Report of Article 1702(2) Summary Panel Regarding the Pre-Existing Dispute Concerning Ontario's Measures Governing Dairy Analogs and Dairy Blends

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DEFINITIONS

Agreement	Agreement on Internal Trade
CIT	Committee on Internal Trade
EOPA	Edible Oil Products Act of Ontario
FPTAFIC	Federal/Provincial/Territorial Agri-Food Inspection Committee
Regulations	Regulation 753, as amended by Regulations 163/04 and 443/04, and Regulation 761, as amended by Regulation 444/04, of the Ontario *Milk Act*
2004 Panel	Article 1704 Panel Concerning the Dispute Between Alberta/British Columbia and Ontario Regarding Ontario's Measures Governing Dairy Analogs and Dairy Blends
282	Regulation 282 of the *Edible Oil Products Act*

REPORT OF ARTICLE 1702(2) SUMMARY PANEL REGARDING THE PRE-EXISTING DISPUTE CONCERNING ONTARIO'S MEASURES GOVERNING DAIRY ANALOGS AND DAIRY BLENDS

1. INTRODUCTION

In 2004, a Panel Report was issued concerning a complaint made by Alberta and British Columbia against Ontario[1]. The subject of the report was Ontario's measures governing Dairy Analogs and Dairy Blends. Ontario banned or restricted the sale and manufacture of various products that resemble or imitate products made out of milk or milk ingredients. The 2004 Panel found that the Ontario statute containing these measures, the *Edible Oil Products Act* (the "EOPA"), was not compliant with the Agreement on Internal Trade (the "Agreement"). The 2004 Panel found that the measures:

- discriminated contrary to Article 401; Ontario's dairy products were a "like product" and Ontario treated them better;

- interfered with the right of entry and exit, contrary to Article 402; EOPA restricted or prevented the movement of goods and related services across its boundary;

- created an obstacle to trade, contrary to Article 403.

The 2004 Panel found that these provisions were not justified by Article 404, the "legitimate objectives" section, and that in various ways Ontario had not complied with transparency requirements under Articles 406 and 907 of the Agreement. Under "recommendations", the 2004 Panel stated that:

- Ontario should proceed with its "scheduled repeal" of the EOPA;

- before adopting any measures subject to the Agreement, the respondent and all parties to the Agreement should take careful note of its findings with respect to transparency requirements contained in Articles 406 and 907.

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[1] *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.

After the 2004 Panel Report was issued, Ontario repealed EOPA – but around the same time enacted amendments[2] to two regulations under the *Milk Act*[3]: Regulation 753, *Grades, Standards, Designations, Classes, Packing and Marking*, and Regulation 761, *Milk and Milk Products* (the "Regulations").

In 2009, the dispute resolution procedures in the Agreement were strengthened by the Tenth Protocol of Amendment. The new regime, which included financial penalties for non-compliance, would apply to disputes on a prospective basis. The Parties to the Agreement recognized, however, that there were still disputes which had given rise to panel reports under the earlier regime and which had remained unresolved. The Parties created a Summary Panel process to address, on an expedited basis, whether measures reviewed by an earlier panel are or would be incompatible with the Agreement. If a Summary Panel finds that they are, it can issue its own fresh findings and recommendations. The new and strengthened dispute settlement regime then applies.

Alberta, supported by British Columbia, Saskatchewan and Manitoba as Intervenors, argues that this Summary Panel has jurisdiction to address Ontario's Regulations. It says that these are not substantively new measures; rather, they are substantially equivalent to measures found non-compliant by the 2004 Panel, and they remain non-compliant. Ontario concedes that in enacting the Regulations, it did not comply with the transparency requirements under Articles 406 and 907. Ontario argues that the Regulations are new measures, however, not replacement ones of substantially equivalent effect, and that in any event they are not inconsistent with the Agreement disciplines, or if they are, are justified by legitimate objectives.

The Summary Panel, for the reasons explained below, agrees with Alberta. The Regulations are in substance the continuation of measures found to be incompatible by the 2004 Panel. The Summary Panel therefore recommends that Ontario bring itself into compliance with the Agreement in respect of the products at issue in this case by February 1, 2011.

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2 Ontario Regulations 163/04 and 443/04 amending Regulation 753, and Ontario Regulation 444/04 amending Regulation 761.

3 R.S.O. 1990, c. M.12.

2. SUMMARY OF THE COMPLAINT PROCESS

On March 30, 2010 Alberta requested the establishment of a Summary Panel. The Disputing Parties exchanged submissions in accordance with the timelines set out in the Agreement[4].

Under Article 1703, any Party that has a substantial interest in the matter in dispute is entitled to join as an Intervenor; British Columbia, Saskatchewan and Manitoba provided the required notice of intent to join the panel proceedings and filed written submissions in support of the Complaining Party's position.

As Disputing Parties, Alberta and Ontario attended the hearing and made oral arguments. British Columbia attended and presented its oral argument; Saskatchewan attended the hearing but made no argument, while Manitoba did not attend the hearing. The Intervenors supported and supplemented the submissions of Alberta.

Under Annex 1702 (4), the Summary Panel in its report shall include the following:

(a) findings of fact;

(b) a determination, with reasons, as to whether the measure in question is or would be inconsistent with the Agreement;

(c) if an affirmative determination is made in (b), a determination, with reasons, as to whether the measure has impaired or would impair internal trade and has caused or would cause injury;

(d) recommendations, if requested by a Disputing Party, to assist in resolving the dispute; and

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[4] On June 1, 2010, Ontario requested a two month extension of time to prepare its response to Alberta's submission, based among other things on the complexity and importance of the matter and its contention that its regulations were new, and not the subject of the 2004 Panel Report. The Summary Panel in its written procedural ruling found that while extensions can be granted, they should not be issued casually or routinely. The Summary Panel noted that the framers of the Agreement had chosen the timelines, that disputes generally consider matters of some complexity and importance, and concluded that it was not convinced that an extension was necessary. Alberta had advised Ontario for many years of its concern that the Regulations were not compliant, and the request for a Summary Panel could not have come as a surprise. The Summary Panel's procedural ruling on Ontario's request is found at Appendix A of this Report.

(e) a determination as to apportionment of Operational Costs in accordance with Rules 54 to 57 of Annex 1705(1).

3. THE COMPLAINT

3.1 Position of the Complainant

On January 1, 2005, Ontario repealed the EOPA which regulated Dairy Blends and Dairy Analogs and was found by the 2004 Panel to be inconsistent with the Agreement. The Complainant submits that Ontario's repeal of the EOPA resolved the dispute regarding Dairy Analogs but that the dispute regarding Dairy Blends remains unresolved because on the same day as the repeal, Ontario re-regulated Dairy Blends by enacting amendments to Regulations 753 and 761.

