

**AGREEMENT ON INTERNAL TRADE
DISPUTE RESOLUTION PANEL**

AIT DISPUTE 12/13 – 09 EDI OIL

**SASKATCHEWAN VERSUS QUEBEC ON MEASURES REGARDING DAIRY BLENDS, DAIRY
ANALOGUES AND DAIRY ALTERNATIVES**

REPLY SUBMISSION ON BEHALF OF THE GOVERNMENT OF SASKATCHEWAN

NOVEMBER 15, 2013

**SASKATCHEWAN MINISTRY OF JUSTICE AND THE ATTORNEY GENERAL
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REPLY SUBMISSION ON BEHALF OF THE GOVERNMENT OF SASKATCHEWAN

1. Introduction and Jurisdiction to Submit Reply Submissions

[1] As per the October 16, 2013 Panel Decision, the following Order was made:

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.

[2] Saskatchewan's written submissions were filed on August 8, 2013 (hereinafter "Saskatchewan's Submissions"). Quebec's Reply Submissions were filed on September 23, 2013 (hereinafter "Quebec's Submissions").

[3] Saskatchewan submits that, broadly speaking, two new issues have been raised by Quebec's Submissions that require a brief written response.

(a) Objections to the jurisdiction of the Panel with regard to measures pertaining to labeling and marketing of Dairy Substitutes (hereinafter the "Labelling Measures")—specifically, section 4.1(1) and (2) of the Quebec *Food Products Act*¹ (see particularly paragraphs 17-27 of Quebec's Submissions); and

(b) The effect of Article 405(1) and Annex 405.1 of the Agreement on Internal Trade (hereinafter the "AIT") and the *Codex Alimentarius* on the commitments found in Article 4 and Article 9 of the AIT (see particularly paragraphs 30-42 Quebec's Submissions).

The forgoing is not intended to prejudice Saskatchewan's right to reply in full to Quebec's Submissions at the January 8, 2014 Panel Hearing related to this matter. Quebec's Submissions raise a number of smaller technical and substantive issues that will be addressed in oral argument.

¹ *Food Products Act*, R.S.Q. c. P-29, s. 4.1 [Saskatchewan's Submissions, Tab H]

2. The Jurisdiction of the Panel

- [4] Quebec, in its Submissions, claims that the text of the January 23, 2012 Request for Consultations, the consultations which followed, and the Request for Panel do not adequately bring the Labelling Measures before this Panel such that the Panel has jurisdiction to hear that dispute. Saskatchewan submits that the Panel has jurisdiction to determine the AIT-compliance of the Quebec Labelling Measures.
- [5] While the Request for Consultations was framed broadly, it did not *specifically* refer to the Labelling Measures. The Request for Consultations did not, however, specifically refer to any section numbers in the *FPA* or any of the labyrinthine Regulations enacted pursuant to the *FPA*. Some, but not all, Intervenors identified specific sections of the *FPA* in their respective requests for consultation. Quebec objects only on the basis that s. 4.1 was not specifically identified in the Request for Consultations, but does not raise the issue that other specific sections of the *FPA* or the accompanying Regulations were not identified.
- [6] Saskatchewan submits that the broad language of the Request for Consultations (i.e. “restrictions on the manufacture and sale”) includes restrictions on the manner and method of sale. While the twin prohibitions on blending dairy products and manufacturing unauthorized dairy substitutes are the most blatant of the “restrictions” on manufacture and sale, they are not the exclusive restriction within the *FPA*. Other than the general permitting requirements, the Quebec *FPA* inherited from its predecessor legislation two central restrictions on the sale of dairy substitutes in Quebec: the prohibition on unauthorized blends and substitutes (ss. 7.1 and 7.2) and the prohibitions on labelling (ss. 4.1(1) and (2)). These are, together, the *FPA* “restrictions” on the manufacture and sale of dairy blends and the Request for Consultations can easily be read to include the labelling and blending provisions.
- [7] It should be noted that the June 17, 2013 Request for Panel from Saskatchewan clearly referred to “marketing” of Dairy Substitutes:

The measures of complaint relate to the restrictions on the manufacture, sale, and marketing of oil-based dairy blends and analogues within the Province of Quebec. In particular, the measures include Quebec’s Food Products Act, R.S.Q., c. P-29 and the

Regulation respecting food, R.S.Q., c. P-29, r. 1, enacted pursuant to that Act (hereinafter the Regulations).

