AGREEMENT ON INTERNAL TRADE
APPELLATE PANEL

IN THE MATTER OF AN APPEAL FROM THE REPORT OF THE PANEL
REGARDING THE DISPUTE BETWEEN SASKATCHEWN AND QUÉBEC
CONCERNING DAIRY BLENDS, DAIRY ANALOGUES AND DAIRY ALTERNATIVES
DATED MARCH 31, 2014

SUBMISSION OF MANITOBA, INTERVENOR

Submission dated August 18, 2014

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PART I – INTRODUCTION

1. Québec is appealing a decision of a Dispute Panel under the Agreement on Internal Trade (the "AIT"). This marks the first time that any Party to an AIT dispute has triggered the appeal procedure.[1] This raises important questions that will be explored for the first time by an AIT Appellate Panel, including: *What is the purpose of an appeal under the AIT?*, and *What is the role of the Appellate Panel?*

2. Manitoba, as an Intervenor, makes this Submission to address those two questions. Otherwise, Manitoba leaves it to Saskatchewan and Québec, and perhaps other Intervenors, to argue in relation to the substantive questions that will need to be answered by the Appellate Panel to properly dispose of this appeal.

3. Overall, Manitoba submits that the purpose of an appeal under the AIT must be narrow and focused. An appeal should be oriented solely towards addressing materially significant questions that will settle the dispute at issue.

4. Otherwise, the AIT appeal procedure will risk becoming an avenue through which dissatisfied parties will be able to pursue theoretical questions, unnecessarily and for purposes unrelated to the resolution of the actual dispute at issue. Accordingly, the role of the Appellate Panel should be one of measured restraint – in the sense that it should engage itself only on those questions that are necessary to resolve the appeal before it, and only to the extent necessary to resolve the appeal in question.

5. Guidance on principles of appeal can be derived by analogy from principles established by Canadian appeal courts. The full range of applicable principles for an AIT appeal panel need not be codified by this Appellate Panel at this time. AIT appeal principles will certainly develop and evolve over time. Nevertheless, for the purposes of resolving this appeal, certain particular guiding principles should be considered and applied by the Appellate Panel.

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1 *The appeal procedure was added pursuant to the Tenth Protocol of Amendment (October 7, 2009).*

PART II – PRINCIPLES OF APPEAL

6. The following are principles which Manitoba submits should guide this Appellate Panel in determining its role in the context of an appeal under the AIT, and in disposing of some of the issues that are being raised by the Appellant.

A. Appellate Panel's Mandate under the AIT

7. The Appellate Panel's mandate is established at Article 1706.1(4) of the AIT, as follows:

> 1706.1(4) The Appellate Panel shall, on the completion of the hearing, issue a report with reasons which:
>
> a) may confirm, vary, rescind, or substitute the Report of the Panel in whole or in part, or refer the matter back to the Panel for re-hearing; and
>
> b) shall award Operational Costs in accordance with Rule 47, and may, in its discretion, award Tariff Costs in which case they shall be made in accordance with Rules 48 and 49, of Annex 1705(1).

8. Article 1706.1(4) is broadly worded, and does not otherwise explain to the Appellate Panel specifically how it is to go about reaching its decision of whether to confirm, vary, rescind or substitute the Report of the Dispute Panel, or to refer a matter back to the Dispute Panel. It is submitted that principles that have been developed by Canadian appeal courts are appropriate points of reference to that end.

B. Appeal the Outcome (ie. the Final Recommendations), Not the Reasons

9. It is submitted that an appeal under the AIT should be focused on the outcome as it appears in the Dispute Panel's Report. The appeal should not be a challenge to the reasons, nor should it be a challenge to discrete individual passages within those reasons.

10. The outcome in this instance appears on page 27 of the Dispute Panel's Report. It consists of the following three final recommendations under the heading "*8 PANEL RECOMMENDATIONS*":

> a. That Québec repeal or amend those Measures which this Panel has determined to be non compliant with the AIT to bring them into compliance

with the AIT no later than December 31, 2014, including those measures in the Regulations which are incidental to the non-compliant Measures.

b. That until such time as compliance is effected, the Respondent refrain from enforcing those Measures which this Panel has determined to be non compliant with the AIT, including new prosecutions pursuant to such Measures.

c. That there be some consideration given by the Parties to the AIT to the remarks of the Panel made in Part 5.2 of this Report in terms of a review of Chapter Seventeen and the relevant Annexes thereto to provide for additional procedural elements allowing the parties to narrow those issues which remain in dispute after the consultations process with more clarity and specificity, all of which would benefit the Parties to a Dispute as well as the Panel seized of such Dispute.

11. Realistically, the most significant – and the singularly operative of the recommendations – is Recommendation 8(a). The Dispute Panel makes the final recommendation that, for Québec to become compliant with its AIT obligations, the repeal or amendment of certain specific provisions of the *Food Products Act* (R.S.Q. c. P-29) is mandated.

12. Recommendation 8(a) does not directly specify which actual legislative provisions need to be changed to be compliant with the AIT. Nevertheless, the remainder of the Report makes it clear that the Dispute Panel is recommending two distinct categories of legislative changes:

> **First.** The Panel recommends the repeal or amendment of section 7.1 and 7.2 of the *Food Products Act* (the "FPA"). These are the legislative provisions that prohibit, in Québec, the manufacture and sale of Dairy Alternatives.
>
> **Second.** The Panel recommends the repeal or amendment of section 4.1(1) of the *Food Products Act* (the "FPA"). This is the legislative provision that restricts, in Québec, certain labelling practices as they relate to the use of dairy-related terms.

