Agreement on Internal Trade

Appeal from the Report of the Article 1703 Panel Regarding the Dispute Between Saskatchewan and Quebec Concerning Dairy Blends, Dairy Analogues and Dairy Alternatives

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Intervenor Submission of

THE GOVERNMENT OF BRITISH COLUMBIA

August 18, 2014

I. Introduction

1. On June 24, 2013, the Government of Saskatchewan ("**Saskatchewan**") requested the establishment of a dispute settlement Panel under Chapter Seventeen of the *Agreement on Internal Trade* (the "**AIT**" or the "**Agreement**") to resolve a dispute between it and the Government of Quebec ("**Quebec**") regarding certain Quebec measures governing the manufacture and sale in Quebec of dairy substitutes ("**Dairy Analogs**") and products that are a blend of dairy products and dairy substitutes ("**Dairy Blends**"). Specifically, Quebec's *Food Products Act* and the *Regulation Respecting Food* promulgated under the authority of that Act (collectively, the "**Measures**") significantly restrict the manufacture and sale of Dairy Analogs and Dairy Blends in Quebec.

2. The Panel held a public hearing on January 8, 2014, and delivered its Report to the participating Parties on March 31, 2014. The Panel concluded that sections 7.1 and 7.2 of the *Food Products Act* were inconsistent with AIT Articles 401, 402 and 403 and that Quebec had not justified these inconsistencies under the legitimate objectives exception in Article 404. The Panel further concluded that section 4.1(1) of the *Food Products Act* is inconsistent with AIT Articles 403 and 905 and that Quebec had not justified those inconsistencies under the legitimate objectives exception in Article 404 as further reinforced by Article 905.

3. The Government of British Columbia ("**British Columbia**") was an Intervenor before the original Panel and submits these Submissions to the Appeal Panel pursuant to Rule 44.2 of AIT Annex 1705(1). British Columbia is of the view that the Panel's conclusions, in their entirety, are legally correct and should be confirmed by this Appeal Panel pursuant to Article 1706.1(4)(a).

II. Summary of Issues Addressed

4. While British Columbia takes issue with every point of appeal raised by Quebec we limit our submissions to only the most significant systemic legal issues being raised

by Quebec. In particular below we make submissions regarding the four following issues:

- Quebec's continuous insistence that the mere similarity between a measure and some "international standard" should thereby be presumed to result in AIT consistency and the Panel's conclusions related to this argument;
- The Panel's interpretation of the interface between the legitimate objectives exception in Article 404 and Article 905;
- The Panel's conclusions regarding the interpretation of Articles 402 and 403; and
- The scope and coverage of Chapter Nine as expressed by the Panel.

5. The lack of comment by British Columbia on all other grounds of appeal advanced by Quebec must not be taken to be an admission by British Columbia of the correctness of Quebec's other arguments. To the contrary, as noted, British Columbia opposes every point of appeal raised by Quebec and notes and fully adopts the submissions of Saskatchewan and the other Intervenors on all other points of appeal not specifically addressed herein.

III. The Panel's Conclusions Regarding Quebec's Reliance on an "International Standard"

6. A considerable portion of Quebec's Appeal Brief is dedicated to re-arguing the point that Quebec's Measures are similar to an existing international standard and that the Panel had committed a legal error in its consideration of the legal consequences of that similarity.

7. Although it is sometimes difficult to discern the specific legal argument Quebec is advancing on this issue, British Columbia believes that it is fair to summarize Quebec's argument on this point as follows - if a Party's measure is similar to an international

standard, it should thereby be presumed to be consistent with the AIT. For example, at paragraph 112 of its Appeal Brief Quebec states:

> "When a measure is substantially similar to a relevant international standard, a Panel should analyze that measure in detail and consider its purposes and effects before ruling that the measure is more trade restrictive than necessary to achieve a legitimate objective ***whereas it enjoys the presumption internationally of not creating an unnecessary obstacle to trade.***" (emphasis added)

8. Quebec had advanced these very same arguments before the Panel. In response, the Panel rightly concluded at page 24 that:

> "Generally speaking, the arguments put forth by the Respondent in its written and oral submissions seem to suggest that where a given measure could be found to be "consistent with an international standard", this fact alone would be sufficient to establish that all obligations imposed on a responding party pursuant to paragraphs (3), (4), (5) and (6) of Article 905 have been discharged.
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> If one were to accept the Respondent's argument, Parties to the AIT would be free to choose amongst a spectrum of potentially available and applicable standards, international or otherwise, and by their mere choosing and being "consistent" therewith completely absolve themselves of the obligation to conform to the legitimate objectives exception. It warrants noting that nowhere in Article 905 is the concept of an "international" standard referenced or mentioned. While such a notion is mentioned in Annex 405.1, it forms part of the global analysis involved in the determination of whether a particular standard or standard-related measure covered by Part IV of the AIT found to be inconsistent with the AIT may still be permissible under the provisions of Article 404.
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> The language used in the AIT is not consistent with the position taken by the Respondent that where one party purports to base its measures on some international standard, that party is somehow excused from meeting otherwise applicable burdens to establish that its measure falls within the exception."

