

**AGREEMENT ON INTERNAL TRADE
DISPUTE RESOLUTION PANEL**

**IN THE MATTER OF ALBERTA'S CHALLENGE WITH RESPECT TO
QUEBEC MEASURES AFFECTING MARGARINE**

SUBMISSION ON BEHALF OF THE GOVERNMENT OF SASKATCHEWAN

AUGUST 30, 2004

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PROCEDURAL HISTORY

1. A panel was requested pursuant to article 1704(1) of the Agreement on Internal Trade (AIT) to resolve a dispute between the governments of Alberta and Quebec with respect to the colouration of margarine. Saskatchewan was notified of the request pursuant to article 1704(4).
2. Pursuant to article 1704(9), Saskatchewan in a letter dated July 16, 2004, delivered written notice of its intention to participate as an interested party.
3. This submission is filed pursuant to Rule 31(a) of Annex 1706.1, the Panel Rules of Procedure. Saskatchewan intervenes in support of Alberta's position that the impugned measures are inconsistent with Quebec's obligations under the AIT.

SUBSTANTIAL INTEREST

4. Saskatchewan has a significant number of persons carrying on business in the Province who are affected by the measure at issue and is therefore deemed by article 1704(10)(b) to have a substantial interest within the meaning of article 1704(9).
5. Oilseed crops are the source of over 80%¹ of the ingredients of margarine sold and consumed in Canada, including Quebec. Saskatchewan producers and refiners of oilseed crops are affected by the impugned measures. Currently, there are approximately 32,790 canola producers alone in the province of Saskatchewan.² There are two oilseed processing plants in the province, one in Clavet and another in Nipawin.

The Value of Margarine Canola in Saskatchewan

6. A review of the importance of margarine sales in relation to sales of canola oil and seed, between the years 1998 and 2001 (more recent data being unavailable) demonstrates this effect.
7. During this period, an average of 126,000 tonnes per year in Canada of deodorized vegetable oil was used for the production of margarine [Statistics Canada - Oils and Fats Series, as reported by the Canola Council of Canada].
8. Of this, an average of 40% (approximately 51,000 tonnes) was canola oil [Statistics

¹80% is a compositional standard prescribed by the *Food and Drug Act*.

²To fund the Saskatchewan Canola Council, a 50 cent per tonne check-off on Saskatchewan produced canola is collected. The number is derived from the Council's check-off management database.

Canada - Oils and Fats Series, as reported by the Canola Council of Canada].

9. The extraction rate for oil from canola is approximately 41% [10 year average, Agriculture and Agri-Food Canada, Oilseed Sector Profile, 1999]. The average annual canola seed volume used for margarine over the period is thus approximately 125,000 tonnes.
10. Saskatchewan's share of the national canola production over the period was approximately 44% [Statistics Canada, Cereals & Oilseeds Review Catalogue No. 22-007-xpb, January 2002, 2001 & 2000]. Assuming that Saskatchewan canola use conforms to the national average, this would mean that approximately 55,000 tonnes of Saskatchewan canola seed was used in the production of margarine.
11. The average price for canola during the period was C\$343 per tonne [Statistics Canada, Field Crop Reporting Catalogue # 22-002-xpb, series 8 volumes 77-80], amounting to an average total annual value of approximately \$19 million for margarine-destined canola seed sales.
12. Based on the input-output model³ from Statistics Canada's Input-Output Division, every dollar of Saskatchewan crop receipts generates an additional \$0.416 of GDP, resulting in a multiplier effect of 1.416. Therefore margarine-destined canola seed sales annually accounted for, on average, \$27 million of Saskatchewan's GDP during the period of 1998-2001.
13. Saskatchewan has approximately 15% of Canada's canola crushing capacity [Canadian Oilseed Processors Association]. Saskatchewan's share of margarine-destined canola seed, assuming the capacity level equalled the actual crushing

³The input-output model is a method of analysis in which the economy is represented by a series of linear production functions, describing the interrelationships between all sectors.

national ratio, thus would amount to approximately 19,000 tonnes per year (15% of 125,000 tonnes).

14. Each tonne of canola seed crushed adds approximately \$50 in value [Canadian Oilseed Processors Association]. Assuming an economic multiplier of 3 [Canadian Oilseed Processors Association], the added value from crushing in Saskatchewan over the period is approximately \$2.8 million per year.
15. Therefore, the total average value added to Saskatchewan's GDP from margarine-destined canola seed sales and crushing activity over the period in question, could be estimated to amount to \$30 million per year.

The Effect of Quebec's Measures

16. Of the "spread" market (including butter and margarine), the national share of margarine consumption is 67% [Edible Oil Food Association of Canada]. In Quebec, the market share is only 58%. It is submitted that the discrepancy is explained by the impugned measures which were intended to have just such an effect to add protection to the butter industry from competition with margarine.
17. The difference in consumption levels amounts to 6,892,890 pounds of margarine in the province of Quebec annually, or, \$17,000,000 [Edible Oil Food Association of Canada]. At an average of 80% vegetable oil content, the lost oil weight would be 5,514,312 pounds, or 2,501 tonnes. The canola portion (40%) would thus be 1000 tonnes of oil or 2,440 tonnes in lost canola seed sales. Saskatchewan's portion (44%) is an average of 1,073 tonnes per year, at a value of approximately \$368,000 per year. Factoring in the appropriate economic multipliers and assumptions with respect to crushing capacity (above), the total loss would amount to an estimated average annual loss to Saskatchewan since 1997 of \$576,000, with a total impact from 1998-2003 of \$3,456,000 (assuming conditions for 2003-2003 are similar to those from 1998-2002).

