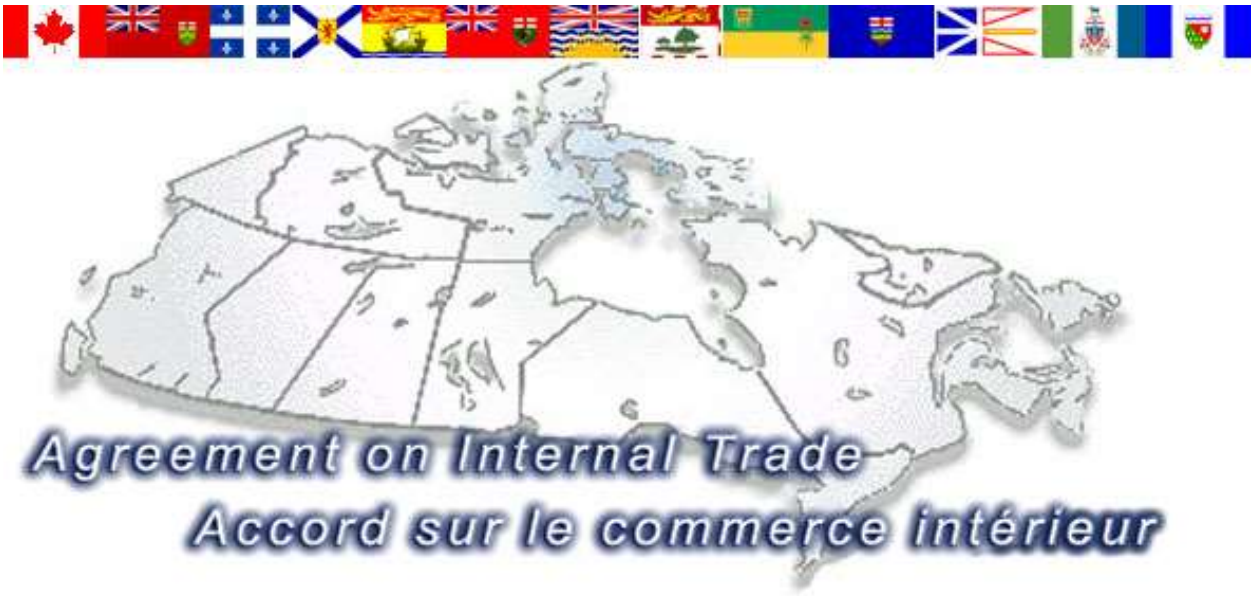

Report of Article 1703 Panel Regarding the Dispute between Saskatchewan and Québec Concerning Dairy Blends, Dairy Analogues and Dairy Alternatives

31 March 2014

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ABBREVIATIONS

AIT	Agreement on Internal Trade
CGSUDT	Codex General Standards on the Use of Dairy Terms - Codex STAN 206-199
FPA	The Food Products Act, R.S.Q., c. P-29

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[1] on Internal Trade (hereinafter the "AIT").

The AIT was entered into in 1995 by the Government of Canada, ten (10) provincial governments and two (2) territorial governments to "*reduce and eliminate to the extent possible the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market.*" All government parties to the AIT recognize and agree that enhancing trade and mobility within Canada would contribute to the attainment of this goal.

The Panel was established to address a dispute (the "Dispute") brought forward by Saskatchewan (hereinafter the "Complainant") against Quebec (hereinafter the "Respondent") regarding access to the Quebec market for certain products known as dairy analogues, products made from oilseeds and other vegetable oils and which are vegetable-based alternative to dairy products (hereinafter "Dairy Analogues"), and dairy blends, products made from a mixture of dairy and non-dairy ingredients which together resemble a dairy product (hereinafter "Dairy Blends"). Each of British Columbia, Alberta and Manitoba joined the Complainant as Intervenors (hereinafter the "Intervenors").

For the purposes of this report, Dairy Blends and Dairy Analogues will be collectively referred to as "Dairy Alternatives" and the Complainant, the Respondent and the Intervenors will collectively be referred to as the "Disputing Parties" or the "Parties".

The complaint pertains to restrictions on the trade of Dairy Alternatives. The Complainant alleges that certain provisions (collectively referred to as "Measures" and individually as "Measure") of the Respondent which are found in The *Food Products Act*, R.S.Q., c. P-29 (the "FPA") and the associated *Regulations Respecting Food*, R.S.Q., c. P-29, R.1 (the "Regulations") are barriers to the trade of Dairy Alternatives in Canada.

On January 23, 2012, in accordance with Article 1702.1 of the AIT, the Complainant along with two of the Intervenors (British Columbia and Manitoba) requested consultations with the Respondent. On April 4, 2012, in-person consultations were held between representatives of all Parties to this Dispute. On June 17, 2013, the Complainant formally requested the establishment of a Panel in accordance with the provisions of paragraph 1 of Article 1703 of the AIT. Each of the Intervenors provided the required notice advising of their intention to join the Panel proceedings as an Intervenor.

The Panel was duly established in accordance with the provisions of the AIT. Its terms of reference, generally, are to examine whether certain provisions of the FPA and the Regulations are inconsistent with the provisions of Articles 401, 402 and 403 of the AIT and if so, whether the Respondent's Measures amount to legitimate objectives within the meaning of Article 404 of the AIT.

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[1] The *Agreement on Internal Trade*; Entered into force July 1, 1995. Unless otherwise specified, "Article" and "Annex" refer to the articles and annexes of the *Agreement*. A consolidated version of the Agreement is available at www.ait-aci.ca.

As provided for in paragraph 3 of Article 1706 (Report of Panel) of the AIT, this Panel Report contains:

(a) findings of fact;

(b) a determination, with reasons, as to whether the measures in question are inconsistent with this Agreement;

(c) a determination, with reasons, as to whether the measures have impaired or would impair internal trade and have or would have caused injury; and

(d) recommendations, if requested by a disputing Party, to assist in resolving the dispute.

2. THE COMPLAINT PROCESS

By way of background, the complaint which is the subject of this Report originated in 2012. Consultations, in accordance with Article 1702.1 of the AIT, were held initially between British Columbia, Saskatchewan and Québec[2] with Manitoba participating in the consultations as an interested party[3]

The consultation process did not lead to a negotiated settlement amongst the Parties and on June 17, 2013, the Complainant formally requested the establishment of a Panel in accordance with the provisions of paragraph 1 of Article 1703 of the AIT. Article 1703 (9.1) of the AIT provides that any party with a substantial interest in a dispute is entitled to join panel proceedings as an Intervenor. Each of British Columbia, Alberta and Manitoba provided the required notice of their intent to join the panel proceedings and filed written submissions in support of the Complainant's position in this matter.

On September 19, 2013, Bill 56 entitled "*Loi modifiant la Loi sur les produits alimentaires*" [4] (hereinafter « Bill 56 ») was introduced into the National Assembly of Québec. On September 24, 2013, the Respondent formally requested that the proceedings related to the Dispute be suspended until such time as Bill 56 was enacted by the National Assembly of Québec. This request was opposed by the Complainant and each of the Intervenors.

As a result of the request, and the opposition thereof, a pre-hearing conference (via telephone) was held on October 7, 2013. During the pre-hearing conference the Panel heard arguments relating to the Respondent's request for suspension of the proceedings as well as arguments put forth by each of the Complainant and Respondent in regard to filing of further written submissions. On October 16, 2013, the Panel issued its decision[5] on the issues raised during the pre-hearing conference.

Following the exchange of submissions provided for in the AIT, including the additional written submissions filed by each of the Complainant and Respondent in accordance with the Panel's

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[2] Letter from Janna Jessee, Internal Trade Representative, British Columbia, to Marie-Andrée Marquis, Advisor, Commercial Policy, Québec, dated January 23, 2012; Letter from Nadette Schermann, Internal Trade Representative, Saskatchewan, to Marie-Andrée Marquis, Advisor, Commercial Policy, Québec, dated January 23, 2012;

[3] Letter from Alan Barber, Internal Trade Representative, Manitoba, to Anna-Maria Magnifico, Executive Director, Internal Trade Secretariat, dated January 25, 2012

[4] Loi modifiant la Loi sur les produits alimentaires : Bill 56, Québec National Assembly, first session, fortieth legislature

[5] See decision attached as Appendix B

decision of October 16, 2013, a hearing of the Panel, which was open to the public, was held in Quebec City, Quebec on January 8, 2014 (the "Hearing").

During the course of the Hearing, the Panel heard oral submissions from each of the Disputing Parties.

3. THE COMPLAINT[6]

3.1 The Complainant's Position

The Complaint pertains to restrictions on trade of Dairy Alternatives. The Complainant challenges certain provisions of the FPA, more particularly sections 7.1, 7.2 and 4.1 thereof, on the basis that such measures are contrary to the interests of inter-provincial trade and that they contravene the Respondent's commitments pursuant to the AIT.

The Complainant claims breaches of the General Rules contained in Chapter Four of the AIT, more particularly:

- A breach of the provisions of Article 401 (Reciprocal Non-Discrimination) on the basis that by prohibiting the sale, manufacture and marketing of Dairy Alternatives in the Québec market, the Respondent discriminates in favour of Québec dairy producers and processors;

- A breach of the provisions of Article 402 (Right of Entry and Exit) on the basis that the Respondent's prohibition of the sale of Dairy Alternatives within Québec acts as a barrier to the movement of Dairy Alternatives into and across Québec and the Respondent's prohibition on the manufacture of Dairy Alternatives restricts the possible export of Dairy Alternatives by manufacturers in Québec; and

- A breach of the provisions of Article 403 (No Obstacles) on the basis that the Québec FPA provisions are an ongoing impediment to internal trade in Dairy Alternatives which, by reason of the size of the Québec market, results in a decrease of the Canada-wide demand for Dairy Alternatives and a hindrance in innovation, by reason of the fact that expected return from innovation in the Dairy Alternatives market is greatly diminished.