The Complainant submits that the Regulations are measures that were a subject of the Pre-existing Dispute within the meaning of Article 1702 of the Agreement. The 2004 Panel Report described the scope of the dispute as "access to the Ontario market for certain vegetable and vegetable oil seed food products"[5]. The 2004 Panel was made aware that potential Regulations to the *Milk Act* could be made and were being contemplated to replace the provisions of the EOPA and to limit the sale or production of Dairy Analogs and Dairy Blends in Ontario. The 2004 Panel did not make a specific recommendation in this regard because it was assured that Ontario did not intend to pursue this course of action and because the text of any proposed measure was not before the 2004 Panel. The 2004 Panel did however make a specific finding that "Any replacement measure that would have the same effect as section 3 and the licensing requirements of the EOPA and that would not be permissible under Article 404 as necessary to achieve a legitimate objective (or that was otherwise permissible under the Agreement) would be likewise inconsistent with the Agreement."[6]

Essentially, the Regulations make the following classes of products illegal to be manufactured or sold in Ontario:

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5 2004 Panel Report, p. 2.

6 2004 Panel Report, pp. 29-30.

- Dairy Blends – Fluids – (i) fluid milk products, such as milk, cream or whipping cream containing any vegetable oil or fats; and (ii) milk beverages that contain 51% or more (by volume) of milk and contain vegetable oil or fats[7]; and

- Dairy Blends – Spreads – any product that combines vegetable oil ingredients with less than 50% milk fat that is a substitute for butter[8].

The Complainant submits that the Regulations prohibit, with very limited exceptions, the manufacture and sale of liquid Dairy Blends and discriminately regulate Dairy Spreads. As such, the Regulations are non-compliant with Articles 401 (Reciprocal Non-Discrimination), 402 (Right of Entry and Exit), 403 (No Obstacles) and 905 (Non-Sanitary and Non-Phytosanitary Measures) and they are not saved by Article 404 (Legitimate Objectives). The Complainant contends that the purpose of regulating Dairy Blends is not related to health or protection of consumers because the national food regulations system is effective in protecting consumers from misrepresentation and fraud by vegetable oil dairy alternatives.

The Complainant further argues that Ontario failed to comply with the transparency requirements of Articles 406(2) and 907 by failing to provide advance notice and a copy of the proposed measure to the Complainant and the Intervenors prior to enacting the Regulations. On December 22, 2004, the Complainant received an email from Ontario advising that the EOPA would be repealed and that the Ontario Farm Products Marketing Commission was "considering regulatory amendments under the Ontario Milk Act to address milk products containing some edible oil-based inputs"[9]. No further notice was provided by Ontario prior to the enactment of the amendments of the Regulations on January 1, 2005. The Complainant contends that the Respondent's violation of the transparency requirements of the Agreement is even more egregious in light of the 2004 Panel's findings on this issue.

The Complainant argues that the 2004 Panel found injury in the loss of opportunity: (1) for packagers and manufacturers of Dairy Blends to sell their products in Ontario, and (2) for oilseed producers and processors to sell their products to manufacturers of Dairy Blends across Canada

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7 Reg. 753, sections 3, 4, 5, 18.

8 Reg. 753, sections 4(1)(4), 4(2), 13.1, 18.

9 Alberta's Submission, Appendix B, Tab 9.

because of the lack of market in Ontario, and that this denial of opportunity continues under the Regulations.

At the hearing, the Complainant argued that the Respondent's request for a transition period of 18 months to implement the Summary Panel Report should not be granted. Ontario simply needs to repeal the amendments adopted in January 2005 and this requires no more than 60 days, as contemplated in Annex 1702 which allows a disputing Party to request that the Summary Panel reconvene as a Compliance Panel 60 days after the Summary Panel Report. The Complainant added that the transition period requested by Ontario is even longer than the one-year period provided in Article 1707(9) for compliance under the "normal" dispute resolution process.

The Complainant asks the Summary Panel to find that:

(a) the Regulations were a subject of the 2004 Panel Report and are thus properly before this Panel as a Summary Panel pursuant to Article 1702;

(b) the dispute leading to the 2004 Panel Report is unresolved and Ontario has not complied with the Panel Report;

(c) the Regulations are inconsistent with Articles 401, 402 and 403 and are not justified to achieve a legitimate objective as defined by Article 404;

(d) Ontario did not comply with Articles 406(2), 905 and 907 when enacting the Regulations; and

(e) the Regulations have impaired internal trade and caused injury.

The Complainant requests that the Summary Panel recommend that:

(a) Ontario immediately brings itself into compliance with the Agreement with respect to the *Milk Act* and the Regulations;

(b) pending amendment of the *Milk Act* and the Regulations, Ontario cease to enforce the Regulations in respect of Dairy Blends;

(c) Ontario abstains from reintroducing similar non-compliant measures;

(d) Operational Costs be apportioned in their entirety to Ontario.

3.2 Position of the Intervenors

The Intervenors support the Complainant's arguments and requests for findings and recommendations. They argue that the Summary Panel process was designed to provide a remedy for unresolved disputes where responding Parties simply disregard a panel's recommendation that inconsistent measures be eliminated. They state that the integrity and reputation of the Agreement are threatened by Parties who ignore panel reports and therefore urge the Summary Panel to help reverse a growing perception amongst workers, businesses and investors that the Agreement is ineffective because it lacks any effect or enforceability.

The Intervenors stress that pursuant to Annex 1702(3), the onus is on the Complaint Recipient to demonstrate that the measure is not inconsistent with its obligations under the Agreement. They state that Ontario has failed to demonstrate to the Summary Panel that the Regulations comply with its obligations under the Agreement. They emphasize that the ongoing restrictions imposed by Ontario continue to cause injury to their respective producers of Dairy Blends and producers of the crops and vegetable oils which are used to make Dairy Blends.

At the hearing, British Columbia submitted that Ontario has shown that it can regulate Dairy Blends with remarkable speed and therefore should be given no more than 90 days to comply with the Summary Panel report.

4. POSITION OF THE RESPONDENT

The Respondent submits that the Regulations are not the measures that were the subject of a Pre-existing Dispute. The original dispute that was before the 2004 Panel related to the effect of the EOPA and Regulation 282 made thereunder on the distribution and sale of a soya loaf imitation cheese product in Ontario. While the 2004 Panel found it had authority to make findings and recommendations about proposed measures, it also found that "There is currently no such measure or proposed measure to be considered by the Panel"[10]. The Regulations were not actual or proposed measures that were before the 2004 Panel and the Panel Report made no definitive

[10] 2004 Panel Report, p. 36.

finding or recommendation about whether any hypothetical measures would be consistent with Ontario's commitments under the Agreement.

The Respondent submits that for the particular purpose of this summary proceeding, the Summary Panel is limited to addressing only the measure that was the subject of the Pre-existing Dispute. The Regulations are not replacement or substitute measures designed to regulate the manufacture and sale of Dairy Blends in Ontario, as they differ from the EOPA in legislative purpose, design, scope and application. The Regulations are part of a comprehensive scheme for the regulation of milk and milk products and are designed, among other objects, to protect the public interest. As such, the consistency of the Regulations with Ontario's commitments under the Agreement must be approached as a new inquiry and the Regulations must be assessed as new, actual measures.