9. British Columbia submits that the Panel's conclusions in this regard are correct and should be confirmed by this Appeal Panel in their entirety. The interpretation advanced by Quebec before the Panel and now repeated in this appeal has no legal basis in the Agreement whatsoever. It would effectively reverse the basic disciplines of the AIT and would fundamentally undermine the Agreement's careful balance of rights and obligations.

10. Quebec entirely bases its arguments in this regard on paragraph 17 of Annex 405.1, which provides:

> "Each Party shall, where appropriate and to the extent practicable, base its standards on relevant National Standards, *de facto* national standards or international standards."

11. Quebec interprets this provision as providing it with a "right" to base its Measures on an international standard. This completely mischaracterizes this provision. Paragraph 17 does not extend any "rights" to Parties. It imposes an obligation on Parties ("each Party ***shall***"). Under the paragraph, Parties are mandatorily required to base their standards on relevant National Standards, *de facto* national standards or international standards to the extent practicable and appropriate.

12. Secondly, British Columbia submits that the paragraph imposes a hierarchy of applicable standards that Parties are required to take into account in the development of their own standards, starting first with National Standards (as defined), then *de facto* national standards, and finally international standards. Such a hierarchical approach to paragraph 17 is fully consistent with the purpose of Annex 405.1, as expressed in Article 405, which states that "[i]n order to provide for the free movement of ...goods...within Canada, the Parties shall, in accordance with Annex 405.1, reconcile their standards..." Quebec completely ignores this hierarchy and has failed to demonstrate that it undertook any efforts whatsoever to first review and consider all other relevant and applicable National Standards or *de facto* national standards. For example, *de facto* national standards in this situation clearly include the more permissive labelling rules that currently exist in almost all other Provinces. Quebec has never explained why these *de facto* national standards are not appropriate and practicable in the circumstances.

13. Finally, Quebec has not demonstrated that it has actually "based" its Measures on a relevant international standard. To the contrary, Quebec's arguments carefully ignore this requirement. What Quebec does state is that its Measures are "***substantially similar*** to a relevant international standard" (see paragraph 39 of its Appeal Brief, for example). This is not the same. Quebec's approach is merely an *ex*

post facto comparison done solely for the purposes of this dispute, and any such coincidental similarity does not meet the analytical requirements of paragraph 17, which mandate a hierarchical *ex ante* consideration of all potentially applicable existing standards.

14. In other words, far from providing Quebec with a presumption of consistency that it argues exists, paragraph 17 of Annex 405.1 imposes on obligation on Quebec which it clearly has not met. Even assuming that Quebec's measures are "substantially similar" to an international standard, such similarity, in and of itself, demonstrates nothing in terms of Quebec's compliance with its AIT obligations.

15. Assuming, *arguendo*, that paragraph 17 of Annex 405.1 does provide Parties with a "right" to simply base their standards on an international standard, what legal consequences then flow from such a right? Based in part on certain provisions of the World Trade Organization's *Agreement on Technical Barriers to Trade* (the "**TBT Agreement**"), Quebec argues that some sort of presumption of AIT consistency thereby results. British Columbia submits that, clearly, no such presumption exists in the AIT. To the contrary, not only does the AIT require Parties to base their standards on other existing and applicable standards, it then goes significantly further and imposes several additional obligations that Parties must simultaneously meet in order to ensure their standards are fully AIT compliant.

16. In principle, British Columbia accepts that, due to their similarity in content and purpose, other international trade agreements can provide useful context and guidance to assist Panels in interpreting AIT obligations in some situations. However, one must be exceedingly cautious when reviewing such other agreements as the obligations in many instances are intentionally different. Quebec commits a fatal legal error by selectively quoting from the TBT Agreement and relying on a provision which has no comparable AIT provision.

17. Quebec relies primarily on Article 2.5 of the TBT Agreement. This Article provides that:

> "A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives 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.***" [emphasis added]

18. There is no doubt that Article 2.5 sets out a clear rebuttably presumption. For TBT Agreement purposes, if a technical regulation is adopted to achieve a legitimate objective and is in accordance with a relevant international standard, it is to be rebuttably presumed that the regulation does not create an unnecessary obstacle to international trade.