13. In Canadian appeal courts, the principle of appealing outcomes and not reasons is well-established and firmly entrenched. It is generally discussed under the heading "Appeal from the

Order, Not the Reasons" in Sopinka and Gelowitz: *The Conduct of an Appeal* (3d, 2012), at pages 6 to 8 **[Tab 1]**.

14. It is submitted that the underlying reasoning that has caused Canadian appeal courts to establish and rely on this principle is equally applicable to an appeal under the AIT. The purpose of an appeal under the AIT should be focused and limited to only those issues that stand to affect the Dispute Panel's outcome (i.e. its final recommendation(s) in this specific matter). In this case, that is primarily the Dispute Panel's recommendation that Québec should be making the two above-noted categories of legislative changes. Otherwise, if this principle is not applied to the conduct of an AIT appeal, then the AIT appeal procedure risks being engaged by an unsatisfied party to a dispute for purely tactical reasons.

15. The triggering of the appeal procedure under the AIT inevitably causes delay in the implementation of a Dispute Panel's recommendations. In addition, the requirement to follow the appeal procedure will cause the successful Party to incur further cost or expense before finally enjoying the benefit of the Dispute Panel's Report. If an appeal is not restricted to dealing only with meaningful issues – that is, issues that stand to materially affect the final recommendation(s) at issue on the appeal – then such consequences are unnecessary and unwarranted.

16. Appealing for tactical reasons is a very realistic prospect under the AIT. The reports prepared by Dispute Panels are invariably comprehensive, multi-faceted and lengthy. They routinely address an array of issues which are often quite complex and highly specialized, and they do this in the context of an agreement (the AIT) which itself is notably complex. The practical reality therefore is that any Party which is dissatisfied with a Dispute Panel's Report finds itself with a vast volume of material within which to search for issues in seeking to locate grounds or questions for a possible appeal. As such, focus and restraint needs to be brought to the prospect of appeals, and the Appellate Panel can accomplish this (and discourage unnecessary

appeals) through the application of the principle that appeals are to be taken from outcomes (i.e. final recommendations) and not reasons.[2]

17. It is submitted that on this appeal, the Appellate Panel is being asked by the Appellant to deal with some questions that, regardless of the answer, will not cause any one of the Dispute Panel's three final recommendation to be altered. For such questions, it is submitted that the Appellate Panel should simply disregard the question on procedural grounds, and award the ultimate remedy that is warranted on the appeal.

18. Such an approach will be entirely consistent with the Appellate Panel's mandate for disposing of an appeal. To the extent that the Appellate Panel has been asked to address some questions that do not stand to materially affect a final recommendation, then the Appellate Panel can comply with Article 1706.1(4) by confirming the Dispute Panel's recommendation, and articulating as its reason for so holding that procedurally speaking, no issue raised by the Appellant has given the Appellate Panel any reason to come to any other conclusion on that issue. The fact alone that an issue may be seen as important for <u>future</u> disputes is not enough reason to warrant an appeal on that issue, if the resolution of that issue will make no material difference to the <u>current</u> appeal.

19. The specific questions to which this principle applies will be identified as this Submission unfolds.

C. An Appellant Should Not Raise an Issue for the First Time on an Appeal

20. It is submitted that an Appellant should not be allowed to use the AIT appeal procedure as a forum through which to raise its issues and arguments for the first time. This principle is generally discussed at pages 92 to 99 of Sopinka and Gelowitz **[Tab 1]**, and it is particularly germane on this appeal as it relates to the Dispute Panel's recommendation for the repeal or

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[2] *The notion of an Appellate Panel "discouraging" appeals does, in fact, expressly appear as a concept within the AIT. In Annex 1705(1), in the context of discussing cost awards, Rules 47.2 (Operational Costs) and 48.2 (Tariff Costs) mention that an Appellate Panel may want to "discourage non-meritorious appeals".*

amendment of sections 7.1 and 7.2 of the FPA – Québec's prohibitions against the manufacture and sale of Dairy Alternatives.

21. The Dispute Panel's Report, coupled with a review of the written Submission that Québec presented to the Dispute Panel, clearly establishes that Québec offered no defence to any aspect of Saskatchewan's challenge to the section 7.1 and 7.2 prohibitions in the FPA. On the main, Québec did not argue substantively in response to Saskatchewan's arguments that the manufacture and sale prohibitions are inconsistent with Articles 401, 402 and 403. And in response, Québec did not seek to discharge the onus upon it of establishing that the manufacture and sale prohibitions meet the "Legitimate Objectives" test under Article 404.

22. Québec's written Submission to the Dispute Panel demonstrates that it offered only one skeletal and substantively uninformative point in response to Saskatchewan's challenge to Québec's manufacture and sale prohibitions: Québec simply notified the Dispute Panel that proposed legislation had recently been tabled in the National Assembly (Bill 56) which, if passed, would repeal sections 7.1 and 7.2 of the FPA.[3] Aside from that, Québec wrote only as follows regarding its manufacture and sale prohibitions:

> 4. Québec wishes to inform the Panel that, following a close examination of the regulations and owing to developments in the food products market, it has been deemed expedient to lift the prohibitions contained in sections 7.1 and 7.2 of the *Food Products Act* (Chapter P-29).
>
> 5. In that regard, a draft bill was tabled in the National Assembly on September 19, 2013, a copy of which is attached to this submission.
>
> 6. Québec wishes to inform the Panel that the decision to lift the prohibitions contained in sections 7.1 and 7.2 of the *Food Products Act* must not be construed as an admission that the legislative provisions concerning substitutes and blends are contrary to the Agreement on Internal Trade. In that regard, Québec maintains that it has always had the right to adopt and maintain those measures.

