DISPUTE RESOLUTION PROCEEDINGS UNDER PART A OF CHAPTER SEVENTEEN
OF THE AGREEMENT ON INTERNAL TRADE

IN THE MATTER OF A CHALLENGE BY SASKATCHEWAN WITH RESPECT TO QUÉBEC'S MEASURES REGULATING DAIRY PRODUCT SUBSTITUTES AND DAIRY PRODUCT AND DAIRY SUBSTITUTE BLENDS

Government-to-government dispute proceedings before a panel established under Article 1703 of the *Agreement on Internal Trade*

QUÉBEC'S SUPPLEMENTARY WRITTEN SUBMISSION

December 19, 2013

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INTRODUCTION

1. On October 16, 2013, the panel found as follows:

   (...)

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

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

      a. Quebec may submit an additional written submission only on new issues raised by Saskatchewan, if any, in its additional written submission; and
      b. No later than December 8, 2013, Quebec shall confirm in writing to the Panel, and to the other Parties, whether it intends to submit or to not submit any such additional written submission and, in the event that Quebec does intend to submit such additional written submission, it shall outline the new issues which will be the subject of the additional written submission; and
      c. Any additional written submission by Quebec made in accordance and in compliance with the provisions of paragraphs a. and b., above, shall be filed no later than December 30, 2013. (...).

2. Further to the above-mentioned decision, Saskatchewan has filed its reply submission on November 15, 2013 (hereinafter the "additional written submission") where it says it provided answers to the two new issues raised in the Québec's submission dated September 23, 2013.

3. Saskatchewan, in its additional written submission, also raises new issues to which Québec responds through this document (hereinafter the "supplementary written submission"), as the panel allowed it in its decision dated October 16, 2013, in paragraph 3(a).

4. These new issues are identified in a Québec's letter dated December 6, 2013, whereby it confirmed its intention to file this supplementary written submission. The new issues raised by Saskatchewan and which require a written reply are as follows:

   (a) The rules on manufacture, sale or labelling of dairy product substitutes and on dairy product and dairy substitute blends, as may be found in the *Food Products*

Act (FPA) and its accompanying Regulations, would be interconnected, inseparable and would have "travelled together" since 1961 and that, therefore, the panel would have jurisdiction;

(b) Québec's objection to the panel's jurisdiction because Saskatchewan may not have identified the labelling measures in the request for consultations and in the request for a panel would be of a technical nature and would not have caused any injury to Québec and that, therefore, the panel would have to establish its jurisdiction in this case;

(c) The panel's jurisdiction should also be established because the proposed repeal of sections 7.1 and 7.2 of the *Food Products Act* (FPA) would not solve the interpretation and implementation problem for section 4.1 of that same Act;

(d) Article 405(1) and Annex 405.1 would have a subsidiary role in relation to Chapter Nine of the AIT and could not, in addition, be used to defend a measure alleged to contravene Articles 401, 402, 403 and 404 of the AIT;

(e) The *Codex Alimentarius* would not be a treaty under international law, Québec would not be a signatory to it, the labelling measures would precede the international standards on which Québec relies, and these international standards could not be used to defend a measure alleged to contravene Articles 401, 402, 403 and 404 of the AIT.

Question No 1: Does the panel have jurisdiction to examine labelling measures, even if the request for consultations makes no mention of them, if the rules on manufacture, sale or labelling of dairy product substitutes and on dairy product and dairy substitute blends are interconnected, inseparable and have "travelled together" since 1961?

5. In paragraph 8 of its additional written submission, Saskatchewan argues that a review of the history of the measures on labelling, substitutes and blends shows that these measures have travelled together as a complete legislative "package" since at least 1961, that labelling and blending measures have been "two companions" for over half a century. This is how Saskatchewan attempts to remedy its omission to properly identify the labelling measures in its request for consultations and in its request for a panel. In other words, it wishes to bring the panel to rule that the fact that its request for consultations is incomplete and has a substantially more restrictive scope than its written submission filed on August 8, 2013, is irrelevant because the labelling measures are inseparable from the restrictions on the production and sale of dairy substitutes and blends.

