

**AGREEMENT ON INTERNAL TRADE  
CHAPTER SEVENTEEN (PART A)  
DISPUTE RESOLUTION PROCEDURES**

**REGARDING  
ALBERTA'S CHALLENGE OF  
QUEBEC'S MEASURES  
GOVERNING THE COLOURING OF MARGARINE**

**Establishment of a Panel pursuant to Article 1704  
Government-to-Government Dispute Resolution**

**SUBMISSION OF QUEBEC**

**2004-09-27**

**SUBMISSION OF QUEBEC CONCERNING  
THE COLOURING OF MARGARINE**

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## **I. INTRODUCTION**

1. This matter refers to Alberta's complaint regarding Quebec's regulation on margarine colouring<sup>1</sup>.
2. Alberta alleges that the regulation applying to Quebec prevents the sale of light yellow margarine in Quebec, that this regulation is a barrier to interprovincial trade, and that it restricts the growth of margarine manufacturers established in Alberta. It claims that the low consumption of margarine in Quebec limits Alberta canola producers and processors from reaching their full potential.
3. Alberta alleges that the regulation on margarine colouring is contrary to Quebec's obligations in the Agreement on Internal Trade (hereinafter referred to as the Agreement). Alberta further claims that Quebec's regulation does not respect the intent of the Agreement, which requires that a Party not discriminate against the products of another Party and requires the Party to remove barriers to internal trade. Alberta also claims that this regulation is unjustifiable in terms of exceptions regarding legitimate objectives.
4. Quebec is disputing Alberta's interpretation.<sup>2</sup> Quebec is of the opinion that Alberta's complaint must be rejected on the grounds that:
  - a. The regulation on margarine colouring is not a measure covered by chapter nine of the Agreement;
  - b. The measure disputed by Alberta is not a barrier under the terms of the Agreement and, on the contrary, the measure meets a legitimate objective and is permitted under the Agreement.

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<sup>1</sup> Dispute between Alberta and Quebec concerning the colouring of margarine.

<sup>2</sup> Quebec also challenges the allegations of the intervenors in the current proceedings for the same reasons.

**PART I: INTERPRETATION OF THE AGREEMENT ON INTERNAL  
TRADE**

**1. OBJECTIVE OF THE AGREEMENT**

5. The objective of the Agreement on Internal Trade, as described in the Preamble and in Chapter One of the Agreement, is the liberalization of trade within Canada, to the extent possible, subject to any exceptions that may be necessary.

6. The Parties, have agreed, both in the Preamble and in Article 100 of the Agreement, that the barriers to free trade will only be reduced and eliminated where possible. They clearly expressed their desire to “reduce and eliminate, to the extent possible, barriers to the free movement of ...goods”.<sup>3</sup> They also stipulated, in Article 101(4) (b), that it was necessary to make provisions for exceptions to the free trade of products between the provinces.

7. The Parties knew that the Agreement they were signing would promote economic growth in Canada. They also knew that trade would not be completely free and that each of the Parties would be able to use specific measures to meet legitimate objectives, among others.

**2. INTERPRETATION PRINCIPLES**

8. The Agreement on Internal Trade was negotiated at the same time as the North American Free Trade Agreement and World Trade Organization (WTO) agreements. It is part of the movement to liberalize international trade, in which Canada and the provinces actively participate. Annex 1813 contains certain rules of interpretation. Among others, these rules deal with the application of provisions in one chapter to issues from another chapter, certain cases of incompatibility between chapters and the requirement that the Party claiming that a measure is incompatible with the Agreement must prove its claim. However, these rules do not stipulate how the provisions of the Agreement should be read or interpreted.

9. In this respect, the principles of statutory interpretation in effect in Canada and the rules governing international trade agreements can be useful guidelines to the parties and members of the panel.

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<sup>3</sup> Agreement on Internal Trade, second paragraph of the Preamble and Article 100.

10. In Canada, in 2002, the Supreme Court of Canada established interpretation principles that must be used to analyze a law.<sup>4</sup> According to the Supreme Court of Canada, the modern method of statutory interpretation reads “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”.<sup>5</sup>

11. At the international level, the WTO Appellate Body, the final body responsible for settling disputes between countries, specified the role of the dispute settlement system and the interpretative principles that should be followed on several occasions.<sup>6</sup> Thus, the Appellate Body noted that the purpose of the dispute settlement system is to clarify existing provisions in Agreements. It specified that the interpretative principles for treaties described in Articles 31 and 32 of the Vienna Convention on the Law of Treaties<sup>7</sup> apply to the interpretation of the WTO agreement. The Appellate Body also recognized the principle of effectiveness by which the person interpreting the treaty must give meaning and effect to all terms of the treaty and that the interpreter is not free to adopt an interpretation that would result in making clauses or full articles of a treaty redundant or useless. Thus, in practice, it is the duty of any treaty interpreter to “read all applicable provisions of a treaty in a way that gives meaning to all of them harmoniously”. The Appellate Body also noted “that an important corollary of this principle is that a treaty should be interpreted as a whole and, in particular, its sections and parts should be read as a whole”. The Appellate Body stipulated that “the legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself” and that the “interpretation principles do not mean that it is necessary or justifiable to assign terms to a treaty that it does not contain or to include concepts in a treaty that had not been planned”.<sup>8</sup>

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<sup>4</sup> *Bell Express Vu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559. (Appendix 1)

<sup>5</sup> *Ibid.*, Section 26. In Section 44 of its decision, the Supreme Court of Canada, after analyzing the ordinary and grammatical sense of the disputed provision, states that the importance to be attached to the purpose of a law is expressed as follows: “Although the Radiocommunication Act is not, unfortunately, equipped with its own statement of purpose (...)” (our underlining).

<sup>6</sup> See, among others, *Korea — Definitive safeguard measure on imports of certain dairy products*, Report from the WTO Appellate Body, December 14, 1999, sections 80 and 81. (Appendix 2).

<sup>7</sup> These two articles are included in the appendix. (Appendix 3).

<sup>8</sup> *India — patent protection for pharmaceutical and agricultural chemical products*, Report from the WTO Appellate Body, December 19, 1997, Section 45. (Appendix 4) See also *Community measures concerning meats and meat-based products (hormones)*, Report from the Appellate Body of the WTO, January 16, 1998, Section 181: “The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination and not the words which the interpreter may feel should have been used.” (Appendix 5).

## **PART II: FACTUAL ANALYSIS**

### **1. Introduction**

12. Alberta disputes the regulation applicable to Quebec concerning margarine colouring.

13. Consultations between Alberta and Quebec, held in accordance with Article 906 of the Agreement, were held first<sup>9</sup>. They were followed by a request for assistance from the Committee on Internal Trade, pursuant to Chapter Seventeen<sup>10</sup> and by a formal request from Alberta, pursuant to Article 1704 of the Agreement, to form a panel.<sup>11</sup>

14. In its submission presented to the panel<sup>12</sup>, Alberta alleges that the measure in Article 40 (1) (c) of the Regulation respecting dairy products substitutes in force in Quebec, is covered by Chapter Nine of the Agreement, which constitutes a barrier to trade and is contrary to the objectives and principles mentioned in the Agreement. It claims that this measure infringes on the following provisions of the Agreement: Article 401 (Reciprocal Non-Discrimination), Article 402 (Right of Entry and Exit), Article 403 (No Obstacles) and that it is not justified according to Article 404 (Legitimate Objectives). It also claims that Quebec had an obligation to harmonize its regulations to promote the free trade of products as per Article 405 (Reconciliation) and Article 101 (3) (c) (Mutually Agreed Principles) and that there is no evidence that the measure aims to protect the consumer (101 [4]).

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<sup>9</sup> September 5, 2003 letter from Mr. Darcy Willis, Senior Policy Analyst, Alberta Agriculture, Food and Rural Development to Mr. Sylvain Boucher, Assistant Deputy Minister, ministère de l'Agriculture, des Pêcheries et de l'Alimentation du Québec (Quebec Ministry of Agriculture, Fisheries and Food) (Appendix 6). September 8, 2003 from Mr. Darcy Willis, Senior Policy Analyst, Alberta Agriculture, Food and Rural Development to Mr. Laval Poulin, Director, Direction des politiques commerciales et intergouvernementales, ministère de l'Agriculture, des Pêcheries et de l'Alimentation du Québec (Department of commercial and intergovernmental politics, Quebec Ministry of Agriculture, Fisheries and Food) (Appendix 7).

<sup>10</sup> May 14, 2004 letter from Mr. Halvar Jonson, Minister, Alberta International and Intergovernmental Affairs to the Honorable Lucienne Robillard, Minister, Industry Canada and to the Honorable Percy Mockler, Minister of Intergovernmental and International Relations New Brunswick and the June 2, 2004 Record of Discussions of the Committee on Internal Trade (Appendix 8).

<sup>11</sup> July 2, 2004 letter from Mr. Halvar Jonson, Minister, Alberta International and Intergovernmental Affairs to the Honorable Lucienne Robillard, Minister, Industry Canada and to the Honorable Percy Mockler, Minister of Intergovernmental and International Relations New Brunswick (Appendix 9).

<sup>12</sup> Written submission of the complaining party, the Government of Alberta, August 16, 2004.

15. Alberta claims, in paragraphs 43 and following of its submission, that the regulation on margarine colouring has negative economic consequences for margarine producers established in its territory, as well as for its producers and processors of canola. It alleges that the absence of colour results in Quebec residents consuming less margarine than in the rest of Canada.<sup>13</sup> It also claims, in paragraph 48 of its submission, that its producers had decided not to produce margarine that respects Quebec's regulation because the costs would have been too high.

16. With regard to the consumption of margarine, the statistics regarding the consumption of margarine published by Agriculture Canada show that the damages suffered by Alberta, Manitoba and Saskatchewan could not have been caused by Quebec because the consumption of margarine in Quebec, for the 1997 to 2002 period, is higher than for Ontario and comparable to that for British Columbia.<sup>14</sup>

17. Since the consumption of margarine was higher or similar to the consumption in Ontario and British Columbia, two provinces in which margarine may be coloured, the losses claimed, but not proven, by Alberta and the two interveners do not exist or, if they do, are not caused by Quebec.

18. Even if the annual losses of \$17 million claimed by Alberta exist, which Quebec disputes, Alberta has an obligation to minimize them. Thus, an investment in an amount of that from Unilever, assessed at \$1.2 million in paragraph 48 of Alberta's submission (but not proven), could make it possible to respect the regulation applicable to Quebec, generate a significant sales figure and make the claimed losses disappear.

19. In this respect, the information we have shows that margarine produced in Alberta that respects the Quebec regulation was sold in Quebec since at least 1998. Still based on this information, the market share of one of the margarine producers in Alberta was larger in Quebec than in Ontario during a certain period. He also would have received a higher price for his products in Quebec than in Ontario, even if the margarine was the same colour as butter, and even if the colour of the margarine in Quebec was white, as mentioned in paragraph 46 of Alberta's submission, which is not very appetizing and resembles lard.<sup>15</sup>

20. These data show that sales of a product do not depend on its colour, but on its characteristics and how it is sold, and that in Quebec, consumers are well informed.

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<sup>13</sup> Manitoba and Saskatchewan also claim that Quebec's measure inflicts damage on them.

<sup>14</sup> Agriculture Canada, Per Capita Consumption of Retail Butter and Margarine, Appendix 10.

<sup>15</sup> Quebec will submit data on market shares of margarine in Quebec during hearings, after receiving assurance from the panel and the parties that the data will be treated confidentially.

21. Thus, the regulation on margarine colouring is not a barrier to trade because it does not prevent the sale of margarine produced elsewhere in Canada. Furthermore, and more importantly, the national consumption data show that the regulation does not cause Quebec consumers to consume less margarine than what is consumed in Ontario or British Columbia. Finally, the damage, if any, is not caused by Quebec and is much lower than that claimed, but not proven, by Alberta, Manitoba and Saskatchewan.

22. Quebec will show in this submission that its regulation is not an obstacle and that it is normal for a merchant to encounter different regulations in the different locations he decides to conduct business and that these differences cannot be classified as obstacles. Alberta margarine producers can sell margarine in Quebec if they respect the regulation. If maintaining two inventories is an obstacle, merchants should also complain about having to maintain multiple inventories of a given product to meet the specific needs of consumers. Margarine is one of these products. Its market is highly segmented and producers must offer many types of margarine to meet the demand. The producers are not complaining because they often cause such segmentation and profit from it. The situation is the same for margarine producers established outside of Quebec. The fact that they dominate the margarine market in Quebec proves this.

23. Alberta claims, in paragraph 22 of its submission, that Quebec is the only jurisdiction in Canada that applies a regulation on margarine colouring. It also claims, in Section 46, that the colour yellow is associated with margarine almost everywhere in the world. Quebec is unable to confirm or deny this claim, and does not need to. In accordance with Article 300 of the Agreement, Quebec, like all the other Parties, has retained all of its rights in terms of exercising its legislative jurisdiction. It may adopt any laws or regulations over which it has jurisdiction and that it deems necessary to adopt.<sup>16</sup>

24. Alberta's allegations, in paragraphs 22 and 46 of its submission, are nevertheless not insignificant. They aim to attract the attention of the expert panel on the fact that this measure should not be upheld given that no other state in the world deemed it necessary to adopt a similar measure. Alberta's allegation deliberately ignores the fact that a similar regulation was in effect in Alberta until 1972<sup>17</sup> and, until very recently, in Ontario and many other jurisdictions. It also ignores the fact that the margarine story began over 100 years ago, that it consists of many laws and that much has been written on the topic.

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<sup>16</sup> In this respect, the Supreme Court of Canada stated that given the federal nature of our constitution, and given that property and civil rights are under the province's jurisdiction, many of the laws in effect in the provinces that affect the conditions for sales activities apply only in the provinces in which they have been adopted. It added that the federal structure of our constitution makes it possible to establish distinct regulation systems for trade whose application are inevitably defined "in terms of provincial boundaries". See *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, 197, number 61. (Appendix 11).

<sup>17</sup> List of Alberta laws. (Appendix 12)

## 2. Background

25. The story of the margarine regulation is part of the history of laws on food safety. Governments ensured early on that foods were unadulterated<sup>18</sup>, but true development occurred during the second half of the 19<sup>th</sup> century and at the start of the 20<sup>th</sup> century. In the United States, for example, many laws have been adopted in this field, starting in 1880, and the first significant law, the Pure Food and Drugs Act, was adopted in 1906 after a book written by Upton Sinclair entitled “*The Jungle*” was published.<sup>19</sup>

26. It is important to remember that, at this time, food available in cities was stored in containers and cans and was not always the same as the food produced in the country. Chemicals may have been used to enhance the colour, change the taste, improve the texture or remove signs that a product was no longer edible. In short, food product falsification was a serious problem and laws to prevent this were non-existent.<sup>20</sup>

27. Margarine was invented in France. In fact, in 1866, Napoleon III launched a contest to develop a reasonable and economical spread. A French chemist, Hippolyte Mège-Mouriez, went to work on this idea and invented a product made from beef fat in 1869. The product was named margarine. The word margarine is from the word “pearl”, or “margarogonia” in Greek, because the product has a pearl-like lustre.<sup>21</sup>

28. Margarine first came to North America soon after it was invented. At that time, margarine was not manufactured in the same manner as it is today. When it was first introduced, margarine was made by crushing beef fat with rollers heating it with water, potassium carbonate and pieces of sheep stomach. Enzymes in the sheep stomachs

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<sup>18</sup> See example, *Food and Drug Law, Cases and Materials*, Peter Barton Hutt, Richard A Merrill, 1991, pages 228-230 (Appendix 13).

<sup>19</sup> Upton Sinclair, *The Jungle*, Paris, Éditions Rencontre, 1983, volume 1, p. 29-71. This book describes the unhealthy conditions that prevailed in a Chicago slaughterhouse at the start of the 20<sup>th</sup> century. After the president of the United States, Theodore Roosevelt, read the book, he ordered an inquiry into slaughterhouses in the United States. The Pure Food and Drugs Act and Meat Inspection Act were subsequently adopted in 1906. (The author’s introduction (pages 29 to 46) is included in the appendix. (Appendix 14) A summary of the book can be consulted at: <http://sunsite.berkeley.edu/literature/sinclair/index.html> .