The Respondent complied with the 2004 Panel's first recommendation by repealing the EOPA, but concedes that it did not fully comply with the recommendation relating to the transparency requirements. However, the Respondent notes that when it notified the other Parties of the prospect of developing new regulations affecting Dairy Blends on December 22, 2004, not one province, including the Complainant and the Intervenors, required additional information or provided comments in response to the late notification.

The Respondent submits that the Regulations do not infringe Article 401 (Reciprocal Non-Discrimination) because all filled milk products and dairy edible oils spreads are treated in a uniform manner under the Regulations, irrespective of the province of origin. Dairy edible oil spreads are subject to the same licensing requirements as butter, the appropriate comparator; filled milk products, which seek to serve as substitute for standardized fluid milk products, are prohibited because they would render the product adulterated under federal legislation.

The Respondent submits that as found in the Quebec Margarine Report, Article 402 (Right of Entry and Exit) is aimed at freedom of transit. The Regulations do not restrict or prevent the movement of goods across Ontario's provincial boundaries and therefore do not breach Article 402.

With respect to Article 403 (No Obstacles), the Respondent concedes that the Regulations pertaining to filled milk products could, in theory, operate to create an obstacle to internal trade. However, the Complainant has failed to provide evidence of actual products available in other provinces that are not able to access the Ontario market to support a conclusion that filled milk products are denied competitive opportunities in Ontario. As for dairy spreads, the Complainant has not shown that the requirements for product labelling, composition and identity, which also apply to standardized butter, have affected competitive opportunities for any one in any manner.

The Respondent submits that the Complainant and the Intervenors have not sufficiently elaborated their complaint with respect to Article 905. The Regulations are sanitary measures adopted pursuant to the food safety and health protection objectives of the *Milk Act*, which cannot be shown to have restricted internal trade in an agricultural or food good.

If the Regulations are found to be inconsistent with Articles 401, 402 or 403 of the Agreement, the Respondent submits that they can be maintained as legitimate objectives under Article 404. The Regulations can be justified under two legitimate objectives recognized in Article 200: consumer protection and the protection of health. The Respondent submits that standards of composition and standards of identity help consumers find and compare milk and milk products at the point-of-sale and that the need for accurate and detailed labelling of pre-packaged dairy products is recognized in other provinces and at the international level. Ontario's assessment of the federal legislation and of its own legislation when the 2004 Panel Report was issued revealed that the legislative scheme did not adequately regulate the manufacture, distribution and sale of filled milk products and blended spreads that resemble or were intended to be used as a butter substitute. Ontario anticipated that the federal government would develop an appropriate framework for Dairy Blends in the near future and as a result, there was an expectation that the Regulations would be interim in nature.

The Respondent argues that the Regulations would not permit dairy edible spreads composed of less than 50 per cent milk fat to be distributed and sold in Ontario to address the risk of consumer confusion with standardized butter or margarine. Since consumers will use dairy edible oil spreads as a substitute for butter, they expect that the product will be predominantly butter in its

composition, and a product that has a lower percentage of milk fat would pose a greater likelihood of deceiving the consumer about the true nature of the product.

The Respondent submits that Regulation 753 prohibits the manufacture and sale of filled milk products in Ontario because existing legislation in Canada is not adequate to assure Ontarians that filled milk products will be made in regulated dairy premises under appropriate standards and are labelled in a fair and transparent manner. Given the compelling legitimate objective of protecting human health and the absence of an appropriate framework for the manufacture and distribution of filled milk products, the Respondent submits that the Regulations are not more trade restrictive than necessary to achieve the legitimate objective.

The Respondent further submits that the Complainant has not demonstrated that an impairment to internal trade or an injury has resulted or could result from the Regulations. The Complainant has offered only one example of a filled milk product that was made available for sale in one or more provinces that would not qualify for sale under the Regulations, and no evidence that this product continues to be offered for sale in Western Canada. The Complainant has offered no example of a dairy spread that is not permitted under the Regulations, and should at a minimum be required to present actual evidence of denial of opportunity, and certainly more relevant and objective information than aggregate farm gate sales data for grain and oil seeds in the Western provinces to substantiate the link between the impugned measures and any loss opportunity.

If the Summary Panel finds that the Regulations breached the Respondent's obligations under the Agreement and cannot be justified under Article 404, the Respondent submits that the remedy sought by the Complainant should not be granted. As there are no proposed measures before the Summary Panel, it would be beyond the scope of the Summary Panel's authority to make a finding or recommendation regarding whether or how the Respondent may choose to develop legislation in the future regarding Dairy Blends.

Further, if the Summary Panel recommends that the Respondent revoke or amend the relevant sections of the Regulations, Ontario would require a period of 18 months from the date of the Summary Panel's final report to develop an appropriate regulatory framework for certain Dairy Blends that is consistent with the Agreement and the legislative object of the *Milk Act*. During the transition period, the Respondent must continue to enforce the Regulations to ensure that

milk and milk products are processed in licensed plants and distributed and sold in accordance with all applicable laws.

With respect to Operational Costs, the Complainant and the Intervenors have provided no supporting rationale to justify that they be apportioned in their entirety to Ontario, which would be an unusual apportionment. The Respondent proposes the following alternate allocation: 33.3% to Alberta, 33.3% to Ontario and 11.1% for each of the Intervenors.

The Respondent adds that it has taken significant steps to address the actual concerns brought forward by amending Regulation 282, by repealing the EOPA and by developing the Regulations which address specific categories of Dairy Blends only. The circumstances of this dispute do not provide any relevant considerations that would justify an assessment of all or a major part of the Operational Costs to Ontario.

The Respondent asks the Summary Panel to make the following findings:

1. No provision in the Regulations was the measure that was the subject of a Pre-Existing Dispute.

2. The Regulations were not actual or proposed measures that were before the 2004 Panel and their contents were not addressed in the two recommendations contained in the 2004 Panel Report to assist in resolving the dispute.

3. Ontario has complied in good faith with the substantive recommendations contained in the 2004 Panel Report and has noted the 2004 Panel Report's findings in modernizing the regulatory framework for dairy, including Dairy Blends.

4. Without the benefit of reviewing specific products affected by the Regulations, no finding can be made about whether or not the Regulations are inconsistent with Ontario's commitments under Articles 401, 402 and 403 of the Agreement.

5. When assessed on a measure-by-measure basis, should any measure in the Regulations be determined to be inconsistent with Ontario's commitments under the Agreement, in particular, Articles 401, 402 and 403, the measure is justified to achieve a legitimate objective as defined by Article 404.

6. The Regulations are not inconsistent with Ontario's commitments under Article 905 of the Agreement.

7. The Regulations have not been shown to impair internal trade and cause injury and there is inadequate evidence to support a finding that they could do so.

8. The Summary Panel is unable to make a specific determination as to whether any hypothetical measures that may be introduced by Ontario in the future would be consistent or inconsistent with Ontario's commitments under the Agreement and any such measures would need to be reviewed in their proper context and assessed specifically against actual products.

