

AGREEMENT ON INTERNAL TRADE

APPEAL OF THE REPORT OF THE PANEL IN THE DISPUTE BETWEEN ARTISAN ALES CONSULTING INC. AND THE GOVERNMENT OF ALBERTA REGARDING MARK-UPS ON BEER

I. INTRODUCTION

A. Overview

1. This appeal is the final stage of a dispute resolution process under the *Agreement on Internal Trade (1994)* (“AIT”). The AIT is a trade agreement that originally came into force on July 1, 1995 and has been updated since then by 14 Protocols of Amendment.¹ The Canadian Free Trade Agreement (“CFTA”) entered into force on July 1, 2017, replacing the AIT. However, this appeal was initiated under the AIT, and accordingly, the AIT is applicable to this dispute, in accordance with Article 1014 of the CFTA.²

2. Unless otherwise stated in this Appellate Report, references to “Article” or “Annex” or subdivisions thereof refer to parts of the AIT.

3. This dispute began with a complaint initiated by Artisan Ales Consulting Inc. (“Artisan Ales”) relating to the Government of Alberta (“Alberta”)’s mark-ups imposed by the Alberta Gaming and Liquor Commission (AGLC) on beer imported from other Canadian provinces and sold in Alberta, since October 28, 2015, and the grants paid by the Alberta Minister of Agriculture and Rural Affairs to Alberta brewers, since August 5, 2016, for the sale of beer in Alberta. Artisan Ales alleges that these measures are inconsistent with the provisions of the AIT, have impaired internal trade, and caused injury or denial of a benefit.³

4. On April 15, 2016, Artisan Ales requested that the Government of Canada (“Canada”) initiate proceedings pursuant to Article 1712 of the AIT (Initiation of Proceedings by Government on Behalf of Persons) in respect of Alberta’s measure to raise the mark-up for the beer of small brewers located outside of British Columbia, Alberta, and Saskatchewan (the “New West

¹ See “Foreward,” AGREEMENT ON INTERNAL TRADE – CONSOLIDATED VERSION (2015) (Published by Internal Trade Secretariat, ISBN 978-1-894055-85-7).

² Article 1014 of the CFTA states:

If, before the effective date, a Complaining Person in a Pre-existing Dispute has requested that proceedings be initiated under... Article 1713(1) (Initiation of Proceedings by Persons) of the Agreement of Internal Trade, the proceedings in the Pre-existing Dispute Shall be conducted in accordance with the provisions of the Agreement on Internal Trade until the dispute is concluded.

Canadian Free Trade Agreement, 2017 (came into Force on July 1, 2017).

³ Submissions of Artisan Ales, Written Representations, February 28, 2017.

Partnership”) to the maximum mark-up rate of \$1.25 per litre (the “2015 Measure”).⁴ In its initial request, Artisan Ales asked Canada to initiate proceedings “in respect of a measure of Alberta relating to the mark-up applied to the imported beer.”

5. Prior to the 2015 Measure, Alberta allowed small breweries to benefit from a lower mark-up than the one applied to large, national breweries. This mark-up increased as the size of the brewery increased, and was applied without regard to the beer’s place of origin. Small breweries from Alberta other provinces were treated equally on the basis of their total sales volumes, and could benefit from graduated mark-up and compete against national breweries.

6. On June 10, 2016, Canada advised Artisan Ales, pursuant to Article 1712(4), that it had decided not to initiate proceedings.

7. On July 13, 2016, Artisan Ales requested the initiation of proceedings pursuant to Article 1713 (Initiation of Proceedings by Persons). This triggered the screening of the complaint under Article 1714.⁵

8. On August 5, 2016 (after Artisan Ales initiated its complaint under the AIT), Alberta repealed the 2015 Measure and instituted a new system, whereby Alberta began applying a mark-up of \$1.25 per litre to the sale of beer brewed in any province (the “2016 Mark-Up”).⁶ At the same time, Alberta started paying a grant on the sale of beer brewed in Alberta through the Alberta Small Brewers Development Program (“ASBD Program”)(together with the 2016 Mark-Up, the “2016 Measures”).⁷ The ASBD Program is a *per* litre grant which the Alberta Ministry of Agriculture and Forestry pays to Alberta breweries for qualifying sales within Alberta.

9. On August 15, 2016, the screener approved the request of Artisan Ales to initiate proceedings.

10. On August 29, 2016, pursuant to Article 1715 (Consultations) of the AIT, Artisan Ales requested consultations with Alberta.

11. On January 30, 2017, pursuant to Article 1716 (Request for Panel), Artisan Ales requested that the AIT Secretariat establish a panel.

12. On June 1, 2017, the Panel held a hearing for the complaint.

⁴ Alberta Gaming & Liquor Commission (AGLC) Mark-Up Rate Schedule (October 28, 2015), online: <<https://www.ait-aci.ca/wp-content/pdfs/English/DisputeResolution/Beer/16-Alberta-Gaming-and-Liquor-Commission-Mark-up-Rate-Schedule-Effective-October-28-2015.pdf>>.