<sup>20</sup> See specifically, James Harvey Young. *The Long Struggle for the 1906 Law*, Food and Drug Administration, FDA Consumer, June 1981. <http://vm.cfsan.fda/~lrd/history2.html>. (Appendix 15).

<sup>21</sup> The Perseus Digital Library. English-Greek Word Search, Margargonia/pearls. <http://www.perseus.tufts.edu/cgi-bin/enggreek?lang=greek&lookup=pearl&type=begin&options=Sort+resultsAlphabetically>. (Appendix 16).

separated the fat from body tissues. The resulting fat was then bleached with acid, mixed with milk, water and a colorant.<sup>22</sup>

29. Because it resembled butter and butter was sold in bulk, it was easy to pass margarine off as butter and hence ask a higher price. Therefore, in the 19th century, in the United States, 99% of the margarine was sold by falsely claiming it was butter.<sup>23</sup>

30. This unacceptable situation led legislators to act quickly to protect consumers, first in the United States and then in Canada. In the United States, at the end of the 1870s and throughout the 1880s, many states adopted laws requiring that margarine be clearly identified on the package. In the mid-1880s, the U.S. federal government imposed high taxes on margarine and prohibited the addition of yellow colorants. Some states went so far as to require that margarine be coloured pink, red or black.<sup>24</sup> Laws covering margarine evolved, as did the manufacturing processes, and many states adopted laws allowing the sale of margarine as long as it was not the same colour as butter, to prevent consumers from being defrauded. At that time already, supporters of margarine alleged that all of these laws had but one goal: to protect the dairy industry. At the same time, the lobby opposing the creation of the Food and Drug Administration (FDA) was very strong and it took the publication of *The Jungle* in 1906 for things to change.

31. The same debate took place in Canada<sup>25</sup>. In 1886, Ontario milk producers, then the largest group of milk producers in Canada, asked the federal government to take the necessary measures to prevent margarine from being sold as butter. Milk consumers and producers had to be protected. Consumers should be able to obtain butter when they want to buy butter and pay the price of butter. They should not receive an imitation product that could, in addition, be unhealthy. Producers should be protected to prevent those guilty of fraud from selling their imitation product as butter. (As an analogy, today laws covering trademarks protect consumers and true holders of trademarks. If someone wants to buy a brand watch and pay the price, an imitation product should not be sold to him or her. The laws protect the consumer as well as the producer, who is entitled to receive compensation for its discovery, patent and marketing. These laws protect the consumer first. For example, false aircraft parts must not be sold as originals and the same is true for medications, automobile parts, etc. It could be claimed that the only objective is to protect production, but this is not true. Like a coin, laws to protect consumers have two

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<sup>22</sup> (2000, February/March). 1950: *The Lower-Priced Spread*. American Heritage (<http://www.americanheritage.com/amher/2000/01timemachshhtml>). (Appendix 17).

<sup>23</sup> *A Propensity to Protect Butter, Margarine and the Rise of Urban Culture in Canada*, W.H. Heick, Wilfrid Laurier University Press, 1991, page 18. (Appendix 18).

<sup>24</sup> *Supra*, footnote 22.

<sup>25</sup> *Supra*, footnote 23, pages 6 and following.

sides. The first protects the consumer and the second encourages manufacturers by allowing them to sell products demanded by consumers.)<sup>26</sup>

32. In Canada, a law was adopted in 1886 prohibiting the import, manufacture and sale of margarine in Canada, following some heated debates in the newspapers and in the House of Commons. This law was named the *An Act to prohibit the Manufacture and Sale of Certain substitutes for Butter* “Acte à l’effet de prohiber la fabrication et vente de certains substitués du beurre”. It stipulated:

“Whereas the use of certain substitutes for butter, heretofore manufactured and exposed for sale in Canada, is injurious to health; and it is expedient to prohibit the manufacture and sale thereof; Therefore Her Majesty, by and with the advice and consent of the Senate and the House of Commons Canada, enacts as follows:

1. No oleomargarine, butterine or other substitute for butter, manufactured from any animal substance other than milk, shall be manufactured in Canada, or sold therein; (...).”<sup>27</sup>

33. This federal law was in effect from 1886 to 1949<sup>28</sup>, when the Supreme Court of Canada declared that the federal government did not have jurisdiction to adopt a law concerning margarine and that this power belonged to the provinces.<sup>29</sup>

34. Faced with this situation, the provinces decided to take over the federal law. Alberta, Manitoba, New Brunswick, Nova Scotia, Ontario and Saskatchewan adopted a regulation prohibiting the sale of yellow margarine, while Prince Edward Island and Quebec prohibited the manufacture and sale of margarine in their territories.<sup>30</sup>

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<sup>26</sup> The counterfeit problem is very serious throughout the world. False medications kill and poison thousands of people. False aircraft parts can cause a crash. Counterfeit children’s clothing are not fire-resistant. Counterfeit sunglasses do not protect us from ultraviolet rays. False brake parts for cars are very dangerous. Counterfeit shampoo can result in hair loss. An Internet search is very persuasive on this issue and shows, among others, that the United States and the World Health Organization are very concerned about this problem. Among others, refer to the articles in Appendix 19 on this topic.

<sup>27</sup> 49 Vict., 1886, c. 42 (Appendix 20).

<sup>28</sup>

<sup>29</sup> *In the Matter of a Reference as to the Validity of Section 5(A).2(a) of the Dairy Industry Act, R.S.C. 1927, Chapter 45*

35. Consumer protection has always been one of the reasons for taking over the margarine issue from the federal government. The following sections cover the reasons mentioned by Quebec, Ontario and Alberta for adopting and maintaining the regulation involving the colour of margarine. Since the margarine issue was always on a national scale, the facts observed in Quebec, Ontario and Alberta, should also have occurred in the rest of Canada.

36. In Quebec, a law was adopted in 1949<sup>31</sup> allowing the government to adopt measures to prohibit or regulate the manufacture and sale of margarine. In the days following adoption of this law, the government adopted a decree prohibiting the manufacture and sale of margarine in Quebec.<sup>32</sup>

37. In 1955, one of the “WHEREAS CLAUSES” comments in the decree that designated any food product that imitated the colour of butter through artificial colouring as a butter substitute stated “the addition of colouring to certain food products of a nature to mislead consumers by making of these products an imitation butter”.<sup>33</sup>

38. In 1961, a law was adopted to allow the sale of margarine in Quebec.<sup>34</sup> This law was adopted because it was found that, despite the prohibition in 1949, it was easy to purchase margarine illegally in Quebec and that the quality of this product was not known since it was illegal.<sup>35</sup> Once again, consumer protection was the main goal. By allowing the sale of margarine, this law ended an illegal trade on the black market. It

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<sup>31</sup> *Loi protégeant l'industrie laitière dans la province*, (S.Q. 1949, c. 44). (Appendix 23) Despite the name of the law, the legislator's intent was to protect both producers and consumers – “( ) our government in Quebec had to present a law that was flexible enough to deal with potential situations and, at the same time, protect producers and consumers. See *Débats de l'Assemblée législative*, excerpts from the 23rd legislative assembly, sessions from January 19 to March 10, 1949, Service de la reconstruction des débats, preliminary version, and, more specifically, pages 422 and 423. (Appendix 24).

<sup>32</sup> Decree, Chambre du Conseil exécutif [executive council chamber], number 291, March 17, 1949, (*Gazette officielle du Québec*, March 19, 1949, Volume 81, No. 11, p. 802). (Appendix 25).

<sup>33</sup> Decree, Chambre du Conseil exécutif [executive council chamber], number 235, March 2, 1955 (*Gazette officielle du Québec*, March 12, 1955, Volume 87, No. 10, p. 905). (Appendix 26) This decree was adopted in accordance with the *Loi pour protéger l'industrie laitière du Québec*, S.Q. 1953, c. 6, sanctioned on December 17, 1953. (Appendix 27) This law repealed the *Loi protégeant l'industrie laitière dans la province* (supra, note 31). Section 2 of the 1953 law prohibits all dairy product substitutes designated by the lieutenant governor pursuant to Section 3.

<sup>34</sup> *Dairy Products Substitute Act*, S.Q. 1961, c. 59, assented to 10<sup>th</sup> June 1961. (Appendix 28) The law repeals the *Loi pour protéger l'industrie laitière du Québec*. Article 8 of the 1961 law stipulates that a butter substitute should not be of the same colour as butter according to the Lovibond scale. (The 1961 law was consolidated in 1964 without any modification to Article 8, see, S.R. 1964, c. 123). (Appendix 29).

<sup>35</sup> Supra, footnote 23, page 107. See also, a ruling of the UCC on this subject, *Terre de chez nous*, May 312, 1961, page 6 (Appendix 30).

ended the sale of fraudulent products that could be dangerous because they were manufactured without following a regulatory framework designed to ensure food safety. These products could be dangerous because government inspectors did not inspect them. **Like in Alberta, the sale of yellow margarine was prohibited.**

39. In 1969, Quebec adopted the Dairy Products and Dairy Products Substitutes Act<sup>36</sup> in order to have all laws related to dairy products and their substitutes in one law. No changes were made regarding the colouring of margarine, except that powers would be exercised by regulations. During the debates surrounding the adoption of the law, the Minister of Agriculture and Colonization, Mr. Clément Vincent, shared the spirit involved in preparing the bill. Mr. Vincent stated:

“Overall, we can summarize the scope of Bill 70 by saying that it was prepared in collaboration with all of the interested groups that had participated more or less directly in its development. Wherever possible, it takes into account the interests of each of the groups, a phenomenon that is somewhat rare in the history of agricultural legislation. It can be said that it favours both the milk producer, the dairy firm and the consumer public.”<sup>37</sup> (our underlining).

40. From 1973 to 1987, the restriction regarding the colour of margarine was withdrawn in Quebec.<sup>38</sup> In 1987, the Quebec government re-established the restriction and it remains in force since.<sup>39</sup> The Minister of Agriculture, Mr. Michel Pagé, stated in the weeks leading up to the adoption of the regulation that establishing a difference in colour between butter and margarine would have several benefits and that the new colour would be like that of margarine manufactured in Ontario.<sup>40</sup> Minister Pagé also stated that

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<sup>36</sup> L.Q., 1969, c. 45. Article 26 indicates that all substitutes must meet the standards on colour established by the regulation, (Appendix 31). Article 40 (1)(a) of the *Regulations concerning Dairy Product Substitutes*, (1970) 102 G.O. II 1332, requires that margarine not be of the same colour as butter on the Lovibond scale. (Appendix 32).

<sup>37</sup> Debates of Quebec’s National Assembly, Fourth Session -28<sup>th</sup> Legislature, November 28 1969, Volume 8- No. 93, page 4371. (Appendix 33).

<sup>38</sup> See Article 5 of the *Regulation amending the regulation respecting Dairy Products Substitutes*, (1972) 104 G.O. II, 11530, which replaced Article 40 of the *Regulations concerning Dairy Product Substitutes* and eradicates all requirements concerning color. (Appendix 34).

<sup>39</sup> See Article 1 of the *Regulation amending the regulation respecting Dairy Products Substitutes*, (1972) 104 G.O. II, 5495, which prohibits margarine of the same colour as butter in the Lovibond scale. (Appendix 35). The *Regulations concerning Dairy Product Substitutes*, R.R.Q., 1981, c. P-30, r. 15 as it was prior to the 1987 amendment is attached at Appendix 36.

<sup>40</sup> On this topic, see “*Un jaune entre le beurre et la moutarde, La couleur dans la margarine fera vendre plus de beurre*”, *Le Devoir*, August 5, 1987, p. 2. (Appendix 37).

this differentiation would allow consumers to really know what they are eating, either at home or in a restaurant.<sup>41</sup>

41. In this respect, it is often stated that consumers can tell the difference between butter and margarine and that there are other methods to protect consumers. However, we should remember that the Ontario and Quebec governments felt at that time, and the Alberta government until 1972, that consumers should be able to see the difference between butter and margarine with their own eyes. Consumers should be protected against fraud, such as the cases discovered in 1982 in Quebec and in 1983 in Ontario.

42. In Quebec, *Le Soleil* reported on February 10, 1982 that consumers had been victims of misrepresentations by being sold margarine when they thought they were buying butter and 4,000 pounds of false butter was seized.<sup>42</sup> The facts showed that fraudeurs were profiting from the high price of butter to fool consumers.

43. In Ontario, as reported in the *Globe and Mail* on January 13, 1983<sup>43</sup>, Ontario consumers were victims of a fraud of over \$500,000 when they were sold margarine instead of butter. It was shown that the fraudeurs purchased margarine in Ontario and Quebec, removed the original packaging, repackaged the products in an unhealthy manner and sold these products as butter. According to Mr. Robert Jardine, responsible for plant inspections for the Ontario Ministry of Agriculture and Food, the unhealthy products were sold in retail stores in the Toronto area. Mr. Jardine from the Ontario Ministry of Agriculture and Food also stated that modern technology made it possible to manufacture margarine with the same texture and consistency as butter and that trusting consumers could not tell the difference. At this time, Mr. Jardine also said that the seizure by the RCMP and the Department of Consumer and Corporate Affairs was not the only one showing that margarine was being sold in Ontario instead of butter, but that it was “one of the largest margarine-butter switches ever seen in the province”. Fraud continued in following years as will be shown later.

44. In Ontario, the reasons the government prohibited the colouring of margarine are similar to those put forward in Quebec. The main reason was to prevent fraud to consumers. This reason resulted from concrete facts such as shown by, among others, the seizure of unhealthy margarine sold as butter in 1983 in Toronto.

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<sup>41</sup> See “*Margarine will be darker: Quebec*” *The Gazette*, April 18, 1987, p. A4. (Appendix 38) Also on this topic, see “Une entrevue avec le ministre Pagé, Le producteur de lait Québécois”, October 1986, p. 15. (Appendix 39)

<sup>42</sup> Robert Fleury, “*On vend pour du beurre de 1,30 \$ de la margarine de 0,74 \$*” *Le Soleil*, February 10, 1982, p. B-6. (Appendix 40).

<sup>43</sup> Kevin Cox, “\$500,000 fraud hits “butter” buyers”, *The Globe and Mail*, January 13, 1983, p.4. (Appendix 41).

45. In Ontario, the Prime Minister, the agriculture ministers and an Assistant Deputy Minister of Agriculture each took turns stating that the desired objective in prohibiting the sale of yellow margarine was consumer protection and the prevention of fraud to consumers.

46. In Ontario, in 1963, the Minister of Agriculture, Mr. W. A. Steward, declared during the debates surrounding the presentation of a bill to amend The Oleomargarine Act to change certain provisions concerning the colouring of margarine that:

“These two distinctive colour ranges will make any misrepresentation impossible and will allow each product (butter and margarine) to be sold with an acceptable colour on its own merits. (...) However, we have recognized in this legislation that this is a food product which many consumers wish to buy. Under this amendment, it will be presented on the market in packages marked in such a way that the consumer will know what he or she is buying and with a colour of yellow which will make misrepresentation between butter and oleomargarine extremely difficult.”<sup>44</sup> (our underlining).

47. In Ontario, on October 23, 1974, the Premier of Ontario, Mr. William G. Davis, in a letter addressed to Mr. John Woodrow, Resolutions Chairman, Consumers Association of Canada (Ontario), about the prohibition against colouring margarine, confirmed that:

“(...) As well, labelling requirements and colour protect the consumers when making their choice in the store, however no protection other than colour exists in restaurants and institutions. Being two different products, I would not recommend the removal of the present colour restrictions on margarine.”<sup>45</sup>

48. In Ontario, in 1980, the Minister of Agriculture, Mr. Lorne C. Henderson, declared to the Ontario Legislature, when submitting the “Oleomargarine-Butter Blend Committee” report that:

“As far as the colouring of margarine is concerned, I believe consumers have a right to know, just by looking at it, whether they are getting butter or margarine. There is no reason that I can see why margarine should be

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<sup>44</sup> Ontario, Debates, Legislative Assembly of Ontario, 1962-1963, p. 2640-2641. (Appendix 42).

