A BOTTLE OF WHITE, A BOTTLE OF RED, PERHAPS A BOTTLE OF BC WINE INSTEAD? EVALUATING BC WINE SALES POLICY AND CANADA’S WTO COMMITMENTS

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INTRODUCTION

British Columbia’s (BC) strict liquor control regulations for distribution, retail sale and licensed premises have long been a source of annoyance for many of its residents. Hours of operation, mandated minimum prices and permissible points of sale are particularly strong headings of discontent. As a result, 2013 saw the BC government embark upon a comprehensive review of liquor regulation in the province that many would contend was long overdue. This resulted in 73 official policy

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recommendations, some of which have been introduced into legislation as amendments to the *Liquor Control and Licensing Act* and its regulations. In the course of this legislative overhaul, the BC government announced new measures introducing the sale of wine in grocery stores, effective April 2015. In short, these regulations allow BC wines to be sold on the shelf in grocery stores with all other wines being restricted to store-in-store sales, which require separate checkout and payment from groceries.

This paper will evaluate the new regulations in the framework of the World Trade Organization’s (WTO) foundational *General Agreement on Tariffs and Trade* (GATT). The paper argues that the impacts on competitive opportunities may constitute violations of national treatment as understood in GATT article III(4). It will be advanced that these violations are not saved by the general exceptions in GATT article XX, but they may be at least partially defensible through Canadian free trade agreements (FTAs). However, with the vast majority of its sales made inside BC, the BC wine industry stands to gain more than it loses from both the preferential retail opportunities directly offered by the new measures and the range of broader potential outcomes resulting from their implementation.

In examining these new BC wine retailing measures, the body of this paper has three parts. After a further overview of the regulations, I delve into...
the paper's core evaluation of the measures in the context of GATT articles III(4), XI(1), XX(b) and (d), prior to looking at previous GATT challenges of provincial liquor regulation schemes. To the extent they pertain to a GATT analysis of the BC measures, I overview relevant provisions of the North American Free Trade Agreement (NAFTA)10 and the recent Canada – European Union (EU) Comprehensive Economic and Trade Agreement (CETA),11 as well as their respective precursor agreements.12 Subsequently, Part III briefly evaluates a policy suggestion to achieve trade compliance while still benefiting the BC wine industry. A brief conclusion follows.

I. OVERVIEW OF THE BC MEASURES

BC’s reforms to the Liquor Control Licensing Act13 and its corresponding regulations permit alcohol sales in grocery stores not within one kilometer of existing liquor stores as of April 2015.14 An eligible grocery store is defined as having sales revenue from food and non-liquor beverages account for 70% or more of non-liquor sales and more than 50% of total sales revenue.15 Initially, it was announced that these sales would have to be conducted by setting up a separate store within a participating grocery outlet.16 As the government has capped new licensee retail store licences until 2022 and no longer issues new wine store licences, the most feasible method of acquisition would be an already existing licence.17
The government’s December announcement expanded the scope, proposing the sale of BC wines would be permissible in grocery stores where an existing Vendors Quality Assurance (VQA) store or wine store transferred their licence. A BC wine is defined as wine and cider in respect of which the naturally occurring sugar used in the fermentation process comes only from plant products grown in BC, honey produced from BC-located beehives, milk from BC-located animals, and sake where only BC grown rice is used. This also means that blended wines or wines only cellared in BC are not included in the definition of BC wine.

Unlike with licensee retail stores, licence transfers from VQA and wine stores to grocery stores do not require a store-in-store to be set up. Rather, these wines can be sold on the shelf alongside regular grocery products at special checkout counters with a properly licensed cashier. While the December announcement indicated that only licences used to sell BC wine on the shelf would be exempt from the one kilometer restriction, the April 2015 amendments to the Liquor Control and Licensing Regulation outline that all wine store licence transfers are exempt. Instead, the one kilometer requirement only applies to licensee retail stores. However, there is still a forced choice for grocery retailers who acquire a wine store licence in the first place – sell wines of all origins in a store-in-store, or sell only BC wines on the shelf.

The primary issue however, concerns how BC wines and non-BC wines are treated within a grocery store with a wine store or licensee retail store licence. BC wines are not restricted to a store-in-store and can be purchased alongside grocery items, albeit at a special checkout counter with a licensed cashier. While both the store-in-store (selling all wines) and on the shelf (selling only BC wines) models cannot coexist in the same grocery store, there is still a potential difference in competitive opportunity. This difference in competitive opportunity may also influence how grocery stores obtaining wine store licences choose to use those licences—on the shelf sales may well present a greater competitive advantage in the wine market relative to a store-

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19 Liquor Regulation, supra note 3, s 14.1(12).
21 The province’s “Serving It Right” qualification would be required of cashiers in these checkout lanes, see ibid.
22 Liquor Regulation, supra note 3, s 14(6).
23 Ibid, s 14.1(11).
in-store. If this is the case, since only BC wines are available on the shelf, the competitive opportunity may be further weighted in their favour.

There are 60 wine store licences and 670 licensee retail store licences in BC. With wine stores greatly outnumbered by licensee retail stores, the potential impact of differences in competitive opportunity would seem to be limited. However, the practical reality is that very few grocery stores in the province are more than one kilometer away from a licensee retail store or liquor store, meaning in many instances, only wine store licences are available for potential grocery store transfers. In the City of Vancouver, only 2 of 53 potentially eligible grocery stores (based on floor space and product mix) do not have a liquor store or licensee retail store within a one kilometer radius. The BC Private Liquor Store Association confirmed that even outside Vancouver, liquor stores are generally in close proximity to grocery stores to take advantage of both the anchor draw of a grocer and high-traffic locations.

The government countered that the one kilometer requirement would not be a hindrance because in reality grocery stores would buyout private licensees or go into business with them to comply with the regulation. Yet The Vancouver Sun found that over 70% of Vancouver grocery stores have two liquor stores within a one kilometer radius, with a majority having three. While it might be feasible for a grocery store to effectively purchase a single nearby licensee retail store for the purpose of transferring its licence, purchasing multiple licences would seem to pose a more challenging business case. Accordingly, wine store licences may accrue a substantially higher value to grocery stores beyond their unique ability to facilitate on the shelf wine sales, which could be further compounded by their relative scarcity.

