

AGREEMENT ON INTERNAL TRADE

APPEAL FROM THE REPORT OF ARTICLE 1703 PANEL REGARDING THE
DISPUTE BETWEEN SASKATCHEWAN AND QUÉBEC CONCERNING DAIRY
BLENDS, DAIRY ANALOGUES AND DAIRY ALTERNATIVES DATED
MARCH 31, 2014
(ISBN # 978-1-894055-88-8)

SUBMISSION OF THE GOVERNMENT OF QUÉBEC (APPELLANT)

June 13, 2014

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

TABLE OF CONTENTS

INTRODUCTION	4
PART I GROUNDS OF APPEAL	5
1. The Panel erred in law in its interpretation of the scope and coverage of Chapter Nine of the AIT	5
2. The Panel erred in law by adopting a broad interpretation of Article 402 of the AIT	6
3. The Panel erred in law in its interpretation and application of international standards and by failing to adequately consider the rules of the World Trade Organization's Agreement on Technical Barriers to Trade	8
3.1 Interpretation of Article 405(1)	12
3.2 Interpretation of paragraph 1 Annex 405.1	14
3.3 Interpretation of paragraph 4 of Annex 405.1 and of Article 905(1)	14
3.4 Application of the Agreement on Technical Barriers to Trade	14
3.5 Relevance of international standard	19
4. The Panel erred in law and/or refused to exercise its jurisdiction when it determined that section 4.1(1) of the FPA contravenes Articles 403 and 905 of the AIT	22
4.1 The Panel erred in law and/or refused to exercise its jurisdiction when it determined that section 4.1(1) of the FPA contravenes Article 403 of the AIT	22
4.2 The Panel erred in law and/or refused to exercise its jurisdiction when it determined that section 4.1(1) of the FPA contravenes Article 905 of the AIT	28
5. The Panel erred in law in its application of Article 404 of the AIT	29
6. The Panel erred in law in the application of Article 905 of the AIT	34

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

6.1 The Panel erred in law in the application of Article 905(1) of the AIT	34
6.2 The Panel erred in law when it asserted that paragraphs 905(2), (3) and (4) of the AIT apply supplementary disciplines on the use of the legitimate objectives exception set out in Article 404 of the AIT	34
6.3 The Panel erred in law in the application of Article 905(2) of the AIT	36
6.4 The Panel erred in law in the application of Article 905(3) of the AIT	38
7. The Panel acted beyond its jurisdiction by recommending that Québec refrain from enforcing its measures	40
8. Alternatively, if the Appellate Panel were to determine that section 4.1(1) of the FPA is inconsistent with Article 403 of the AIT, it should rule that this measure is still permissible under Article 404 of the AIT	41
PART II ALLOCATION OF OPERATIONAL COSTS	44
PART III CONCLUSION	45

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

INTRODUCTION

1. On June 24, 2013, the Internal Trade Secretariat received a request from Saskatchewan, under the Agreement on Internal Trade (AIT), for the establishment of a panel to determine whether certain Québec measures regulating dairy product substitutes and dairy product and dairy substitute blends are compliant with the AIT. British Columbia, Alberta and Manitoba joined the proceeding.
2. The Panel held a public hearing on January 8, 2014, and presented its report to the parties on March 31, 2014. In its report, the Panel wrote that sections 7.1 and 7.2 of the *Food Products Act* (CQLR, chapter P-29)¹ (FPA) contravene Articles 401, 402 and 403 of the AIT and that they do not serve a legitimate objective. The Panel further wrote that section 4.1(1) of the FPA contravenes Articles 403 and 905 of the AIT and that it is not justified under Articles 404(c) and 905(2) and (3) of the AIT. In addition, the Panel ruled that sections 4.1(1), 7.1 and 7.2 of the FPA constitute an ongoing impediment to internal trade and cause injury.
3. The Panel erred in law and/or acted beyond or refused to exercise its jurisdiction, which fundamentally flaws some of the findings in the Panel's report. Québec asks the Appellate Panel to rescind certain of the Panel's determinations, interpretations and findings and to state that its measures pertaining to the labelling of substitutes are not in contravention of or are otherwise permissible under the AIT.

¹ *Food Products Act*, Appendix 1.

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

4. In its report, the Panel erred in law because, amongst other things, it failed to properly apply the relevant rules of interpretation and it failed on several occasions to provide its analysis for arriving at its determinations and findings. Consequently, the Panel failed to satisfy Article 1706(3)(b) of the AIT, which states that the Panel's report must contain a determination, with reasons, as to whether the measure in question is or would be inconsistent with the AIT.

PART I GROUNDS OF APPEAL

1. The Panel erred in law in its interpretation of the scope and coverage of Chapter Nine of the AIT

5. At page 10 of its report, the Panel wrote: "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." In making this determination, the Panel erred in law.

6. Article 902(1) of the AIT reads as follows:

Article 902: Scope and Coverage

1. This Chapter applies to technical measures adopted or maintained by a Party relating to internal trade in agricultural and food goods. (underlining ours)

7. The Panel erred in law because its determination was not accompanied by its analysis of the terms used in Article 902(1) and because that determination completely undermines the scope and coverage of Chapter Nine which are limited, pursuant to Article 902(1) of the AIT, to only technical measures adopted or maintained by a Party relating to

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

internal trade in agricultural and food goods. The Panel erred in law and that determination must be rescinded.

2. The Panel erred in law by adopting a broad interpretation of Article 402 of the AIT

8. The Panel wrote, at pages 17 and 18 of its report, that Article 402 of the AIT had been given different interpretations by previous panels, that one panel had interpreted Article 402 narrowly to mean transit across a province whereas other panels had adopted a wider interpretation to mean a restriction to importation or a barrier to entry into a province.
9. The Panel then ruled, by a majority of its members with one member dissenting, that it favoured the wider and more liberal interpretation of Article 402. In that regard, the Panel referred to the Summary Panel's finding in *Ontario – Dairy Analogues II* to justify that choice.
10. However, the regulations on substitutes and blends do not, in actual fact, restrict or prevent the movement of these goods across a provincial boundary. Section 55 of the FPA is clear on that matter and reads as follows:

55. Nothing in this Act shall be interpreted as prohibiting the transportation of products in transit in Québec ...

11. In the matter of the colouring of margarine, it was held as follows:

Bearing in mind that different provisions of an agreement should be given different meanings, it is superfluous to treat Article 402 as having the same meaning as 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 ...

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

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. Indeed, section 55 of the *Food Products Act* expressly provides the opposite.²

12. The Panel's interpretation of Article 402 in the present matter constitutes an error in law, and it is important that this finding be rescinded so that the broad interpretation of Article 402 is not maintained in the future.
13. In that regard, the Panel majority should have done as the minority member and determined that Article 402 of the AIT does not concern a barrier to the sale of goods but the transit and movement of goods and that section 55 of the FPA allows the transportation of products in transit in Québec.
14. The Appellate Panel should rescind the findings of the Panel's majority members and adopt the minority member's dissenting opinion, which is more consistent with the wording and context of Article 402. As the minority member indicated in his dissenting opinion at pages 29 and 30 of the Panel's report:

Following our review of the previous reports that ruled in favour of a broad interpretation, 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.