<sup>45</sup> A copy of this letter is included in Appendix 43; Source: affidavit of Mr. Rolf J. Bolhuis, Vice President Marketing, Refrigerated Foods, Division of Thomas J. Lipton Inc. This affidavit was produced in the Supreme Court of Ontario on December 30, 1986 in the case between *Institute of Edible Oil Foods, Thomas J. Lipton Inc., Nabisco Brands Limited and Geraldine Saby* versus *Her Majesty the Queen in Right of Ontario*, No. 264/87.

allowed to masquerade as butter. Therefore, I will not be proposing any changes to the regulations governing these three matters.”<sup>46</sup>

49. In Ontario, on March 17, 1981, the Minister of Agriculture, Mr. Lorne C. Henderson, in a letter addressed to Mr. Douglas Caldwell, Executive Director, Institute of Edible Oil Foods, explained:

“The primary reason for maintaining the existing colour differential on margarine is that it permits consumers to visually differentiate between butter and margarine, (...).

Because of modern manufacturing techniques, physical differences between butter and margarine are difficult to detect. Therefore, unscrupulous persons have used this sameness to pass off margarine as butter on unsuspecting persons.”<sup>47</sup>

50. In Ontario, on September 19, 1984, the Minister of Agriculture, Mr. Dennis R. Timbrell, in a letter to Mr. Bruce Wood, President, Institute of Edible Oil Foods, reiterated the opinion of the government of Ontario concerning margarine colouring. He wrote:

“I realize that we are far apart in our views of the need for oleomargarine to be coloured distinctively from butter but must reiterate that we view those provisions of The Oleomargarine Act to be consumer protection oriented and fully justified.”<sup>48</sup>

51. In Ontario, on October 11, 1985, the Minister of Agriculture, Mr. Jack Riddell, in a letter to Mr. J. W. O’Donnell, President, Monarch Fine Foods Company Limited, indicated:

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<sup>46</sup> Ontario, Legislature of Ontario, April 17, 1980, p. 829. (Appendix 44).

<sup>47</sup> A copy of this letter is included in Appendix 45; Source: affidavit of Mr. Rolf J. Bolhuis, Vice President Marketing, Refrigerated Foods, Division of Thomas J. Lipton Inc. This affidavit was produced in the Supreme Court of Ontario on December 30, 1986 in the case between *Institute of Edible Oil Foods, Thomas J. Lipton Inc., Nabisco Brands Limited and Geraldine Saby* versus *Her Majesty the Queen in Right of Ontario*, No. 264/87.

<sup>48</sup> A copy of this letter is included in Appendix 46; Source: affidavit of Mr. Rolf J. Bolhuis, Vice President Marketing, Refrigerated Foods, Division of Thomas J. Lipton Inc. This affidavit was produced in the Supreme Court of Ontario on December 30, 1986 in the case between *Institute of Edible Oil Foods, Thomas J. Lipton Inc., Nabisco Brands Limited and Geraldine Saby* versus *Her Majesty the Queen in Right of Ontario*, No. 264/87.

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“It is a measure of consumer protection that the previous government continued to require the colour differential in the face of considerable pressure from the Institute of Edible Oil Foods. (...) consumer protection has to be a major consideration of this ministry.”<sup>49</sup>

52. In Ontario, on June 16, 1987, Mr. George H. Collin, Assistant Deputy Minister, Ontario Ministry of Agriculture and Food, declared in an affidavit in the case between Institute of Edible Oil Foods, Thomas J. Lipton Inc., Nabisco Brands Limited and Geraldine Saby versus Her Majesty the Queen in Right of Ontario<sup>50</sup>:

“21. That the Oleomargarine Act first came into force on April 1, 1949. The intent of the legislation and its regulations has been and continues to be, to protect public health, to ensure that the product is fit for human consumption, and to prevent the possibility of fraud or misrepresentation. These goals have been accomplished through the requirements for (...) colour (...) (our underlining).

(...)

23. That I am informed by Doug Grout, Chief of the Investigative Unit, Quality and Standards Division, whose unit has been responsible for the enforcement of the Oleomargarine Act since September 1982, and do verily believe, that from mid-January until the end of May 1987, forty-four charges have been laid for selling or having in possession for sale, illegally coloured oleomargarine.

24. That I am informed by Doug Grout that between October 1982 and October 1986 there were 28 successful prosecutions for the sale of illegally coloured margarine as butter (our underlining).

25. That I am informed (...) Quebec and Prince Edward Island are in the process of re-introducing specific colour requirements for margarine (...).

26. That in deciding to amend its regulations, the government of Quebec has taken into account the interests of consumers, (...) in order to reduce consumer confusion. (...).” (our underlining)

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<sup>49</sup> A copy of this letter is included in Appendix 47; Source: affidavit of Mr. Rolf J. Bolhuis, Vice President Marketing, Refrigerated Foods, Division of Thomas J. Lipton Inc. This affidavit was produced in the Supreme Court of Ontario on December 30, 1986 in the matter of the *Institute of Edible Oil Foods, Thomas J. Lipton Inc., Nabisco Brands Limited and Geraldine Saby* and *Her Majesty the Queen in Right of Ontario*, No. 264/87.

<sup>50</sup> A copy of this affidavit is included in Appendix 48.

53. In Alberta, Section 5 of the law regarding margarine adopted in 1949 and named “An Act Respecting the Regulation and Control of Margarine” stipulated:

“No person shall offer for sale, sell, have in his possession for sale, or serve in any public eating place within the Province margarine coloured the natural colour of butter or any shade of yellow which might cause it to be mistaken for butter.”<sup>51</sup>

54. The use of the expression “which might cause it to be mistaken for butter” shows that the legislator’s intent was to protect Alberta consumers, to ensure they do not make a mistake by buying butter when in reality, they are buying margarine. At face value, this is a provision to protect consumers.

55. According to the foregoing, the regulations concerning margarine were adopted to protect consumers from fraud. The statements by the ministers during adoptions, both in Quebec and Ontario, are persuasive on this topic and cannot be questioned. Similarly, the veracity of fraud and seizures related to margarine sold as butter in Quebec and Ontario in the years preceding adoption of the regulation by Quebec cannot be doubted. Finally, reading the 1949 Alberta law clearly shows that it was adopted to protect consumers.

### **PART III: LEGAL ANALYSIS**

#### **1. Topic of the dispute**

56. Alberta disputes the regulation applicable to Quebec concerning margarine colouring. It maintains that this regulation is contrary to Quebec’s commitments in the *Agreement on Internal Trade*. Among others, Alberta is asking an expert panel to recommend to Quebec that it should immediately suspend application of Article 40 (1) (c) of the *Regulation respecting dairy products substitutes*<sup>52</sup> and that it immediately take the necessary measures to repeal it.

57. Quebec claims that Alberta’s complaint must be rejected. Quebec will first show that the expert panel does not have jurisdiction to decide the complaint presented by

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<sup>51</sup> *Supra*, footnote 17.

<sup>52</sup> The Regulation respecting dairy products substitutes, C.C.Q., 1981, c. P-30, r. 15 (Appendix 49) was adopted in accordance with Section 42 (g) of the Dairy Products and Dairy Products Substitutes Act, R.S.Q., c. P-30. (Appendix 50). This law was repealed by the Act to amend the Agricultural Products, Marine Products and Food Act, and other legislative provisions, L.Q., 2000, c. 26 (Appendix 51), which are now in sections 7.2 and 40 (b.2) and (3) of the *Loi sur les produits alimentaires*, R.S.Q. c. P-29 (Appendix 52). Section 74 of the amending act, the Act to amend the Agricultural Products, Marine Products and Food Act, and other legislative provisions (*supra* Appendix 51) stipulates that the provisions in the regulations decreed in accordance with the Dairy Products and Dairy Products Substitutes Act remain in effect.

Alberta because the regulation on margarine colouring is not a measure covered by Chapter Nine of the Agreement. Quebec will then show that the measure disputed by Alberta, if the expert panel has jurisdiction, which Quebec disputes, does not constitute an obstacle under the terms of the Agreement and, if otherwise, that this measure meets a legitimate objective and is permitted by the Agreement.

## **2. Legal argument**

### **2.1 The panel does not have jurisdiction**

58. Quebec is of the opinion that the panel does not have jurisdiction to hear and decide on the complaint submitted by Alberta.

59. The *Agreement on Internal Trade* is an agreement negotiated between the provincial, territorial and Canadian governments. Its main objective is to liberalize trade within Canada. It contains rights, obligations and exceptions to them.

#### **2.1.2 The regulation on margarine colouring is not included in the scope and coverage of Chapter Nine**

##### **2.1.2.1 The notice was not provided on time**

60. The regulation on margarine colouring is not included in the scope and coverage of Chapter Nine. The written notice from the Federal/Provincial Agriculture Trade Policy Committee was sent tardily and produced no effect. This was a fatal flaw.

61. In accordance with Article 902(3), this notice should have been given no later than September 1, 1997, but was only given on October 1, 1997, which was one month after the latest date agreed by the governments that are parties to the Agreement.<sup>53</sup>

62. Article 902(3) reads as follows:

“Measures involving technical barriers with policy implications shall be included in the scope and coverage of this Chapter effective September 1, 1997. The Federal-Provincial Trade Policy Committee (the “Trade Policy Committee”) shall, on or before September 1, 1997, give written notice to the Committee on Internal Trade of such measures.” (our underlining)

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<sup>53</sup> A copy of this letter is included. (Appendix 53).

63. The parties to the Agreement could have assented to this failure to meet a provision of the Agreement by formally amending the Agreement, but never did so. The notice is therefore invalid.

69. In this matter, the jurisdiction of the panel was not questioned by the Parties involved in the dispute. The fact that the Parties have agreed does not remove the panel's obligation to check whether the Parties are correct. The panel should have carried out its own analysis and made its own decision. This acquiescence to hear the matter and make a decision on a specific matter is not sufficient to amend the Agreement. Quebec was not involved in these procedures and has never recognized the validity of the letter dated October 1, 1997. Furthermore, there can be no question about interpreting the silence of the Parties as sufficient to recognize the jurisdiction of the expert panel and amend the Agreement.

70. In the Farmers Dairy matter, New Brunswick questioned the validity of the letter of October 1<sup>st</sup>. It pleaded, as mentioned by the panel on page 11 of its decision, that "the authors of the letter made the decision to apply its content retroactively on their own". The panel decided, on page 13 of its decision, that the letter had been sent correctly, but it nevertheless neglected to mention the illegal nature of the retroactivity as it should have done so given the delay of preclusion was involved.

71. This interpretation, the notice being sent late and producing no effect, is reinforced by the context of Article 902(3) and, more specifically, by the title of paragraph 7 of Annex 902.5 entitled "Reports on Measures That May Affect Internal Trade". This section refers to the measures discussed in the meeting of agricultural ministers held from July 4 to 6, 1994, which include the regulation on margarine colouring.<sup>55</sup> Paragraph 7 of Annex 902.5 specifies "an effective date no later than September 1, 1997". No additional time period is planned. This delay of preclusion that should be respected. If not, the Federal/Provincial Agriculture Trade Policy Committee loses its jurisdiction.

72. This interpretation is also the result of the requirement of the interpreter of the Agreement to provide a sense to all terms in the Agreement and from the fact that Article 902(2), while specifying that the written notice from the Federal/Provincial Agri-Food Inspection Committee concerning the measures identified as technical obstacles to trade should be provided no later than the date on which the Agreement goes into effect, explicitly stipulates that the committee may inform after this date that the Agreement applies to other measures.<sup>56</sup> This type of possibility is not included in Article 902(3). In Article 902(3), a time of preclusion is involved.

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<sup>55</sup> A copy of the minutes is appended. (Appendix 56).

<sup>56</sup> There is some flexibility regarding the other measures likely to influence internal trade that can be adopted by the ministers. They are included in the scope and coverage of application of Chapter Nine, in accordance with Article 902 (5), as of the date on which they were adopted. To ensure this article can apply, a decision from the ministers is nevertheless absolutely necessary.

73. Alberta mentions, in Section 16 of its submission, that the Federal/Provincial Agri-Food Inspection Committee (the Inspection Committee), in a letter dated June 28, 1993 sent to the Federal/Provincial Agriculture Trade Policy Committee, identified the rules concerning margarine colouring as one of the eight barriers to interprovincial trade.

74. Alberta only mentions this letter dated June 28, 1993 and does not draw any conclusions from its transmission.

75. Alberta could not have done otherwise because this letter cannot be used to interpret the Agreement and has no value in this matter.

76. In fact, this letter was written on June 28, 1993, which was more than one year before the Agreement was signed and was not addressed, contrary to what Alberta claims, to the Federal/Provincial Agriculture Trade Policy Committee.

77. The letter of June 28, 1993 is actually an internal note addressed, as can be seen on its front, to the “Members, FPAFIC”, or members of the Inspection Committee by the Secretariat of the same Inspection Committee.

78. This letter, or internal memo, dated June 28, 1993 was not sent in application of a provision in the Agreement and cannot in any way be used by the Parties or expert panel as evidence that the measure concerning margarine colouring is covered by Chapter Nine.

79. Moreover, the authority for informing that a measure identified as a “technical barriers with policy implications” was within the scope and field of application of Chapter Nine was the responsibility of the Trade Policy Committee in accordance with Article 902(3), not the Inspection Committee mentioned in Article 902(2).<sup>57</sup>

Finally, even if the inspection committee had this power, which Quebec disputes, the internal memo of June 28, 1993 does not constitute a notice because it is prior to the conclusion of the Agreement<sup>58</sup> and was not sent to the Committee on Internal Trade.

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<sup>57</sup> Contrary to what Saskatchewan seems to allege in paragraphs 23 and 25 of its submission, the Agreement does not treat measures identified as “technical barriers to trade” in the same manner as measures involving “technical barriers with policy implications”. The “technical barriers to trade” are discussed in Article 902 (2), while “technical barriers with policy implications” are discussed in Article 903 (3). In the first case, the Agreement applies after the Federal/Provincial Agri-Food Inspection Committee informs the Committee of Ministers of Internal Trade in writing. In the second case, the notice must be provided by the Federal/Provincial Agriculture Trade Policy Committee. In the first case, the time frame is flexible. In the second case, a time of preclusion is involved.

<sup>58</sup> Manitoba’s allegation, in Section 21 of its submission, that the notice from the inspection committee described in Article 902 (2) could have been given before or after the Agreement went into effect does not mean a notice that was given before the Agreement was signed, on July 18, 1994. In fact, the text of Article 902 (2) stipulates that the inspection committee provides a written notice to the Committee of Ministers of

80. To summarize, the notice provided by the Federal/Provincial Agriculture Trade Policy Committee on October 1, 1997 was provided too late. It produced no results. The regulation on margarine colouring is not included in the scope and coverage of Chapter Nine.<sup>59</sup>

**2.1.2.2 The Federal/Provincial Agriculture Trade Policy Committee provided the notice without having the mandate**

81. Without detracting from the scope of the preceding arguments and without admitting that the notice mentioned in Article 902(3) was provided in the time frame specified, Quebec maintains that the Federal/Provincial Agriculture Trade Policy Committee provided the written notice on measures involving technical barriers with policy implications that should have been part of the scope and coverage of Chapter Nine and, among others, the measures regarding margarine colouring, without having the mandate.

82. The letter from the Federal/Provincial Agriculture Trade Policy Committee that informs the Committee of Ministers of Internal Trade:

- i. was signed on October 1<sup>st</sup>, 1997;
- ii. was signed by the two cochairpersons of the Federal/Provincial Agriculture Trade Policy Committee;
- iii. was addressed to the two cochairpersons of the Committee of Ministers of Internal Trade;
- iv. states that, in accordance with Article 902.3, the Federal/Provincial Agriculture Trade Policy Committee must inform the Committee of Ministers of Internal Trade of any measures involving technical barriers with policy implications no later than September 1<sup>st</sup>, 1997;
- v. identifies five obstacles;
- vi. indicates that it is “recognized” that these measures fall within the scope and coverage of Chapter Nine as of September 1<sup>st</sup>, 1997.

