Agreement on Internal Trade

Report of the Article 1704 Panel Concerning the Dispute Between Alberta / British Columbia and Ontario Regarding Ontario's Measures Governing Dairy Analogs and Dairy Blends

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TABLE OF CONTENTS

ABBREVIATIONS

Agreement	*Agreement on Internal Trade*
EOPA	*Edible Oil Products Act*
CIT	Committee on Internal Trade
FSQA	*Food Safety and Quality Act*
FPTAFIC	Federal/Provincial/Territorial Agri-Food Inspection Committee

1. INTRODUCTION

The following is a report of a dispute resolution panel (hereinafter the ”Panel”) established under the terms of Chapter Seventeen (Dispute Resolution Procedures) of the *Agreement on Internal Trade* (hereinafter the “Agreement”)[1] to address a dispute brought forward by Alberta and British Columbia (hereinafter the “Complainants”) under Article 1704 (Request for a Panel) against Ontario (hereinafter the ”Respondent”) regarding access to the Ontario market for certain vegetable and vegetable oil seed food products. Both Saskatchewan and Manitoba joined the Complainants as Intervenors, (hereinafter the “Intervenors”). [2]

For purposes of the report, the relevant vegetable and vegetable oil seed products comprise two categories, namely imitation dairy products which are vegetable based products that resemble dairy products but contain no dairy ingredients (hereinafter “Dairy Analogs”) and vegetable oil products with any amount and kind of milk ingredient and that resemble a dairy product (hereinafter “Dairy Blends”).

By way of background, the present complaint about access to the Respondent’s market for specific edible oil-based products originated in 1999. British Columbia commenced consultations on this matter with the Respondent on behalf of a British Columbia stakeholder. British Columbia and the Respondent agreed to put the consultations on hold notwithstanding the complaint, pending a national initiative, chaired by the Respondent, to harmonize the regulatory framework for the products in question.

In late 1999, the British Columbia stakeholder independently pursued a person-to-government dispute which resulted in a screener’s report rejecting the stakeholder’s request to proceed with Chapter Seventeen dispute resolution proceedings. [3]

In January 2001, on behalf of an Alberta stakeholder that manufactures and/or distributes Dairy Analogs and Dairy Blends, Alberta also commenced consultations with the Respondent. Failing resolution of the dispute, British Columbia resumed consultations with the Respondent in April 2002.

The Panel was duly established under the provisions of the Agreement. Its terms of reference are to examine whether the actual or proposed measure or other matter at issue is or would be inconsistent with the Agreement. [4]

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1 *Agreement on Internal Trade*; Entered into force July 1, 1995. Unless otherwise specified, Articles and Annexes” refer to the articles and annexes of the Agreement. A consolidated version of the Agreement is available on the website of the Internal Trade Secretariat: www.ait-aci.ca.

2 Article 1704(9).

3 Government-to-Government Recourse to an Article 1704 Panel Hearing under the Agreement on Internal Trade in the Matter of a Dispute by British Columbia and Alberta Concerning Ontario’s Edible Oil Products Act, Counter Submission by the Government of Ontario (hereinafter “Ontario’s Submission”), Exhibit 6.

4 Article 1705(4).

As provided in paragraph 2 of Article 1707 (Report of Panel) of the Agreement, this Panel report contains:

> "(a) findings of fact;
>
> (b) a determination, with reasons, as to whether the actual measure in question is inconsistent with this *Agreement*;
>
> (c) a determination, with reasons, as to whether the measure has impaired or would impair internal trade and has caused or would cause injury; and
>
> (d) recommendations, if requested by a disputing Party, to assist in resolving the dispute."

2. COMPLAINT PROCESS

In accordance with Article 906 (Consultations) of Chapter Nine (Agriculture and Food Goods) of the Agreement, British Columbia requested, in March 1999, that the Respondent enter into consultations on the matter in question.[5] In June 1999, the British Columbia and Ontario Deputy Ministers of Agriculture agreed to put Article 906 consultations on hold pending resolution of a national effort to harmonize regulations respecting Dairy Analogs and Dairy Blends.[6]

In accordance with Article 906, Alberta formally requested, by letter dated January 19, 2001 that the Respondent enter into consultations on the same matter.[7]

British Columbia requested resumption and completion of the consultations launched in March 1999, in a letter to Ontario's Internal Trade Representative dated April 5, 2002.[8]

The Complainants formally requested by letters dated February 10, 2004, the assistance of the Committee on Internal Trade (hereinafter the "CIT"), in resolving the matters.[9] The Ministers met by conference call on March 1, 2004 to consider the matters. No resolution was reached with respect to the complaints at that time.[10] The CIT agreed at that meeting, that, if Alberta and British Columbia decided they wanted to proceed with a request for a Panel in this matter, they could do so jointly.[11]

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5 Submission to the Internal Trade Panel Concerning Ontario's Measures Regulating Edible Oil Products, Dairy Blends and Dairy Analogs by the Government of Alberta and the Government of British Columbia, Challenge by Alberta and British Columbia, June 25, 2004 (hereinafter "Alberta and British Columbia's Submission"), Volume 2, p. 2, para. 9.

6 *Ibid*., para. 10.

7 *Ibid.* p. 6, para. 3

8 *Ibid.* Volume 3, Tab. 10.

9 *Ibid.* Tab 24.

10 *Ibid*. Tab 26.

11 *Ibid.*

In a letter dated May 10, 2004, the Complainants requested the establishment of a Panel under Article 1704 (Request for Panel).[12]

Following the exchange of submissions provided for in the Agreement, a hearing of the Panel, which was open to the public, was held in Toronto, Ontario on September 28, 2004.

In accordance with Article 1704(9), any Party with a substantial interest in a dispute is entitled to join panel proceedings as an Intervenor. Manitoba and Saskatchewan provided the required notice of their intent to join the panel proceedings and filed written submissions in support of the Complainants' position in this matter to the Panel. Saskatchewan made an oral presentation at the hearing, Manitoba did not. [13]

3. THE COMPLAINT [14]

3.1 The Position of the Complainants

The Complainants have presented four areas of complaint in their dispute with the Respondent and make the following allegations:

1. That elements of the Respondent's *Edible Oil Products Act* [15] (hereinafter the "EOPA") are inconsistent with the Agreement;

2. That the Respondent's *Milk Act* could be used to restrict trade in some vegetable based dairy alternatives;

3. That the Respondent failed to provide information requested by the Complainants concerning the Respondent's intentions with regard to the introduction of legislative and regulatory amendments and to consult with them in these matters as required by the Agreement; and

4. That any new measures introduced by the Respondent that would affect trade in Dairy Analogs and Dairy Blends without consulting other Parties would be inconsistent with the Agreement.

Specifically, with respect to the EOPA, the Complainants allege that subsection 3 of the EOPA which makes it illegal to manufacture and sell without a license any product other than oleomargarine, that resembles a dairy product and that combines vegetable oil

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12 Submission to the Internal Trade Panel Concerning Ontario's Measures Regulating Edible Oil Products, Dairy Blends and Dairy Analogs by the Government of Alberta and the Government of British Columbia, Reply Submission (hereinafter "Alberta and British Columbia's Reply Submission") Attachment R1.

13 Hearing Transcript, pp. 51-62.

14 The complaints of Alberta, British Columbia, Saskatchewan and Manitoba are described more fully in their respective submissions to the Panel which can be found on the Internal Trade Secretariat website: www.ait-aci.ca/oil.

15 *Edible Oil Products Act*, R.S.O. 1990, Chapter E.1.

with any amount of dairy ingredients (Dairy Blends), is inconsistent with Article 401 (Reciprocal Non Discrimination), Article 402 (Right of Entry and Exit), and Article 403 (No Obstacles) of the Agreement. The Complainants allege that these inconsistencies can not be justified under the provisions of Article 404 (Legitimate Objectives) of the Agreement.

The Complainants further allege that the EOPA's licensing requirements for Dairy Analogs, to the extent that they are different from the requirements for other food products in Ontario and specifically the "special designation" established for vegetable based dairy alternatives and the unique labeling, advertising and placement of products requirements, are inconsistent with Article 401 (Reciprocal Non Discrimination), Article 402 (Right of Entry and Exit) and Article 403 (No Obstacles). The Complainants allege that these inconsistencies can not be justified under the provisions of Article 404 (Legitimate Objectives) of the Agreement.

With respect to the Respondent's *Milk Act*, the Complainants allege that the Act could be used to restrict trade in some vegetable based dairy alternatives, and to the extent that it does this, these measures would also be inconsistent with the Agreement.

Regarding allegations of failure by the Respondent to provide information, the Complainants claim that the Respondent failed to provide information requested by the Complainants concerning the Respondent's intentions with regard to the introduction of regulatory amendments, to the EOPA and the *Milk Act* affecting trade and Dairy Blends and Dairy Analogs, and to consult with them in these matters as required by the Agreement. In particular, the Complainants claim breaches of the Agreement as follows:

1. Under Article 905, in that the Respondent proposes to adopt or amend a measure that affects trade in Dairy Analogs and Dairy Blends;

2. Under Article 405(1), and Annex 405.1 if the Respondent proposes to adopt a standard for a Dairy Analog or Dairy Blend that would restrict trade in these products;

3. Under Article 405(2), and Annex 405.2 if the Respondent proposes to adopt or amend a regulation that would operate to create an obstacle to trade in these products; and

4. Under Article 406(2), if the Respondent proposes to adopt or modify a measure that might materially affect the operation of the Agreement.[16]

With respect to allegations that introduction of any new measures affecting trade in Dairy Analogs and Dairy Blends without consultation with other Parties would be inconsistent with the Agreement, the Complainants argue that their position is supported by the following references in the Agreement:

[16] Hearing Transcript pp. 26-28; and Alberta and British Columbia's PowerPoint Presentation at the Panel Hearing, Slide No. 17.