² *Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Québec Regarding Québec's Measure Governing the Sale in Québec of Coloured Margarine*, June 23, 2005, pages 25 and 26. (Appendix 2).

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

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) and make these dispositions meaningless.

...

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).

3. The Panel erred in law in its interpretation and application of international standards and by failing to adequately consider the rules of the World Trade Organization's Agreement on Technical Barriers to Trade

15. The Panel's reasoning and analysis with regard to the application of international standards and the rules of the World Trade Organization's (WTO) Agreement on Technical Barriers to Trade³ (TBT Agreement) to a measure of a Party to the AIT are not consistent with the interpretation that must be given within the framework of the AIT and constitute errors in law that the Appellate Panel must rectify.
16. The Panel erred in law by asserting, at page 24 of its report, that nowhere in Article 905 is the concept of an "international" standard referenced or mentioned. That determination by the Panel constitutes an error in law because Chapter Nine of the AIT clearly states in Article 900 that Chapter Four, in which can be found the concept of international standard at paragraph 17 of Annex 405.1, applies to Chapter Nine. Article 900 reads as follows: "For greater certainty,

³ Agreement on Technical Barriers to Trade, Appendix 3.

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

Chapter Four (General Rules) applies to this Chapter, except as otherwise provided in this Chapter.”

17. The Panel erred in law in its interpretation of paragraph 17 of Annex 405.1, which states as follows: “*Each Party shall, where appropriate and to the extent practicable, base its standards on relevant National Standards, de facto national standards or international standards.*” It incorrectly applied the rules of interpretation that could have been useful to it.
18. The AIT is an agreement between the Government of Canada, the provinces, the Northwest Territories and Yukon. It contains rules of interpretation in Annex 1813 that may be supplemented by the general rules of interpretation of contracts in civil and common law. The rules of interpretation of a statute established by the Supreme Court of Canada, even though the AIT is not a statute, may also be useful. The same is true for the rules of interpretation established by the WTO Appellate Body.⁴
19. Under the *Civil Code*, the common intention of the parties rather than adherence to the literal meaning of the words should be sought in interpreting a contract, and the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, should all be taken into account. The Code further states that each clause of a contract is interpreted in light of the others so that each is given the meaning derived from the contract as a whole, and

⁴ In the matter on the colouring of margarine, *supra*, note 2, at page 14, the Panel wrote that other AIT panels had referred to such rules and to the decisions of WTO panels and the Appellate Body and that it would do likewise.

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

that a clause is given a meaning that gives it some effect rather than one that gives it no effect. In addition, words susceptible of two meanings are to be given the meaning that best conforms to the subject matter of the contract, and the clauses of a contract cover only what it appears that the parties intended to include, however general the terms used.⁵

20. According to the Supreme Court of Canada, when interpreting a statute, “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (...) The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words plays a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role.”⁶
21. Consequently, whereas the expression “*where appropriate and to the extent practicable*” at paragraph 17 of Annex 405.1 is clear, the ordinary meaning of the words must play a dominant role in the interpretive process. The intention of Parties to the AIT was not to force the Parties to base their standards on international standards no matter what the situation, but to encourage them to do so, as rightfully indicated by the Panel, at page 21 of its report, where appropriate and practicable.

⁵ *Civil Code of Québec*, articles 1425, 1426, 1427, 1428, 1429 and 1431. (Appendix 4).

⁶ *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 610, para. 10 (a matter relating to a federal statute). (Appendix 5).

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

22. In addition, paragraph 17 of Annex 405.1 does not refer to just any international standard. The standard itself must be relevant. If it is not relevant, it may not be taken into account by a Party for establishing its own standards.
23. For that reason, the Panel erred in law when it stated, at page 24 of its report, that if one were to accept Québec's arguments concerning the applicability of international standards, "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."
24. That statement demonstrates that the Panel incorrectly analyzed the meaning and scope of paragraph 17 of Annex 405.1 and, in particular, the meaning and scope of the words "relevant international standards." The Panel should have interpreted the rule in paragraph 17 of Annex 405.1 of the AIT so as to give it a scope and meaning harmonious with the meaning of the words used, the context in which it is found and the intention of the Parties.
25. Article 405(1), paragraphs 1 and 4 of Annex 405.1 and Article 905(1) of the AIT are part of the context of paragraph 17 of Annex 405.1 and they are extremely useful for identifying the true meaning. They read as follows:

Article 405: Reconciliation

1. In order to provide for the free movement of persons, goods, services and investments within Canada, the Parties shall, in

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

accordance with Annex 405.1, reconcile their standards and standards-related measures by harmonization, mutual recognition or other means.

ANNEX 405.1

Scope and Coverage

1. This Annex applies to standards and standards-related measures covered by Part IV.

Right to Establish Standards and Standards-Related Measures

4. For greater certainty, a Party may, in accordance with this Agreement, adopt or maintain any standard or standards-related measure to achieve a legitimate objective and may, in pursuing that objective, establish the level of protection that it considers to be appropriate.

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.

3.1 Interpretation of Article 405(1)

26. Article 405(1) states that, by signing the AIT, the Parties agree to provide for the free movement of goods by reconciling their standards by various means in accordance with Annex 405.1. The Parties thus agreed amongst themselves that the rules contained in Annex 405.1 provided for the free movement of goods and were to enable the approximation of their reciprocal standards.⁷
27. Article 405(1) must not be interpreted as requiring a Party to reconcile its standards on the basis of the weakest level of protection. If that were

⁷ The word "reconcile" is defined, among other meanings, as finding some common ground between, or approximating, different things. *Bibliorum Larousse, Le Petit Larousse* (electronic version). (Appendix 6).

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

the interpretation to be given, then it would mean that one or more Parties that adopt or maintain minimum rules or decide not to regulate certain sectors of their economy could complain under the AIT about the other Parties' standards and, ultimately, obtain the complete deregulation of sectors of the economy in Canada to the detriment of public security and safety, protection of human, animal or plant life or health, protection of the environment, consumer protection, protection of the health, safety and well-being of workers, or affirmative action for disadvantaged groups.⁸ That is surely not the intention sought by the signatories of the AIT.

28. A similar interpretation was adopted by the Summary Panel in *Ontario – Dairy Analogues II*, at page 23:

To be clear, the Summary Panel does not hold that Ontario is necessarily precluded from adopting safety or consumer protection measures that supplement federal regulations, or that go above or beyond the measures adopted in other provinces. Article 405 and Annex 405.1 call on Parties to seek to reconcile standards by “harmonization, mutual recognition and other means,” but this provision does not rule out the possibility that a jurisdiction might reasonably find that it needs to maintain its own distinctive standards.⁹

29. Article 405(1) and paragraph 17 of Annex 405.1 must be interpreted to give them a meaning and as meaning that, if a Party bases its standards on recognized and relevant international standards, it has adopted a standard that favours the free movement of goods, even if it is more demanding than the other Parties.

⁸ This list is not exhaustive and reproduces the legitimate objectives set forth in Article 200 of the AIT.

⁹ *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, ISBN # 978-1-894055-74-1. (Appendix 7).