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25 Chad Skelton & Tiffany Crawford, “Only two of 53 grocery stores in Vancouver will be able to sell liquor” The Vancouver Sun (28 March 2014), online: <www.vancouversun.com/news/Only+grocery+stores+in+Vancouver+will+be+able+to+sell+liquor/9624538/story.html>. Note that this study was completed based on earlier announcements with a slightly different formula for determining eligible grocery stores than the April amendments to the Liquor Control and Licensing Regulation. However, there is no reason to believe that a revised study would deliver substantially different results as the new formula would not seem to allow for the inclusion of any new class of store or style of store as eligible (for example, retailers such as London Drugs, Shoppers Drug Mart or Wal-Mart, each of whom have substantial but likely insufficient food and beverage sales).
26 Ibid.
27 Ibid.
28 Ibid.
II. EVALUATING THE MEASURES

a. GATT

1. Article III(4)

The most applicable GATT provision to the BC measures is article III(4). The relevant portion of III(4) reads as follows:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.\(^2\)

The Appellate Body set out in *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korea - Beef)* that three elements need to be established for an article III(4) violation:

[That the imported and domestic products at issue are 'like products'; that the measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use'; and that the imported products are accorded 'less favourable' treatment than that accorded to like domestic products.\(^3\)]

Likeness, the first element, requires an analysis of all relevant factors.\(^31\) As the Appellate Body outlined in *European Communities - Measures Affecting Asbestos and Products Containing Asbestos (EC - Asbestos)*, there are four general criteria: physical properties, end uses, consumer perception and behaviour, and tariff classification.\(^32\) The Appellate Body was careful to only classify these criteria as “tools to assist” and not a closed list, nor binding considerations.\(^33\)

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\(2\) GATT, *infra* note 7, art III(4).


\(31\) *Ibid* at paras 101-03. It should be noted that the European Communities is the GATT name for the predecessor to the European Union.

\(32\) *Ibid* at para 102.
However, the Panel in *India – Measures Affecting the Automotive Sector (India – Autos)*\(^{34}\) outlined that when origin is the only criteria to distinguish between products, then such products are like.\(^{35}\) This approach was supported by *Canada – Measures Relating to Exports of Wheat and Treatment of Grain Imports*,\(^{36}\) *Canada – Certain Measures Affecting the Automotive Industry (Canada – Autos)*,\(^{37}\) *China – Measures Affecting Imports of Automobile Parts*,\(^{38}\) *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products)*,\(^{39}\) *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines (Thailand – Cigarettes (Philippines))*\(^{40}\) and *Turkey – Measures Affecting the Importation of Rice*.\(^{41}\) Considering the BC measures at issue, the goods would only be distinguished by whether or not they are a 100% BC product, in turn indicating that origin is the only point of distinction and likeness is present.

With the second element, the *Liquor Control and Licensing Act*\(^{42}\) and its regulations would fulfil the initial law or regulation aspect. As for the “affecting” language, the Panel in *Canada – Autos* defined the term as a broad concept concerning measures that impact imported goods.\(^{43}\) This sentiment was well framed in *China – Publications and Audiovisual Products*, where the

\(^{34}\) India – Measures Affecting the Automotive Sector (Complaint by the European Communities) (2001), WTO Doc WT/DS 146, 175/R (Panel Report), online: WTO <www.wto.org/english/tratop_e/dispu_e/cases_e/ds146_e.htm>.

\(^{35}\) Ibid at para 7.174.


\(^{42}\) Supra note 2.

\(^{43}\) Canada – Autos, supra note 37 at para 10.80.
Panel outlined that "the word 'affecting' covers not only measures which
directly regulate or govern the sale of domestic and imported like products,
but also measures which create incentives or disincentives with respect to the
sale, offering for sale, purchase, and use of an imported product 'affect' those
activities." The BC regulations seemingly affect imported goods through
both their internal sale and offering for sale, as non-BC wines cannot be sold
in the same way and same places within a store as BC wines. A grocery store
wishing to obtain a wine store licence to sell wine has a forced choice of sorts:
provide convenience to the customer and sell only BC wines on the shelf, or
provide variety to the customer through selling wines of all origins while
limiting convenience relative to on the shelf sales via a store-in-store.

This analysis drifts into the third aspect of an article III(4) violation,
"treatment no less favourable." The key facet here is whether an equality of
competitive opportunities is present. Importantly, the Appellate Body noted
in Korea – Beef that a formal difference in treatment is not necessarily less
favourable treatment. In EC – Asbestos, the Appellate Body went on to say
that such a concept extends to a group of products, noting that "a Member
may draw distinctions between products which have been found to be 'like',
without, for this reason alone, according to the group of 'like' imported
products 'less favourable treatment' than that accorded to the group of 'like'
domestic products."

Korea – Beef is especially illustrative because it concerned store
placement of like goods where a strong case could be made that the only
difference was origin. Korea created a system of dual retail distribution
where imported beef was to be sold at stores carrying only imported beef, or
in retail outlets over a certain size (department stores), in clearly segregated
displays. For smaller stores, this meant a choice of carrying Korean beef or
imported beef and in practice, this forced choice led to a strong preference for
Korean beef sales. Despite the Appellate Body's thoughts that differential

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44 China – Publications and Audiovisual Products, supra note 39 at para 7.1450.
45 Liquor Regulation, supra note 3, s 14.1.
46 GATT, supra note 7, art III(4).
47 Canada – Autos, supra note 37 at para 10.84.
48 Korea – Beef, supra note 30 at para 135.
49 EC – Asbestos, supra note 31 at para 100.
50 Korea – Beef, supra note 30 at paras 144-47.
51 In WTO jurisprudence, Korea refers to the Republic of Korea, commonly known as South Korea.
52 Korea – Beef, supra note 30 at para 143.
53 Ibid at para 145.
treatment was not always less favourable treatment, it found that in this instance the treatment was less favourable for imported beef because of the broadly less favourable conditions of competition created for imported products.

The BC measures require a slightly different analysis—in the instance of a transferred wine store licence there is a somewhat different scope of forced choice for grocery stores. While stores can stock both BC and imported wines if they choose to sell wine within a store-in-store, there is a choice in the first instance between selling all wines in the store-in-store and only BC wines on the shelf. When combined with the serious difference in competitive opportunities in both the formal and practical sense, this is troublesome. Formally, BC wines have the ability to gain far more advantageous retail space than imported wines. While both can be sold in grocery stores (again to be clear, a store-in-store and on the shelf sales cannot coexist in the same store), non-BC wines are in all instances restricted to a store-in-store where a separate checkout would be required. Although the BC government has noted that consumers can use the same shopping cart for store-in-store alcohol purchases, a consumer looking to purchase a bottle of non-BC wine at a grocery store would have to always line-up twice if they were also buying groceries. Conversely, a consumer purchasing a BC wine at a grocery store where a wine store licence transfer has created on the shelf sales can pick up that bottle without frequenting the store-in-store and pay for their wine and groceries at the same time. Further, when considering wine store licences there is still a slightly different scope of forced choice in terms of a licence acquiring grocery store having to choose between selling all wines in a store-in-store or only BC wines on the shelf in the more favourable way as outlined above.