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Internal Trade no later than the date on which the Agreement goes into effect. The obligation of the committee cannot be prior to the conclusion of the Agreement.

<sup>59</sup> Contrary to what Saskatchewan alleges in paragraph 24 of its submission, Quebec never acknowledged that the measure regarding margarine colouring had been identified by the inspection committee or the trade policy committee as an obstacle in the sense of Chapter Nine.

83. The identification of measures involving technical barriers with policy implications was not left to the two cochairpersons of the Federal/Provincial Agriculture Trade Policy Committee. An explicit decision by the Parties (the Canadian, provincial and territorial governments) had to be made on this. Such a decision had never been made by the Parties and the Federal/Provincial Agriculture Trade Policy Committee never received and never could receive a mandate to inform the Committee on Internal Trade of these measures. In this respect, there was an abuse of power or even usurpation.

84. A definition of what constitutes a “technical barriers with policy implications” is not included in the Agreement. However, the minutes<sup>60</sup> of decisions made at the meeting of ministers (agricultural) held from July 4 to 6, 1994 and mentioned in Section 6 of Appendix 902.5<sup>61</sup> describes these types of obstacles.

85. Thus, the “technical barriers with policy implications” identified by the cochairpersons of the Federal/Provincial Agriculture Trade Policy Committee in their letter dated October 1, 1997 are identical to the measures identified by the agricultural ministers in the minutes of decisions made at the meeting of agricultural ministers held from July 4 to 6, 1994, which was held only a few days before the Agreement was signed.

86. The measures identified by the cochairpersons of the Federal/Provincial Agriculture Trade Policy Committee and those they identified from the minutes of the meeting of ministers in July 1994 could not be included in the scope and field of application of Chapter Nine without respecting the procedures outlined in the Agreement.

87. This procedure is found in paragraphs 6, 7 and 8 of Annex 902.5, the paragraphs on which, it should be noted, the Federal-Provincial Agricultural Trade Policy Committee Co-Chairs relied, without right, to identify the measures they denounced and to determine the date of their inclusion in the Agreement.

88. Paragraphs 6, 7 and 8 of Annex 902.5 read as follows:

“6. The Ministers shall, within the framework of their review of Canadian agri-food policy, direct their respective officials to establish industry consultation and review work programs for the purpose of jointly preparing reports and recommendations in relation to the measures agreed

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<sup>60</sup> *Op.cit*, footnote 55.

<sup>61</sup> Paragraph 6 of Annex 902.5 is as follows: “The Ministers shall, within the framework of their review of Canadian agri-food policy, direct their respective officials to establish industry consultation and review work programs for the purpose of jointly preparing reports and recommendations in relation to the measures agreed to by the Ministers, in accordance with the record of decision of their meeting held on July 4-6, 1994.”

to by the Ministers, in accordance with the record of decision of their meeting held on July 4-6, 1994.

7. Subject to any changes that may be agreed to by all Parties, the Parties shall adopt, with an effective date no later than September 1, 1997, the measures referred to in paragraph 6 and the recommendations made in relation to those measures that are contained in the reports prepared under that paragraph.

8. The dates for the adoption of recommendations concerning imitation dairy products and butter blends are to be determined by the Ministers."  
(our underlining)

89. Under these paragraphs, which form an integral part of Chapter Nine, several steps had to be taken before any measure termed a "technical barrier with policy implications" could be covered under Chapter Nine. The requirements were:

1. to prepare a list of the measures that the Ministers of Agriculture had agreed to review from the record of decision of their meeting held on July 4 to 6, 1994;
2. that with respect to the measures in question in the preceding paragraph, the ministers direct their respective officials to:
  - a. establish industry consultation;
  - b. review work programs;
3. that the ministers' officials jointly prepare reports and recommendations in relation to these measures;
4. that the federal, provincial and territorial governments adopt, with or without change, the measures and the recommendations made in relation to those measures that are contained in the reports prepared by the ministers' officials in accordance with paragraph 6 of Annex 902.5;
5. that these steps be taken prior to September 1<sup>st</sup>, 1997 given that the effective date for the measures could not be later than September 1<sup>st</sup>, 1997, with the exception of the recommendations respecting imitation dairy products and butter blends for which the date for adoption was to be determined by the ministers.

90. All these steps had to be completed in the order stated before any notice could be sent under Article 902 (3). However, the third step was not completed: no report or any

recommendation was prepared by the ministers' officials. This lack of report or any recommendation prevented completion of the fourth step: the Parties to the Agreement, i.e. the federal, provincial and territorial governments, were unable to adopt any measure or recommendation of any kind. No measure or recommendation having been adopted, the fifth step could not be completed and the September 1<sup>st</sup>, 1997 date could not be respected.

91. It was never contemplated that the measures identified in Article 902(3) would automatically be included in the scope and coverage of Chapter Nine. If this had been the case, it would have been sufficient to identify the measures and schedule a date of entry into force; paragraphs 6 and 7 of Annex 902.5 would not have been necessary. And so the prerequisite conditions were not fulfilled and the regulation on the colour of margarine was never included in the scope and coverage of Chapter Nine. The two Federal-Provincial Agricultural Trade Policy Committee Co-Chairs could not, of their own volition, make a decision on these measures. They acted without authority.

92. Further, Quebec submits in the alternative that this absence of authority is made abundantly clear in certain sections of the October 1<sup>st</sup>, 1997 letter and in the decision of the Parties to the Agreement, contained in paragraph 8 of Annex 902.5, to leave to the ministers the matter of the scheduling of the dates for adoption of recommendations respecting imitation dairy products and butter blends.<sup>62</sup>

93. In point of fact, the signatories to the October 1<sup>st</sup>, 1997 letter indicate in their letter that they have identified the barriers including "standards regarding dairy blends (mixtures of butter and margarine) and imitation dairy products" and that "(it) is recognized that these measures will fall within the scope and coverage of Chapter Nine of the Agreement as of September 1<sup>st</sup>, 1997" (our underlining). However, paragraph 8 of Annex 902.5 does not say this. No effective date is indicated with respect to these measures. Rather it is indicated that it is the ministers who shall set the dates for adoption of recommendations respecting imitation dairy products and butter blends. The signatories to the October 1<sup>st</sup>, 1997 letter used their own interpretation and acted without authority. In addition, they gave retroactive effect to their action, which was in no way contemplated by the Parties.

94. The signatories to the October 1<sup>st</sup>, 1997 letter did not treat the "restrictions on the colour of margarine and other standards applicable to margarine" in a specific manner when they should have been combined with the "recommendations respecting imitation

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<sup>62</sup> Paragraph 8 of Annex 902.5 should be read in conjunction with Article 902(5) which stipulates that "Other measures that may affect internal trade and that are adopted by the Ministers in accordance with the process set out in Annex 902.5 shall be included in the scope and coverage of this Chapter effective on the date of their adoption". Paragraph 8 of Annex 902.5 is the only provision of the Annex that provides that the Ministers may adopt a measure. Paragraphs 6 and 7 actually provide that the right to adopt a measure referred to in the record of decision of the meeting on July 4 to 6, 1994 rests with the Parties, that is, the federal, provincial and territorial governments.

dairy products” and made the subject of a separate decision by the ministers with respect to the date or dates of their adoption. In point of fact, margarine is an “imitation dairy product” and any recommendation in its respect, as regards colour or anything else, should have been decided by the Ministers of Agriculture separately. The silence of the ministers could not be interpreted as a decision that the margarine regulation was included in the scope and coverage of Chapter Nine on September 1<sup>st</sup>, 1997.

95. The signatories to the October 1<sup>st</sup>, 1997 letter used their personal knowledge and their own interpretation of this knowledge to draft the letter without taking into account the provisions of the Agreement. They used the text from the report on the decisions of the Ministers of Agriculture from the early July 1994 meeting to draft their letter. They did not in any way take into account the text of paragraphs 6, 7 and 8 of Annex 902.5 and of the fact that: 1) recommendations were supposed to be made; 2) the measures and recommendations were supposed to be adopted by the Parties; 3) the regulation respecting margarine colouring is a regulation respecting an imitation dairy product; and 4) the ministers were to determine the date for adoption of the recommendations respecting imitation dairy products. The signatories to the October 1<sup>st</sup>, 1997 letter therefore contravened the basic principles for the interpretation of laws and treaties as outlined in paragraphs 10 and 11 of this submission, by not reading the Agreement in its overall context and by not reading the words that were actually used but rather the words that, in their opinion, should have been used.

96. Quebec maintains that the decisions of the two previous panels to recognize the validity of the October 1<sup>st</sup> letter may not be held against it. In this respect, it reaffirms each and every one of its arguments contained in paragraph 67 *et seq.* of the preceding section of this submission.

97. Further, Alberta mentions in paragraph 40 *et seq.* of its submission that on January 8, 1997, Quebec published a draft regulation the purpose of which was to eliminate Article 40 (1) (c) of the *Regulation respecting dairy product substitutes* but that this draft was never adopted.

98. Alberta uses this pre-publication, in paragraph 41 of its submission, to allege that Quebec recognized that the regulation on the colour of margarine contravenes the Agreement and that it has an obligation to repeal it in order to harmonize its regulation with those of the other provinces and federal government.

99. Quebec maintains that Alberta’s allegations are without merit and that they should not be retained by the panel.

100. In Quebec, every draft regulation must be pre-published in the *Gazette officielle du Québec* under Article 8 *et seq.* of the Regulations Act<sup>63</sup> in order to allow any

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<sup>63</sup> *Regulation Act*, R.S.Q., Chapter R-18.1. (Appendix 57).

interested parties to make their comments known before its adoption. This is a mandatory consultation mechanism required by law<sup>64</sup>. After the consultation period, the government has the option of adopting or not adopting the draft regulation.

101. This pre-publication took place on January 8, 1997, almost nine months before September 1<sup>st</sup>, 1997. It cannot be interpreted to mean that Quebec is barred from maintaining that the panel has no jurisdiction because the notice mentioned in Article 902(3) was given late and without authority.

102. This pre-publication does not constitute a recognition by Quebec that the regulation on the colour of margarine constitutes a barrier prohibited by the Agreement and cannot prevent it, if the panel concluded to the contrary, from arguing that this measure is allowed because it meets a legitimate objective.<sup>65</sup>

103. In summary, the signatories to the October 1<sup>st</sup>, 1997 letter acted without authority. The letter that they sent out after the expiry of the September 1<sup>st</sup>, 1997 mandatory deadline had no effect. The regulation on the colour of margarine is not included within the scope and coverage of Chapter Nine.

104. If the regulation on the colour of margarine is included in the scope and coverage of Chapter Nine, which Quebec contests, the panel must determine if this measure constitutes a barrier to trade and if this measure is otherwise allowed under a provision of the Agreement.

## **2.2 The regulation respecting margarine colouring does not constitute a barrier**

### **2.2.1 Colouring is not prohibited**

105. If the regulation respecting margarine colouring is included in the scope and coverage of Chapter Nine, which Quebec contests, this regulation does not constitute a barrier because it allows for the use of colouring within a specified range of the Lovibond scale.

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<sup>64</sup> *Ibid.*, article 10.

<sup>65</sup> The June 20, 1996 letter from an advisor to the Prime Minister, cited by Alberta in Paragraph 39 of its submission, was written over a year before September 1<sup>st</sup>, 1997. It cannot prevent Quebec from arguing that the notice required under Article 902 (3) was given late and without authority, that the measure does not constitute a barrier and that this measure meets a legitimate objective.

106. The regulation in force allows manufacturers to colour margarine.<sup>66</sup> It is inaccurate to suggest that the use of colouring is prohibited. Producers offer margarine in a pale yellow colour for sale in Quebec but they could sell a much yellower product.<sup>67</sup>

107. It is interesting to note that the decision to offer margarine in a lighter yellow colour than butter was made by a majority of producers, as was reported in an article published in *Le Soleil* newspaper on October 3, 1987.<sup>68</sup>

108. The producers could have marketed much darker margarine but did not.

109. Margarine producers from outside Quebec may market their products in Quebec and the products they market are purchased by consumers.

110. If the regulation respecting margarine colouring constitutes a barrier, which Quebec contests, Quebec maintains that under paragraph 1 of Article 903, the Parties are not necessarily obligated to eliminate any measures that may exist. The Article reads as follows:

“Article 903: Review

1. The Parties shall work together in accordance with Annexes 902.5 and 903.1 to reduce or eliminate measures that constitute obstacles to internal trade in agricultural and food goods.”

111. They may also work together to reduce the impact if appropriate, in order to allow the free movement of goods within Canada. The objective of reducing a barrier, to the extent possible, stems from the ordinary meaning of the words interpreted in context and is clearly expressed in the second paragraph of the Preamble and in Article 100 of the Agreement. Nor are they obligated to harmonize their regulations if the goods can move freely within Canada. Thus Quebec considers that no action is warranted given that margarine produced elsewhere in Canada may be and is being sold within its jurisdiction to the extent that it conforms with the regulation.

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<sup>66</sup> In 1964, Alberta amended its regulations to introduce the use of the Lovibond scale to measure the colour of margarine. The permissible parameters were the same as those currently in effect in Quebec. At the time the Edmonton Journal indicated that henceforth coloured margarine would be available and that the use of the Lovibond scale meant that margarine “will be yellow but must be a shade lighter or darker than butter”. See “Yellow Margarine Coming in June; Not Like Butter”, the Edmonton Journal, March 21, 1964, page 66. (Appendix 58).

<sup>67</sup> The permissible colour scale is attached as an appendix. (Appendix 59).

<sup>68</sup> Michel Pomerleau, *Le Soleil*, October 3, 1987, « Coloration de la margarine- Les fabricants font appel à la Cour supérieure » [Margarine Colouring: Producers Appeal to the Superior Court], p. A-12. (Appendix 60).

**2.2.2 The regulation respecting margarine colouring respects the Preamble, Operating Principles and Objectives of the Agreement**

112. The regulation respecting margarine colouring respects each and every one of the provisions of the Agreement and is not inconsistent with the Preamble, Operating Principles and Objectives of the Agreement.

113. Under the applicable principles of interpretation, these provisions must be interpreted by taking into account the ordinary meaning of the terms used, their context, and the intent of the Parties. In signing the Agreement, the Parties agreed in the Preamble that they intended, among other things, “to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments” and to recognize “the diverse social, cultural and economic characteristics of the provinces”.

114. The intent formulated in the Preamble is reflected in Article 100, under the heading “Objective”. This Article expresses the objective sought by the Parties in signing the Agreement as follows:

“Article 100: Objective

It is the objective of the Parties to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market. All Parties recognize and agree that enhancing trade and mobility within Canada would contribute to the attainment of this goal.”  
(our underlining)

115. In addition, in Article 101 (4) (b) and (d), under the heading “Mutually Agreed Principles”, the Parties recognized the need to allow for exceptions to the commitment to promote the liberalization of trade and to take into account the importance of consumer protection.

116. The intent of the Parties, formulated in the Preamble and in Chapter One of the Agreement, is to promote the liberalization of trade in Canada while allowing for some exceptions.

117. This intent to liberalize trade while allowing for exceptions must be taken into account in analyzing Article 405 of the Agreement with respect to the harmonization of standards and measures.

118. The Parties took this into account when they negotiated the Agreement by specifying, in Article 405, that such harmonization should be in accordance with Annex 405.1. They in fact noted, in paragraph 17 of Annex 405.1, that harmonization efforts

were not always mandatory and that they should be instituted only “where appropriate and to the extent practicable”.

119. Hence Quebec was not obligated to harmonize its measure with those of other Parties to the Agreement if it considered that it was not practicable. In this regard, Quebec maintains that its measure meets a legitimate objective and that harmonization would not have been practicable without adversely affecting the pursuit of that legitimate objective.