19. However, a number of additional factors must be noted here. First, this rebuttable presumption does not apply to all obligations of the TBT Agreement; it applies to only one of the TBT Agreement's many obligations (that regulations are not to create "unnecessary obstacles to international trade" as provided for in Article 2.2). However, the TBT Agreement provides a host of other obligations (which Quebec fails to reference) that do not benefit from this presumption. Those obligations continue to apply and must separately be met by Members regardless of the fact that a given regulation may have been based on an international standard. Just as one example, Article 2.3 provides that:

> "***Technical regulations shall not be maintained*** if the circumstances or objectives giving rise to their adoption no longer exist of if the changed circumstances ***or objectives can be addressed in a less trade-restrictive manner.***" [emphasis added]

20. Thus, while Quebec makes significance of the point that its Measures appear to be substantially similar to an international standard and therefore would benefit from the rebuttable presumption in Article 2.5, the fact is that such presumption does not apply to the obligations of Article 2.3. British Columbia submits that Quebec's measures do not comply with the separate obligations of Article 2.3 in these circumstances as there are clearly less trade restrictive alternatives available to it to achieve its objectives in the circumstances (as is readily apparent from the rules currently in place in almost all other

Provinces). In other words, it appears likely that Quebec's Measures are not even consistent with the TBT Agreement.

21. More importantly, however, there is clearly no rebuttable presumption in the AIT of the type specifically provided for in Article 2.5 of the TBT Agreement. Quebec makes no effort to identify one because none exists. Rather, it argues that such a presumption should simply be read into the AIT. For example, at paragraph 39 of its Appeal Brief Quebec states that "...the fact that Quebec has adopted and maintained a measure relating to the labelling of substitutes that is substantially similar to a relevant international standard ***must be taken into consideration*** when analyzing the conformity of that measure with the AIT, and, where necessary, to determine whether that measure is otherwise permissible under Article 404 of the AIT." [emphasis added]

22. As Quebec itself notes (at paragraph 32 of its Appeal Brief), the AIT was negotiated at the same time as the *North American Free Trade Agreement* ("**NAFTA**") and the *World Trade Organization Agreements* (including the TBT Agreement). The AIT was clearly negotiated in light of those other agreements and, in many cases, uses identical or similar concepts and terms (such as "legitimate objective"). British Columbia submits that it can thereby be presumed that the AIT drafters were fully conversant with the rights and obligations of the TBT Agreement, including the presumption found in Article 2.5. With full knowledge of those rights and obligations the AIT drafters specifically chose not to include any such presumption into the Agreement. This being the case, British Columbia submits that it would be highly inappropriate and directly contrary to the intent to the drafters to now read any such presumption into the AIT where none was intended to exist.

23. This being the case, we submit that Quebec is entitled to no such presumption and it must clearly demonstrate that all of the requirements of Articles 404 and 905 are met in the circumstances. This it did not – and cannot - do. This is clearly what the Panel concluded and consequently the Panel committed no legal or jurisdictional error in that regard.

IV. The Panel's Interpretation of Article 905

24. Quebec argues that the Panel erred in law when it concluded that the provisions of AIT paragraphs 905(2), (3) and (4) apply supplementary disciplines on the use of the legitimate objectives exception of Article 404. In this regard the Panel stated at page 23 that it:

> "...views the provisions of paragraphs 905 (2), (3) and (4) as applying supplementary disciplines on the use of the legitimate objectives exception set out in Article 404.
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> In other words, where a Party wishes to rely on the legitimate objectives exception to justify a technical measure which would otherwise be inconsistent with the provisions of the AIT, that Party must meet the four (4) elements set out in paragraphs (a) through (d) of Article 404 as such elements are further elaborated upon and supplemented by paragraphs 2 through 4 of Article 905. A Party who wishes to establish that a measure is not more trade restrictive than necessary to achieve a legitimate objective in accordance with paragraph 404 (c) is, under paragraph 905(2), required to take into account the risk(s) that would be created by the nonfulfillment of that legitimate objective and then, ensure a proportionality between the trade restrictiveness of the technical measure at issue and the risk(s) created by non-fulfillment. Paragraph 905(3) imposes upon a Party adopting or maintaining a technical measure for a legitimate objective the obligation to ensure that such technical measure does not arbitrarily or unjustifiably discriminate between or amongst Parties, including between that Party and the other Parties where identical or similar measures prevail. Paragraph 905(4) simply imposes upon a Party the obligation to refrain from adopting or applying a technical measure in a manner which would constitute a disguised restriction on internal trade, which obligation is already provided for in Article 404 (d). Thus, in the context of technical measures adopted for legitimate objectives only, only 905(3) can be viewed as adding an additional or fifth requirement which Parties must meet in order to establish that the requirements of Article 404 have been met."

