Report on the Compliance of the Decision of Article 1716 Panel Regarding the Dispute between Artisan Ales Consulting Inc. and Alberta Regarding Beer Mark-ups

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Panel Constituted

This Compliance Panel was constituted at the request of Artisan Ales Consulting Inc. ("Ales"), under Article 1721(9) of the Agreement on Internal Trade ("AIT"), to deal with their allegation of non-compliance by the Province of Alberta ("Alberta") relative to the Decision of the Hearing Panel on July 28, 2017, as amended and clarified by the Appellate Panel constituted in this matter in its clarification report of May 29, 2018.

A brief review of the facts is desirable.

The 2015 Measure

Alberta, like other provinces, has indirectly controlled levels of wholesale prices for alcoholic beverages, including beer, sold in its province through its mark-up regime. In turn this can influence retail prices. The mark-up regime in place prior to October 28th 2015 provided for mark-ups that differentiated between beer producers/breweries on a graduated scale that varied according to individual brewer's total production/sales (capacity). As in other provinces, these mark-ups were graduated in a manner that benefited smaller brewers, a system known as the "Small Brewer Mark-up". The graduated mark-ups had, to that point, applied to beer products that were sold in Alberta, whether brewed in Canada or imported, such that all breweries with similar levels of output and sales were treated equally, on the basis of their total sale volumes.

However, on October 28th, 2015, Alberta amended the previous "Small Brewer Mark-up", essentially revoking this for all suppliers except for brewers in the Provinces of Alberta, Saskatchewan, and British Columbia (the "New West Partnership"). Beer supplied from all other sources was charged the maximum mark-up, which had previously applied only for large commercial brewers, at the rate of $1.25 per litre.

The 2016 Measure

On August 5th, 2016, Alberta repealed the October 28th, 2015 mark-up regime and instituted a new system in which a $1.25 per litre wholesale mark-up was applied to all beer sold in Alberta, regardless of the sources or the total sales volumes of supplying breweries. No exception was made for beer produced in Alberta or for beer produced within the New West Partnership.

Within a few weeks of the application of the "across the board" wholesale mark-up of $1.25 per litre on all beer sold in Alberta (administered by the Alberta Gaming, Liquor and Cannabis Commission), Alberta introduced an Alberta Small Brewers' Development (ASBD) grant program, operated by the Alberta Ministry of Agriculture and Forestry. This program of grants required annual application and was available, on a per litre basis, to Alberta brewers based on their qualifying total annual sales. The grants applied on a sliding scale, with the maximum grant of $1.15 per litre accessible to Alberta brewers that had the lowest levels of qualifying sales, and declined to $0.00 for those brewers with sale volumes of 250,000 or more hectoliters.

Hearing Panel Decision

The Hearing Panel issued its decision on July 28, 2017. Essentially, a majority of the panel determined:

1. That the 2015 Measures were inconsistent with Articles 401 and 1004 of the AIT.
2. That the 2015 Measures were inconsistent with Articles 403 and 1005 of the AIT.
3. That the 2016 measures (i.e. the uniform mark-up and the ASBD grant program) were inconsistent with Articles 401 and 1004 of the AIT.
4. That the 2016 Measures (i.e. the uniform mark-up and the ASBD grant program) were inconsistent with Articles 403 and 1005 of the AIT.

5. That Ales, as well as others importing beer into Alberta or brewing beer for import into Alberta, including Saskatchewan breweries, had suffered injury due to the Measures.

6. That Alberta repeal or amend the Measures to bring its beer-related mark-ups and related grant programs into compliance with the AIT as soon as possible, and in no case later than six (6) months after the issuance of this panel's decision.

7. That the operational costs should be assessed against Ales, Alberta, and Saskatchewan on the following basis:

Saskatchewan	Five (5%) percent;
Ales	Forty-five (45%) percent;
Alberta	Fifty (50%) percent.

8. That Ales be awarded tariff costs on the basis of Fifty (50%) percent of the permissible cap.

Appellate Panel Decision

Alberta appealed the panel's decision on August 28, 2017, and on May 11, 2018 the Appellate Panel issued its Report. While the Appellate Panel accepted Alberta's position on a number of issues and reversed several determinations reached by the Panel, ultimately it held that the Small Brewers Grant violated the Agreement.

