

**SUPPLEMENTAL MEMORANDUM OF QUEBEC
ON THE DISPUTE OF
ALBERTA WITH RESPECT TO
MEASURES BY QUEBEC GOVERNING
THE COLOURING OF MARGARINE**

2005-04-28

Supplemental Memorandum of Quebec on the Dispute of Alberta with Respect to
Measures by Quebec Governing the Colouring of Margarine

1. Quebec thanks the panel for the opportunity it was given to respond to the second memorandum of Alberta of April 14, 2005.
2. Quebec will first deal with the scope and coverage of chapter nine of the Agreement. It will then deal with the way that Articles 401 and 403 must be interpreted. It will end by giving its interpretation of chapter eight.

The measure is not included within the scope and coverage of chapter nine

3. Quebec has never maintained that the measures relating to the colouring of margarine have not been taken up in the course of the negotiations which led to the conclusion of the Agreement. It maintains rather that the notice provided for by Article 902(3) has been given late and without mandate.¹
4. Concerning the lack of a warrant, Quebec repeats the arguments it mentioned in paragraphs 81 *et seq.* of its first memorandum. Quebec maintains that Alberta's supplemental memorandum does not demonstrate that the governments of Canada, of the provinces and of the territories or that the Ministers of Agriculture have made an explicit decision in this respect as they should have in accordance with paragraphs 6, 7 and 8 of Annex 902.5. A reading of paragraph 3 of Alberta's supplemental memorandum might lead one to believe it, but it is nothing of the sort. The events which are mentioned therein occurred in the inverse order in which they are mentioned and predate the signature of the Agreement. Moreover, the November 10, 1995 meeting which is referenced in Appendix 4 of Alberta's supplemental memorandum was a meeting of Assistant Deputy Ministers of Agriculture and not a meeting of ministers. The Assistant Deputy Ministers had no particular power under the Agreement.
5. Alberta maintains that Quebec's silence or inaction after October 1, 1997; that is, the date on which notice was given, constitutes an acknowledgment of the validity of this notice.
6. Quebec would like to bring to the attention of the panel that nothing in the Agreement obligated it to protest this notice and that the fact that it did not modify its regulation on the colouring of margarine was known to everyone after the October 1, 1997 notice.²

¹ Memorandum of Quebec, paragraphs 60 *et seq.*

² See the November 10, 1997 letter of Ontario advising Quebec that Ontario had accepted the request of Unilever to contest the Quebec regulation. (Appendix QS-1).

7. Quebec would also like to inform the panel that it did not intervene in any of the three disputes during which the October 1, 1997 notice was raised and that the annual report of the Secretariat cannot be a source of law. It repeats that a panel must verify for itself the jurisdictional questions of competence and not rely on the fact that the parties are not questioning it. Quebec is therefore asking the panel to apply the provisions of Article 1703(3) *a contrario* and to declare that the recommendations formulated by the panel in these three matters are not applicable to Quebec; to declare, in other words, that the conclusion of the panels concerning the validity of the notice is not applicable to Quebec and that it may plead that the notice was given late and without mandate.
8. Quebec maintains, furthermore, that this panel is the appropriate forum to determine the applicability of the October 1, 1997 notice and that it took advantage of the first occasion given to it; that is, the drafting of its September 27, 2004 memorandum to make known its objection.
9. Quebec considers that it did not have to raise its objection during the course of the consultations which took place with Alberta. In fact, an analysis of chapter 17 demonstrates that the plaintiff must, in accordance with Article 1702(2), make known the measure which is the subject of his complaint and the relevant provisions of the Agreement which are applicable. However, nothing obligates the other Party to make known immediately its means of defense. Moreover, and this is very important, even if Quebec had made known its means of defense, Alberta is duty bound to comply with Article 1702(5). It must not divulge information which has been conveyed to it by Quebec during the consultations, which are confidential, so that Quebec may take full advantage of its rights in the course of the proceedings.
10. Quebec also maintains that it is not responsible for the fact that the notice was sent late. It maintains that the deadline in Article 902(3) was an absolute deadline as is demonstrated by the use of the word “shall”. Section 11 of *The Interpretation Act*, stipulates, in effect: “*The expression ‘shall’ is to be construed as imperative and the expression ‘may’ as permissible.*”³ Quebec also refers to the fact that the panel must make its own interpretation of the provisions of the Agreement, that it is not bound by prior decisions of other panels, especially since none of them have ruled on the question raised here by Quebec, that it is a matter of competence and that the panel must not perpetuate an error in interpretation which was made earlier.
11. Finally, Quebec would like to bring to the panel’s attention the fact that silence by one Party may not be interpreted as an acceptance or a recognition that a situation is consistent with the Agreement and that it has waived the assertion of its rights. In this respect, Quebec refers the panel to the recent decision by the panel of the WTO in the matter of “*European Communities – Thailand – Sugar Export*