⁵ See request for Initiation of Proceedings, Letter from Benjamin Grant to Secretariat (July 13, 2016), online at: <<https://www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/Beer/3-Request-for-Initiation-of-Proceedings-Letter-from-Benjamin-Grant-to-Secretariat-July-13-2016.pdf>>.

⁶ AGLC Mark-Up Rate Schedule (August 5, 2016), online: <<https://www.ait-aci.ca/wp-content/pdfs/English/DisputeResolution/Beer/25-Alberta-Liquor-and-Gaming-Commission-Mark-up-Rate-Schedule-Effective-August-5-2016.pdf>>.

⁷ Alberta Ministry of Agriculture and Forestry, “Alberta Small Brewers Development (ASBD) Program Terms and Conditions,” online: <<https://www.ait-aci.ca/wp-content/pdfs/English/DisputeResolution/Beer/26-Alberta-Small-Brewers-Development-Program-Terms-and-Conditions.pdf>>.

13. On July 28, 2017, the Panel issued its report, finding that the 2015 Measure is inconsistent with Articles 401 (Reciprocal Non-Discrimination) and 1004 (Reciprocal Non-Discrimination for the Alcoholic Beverages Chapter), 403 (No Obstacles) and 1005 (No Obstacles for the Alcoholic Beverages Chapter) of the AIT; the 2016 Measures (i.e. the 2016 Mark-Up and the ASBD Program) are inconsistent with Article 401, 1004, 403 and 1005 of the AIT; that Artisan Ales, as well as others importing beer into Alberta or brewing beer for import into Alberta, including Saskatchewan breweries, have suffered injury due to the measures at issue and awarded costs.
14. On August 28, 2017, Alberta submitted its notice of appeal of the Panel Report. On October 11, 2017, Alberta submitted an appeal of the Panel Report.
15. On November 27, 2017, the Government of Saskatchewan (“Saskatchewan”), an intervenor in this appeal, submitted its intervention submission.
16. On December 1, 2017, Artisan Ales submitted its respondent submission to the Appellate Panel.
17. On January 25, 2018, the Appellate Panel heard the appeal from the Panel Report in Montréal, Québec.

II. PANEL REPORT UNDER APPEAL

18. The majority of the Panel determined as follows:
 1. That the 2015 Measures (as defined in the Panel Report) are inconsistent with the reciprocal non-discrimination provisions Articles 401 and 1004 of the AIT;
 2. That the 2015 Measures (as defined in the Panel Report) are inconsistent with Article 403 and 1005 of the AIT;
 3. That the 2016 Measures (i.e. the 2016 Mark-Up and the ASBD Program) are inconsistent with Article 401 and 1004 of the AIT;
 4. That the 2016 Measures (i.e. the 2016 Mark-Up and the ASBD Program) are inconsistent with Article 403 and 1005 of the AIT;
 5. That Artisan Ales, as well as others importing beer into Alberta or brewing beer for import into Alberta, including Saskatchewan breweries, have suffered injury due to the measures at issue; and
 6. That Alberta repeal or amend the measures at issue to bring its beer-related mark-ups and related grant programs into compliance with the AIT as soon as possible, and in no case later than six (6) months after the issuance of this Panel’s decision.⁸

⁸ Report of Article 1716 Panel Regarding the Dispute between Artisan Ales Consulting Inc. and Alberta Regarding Beer Mark-ups, (July 28, 2017) at pp. 10-11 [“Panel Report”].

19. The Panel assessed costs against Artisan Ales, Alberta and Saskatchewan on the following basis: five percent (5%) for Saskatchewan; forty-five percent (45%) to Artisan Ales; and fifty percent (50%) to Alberta. The Panel also awarded tariff costs on the basis of fifty (50%) percent of the permissible cap.

III. GROUNDS OF APPEAL

20. Alberta asks the Appellate Panel to rescind the Panel’s reasoning, analyses, interpretations and findings in the Panel Report, raising five issues on appeal:

- (a) The Panel should not have examined the 2016 Measures;⁹
- (b) The Panel did not actually engage in or analyze the requirements of the AIT as they apply to the 2016 Measures;¹⁰
- (c) The Panel should not have concluded that the 2016 Measures violated the Agreement (specifically, Articles 401, 403, 1004, and 1005 of the AIT);¹¹
- (d) The Panel failed to provide reasons;¹² and
- (e) The Panel failed to give Alberta an opportunity to respond to an argument made by Artisan Ales in oral submissions in reply.¹³

IV. STANDARD OF REVIEW

A. Article 1706.1 of the AIT

21. Article 1706.1(1) of the AIT provides that an appeal may be based “on the grounds that the panel erred in law, failed to observe a principle of natural justice or acted beyond or refused to exercise its jurisdiction.”