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[3] *In fact, Bill 56 never became law. The legislative session closed without passage of Bill 56. So far, the current session has seen no equivalent to Bill 56 tabled* ***[Tab 2]****.*

> 7. As regards the challenged composition standards set out in the *Regulations Respecting Food* (Chapter P-29, r.1), Québec wishes to inform the Panel that draft regulations should be prepared shortly to effect the necessary adjustments to ensure conformity when sections 7.1, 7.2 and 40 b. 1 and b. 2 of the *Food Products Act* have been repealed.

23. The Dispute Panel has written as follows at page 19 of its Report regarding the approach that Québec took in relation to the matter of whether the section 7.1 and 7.2 manufacture and sale prohibitions might meet the legitimate objectives test under the AIT:

> In terms of Article 404, it is not sufficient to assert that the purpose of a measure is to achieve a legitimate objective. A Party wishing to rely on the provisions of Article 404 must "demonstrate" the existence of some linkage between the measure which is being challenged and the legitimate objective which it purports to achieve.
>
> As [Québec] has not put forth any argument that the purpose of either section 7.1 or 7.2 is to achieve a legitimate objective, there is no need for this Panel to make a determination in that regard. Clearly, [Québec] has not met this onus in the case of sections 7.1 and 7.2.

24. A review of the written Submission that Québec presented to the Dispute Panel confirms that there was a complete absence of any case having been made by Québec with respect to any questions regarding the section 7.1 and 7.2 manufacture and sale prohibitions – whether in relation to the obligations at Articles 401, 402 or 403, or in relation to the legitimate objectives defence at Article 404.

25. In short, Québec was squarely challenged by Saskatchewan regarding the compliance of its manufacture and sale prohibitions at sections 7.1 and 7.2 of the FPA with Québec's obligations under the AIT. And while Québec only notionally asserted that "it has always had the right to adopt and maintain those measures", it presented no case to the Dispute Panel that amounted to a substantive attempt to articulate that position.

26. It is submitted that any and all submissions that Québec is now making on this appeal should be understood in the context that Québec simply presented no case to the Dispute Panel regarding the application of any aspect of the AIT to the manufacture and sale prohibitions at sections 7.1 and 7.2 of the FPA. The Appellate Panel should, very simply, refuse to entertain any arguments that might now be advanced by Québec, at the appeal stage, to the extent that those arguments might be intended as a response or defence to Saskatchewan's challenge to the section 7.1 and 7.2 manufacture and sale prohibitions.

27. In any event, Québec's written submission on this appeal is not focused on challenging the Dispute Panel's recommendation for the repeal or amendment of sections 7.1 and 7.2 of the FPA. And quite properly so, in light of the manner that Québec responded (or more accurately, did not respond) to that aspect of Saskatchewan's challenge before the Dispute Panel.

D. An Appellate Panel Should Not Deal with Moot or Theoretical Questions

28. It is submitted that the Appellate Panel should discourage appeals of moot or theoretical issues, by refraining from addressing on appeal any question or issue that does not stand to materially affect any one of the Dispute Panel's final recommendation(s). This principle is similar to the principle already discussed above, about appealing outcomes and not reasons, but considers the point from a somewhat different perspective. Sopinka and Gelowitz discuss this point at pages 59 to 66 of their text **[Tab 1]**.

29. On this appeal, this principle is particularly salient as it relates to the Dispute Panel's recommendation for the repeal or amendment of sections 7.1 and 7.2 of the FPA (i.e. the manufacture and sale prohibitions). In coming to that recommendation, the Panel has concluded that those provisions are inconsistent and non-compliant with three distinct AIT obligations:

    a. Article 401 (Reciprocal Non-Discrimination).
    b. Article 402 (Right of Entry and Exit).
    c. Article 403 (No Obstacles).

30. All three of those obligations are subject to Article 404 (Legitimate Objectives), but it has already been noted that Québec presented no case to the Dispute Panel on the Article 404 legitimate objectives test, as it relates to the section 7.1 and 7.2 manufacture and sale prohibitions. As such, to the extent that the Dispute Panel has made the final recommendation for repeal or amendment of those provisions, it is based on the Dispute Panel's finding of inconsistency with three distinct AIT obligations (i.e. each of Articles 401, 402 and 403).

31. Given the three separate findings of inconsistency, any appeal from the recommendation for repeal or amendment of the section 7.1 and 7.2 manufacture and sale prohibitions would be meaningful only if Québec, as Appellant, were to be seeking to displace all three of the Dispute Panel's findings of inconsistency. Otherwise, for so long even just one finding of inconsistency goes unchallenged on appeal, then the Appellate Panel's only logical conclusion would be to confirm the Dispute Panel's recommendation for the repeal or amendment of sections 7.1 and 7.2.[4]

32. It is to be recognized that, to the extent that a measure is found to be inconsistent with more than one AIT obligation (as is the case here for the section 7.1 and 7.2 manufacture and sale prohibitions), this will pose a greater burden on a prospective Appellant in its pursuit of an appeal. And for good reason. The more egregious a measure is in relation to the AIT obligations – that is, the more AIT obligations a measure offends – then the greater the burden should be on a prospective Appellant at the appeal stage. For the appeal to be meaningful, the Appellant will need to challenge all of the underlying findings of inconsistency, failing which the appeal will serve no true purpose for either of the parties to the dispute.