The Respondent requests the Summary Panel to make the following recommendation:

> Dismiss the complaint of the Disputing Party and that of the Intervenors and recommend in its report that, to assist in resolving further disputes about Ontario measures that purport to regulate Dairy Analogs or Dairy Blends, Parties to the Agreement should address any disputes about such measures through the normal consultation and complaint process set out in the Agreement.

5. SUMMARY PANEL FINDINGS

5.1 Jurisdiction of the Summary Panel under Article 1702

The "Summary Panel" procedure was added to the Agreement by the Tenth Protocol of Amendment in 2009. This package of amendments was intended to strengthen the dispute resolution procedure on a go-forward basis. It includes new provisions such as authorizing financial penalties in case of non-compliance with a panel report. The Parties to the Agreement adopted the "Summary Panel" procedure as a transitional measure, to deal with situations where a dispute remained over compliance with panel reports issued prior to 2009. Several such disputes had been identified by the ministerial Committee on Internal Trade. At the June 2008

meeting, Alberta contended that the Edible Oils dispute, the subject of the 2004 Panel Report, was among them, and Ontario expressed the view that it had complied with that report[11].

Article 1702 specifically provides that during a "transition period", a Party to the Agreement may request a Summary Panel "to determine whether or not the measure that was the subject of a pre-existing dispute is or would be consistent with this Agreement". A pre-existing dispute is defined as "one for which a panel report has been issued and which remains unresolved" as of the date of the last Party's signature of the Tenth Protocol.

Annex 1702 provides that the Summary Panel will in many respects follow the ordinary dispute resolution under the Tenth Protocol[12]. There are, however, some distinct features to reflect the fact that a dispute has been the subject of earlier submissions by the Parties and report by a panel. The Secretariat provides the Summary Panel with the record of the Pre-Existing-Dispute[13] and that record is admissible in the Summary Panel Proceeding[14]; Annex 1702.3 provides that "In a Summary Panel proceeding, the onus is on the Complaint Recipient to demonstrate the measure is not inconsistent with its obligation under this Agreement."

The provisions just canvassed do not make the evidence or conclusions of an earlier panel report absolutely binding on a Summary Panel. A Complaint Recipient may be able to overcome evidence from the earlier report with newer and more convincing evidence. It may be able to convince the Summary Panel that the earlier panel's interpretation of the Agreement was mistaken, that it erred in application of the law to the facts, or that factual or legal realities have changed since the earlier panel and that they militate in favour of a different conclusion. But the admissibility of the record from the earlier panel, and the placing of the onus on the Complaint Recipient, provides considerable weight to the earlier panel proceedings as a whole.

Before a Summary Panel can apply the distinctive and expedited features of the Summary Panel, all of the conditions for exercising its jurisdiction must be met. Otherwise, the Complaint

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11 Committee on Internal Trade, Record of Decisions, June 10, 2008, Alberta's Submission, Appendix B, Tab 3.

12 See Articles 1702(4) (ordinary procedures for establishing a panel apply) and Annex 1702.5 (except as otherwise provided, the provisions of Chapter Seventeen on government-to-government dispute resolution apply).

13 Annex 1702.1.

14 Annex 1702.2.

Recipient would be put at an unwarranted disadvantage in comparison to the ordinary dispute resolution provisions established under the Tenth Protocol.

With respect to timing, it is unquestioned that Alberta, a party to earlier proceedings, brought its request for a Summary Panel within the Transition Period set out in Article 1702.

Alberta pointed out, in the 2004 complaint, that the terms of reference of a dispute panel included examining whether "the actual or *proposed* measure or *other matter* at issue is or *would* be inconsistent with this Agreement". The 2004 Panel concluded – correctly in our view – that "while there must be some limited scope in what can be filed in a request for panel, once the request is duly filed, a Panel has considerable freedom to make the findings it needs to deal with the issue before it"[15].

The 2004 Panel found that the EOPA was inconsistent with the Agreement and that "any replacement measure that would have the same effect as s. 3 and the licensing requirements of the EOPA and that would not be permissible under Article 404 as necessary to achieve a legitimate objective (or that was otherwise permissible under the Agreement) would be likewise inconsistent with the Agreement"[16]. The 2004 Panel was invited by Alberta to consider the possibility that Ontario, at the request of Dairy Farmers of Ontario, would use the *Milk Act* to limit the sale and distribution of Dairy Analogs and Dairy Blends. The 2004 Panel accepted Ontario's assurance that it did not intend to pursue this course of action. The 2004 Panel noted that it had "no proposed measure before it that is sufficiently elaborated for there to be a proper debate as to whether or not it is consistent with the Agreement. Accordingly, there is no *specific* measure that could be subject to review by the Panel for consistency of compliance."[17] The 2004 Panel added that it would be "advisable for [Ontario] to make it clear that it will not use the *Milk Act* to implement limitations on the sale of Dairy Analogs and Dairy Blends in a manner similar to the limitations imposed by the EOPA."[18]

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15 2004 Panel Report, pp. 28-29.

16 2004 Panel Report, p. 29.

17 *Ibid*.

18 *Id*, p. 32.

Ontario argues that the only recommendations, as opposed to findings, of the 2004 Panel were that:

- Ontario follows through "with the scheduled repeal of the EOPA on January 1, 2005";

- "Ontario and all Parties take careful note of the Panel's findings with respect to the transparency obligations of the Agreement contained in Articles 406 and 407 and that whenever they intended to adopt any measure subject to these Articles they do so in accordance with the detailed transparency requirements provided herein."[19]

The Summary Panel does not agree that a "dispute for which a panel report has been issued and which remains unresolved" within the meaning of Article 1702 is confined in this case to matters for which the 2004 Panel framed its conclusion as a "recommendation" rather than a "finding". The language of Article 1702 contains no such distinction or accompanying limitation. It would be contrary to the objectives of Article 1702 - which include bringing resolution to lingering disputes that have been addressed by a panel - to so confine its operation.

The Summary Panel would in any event disagree with Ontario's construction of the "recommendations" of the 2004 Panel Report. The recommendation to "follow through with the scheduled repeal of the EOPA" was made in the context of the 2004 Panel noting that Ontario had stated that its "scheduled repeal" would not include similar measures under the *Milk Act*[20]. The "scheduled repeal" recommended by the 2004 Panel was a genuine repeal, not the mere shifting of the substance of the measures from one statutory location to another, and in particular, to the *Milk Act*.