The Complainant submits that the Respondent's FPA provisions impact the entire chain of value-adding participants in the market (such as growers of oilseed and other oil-producing crops, oilseed crushers and oil producers) and not just the final producers and manufacturer of the Dairy Alternatives themselves. Furthermore, the Complainant alleges that as a result of the prohibitive measures within the FPA, consumers in Quebec and elsewhere in Canada have been deprived of choice and access to products.

The Complainant contends that the impugned provisions of the FPA are inconsistent with the provisions of each of Articles 401, 402 and 403 of the AIT and are not permissible as legitimate objectives under Article 404.
The Respondent, in its written submission to the Panel dated September 23, 2013, raised the issue of the Panel's jurisdiction to rule on the provisions of section 4.1 of the FPA. The

[6] Saskatchewan's Complaint is more fully described in i) Letter to the Internal Trade Secretariat dated June 17, 2013; and ii) in Saskatchewan's written submissions to the Panel dated August 8, 2013 and November 15, 2013;

Complainant addressed this matter in its supplemental written submission to the Panel dated November 15, 2013 and set out the following arguments in support of its opposition to the Respondent's challenge of the Panel's jurisdiction to rule on section 4.1 of the FPA:

- the Panel has jurisdiction to rule on the compliance of section 4.1 of the FPA because the broad language used in the request for consultations (restriction on the manufacture and sale of Dairy Alternatives) includes the restrictions on the manner and method of sale and as such the request for consultations can easily be read to include the labelling and blending provisions;

- there is no hindrance to the Panel's jurisdiction to rule on the compliance of section 4.1 of the FPA by reason of the fact that the Complainant's Request for Panel expressed its complaint as "*The measures of complaint relate to the restrictions on the manufacture, sale and marketing of oil-based dairy blends and analogues within the Province of Quebec. In particular, the measures include Quebec's Food Products Act....and the Regulation respecting food* ...." and this encompasses the labelling provisions;

- the Respondent was able to make thorough and fulsome submissions on the issue of the compliance of section 4.1 of the FPA with the provisions of the AIT and the Respondent has suffered no prejudice

The Complainant further argued that this matter was a proper matter for the exercise of the Panel's discretion pursuant to Rule 55 of Annex 1705(1) of the AIT, in favour of an unequal apportionment of Operational Costs in favour of the Complainant and the Intervenors. The arguments raised by the Complainant are that the Respondent had, or should have had, long-standing knowledge that its measures were non-compliant with the AIT given the fact that: a) two (2) previous panel, in other matters, having ruled that similar measures pertaining to Dairy Alternatives were non-compliant; b) despite the non-compliance of its measures having been brought to the Respondent's attention in excess of a year prior to the Hearing, the measures were not yet repealed or amended at the time of the Hearing.

The Complainant asked the Panel to find that[7]:

1. Sections 4.1, 7.1 and 7.2 of the FPA, alongside the compositional formulas for Dairy Alternatives provided for in the Regulations, abrogates Québec's commitments under the AIT, Articles 401, 402, and 403, as well as the commitments in Chapter 9.

2. The Measures do not serve a "legitimate objective";

3. In the alternative, if the Measures do serve a "legitimate objective", they cannot be justified under Articles 404(b)-(d) and Article 905 of the AIT.

and requested from the Panel the following recommendations[8]:

1. That the Respondent repeal or amend the Measures to bring them into compliance with the AIT by no later than the end of 2013;

2. That until such repeal or amendment is effected, the Respondent neither enforce the Measures or prosecute any persons for contravening them;

[7] Saskatchewan written submission dated August 8, 2013, paragraph 117, page 38;
[8] Ibid, paragraph 118, page 38;

3. That the Respondent refrain from enacting any further measures that would limit the sale, manufacture, and marketing of Dairy Alternatives within the province.

3.2 The Positions of the Intervenors

In their written submission, each of Alberta[9], British Columbia[10] and Manitoba[11] expressed their full agreement with and support of the Complainant's contentions regarding the effect of the provisions of sections 7.1 and 7.2 of the FPA. They as well endorsed the Complainant's submission that the Panel should exercise its discretion and that Operational Costs should be apportioned substantially to the Respondent.

As for the effect of the provisions of section 4.1, each of Alberta and British Columbia stated at the Hearing that they had no position on the issue[12] whereas Manitoba endorsed the position taken by the Complainant.[13]

At the Hearing, Alberta concluded its argument by asking the Panel to rule on the provisions of 7.5 of the FPA, in addition to the provisions of 7.1 and 7.2 of that Act, and also on sections 11.9.1, 11.9.2 and 11.9.4 of the Regulations[14]. These requests were made of the Panel despite there being no request for relief pertaining to section 7.5 of the FPA nor to sections 11.9.1, 11.9.2 and 11.9.4 of the Regulations expressed in Alberta's written submissions of August 29, 2013. In fact, in its written submission[15], Alberta expressly supports paragraphs 117 and 118 of the Saskatchewan written submission.[16]

4. THE POSITION OF THE RESPONDENT[17]

In regard to sections 7.1 and 7.2 of the FPA, the Respondent simply took the position that such measures were consistent with the provisions of the AIT. It advised the Panel that Bill 56, once passed, would repeal sections 7.1 and 7.2 of the FPA but maintained that the Respondent has, and always has had, the right to adopt and maintain those Measures. The Respondent also stated that draft regulations were being prepared to effect necessary adjustments to ensure conformity once sections 7.1, 7.2 and 40 b.1 and b.2 of the FPA were repealed.[18]

The Respondent argued that that part of the Complaint which dealt with section 4.1 of the FPA should be dismissed because the issue of labelling rules was not addressed either during the consultations or in the request to establish the Panel. The Respondent argued that as such, the Panel did not have the jurisdiction to make a ruling on the compliance of section 4.1 with the provisions of the AIT.

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[9] Alberta's position is more fully described in Alberta's written submission to the Panel dated August 29, 2013

[10] British Columbia's position is more fully described in British Columbia's written submission to the Panel dated August 28, 2013;

[11] Manitoba's position is more fully described in Manitoba's written submission to the Panel dated August 28, 2013;

[12] Transcript of the Proceedings, page 97 and page 104

[13] Ibid page 101

[14] Ibid page 92 - 93

[15] Supra, note 9, paragraphs 14 and 15, page 6

[16] Supra note 7;

[17] Quebec's Response is more fully described in its written submissions to the Panel dated September 23, 2013 and December 19, 2013;

[18] Québec written submissions dated Sept 23, 2013 paragraphs 4-7, pages 4 and 5

In the alternative, the Respondent took the position that if the Panel did seize itself of that part of the Complaint relating to labelling, section 4.1 is compliant with and not contrary to any provision in the AIT. More particularly, the Respondent maintained that section 4.1 is not inconsistent with its obligations under the AIT by reason of the fact that it is consistent with an international standard, as recommended in paragraph 17 of Annex 405.1 of the AIT Alternatively, the Respondent argued that section 4.1 is permissible pursuant to Article 404 of the AIT and that the analysis of the legitimate objectives under Article 404 must take into account the provisions of Article 905, which relates to Parties' right to establish technical measures.

The Respondent argued that the Complainant had failed to show injury to any party as a result of the Respondent maintaining section 4.1 of the FPA.

The Respondent argued as well that there was no basis or justification for an unequal apportionment of Operational Costs in favour of the Complainant and the Intervenors. The Respondent submitted that the period of time between consultations and the request to establish a panel is irrelevant and that the mere fact that a Party does not amend impugned provisions shortly after a request for consultations is issued is not a basis for an unequal apportionment of Operational Costs. The Respondent argued, as well, that long-standing knowledge that its measures were or could be non-compliant could not be imputed to it as this Panel is not bound by reports issued by previous panels and the conclusions drawn by previous panels in matters dealing with altogether different measures would not, as a matter of course, apply the Respondent's provisions which are being challenged in this matter.

5. PANEL FINDINGS

5.1 The Impugned Provisions

The Complainant and each of the Intervenors allege that various provisions found in the Respondent's FPA are barriers to the trade of Dairy Alternatives in Canada.

While during the scope of its oral argument before the Panel, the Complainant argued that several provisions of the FPA were inconsistent with the Respondent's commitments pursuant to the AIT, in its written submission to the Panel, the Complainant sought from the Panel, inter alia, a finding that:

> "*ss. 4.1, 7.1 and 7.2 of the FPA, alongside the compositional formulas for Dairy Alternatives provided in the Regulations, abrogates Québec's commitments under the AIT, Articles 401, 402 and 403, as well as the commitments in Chapter 9*." [19]

As previously noted, each of the Intervenors expressed their full agreement and support the Complainant's contentions regarding the effect of the provisions of sections 7.1 and 7.2 of the FPA. As for the effect of the provisions of section 4.1, each of Alberta and British Columbia stated that they had no position on the issue[20] whereas Manitoba endorsed the position taken by the Complainant.[21] At the Hearing, Alberta concluded its argument by asking the Panel to

[19] Supra, note 7, paragraph 117(1)
[20] Supra, note 12 page 97, page 104
[21] Supra, note 13 page 101

rule on the provisions of 7.5 of the FPA, in addition to the provisions of 7.1 and 7.2 of that Act, and also on sections 11.9.1, 11.9.2 and 11.9.4 of the Regulations[22].

