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 SUBMISSION

September 23, 2013

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INTRODUCTION

1. Québec is the subject of a complaint by Saskatchewan under the Agreement on Internal Trade (Agreement) concerning dairy product substitutes and dairy product and dairy substitute blends.

2. Saskatchewan alleges that certain measures of Québec are barriers to interprovincial trade in dairy product substitutes and dairy product and dairy substitute blends. Saskatchewan believes that the measures contravene Québec's commitments as stated in the Agreement on Internal Trade.

3. Saskatchewan argues that the measures serve primarily to protect the interests of dairy producers and manufacturers. It alleges that Québec's measures suppress the sale and manufacture in Québec of dairy product substitutes and dairy product and dairy substitute blends. It further argues, belatedly, that measures place restrictions on the labeling of substitutes.

4. Québec wishes to inform the Panel that, following a close examination of the regulations and owing to developments in the food products market, it has been deemed expedient to lift the prohibitions contained in sections 7.1 and 7.2 of the *Food Products Act* (Chapter P-29).[1]

5. In that regard, a draft bill was tabled in the National Assembly on September 19, 2013, a copy of which is attached to this submission.[2]

6. Québec wishes to inform the Panel that the decision to lift the prohibitions contained in sections 7.1 and 7.2 of the *Food Products Act* must not be construed as an admission that the legislative provisions concerning substitutes and blends are contrary to the Agreement on Internal Trade. In that regard, Québec maintains that it has always had the right to adopt and maintain those measures.

7. As regards the challenged composition standards set out in the *Regulations Respecting Food* (Chapter P-29, r. 1), Québec wishes to inform the Panel that draft regulations should be prepared shortly to effect the necessary adjustments to ensure conformity when

[1] The *Food Products Act* and the *Regulations Respecting Food* are attached in Appendix 1.
[2] Appendix 2.

sections 7.1, 7.2 and 40 *b*.1 and *b*.2 of the *Food Products Act* have been repealed.

8. In addition, Québec challenges the complaint by Saskatchewan in respect of the labeling rules set out in section 4.1 of the *Food Products Act.*

9. Québec submits its arguments below in respect of section 4.1 of the *Food Products Act*.

PART I FACTUAL BACKGROUND AND HISTORY OF PROCEEDINGS

10. Saskatchewan challenges the regulations applicable in Québec concerning dairy product substitutes, dairy product and dairy substitute blends and certain labeling rules.

11. In accordance with Article 1702.1 of the Agreement, consultations were held initially between British Columbia, Saskatchewan and Québec.[3] Manitoba participated in the consultations as an interested party.[4]

12. The consultations were followed by a formal request from Saskatchewan for the establishment of a panel in accordance with Article 1703 of the Agreement.[5] British Columbia, Alberta and Manitoba expressed their intention to join the proceedings.[6]

13. In its submission to the Panel,[7] Saskatchewan alleges that the challenged measures are covered by Chapter Nine of the Agreement and are barriers to interprovincial trade. It maintains that the measures

[3] Letter dated January 23, 2012, from Ms. Janna Jessee, Internal Trade Representative, British Columbia to Marie-Andrée Marquis, Advisor, Commercial Policy, Québec. (Appendix 3). Letter dated January 23, 2012, from Nadette Schermann, Internal Trade Representative, Saskatchewan to Marie-Andrée Marquis, Advisor, Commercial Policy, Québec. (Appendix 4).
[4] Letter dated January 25, 2012, from Alan Barber, Internal Trade Representative, Manitoba to Anna Maria Magnifico, Executive Director, Internal Trade Secretariat. (Appendix 5).
[5] Letter dated June 17, 2013, from Tim McMillan, Minister Responsible for Trade, Saskatchewan, to Patrick Caron, Internal Trade Officer, Internal Trade Secretariat. (Appendix 6). This letter was received on June 24, 2013, by the Internal Trade Secretariat. See email from Patrick Caron dated June 24, 2013. (Appendix 7).
[6] Email dated July 8, 2013, from Sandra Carroll, Deputy Minister, Ministry of International Trade and Minister Responsible for Asia Pacific Strategy and Multiculturalism, British Colombia to Patrick Caron, Internal Trade Officer. (Appendix 8). Letter dated July 4, 2013, from Shawn Robbins, Executive Director, International and Intergovernmental Relations, Alberta to Patrick Caron, Internal Trade Officer. (Appendix 9). Letter dated July 4, 2013, from Tami Reynolds, Internal Trade Representative, Manitoba to Patrick Caron, Officer, Internal Trade Secretariat. (Appendix 10).
[7] Written observations of the complainant, the Government of Saskatchewan, August 8, 2013.

violate the following provisions of the Agreement: Article 401 (Reciprocal Non-Discrimination), Article 402 (Right of Entry and Exit), Article 403 (No Obstacles) and that they are not justified by Article 404 (Legitimate Objectives). It also maintains that Québec's measures are injurious to free trade.[8]

14. As regards sections 7.1 and 7.2, a draft bill has been tabled to repeal those provisions.

15. As regards the labeling rules set out in section 4.1 of the *Food Products Act*, Québec will demonstrate that Saskatchewan's complaint must be dismissed because the issue of labeling rules was not addressed during consultations and in the request to establish the Panel, and that they cannot be the subject of a complaint by Saskatchewan in the present matter.

16. Québec will further demonstrate, if the Panel is not of that opinion, that the labeling rules are permissible under the Agreement and do not contravene Article 401, 402 or 403, and that, on the contrary, they meet a legitimate objective and are permissible under the Agreement.

PART II THE PANEL DOES NOT HAVE JURISDICTION TO EXAMINE THE MEASURE SET OUT IN SECTION 4.1

17. In paragraphs 117 and 118 of its submission, Saskatchewan asks the Panel to declare that section 4.1 of the *Food Products Act* abrogates Québec's commitments under the Agreement on Internal Trade and to recommend that Québec repeal that section.

18. Québec was surprised to learn of that request in Saskatchewan's submission because the issue had never been raised up until then, either in the request for consultations or in the request to establish the Panel.

19. A Party cannot challenge just any measure in its submission. Under the terms of Article 1702.1, a Party that considers that a measure of another Party is inconsistent with that other Party's obligations may request consultations and must specify the measure complained of in its notice. That was not done. Article 1702.1 reads as follows:

[8] *Supra*, note 7, paragraph 6.

> Article 1702.1: Consultations
>
> 1. Subject to Article 1707.3 *(Removal of Dispute Resolution Privileges)*, a Party that considers that a measure of another Party is or would be inconsistent with that other Party's obligations under this Agreement may request consultations with that other Party by delivering written notice to that other Party, to all other Parties and to the Secretariat. The notice shall specify the actual or proposed measure complained of, the relevant provisions of this Agreement and provide a brief summary of the complaint. (not underlined in original).

20. Québec refers the Panel to the request for consultations submitted by Saskatchewan on January 23, 2012.[9] In its letter, Saskatchewan complains of prohibitions on the manufacture and sale of substitutes and blends, but does not complain of matters related to labeling:

> Measure Complained of:
>
> The measures complained of related to the restrictions on the manufacture and sale of dairy blends and analogues within the province of Québec.…
>
> Summary of the Complaint:
>
> It is Saskatchewan's view that the Québec prohibitions on the manufacture and sale of dairy blends and analogues in the Québec Food [Products] Act and Regulation Respecting Food provide limited access to the dairy blend market and are in contravention of the AIT. If during the course of consultation we conclude that other Québec measures or AIT Articles are relevant to this complaint, we will draw them to your attention. (not underlined in original).