3.2 Interpretation of paragraph 1 of Annex 405.1

30. Paragraph 1 of Annex 405.1 is part of the context of paragraph 17 of Annex 405.1. It specifies the scope and coverage of Annex 405.1: "*This Annex applies to standards and standards-related measures covered by Part IV.*" Paragraph 1 is clear: Annex 405.1 applies to standards covered by Part IV of the AIT, and therefore to technical measures covered by Chapter Nine of the AIT, which relates to agricultural and food goods.

3.3 Interpretation of paragraph 4 of Annex 405.1 and Article 905(1)

31. Paragraph 4 of Annex 405.1 and Article 905(1) are also part of the context of paragraph 17 of Annex 405.1. Under those provisions, a Party may adopt or maintain a standard or a technical measure to achieve a legitimate objective and establish a level of protection that it considers appropriate to achieve that objective, which level, pursuant to paragraph 17 of Annex 405.1, may be established at a level equal to that of a relevant international standard. These provisions recognize the jurisdiction of Parties that decide to protect their consumers against practices that may be misleading. These provisions may serve to demonstrate that a measure does not create an impediment to trade and therefore complies fully with the AIT.

3.4 Application of the Agreement on Technical Barriers to Trade

32. The AIT was negotiated at the same time as the *North American Free Trade Agreement* and *World Trade Organization (WTO) agreements*. It is part of the movement to liberalize international trade, in which Canada and the provinces actively participate. For that reason, the

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

international trade agreements and the rules of interpretation that apply to them can serve as useful guides for interpreting the AIT.

33. In that regard, the rules outlined in the *WTO Agreement on Technical Barriers to Trade* (TBT Agreement) can assist in interpreting paragraph 17 of Annex 405.1 and determining “where appropriate” to base a measure on a relevant international standard.
34. Indeed, a Party to the AIT is urged, before adopting a technical measure or maintaining an existing technical measure, to analyze not only whether it is compliant with the AIT but also whether it is consistent with the international rules applicable under the TBT Agreement. The relevant articles of the TBT Agreement are the following:

2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

2.5 A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

35. In the case of a technical measure, a Party to the AIT is urged to take the TBT Agreement into account and verify whether a relevant

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

international standard exists. If a relevant international standard does exist, then in order to comply with Article 2.4 of the TBT Agreement, the Party to the AIT is urged to consider the possibility of using, or to use, the relevant parts of the international standard as a basis for its technical regulation, unless that international standard or its relevant parts would be insufficient or inappropriate for achieving the legitimate objectives sought.

36. Canada is a member of the WTO and advocates the harmonization of rules governing the trade of food goods on the basis of international standards. In a document titled "*Canada's Strategic Framework for Participation in the Joint FAO/WHO Food Standards Program*,"¹⁰ Canada states as follows:

Currently, there are 176 member governments including Canada [in the Codex]. The primary mandate of Codex is to develop food standards for the protection of the health of consumers and to ensure fair practices in food trade....

The impact of Codex standards and related texts on the international trading system has become increasingly significant since the establishment of the World Trade Organization (WTO) in 1995, of which Canada is a member....

[The WTO Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade] ascribe great importance to international standards, guidelines and recommendations. WTO Members are strongly encouraged to base their food safety measures and food related technical regulations and standards on Codex standards and related texts in order to minimize unnecessary obstacles to trade while maintaining their right to protect human life or health and to prevent deceptive practices. As Canada is both a major importer and exporter of

¹⁰ <http://www.hc-sc.gc.ca/fn-an/intactivit/codex/activit/strateg-codex-2008-2012-eng.php> (Website consulted on November 28, 2013), pages 3, 6 and 7. The document is attached as Appendix 8.

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

food, it is in Canada's interest to promote the use of Codex standards and related texts by other countries so as to protect the health of consumers and ensure fair practices in the food trade. In addition, greater harmonization of measures will contribute to a more predictable regulatory environment thereby facilitating the conduct of international trade in food....
(underlining ours)

37. A Party to the AIT that would thus base its technical measure on an international standard could then put forth to WTO member governments, by the appropriate means at its disposal, that it benefits from a presumption under Article 2.5 of the TBT Agreement to the effect that its measure does not create an unnecessary obstacle to international trade. In that regard, the WTO wrote in a publication on the TBT Agreement, published on May 16, 2014, at page 20:¹¹

Article 2.5 of the TBT Agreement is also relevant to the discipline on avoiding unnecessary barriers to trade, as it provides a form of "safe haven"; it states that if a technical regulation is in accordance with a relevant international standard, it is presumed (although this presumption can be challenged) not to create an unnecessary obstacle to international trade. Thus the international standard provides a first line of defence against an eventual challenge that the measure is creating an unnecessary barrier to trade.
(underlining ours)

38. It could also put forth internationally that the use of an international standard improves competition and favours international trade. On that subject, the WTO wrote in the publication referred to in the preceding paragraph on the TBT Agreement, at page 22:¹²

¹¹ World Trade Organization, *The WTO Agreements Series, Technical Barriers to Trade*, published by the World Trade Organization on May 16, 2014.
http://www.wto.org/english/res_e/publications_e/tbtttrade_e.pdf, copy attached as Appendix 9.

¹² *Supra*, note 11.

Why is the use of international standards promoted?

When technical requirements vary from market to market, traders must contend with the costs of both product adaptation (or redesign) and conformity assessment associated with each market they wish to enter. This can segment markets, hindering competition and reducing international trade. International standards can help countries overcome these problems. By ensuring compatibility across countries and conveying information to consumers about goods that have been produced abroad or processes that took place in another country, international standards can generate economies of scale and production efficiencies, reduce transaction costs, and facilitate international trade. This is an important means of promoting regulatory convergence. Moreover, because international standards codify the related scientific and technical knowledge developed at the global level, their development and use are important means of disseminating knowledge and fostering innovation.

39. The TBT Agreement strongly encourages WTO members to adopt relevant international standards as standards applicable across their territory¹³ and Canada has stated that it is in the national interest to promote their use.¹⁴ Consequently, the fact that Québec has adopted and maintained a measure relating to the labelling of substitutes that is substantially similar to a relevant international standard must be taken into consideration when analyzing the conformity of that measure with the AIT, and, where necessary, to determine whether that measure is otherwise permissible under Article 404 of the AIT. Québec will present its arguments on that matter in a discussion of Articles 403 and 404 of the AIT further on in this submission.

¹³ *Supra*, note 11, page 20: "The TBT Agreement strongly encourages members to use 'relevant' international standards, guides or recommendations 'as a basis' for their regulations and standards."

¹⁴ *Supra*, note 10.

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

3.5 Relevance of international standard

40. In order to determine “where appropriate” to base a measure on a relevant international standard, it must be established that the international standard is relevant. Québec has demonstrated in its main submission,¹⁵ in its supplementary written submission¹⁶ and in its oral submission¹⁷ that the *Codex Alimentarius* standard titled *Codex General Standards on the Use of Dairy Terms* (CGSUDT)¹⁸ is a relevant standard. Québec refers the Appellate Panel to the arguments it presented then.
41. Furthermore, the Panel erred in law at page 21 of its report:
- a. when it compared section 4.1(1) of the FPA with section 4.5 of the CGSUDT;
 - b. when it determined that section 4.1(1) of the FPA is prohibitive to a degree far beyond what is contemplated in section 4.5 of the CGSUDT;
 - c. when it wrote that it did not find it necessary or useful to engage in a long discourse as to whether the provisions of section 4.1(1) of the FPA are, as a whole, consistent with the CGSUDT.