A clarification, issued by the Appellate Panel on May 29, 2018, advised that Alberta was to bring itself into compliance with the AIT no later than six months following the Clarification Decision. The time for compliance was, therefore, established as being November 29, 2018.

Implementation

On November 26, 2018, the nature of a new graduated mark-up program, accompanied by the termination of the grant program, was publicly announced by Alberta, to come into effect on December 16, 2018; application forms and related information were also made directly available to suppliers and their agents, by email, on November 26, 2018. On December 15, 2018, 16 days after the end of the Compliance Period, the Small Brewers Grant Program was terminated. The new mark-up program instituted by Alberta came into effect one day later, on December 16, 2018. We accept as fact that Alberta notified members of the brewing industry, including Ales, on November 26, 2018 (just before the end of the Compliance Period) of the changes that would become effective on December 16, 2018. There does not seem to be any dispute between Ales and Alberta that the new mark-up program instituted by Alberta does in fact meet the tests of the AIT.

Considerations

The Canadian Free Trade Agreement replaced the AIT as of July 1st, 2017. However, this Compliance Panel must apply the provisions of the. AIT The transitional provisions of the Canadian Free Trade Agreement specify that, for person-to-government disputes which began under the AIT prior to July 1st, 2017 (such as this dispute), the proceedings shall be conducted in accordance with the provisions of the AIT and that presiding bodies (including a compliance panel) shall determine the matter in accordance with the provisions of the AIT (which makes this particular Compliance Panel unique in that it is the last Compliance Panel constituted under the AIT).

Issues for Determination

Ales has requested that the Compliance Panel deal with all of the issues raised in Article 1721(11) of the AIT, specifically:

> "(a) a determination on whether or not the Complaint Recipient has, with regard to the matter in dispute, brought itself into compliance with the Agreement;

(b) where the determination is that there has not been compliance, a Monetary Penalty order made in accordance with Article 1722;

(c) at the discretion of the Compliance Panel, an order apportioning Operational Costs, as provided for in Annex 1734;

(d) at the discretion of the Compliance Panel, an order awarding Tariff Costs, as provided for in Annex 1734;

(e) at the discretion of the Compliance Panel, an order awarding Additional Costs, as provided for in Annex 1734; and

(f) if an order for a Monetary Penalty has been made, a form of order that:

(i) is enforceable in the same manner as an order against the Crown in the superior courts of the Party against which the order is made; or

(ii) the Secretariat will rely on when, in accordance with Rule 10 of Annex 1705(1) and 1718(1), it demands payment by the financial institution that issued a Standby on behalf of the Party against whom the order is made."

Discussion:

Article 1721(11)(a) - Compliance

Both Alberta and Ales in their submissions and rebuttals, acknowledge that Alberta became fully compliant with the Appellate Panel's Order on December 16th, 2018 when the provisions of the new graduated mark-up became effective and the Small Brewers Grant Program was formally removed. There does not appear to be any dispute in any of the materials filed that the measures which Alberta instituted effective December 16th, 2018 brought Alberta into compliance with the Hearing and Appellate Panels' Order. And there seems to be no disagreement between the parties that Alberta was 16 days late in effecting compliance with the Order.

Article 1721(11)(b)

Our panel, having determined that there was a lack of compliance for 16 days, must next consider whether a Monetary Penalty is in order. In doing so, it must have regard to the provisions of Article 1722 of the AIT. It is instructive to set out in full the provisions of Article 1722(1) which state as follows:

> "1. In determining the amount of a Monetary Penalty, the Compliance Panel shall be guided by the primary purpose of a Monetary Penalty which is to encourage compliance with the Agreement. The Compliance Panel shall also consider:
>
> (a) the seriousness of the inconsistency with the Complaint Recipient's obligations under the Agreement;
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> (b) the magnitude of the impact of the inconsistency on the market;
>
> (c) where the Complaint Recipient has previously been found by a Presiding Body in a Proceeding not to have been compliant with the Agreement, whether the complaint has been resolved or remains outstanding;
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> (d) whether the Complaint Recipient has made efforts, in good faith, to comply with the Agreement in respect of the matters addressed in the Report before the Compliance Panel; and
>
> (e) subject to paragraph 3, any other factor the Compliance Panel considers relevant."