21. Saskatchewan did not subsequently amend its request for consultations.

22. Québec also wishes to draw the Panel's attention to the fact that the other Party to the consultations and the interested party did not refer to section 4.1 in their notice.[10]

23. Moreover, Québec wishes to inform the Panel that Saskatchewan did not refer to section 4.1 at the time of its request to establish the Panel as it would have been required to do in accordance with Article 1703 (3) (a) if section 4.1 had been mentioned at the time of consultations. That article reads as follows:

[9] See *supra*, note 3.
[10] See *supra*, notes 3 and 4.

Article 1703: Request for Panel

…

3. A request to establish a panel shall:

(a) specify the actual or proposed measure complained of; (...)

24. Saskatchewan never mentioned in its request for consultations and in its request to establish the Panel that it was challenging Québec's regulations on labeling as set out in section 4.1 of the *Food Products Act* and the Panel is obliged to dismiss that request by Saskatchewan.

25. A request for consultations is a crucial step in the dispute resolution process. It allows all the Parties to the Agreement to review the measure being complained of and, if they so desire, to join the proceedings.

26. In the matter at issue, the other Parties in Canada that may have measures similar to section 4.1 or an interest in such measures could have decided to join the proceedings, had they known that Québec's measure in respect of labeling was being challenged.

27. If the Panel refuses to dismiss Saskatchewan's request in respect of section 4.1, Québec argues that the measure is not prohibited by the Agreement, does not contravene any provision of the Agreement and, on the contrary, is permissible under Article 404. Québec's arguments in that regard are the following.

PART III LEGAL ARGUMENTS CONCERNING SECTION 4.1 OF THE *FOOD PRODUCTS ACT*

28. In paragraph 117 of its submission, Saskatchewan asks the Panel to determine:

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

(2) That the Measures do not serve a "legitimate objective";

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

29. Québec will demonstrate that the rule on labeling set out in section 4.1 of the *Food Products Act* is not an unusual measure, that the measure is consistent with a relevant international standard and that it is permissible under the Agreement.

1. The measure set out in section 4.1 is permissible under the Agreement

30. Section 4.1 of the *Food Products Act* reads as follows:

> 4. In addition, no person shall
>
> (1) use the words « milk », « cream », « butter », « cheese » or a derivative of any of those words to designate a dairy product substitute;
>
> (2) use any words, trademarks, names or images that evoke the dairy industry to designate a dairy product substitute.

31. The rule on labeling set out in section 4.1 is consistent with an international standard as recommended in paragraph 17 of Annex 405.1 of the Agreement, and it does not contravene the Agreement. It provides for the free movement of goods, as specified in Article 405. Paragraph 17 of Annex 405.1 reads as follows:

> 17. Each Party shall, where appropriate and to the extent practicable, base its standards on relevant National Standards, *de facto* national standards or international standards. (not underlined in original).

32. Additionally, at an international level, Article 2.5 of the World Trade Organization's (WTO) Agreement on Technical Barriers to Trade states that a measure consistent with an international standard will be presumed not to create an obstacle to international trade. That article reads as follows:

> 2.5 … Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade. (not underlined in original).[11]

[11] The Agreement on Technical Barriers to Trade is attached in Appendix 11.

33. The labeling rules set out in section 4.1 prohibit use of the words milk, cream, butter, cheese or a derivative of any of those words, or use of any words, trademarks, names or images that evoke the dairy industry, to designate a dairy product substitute. The CODEX ALIMENTARIUS standard titled Codex General Standard for the Use of Dairy Terms,[12] although formulated differently, is intended to achieve exactly the same objective.

34. The Codex General Standard for the Use of Dairy Terms is an international standard. "The Codex Alimentarius Commission, established by FAO and WHO[13] in 1963, develops harmonised international food standards, guidelines and codes of practice to protect the health of the consumers and ensure fair practices in the food trade. The Commission also promotes coordination of all food standards work undertaken by international governmental and non-governmental organizations."[14] (not underlined in original).

35. That standard is relevant in the matter at issue as it deals specifically with the use of dairy terms. Various sections from the standard are reproduced below:

> Section 2.6: *Dairy terms* means names, designations, symbols, pictorial or other devices which refer to or are suggestive, directly or indirectly, of milk or milk products milk and milk products, to protect consumers from being confused or misled and to ensure fair practices in the food trade.
>
> Section 3: Foods shall be described or presented in such a manner as to ensure the correct use of dairy terms intended for milk and milk products, to protect consumers from being confused or misled and to ensure fair practices in the food trade.
>
> Section 4.2.1: Only a food complying with the definition in Section 2.1 may be named "milk." If such a food is offered for sale as such it shall be named "raw milk" or other such appropriate term as would not mislead or confuse the consumer.

[12] The standard is attached in Appendix 12.
[13] FAO: Food and Agriculture Organization of the United Nations. WHO: World Health Organisation.
[14] See the Codex Alimentarius Website at http://www.codexalimentarius.org/codex-home/en/

> Section 4.3.1: Only a product complying with the provisions in a Codex standard for a milk product may be named as specified in the Codex standard for the product concerned.
>
> Section 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.

36. As regards application of Section 4.3.1 of the Codex standard on dairy terms—which states that only a product complying with the provisions in a Codex standard for a milk product may be named as specified in the Codex standard—Québec maintains that the Codex Standard for Butter and the Codex Standard for Cheese[15] regulate use of the word butter and the word cheese and that only those products can be named as such**.**

37. Québec further maintains that section 4.6.3 of the Codex standard on dairy terms, which deals with products that are neither milk nor dairy products, refers, among other things, to substitutes and prohibits the use of dairy terms to designate a substitute.

38. Québec maintains that section 4.1 is permissible under the Agreement because it is consistent with a relevant international standard as recommended in paragraph 17 of Annex 405.1.

39. The Government of Canada has indicated that the Codex General Standard for the Use of Dairy Terms protects consumers and writes on its Website:[16]

> **The use of dairy terms for labelling and promotional information**
>
> Dairy terms means names, designations, symbols, pictorial or other devices which refer to or are suggestive, directly or indirectly, of milk or milk products. This includes names and designations of milk or milk products and pictures of milking animals such as cows, churns, milk cans, etc.

[15] The standards are attached in Appendix 13.
[16] See "The use of dairy terms for labelling and promotional information," Government of Canada, September 5, 2013, http://www.dairyinfo.gc.ca/index_e.php?s1=idf-fil&s2=news-nouv&page=septfactsheet2012. (Appendix 14).

The General Principles of Food Labelling

According to Codex Alimentarius, food products shall not be labelled in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding their character in any respect. This includes making direct or indirect reference to other products with which the food might be confused and could lead consumers to be misled as to the true nature of the food concerned.

The Unique Perceptional and Regulatory Position of Milk and Milk Products

… The Codex GSUDT is globally recognized and has been implemented in the regulations or policies of many countries all over the world.

Importance of the Codex GSUDT for the Global Dairy Sector

… Its application assists consumers all over the world in making their own purchasing decisions with regard to milk products versus non-milk products and it ensures fair practices in the food trade.