1. Article 101(4) (Mutually Agreed Principles);

2. Article 907 (Transparency);

3. Article 406 (Transparency);

4. Article 405(2) (Reconciliation); and

5. Annex 405.2 (Regulatory Measures and Regulatory Regimes).

The Complainants allege that packagers and manufacturers in Alberta and British Columbia have been injured through losses suffered because they have been unable to sell their vegetable based Dairy Analogs and Dairy Blends in Ontario. In addition, oil seed producers and processors in Alberta and British Columbia have lost opportunities to sell their products to manufacturers in their own provinces, in Ontario and elsewhere because the market for their product has been restricted by the EOPA.

It is the view of the Complainants that generally the growth of the vegetable oil industry in Canada has been curtailed by restrictions under the EOPA. Furthermore, the Complainants allege that consumers in Ontario and elsewhere in Canada have been deprived of choice and access to products as a result of the Respondent's measures under the EOPA.

The Complainants asked the Panel to find that:

1. Because it operates as a barrier to trade for vegetable based dairy alternatives, the EOPA and Regulations thereunder are inconsistent with the Agreement and this inconsistency is not justified by a legitimate objective;

2. The EOPA and Regulations thereunder have caused injury to the vegetable oil industry in Alberta, British Columbia and the rest of Canada;

3. Any new measures that the Respondent has introduced, or intends to introduce under the *Milk Act*, or any other measure, to regulate vegetable based dairy alternatives, including Dairy Analogs and Dairy Blends, that restrict trade in these products are inconsistent with the Agreement unless they are justified by a legitimate objective;

4. Any regulations that apply to vegetable based dairy alternatives, including Dairy Analogs and Dairy Blends, that the Respondent introduces under the *Milk Act* or any other measure that restricts trade in these products because the Respondent's new measures have not been reconciled with national food regulations or with the regulations of other jurisdictions are inconsistent with the Agreement unless they are justified by a legitimate objective;

5. It is inconsistent with the Agreement for the Respondent to introduce new measures or amend existing ones if they affect trade in vegetable based dairy alternatives, including Dairy Analogs and Dairy Blends, without consulting the Complainants and other Parties and taking their comments into account; and

6. When the EOPA is repealed, any new measures that the Respondent introduces to regulate Dairy Analogs and Dairy Blends, will cause injury to the vegetable oil industry in Alberta, British Columbia and the rest of Canada if they restrict trade in these products.

In their initial submission, the Complainants requested recommendations of the Panel as follows:

1. That the Respondent immediately repeal the EOPA if it has not already been repealed as provided in the *Food Safety and Quality Act* (hereinafter the "FSQA");[17]

2. That the Respondent withdraw any other measures that regulate Dairy Analogs and Dairy Blends, that they have not demonstrated are justified by a legitimate objective;

3. That the Respondent not introduce any further measures to regulate Dairy Analogs and Dairy Blends, unless they are necessary to meet a legitimate objective;

4. That the Respondent defer to the existing national food regulation of Dairy Analogs and Dairy Blends as recommended by the Federal/Provincial/ Territorial Agri-Food Inspection Committee (hereinafter the "FPTAFIC") report in February 2001; and

5. That all other Canadian governments implement the recommendations of the FPTAFIC report of February 2001.

In their argument before the Panel, the Complainants included further requests for the Panel to recommend:

1. That the *Milk Act* be amended to restrict the *Milk Act's* regulatory scope to the "standardized" dairy products specifically set out in that Act;

2. That the Respondent must not amend or adopt any measure that restricts trade in Dairy Analogs and Dairy Blends or has the effect of maintaining the measures currently in place and that are inconsistent with the Agreement; and

[17] Bill 87, *The Food Safety and Quality Act* (FSQA) has been adopted by the Ontario Legislature but has not yet been proclaimed. Section 57 and Section 61 are the provisions under discussion in this dispute.

3. That the Respondent must consult with the Complainants prior to amending or adopting measures that may affect trade in Dairy Analogs and Dairy Blends.

The Respondent objected to this expansion of the Complainants' requested relief. This objection is dealt with below in Section 5.2.7.

3.2. The Positions of the Intervenors

Manitoba's submission to the Panel supports the Complainants' contention that the Respondent's continued maintenance and enforcement of the EOPA, which restricts trade in vegetable based dairy alternatives, is inconsistent with the Respondent's obligations under the Agreement.

In its presentation at the Panel hearing, Saskatchewan reiterated its support for the position and arguments presented by the Complainants in this dispute. In addressing issues raised regarding the scope of the dispute and the panel hearing, particularly with respect to the *Milk Act*, Saskatchewan noted the following:

> ". . .it's our submission that the scope of this hearing is as wide as that identified technical barrier to trade regardless of where it's addressed and how it's addressed by Ontario's measures. We see it principally in the Edible Oil Products Act, but we also agree with the submissions that B.C. and Alberta have made with respect to the Milk Act. We would submit that wherever imitation dairy products and standards regarding dairy blends are affected by regulation in Ontario that that [Sic.] should be addressed by this Panel."[18]

Saskatchewan also addressed the applicability of Chapter Four (General Rules) of the Agreement to Chapter Nine. Saskatchewan noted in its presentation that by virtue of the fact that Dairy Analogs and Dairy Blends have been identified as a technical barrier within the jurisdiction of the Agreement, specifically within Chapter Nine, they will also be, by definition, an obstacle to trade within the meaning of Article 403.[19]

Saskatchewan concluded by highlighting the importance of this issue to Saskatchewan and the more than 32,000 canola producers and three oilseed crushing facilities in the province. Saskatchewan contended that remaining measures with any kind of restrictive effect on the development or marketing of Dairy Analogs and Dairy Blends will impede product development by producers in Saskatchewan, and reiterated that the EOPA, which remains, an "identified technical barrier to trade" must be addressed. [20]

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[18] Hearing Transcript, p. 57.

[19] *Ibid*. p. 58.

[20] *Ibid*. p. 62.

4. THE POSITION OF THE RESPONDENT [21]

The Respondent maintains that it has addressed all substantive issues raised by the Complainants regarding edible oil-based imitation cheese products, repeal of the EOPA and the prospects of substitute regulations.

The Respondent concedes that the EOPA restricts trade in edible oils in Ontario. However, it confirms that the current government of Ontario intends to carry through with the existing legislation to repeal the EOPA effective January 1, 2005.

In addition to repealing the EOPA, the Respondent asserts that in a further attempt to bring early closure to the dispute in May 2004, it adopted interim regulations to allow for edible oil products that imitate cheese and contain up to 20 per cent casein or caseinate. The Respondent's position is that this action addresses both substantive elements of the complaint initiated by the Complainants.

The Respondent contends that all necessary steps have been taken, within the confines of any government's standing obligation to duly respect its Legislature, to amend the subject measures and to immediately alleviate the harm alleged.

The Respondent further contends that it has been engaged in proactive efforts to address the matter within the national context. The Respondent describes its role in spearheading a federal/provincial working group to develop recommendations adopted by the FPTAFIC calling for a national approach to regulating imitation dairy products, by deferring to relevant federal regulations. These recommendations advocated repealing all provincial legislation and regulations respecting products that imitate or resemble dairy products.

The Respondent introduced legislation in June 2004 that will delay repeal of the EOPA to January 1, 2005. The Respondent stated at the time of introduction that the purpose of deferral of the repeal was to provide industry stakeholders and the federal government an additional six months time to complete a legislative review of labeling regulations including imitation dairy products, being conducted by the Canadian Food Inspection Agency.

The Respondent maintains that it has taken steps to reduce and eliminate, "to the extent possible", as provided in the Preamble and Article 100 of the Agreement, barriers to the free movement of imitation dairy products, while fully observing its legislative process, as is the priority obligation of every Party to the Agreement.[22] The Respondent contends that the Complainants have raised new allegations in contravention of the letter and spirit of the Agreement. The Respondent claims that submissions introduced by the Complainants beyond simulated cheese products and continued enforcement of the EOPA fall outside the scope of the matter in dispute and should be rejected by the Panel.

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[21] Ontario's response is described more fully in their submission to the Panel which can be found on the Internal Trade Secretariat website: www.ait-aci.ca/oil.

[22] Ontario's Submission, p. 8, para. 38.

The Respondent refers specifically to the Complainants' statement at paragraph 20, of their joint submission that:

> "Now Alberta's and British Columbia's complaint is with respect to any and all Vegetable Based Dairy Alternatives and Ontario's current measures and any future measures that Ontario might introduce to regulate Vegetable Based Dairy Alternatives that restricts trade in these products." [23]

The Respondent contends that the above statement by the Complainants in their joint submission demonstrates a disregard for the obligations set out in Article 1700 (Cooperation) of the Agreement and demonstrates a lack of procedural fairness, contravening the spirit in which consultations are to be conducted under Chapter Nine of the Agreement.

The Respondent responds to a concern raised by the Complainants regarding potential substitute regulations impacting vegetable based dairy alternatives. The Respondent argues that in raising a concern regarding potential substitute regulations, the Complainants are advancing the notion that any stakeholder request presented to a Party to the Agreement constitutes sufficient evidence to ground a potential challenge under the Agreement, simply by virtue of the fact that the Party is in receipt of a request by a stakeholder group.

The Respondent asserts that it is imperative that complaints be directed to actual or proposed government measures, and that speculation as to possible future government measures falls outside of the jurisdiction of an Agreement panel review.

The Respondent argues that the onus rests on the Complainants to advance evidence of the Respondent's intention to impair their rights under the Agreement and the Complainants have not met this onus. The Respondent further argues that it has provided evidence of government policy with respect to the matter at hand, which the Complainants are unable to contradict.[24]

The Respondent submits that:

1. All substantive issues raised by the Complainants regarding edible oil-based imitation cheese products, repeal of the EOPA and the prospects of substitute regulations have been addressed;

2. The issue of the EOPA's consistency with the Agreement is moot since the EOPA will be repealed by January 1, 2005;

3. The real issue before the Panel is one of timing in that the Complainants are dissatisfied with the amount of time that the process for legislative repeal and regulatory amendment has taken in Ontario;

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[23] Alberta and British Columbia's Submission, Volume 1, p. 7, para. 20.