From the practical perspective, United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline) is useful for its evaluation of a competitive reality created by a clean air regulation. Here the standard for domestic refiners was tied to their own product baselines, whereas foreign refiners had to meet a statutory baseline that was not tethered

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54 Ibid at para 141.
55 Ibid at para 148.
56 Liquor Regulation, supra note 3, ss 13.08–14.11.
57 Ibid.
to their products. This individual baseline system created two different sets of sales conditions for chemically identical gasoline. Accordingly, the Panel held that imported gasoline was receiving less favourable treatment through the advantageous market environment provided to domestic gasoline as a result of the regulation. Likewise in Thailand – Cigarettes (Philippines), the Appellate Body set out that the assessment of a measure will include empirical evidence concerning actual market impacts. This analysis can provide the necessity of a genuine relationship between the measure at issue and its adverse impact on competitive opportunities for imported versus like domestic products to support a finding that imported products are treated less favourably. BC’s new policies create similar practical considerations through regulation. As of 2014, slightly less than half of all wine consumed in BC was foreign made and about 15% was certified BC VQA. With an expert estimate based on previous similar market experiences predicting 65-70% of wine sales in BC would shift to grocery stores, the potential for less favourable treatment to impact competitive opportunity is serious. If this predicted increase in grocery store wine sales materializes, BC wines would benefit through more favourable shelf placement compounded by a practically limited supply of transferrable licences.

A potential line of defence for the BC measures however, would stem from the reasoning in EC – Asbestos. The Appellate Body specifically outlined that “a Member may draw distinctions between products which have been found to be ‘like’, without, for this reason alone, according to the group of ‘like’ imported products ‘less favourable treatment’ than that accorded to the group of ‘like’ domestic products.” The argument would then be that since non-BC Canadian wines would be treated the same as foreign wines,


59 Ibid at para 6.10.

60 Ibid at para 6.16.


62 Ibid at para 134.


65 EC–Asbestos, supra note 31.

66 Ibid at para 100.
foreign wines as a group would not be receiving less favourable treatment than domestic wines as a group, even if there were distinctions between certain domestic wines and imported wines. However, while the group to group comparison in EC – Asbestos might be useful, it would seem to require another and more significant leap of reasoning for the above argument to succeed, namely that the same treatment to the bulk of like domestic products can override less favourable treatment relative to a distinct subset of like domestic goods. Considering that WTO law more generally does not contemplate offsetting behaviour, this might well be a leap too far.

2. Article XI(1)

Article XI(1) would likely be the next most pertinent GATT provision and reads as follows:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.67

In short, article XI(1) prohibits quantitative restrictions. Article XI(1) is particularly attractive to complaining parties because of its shifting burden—once a complainant has presented a prima facie case, the burden shifts to the alleged violator to rebut.68 Compared to article III(4) where the burden of proof lays with the party bringing the claim, the shifting burden provides a distinct advantage to complainants, thus providing incentive for claims to be framed first as article XI violations.69 The attractiveness of article XI for complainants further increases when you consider that article XI measures, unlike article III(4) measures, are not permissible.70

67 GATT, supra note 7 at article XI(1).
69 Ibid.
70 The inverse also applies of art III(4) being how defendant parties would prefer to frame measures that spur art XI complaints.
Mechanically, an article XI(1) measure can operate directly or indirectly. Beyond direct and de facto prohibitions and restrictions concerning both imports and exports, article XI(1) can be applied to such things as licensing regimes, enforcement measures, minimum export prices, limited port access and restrictions imposed by state-owned trading companies. Summing this up, the Panel in India – Quantitative Restrictions on Imports of Agricultural and Industrial Products (India – Quantitative Restrictions) noted that article XI(1) applies “to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges.”

While article XI is intended to address competitive opportunities, it does not apply to all measures impacting opportunities to enter a market. Instead article XI(1) concerns those measures that are “a prohibition or restriction on the importation of products, i.e. those measures which affect the opportunities for importation itself.”

Still there are multiple lines of argument that a prospective complainant might contemplate against the BC measures in an attempt to utilise the stronger article XI(1). The first of these would be equating the BC policy to a restriction on imports by particular persons, with grocery retailers serving as the (corporate) persons. This argument would build upon the unappealed Panel finding in India – Quantitative Restrictions, where an “Actual User Requirement” being a precondition for an import licence (meaning that only end users were eligible for a licence) was found to be an article XI(1) violation.

A less promising argument would be based on Colombia – Indicative Prices and Restrictions on Ports of Entry (Colombia – Ports of Entry), where uncertainty and port restrictions were found by the Panel to be an article

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73 India–Quantitative Restrictions, supra note 68 at para 5.128.
75 Ibid.
76 India–Quantitative Restrictions, supra note 68 at para 5.142-43.
XI(1) violation. The Panel specified that while consideration of trade volumes was permissible, it was not necessary. Further, the Panel in Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather (Argentina – Hides and Leather) took a stronger position against the use of trade volumes to demonstrate article XI(1) causation. This Panel outlined that “unusually low” export quantities are not inherently sufficient to prove a violation of article XI(1) attributable to an alleged restrictive measure, especially when considering de facto measures where a multitude of factors could be having varying degrees of impact.

For purposes of attacking the BC measure, a prospective complainant would want to use one or more of these argument threads to demonstrate an article XI(1) violation. While as much imported wine can be brought into BC as an importer desires, the wine can only be sold in a severely limited number of retail outlets. The case would centre on whether imported wines being excluded from where 60-65% of wine sales are made constitutes a de facto quota (subject of course, to industry projections on wine sales by outlet type holding up once the measures were implemented).

This being said, it seems more probable that the BC measures would find their home in article III(4) as opposed to article XI(1). United States – Restrictions on Imports of Tuna (US – Tuna), the first of a string of decisions on American regulations on tuna harvesting to protect marine mammals, was perhaps the most important Panel report in establishing the interplay between article III and article XI(1). Broadly speaking, article XI(1) is intended to capture measures that impact goods at the border and article III aims at internal treatment once the border has been cleared. The Panel specified that the product directly affected by a measure will also be at the heart of determination between articles III and XI(1). A measure directly impacting the good in question will indicate an article III violation, if the pith and substance of measure concerns something else, then article III will not

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28 Ibid at para 7.252.
29 Argentina – Hides, supra note 71 at para 11.21.
30 Ibid at paras 11.20–21.
32 Ibid at para 4.17.
33 Ibid at paras 5.14–16, 5.18, 5.35.
apply. Viewed through the facts in US – Tuna, this meant that measures effectively aimed at the protection of dolphins that ended up regulating how tuna could be harvested ended up as an article XI violation, as opposed to a violation of article III. Although US – Tuna was not adapted by the Dispute Settlement Body due to Mexico’s decision to not further pursue the remedy, the European Union launched a complaint soon after, leading to a similar Panel decision. Since the Panel occurred prior to the modern day WTO, the reverse consensus mechanism for report adaptation had not been implemented, allowing the US to deny consensus.