40. Québec further maintains that section 4.1, contrary to the claims made by Saskatchewan in paragraph 67 of its submission, is not an unusual measure. Similar measures exist elsewhere as well. Québec refers the Panel to *COUNCIL REGULATION (EEC) No 1898/87 of 2 July 1987 on the protection of designations used in marketing of milk and milk products.*[17]

41. In the sixth "whereas" clause, the EEC Regulation states that it is also necessary to avoid any confusion in the mind of the consumer between milk products and other food products, including those consisting partly of milk components. Article 2 (2) states that the terms listed in the Annex, including cream, butter, cheese and yoghurt, are reserved exclusively for milk products. Article 3 (2) states, in respect of a product other than those described in Article 2, that no label, commercial document, publicity material or any form of advertising (as defined in Article 2 (1) of Directive 84/450/CEE (1)) or any form of presentation, may be used which claims, implies or suggests that the product is a dairy product. That regulation is binding, under the terms of Article 6, and is directly applicable in all Member States of the European Union. The sixth "whereas" clause and the articles referred to above read as follows:

COUNCIL REGULATION (EEC) No 1898/87 of 2 July 1987

[17] A copy of the EEC Regulation is attached in Appendix 15.

on the protection of designations used in marketing of milk and milk products

Sixth "whereas" clause
… Whereas, apart from the case of products the exact nature of which is known through traditional usage, it is also necessary to avoid any confusion in the mind of the consumer between milk products and other food products, including those consisting partly of milk components;

Article 2
2. For the purposes of this Regulation, 'milk products' shall mean products derived exclusively from milk, on the understanding that substances necessary for their manufacture may be added provided that those substances are not used for the purpose of replacing, in whole or in part, any milk constituent.
The following shall be reserved exclusively for milk products:
— the designations listed in the Annex hereto,
— designations or names within the meaning of Article 5 of Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (1), as last amended by Directive 85/7/EEC (2), actually used for milk products.

Article 3
(2). In respect of a product other than those described in Article 2, no label, commercial document, publicity material or any form of advertising (as defined in Article 2 (1) of Directive 84/450/EEC (1)) or any form of presentation, may be used which claims, implies or suggests that the product is a dairy product.

Article 6
This Regulation shall enter into force on 1 July 1987.
This Regulation is binding in its entirety and directly applicable in all Member States.

ANNEX
Designations referred to in Article 2 (2) second paragraph, first indent
— whey
— cream
— butter
— buttermilk
— butteroil
— caseins
— anhydrous milkfat (AMF)
— cheese
— yoghurt
— kephir
— koumiss (not underlined in original).

42. Moreover, Québec maintains that section 4.1 of the *Food Products Act* is not an obstacle referred to in Article 401, 402 or 403 and, on the contrary, section 4.1 is permissible under Article 404.

2. The regulations on the labeling of substitutes are not inconsistent with Articles 401, 402 and 403

2.1 The regulations are not inconsistent with Article 401

43. Section 4.1 is not an obstacle referred to in Article 401, which reads as follows:

> **Article 401: Reciprocal Non-Discrimination**
>
> 1. Subject to Article 404, each Party shall accord to goods of any other party treatment no less favourable than the best treatment it accords to:
>
> (a) its own like, directly competitive or substitutable goods; and
>
> (b) like, directly competitive or substitutable goods of any other Party or non-Party.
>
> 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.
>
> 3. With respect to the Federal Government, paragraphs 1 and 2 mean that, subject to Article 404, it shall accord to:
>
> (a) the goods of a Province treatment no less favourable than the best treatment it accords to like, directly competitive or substitutable goods of any other Province or non-Party;
>
> (b) the persons, services and investments of a Province treatment no less favourable than the best treatment it accords, in like circumstances, to persons, services and investments of any other Province or non-Party.
>
> 4. The Parties agree that according identical treatment may not necessarily result in compliance with paragraph 1, 2 or 3.

44. As Saskatchewan states in paragraph 57 of its submission, Article 401 was analyzed in the matter concerning a dispute between Alberta and

Canada regarding the *Manganese-Based Fuel Additives Act*.[18] At paragraph 9 of its ruling, the Panel indicated that the basic issue as to whether an Act is inconsistent with Article 401 should be addressed in two stages. Those two stages are the following:

1. Does the Act 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?

45. The Panel indicated that <u>there must be a geographical component to the discrimination</u>, stating that "this geographical component can be direct, where goods from one Party are favoured over identical goods from another Party, or indirect, where goods produced predominately in the territory of one Party are favoured over directly competitive or substitutable goods produced predominately in the territory of another Party."[19]

46. Looking only at the measure impugned, the first part of the test clearly is not met, as Québec's measure has neither the purpose nor the effect of discriminating geographically against the goods of Saskatchewan to the benefit of the goods of a Party other than Saskatchewan. The labeling rules applicable under section 4.1 apply equally to any good, regardless of its provenance.

47. As for the second part of the test, Saskatchewan had the onus of demonstrating that the challenged labeling measures create discrimination between dairy products and non-dairy products that may be *like, directly competitive or substitutable* with the former. In that respect, Saskatchewan has not met its burden of proof, as it has not demonstrated that the purpose or effect of section 4.1 is to discriminate

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[18] *Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the Manganese-Based Fuel Additives Act, June* 12, 1998, at p. 7. (Appendix 16). <u>This decision was followed by other panels in interprovincial disputes</u>. See *Report of the Article 1704 Panel Concerning the Dispute Between Nova Scotia and Prince Edward Island Regarding Amendments to the Dairy Industry Act Regulations*, January 18, 2000, paragraph 9. (Appendix 17); *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, at pp.14 and 15. (Appendix 18); *Report of Article 1702(2) Summary Panel Regarding the Pre-Existing Dispute Concerning Ontario's Measures Governing Dairy Analogs and Dairy Blends,* September 24, 2010*,* at p. 22. (Appendix 19).

[19] *Supra,* note 18.

against goods that are like, directly competitive or substitutable with dairy products, and even less so on a geographical basis.

48. Governing how food consumption goods are identified before they are sold to the public is a responsibility of government that is assumed by a vast number of governments and is a necessary measure. The proper identification of a good in relation to its content cannot, in itself, be considered a diversion from the natural flows of trade.

49. Article 401 must also be analyzed in consideration of the fact that Québec's measure is consistent with an international standard and, in a case of that nature, a measure is not considered to create a barrier to trade and, for that very reason, not to be discriminatory.

2.2 The regulations are not inconsistent with Article 402

50. Section 4.1 is not a barrier referred to in Article 402, which reads as follows:

> Article 402: Right of Entry and Exit
>
> Subject to Article 404, no Party shall adopt or maintain any measure that restricts or prevents the movement of persons, goods, services or investments across provincial boundaries.

51. The regulations on labeling rules for substitutes neither restrict nor prevent the movement of substitutes across provincial boundaries. The regulations do not prohibit the movement of goods across provincial boundaries. Section 55 of the *Food Products Act* is clear in that regard:

> Section 55. Nothing in this Act shall be interpreted as prohibiting the transportation of products in transit in Québec; however, in the absence of any evidence to the contrary, the transportation of a product without a bill of lading indicating the names and addresses of the sender and consignee is evidence that such product is to be delivered in Québec.

52. Québec maintains that Saskatchewan's arguments in paragraphs 71-77 of its submission concerning a broad interpretation should be dismissed because the interpretation submitted by Québec is more consistent with the wording and context of the article. Article 402 does not deal with barriers to the sale of goods, but with the transit, flow and movement of goods.