While the Respondent maintains that sections 7.1 and 7.2 of the FPA are consistent with and not contrary to the AIT and that the Respondent has always had the right to adopt and maintain such measures, it did advise the Panel that on September 19, 2013, Bill 56 was tabled in the Quebec National Assembly and that, once passed, sections 7.1 and 7.2 of the FPA would be repealed. The Respondent also represented to the Panel that once repeal of the provisions of sections 7.1 and 7.2 was effected, the composition standards set out in the Regulations and matters incidental to sections 7.1 and 7.2 which are in the Regulations would be repealed and/or amended[23].

The Respondent contends that the lifting of the prohibitions contained in section 7.1 and 7.2 of the FPA should not be construed as an admission by the Respondent that such provisions are contrary to the AIT but makes no further argument in defence of the impugned provisions.

The tabling of Bill 56 is heralded as a positive development by the Complainant and the Intervenors. They argue, however, that there has been no progress on the Bill since it was introduced into the Québec National Assembly, there is no guarantee as to when and if it will be adopted and that Bill 56, even if passed, is not sufficient to address all the issues raised by the Complainant.

The impugned provisions are in force until such time as they are repealed. While the Panel, like the Disputing Parties, view Bill 56 as a positive element in the resolution of the Dispute amongst the Parties, the tabling of Bill 56 does not relieve this Panel of the obligation to rule on the Complaint which is properly before it.

5.2 The Panel's Jurisdiction

The full inclusion of food and agricultural measures into the AIT was effected by the Eleventh Protocol of Amendment on November 8, 2010 and the introduction of the new Chapter Nine to the AIT. It warrants noting that there is no dispute as to whether Dairy Alternatives are subject to the AIT and they have been identified as a measure within the jurisdiction of the AIT and in particular, Chapter Nine thereof.

The issue of the Panel's jurisdiction was raised by the Respondent in relation to section 4.1 of the FPA, which reads as follows:

> ***4.1*** *In addition, no person shall*
>
> *(1) Use the words "milk", "cream", "butter", "cheese" or a derivative of any of those words to designate a dairy product substitute;*
>
> *(2) Use any words, trademarks, names or images that evoke the dairy industry to designate a dairy product substitute.*

More particularly, the Respondent contends that this Panel lacks the jurisdiction to make any ruling or finding in regard to the provisions of section 4.1, because the issue of section 4.1 was not raised by the Complainant in the request for consultations or in the request to establish the Panel.

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[22] Supra, note 12 page 92 - 93
[23] Supra, note 12 page 159

The AIT contemplates that that disputing Parties go through an extensive consultation process prior to a matter being put before a panel[24]. While these two steps in the process must be examined as a whole, they are nonetheless distinct steps in the process with very different objectives.

Chapter Seventeen of the AIT contains the Dispute Resolution Procedures. Article 1702.1 governs the consultations between disputing parties. Paragraph 1 of Article 1702.1 provides as follows:

> *Article 1702.1: Consultations*
>
> 1. *Subject to Article 1707.3 (Removal of Dispute Resolution Privileges), a Party that considers that a measure of another Party is or would be inconsistent with that other Party's obligations under this Agreement may request consultations with that other Party by delivering written notice to that other Party, to all other Parties and to the Secretariat. The notice shall specify the actual or proposed measure complained of, the relevant provisions of this Agreement and provide a brief summary of the complaint.* (the underlining is ours)

In its request for consultations dated January 23, 2012, Saskatchewan wrote the following:

> *"Measure Complained of:*
>
> *The measures complained of related to the restrictions on the manufacture and sale of dairy blends and analogues within the province of Québec...*
>
> *Summary of the Complaint:*
>
> *It is Saskatchewan's view that the Québec prohibitions on the manufacture and sale of dairy blends and analogues in the Québec Food [Products] Act and Regulation Respecting Food provide limited access to the dairy blend market and are in contravention of the AIT. If during the course of consultation we conclude that other Québec measures or AIT Articles are relevant to this complaint, we will draw them to your attention."* (the underlining is ours)

If the consultations amongst the disputing parties do not result in a negotiated settlement of the issues, the party who initiated the consultations may make a request for a panel to be established, in accordance with the provisions of Article 1703, the relevant part of which is the following:

> ***Article 1703: Request for Panel***
>
> *1. Where the matter in question has not been resolved to the satisfaction of the Initiating Party or to the satisfaction of a Consulting Participant, the Initiating Party and Consulting Participant jointly, may make a written request to the Secretariat, with a copy to the Committee, to establish a Panel. No request to establish a Panel may be made sooner than 120 days after the Initiating Party delivered a request for consultations to the Replying Party pursuant to Article 1702.1(1).*
>
> *2. ...*

[24] See Articles 1702.1 and 1703 of the AIT

> *3. A request to establish 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.*

By letter to the Internal Trade Secretariat dated June 17, 2013[25], the Complainant framed its request for panel as follows:

> *"The measures of complaint relate to the restrictions on the manufacture, sale, and marketing of oil-based dairy blends and analogues within the Province of Québec. In particular, the measures include Quebec's Food Products Act, R.S.Q., c. P-29 and the Regulation respecting food, R.S.Q. c. P-29, r.1, enacted pursuant to that Act (hereinafter the Regulations)."* (the underlining is ours)

The Respondent sees the Dispute as limited to the compliance with the AIT of sections 7.1 and 7.2 of the FPA (the sale and manufacture), which were raised in the Complainant's request for consultations and objects to the alleged expansion of the Dispute with regard to the provisions of section 4.1 of the FPA, which deal with labelling.

It warrants noting that the position taken by the Respondent is not that the Complainant's obligation was to set out the specific section with which it took issue[26], it simply contends that the issue of "labelling" is not encompassed by the Complainant's reference to the "manufacture and sale" of Dairy Alternatives in its Request for Consultations and thus outside this Panel's jurisdiction.

The first issue raised by the Respondent's objection is whether a panel is restricted to or by the manner in which a Party framed its request for consultations.

Although not bound by reports of previous panels, this Panel is mindful of the finding of the Panel in *Ontario - Dairy Analogues I*:

> "*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. …"*[27]

The AIT is clearly designed to ensure that Disputing Parties go through an extensive consultation process before a matter may be put before a panel. The consultations amongst disputing parties may, or may not, be followed by a request to establish a panel. As previously

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[25] Supra, note 6 page 1 Letter to the Internal Trade Secretariat dated June 17, 2013
[26] Supra, note 12, page 127-128
[27] 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, November 10, 2004, page 31

stated, while these two steps in the process must be examined as a whole, they are nonetheless distinct steps in the process with very different objectives.

The objective of the consultations process is to provide to disputing parties a framework within which they may arrive at a negotiated settlement of the issues on which there is no agreement which is satisfactory to all. Article 1700 of Chapter Seventeen of the AIT speaks to spirit of cooperation in which disputing parties are encouraged to resolve disputes:

> *Article 1700: Cooperation*
>
> *1. The Parties undertake to resolve disputes in a conciliatory, cooperative and harmonious manner.*
>
> 2. *The Parties shall make every attempt through cooperation, consultations and other dispute avoidance and resolution processes available to them to arrive at a mutually satisfactory resolution of any matter that may affect the operation of this Agreement.*

In an ideal world, disputing parties engaging in consultations would eventually emerge from the process with a resolution of all issues in dispute which is acceptable to all parties. There are times, however, when the consultations process does not yield this ideal outcome. Sometimes, some or most of the issues are settled amongst the disputing parties during the consultations process however, sometimes none or some of such issues are not settled and the disputing parties must resort to a request for panel in order that the unresolved issues may be put before a panel.

While a panel is eventually made aware of the request for consultations, a panel is not, nor should it be, privy to the nature or substance of the matters on which the disputing parties consulted. It is the issues upon which there could be no agreement on or resolution of as between the disputing parties, in the form in which they emerge from the consultations process, which are put before a panel for consideration of and resolution. The requirement for the parameters of the complaint to be set out in the notice of a request for consultations[28] and the same requirement being imposed in the request to establish a panel[29] speaks to the fact that the issues identified at the beginning of the consultations process may be framed differently at that stage of the process where there is a request to establish a panel.

This Panel agrees with the panel in the *Ontario Dairy Analogues I* matter, supra, that limiting the issues which can be addressed by the Panel to those which are explicitly identified by a Complainant at the beginning of the consultation process is too technical and restrictive an approach and would not be consistent with the spirit of Chapter Seventeen of the AIT.