[24] Hearing Transcript, pp. 86-87.

4. The Agreement contemplates that observance of the interprovincial trade commitments must be to the extent possible, and within this context, the Respondent has been active in its attempts to resolve the matter at issue both nationally and within the province;

5. Allegations that are not linked to a specific government measure are not within the jurisdiction of a Chapter Seventeen panel;

6. The conduct of the Complainants raises the issue of fair and constructive engagement of the Chapter Seventeen dispute resolution procedures. Panel review processes under the Agreement are to be employed only as a measure of last resort where one party refutes the allegations and refuses to amend the measure complained of. This is not the case in the circumstances under consideration in this dispute; and

7. Bringing the matter in dispute forward for panel review when there is no substantive issue in contention is an abuse of the dispute resolution procedures of the Agreement.

The Respondent requests that the Panel make the following findings:

1. That the Respondent has taken appropriate steps to respond to concerns raised by the Complainants with respect to edible oil-based imitation cheese products, and repeal of the EOPA;

2. That allegations that are not linked to a specific government measure, either actual or proposed, fall outside the review jurisdiction of an Agreement Panel;

3. That government measures, not stakeholder requests, are the only legitimate basis for a complaint under the Agreement; and

4. The Panel findings can not be based on speculation and conjecture, but rather must weigh the interprovincial trade principles set out under the Agreement against specific government measures, either existing or being proposed.

5. PANEL FINDINGS

5.1 Procedural Issues

5.1.1 Whether the Dispute is properly before the Panel

In its submission, the Respondent argued that the current Panel had not been established in accordance with the stated goals of the Agreement with respect to fair

and constructive engagement of the Chapter Seventeen dispute resolution provisions. In short, the Respondent argued that many of the issues raised in the complaint had not first gone through the required consultation process.[25] The Respondent submitted that the Complainants had thus inappropriately expanded the scope of the complaint. In particular, the Respondent sees the dispute as limited to the EOPA and its enforcement and objected to the expansion of the dispute with respect to provisions of the *Milk Act* and generally to any issues beyond the access to the Ontario market for imitation cheese products (which was the initial issue raised by the British Columbia stakeholder in 1999).

In considering these positions, the Panel is mindful of the following relevant provisions of the Agreement.

> "**Article 1701: Application**
>
> 1. Subject to paragraph 6, this Chapter applies to the avoidance and resolution of disputes between Parties, or persons and Parties, regarding the interpretation or application of this Agreement.
>
> 2. Before a Party initiates dispute resolution proceedings under Part A of this Chapter, it shall select and proceed only under the one chapter in Part IV of this Agreement that it considers to be most applicable to the matter.
>
> 3. A complaining Party shall deliver written notice to the Party complained against and the Secretariat of the selection of the applicable chapter and of the matter.
>
> 4. On delivery of notice in accordance with paragraph 3, the complaining Party and the Party complained against shall attempt to resolve the matter using the dispute avoidance and resolution process provided in the applicable chapter. Such process must be exhausted before a complaining Party may proceed to dispute resolution under this Chapter. The dispute avoidance and resolution processes in each chapter and their completion dates are listed in Annex 1701.4."
>
> "**Article 906: Consultations**
>
> 1. A Party may make a written request for consultations with another Party on any matter covered by this Chapter. The Party requesting consultations shall deliver a notice of its request to the other Party.
>
> 2. The consulting Parties may request the Trade Policy Committee to assist them in the resolution of the matter. Where so requested, the Trade Policy Committee shall facilitate the consultations by considering the matter itself or by referring the matter for advice or recommendations to an existing or ad hoc working group or another appropriate forum.
>
> 3. The Trade Policy Committee shall consider any matter referred to it under paragraph 2 as expeditiously as possible, particularly matters regarding perishable goods, and promptly forward to the consulting Parties any technical advice or recommendations that it develops or receives concerning the matter. The consulting Parties shall provide a written response to the Trade Policy Committee concerning the technical advice or recommendations within such time as that Committee may request."

[25] Ontario's Submission, paras. 39-48.

"**Article 1702: Consultations**

1. If the disputing Parties fail to resolve the matter using the dispute avoidance and resolution process provided in the chapter selected under Article 1701(2), or if a complaining Party proceeds directly to dispute resolution under this Chapter by reason of Article 1701(5):

(a) either disputing Party may request consultations under this Article; or

(b) the disputing Parties may agree to proceed directly under Article 1703 or Article 1704.

2. The Party requesting consultations under paragraph 1 shall deliver written notice of its request to all other Parties and the Secretariat. The request shall:

(a) specify the actual or proposed measure or other matter complained of;

(b) list the relevant provisions of this Agreement; and

(c) provide a brief summary of the complaint.

6. The consulting Parties shall exchange all information necessary to enable a full examination to be made of how the actual or proposed measure or other matter may affect the operation of this Agreement. In so doing, the consulting Parties shall treat any confidential information exchanged on the same basis as the Party providing the information."

"**Article 1704: Request for Panel**

1. Where the matter in dispute has not been resolved to the satisfaction of the disputing Parties within:

(a) 30 days after the completion date of the applicable dispute avoidance and resolution process listed in Annex 1701.4, where the disputing Parties have agreed under Article 1702(1)(b) to proceed directly under this Article;

(b) 40 days after the date of delivery of the request for consultations under Article 1702, where the disputing Parties have agreed under Article 1702(1)(b) to proceed directly under this Article and not to request assistance under Article 1703;

(c) 50 days after the date of delivery of the request for assistance under Article 1703; or

(d) such other period of time as the disputing Parties may agree;

any disputing Party may make a written request to the Committee for the establishment of a panel."

The Panel concludes that the Agreement is thus designed to ensure that disputing Parties go through an extensive consultation process before a matter may be put to a Panel (unless the Parties specifically agree to go directly to a Panel). In this case, the Panel is generally satisfied that the Parties have reasonably exhausted available consultation processes. In this regard the Panel notes:

1. The issues surrounding imitation cheese products were the initial matter that began this dispute;

2. However, in the consultation process the Complainants did not limit the subject matter of their complaint strictly to imitation cheese products;[26]

3. In fact, the correspondence[27] makes it clear that during the course of consultations the concerns of the Complainants went on to cover the treatment by the Respondent of Dairy Analogs and Dairy Blends generally; and

4. Specific concerns with respect to the *Milk Act* were raised in writing only in November 2003,[28] i.e. after the initial launch of the consultations. However, this is understandable given that the potential use of the *Milk Act* to limit the sale or production in Ontario of Dairy Analogs and Dairy Blends had not before that time been contemplated by the Complainants. They were made aware of this potential by the representations of the Dairy Farmers of Ontario to the Ontario government. [29]

The Panel is convinced that the Complainants brought this dispute forward in good faith and have made reasonable efforts to make clear the extent of their complaint. That being said, the Panel is mindful of the importance of the pre-consultation requirement and the Complainants would have been well advised to make much more explicit the width of the net they were casting. However, on balance, the Panel does not believe that the Respondent can be surprised by the issues raised before this Panel or that it is has been denied the opportunity to subject all the issues before the Panel to the sectoral consultations anticipated in Chapters Nine and Seventeen of the Agreement.

For instance, in 2001, in the context of introducing the FSQA, which included a provision to repeal the EOPA, the Respondent introduced amendments to the *Milk Act*. These measures, yet to be proclaimed, were introduced in the context of the national initiative in respect of Dairy Analogs and Dairy Blends. In view of the manner in which this dispute evolved, and the ongoing national consultation process that was taking place relating to Dairy Analogs and Dairy Blends, it would be difficult to determine specifically the scope and extent of the various consultations among the parties.

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26 Alberta and British Columbia's Submission, Volume 3, Tab 15. Letter dated January 19, 2001 from Mr. Darcy Willis, Senior Policy Analyst, Alberta Agriculture, Food and Rural Development to Mr. Phil Malcolmson, Manager, Policy Analysis, Ontario Ministry of Agriculture, Food and Rural Affairs requesting consultations under Chapter Nine (Article 906), wherein Alberta in two instances states: "[…] Without limiting the grounds for our complaint […]"

27 *Ibid*.

28 Alberta and British Columbia's Submission, Volume 3, Tabs 22 and 23. Letter dated November 19, 2003 from the Honourable Shirley McClellan, Alberta Deputy Premier and Minister of Agriculture, Food and Rural Development to the Honourable Steve Peters, Ontario Minister of Agriculture and Food; and letter dated November 12, 2003 from the Honourable Halvar Jonson, Alberta Minister International and Intergovernmental Relations to the Honourable Joe Cordiano, Ontario Minister of Economic Development and Trade.

29 *Ibid*. Tab 18.

The Panel therefore finds that the applicable procedural requirements of the Agreement have been fulfilled and that the current Panel has been established in accordance with the dispute resolution provisions of Chapters Nine and Seventeen of the Agreement.

5.1.2 Admissibility of Correspondence Produced by Complainants during the Hearing

In its presentation to the Panel at the hearing, the Complainants asked that correspondence dated June 15, 2004 from the Honourable Shirley McClellan, Deputy Premier and Alberta Minister of Agriculture, Food and Rural Development to the Honourable Steve Peters, Minister, Ontario Ministry of Agriculture and Food be admitted into the record. The Panel accepted copies of the letter and committed to take the matter under advisement.

With respect to admitting the letter into the record, the Panel notes that it warned Parties to file all their relevant material in advance of the hearing, and such late filing is to be discouraged:

1. The letter in question is relevant to questions raised by the Panel at the hearing;

2. The letter was created only a few days before the initial submission of the Complainants was filed with the Internal Trade Secretariat; and

3. The Respondent has had access to the letter since it was addressed to the Honourable Steve Peters, Minister, Ontario Ministry of Agriculture and Food and there is, therefore, no surprise in its contents and no prejudice suffered in admitting it into the record.