53. In the matter concerning margarine, the Panel concluded that Article 402 dealt with transit and that the article had not been violated. The Panel ruled as follows:

> Québec does not purport to restrict or prevent the movement of goods across its boundaries such that shipments of coloured margarine from Western or Central Canada are constrained from being shipped to the Maritime provinces. Indeed, section 55 of the *Food Products Act* expressly provides the opposite….
>
> The Panel finds no breach of Article 402.[20]

54. Québec further maintains that the fact that the measure is consistent with an international standard must be taken into consideration and that, as such, the measure does not prevent the movement of goods meeting the standard.

55. Saskatchewan's request with regard to Article 402 must be dismissed.

2.3 The regulations are not inconsistent with Article 403

56. Québec's regulations are not an obstacle under Article 403, which reads as follows:

> Article 403: No Obstacles
>
> Subject to Article 404, each Party shall ensure that any measure it adopts or maintains does not operate to create an obstacle to internal trade.

57. At first view, Article 403 settles the case of all measures because no measure should create an obstacle to trade. However, that interpretation is not applicable.

58. To determine the true scope of Article 403, its analysis must include an examination of both its purpose and its effect.

59. A proper understanding of Article 403 can be found in the panel report concerning the margarine dispute. The Panel indicated that "the purpose of such rules as Articles 401 and 403 is to preserve competitive opportunities."[21]

60. To determine conformity with Article 403, it is necessary to determine whether competitive opportunities have been preserved or if the purpose or effect of the measure at issue is to restrict a merchant's

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[20] *Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Québec Regarding Québec's Measure Governing the Sale in Québec of Coloured Margarine,* June 23, 2005, at pp. 25-26. (Appendix 20).
[21] *Supra*, note 20, at p. 27.

freedom to produce, advertise, market and finally sell its product. Designing, identifying or correctly labeling a product on the basis of its contents for the purpose of not creating confusion in the marketplace as to the nature and contents of the product in question cannot constitute an obstacle. Admitting the contrary would be tantamount to admitting that it is alright to mislead the buyer or recipient of a product by letting them believe that the nature of the product is different from what they truly wish to acquire.

61. Additionally, in the matter at issue, all Parties in Canada that wish to conduct business in Québec have the same rights and are subject to the same obligations as Québec producers of dairy products and substitutes. Competitive opportunities are fully preserved and Québec's regulations are not an obstacle referred to in Article 403.

62. Furthermore, an analysis of compliance with Article 403 must consider the fact that the measure is consistent with an international standard whose purpose is to protect consumers and, because that is the case, that the measure does not create an obstacle to internal trade.

63. In conclusion, section 4.1 is not a measure inconsistent with Article 401, 402 or 403. However, if the Panel were to conclude otherwise, Québec maintains that it is nonetheless permissible under the Agreement, as it meets each and every one of the conditions set out in Article 404.

3. Arguments concerning applicability of Article 404

64. If the Panel were to conclude that Québec's regulations as contained in section 4.1 of the act do not comply with Article 401, 402 or 403, Québec argues, in the alternative, that the regulations comply with each of the conditions of Article 404, which reads as follows:

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

(d) the measure does not create a disguised restriction on trade.

65. In accordance with the applicable principles of interpretation, the article must be interpreted in consideration of the ordinary meaning of the words used, its context and the intention of the Parties.[22]

66. When signing the Agreement, the Parties agreed in the Preamble that it was their intention, among other things, "to promote an open … domestic market," "to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments" and "to recognize the diverse social, cultural and economic characteristics of the provinces."

67. The intention formulated in the Preamble is echoed in Chapter One (Operating Principles), at Article 100, under the heading "Objective." That article lays out the objective sought by the Parties upon signing the Agreement, as follows:

> Article 100: Objective
> It is the objective of the Parties to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market. All Parties recognize and agree that enhancing trade and mobility within Canada would contribute to the attainment of this goal.

68. In addition, at Article 101 (4) (b) and (d), under the heading "Mutually Agreed Principles," the Parties recognized the need for exceptions to the commitment to enhance trade liberalization and to take into account the importance of consumer protection.

69. The Parties' intention, as expressed in the Preamble and Chapter One of the Agreement, is to enhance trade liberalization in Canada while allowing exceptions to that liberalization.

[22] The principles of statutory interpretation in effect in Canada must be taken into account. In 2005, the Supreme Court of Canada stated that "It has been long established as a matter of statutory interpretation that 'the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words plays a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole." See *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, at paragraph 10. (Appendix 21).

70. The intention to liberalize trade and yet allow exceptions is clearly expressed in Chapter Four of the Agreement titled "General Rules." Articles 401, 402 and 403 contain rules to enhance trade liberalization in Canada and Article 404, exceptions to those rules.

71. It follows from the above that the exception in respect of a legitimate objective stated in Article 404 must not be applied in such a restrictive manner that it prevents its actual use. In that regard, the Agreement gives significant latitude and states in the new Article 905 (1) that, for greater certainty, in adopting or maintaining any technical measure a Party may establish the level of protection it considers appropriate in the circumstances to achieve a legitimate objective. Annex 405.1 (4) has the same effect and states that a Party may establish the level of protection that it considers to be appropriate when adopting or maintaining any standard or standards-related measure to achieve a legitimate objective.

72. The discretionary authority to establish the appropriate level of protection granted to the Party invoking the exception in respect of a legitimate objective clearly shows that the Parties, by signing the Agreement and agreeing on a new Chapter Nine in 2010, intended for the exception to be usable. The Parties never intended that the requisite conditions would be such as to prohibit use of the exception.

73. In order to give effect to the Parties' intention, Québec is of the opinion that the Panel must interpret the exception in such a way as to give it meaning and permit its use.

74. Québec further maintains that the court rulings referred to in paragraph 110 of Saskatchewan's submission do not apply in the present matter for the following reasons: the purpose of the Court of Appeal's review was not to determine the legislator's intention when it adopted section 4.1; the court rulings do not have the authority of precedents or *stare decisis* before a panel; and the concept of legitimate objective is one specific to the Agreement on Internal Trade and does not apply before courts of law.

75. Québec is of the opinion that the Panel must carry out its own analysis to determine whether the purpose of the measure is to achieve a legitimate objective. In that regard, as stated by the Panel at page 30 of its ruling in the matter concerning the colour of margarine, "it will be necessary for a panel to scrutinize a measure to determine whether its main or even its predominant purpose is to achieve a legitimate objective" given that "[m]easures often (indeed in many cases) have more than one purpose." It must also distinguish between purposes, the

means to achieve those purposes and the direct and secondary effects of a measure.

76. In the paragraphs that follow, Québec will demonstrate that its regulations on labeling rules for dairy product substitutes meet each of the conditions of Article 404.