6. This Saskatchewan's claim is wrong in law and, in fact, is not sustained by the review of the history of the measures in question. Indeed, for the purposes of this supplementary

written submission, if the history starts in 1961, as suggested by Saskatchewan, it is presented as follows:

- In 1961, Québec has adopted the *Dairy Products Substitutes Act.*[1] This statute contained provisions on labelling[2] and the obligation to hold a license for the manufacture and the wholesale of substitutes.[3] It did not contain any provision regarding blends;[4]

- In 1964, the *Dairy Products Act* was revised.[5] It did not contain any provision regarding blends;

- In 1969, Québec has adopted the *Dairy Products and Dairy Products Substitutes Act,*[6] with a view, among other things, to consolidate in the same statute the provisions regulating the trade of dairy products and the trade of substitutes. Some restrictions on blends have appeared at that time;[7]

- In 1987, Québec has adopted the *Act to amend the Dairy Products and Dairy Products Substitutes Act*[8] where it was prohibited to prepare, offer for sale, sell, deliver, process or keep, display or transport for the purpose of sale any dairy product substitute not designated by a regulation.[9] This legislative amendment did not intend to and did not actually amend the labelling rules for dairy products, dairy product substitutes or dairy product and dairy substitute blends;

- In 2000, some provisions of the *Dairy Products and Dairy Products Substitutes Act* concerning labelling, substitutes and blends were included in the *Food Products Act*. The objective was to incorporate the provisions concerning the *Dairy Products and Dairy Products Substitutes Act* into the *Food Products Act.*[10]

[1] The statute is attached in Appendix 24 to Québec's main brief.
[2] *Supra*, Note 1, Section 7.
[3] *Id*, Section 3.
[4] The explanatory note to the bill, *Dairy Products Substitutes Act*, which name was given to the statute, does not mention any blends. It reads as follows: (Translation) "*This bill intends to regulate the manufacture and sale of dairy product substitutes. Designations intending to deceive are prohibited, as well as any colouring of margarine beyond the degree specified in section 8".* The bill is attached in Appendix 1.
[5] (R.S. 1964, chapter 121). The statute is attached in Appendix 2.
[6] The statute is attached in Appendix 26 to Québec's main brief.
[7] *Supra*, Note 6, Section 2 (3).
[8] The statute is attached in Appendix 3.
[9] *Supra*, Note 8, Section 2.
[10] The *Explanatory Notes* of the bill, *Act to amend the Agricultural Products, Marine Products and Food Act and other legislative provisions,* read as follows : "*This bill amends the Agricultural Products, Marine Products and Food Act to integrate the dairy products and substitutes sector currently governed by the Dairy Products and Dairy Products Substitutes Act. The provisions of the Agricultural Products, Marine Products and Food Act as amended under this bill will then apply to all food products, including dairy products and dairy product substitutes". (...)* The bill is attached in Appendix 4.

7. All of which demonstrate, contrary to Saskatchewan's claim, that the measures regulating labelling, substitutes and blends have not "travelled together" since 1961. The measures regulating labelling date back to 1961, the measures regulating blends date back to 1969 and the prohibition to manufacture and sell any substitute not designated under the regulation dates back to 1987. The fact that three items regarding the trade of two categories of food products are found in the same legislation does not mean however that the accompanying measures are interconnected, inseparable and that the evolution of one of them necessarily brings the same changes for the others. If such is the case, direct links between each subject in question should be showed, which is what Saskatchewan was not able to do because such links do not exist.

8. All these measures largely differ from one another and *have not travelled together as a complete legislative package* since 1961. Moreover, Saskatchewan mentions, in paragraph 10 of its additional written submission, that the measures regulating labelling are barriers independent from the measures regulating substitutes and blends. Furthermore, whether or not they have travelled together, it does not excuse Saskatchewan for its omission to include, in its request for consultations, all the measures it wished to challenge and, in particular, those regulating labelling.

9. A Party must be clear in its request for consultations regarding the measures it intends to challenge; otherwise, the Complaint Recipient will never be able to hold proper consultations or to defend itself fully before a Panel.

10. Saskatchewan attempts to remedy the fundamental flaw of its approach by referring to the term "marketing" in its request for a panel and by asking the panel to establish a direct link between this term and the question of labelling of dairy product substitutes and dairy product and dairy substitute blends. If Saskatchewan truly wished to identify labelling as a barrier, it should have done it specifically in its request for consultations. To allow Saskatchewan's proposal could mean that the request for consultations would cover all the statutory provisions and all other operations regarding, in one way or another, the trade of substitutes and blends (food safety, license, inspection, seizure, etc.). Such an interpretation would alter the character of Articles 1702, 1, 1703 and 1704 of the AIT. This argument from Saskatchewan should thus be dismissed by the panel.