That being said, this Panel's finding should not be construed as meaning that an initiating party may cast so wide a net as to render it impossible for a responding party to know the nature, substance and scope of the issue(s) to which it needs to respond, whether prior to the consultations or prior to the establishment of a Panel. While a technical and restrictive approach is not warranted, some degree of specificity is nonetheless desirable and parties should frame their request for consultations and their request for panel in such a way as to allow all parties to the dispute, and the Panel where applicable, to identify:

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[28] Article 1702.1 (1) of the AIT
[29] Article 1703 (3) of the AIT

a. The person(s), good(s), service(s) and/or investment(s) upon which the complaint bears. As an example, in the matter before us, it was made clear that the complaint related to oil-based dairy blends and analogues and the restrictive measures relating thereto.

b. The impugned legislation. As an example, in the matter before us, the FPA and the Regulations were identified as the impugned legislation. The Respondent did not argue and this Panel's finding is not that parties should be held to identify the exact and specific sections of the impugned statute or regulation, at either stage of the process. However, to the extent that this can be done it is highly encouraged.

c. The measures complained of, in some descriptive form. As an example, in the matter before us, at the consultations stage, the measures were identified as the "*manufacture and sale*" of Dairy Alternatives, and at the request for panel stage, the measures were identified as the "*sale, manufacture, and marketing*" of Dairy Alternatives.

This Panel's finding should also not be construed as meaning that the complaint which is framed at the stage of the request for panel may be so different as to not bear any resemblance to the complaint which was framed at the stage of the consultations process. The complaint which may be put before a Panel is the same one which was the subject of the consultations process although it may be framed differently as it emerges through the consultations process.

This Panel wishes to emphasize that parties to a dispute should, in their written submissions to a panel, specify the provision(s) regarding which they seek relief and the nature of the relief which they are seeking. Panels should not be left guessing what ruling is sought on which provision. While a technical and restrictive approach is not consistent with the AIT, a rigorous and disciplined approach in the crafting of written and oral arguments to the panel which is called upon to decide the outcome of a complaint is highly desirable and encouraged.

Having found that the issues which may be addressed by the Panel are not limited to those which were explicitly identified by the Complainant at the beginning of the consultation process, the Panel must now determine whether the labelling provisions in section 4.1 of the FPA are encompassed in the Complainant's description of the measures complained of as "*the manufacture, sale and marketing*" of Dairy Alternatives.

In the Merriam-Webster Dictionary[30], the expression "marketing" is defined as:

> mar·ket·ing
> ***noun*** \ˈmär-kə-tiŋ\
> : the activities that are involved in making people aware of a company's products, making sure that the products are available to be bought, etc.

According to the above definition, marketing encompasses all those activities involved in bringing a product to be available for sale to consumers. The labelling of any product which is destined to being sold to consumers would necessarily fall within activities encompassed by the "marketing" of a product. Furthermore, by definition, marketing would be encompassed within the "sale" of a product.
In its defence of the compliance of section 4.1, the Respondent itself argues that the purpose of section 4.1 is the protection of consumers. Whether or not that is indeed the purpose of section 4.1, the Respondent's argument in that context is not consistent with its contention that the

[30] Merriam-Webster.com. Merriam-Webster,2011. Sat. 8 January, 2014

labelling provisions are not encompassed within the Complainant's characterization of the measures complained of as being the "*manufacture, sale and marketing*" of Dairy Alternatives as the protection of consumers necessarily contemplates a sale or offer of sale being made to consumers.

Thus, the Panel's view is that even if it were restricted to addressing those issues which were explicitly identified by the Complainant at the beginning of the consultation process (the sale and manufacture), which it is not, it would not be precluded from ruling on the provisions of section 4.1 of the FPA as the labelling provisions are, in our view, encompassed within the characterization of the "manufacture and sale" of Dairy Alternatives.

The Panel rejects the Respondent's argument that it was somehow misled by the Complainant's characterization of the Complaint in the request for consultations or in the request for panel.

Neither the parties nor a panel should be taken by surprise at any stage of the proceedings. In the *Ontario Dairy Analogues I* matter, supra, the relief sought by the complainants in their written submission was more limited than what was verbally presented at the hearing. Although in this matter, the issue is that of the request for consultations being allegedly more limited than the request for panel, the remarks of the panel in the *Ontario Dairy Analogues I* matter, supra, are nonetheless relevant:

> "*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*."[31]

This Panel does not believe that the Respondent was surprised by the issue of section 4.1 being raised in the Complainant's written or oral submissions to the Panel or that it has been denied the opportunity to fully address the Complainant's complaint in respect thereof both in its written and oral submissions to this Panel.

The Panel finds that it is properly seized of and has the jurisdiction to rule on the provisions of section 4.1 of the FPA.

5.3 Sections 7.1 and 7.2 of the FPA – Compliance with AIT Provisions

As the Complainant and each of the Intervenors are unanimous in their assertion that sections 7.1 and 7.2 of the FPA are inconsistent with the Respondent's obligations and commitments under Articles 401, 402 and 403 of the AIT, the Panel will first address the issue of the compliance of those sections with the provisions of the AIT.

The commitments and obligations of the Respondent which have allegedly been breached are contained in Chapter Four of the AIT, more particularly Article 401 (Reciprocal Non-Discrimination); Article 402 (Right of Entry and Exit); and Article 403 (No Obstacles).

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[31] Supra, note 27, page 13

5.3.1 Compliance with Article 401

The provisions of sections 7.1 and 7.2 of the FPA are the following:

> ***7.1****. No person shall mix a dairy product or constituent of a dairy product with a dairy product substitute, except to the extent provided by regulation.*
>
> ***7.2.*** *No person shall prepare, offer for sale, sell, deliver, process or keep, display or transport for the purpose of sale any dairy product substitute that is not designated by regulation.*

Article 401 of the AIT 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*

It has been held by previous panels[32] that two factors must be considered with respect to Article 401(1), namely:

1. Does the measure discriminate against the goods of one Party to the benefit of the goods of another Party?

2. Are the goods discriminated against "like, directly competitive or substitutable" with the goods of another Party?

As to the second factor, the Complainant, as do the Intervenors, contends that Dairy Alternatives constitute goods which are "like, directly competitive or substitutable" to the Respondent's dairy products. The Respondent did not contest this point and the Panel is of the view that there is no doubt that Dairy Alternatives are "like, directly competitive or substitutable" to dairy products. That is the very nature of Dairy Alternatives.

As to the first factor, the Panel is mindful of the findings expressed in the AIT Panel Report in *New Brunswick – Fluid Milk*[33].

> "With respect to the first criterion, the previous panels concluded that there must be a geographical component to the discrimination for a measure to be inconsistent with Article 401(1). Further, those panels concluded that this geographical component can be direct, where goods from one Party are favoured over identical goods from another Party, or indirect, where goods produced predominantly in the territory of one Party are favoured over directly competitive or

[32] 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, September 13, 2002; Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the Manganese-Based Fuel Additives Act, June 12, 1998; Report of Article 1702(2) Summary Panel Regarding the Pre-Existing Dispute Concerning Ontario's Measures Governing Dairy Analogs and Dairy Blends, September 24, 2010;

[33] Ibid page 13

> substitutable goods produced predominantly in the territory of another Party. The Panel accepts this reasoning."

The Panel agrees with and accepts the Complainant's argument that by prohibiting: a) the mixing of a dairy product or constituent of a dairy product with a dairy product substitute; and b) the preparation, sale, delivery etc of any dairy product substitute that is not designated by regulation, the Respondent discriminates in favour of its domestic dairy producers and processors.

This Panel finds that the provisions of sections 7.1 and 7.2 of the FPA are inconsistent with Article 401 of the AIT.

5.3.2 Compliance with Article 402

Article 402 of the AIT 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.*

It was, quite rightly, pointed out by all Disputing Parties during the course of the Hearing that previous panels have given different interpretations to the provisions of Article 402. One panel interpreted Article 402 to mean transit across a province[34] whereas other panels adopted a wider interpretation of Article 402 to mean a restriction to importation or a barrier to entry into a province[35]

This Panel favours the wider and more liberal interpretation of the provisions of Article 402 and agree with the Summary Panel's finding in Ontario – Dairy Analogues II[36] that Article 402 could apply to any of the following:

> -restrictions on entry of a good or service into a province;
>
> -restrictions on a product leaving the province (e.g., prohibition against the export of a raw material from a province);
>
> -restrictions on transit of a good across the province.

Section 7.1, by prohibiting the manufacture of Dairy Alternatives within Québec, restricts the possible export of such goods by Québec manufacturers; and section 7.2, by prohibiting the sale of Dairy Alternatives within Québec, acts as a barrier to the movement of Dairy Alternatives

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[34] Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Quebec Regarding Quebec's Measure Governing the Sale in Quebec of Coloured Margarine pp 25-26;

[35] Supra, note 32, pp 16-17; 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; supra, note 32, p18; and Report of Article 1702(2) Summary Panel Regarding the Pre-Existing Dispute Concerning Ontario's Measures Governing Dairy Analogs and Dairy Blends, 24 September 2010, page 19;

[36] Ibid, page 19

into and across the province of Québec. Those provisions, clearly, create a barrier that restricts or prevents the movement of goods across a provincial boundary. Thus, in maintaining sections 7.1 and 7.2 of the FPA, the Respondent is in breach of its obligations under Article 402.

This Panel finds that the provisions of sections 7.1 and 7.2 of the FPA are inconsistent with Article 402 of the AIT.

5.3.3 Compliance with Article 403

Finally, the provisions of Article 403 of the AIT are the following:

> *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. .*

It is alleged that the Québec provisions are an injurious and ongoing impediment to internal trade in Dairy Alternatives and other products and that by prohibiting the sale and manufacture of these products, the Respondent greatly diminishes the Canada-wide demand for Dairy Alternatives. It is also alleged that by suppressing the demand for Dairy Alternatives, the secondary effect of the Québec provisions is to prevent innovation by greatly diminishing the expected return from innovations in the Dairy Alternatives market, thereby reducing choices available to consumers and distorting markets in the Dairy Alternative category for consumers, not only in Québec, but across Canada.

