

**In The Matter Of The
Agreement On Internal Trade**

and

**In The Matter Of A Request Under
That Agreement**

made by

Saputo Inc.

**To Commence Dispute Resolution Proceedings By A
Person-To-Government Complaint Against Canada**

**Screener:
Bettyann Cox**

**Date Of Decision:
August 18, 2008**

Introduction

1. Saputo Inc. has applied for permission to commence person-to-government dispute resolution proceedings against Canada, as provided in Part B: Person-To-Government Dispute Resolution, Article 1711(1)(a) (Initiation of Proceedings by Persons) of the Agreement on Internal Trade (AIT).
2. As screener for the Province of Saskatchewan, I am required to decide whether permission to commence dispute resolution proceedings should be granted based on the assessment criteria contained in Article 1712(4) and the Screener Process Guidelines. In the event I determine that dispute resolution proceedings can commence, I must also determine the chapter of Part IV under which the person shall proceed.

The Issue

3. The issue in this matter is summarized as follows:
 - (a) Saputo Inc. alleges that the amendments made by the Government of Canada to the cheese standards in the *Food and Drug Regulations* (“FDR”) and the *Dairy Products Regulations* (“DPR”) in enacting the *Regulations Amending the Food and Drugs Regulations and the Dairy Products Regulations* SOR/2007 – 302, which Regulations were registered on December 13, 2007, and will come into force on December 14, 2008, will restrict and create an obstacle to trade in cheese in Canada and are inconsistent with the AIT and the Federal obligations thereunder.
 - (b) Saputo Inc. further alleges, among other things, that as a result of these amendments, it will suffer adverse effects including increased manufacturing costs, increased consumer costs, a depressed market and that the effects of this “economic injury” will be also felt throughout the province of Saskatchewan.

Relevant Provisions of the AIT

4. Part B (Person-To-Government Dispute Resolution), Article 1710 (Initiation of Proceedings by Government on behalf of Persons)(1) allows a person to request that a party with whom it has a substantial connection, within the meaning of Article 1703(5), (6) or (7) initiate dispute resolution proceedings under Part A (Government-to-Government Dispute Resolution).

For our purpose, the meaning of “substantial connection” is ascribed in Article 1703(5) whereby a Party (Province) is deemed to have a “substantial and direct connection” with a person if: the person carries on business in the Province; the person has suffered an economic injury or denial of benefit; and the consequences of that economic injury or denial of benefit are being felt in the Province [emphasis added].

5. Article 1710(2) requires that the person requesting a party to initiate dispute resolution proceedings make the request in writing specifying the measure complained of, listing the relevant AIT provisions and providing a brief summary of the Complaint.
6. The party receiving the request is required to decide within 30 days whether to initiate proceedings on behalf of the person (Article 1710:4) and to provide written notice to the person within this timeframe of its decision. A failure to provide such notice within this time frame is deemed to be notice pursuant to Article 1711(a) (Initiation of Proceedings by Persons) that a Party will not initiate dispute resolution proceedings thereby allowing a person of the Party to commence dispute resolution proceedings under Article 1711(1).
7. In order to commence proceedings, Article 1711(4) requires the person to have requested a Party to initiate dispute resolution proceeding under Article 1710(1): “...within two years after the date on which the person acquired, or should have

acquired, knowledge of the alleged inconsistent measure and knowledge that the person incurred loss or damage or suffered a denial of benefit.”

Steps Taken by Saputo Inc.

8. Saputo Inc. wrote to the Director of Trade Policy, Saskatchewan Government Relations, with copies to the Minister of Government Services and the Minister of Agriculture for Saskatchewan by letter dated November 28, 2007. In its letter, Saputo Inc. requested that the Province request consultations with the Federal Government under Article 1702 with a view to requesting an AIT Panel if the consultations failed to provide the desired results.
9. When the Province failed to respond within the required 30 day timeframe as provided in Article 1710(4), Saputo Inc. took this as deemed notice for the purposes of Article 1711(1)(a).
10. On July 17, 2008, Saputo Inc. served Notice of Commencement pursuant to Article 1711(3) of the AIT.