³ Interpretation Act, R.S., c. I-23 section 11, Appendix QS-2.

Subsidy”.⁴ The WTO panel states as follows in paragraph 7.211: “In this respect, the WTO Panel refers to the findings of the *EC – Bananas Panel (Article 21:5 – EC)* indicating that the silence or absence of dispute of a measure by a Member does not create the presumption that said member has accepted that the measure in question was consistent with *the WTO Agreement*.” This interpretation concerning the silence of a party should be noted by this panel, in such a manner as to allow Quebec to assert fully its rights.

Interpretation of Article 401

12. With respect to the interpretation by Alberta of Article 401(1), Quebec maintains that it is not sufficient to indicate that two products receive different treatment in order to demonstrate that there is an infraction of the rule contained in Article 401(1), as it is not sufficient, in accordance with Article 401(4), to give identical treatment to two products in order to necessarily ensure compliance with this rule. One must establish, as in the analysis of the rule of “national treatment” contained in Article III of the GATT of 1994, from which Article 401(1) has its origin, whether the regulation modifies the conditions of competition to the detriment of the product imported into the market. Quebec will first set forth the principles of interpretation developed in accordance with the WTO and subsequently apply them to Article 401(1).
13. The Appellate Body has indicated in the matter of *Japan – Taxes on Alcoholic Beverages*⁵ that the “fundamental objective of Article III” of the GATT, in which the principle of national treatment is found, “is to avoid protectionism when taxes and internal regulatory measures are applied. More specifically, the object of Article III is to see to it that internal measures are not applied to imported or national products in such a manner as to protect national production. To do this, Members of the WTO are obligated to guarantee the equality of competitive conditions between imported products and national products. The intent of the drafters of the General Agreement was obviously that imported products, once they have cleared through customs, be treated in the same way as like products of national origin.” (our underlining).
14. In the matter of *Korea – Fresh Beef Products*⁶, the Appellate Body has indicated that “Article III: 4 requires only that a measure not subject imported products to a ‘less favorable treatment’ than that granted similar national products.” Thus, “a measure which grants imported products a *different* treatment from that granted to like national products is not necessarily inconsistent with Article III: 4 insofar as the treatment given by this measure is not less favorable. A definite difference in treatment between imported products and similar national products is therefore neither necessary nor sufficient to demonstrate that there is a violation of Article III: 4. The question of knowing whether or not imported products are

⁴ Report of the panel, WT/DS283/R, October 4, 1996, to paragraph F, Interpretation of Article III, Appendix QS-4.

⁵ AB-1996-2, WT/DS8/AB/R, October 4, 1996, in paragraph F, Interpretation of Article III, Appendix QS-4.

⁶ AB-2000-8, WT/DS/161/AB/R, December 11, 2000, to paragraphs 135 and 137. Appendix QS-5.