Previous panels have found that similar provisions constituted an obstacle to trade.[37] While not determinative of the issues raised in this Dispute, it warrants noting that in *Ontario Dairy Analogues I*[38]*,* nearly identical measures to the ones which are the subject of this Dispute were found to be non-compliant with the provisions of Articles 401, 402 and 403 of the AIT.

Based on the evidence before it, the Panel finds that the provisions of sections 7.1 and 7.2 of the FPA are inconsistent with Article 403 of the AIT.

5.3.4 Article 404 – Legitimate Objectives

In view of the Panel's findings, as outlined above, the Panel would normally proceed with an analysis of the provisions of Article 404 of the AIT to determine whether, although inconsistent with Article 401, 402 and 403, the Respondent's Measures are still permissible under the AIT.

The onus was on the Respondent to demonstrate that it fully meets the requirements of Article 404. Rule 11 of Annex 1813 (Rules of Interpretation) of the AIT provides that a Party asserting that a measure is subject to an exception under the AIT has the burden of establishing that the exception applies.

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[37] Ontario Dairy Analogues I and II: Report of the Panel concerning a dispute brought by Alberta, British Columbia, Saskatchewan and Manitoba against Ontario Governing Dairy Analogs and Dairy Blends, November 10 2004; Report of Article 1702(2) Summary Panel Regarding the Pre-Existing Dispute Concerning Ontario's Measures Governing Dairy Analogs and Dairy Blends, September 24, 2010

[38] Supra, note 32 Report of the Panel concerning a dispute brought by Alberta, British Columbia, Saskatchewan and Manitoba against Ontario Governing Dairy Analogs and Dairy Blends, November 10 2004

In terms of Article 404, it is not sufficient to assert that the purpose of a measure is to achieve a legitimate objective. A Party wishing to rely on the provisions of Article 404 must "demonstrate" the existence of some linkage between the measure which is being challenged and the legitimate objective which it purports to achieve.

As the Respondent has not put forth any argument that the purpose of either of sections 7.1 or7.2 is to achieve a legitimate objective, there is no need for this Panel to make a determination in that regard. Clearly, the Respondent has not met this onus in the case of sections 7.1 and 7.2.

5.4 Section 4.1 of the FPA – Compliance with AIT Provisions

The Complainant asserts that Section 4.1 of the FPA is inconsistent with the Respondent's obligations and commitments under the AIT, which position is endorsed by Manitoba[39]. Each of Alberta[40] and British Columbia[41] stated at the Hearing that they took no position on this particular matter.

For ease of reference, the provisions of Section 4.1 of the FPA are, again, reproduced below:

> ***4.1.*** *In addition, no person shall*
>
> *(1) use the words « milk », « cream », « butter », « cheese » or a derivative of any of those words to designate a dairy product substitute ;*
>
> *(2) use any words, trademarks, names or images that evoke the dairy industry to designate a dairy product substitute.*

We note that the Complainant, in its written and oral submissions, concentrated the bulk of its arguments on the provisions of section 4.1(1). The hurdle of the jurisdiction issue having been determined in part 5.2 of this Report, the Panel will therefore address the issue of compliance or non-compliance of Section 4.1(1) of the FPA with the provisions of the AIT based on the arguments put forth by the Complainant.

While the Complainant contends that the provisions of section 4.1 of the FPA are inconsistent with each of Articles 401 (Reciprocal Discrimination), 402 (Right of Entry and Exit) and 403 (No Obstacles) of the AIT, the Respondent submits that the provisions of section 4.1 of the FPA breach none of the provisions within the AIT.

5.4.1. Annex 405.1

The Respondent has, very ably, argued that because of its consistency with an international standard, as recommended in paragraph 17 of Annex 405.1 of the AIT, it cannot be inconsistent with any obligation set out in the AIT. Paragraph 17 of Annex 405.1 reads as follows:

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[39] Supra, note 13, page 101.
[40] Supra note 12, pages 97
[41] Supra note 12, page 104

Annex 405.1
Standards and Standard-Related Measures

...
Harmonization
17. Each Party shall, where appropriate and to the extent practicable, based its standards on relevant National Standards, de facto national standards or international standards.
...

The Respondent's position is that its section 4.1 is consistent the *Codex Alimentarius* standard titled "*Codex General Standard for the use of Dairy Terms*" [42] (hereinafter the "CGSUDT") and thus, is permissible under and consistent with the AIT.

The CGSUDT was developed by the Codex Alimentarius Commission, established by the World Health Organization (the "WHO") and the Food and Agriculture Organization (the "FAO") of the United Nations in 1963. The Codex Alimentarius Commission develops harmonized international food standards, guidelines and codes of practice to protect the health of the consumers and ensure fair practices in the food trade. The Respondent argues that the CGSUDT is an international standard which is highly relevant to this matter as it deals specifically with the use of dairy terms.

The Respondent further relies on Article 2.5 of the World Trade Organization's (the "WTO") Agreement on Technical Barriers to Trade[43] which states that a measure consistent with an international standard will be presumed not to create an obstacle to international trade.

Thus, the Respondent's argument is that if consistent with the CGSUDT (and the Respondent's position is that it is consistent with the CGSUDT), the provisions of section 4.1 of the FPA, it follows (or should follow), are permissible under the AIT and not inconsistent with any provisions therein.

Section 2.3, found in the defining provisions, and section 4.5, found in the section relating to the application of dairy terms, of the CGSUDT provide for the following:

> *2. DEFINITIONS*
>
> *2.3 Composite milk product is a product of which the milk, milk products or milk constituents are an essential part in term of quantity in the final product, as consumed provided that the constituents not derived from milk are not intended to take the place in part or in whole of any milk constituents*
>
> *....*
>
> *4 Application of Dairy Terms*
> *...*
> *4.5 Use of terms for composite milk products*
> *A product complying with the description in Section 2.3 may be named with the term "milk" or the name specified for a milk product as appropriate, provided that a clear description of the other characterizing ingredient(s) (such as flavouring foods, spices, herbs and flavours) is given in close proximity to the name*

[42] Codex General Standards for the Use of Dairy Terms - Codex STAN 206-199
[43] Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120

A bare comparison of the provisions of section 4.5 of the CGSUDT and the provisions of section 4.1(1) leads us to the conclusion that section 4.1(1) of the FPA, which outright proscribes the use of the words “milk”, “cream”, “butter”, “cheese” or a derivative of any of those words to designate a dairy product substitute, is prohibitive to a degree far beyond what is contemplated in section 4.5 of the CGSUDT.

The Panel does not find it necessary or useful to engage in a long discourse as to whether the provisions of section 4.1 of the FPA are, as a whole, “consistent with” the CGSUDT as consistency with a “standard”, international or otherwise, within the meaning of paragraph 17 of Annex 405.1 cannot, per se, deem a provision to be permissible or compliant with the obligations set out in the AIT.

While the Panel agrees with the Respondent that Parties to the AIT are encouraged, where appropriate and practicable, to base their standards on relevant national or international standards, the Panel does not subscribe to the Respondent’s view that doing so automatically stands for the proposition that a Party’s standard would, de facto, be deemed compliant with all provisions within the AIT, nor that it would, de facto, be permissible under Article 404. Compliance or consistency with a national or international standard may be used as an evidentiary basis to establish consistency with the provisions of the AIT but does not automatically equate to such consistency.

5.4.2 Compliance with Article 403

In view of the above, the Panel must now consider whether the provisions of section 4.1 of the FPA are inconsistent with the provisions of the AIT.

While the Complainant contends that the provisions of section 4.1 of the FPA are inconsistent with each of Articles 401 (Reciprocal Non-Discrimination), 402 (Right of Entry and Exit) and 403 (No Obstacles) of the AIT, for the Complainant to succeed it is not necessary for it to establish inconsistency with each of Articles 401, 402 and 403, it is sufficient for it to establish inconsistency of the impugned provision with any one of such Articles of the AIT.

Article 403 of the AIT reads 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.*

It is this Panel’s view that the provisions of section 4.1 of the FPA operate to create an obstacle to internal trade. The Respondent’s provisions create an obstacle to internal trade in that their prohibition of the use of the words “milk”, “cream”, “butter”, “cheese” or a derivative of any of those words to designate a dairy product substitute, effectively creates a barrier to Parties’ ability to sell milk, cream, butter or cheese alternatives by reason of their inability to use the proper words, in conjunction with other words, to describe their product. To use the analogy used by the Complainant during the course of the hearing, if one is selling faux leather furniture and is prohibited from using the word “leather” in its labelling of the product, this results in a restriction on the sale of faux leather furniture.