Clearly under Article 1722 of the AIT there are several factors to consider in assessing any appropriate Monetary Penalty. Both Ales and Alberta placed considerable emphasis in their submissions and rebuttals discussing the Monetary Penalty issue in the context of the conduct, i.e. "the good faith" of Alberta in delaying, until December 15th, 2018, the actual implementation of the compliance remedy.

In the materials filed by Ales it appears that Alberta informally advised Ales of its intent to shortly comply with its obligations under the Agreement, in a manner described as informal

advice supplied to its counsel on November 15, 2018, indicating the nature of changes in the proposed new policy to come into effect in mid-December. Ales notes that it wrote to Alberta on November 19th, 2018, indicating that if the deadline for compliance was not satisfied by November 29th, 2019, a compliance proceeding application would be brought against Alberta. As noted above, Alberta indicates that all beer suppliers and agents (including Ales) were emailed full application forms and information relative to the new mark-ups on November 26th, 2018, which were to come into effect on December 16, 2018.

Ales argued in its submission, relative to this proceeding, that any period of non-compliance, no matter how brief, required that the offending party be sanctioned and that a Monetary Penalty was the appropriate sanction. Ales' counsel acknowledged that an individual complainant cannot sue for breach of the AIT and argued that this made imposition of a Monetary Penalty even more compelling. In short, while not expressed explicitly, Ales suggests that Alberta was not acting in good faith in achieving compliance within the time prescribed by the Appellate Panel.

On the other hand, Alberta provided equivalent emphasis in its submission, to indicate that they had in fact acted in good faith, by providing factual background relating to the necessity for broad consultation on acceptable alternative components of provincial policy for beer, including mark-up systems, as well as statements of Alberta's series of involuntary involvement in court actions, representations and appeals, including a court judgment that was not consistent with the May 11th, 2018 Appellate Panel findings relating to Alberta's measures. There is no doubt that dealing with the diverse and continuing complaints and lawsuits that arose against Alberta in respect of the 2015 and 2016 measures was complex, time-consuming and would have been distracting. It is suggested that these activities hampered Alberta's ability to achieve compliance with the Appellant Order within the prescribed timeframe. It also appears that following the informal advice provided on November 15, 2018 and formal communications provided to Ales by Alberta on November 26th, 2018, there were numerous enquiries of Alberta and information provided by Alberta, in the intervening period to December 16th, 2018, in regards to the new compliance arrangements.

Having regard to the submissions and rebuttals, our panel accepts as a fact that Alberta did in fact act in good faith, attempting to comply as quickly as possible with the Appellant Order.

While we acknowledge that lack of compliance for a period of 16 days and unrelated relevant external economic influences may both have had adverse impacts on industry, these are unlikely to have been different than the impacts of such influences during any equivalent length of time in the preceding period of some three years. Taken in the context of that comparative, the impact of this particular 16-day non-compliance period would be viewed as negligible. It is noted that in its submission regarding the current Compliance Proceedings initiated by Ales, Alberta states that rather than initiating its new measures on the day that these were announced (November 26th2018), they believed that a 16-day delay from the compliance date of November 29, 2018 was equitable in providing for a more orderly implementation that provided sufficient notice to brewers located out-of-province, relative to in-province brewers.

While the details of the revised program of compliance were formally released on November 26th, 2018, for implementation on December 16th, 2018, there is nothing in the AIT that specifically addresses the issue of technical non-compliance. However, the panel's view is that the 16-day period of non-compliance between November 29 and December 15, 2018 was insignificant, that good faith was exhibited by Alberta, and that under the circumstances, a Monetary Penalty would not be appropriate.

Under these circumstances, the panel has no hesitation in ordering as follows:

1. Alberta has by its decision to end the Alberta Small Brewers' Development Program on the 15th day of December, 2018, brought itself into compliance with the Order of the Hearing Panel as amended and clarified by the Appellate Panel.

2. That while Alberta was 16 days late in bringing itself into compliance with the Order of the Hearing Panel as amended and clarified by the Appellate Panel, this was a

minor deviation and Alberta acted in good faith in the development and implementation of its new mark-up program.

3. The assessment of a Monetary Penalty in these circumstances is not warranted.

4. The operational costs shall be allocated equally between Ales and Alberta.

5. We make no award of tariff costs.

David McKeague, Chair of the Panel

Ron Perozzo, Panelist

Michele Veeman, Panelist