¹⁵ Québec's Submission, September 23, 2013, specifically at paragraphs 28 to 42.

¹⁶ Québec's Supplementary Written Submission, December 19, 2013, specifically at paragraphs 35 to 65.

¹⁷ AIT PANEL HEARING, *Saskatchewan v. Québec re: Edible Oil Products, Dairy Blends and Dairy Analogues*, January 8, 2014, specifically at pages 168 to 194 and 201 to 210.

¹⁸ *Codex General Standard for the Use of Dairy Terms* (CGSUDT), Appendix 10.

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

42. The Panel's error in law consists primarily in having chosen to compare section 4.1(1) of the FPA to section 4.5 of the CGSUDT, a section that has not been referred to by either Saskatchewan or Québec.
43. The Panel compared apples to oranges. It chose to compare Quebec's measure concerning the labelling of substitutes to a specific section of the CGSUDT, which concerns the labelling of a class of milk products, i.e. composite milk products.
44. Indeed, according to the definition of composite milk product contained in section 2.3 of the CGSUDT, a composite milk product is a true milk product. That definition reads as follows:
- 2.3 Composite milk product is a product of which the milk, milk products or milk constituents are an essential part in terms 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 constituent. (underlining ours)
45. The following products meet this definition and are composite milk products: flavoured coffee creamer, chocolate milk, herbed cheese and fruit yogurt. These products are milk products and section 4.5 of the CGSUDT allows for them to be designated by dairy terms. The FPA does so as well.
46. These composite milk products are milk, or dairy, products according to the definition of "dairy product" found in section 1(a.3) of the FPA, and they do not satisfy the definition of "dairy product substitute" in section 1(a.4) of the FPA. These definitions read as follows.

1. In this Act, unless the context indicates a different meaning, the following expressions mean ...

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

(a.3) "dairy product": milk, or any derivative of milk, and any food product made with milk as the sole ingredient or the main ingredient;

(a.4) "dairy product substitute": any food product which may be substituted for a dairy product and which, in its external characteristics or its mode of use, resembles a dairy product; (underlining ours)

47. The comparison made by the Panel between the labelling rules applicable to a dairy product substitute and the rules applicable to a composite milk product could only lead the Panel to the conclusion that these rules were not similar. The Panel misinterpreted the CGSUDT. It chose section 4.5 of the CGSUDT from among all the provisions of the CGSUDT, which allowed it to determine that section 4.1(1) of the FPA was much more prohibitive than section 4.5 of the CGSUDT. Armed with this finding, the Panel was able to write, at page 21 of its report, that it "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."

48. If the Panel had compared section 4.1(1) of the FPA to the relevant provisions of the CGSUDT that regulate the use of dairy terms for a product that is neither milk nor a milk product nor a composite milk product, it would have found that the labelling rules set forth in section 4.1(1) are in agreement with the CGSUDT. In that regard,

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

Québec refers the Appellate Panel to the arguments that it submitted to the Panel.¹⁹

49. Such a finding would have allowed it to determine, in the particular case of section 4.1(1) of the FPA, that paragraph 17 of Annex 405.1 of the AIT encourages Parties to base their measures on relevant international standards, that section 4.1(1) is based on or consistent with a relevant international standard that has gained worldwide consensus, and that governments that have adopted that standard protect consumers. The Panel's determinations and findings with regard to Articles 403, 404, 405 and 905 would have been impacted as a result. The Appellate Panel must admit this error of law by the Panel and recognize that the CGSUDT is a relevant international standard.

4. The Panel erred in law and/or refused to exercise its jurisdiction when it determined that section 4.1(1) of the FPA contravenes Articles 403 and 905 of the AIT

4.1 The Panel erred in law and/or refused to exercise its jurisdiction when it determined that section 4.1(1) of the FPA contravenes Article 403 of the AIT

50. At page 21 of its report, the Panel wrote that, in its view, the provisions of section 4.1 of the FPA operate to create an obstacle to internal trade, and it then found, at pages 26 and 27 of its report, that section 4.1(1) of the FPA is contrary to Québec's commitments under the AIT Articles 403 and 905, constitutes an ongoing impediment to internal trade and has caused injury.

¹⁹ *Supra*, notes 15, 16 and 17.

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

51. That determination and those findings constitute errors of law and/or demonstrate the Panel's refusal to exercise its jurisdiction.

52. The Panel did not indicate how it had analyzed Article 403 and how it had taken into account the arguments submitted by Québec, at page 18 of its main submission, concerning the interpretation of Article 403. By failing to do so, i.e. by remaining silent on a Party's arguments and not providing an interpretation of the applicable article, constitutes an error of law and/or a refusal to exercise its jurisdiction and flaws the Panel's finding. Internationally, in accordance with the rules of interpretation applied by the WTO Appellate Body, a Panel's determinations may be reversed on appeal when the Panel does not provide an interpretation of the applicable article of the agreement and it does not apply its interpretation to determinations of fact. According to the Appellate Body, when a Panel acts in that manner, it is basing its determinations on pure speculation.²⁰

53. In the matter at issue, the Panel failed to provide in its report the reasons for which it had rejected Québec's arguments or the manner in which it had interpreted Article 403 of the AIT. In failing to do so, the Panel's findings were flawed with regard to the compliance of section 4.1(1) of the FPA with Article 403 of the AIT, and the Appellate Panel must reverse those findings.

²⁰ The Appellate Body has held that panels should make an objective assessment of the matter before them and that a panel fails to fulfil its mandate if it does not make an objective assessment of the matter and if it declines to exercise its jurisdiction and abstains from making any finding on the matter before it. See *Mexico – Tax Measures on Soft Drinks and Other Beverages*, AB-2005-10, Appellate Body Report, WT/DS308/AB/R, 6 March 2006, para. 51. (Appendix 11) The Appellate Body also recognized that a panel's findings based on pure speculation could be reversed on appeal and that it could be the case where a panel did not provide an interpretation of the article it applies and that it did not apply its interpretation to findings of fact. See *Canada – Certain Measures Affecting the Automotive Industry*, AB-2000-2, WT/DS139/AB/R WT/DS142/AB/R, 31 May 2000, para. 174. (Appendix 12).

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

54. A proper interpretation of Article 403 must be based on a textual and contextual analysis to find a meaning that is harmonious with the AIT as a whole.²¹ Article 403 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.