- [8] A review of the history of the Measures in the Saskatchewan submissions, including the Labelling Measures, shows that the restrictions on sale and the restrictions on labelling have travelled together as a complete legislative “package” since at least 1961,² and through significant amendments in the years 1969, 1987, and 2000 (see Saskatchewan’s Submissions, paragraphs 33-35). The Labelling Measures and general blending prohibitions have been two companion protections for the Quebec dairy industry for over half a century.
- [9] Furthermore, as Quebec’s thorough and fulsome submissions evince, there has been no apparent prejudice to the Responding Party’s ability to respond to the complaint that the Labelling Measures are not AIT-compliant. Quebec’s objection is a technical one, and has not resulted in any prejudice to the Responding Party.
- [10] While Saskatchewan submits that the Labelling Measures represent a barrier to internal trade independent of the blending and manufacturing prohibitions, a consideration of the Labelling Measures is necessarily incidental, in part, to the argument for the repeal of the blending and manufacture prohibitions, found in s. 7.1 and 7.2 of the *FPA*. Quebec has chosen not to defend the blending and manufacture prohibitions and advises that the repeal of these sections is planned.³ Taking, momentarily, the repeal of s. 7.1 and 7.2 of the *FPA* as a given, several problems arise *vis-à-vis* the Labelling Measures which are important to address.
- [11] With the anticipated repeal of ss. 7.1 and 7.2, a difficult problem immediately presents itself. Section 4.1 states:

4.1. In addition, no person shall

(1) use the words « milk », « cream », « butter », « cheese » or a derivative of any of those words to designate a dairy product substitute;

(2) use any words, trademarks, names or images that evoke the dairy industry to designate a dairy product substitute.

² *Dairy Substitutes Act*, S.Q. 1961, c. 59 [Saskatchewan’s Submissions, Tab B]

³ At time of writing, Bill No. 56 (which repeals ss. 7.1 and 7.2 of the *FPA*) has not proceeded past first reading in the National Assembly.

It is not at all clear whether the newly-legalized dairy blends and substitutes—e.g. blended cheese analogues and butters blended with oils—will be considered “dairy product substitutes” under the *FPA*. The definition in section 1 of the *FPA* is unclear whether “blended” products would be considered “dairy products,” “dairy product substitutes” or some other, *sui generis* category of good:

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

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

[12] A manufacturer producing and selling a butter blend in Quebec would, under the *FPA* as currently drafted, be unable to describe their product as a “butter blend” or “butter blended with oil.” A similar problem immediately arises when cheese blends or cheese analogues are considered—a manufacturer of a cheese blend or cheese analogue would be unable to even describe their product as a “cheese blend” or “cheese blended with soy” under the current *FPA* regime. Again, only when ss. 7.1 and 7.2 are repealed does this problem present itself to the new dairy blend category. Without a repeal or partial repeal of the Labelling Measures, it would be illegal to even describe new dairy substitute products in Quebec *accurately* under the *FPA*.

[13] This is part of a larger legislative *lacunae*, namely: are dairy blends considered “dairy products” or “dairy product substitutes” under the *FPA*? These are broader technical concerns that will need to be addressed by the Quebec legislature, going forward, but the Labelling Measures are especially problematic. Blended products can be sold across Canada, and forcing manufacturers to produce separate packaging for Quebec-bound goods will present not only an increased cost to these manufacturers, but a barrier to entry into the newly-opened Quebec market. The discriminatory effect of the Labelling Measures affects all dairy substitutes within Quebec, but is going to be particularly keen for novel, blended dairy products entering the Quebec market.

3. The Effect of the *Codex Alimentarius*

[14] The Quebec Submissions raise a new issue regarding the effect of Annex 405.1 of the AIT and the effect of a particular international agreement—the *Codex Alimentarius*—on the commitments of the AIT. Saskatchewan submits that Article 405.1 of the AIT does not relieve parties of their obligations under Chapter Four or Chapter Nine of the AIT. In the Alternative, Saskatchewan submits that the Quebec Measures are stricter than the *Codex Alimentarius* requires, and given that no other Parties maintain similar measures it is inconsistent with the goals of the AIT and Annex 405.1 to look to the *Codex Alimentarius* for a defense of the Measures.