- subjected to a 'less favorable' treatment than like national products should rather be assessed by asking whether a measure alters the *competitive conditions* to the detriment of products imported into the market in question." (our underlining).
15. The first paragraph of Article 401 of the Agreement provides, subject to Article 404, that each Party shall accord to goods of any another Party treatment no less favourable than the best treatment it accords:
 - a. to its own products, which are similar, directly competitive or substitutable goods;
 - b. to similar products, directly competitive or substitutable goods of any other Party or third Party.
 16. There is no doubt that margarine that comes from outside of Quebec receives the same treatment as that granted to margarine produced in Quebec.
 17. The question is rather to ascertain whether margarine produced outside of Quebec receives treatment less favourable than the treatment granted to the product for which it is a substitute, that is, butter.
 18. The Quebec measure prohibits margarine from being the ordinary colour of butter. On the other hand, there is no Quebec measure regulating the colour of butter.
 19. One must determine whether the Quebec measure regarding the colouring of margarine is a protectionist measure likely to protect butter produced in Quebec.
 20. There is no doubt that the two products do not receive the same treatment: the colour of margarine is regulated and that of butter is not.
 21. As was decided by the Appellate Body in the matter of *Korea – Fresh Beef*, a measure which grants imported products a treatment different from that granted similar (or substitutable) national products is not necessarily inconsistent with the national treatment, insofar as the treatment granted by this measure is not less favourable.
 22. The Appellate Body adds that granting treatment no less favourable means not subjecting the imported product to competitive conditions less favourable than those which the similar or substitutable national product enjoys.
 23. One must therefore ask whether margarine imported into Quebec is subjected to competitive conditions less favourable than those which butter enjoys.
 24. The measure prohibits margarine producers from colouring their product the same colour as butter.

25. The measure does not prohibit the sale of the imported product. It prohibits, rather, producers of margarine, which is a substitute for a natural product, from copying the colour of the natural product and trying to convince consumers that there is no difference between margarine and butter.⁷
26. The imported product, in this case margarine, is not subjected to competitive conditions less favorable than those enjoyed by the product for which it is a substitute, in this case, butter.
27. Margarine and butter may both be sold in Quebec in their respective natural colour: it is possible to sell white (its natural colour) and even pale, yellow margarine and it is possible to sell yellow butter (its natural colour).
28. In other words, given that:
- i. margarine is a substitute for butter;
 - ii. the natural colour of margarine is not yellow;
 - iii. the natural colour of butter is yellow;
 - iv. margarine producers want to be able to sell margarine that is the same colour as butter in Quebec,

as a result, the fact of prohibiting a substitute product from copying the colour of the product for which it is supposed to substitute does not have the effect of subjecting it to less favorable competitive conditions since margarine producers may offer their products to consumers from Quebec by highlighting, as do butter producers, the true characteristics of their products.

29. Imported margarine is therefore not subjected to competitive conditions less favorable than those enjoyed by butter. There is therefore no violation of Article 401(1).

⁷ A Canadian company, Unilever, offers margarine under the name "*I Can't Believe It's Not Butter*". Appendix QS-6. Unilever nonetheless declared itself concerned about product imitations. In January 2004, its president of marketing declared, when speaking of counterfeiting, that it is a "massive problem". Appendix QS-7.

Interpretation of Article 403

30. Alberta, in paragraph 19 of its second memorandum, indicates that the Quebec regulation constitutes an economic obstacle because it grants a different and discriminatory treatment to margarine (which is a product directly competitive with butter) and that thus rendering the sale of margarine in a disadvantageous position.
31. The test proposed by Alberta to determine whether there is a violation of Article 403 is not the right one. In fact, the test proposed by Alberta is to determine whether the product benefits from the national treatment rule. It is a matter of the test applicable to Article 401(1) and not of that which is applicable to Article 403. If the test were the same, one of the two articles would not have its reason for being. If one wants to give meaning to Article 403, its objective must be different from that of Article 401(1).
32. Quebec maintains that the applicable test is the following: one must ask whether the measure may be considered objectively as a normal regulation applicable in a province with which all companies doing business there must comply. The interpreter must not compare the treatment applicable to substitute products but rather determine whether the measure creates an obstacle to internal trade.
33. In this respect, Quebec refers the panel to paragraphs 15 *et seq.* of its September 27, 2004 memorandum with respect to the fact that margarine consumption in Quebec is not lower than that of other Canadian provinces and that it is normal for a merchant to encounter different regulations in the different places where it decides to do business. Quebec also repeats all the arguments it asserted with regard to Article 403 in paragraphs 174 *et seq.* of its memorandum. The Quebec regulation does not constitute an obstacle to trade within Canada. The fact that a large proportion of margarine sold in Quebec comes from outside Quebec proves it amply.