55. The ordinary meaning of that article is to prohibit Parties from creating any obstacle whatsoever to internal trade. The ordinary meaning must, however, be analyzed in its context and it must be harmonious with the spirit of the AIT and the intention of the Parties that entered into that agreement. Articles 401 and 402 of the AIT are part of the immediate context of Article 403 and they must be given a harmonious interpretation that does not make any of those articles meaningless. The dissenting Panel member, at pages 29 and 30 of the Panel's report, shares that opinion when he speaks of the overlapping between Articles 401, 402 and 403. He expressed the opinion that each article of the AIT should be interpreted by reference to one another, in accordance with the general interpretation principles of contracts, so that each conserves its meaning and that the contract is coherent as a whole. For the dissenting member, it would be superfluous to interpret Article 402 in the sense of it including sales restrictions, since such interpretation would completely undermine the application of Articles 401 and 403 and make those provisions meaningless.
56. That reading of Article 403 must be adopted by the Appellate Panel. Article 403 must not be interpreted as referring to all obstacles

²¹ See the rules of interpretation at paragraphs 18, 19 and 20 of this Submission.

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

whatsoever because such interpretation would make Articles 401 and 402 meaningless and completely useless, which cannot have been the Parties' intention when they entered into the AIT.

57. A proper understanding of Article 403 can be found in the panel report on the colouring of margarine. That panel wrote that "the purpose of rules such as Articles 401 and 403 is to preserve competitive opportunities."²²
58. In order to determine compliance with Article 403, it must be determined whether competitive opportunities have been preserved or if the measure at issue has the purpose or the effect of restricting a merchant's freedom to produce, advertise, market and finally sell its good. Correctly designating, identifying or labelling a good on the basis of its contents for the purpose of not creating confusion in the marketplace as to the nature and contents of the good in question would not constitute an obstacle. Admitting the contrary would be tantamount to recognizing that it is acceptable to mislead those buying or acquiring a good by making them believe that the nature of the good is different from what they truly wish to acquire.
59. In addition, in the present matter, all the Parties in Canada who wish to conduct business in Québec have the same rights and are subject to the same obligations as Québec dairy products and substitutes producers. Competitive opportunities are fully preserved and Québec's regulations do not contravene Article 403.

²² *Supra*, note 2, page 29.

60. A measure based on an international standard whose purpose is to protect consumers does not create an obstacle to trade under Article 403 of the AIT. The Panel should analyze it in detail and consider its purposes and its effects. In that regard, the Panel wrote, at pages 21 and 22 of its report, that Parties to the AIT were encouraged to base their standards on relevant international standards and that compliance or consistency with an international standard may be used as an evidentiary basis to establish consistency with the provisions of the AIT even though that does not automatically equate to such consistency.

61. As regards the purposes of the measure, Québec demonstrated to the Panel²³ that section 4.1(1) of the FPA was based on a relevant international standard whose objective was to protect consumers and that that international standard was relevant because it seeks exactly the same objectives as section 4.1(1) of the FPA, i.e. to ensure the correct use of dairy terms, to protect consumers from being confused or misled and to ensure fair trade practices. Section 3 of the CGSUDT outlines the general principles of that standard and demonstrates its relevance with regard to Québec's measure. Section 3 reads as follows:

3. GENERAL PRINCIPLES

Foods shall be described or presented in such a manner as to ensure the correct use of dairy terms intended for milk and milk products, to protect consumers from being confused or misled and to ensure fair practices in the food trade.

62. The effects of Québec's measure are twofold: (1) to enable consumers to be well informed about the goods they buy and enable them to make

²³ *Supra*, notes 15, 16 and 17.

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

informed choices; (2) to enable dairy producers and substitute producers across Canada to provide accurate information on their goods.

63. The purposes and effects of the measure do not operate to create an obstacle to the trade of substitutes in Canada within the meaning of Article 403. The measure is fair, equitable, proportionate and balanced because it merely makes clear to everyone how substitutes are to be identified so that consumers are not misled.²⁴ Such a measure is to ensure honesty in selling and honesty in selling measures are admitted by the Parties.²⁵
64. The labelling rules for substitutes regularize trade and do not constitute an obstacle to trade any more than standards in the area of the transportation of perishable goods or merchandise because, in order to promote honesty in selling, it cannot be permitted to use a false or misleading designation with respect to an essential feature of a good if the designation is such as to mislead consumers.
65. For the foregoing reasons, the Appellate Panel must determine that the Panel erred in law and/or refused to exercise its jurisdiction when it determined that section 4.1(1) of the FPA contravenes Article 403 of the

²⁴ A document titled "*Understanding the Codex Alimentarius*" states at page 1 that "[t]he highest priority of the Codex Alimentarius Commission, as stated in Article 1 of its statutes, is to protect the health of consumers and ensure fair practices in the food trade," <http://www.fao.org/docrep/008/y7867e/y7867e07.htm> (consulted May 30, 2014). (Appendix 13).

²⁵ Parties to the AIT have demonstrated the importance of consumer protection because they devoted the entire Chapter Eight of the AIT to that goal. The chapter is titled "Consumer-Related Measures and Standards." Article 810 defines "consumer-related measures and standards" as measures and standards that are intended, among other things, to protect the economic interests of consumers, which are varied, including the prevention of unfair trade practices.

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

AIT and it must rule that section 4.1(1) of the FPA does not contravene Article 403 of the AIT.

4.2 The Panel erred in law and/or refused to exercise its jurisdiction when it determined that section 4.1(1) of the FPA contravenes Article 905 of the AIT

66. The Panel erred in law when it stated in its findings that section 4.1(1) of the FPA is contrary to Québec's commitments under Article 905 for two reasons: (1) it failed to provide in its report its analysis and its reasons for arriving at that finding; (2) it incorrectly applied the burden of proof rule found in paragraph 10 of Annex 1813 of the AIT.
67. The Panel did not provide in its report the reasons for which section 4.1(1) of the FPA contravenes Article 905, as required by Article 1706(3)(b) of the AIT.
68. In addition, for the Panel to assert in its findings that section 4.1(1) of the FPA is contrary to Québec's commitments under Article 905, Saskatchewan had to, at the outset, demonstrate, under paragraph 10 of Annex 1813, that section 4.1(1) is inconsistent with Article 905. Paragraph 10 of Annex 1813 of the AIT reads as follows:

Annex 1813

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.

69. Article 905 is titled "Right to Establish Technical Measures." It gives a Party a right to adopt a technical measure and it outlines the terms and conditions for exercising that right, whereby obligations inure to the

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

Party that adopts or maintains such a measure. Consequently, it is neither an exemption nor an exception that would result in a reversal of the burden of proof. The customary burden of proof rule applies, and the burden lies on the Party asserting that a measure of another Party is inconsistent with Article 905.

70. In order to discharge its burden of proof, Saskatchewan had to provide sufficient and convincing proof demonstrating, on the balance of probabilities, a contravention of Article 905. Paragraph 10 of Annex 1813 is clear in that regard because it states that a Party asserting that a measure is inconsistent with the AIT has the burden of establishing that inconsistency.

71. Consequently, Saskatchewan had not merely to allege that the measure cannot be justified under Article 905;²⁶ Saskatchewan had to demonstrate, with reasons, that Québec did not comply with that article. However, Saskatchewan provided no proof to the effect that Québec did not comply with Article 905 and it is now too late to do so.

72. For the above reasons, the determinations and findings to the effect that section 4.1(1) of the FPA contravenes Articles 403 and 905 of the AIT are errors of law and must be rescinded.