Despite not being adopted, the framework from US – Tuna was further entrenched in a similar series of disputes concerning American regulation of shrimp harvesting to protect sea turtles. The US measure here prohibited imports of shrimp from countries that did not require the use of turtle exclusion devices on their shrimping vessels. The measure also brought most-favoured nation into play through providing some very different timeframes for compliance, with Caribbean nations being granted years and Southeast Asian countries only provided three months. Interestingly, when the complainants in United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp) brought article XI arguments based on US – Tuna, the US conceded that the measure was a violation of article XI(1). Instead, the US decided to defend the measure on the basis of it being justified under article XX. For the purposes of article XI(1) however, the Panel (and the Appellate Body) supported the pith and substance line of reasoning set out in US – Tuna and its early companion dispute. Namely, that a policy measure concerning turtle protection effectively banning certain shrimp imports was not an article III violation, but instead an article XI(1) violation. Applied to the BC measures, this framework indicates article III(4) to be the appropriate violation vehicle as the pith and substance of the

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84 Ibid at para 5.35
85 Ibid.
89 Ibid at para 3.146.
90 Ibid at para 7.16.
91 Ibid.
BC regulations target wine, and the products impacted are non-BC wines, the vast majority of which are foreign imports.

Further, while it may be tempting to view a major restriction on access to where a substantial majority of wine sales occur as a quantitative restriction, the measures seem to apply internally as opposed to at the border. Where impacts on trade volumes have been components of successfully demonstrated article XI(1) violations, the impacts have been accompanied by visible measures at the border. For instance, in Argentina – Hides and Leather, the visible measure was the presence of domestic industry representatives at customs inspection, and in Colombia – Ports of Entry the visible measure was the lack of availability and certainty of port access. Although the BC measures will seemingly make it more difficult for grocery stores to place non-BC wine on their shelves (being limited to store-in-store sales), placement is possible, and once on shelves there is no limit to how much imported wine can be sold. Likewise, there is no restriction on how much wine can be imported for the purpose of sale—the impact in terms of lesser sales will seemingly result from less favourable internal treatment as opposed to border restrictions.

3. Article XX

GATT article XX allows exceptions to violations of other GATT articles under a number of headings. The “chapeau” clause that informs and controls the list of exceptions reads as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures[.]

Considering the nature of the BC measures however, of the ten exceptions listed in article XX only article XX(b) and (d) would seem potentially applicable.

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62 Argentina–Hides, supra note 71 at para 4.47.
63 Colombia–Ports, supra note 77 at para 7.275.
64 GATT, supra note 7, art XX.
a. Article XX(b)

Article XX(b) concerns preservation of life and health.\textsuperscript{95} Since the BC measures stem from an amended version of the \textit{Liquor Control and Licensing Act}\textsuperscript{96} and its regulations concerning off-site sales, there is an implicit health argument involved. Although the legislative framework lacks a preamble or explicit statement voicing health concerns, the government’s liquor policy review report discussed health and safety impacts of grocery store alcohol sales.\textsuperscript{97} Further, the Hansard debate on the broader package of changes to the \textit{Liquor Control and Licensing Act} saw the Minister of Justice outline that:

The goal of the liquor policy review, and by extension this legislation, is to transfer B.C. liquor laws in a host of different ways, enhancing convenience, sparking the economy, cutting red tape, creating new opportunities for businesses and continuing to protect health and public safety.\textsuperscript{98}

Although a successful article XX(b) argument might be a stretch, it is still sufficiently within the realm of reality to merit evaluation.

Beginning with another national treatment measure that concerned alcoholic beverages, the Panel held certain taxes in violation of article III(2) in \textit{Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages}, noting that parties have considerable discretion to design policy and execution of internal taxation.\textsuperscript{99} Similarly, in \textit{Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes (Thailand – Cigarettes (US))}, the Panel dealt with a prohibition of American cigarettes based on additives that Thailand argued made them more dangerous than domestic cigarettes.\textsuperscript{100} Thailand also put forward that restriction of tobacco competition would make competition less effective, reducing the end market for cigarettes, in turn fulfilling public health objectives.\textsuperscript{101} While the Panel accepted the expert

\textsuperscript{95} Ibid, art XX(b).
\textsuperscript{96} Supra note 2.
\textsuperscript{97} British Columbia, \textit{Liquor Policy Review, supra note 1} at 18, 41, 43–45.
\textsuperscript{98} British Columbia, \textit{Official Report of Debates of the Legislative Assembly (Hansard), 40th Parl, 4th Sess, Vol 22, No 6 (26 March 2015) at 7006 (Hon Suzanne Anton) [British Columbia, Debates].}
\textsuperscript{101} Ibid at para 79.
evidence that smoking was harmful and efforts to reduce smoking were within the scope of article XX(b), the key for this decision, and indeed for article XX(b) in general, was necessity.\textsuperscript{102} Using the same concept of necessity as had been applied to article XX(d), the issue was framed as whether there was a GATT compliant and less trade restrictive measure available.\textsuperscript{103} Failing this, the question shifted to the availability of a generally less trade restrictive measure.\textsuperscript{104} Applied directly to the case, the prohibition of US cigarettes did not pass the least restrictive test.\textsuperscript{105} Alternatives such as a blanket ban on additives, an advertising ban and labelling restrictions were cited as less trade restrictive possibilities.\textsuperscript{106}

In the subsequent Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Retreaded Tyres)\textsuperscript{107} however, the Appellate Body provided a commentary focused more on the necessity test. They directed the weighing and balancing of relevant factors requiring consideration such as “the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness.”\textsuperscript{108} The weighing process is then complemented by a comparison to “possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective.”\textsuperscript{109}

Yet even if an application of the necessity test concentrated on an arguably more permissive weighing and balancing framework, the test would still likely be the end of any attempt by Canada to defend the BC measures under article XX(b). Compared to the example of Thailand – Cigarettes (US), the BC measures would have a somewhat higher hurdle to demonstrate being within the scope of protecting human health. While cigarettes would seem to have a blanket consensus surrounding their detrimental effects on human health, alcohol does not. Although alcohol causes certain harmful health impacts, unlike with cigarettes, regular moderate consumption is not necessarily damaging. In the case of wines (particularly red wines), moderate

\textsuperscript{102} Ibid at para 73.
\textsuperscript{103} Ibid at paras 75, 78–79.
\textsuperscript{104} Ibid.
\textsuperscript{105} Ibid at para 79.
\textsuperscript{106} Ibid at para 78–79.
\textsuperscript{108} Ibid at para 178.
\textsuperscript{109} Ibid.
consumption in fact has demonstrated health benefits. Still, the measures within the larger scheme of liquor control and licensing, as outlined by the Minister of Justice, have a strong opportunity to fit within the space of protecting human life.