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[4] *The Dispute Panel makes this precise analytical observation at page 21 of its Report, where it deals with the question of whether section 4.1(1) of the FPA (the labelling restriction) is inconsistent with the AIT. The Dispute Panel writes: "... for [Saskatchewan] to succeed, it is not necessary for it to establish inconsistency with each of Articles 401, 402 and 403, it is sufficient for it to establish inconsistency with any one of such Articles of the AIT."*

PART III – SECTIONS 7.1 AND 7.2 OF THE *FOOD PRODUCTS ACT*

33. It is submitted that in light of the principles articulated under Part II of this Submission, the Appellate Panel should confirm on procedural grounds, and without engaging in any detailed substantive analysis, the Dispute Panel's final recommendation that sections 7.1 and 7.2 of the FPA should be repealed or amended.

34. As a first point, Québec never presented any case to the Dispute Panel as a defence to Saskatchewan's challenge to the section 7.1 and 7.2 manufacture and sale prohibitions. Québec did not present any substantive case in response to the allegation that these prohibitions are inconsistent with three different AIT obligations (Articles 401, 402 and 403). And Québec presented no case regarding whether those impugned provisions meet any legitimate objectives (Article 404). Therefore, Québec should not now be allowed, for the first time on appeal, to present any case in relation to those issues. In fact, Québec's written Submission on this appeal does not seek to challenge the Dispute Panel's recommendation for the repeal or amendment of the section 7.1 and 7.2 manufacture and sale prohibitions. And rightfully so.

35. Further, the Appellate Panel should not be entertaining any arguments of any kind from Québec, as it relates to the Dispute Panel's recommendation for repeal or amendment of sections 7.1 and 7.2 of the FPA, for the fact that the Appellant is not proposing in its written Submission to put in play questions about all three AIT obligations of which the manufacture and sale prohibitions are inconsistent (re. Articles 401, 402 and 403). Otherwise, to the extent that an appeal might be focused on only one finding of inconsistency (for example, Article 402 – the one provision that attracted dissenting reasons), the Appellate Panel would be dealing with a purely theoretical or moot question for the purposes of this appeal, as it relates to sections 7.1 and 7.2 of the FPA.

36. It is to be noted that at paragraph 3 of its written Submission, Québec is asking that the Appellate Panel reverse the Dispute Panel's finding as it relates to Québec's measures regarding labelling restrictions and the use of dairy-related terms (i.e. section 4.1 of the FPA). But Québec

is not asking for the Appellate Panel to also reverse the Dispute Panel's finding as it relates to Québec's measures prohibiting the manufacture and sale of Dairy Alternatives (i.e. sections 7.1 and 7.2 of the FPA). Similarly, at paragraph 119 of its written Submission on this appeal, Québec is only asking for the reversal of findings as they relate to the section 4.1 labelling restrictions, and not in relation to the section 7.1 and 7.2 manufacture and sale prohibitions.

37. Ultimately, it is submitted that the Dispute Panel's Recommendation 8(a) for the repeal or amendment of sections 7.1 and 7.2 of the FPA, regarding Québec's manufacture and sale prohibitions, should simply be confirmed by the Appellate Panel under AIT Article 1706.1(4) on procedural grounds, without further substantive analysis.

PART IV – SECTION 4.1(1) OF THE *FOOD PRODUCTS ACT*

38. It is acknowledged that the Appellate Panel will likely want to use different lines of reasoning for the purpose of considering this appeal as it relates to the Dispute Panel's final recommendation that section 4.1(1) of the FPA, which restricts labelling practices, be repealed or amended.

39. Québec did, after all, present arguments to the Dispute Panel in relation to section 4.1(1) and its labelling restrictions. Further, the Dispute Panel's recommendation for repeal or amendment of that provision of the FPA is based on only one finding of inconsistency with the AIT – being Article 403. While Saskatchewan did also argue that the section 4.1(1) labelling restriction is inconsistent with Articles 401 and 402 of the AIT, the Dispute Panel has not addressed those other two allegations, having written as follows on page 25 of its Report:

> "... it is not necessary for the Panel to proceed with an analysis as to compliance with articles 401 and 402 ..."

40. As such, the Appellate Panel's consideration of this appeal – as it relates to the Dispute Panel's final recommendation for the repeal or amendment of the section 4.1(1) labelling restriction – should be procedurally distinct from its consideration of the recommendations regarding the section 7.1 and 7.2 manufacture and sale prohibitions. The Appellate Panel may need to decide whether to confirm, vary, rescind or substitute the recommendation regarding section 4.1(1), or to refer the matter of section 4.1(1) back to the Dispute Panel for a re-hearing, after considering the issues in a more substantive way.

A. Grounds of Appeal that Do Not Need to be Addressed

41. Nevertheless, it is submitted that not all of the substantive issues that are being raised by Québec in its written Submission on this appeal are materially significant to the question of whether the Dispute Panel committed an error in coming to its final recommendation that the section 4.1(1) labelling restriction be repealed or amended.