22. Article 1706.1(4) sets out the Appellate Panel’s mandate in the following terms:

The Appellate Panel shall issue the Appellate Report with reasons which:

- (a) may confirm, vary, rescind, or substitute the Report of the Panel in whole or in part, or refer the matter back to the Panel for re-hearing; [...]

B. Positions of the Parties

23. Alberta submits that the appropriate standard of review for jurisdictional issues is correctness on the basis that an Appellate Panel will have greater expertise in areas of Canadian

⁹ Alberta Appeal Submission at para. 19.

¹⁰ *Ibid.* at para. 14.

¹¹ *Ibid.* at para. 15.

¹² *Ibid.* at paras. 29-34.

¹³ *Ibid.* at para. 35.

administrative law than the panel.¹⁴ Alberta submits that the issue of jurisdiction falls squarely within Canadian administrative law and requires an analysis for which the Appellate Panel has greater expertise.¹⁵

24. Artisan Ales submits that the Appellate Panel should apply a standard of reasonableness to the Panel's decision.¹⁶

25. The Panel's decision to examine the 2016 Measure should be reviewed on a standard of reasonableness as it concerns, fundamentally, the interpretation of the AIT. The fairness of the Panel's procedure should be reviewed on a standard of correctness.¹⁷

26. Artisan Ales further argues that the Appellate Panel should reject Alberta's submission that the Panel's decision to examine the 2016 Measure is a matter of jurisdiction, which triggers correctness review, and that this Appellate Panel should review the 2016 Measure under the reasonableness standard.

C. Analysis

27. The applicable standard of review will vary depending on the nature of the appeal or review hearing, and on the nature of the error being considered.

28. Thus, the standard of review applied by a Court of Appeal in an appeal of a lower court decision will not be the same as the standard applied by a court conducting a judicial review of a decision of a lower court or a tribunal. Similarly, the standard of review for questions of law may not be the same as that for findings of fact or mixed fact and law.

29. To determine the appropriate standard of review for this Appellate Panel sitting in a review of the Panel decision in this appeal, we will first consider the nature of an appeal under the AIT, and then examine the types of questions we have been asked to review.

30. Article 1720(4) of the AIT gives the Appellate Panel a broad power to "confirm, vary, rescind, or substitute the Report in whole or in part, or refer the matter back to the Panel for re-hearing". That authority indicates the appellant panel's role is more closely akin to a court of appeal rather than a court judicially reviewing an administrative decision of a tribunal. That view is supported by the fact that the Panel's decision "[u]nless appealed pursuant to Article 1706.1(1) or Article 1720, a Report is final and is not subject to judicial review".¹⁸

31. In addition, appeals to the Appellate Panel are not subject to any privative clause.

32. We take note of the fact that the requirements for the constitution of Panel and Appellate Panel rosters might suggest some deference to panel findings relating to the interpretation of the AIT. Annex 1704(2) requires that Panel roster members shall have expertise in matters covered by the AIT, and at least one member of each Party's roster should have expertise in Canadian

¹⁴ *Ibid.* at para. 5.

¹⁵ *Ibid.*

¹⁶ *Ibid.* at para. 4.

¹⁷ Artisan Ales, Appeal Submission at paras. 39-40.

¹⁸ AIT, Article 1728.1.

administrative law.¹⁹ By contrast, members of the Appellate Panel roster are required only to have expertise in Canadian administrative law.²⁰ While those provisions might suggest that we must give deference to panel decisions in areas involving the interpretation of the AIT, we do not consider that to be an overriding consideration.

33. Deference is normally due to administrative decision makers who have built up considerable expertise in specialized areas over a significant period of time. In the context of the AIT, and, in particular, interpretation of the AIT's provisions, given the paucity of panel decisions, the limited frequency with which roster members are called to serve, the limited right to challenge panel decisions, and the broad authority of the Appellate Panel in an appeal, we do not consider that Appellate Panels are required to show significant deference to panel decisions.

34. The Appellate Panel is, therefore, the one and only opportunity for a Disputant to challenge a panel decision, and the Appellate Panel has a broad power to "confirm, vary, rescind, or substitute the Report in whole or in part, or refer the matter back to the Panel for re-hearing".

35. We therefore consider that an Appellate Panel functions as a court of appeal from panel decisions, and the standard of review we apply should be governed by the standard of review that a court of appeal would normally apply when hearing an appeal from a decision of a lower court.

36. The leading authority on the standard of review to be applied by a court of appeal reviewing a decision from a lower court is *Housen v. Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33 (CanLII) ("*Housen*"). In *Housen*, the Supreme Court of Canada (the "Supreme Court") prescribed the standard of review that courts of appeal are to apply to questions of law, questions of fact, inferences of fact, and questions of mixed fact and law.