A. Application of Annex 405.1

[15] Article 405 of the AIT states as follows:

Article 405: Reconciliation

1. In order to provide for the free movement of persons, goods, services, and investments within Canada, the Parties shall, in accordance with Annex 405.1, reconcile their standards and standards-related measures by harmonization, mutual recognition, or other means.
2. Where a difference, duplication, or overlap in regulatory measures or regulatory regimes operates to create an obstacle in internal trade, the Parties shall, in accordance with Annex 405.2, cooperate with a view to addressing the difference, duplication, or overlap.

[16] It should be noted that “standards” and “standards-related measures” have different meanings in Chapter Four and Chapter Nine. In Chapter Four, the definition of those terms are found in Article 200:

Article 200: Definitions

In this Agreement, except as otherwise provided: [...]

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;

standards-related measure: means a measure that incorporates a standard and may also set out the requirements and procedures to ensure conformity or compliance. [emphasis added]

- [17] With regard to Chapter Nine, the chapter provides for a different definition of “standard,” which is different from the Chapter Two definition.

Article 907: Definitions [...]

standard means a document approved by a recognized Body including those accredited by Canada’s National Standards System, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. 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.

- [18] The Chapter 9 definition of “standard” is broader in some ways than the Chapter 4 definition: the Chapter 9 definition includes matters of “packaging and labelling” which are not included in the Chapter 2, AIT-wide definition. However, the Chapter 9 definition refers only to matters which are “not mandatory.”

- [19] The labeling component of the Quebec Measures are nonetheless within the jurisdiction of Chapter Nine due to the broad definition of “technical regulation”:

Article 907: Technical regulation

technical measure means a measure that is a technical regulation, a standard, a sanitary or phytosanitary measure or a conformity assessment procedure but does not include purchasing specifications prepared for production or consumption requirements of a Party that are addressed in Chapter Five (Procurement), according to the coverage of that 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.

- [20] Labelling requirements are “technical regulations” (and therefore “technical measures”) and are covered by Chapter Nine:

Article 902: Scope and Coverage

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

Article 900 states that Chapter Four applies to Chapter Nine. Articles 901 and 400 state that the provisions of Chapter Nine prevail to the extent of any inconsistency.

- [21] This leads to a peculiar situation: It is not clear whether the Chapter Two or Chapter Nine definition of “standard” ought to guide the interpretation of Article 405(1). Chapter Four as a whole nonetheless applies to the Labelling Measures, since the Labelling Measures are “technical measures” within the meaning of Chapter Nine.
- [22] If the Chapter Nine definition prevails, then the labelling Measures are not “standards.” The Quebec Measures are “mandatory” and sanctions are meted out to violators.⁴
- [23] If the Chapter Two definition of “standard” applies to Article 405(1), Saskatchewan submits that the Labelling Measures are not “standards” in need of reconciliation for the purposes of Article 405(1). Is a prohibition on labelling with particular words a “specification” relating to “rules, guidelines or characteristics for goods”? Considering that the Chapter Nine definition of “standard” has been specifically *enlarged* to include rules that “include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product [...]” the narrower definition in Chapter Two is underscored. The failure to include labelling or marking rules in the Chapter Two definition of “standard” and commensurate inclusion of those qualities in the Chapter Nine definition is surely material, and leads to the inference that labelling is not a component of the Chapter Two definition of “standard”: *expressio unius est exclusio alterius*. Saskatchewan submits that the restriction on using certain words or phrases on certain packaging as set out in the Labelling Measures is not a “standard” within the meaning of Chapter Two.