5. The Panel erred in law in its application of Article 404 of the AIT

73. The Panel erred in law and/or refused to exercise its jurisdiction in its analysis and interpretation of Article 404 of the AIT by failing to provide its position on Article 404(a) before providing its position on

²⁶ Saskatchewan's written submission of August 8, 2013, at paragraphs 87 and 117, where Saskatchewan simply alleges that Québec's measures cannot be justified under Article 905.

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

Article 404(c) and Article 905(2) and (3) of the AIT. The Panel's failure to do so constitutes an error of law and/or a refusal to exercise its jurisdiction which affected its entire analysis and findings as to Articles 404(c) and 905.

74. According to the rules of interpretation, the interpretation of a provision must be made according to a textual and contextual analysis to find a meaning that is harmonious with the text as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process, taking for granted that the words faithfully reflect the intention of the parties. In addition, a contract interpreter must interpret each clause in light of the others so that each is given the meaning that is derived from the contract as a whole and that gives it some effect rather than one that gives it no effect.²⁷
75. Internationally, the rules of interpretation are likewise. According to the Appellate Body, a treaty interpreter must give meaning and effect to all the terms of a treaty and is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.²⁸ An interpreter has the duty to read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.²⁹ A panel does not fulfill its terms of reference if it does not make an objective assessment of the matter before it and if it decides not to

²⁷ See rules of interpretation at paragraphs 18, 19 and 20 of this Submission.²⁸ See *United States - Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, AB-1996-1, WT/DS2/AB/R, 29 April 1996, page 23. (Appendix 14).

²⁸ See *United States - Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, AB-1996-1, WT/DS2/AB/R, 29 April 1996, page 23. (Appendix 14).

²⁹ *Argentina – Safeguard Measures on Imports of Footwear*, Appellate Body Report, AB-1999-7, WT/DS121/AB/R, 14 December 1999, para. 81. (Appendix 15).

Deleted: ¶

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

exercise its jurisdiction and to abstain from making any finding on the matter before it.³⁰

76. The Panel erred in law and/or refused to exercise its jurisdiction when it ruled, at page 25 of its report, that it is not necessary to determine whether Québec's measure might be justified as a consumer protection measure for the purposes of Article 404(a) of the AIT on the grounds, in the Panel's view, that Québec had not discharged the burden incumbent upon it under Article 404(c), i.e. to demonstrate that the measure was not more trade restrictive than necessary to achieve that legitimate objective.

77. The Panel further erred in law and/or refused to exercise its jurisdiction when it found, at paragraph 7(e) on page 26 of its report, that:

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).

78. The Panel erred in law and/or refused to exercise its jurisdiction by refusing to determine, in accordance with Article 404(a), whether the purpose of section 4.1(1) of the FPA is to achieve a legitimate objective before it determined whether section 4.1(1) is not more trade restrictive than necessary to achieve "that" legitimate objective.

79. Paragraphs (a) and (c) of Article 404 read as follows:

³⁰ *Supra*, note 20.

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) ...
- (c) the measure is not more trade restrictive than necessary to achieve that legitimate objective; and
- (d) ...

80. The terms of this article are clear and unequivocal: a Party that wishes to establish that a measure inconsistent with Article 401, 402 or 403 is still permissible under the AIT must first demonstrate that the purpose of the measure is to achieve a legitimate objective and, subsequently, that the measure is not more trade restrictive than necessary to achieve "that" legitimate objective, i.e. the legitimate objective determined in the first place.

81. A Party must proceed by way of a three-step process to demonstrate that the condition set forth in Article 404(c) is met. Those steps are as follows:

- Step #1: It must identify the measure at issue;
- Step #2: It must establish, in accordance with Article 404(a), that the purpose of the measure is to achieve a specific legitimate objective;
- Step #3: It must establish that the measure is not more trade restrictive than necessary to achieve "that" legitimate objective, i.e. the specific legitimate objective determined in Step #2.

82. The Panel had to follow the same steps to determine whether a Party had demonstrated that the condition set forth in Article 404(c) is met, but it failed to do so.
83. The Panel erred in law and/or refused to exercise its jurisdiction when it failed to carry out an objective analysis of Article 404(a) and refrained from making any finding on the matter as to whether the purpose of section 4.1(1) of the FPA is to achieve a legitimate objective.
84. The Panel decided to interpret Article 404(c) as if the word “that” in the expression “that legitimate objective” was not there. It interpreted Article 404(c) as if it were an abstract provision. However, the impact of a measure in terms of trade restrictiveness can be assessed only in the light of the particular legitimate objective that is sought in each case.
85. If the Panel had determined that the purpose of section 4.1(1) is to achieve a legitimate objective, its determinations and findings would have been different. Its analysis of Article 404(c) would have taken into account the fact that section 4.1(1) is based on a relevant international standard and that such a measure must be analyzed in detail and its purposes and effects must be taken into consideration before ruling that the measure is more trade restrictive than necessary to achieve the legitimate objective of protecting consumers.
86. The Appellate Panel must determine that this error in law and/or this refusal to exercise its jurisdiction in respect of the application of Article 404(a) and (c) of the AIT have affected the Panel's entire analysis and findings with regard to Articles 404(c) and 905 of the AIT.

6. The Panel erred in law in the application of Article 905 of the AIT

6.1 The Panel erred in law in the application of Article 905(1) of the AIT

87. The Panel erred in law and did not provide its reasoning for determining, at page 23 of its report, that it did not read anywhere in Article 905(1) anything to suggest the exclusion of the application of the general rules found in Chapter Four to a technical measure.
88. A correct understanding of Article 905(1) of the AIT is that this article, when read with the rules set forth in Chapter Four of the AIT, allows a Party to adopt or maintain a technical measure, which may be based on a relevant international standard, and that it allows the Party to establish the level of protection that the Party deems appropriate to achieve a legitimate objective. By so doing, it is understood that Chapter Four continues to apply to such a measure.

6.2 The Panel erred in law when it asserted that paragraphs 905(2), (3) and (4) of the AIT apply supplementary disciplines on the use of the legitimate objectives exception set out in Article 404 of the AIT

89. The Panel erred in law, at page 23 of its report, when it asserted that the provisions of paragraphs 905(2), (3) and (4) of the AIT apply supplementary disciplines on the use of the legitimate objectives exception set out in Article 404 of the AIT for the following reasons:
- a. nothing in Article 404 or Article 905 states that Article 905 adds supplementary disciplines to Article 404;

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

b. the burden of proving that Québec has not met the obligations set forth in Article 905 rested on Saskatchewan.

90. The Panel added disciplines to Article 404 that can be found neither in Article 404, nor in Article 905, nor elsewhere. It did not have the right to do so. In that regard, the rules of interpretation of contracts state that clauses of a contract cover only what it appears that the parties intended to include.³¹ The rules of interpretation of treaties are likewise. The Appellate Body has thus held that the legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself, that the principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended³² and that "[t]he fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used."³³

91. In addition, the burden of proving a contravention of Article 905 rests on the Party alleging the contravention, i.e. Saskatchewan, under paragraph 10 of Annex 1813 of the AIT.³⁴

92. Whereas Article 905 of the AIT does not add disciplines to Article 404 of the AIT and Saskatchewan has not provided any proof that Québec is in contravention of Article 905, the burden of proof has not been reversed

³¹ See the rules of interpretation at paragraph 19 of this Submission.