25. Quebec argues that Article 905 provides no such additional disciplines, meaning therefore that the provisions of Article 905 are simply obligations, nothing more. As obligations, Saskatchewan bore the burden of proving that Quebec was non-compliant with these obligations and it failed to do so.

26. British Columbia submits that, while paragraphs 905(2), (3) and (4) do not make specific reference to Article 404, the Panel clearly adopted the most reasonable interpretation for these provisions in the circumstances and committed no legal error.

27. Article 905 is a new obligation, having been added to Chapter Nine when the Chapter was most recently amended in November, 2010. Consequently, this obligation had not been considered by any other AIT panel in previous disputes involving Chapter Nine. The Article states as follows:

> "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.
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> 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.
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> 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.
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> 4. No Party shall adopt or apply a technical measure in a manner that would constitute a disguised restriction on internal trade.
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> 5. Each Party shall, where appropriate and to the extent practicable, specify its technical measures in terms of results, performance or competence.
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> 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."

28. British Columbia submits that Article 905 serves three purposes. First, the Article, through paragraph 1, affirms that Parties remain able to maintain existing technical measures and to adopt new technical measures, including those necessary to achieve a legitimate objective, provided that in doing so they continue to meet the other obligations of the Chapter. There is nothing in paragraph 1 which in anyway suggests that the purpose of Article 905 is to exclude application of any of the General Rules to technical measures falling within the scope of Chapter Nine.

29. Second, in paragraphs 5 and 6, Article 905 imposes two additional disciplines on Parties when they choose to adopt any technical measure (and not just a technical measure being adopted to achieve a legitimate objective). First, where appropriate and to the extent practical, Parties are to specify their technical measures in terms of results, performance or competence. Second, Parties are to ensure that all technical measures

have a scientific, factual or other reasonable basis and, where appropriate, that they are based on an assessment of risk.

30. Finally, in paragraphs 2 through 4, Article 905 applies supplementary disciplines to the legitimate objectives exception of Article 404 – that is, in any case where a Party is attempting to rely on the legitimate objective exception in Article 404 to "shield" an otherwise inconsistent technical measure, that Party must meet the four specified elements of Article 404 as those elements are further elaborated upon and supplemented by paragraphs 2 through 4. These paragraphs both clarify the application of some of the elements of Article 404 as well as add a further element to the use of Article 404.

31. With regard to clarification, with respect to paragraph (c) of Article 404 (that the measure be no more trade restrictive than is necessary to achieve the legitimate objective), under paragraph 2 of Article 905, Parties are further required to take into account the risks that non-fulfillment would create and must ensure a proportionality between the trade restrictiveness of the technical measure at issue and the risk of non-fulfillment. Use of the phrase "for greater certainty" and precisely the same language that is used in paragraph (c) of Article 404 make the direct linkage between these two provisions clear.

32. With respect to the new element, paragraph 3 of Article 905 provides that Parties must additionally ensure that any technical measure adopted for a legitimate objective does not arbitrarily or unjustifiably discriminate between or among Parties, including between that Party and the other Parties, where identical or similar conditions prevail. Thus, in the context of technical measures adopted for legitimate objectives only, this can be seen as adding an additional, or a fifth, element that Parties must further demonstrate has been met in order to successfully rely on Article 404.

33. British Columbia submits that there are at least four reasons why it is most reasonable to interpret paragraphs 905(2), (3) and (4) as modifying the provisions of Article 404. First, these paragraphs all specifically refer to "legitimate objectives". For AIT purposes, this is clearly a "loaded" term. The only time that term appears in the

General Rules and is substantively applied in the Agreement is through the "legitimate objectives" exception in Article 404. It is therefore completely reasonable to presume in the circumstances that the drafters were of the view that a reference to "legitimate objectives" in these provisions was sufficient to tie them back to Article 404 without a need to also specifically reference that Article.

34. Second, when the drafters intended a Chapter Nine obligation to apply more generally to all technical measures, they did not include the term "legitimate objective" in that obligation. This is the case, for example, in paragraphs 905(1), (4), (5) and (6). Those obligations apply generally to all technical regulations, not just technical regulations being adopted to pursue a legitimate objective. Had the drafters intended that paragraphs (2), (3) and (4) were to have general application, as Quebec argues they do, the drafters would not have included any reference to "legitimate objectives" in those provisions.