B. Interpretation of Article 405(1) and Annex 405.1

- [24] Even if the Labelling Measures are “standards” within the Chapter Two definition, Article 405(1) and Annex 405.1 do not “permit” or otherwise justify the labelling Measures. The purpose and application of Article 405(1) and Annex 405.1 are not intended to defend or immunize measures which are otherwise non-compliant with the AIT. The existence of an international agreement or particular compositional standard is a factor that, in particular cases, an AIT Dispute Resolution Panel might take into account when making a variety of

⁴ See e.g. *Unilever Canada inc. c. Québec (Directeur des poursuites criminelles & pénales)*, 2013 QCCA 546.

determinations. Article 405(1) and Annex 405.1 do not somehow elevate external standards or third-party documents to defenses to an AIT claim. The purpose of Article 405(1) and the associated Annex are to encourage harmonization, not to provide defenses to AIT claims.

- [25] Article 405(1) contains an extremely important predicate clause: “In order to provide for the free movement of persons, goods, services, and investments within Canada” the Parties undertake to reconcile their standards *via* the Annex. This is an important qualifier—the “reconciliation” of standards must have the goal of “free movement” of goods in mind. Saskatchewan submits that Article 405(1) does not sanitize measures which would otherwise be non-compliant with Chapter Four (or Nine) of the AIT. Article 405(1) and Annex 405.1 guide the harmonization or reconciliation process between the AIT Parties, but no more. Article 405(1) is an obligation on the AIT Parties to “reconcile” their standards-related measures; if anything, it places an obligation on Quebec to bring its standards into line with other AIT Parties’ regulatory frameworks. Article 405(1) does not *permit* a course of action or measure which does not serve the “free movement” of goods.
- [26] Article 405(1) is plainly not intended as a defense to a claim under the other obligations in Chapter Four or more specific obligations in Division IV of the AIT (i.e. Chapter Nine). It would strain the text of Article 405(1) to the breaking point to suggest that the Article, through the Annex, provides to a Measure a defense from scrutiny under Articles 401, 402, and 403. Likewise, it does not provide an expansion of the Article 404 test for legitimate objectives. Article 405(1) and the associated Annex are totally irrelevant to the matter before this Dispute Resolution Panel.
- [27] It is not precisely clear what Quebec asserts as the legal basis for the conclusion that Article 405(1) somehow justifies or immunizes the measures. The subheading (at paragraph 30 of the Quebec Submissions) states that the labelling measure is simply “permissible under the AIT” (In French, *“permise par l’Accord”*) by virtue of Article 405(1). Respectfully, there is no legal test under the AIT that reflects a “permissibility” carve-out in the manner suggested by Quebec—a measure is either inconsistent with Articles 401, 402, and 403 or it is not, and thereafter justified under Article 404 or not. The Quebec approach, which is to point to the harmonization requirement in Article 405(1) and the text of Annex 405.1(17) as a novel category of “permitted” measures under the AIT, should be rejected.

- [28] The Chapter Four of the AIT is relatively clear, analytically: first, it must be asked whether the Measures in question are contrary to 401, 402, or 403 and, if so, whether they can be justified by Article 404. Article 405 does not intervene in this analytical approach to inconsistencies or legitimate objectives. Certainly, no previous Dispute Resolution Panel has interpreted Article 405(1) in the manner suggested by Quebec. Article 405(1) does not make otherwise AIT-inconsistent measures somehow consistent with the AIT, or enlarge the definition of “legitimate objectives” or the application of the “legitimate objectives” test.
- [29] It should be noted that, to Saskatchewan’s knowledge, no other province maintains measures similar to Articles 4.1 and 4.2 of Quebec’s *Food Product Act*. Quebec has not indicated any other provinces that maintain similar labeling restrictions. Quebec’s Measures do not have the effect of harmonizing trade across the AIT Parties; the Measures are singular among the Parties and serve only as a barrier to trade among them. As noted, the introductory text to Article 405(1) sets out the purpose of the harmonization commitment in that Article. To allow Quebec to refer to a single international document and maintain a measure that, in Saskatchewan’s opinion, is contrary to Chapters Four and Nine (and unique among the AIT Parties) flies in the face of the “reconciliation” goal of Article 405(1). It is absurd for Quebec to claim to be “reconciling” its labelling measures without pointing to AIT Parties that maintain the same or even similar measures.
- [30] Annex 405.1(17) notes that international standards can be used for harmonization purposes only “where appropriate.” Where no other AIT Party has adopted the international standard, the “appropriateness” of relying on that standard should be in jeopardy.
- [31] The fact that the Measures purport to be consistent with a single international standard does not relieve Quebec of its obligations under Articles 401, 402, and 403 of the AIT. The question of whether the Labelling Measures should *also* be harmonized between the AIT Parties is not a question that presents itself to the Panel in the within dispute.