Assuming the BC measures fall within this scope of addressing human life and health, the much more difficult test of necessity will need to be satisfied as well. Unlike Thailand however (or Brazil in *Retreaded Tyres*), Canada is not a developing country and is not particularly limited in its public policy means and capacity. Considering the failure of Thailand’s arguments concerning its range of plausible alternatives, Canada would be poorly positioned to argue that BC did not have a full range of policy instruments available. Further, where Thailand could argue that there were differences in American cigarettes that impacted health outcomes, there is nothing to indicate any similar issues between BC and foreign wines. Thus while control of alcohol sales could well be defensible, distinguishing between like products with no differential health effects would seem far less so.

With specific reference to article III(4) and necessity, Canada would seem to have a weaker article XX(b) defence than the US had in US – Gasoline. The US regulation creating differential baseline requirements could at least be defended to the extent that chemical makeups of particular fuels can have greater or lesser impacts on pollution and such effects on pollution can have differential impacts on human health. That there would be differences on a refinery level and foreign levels could be more difficult to attain, all could play towards the regulation being necessary. Yet despite these arguments, the US failed on demonstrating necessity because the Panel found there were plausible and less trade restrictive alternatives (such as a common baseline for all fuel, or individual baselines for foreign refiners).

Again for Canada, there is no measurable difference in product or health effects. While differences in alcohol content can have an impact, relative to spirits almost all wines are low in alcohol and within the wine realm there is no indication of any notable difference between BC and non-BC wines as broad categories. Although regulation is certainly permissible to

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110 Mayo Clinic Staff, “Red Wine and Resveratrol: Good for Your Heart?”, Mayo Clinic (25 April 2014), online: <www.mayoclinic.org/diseases-conditions/heart-disease/in-depth/red-wine/art-20048281>

112 British Columbia, *Debates*, supra note 98 at 7006.

113 *Thailand–Cigarettes (US)*, supra note 100 at para 14.

114 Ibid at para 6.21, 6.27

govern alcohol, by the standard established in US – Gasoline\textsuperscript{116} and Thailand – Cigarettes (US),\textsuperscript{117} or the potentially more holistic developments present in Brazil – Retreaded Tyres,\textsuperscript{118} less favourable treatment of non-BC wines would seem to be a bizarre choice to abate the health effects of alcohol. Even if Canada argued the measures are designed to strike a balance between availability for moderate consumption and prevention of overconsumption, there would still seem to be any number of less trade restrictive options. For instance, alternatives could include limiting shelf space for all wines in the grocery store (but outside the store-in-store).

These issues would be likewise troublesome when considered in concert with the chapeau.\textsuperscript{119} The Appellate Body in Brazil – Retreaded Tyres explained the chapeau as serving to “ensure that Members’ rights to avail themselves of exceptions are exercised in good faith to protect interests considered legitimate under Article XX, not as a means to circumvent...obligations towards other WTO Members.”\textsuperscript{120} Given how they have been publically framed, if the BC measures were to be defended as health policy they would appear to be both arbitrary and as disguised restrictions on trade. These are the sort of measures and subsequent justification attempts that the Appellate Body in US – Gasoline determined it was appropriate to invoke the chapeau bulwark due to the questionable and potentially abusive nature of the article XX justification attempts.\textsuperscript{121}

Brazil – Retreaded Tyres is particularly pertinent to an exploration of BC’s measures in the context of article XX(b) and the article XX chapeau.\textsuperscript{122} Brazil successfully made out that its import ban on retreaded tyres was permissible to prevent the spread of mosquito borne diseases (including malaria and dengue fever), but failed on chapeau application because of its exclusion of Mercosur imports despite a seemingly strong health rationale.\textsuperscript{123} The Appellate Body made clear that the “cause of the discrimination, or the rationale put forward to explain its existence” should be the focus of a

\footnotesize{\textsuperscript{116} US–Gasoline, Panel, supra note 58.}
\footnotesize{\textsuperscript{117} Thailand–Cigarettes (US), supra note 100.}
\footnotesize{\textsuperscript{118} Brazil–Retreaded Tyres, supra note 107.}
\footnotesize{\textsuperscript{119} GATT, supra note 7, art XX.}
\footnotesize{\textsuperscript{120} Brazil–Retreaded Tyres, supra note 107 at para 215.}
\footnotesize{\textsuperscript{122} Brazil–Retreaded Tyres, supra note 107.}
\footnotesize{\textsuperscript{123} Ibid at para105.}}
chapeau analysis.\textsuperscript{124} Applied to the facts, the Appellate Body could not reconcile an alleged discrimination rationale (a Mercosur arbitration ruling that precluded application of the ban to Mercosur countries) that would contradict "the objective that was provisionally found to justify a measure under a paragraph of Article XX."\textsuperscript{125} The BC measures may encounter similar issues should they reach the stage of chapeau analysis. It would appear hard to reconcile the objective of preserving health and safety through regulating alcohol sales via measures that would make those sales easier. In addition to making wine sales easier, these measures would also (as with Brazil's restrictions in \textit{Retreaded Tyres}) discriminate between product groups based merely on their origin, with no easily discernable disparate health and safety impacts.

\textbf{b. Article XX(d)}

The other article XX defence that Canada could seek for the BC measures would be under the lengthier and somewhat more convoluted article XX(d):

\begin{quote}
[N]ecessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.\textsuperscript{126}
\end{quote}

Compared to an application of article XX(b), there is far more to deconstruct in subsection (d). Beginning with the necessity requirement, there does not seem to be a noticeable difference with the concept of necessity in article XX(b)—the lack of an available less trade restrictive alternative.\textsuperscript{127} The Panel in \textit{United States – Measures Affecting Alcoholic and Malt Beverages}, confirmed as much in addressing an in-state distribution requirement for imported beers.\textsuperscript{128}

\begin{footnotesize}
\textsuperscript{124} \textit{Ibid} at para 226.
\textsuperscript{125} \textit{Ibid} at paras 227–28.
\textsuperscript{126} \textit{GATT, supra} note 7, art XX(d).
\textsuperscript{127} \textit{WTO, Committee} on Trade and Environment, \textit{GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g)}, \textit{WTO Doc WT/CTE/W/203} (2002) at 14–15, online: \textit{WTO <www.oas.org/dsd/Tool-kit/Documentos/MOdulell/GATT%20WTO%20Dispute%20Settlement%20Practice.pdf>}.\textsuperscript{128}
\end{footnotesize}
The US failed to discharge its burden to show that the wholesaler transport measure was the least trade restrictive option. The Panel used the evidence of some states not using a common carrier as sufficient to demonstrate a potentially less trade restrictive means of enforcement (in this instance, tax laws). Applied to the BC measures, the necessity hurdles will be significant and similar to those that were evaluated under the preceding article XX(b) analysis.