Question No 2: Does the panel have jurisdiction even if the request for consultations makes no mention of labelling rules because that would not cause any injury to Québec?

11. Saskatchewan argues, in paragraph 9 of its additional written submission, that Québec has not suffered any injury, even though the request for consultations is incomplete, because Québec was nevertheless able to file a complete defence: "Quebec's thorough and fulsome submissions". That would show that the objection raised by Québec is of a technical nature and that it does not constitute, as Québec claims, an issue concerning directly the panel's jurisdiction.

12. Saskatchewan asserts, without any direct knowledge of it, that Québec has not suffered any injury even though rules have not been followed.

13. Furthermore, the determination of the injury suffered by Québec is of no relevance within this review of the panel's jurisdiction. No provision of the *Agreement on Internal Trade* requires the existence of an injury to be able to allege a fundamental flaw in the procedure followed by the Complaining Party. No provision of the AIT supports Saskatchewan when it argues that the Québec's objection is of a technical nature and that Saskatchewan's failure to mention the labelling rules in its request for consultations has not caused any injury to Québec. The dispute resolution mechanism under the AIT governs a process agreed to by the Parties in order to assert and maintain their respective rights, obligations and interests. A clear and precise identification of the measures challenged by the Complaining Party is an essential element in the process because it allows the Complaint Recipient to prepare a full and complete defence. It is a principle of natural justice which should not be treated lightly.

14. This argument raised by Saskatchewan should also be dismissed as devoid of any legal basis.

Question No 3: Does the panel have jurisdiction even if the request for consultations makes no mention of labelling rules because section 4.1 of the FPA, if not repealed or amended, in part or in whole, will lead to interpretation problems with the legislation applicable in Québec?

15. Saskatchewan claims, in paragraphs 10-13 of its additional written submission, that the panel has jurisdiction to examine section 4.1 of the *Food Products Act* because, if the labelling rules are not repealed, in part or in whole, in accordance with the repeal of sections 7.1 and 7.2 of the same act, it will lead to interpretation and implementation problems with the legislation in Québec.

16. Québec submits, in that respect, that if Saskatchewan has anticipated problems of interpretation in case it would succeed on sections 7.1 and 7.2 of the FPA, it should have drafted its request for consultations in a complete manner and indicated that it also challenged the labelling rules. It did not do so and now, it is too late.

17. Furthermore, any difficulty to understand a statute does not constitute a case of default or non-compliance under the AIT. This argument raised by Saskatchewan should be dismissed.

Question No 4: Do Article 405(1) and Annex 405.1 only play a subsidiary role in relation to Chapter Nine of the AIT and can they, in addition, be used by one Party to defend measures alleged to contravene Articles 401, 402, 403 or 404 of the AIT?

18. Saskatchewan claims, in paragraphs 15-23 of its additional written submission, that the Québec labelling rules do not constitute any standard or standards-related measure under Article 405(1) because they are not defined as such under Article 200 of the Agreement. Such claim is unfounded.

19. Québec submits rather that the labelling rules under section 4.1 of the Act are technical regulations under the definition found in Article 907 of the Agreement and that they are also standards and standards-related measures under Article 200.

20. They are technical regulations under Article 907 because they deal with labelling requirements applicable to a product and because they are mandatory.

21. They are also standards and standards-related measures under Article 200 because they set out characteristics applicable to products and requirements to ensure compliance.

22. The definition of "technical regulation" in Article 907 and the definitions of "standard" and "standards-related measure" in Article 200 of the Agreement are as follows:

> Article 907
>
> In this chapter: (...)
>
> **technical regulation** means a document or instrument of a legislative nature which defines product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory by law. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.
>
> Article 200
>
> In this Agreement, except as otherwise provided. (...)
>
> **standards-related measure** means a measure that incorporates a standard and may also set out the requirements and procedures to ensure conformity or compliance. (Our emphasis).
>
> **standard** means a specification, approved by a Party or by a recognized body, including those accredited as members of Canada's National Standards System, that sets out the rules, guidelines or characteristics for goods or related processes and production methods, or for services, service providers or their related operating methods; (Our emphasis).