C. The Effect of the *Codex Alimentarius*

- [32] Quebec submits, at paragraph 38, that section 4.1 of the FPA is “consistent” with the *Codex Alimentarius*. While this statement may be true, it is not necessarily the test for compliance

with the AIT. As noted in Annex 405.1(5), 404(c), 905(2), the Parties still have the obligation to impose measures no more trade restrictive than necessary to maintain a legitimate objective. Simply put: less restrictive measures will not only meet the same legitimate objective, but will also be compliant with the *Codex Alimentarius*.

[33] It should be noted that Saskatchewan's primary position is that this Panel does not need to analyze the narrow question of interpreting the *Codex Alimentarius*. This Panel's jurisdiction is, of course, restricted to interpreting the AIT and measuring compliance of the Quebec Measures. For the reasons above, Saskatchewan submits that the Panel does not need to parse the technical language of the *Codex Alimentarius* in order to dispose of this argument.

[34] Portions of the *Codex Alimentarius* not set out in the Quebec Submissions should be noted, however. Quebec refers, primarily, to the *Codex General Standard for the Use of Dairy Terms* (hereinafter *CGSUDT*).⁵ At paragraph 35 of Quebec's Submissions, it refers to Article 4.3.1 of the Codex; the Articles that follow 4.3.1 in the *CGSUDT* should be noted:

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. [...]

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.

Article 4.3.3 shows that milk products under the *Codex Alimentarius* can be named descriptively where milk constituents are being added or removed to the product, which may be the case with a variety of dairy blends.

[35] Quebec refers to Article 4.6.3 in its Submissions for the general proposition that non-dairy products should not use dairy terms in a way that would imply the final product is a dairy product. A footnote to Article 4.6.3 states, importantly:

⁵ *Codex General Standard for the Use of Dairy Terms, 206-1999* [Quebec Submissions, Annex 12; English version attached at Saskatchewan's Supplemental Submissions, Tab H]

This [Article 4.6.3] 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.

- [36] Turning to the *Codex General Standard for the Labelling of Prepackaged Foods*,⁶ Article 4.1.1.3, the following is noted:

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.

Where a “common or usual name” is an “appropriate descriptive term” for the product, it the common name can be used, despite the fact that it would normally abrogate Article 4.6.3 of the *CGSUDT*. Very arguably, descriptive common names such as “soy cheese” or “filled milk” are not only allowed by the *Codex* but, perhaps, encouraged, since overwrought descriptions may confuse consumers, not enlighten them.

- [37] Upon review, it does not appear that the specific *Codex* standards for particular dairy products prohibit the use of words. The word “butter,”⁷ for example, is not prohibited writ large by the *Codex Standard for Butter*, nor is the word “cheese” prohibited by the *Codex General Standard for Cheese*.⁸ Those *Codex* standards mandate only that butter and cheese that meet particular compositional standards are properly “butter” or “cheese.” That requirement is, of course, already found in Canadian federal regulations.⁹ There is an

⁶ *Codex General Standard for the Labelling of Prepackaged Foods, 1-1985* [Saskatchewan’s Supplemental Submissions, Tab F]

⁷ *Codex Standard for Butter, 279-1971*, Article 7.1 [Quebec Submissions, Annex 13]

⁸ *Codex General Standard for Cheese, 283-1978* [Saskatchewan’s Supplemental Submissions, Tab D]

⁹ Butter is a “standardized” product under the *Food and Drug Regulations*, C.R.C., c. 870 [Saskatchewan’s Submissions, Tab K] section B.08.056, and as per 6(3) of the *Food and Drugs Act*, R.S.C. 1985, c. F-27 [Saskatchewan’s Submissions, Tab J] a product that is not a standardized product cannot claim to be one unless it

enormous amount of regulatory “middle ground” between ensuring that butter and margarine are properly and accurately labelled and prohibiting the mere word “butter” (or descriptive derivatives like “buttery,” “butter-flavoured,” “butter blend,” etc.) to appear on packages of margarine or butter blends. The same argument applies to “cheese” (and similar descriptive terms, like “cheese substitute” or “cheese flavoured”). The definitional/compositional method of standardizing food products is, of course, the animating principle of the federal food and drug regime, which Quebec has augmented or enlarged with its own, additional rules for the use of certain words on dairy substitute products.