3.1. Application of Article 905

77. Québec asks that the Panel take the new Article 905 into account in its analysis of Article 404. Article 905 reads as follows:

> Article 905: Right to Establish Technical Measures
>
> 1. For greater certainty, in adopting or maintaining any technical measure a Party may establish the level of protection it considers appropriate in the circumstances to achieve a legitimate objective.
>
> 2. For greater certainty, each Party shall, in ensuring that any technical measure that it adopts or maintains is not more trade restrictive than necessary to achieve a legitimate objective, take into account the risks that non-fulfillment of that legitimate objective would create and ensure proportionality between the trade restrictiveness of the technical measures and those risks.
>
> 3. Each Party shall ensure that any technical measure adopted or maintained for a legitimate objective does not arbitrarily or unjustifiably discriminate between or among Parties, including between that Party and other Parties, where identical or similar conditions prevail.
>
> 4. No Party shall adopt or apply a technical measure in a manner that would constitute a disguised restriction on internal trade.
>
> 5. Each Party shall, where appropriate and to the extent practicable, specify its technical measures in terms of results, performance or competence.
>
> 6. Each Party shall ensure that its technical measures have a scientific, factual or other reasonable basis and that where appropriate, such technical measures are based on an assessment of risk.

78. The article is titled "Right to Establish Technical Measures" and sheds some light on how Article 404 is to be applied. Contrary to Saskatchewan's claims in paragraph 87 of its submission, Article 905 does not have the effect of limiting the scope of the "legitimate objectives" justification. Rather, it guides its application, as will be demonstrated below.

79. Article 905 first states in its heading that establishing a technical measure is a right. It then goes on to describe how that right must be applied.

80. In paragraph 1, Article 905 states that a Party may establish the level of protection it considers appropriate in the circumstances to achieve a legitimate objective. Consequently, it is not a matter of a Party establishing a measure that provides a lesser level of protection than what it has chosen simply because that level has been established by the other Parties, particularly when the measure is consistent with an international standard whose objective is to protect consumers.

81. Paragraph 2 of Article 905 can be read with Article 404 (c). It states that a Party shall, in ensuring that any technical measure is not more trade restrictive than necessary to achieve a legitimate objective, take into account the risks that non-fulfillment of that legitimate objective would create and ensure proportionality between the trade restrictiveness of the technical measures and those risks.

82. In the absence of proof to the contrary, maintaining a measure that existed prior to the coming into effect of the new Chapter Nine should be considered sufficient demonstration that a Party took into account the risks that non-fulfillment of that legitimate objective would create[23] and that the Party believes there to be proportionality between the trade restrictiveness of the technical measures and those risks. Furthermore, Québec is of the opinion that paragraph 2 of Article 905 should not be considered a provision creating an obligation that prevents the fulfillment of Article 404 (c) since the concept of proportionality is a subjective one and can rarely be agreed upon unanimously by the Parties. Finally, that the measure is consistent with an international standard whose objective is to protect consumers should be considered a demonstration of compliance with Article 905 (2).

83. Paragraph 3 of Article 905 asks a Party to ensure that its technical measures do not discriminate. All Parties must therefore be treated on the same footing. The fact that a measure is consistent with an international standard demonstrates that it is not discriminatory.

84. Paragraph 4 of Article 905 echoes Article 404 (d) and prohibits the adoption or application of a technical measure in a manner that would constitute a disguised restriction on internal trade. The fact that a

[23] *Le Petit Robert de la langue française*, 2012 edition, defines "*tenir compte* [take into account]" by "*prendre en considération* [consider]." (Appendix 22). The words "take into account" do not create an obligation to act according to consequences.

measure is consistent with an international standard demonstrates that it does not constitute a disguised restriction on trade.

85. Paragraph 5 of Article 905 states that a Party must, "where appropriate and to the extent practicable," specify its technical measures in terms of results, performance or competence. In using the words "where appropriate and to the extent practicable," the paragraph highlights that a technical measure adopted to fulfill a legitimate objective does not necessarily have to be specified in terms of results, performance or competence. In addition, the fact that the measure is consistent with an international standard whose objective is to protect consumers should be considered a demonstration of compliance with Article 905 (5).

86. Furthermore, paragraph 6 of Article 905, by using the words "or other reasonable basis" when it states "Each Party shall ensure that its technical measures have a scientific, factual or other reasonable basis" clearly demonstrates that scientific proof is absolutely not necessary. The word "*motif* [basis]" is defined in the dictionary *Le Petit Robert* as "*mobile d'ordre psychologique, raison d'agir* [psychological motive, reason to act]."[24] In the matter at issue, the measure is based on an international standard whose objective is to protect consumers, thereby demonstrating that the basis is reasonable.

87. Finally, use of the words "where appropriate" in Article 905 (6), which states "where appropriate, such technical measures are based on an assessment of risk" demonstrates, contrary to Saskatchewan's argument in paragraph 87 of its submission, that an assessment of risk is not always necessary.[25] In addition, the recommendation in paragraph 17 of Annexe 405.1 to base its standards on international standards should be taken into account as demonstration that an assessment of risk is not necessary when the bodies of an international organization such as the Codex Alimentarius Commission have decided that it was appropriate, for the protection of consumers, to adopt a standard in a specific area.

3.2 Application of Article 404

88. To apply Article 404, Québec is of the opinion that the Panel must analyze each of the four conditions set out therein, starting with the first. Québec is of the opinion that the Panel must first determine whether the purpose of the measure is to achieve a legitimate objective before it can determine whether the other three conditions have been met.

[24] *Le Petit Robert de la langue française*, 2012 edition. (Appendix 23).
[25] Québec points out that the reference to Article 905 (5) in paragraph 87 of Saskatchewan's submission seems to be a reference to Article 905 (6).

3.2.1 Article 404 (a) - the purpose of the measure is to achieve a legitimate objective

89. The first condition that needs to be met by a measure inconsistent with Article 401, 402 or 403 in order for it to be permissible under Article 404 is that the purpose of the measure is to achieve a legitimate objective.

90. The legitimate objective referred to in paragraph (a) of Article 404 must be one of those found in the definition of the expression "legitimate objective" in Article 200 of the Agreement. That definition is as follows:

> Article 200: Definitions of General Application
>
> In this Agreement, except as otherwise provided:
>
> …
>
> **legitimate objective** means any of the following objectives pursued within the territory of a Party:
>
> …
>
> (e) consumer protection;
>
> …
>
> considering, among other things, where appropriate, fundamental climatic or other geographical factors, technological or infrastructural factors, or scientific justification.
>
> Except as otherwise provided, "legitimate objective" does not include protection of the production of a Party, or, in the case of the Federal Government, favouring the production of a Province.
>
> For greater certainty, "legitimate objective" may be amended by a provision in Part IV.

91. Consumer protection is one of the legitimate objectives listed in Article 200. Therefore, it needs to be determined whether the purpose of Québec's regulations is consumer protection. In that regard, Québec maintains that the purpose of the regulations on labeling rules for dairy product substitutes is to protect consumers.

92. The panel in the matter of margarine stated that "Measures often (indeed in many cases) have more than one purpose. Precisely how a panel must distinguish between multiple purposes of a measure and

weigh such purposes in order to conclude whether the measure is intended to achieve a legitimate objective, is a matter which can be left to another day."[26] Saskatchewan says it agrees with that statement, in paragraph 90 of its submission, namely, that a measure may have more than one goal. Québec further maintains that a distinction must be made between goals, the means to attain those goals and the direct and secondary effects of a measure.

93. Québec will demonstrate that the measure, introduced in 1961, originally intended to protect consumers, that the means to achieve that goal was to restrict the use of certain terms and that the secondary effect was to allow only dairy producers or manufacturers from across Canada to use those terms exclusively.

94. The present matter gives the Panel an opportunity to distinguish between the various goals of an act and the goal of a specific measure, and to apply the rules of the Agreement as they should be applied.