35. Third, adopting Quebec's proposed interpretation would effectively create three different categories of obligations in Chapter Nine: (a) those obligations applicable to all technical measures; (b) those obligations applicable to only technical regulations that are fully consistent with the General Rules but which being applied to achieve a legitimate objective; and (c) those obligations applicable to technical regulations that are inconsistent with one or more of the General Rules, but which are being applied to achieve a legitimate objective. The logical outcome of Quebec's argument is that paragraphs 905(2), (3) and (4) are direct obligations (not exceptions) that only apply to those measures falling within the scope of category (b). However, there is no doubt that all category (c) measures are also clearly being applied to achieve a legitimate objective. In that case, would not the provisions of paragraphs 905(2), (3) and (4) also then equally apply to those measures simultaneously with the provisions of Article 404? Logically, such must be the case. So, in the case of category (c) measures, would not paragraphs 905(2), (3) and (4) then necessarily have to modify the application of Article 404? And does this not then mean that the application of paragraphs 905(2), (3) and (4) would then vary depending on whether a category (b) or a category (c) measure was at issue - being a direct obligation for only category (b) measures, but being an

essential part of the application of the Article 404 exception for category (c) measures? And, in any case, given that Quebec's Measures are clearly non-compliant and therefore must be considered category (c) measures, does the potentially different application that Quebec is advocating even matter in this case?

36. Finally, a side-by-side comparison of paragraph 5 of Annex 405.1 and Article 905(2) demonstrates that these two provisions are virtually identical except that paragraph 5 of Annex 405.1 makes a specific reference back to Article 404(c):

Paragraph 5 of Annex 405.1	**Article 905(2)**
For greater certainty, ***with respect to the application of Article 404(c)***, each Party shall, in ensuring that any standard or standard-related 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-fulfilment of that legitimate objective would create and ensure proportionality between the trade restrictiveness of the standard standard-related measures and those risks. [emphasis added]	For greater certainty, 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-fulfilment of that legitimate objective would create and ensure proportionality between the trade restrictiveness of the technical measure and those risks

37. Similarly, paragraphs 905(1), (5) and (6) are virtually identical to paragraphs 4, 7 and 8 of Annex 405.1, respectively, and paragraph 905(3) is similar in intent to paragraph 6 of Annex 405.1. Therefore, there is a substantial overlap between Article 905 and paragraphs 4 through 8 of Annex 405.1. We submit that Article 905 should therefore largely be interpreted as being a specific application of these substantially similar provisions of Annex 405.1. Such a specific application necessarily includes the link back to Article 404, as is specifically noted in paragraph 5 quoted above.

38. Moreover, Quebec clearly argues that Annex 405.1 applies to it in the circumstances. At paragraph 30 of its Appeal Brief it states that "...Annex 405.1 applies

to standards covered by Part IV of the AIT and therefore to technical measures covered by Chapter Nine of the AIT, which relates to food goods." This being the case, even if Quebec's argument regarding the application of paragraphs 905(2), (3) and (4) were to be accepted, the obligations of paragraph 5 of Annex 405.1, which undoubtedly do supplement the requirements of Article 404, would clearly continue to apply. As the Panel concluded, Quebec in any case has failed to demonstrate that it took into account the risks that non-fulfilment would create and did not ensure any proportionality between the trade restrictiveness of Measures and those risks. Consequently, even fully accepting Quebec's arguments concerning Article 905, it has still failed to meet the requirements of paragraph 5 of Annex 405.1.

39. As it did before the Panel, British Columbia maintains that Quebec's measures are clearly inconsistent with its obligations under Article 905. First, the Measures have no scientific, factual or other reasonable basis and are not based on any assessment of risk. Nor are the Measures based on results, performance or competence. This being the case, the Measures are clearly inconsistent with paragraphs 5 and 6 of Article 905.

40. With regard to paragraph 2 of Article 905, Quebec is unable to meet the requirements of paragraph (b) of Article 404 and the Measures are plainly more restrictive than is necessary to achieve a legitimate objective. This inconsistency is then further compounded by the additional requirements of paragraph 2 of Article 905 in that plainly Quebec has undertaken no efforts whatsoever to ensure any proportionality between the trade restrictiveness of the Measures (virtually a complete prohibition) and the risk of not fulfilling the underlying legitimate objective (consumer protection or protecting human health, for example). The Measures are clearly overly-restrictive compared with any health or consumer risks that might be at issue.

