

procedural fairness.

8. The Appellate Body found that it could complete the analysis of Article III:2 of the GATT 1994 in this case, provided that there was sufficient basis in the "Main Arguments" part of the Panel Report to allow the Appellate Body to do so. The Appellate Body, therefore, relied on the summary of arguments from the Panel report with respect to Article III:2, second sentence of the GATT 1994. This is no substitute for a full written and oral argument on appeal.

9. The Appellate Body based its decision on a test that was not dealt with in the Panel report, that was not raised on appeal, and that was accordingly not addressed in the written or oral arguments of the parties. No notice was given to the parties of the intention of the Appellate Body to base its decision on a test that did not form the basis of the appeal under Article 17, paragraph 6 of the DSU. The Appellate Body, therefore, rendered its decision without the benefit of written or oral argument by the parties, and without providing a proper opportunity to the parties to submit such argument. The procedure adopted by the Appellate Body amounts to a denial of the right to be given notice and to be heard on all relevant issues.

10. The Appellate Body relied on the *United States-Gasoline* case, where it considered the chapeau to Article XX after deciding that one of the subparagraphs of Article XX was applicable. This was simply a two-step analysis of a single legal provision. Any ruling on whether an exception in Article XX applies automatically involves a consideration of the chapeau. The two sentences of Article III:2 of the GATT 1994, in contrast, are distinct obligations with different coverage and rules, and have been clearly treated as such in prior decisions, including the *Japan-Alcoholic Beverages* case.

11. In reviewing Canada's appeal of the Panel's decision on the excise tax as a services measure, the Appellate Body inferred that because Canada did not appeal the ruling on Tariff Code 9958, the excise tax should be considered a tax on a good. It is inappropriate, as a matter of fairness, to draw prejudicial inferences from decisions not to appeal distinct issues.

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12. With respect to Canada's arguments on the application of GATT disciplines to services measures, Canada is most disappointed in the Appellate Body's ruling. A coherent interpretation of the GATT 1994 and the GATS together, giving meaning to all the treaties' provisions, is essential for future compliance by Members with all their obligations and commitments in respect of trade in goods and services.

13. When the Appellate Body is asked to rule on the relative scope of the two agreements, it is important to apply careful and