Application of chapter eight

34. Quebec maintains that nothing in the Agreement prohibits application of chapter eight to a measure which falls within the scope and coverage of chapter nine. As Quebec mentioned in paragraph 11 of its September 27, 2004 memorandum, the interpreter of a treaty has the obligation to read all of the applicable provisions in such a manner as to give one meaning to all, harmoniously, and the legitimate expectations of the parties to a treaty are the result of the terms of the treaty itself. Thus, if the Parties to the Agreement had wanted chapter eight to not apply to agricultural and food products, they should have said so but they did not.
35. Quebec did not have to announce its defense at the level of consultations.⁸

⁸ See Quebec's arguments in this respect in paragraph 9 of this memorandum. Moreover, in order not to take the Defending Party by surprise, the Complaining Party must, in accordance with Article 1701(2),

36. Alberta maintains that the use of a regulation regarding the colouring of margarine is not a sophisticated way of protecting consumers, but is rather a way to restrict trade.
37. Quebec does not agree with Alberta. Colour is an efficient way to allow for the differentiation of things that are different. Quebec refers the panel to paragraph 177 of its first memorandum and to the regulations in which colour is utilized to distinguish food products: the *Codex* for gouda and cheddar, the *Dairy Products Regulations* for butter, cheddar and dairy products, and the *Code of Federal Regulations* for bread. In other fields, colour is used to distinguish, among others, electrical wire capacity⁹ and traffic signals.¹⁰
38. Alberta also maintains, in paragraph 22, that “It is clear that a requirement that margarine be labeled ‘margarine’ is more than sufficient to meet the needs of the consumer to establish the difference between butter and margarine.” Quebec does not agree with this assertion.
39. In effect, the cogency of a measure must be analyzed according to the level of protection chosen by a province and not the reverse. A province must first establish the level of protection it considers appropriate and afterwards adopt the measure which allows it to give this level of protection to the consumers in its province. Article 804(1) and paragraph 4 of Annex 405.1 are clear: a Party may set the level of protection it considers appropriate and adopt a measure to achieve it. Quebec has established a high level of protection in order to ensure that its consumers consume the product they want even when there is no label or packaging or they cannot read it. It therefore wants to offer protection at all times, in all circumstances. To achieve this level of protection, the measure chosen is that requiring that margarine be of a different colour than that of butter.
40. In accordance with Article 804 and paragraph 4 of Annex 405.1, the choice of the level of protection is a matter exclusively for each Party.¹¹

choose beforehand the chapter of Part IV it considers the most relevant to the question and only act in accordance with that chapter. (This obligation does not apply to the Defending Party).

⁹ Electrical wires, besides having different colours according to their capacity, carry on their sheaths, in order to give the greatest protection possible, an inscription, written out, of their capacity.

¹⁰ Colours are utilized in order to be able to distinguish clearly certain dangers or certain situations. See documents consulted on the internet. Appendix QS-8.

¹¹ By analogy, in the matter of *Australia – Salmon*, the WTO Appellate Body indicated, in paragraph 199, the determination of the appropriate level of protection of a sanitary or phytosanitary measure is the prerogative of the Member of the WTO which has selected it and not that of the panel or the Appellate Body. AB-1998-5, WT/DS 18AB/R, October 20, 1998, Annex QS-9. See also the report of the Appellate Body in *CE-Canada – Asbestos*, AB-2000-11, WT/DS135/AB/R, paragraph 168, Annex QS-10.