Accordingly, the Panel finds that the correspondence presented by the Complainants to the Panel at the hearing, and not included in earlier submissions, may be admitted into the record of these proceedings.

5.2 Substantive Issues

5.2.1 Dairy Analogs and Dairy Blends under the Agreement – Article 902(3)

There was no dispute in this case as to whether Dairy Analogs and Dairy Blends are subject to the Agreement. Nonetheless, the Panel considers that it should satisfy itself that Dairy Analogs and Dairy Blends are properly covered by the Agreement.

Dairy Analogs and Dairy Blends have been identified as a measure within the jurisdiction of the Agreement, and in particular, Chapter Nine.

Article 902(3) states:

> "Measures involving technical barriers with policy implications shall be included in the scope and coverage of this Chapter effective September 1, 1997. The Federal-Provincial Trade Policy Committee (the "Trade Policy Committee") shall, on or before September 1, 1997, give written notice to the Committee on Internal Trade of such matters."

Technical barriers to trade are defined in Article 908 (Definition) as follows:

> **"technical barriers to trade** means a measure that:
>
> (a) involves product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory;"

Further to Article 902(3), the co-chairs of the Federal/Provincial Agricultural Trade Policy Committee wrote to the co-chairs of the CIT on October 1, 1997, identifying "standards regarding Dairy Blends (mixtures of butter and margarine) and imitation dairy products" as one of five technical barriers with policy implications.

With respect to the effectiveness of the written notice given by the Federal/Provincial Trade Policy Committee, this Panel notes that while the notice was dated October 1, 1997, when Article 902(3) required it to be given on or before September 1, 1997, the Panel finding in the *Report of the Article 1716 Panel concerning a dispute between Farmers Co-operative Dairy Limited of Nova Scotia and New Brunswick regarding New Brunswick's Fluid Milk Licensing Measures* (hereinafter "Farmers Dairy/New Brunswick Panel Report")[30] accepted the validity of the October 1, 1997 letter as notification to the CIT of technical barriers with policy implications. This Panel agrees with those findings.

> **The Panel finds that Dairy Analogs and Dairy Blends are subject to the provisions of the Agreement.**

5.2.2. EOPA Consistency with the Agreement

The Complainants have summarized their allegations of non-compliance of the EOPA with the Agreement as follows:

> "**Dairy Blends:** Section 3 of the EOPA (illegal to manufacture and sell Dairy Blends) is inconsistent with Article 401 (Reciprocal Non Discrimination), Article 402 (Right of Entry and Exit), Article 403 (No Obstacles) and these inconsistencies are not justified to achieve a legitimate objective as provided by Article 404 (Legitimate Objectives);
>
> **Dairy Analogs:** The EOPA's licensing requirements for Dairy Analogs, to the extent that they are different from the requirements for other food products in Ontario, the "special designation" established for Vegetable Based Dairy Alternatives and the unique labelling,

[30] *Report of the Article 1716 Panel Concerning the Dispute between Farmers Co-operative Dairy Limited of Nova Scotia and New Brunswick Regarding New Brunswick's Fluid Milk Distribution Licensing Measures*, pp. 11-13. The Panel finding in the Report of the Article 1704 Panel Concerning the Dispute Between Nova Scotia and Prince Edward Island Regarding Amendments to the Dairy Industry Act Regulations (p. 9) also accepted the validity of the October 1, 1997 letter as notification to the CIT of technical barriers with policy implications.

advertising and placement of products requirements are inconsistent with Article 401 (Reciprocal Non-Discrimination), Article 402 (Right of Entry and Exit), Article 403 (No Obstacles). These inconsistencies are not justified to achieve a legitimate objective as provided by Article 404 (Legitimate Objectives);"[31]

The relevant sections of the EOPA read as follows:

"**Definitions**

1. In this Act,

"analyst" means an analyst appointed under this Act; ("analyste")

"chief inspector" means the chief inspector appointed under this Act; ("inspecteur en chef")

Act or designated as a milk product or fluid milk product in the regulations made thereunder; ("produit laitier")

"edible oil product" means a food substance, other than a dairy product, of whatever origin, source or composition that is manufactured for human consumption wholly or in part from a fat or oil other than that of milk; ("produit oléagineux comestible")

"inspector" means an inspector appointed under this Act; ("inspecteur")

"licence" means a licence under this Act; ("permis")

"Minister" means the Minister of Agriculture and Food; ("ministre")

"regulations" means the regulations made under this Act; ("règlements")

"Tribunal" means the Agriculture, Food and Rural Affairs Appeal Tribunal continued under the *Ministry of Agriculture, Food and Rural Affairs Act*. ("Tribunal") R.S.O. 1990, c. E.1, s. 1; 1999, c. 12, Sched. A, s. 10.

Application of Act

2. This Act applies to every edible oil product and class of edible oil product designated in the regulations. R.S.O. 1990, c. E.1, s. 2.

3. (1) No person shall manufacture or sell an edible oil product, other than oleomargarine, oleomargarine, margarine, manufactured by any process by which fat or oil other than that of milk has been added to or mixed or blended with a dairy product in such manner that the resultant edible oil product is an imitation of or resembles a dairy product. R.S.O. 1990, c. E.1, s. 3 (1).

Flavouring exempted

(2) Subsection (1) does not prevent the use of chocolate or cocoa or any flavouring preparation that contains fait or oil other than that of milk when used for the purpose of flavouring a dairy product so long only as such fat or oil does not exceed one-half of 1 per cent by weight of the dairy product. R.S.O. 1990, c. E.1, s. 3 (2).

[31] Alberta and British Columbia's Submission, p. 9, para. 27.

Licence required

> 4. No person shall manufacture or sell by wholesale an edible oil product to which this Act applies without a licence therefor from the chief inspector. R.S.O. 1990, c. E.1, s. 4. […]

Sale of edible oil products

> 12. No person shall offer for sale or sell by wholesale or retail an edible oil product to which this Act applies that does not comply with this Act and the regulations. R.S.O. 1990, c. E.1, s. 12." [32]

With respect to the Complainants allegations of non-compliance of the EOPA with the Agreement the Panel notes:

1. The Respondent has not countered the Complainants' assertion that the EOPA is inconsistent with the Agreement. The Respondent has likewise not claimed that the inconsistency is justified by a legitimate objective; and

2. In fact, the Respondent has conceded that the EOPA restricted trade in edible oils in Ontario.

Article 401 reads as follows:

> **"Article 401: Reciprocal Non-Discrimination**
>
> 1. Subject to Article 404, each party shall accord to goods of any other Party treatment no less favourable than the best treatment it accords to:
>
> (a) its own like, directly competitive or substitutable goods; and
>
> (b) like, directly competitive or substitutable goods of any other Party or non-Party.
>
> 2. Subject to Article 404, each party shall accord to persons, services and investments of any other Party treatment no less favourable than the best treatment it accords, in like circumstances, to:
>
> (a) its own persons, services and investments; and
>
> (b) persons, services and investments of any other Party or non-Party.
>
> 3. With respect to the Federal Government, paragraphs 1 and 2 mean that, subject to Article 404, it shall accord to:
>
> (a) the goods of a Province treatment no less favourable than the best treatment it accords to like, directly competitive or substitutable goods of any other Province or non-party; and
>
> (b) the persons, services and investments of a Province treatment no less favourable than the best treatment it accords, in like circumstances, to persons, services and investments of any other Province or non-Party.

[32] *Edible Oil Products Act*, R.S.O. 1990, Chapter E.1, s. 1, 2, 3, 4, 12.

> 4. The Parties agree that according identical treatment may not necessarily result in compliance with paragraph 1, 2, or 3."

Thus, Article 401 provides a broad non-discrimination obligation akin to the national treatment obligation contained in a variety of international trade agreements such as the World Trade Organization agreements and the North American Free Trade Agreement. To the extent that the EOPA forbids or restricts the sale of Dairy Analogs and Dairy Blends it fails to provide to the producers of these products from other provinces the best treatment it accords to producers of dairy products in Ontario. Since the dairy alternatives and blends at issue here are "like" or "directly competitive" goods to dairy products, the Respondent is in breach of its obligations under Article 401(1).

Likewise, the Panel observes that in maintaining the EOPA, the Respondent has failed to live up to the obligations contained in Article 401(2) of the Agreement in that it does not accord to persons, services and investments of the Complainants and Intervenors treatment that is no less favourable than the best treatment it accords, in like circumstances, to its own dairy producers.

The Panel also notes, for the same reasons, that the EOPA's licensing requirements for Dairy Analogs is in breach of the Respondent's obligations under paragraphs (1) and (2) of Article 401.

Moreover, the Panel concludes that it has not been demonstrated that the Respondent's breach of Article 401 is permissible under Article 404 as necessary to achieve a legitimate objective.

Article 402 reads as follows:

> "**Article 402: Right of Entry and Exit**
>
> Subject to Article 404, no Party shall adopt or maintain any measure that restricts or prevents the movement of persons, goods, services or investments across provincial boundaries."

In prohibiting, limiting and subjecting to licensing the production and sale of Dairy Analogs and Dairy Blends in Ontario, the Respondent is creating in fact a barrier that restricts or prevents the movement of goods and related services and investments across the provincial boundary. Thus, in maintaining the EOPA, the Respondent is in breach of its obligations under Article 402 and it has not been demonstrated that this breach is permissible as necessary to achieve a legitimate objective under Article 404.

Article 403 provides as follows:

> "**Article 403: No Obstacles**
>
> Subject to Article 404, each Party shall ensure that any measure it adopts or maintains does not operate to create an obstacle to internal trade."

Based on the evidence before it, the Panel concludes that section 3 and the licensing requirements of the EOPA effectively prohibit or severely limit the sale of Dairy Analogs and Dairy Blends produced in the jurisdictions of the Complainants and Intervenors. Manifestly, this is an obstacle to trade and it has not been demonstrated that this barrier

is permissible as necessary to achieve a legitimate objective under Article 404 of the Agreement.