23. These definitions are substantially similar and easily reconcilable.

24. Indeed, an analysis of definitions in Article 200 for the term "standard" and the expression "standards–related measure" demonstrates that they apply to the measure setting out characteristics for goods and the requirements to ensure compliance.

25. A standards–related measure, under the definition in Article 200, may incorporate a standard and set out the requirements to ensure compliance. It means that compliance with a standard may be mandatory under the definition of Article 200.

26. A standard under Article 200 may specify characteristics for goods. The word "characteristic" is not defined under the *Agreement on Internal Trade*, but it has already been analyzed by the Appellate Body of the World Trade Organization (WTO). In that respect, as already decided by previous panels under the AIT, Québec invites the panel to be inspired by and refer to the rules and decisions of the WHO panels and of the Appellate Body .[11] According to the Appellate Body:[12]

> The word "characteristic" has a number of synonyms that are helpful in understanding the ordinary meaning of that word, in this context. Thus, the "characteristics" of a product include, in our view, any objectively definable "features", "qualities", "attributes", or other "distinguishing mark" of a product. Such "characteristics" might relate, *inter alia*, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. In the definition of a "technical regulation" in Annex 1.1, the *TBT Agreement* itself gives certain examples of "product characteristics" – "terminology, symbols, packaging, marking or labelling requirements". These examples indicate that "product characteristics" include, not only features and qualities intrinsic to the product itself, but also related "characteristics", such as the means of identification, the presentation and the appearance of a product (Our emphasis).

27. It appears from the definitions of "standard" and "standards–related measure" under Article 200 and the Appellate Body's interpretation of the word "characteristic" that a standard and a standards-related measure, as defined under Article 200, may specify certain mandatory labelling rules. Such standard and standards–related measure can also be a technical regulation under Article 907 and vice versa.

28. Thus, the Québec measure regulating labelling is a standard and a standards-related measure under Article 200 and a technical regulation under Article 907. There is no incompatibility between the provisions of Chapters Two and Four and those of Chapter

[11] See panel's decision in the margarine dispute, p. 14. The decision is attached in Appendix 20 to the Québec main brief.
[12] *European Communities – Measures affecting asbestos and asbestos-containing products*, AB-2000-11, WT/DS135/AB/R, March 12, 2001, paragraph 67. The decision is attached in Appendix 5.

Nine. Section 405 (1) and Annex 405.1 apply to the Québec measure regulating labelling.[13]

29. In paragraphs 24-31 of its additional written submission, Saskatchewan submits that Article 4305(1) and Annex 405.1 do not permit or otherwise justify measures which are non-compliant with Division IV of the AIT, as is otherwise allowed, for instance, under Article 404. Saskatchewan also claims that the sole purpose of such provisions is the reconciliation and the harmonization of measures within Canada because Article 405(1) provides as predicate that the commitments regarding reconciliation and harmonization to ensure the free movement of persons, goods, services, and investments within Canada. Once again, these claims are wrong.

30. Québec submits that, when some measures are impugned, wrongly, for creating barriers to trade, the defence to be opposed is to demonstrate that such measures do not constitute such barriers.

31. In this matter, Québec has demonstrated that its labelling rules under section 4.1 of the FPA do not constitute trade barriers because:

    - there is an international consensus about the use of certain terms in the labelling of agricultural and food products;

    - this consensus has led to the development of a standard that is applied within several States which have also undertaken to ensure the free movement of agricultural and food products;

    - the AIT encourages Parties to base their standards on international standards where appropriate.

32. Québec also submits that, even if the primary purpose of Article 405(1) and Annex 405.1 is not to justify a non-compliant measure, as is done in Article 303, these provisions may allow establishing and/or reinforcing the idea that the impugned measures are very much in compliance with Division IV of the AIT.