The Summary Panel further notes that the 2004 Panel Report had recommended compliance with the transparency requirements of the Agreement, and that Ontario failed to do so. The provisions of Article 907 require that other Parties to the Agreement receive twenty days notice of a

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19 *Id.*, p. 36;

20 2004 Panel Report, p. 29; Letter from the Ontario Minister of Agriculture and Food dated June 30, 2004, Exhibit 15 of Ontario's Submissions to the 2004 Panel.

proposed measure, including its full text. Other Parties have a right to make comments on it. The proposing party must, on request, discuss those comments and take the results of those discussions into account. Instead, Alberta received an email on December 22, 2004 – a time when many officials were unavailable – merely advising that regulatory amendments under the *Milk Act* were being considered[21] and the Regulations came into force ten days later, on January 1, 2005. Ontario concedes it did not comply with Article 907. Its non-compliance with transparency requirements, in the face of both the Agreement and the 2004 Panel Report's express recommendation, is an integral aspect of the unresolved nature of the "dispute for which a panel report was issued". It denied Alberta a better opportunity to appreciate the substance and purpose of the Regulations and to potentially have an influence on their contents.

The Summary Panel further concludes that the contested Regulations are "measures" that were the subject of the Pre-existing Dispute. Ontario does not appear to contest that a Summary Panel does have authority to address measures that can be fairly viewed as "replacement measures". It would be untenable to argue otherwise. The Agreement is concerned with the substance of measures, not only their form. The Agreement's requirements cannot be avoided by altering the packaging of a governmental measure. The term "measure" itself is defined in Article 200 as including "any legislation, regulation, directive, requirement, guideline, program, policy, administrative practice or other procedure". A government cannot escape its disciplines by embodying a barrier to trade in one kind of text (e.g., a policy statement) rather than legislation, or by simply carrying out a practical course of administrative action rather than forthrightly acknowledging a norm in an official pronouncement of some sort. The "mutually agreed principles" of the Agreement include "accessible, timely, credible and effective" dispute settlement and compliance mechanisms; it could not have been contemplated by the framers of Article 1702 that the Summary Panel procedures for resolving lingering disputes had no application to situations where a contested measure was reformatted rather than altered in substance.

Ontario's argument that the impugned measures appear in a different statutory scheme is unpersuasive absent any demonstration that the repositioning is a matter of substance rather than mere legislative geography. As for the scope of the EOPA compared to the Regulations, it is

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[21] Alberta's Submission, Appendix B, Tab 9.

true that the Regulations do not address Dairy Analogs, whereas the EOPA did. But Alberta's complaint before the Summary Panel is in relation to Dairy Blends. Ontario's ongoing restrictions in this respect are substantially equivalent in effect to those found non-compliant by the 2004 Panel:

- The manufacture or sale of Dairy Blends was prohibited by the EOPA. The Regulations contain similar provisions;

- The sale of dairy-oil spreads was banned by the EOPA. Manufacturers in Ontario required a license. The Regulations contain similar provisions.

The Summary Panel accepts that there are some differences in detail between the EOPA and the Regulations. Whether looked at individually or cumulatively, however, no distinctions brought to the Panel's attention by Ontario dispel the Summary Panel's opinion that the Regulations contain a set of bans and restrictions that amount to a re-enactment of some of the measures found to be non-compliant by the 2004 Panel.

The Summary Panel finds that on the facts of this case, all of the conditions for the exercise of jurisdiction by the Summary Panel are met, in particular that the Regulations are substantially equivalent to the EOPA which was the subject of the 2004 Panel Report and constitute a pre-existing dispute within the meaning of 1702.

5.2 Consistency of the Regulations with the Agreement

Various provisions of Regulation 753 designate products that are milk products. The designations cover a range of products including milk, milk beverages, filled milk and dairy edible-oil spreads. Compositional standards for these milk products are established. Section 18 prohibits the production and/or sale of products that do not comply with the Regulation. The effect of the compositional standards and other provisions of the Regulation is that many dairy blends, specifically filled milk, are banned. Similarly, dairy edible-oil spreads that compete with butter and with vegetable oil as the primary fat or oil component are also prohibited.

Regulation 761 contains provisions requiring facilities that produce and sell dairy products to be licensed and to comply with conditions set by the Director, including a requirement that the

holder of a license observes the requirements of the Act and the regulations, which would include Regulation 753. Similarly, distributors are required to be licensed and to comply with the *Milk Act* and the Regulations.

5.2.1 Article 401: Reciprocal Non-Discrimination

The relevant sections of Article 401 read as follows:

> 1. Subject to Article 404, each Party shall accord to goods of any other Party treatment no less favourable than the best treatment it accords to:
>
> (a) its own like, directly competitive or substitutable goods; and
>
> (b) like, directly competitive or substitutable goods of any other Party or non-Party.
>
> 2. Subject to Article 404, each Party shall accord to persons, services and investments of any other Party treatment no less favourable than the best treatment it accords, in like circumstances, to:
>
> (a) its own persons, services and investments; and
>
> (b) persons, services and investments of any other Party or non-Party.[…]
>
> 4. The Parties agree that according identical treatment may not necessarily result in compliance with paragraphs 1, 2 or 3.

Previous panels[22] have held that two factors must be considered with respect to Article 401(1):

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?

With respect to the second criterion, the 2004 Panel found that Dairy Blends are "like" or

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[22] *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.

"directly competitive" goods to dairy products.[23] The Summary Panel agrees.

With respect to the first criterion, by prohibiting filled milk and certain types of spreads from being sold in the province, Ontario fails to accord these goods produced in other provinces the best treatment it provides to dairy products in Ontario.

The Summary Panel finds that provisions of Regulations 753 and 761 respecting Dairy Blends are inconsistent with Article 401 of the Agreement.

5.2.2 Article 402: Right of Entry and Exit

Article 402 states:

> 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.

Previous panels have interpreted Article 402 in different manners. In the Alberta/Quebec Margarine dispute[24], the Panel interpreted the meaning to be transit across Quebec. In the Farmers Cooperative/New Brunswick case[25] and the Nova Scotia/PEI Dairy case[26] Article 402 was interpreted to mean a restriction to importation or a barrier to entry into a province. The 2004 Panel[27] also interpreted Article 402 to mean a barrier to entry into Ontario.

In the Summary Panel's view, Article 402 could apply to any and all of the following situations:

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

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23 2004 Panel Report, p. 18.

24 *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.

25 *Supra*, note 21, pp. 16-17.

26 *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.

27 2004 Panel Report, p. 18.

The Summary Panel agrees with the majority of the other Panels that the meaning of Article 402 includes a restriction on entry of a good into a province.

Regulation 753 prohibits filled milk and many types of spreads from being sold in Ontario. As a result, it bars entry of these products from other provinces into the Ontario market.

Accordingly, the Summary Panel finds that the provisions of Regulations 753 and 761 as they relate to Dairy Blends restrict entry into Ontario and are inconsistent with Article 402 of the Agreement.

5.2.3 Article 403: No Obstacles

Article 403 states:

> 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.

The prohibition on the sale of Dairy Blends, specifically filled milk and certain types of dairy edible-oil spreads, has a direct negative impact on both the sale of existing products that are competitive to dairy products and the development of new products of this nature.