> **Accordingly the Panel finds that section 3 and the licensing requirements of the EOPA are not consistent with Articles 401, 402 and 403 of the Agreement and are not permissible under 404 as necessary to achieve a legitimate objective.**

5.2.3 Whether the Substantive Issues Complained of have been Resolved

While the Respondent has not explicitly challenged the jurisdiction of this Panel under the Agreement, it has raised questions as to whether a panel hearing was appropriate given circumstances outlined in their submission and presentation to the Panel. Namely, the Respondent asserts that the substantive issues of the complaint have been resolved.

In its written submission to the Panel, the Respondent notes:

> "The current Ontario Minister of Agriculture and Food, the Honourable Steve Peters, has articulated government policy with respect to the EOPA in the clearest language possible. In a letter to the Dairy Farmers of Ontario dated June 30, 2004, Minister Peters leaves no ambiguity as to the government's intention to repeal the EOPA on January 1, 2005" […] [33]

In its submissions to the Panel, the Respondent suggested that to bring the matter forward for Panel review, when there is no substantive issue in contention, is an abuse of the Agreement's dispute resolution provisions. [34] The Respondent further suggested that the issue of the EOPA's consistency with the Agreement is moot given that the EOPA will be repealed by January 1, 2005.[35]

The Panel rejects the Respondent's suggestion that the issue is academic because the EOPA is scheduled to be repealed. The Panel notes:

1. At the present time, the EOPA is still in effect and remains a barrier to trade under the Agreement;

2. The complaint is not merely of academic interest because there has been a pattern of delay in the repeal of the EOPA;

3. As the Respondent notes in its written submission, while the Respondent has passed legislation that will repeal the EOPA on January 1, 2005, the original date for repeal of the EOPA was June 1, 2003;

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[33] Ontario's Submission, p. 6, para. 24.

[34] *Ibid*. p. 12, para. 60.

[35] Hearing Transcript, p. 86.

4. In December 2002, the Respondent passed the *Edible Oil Products Repeal Date Amendment Act*, 2002, postponing repeal of the *EOPA* from June 1, 2003, to June 1, 2004;

5. On April 28, 2004, the Respondent introduced a bill to amend the FSQA of 2001, delaying repeal of the EOPA from June 1, 2004, to January 1, 2005; and

6. The Complainants are within their rights to seek resolution of the dispute through the Agreement's Chapter Seventeen dispute resolution provisions.

The Panel therefore finds that the substantive issues with respect to the EOPA have not been resolved and the Complainants are entitled to bring forward this complaint and to have a Panel finding to that effect.

The Panel is mindful, however, of the Respondent's commitment communicated in correspondence to the Dairy Farmers of Ontario and referenced earlier in this section of the report. In correspondence to the Dairy Farmers of Ontario, the Honourable Steve Peter, Ontario Minister of Agriculture and Food, has written:

> "We have agreed to postpone the repeal of the EOPA to January 1, 2005, to allow the Dairy Farmers of Ontario (DFO) and your national association, the Dairy Farmers of Canada, more time to engage the federal government on issues raised regarding labelling and potential consumer misinformation. The delay also offers more time to discuss the tariff import status of products containing less than 50 per cent butterfat with federal officials, who have the sole purview over this matter. Please bear in mind that your discussions with the federal government, which this ministry is happy to facilitate, are not regarded as a determining factor with respect to repealing the EOPA. It is this government's intention to carry through with repeal of the EOPA on January 1, 2005." [36]

The Panel recommends that the Respondent follow through with the repeal of the EOPA in line with its stated intentions in the correspondence noted above.

5.2.4 To the Extent Possible

The Respondent concludes in its written submission that:

> "The **AIT** contemplates that observance of the interprovincial trade principles must be **to the extent possible**, with paramountcy afforded to the Legislatures of the parties to the Agreement. Within this context, Ontario has been active in its attempts to resolve this issue both nationally and within the province." [37]

The Respondent argues that the Panel should, therefore, find that the Respondent has discharged its obligations under the Agreement.

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[36] Ontario's Submission, Exhibit 15.

[37] *Ibid.* p. 12, para. 57.

References in this context to the "extent possible" occur in the Preamble to the Agreement and in Article 100.

In the Preamble and Article 100 of the Agreement, the Parties resolved to:

> "**Reduce and eliminate**, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada;
>
> **Article 100: Objective**
>
> It is the objective of the parties to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market. All parties recognize and agree that enhancing trade and mobility within Canada would contribute to the attainment of this goal."

In its presentation at the Panel hearing, the Respondent argued that bringing about compliance under the Agreement with respect to the EOPA involves repeal of a law, requiring the engagement of cabinet and the legislative processes. The Respondent asserts that "[u]ltimately, government is beholden to the Legislature."[38]

With respect to Article 401, the Panel notes that Chapter Four itself does not mention compliance "to the extent possible". The obligations of this Chapter are not qualified by a "best efforts" or other test based on the intentions or attempts at compliance of the Party against which a complaint is made.

The Respondent suggested that its obligation in Article 401 should be interpreted in the context of Articles 100 and 101 and the Objective of the Agreement to eliminate barriers to the extent possible. From that, the Respondent suggests that where a Party can show that it has attempted to comply with its obligations to the extent possible, a Panel should find no inconsistency with Chapter Four obligations.

The Panel rejects the Respondent's contention that a breach of Chapter Four is remedied by the demonstration that the Party committing the breach has "to the extent possible" remedied the breach. Chapter Four does not support such an interpretation. The Panel notes that the language "to the extent possible" is found in the Preamble and the Objective of the Agreement which outline the very broad principles of the Agreement. Where the Agreement provides for a specific set of undertakings, such as in Chapter Four, and does not qualify those undertakings as suggested by the Respondent, then the specific obligations of a particular chapter must take precedence over the general objective and intentions of the Agreement. Moreover, the Panel is of the view that while the phrase "to the extent possible" refers to the intention of the Parties to reduce as much as possible barriers to internal trade, it is not meant to lessen the full force of the specific commitments made in the specific chapters of the Agreement.

In other words, the objective set out by the Parties to the Agreement was to eliminate barriers to interprovincial trade "to the extent possible". One of the ways in which this

[38] Hearing Transcript, p. 74.

objective is pursued is by the full implementation of Chapter Four and Chapter Nine obligations. The phrase "to the extent possible" is meant to convey that the Parties wish to accomplish all they can in the Agreement to reduce barriers - it is not meant to qualify the scope or intensity of the various commitments elaborated elsewhere in the Agreement.

To accept the Respondent's interpretation in this regard would lessen the full scope of the obligations in the Agreement which the Panel does not believe was the intention of the Parties. In any event, even accepting the Respondent's thesis, the Panel is not convinced that the Respondent has done everything "possible" to bring itself into compliance with its Chapter Four obligations. In this regard, the Panel notes that the Respondent twice introduced legislation to delay repeal of the EOPA which the Respondent itself recognizes is inconsistent with the Agreement.

The Panel is also not convinced by the Respondent's arguments based on the legislative process. In the Panel's view, it is correct that the Agreement contemplates the paramountcy of the legislatures. Every Party's legislature retains the power to pass laws as it deems fit; the Agreement contemplates no limitations whatsoever on the constitutional powers of the provinces, territories and the federal government. In other words, the Parties retain the power to pass or maintain laws that are not consistent with the Agreement. However, if they choose to do so, then the other Parties are entitled to pursue dispute resolution mechanisms available under the Agreement. It is not a defence in such procedures to assert that the measures are duly passed by a legislature of a province and that the legislatures are paramount under the Agreement.

The Panel does not believe that it could have been the intention of the Parties to accept this line of reasoning, which would effectively nullify the general and specific commitments of the Parties to one another. In reaching its conclusions in this regard, the Panel is also mindful of the findings in the Farmers Dairy/New Brunswick Panel Report with respect to New Brunswick's arguments about the paramountcy of the legislatures under the Agreement. That Panel affirmed that the Agreement does not alter, limit or override in any way the constitutional powers of the legislatures but added as follows:

> "That being said, the Panel notes that the Agreement contains the solemn undertakings of the signatory governments. By entering into the Agreement, the Parties agreed that past legislation, practice or policies may no longer be appropriate given the stated goals of the Agreement. These objectives are the reduction or elimination of barriers to the free movement of persons, goods, services and investment within Canada and the establishment of an open, efficient and stable domestic market.
>
> In signing the Agreement, the Parties recognized that constitutionally valid measures may be contrary to the Agreement and may need to be changed in order to achieve the objectives of the Agreement. Having themselves emphasized the importance of the Agreement, the Parties ought to rigorously respect the commitments it contains." [39]

This reasoning applies equally to the arguments of the Respondent with respect to the paramountcy of its legislature, the need to respect its legislative priorities and its compliance "to the extent possible".

[39] Farmers Dairy/New Brunswick Panel Report pp. 28-29

The Panel finds that "to the extent possible" as referred to in the Preamble and Article 100 of the Agreement is not intended to lessen the full force of the specific obligations of the Parties as contained in the general and sectoral chapters of the Agreement but rather refers to the intention of the Parties to the Agreement to reduce to the extent possible barriers to internal trade.

The Panel further finds that the Respondent, for the reasons stated above, has not "to the extent possible" complied with its obligations under the Agreement as explained elsewhere in this Report, as it relates to the repeal of the EOPA.