41. Finally, with respect to paragraph 3 of Article 905, Dairy Analogs and Dairy Blends are produced, sold and consumed in almost all other Provinces and Territories of Canada. The consumers of such products in these jurisdictions are all substantially similar to consumers in Quebec, with substantially similar physiological make-ups and vulnerabilities or predispositions to substantially similar food-borne illnesses and

diseases. Yet most Dairy Analogs and all Dairy Blends are prohibited in Quebec, but without restrictive labelling requirements are still safely consumed in almost all other areas of Canada. British Columbia therefore submits that Quebec is clearly and unjustifiably discriminating between it and other Parties where identical conditions prevail.

42. The Panel fully considered Quebec's arguments regarding the linkage between Articles 905 and 404 and came to the correct legal conclusion. Consequently, the Panel committed no legal error and its conclusions regarding this linkage should be confirmed in their entirety.

V. The Panel's Interpretation of Articles 402 and 403

43. The Panel noted that Article 402 had been given two different interpretations by previous panels. One panel had interpreted Article 402 narrowly to address only transit across a province, whereas all other panels that had considered the obligation had adopted a broader interpretation to include restrictions on importation and barriers to entry into a province. A majority of the Panel then adopted the broader interpretation. The dissenting panellist advocated a narrow interpretation of Article 402, concluding that the provision should be interpreted as only prohibiting transit restrictions, thereby allowing it to be fully reconciled with Articles 401 and 403. Quebec now argues that the majority's conclusion in this regard was a legal error and instead the Panel should have adopted the more restrictive interpretation advanced by the dissenting panellist.

44. British Columbia submits that, to the contrary, the majority's conclusion was correct. Adopting a narrow interpretation of Article 402 as advanced by Quebec clearly would not fully reconcile that provision with Articles 401 and 403, would result in a potentially serious gap in the General Rules and would not be consistent with the drafters' intentions in that regard.

45. It is essential to first review closely the specific wording of Articles 402 and 403. These provisions state:

> "**Article 402 Right of Entry and Exit**
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> Subject to Article 404, no Party shall adopt or maintain any measure that restricts or prevents the movement of ***persons, goods, services or investment*** across provincial boundaries.
>
> **Article 403 No Obstacles**
>
> Subject to Article 404, each Party shall ensure any measure it adopts or maintains does not operate to create an ***obstacle to internal trade.***" [emphasis added]

46. It is important to note that Article 402 refers broadly to measures applicable to "persons, goods, services or investment". Article 403 is more limited, applying only to obstacles to "internal trade". The term "trade" as it is commonly used, refers only to the buying and selling of goods or services. As commonly understood, the term "internal trade" would therefore not include "people" (that is, labour mobility) or "investment". While labour and investment clearly do move inter-provincially, they are not "traded" and, in most cases, barriers to their movement cannot be considered to be obstacles to "internal trade".

47. Taking this fundamental difference between these two obligations into account, if one applies a narrow interpretation to Article 402 so that it only applies to transit through a province (as advocated by Quebec and the minority panellist), one is confronted with the immediate reality that neither Article 402 nor 403 would then discipline measures not related to transit through a province which imposed restrictions on labour mobility or investment. There is nothing in the Agreement which supports an interpretation of the General Rules that would result in such fundamentally different general obligations applying to goods and services on the one hand versus labour mobility and investment on the other. To the contrary, such an interpretation would be directly contrary to the AIT's Objective, as stated in Article 100, and the Mutually Agreed Principles, as stated in Article 101, which state that the Agreement is to equally provide for the reduction and elimination of barriers to the free movement of persons, goods, services and investment, without distinction between these four areas.

48. Given its arguments here, it is not surprising to note that Quebec had also made these very same arguments regarding Article 402 before the only other AIT Panel that has interpreted that Article as addressing only transit through a province. However,

British Columbia submits that this previous Panel based its conclusions in this regard on a fundamentally flawed assumption and failed to recognize the important differences between the scope of Articles 402 and 403, discussed above. That previous Panel stated that:

> "In the Panel's view, the measure is more appropriately dealt with under Article 401 and potentially Article 403. Bearing in mind that different provisions of an agreement should be given different meanings, it is superfluous to treat Article 402 as having the same meaning as Article 403. In this respect, ***the Panel agrees with Quebec that Article 402 appears to be derived from GATT Article V which is aimed at freedom of transit and it should be given a different meaning and effect than Article 401 (akin to GATT Articles I and III) and Article 403 (akin to GATT Article XI).***
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> Quebec 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. While it can be said that the measure restricts or prevents the movement of coloured margarine across the Quebec provincial boundary where such margarine is destined for consumption within Quebec, this is a denial of national treatment or potentially an obstacle to trade, not a measure which is caught by Article 402."[1] [emphasis added]