95. In 1961, in discussions surrounding the adoption of the *Dairy Products Substitutes Act,*[27] whose goal was, among other things, to restrict the use of certain dairy terms, Alcide Courcy, Minister of Agriculture and Colonization, stated that:

> [Translation] The draft bill is intended to protect both the dairy industry and consumers. The latter have often been misled by the presence on packaging displays of a product that looks like butter. This practice must be stopped.[28] (underlining ours).

96. Section 7 of the 1961 act read as follows:

> [Translation]
>
> 7. It is prohibited
>
> (a) to use the words "milk," "cream," "butter," "cheese," "blend" or a derivative of any of those words to designate a substitute;
>
> (b) to use the words "dairy," "creamery," "butter making plant," "cheese making plant" or a derivative of any of those words to designate an entity that manufactures or sells a substitute;

[26] *Supra*, note 20, at page 30.
[27] S.Q., 1961, c. 59. (Appendix 24). The goal of the act was to allow the sale of margarine and restrict the use of certain terms on packaging.
[28] Debates of the Legislative Assembly, 26th Legislature, 2nd Session, 1960-1961, May 25, 1961, at p. 1380. (Appendix 25).

(c) to use names or images evoking the dairy industry to designate a substitute.

97. In 1969, Québec adopted the *Dairy Products and Dairy Products Substitutes Act*[29] to group together the statutes respecting dairy products and substitutes in a single act. In debates surrounding the adoption of the act, the Minister of Agriculture and Colonization, Clément Vincent, spoke of the spirit that drove preparation of the draft bill. Mr. Vincent stated as follows:

> [Translation] In short, we can summarize the scope of Bill 70 by saying that it was prepared in collaboration with all the interested parties who participated more or less directly towards its development. It takes into account, to the extent possible, the interests of each of those groups, a relatively unique phenomenon in the history of agricultural legislation. It can be said to benefit milk producers, industry and the consuming public.[30] (not underlined in original).

98. Section 7 of the 1961 act was incorporated with minor changes into the 1969 act. It became section 28 and read as follows:

> [Translation]
>
> 28. It is prohibited:
> (a) to use the words "milk," "cream," "butter," "cheese" or a derivative of any of those words to designate a substitute;
>
> (b) to use any words, trademarks, names or images that evoke the dairy industry to designate a substitute;
>
> (c) to use a false, misleading or fraudulent indication in respect of a substitute or a class of substitutes, by words or otherwise, in an advertisement or flyer, or on packaging that contains a substitute.

99. Section 28 of the 1969 act was finally incorporated, with changes, into the *Food Products Act* in 2000. It became section 4.1, which is the subject of this matter.

100. As stated above in this submission, section 4.1 deals with packaging and has the clear objective of protecting consumers and avoiding any confusion. It is consistent with an international standard, as recommended by paragraph 17 of Annex 405.1, namely, the Codex

[29] S.Q., 1969, c. 45. (Appendix 26).
[30] Debates of the National Assembly of Québec, Fourth Session – 28th Legislature, November 28, 1969, Volume 8- No. 93, page 4371. (Appendix 27).

General Standard for the Use of Dairy Terms, which was adopted to ensure fair practices in the food trade. Québec refers the Panel to the arguments that it presented in a previous section of this submission.[31] It refers the Panel, in particular, to Section 3 of the Codex General Standard for the Use of Dairy Terms, which states that the purpose of dairy terms intended for milk and milk products is to protect consumers from being confused or misled and to ensure fair practices in the food trade. The section reads as follows:

> Section 3: Foods shall be described or presented in such a manner as to ensure the correct use of dairy terms intended for milk and milk products, to protect consumers from being confused or misled and to ensure fair practices in the food trade. (not underlined in original).

101. The objective to protect consumers also arises from the wording and context of section 4.1, which begins with the words "In addition, no person shall." The dictionary *Le Petit Robert* defines the word "*également* [in addition]" as "*D'une manière égale, au même degré, au même titre. pareillement* [in equal manner, to the same degree, on the same basis, likewise]."[32] Use of the words "in addition" refers directly to the preceding section, namely, section 4 of the act, whose purpose is consumer protection.[33] Clearly the legislator, by using the formulation "In addition, no person shall" wanted to afford the same type of protection as found in the preceding section and protect consumers even further.

102. Moreover, the expression "In addition, no person shall" replaced the expression "It is prohibited," found in section 28 of the 1969 act. The legislator's choice to replace that expression, to place section 4.1 directly after section 4 and to use the words "In addition, no person shall" demonstrates the intention mainly and predominantly to protect consumers.

103. It comes to light from the above that the regulations on the labeling of dairy product substitutes were intended, from the outset, to protect consumers by preventing them from being misled by packaging that looked like butter, and that, in order to do so, they restricted the use of certain terms, with the secondary effect of permitting producers alone to use them.

[31] See paragraphs 28 and following of this submission.
[32] *Le Petit Robert de la langue française*, 2012 edition. (Appendix 28).
[33] Saskatchewan is also of the opinion, in paragraphs 70 and 112 of its submission, that the purpose of section 4 of the act is to protect consumers.

104. If the Panel admits, as Québec argues, that the measure is intended to protect consumers, then it must decide that the conditions of Article 404 (a) have been met.

105. To make its decision, the Panel must analyze the measure based on the situation today while considering the situation when it was adopted.

106. The Panel must take into consideration how important consumer protection has become in recent years. It must also take into consideration the fact that in 1961, in the infancy of the consumer movement of the 1960s, consumer protection had been deemed important enough for discussion in debates surrounding the adoption of an act and for the need to cease the misleading behaviours of which consumers were victims.

107. In consideration of the above, particularly the ministers' statements in 1961 and 1969, the fact that the measure is consistent with an international standard, and the incorporation of section 4.1 into the *Food Products Act* with its introductory wording that refers to section 4, the Panel must decide that the measure has always had the first and foremost objective of protecting consumers and that producers benefit from that measure in a secondary or indirect manner.

108. In the present matter, the objective of the measure is clearly to <u>fully</u> protect consumers who directly consume products by preventing them from being confronted with terms or images that imitate dairy products. The measure prevents any possibility of confusion and any possibility that a consumer may purchase a product by mistake.

109. The Panel cannot question that objective even if the level of protection is greater than that adopted by certain other Parties because the Agreement expressly permits a Party, under the terms of Article 905 (1), to establish the level of protection it deems appropriate in the circumstances to achieve a legitimate objective.

110. That provision does not allow a panel to review the objective sought by a Party nor the level of protection that it has chosen and apply its own value system and its own assessment of the appropriate level of protection.

111. Québec maintains that consumer protection is of the utmost importance today, that it can establish the level of protection that it deems appropriate and that the Panel cannot substitute its own judgment for that of Québec.

112. Article 905 (1) does not allow the Panel to question the good faith of the Party that adopted a measure to achieve a legitimate objective even if the level of protection is deemed high.

113. Clearly as well, section 4.1 is consistent with an international standard whose objective is to protect consumers and, for that reason alone, the measure should be seen as one whose purpose is to achieve a legitimate objective.

114. In deciding as much, the Panel must also decide that the indication in Article 200, "… does not include protection of the production of a Party …," does not refer to the case of a measure whose natural consequence is that only a product compliant with the labeling rules, regardless of the province where it was produced, can be marketed. In such instance, if there were protection, it would be protection of all the provinces' production. Thus, given that all the provinces' dairy products and substitutes authorized by the regulations can be marketed in Québec, the challenged regulations do not seek to geographically protect Québec's production.