5.2.5 Obligation to Consult

In setting out its complaint, the Complainants alleged the following inconsistency with the Agreement:

> "Ontario's failure to provide the information that Alberta requested concerning Ontario's intentions with regard to the introduction of regulatory amendments and to consult with Alberta and British Columbia in these matters." [40]

The Complainants elaborate on this point in their submission to the Panel as follows:

> "The Parties to the AIT established the principles of openness with regard to measures that may restrict trade in Article 101(4)(a) (Mutually Agreed Principles) which recognizes "[…] *the need for full disclosure of information, legislation, regulations and policies and practices that have the potential to impede an open, efficient and stable domestic market.*" Further, Article 907 requires Ontario and the OFPMC to consult with Alberta and British Columbia and other interested Parties and persons if they intend "[…] t*o adopt or amend a measure that may affect trade in an agricultural or a food good.*" Therefore, Ontario and the OFPMC are obliged to consult Alberta, British Columbia and other Parties if they propose to introduce any measure that will affect trade in Vegetable Based Dairy Alternatives. This would include the regulations under the Milk Act that Ontario is reported to be considering." [41]

In their submission to the Panel, the Complainants outline a series of events culminating in approval in May 2004 by the Respondent of the bill delaying repeal of the EOPA and the regulation giving access to some vegetable based dairy alternatives to Ontario markets. The Complainants contend that the Respondent did not provide the Complainants with an opportunity to comment on the substance of these changes despite a request by the Complainants for information in April 2004. With respect to this aspect of the complaint there are two Articles of the Agreement which merit particular attention, Articles 406 and 907 which provide as follows:

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[40] Alberta and British Columbia's Submission, Volume 1, p. 5, para. 14.

[41] *Ibid*, pp. 16 -17, para. 51.

"Article 406: Transparency

1. Each party shall ensure that its legislation, regulations, procedures, guidelines and administrative rulings of general application respecting matters covered by this Agreement are made readily accessible.

2. A Party proposing to adopt or modify a measure that may materially affect the operation of this Agreement, shall to the extent practicable, notify any other Party with an interest in the matter of its intention to do so and provide a copy of the proposed measure to that Party on request.

3. Paragraph 2 does not apply where the immediate implementation of a measure is necessary to address an urgent situation related to a legitimate objective provided that, on adoption of the measure, the Party adopting it:

(a) notifies the other Parties of the measure and provides a copy of the measure to any Party that request it; and

(b) provides the other Parties with an opportunity to comment on the measure, and takes such comments into consideration.

4. The provision of notice under paragraph 2 or 3 is without prejudice as to whether the measure is consistent with this Agreement.

5. Each party shall maintain an enquiry point able to answer reasonable enquiries and to provide information pertaining to its measures and to other matters covered by this Agreement.

6. Each Party shall ensure that documents requested by interested persons or Parties are supplied in a non-discriminatory manner and that any fees charged are reasonable [. . .]"

"Article 907: Transparency

1. Further to Article 406 (Transparency), a party proposing to adopt or amend a measure that may affect trade in an agricultural or food good shall:

(a) at least 20 days prior to the adoption or amendment of the measure, publish a notice of the proposed measure or amendment and provide the Trade Policy Committee and the other Parties with a copy of the notice and the full text of the proposed measure or amendment;

(b) provide a brief description, in the notice referred to in paragraph (a), of the objective of and reasons for the measure or amendment and identify the good to which it would apply;

(c) provide a copy of the proposed measure or amendment to any interested person and, where a sanitary or phytosanitary measure or an amendment to such a measure is proposed, wherever possible, identify any provision of the proposed measure or amendment that deviates in substance from relevant national and international standards, guidelines or recommendations; and

(d) allow other Parties and interested persons to make comments in writing and, on request, discuss the comments and take the comments and the results of any discussions into account."

Thus, Article 406 provides a fairly general obligation to make readily available any government measures (paragraph 1) and to provide notice to the other Parties when a Party proposes to adopt or modify a measure which will materially affect the operation of the Agreement (paragraph 2). With respect to agricultural measures, there is a very specific set of commitments that overlay and are in addition to the Article 406 obligations. Article 907 contains a far-reaching commitment to provide notice, in advance, of any measure which may affect trade in agricultural goods.

With respect to the present case, the Panel notes that the relevant issues relate to whether the measures introduced by the Respondent relating to the EOPA and its repeal, or more generally measures relating to Dairy Analogs and Dairy Blends, or the manner of introducing those measures, were carried out in a way that was consistent with Articles 406 and 907.

The Parties' submissions and presentations raised certain relevant events and measures as follows:

1. The Respondent's passing of the FSQA in December 2001 (including the unproclaimed definition of "milk products" under the *Milk Act)*;

2. The Respondent's passing of the *Edible Oil Products Repeal Date Amendment Act*, in December 2002;

3. Introduction by the Respondent in April 2004 of a bill to amend the FSQA delaying repeal of the EOPA from June 1, 2004, to January 1, 2005, which bill received Royal Assent on May 20, 2004; and

4. The adoption of regulations under the EOPA in May 2004 allowing for certain imitation cheese products to be produced and sold in Ontario. [42]

In considering the Complainants' allegations regarding the Respondent's commitments to transparency under the Agreement, the Panel observes that there have been ongoing negotiations with the federal government in which all the Parties before the Panel have participated. The Panel recognizes the efforts of the Parties to harmonize regulations nationally. Having said that, the matter before the Panel is whether the Respondent fulfilled its specific obligations under Articles 406 and 907. In this regard the Panel notes the following:

1. With respect to the initial adoption of the FSQA in 2001, the records before the Panel indicate sufficient evidence[43] to demonstrate that the Respondent has satisfied its obligation under Article 406. However, the records indicate that the Respondent did not satisfy the full requirements

[42] Alberta and British Columbia's Submission, Volume 1, p. 3, paras. 8-9; pp. 6-7, paras. 18-20; and Ontario's Submission, p. 5, paras. 18-20.

[43] Alberta and British Columbia's Submission, Volume 3 Tab 17, letter dated Sept. 14, 2001 from the Honourable Halvar Jonson, Alberta Minister of International and Intergovernmental Relations to the Honourable Shirley McClellan, Alberta Deputy Premier and Minister of Agriculture, Food and Rural Development, referring to earlier correspondence regarding Ontario's proposed FSQA.

of transparency set out under Article 907. In particular, it appears that neither the 20-day notice required in subparagraph 1(a); the description provided by subparagraph 1(b); nor the copies prescribed in subparagraph 1(c) were provided by the Respondent;

2. With respect to the *Edible Oil Products Repeal Date Amendment Act* of December 2002, the record indicates that the Respondent did not meet its obligations under Articles 406 or 907. In fact, in the Complainants' submission, records indicate that the Respondent gave assurances to the Complainants in August 2002 that the Respondent had no plans to modify the EOPA repeal legislation,[44] yet, in December 2002, the Respondent did just that without providing any of the notices or copies required by Articles 406 and 907;

3. With respect to the delay of the repeal of the EOPA from June 1, 2004, to January 1, 2005, the Panel has little material before it to confirm or deny that the Respondent lived up to its obligations under Articles 406 and 907. Assuming that the Parties put before the Panel all the relevant correspondence and documents in their possession relating to the issues before this Panel, the Panel has little option but to conclude that the notices, description and copies referred to in Articles 406 and 907 were not provided by the Respondent, in contravention of its obligations under those articles; and

4. With respect to the May 2004 amendment to the Regulations under the EOPA allowing for imitation cheese products, there is little material in this regard before the Panel. However, operating again under the assumption that the Parties have put before the Panel all relevant materials with respect to this matter, the Panel concludes that in this instance the Respondent failed to meet its obligations under Articles 406 and 907.

Based on the record, the Panel concludes that it is probable that the Parties to the Agreement have not fully implemented the extensive transparency obligations of Articles 406 and 907. It would appear that the notices and other requirements of these articles are not regularly provided by the Parties and that the *modus operandi* of the Parties and the CIT has not yet incorporated the extensive transparency commitments that the Parties have given each other as part of their obligations under the Agreement. The Panel is concerned that there continues to be significant non compliance by the Parties of their obligations under Articles 406 and 907. The Panel, therefore, strongly urges the Respondent and all the Parties to the Agreement to review their practices and to ensure that they are living up to these important commitments. The Parties explicitly elaborated and made these commitments and assumed these obligations, presumably because they considered them important to the proper implementation and administration of the Agreement. Failing to live up to these commitments undermines the functioning of the Agreement and the important liberalizing objectives it sets out.

[44] Alberta and British Columbia's Submission, Volume 3, Tab 11.

Moreover, the Panel observes that while there were allegations of failures in complying with Articles 406 and 907, the Parties did not focus on these serious allegations in a manner that the Panel considers satisfactory. Perhaps these issues seemed secondary to the Parties to this dispute. However, if a Panel is to make accurate findings and helpful recommendations, the complaining Parties must explicitly identify the non-complying events and file all the relevant materials to ensure that the issues are properly presented and that the Panel has all the available information to make enlightened findings. As a result, since the Complainants in this dispute did not adequately do so, the Panel had to identify the precise events where breaches of Articles 406 and 907 occurred and reconstruct the surrounding circumstances based on the record before it. The Panel, therefore, urges Parties to disputes to more carefully focus on "transparency" issues to ensure that future Panels are better equipped to deal with specific allegations and to make findings that allow the Parties to monitor compliance with these critical obligations.