37. On pure questions of law, the standard of review is correctness, and the appellate court is free to replace the opinion of the trial judge with its own.²¹

38. On findings of fact, the standard of review is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding" error.²² The rationale for that is the deference that a court of appeal must show to the trial judge as the finder of fact. The standard of review for inferences of fact is the same as that applied to findings of fact, that is, "palpable and overriding error".²³

39. Finally, the standard of review applicable to questions of mixed fact and law is, again, "palpable or overriding error" "unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard [of care] or its application", in which case the error may amount to an error of law.²⁴

40. In the Appellate Panel decision *Regarding the Dispute between Saskatchewan and Québec Concerning Dairy Blends, Dairy Analogues and Dairy Alternatives*, dated January 26, 2015

¹⁹ AIT, Annex 1704(2), Articles 3 and 4.1.

²⁰ AIT, Annex 1704(2), Article 9.

²¹ *Housen v. Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33 (CanLII) at para. 8 [*Housen*].

²² *Ibid.* at para. 10.

²³ *Ibid.* at para. 25.

²⁴ *Ibid.* at para. 37.

(“*Dairy Blends*”), the Appellate Panel examined a line of jurisprudence involving the standard of review to be applied by appellate administrative tribunals.²⁵

41. That line of cases, commencing with *Newton v. Criminal Trial Lawyers Association*, 2010 ABCA 399 (“*Newton*”) requires the appellate court to consider several factors that must be adapted to the particular context of the judicial review under consideration.²⁶ Those factors are listed in *Newton* as follows:

- (a) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;
- (b) the nature of the question in issue;
- (c) the interpretation of the statute as a whole;
- (d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;
- (e) the need to limit the number, length and cost of appeals;
- (f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and
- (g) other factors that are relevant in the particular context.²⁷

42. We do not find the *Dairy Blends* Appellate Panel’s analogy between appellate panel review under the AIT and judicial review of administrative tribunals to be particularly convincing. The bodies sitting in judicial review of administrative tribunals are generally permanent institutions that are in a position to build an institutional approach to administrative decision making in their fields of expertise. That is not the case with appellate panels under the AIT, which are appointed from a large roster of potential decision makers to review a single decision.

43. In addition, the approach taken by the *Dairy Blends* Appellate Panel complicates, rather than simplifies, the appeal process. The *Dairy Blends* Appellate Panel examined a number of the factors set out in *Newton* and came to the conclusion that the appropriate standard of review for an appellate panel on questions of law was different depending on the nature of that question of law.

44. The *Dairy Blends* Appellate Panel considered the standard of review was correctness for questions involving adequacy of reasons, but considered the standard was reasonableness for questions involving the interpretation of the AIT. The Appellate Panel stated:

77. In our view, the standard of review to be applied to adequacy of reasons is one of correctness. It can be assumed that the Panel considered its reasons to be

²⁵Report of Article 1706.1 Appeal Panel Regarding the Dispute between Saskatchewan and Québec Concerning Dairy Blends, Dairy Analogues and Dairy Alternatives, dated January 26, 2015 (“*Dairy Blends*”) at paras. 39 to 64.

²⁶*Newton v. Criminal Trial Lawyers Association*, 2010 ABCA 399 at para. 44 [*Newton*].

²⁷*Newton* at paras. 42-43.

adequate or it would have written them differently. We do not consider however that we are obliged to defer to the Panel's assessment of its own reasons. ...

91. This brings us to the fundamental question to be resolved with respect to standard of review. When an Appellant alleges that a Panel erred in interpretation of the AIT, does the Appellate Panel review the Panel on a standard of correctness or a standard of reasonableness?

92. In our view, the appropriate standard is reasonableness.

93. As we have explained above, many of the considerations that induce a court to exercise deference towards an administrative tribunal on judicial review do not apply in the relationship between the Appellate Panel and a Panel under the AIT. Likewise, many of the considerations that govern an appeal court's oversight of lower courts do not apply in the relationship between the Appellate Panel and a Panel under the AIT.

94. One consideration however that does apply in both the judicial review context and in the present context is the relative expertise of the generalized reviewing body as compared to the specialized decision maker. Unlike the Panel, we do not have "expertise or experience in matters covered by this Agreement". Such experience provides a basis for a practical interpretation of the Agreement in a manner that best achieves its objectives.

45. The adequacy of reasons is both an element of procedural fairness and a question of whether the Panel met the requirements of Article 1719 of the AIT. Both a breach of procedural fairness and a failure to provide reasons sufficient to comply with the requirements of Article 1719.3 are questions of law.

46. In terms of the respective roles of panels and Appellate Panels under the AIT, the underlying legislation – the AIT – clearly provides for a full review of the Panel's decision by the Appellate Panel and permits the Appellate Panel to "confirm, vary, rescind, or substitute the Report in whole or in part, or refer the matter back to the Panel for re-hearing".²⁸ That broad authority suggests the Appellate Panel is not required to be deferential to the original Panel report.