42. It is submitted that some of the grounds of appeal that are raised by Québec in its written Submission simply do not need to be considered, addressed or disposed of by the Appellate Panel on this appeal.

i. Ground of Appeal 1: Scope of AIT Chapter Nine

43. It is submitted that the Appellate Panel should not pronounce itself on Québec's Ground of Appeal 1. In this ground of appeal, Québec is arguing that the Dispute Panel erred in law in its interpretation of the scope of Chapter Nine of the AIT. However, this is not a question for which the answer has any potential to make any material difference regarding the Dispute Panel's recommendation for repeal or amendment of section 4.1(1) of the FPA.

44. Québec's issue on this ground of appeal appears to be rooted in a disagreement that Québec has with the Dispute Panel's choice of wording in writing a particular sentence on page 10 of the Report. Québec argues that Chapter Nine of the AIT applies only to technical measures. And on that basis, Québec appears to be asking the Appellate Panel to rescind that specific sentence from the Dispute Panel's Report.

45. Québec's argument on this point can be distilled to the question of whether the word "only" should be read into the meaning of Article 902(1), where that Article does not actually use that word. However, it is in no way apparent why that question calls for resolution on this appeal, given that there is no indication how that question is materially significant to any aspect of the Dispute Panel's final recommendation for the repeal or amendment of the section 4.1(1) labelling restriction. It is an entirely theoretical question which calls for no answer from the Appellate Panel.

ii. Ground of Appeal 2: Scope of Article 402 Obligation

46. It is submitted that the Appellate Panel should not pronounce itself on Québec's Ground of Appeal 2. Québec argues that the Dispute Panel – notably the majority – erred in law by adopting a broad interpretation of Article 402 the AIT. Québec argues that the dissenting

opinion, which favours a more narrow interpretation, should prevail. However, that is not a question for which the answer has any potential to make a material difference to the outcome of this appeal.

47. Québec argues at paragraph 10 of its written Submission that section 55 of the FPA is consistent with the dissenting opinion in the Dispute Panel's Report, and therefore consistent with the operation of Article 402. However, section 55 of the FPA also is not a question which stands to make a material difference to the outcome of this appeal.

48. To the extent that this appeal is focused around the Dispute Panel's finding that the section 4.1(1) labelling restriction is inconsistent with the AIT, the Dispute Panel has held that the inconsistency lies in Article 403 of the AIT, not Article 402. As noted above at paragraph 39, while Saskatchewan argued that the section 4.1(1) labelling restriction also is inconsistent with Article 402, the Dispute Panel has expressly written at page 25 of its Report that an analysis regarding Article 402, in relation to the section 4.1(1) labelling restriction, is not necessary and therefore was not undertaken by the Dispute Panel.

49. Otherwise, it has already been demonstrated that the Dispute Panel's final recommendation regarding sections 7.1 and 7.2 of the FPA (the manufacture and sale prohibition) – even if that recommendation were to be at issue on this appeal – is based on three distinct findings of inconsistency (Articles 401, 402, and 403). And so, if there were to be an appeal related to the Dispute Panel's recommendation regarding sections 7.1 and 7.2, that appeal would need to put into play all three findings of breach to be a meaningful appeal (but that is not being done, and in any event should not be done). As such, the question of the proper interpretation of Article 402 of the AIT can have no materially significant impact on the question of either the Dispute Panel's final recommendation for the repeal or amendment of section 7.1 and 7.2 of the FPA, or its recommendation for the repeal or amendment of section 4.1(1) of the FPA (which is based on an inconsistency with Article 403). In short, the question about the interpretation of Article 402 is purely theoretical for the purposes of this appeal.

B. Grounds of Appeal that May Warrant being Addressed Substantively

50. To the extent that this appeal raises questions about whether the Dispute Panel was in error in coming to its recommendation for the repeal or amendment of section 4.1(1) of the FPA, it is acknowledged that Québec's written Submission does identify some grounds of appeal that may warrant substantive consideration by the Appellate Panel – but, again, only in relation to the Dispute Panel's recommendation regarding section 4.1(1).

51. These grounds of appeal are to be found from within Québec's written Submission under the headings for Grounds of Appeal 3 to 6, and Ground of Appeal 8. However, even then, it is submitted that it is still not necessary for the Appellate Panel to be addressing each and every specific sub-ground that appears under each Ground of Appeal, as framed by Québec in its written Submission. As argued under Part II of this submission, the Appellate Panel should be dealing substantively with only those grounds, or sub-grounds, that stand to have a materially significant impact on the outcome in question. In this case, the focus is on whether the question stands to have a material impact on the Dispute Panel's recommendation 8(a) for the repeal or amendment of the section 4.1(1) labelling restriction.

i. Ground of Appeal 3: Application of Principles of Interpretation to Articles 405 and 905

52. The overall theme of Ground of Appeal 3 – and its five (5) sub-grounds – can be distilled to Québec's argument that, as Québec sees it, the Dispute Panel did not properly interpret and apply international standards within the context of this dispute under the AIT. Québec argues that the Dispute Panel failed to adequately consider the rules of an international trade agreement (the WTO Agreement on Technical Barriers to Trade) for that purpose.

53. This is, perhaps, an issue that might warrant being addressed by the Appellate Panel on this appeal. But in doing so, it is submitted that this issue must be analyzed and understood in the context of the proper analytical framework of the AIT. That analytical framework is as follows:

a. First, the question is whether the Dispute Panel properly concluded that the challenged measure is inconsistent with an AIT obligation. In this case, the Dispute Panel has found that there is an inconsistency: specifically it has found that the section 4.1(1) labelling restriction is inconsistent with the AIT obligation at Article 403.

b. Second, if such an inconsistency has been found, then the question becomes whether the Dispute Panel properly reached its conclusion with respect to the "legitimate objectives" test" at Article 404. In this case, the Dispute Panel has found that the legitimate objectives test is not met, which is what has led the Dispute Panel to recommend the repeal or amendment of the section 4.1(1) labelling restriction.