- [38] It should be noted that the *Codex Alimentarius* specifically authorizes not only “blended spreads” (i.e. spreads which contain dairy and non-dairy oils) but also authorizes the use of descriptive terms in the names of those products. In the *Standard For Fat Spreads and Dairy Spreads*,¹⁰ the *Codex* states:

3.1 Composition [...]

3.1.2 Blended Spreads

3.1.2.1 These are blended spreads in which milk fat is more than 3% of the total fat content. However a higher minimum percentage of milk fat may be specified in accordance with the requirements of the country of the retail sale.

[...]

7. LABELLING

The product shall be labelled in accordance with the Codex General Standard for the Labelling of Pre-packaged Foods (CODEX STAN 1-1985), Codex Guidelines on the Use of Nutrition Claims (CAC/GL 23-1997) and other relevant food labelling guidelines. The product designations should be translated into other languages in a meaningful way and not strictly word by word.

7.1 Name of the Food

The name of the food to be declared on the label shall be as specified in Sections 3.1.1 and 3.1.2.

meets the strict definitional requirement for “butter” found in the *Food and Drug Regulations*. Similar rules apply to margarine (see s. B.09.016 of the *Food and Drug Regulations*) and cheese (see s. B.08.030).

¹⁰ *Codex Standard for Fat Spreads and Dairy Spreads, 256-2007* [Saskatchewan’s Supplemental Submissions, Tab B]

7.1.1 In accordance with requirements acceptable in the country of retail sale, fat spreads defined in section 3.1.1.2 with a fat content of less than 80% may incorporate the term “margarine” in the name of the food, provided that the term is qualified to make clear the lower fat content. Fat spreads with a fat content of 39 to 41% may be designated as “Minarine” or “Halvarine”.

7.1.2 For item 3.1, the name of the product may incorporate the name of the fats and oils in a generic or specific manner. [emphasis added]

The *Codex*, then, suggests that “blended” spreads may incorporate the name of the fats and oils that compose it (as per Article 7.1.2) on the packaging. This is a common-sense conclusion—it is hard to conceive of a description of a “butter and canola oil blend,” for example, that is compliant with the Labelling Measures (i.e. does not include the word “butter”) yet sufficiently descriptive of the product such that consumers can accurately identify the product being purchased.

[39] Furthermore, the *Codex Alimentarius* is not a binding treaty, and Quebec is not a signatory to it. The *Codex Alimentarius* was first drafted in 1963 by two United Nations groups: the Food and Agriculture Organization and the World Health Organization. The *Codex Alimentarius* is not itself a treaty and it has no signatories. Canada is a member of the Codex Committee, which assists with drafting and monitoring Codex standards, but the Codex standards are not mandatory for members of the WHO, FAO, the Codex Committee, or any other state. Neither Canada nor Quebec has “implemented” the *Codex Alimentarius* into its domestic law.

[40] The suggestion at paragraph 39 of Quebec’s Submissions that Canada has federally endorsed the *Codex Alimentarius* rules on dairy terminology can be quickly addressed. The document referred to at Annex 14 of Quebec’s Submissions is the text of a *newsletter* of the International Dairy Federation (IDF), posted (at one time¹¹) to a web site run jointly by the federal government and two industry associations, the Dairy Farmers of Canada and the Dairy Producers Association of Canada. The original newsletter with identical text and IDF branding is attached at Tab I of these Supplemental Submissions. The IDF, according to its website, represents dairy interests and industries and has as a mission the representation

¹¹ The document no longer exists at the link provided in Quebec’s Submissions. The PDF version can be found at *Canadian Dairy Information Center Website* (retrieved 11-13-2013) <<http://dairyinfo.gc.ca/pdf/septfactsheet2012.pdf>> [Saskatchewan’s Supplemental Submissions, Tab I]

of the dairy sector.¹² The Dairy Farmers of Canada and Dairy Producers Association of Canada are also dairy industry-run groups, representing the public policy interests of dairy farmers and dairy producers, respectively. Saskatchewan respectfully submits that the posting of a dairy industry newsletter to a website run by dairy industry groups jointly with the federal government does not indicate federal approval or endorsement of the *CGSUDT* standards.