Ontario is the largest market in Canada for consumer products, including dairy products and their direct competitors. By restricting the sale and manufacture of competitive products (i.e. dairy blends) through the Regulations, an obstacle is created not only to the sale of such products manufactured in other provinces, but also to the development of new competitive products in other provinces and in Ontario. With respect to the ban on the manufacture of dairy blends in Ontario, the Regulations create an obstacle to trade in vegetable oils from other provinces that Ontario plants would utilize in their production. The 2004 Panel found that the similar prohibitions in EOPA served as an obstacle to trade.[28]

The Summary Panel finds that the provisions of Regulations 753 that prohibit the production and sale of dairy blends and the licensing requirements of Regulation 761 affecting dairy blends are not consistent with Article 403 of the Agreement.

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[28] 2004 Panel Report, p. 18-19.

5.2.4 Article 404: Legitimate Objectives

Article 404 reads as follows:

> 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.

The definition of a legitimate objective is found in Article 200 as follows:

> **legitimate objective** means any of the following objectives pursued within the territory of a Party:
>
> (a) public security and safety;
>
> (b) public order;
>
> (c) protection of human, animal or plant life or health;
>
> (d) protection of the environment;
>
> (e) consumer protection;
>
> (f) protection of the health, safety and well-being of workers; or
>
> (g) affirmative action programs for disadvantaged groups;

Ontario's position is that, even if the provisions of the Regulations under dispute are inconsistent with the Agreement, they are permissible under Article 404. In particular, it points to (c) protection of human health and (e) consumer protection, as legitimate objectives that are pursued by the Regulations.

Food products, particularly dairy products, are subject to a significant degree of regulation by the federal government and all provinces. These measures address the health safety associated with

food processing, distribution and sale. They also serve to inform and protect consumers through labelling requirements.

In reviewing the submissions and in the presentations at the hearing, the Summary Panel found little to support a claim that the measures under dispute support a legitimate objective.

With respect to protection of human health, the record does not explain the need for a prohibition on dairy blends when dairy products themselves can be produced, distributed and sold lawfully. As pointed out by Alberta, Ontario does not distinctly regulate the mixing of dairy products with other goods in a variety of other contexts, and does not explain why it needs to do so when dairy products are mixed with edible oils.

It is also difficult to understand from the evidence presented how human safety issues arise if the amount of edible oil added forms a certain percentage of a product, but not otherwise. Spreads containing more than 50% oil are prohibited; there is no explanation as to why product safety is suddenly triggered by crossing this threshold. Small amounts of edible oils can be added to milk for flavouring or as an omega 3 supplement; the evidence in the record does not indicate how adding a larger amount of oil would trigger a bona fide health concern.

Ontario's submissions on the health and consumer safety issues do not include expert evidence, scientific or technical literature, or reasoned explanations by regulatory authorities that support the contested prohibitions and restrictions. There is no indication of how health or consumer safety problems have actually arisen in the provinces that have permitted the manufacture and sale of the contested products.

In 2001, Ontario was part of a Federal-Provincial-Territorial Agri-Food Inspection Committee (FPTAIC) that studied Dairy Product Analogs and Regulations. The FPTAIC report states that:

> "The majority of groups contacted support the position expressed by the Working Group, that 'Provinces should deregulate products that imitate or resemble dairy products, whether or not they contain dairy ingredients, and refer to existing federal regulatory processes that address consumer information and fraud issues'.
>
> The use of dairy terminology is adequately addressed in current federal legislation. The Working Group supports a review of the Guide to Food Labelling and Advertising with a view to clarifying the relevant provisions. The Working Group further believes that it is

> difficult to justify prohibiting access by consumers to wholesome food products solely on the basis of potential negative impact on one sector of the economy. Other sectors are likely to benefit and consumers are sure to do so as implementation of the recommendations would remove limits to consumer choice.
>
> Implementation of the recommendations would eliminate inter-provincial trade barriers in these categories of foods. Such barriers have long and often been identified as undesirable."[29]

Ontario argues that the federal regulations are inadequate, and that it has tried unsuccessfully to work with the federal government to improve them, but provides no convincing demonstration in the evidence it submitted that the claimed insufficiency actually exists.

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. When Ontario's measures are incompatible with the open trade provisions of the Agreement, however, it bears the burden of proving that such measures are justifiable on a basis such as human health and consumer protection. That onus would exist as a matter of the ordinary interpretation of the Agreement, quite apart from the special onus on a respondent in a summary panel proceeding.

In its submission to the 2004 Panel, Ontario admitted that the EOPA was non-compliant and did not even attempt to identify an objective recognized by the Agreement that might justify its measures. Neither the record from the panel proceeding in 2004 nor this one substantiates the existence of a recognized objective under the Agreement such as human health or consumer protection.

The contested Regulations in this case were enacted by the Ontario Farm Products Marketing Commission under the authority of the *Milk Act*. The Commission's purposes, under s. 2(a) is to stimulate, increase and improve the producing of milk within Ontario but also, under s. 2(c), to regulate the quality of products. Ontario's evidence before the Summary Panel does not

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[29] *Dairy Product Analogs and Blends: Consultation Report and Recommendations*, February 8, 2001, Attachment 21 to Ontario's Submission.

establish that bona fide and significant concerns about quality were the objective of the Commission in adopting the contested regulations, rather than promoting the economic interests of producers.

Even if Ontario had been able to identify objectives compatible with the Agreement for its measures, such as health or consumer protection, it would have to demonstrate that the measures it adopted do not restrict trade "unduly" and that they are not "more trade restrictive than necessary". In the latter regard, Ontario has not shown that the only measure available to protect human health and consumers are the prohibitions and restrictions contained in the Regulations. It would appear that there are many avenues that could be explored to achieve legitimate objectives in a less trade distorting manner.

Accordingly, the Summary Panel finds that the provisions of Regulations 753 and 761 that prohibit dairy blends or regulate them in a discriminatory manner are inconsistent with Articles 401, 402 and 403 of the Agreement and are not permissible under Article 404 as necessary to achieve a legitimate objective.

5.2.5 Article 406 and Article 907: Transparency

Both Articles 406 and 907 refer to a Party's obligation to inform other Parties prior to adopting certain measures that might affect internal trade. Article 406(2) states:

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

Article 907 is specific to agricultural and food products. It states, in part:

> 1. Further to Article 406 (Transparency), a Party proposing to adopt or amend a measure that may affect trade in an agricultural or food good shall:
>
> (a) at least 20 days prior to the adoption or amendment of the measure, publish a notice of the proposed measure or amendment and provide the Trade Policy Committee and the other Parties with a copy of the notice and the full text of the proposed measure or amendment;

Ontario has conceded that it did not comply with its obligations under Articles 406 and 907 of the Agreement[30]. This lack of notice must be considered not only in the context of Ontario's obligations under the Agreement, but also in light of the specific recommendation of the 2004 Panel with respect to Articles 406 and 907 and its caution concerning replacement measures[31].

The Summary Panel finds that Ontario did not comply with Articles 406 and 907 of the Agreement and the 2004 Panel Report recommendation when it developed the amendments to the Regulations with respect to dairy blends.