54. What remains unclear from Québec's written Submission on this appeal is how Ground of Appeal 3, or any of the five (5) sub-grounds identified under it, might potentially have any material significance to the Dispute Panel's recommendation for repeal or amendment of section 4.1(1) of the FPA, within the above-noted analytical framework.

55. Québec's Ground of Appeal 3 presents an argument in relation to Article 405 of Chapter Four. That is the provision in Chapter Four through which the parties to the AIT have committed themselves towards reconciling their standards and standard-related measures. They are to do this in accordance with the provisions of Annex 405.1, and recognizing Article 905 in Chapter Nine.

56. While Québec does construct an argument under its Ground of Appeal 3 about the interpretive methods that should be used when searching for the meaning of Articles 405 and 905, what remains unexplained by Québec is the more fundamental question of how that issue somehow interrelates to the analytical framework through which the Dispute Panel came to its recommendation for the repeal or amendment of section 4.1(1) of the FPA. It is unclear where the logic of the argument is rooted that the Dispute Panel's treatment (or non-treatment) of Articles 405 and 905 led it to make an error with respect to its findings about the breach of the

Article 403 obligation and the failure to meet the Article 404 "legitimate objectives" defence. It is the findings relating to Articles 403 and 404 that led the Dispute Panel to recommend the repeal or amendment of the section 4.1(1) labelling restriction, and it is not apparent how the interpretative methods regarding Articles 405 and 905 might relate to those findings.

57. Québec appears to argue at paragraph 39 of its written Submission on this appeal that this Ground of Appeal is generally related to the Article 404 legitimate objectives defence. But the analytical connection that is offered in that regard is slight, and not based on the specific structure of the AIT and its actual wording.

ii. Ground of Appeal 4: Finding of Inconsistency with Article 403

58. With respect to Québec's Ground of Appeal 4, the overall argument that is made in Québec's written Submission on this appeal is that the Dispute Panel erred when it determined that the section 4.1(1) labelling restriction in the FPA contravenes Article 403.

59. It is recognized that this Ground of Appeal is a question that has the potential to be materially significant to the outcome on this appeal. The Dispute Panel's finding of inconsistency of FPA section 4.1(1) with Article 403 is a crucial analytical step that underpins the Dispute Panel's recommendation for the repeal or amendment of section 4.1(1). It is, therefore, a question that may warrant being answered substantively by the Appellate Panel. As noted above, Manitoba leaves it to other parties to argue the substantive merits of this Ground of Appeal.

60. It should be understood, however, that Manitoba only recognizes the point that there is a potentially meaningful question for an appeal, to the extent that this Ground of Appeal refers to Article 403 of the AIT. On page 22 of its written Submission on this appeal, Québec's heading 4 proposes the argument that "The Panel erred in law and/or refused to exercise its jurisdiction when it determined that section 4.1(1) of the FPA contravenes Articles 403 and 905 of the AIT." It is acknowledged that the Dispute Panel did find that section 4.1(1) of the FPA is inconsistent

with Article 403 of the AIT. Manitoba disputes any suggestion that the Dispute Panel also found that section 4.1(1) contravenes Article 905 of the AIT.

61. Not only has the Dispute Panel not made a finding to that effect regarding Article 905, it has expressly rejected at page 23 of its Report Québec's argument that Article 905 should be read as either creating a distinct obligation in the same way that Article 403 creates an obligation, or perhaps altering or eclipsing the Article 403 obligation. As such, nowhere in its Report does the Dispute Panel make any actual finding that it has somehow found a contravention of Article 905, making it inaccurate for Québec to argue that such a finding has been made (whether expressly or implicitly). In any event, the Dispute Panel quite properly found that Articles 905(2), (3) and (4) do not create primary obligations; rather, they generally supplement the "legitimate objectives" defence in Article 404. As for Articles 905(5) and (6), the Dispute Panel has also properly framed the analysis in relation to them, at page 24 of its Report, and it suffices to say that these provisions do not entirely eclipse for agricultural purposes the fundamental obligations at Articles 401 to 403. In fact, any argument to that effect fails to recognize Articles 900 and 901 of Chapter Nine, which affirm that Chapter Four continues to generally apply, except where Chapter Nine otherwise provides, or where there is an inconsistency between the two chapters in which case Chapter Nine prevails to the extent of the inconsistency.

62. Having recognized that there is some potential for a meaningful appeal in relation to the Dispute Panel's finding of an inconsistency of section 4.1(1) with Article 403, Manitoba nevertheless submits that the Appeal Panel will still need to determine both <u>whether</u> it has the jurisdiction to address this question, and if so <u>how</u> it will go about dealing with it.

    a. The question of whether the Appellate Panel has jurisdiction is to be answered by referring to Article 1706.1, which limits the Appellate Panel to dealing only with alleged errors of law, or alleged failures to observe natural justice, or alleged actions beyond or refusals to exercise jurisdiction.

b. And if there is jurisdiction for an appeal, then the question of how to address the issue will be answered through a determination of the Appellate Panel's guiding standard of review.