- [41] Notably, as the history of the measures are described in Saskatchewan's Submissions, the restrictions on labeling and manufacture of Dairy Substitutes within Quebec were enacted in 1961, some two years before the *Codex Alimentarius* even existed.¹³ Furthermore, the dairy terminology portions of the *Codex Alimentarius* regarding dairy terminology were not added to the Codex until 1999.¹⁴
- [42] The Measures might therefore conform to the *Codex Alimentarius*, but they were certainly not enacted with the *Codex Alimentarius* in mind, and it is difficult to see how the Labelling Measures could have been "based" on the *Codex*, as *per* Annex 405.1(17). Furthermore, less trade-restrictive Quebec legislation would be perfectly compliant with the *Codex Alimentarius* and meet the test found in Annex 405.1(5) and elsewhere. Most importantly, as argued above, the existence of a particular standard for labelling does not relieve Quebec of its obligations under Chapters Four and Nine of the AIT.
- [43] The federal government of Canada has not integrated the dairy terminology standards in the *Codex Alimentarius* into domestic law, nor (to the knowledge of Saskatchewan) have any of the other Parties to the AIT. If "harmonization" is truly the animating principle behind importing the *Codex Alimentarius* to this dispute, this fact should be emphasized.

¹² *International Dairy Federation Website, "About Us"* (retrieved 11-14-2013) <<http://www.fil-idf.org/Public/TextFlowPage.php?ID=23084>>

¹³ *Supra*, note 2.

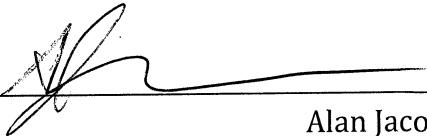
¹⁴ See *Codex Alimentarius Commission, Report of the Third Session of the Codex Committee on Milk and Milk Products, 23rd Session, May 18-22, 1998* [Saskatchewan's Supplemental Submissions, Tab B]

4. Conclusion

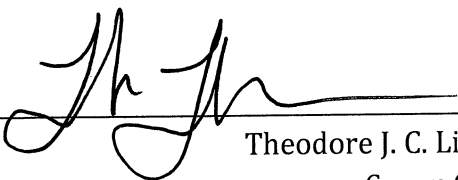
[44] For the forgoing reasons, Saskatchewan respectfully submits that:

- (a) The Panel has jurisdiction to rule on the AIT compliance of the Labelling Measures; and
- (b) The Panel should reject the argument that Article 405(1) or Annex 405.1 protects or immunizes the Labelling Measures from the full and proper analysis of “inconsistency” with the commitments in Chapter Four (i.e. Articles 401, 402, and 403) and the “legitimate objectives” test found in Article 404.

All of which is submitted this 15 day of November, 2013.



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Government of Saskatchewan

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- A. *Codex Alimentarius Committee, Report of the Third Session of the Codex Committee on Milk and Milk Products* [excerpts]
- B. *Codex Standard for Fat Spreads and Dairy Spreads, 256-2007* [English]
- C. *Codex Standard for Fat Spreads and Dairy Spreads, 256-2007* [French]
- D. *Codex General Standard for Cheese, 283-1978* [English]
- E. *Codex General Standard for Cheese, 283-1978* [French]
- F. *Codex General Standard for the Labelling of Prepackaged Foods, 1-1985* [English]
- G. *Codex General Standard for the Labelling of Prepackaged Foods, 1-1985* [French]
- H. *Codex General Standard for the Use of Dairy Terms, 206-1999* [English]
Note: The French Version of Tab H is found at Annex 12 of Quebec's Submissions
- I. *International Dairy Federation Factsheet* (September 2012)