6. DETERMINATION OF IMPAIRMENT OF TRADE AND INJURY

Article 4(c) of Annex 1702, on summary panels, requires that if a panel finds a measure to be inconsistent with the agreement, it shall provide a determination, with reasons, as to whether the measure has impaired or would impair internal trade or has caused or would cause injury. The 2004 Panel addressed a similar question.

The Summary Panel agrees with the 2004 Panel, which was mindful of an earlier decision in the 2002 *Farmers Co-operative/New Brunswick* case, that:

- a complainant is not required to prove a particular dollar amount of an injury or its extent;

- the denial of an opportunity to market a product in another province is injury itself.

The 2004 Panel referred to evidence that the potential market for dairy blends in Canada was of the order of a quarter of a billion dollars per year, and with innovation and market education, could grow to five to ten per cent of the market of dairy and vegetable based products.[32]

The Summary Panel concurs with the legal approach of the 2004 Panel and its factual findings at the time in relation to injury.

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30 Ontario Submission, p. 11.

31 2004 Panel Report, pp. 32 and 36.

32 2004 Panel Report, p. 32.

Alberta submitted the following evidence to show that the situation remains the same and that the denial of opportunity continues.

In 2005, the Vegetable Oil Industry of Canada ("VOIC"), which represents over fifty thousand oilseed producers, wrote to the Ontario Minister of Food and Agriculture that VOIC members "spent $1 million on research and development, labour, plant trials (at an underutilized Ontario facility) to develop a vegetable oil/dairy blended product only to have the opportunity to launch this product scuttled by amendments made under the *Milk Act*."[33]

In early 2010, the VOIC stated that it expected that the market opportunity for dairy vegetable oil blends had grown since 2004. It observed that the injury extended to over 12,000 canola growers and five major oilseed processing plants in Alberta as a result of the suppressed demand for vegetable oil[34].

The Summary Panel accepts this evidence and finds that the denial of opportunity which amounts to injury to internal trade continues.

The Summary Panel finds that the 2004 Panel's findings on injury were legally and factually correct, and that the same kind of injury continues as a result of Ontario's replacement measures.

7. RECOMMENDATIONS

The Summary Panel takes seriously Ontario's submission that the sale of food products can raise significant issues of health and consumer protection. However, on the basis of the record before it, the Summary Panel has found that the contested Regulations are not compliant with the Agreement.

The Summary Panel cannot altogether preclude, however, the possibility that rather than simply repealing the measures and not enacting any new ones, Ontario might, after engaging in the required consultations, put in place some narrower and more carefully crafted measures that

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[33] Letter from VOIC to Ontario Minister of Agriculture and Food dated July 28, 2005, Alberta's Submission, Appendix B, Tab 10.

[34] Letter from VOIC to Alberta Minister of International and Intergovernmental Relations dated February 5, 2010, Alberta's Submission, Appendix B, Tab 11.

either comply with all open trade norms under the Agreement, or that can be justified under Article 404. The Summary Panel is not suggesting in this respect that it has a view that some new measures actually are warranted by health or consumer safety concerns, but merely that it wishes to refrain from any unnecessary prejudgments in the absence of evidence in this respect.

With respect to how long Ontario should have to bring itself into compliance with the Agreement, the Summary Panel is mindful that Ontario was alerted to the objections to trade-restrictive measures concerning dairy blends over a decade ago, that the 2004 Panel unanimously ruled against Ontario, and that Alberta has formally and repeatedly protested to Ontario that the contested Regulations are not compliant with the Agreement. Ontario has had ample time and warning to develop a contingency plan in case the Summary Panel ruled against it. The Summary Panel has no certain knowledge however, that Ontario has done so. Out of an abundance of caution in relation to the public interest, the Summary Panel has therefore determined that Ontario should have until February 1, 2011 to bring itself into compliance. Accordingly, the recommendations of the Summary Panel are as follows:

1. **In respect of its regulation of the products at issue in this case, Ontario should bring itself into compliance with the Agreement no later than February 1, 2011;**

2. **Ontario should take careful note of all provisions of the Agreement concerning transparency if it decides to consider and implement any new measures.**

8. ALLOCATION OF COSTS

Rules 55 to 57 of Annex 1705 (1): Rules of Procedure of the Agreement give a Panel the discretion to apportion the operational costs of a Panel among the Disputants.

Alberta and the Intervenors have recommended that the operational costs be apportioned in their entirety to Ontario; however, they offer no supporting rationale to justify their position. One consideration in allocating costs can be the manner in which a Party has conducted itself in the context of the proceedings. Ontario participated in the 2010 process in a cooperative manner, and complied with all timelines and rules of procedure. Ontario proposes an allocation of: 33.3% to Alberta; 33.3% to Ontario; and 11.1% for each of the Intervenors. It points to the

unusual nature of the apportionment recommended by Alberta and the Intervenors, the complexity of the dispute and the public interest implications at stake in the outcome.

In light of the Summary Panel's findings that the measures are replacement measures to the EOPA that had been found inconsistent with the Agreement, that Ontario did not comply with the transparency provisions of the Agreement and with the 2004 Panel's associated recommendation, and that the replacement measures are also inconsistent with the Agreement, the Summary Panel allocates operational costs as follows: (to be paid pursuant to the public issue of the Summary Panel report)

- 70% to Ontario
- 15% to Alberta
- 5% to British Columbia
- 5% to Saskatchewan
- 5% to Manitoba

APPENDIX A

Ruling on a Procedural Question by the Summary Panel

Re: "Pre-existing Dispute Concerning Ontario's Measures Governing Dairy Analogs and Dairy Blends and Report of Panel, November 10, 2004"

June 10, 2010

RE: ONTARIO'S REQUEST FOR A TWO MONTH EXTENSION TO RESPOND TO ALBERTA'S SUBMISSION

Introduction

On March 30, 2010, Alberta submitted to the Secretariat its request for a summary panel.

Article 1702(2) provides that such a panel can be established to determine "whether or not the measure that was the subject of a Pre-existing dispute is or would be inconsistent" with the AIT.

In response to this request, this panel has now been constituted. British Columbia, Manitoba and Saskatchewan have intervened.

Alberta in its submission on the merits, dated May 12, 2010, contends that:

- On November 10, 2004, an AIT panel found Ontario measures governing dairy analogs and dairy blends were inconsistent with the AIT;
- On January 1, 2005, Ontario repealed *The Edible Oil Products Act*, which until then had governed dairy analogs and dairy blends;
- However, on the same day Ontario also enacted two regulations under *The Milk Act* that contravened the panel report. In Alberta's submission, the two *Milk Act* regulations are measures that are the subject of the Pre-existing Dispute before the original panel;
- At a Ministerial Committee on Internal Trade meeting on June 6, 2005, there was a discussion of the possibility of reconvening the original panel to determine if Ontario had complied;
- On February 24 and 28, 2005, the Alberta Ministers of Agriculture, Food and Rural Development and International and Intergovernmental Relations wrote to their Ontario counterparts to specifically state that the two *Milk Act* regulations contravened the original panel findings;
- On October 11, 2005, the Alberta Minister of International and Intergovernmental relations wrote to the Ontario Minister of Economic Development and Trade to request that the original panel be reconvened;
- On February 5, 2006, the Ontario Minister responded that it had met its commitments under the AIT by repealing *The Edible Oil Products Act*;

- Record of Decision for 2005, 2008 and 2009 from Ministerial Committee on Internal Trade noted that Alberta does not consider the original panel report to have been fully implemented.