115. In addition, Québec maintains that Article 905 (1) is a provision contrary to the second paragraph of the definition of "legitimate objective" and that that paragraph does not apply in the matter at issue.[34] Indeed, it is possible that the right to establish a higher level of protection may favour the production of a product as an indirect consequence.

116. Any other interpretation takes away any meaning from the possibility provided by a Party to adopt a measure whose purpose is to achieve a legitimate objective.

3.2.2 Article 404 (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

117. The test to determine whether a measure meets the requirements of Article 404 (b) is the following:

    1. First, it is necessary to ensure that the measure meets the requirements of Article 404 (a) and that its purpose is to achieve a legitimate objective.

[34] The definition of "legitimate objective" in Article 200 states that "Except as otherwise provided, "legitimate objective" does not include protection of the production of a Party …."

2. Next, it must be determined whether the good of the Party requesting access to the territory of the other Party does not impede achievement of the legitimate objective.

3. If the good in question does not impede achievement of the legitimate objective, then it must be determined whether the measure adopted to achieve that legitimate objective does not operate to impair "unduly" the access of the good.

118. When the test is applied to the facts of this matter, it appears:

1. That the measure adopted by Québec in respect of the labeling of substitutes has the purpose of achieving a legitimate objective, that is, consumer protection, as has been demonstrated in this submission.

2. That the goods from Saskatchewan for which access to Québec's territory is being requested, namely, substitutes that allegedly fail to meet the labeling requirements set out in section 4.1, would impede achievement of the legitimate objective sought by Québec. In accordance with the wording of Article 404 (b), the good for which access is being requested must not impede achievement of the legitimate objective. In the case at issue, if dairy product substitutes from Saskatchewan could be sold in Québec while failing to comply with the labeling standards set out in section 4.1, the measure adopted by Québec to protect consumers would become without effect and Québec would no longer be able to meet its legitimate objective.

3. Since the goods for which access is being requested, namely, dairy product substitutes that fail to comply with the labeling standards set out in section 4.1, would impede achievement of the legitimate objective sought by Québec, there is no need to determine whether the third part of the test, namely, whether the measure adopted to achieve the legitimate objective, does not operate to impair "unduly" the access of goods. Québec has no choice, it must prohibit access to dairy product substitutes that fail to meet the labeling standards set out in section 4.1 in order to fulfill the objective that it has chosen to achieve and the level of protection that it deems appropriate.

4. Finally, given that the measure is consistent with an international standard whose objective is to protect consumers, it must not be seen as operating to impair unduly the access of goods of other Parties and it must be permissible under Article 404 (b).

3.2.3 Article 404 (c) - the measure is not more trade restrictive than necessary to achieve that legitimate objective

119. The test to determine whether a measure meets the requirements of Article 404 (c) is the following:

1. First, it is necessary to ensure that the measure meets the requirements of Article 404 (a) and that its purpose is to achieve a legitimate objective.

2. Next, it must be determined whether the measure (which at this stage, and in the Panel's opinion, would restrict trade because otherwise there would be no need to apply Article 404) goes beyond what is necessary to achieve the legitimate objective.

120. When the test is applied to the facts of this matter, it appears:

1. That the measure adopted by Québec in respect of the labeling of substitutes has the purpose of achieving a legitimate objective, namely, consumer protection, as has been demonstrated in the preceding section of this submission.

2. That the regulations on labeling prevent persons in Québec, Saskatchewan and the other provinces and territories from using terms that are prohibited by section 4.1 to designate dairy product substitutes.

3. That those regulations do not go beyond what is necessary to achieve the established level of protection and meet the legitimate objective sought by Québec, which consists in affording the best protection possible to consumers and avoiding any risk of confusion.

4. That the measure does not go beyond what is necessary to achieve the legitimate objective being sought because it is based on a relevant international standard, as prescribed by paragraph 17 of Annex 405.1, namely, the Codex General Standard for the Use of Dairy Terms.

5. Québec maintains that it has chosen a level of protection based on an international standard and that it is not required to adopt a measure that would provide a lesser level of protection, even if that measure were less trade restrictive.

6. In addition, the fact that Québec maintains its regulations must be seen as sufficient demonstration that it took paragraph 2 of

Article 905 into account, including the risks with which it would have to deal if the legitimate objective were not achieved, and that it made assurances that a proportionality existed between the trade restrictiveness of the technical measures and the risks in question.[35] Québec is further of the opinion that paragraph 2 of Article 905 should not be seen as a provision creating an obligation that prevents the fulfillment of Article 404 (c) since the concept of proportionality is a subjective one and may rarely be agreed upon unanimously by the Parties. In addition, the fact that the measure is consistent with an international standard whose objective is to protect consumers must be taken into consideration in analyzing this paragraph. It shows that the global community considers the standard to be acceptable in trade.

7. Finally, use of the words "where appropriate" in Article 905 (6), which states "where appropriate, such technical measures are based on an assessment of risk," shows, contrary to Saskatchewan's argument in paragraph 87 of its submission, that an assessment of risk is not always necessary.[36] In addition, the decision to base a measure on an international standard waives any obligation to carry out an assessment of risk.

3.2.4 Article 404 (d) - the measure does not create a disguised restriction on trade

121. In the matter at issue, the measure adopted by Québec is transparent. Terms prohibited by section 4.1 for the designation of substitutes cannot be used.

122. Manufacturers in Québec, Saskatchewan, and the other provinces and territories, all governments in Canada, grocers and consumers know exactly what to expect as regards dairy product substitutes: terms prohibited by section 4.1 for the designation of substitutes cannot be used.

123. Québec's measure prohibits the use of certain terms, but it cannot be argued that it is a disguised restriction on trade. The measure does not hide anything. Moreover, it is consistent with an international standard and it is needed to achieve the legitimate objective sought by Québec, which is to protect consumers.

[35] In note 23, *supra*, Québec indicated that the words "*tenir compte*" were defined as "*prendre en considération*." It also indicated that the words "*tenir compte*" do not create an obligation to act according to the consequences.

[36] Québec is of the opinion that the reference to Article 905 (5) in paragraph 87 of Saskatchewan's submission seems to be a reference to Article 905 (6).

124. Québec maintains that the main objective of its regulations is to protect consumers; however, it does not deny the secondary effect, which is to allow dairy producers from across Canada to exclusively use certain names and certain images. The measure is totally transparent and legitimate, and it meets the conditions of Article 404 (d).

125. In conclusion, the regulations on the labeling of dairy product substitutes, if they are not consistent with Article 401, 402 or 403, which Québec challenges, are permissible under Article 404 of the Agreement.

PART IV ADDITIONAL CONSIDERATIONS

126. Québec wishes to inform the Panel that it does not agree with Saskatchewan's interpretation, in paragraph 17 of its submission, that jurisdiction of the new Chapter Nine of the Agreement on Internal Trade extends to all measures relating to food and agriculture.

127. Québec maintains that, in accordance with Article 902.1 of the Agreement, only technical measures adopted or maintained by a Party in respect of internal trade in agricultural and food goods fall within the jurisdiction of Chapter Nine. For the new Chapter Nine to apply, it must be determined whether a measure is a "technical measure" within the meaning of the definition given to that expression in Article 907.