120. The regulation on the colour of margarine is a legally adopted regulation that all must respect. It does not prevent in any way the sale of margarine in Quebec, economic growth and competitiveness.

121. This regulation was adopted, as will be shown further on, in order to enable the achievement of a legitimate objective. It is permissible under the Agreement. If the panel came to the conclusion that the regulation on the colour of margarine does not respect the Preamble, Operating Principles and Objectives of the Agreement, Quebec argues the prevailing application of Chapter Nine.

### **2.2.3 Prevailing application of Chapter Nine**

122. If the panel came to the conclusion that the regulation on the colour of margarine is inconsistent with the Preamble, Operating Principles and Objectives of the Agreement, which Quebec contests, Quebec maintains that these provisions are inconsistent with the provision which is found in Article 903 (1) of the Agreement, which does not require a Party to eliminate a measure that may constitute an obstacle to internal trade in agricultural and food goods.<sup>69</sup> This Article must be read with Article 901, which stipulates:

“Article 901: Relationship to Other Chapters

In the event of an inconsistency between a provision of this Chapter and any other provision of this Agreement, this Chapter prevails to the extent of the inconsistency.”

123. In the event of an inconsistency, the provisions of Chapter Nine shall prevail as stated in the rule contained in Article 901. There can be no question of reconciling inconsistent rules. In fact, if this had been the intent of the Parties, they would have said so as they did in Article 1501 in the chapter on environmental protection. Article 1501 stipulates:

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<sup>69</sup> “See *supra*, paragraphs 110 and following.

“Article 1501: Relationship to Other Chapters

Subject to Article 1508(3), in the event of an inconsistency between this Chapter and any other chapter, the Parties shall endeavour to reconcile the inconsistency.”

124. There is no such provision in Chapter Nine. Rather a contrary provision is found in Article 901, and in the event of an inconsistency between a provision contained in Chapter Nine and another provision of the Agreement, that contained in Chapter Nine must prevail. This interpretation must be adopted by the panel and stems from the “principle of effectiveness” which states that meaning and effect must be given to all the terms of a treaty and that the interpreter is not free to adopt an interpretation that would result in rendering entire clauses and paragraphs of a treaty useless.

125. In summary, the regulation on the colour of margarine does not constitute an obstacle as it allows producers to colour their products in a range of colours from the Lovibond scale and to sell them in Quebec. If this regulation constitutes an obstacle, which Quebec contests, it is still permissible and does not have to be harmonized because it is covered by the exception relating to consumer protection provided for in Chapter One. Finally, in its interpretation of the Agreement, the panel must take into account the prevailing application of Chapter Nine and the fact that under Article 903 (1), a Party is not obligated to eliminate a measure that constitutes an obstacle to internal trade in agricultural and food goods.

**2.3 The regulation respecting margarine colouring is a consumer protection measure permissible under Chapter Eight of the Agreement**

126. If the regulation respecting margarine colouring is included in the scope and coverage of Chapter Nine, which Quebec contests, this measure is allowed under Chapter Eight.

127. Quebec will show in the next section of this submission, that Chapter Eight applies to Chapter Nine, that the regulation on the colour of margarine is a consumer protection measure that is included in the scope and coverage of Chapter Eight and that this measure does not constitute an obstacle under Article 401, 402 or 403 and that, in the alternative, it is a measure that meets a legitimate objective and that it is permissible under Article 803.

**2.3.1 Chapter Eight applies to Chapter Nine**

128. Chapter Eight is entitled “Consumer-Related Measures and Standards”. It is, under Article 1813, a horizontal chapter that applies to matters that fall within the scope

of vertical chapters. Since Chapter Nine is a vertical chapter, the rules of Chapter Eight apply to it.<sup>70</sup> Further, under the rules of interpretation listed in paragraphs 10 and 11 of this submission, the terms used in Chapter Eight must be read in their overall context and given the ordinary and grammatical meaning that is consistent with its spirit, purpose and the intent of the Parties.

129. As indicated in Article 801, Chapter Eight applies to consumer-related measures and standards adopted or maintained by a Party.<sup>71</sup> It must therefore be verified and determined if the regulation respecting margarine colouring, in the event it were included in the scope and coverage of Chapter Nine, which Quebec contests, is a consumer-related measure or standard to which Chapter Eight applies. The test for making this verification consists primarily of establishing the scope of the expression “consumer-related measure or standard” and then determining if the regulation respecting margarine colouring is included within the scope of this expression.

### **2.3.2 The regulation respecting margarine colouring is a consumer-related measure or standard**

#### **2.3.2.1 Scope of expression “consumer-related measure or standard”**

130. Chapter Eight is designed to allow Parties to adopt or maintain measures relating to consumer protection. In order to indicate clearly its scope and coverage, the authors used specific terms and expressions and defined them in Article 810.

131. The expression “consumer-related measures and standards” is defined as follows:

“Article 810: Definitions

In this Chapter:

(...)

**consumer-related measures and standards** means measures and standards that are intended to protect the personal safety of consumers or the economic interests of consumers and are related to the offer, acquisition or use of a good or service intended primarily for personal, family or household purposes; (...)” (our underlining).

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<sup>70</sup> See paragraphs 1 and 3 of Annex 1813 of the Agreement.

<sup>71</sup> The text of Article 801 is as follows: “Article 801: **Scope and Coverage:** This Chapter applies to consumer-related measures and standards adopted or maintained by a Party.

132. Under this definition, specific to Chapter Eight, a measure that is intended to protect the economic interests of consumers is a consumer-related measure. It should therefore be determined what is covered by the expression “economic interests of consumers”. In order to indicate clearly its scope, the expression is defined in Article 810 as follows:

“Article 810: Definitions

In this Chapter:  
(...).

**economic interests of consumers** includes, but is not limited to:

(...);

(b) accurate and timely information about goods, services and suppliers, including cost of credit;

(...);

(f) prevention of unfair trade practices; (...)” (our underlining).

133. Consequently, a measure whose purpose is accurate and timely information about goods or prevention of unfair trade practices is intended to protect the economic interests of consumers and is a consumer-related measure which is included in the scope and coverage of Chapter Eight.

134. The next step is to determine if the regulation respecting margarine colouring is a consumer-related measure under Chapter Eight.

### **2.3.2.2 Application of Chapter Eight definitions to the regulation respecting margarine colouring**

135. The regulation respecting margarine colouring was adopted by Quebec in order to protect consumers and to avoid, among other things, a recurrence in Quebec of the unfortunate events which took place in Quebec and Ontario during the eighties. It should be remembered here that in the eighties numerous cases of fraud occurred against consumers when counterfeit yellow margarine was sold for butter. In this regard we will repeat here each and every argument that we presented in the preceding sections in order to show clearly that the regulation respecting margarine colouring was adopted in

Quebec, as it was in Ontario and Alberta, to protect consumers and prevent unfair consumer practices.<sup>72</sup>

136. Further, even though the regulation respecting the colour is part of a group of measures that are all designed to protect the consumer<sup>73</sup>, it is the only one that informs and protects the consumer when there are no others.<sup>74</sup>

137. As was shown in the preceding paragraphs, under the specific definitions applicable to Chapter Eight, [it] is a consumer-related measure, a measure that is intended to protect the economic interests of consumers and, in particular, to enable accurate and timely information about goods or to prevent unfair trade practices. As was also shown in the preceding sections, the objective of preventing unfair practices against consumers, and of enabling consumers to obtain accurate and timely information on goods<sup>75</sup>, is the main objective sought by Quebec through the regulation respecting margarine colouring. Further, the objective of protecting the consumer against unfair practices has always been the reason given by Ontario for maintaining its own regulation on the colour of margarine and this objective was recognized by Ontario as being Quebec's intended reason for reintroducing its regulation in 1987.<sup>76</sup> This objective of protecting the consumer is also clearly apparent when reading Alberta's Margarine Act adopted in 1949.<sup>77</sup>

138. The regulation respecting margarine colouring is therefore a consumer-related measure under Chapter Eight as it is intended to protect the economic interests of consumers by enabling them to obtain accurate and timely information on the good and also by preventing unfair trade practices. This interpretation stems directly from the ordinary meaning of the words and from the intent of the Parties.

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<sup>72</sup> See *supra*, paragraphs 25 and following.

<sup>73</sup> Articles 42, 44, 49, 49.2, 49.3 and 49.4 of the Regulation Respecting Dairy Product Substitutes, *op. cit.*, note 52, provide that a butter substitute must bear the word "margarine" in very legible and prominent letters, and that in the retail trade, margarine must be delivered in an opaque package. Further, Article 37 of this regulation provides that when the substitute is served in an establishment where food is served for a consideration, an indication on the menu or on a sign or label must indicate that it is a substitute. Article 38 of the regulation provides that when displayed for sale in "grocery stores", substitutes must be placed far enough from any dairy product to prevent any mistake or confusion on the part of the buyer.

<sup>74</sup> Quebec notes that Alberta only contests the regulation respecting colour whereas the other provisions applicable to margarine, such as the requirement to use opaque containers and to separate margarine from butter in grocery stores, could also impose costs on manufacturers from that province.

<sup>75</sup> At the moment when they are ready to consume the margarine, consumers know that it is margarine even if there is no label or they cannot read it.

<sup>76</sup> See *supra*, paragraphs 44 and following.

<sup>77</sup> See *supra*, paragraphs 53 and following.

139. Quebec has the right, under Chapter Eight, to maintain this regulation. It has the right to establish the level of consumer protection that it considers appropriate and to maintain its measure even if Alberta decided to abolish it.

**2.4 Right to establish an appropriate level of protection and to maintain a consumer-related measure**

140. The Parties to the Agreement agreed, in Article 101(4)(e) on the need to take into account the importance of consumer protection. The Parties not only expressed the desire, they also made concrete provision in Chapter Eight as to how they intended to implement this need to protect consumers. The Parties decided, in Article 804, that each of them had the right to establish or maintain consumer-related measures and standards. That Article reads as follows:

“Article 804: Right to Establish Consumer-Related Measures and Standards

1. Each Party may, in pursuing a legitimate objective, adopt or maintain measures establishing the level of consumer protection that it considers appropriate.
2. For greater certainty, the decision of a Party not to adopt or maintain a particular consumer-related measure or standard shall not affect the right of any other Party to adopt or maintain such consumer-related measure or standard.”

**2.4.1 Application of Article 804 (1)**

141. Under Article 804 (1), a Party may:

1. in pursuing a legitimate objective,
2. adopt or maintain measures,
3. establishing the level of consumer protection that it considers appropriate.

142. The expression which is under consideration in Article 804 (1), “legitimate objective”, is defined in Article 810 as follows:

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“Article 810: Definitions

In this Chapter:  
(...).

**legitimate objective** means the protection of the personal safety of consumers or the economic interests of consumers and includes the enforcement of consumer-related measures and standards; (...)<sup>78</sup> (our underlining).

143. The protection of the economic interests of consumers, which includes, as provided in the definition of this expression<sup>79</sup>, accurate and timely information about goods and the prevention of unfair trade practices, is a legitimate objective that a measure of a Party may address according to Article 804.

144. The definition of the expression “legitimate objective” echoes the definition of the expression “consumer-related measures and standards”. In fact, as provided in the definition of “consumer-related measures and standards” in Article 810, it is a measure that is intended to protect the economic interests of consumers which expression includes accurate and timely information about goods and the prevention of unfair trade practices.

145. A Party also has the right, under Article 804 (1), to establish the level of consumer protection that it considers appropriate. The expression “level of consumer protection” is defined in Article 810 as follows:

“Article 810: Definitions

In this Chapter:  
(...).

**level of consumer protection** means the scope and coverage of a particular consumer-related measure or standard as determined by a Party at the cost that it considers appropriate to address a particular objective; (...).”

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<sup>78</sup> The definition of the expression “legitimate objective” in Article 810 is different from that in Article 200 and should alone be applied to interpret matters relating to Chapter Eight. In fact, the preamble to Article 200 is clear on this subject. It provides that “In this Agreement, except as otherwise provided”... this interpretation is corroborated by the end of the Article 200 definition of “legitimate objective” which provides that “for greater certainty”, “legitimate objective” may be amended by a provision in Chapter Eight is part of Part IV of the Agreement and contains its own definition of “legitimate objective”.

<sup>79</sup> Article 810.

146. This definition leaves a great deal of discretion to the Party adopting a consumer-related measure. Under this definition, a Party may define the scope and coverage of a consumer-related measure and the cost which must be born by the merchants in order to achieve the objective that it set.<sup>80</sup> The level of protection selected is the only protection that remains when there are no others. The measure allows the consumer to obtain accurate and timely information about goods in restaurants or elsewhere and enables the prevention of unfair consumer trade practices.

147. The Parties, in negotiating the Agreement, therefore provided that consumer protection-related measures that they were given the right to adopt, could involve costs to achieve them and that the Party that adopted the measure had discretion in this regard. This intent of the Parties, clearly expressed, must be taken into account in the interpretation of the Agreement and cannot be disregarded as that would result in this provision being rendered useless.

148. In summary, Article 804 (1) gives the right to a Party to adopt or maintain a measure that has the objective of accurate and timely information about goods and the prevention of unfair trade practices against consumers, even if the costs to implement and achieve it must be born by merchants. Such a measure pursues a legitimate consumer-related objective and is permissible under Article 804 (1).

149. The application of Article 804 (1) to the regulation respecting margarine colouring shows that Quebec has the right to maintain its regulation. As shown in the preceding sections<sup>81</sup>, the regulation applicable in Quebec:

1. is a consumer-related measure as it is intended to protect the economic interests of consumers and, in particular, to enable accurate and timely information about goods and prevent unfair trade practices;
2. is a measure that pursues a legitimate objective, namely the protection of the economic interests of consumers and, in particular, accurate and timely information about goods and the prevention of unfair trade practices;
3. establishes a level of consumer protection that may entail a cost to the merchant and that Quebec deems appropriate.

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<sup>80</sup> Saskatchewan alleges in Paragraph 40 of its submission that labelling standards could be sufficient to prevent margarine from being confused with butter. Quebec is not of this opinion and Article 804 (1) gives it the right to choose, on its own, the level of consumer protection that it deems appropriate.

<sup>81</sup> See *supra*, paragraphs 126 and following.

#### **2.4.2 Application of Article 804 (2)**

150. The right of a Party, in the pursuit of a legitimate objective, to adopt or maintain a consumer-related measure, to establish the level of consumer protection that it deems appropriate, and to determine the costs that must be born to achieve it, is a right that belongs to each of the Parties without regard to the decisions that may be taken by the other Parties with respect to a similar measure. This right to establish distinct measures is established in Article 804 (2) and expressed in the following terms:

“Article 804: Right to Establish Consumer-Related Measures and Standards

1. Each Party may, in pursuing a legitimate objective, adopt or maintain measures establishing the level of consumer protection that it considers appropriate.
2. For greater certainty, the decision of a Party not to adopt or maintain a particular consumer-related measure or standard shall not affect the right of any other Party to adopt or maintain such consumer-related measure or standard.” (our underlining).

151. Article 804 (2) is clear and its terms must be interpreted in their ordinary sense. A Party has the right to adopt or maintain a specific consumer-related measure even if another Party decides not to adopt or maintain a similar measure.

152. Article 804 (2) applies directly to the regulation respecting margarine colouring applicable in Quebec. Quebec has the right to maintain its regulation respecting margarine colouring even if Alberta, Ontario and the other provinces have decided not to maintain their own regulation respecting margarine colouring. The decision of Alberta, Ontario and the other provinces does not affect Quebec’s right to maintain its measure.

153. The right of a Party to adopt or maintain a consumer-related measure that may be distinct from those of the other Parties, to establish the level of consumer protection that it deems appropriate and to determine the cost that must be born by merchants in order to achieve it, shows the importance that the Parties to the Agreement attributed to consumer protection. This should be taken into consideration, in order to respect the principles of interpretation outlined in paragraphs 10 and 11 of this submission, when a consumer-related measure is assessed to determine if it is consistent with Articles 401, 402 and 403, which are applicable to Chapter Eight under Article 800 (2). This right should also be taken into account where the measure is inconsistent with one or another of these Articles, in order to confirm whether it would still be permissible under Article 803.