Manitoba allows the submissions of Saskatchewan, Alberta and British Columbia to more fully inform the Appellate Panel in relation to those two analytical steps. But Manitoba's general position is that deference should be used wherever it can be used.

iii. Grounds of Appeal 5 and 8: Article 404 (Legitimate Objectives)

63. Québec's Grounds of Appeal 5 and 8 focus on whether, after the Dispute Panel determined that the section 4.1(1) labelling restriction contravenes Article 403, it erred in its consideration of the Article 404 legitimate objectives defence.

64. It is recognized that these Grounds of Appeal are questions that have the potential to be materially significant to the outcome on this appeal. The Dispute Panel's finding that section 4.1(1) is not saved by the Article 404 legitimate objectives defence is a crucial analytical step that underpins the Dispute Panel's recommendation for the repeal or amendment of section 4.1(1). These grounds of appeal are, therefore, questions that may warrant being answered by the Appellate Panel.

65. As noted above, Manitoba leaves it to other parties to argue the substantive merits of this Ground of Appeal – but nevertheless reiterates the points made in paragraph 62 above, about the need to initially determine the two analytical steps: whether it is a question over which the Appellate Panel properly has jurisdiction for an appeal, and determining the appropriate standard of review for the appeal.

iv. Ground of Appeal 6: Article 905 (Right to Establish Technical Measures)

66. Québec's Ground of Appeal 6 focuses on whether the Dispute Panel properly interpreted and applied Article 905 of the AIT in the context of this dispute.

67. It is recognized that this Ground of Appeal is a question that could have the potential to be materially significant to the outcome on this appeal, to the extent that there is an analytical interplay between certain aspects of Article 905 and the Article 404 legitimate objectives defence. As such, it is a question that may warrant being answered by the Appellate Panel – subject, again, to the questions of the two analytical steps of jurisdiction and standard of review (as per paragraph 62 above).

68. Still, without repeating or revisiting the arguments that presumably will be made by others, Manitoba's position is very clear and succinct as it relates to Article 905. The express wording of Article 905 – especially sub-Articles 905(1) to (4) – leaves little room for argument about how these provisions are intended to operate within the analytical framework of the AIT. These sub-Articles are intended to be interpreted, considered and applied in the context of the "legitimate objectives" test at Article 404. Otherwise, sub-articles 905(5) and (6) simply supplement for agricultural purposes, and do not completely replace, the primary obligations at Articles 401, 402 and 403 (of which only Article 403 is operative in the Dispute Panel's Report in any event).

PART V – RECOMMENDATION 8(b) – RELIEF IN THE INTERIM

69. Québec makes one argument in its written Submission on this appeal that relates to a recommendation other than the Dispute Panel's Recommendation 8(a) for the repeal or amendment of section 4.1(1) of the FPA.

70. At its Ground of Appeal 7, Québec argues that the Dispute Panel exceeded its jurisdiction in making Recommendation 8(b). This recommendation urges Québec to implement temporary relief, until Québec actually enacts the requisite legislative amendments in response to the Dispute Panel's primary Recommendation 8(a).

71. Of course, if for any reason the Dispute Panel's Recommendation 8(a) is overturned by the Appellate Panel, as it relates to repeal or amendment of the section 4.1(1) labelling restriction, then there is no purpose in the Appellate Panel making any decisions as it relates to Recommendation 8(b) regarding section 4.1(1). That is because, if Québec succeeds on its appeal regarding the Dispute Panel's recommendation 8(a) for the repeal or amendment of section 4.1(1) of the FPA, then Recommendation 8(b) for an interim measure as it relates to section 4.1(1) serves no purpose.

72. Still, one way or another, the question of the appeal of Recommendation 8(b) remains relevant, and may warrant being addressed – as it relates to Recommendation 8(a) for the repeal or amendment of sections 7.1 and 7.2 of the RPA (subject, again, to questions of jurisdiction and standard of review). Manitoba has already argued above that on procedural grounds, the appeal from the Dispute Panel's recommendation for repeal or amendment of sections 7.1 and 7.2 of the FPA should be dismissed. That being the case, Recommendation 8(b) is relevant regardless of what the Appellate Panel might conclude regarding the Dispute Panel's recommendation 8(a) for repeal or amendment of section 4.1(1) of the FPA. To this end, the Appellate Panel may have reason to consider the question of whether the Dispute Panel had the jurisdiction to make Recommendation 8(b), regardless of what happens with the other Grounds of Appeal.

73. It is submitted that the Dispute Panel did have the jurisdiction to make Recommendation 8(b).

74. A recommendation made by a Dispute Panel under the AIT is precisely what it says it is: a recommendation. Until a party subject to a recommendation under the AIT formally implements that recommendation (such as a recommendation to repeal or amend a law), that recommendation is not legally enforceable in a court of law.

75. The result is that, unlike a court, a Dispute Panel is devoid of any ability to grant any truly immediate and binding enforceable remedies to successful parties. This is especially the case where the measure at issue is a statutory instrument. Even the most expedient of efforts by a Party to implement a recommendation will inevitably have inherent delay. And so in the meantime, and until the necessary legislative change can be implemented, the Dispute Panel's recommendation is not sufficient to immediately render a statutory instrument invalid or inoperable.

76. Because of this, if a Dispute Panel considers it appropriate to award more immediate relief, it can make the additional recommendation – as it did in this case – that the unsuccessful Party hold off from enforcing the legislation until the legislative process can be fully implemented.