Moving next to the securing compliance element, this generally concerns smaller components (being the measures of direct scrutiny) as a part of a larger regulatory regime. For instance, the measure at issue in *EEC – Regulation on Imports of Parts and Components* was designed to avert avoidance of a larger anti-dumping regime. First, the Panel outlined that compliance must be secured with laws or regulations that "are not inconsistent with the General Agreement." The evaluation of this compliance is limited to the laws and regulations themselves and does not extend to policy objectives.

BC's measures are amendments to the greater liquor control and licensing scheme, and ostensibly it would be compliance with this regime that the measures would aim to secure. In 1988 and 1992 Panel Reports were released following complaints from the European Communities and US respectively, regarding Canadian provincial liquor control and licensing regimes. While in both instances various aspects and components of these regimes were found to be GATT violations, the provincial monopolies on liquor sale and distribution themselves were not at issue. In *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies (Canada – Marketing Agencies II)* the Panel saw each side acknowledge the applicability of article 31 of the *Havana Charter* to provincial liquor control of imports in so far as “some monopolies are established and

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129 Ibid at para 5.52.
131 Ibid at para 5.11.
132 Ibid at paras 5.17–18.
135 Ibid at para 5.15; Canada–Marketing Agencies I, supra note 133 at paras 3.1, 4.24.
136 Canada–Marketing Agencies II, supra note 134 at paras 4.20–21.
operated mainly for social, cultural, humanitarian or revenue purposes."\textsuperscript{137} Further, the Panel acknowledged that the Havana Charter also authorized transport, distribution and other costs to be charged by import monopolies to facilitate the market for imported goods.\textsuperscript{138}

As for the next and directly connected element of permissible monopolies, Canadian provincial liquor control schemes are governed by article II(4) as monopolies and by article XVII as state trading enterprises.\textsuperscript{139} However, neither Panel had the opportunity to evaluate the provincial monopolies in the context of an article XX(d) exception.\textsuperscript{140} The Panel in Japan – Restrictions on Imports of Certain Agricultural Products had such an opportunity in its examination of an import monopoly’s use of import restrictions.\textsuperscript{141} Dealing with import monopoly administered import restrictions, the Panel noted that article XX(d) allows for “measures necessary to enforce the exclusive possession of the trade by the monopoly, such as measures limiting private imports that would undermine the control of the trade by the monopoly.”\textsuperscript{142} Still, the Panel was careful to set out that laws and regulations with which a measure aims to secure compliance with must not be “inconsistent with the provisions of [the General] Agreement”.\textsuperscript{143} The Panel went on to reinforce that:

The General Agreement contains detailed rules designed to preclude protective and discriminatory practices by import monopolies...These rules would become meaningless if Article XX(d) were interpreted to exempt from the obligations under the General Agreement protective or discriminatory trading practices by such monopolies.\textsuperscript{144}

The reasoning concerning the broader credibility of GATT was noted by intervenors to a slightly different set of facts in US – Tuna, which saw a US embargo extended to third parties with the intention of preventing states affected by an initial direct embargo from circumventing this embargo via a

\textsuperscript{137} Havana Charter, UNCTAD, UN Doc E/Conf 2/78 (1948), art 31(6), online: WTO <www.wto.org/english/docs_e/legal_e/havana_e.pdf >.
\textsuperscript{138} Canada–Marketing Agencies II, supra note 134 at para 5.19.
\textsuperscript{139} Ibid at para 5.15.
\textsuperscript{140} Ibid at para 4.90.
\textsuperscript{142} Ibid at para 5.2.2.3.
\textsuperscript{143} Ibid.
\textsuperscript{144} Ibid.
third country. In this instance the third country embargo was the measure designed to secure compliance with the law or regulation. However, since the larger law itself was found to be inconsistent with the GATT, an article XX(d) justification for the third party measure was not available. The BC measures may have a slight advantage, relative to the measures in US – Tuna. They were designed to secure compliance with a broader regime (in BC’s provincial liquor control regulation) that has generally survived GATT scrutiny, despite certain elements failing upon GATT challenge in both the Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies (Canada – Marketing Agencies I) and Canada – Marketing Agencies II Panel reports. However the clear monopoly only exists in importing and distribution through the BC Liquor Distribution Branch. At the retail level, although there is a monopoly in terms of allotting licences for retail operations, a substantial number of licences are obtained by private outlets. Even in the unlikely event the measures gain the benefit of this securing compliance argument, should Canada frame a defence of the BC measures in terms of article XX(d), the measures being within the bounds of securing compliance would not appear to exempt them if they are otherwise GATT violations. Thus in short, in the likely event of the BC measures being found to be article III(4) violations, article XX(d) would not appear to save them.

4. Previous GATT challenges of provincial liquor regulations

As noted, Canadian provincial measures regulating sale and distribution of alcohol have twice previously formed the core of GATT disputes. In 1988, arising out of a complaint from the European Communities, the Panel report in Canada – Marketing Agencies I was adopted. Notably, provincial practices concerning points of sale listing and delisting requirements were found to be restrictions instituted via state trading monopoly and in violation of article XI(1). While article III(4) was not found to be relevant considering the finding on article XI(1), the

146 Ibid at para 2.10.
147 Ibid at para 5.40.
148 Canada–Marketing Agencies I, supra note 133; Canada–Marketing Agencies II, supra note 134.
150 Canada–Marketing Agencies I, supra note 133.
151 Ibid at para 4.25.
argument that article III(4) applied to state-trading enterprises when, as in the case of provincial liquor boards, there was a combination of import and distribution monopolies, was viewed as being persuasive.\textsuperscript{152}

Prospectively relevant to the BC situation, Canada was found to be non-compliant with its obligations under article XXIV(12) in so far as Canada had not taken all reasonable measures to ensure compliance by provincial liquor boards with the GATT.\textsuperscript{153} However, given that the European Communities complaints of Canada’s continued non-implementation of certain aspects of the Panel report were cited as an impairment of benefits in \textit{Canada – Marketing Agencies II},\textsuperscript{154} Canada has in the past not necessarily been in any great rush to either pressure the provinces to comply, or to compensate at the border for the GATT violations of provincial liquor boards. Still, despite the noted lack of response by Canada\textsuperscript{155} to findings against it in the 1988 Panel decision, the later Panel was in some ways decidedly more favourable to Canada. This time, outside of Ontario, the US claim that listing and delisting practices were inconsistent with article XI(1) was not found to have merit.\textsuperscript{156}