33. Lastly, the interpretation given by Saskatchewan to Article 405(1) is much too narrow. Article 405(1) is clear. It contains a commitment by the Parties to the reconciliation of their standards and standards-related measures, in accordance with Annex 405.1, which, in its paragraph 17, recommends to each Party to base its standards on international standards. It is exactly what Québec did. One should not blame Québec for having made

[13] The fact that the definition of the word "standard" differs from Chapter Two to Chapter Nine does not constitute an incompatibility in this case. In fact, the measure is not a standard under Chapter Nine but rather a technical regulation, and the definition of technical regulation is reconcilable with the definitions of standard and standards-related measure in Chapter Two.

the choice to better protect its consumers with clear labelling rules, in accordance with an international standard.

34. One would then expect other Parties to take the same approach. However, if some Parties choose not to base their own standards on relevant international standards in spite of paragraph 17 of Annex 405.1, they should not criticize Québec on its decision. The AIT does not require that the reconciliation and harmonization only take place within a Canadian framework, contrary to what Saskatchewan is asking, and even less by an alignment of the Parties' regulatory systems with their lowest common denominator.

Question No 5: Can the *Codex Alimentarius* standards be used to justify measures alleged to contravene Articles 401 to 404 of the AIT although they do not arise from an international treaty?

35. In paragraphs 32-43 of its additional written submission, Saskatchewan sets out different interpretations of the standards of the *Codex Alimentarius* in order to demonstrate that the *Codex General Standard for the Use of Dairy Terms*[14] (CGSUDT) would not prohibit the use of a dairy term to describe a dairy product substitute. Québec does not agree with this interpretation.

36. In paragraph 33 of its additional written submission, Saskatchewan argues that the panel does not need to do a detailed analysis of the *Codex Alimentarius* standards. In Québec's view, that should not however prevent the panel from finding that Québec labelling rules are similar to the *Codex General Standard for the Use of Dairy Terms*. In that respect, Québec notes that, when referring to the *Codex General Standard for the Use of Dairy Terms*, it does so to demonstrate to the panel that its labelling rules are no barriers to the free movement of agricultural and food products and they protect consumers adequately.

37. Québec's labelling rules are clear and, like Article 3 of the CGSUDT, they have been adopted so that food products would be described or presented in a way that ensured the correct use of dairy terms intended for milk and milk products, that protected consumers from being confused or misled and that guaranteed fair practices in the food trade. Such objectives are perfectly aligned with the purposes and goals of the AIT.

38. The CGSUDT prohibits any reference to any dairy term to designate any dairy product substitute.

39. Saskatchewan submits, in paragraph 34 of its additional written submission, that under Section 4.3.3 of the CGSUDT, milk products can be named descriptively where milk constituents are being added or removed to the product, which in its opinion may be the case with a variety of dairy blends.

[14] The standard is attached in Appendix 12 to Québec's main brief.

40. Section 4.3.3 of the CGSUDT reads as follows:

> 4.3.3 Products that are modified through the addition and/or withdrawal of milk constituents may be named with the name of the relevant milk product in association with a clear description of the modification to which the milk product has been subjected provided that the essential product characteristics are maintained and that the limits of such compositional modifications shall be detailed in the standards concerned as appropriate. (Our emphasis).

41. This Section refers, for example, to milk where lactose has been reduced. In that respect, section 11.8.13, paragraph 16 of the *Regulation respecting food,*[15] provides as follows:

> 11.8.13. The following information must appear in indelible, legible and visible characters on the container or package of all dairy products packaged for sale: (...) 16º for dairy products treated with lactase, the words "lactose reduced" or "reduced lactose content" with the percentage reduction appearing immediately above; (...)

42. Section 4.3.3 of the CGSUDT also refers to cheese where the percentage of fat content has been reduced, as provided under sections 28(3) and 28.1 of the *Dairy Products Regulations.*[16] This could be, for instance, a "light gouda cheese". These sections partly read as follows:

> 28 (3) Notwithstanding subparagraphs (1)(*a*)(iii) and (iv), a cheese of a variety set out in column I of an item of Part I of the table to this section may contain more than the maximum percentage of moisture set out in column II of that item and less than the minimum percentage of milk fat set out in column III of that item, where:
>
> (a) a statement or claim set out in column 4 of any of items 12 to 14, 16, 20, 21 and 45 of the table following section B.01.513 of the *Food and Drug Regulations* is shown on the label of the product as part of the common name; and;
>
> (b) the cheese has the characteristic flavour and texture of the named variety of cheese. (...).
>
> 28.1 Any cheese product for which a standard is established by any of sections 29 to 45 may contain more than the maximum percentage of moisture set out in the applicable standard and less than the minimum percentage of milk fat set out in the applicable standard, where:

[15] A copy of the *Regulation respecting food* is attached to Québec's main brief.