5.4.3 Articles 905 and 404 - Exceptions

Having concluded that the provisions of section 4.1 of the FPA are inconsistent with the provisions of Article 403 of the AIT, we must now determine whether, although inconsistent with Article 403, they would be permissible by virtue of the provisions of Article 404 of the AIT, which reads as follows:

> *Article 404: Legitimate Objectives*
>
> *Where it is established that a measure is inconsistent with Article 401, 402 or 403, that measure is still permissible under this Agreement where it can be demonstrated that:*
>
> *(a) the purpose of the measure is to achieve a legitimate objective;*
>
> *(b) the measure does not operate to impair unduly the access of persons, goods, services or investments of a Party that meet that legitimate objective;*
>
> *(c) the measure is not more trade restrictive than necessary to achieve that legitimate objective; and*
>
> *(d) the measure does not create a disguised restriction on trade.*

Again, the onus is on the Respondent to demonstrate that its provision meets the requirements of each of paragraphs (a) through (d) of Article 404[44]. In its' written and oral submissions, the Respondent argued that section 4.1 of the FPA is permissible pursuant to the provisions of Article 404. It further argued that in any analysis of the provisions of Article 404 must take into account the provisions of Article 905 which relate to the right of the Parties to establish technical measures.

Article 905 is found within Chapter Nine of the AIT, which deals with Agricultural and Food Goods. The provisions of Article 905 of the AIT are reproduced in their entirety, below:

> *Article 905: Right to Establish Technical Measures*
>
> *1. For greater certainty, in adopting or maintaining any technical measure a Party may establish the level of protection it considers appropriate in the circumstances to achieve a legitimate objective.*
>
> *2. For greater certainty, each Party shall, in ensuring that any technical measure that it adopts or maintains is not more trade restrictive than necessary to achieve a legitimate objective, take into account the risks that non-fulfillment of that legitimate objective would create and ensure proportionality between the trade restrictiveness of the technical measure and those risks.*
>
> *3. Each Party shall ensure that any technical measure adopted or maintained for a legitimate objective does not arbitrarily or unjustifiably discriminate between or among Parties, including between that Party and other Parties, where identical or similar conditions prevail.*
>
> *4. No Party shall adopt or apply a technical measure in a manner that would constitute a disguised restriction on internal trade.*

[44] See Rule 11 of Annex 1813 (Rules of Interpretation) to Chapter Eighteen of the AIT

5. *Each Party shall, where appropriate and to the extent practicable, specify its technical measures in terms of results, performance and competence.*

6. *Each Party shall ensure that its technical measures have a scientific, factual or other reasonable basis and that where appropriate, such technical measures are based on an assessment of risk*

Article 905 is a new obligation which did not exist at the time of previous panels' consideration of measures similar to that of the Respondent. This Panel is the first panel to have an opportunity to consider the provisions of Article 905.

The Panel agrees with the Respondent that where agricultural and food goods within the scope of Chapter Nine of the AIT are in issue, in the determination of whether any technical measure is permissible under the provisions of Article 404, it must take into account the provisions of Article 905.

This Panel reads paragraph 1 of Article 905 as an affirmation that Parties may maintain existing technical measures or adopt new technical measures, including those measures necessary to achieve a legitimate objective. In its written submission dated September 23, 2013, the Respondent seems to suggest that by reason of Article 905(1), it is and was free to apply measures with any level of protection to achieve a legitimate objective, even where other Parties to the AIT have chosen a lesser level of protection, particularly when such measures are consistent with an international standard.

While Article 905(1) allows Parties, in maintaining or adopting any technical measure, to establish the level of protection they consider appropriate in the circumstances to achieve a legitimate objective, the Panel does not read anywhere in paragraph 1 of Article 905 anything to suggest the exclusion of the application of the general rules found in Chapter Four to technical measures, regardless of whether consistency with an international standard has, or has not, been established.

The Panel views the provisions of paragraphs 905 (2), (3) and (4) as applying supplementary disciplines on the use of the legitimate objectives exception set out in Article 404.

In other words, where a Party wishes to rely on the legitimate objectives exception to justify a technical measure which would otherwise be inconsistent with the provisions of the AIT, that Party must meet the four (4) elements set out in paragraphs (a) through (d) of Article 404 as such elements are further elaborated upon and supplemented by paragraphs 2 through 4 of Article 905. A Party who wishes to establish that a measure is not more trade restrictive than necessary to achieve a legitimate objective in accordance with paragraph 404 (c) is, under paragraph 905(2), required to take into account the risk(s) that would be created by the non-fulfillment of that legitimate objective and then, ensure a proportionality between the trade restrictiveness of the technical measure at issue and the risk(s) created by non-fulfillment. Paragraph 905(3) imposes upon a Party adopting or maintaining a technical measure for a legitimate objective the obligation to ensure that such technical measure does not arbitrarily or unjustifiably discriminate between or amongst Parties, including between that Party and the other Parties where identical or similar measures prevail. Paragraph 905(4) simply imposes upon a Party the obligation to refrain from adopting or applying a technical measure in a manner which would constitute a disguised restriction on internal trade, which obligation is already provided for in Article 404 (d). Thus, in the context of technical measures adopted for legitimate

objectives only, only 905(3) can be viewed as adding an additional or fifth requirement which Parties must meet in order to establish that the requirements of Article 404 have been met.

Paragraphs 5 and 6 of Article 905, specify that where Parties choose to adopt technical measures, regardless of whether or not such measures are adopted to achieve a legitimate objective: i) where appropriate and to the extent practicable, Parties are to specify their technical measures in terms of results, performance or competence; and ii) Parties are to ensure that all technical measures have a scientific, factual or other reasonable basis and, where appropriate, that they are based on assessment of risk. These are requirements which must be met by any Party wishing to adopt technical measures. There is nothing in Article 905(5) and (6) to suggest that measures adopted in compliance with 905(5) and (6) or for that matter, measures consistent with an "international standard", are, de facto, permissible under Article 404 or somehow immune to challenge.

In its written and oral submissions, the Respondent put forth the proposition that where a Party maintains a measure which existed prior the coming into force of Article 905, this should be considered a sufficient demonstration that such Party took into account the risks created by the non-fulfillment of that legitimate objective and a demonstration that the Party believes there to be proportionality between the trade restrictiveness of the technical measures and those risks. The Panel finds no support in Article 905(2) for the contention that the mere existence and effect of a measure prior to Article 905 would allow the Panel to assume that the requirements of Article 905 (2), and 404(c) have been met and that the burden of proof would therefore shift to the Complainant and the Intervenors to provide "proof to the contrary". The Panel also finds no support in paragraph 2 of Article 905 for the Respondent's contention that a measure found to be consistent with an international standard whose objective is to protect consumers (or whose object is any other legitimate objective as defined in Article 200) should be considered a demonstration of compliance with Article 905(2).

Generally speaking, the arguments put forth by the Respondent in its written and oral submissions seem to suggest that where a given measure could be found to be "consistent with an international standard", this fact alone would be sufficient to establish that all obligations imposed on a responding party pursuant to paragraphs (3), (4), (5) and (6) of Article 905 have been discharged.

If one were to accept the Respondent's argument, Parties to the AIT would be free to choose amongst a spectrum of potentially available and applicable standards, international or otherwise, and by their mere choosing and being "consistent" therewith completely absolve themselves of the obligation to conform to the legitimate objectives exception. It warrants noting that nowhere in Article 905 is the concept of an "international" standard referenced or mentioned. While such a notion is mentioned in Annex 405.1, it forms part of the global analysis involved in the determination of whether a particular standard or standard-related measure covered by Part IV of the AIT found to be inconsistent with the AIT may still be permissible under the provisions of Article 404.

The language used in the AIT is not consistent with the position taken by the Respondent that where one party purports to base its measures on some international standard, that party is somehow excused from meeting otherwise applicable burdens to establish that its measure falls within the exception.

Having found that section 4.1(1) of the FPA is inconsistent with the provisions of Article 403 of the AIT the Respondent has the burden of demonstrating that all of the requirements of Articles 404 and 905 have been met.

In this Report, the Panel found that the provisions of section 4.1 of the FPA operate to create an obstacle to internal trade, in that their prohibition of the use of the words “milk”, “cream”, “butter”, “cheese” or a derivative of any of those words to designate a dairy product substitute, effectively creates a barrier to Parties’ ability to sell milk, cream, butter or cheese alternatives by reason of their inability to use the proper words, in conjunction with other words, to describe their product.

The Respondent has argued throughout the proceedings that it adopted and maintained the provisions of section 4.1(1) of the FPA with a view to protect consumers, consumer protection being one of the legitimate objectives set out in Article 200 of the AIT.

The Panel accepts that, on proper evidence, the adoption of labelling measures could be justified as a consumer protection measure for the purpose of Article 404 (a). It is not necessary for the Panel to rule whether the Respondent established that the purpose of this particular labelling measure was consumer protection because the Panel finds that the Respondent has failed to discharge the burdens placed upon it in Article 404 (c) and Article 905 (2) to show that its measure is not more trade restrictive than necessary to achieve a legitimate objective and in Article 905(3) to show that its measure does not arbitrarily or unjustifiably discriminate between or among Parties, including between that Party and other Parties, where identical or similar conditions prevail.

The Respondent has offered no apparent scientific, factual or other reasonable basis for the adoption and maintenance of its measure nor has it shown that it has undertaken any effort to ensure a proportionality between the restriction on trade, which is a virtual prohibition, and the risk which would be created by any non-fulfillment of its legitimate objective to protect consumers.

In terms of Article 905(3), it is well established that Dairy Alternatives are produced, sold, labelled and consumed in all other provinces and territories in Canada. The Panel has received no evidence to suggest that consumers in Quebec are somehow physiologically different or have particular vulnerabilities or predispositions which would justify the degree of consumer protection, as compared with the restriction on trade, which flow from the Respondent’s measures.