ISSUES

18. Are the impugned Quebec measures a technical barrier to trade within the meaning of chapter 9 of the AIT?
19. What are the obligations of a party to the AIT in relation to a technical barrier to trade within the meaning of chapter 9 and 4 of the AIT?
20. Are there legitimate objectives at play to render the impugned measures permissible within the meaning of chapter 4 of the AIT?

ARGUMENT

Technical Barrier to Trade under Chapter 9 of the AIT

21. The Quebec impugned measures are those identified by Alberta in its submission, specifically at paragraph 9, that is s. 40(1)(c) of Quebec's *Regulation Respecting Dairy Products Substitutes*.
22. Chapter 9 of the AIT covers agricultural and food goods. Rather than setting out a judicial test for the identification of inconsistent measures, it contemplates and delegates the identification of technical barriers to trade by the Federal-Provincial Agri-Food Inspection Committee (the "Inspection Committee"). In other words, inconsistent measures under chapter 9 are determined prescriptively, not descriptively.
23. The question for this panel is not whether the impugned measures amount to a technical barrier to trade within the meaning of chapter 9, but rather whether the impugned measures have been identified as such by the Inspection Committee.
24. As identified and documented in Alberta's brief, Quebec's impugned measures have been identified by the Inspection Committee and by the Federal-Provincial Trade Policy Committee as technical barriers to trade within the meaning of chapter 9 and according to the procedures set out in article 902, and were acknowledged as such by the Government of Quebec.
25. This panel is not seized with the question of whether the Inspection Committee was correct or reasonable in its conclusion that the impugned measures are technical barriers to trade within the definition of article 908 or by any other standard. In any event, the impugned measures, regulating the colouration of margarine, clearly fit within the article 908 definition of "technical barriers to trade", regulating as they do product characteristics.
26. An AIT panel (*Nova Scotia v. Prince Edward Island re Dairy Industry Regulations*

amendments, January 18, 2000) has already recognized that the measures identified by the relevant committees satisfied the requirements of article 902 for purposes of identifying technical barriers to trade and that the measures identified were to be brought into conformity with the AIT by September 1, 1997.

Reciprocal Non-Discrimination and Obstacles to Internal Trade under Chapter 4 of the AIT

27. Saskatchewan supports Alberta's submission of August 16, 2004 with respect to the application of the general rules and principles of the AIT, and particularly the application of the general rules of chapter 4. Saskatchewan similarly supports the arguments made in that submission that the impugned measures are inconsistent with Quebec's obligations under those general rules and principles of the AIT.
28. Article 900 provides that, subject to any inconsistency, the general rules of chapter 4 of the AIT apply to chapter 9.
29. The effect of this, it is submitted, is that the rules of reciprocal non-discrimination (article 401), and obstacles to trade (article 403) for example, apply to measures that have been identified as technical barriers to trade.
30. It is submitted that a technical barrier to trade is by definition an obstacle to internal trade within the meaning of article 403. An interpretation short of such a conclusion would make meaningless the exercise of the relevant committees under chapter 9 of identifying technical barriers. Quebec has therefore been in breach of the obligation to remove this technical barrier to trade since September 1, 1997.
31. Similarly, it is submitted that the impugned measures amount to a breach of the obligation to accord treatment no less favourable to goods of other jurisdictions than the treatment it accords to its own like, directly competitive or substitutable goods and that of other jurisdictions within the meaning of article 401(1).
32. The fact that margarine is a like, directly competitive or substitutable goods is confirmed by Quebec's own regulatory acknowledgment of margarine as "the butter

substitute” as documented in Alberta’s submission of August 16, 2004.

33. While it is true that the impugned measure does not favour Quebec margarine over margarine from other provinces, the non-discrimination obligation of article 401 requires no less favourable treatment to like and substitutable goods and it is contemplated that treatment of one good is to be compared with treatment of a like, competitive or substitutable good.
34. The identification of the impugned measure as a technical barrier to trade is at least a *prima facie* indication of discriminatory treatment.
35. Furthermore, the purpose and effect of the impugned measure is to impose a competitive disadvantage on margarine vis-à-vis butter. The impugned measure, after all, forbids the colouration of margarine to resemble the colour of butter as actually marketed in Quebec. No similar restriction is imposed on butter manufacturing. This is treatment less favourable.

Legitimate Objectives

36. Article 404 is an important limit on non-discrimination and no-obstacles obligations. Were there an issue of human health or consumer protection involved, for example, each jurisdiction should not be fettered in protecting such an important value for the sake of trade liberalization.
37. However, there is no legitimate objective in question, as defined in chapter 2 of the AIT, in this instance. It is submitted that the burden of proof would be on Quebec to establish such a legitimate objective.
38. The history of Quebec’s expressed intent with respect to this issue would belie any claim to legitimate objective.
39. Article 404, moreover, requires that even where such a legitimate objective exists, the measure must not overreach that objective by unduly impairing access of goods,

by making it more trade restrictive than necessary to meet a legitimate objective, or by creating a disguised restriction on trade.

40. It is submitted that even if it were to be accepted that a legitimate objective exists (which Saskatchewan expressly disputes), the impugned measure would be far more restrictive than necessary to meet such an objective. Labelling requirements, for example, that would prevent margarine from posing as butter, would be adequate.
41. To require differentiation of spread products on the basis of colour restrictions is a restriction of trade that is either a blatant breach of the AIT, a disguised restriction on trade or an overreaching restriction based on a dubious legitimate objective.

RELIEF REQUESTED

42. Saskatchewan requests that relief be accorded as requested by Alberta in its August 16, 2004 submission.

All of which is respectfully submitted this 30th day of August, 2004

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