47. Even if we were to accept the *Newton* considerations, we do not consider that significant deference is required.

48. In terms of the nature of the question in issue, Appellate Panel review will almost always involve a review of the panel's interpretation of provisions of the AIT. Our conclusions in respect of those interpretations of the AIT may have an impact well beyond the parties to the dispute.

49. There is nothing in the AIT itself that clearly requires an Appellate Panel to exercise deference with respect to panel decisions. Rather, the agreement suggests that an Appellate Panel may conduct a full and unrestrained review of the Panel decision.

²⁸ AIT, Article 1720.4(a).

50. On pure questions of law, the standard of review is correctness, and we are free to replace the opinion of the Panel with our own. In sum, we considered that the Appellate Panel has a broad jurisdiction to review the panel decision in this appeal and, in conducting that review, it should be guided by the Supreme Court's decision in *Housen*.

51. The questions at issue in this appeal do not involve questions or inferences of fact or questions of mixed law and fact. Consequently, we do not need to apply the appropriate standard of review for such questions.

V. ANALYSIS OF GROUNDS OF APPEAL

A. Jurisdiction of the Panel

52. Alberta argues that the submission to Canada and the Screener are true jurisdictional thresholds and that they have not been satisfied in this case because the 2016 Measures were not before Canada and the Screener.

53. Article 1712 of the AIT requires the complainant to identify the "actual measure". Artisan Ales did that by identifying the actual measure in force at that time, which was the 2015 Measure.

54. Article 1713 merely requires that the complainant provide a brief summary of the dispute and other information referenced in Article 1713(3). Artisan Ales complied with this provision on July 13, 2016 when it requested the initiation of proceedings.

55. After the initiation and submission to the Screener pursuant to Articles 1713 and 1714, Alberta repealed the 2015 Measure and implemented the 2016 Measures (i.e. the 2016 Mark-Up and the ASBD Program).

56. The Screener approved Artisan Ales' request to initiate proceedings in this case on August 15, 2016.²⁹ The Screener's role pursuant to Article 1714 is to decide whether to approve the request to initiate proceedings. In a proceeding initiated by a person pursuant to Article 1714, a Screener must review a request and accompanying documents to determine whether the person should be permitted to initiate proceedings. The proceedings are, therefore, only initiated after the Screener has made a positive decision. The Screener's task is purely procedural and does not go to jurisdiction.

57. As a matter of fact, Artisan Ales included the 2016 Measures in its request for consultations pursuant to Article 1715 as well as in its request for the establishment of a panel pursuant to Article 1716.

58. The request to establish a Panel is the formal document that commences the Panel proceedings. Article 1716(3) states that a Panel request shall:

- (a) specify the actual measure complained of;
- (b) list the relevant provisions of the Agreement;

²⁹ See the Report of the Screener (August 15, 2016) available at <https://www.cfata-alec.ca/wp-content/pdfs/English/DisputeResolution/Beer/4-Artisan-Ales-Report-of-the-Screener-August-15-2016.pdf> (Record, Artisan Ales, Tab 4).

- (c) provide a brief summary of the complaint;
- (d) explain how the measure has impaired internal trade; and
- (e) identify the injury or denial of benefit caused by the measure.

59. According to Article 1716.1, the terms of reference of the Panel are “to examine whether the actual measure at issue is inconsistent with the Agreement.”

60. Clearly, the terms of reference of the Panel, and therefore, its jurisdiction, are based upon the request for the establishment of the Panel. That is the formal document that commences a Panel proceeding and on which its terms of reference are based.

61. We conclude, therefore, that the constitutive document that formed the terms of reference for the Panel in this case was the request for the establishment of the Panel. In that document, the 2016 Measures are clearly referred to. For that reason, we reject Alberta’s claim that the Panel did not have jurisdiction to consider the 2016 Measures.

B. 2016 Measures: Consistency with Articles 401, 403, 1004 and 1005 of the AIT

1. Panel Report

62. The majority of the Panel determined that the 2016 Measures (i.e. the 2016 Mark-Up and the ASBD Program) are inconsistent with Articles 401, 403, 1004 and 1005 of the AIT. Alberta appeals those findings.

63. The reasons given by the majority of the Panel for its findings were perfunctory at best. In its report, the majority states that it:

...believes that when both features of the measures introduced in 2016 are considered as a whole ie. when considering the mark-up provisions and the ASBD Program together, these clearly discriminate against the beer products of non-Alberta breweries in the sale of those products within Alberta. Indeed, that would appear to be conceded by counsel for Alberta, at least in the context of the 2015 Measure. The majority of the Panel has concluded that the 2016 Measure, considered as a whole, the 2016 mark-up amendment and the ASBD program, substantially replicates the 2015 Measure and therefore creates the same result.³⁰

64. The majority did not interpret or analyze the Articles of the AIT that it found in its conclusions were violated by the 2016 Measures. Nor did it elaborate its own reasons for its conclusions, other than to “accept” the submissions of Artisan Ales and Saskatchewan relating to Injury and the relationship between Chapters 10 and 6 of the AIT.³¹

³⁰ Panel Report, p. 8.