49. While Articles 401, 402 and 403 do share some similarities with some obligations of the *General Agreement on Tariffs and Trade* ("**GATT**"), British Columbia believes it incorrect and highly problematic to simply conclude that these AIT obligations are "derived" from the GATT and then to interpret the AIT obligations so as to comply with those similar GATT obligations. While, no doubt, the two agreements share a similar legal underpinning, as both are concerned with liberalizing trade, the fact is that the AIT has a much broader application in that it applies equally to goods, services, labour mobility and investment, whereas the GATT is strictly limited to trade in goods. British Columbia considers it highly inappropriate to utilize another agreement which is wholly

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[1] *Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Quebec Regarding Quebec's Measure Governing the Sale in Quebec of Coloured Margarine* (the "**Margarine Panel**") at pages 25-26. This Panel Report can be found at Appendix 2 of Quebec's Appeal Brief.

limited to trade in goods to restrictively interpret an agreement with much broader application.[2]

50. Further, the Margarine Panel identified no documentation or AIT negotiating history to support its conclusion that the AIT's General Rules were "derived" from the GATT. To the contrary, to the extent that the AIT's General Rules can be said to be "derived" from any international agreement, we submit that it is much more likely to have been the 1957 *Treaty of Rome*,[3] which established the European Economic Communities, now the European Union ("**EU**"), and which has a substantially similar subject-matter scope, guaranteeing the so-called "four freedoms" – the free movement of goods, services, capital and people within the EU. That said, the specific provisions implementing these four freedoms were sprinkled throughout the *Treaty of Rome* and it is therefore not possible to say that AIT Article 402 was "derived" from any one single Article of the Treaty, and that another single Article of the Treaty provided the basis for AIT Article 403. The AIT's General Rules (or its own four freedoms) are an amalgam of several different provisions which collectively implemented the Treaty's four freedoms. Thus, while the *Treaty of Rome* may have provided the basic underpinnings of the AIT's General Rules, the language of the AIT is all its own.

51. As we have noted above in paragraph 15, this discussion once again highlights the problems that can be encountered through a too causally, or a too slavish, use of similar international agreements as an interpretative aid (as Quebec again advocates regarding this issue). While such other agreements can be helpful in some situations, one must always be aware that the obligations of these other agreements are not identical and, in many cases, the AIT is purposefully different.

52. If one interprets Article 402 broadly, as was done by the majority (and most other Panels), does Article 403 then become superfluous? In fact, clearly not. While there

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[2] It should also be noted that the Margarine Panel failed to note the significantly different titles given to the provisions at issue, which, at the very least, should have been taken to indicate at least some difference in scope and intent of these provisions - AIT Article 402 is entitled "Right of Entry and Exit", whereas GATT Article V is entitled "Freedom of Transit".

[3] The *Treaty of Rome* has since been subsumed into the *Treaty on the Functioning of the European Union*, also known as the *Lisbon Treaty*.

may be some overlap, Article 403 will still independently apply to a range of measures not captured by Article 402, but which can still affect internal trade. For example, the provision of a subsidy to a producer would likely not offend Article 402, but could distort trade and create an obstacle to trade thereby potentially offending Article 403. Similarly, government procurement measures can also create obstacles to internal trade by reducing marketing opportunities for investors or out-of-province suppliers, but such measures need not restrict the cross-border movement of goods and services and therefore can still be consistent with Article 402.

53. Thus, British Columbia submits that the Panel's conclusions regarding the scope of Article 402 are entirely correct and should be confirmed in their entirety. A broad interpretation of Article 402 is consistent with the Agreement's purpose and intent and the Article can still be interpreted in harmony with the other General Rules. While this may result in an overlap between obligations (as they apply to goods and services) in some situations, we submit that such an overlap is far superior to a narrow interpretation of Article 402 which would result in a significant gap in the General Rules in many situations (such as where the General Rules apply to labour mobility and investment).

VI. The Panel's Statement Regarding the Scope of Chapter Nine

54. Quebec argues that the Panel committed a legal error when it stated that "[t]he full inclusion of food and agricultural measures into the AIT was effected by the Eleventh Protocol of Amendment on November 8, 2010 and the introduction of the new Chapter Nine into the AIT" (see paragraph 5 of Quebec's Appeal Brief).