Having found that the Respondent has failed to establish the requirements of Articles 404(c) and 905(2) and (3) in regard to the provisions of section 4.1(1) of the FPA, it is not necessary for the Panel to proceed with an analysis as to compliance with Articles 401 and 402 nor with the analysis of the requirements under 404 (a), (b) and (d) and the remaining paragraphs in Article 905.

6 DETERMINATION OF IMPAIRMENT TO TRADE AND INJURY

Article 1716 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 to the issue of injury, the Panel is mindful of the determination of the panel in *New Brunswick –Fluid Milk* [45], the relevant part of which reads as follows on page 28 of its report:

> *"With respect to injury Complainant alleges that the denial of a fluid milk distribution license 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 demonstrated 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 license in a manner that is fair and consistent with the Agreement is injury of itself, as is the denial of the opportunity to participate on an equal footing in the New Brunswick market*"

We agree with the statements of the Panel in that case and the Panel adopts the same reasoning in the present case.

The determination that the Respondent's Measures constitute an ongoing impediment to the internal trade of Dairy Alternatives is injury of itself.

7 SUMMARY OF PANEL FINDINGS

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

a. Section 7.1 and 7.2 of the FPA are contrary to Quebec's commitments under the AIT Articles 401, 402 and 403.

b. The issue of compliance of section 4.1 of the FPA with the AIT is properly before this Panel in this Dispute.

c. Section 4.1(1) of the FPA is contrary to Quebec's commitments under the AIT Articles 403 and 905 of the AIT

d. Section 7.1 and 7.2 of the FPA do not serve a legitimate objective

e. While the Panel makes no ruling on the issue of whether the provisions of section 4.1(1) of the FPA serve the legitimate purpose of consumer protection, the Panel finds that even if such legitimate purpose was established, the provisions of section 4.1(1) cannot be justified under Articles 404 (c) and 905 (2) and (3).

f. The Panel declines to make a ruling on the provisions of section 7.5 of the FPA and on sections 11.9.1, 11.9.2 and 11.9.4 of the Regulations

[45] Supra, note 32

g. Sections 4.1(1), 7.1 and 7.2 of the FPA constitute an ongoing impediment to internal trade and have caused injury.

8 PANEL RECOMMENDATIONS

For the reasons set out in this Panel's Report, the Panel makes the following recommendations:

a. That Quebec repeal or amend those Measures which this Panel has determined to be non compliant with the AIT to bring them into compliance with the AIT no later than December 31, 2014, including those measures in the Regulations which are incidental to the non-compliant Measures.

b. That until such time as compliance is effected, the Respondent refrain from enforcing those Measures which this Panel has determined to be non compliant with the AIT, including new prosecutions pursuant to such Measures.

c. That there be some consideration given by the Parties to the AIT to the remarks of the Panel made in part 5.2 of this Report in terms of a review of Chapter Seventeen and the relevant Annexes thereto to provide for additional procedural elements allowing the Parties to narrow those issues which remain in dispute after the consultations process with more clarity and specificity, all of which would benefit the Parties to a Dispute as well as the Panel seized of such Dispute.

9 ALLOCATION OF COSTS

Rule 55 of Annex 1705(1) (Panel Rules of Procedure) of the AIT confers upon a Panel the discretion to apportion Operational Costs amongst the participating Parties.

The Complainant submits that the Panel should exercise its discretion and award an unequal division of costs in favour of the Complainant and the Intervenors. The Complainant alleges that such an award is justified by reason of the fact that (a) the non-compliance of the Measures with the provisions of the AIT was brought to the attention of the Respondent in excess of a year prior to the hearing and that despite a year long period of consultations prior to the Notice of Panel, the Respondent did not amend, repeal or bring the Measures into compliance with the Respondent's AIT commitments; (b) that the non-compliance of the Measures with the provisions of the AIT should have been evident to the Respondent after the 2004 Panel Report in the matter of *Ontario-Dairy Analogues I* and further evident after the 2010 Panel Report in the matter of *Ontario-Dairy Analogues II*.

The Complainant argues that the Respondent's long-standing knowledge that the Measures were not compliant with the AIT is "other relevant consideration" within the meaning of Rule 55 (c) that ought to guide and affect this Panel's apportionment of the operational costs.

The Intervenors, echo and support the position expressed by the Complainant.

The Respondent, in contrast, argued the absence of any justification for an unequal apportionment of Operational Costs in favour of the Complainant and the Intervenors. The Respondent's position is that the period of time between consultations and the request to establish a panel is irrelevant and that the mere fact that a Party does not amend impugned provisions shortly after a request for consultations is issued is not a basis for an unequal apportionment of Operational Costs. The Respondent also argued, reports issued by previous

panels and the conclusions therein could not operate as imputing to the Respondent long-standing knowledge that its measures were or could be non-compliant.

This Panel finds no basis to support the Complainant's and the Intervenors' contention that this matter warrants an unequal division of costs in favour of the Complainant and the Intervenors. We are not prepared to ascribe to the Respondent a "long-standing knowledge" of any non-compliance of measures with the AIT based on the fact that previous panels have, in the past, deemed similar measures to be non-compliant. If any such knowledge was to be derived from those reports, any Party to the AIT could have launched the consultation process shortly thereafter. Any "long-standing knowledge" flowing from such previous reports could be ascribed to any Party to the AIT and cannot form the basis of an unequal division of cost.

The consultation process is a process is designed to allow Parties to find common ground and to encourage Parties to find total or partial resolution of the issues on which they, presumably, have opposite view. The process is not designed to force or coerce any Party which disagrees with the view(s) of another Party (or Parties) to bring itself in line with such opposite views. Consequently, we fail to see how the period of time between consultations and the request to establish a panel can form the basis for an unequal apportionment of Operational Costs.

The Panel considers a fair allocation of Operational Costs to be:

- 50% to Québec;
- 35% to Saskatchewan;
- 5% to Alberta;
- 5% to British Columbia; and
- 5% to Manitoba.

Denise A. LeBlanc QC (Chair)

Bernard Jacob

Warren N. Sproule QC

10 Dissenting Opinion (member Jacob)

I agree with my colleagues about all aspects of the findings and reasons thereof except with respect to the interpretation given to Article 402 of the AIT. Based on my review of previous panels' decision and my understanding of the provisions of Articles 401, 402 and 403 as a whole, I am unable to conclude that Article 402 (Right of Entry and Exit) should be interpreted broadly, for the following reasons.

As underlined by my colleagues in their findings regarding Article 402, previous panels have given different interpretations to this provision, but the majority of panels have ruled in favor of a broad interpretation.

Following our review of the previous reports that ruled in favour of a broad interpretation[46], we find that none of these decisions address the question of the overlapping of Section 402 with Sections 401 and 403.

In accordance with the general interpretation principles of contracts, each article of the AIT should be interpreted in light of the others so that each conserves its meaning and that the contract is coherent as a whole.

Accordingly, as it has been asserted by the Respondent, it would be superfluous to interpret Article 402 in the sense of it including sale restrictions, since such interpretation would completely undermine the application of Articles 401 (Non-discrimination) and 403 (Obstacle to Internal Trade)[47] and make these dispositions meaningless.

While it is true that Panel is not bound by previous rulings, I endorse the findings expressed in the AIT Panel Report in its *Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Quebec Regarding Quebec's Measure Governing the Sale in Quebec of Coloured Margarine*, which states the following:

> "In Alberta's view, the measure effectively does not allow the export into and sale of coloured margarine in Québec. Accordingly, it prevents the movement of coloured margarine across provincial boundaries into Québec.
>
> In the Panel's view, the measure is more appropriately dealt with under Article 401 and potentially Article 403. In this respect, the Panel agrees with Québec that Article 402 appears to be derived from GATT Article V, which is aimed at freedom of transit and it should be given a different meaning and effect than Article 401 (akin to GATT Articles I and III) and Article 403 (akin to GATT Article XI).
>
> Québec does not purport to restrict or prevent the movement of goods across its boundaries such that shipments of coloured margarine from Western or Central Canada are constrained from being shipped to the Maritime provinces. ».

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[46] Report of the Article 1704 Panel Concerning the Dispute Between Nova Scotia and Prince Edward Island Regarding Amendments to the Dairy Industry Act Regulations, January 18, 2000; 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, September 13, 2002; 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, November 10, 2004; Report of Article 1702(2) Summary Panel Regarding the Pre-Existing Dispute Concerning Ontario's Measures Governing Dairy Analogs and Dairy Blends, September 24, 2010.

[47] Transcript of the Hearing, pages 218.

A narrow interpretation of Article 402 is also more consistent with its wording and more precisely with the use of the expression “movement”, which is defined, in the Merriam-Webster Dictionary[48], as:

> **Move·ment**
>
> *noun* \ˈmüv-mənt\
>
> : the act or process of moving people or things from one place or position to another

I do not agree with the Complainant’s assertion that Article 402 should be interpreted broadly in order to protect the AIT Parties from a situation where a party indiscriminately prohibits certain categories of goods from the province. In fact, such situation would be in blatant contravention of Article 403 since it creates an obstacle of internal trade.

In that context, a narrow interpretation of Article 402 following which it only prohibits transit restrictions thus reconciles fully with the specific purposes of 401 (Non-discrimination) and 403 (Obstacle to Internal Trade).

In light of the above, Section 7.1 and 7.2 do not restrict entry, export or transit of Dairy Alternatives within the meaning of Article 402. The measure of Section 7.2 does create a restriction on the movement of Dairy Alternatives across Québec where Dairy Alternatives are destined for consumption within Québec. However, it does not prevent the movement/transit of Dairy Alternatives whether within, in or out of the province.