³¹ *Ibid.*, p. 10.

2. *Parties' Submissions*

65. Alberta claims that the Panel erred in determining that the 2016 Measures are inconsistent with Articles 401 and 1004 as well as Articles 403 and 1005 of the AIT. According to Alberta, the 2016 Measures can be separated into two measures: the Mark-Up and the ASBD Program. The Mark-Up applies the same mark-up to beer from Alberta and beer from other provinces. Therefore, Alberta maintains that the reciprocal non-discrimination provisions of Articles 401 and 1004 and the “no obstacle” provisions of Articles 403 and 1005 are not violated. The ASBD Program, Alberta argues, is an “incentive” under Chapter 6 of the AIT, and Articles 401 and 403 do not apply to incentives.³² The Panel majority made no finding on this issue, Alberta states. But it is the Panel’s interpretation of Annex 1813(4) that Alberta considers particularly unreasonable.³³ In Alberta’s view, there is no inconsistency between the provisions for incentives in Chapter Six and Chapter Ten in this case.

66. Artisan Ales takes the position that the two aspects of the 2016 Measures “dovetailed” to form a single measure and that the Panel’s decision was well within the reasonableness range.³⁴ Even considering the ASBD Program grant aspect alone, Artisan Ales argues that the Panel’s finding of a violation is reasonable for the following reasons: (i) The ASBD Program grant is a measure “relating to trade in beverage alcohol products” under Article 1001; (ii) the non-discrimination obligation in Article 401 applies to grants covered by Chapter 10; and (iii) the Panel majority also considered whether the ASBD Program could be considered an “incentive” under Chapter 6 of the AIT, and if so, whether that incentive should therefore be exempted pursuant to the provisions of Chapter Six from the application of the provisions of Chapter Ten of the AIT.

67. Again, without interpreting the relevant provisions of the AIT, the Panel majority simply adopted the reasoning in Saskatchewan’s written submission and asserted that: “there is an inconsistency between the two chapters and that in accordance with the interpretation provisions of Paragraph 4 Annex 1814, the Chapter 10 requirements must be complied with by Alberta.” For those reasons, Alberta was found to be “in breach of the AIT in relation to the 2016 Measure.”³⁵

3. *Analysis*

- (a) *Are the 2016 Measures inconsistent with Articles 401, 403, 1004 and 1005 of the AIT?*

68. The Panel majority found that the 2016 Measures, considered as a whole, violated Articles 401, 403, 1004 and 1005 of the AIT because they discriminated against beer imported from other provinces as compared with beer produced in Alberta. However, the Panel failed to interpret or analyze the provisions of the AIT itself in coming to its determinations. Moreover, the Panel’s determinations that the 2016 Measures “clearly discriminate against the beer products of non-Alberta breweries in the sale of those products within Alberta”, and that “the 2016 Measure

³² Alberta Appeal Submission at para.21.

³³ *Ibid.* at paras. 25-26.

³⁴ Artisan Ales Appeal Submission, p. 18.

³⁵ *Ibid.*, p. 10. This is a very broad finding for a section on Articles 4 and 10 of the AIT. However, the Panel did not analyze the relevant provisions specifically in coming to its conclusions.

substantially replicates the 2015 Measure and therefore creates the same result” were not supported by reasons in the Panel Report.

69. We will address two key questions in our analysis:

- (a) Was the Panel correct in finding that the 2016 Measures should be considered as whole, or should the 2016 Mark-Up and the ASBD Program be considered as separate measures?
- (b) Was the Panel correct in finding that the 2016 Measures were inconsistent with Articles 401, 403, 1004 and 1005 of the AIT?
 - (i) 2016 Measures

70. The 2016 Measures are comprised of two distinct government policies: the 2016 Mark-Up and the ASBD Program. These two policies are established by different legal instruments and are administered by different departments or agencies of the Government of Alberta. They are also different in that the Mark-Up is a tax on the price of a product, beer, while the ASBD Program is a grant to a producer or brewer in Alberta, in effect a tax rebate.³⁶ The Panel found that the 2016 Mark-Up and the ASBD Program, taken together, “substantially replicate” the 2015 Measure because of their overall discriminatory effects.³⁷ However, whether or not a measure is discriminatory is to be determined by analyzing whether it is consistent with a Party’s obligations under the AIT. The Panel has made an assumption without conducting an analysis of the measures at issue and interpreting and applying the relevant provisions of the AIT to those measures.