³² *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Appellate Body Report, AB-1997-5, WT/DS50/AB/R, 19 December 1997, para. 45. (Appendix 16).

³³ *EC Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, AB-1997-4, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, para. 181. (Appendix 17).

³⁴ *Supra*, see paragraphs 68 to 71 of this Submission concerning burden of proof.

and Québec is not required to demonstrate that it complies with Article 905 of the AIT.

6.3 The Panel erred in law in the application of Article 905(2) of the AIT

93. The Panel erred in law in the application of Article 905(2) of the AIT, at page 25 of its report, when it asserted that:
- a. Québec had failed to demonstrate, under Article 905(2), that section 4.1(1) of the FPA is not more trade restrictive than necessary to achieve that legitimate objective;
 - b. Québec 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 and the risk if the legitimate objective is not achieved.
94. The Panel erred in law for two reasons:
- (1) it did not determine the legitimate objective that the measure sought to achieve before determining that Québec had not demonstrated that the measure was more trade restrictive than necessary to achieve “that” particular legitimate objective;
 - (2) it incorrectly applied the rule of burden of proof, which rested on Saskatchewan, not on Québec.

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

95. Regardless of the issue of burden of proof, which rests on Saskatchewan, the Panel determined that the measure was not more trade restrictive than necessary to achieve a legitimate objective without first determining the legitimate objective in question. In so doing, it erred in law.
96. Prior determination of the legitimate objective being sought is essential for determining if the measure is not more trade restrictive than necessary to achieve a legitimate objective. Without that prior determination, the Panel is unable to determine whether the measure is or is not more trade restrictive than necessary to achieve a legitimate objective. Indeed, the trade restrictiveness must be assessed on the basis of the legitimate objective of the measure, not abstractly.
97. Furthermore, the burden of proving a contravention of Article 905(2) of the AIT rests on Saskatchewan pursuant to paragraph 10 of Annex 1813 of the AIT.³⁵ Saskatchewan must bring evidence that Québec did not consider the consequences that would have to be dealt with if the legitimate objective was not achieved and that it did not ensure that there was a proportionality between the trade restrictiveness of the technical measures and the consequences in question. Saskatchewan did not provide the Panel with proof to that effect and it is now too late to do so. The burden of proof has not been reversed and Québec was not required to demonstrate that it complied with Article 905(2) of the AIT.
98. The Panel further erred in law, at page 24 of its report, when it asserted that it “finds no support in Article 905(2) for the contention that the mere

³⁵ *Supra*, see paragraphs 68 to 71 of this Submission concerning burden of proof.

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 Intervenor to provide 'proof to the contrary'."

99. The Panel erred in law because Article 905(2) adds no disciplines to Article 404 and because the burden of proving a contravention of Article 905(2) rested on Saskatchewan, not on Québec, under paragraph 10 of Annex 1813 of the AIT.³⁶

6.4 The Panel erred in law in the application of Article 905(3) of the AIT

100. The Panel erred in law in the application of Article 905(3) of the AIT, at page 25 of its report, when it asserted that:

- a. Québec had failed to show that the measure it maintained to achieve a legitimate objective does not arbitrarily or unjustifiably discriminate between the Parties, including between that Party and the other Parties, where identical or similar conditions prevail;
- b. 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."

³⁶ *Supra*, see paragraphs 68 to 71 of this Submission concerning burden of proof.

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

101. The Panel erred in law for two reasons:

- (1) it failed to determine the legitimate objective that the measure sought to achieve before determining that Québec had not shown that the measure it maintained to achieve a legitimate objective did not arbitrarily or unjustifiably discriminate;
- (2) it incorrectly applied the rule of burden of proof, which rested on Saskatchewan, not on Québec.

102. Regardless of the burden of proof, which rested on Saskatchewan, the Panel erred in law when it failed to determine the legitimate objective sought by Québec before determining that Québec had not shown that the measure it maintained to achieve a legitimate objective does not arbitrarily or unjustifiably discriminate.

103. Prior determination of the legitimate objective being sought is essential for determining that a measure that seeks to achieve a legitimate objective does not arbitrarily or unjustifiably discriminate. Without that prior determination, the Panel is unable to determine whether the measure does or does not arbitrarily or unjustifiably discriminate. Indeed, the arbitrary or unjustifiable character of the discrimination must be analyzed on the basis of the legitimate objective of the measure in question, not abstractly.

104. Furthermore, the burden of proving a contravention of Article 905(3) rests on Saskatchewan pursuant to paragraph 10 of Annex 1813 of the AIT.³⁷ Saskatchewan must provide proof that Québec did not ensure

³⁷ *Supra*, see paragraphs 68 to 71 of this Submission concerning burden of proof.

that the technical measures adopted or maintained to achieve a legitimate objective did not arbitrarily or unjustifiably discriminate between the Parties, including between that Party and the other Parties, where identical or similar conditions prevail. Saskatchewan did not provide the Panel with proof to that effect and it is now too late to do so.

7. The Panel acted beyond its jurisdiction by recommending that Québec refrain from enforcing its measures

105. The Panel acted beyond its jurisdiction by accompanying its findings with a recommendation to the effect that Québec should refrain from enforcing the measures determined to be non-compliant until they are repealed or amended because it does not have the jurisdiction needed to impose or recommend the non-enforcement of a measure established by a Party.

106. A Panel's jurisdiction is limited to a review of the compliance of an actual or proposed measure with the AIT. It has jurisdiction to determine whether a measure is compliant with the AIT, but it does not have jurisdiction to recommend that a Party refrain from enforcing its laws and regulations and from new prosecutions.

107. Only a court of law constitutionally has the power to declare a law invalid or inoperative. A Panel does not have that jurisdiction. Moreover, in Canadian constitutional law, Parties to the AIT do not have prerogatives allowing them to rule that a law will not be enforced:

[Translation]

Legislative supremacy allows Parliament to abolish, reduce or relativize prerogatives, whatever their nature. Indeed, the most

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

fundamental laws of British constitutional history, including the *Bill of Rights, 1689* and the *Act of Settlement, 1700*, were specifically intended to limit royal prerogatives: consequently, neither the Crown nor Government may take justice into their own hands nor intervene in the normal course of justice, waive compliance with laws or impose a tax without the consent of Parliament.”³⁸ (underlining ours)

108. Finally, such recommendation must be rescinded because it may, under Articles 1707 and 1707.1 of the AIT, be taken into account by a Compliance Panel in its Compliance Report on the Complaint Recipient in respect of the matters addressed in the Panel's report and in determining the amount of the monetary penalty.

8. Alternatively, if the Appellate Panel were to determine that section 4.1(1) of the FPA is inconsistent with Article 403 of the AIT, it should rule that this measure is still permissible under Article 404 of the AIT

109. Alternatively, if the Appellate Panel were to determine that section 4.1(1) of the FPA is inconsistent with Article 403 of the AIT, it should rule that this measure is still permissible under Article 404 of the AIT because it meets each and every one of the requirements set forth in Article 404.