Accordingly, the Panel finds that the Respondent contravened its obligations with respect to consultation:

1. **Under Article 907 in the instance of the initial adoption of the FSQA in 2001;**

2. **Under Articles 406 and 907 in the instance of the adoption of the *Edible Oil Products Repeal Date Amendment Act* in December 2002;**

3. **Under Articles 406 and 907 in the instance of the delay of the repeal of the EOPA from June 1, 2004, to January 1, 2005; and**

4. **Under Articles 406 and 907 in the instance of the May 2004 amendment to the Regulations under the EOPA.**

5.2.6 Proposed Measures

The Complainants have asked the Panel to make findings regarding further measures to regulate dairy alternatives. Specifically, the Complainants identified the following:

> "Any new measures that Ontario has introduced, or intends to introduce, under the Milk Act, or any other measure, to regulate Vegetable Based Dairy Alternatives, including dairy based vegetable oil blends, that restrict trade in these products are inconsistent with the AIT unless they are justified by a legitimate objective;
>
> Any regulations that apply to Vegetable Based Dairy Alternatives, including dairy based vegetable oil blends, that Ontario introduces under the Milk Act or any other measure that restricts trade in these products because Ontario's new measures have not been reconciled with national food regulations or with the regulations of other jurisdictions are inconsistent with the AIT unless they are justified by a legitimate objective;
>
> It is inconsistent with the AIT for Ontario to introduce new measures or amend existing ones if they affect trade in Vegetable Based Dairy Alternatives, including dairy based vegetable oil blends, without consulting Alberta, British Columbia and other Parties and taking their comments into account;

> When the EOPA is repealed, any new measures that Ontario introduces to regulate vegetable oil based dairy alternatives, including dairy based vegetable oil blends, will cause injury to the vegetable oil industry in Alberta, British Columbia and the rest of Canada if they restrict trade in these products." [45]

The Complainants refer to Article 1705(4) of the Agreement in support of their argument regarding a finding with respect to proposed measures:

> "Unless the disputing parties otherwise agree, the terms of reference for a panel shall be to examine whether the actual or proposed measure or other matter at issue is or would be inconsistent with this Agreement." [Emphasis added.]

In considering this matter the Panel refers to Article 1702(2) and Article 1704(3), which provide as follows:

> **"Article 1702: Consultations**
>
> 2. The party requesting consultations under paragraph 1 shall deliver written notice of its request to all other Parties and the Secretariat. The request shall:
>
> (a) specify the actual or proposed measure or other matter complained of;
>
> (b) list the relevant provisions of this Agreement; and
>
> (c) provide a brief summary of the complaint."
>
> "**Article 1704: Request for Panel**
>
> 3. The request for the establishment of a panel shall:
>
> (a) specify the actual or proposed measure complained of;
>
> (b) list the relevant provisions of this Agreement;
>
> (c) provide a brief summary of the complaint;
>
> (d) explain how the measure has impaired or would impair internal trade; and
>
> (e) identify the actual or potential injury or denial of benefit caused by the actual or proposed measure."

Thus, Article 1704(3) sets out a more limited scope (compared to Article 1705(4)) in terms of what can be included in requests for panels under the Chapter Seventeen process. The request for the establishment of a panel must specify the "actual or proposed measure complained of" and explain how the measure has impaired or would impair interprovincial trade. There is no mention in Article 1704(3) of any "other matter at issue that is or would be inconsistent with the Agreement" as there is in Article 1705(4).

However, Article 1705(4) suggests that once a request for panel has been properly filed, the Agreement gives wide latitude to a Panel to consider any issues it deems relevant to

[45] *Ibid*. Volume 1, pp. 29-30, paras. (c), (d), (e) and (f).

the matter under consideration. The Panel can only conclude that while there must be a limited scope in terms of what can be filed in a request for panel, once the request is duly filed, a Panel has considerable freedom to make the findings it deems necessary to deal with the issue before it. Article 1705(4) thus gives the present Panel a very broad mandate to make findings on any matters that the Panel has determined are relevant to the issue under consideration and that might point to an inconsistency with the Agreement.

With respect to the Complainants' request that the Panel make findings regarding further measures to regulate dairy alternatives, the Panel notes the following:

1. Having concluded that the EOPA operates as an Agreement-inconsistent barrier to trade, it follows that a measure that would replace the EOPA and have the same effect of restricting trade in Dairy Analogs and Dairy Blends in a manner inconsistent with the Agreement, and that could not be justified under Article 404 as a legitimate objective, would likewise be inconsistent with the Agreement;

2. There is a suggestion on the record, put forward by the Dairy Farmers of Ontario with respect to using the regulating authority under the *Milk Act* to limit the sale and distribution of Dairy Analogs and Dairy Blends.[46] The Respondent, in its response to that suggestion has indicated that the government of Ontario does not intend to pursue this course of action. There is no proposed measure before the Panel that is sufficiently elaborated for there to be a proper debate as to whether or not it is consistent with the Agreement. Accordingly, there is no specific measure proposed by the Respondent that could be subject to review by the Panel for consistency of compliance.

Under the circumstances, it would be premature to make findings with respect to hypothetical measures that the Respondent does not appear committed to adopting. The Panel refers in this regard to clear statements regarding repeal of the EOPA in correspondence from the Ontario Minister of Agriculture to the Dairy Farmers of Ontario cited earlier in this report.[47]

Accordingly, the Panel finds that:

1. It has the authority to make findings and recommendations with respect to proposed measures including proposed amendments to or regulations under the *Milk Act* dealing with Dairy Analogs or Dairy Blends;

2. Any replacement measure that would have the same effect as section 3 and the licensing requirements of the EOPA and that

[46] *Ibid*. Volume 3, Tab. 18. Dairy Farmers of Ontario proposed amendments to regulations under Ontario's *Milk Act* (November 2002).

[47] Ontario's Submission, Exhibit 15.

would not be permissible under Article 404 as necessary to achieve a legitimate objective (or that was otherwise permissible under the Agreement) would be likewise inconsistent with the Agreement; and

3. There is currently no such measure or proposed measure to be considered by this Panel and it is, therefore, premature for this Panel to consider the consistency of suggestions by an interest group and their hypothetical implementation by the Respondent.

5.2.7 The Ontario *Milk Act*

Two preliminary issues were raised in submissions and in presentations to the Panel with respect to the *Milk Act.* In particular there was debate as to whether it is legitimate for the Panel to consider the consistency of certain provisions of the *Milk Act* with the Agreement in view of the following:

1. The Respondent's allegations that these issues were not part of initial Chapter Nine consultations; and

2. The Complainants' expansion of the relief sought at the hearing to include a finding regarding whether the definition of "milk product" in the *Milk Act* (as it currently exists or as passed in 2001 but not yet proclaimed) acts as an Agreement-inconsistent barrier.

As noted earlier, the relief sought by the Complainants in their initial submission was more limited than what was verbally presented at the hearing. One of the recommendations requested by the Complainants in their presentation at the hearing included the following:

> "That the *Milk Act* should be amended to restrict the *Milk Act's* regulatory scope to the "standardized" dairy products specifically set out in the *Act*". [48]

The Complainants had raised the *Milk Act* in their written submissions to the Panel alleging that the Respondents' *Milk Act* could be used to restrict trade in some vegetable based dairy alternatives. However, they had not explicitly requested the above recommendation in their written submissions. Nonetheless, given the reasoning above in section 5.1.1 and with respect to Article 1705(4) at section 5.2.6 of this Report, the Panel concludes that it is entitled to consider making recommendations about the consistency of relevant parts of the *Milk Act* with the Agreement.

The Respondent argued that Chapter Nine consultations with the Complainants had dealt specifically with the Respondent's enforcement of the EOPA with respect to imitation cheese products.[49] The Respondent argues that including the *Milk Act* in oral submissions to the Panel and extending written allegations and submissions so as to

[48] Alberta and British Columbia's PowerPoint Presentation at the Panel Hearing, Slide No. 20.

[49] Ontario's Submission, p. 9, para. 43.

include the *Milk Act,* constitutes a lack of procedural fairness in contravention of the spirit in which consultations are to occur under sectoral Chapters of the Agreement.

In addition, the Respondent suggests that it is inappropriate to expand the scope of any complaint beyond the measure originally complained of at the consultation stage, raising the issue of whether it is within this Panel's jurisdiction to review allegations by the Complainants concerning the *Milk Act*.

With respect to the matter of considering the *Milk Act* in this panel review, the Panel observes as follows:

1. Although the Complainants could have been more explicit in making it clear that the *Milk Act* became part of the consultations that they initiated under Article 906 of the Agreement in 2001, the Panel is satisfied that over the course of the exchanges that ensued, it became clear that the issues of concern involved legislative and regulatory measures affecting trade in Dairy Analogs and Dairy Blends;

2. Concerns about imitation cheese prompted the consultations. However, the Complainants never limited their concerns to this product only;[50] and

3. The *Milk Act* (and modifications thereto contained in the FSQA passed in 2001, and not yet proclaimed) only clearly became an issue when the Dairy Farmers of Ontario communicated their proposal regarding the *Milk Act* in November 2002.[51]

In light of the above, the Panel is not prepared to conclude that only issues explicitly identified by the Complainant at the beginning of the consultation process can eventually be brought before a panel. Such a restrictive and technical approach is not consistent with the spirit and letter of the sectoral consultation obligations and Chapter Seventeen. It is natural that by their very nature consultations will serve to identify and focus the issues and measures that might raise concerns about consistency with the Agreement and that might eventually be properly considered by a panel. It is not appropriate to strictly limit panel consideration to issues or measures that were explicitly identified at the beginning of the consultation process.

The Panel, therefore, finds that the issue of compliance of relevant provisions of the *Milk Act* with the Agreement is properly before the Panel in this dispute.

With respect to the matter of whether the definition of "milk product" in the *Milk Act* is inconsistent with the Agreement, the definition is as follows:

> "milk product" means any product processed or derived in whole or in part from milk, and includes cream, butter, cheese, cottage cheese, condensed milk, milk powder, dry milk,

50 Alberta and British Columbia's Submission, Volume 3, Tabs 11 and 15.

51 *Ibid*. Tab 18.

> ice cream, ice cream mix, casein, malted milk, sherbet and such other products as are designated as milk products in the regulations; ("*produit du lait*")".[52]

In the new version of the *Milk Act*, which is not yet proclaimed, the definition of "milk product" reads as follows:

> "milk product" means,
>
> (a) cream, butter, cheese, cottage cheese, condensed milk, milk powder, dry milk, ice cream, ice cream mix, casein, malted milk or sherbet it if is processed or derived from milk from cows and does not contain,
>
> (i) any milk or components of milk from animals other than cows, or
>
> (ii) any products made with milk from animals other than cows, or
>
> (b) any other product that is processed or derived in whole or in part from milk from cows and that is designated as a milk product in regulations; ("produit du lait")" [53]

Both the current and un-proclaimed definitions of "milk product" under the *Milk Act* contain a broad power to designate a product as a "milk product". In the current definition, any number of products could be designated as a "milk product". Under the un-proclaimed definition, the power to designate products as "milk products" is limited to products that are derived in whole or in part from milk from cows.