5. Impact of Free Trade Agreements

The BC Wine Institute, the voluntary trade association representing the bulk of the BC wine industry and the holder of the VQA licences, publicly responded to complaints from California wine producers by saying the proposals concerning transfer of VQA licences were “grandfathered into trade agreements.”\textsuperscript{157} This is to some degree true and considering that the most likely source of a GATT challenge for the BC measures would be the US and European Union, such defences are worth evaluating. Besides both the US and EU accounting for a significant quantity of WTO disputes, both entities (in addition to Chile, which for reasons explained below is pertinent to the discussion) have FTAs with Canada, although the European Union CETA is not yet in force. Canada represents the number two export destination for American wines and almost immediately following the announcement of the BC measures, protests came from the California wine

\textsuperscript{152} \textit{Ibid} at para 4.26.
\textsuperscript{153} \textit{Ibid} at para 4.35.
\textsuperscript{154} \textit{Canada–Marketing Agencies II}, supra note 134.
\textsuperscript{155} \textit{Ibid} at paras 3.1, 6.2.
\textsuperscript{156} \textit{Ibid} at para 6.1.
\textsuperscript{157} \textit{BC Wine Institute}, supra note 63.
Likewise, the EU encompasses many of the largest wine producers in the world, and correspondingly many of the largest exporters of wines to Canada. Whatever is made of the relatively limited body of decisions concerning article XXIV(5) and article XXIV more broadly, a FTA can in certain instances serve as an effective, if not formal, GATT defence. As article XXIV(5) sets out that a FTA cannot be more trade restrictive, if certain FTA carve-outs, such as those for wine licences, are viewed as being more trade restrictive, then the FTA itself would be in violation of article XXIV(5). Unlike with article XXIV(4) concerning customs unions, where the agreement between contracting parties need only be less restrictive on the whole, there is no room for a FTA to be more trade restrictive. The likelihood of the US or EU (or another party) making arguments where the implicit takeaway was that their trade agreements with Canada were invalid would not seem particularly high. Accordingly, this section evaluates possible defences Canada might use by virtue of certain FTAs.

a. NAFTA

Although the response from the BC Wine Institute discussed above was (perhaps purposefully) vague, one likely source of the statement is annex 312.2 of NAFTA, which incorporates from the Canada – US Free Trade Agreement "any measure related to the internal sale and distribution of wine

161 Note that a FTA under GATT, supra note 7, art XXIV, by definition, is a formal defence to violation of most-favoured nation.  
162 Ibid, art XXIV.  
163 The industry association for California wine producers has made insinuations about the BC measures being in violation of NAFTA, supra note 10, c 11 concerning treatment of investments. Investor status would make available NAFTA's relatively unique investor-state dispute resolution mechanism and provide a direct avenue of complaint and resolution that would not require action from the US government. However, as exporting to a party does not grant the same status as an investor in that party, this avenue of approach would appear to be without merit. As for any potential American investors in BC wineries, while NAFTA, c 11 would apply, under the new BC measures product origin and not ownership would be the relevant criteria for treatment, meaning that the American owner of a BC winery would benefit.
and distilled spirits.”164 This incorporation would include article 804(2)(b) of the Canada – US Free Trade Agreement, which reads: “maintain a measure requiring private wine store outlets in existence on October 4, 1987 in the provinces of Ontario and British Columbia to discriminate in favour of wine of those provinces to a degree no greater than the discrimination required by such existing measure.”165 The argument would be that VQA and wine store licences in existence prior to October 1987 would not be in violation of 804(2)(b) through a licence transfer to a grocery store. It is a creative position and perhaps the best defence the BC measures will have against their strongest opposition. There are obvious problems with this line of argument however, with slightly different implications for VQA and non-VQA wine store licences respectively.

The first is the concept of wine outlets in existence as of October 1987. By means of background, the VQA program arose out of 21 never cancelled or revoked licences that predated NAFTA.166 On the condition that these licences were held by the BC Wine Institute, the New Democrat government of the early 1990’s approved the reactivation of ten licences.167 The other ten current licences were reactivated when the BC Liberals came to power after the 2001 election.168 The VQA stores, accounting for a relatively small portion of the BC wine market (and a relatively small portion of licences potentially eligible for on the shelf grocery store sales), have not been challenged through trade law dispute resolution.

The premise with regard to article 804(2)(b) seems to be that an outlet equates to a licence, and licences can be amended or transferred with no restrictions. With the VQA licences and wine store licences in existence prior to October 1987, the transfer to a grocery store would be effected by amendment of an existing licence, meaning that there is a continuous chain to what was in existence as of 1987.169 Accordingly, Canada would seem to have a defensible ground on this point where licences could be tied back via amendment to 1987.

164 Ibid, c 3, Annex 312.2(1).
166 "VQA Stores: Private Option 'Just Takes Political Will’" Winesite.ca, online: <www.alanmcginty.com/article/475>.
167 Ibid.
168 Ibid.
169 Ibid; Liquor Regulation, supra note 3, s 14.1.
The next issue is the aspect of article 804(2)(b) explaining that wine outlets can discriminate to no greater degree than required by the existing measure. As discussed during the overview of GATT article III(4), the BC measures seem to discriminate against non-BC wines. Whereas the existing retail outlet regime was balanced between government stores, wine stores, VQA stores, and licensee retail stores, the new policy measures would strongly impact the competitive balance. With the experience in other jurisdictions being a substantial shift to grocery store sales once introduced, BC wines on regular shelves will have major competitive advantages within the grocery store environment that did not previously exist. Namely, BC wines will be in outlets with far more traffic than either wine stores or VQA stores and compared to non-BC wines available in the grocery store-in-store, purchasing a BC wine will be far more convenient. Considering these two points, it is difficult to view the new measures as discriminating to a degree no greater than that already existing.

b. Canada – EU CETA

Prior to the CETA, which has not yet come into force, Canada and the EU had two previous agreements concerning wines and spirits from 1989 (1989 Agreement) and 2003 (2003 Agreement). Chapter 2 of CETA contains an annex which incorporates a number of amendments to these wines and spirits agreements, including a reframing of the 2003 Agreement’s reiteration of GATT article XVII. Most pertinent to the BC measures is section 3 which concerns private wine outlets selling only Canadian wines and will act to supplant the previous text from the 1989 Agreement and the 2003 Agreement. The new CETA section now requires:

[Off site private wine store outlets in Ontario and British Columbia to sell only wines produced by Canadian wineries. The number of these off site private wine store outlets authorised to

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170 Canada-US FTA, supra note 165.
171 British Columbia, "Liquor Retail Stores", supra note 17.
172 Woo, supra note 64.
175 CETA, supra note 11, c 2, Annex X.05.
Asper Review

sell only wines produced by Canadian wineries in these provinces shall not exceed 292 in Ontario and 60 in British Columbia.176

Annex VIII of the 2003 Agreement177 amended article 2 of the 1989 Agreement.178 While the amended article 2(1) of the 1989 Agreement repeats GATT national treatment and most favoured nation provisions,179 article 2(2) amounts to a specific exception from national treatment.180 Whereas the amendment to the 2003 Agreement only listed private wine store outlets as an exception to national treatment,181 the CETA proposes to narrow this exception considerably.182 As the VQA program currently only includes 19 stores there would appear to be minimal potential for a direct CETA violation in terms of outlets exceeding the allotment until a strong majority of wine store licences are transferred to grocery stores.183 Thus, it would appear that the BC measures have, practically speaking, a strong defence under the pending CETA.

c. Canada – Chile FTA

Of the remaining FTAs which Canada is a party to, the 1997 Canada – Chile FTA184 is the only one with a major grape wine exporting nation. In recent years, Chile has ranged between the world’s fourth and fifth largest exporter of grape wines185 and seventh and ninth largest producer.186 Chile is the fifth largest importer of grape wines into Canada in terms of volume,

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176 Ibid, c 2, Annex X.05, s 3.
177 Canada-Europe 2003, supra note 174, Annex VIII, art C.
178 Canada-Europe 1989, supra note 173.
179 Canada-Europe 2003, supra note 174, Annex VIII, art C(1)
180 Ibid, Annex VIII, art C(2).
182 CETA, supra note 11, c 2, Annex X.05, s 3.
accounting for just over 8% of all imports into Canada. The Chilean wine industry also has a heavy export focus, with roughly 70% of all production destined for abroad, a ratio unparalleled amongst the world’s largest grape wine producers. Accordingly, if there is a particular sector where Chile would most want to enforce FTA agreements, it could logically be in the wine industry.

Unlike both the Canada – US FTA and the CETA, the Canada – Chile FTA makes no specific mention of BC (nor Ontario) retail outlets selling only in-province wines. Additionally, the national treatment provision of the FTA has major exceptions for wines and spirits. Specifically Annex C-10.2 excepts:

a. a non-conforming provision of any existing measure;
b. the continuation or prompt renewal of a non-conforming provision of any existing measure; or
c. an amendment to a non-conforming provision of any existing measure to the extent that the amendment does not decrease its conformity with Article C-01.

The party asserting the application of an exception (which would almost certainly be Canada), has the burden of proof to demonstrate its validity. In practice, “c.” would seem most applicable, and as it refers to a general national treatment clause in article C-01, the analysis may be similar to the grandfathering provision in the Canada – US FTA in terms of tying the amendment of a permitted non-conforming measure. The primary difference is that more wine store licences were in existence prior to the Canada – Chile FTA than in the October 1987 date outlined by the Canada – US FTA. Thus the potential avenue of challenge for Chile would appear weaker than that possessed by the United States.

III. POLICY ALTERNATIVES

The primary threat to the BC measures is national treatment. For alternatives to make sense, they must be far less obvious violations of national

188 Felzensztein, supra note 185 at 3.
189 Canada-Chile FTA, supra note 184, Annex C-10.2.
190 Ibid.
treatment while still achieving the ostensive policy goal of providing a retail boost to BC wines. Fortunately, removing national treatment issues could be relatively straightforward. All wines could be sold on the shelf, or all could be restricted to store-in-store retail. However, achieving both national treatment compliance and BC wine promotion objectives at the same time is troublesome.

One potential work around would be upon the transfer of a wine store licence to a grocery store, allowing a share of shelf space reserved for BC and non-BC wines proportionate to sales over the previous several years. In the grocery store business, such an arrangement would lead to charging for shelf space. In turn, with potentially more foreign wines competing for the foreign share of shelf space than there would be BC wines competing for the BC shelves, foreign wines would likely have to incorporate a higher cost of shelf space in their pricing scheme. Accordingly, BC wines might be afforded a price advantage on the shelf that would not carry over to the store-in-store space. A revision along these lines would seem to position the measures, while not necessarily compliant, closer to compliance than the existing regulations and the scenario in Korea – Beef. Still, without the benefit of practical implementation, or even a detailed financial analysis, the possibility that a more vigorous competition for shelf space may exist between BC wines is well within the realm of possible.

A further problem with this reform may be the centralized nature of liquor distribution in BC. With a central government wholesaler selling to retail outlets, the wholesale price is strictly regulated and upwards of half the consumer price for wine comes in various forms of taxes. Still the government could ensure that there was no prohibition on grocery stores directly charging wine producers a fee in return for the stores ordering their wines from the government wholesaler for the limited and much more valuable shelf space. If grocery stores charged such a fee, it would be an indirect competitive disadvantage for foreign wine producers looking to sell in BC that would lower their margins per unit, while minimizing the appearance of governmental causation. Since there would be no restriction on restocking shelf space, no quantitative issue would arise – as much foreign wine could be sold as the grocery store ordered and it would be up to the grocery store, not

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192 For a well-cited discussion on the relationship between shelf space and sales see Ronald C Curhan, “The Relationship Between Shelf Space and Unit Sales in Supermarkets” (1972) 9:4 J Marketing Research 406.
193 Korea–Beef, supra note 30.
the government, to choose which wines to stock. However, it is worth noting that even with finding a way to route the reform through the existing Liquor Distribution Branch system, it may be more liberalization than the BC government is realistically willing to entertain.

CONCLUSION

In short, the BC wine measures may be found as violations of national treatment if a trade complaint is launched. With regard to the WTO dispute settlement process, these measures are not likely to be saved by the GATT general exceptions. Yet despite these prospects of success in a trade dispute forum, the BC government has drawn sound political and economic conclusions in implementing these measures. Even in the worst realistic scenario with the measures being eventually deemed non-compliant and struck, a period of time will be gained during which BC wines will gain some potentially sizable benefits (in terms of market share) at little cost. Thus the BC government has little immediate incentive to shelve the measures and every reason to implement and maintain the measures until a disincentive arises with far more weight than any currently within the realm of possibility. At the same time however, BC’s incentive structure represents corresponding risks for Canada as the federal government will possess the burden of any adverse trade law consequences, consequences that may well impact industries beyond wines and outside of BC.