[16] SOR/79-840. Copy of the *Dairy Products Regulations* is attached in Appendix 6. http://laws-lois.justice.gc.ca/eng/regulations/SOR-79-840/FullText.html (Website consulted December 6, 2013).

(a) the characteristic flavour and texture of the cheese product are maintained in the modified cheese product; and; (...).

43. Section 4.3.3 of the CGSUDT does not concern dairy blends because it only applies to dairy products modified through the addition and/or withdrawal of milk constituents.

44. Thus, Section 4.3.3 of the CGSUDT does not apply, for instance, to a blend where butter has been added to margarine because it does not concern any blends and because butter or soy are not milk constituents. That is why Saskatchewan's claim is invalid.

45. Saskatchewan also submits, in paragraphs 35-36 of its additional written submission, that Section 4.1.1.3 of the *General Standard for the Labelling of Prepackaged Foods* (GSLPF),[17] referred to in the footnote to Article 4.6.3 of the CGSUDT, allows the use of descriptive terms, such as "soy cheese" or "filled milk". This claim is unfounded.

46. In order to properly present and understand all these provisions, it is necessary to read them together with Section 4.6.4 of the CGSUDT. These sections read as follows:

CGSUDT

4.6.3 In respect of a product which is not milk, a milk product or a composite milk product, no label, commercial document, publicity material or any form of point of sale presentation shall be used which claims, implies or suggests that the product is milk, a milk product or a composite milk product, or which refers to one or more of these products [2]. (Our emphasis) [Footnote [2]: This excludes descriptive names as defined in Section 4.1.1.3 of the General Standard for the Labelling of Prepackaged Foods (GSLPF) and ingredients lists as defined in Section 4.2.1.2 of the GSLPF providing the consumer would not be misled.]

4.6.4 However, with regard to products referred to in Section 4.6.3, which contain milk or a milk product, or milk constituents, which are an essential part in terms of characterization of the product, the term "milk", or the name of a milk product may be used in the description of the true nature of the product, provided that the constituents not derived from milk are not intended to take the place, in part or in whole, of any milk constituent. For these products dairy terms may be used only if the consumer would not be misled.

If however the final product is intended to substitute milk, a milk product or composite milk product, dairy terms shall not be used.

For products referred to in Section 4.6.3 which contain milk, or a milk product, or milk constituents, which are not an essential part in terms of characterization of the

[17] The standard is attached in Appendix 7.

> product, dairy terms can only be used in the list of ingredients, in accordance with the General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985). For these products dairy terms cannot be used for other purposes. (Our emphasis).
>
> GSLPF
>
> 4.1 The name of the food
>
> 4.1.1 The name shall indicate the true nature of the food and normally be specific and not generic:
>
> 4.1.1.1 Where a name or names have been established for a food in a Codex standard, at least one of these names shall be used.
>
> 4.1.1.2 In other cases, the name prescribed by national legislation shall be used.
>
> 4.1.1.3 In the absence of any such name, either a common or usual name existing by common usage as an appropriate descriptive term which was not misleading or confusing to the consumer shall be used.

47. Section 4.6.3 of the CGSUDT refers to a product which does not contain any milk product. Such a product must not use any term which claims, implies or suggests that the product is a milk product. This section, read together with Section 4.1.1.3 of the GSLPF, however allows the use of an appropriate descriptive name provided the consumer would not be misled by it.

48. A good example of an application of Section 4.6.3 of the CGSUDT and of Section 4.1.1.3 of the GSLPF may be the use of the name "peanut butter". This name or designation is allowed because:

    - "peanut butter" does not contain any milk product;
    - the name "peanut butter" is the common or usual name of the product;
    - the name "peanut butter" does not risk misleading the consumer as nobody is likely to believe that peanut butter might contain any milk product. Here, the word "butter" refers only and specifically to the oleaginous and spreadable nature of the product.

49. Conversely, Section 4.6.3 of the CGSUDT and Section 4.1.1.3 of the GSLPF do not allow the use of the name "soy cheese" because the name "soy cheese" clearly risks misleading the consumer by suggesting that it is a milk product or milk constituent, although it is not the case. Moreover, this name is not the common or usual name of the product.