41. If a measure establishing a level of protection constitutes an obstacle, it must not, in accordance with Article 803(c)¹², restrict trade more than necessary to ensure the level of consumer protection adopted or maintained in accordance with Article 804.
42. In this connection, Quebec invites the Panel to be inspired by Article 5:6 of the *WTO Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement) and by its footnote.¹³
43. The footnote relating to Article 5:6 indicates that "...a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade."
44. The Appellate Body has indicated in paragraph 194 in the matter of *Australia-Salmon*¹⁴ that the footnote relating to Article 5:6, clearly establishes a triple criteria for determining whether there is a violation of Article 5:6. The three elements of the criteria applying to Article 5:6 are cumulative and refer to the existence of an SPS measure which:
- 1) is reasonably available taking into account technical and economic feasibility,
 - 2) achieves the level of sanitary or phytosanitary protection deemed appropriate by the Member; and
 - 3) is significantly less restrictive to trade than the SPS measure being disputed.
45. With respect to the first element of the test, are there consumer protection measures which are reasonably available taking into account technical and economic feasibility?
46. There are other consumer protection measures than that chosen by Quebec. Such a measure could consist, among others, of prohibiting any sale of margarine, prohibiting any colouring or providing for a particular labeling.
47. With respect to the second element of the test, one must ask whether these alternative measures achieve the level of sanitary or phytosanitary protection deemed appropriate by the Party.

¹² An identical rule applies in accordance with Article 404(c).

¹³ A copy of Article 5:6 is in Annex QS-11.

¹⁴ See *supra*, note 11.

48. In this regard, the total prohibition against selling or colouring achieves the level chosen but the labeling does not achieve it when there is no label or wrapping at a restaurant, at home or elsewhere, or where consumers cannot read it.
49. With respect to the third element of the test, the alternative measure must be significantly less restrictive to trade than the measure being contested.
50. The prohibition against selling or colouring any margarine does not meet this part of the test because it is a much more restrictive measure. In other respects, labeling is a less restrictive measure but this measure does not meet the second part of the test (that is to obtain the level of protection deemed appropriate by Quebec at all times, in all circumstances) and cannot be accepted.
51. Given that no alternative measure meets the three elements of the Article 5.6 test, the Quebec measure complies with Article 803(c) and does not restrict trade more than necessary to ensure the level of consumer protection adopted by Quebec.
52. Alberta maintains, moreover, in paragraph 23 of its supplemental memorandum, that Quebec is pleading that chapter eight is applicable to this matter because by virtue of this chapter, the definition of “legitimate objective” does not take into account the fact that the measure may have an effect on the protection of the production of a Party.
53. In this regard, Quebec mentions that the objective of its regulation is to protect consumers.
54. Finally, Quebec repeats each and every one of the arguments it presented in its first memorandum and each and every one of its conclusions.

All the foregoing respectfully submitted this April 28, 2005.

Original signed by Raymond Tremblay

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LIST OF APPENDIXES

APPENDIXES

- QS-1 November 10, 1997 letter of Mr. Noble A. Villeneuve, Minister of Agriculture, Food and Rural Affairs of Ontario to Mr. Guy Julien, Minister of Agriculture, Fisheries and Food of Quebec advising that Ontario had accepted the request of Unilever Canada Limited to challenge the regulation applicable to Quebec under the agreement.
- QS-2 Interpretation Act (L.R. 1985, c I-21); (English version).
- QS-3 European Community – Subsidies of Sugar Export – Thailand’s Complaint – Panel Report.
- QS-4 Japan – Taxes on Alcoholic Beverages – Appellate Body Report.
- QS-5 Korea – Measures Affecting Imports of Fresh, Refrigerated or Frozen Beef – Appellate Body Report.
- QS-6 Unilever: I Can’t Believe It’s Not Butter!
- QS-7 Declaration of Mr. Anthony Simon, President, Marketing, Unilever.
- QS-8 Internet Research of Security Colours.
- QS-9 Australia – Measures Affecting Importation of Salmon – Appellate Body Report.
- QS-10 European Community – Measures Affecting Asbestos and Products Containing It – Appellate Body Report.
- QS-11 Agreement on the Application of Sanitary and Phytosanitary Measures.