Nonetheless, I agree with my colleagues that Section 7.1 and 7.2 are inconsistent with Articles 401 and 403 of the AIT since they create discrimination between Dairy Alternative and other dairy products and it is a potential obstacle to trade, but do not restrict the transit of goods as prescribed in Article 402.

As stated in the Rule 10 of Annex 1813 (Rules of Interpretation) of the AIT, the onus was on the Complainant to demonstrate that Section 7.1 and 7.2 of the FPA are inconsistent with Article 402:

> *10. A Party asserting that a measure or proposed measure is inconsistent with the provisions of this Agreement has the burden of establishing that inconsistency.*

I believe the Complainant did not meet its burden of proof since it did not put forth any arguments with respect to the restriction of Section 7.1 and 7.2 of the FPA on the Dairy Alternatives’ right of entry or exit[49]. Therefore, I hereby find that the provisions of Section 7.1 and 7.2 of the FPA are not inconsistent with Article 402 of the AIT.

[48] Merriam-Webster.com. Merriam-Webster, 2011. Fri. 14 March, 2014
[49] Transcript of the Hearing, pages 67

APPENDIX A
Participants in the Panel Hearing

Panel

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Warren N. Sproule QC

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Rob Swallow
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Quebec

Spokespersons

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Me Raymond Tremblay
Avocat
Ministère de la Justice du Québec

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For Manitoba

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APPENDIX B

PANEL'S DECISION OF OCTOBER 16, 2013:

IN THE MATTER OF AIT dispute: 12/13 – 09 Edi Oil:
SK v. QC on measures regarding Dairy Blends, Dairy Analogues and Dairy alternatives

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Panel Decision Following a Pre-Hearing Conference
Held on October 7, 2013

WHEREAS on July 1, 1995, the Agreement on Internal Trade (the "AIT"), signed by representatives of each Canadian province and a representative of the federal government, came into force; and

WHEREAS a dispute has arisen as between the Government of Saskatchewan ("Saskatchewan") and the Government of Quebec ("Quebec") (the "Dispute") in regard to certain restrictions on trade relating to products known as Dairy Blends and Dairy Analogs (collectively referred to as Dairy Alternatives"); and

WHEREAS the Governments of Alberta, British Columbia, and Manitoba (the "Intervenors") are Intervenors in the Dispute within the meaning of Article 1703 (9.1) of the AIT; and

WHEREAS Saskatchewan has alleged that certain measures of the Government of Quebec, found in *The Food Products Act,* R.S.Q., c. P-29 and the associated *Regulations Respecting Food,* R.S.Q., c. P-29, R. 1, (the "Quebec Legislation") are barriers to the trade of Dairy Alternatives in Canada and that such measures contravene Quebec`s commitments pursuant to the AIT; and

WHEREAS on June 17, 2013, Saskatchewan formally requested the establishment of a Panel in accordance with the provisions of Article 1703(1) of the AIT (the "Panel") to preside over all proceedings between the Parties, including a hearing pursuant to the provisions of rule 32 of Annex 1705(1) of the AIT (the "Hearing"); and

WHEREAS on September 19, 2013, a Bill 56 entitled "Loi modifiant la Loi sur les produits alimentaires" (« Bill 56 ») was introduced into the National Assembly of Quebec; and

WHEREAS Bill 56 purports to repeal certain provisions of the Quebec Legislation; and

WHEREAS on September 24, 2013, Quebec formally requested that the proceedings relating to the Dispute be suspended until such time as the National Assembly of Quebec has enacted bill 56; and

WHEREAS Saskatchewan and each of the Intervenors oppose Quebec`s request for a suspension of the proceedings relating to the Dispute; and

WHEREAS on October 7, 2013, during the course of a pre-hearing conference (the "Pre-Hearing Conference"), the Panel heard submissions made on behalf of Quebec, Saskatchewan and each of the Intervenors the issue of the suspension of the proceedings relating to the Dispute and on certain other issues raised as a result thereof;

IT IS HEREBY DECIDED that:

1. In response to the request by Quebec to suspend the proceedings relating to the Dispute, the Panel finds that:

    a. the Panel`s authority and jurisdiction to order a suspension of the proceedings is set out in Article 1707 (4) of the AIT and the provisions of any rule contained within Annex 1705(1) should not and cannot be construed to extend or limit the jurisdiction of this Panel or any other panel established pursuant to Article 1703(1) of the AIT; and

    b. in view of the positions put forth by each of the parties during the Pre-Hearing Conference, the Panel is of the view that there is no basis for granting Quebec`s request for a suspension of the proceedings relating to the Dispute "*in order to negotiate a mutually satisfactory resolution*" pursuant to the provisions of Article 1707 (4) of the AIT and the Panel hereby denies Quebec`s request.

2. In response to the request by Saskatchewan to submit an additional written submission, the Panel will allow Saskatchewan`s request provided that Saskatchewan`s additional written submission shall be restricted to those issues raised by Quebec in its main submission which were not raised by Saskatchewan in its main submission. The deadline for filing of the additional written submission by Saskatchewan shall be November 15, 2013.

3. In response to the request by Quebec to submit an additional further submission in response to the additional written submission of Saskatchewan referenced in paragraph 2, above, the Panel will allow Quebec to submit and additional written submission only in accordance with the following:

    a. Quebec may submit an additional written submission only on new issues raised by Saskatchewan, if any, in its additional written submission; and

    b. No later than December 8, 2013, Quebec shall confirm in writing to the Panel, and to the other Parties, whether it intends to submit or to not submit any such additional written submission and, in the event that Quebec does intend to submit such additional written submission, it shall outline the new issues which will be the subject of the additional written submission; and

    c. Any additional written submission by Quebec made in accordance and in compliance with the provisions of paragraphs a. and b., above, shall be filed no later than December 30, 2013.

4. To the extent that the provisions of rule 32 of Annex 1705(1) stipulate that the Panel shall fix the date for the Hearing within 30 days of receipt of the last written submission, which was September 23, 2013, the Panel relies on the provisions of rule 32 and 3.6 of said Annex 1705(1) and hereby sets January 8, 2014 as the date of the Hearing, which Hearing will be held in Quebec City at a location to be determined in due course.

5. In response to the request by Manitoba to participate in the Hearing of January 8, 2014 by electronic means, the Panel denies this request.

The decisions of the Panel outlined herein are unanimous.

While Quebec`s request for a formal suspension of the proceedings has been denied, the members of the Panel strongly encourage all parties concerned, in accordance with the spirit of the AIT, to explore a satisfactory resolution of the Dispute, or some of the issues raised within the Dispute, prior to the date of Hearing.

DATED this _16__ day of October 2013.

Originally signed by

_____

Denise A. LeBlanc, Q.C., Panel Chair

APPENDIX C

PANEL'S ORDER OF FEBRUARY 11, 2014:

IN THE MATTER OF AIT dispute: 12/13 – 09 Edi Oil:
SK v. QC on measures regarding Dairy Blends, Dairy Analogues and Dairy alternatives

Panel Order Following the Hearing Held on January 8, 2014

WHEREAS the Panel is seized of the dispute in regard to certain restrictions on trade relating to products known as Dairy Blends and Dairy Analogs between the Government of Saskatchewan ("Saskatchewan"), as a Complaining Party, and the Government of Quebec ("Quebec"), as the Complaint Recipient (the "Dispute"), and wherein the each of the Government of Alberta ("Alberta"), Government of British Columbia ("British Columbia") and Government of Manitoba ("Manitoba") is an Intervenor, (collectively the "Parties"); and

WHEREAS on January 8, 2014, the hearing of the Dispute pursuant to the provisions of the Agreement on Internal Trade (the "AIT") was held in Quebec City (the "Hearing") and the Panel heard oral submissions made on behalf of each of the Parties; and

WHEREAS Annex 1705(1) to Chapter Seventeen of the AIT provides for certain Rules of Procedure with respect to Panel Proceedings conducted pursuant to Chapter Seventeen; and

WHEREAS Rule 39 of Annex 1705(1) provides that the time period for the release of the Panel`s Report following the Hearing is 45 days after the date of completion of the Hearing; and

WHEREAS Rule 3.6 of Annex 1705(1) confers upon the Panel the discretion to extend or abridge the time limits fixed by the rules or otherwise fixed by the particular Presiding Body, either before or after their expiry; and

WHEREAS Article 1706 (2) of Chapter Seventeen provides that if the Panel cannot release its final Report within the period stipulated in Rule 39 of Annex 1705(1), it shall inform the Parties in writing of the reasons for the delay together with an estimate of the date by which it will issue its Report; and

WHEREAS the time required for the translation of the Panel`s Report is included in the time period provided for in Rule 39 of Annex 1705(1); and

WHEREAS the Panel has determined, after due consideration, that it will be unable to produce its Report and its translation within the time period provided for in Rule 39 of Annex 1705(1);

IT IS HEREBY ORDERED that:

1. The time period for the delivery of the report of the Panel pursuant to section 39 of Annex 1705(1) is hereby extended in accordance with the provisions of section 3.6 of Annex 1705(1) and Article 1706(2).

2. The Panel shall issue its Report no later than Monday, March 31, 2014.

DATED this __11_ day of February, 2014.

Originally signed by

Denise A. LeBlanc, Q.C., Panel Chair