71. We find that the Panel erred in determining that “the 2016 Measure, considered as a whole... substantially replicates the 2015 Measure and therefore creates the same result.”³⁸

72. There are two legal instruments supporting the 2016 Measures: the 2016 Mark-Up and the ASBD Program, each of which has a different government agency responsible for it. Recognizing that each instrument or policy can be characterized as a specific type of trade policy: the 2016 Mark-Up is a tax and the ASBD Program is a grant; we will proceed to analyze each in turn.

- (ii) Articles 401, 403, 1004 and 1005

Chapter Ten

73. The 2016 Measures – the 2016 Mark-Up and the ASBD Program – relate to trade in beer, which is a beverage alcohol product. Article 1001 of the AIT states that Chapter Ten “applies to measures adopted or maintained by a Party relating to trade in beverage alcohol products.” Therefore, Chapter Ten is applicable to the 2016 Mark-Up and the ASBD Program.

³⁶ See *supra*, ASBD Program Terms and Conditions.

³⁷ Panel Report, p. 8.

³⁸ *Ibid.*

74. Pursuant to Article 1000, Articles 401 (Reciprocal Non-Discrimination) and 403 (No Obstacles) apply to measures relating to trade in beverage alcohol products, “except as otherwise provided in this Chapter.”

75. Article 1004: Reciprocal Non-Discrimination provides as follows:

1. Article 401 (Reciprocal Non-Discrimination) applies, in particular, to measures in respect of:

- (a) listing;
- (b) pricing;
- (c) access to points of sale;
- (d) distribution;
- (e) merchandising; and
- (f) cost of service, fees and other charges.³⁹

76. The first interpretative question is whether the 2016 Mark-Up can be considered as one of the types of measures listed under Article 1004(1). Although it is not related to the cost of service, the 2016 Mark-Up could possibly be considered as a “fee or other charge” under subparagraph (f) of Article 1004.1. With respect to the ASBD Program, while a grant does not come under the types of measures specifically listed in Article 1004, the list set out in that Article is not an exhaustive list. It states that Article 401 (Reciprocal Discrimination) applies “in particular” to the listed measures. This does not limit the scope of Article 401 exclusively to the measures listed in Article 1004. We see Article 1004(1) as an illustrative list of some of the types of measures that could be applied in a manner that is inconsistent with Article 401 of the AIT. But there could be other measures that are also inconsistent with Article 401. The list is illustrative, not exhaustive.

77. The operative provision in Chapter 10 is Article 1000 which confirms that Articles 401 (Reciprocal Non-Discrimination) and 403 (No Obstacles) apply to trade in beverage alcohol products. Article 1004 provides an illustrative list of some types of measures that may be inconsistent with Article 401, but there may be other types of measures that also could be inconsistent with Articles 401 and 403.

78. Our interpretation of Article 1000 demonstrates that Article 401 applies to the 2016 Mark-Up and to the ASBD Program. Whether or not a measure is listed under Article 1004 is not the end of the inquiry. If a measure relates to trade in beverage alcohol products, and there is no provision to the contrary in Chapter Ten, then Article 401 applies to that measure.

79. Similarly, taxes and grants are not specifically listed as types of measures covered under Article 1005 (No Obstacles). However, we see this list as illustrative because of the phrase “such as” in the chapeau. Moreover, Article 1000 clarifies that Article 403 (No Obstacles) applies to measures relating to trade in beverage alcohol products. For these reasons, we find that Article 403 applies to the 2016 Mark-Up and the ASBD Program.

³⁹ AIT, Article 401.

80. We therefore determine that Articles 401 and 403 apply to the 2016 Mark-Up and the ASBD Program.

Chapter Four

81. Article 401(1), the provision on the obligation on Reciprocal Non-Discrimination states 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.

82. Two legal elements must be demonstrated pursuant to Article 401(1)(a): (i) the goods of the importing Party must be “like, directly competitive or substitutable” goods as compared with the goods of the other Party; and (ii) the importing Party must provide “no less favourable treatment” than the “best treatment” it accords to its own goods.

83. The goods under consideration in this appeal are the same for both 2016 Measures: the 2016 Mark-Up and the ASBD Program. Therefore, we can analyze the “like, directly competitive or substitutable” goods element for the 2016 Measures together. The imported products and the Alberta products are both beer beverages. There have been no arguments that they are not like, directly competitive or substitutable. We find that the imported products and the Alberta products in this case are like, directly competitive or substitutable goods and therefore, meet the first legal requirement of Article 401.

84. The more difficult issue is whether the 2016 Measures constitute “less favourable treatment” of imported beer as compared with Alberta beer. In order to analyze this legal issue, we will examine each measure in turn.

85. The 2016 Mark-Up, the parties to this dispute agree, by its own terms, does not discriminate between beer produced in Alberta and beer from other provinces. For this reason, we reverse the Panel’s determination as it relates to the 2016 Mark-Up, and determine that the 2016 Mark-Up is not inconsistent with Article 401 of the AIT.