With respect to the matter of whether or not the definition of "milk product" in the *Milk Act* (as it currently exists or as passed in 2001 but not yet proclaimed) acts as a barrier under the Agreement the Panel notes that the definition as written contains a regulation-making power that could potentially be used to create a barrier that is inconsistent with the Agreement, but so could many such laws. The ability to make regulations that could create a barrier does not mean that such regulations will be adopted.

The Complainants argued that the uncertainty with respect to the regulation making power itself creates barriers to trade in these products and restricts investment, because manufacturers are not assured whether or not these products will be permitted to be sold in Ontario.

While the Panel is not convinced that this regulatory uncertainty is itself in breach of the Agreement, the Panel agrees that the definition of "Milk Product" in the *Milk Act* is vague in terms of its potential impact on Dairy Analogs and Dairy Blends. Thus, there remains some significant amount of ambiguity as to whether once the EOPA is repealed, Dairy Analogs and Dairy Blends will be allowed for sale in Ontario, due in large part to concerns raised with respect to the *Milk Act*. The Panel therefore considers that it would be advisable for the Respondent to make it clear that it will not use the *Milk Act* to implement limitations on the sale of Dairy Analogs and Dairy Blends in a manner similar to the limitations imposed by the EOPA.

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[52] *Ibid*. Tab 3, *Milk Act* and Selected Regulations p. 2.

[53] *Ibid*. p. 3.

The panel finds that neither the current or unproclaimed version of the definition of "milk product" in the *Milk Act* breaches Articles 401, 402 or 403 of the Agreement.

6. DETERMINATION OF IMPAIRMENT TO TRADE AND INJURY

Article 1707(2) (c) requires that the Panel's report contain a determination, with reasons, as to whether the measures under review have impaired internal trade and caused injury.

As an example of an indication of injury, the Complainants together with the Intervenors have referred in their submissions and presentations to the Panel to the significance of canola production in their jurisdictions.[54]

Having established the importance of canola production to their respective provincial economies, the Complainants and Intervenors describe injury as a result of the EOPA in the following two areas:

1. Limiting the sale and purchase of vegetable oils; and

2. Limiting the potential development and growth of the edible oils-based dairy analog and dairy blend sector.[55]

With respect to the limiting the sale and purchase of vegetable oils, Saskatchewan notes in its submission to the Panel as follows:

> "The edible oils-based dairy substitutes sector accounts for $570,000,000 in Canadian sales. The margarine industry accounts for $308,000,000 of those sales. The non-margarine portion of the edible oils-based dairy sector is considerable and can be expected to experience significant growth rates if growth rates in Canada are similar to those projected in the US. The current fragmentation of the Canadian marketplace and excessively restrictive regulatory environment created by Ontario's Edible Oil Products Act is hampering the development and introduction of the new products and therefore limiting the potential development and growth of his important sector." [56]

With respect to limiting the potential development and growth of the edible oils-based dairy sector, the Complainants suggest that there is significant growth potential for edible oil dairy blends.

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54 Alberta and British Columbia's Submission, Volume 1, pp. 25-28; Agreement on Internal Trade Dispute Resolution Panel, In the Matter of a Challenge by Alberta and British Columbia with Respect to Ontario Measures Regulating Edible Oil Products, Dairy Blends and Dairy Analogs, Submission on Behalf of the Government of Saskatchewan, July 16, 2004 (hereinafter "Saskatchewan's Submission"), pp. 3-5; and In the Matter of Alberta and British Columbia's Challenge Regarding Ontario's Measures Regulating Edible Oil Products, Dairy Blends and Dairy Analogs, Government-to-Government Recourse to Article 1704 Panel Hearing, Submission of Manitoba, July 16, 2004 (hereinafter "Manitoba's Submission"), pp. 2-4.

55 *Ibid*.

56 Saskatchewan's Submission, p. 4.

> "The potential market for Dairy Blends specifically, not taking into account other vegetable oil products or Dairy Analogs and without the restrictions that now exist in Canada, is $226,000,000 [...] According to the industry, with innovation and consumer education, the market for Dairy Blends in Ontario could grow to five to ten per cent of the market for dairy and vegetable based products;" [57]

As noted earlier in this report the Panel has found that the EOPA has impaired internal trade. As to the issue of injury, the Panel is mindful of the determination of the Panel constituted in the Farmers Co-operative/New Brunswick case the relevant part of which reads as follows:

> "With respect to injury, Complainant alleges that the denial of a fluid milk distribution licence in New Brunswick has caused significant injury to Complainant's prospects for growth and eroded its capability to respond to competition in the future. Complainant admits that it is difficult to quantify the extent of injury and submitted no documentation in that regard. The Panel notes that a complainant is not required under the *Agreement* to prove a demonstrable dollar amount to establish injury, nor is a Panel required to rule on the extent of injury. It is the view of the Panel that the denial of the opportunity to be considered for a fluid milk distribution licence in a manner that is fair and consistent with the *Agreement* is injury in itself, as is the denial of the opportunity to participate on an equal footing in the New Brunswick market." [58]

The Panel agrees with the statements of the Panel in that case and adopts the same reasoning in the present case. In the Panel's view, the Complainants have demonstrated (and the Respondent has not contested this evidence) that it is reasonable to conclude that producers of Dairy Analogs and Dairy Blends and producers of products that are used to make these products have been and are being injured by the prohibitions of the EOPA. It is not necessary for this Panel to find a specific dollar amount of injury. In the Panel's view the mere denial of the opportunity to market such products in Ontario is injury itself.

> **The Panel finds that section 3 and the licensing requirements of the EOPA have impaired internal trade and have caused injury.**

7. SUMMARY OF PANEL FINDINGS

The summary of Panel findings below is provided for convenience only. The actual findings in the Report above and the reasoning and context within which they are made, should be considered authoritative. Accordingly, the Panel makes the following findings:

1. **The applicable procedural requirements of the Agreement have been fulfilled and the current Panel has been established in accordance with the dispute resolution provisions of Chapters Nine and Seventeen of the Agreement.**

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[57] Alberta and British Columbia's Submission, Volume 1, p. 28, para. 81 (c), (d).

[58] Farmers Dairy / NB Panel Report, p. 27.

2. The correspondence presented by the Complainants to the Panel at the hearing, and not included in earlier submissions, may be admitted into the record of proceedings.

3. Dairy Analogs and Dairy Blends are subject to the provisions of the Agreement.

4. Section 3 and the licensing requirements of the EOPA are not consistent with Articles 401, 402 and 403 of the Agreement and are not permissible under 404 as necessary to achieve a legitimate objective.

5. The substantive issues with respect to the EOPA have not been resolved and the Complainants are entitled to bring forward this complaint and to have a Panel finding to that effect.

6. "To the extent possible" as referred to in the Preamble and Article 100 of the Agreement is not intended to lessen the full force of the specific obligations of the Parties as contained in the general and sectoral chapters of the Agreement but rather refers to the intention of the Parties to the Agreement to reduce to the extent possible barriers to internal trade.

In any event, the Respondent has not "to the extent possible" complied with its obligations under the Agreement as explained elsewhere in this Report, as it relates to the repeal of the EOPA.

7. The Respondent contravened its obligations with respect to consultation:

(a) Under Article 907 in the instance of the initial adoption of the FSQA in 2001;

(b) Under Articles 406 and 907 in the instance of adoption of the *Edible Oil Products Repeal Date Amendment Act* in December 2002;

(c) Under Articles 406 and 907 in the instance of the delay of the repeal of the EOPA from June 1, 2004, to January 1, 2005; and

(d) Under Articles 406 and 907 in the instance of the May 2004 amendment to the Regulations under the EOPA.

8. With respect to the issue of making determinations regarding proposed measures:

(a) The Panel has the authority to make findings and recommendations with respect to proposed measures including proposed amendments to regulations under the *Milk Act* dealing with Dairy Analogs and Dairy Blends;

(b) Any replacement measure that would have the same effect as section 3 and the licensing requirements of the EOPA and that would not be permissible under Article 404 as necessary to achieve a legitimate objective (or that was otherwise permissible under the Agreement) would be likewise inconsistent with the Agreement; and

(c) There is currently no such measure or proposed measure to be considered by this Panel and it is, therefore, premature for this Panel to consider the consistency of suggestions by an interest group and their hypothetical implementation by the Respondent.

9. The issue of compliance of relevant provisions of the *Milk Act* with the Agreement is properly before the Panel in this dispute.

10. The panel finds that neither the current or unproclaimed version of the definition of "milk product" in the "Milk Act" breaches Articles 401, 402 or 403 of the Agreement.

11. Section 3 and the licensing requirements of the EOPA have impaired internal trade and caused injury.

8. PANEL RECOMMENDATIONS

For the reasons set out herein the Panel makes the following recommendations:

1. That the Respondent follow through with the scheduled repeal of the EOPA on January 1, 2005; and

2. That the Respondent and all Parties to the Agreement take careful note of the Panel's findings with respect to the transparency obligations of the Agreement contained in Articles 406 and 907 and that whenever they intend to adopt any measures subject to these Articles that they do so in accordance with the detailed transparency requirements provided therein.

9. ALLOCATION OF COSTS

Rule 53 of Annex 1706(1) (Panel Rules of Procedure) of the AIT gives a Panel the discretion to allocate a portion of the operational costs of a Panel to the Intervenors in a dispute resolution process.

The Panel considers a fair allocation of operational costs to be:

- 50% to Ontario;
- 20% to Alberta;
- 20% to British Columbia;
- 5% to Manitoba; and
- 5% to Saskatchewan.

APPENDIX A
Participants in the Panel Hearing

Panel

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For Alberta and British Columbia

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