Ontario has not yet submitted its response on the merits. Under the AIT rules, it would ordinarily have within 45 days of Alberta's submission to respond. On June 1, 2010 however Ontario submitted a request for an extension until August 27, 2010.

Ontario's Arguments in Favour of the Extension

In support of its request for an extension, Ontario argues that:

- Novelty: the two *Milk Act* regulations are "new measures" that were not before the original panel. The first time Ontario saw Alberta's "full argument" was May 12, 2010;

- Complexity: the overall context for *The Milk Act* regulations is a complicated scheme for regulation of dairy products in the public interest, and Ontario must frame its response accordingly. In light of this complexity, it needs more time to prepare its response;

- Remedy sought: Alberta is seeking remedies that would impact Ontario's ability to regulate dairy blends and analogues on a go-forward basis. In Ontario's view, such remedies "go beyond what the original panel was prepared to deal with" and are not an appropriate subject for this summary panel. Ontario must have time to address the appropriate scope of these proceedings;

- Time and resource challenges: Ontario needs to coordinate the work of staff in a number of areas, and the work of several counsel. Some of the issues in this case touch upon "other significant matters", including a "very serious food safety prosecution" and Ontario needs time to take these other matters into account.

Ontario asks for a two months' extension to prepare for its reply in light of the important public interest implications of Alberta's submission and requested remedies.

Alberta's Response

In its response to Ontario's request, Alberta argues that:

- Onus: Ontario must show under Article 3.6 of Annex 1705(1) that it is "fair and equitable" to grant the extension;

- Interpretive guidance:

  - In Article 3.1 of Annex 1705(1) the Parties state that: "these rules shall be liberally construed to secure the fairest, most transparent, least expensive and most expeditious determination of every Proceeding."

  - Article 101(4)(d) refers to the need for supporting "...dispute settlement and compliance mechanisms that are accessible, timely, credible and effective."

  - The negotiating history of the summary panel provisions show that the Parties sought an abbreviated overall time line for this kind of procedure.

- The time allotted for replies in a summary panel proceeding, however, is the usual 45 days, which is not different from the timeline that would apply to a new dispute going to a panel;

- Novelty:

  - Ontario has replaced one non-conforming measure with another non-conforming measure, which was considered and addressed in the original panel report; see Panel Findings # 8(a) and 8(b);

  - Ontario has had notice since at least early 2005 that Alberta considers the two *Milk Act* regulations to be a contravention of the original panel report;

  - In its letter of March 30, 2010, requesting the establishment of a Summary Panel, Alberta set out again the gist of its concern. Ontario therefore had the extra 43 days prior to Alberta's detailed submission of May 12 - which started the 45 day "clock" on a response - to begin preparing.

- Complexity and need for coordination and resource limitations

  - This issue is straightforward - one non-compliant measure has been replaced with another;

  - In any event, complexity and the need for intragovernmental coordination, "this can be said of all issues before the AIT and cannot constitute the basis for a finding of unfairness". Similarly, "it is likely that all of the Parties to this Summary Panel proceeding face staffing and resource constraints… and again, this cannot be considered unfair or inequitable to Ontario."

The three Intervenors have each made a submission that concurs with Alberta.

Analysis

The only issue that requires immediate disposition at this time is a procedural issue: Ontario's request for a time extension to prepare a response to Alberta's submission. The references in the AIT to "expeditious" and "timely" dispute resolution suggest that it is important for panels to adhere to timeframes unless there is a significant reason for departure. Extensions should not be granted routinely, casually or prematurely. The onus is on the party seeking an extension to provide a convincing justification.

The AIT does, however, recognize the importance of the "fairest" resolution of disputes in the same section that refers to "expeditious", and the authority under article 3.6 of Annex 1705(1) confers the discretion on a panel to grant extensions when justified by considerations of fairness or equity.

The panel is readily prepared to assume for the sake of addressing the request for an extension that the issues raised by Alberta have important public policy implications for Ontario. But this will be the case in disputes under the AIT generally. One party has a perceived public policy interest in maintaining a measure. A challenger contends that doing so is damaging to other public policy interests that are embodied in the norms of the AIT. The intent of the AIT is to give reasonable time and scope for the party defending the measure, but also to ensure reasonably

expeditious resolution of complaints made by the challenger. The framers of the AIT balanced the competing considerations by arriving at a presumptive timeline of 45 days. Before granting an extension this panel must be convinced that fairness or equitable considerations require departing from that time line in light of the specifics of this case.

With respect to the "timeliness" point, the panel does not find it necessary or appropriate to in any way address the actual scope of the original panel decision. The record does establish, however, that Alberta more than five years ago, after that panel decision, began expressing its own position that the two *Milk Act* regulations are not compliant with that decision. While Ontario has not seen Alberta's "full argument" before, Ontario has long ago been provided with the gist of Alberta's position and the possibility that Alberta would pursue some form of redress under AIT procedures. Ontario had the opportunity to carry out at least some initial consideration of Alberta's concern.

Even if the prior alerts were not on record the fact remains that 45 days is the period that the framers of the AIT set out to respond to submissions on the merits of disputes generally, including ones that were not the subject of previous panel reports.

The panel is not convinced that the "novelty" argument weighs in favour of an extension in this case.

With respect to the "complexity" argument, the panel is prepared to assume for argument's sake that Ontario is correct, and that, among other things, the two *Dairy Act* regulations must be viewed in the context of the wider regulatory regime concerning dairy products. The question is whether there is a level of complexity present that warrants, in itself or in combination with other factors, an extension of time beyond that which ordinarily is allotted. Ontario's submission has not demonstrated that this is the case. The need to view a regulation, or even a statute, in wider legislative context is a common feature in interpreting an enactment and evaluating its consistency with some overarching regime such as a human rights code or the Agreement on Internal Trade.

Similar considerations apply to Ontario's submission that intergovernmental coordination is required.

Conclusion

For the foregoing reasons, Ontario's request of June 1, 2010 for an extension is denied.

BRYAN P. SCHWARTZ, Chair on behalf of the Panel

APPENDIX B

Participants in the Summary Panel Hearing

Panel

Bryan Schwartz (Chair)
Madeleine Renaud
Lorne Seitz

For Alberta

Shawna Vogel
Peter Kuperis
Shawn Robbins
Lorraine Andras

For Ontario

Robert Radcliffe
Bobby Seeber
Dagny Ingolfsrud
Richard Caine

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Jeffery S. Thomas
Danielle Park

For Saskatchewan

Sidney Friesen