50. As to Section 4.6.4 of the CGSUDT, it refers to a product which is not a dairy product but which contains milk, a milk product, or milk constituents, which are an essential part in terms of characterization of the product. It provides that a dairy term may be used under two conditions :

    i. The constituents non derived from milk are not intended to take the place, in part or in whole, of any milk constituent;
    ii. The final product must not be intended to substitute milk, a milk product or a composite milk product.

51. A good example of an application of Section 4.6.4 is the use of the name "cheesecake" because:

    - cheesecake is not a dairy product as such;
    - cheesecake however contains milk, a milk product or a milk constituent;
    - milk, milk product or milk constituent are essential to characterize a "cheesecake";
    - flour and other non-dairy ingredients are not intended to substitute a milk constituent;
    - cheesecake is not intended to take the place of any milk product.

52. Conversely, Section 4.6.4 does not allow the use of a dairy term to designate "soy spread" (75 % soy oil and 5 % milk fat) because soy spread is intended to take the place of a milk product, i.e. either butter or cream cheese.

53. Saskatchewan, in paragraph 37 of its additional written submission, alleges that the *Codex Standard for Butter* and the *Codex General Standard for Cheese* do not prohibit the use of the words "butter" and "cheese". Québec wishes to remind that the labelling provisions in these two standards are a complement to those of the CGSUDT but do not replace them;[18] the prohibition to use those terms is to be found in Section 4.3.1 of the CGSUDT.

54. In the same paragraph 37 of its additional written submission, Saskatchewan suggests that the federal regulation allows the use of the word "butter" and its derivatives like "buttery", "butter-flavored", "butter blend", etc., on packages of margarine or butter blends, and the use of the word "cheese" to describe "cheese substitute" or "cheese flavored". Québec does not agree with the interpretation given by Saskatchewan.

55. Indeed, section 2.1 of the *Dairy Products Regulation (federal)*[19] reads as follows:

[18] See Section 7 of the *Codex Standard for Butter* and Section 7 of the *Codex General Standard for Cheese*. Copies of these standards are attached in Appendix 13 to the Québec main brief.
[19] *Supra*, Note 16.

> PROHIBITION
> **2.1** Where a grade or standard is established under these Regulations for a dairy product, no person shall market any product in import, export or interprovincial trade in such a manner that the product is likely to be mistaken for the dairy product. SOR/91-558, s. 2. (Our emphasis)

56. The above section prohibits, where a grade or standard is established for a dairy product, any interprovincial trade of another product in such a manner that the product is likely to be mistaken for the dairy product.

57. A standard or a grade having been established for butter, butter products and cheddar cheese, [20] cream cheese, processed cheese, processed cheese food, processed cheese spread, pizza cheese and for a wide variety of cheese marketed in Canada,[21] it is therefore forbidden to sell, on the interprovincial market in Canada, any product in such a manner that the product is likely to be mistaken for butter or for any of the standardized dairy products.

58. One should also note, with respect to the argument raised by Saskatchewan and according to which it is allowed, under federal legislation, to use the word "butter" or the word "cheese", or any derivative of these words:

    - that, under Section 5 of the *Food and Drugs Act*[22], it is prohibited to label or to advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character or its composition;

    - that, under Section 6(3) of the same Act, where a standard for any food has been prescribed, it is prohibited to label, package, sell or advertise any article in such a manner that it may be mistaken for that food unless the article complies with the prescribed standard if it has been sent or conveyed from one province to another, or is intended to be sent or conveyed from one province to another;

    - that, because the *Food and Drug Regulations* have established standards regarding cheese and butter,[23] it is prohibited to label any food in such a manner that it is likely to be mistaken for any standardized dairy product in interprovincial trade.

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[20] *Id.*, Section 3.
[21] *Id.,* Sections 27 to 45.
[22] R.S.C. (1985), Chapter F-27. Copy of the *Food and Drugs Act* is attached to Appendix 8. http://laws-lois.justice.gc.ca/PDF/F-27.pdf (Website consulted December 6, 2013).
[23] (C.R.C., c. 870), sections B.08.030 à B.08.056. Division 8 of the *Food and Drug Regulations* is attached in Appendix 9.