128. Because no transitional measures were specified by the drafters of the new Chapter Nine, Québec maintains that a measure that used to fall within the jurisdiction of the old Chapter Nine may possibly be outside the jurisdiction of the new Chapter Nine.

129. In paragraph 11 of its submission, Saskatchewan hopes for a body of case law to be built as soon as an apparent similarity seems to exist between cases and submits that the burden is on the defendant to demonstrate that past decisions must not be followed.

130. The Agreement contains no rule stating that panels are bound to or must echo the conclusions of other panels in distinct matters, whether similar or not.

131. Québec makes its own comments as to what it believes to be fair with regard to past decisions, as it has done in this submission. It should be pointed out, however, that Saskatchewan would not benefit from a presumption of that nature and that it has the burden of demonstrating

why decisions with regard to Ontario should be followed in the case at issue.

132. Québec further wishes to inform the Panel that it does not intend to respond to some of the points raised by Saskatchewan and the interveners that it considers to have no relevance in the present matter. That decision by Québec must not be construed as an admission, and Québec reserves the right to respond if the Panel deems it necessary to do so. Those points are, among other things, that Québec produces more milk than the national average, that butter can be called "soy loaf," that Québec's dairy industry agrees with Saskatchewan's statement that the challenged measures favour the dairy industry and the obligation to lobby.

PART V INJURY

133. Saskatchewan did not indicate, in paragraphs 113-116 of its submission, that it was suffering an injury by reason of the labeling rules set out in Section 4.1. It is also fair to wonder how a measure that is consistent with an international standard can cause injury.

PART VI APPORTIONMENT OF OPERATIONAL COSTS

134. In paragraphs 119-123 of its submission, Saskatchewan asks the Panel not to distribute operational costs evenly.

135. Québec objects to Saskatchewan's request and sees no justification for operational costs not to be divided equally as stated in Article 55 of Annex 1705 (1).

136. Saskatchewan's argument in paragraph 120 of its submission concerning the period of time between consultations and the request to establish a panel must not be taken into account by the Panel for the following reasons.

137. The fact that a request for consultations was made and that a Party does not immediately amend the challenged measures is not a reason not to divide costs equally. The goal of consultations is to allow the Parties to discuss a measure that one Party believes to be inconsistent with the Agreement. Consultations are confidential and without prejudice to the rights of the Consulting Parties in any proceedings in accordance with Article 1702. 1 (11). The fact that a request to establish a panel was not submitted immediately after the statutory deadline of

120 days is a confidential matter between the Consulting Parties and must not be taken into account in dividing the operational costs.

138. Saskatchewan's argument in paragraph 121 of its submission to the effect that non-compliance of the measures should be evident after the decisions concerning Ontario in 2004 and 2010, and Alberta's argument, in paragraph 16 of its submission, that Québec participated in the negotiations and agreed to the new Chapter Nine, must be dismissed.

139. Saskatchewan's argument in paragraph 123 of its submission, and Alberta's argument in paragraph 16 of its submission, to the effect that long-standing knowledge of non-compliance is another relevant factor must also be dismissed.

140. In that regard, Québec does not agree with Saskatchewan's interpretation that jurisdiction of the new Chapter Nine of the Agreement on Internal Trade extends to all measures relating to food and agriculture.

141. Québec maintains that, in accordance with Article 902.1 of the Agreement, only technical measures adopted or maintained by a Party in respect of internal trade in agricultural and food goods fall within the jurisdiction of Chapter Nine; for the new Chapter Nine to apply, it must be determined whether a measure is a "technical measure" within the meaning of the definition given to that expression in Article 907.

142. Because no transitional measures were specified by the drafters of the new Chapter Nine, Québec maintains that a measure that used to fall within the jurisdiction of the old Chapter Nine may possibly be outside the jurisdiction of the new Chapter Nine.

143. Québec further maintains that there is no rule stating that panels are bound to or must apply the conclusions of other panels, and that the decisions concerning Ontario do not automatically apply in the present matter.

144. The matter concerning margarine referred to by Saskatchewan in paragraph 123 of its submission must not be taken into account because the challenged measures were completely different from those in the matter at issue.

145. In addition, the decision to assess 70% of the costs to Ontario in *Ontario – Dairy Analogues II* in 2010 cannot serve as a basis for applying a similar division in the matter at issue. In 2010, the Summary

Panel assessed a substantial portion of the costs to Ontario because, as indicated at pages 33 and 34 of its decision:

> 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 ….

146. The situation here is different. Québec has collaborated with the Secretariat and the other Parties and it has complied with the timelines. Its decision to table a draft bill and not to present a written argument in respect of sections 7.1 and 7.2 and the measures relating to composition rules must not be construed as a failure to participate in the dispute in accordance with Article 1707.5, but rather as a demonstration of Québec's desire to avoid costs to all the Parties.

PART VII SUMMARY

147. Québec has indicated in this submission that, following a close review of its regulations, it had been determined expedient to lift the prohibitions contained in sections 7.1 and 7.2 of the *Food Products Act*. It has indicated that the necessary adjustments to ensure conformity should be made to the *Regulations Respecting Food*. It has indicated that that decision was not an admission of the non-compliance of its measures with the Agreement on Internal Trade.

148. It has further indicated that it did not agree with Saskatchewan that the jurisdiction of Chapter Nine of the Agreement extends to all measures relating to food and agriculture. In the view of Québec, that chapter applies only to technical measures relating to internal trade in agricultural and food goods.

149. Québec subsequently indicated that it objected to the admissibility of Saskatchewan's complaint with regard to the labeling rules set out in section 4.1 of the *Food Products Act* because the labeling rules were not invoked at the time of the request for consultations and at the time of the request to establish a panel; consequently, the Panel has no jurisdiction to examine same.

150. Québec has finally demonstrated that its labeling rules were consistent with an international standard, the *Codex Alimentarius*, that they were permissible under the Agreement, that they were not an obstacle under

Article 401, 402 or 403 and, on the contrary, they are measures permissible under Article 404.

PART VIII CONCLUSION

In consideration of the foregoing, Québec asks the Panel:

(a) To acknowledge its decision to lift the prohibitions contained in sections 7.1 and 7.2 of the *Food Products Act* and to make the consequential amendments to the *Regulations Respecting Food*;

(b) To declare that the Panel has no jurisdiction over the labeling rules set out in Section 4.1 of the *Food Products Act* because the labeling rules were not invoked at the time of the request for consultations and at the time of the request to establish a panel and that they cannot be the subject of a complaint by Saskatchewan in the present matter;

(c) Should the Panel decide that it has jurisdiction over the labeling rules, to declare that Québec's regulations with regard to labeling are consistent with an international standard of the Codex Alimentarius Commission, the Codex General Standard for the Use of Dairy Terms, and that, for that reason, they are permissible under the Agreement on Internal Trade;

(d) To declare that the regulations on the labeling of substitutes are not an obstacle to internal trade and that they do not contravene Article 401, 402 or 403 of the Agreement on Internal Trade;

(e) Otherwise, to declare that the regulations on the labeling of substitutes are permissible under Article 404 and Article 905 of the Agreement on Internal Trade;

(f) To dismiss Saskatchewan's complaint concerning section 4.of the *Food Products Act*;

(g) For the same reasons, to dismiss the interventions by British Columbia, Alberta and Manitoba;

(h) To divide the Panel's operational costs evenly.

All of which is respectfully submitted this 23rd of September, 2013.

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