**2.5 The regulation respecting margarine colouring is not inconsistent with Articles 401, 402 and 403**

154. Under Article 800 (2) of the Agreement, Articles 401, 402 and 403 are applicable to Chapter Eight<sup>82</sup>. These Articles deal with “reciprocal non-discrimination”, “right of entry and exit”, and “no obstacles”. Quebec will show, in the paragraphs that follow, that the regulation respecting margarine colouring respects these three provisions. It will also show, should the panel conclude to the contrary, that its regulation is still allowed because it meets each and every one of the conditions in Article 803.

**2.5.1 The regulation is not inconsistent with Article 401**

155. The margarine regulation does not constitute an obstacle under Article 401. That Article reads as follows:

“Article 401: Reciprocal Non-Discrimination

1. Subject to Article 404, each Party shall accord to goods of any other Party treatment no less favourable than the best treatment it accords to:

(a) its own like, directly competitive or substitutable goods; and

(b) like, directly competitive or substitutable goods of any other Party or non-Party.

(...)

4. The Parties agree that according identical treatment may not necessarily result in compliance with paragraph 1, 2 or 3.”

156. This Article was analyzed in the case concerning the dispute between Alberta and Canada respecting the Manganese-based Fuel Additives Act<sup>83</sup>. The panel, in paragraph 9

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<sup>82</sup> Article 800(2) reads as follows: “For greater certainty, Articles 400 (Application), 401 (Reciprocal Non-Discrimination), 402 (Right of Entry and Exit), 403 (No Obstacles), 405 (Reconciliation) and 406 (Transparency) apply to this Chapter, except as otherwise provided in this Chapter.”

<sup>83</sup> Report Of The Article 1704 Panel Concerning A Dispute Between Alberta And Canada Regarding The *Manganese-Based Fuel Additives Act*, Winnipeg, Manitoba, June 12, 1998, File No. 97/98 - 15 - MMT - P058 (hereafter MMT). (Appendix 61) This analysis was also adopted in the *Report of the Article 1704 Panel Concerning a Dispute Between Nova Scotia and Prince Edward Island Regarding Amendments to the Dairy Industry Act Regulations*, Winnipeg, Manitoba, January 18, 2000, File No. 98/99 - 9 - FCD PEI - P031, paragraph 9. (*supra*, footnote 54).

of its decision, indicated that the basic issue as to whether an Act is inconsistent with Article 401, should be addressed in two stages. The two stages are:

- “1. Does the Act discriminate against the goods of one Party to the benefit of the goods of another Party?
2. Are the goods discriminated against “like, directly competitive or substitutable” with the goods of another Party?”

157. To meet the test, it must first be shown that Quebec accords to margarine from Alberta treatment less favourable than the best treatment Quebec accords to margarine produced in Quebec or produced by another Party. In this regard, Quebec margarine manufacturers are subject to the same rules as manufacturers in other provinces and territories. They do not benefit from any special treatment. The treatment accorded to goods from Alberta and other Parties enables these goods to be sold in Quebec on the same basis as the goods manufactured in Quebec. Consequently, there is no discrimination and the first stage of the test has not been met. Given that the law does not discriminate with respect to margarine from other Parties, and, in particular, Alberta, it is not possible to confirm whether the conditions contemplated in the second stage of the test have been met, that is, to confirm whether the goods discriminated against are “like, directly competitive or substitutable” with the products of another Party.

158. Alberta alleges, in paragraph 27 of its submission, that Quebec does not require that butter conform to the regulation respecting margarine colouring and that therefore Quebec is not offering as favourable treatment for margarine as the best treatment accorded to butter.<sup>84</sup>

159. This argument is not valid and should be rejected. The colour of butter is decided by producers<sup>85</sup>, but it is primarily governed by federal regulations that require that the colour be uniform and characteristic for butter to be graded *Canada 1*.<sup>86</sup>

160. Article 401 (1) requires that a Party accord to the goods of any other Party treatment no less favourable than the best treatment it accords to its own goods. Quebec legislated the colouring of margarine but did not legislate the colour of butter grade

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<sup>84</sup> Quebec has no reason to prohibit yellow-coloured butter as that is its natural colour.

<sup>85</sup> Colouring agents may be added to butter under Article 3 (1) (iv) of the Dairy Products Composition, Packaging and Labelling Regulations, R.R.Q., c. P-30, r.2 (Appendix 62). The federal standards mentioned in Note 16 of the Alberta submission are sanitary standards relating to authorized food colouring agents.

<sup>86</sup> The colour of butter is regulated by the Federal Government under Article 12 (g) of the Dairy Products Regulations, (1990) 124 Gaz. Can. II, 672. The Article reads as follows: “12. Butter and butter products may be graded Canada 1 if the butter or butter product meets the requirements of Section 4 and subsections 6 (1), (2) and ... (g) its colour is uniform and characteristic of butter”. (Appendix 63)

Canada 1. It is therefore not possible to compare non-existent measures. The colour of butter-graded Canada 1 is not determined by Quebec. Quebec has no measure regarding the colour of butter-graded Canada 1 and therefore does not accord it any treatment. The butter sold in Quebec may come from anywhere in Canada and there is no requirement that it be produced in Quebec. Finally, Alberta may sell yellow butter in Quebec and benefits from the same treatment as that accorded to butter from Quebec and any other Party.

161. Further, the fact that the regulation respecting the colouring of margarine is a consumer-related measure must be taken into account in analyzing its consistency with Article 401. Quebec has the right, under Article 804, to maintain a consumer-related measure that may be distinct from those of other Parties, to establish the level of consumer protection it considers appropriate, and to determine the costs that must be born by merchants to achieve it. Accordingly, even if Article 401 is made applicable to Chapter Eight by Article 800 (2), it must be applied by taking into account Article 400, which is also applicable under Article 800 (2). Article 400 reads as follows:

**“Article 400: Application**

The general rules established under this Chapter apply only to matters covered by Part IV, except as otherwise provided in this Agreement. In the event of an inconsistency between a specific rule in Part IV and a general rule in this Chapter, the specific rule prevails to the extent of the inconsistency.”

162. Article 400 provides that in the event of an inconsistency, a specific rule in Part IV prevails over a general rule in Chapter Four.

163. Within the context of the present case, if a rule in Chapter Eight allows an exception to the provisions of Article 401, that specific rule shall prevail. Such a specific rule exists in Chapter Eight.

164. Article 804 grants a Party the right to adopt a consumer-related measure that may be distinct from those of other Parties, to establish the level of consumer protection that it considers appropriate, and to determine the costs to be born by merchants in order to achieve this. It is a right to establish a distinct measure whose realization may have associated costs, no more, no less.

165. If a measure maintained under this right was deemed inconsistent with the rules of Article 401, the right to adopt the measure under Article 804 would prevail over Article 401 and the latter would have to be considered without effect. This interpretation must be retained in order to respect the “principle of effectiveness” used to interpret treaties and not render entire paragraphs of the Agreement useless.

166. The application of Article 401 must also be analyzed taking into account the fact that the Parties are not required to eliminate measures that constitute obstacles to trade under Article 903 (1).

167. The rule provided in Article 401 is therefore inconsistent with the one contained in Article 903 (1) and the latter must prevail under Article 901.<sup>87</sup>

168. In summary, Quebec accords Alberta margarine the same treatment accorded to Quebec margarine and because it has not been discriminated against, it is not possible to proceed to the second stage of the test and confirm whether Alberta margarine is like, directly competitive or substitutable for margarine from another Party. In addition, the colour of butter is determined by producers who, in order to be able to use the grade name “*Canada 1*”, seek a uniform and characteristic colour. Accordingly, the treatment accorded margarine by Quebec cannot be compared to the treatment accorded *Canada 1*-graded butter as Quebec has no measure in this regard and accords no treatment. Finally, Article 401 must be interpreted taking into account the prevailing application of Article 804 and Article 901. The allegation regarding Article 401 must be rejected.

**2.5.2 The regulation respecting margarine colouring does not constitute an obstacle of the kind contemplated by Article 402 of Chapter Four**

169. The margarine regulation does not constitute an obstacle as contemplated in Article 402. That Article reads as follows:

**“Article 402: Right of Entry and Exit**

Subject to Article 404, no Party shall adopt or maintain any measure that

indicating the names and addresses of the sender and consignee is evidence that such product is to be delivered in Québec.”

171. It is interesting to note that none of the industry letters received by Alberta, urging it to take recourse against Quebec, mentions a violation of Article 402. That clearly means that nothing is restricting or preventing the movement of yellow margarine across provincial boundaries.<sup>88</sup>

172. Article 402 seems to originate from Article V of the 1994 GATT regarding freedom of transit. Its objective is completely different from the objectives identified in Article 401, that being primarily the application of the “most favoured nation treatment” standard which originates from Article I of the 1994 GATT and, secondly, the application of the “national treatment” rule which originates in Article III of the 1994 GATT.<sup>89</sup>

173. In summary, Article 402 addresses the transit of goods and not the sale of goods and has no application within the context of the present case. The regulation respecting margarine colouring does not prevent the transit of margarine across provinces, regardless of its colour. If the panel concluded to the contrary, Quebec argues that Article 402 must be analyzed taking into account that this is a consumer-related measure, and also argues the prevailing application of Chapter Nine.<sup>90</sup>

### **2.5.3 The regulation respecting margarine colouring does not constitute an obstacle of the kind contemplated in Article 403 of Chapter Four**

174. The margarine regulation does not constitute an obstacle of the kind contemplated by Article 403. That Article reads as follows:

“Article 403: No Obstacles

Subject to Article 404, each Party shall ensure that any measure it adopts or maintains does not operate to create an obstacle to internal trade.”

175. A Party has the right to adopt a measure that does not restrict the movement of goods. Margarine from other Parties that respect the applicable regulation may be sold in Quebec and is in fact sold there. There is therefore no infraction of Article 403.

176. This interpretation stems also from the overall context in which the Agreement was developed. In reality, every government has standards that are specific to it without

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<sup>88</sup> See the industry letters attached to Alberta’s submission: Appendices 10 and 13.

<sup>89</sup> Articles I, III and V of the GATT of 1994 are included in Appendix 64.

<sup>90</sup> Quebec reaffirms the arguments made in paragraphs 161 to 167, adapted as required.

their being considered obstacles to trade. For example, some governments maintain specific regulations respecting types of electric plugs, right-hand driving, labelling in one or more languages, packaging, scope or duration of warranty coverage, amount of fat in some food products, amount of protein. All these measures and many others must be respected by companies that wish to do business in the jurisdiction where they are in effect. They give rise to additional costs but they do not constitute obstacles to the free movement of goods.

177. There are measures in the world respecting colour standards that are applied to food products without their being able to be considered obstacles to the free movement of goods. The *Codex Alimentarius* sets international standards for cheeses and, in particular, provides that gouda must be “yellowish” in colour<sup>91</sup>, and that cheddar must be of a colour “going from light to dark straw all the way to orange”<sup>92</sup>. In Canada, the Dairy Products Regulation<sup>93</sup> provides in Article 12 (g) that butter and butter products may be graded Canada 1 if their “colour” is uniform and characteristic”. Article 13 (1) (e) of the same regulation provides that cheddar cheese may be graded Canada 1 if its colour is uniform and characteristic of cheddar cheese, except in the case of marbled cheese. Article 14 (1) (d) provides that any dry milk product may be graded Canada 1 if it is white or cream in colour. In the United States, it is prohibited to add colouring to bread.<sup>94</sup> In Quebec, in order not to change the colour, it is prohibited to add blood or any additive to ground meat.<sup>95</sup> In Quebec and Ontario, on the other hand, it is mandatory to colour meat that is unfit for consumption.<sup>96</sup> These standards must be respected in the jurisdictions in where they apply and do not constitute obstacles to the free movement of goods.<sup>97</sup>

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<sup>91</sup> Individual international standard for gouda. Standard No. C-5 (1996), *Codex Alimentarius*, Volume 16, Code of Principles Respecting Milk and Milk Products, international standards for dairy products and individual international standards for cheeses. Food and Agriculture Organization of the United Nations, World Health Organization. (Appendix 65).

<sup>92</sup> Individual International Standard for Cheddar. Standard No. C-1 (1966). *Codex alimentarius*, *ibid.* (Appendix 66).

<sup>93</sup> See, *supra*, paragraph 159.

<sup>94</sup> *Code of Federal Regulations*, Title 21, Volume 21, article 136.110(c)(17). (Appendix 67).

<sup>95</sup> Articles 6.4.1.13 (c) and 6.4.1.20 of the *Regulation Respecting Food*, R.R.Q. 1981, c. P-29, r.1 (Appendix 68). More specifically sulphite could permit ground beef to retain its red colour uniformly for longer.

<sup>96</sup> In Quebec, see Article 7.4.5 of the *Regulation Respecting Food*, (*id*) and in Ontario see Article 20 (1) (b) of *Regulation 263*, R.R.O., 1990 adopted pursuant to the *Dead Animal Disposal Act*. (Appendix 69).

<sup>97</sup> These standards are respected and are not questioned by companies that wish to market the products in question.

178. In summary, the Quebec margarine regulation is permissible under Article 804 and does not constitute an obstacle to internal trade of the kind contemplated in Article 403, as it does not prevent the sale in Quebec of margarine manufactured within the jurisdictions of other Parties. The standards on the colour of margarine are neutral. They are based on product characteristics and allow margarine and butter to establish their distinctive character. If the panel concluded to the contrary, Quebec argues that Article 403 must be analyzed taking into account that this is a consumer-related measure, and also argues the prevailing application of Chapter Nine.<sup>98</sup>

## **2.6 The regulation respecting margarine colouring is permissible under Article 803**

179. The regulation respecting margarine colouring does not constitute a measure that is inconsistent with Articles 401, 402 and 403, which are applicable to Chapter Eight under Article 800 (2). However, should the panel conclude to the contrary, Quebec maintains that this measure is still permissible by the Agreement as it addresses a legitimate objective and meets each and every one of the conditions given in Article 803. In the paragraphs that follow, Quebec will demonstrate that the measure put in issue by Alberta in the present case meets each of the conditions of Article 803.

180. Article 803 provides that a consumer-related measure which is inconsistent with Article 401, 402 or 403 is still permissible under the Agreement if its purpose is to achieve a legitimate objective and if it meets certain other conditions. Article 803 differs in an important respect from Article 404 and must therefore be interpreted, according to the rules of interpretation outlined in paragraphs 10 and 11 of this submission, in a specific way. This is evident from the provisions of Article 803 and from the decision of the Parties, in Article 800 (1), to provide that Article 404 does not apply to Chapter Eight.<sup>99</sup> In addition, Article 803 must be interpreted taking into account the specific definition given to certain expressions by Article 810, and the right of a Party, under Article 804, to adopt or maintain a consumer-related measure that may be distinct from those of other Parties, to establish the level of consumer protection that it considers appropriate and to determine the costs to be born by merchants in achieving it. Article 803 reads as follows:

### **“Article 803: Legitimate Objectives**

Where it is established that a consumer-related measure or standard is inconsistent with Article 401 (Reciprocal Non-Discrimination), 402 (Right

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<sup>98</sup> Quebec reaffirms the arguments made in paragraphs 161-167, adapted as required.

<sup>99</sup> Article 800(1) reads as follows: “Article 404 (Legitimate Objectives) does not apply to this chapter.”

of Entry and Exit) or 403 (No Obstacles), that measure or standard is still permissible under this Agreement where it can be demonstrated that:

(a) the purpose of the measure or standard is to achieve a legitimate objective;

(b) the measure or standard does not operate to impair unduly the access of persons, goods, services or investments of a Party that meet that legitimate objective;

(c) the measure or standard is not more trade restrictive than necessary to achieve the level of consumer protection adopted or maintained under Article 804; and

(d) the measure or standard does not create a disguised restriction on trade.