110. Québec has shown in its main submission,³⁹ its supplementary written submission⁴⁰ and its oral submission⁴¹ before the Panel that the

³⁸ Henri Brun, Guy Tremblay, Eugénie Brouillet, *Droit constitutionnel*, 5^e édition, Éditions Yvon Blais, Cowansville, 2008, p. 714. (Appendix 18).

³⁹ Québec's Submission, September 23, 2013, specifically at paragraphs 88 to 125.

⁴⁰ Québec's Supplementary Written Submission, December 19, 2013, specifically at paragraphs 35 to 65.

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

purpose of section 4.1(1) of the FPA is to achieve a legitimate objective, i.e. to protect consumers, and that it satisfies all the requirements set forth in Article 404 of the AIT. It reiterates here all the arguments that it put forth then and adds the following.

111. The measure in no way impairs the access of substitutes of Saskatchewan that are authorized under the FPA and that comply with the labelling rules set out in section 4.1(1) of the FPA. These substitutes can be sold in Québec.
112. When a measure is substantially similar to a relevant international standard, a Panel should analyze that measure in detail and consider its purposes and effects before ruling that the measure is more trade restrictive than necessary to achieve a legitimate objective whereas it enjoys the presumption internationally of not creating an unnecessary obstacle to trade.
113. In the present case, if the measure is trade restrictive, which Québec disputes, then the measure is not more trade restrictive than necessary to achieve a legitimate objective within the meaning of Article 404(c). It is fair, equitable, proportionate and balanced because it merely makes clear to everyone how substitutes are to be identified so that consumers are not misled. Such a measure is to ensure honesty in selling.

⁴¹ AIT PANEL HEARING, *Saskatchewan v. Québec re: Edible Oil Products, Dairy Blends and Dairy Analogues*, specifically pages 225 to 249.

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

114. In *Ontario – Dairy Analogues II*,⁴² Alberta and British Columbia suggested in their oral arguments that labeling was an appropriate means for avoiding confusion among consumers.

The representatives for Alberta expressed themselves as follows:

- At page 32: “The simple answer is labelling. Everybody can read.... Products have to be labelled in any event. That is going to take care of the entire question of consumer misinformation or consumer confusion.”
- At page 35: “Labelling requirements don’t impair unduly access.”
- At page 47: “... labelling would be more than adequate.... Ontario could ... institute a labelling requirement if it felt necessary, to prevent consumer deception and leave it to the marketplace to determine the eventual success of any product.”
- At pages 48 and 49: “Even if the panel would agree with Ontario that there are deficiencies with the federal scheme, the Ontario could simply correct those deficiencies through its own labelling scheme.”

The representative for British Columbia, after saying at page 57: “What I would like to do is focus on subparagraph C,” expressed himself as follows at page 60 “... Ontario fails to provide any evidence whatsoever that this alleged issue of increased consumer confusion cannot be adequately addressed through labelling.”

⁴² See *Edible Oil Products Dispute*, Panel Hearing, Toronto, Ontario, Thursday, July 22, 2010. (Appendix 19).

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

115. Finally, it has been demonstrated in this Submission that the Panel erred in law when it ruled that section 4.1(1) of the FPA was contrary to Québec's commitments under Article 905 of the AIT and could not be justified under Articles 905(2) and (3) of the AIT, and that those errors of law were due to the fact that the Panel incorrectly applied the burden of proof, which rested on Saskatchewan pursuant to paragraph 10 of Annex 1813 of the AIT, and that it added obligations to Article 404 that cannot be found anywhere there. Nonetheless, if it were to be otherwise section 4.1(1) of the FPA would still be compliant because it is consistent with Article 905.

116. In conclusion, the regulations on the labelling of dairy product substitutes, if not compliant with Article 403 of the AIT, which Québec contests, are permissible under Article 404 of the AIT.

PART II ALLOCATION OF OPERATIONAL COSTS

117. The Appellate Panel should consider, when allocating operational costs, the serious grounds of appeal raised by Québec, its conduct within the framework of the appeal proceedings and the fact that the appeal is in no way frivolous or unfounded.

118. Québec asks the Appellate Panel to adjudicate operational costs equally between the Appellant and the Respondent in accordance with Article 1706.1(4)(b) of the AIT and paragraph 47.4 of the *Panel, Compliance Panel and Appellate Panel Rules of Procedure*.

PART III CONCLUSION

119. For the reasons set forth in this Submission, Québec asks the Appellate Panel to allow this appeal and to rescind the Panel's reasoning, analyses, interpretations and findings on the basis that it erred in law and/or acted beyond or refused to exercise its jurisdiction and, more specifically, but without restricting the generality of the foregoing:

- (a) to rescind the interpretation made by the Panel with regard to the scope and coverage of Chapter Nine of the AIT to the effect that Chapter Nine includes all food and agricultural measures, and to replace it by stating that Chapter Nine of the AIT applies only to technical measures adopted or maintained by a Party in respect of the internal trade of agricultural and food goods;
- (b) to rescind the broad interpretation given by the Panel to Article 402 of the AIT in part 5.3.2 of its report, and to replace it by stating that Article 402 of the AIT must be interpreted as referring solely to transit;
- (c) to rescind the finding at paragraph 7(c) of the Panel's report to the effect that section 4.1(1) of the FPA is contrary to Québec's commitments under Articles 403 and 905 of the AIT;
- (d) to rescind the finding at paragraph 7(e) of the Panel's report to the effect that "[w]hile 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);"

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

- (e) to rescind the finding at paragraph 7(g) of the Panel's report to the effect that section 4.1(1) of the FPA constitutes an ongoing impediment to internal trade and has caused injury;
- (f) to replace the findings at paragraphs 7(c), (e) and (g) of the Panel's report by a finding to the effect that section 4.1(1) of the FPA does not contravene the AIT;
- (g) alternatively, if the Appellate Panel were to confirm the Panel's finding whereby section 4.1(1) of the FPA contravenes Article 403 of the AIT or any other provision, to state and find that section 4.1(1) of the FPA is still permissible under Article 404 of the AIT;
- (h) alternatively, if the Appellate Panel determines that Article 905 adds disciplines to Article 404, which Québec disputes, to state that section 4.1(1) of the FPA also complies with Article 905 of the AIT;
- (i) to state and find that the Panel acted beyond its jurisdiction when it recommended at paragraph 8(b) of its report "[t]hat 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;"
- (j) to rescind the recommendation at paragraph 8(b) of the Panel's report;
- (k) to divide the operational costs equally between the Parties to this dispute.

QUÉBEC'S APPEAL SUBMISSION CONCERNING DAIRY PRODUCT
SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

All of which is respectfully submitted this 13th of June, 2014.

Raymond Tremblay, Advocate
Québec Ministry of Justice

Jean-François Lord, Advocate
Québec Ministry of Justice

Marie-Andrée Marquis
Internal Trade Representative
Trade Policy Division
Québec Ministry of Economy,
Innovation and Exports