77. In this case, the Dispute Panel's recommendation 8(b) essentially calls for Québec's Executive Branch of government to hold off from enforcing the legislation in question, until the Legislative Branch is in a position to pass the necessary legislation.

78. Seen from one perspective, Québec's appeal on this point perhaps raises a question about whether it is appropriate, at law, for an Executive Branch of Government to disregard legislation until the Legislative Branch actually completes the necessary legislative change. However, consideration of that precise formulation of a question resides outside the narrow confines of a Dispute Panel's abilities under the AIT, or the Appellate Panel's jurisdiction on appeal.

79. The more appropriate question on this appeal, it is submitted, is whether the Dispute Panel has made a recommendation that Québec, as a province, will be able to implement one way or another. And in this case, it is submitted that the answer is "yes" – Québec does have the ability to implement Recommendation 8(b).

80. It is to be noted that Recommendation 8(a) already will require Québec to make statutory changes. Thus, the question about the viability of Recommendation 8(b) should appropriately include consideration of whether that recommendation could also be implemented through legislative means, if necessary.

81. When it comes to the drafting of legislation, a Legislature has the widest of possible ranges of toolkits available to it to implement the recommendations that are made by a Dispute Panel. It could even, if necessary, give legislative changes retroactive effect. A Legislature can also finally and conclusively dispose of any pending and unresolved court matter, if it so chooses. That being the case, it is submitted that a Legislature could, if necessary, enact legislation to give effect to Recommendation 8(b).

82. It is therefore submitted that in this case, the Dispute Panel had every authority to make Recommendation 8(b). It will be up to Québec's Executive and Legislative Branches to determine how to respond accordingly. But they could, if necessary, propose and enact legislation to give effect to Recommendation 8(b). That being the case, it is difficult to see how Recommendation 8(b) is beyond the scope of the Dispute Panel's ability to make.

PART VI – CHOICE OF REMEDY

83. Should the Appellate Panel conclude that the Dispute Panel has made an error that warrants remedial redress on appeal, the Dispute Panel will then need to deliberate over the choice of remedy.

84. Article 1706.1(4) gives the Appellate Panel the following range of remedial options:

a. Confirm the Dispute Panel's Report, in whole or in part.

b. Vary the Dispute Panel's Report, in whole or in part.

c. Substitute the Dispute Panel's Report, in whole or in part.

d. Refer the matter back to the Dispute Panel for a re-hearing.

85. While the Article does identify the above as the closed list of remedial options, it does not direct the Appellate Panel on the matter of how it should go about selecting a remedy. Manitoba submits that the Appellate Panel's operative preference should be to proceed, above all, by recognizing that deference should be given to the Dispute Panel. The Appellate Panel should accordingly avoid making presumptions or assumptions about what a Dispute Panel might have decided, if it has not actually made a decision on a point.

86. For example, to the extent that this appeal should be centred substantively only on the Dispute Panel's findings in relation section 4.1(1) of the FPA, if the Appellate Panel rescinds the Dispute Panel's conclusion that section 4.1(1) is inconsistent with Article 403, then the Appellate Panel's primary remedial option should be to refer the matter of section 4.1(1) back to the Dispute Panel, for re-hearing on the question of whether section 4.1(1) is inconsistent with either or both of Articles 401 and 402. Those points had been put in issue by Saskatchewan, but the Dispute Panel said on page 25 of its Report that it did not need to decide them. It should not be for the Appellate Panel to make a decision on those points absent findings at first instance by the Dispute Panel. Of course, the Appellate Panel's direction about any re-hearing should be specific, and it should remain clear that the Appellate Panel is nevertheless confirming the Dispute Panel's recommendation for the repeal or amendment of sections 7.1 and 7.2 of the FPA.

PART VII – COSTS ON THIS APPEAL

87. Article 1706(4)(b) of the AIT requires the Appellate Panel, on this appeal, to award Operational Costs in accordance with Rule 47 of Annex 1705(1). Under Chapter Seventeen, Operational Costs essentially refers to the institutional costs related to the conduct of the hearing (i.e. costs of and for panel members; hearing-related costs for facilities and equipment).

88. The Appellate Panel also has the discretion – but not the requirement – to award Tariff Costs in accordance with Rules 48 and 49 of Annex 1705(1). Under Chapter Seventeen, Tariff Costs are comparable to awards of costs made by the judiciary in court cases. Those costs awards are intended to represent the costs to a party for retaining and instructing counsel on the litigation.

89. The AIT rules on both categories of costs on appeals are drafted in a way that they are an issue for only the Appellant and the Respondent to the appeal. These rules do not mention costs consequences, one way or another, to Intervenors on appeals. As such on this appeal, because Manitoba is an Intervenor, it simply submits that the Appellate Panel should neither award costs for, nor against, Manitoba. This is so, whether it be Operational Costs, or Tariff Costs.

90. To the extent that the Dispute Panel did, at the prior hearing, make an allocation of Operational Costs against Manitoba as an Intervenor (i.e. the Dispute Panel allocated 5% of costs against Manitoba) – Manitoba notes that this is not a matter that has been made the subject-matter of this appeal. Québec has not made the Dispute Panel's allocation of Operational Costs an issue on this appeal. And no appeal has been filed by any other party in relation to the Dispute Panel's allocation. As such, it is submitted that the Appellate Panel should not be revisiting on this appeal, in any way, the Dispute Panel's allocation of the Operational Costs for the initial dispute.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18TH DAY OF AUGUST, 2014

Denis Guénette, General Counsel