**2.6.1 The regulation respecting margarine colouring is permissible under Article 803 (a)**

**Article 803 (a): the purpose of the measure or standard is to achieve a legitimate objective**

181. The Party that maintains a consumer-related measure that is inconsistent with Article 401, 402 or 403 must first show that the objective of this measure is to achieve a legitimate objective. The expression “legitimate objective” as addressed in Article 803 (a), is defined in Article 810 as follows:

**“Article 810: Definitions**

In this Chapter:

(...)

**legitimate objective** means the protection of the personal safety of consumers or the economic interests of consumers and includes the enforcement of consumer-related measures and standards. (...).”

182. The definition of the expression “legitimate objective” in Article 810 is different from that found in Article 200 and must be applied to interpret Chapter Eight. The preamble to Article 200 is clear on this matter. It provides that “In this Agreement, except as otherwise provided.” This interpretation is corroborated by the end of the Article 200 definition of “legitimate objective” which states that “For greater certainty, “legitimate

objective" may be amended by a provision in Part IV." Finally, the introductory clause of Article 810 states that the definitions that follow apply "in this chapter".

183. The definition of the expression "legitimate objective" in Article 810 is specific to measures that address consumer protection and does not contain a provision to the effect that "legitimate objective" does not include protection of the production of a Party. Consequently, in order to respect the principle of interpretation that requires that meaning be given to all terms of a law or agreement, in their interpretation of the expression "legitimate objective" in Article 803 (a), the Parties and the panel must not consider the fact that a consumer-related measure may have an impact on the production of a Party. Such an impact has no bearing and, if it exists, must not be taken into account.

184. The test applicable to Article 803 (a) is therefore to determine if the purpose of a measure is to achieve a legitimate objective. In order to determine if the purpose of a measure is to achieve a legitimate objective, it must be determined, among other things, in accordance with the definition in Article 810, whether the purpose of the measure is to protect the economic interests of consumers. Finally, to determine if the purpose of a measure is to protect the economic interests of consumers, it must be confirmed whether the measure is intended to ensure accurate and timely information about goods or the prevention of unfair trade practices against consumers.

185. Quebec has shown in the preceding sections of this submission that the regulation respecting margarine colouring is a consumer-related measure the purpose of which is the protection of the economic interests of consumers by providing for accurate and timely information about goods and prevention of unfair trade practices.<sup>100</sup> Quebec reaffirms each and every one of its arguments in this regard.

186. Quebec has also shown in other sections of this submission that Article 804 accords it the right, in the pursuit of a legitimate objective, to maintain its regulation.<sup>101</sup> Quebec reaffirms each and every one of its arguments in this regard.

187. In summary, this measure meets the condition listed in Article 803 (a). The regulation respecting margarine colouring is a measure whose purpose is the achievement of a legitimate objective in accordance with the definition of this expression in Article 810.

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<sup>100</sup> See, among others, paragraphs 126 and following.

<sup>101</sup> See paragraphs 140 and following.

**2.6.2 The regulation respecting margarine colouring is permissible under Article 803 (b)**

**Article 803 (b) : the measure or standard does not operate to impair unduly the access of persons, goods, services or investments of a Party that meet that legitimate objective;**

188. The test for establishing that a measure meets the requirements of Article 803 (b) is the following:

1. First of all, it is necessary to ascertain that the measure meets the requirements of Article 803 (a) and that its purpose is the achievement of a legitimate objective;
2. Next, it is necessary to establish that the product of the Party demanding access to the territory of the other Party does not harm the pursuit of the legitimate objective;
3. If the product in question does not harm the pursuit of the legitimate objective, it is then necessary to establish that the measure adopted to achieve this legitimate objective does not have the effect of hindering “unduly” access to the product.

189. Application of this test to the present case demonstrates:

1. That the purpose of the measure adopted by Quebec regarding the colouring of margarine is to achieve a legitimate objective according to the definition of this expression contained in Article 810, all of this having been demonstrated in the preceding paragraphs of this submission;<sup>102</sup>
2. That the product from Alberta for which access to the territory of Quebec is requested, that is, margarine having the same colour as butter, would harm the pursuit of the legitimate objective sought by Quebec. In effect, in accordance with the wording of Article 803 (b), the product for which one is requesting access must not harm the achievement of the legitimate objective. In this case, if Albertan margarine of the same colour as butter could be sold in Quebec, the measure adopted by Quebec to protect consumers by allowing them to obtain, timely, accurate information on the product and by preventing unfair trade practices would become ineffective and Quebec could no longer pursue its legitimate objective;

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<sup>102</sup> See paragraphs 181 and following.

3. Since the product for which access is requested, that is, margarine having the same colour as butter, would harm the pursuit of the legitimate objective sought by Quebec, it is not necessary to prove the third part of the test, that is, whether the measure adopted to achieve the legitimate objective has the effect of hindering “unduly” product access. Quebec does not have a choice; it must ban access to margarine having the same colour as butter in order to achieve the legitimate objective it has chosen to attain. However, margarine produced in Alberta can be sold in Quebec if it complies with the applicable regulation and margarine produced in other provinces is, in fact, sold in Quebec.

**2.6.3 The regulation respecting margarine colouring is permissible under Article 803 (c)**

**Article 803 (c): the measure or standard is not more trade restrictive than necessary to achieve the level of consumer protection adopted or maintained under Article 804**

190. The test for establishing that a measure meets the requirements of Article 803 (c) is the following:

1. First of all, it is necessary to ascertain that the level of consumer protection adopted or maintained in accordance with Article 804;
2. Next, it is necessary to determine whether the measure, (which at this stage and according to the opinion of the panel, would restrict trade because it would not be necessary to apply Article 803) would not restrict trade more than necessary to achieve the level of protection maintained in accordance with Article 804.

191. Application of this test to the facts of this case demonstrates:

1. The level of protection maintained by Quebec in accordance with Article 804 consists of banning the sale of margarine having the same colour as butter in order to allow consumers to obtain, in a timely manner, accurate information on the product and preventing unfair trade practices. At the time when he is about to consume the margarine, the consumer knows that it is margarine even if there is no label or he cannot read it. In addition, in the preceding sections of this submission, Quebec demonstrated that unfair trade practices had occurred during the years preceding the adoption of the regulation in 1987.<sup>103</sup> Quebec has adopted a

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<sup>103</sup> See paragraphs 25 and following.

measure and a level of consumer protection which it had the right to adopt in accordance with Article 804 and this level of consumer protection should not be questioned at this stage in the analysis of Article 803. It can only be noted.<sup>104</sup>

2. The regulation regarding the colouring of margarine prevents producers from Quebec, from Alberta and from other provinces and territories from selling margarine of the same colour as butter in Quebec. This measure is necessary to achieve the legitimate objective sought by Quebec which consists of protecting consumers by allowing them to obtain, in a timely manner, accurate information about the product and by preventing trade practices unfair to them. This finding should not be challenged at this stage in the analysis of Article 803. If in the view of the panel this measure restricts the trade of margarine having the same colour as butter, it does not restrict the trade of margarine which complies with the regulation applicable to Quebec. If, in the view of the panel this measure restricts trade, it does not restrict it absolutely but rather to the extent necessary to assure the level of consumer protection is maintained in accordance with Article 804. Moreover, Article 803 (c) does not require that the measure not restrict the sale of yellow margarine; it requires rather that the measure not restrict trade in general. The proportionality of the measure is amply demonstrated by the fact that margarine sold in Quebec comes from outside of Quebec and, in particular, from Alberta. In short, the margarine trade is not restricted more than necessary to achieve the level of consumer protection is maintained in accordance with Article 804.<sup>105</sup>

**2.6.4 The regulation respecting margarine colouring is permissible under Article 803 (d)**

**Article 803 (d): the measure or standard does not create a disguised restriction on trade.**

192. In this matter, the measure adopted by Quebec regarding the colouring of margarine is transparent: margarine may be sold in Quebec if it complies with the terms of the regulation and, in particular, if it is not the same colour as butter.

193. Margarine producers from Quebec, from Alberta, from other provinces and territories, every government in Canada, grocers and consumers know exactly what to

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<sup>104</sup> See paragraphs 140 and following.

<sup>105</sup> Quebec will present data concerning market share of margarine in Quebec at the time of hearings upon receipt of assurances from the special group and the Parties that this data will be treated confidentially.

expect with respect to margarine in Quebec: margarine may be sold in Quebec if it complies with the terms of the regulation and, if it is not the same colour as butter.

194. Article 803 (d) appears to derive its origin from the introductory text of Article XX of the GATT of 1994, which reads as follows:

“Article XX – General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures (...).” (our underlining)

195. This provision has been interpreted by the Appellate Body of the WTO in the matter of United States – Standards for Reformulated and Conventional Gasoline<sup>106</sup> as encompassing those restrictions which amount to arbitrary or unjustifiable discrimination in international trade and to the effect that its fundamental element is in the aim and purpose which are to avoid the abuse or illegitimate use of the exceptions.

196. In accordance with Article 803 (d), a trade restriction is acceptable if it is not arbitrary or unjustifiable.

197. In this respect, one must analyze the aim and the purpose of the Quebec measure, which, one must remember, are to protect consumers.

198. The Quebec measure is perfectly justifiable and is in no way arbitrary. To the contrary, a measure which would impose licenses which would be issued upon receipt of authorization by margarine or butter producers whose production plants are in Quebec would be arbitrary or unjustifiable. By the same token, a measure which would provide that any import of margarine into Quebec would need to be approved by a committee of butter and margarine producers whose production plants are in Quebec would be just as arbitrary or unjustifiable.

199. Quebec maintains that the main objective of the regulation is to protect consumers but does not deny that a subsidiary effect is that it allows producers throughout Canada to supply butter to consumers who demand it.<sup>107</sup> This regulation is entirely transparent.<sup>108</sup>

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<sup>106</sup> WT/DS2/AB/R, April 29, 1996, p.26. (Appendix 70).

<sup>107</sup> The protection of production, whether direct or indirect, should not be taken into account in the framework of Chapter Eight. In this respect, Quebec reiterates the arguments set forth in Paragraph 183 of this submission.

200. In summary, the Quebec measure bans the sale of margarine having the same colour as butter but one cannot claim that it is a disguised trade restriction or that it is arbitrary or unjustifiable. This measure is not concealing anything. It is necessary in order to achieve the legitimate objective sought by Quebec and to assure the level of consumer protection that it established in accordance with Article 804 and these findings should not be called into question at this stage in the analysis of Article 803<sup>109</sup>. The measure is transparent and meets the conditions of Article 803 (d)<sup>110</sup>.

201. In conclusion, the regulation regarding the colouring of margarine maintained by Quebec, if it is inconsistent with Articles 401, 402 or 403, is nonetheless permissible under the Agreement because it meets each and every condition of Article 803.

## **2.7 Quebec's arguments regarding the applicability of Article 404**

202. In the event the panel arrives at the conclusion that chapter eight does not apply, Quebec pleads in the alternative that the measure meets each of the conditions of Article 404.

203. The regulation regarding the colouring of margarine does not constitute a measure inconsistent with Articles 401, 402 or 403. However, in the event the panel reaches the opposite conclusion, Quebec maintains that this measure is nonetheless permissible under the Agreement because it aims at a legitimate objective and meets each and every condition mentioned in Article 404. In the following paragraphs, Quebec will demonstrate that the measure called into question by Alberta in this case meets each of the terms of Article 404.

### **2.7.1 The regulation respecting margarine colouring is permissible under Article 404**

204. If the regulation regarding margarine constitutes a measure inconsistent with Articles 401, 402 or 403, as Quebec disputes, this measure is permissible under Article 404 of the Agreement. Article 404 states the following:

**“Article 404: Legitimate Objectives**

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<sup>108</sup> In this respect, Quebec reiterates its arguments set forth, among others, in Paragraph 31 of this submission.

<sup>109</sup> See paragraphs 140 and following.

<sup>110</sup> A large proportion of the margarine sold in Quebec comes from outside of Quebec. This shows that this measure is easily reconcilable with its objective which is to protect consumers and that producers from other provinces are able to comply with it easily.

Where it is established that a measure is inconsistent with Article 401, 402 or 403, that measure is still permissible under this Agreement where it can be demonstrated that:

- (a) the purpose of the measure is to achieve a legitimate objective;
- (b) the measure does not operate to impair unduly the access of persons, goods, services or investments of a Party that meet that legitimate objective;
- (c) the measure is not more trade restrictive than necessary to achieve that legitimate objective; and
- (d) the measure does not create a disguised restriction on trade.”

205. In accordance with applicable principles of interpretation, this article must be interpreted taking into account the ordinary meaning of the terms utilized, its context and the intent of the Parties. The Parties to the Agreement agreed in the Preamble that they intended, among other things, “to promote an open domestic market”, “to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments” and to recognise “ the social, cultural and economic characteristics of the provinces”.

206. The intention set forth in the Preamble is repeated in Chapter One (Operating Principles), in Article 100, under the heading ‘Objective’. This article expresses the objective sought by the Parties signing the Agreement in the following manner:

**“Article 100: Objective**

It is the objective of the Parties to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market. All Parties recognize and agree that enhancing trade and mobility within Canada would contribute to the attainment of this goal.”  
(our underlining).

207. Moreover, in Article 101 (4) (b) and (d), under the heading ‘Mutually Agreed Principles’, the Parties recognized the need to allow for exceptions to the obligation to promote trade liberalization and to take into account the importance of consumer protection.

208. The intent of the Parties, set forth in the Preamble and in Chapter One of the Agreement, is to promote trade liberalization in Canada while allowing for exceptions to this liberalization.

209. This intent to liberalize trade while allowing for exceptions is clearly expressed in Chapter Four of the Agreement entitled ‘General Rules’. Articles 401, 402 and 403 contain rules favouring the liberalizing of trade in Canada. In accordance with them, a measure adopted or maintained by one Party may not constitute an obstacle to trade except if it meets the conditions set forth in Article 404 regarding ‘legitimate objectives’.

210. What emerges from the foregoing is that the application of the exception to a legitimate objective stated in Article 404 must not be made in a manner so restrictive that, in actual fact, it prevents its use. In this respect, the Agreement accords considerable latitude and provides, rather, in Annex 405.1 (4) that a Party may establish, when it adopts or maintains a measure to achieve a legitimate objective, the level of protection that it considers to be appropriate.

211. The discretion to set the appropriate level of protection granted to the Party invoking the exception to legitimate objectives clearly demonstrates that the Parties, by signing the Agreement, intended that this exception be usable. The Parties never intended that the conditions to be met be such that they preclude use of the exception. It has never been the case that the exception could only be used in urgent situations or situations of exceptional risk or where no other means of attaining the sought objective exist. Such an interpretation would run counter to the principle of interpretation to the effect that the interpreter would have to read the words which had actually been used in an agreement and not the words which should have been used in his opinion.

212. In the following paragraphs, Quebec will demonstrate that its regulation regarding the colouring of margarine meets each of the terms of Article 404.

**2.7.1.1. The regulation respecting margarine colouring is permissible under Article 404 (a)**

**Article 404 (a): the purpose of the measure is to achieve a legitimate objective:**

213. The first condition to be met so that a measure inconsistent with Articles 401, 402 or 403 may be permissible under Article 404 is that the purpose of this measure must be a legitimate objective.

214. The legitimate objectives in question in paragraph (a) of Article 404 are those found in the definition of the expression ‘legitimate objective’ in Article 200 of the Agreement. This definition is the following:

“Article 200: Definitions of General Application

In this Agreement, except as otherwise provided.

(...)

**legitimate objective** means any of the following objectives pursued within the territory of a Party:

(...),

e) consumer protection;

(...),

considering, among other things, where appropriate, fundamental climatic or other geographical factors, technological or infrastructural factors, or scientific justification.

Except as otherwise provided, "legitimate objective" does not include protection of the production of a Party or, in the case of the Federal Government, favouring the production of a Province.

For greater certainty, "legitimate objective" may be amended by a provision in Part IV." (our underlining).