59. In paragraph 39 of its additional written submission, Saskatchewan attempts to minimize the importance of the *Codex Alimentarius* by saying that it is not a "binding treaty", that Québec is not a signatory to it, that the standards created by the *Codex Alimentarius* are not mandatory for members of the WHO, FAO and the Codex Committee and, lastly, that neither Canada nor Québec have "implemented" the *Codex Alimentarius* into their domestic law.

60. It is true that the *Codex Alimentarius* is not incorporated into Québec and Canada domestic legislation. However, its standards are established by the consensus of all participating countries and they aim at creating a basis for national State regulation.

61. In a document entitled "*Understanding Codex Alimentarius,"* [24] published by the WHO and the FAO, the Preface states the following:

> The Codex Alimentarius, or the food code, has become the global reference point for consumers, food producers and processors, national food control agencies and the international food trade. (...) Its influence extends to every continent, and its contribution to the protection of public health and fair practices in the food trade is immeasurable.
> (...)
> The Codex Alimentarius has relevance to the international food trade. With respect to the ever-increasing global market, in particular, the advantages of having universally uniform food standards for the protection of consumers are self-evident. It is not surprising, therefore, that the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement) both encourage the international harmonization of food standards. Products of the Uruguay Round of multinational trade negotiations, these Agreements cite international standards, guidelines and recommendations as the preferred measures for facilitating international trade in food. As such, Codex standards have become the benchmarks against which national food measures and regulations are evaluated within the legal parameters of the World Trade Organization (WTO) Agreements.

62. This excerpt is self-explanatory: within the international community, the *Codex Alimentarius* standards constitute a reliable, scientific and important reference for international trade; they are referred to as *benchmarks*. When a State adopts and maintains rules regarding food product trade that are based on such standards, it facilitates the trade of the products under fair trade practices which better protect consumers.

63. Canada is a member of both organizations (Codex and WTO) and promotes itself the harmonization of food product trade rules with the standards developed by the *Codex*

[24] http://www.codexalimentarius.org/about-codex/understanding-codex/en/ (Website consulted on December 2, 2013). The text is attached in Appendix 10.

Alimentarius. In a document entitled "*Canada's strategic framework for participation in the joint FAO/WHO food standards program*", the Canadian government states as follows:

> Currently, there are 176 member governments [in the Codex] including Canada. 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 standards, guidelines and related texts developed by Codex are intended for voluntary use by governments. (...)
>
> 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 (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement)] 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 <u>in order to minimize unnecessary obstacles to trade while maintaining their right to protect human life or health and to prevent deceptive practices</u>. As Canada is both a major importer and exporter of 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. (...) (Our emphasis)

64. Consequently, Québec submits that it is correct to determine that its labelling rules, more precisely, those in section 4.1 of the FPA, do not create any discrimination or barrier to entry or exit, or any barrier to the internal trade of agricultural and food products, *considering that they* essentially follow the *Codex General Standard for the Use of Dairy Terms* of the *Codex Alimentarius*, an international reference of primary importance.

65. In reply to the claim made by Saskatchewan, in paragraphs 42-43 of its additional written submission, to the effect that restrictions on labelling predated the adoption in 1999 of the *Codex General Standard for the Use of Dairy Terms*, it is to be noted that these international standards are based on proposals and initiatives by the State-members of the Codex, that they are discussed for several years and that, once they are adopted, the States, one by one, incorporate them into their domestic law. Moreover, this argument brought forward by Saskatchewan is unfounded because section 4.1 was enacted in 2000 that is after the adoption in 1999 of the *Codex General Standard for the Use of Dairy Terms*.

66. Finally, Québec repeats its claims and arguments as set out in paragraphs 29-34 of this supplementary written submission in response to Saskatchewan's allegations according to which the basing of labelling rules on international rules, as those proposed by the *Codex Alimentarius*, cannot be used to justify any contravention of Articles 401, 402, 403 or 404 of the *Agreement on Internal Trade*.

CONCLUSION

Considering the above, Québec:

- repeats the findings it has set out in its written submission dated September 23, 2013;

- asks the panel to dismiss the findings of Saskatchewan contained in its additional written submission dated November 15, 2013.

All of which is respectfully submitted on December 19, 2013.

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