Role and Mandate of the Screener

11. The Screener’s mandate is contained in Article 1712 of the AIT (screening). Article 1712(3) requires that the request be reviewed within 30 days after the date of its delivery.
12. In deciding whether to permit the commencement of dispute resolution proceedings, Article 1712(4) requires the Screener to take into account:
 - (a) whether the complaint is frivolous or vexatious;
 - (b) whether the complaint has been instituted merely to harass the Party complained against; and

- (c) whether there is a reasonable case of injury or denial of benefit to the person...
13. Further guidance is provided to the Screener in the Screener Process Guidelines wherein it states that “the screener should not pronounce or conclude on consistency with the Agreement and the arguments involved, the extent of the injury, or the nature of any further dispute process” (paragraph 4).
14. Paragraph 6 requires a copy of the Screener’s decision, which must be in writing, to be delivered to:
- (a) the person making the request;
 - (b) the Internal Trade Representative of the Party which received a request pursuant to Article 1710(1);
 - (c) the Internal Trade Representative of the Party against which the dispute was initiated; and
 - (d) the Internal Trade Secretariat.
15. The Screener is also required to determine the chapter of Part IV under which the person shall proceed when commencing dispute resolution proceedings under Article 1711(1)(a).

Analysis and Conclusions

16. Having reviewed the Agreement on Internal Trade, the materials submitted by Saputo Inc. including its written submissions, the amending regulations, the regulatory impact analysis statement, Saputo Inc.’s letter to the Internal Trade Representative for Saskatchewan and the Screener Guidelines, I have reached the following conclusions:

- i) On November 28, 2007, Saputo Inc. requested that the Government of Saskatchewan initiate dispute resolution proceedings on its behalf pursuant to Article 1710 of the AIT.
- ii) The request that was made in writing specified the actual measure complained of, listed the relevant provisions of the AIT and provided a brief summary of the complaint, as required by Article 1710(2).
- iii) The Government of Saskatchewan failed to provide notice to Saputo Inc. within the 30 day timeframe set out in Article 1710(4) of the AIT.
- iv) Saputo Inc. is not a person with a substantial connection within the meaning of Article 1703(5) insofar as the person is required to have suffered an economic injury or denial of benefit and the consequences of such economic injury or denial of benefit are being felt in the Province. While Saputo Inc. alleges that it will suffer an economic injury upon being required to comply with the federal amendment regulations to the *Food and Drug Regulations* and the *Dairy Products Regulations* and further alleges that the consequences of its alleged economic injury will be felt in the Province, there is no evidence that on the date of its request to the Province of Saskatchewan, being November 28, 2007, nor as of the date of its Notice of Commencement, being July 17, 2008, it has actually suffered an economic injury or denial of benefit, the consequences of which are being felt in the Province. As such, I find that Saputo Inc. does not have the necessary standing to initiate a person-to-government dispute resolution proceeding.
- v) Unlike Article 1703(9)(b) of the AIT where it specifies that persons “carrying on business in the Province are or will be affected by the measure at issue”, Article 1703(4) requires that in order for a party to have a substantial and direct connection with a person, the person must have suffered an economic injury or denial of benefit. Accordingly, it appears that the intention under the AIT is that a person, wishing to initiate a person-to-government dispute resolution process is required to actually have suffered an economic injury or denial of benefit rather than speculating that it will suffer an economic injury

- or denial of benefit if or when measures are implemented -- in this case, the federal amendment regulations which come into force on December 14, 2008.
- vi) Based on the definition of “frivolous” contained in Saputo Inc.’s submission wherein it sets out the definition contained in Black’s Law Dictionary (7th Edition) (1999) to include: “lacking a legal basis”, I conclude that in not having the necessary standing the complaint is currently lacking a legal basis and thereby frivolous in nature insofar as Saputo Inc. does not fit the definition of a person with a substantial connection to a Party, as required by Article 1710(1). Additionally, as the injury or denial of benefit has not yet occurred, since the regulations do not come into effect until December 14, 2008, I find that there is not a reasonable case of injury or denial of benefit to the person.

Accordingly, based on all the above, the request to commence dispute resolution proceedings is denied.

Decision

17. Saputo Inc. is denied permission to commence person-to-government dispute resolution proceedings against Canada as it is not a person of a Party with a substantial connection within the meaning of Article 1703(5) and as required by Article 1710(1). As such, the Complaint is found to be frivolous with no reasonable case of injury or denial of benefit to the person.



Bettyann Cox
In my capacity as Saskatchewan Screener