215. Consumer protection is one of the legitimate objectives enumerated in Article 200.<sup>111</sup> It is therefore necessary to determine whether the purpose of the Quebec regulation is consumer protection. In this respect, Quebec maintains that the purpose of the regulation regarding the colouring of margarine is to protect consumers. The history of margarine and of the various laws and measures which have been adopted in the United States, in Canada, in Quebec, in Alberta and in other provinces demonstrates beyond the shadow of a doubt that this is a measure aimed at informing the consumer and protecting him from fraud.

216. In the United States, in the 19<sup>th</sup> century, nearly all margarine was sold falsely stating that it was butter. In Canada, the preamble of the first federal law stated that the objective was to protect the health of the consumer against, if it can be believed, insalubrious products. In Alberta, the law of 1949 concerning margarine banned margarine having the same colour as butter "which might cause it to be mistaken for butter". In Ontario, the declarations of the Prime Minister, of several Ministers of Agriculture and of a Deputy Minister are all to the effect that the main goal of the regulation was to protect consumers against fraud. In Quebec, consumer protection has always been the motive. In 1987, at the time when Quebec introduced the regulation

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<sup>111</sup> Saskatchewan has recognized in Paragraph 36 of its submission that issues relating to consumer protection are important and that a jurisdiction must not be prevented from acting to protect such a value for the sole purpose of liberalizing trade.

challenged by Alberta, the Quebec Minister of Agriculture, Mr. Michel Pagé, maintained that the objective was consumer protection. At the same time period, the assistant Deputy Minister of Agriculture, Mr. George H. Collin, stated that consumers were subject to fraud in Ontario and that margarine was being sold under insalubrious conditions in place of butter. He also stated that the measure envisaged by Quebec took into account the interests of consumers and would decrease confusion.<sup>112</sup>

217. Consumer protection has always constituted the reason for which Quebec adopted measures regarding the colouring of margarine even if they may have had an incidental effect on dairy producers. This is clearly demonstrated by the historical background of the measures adopted by it. This is also clearly demonstrated by the fact that more and more margarine and less and less butter is being sold. This situation was known by dairy producers in Quebec in 1987 and had even been the subject of declarations by their representatives<sup>113</sup>. Moreover, even if the measure had an incidental effect on dairy producers, the measure would remain a consumer protection measure. When the governments of Quebec and other provinces adopted their regulation regarding the colouring of margarine, they had to take into account all of the potential effects. They knew that those opposed would argue that their respective measure had the goal of protecting dairy producers. The governments did not give in, convinced by very concrete facts that they should keep their measure despite the considerable lobby. Furthermore, it is important to underscore that dairy production is regulated by a series of agreements at the national level in Canada and that butter trade has no borders in Canada. Butter sold in Quebec may have been produced in Quebec but in other provinces as well. Thus, the regulation regarding the colour of margarine has an incidental effect on dairy production throughout Canada and it is not possible to maintain that it was adopted to protect dairy production in Quebec when it has been demonstrated in this submission that its objective was consumer protection.

218. The governments of Quebec and the other provinces never denied the incidental effect of the measure since no government can legislate behind closed doors and any measure has incidental effects. In the case of the colouring of margarine, one of these effects could be that dairy producers throughout Canada, and not only in Quebec, sell butter to the consumer who really wants to buy some and thus draw a legitimate income. It is a legitimate income given that the consumer obtains exactly what he would like to buy. There is no pressure or incentive by the government and the dairy producer's income depends essentially on the enlightened decision of the consumer. The governments made the decision to protect the consumer against fraud relating to

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<sup>112</sup> See above, the section of the submission concerning the history of margarine, Paragraph 25 *et seq.* of the submission.

<sup>113</sup> See article by L. Lévesque, “*L’UPA admet que la margarine colorée ne profitera pas au beurre*”, *La Presse*, August 14 1987, p. A4. (Annex 71)

margarine in the same way they did with respect to fake products in the field of trademarks, non-genuine airplane parts and fake medications.

219. All of the foregoing demonstrates that Quebec had good reasons to believe that the measure had the goal of and would achieve a legitimate objective. It is not just a declaration by one person in authority that the measure had the purpose of consumer protection. Quebec's goal of protecting consumers was also the goal of Alberta and Ontario when a similar measure was adopted and applied there. The official Ontario representatives also recognized officially that consumer protection was the goal of Quebec.<sup>114</sup>

220. It is therefore correct to maintain today that the measure disputed by Alberta still has the same objective and that it still aims to protect consumers. The original objective intended when a measure has been adopted cannot be modified later. Alberta cannot claim today, in 2004, that the objective sought in 1987 by the Government of Quebec was not to protect consumers. In so arguing, Alberta contradicts the former Quebec Minister of Agriculture and the former Ministers of Agriculture, the former Deputy Ministers of Agriculture and even one of the former Prime Ministers of Ontario, which is completely unacceptable for one province vis-à-vis another province.<sup>115</sup>

#### **2.7.12 The regulation respecting margarine colouring is permissible under Article 404 (b)**

Article 404 (b) : the measure does not operate to impair unduly the access of persons, goods, services or investments of a Party that meet that legitimate objective

221. The test to determine whether a measure meets the requirements of Article 404 (b) is the following:

1. One must first ascertain that the measure meets the requirements of Article 404 (a) and that its goal is the achievement of a legitimate objective;

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<sup>114</sup> See, on this subject, paragraphs 41 *et seq.* of this submission and, in particular, paragraph 52.

<sup>115</sup> Alberta, at our 18 of its submission, indicates that federal food and drug law does not ban the sale of coloured margarine and does not demand that margarine be of any particular colour. In this respect, Quebec would like to refer to the fact that the Supreme Court of Canada decided in 1949 that the regulation of local trade of a product is not within the jurisdiction of the federal but rather of the provinces. See, on this subject, paragraph 33 of this submission.

2. One must then determine whether the product of the Party demanding access to the territory of the other Party does not harm the pursuit of the legitimate objective;

3. If the product in question does not harm the pursuit of the legitimate objective, one must then determine whether the measure adopted to achieve the legitimate objective has the effect of hindering ‘unduly’ product access.

222. Application of this test to the facts of the case demonstrates:

1. That the measure adopted by Quebec with respect to the colouring of margarine has the goal of achieving a legitimate objective (consumer protection), the entirety as it has been proven in the preceding section of the present submission;<sup>116</sup>

2. That the product from Alberta for which access to the territory of Quebec is requested, that is, margarine of the same colour as butter, would harm the pursuit of the legitimate objective sought by Quebec. In effect, in accordance with the wording of Article 404 (b), the product for which access is sought must not harm the pursuit of the legitimate objective. In this case, if Albertan margarine having the same colour as butter could be sold in Quebec, the measure adopted by Quebec to protect the consumer would become ineffective and Quebec could no longer pursue its legitimate objective;

3. Because the product for which access is requested, that is, margarine having the same colour as butter, would harm the pursuit of the legitimate objective sought by Quebec, it is not necessary to prove the third part of the test, that is, whether the measure adopted to achieve the legitimate objective has the effect of hindering ‘unduly’ product access. Quebec has no choice, it must ban entry of margarine having the same colour as butter in order to achieve the legitimate objective it has set out to achieve. However, margarine produced in other provinces may be sold in Quebec if it complies with the applicable regulation and is, in fact, sold.

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<sup>116</sup> See paragraphs 204 and following of this submission.

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**2.7.1.3. The regulation respecting margarine colouring is permissible under Article 404 (c)**

Article 404 (c) : the measure is not more trade restrictive than necessary to achieve that legitimate objective

223. The test for determining whether a measure meets the requirements of Article 404 (c) is the following:

1. One must firstly ascertain that the measure meets the requirements of Article 404 (a) and has the goal of achieving a legitimate objective;
2. One must then determine whether the measure (which at this stage and in the opinion of the panel, would restrain trade because it would not be necessary to apply Article 404) goes beyond what is necessary in order to achieve the legitimate objective;
3. Finally, one must determine, in accordance with paragraph 5 of Annex 405.1, that the party which adopted the measure took into account: a) the risks which non-achievement of the legitimate objective would create; and, b) ensured proportionality between these risks and the effects of the trade restrictiveness of the measure.<sup>117</sup>

224. Application of this test to the facts of this case demonstrates:

1. That the measure adopted by Quebec relating to the colouring of margarine has as its goal the achievement of a legitimate objective (consumer protection), the entirety as it has been proven in the preceding section of the present submission;<sup>118</sup>
2. The regulation regarding the colouring of margarine prevents producers from Quebec, Alberta and other provinces and territories from selling margarine having the same colour as butter in Quebec. This measure is necessary to achieve the legitimate objective sought by Quebec, which consists of protecting consumers and this finding should not be challenged at this stage in the analysis of Article 404. If, in the view of the panel, this measure restricts the trade of margarine having the same colour as butter, it does not restrict the trade of margarine which complies

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<sup>117</sup> Paragraph 5 of Annex 405.1 states the following: “For greater certainty, with respect to the application of Article 404 (c), each Party shall, in ensuring that any standard or standards-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-fulfillment of that legitimate objective would create and ensure proportionality between the trade restrictiveness of the standard or standards- related measure and those risks.”

<sup>118</sup> See paragraphs 204 and following of this submission.

with the regulation applicable to Quebec. Thus, if in the view of the panel this measure restricts trade, it does not restrict it completely but rather to the extent necessary to achieve the legitimate objective sought. Moreover, Article 404 does not require that the measure not restrict the sale of yellow margarine; it requires rather that the measure not restrict trade in general. The proportionality of the measure is amply demonstrated by the fact that margarine sold in Quebec comes, to a large degree, from outside Quebec. In short, the margarine trade is not restricted more than necessary to achieve the legitimate objective sought;

3. (a) in conformity with the provisions of paragraph 5 of Annex 405.1, Quebec took into account the risks which would be created if the measure were not achieved. The principal objective of the measure is consumer protection and Quebec considers that there is a possibility of confusion and fraud. In this respect, Quebec reiterates the arguments it made in the preceding sections regarding the adequacy of the measure with the definition in the Agreement of legitimate objectives.<sup>119</sup> Without limiting the generality of the foregoing, Quebec submits that at the moment when the consumer is about to consume the margarine, he knows that it is margarine even if there is no label or he cannot read it and that acts of fraud of which Quebecer and Ontarian consumers have been victims during the 1980s are sufficiently worrisome to justify the measure. Quebec considers that risks of fraud and confusion exist and that they must be taken into account;<sup>120</sup>

(b) The risks identified are proportional to the effects of the measure's trade restrictiveness. The measure does not ban the sale of margarine in Quebec. The measure permits the sale of margarine which complies with the regulation in effect and bans the sale of margarine having the same colour as butter. It avoids, as does the 1949 law of Alberta, consumer confusion and reduces the possibility that malevolent people, as was the case in Quebec and Ontario, defraud consumers by selling them adulterated margarine in the place of butter.

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<sup>119</sup> See, among others, paragraphs 204 and following of this submission.

<sup>120</sup> See on this subject, paragraphs 41 and following of this submission.

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**2.7.1.4. The regulation respecting margarine colouring is permissible under Article 404 (d)**

Article 404 (d) : the measure does not create a disguised restriction on trade.

225. In this case, the measure adopted by Quebec regarding the colouring of margarine is transparent: margarine may be sold in Quebec if it complies with the terms of the regulation and, in particular, if it is not the same colour as butter.

226. Margarine producers from Quebec, Alberta, other provinces and territories, all governments of Canada, grocers and consumers know exactly what to expect with respect to margarine in Quebec: margarine may be sold in Quebec if it complies with the terms of the regulation and if it is not the same colour as butter.

227. Article 404 (d) appears to derive its origin from the introductory text of Article XX of the GATT of 1994, which reads as follows:

“Article XX – General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures (...).” (our underlining)

228. This provision has been interpreted by the Appellate Body of the WTO in the matter of the United States – Standards for Reformulated and Conventional Gasoline<sup>121</sup> as encompassing those restrictions which amount to arbitrary or unjustifiable discrimination in international trade and to the effect that its fundamental element is in the aim and purpose which are to avoid the abuse or illegal use of exceptions.

229. In accordance with Article 404 (d), a trade restriction is acceptable if it is not arbitrary or unjustifiable.

230. In this respect, one must analyze the aim and the purpose of the Quebec measure, which, one must remember, are to protect consumers.

231. The Quebec measure is perfectly justifiable and is in no way arbitrary. To the contrary, a measure which would impose licenses which would be issued upon receipt of authorization by margarine or butter producers whose production plants are in Quebec

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<sup>121</sup> See *supra*, footnote 106.

would be arbitrary or unjustifiable. By the same token, a measure which would provide that any import of margarine into Quebec would need to be approved by a committee of butter and margarine producers whose production plants are in Quebec would be just as arbitrary or unjustifiable.

232. The Quebec measure bans the sale of margarine having the same colour as butter but one cannot claim that it is a disguised trade restriction or that it is arbitrary or unjustifiable. This measure is not concealing anything. It is necessary in order to achieve the legitimate objective sought by Quebec which is to protect the consumer and this finding should not be called into question at this stage in the analysis of Article 404.<sup>122</sup>

233. Quebec maintains that the main objective of the regulation is to protect consumers but does not deny that a subsidiary effect is that it allows dairy producers throughout Canada to supply butter to consumers who demand it. The measure is entirely transparent and legitimate and meets the terms of Article 404 (d).<sup>123</sup>

234. In conclusion, the regulation regarding the colouring of margarine, if it is inconsistent with Articles 401, 402 or 403, which Quebec disputes, is permissible under Article 404 the Agreement.

### **3. Summary**

235. Quebec has demonstrated in this submission that the panel does not have jurisdiction. The regulation regarding the colouring of margarine does not fall within the scope and coverage of Chapter Nine for two reasons. Firstly, the notice stipulated in Article 902 (3) was given late, after expiration of the absolute deadline stipulated in this article. Secondly, the Trade Policy Committee served notice without having received the mandate from the Parties to the Agreement, the governments of Canada, the provinces and the territories.

236. Quebec has also demonstrated that the regulation governing the colouring of margarine does not constitute an obstacle covered by Chapter Four and complies with the Preamble, the Guiding Principles and Objectives of the Agreement. If an inconsistency exists, which Quebec disputes, the regulation is permissible under Chapter Nine because the provisions of Chapter Nine prevail over any other provision in the Agreement in the event of inconsistency.

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<sup>122</sup> A large proportion of the margarine sold in Quebec comes from outside of Quebec. This shows that this measure is easily reconcilable with its objective which is to protect consumers and that producers from other provinces are able to comply with it easily.

<sup>123</sup> In this respect, Quebec reiterates its arguments set forth in paragraphs 215 *et seq.* of this submission.

237. Quebec subsequently demonstrated that the regulation regarding the colouring of margarine is a consumer-related measure permissible under Chapter Eight, that it does not constitute an obstacle in accordance with articles 401, 402 or 403 and, in the alternative, that it is a measure permissible under article 803.

238. Finally, Quebec has demonstrated, subsidiarily, that the measure meets each of the conditions of article 404.

**PART IV: CONCLUSION**

In view of the foregoing, Quebec requests the panel to:

- a) rule that the panel does not have jurisdiction because the regulation regarding the colouring of margarine does not fall within the scope and coverage of Chapter Eight because the notice stipulated in article 902 (3) was given late and without mandate;
- b) rule that the regulation regarding the colouring of margarine does not constitute an obstacle to internal trade and that it does not fail to comply with the Preamble, the Guiding Principles, the objectives and articles 401, 402, 403 or 405 of the Agreement on Internal Trade;
- c) rule that the regulation regarding the colouring of margarine is a consumer-related measure permissible under Chapter Eight of the Agreement on Internal Trade;
- d) rule that the regulation regarding the colouring of margarine is a measure permissible under article 404 of the Agreement on Internal Trade;
- e) and consequently, dismiss Alberta's complaint;
- f) dismiss, on the same grounds, the interventions of Manitoba and Saskatchewan.

Respectfully submitted, September 27, 2004

Original signed by Raymond Tremblay

**RAYMOND TREMBLAY, SOLLICITOR**  
Quebec Department of Justice