55. British Columbia submits that, to the extent that this statement may be an error, it is an inadvertent factual error, not one of legal analysis. Consequently, it is not an error of law and as such cannot be appealed under AIT Article 1706.1. If Quebec believes it to be an error it should have raised this issue with the Panel through the comment process provided for in AIT Article 1706(5). Quebec failed to do so. Moreover, the statement is clear *obiter dicta*, and nothing of substance turned on it in this case.

Regardless of the Panel's statement, Quebec's Measures are clearly subject to AIT Chapter Nine (Agricultural and Food Goods).

56. In the event that this Appeal Panel determines that this statement may constitute a legal error, British Columbia outlines how Quebec's Measures still fall within the scope and coverage of AIT Chapter Nine.

57. The scope and coverage of Chapter Nine is established by Article 902(1), which provides that: "[t]his Chapter applies to ***technical measures*** adopted or maintained by a Party ***relating to internal trade*** in ***agricultural and food goods***." Thus, in order for a measure to fall within the scope of the Chapter, it must be demonstrated that: (i) it is a "technical measure"; (ii) that relates to internal trade; (iii) in an agricultural or food good.

58. Article 907 defines both "agricultural good" and "food good" as follows:

> "**agricultural good** means:
>
> (a) an animal, a plant or an animal or plant product; or
>
> (b) a product, including any food or drink, wholly or partly derived from an animal or plant;
>
> but does not include fish or fish products or alcoholic beverages;
>
> ...
>
> **food good** means an article manufactured, sold or represented for use as food or drink for humans, chewing gum, and any ingredient that may be mixed with food for any purpose whatever, but it does not include fish or fish products or alcoholic beverages..."

59. Dairy Analogs and Dairy Blends are clearly either, or both, agricultural goods or food goods (depending on their specific composition and use), being as they are plainly plant products as well as articles that are manufactured, sold or represented for use as food or drink for humans. Consequently, there can be no doubt that the Measures concern "agricultural and food goods".

60. With regard to the requirement that the Measures are "relating to internal trade", as the Measures effectively prohibit the importation and sale in Quebec of almost all Dairy Analogs and all Dairy Blends manufactured in any other Province, it is obvious that the Measures thereby "relate" to internal trade.

61. With regard to the requirement that the Measures be "technical measures", that term is defined in AIT Article 907 to mean:

> "...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." [emphasis added].

The term "technical regulation" is then further defined in Article 907 to mean:

> "...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."

62. The Measures are "technical regulations" because they are legislative nature, they clearly define the characteristics of specific types of products (Dairy Analogs and Dairy Blends) and their process and production methods, they impose restrictions on their production and sale in Quebec, and compliance with them is plainly mandatory. Being as the Measures are "technical regulations" they thereby automatically fall within the scope of the definition of "technical measures".

63. Consequently, British Columbia submits that Quebec's Measures are plainly "technical measures adopted or maintained by a Party relating to internal trade in agricultural and food goods" and are therefore are fully subject to the disciplines of AIT Chapter Nine. In fact, Quebec has never disputed that basic categorization[4] and the Panel's statement regarding the scope of the Chapter Nine did not and does not affect that basic legal conclusion.

64. In the event that this Appeal Panel determines that a correction is both permissible under AIT Article 1706.1 and necessary, British Columbia submits that all that would be required is to include the term "technical" in the subject phrase, such that the phrase would state: "The full inclusion of food and agricultural ***technical*** measures

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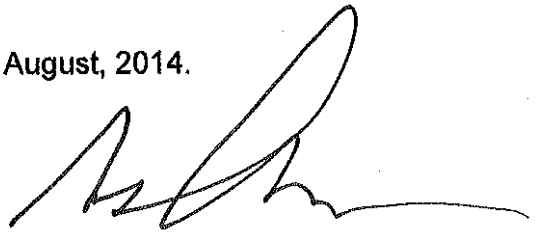
[4] At page 10 of its Report the original Panel noted that: "[i]t warrants noting that ***there is no dispute*** as to whether Dairy Alternatives are subject to the AIT and they have been identified as a measure within the jurisdiction of the AIT and, in particular, Chapter Nine thereof." [emphasis added]

into the AIT was effected by the Eleventh Protocol..." As we note, nothing of consequence in this case would turn on such a correction.

VII. Conclusions

65. Based on the foregoing, British Columbia requests that this Appeal Panel confirm the original Panel's conclusions in their entirety, pursuant to AIT Article 1706.1(4)(a).

All of which is respectfully submitted this 18th day of August, 2014.



Jeffrey Thomas
Counsel to the Province of British Columbia
Borden Ladner Gervais LLP

Matthew C. Carnaghan
Internal Trade Representative
Government of British Columbia