86. With respect to the ASBD Program, it is a grant that is only available to certain brewers in Alberta, which is based on the volume of production of beer by qualified brewers. The Panel found that the grants apply on a sliding scale, with the maximum grant of \$1.15 per litre accessible to Alberta brewers that have the lowest levels of qualifying sales, declining to \$0.00 for sales volumes of 250,000 hectolitres. The grant is not available to brewers or producers of beer in other provinces.

87. When grants or incentives are based on market factors, such as in-province production or sales, their compliance with the AIT may be tested against rules that prohibit distortionary measures that affect trade in goods.

88. By tying the grant explicitly to certain levels of production and sales of beer produced in Alberta, the ASBD Program encourages the production and sale of Alberta beer and provides a competitive advantage to qualifying Albertan beer over beer produced in other provinces. The ASBD Program does not provide equality of competitive opportunities as between beer produced in Alberta and beer produced in other provinces. It distorts the playing field, and as such, results in “less favourable treatment” of beer produced in other provinces.

89. For this reason, we uphold the Panel’s determination, in so far as it finds that the ASBD Program is inconsistent with Article 401(1)(a) of the AIT.

90. Article 403: No Obstacles provides as follows:

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.⁴⁰

91. As noted in paragraph 85 above, the 2016 Mark-Up applies equally to beer produced in Alberta as well as to beer produced in other provinces. For that reason, the 2016 Mark-Up is not an obstacle to internal trade contrary to Article 403 of the AIT. We therefore reverse the determination of the Panel that the 2016 Mark-Up is inconsistent with Article 403 of the AIT.

92. The ASBD Program also acts as an obstacle to internal trade providing brewers in Alberta with competitive advantages that brewers and sellers in other provinces do not have and preventing entry into the Alberta market. As discussed above, the ASBD Program is based on market factors that have a direct effect on the provincial market for beer and internal trade in beer. The ASBD Program provides a direct incentive to produce beer in Alberta, thereby putting producers of beer from other provinces at a competitive disadvantage in the market for beer in Alberta.

93. For these reasons, we uphold the determination of the Panel that the ASBD Program is inconsistent with Article 403 of the AIT.

94. For the above reasons, we reverse the determinations of the Panel that the 2016 Mark-Up is inconsistent with Articles 401 and 403 of the AIT. We uphold the determinations of the Panel insofar as it finds that the ASBD Program is inconsistent with Articles 401 and 403 of the AIT. We also find that Articles 1004 and 1005 are not relevant substantive obligations in this case, and therefore reverse the findings of the Panel that the 2016 Measures are inconsistent with Articles 1004 and 1005.

(b) *Could the ASBD Program be considered an incentive under Chapter 6 and therefore be exempted from a finding of inconsistency with Articles 401, 403, 1004, and 1005 of the AIT?*

95. The issue is whether the provisions of Chapter Six relating to incentives, in particular, Articles 607 and 608, can act as an exemption to findings of violation or inconsistency with Articles 401, 403, 1004 or 1005 of the AIT.

⁴⁰ AIT, Article 404.

96. In order to examine this question, we must interpret and consider Articles 401, 403 and 404 in Chapter 4 as well as Articles 602, 600, 607 and 608 in Chapter Six.

Chapter Six

97. Article 602(3) states: “[t]his Chapter, except as provided in Articles 607 and 608, does not apply to measures relating to incentives.” Our interpretation of the ordinary meaning of that provision is that only Articles 607 and 608 in Chapter 6 apply to measures relating to incentives. If, indeed, the ASBD Program can be considered an incentive, then we must look to Articles 607 and 608, and not to the rest of Chapter Six.

98. Article 607 relates to Performance Requirements and Article 608 relates specifically to Incentives. These Articles appear within Chapter Six: Investment for a reason: because they are addressed to measures that relate to enterprises (i.e. companies) or investors. Chapters Four and Ten, on the other hand, are addressed to measures relating to trade in goods, not to activities of enterprises or investors. This is an important distinction when characterizing and analyzing measures and obligations under trade agreements.

99. Alberta maintains that Articles 401 and 403 do not apply to incentives by the terms of Article 600. We do not agree with this argument. Article 602(3) states clearly that “[t]his Chapter, except as provided in Articles 607 and 608, does not apply to measures relating to incentives.” In our view, “this Chapter” includes Article 600. We see no reason why Articles 401 and 403 could not apply to incentives to the extent that they may affect trade in goods. But that would be a separate examination under Chapter Four, in our view.

100. We also note that Articles 401 and 403 have general exemption provisions directly incorporated in them. They are provided for in Article 404 (Legitimate Objectives) of the AIT. Thus, the Parties to the AIT clearly contemplated that there would be exceptions to the Reciprocal Non-Discrimination and No Obstacles obligations of Articles 401 and 403, but they are expressly included in Article 404 which allows for a measure the purpose of which is to achieve a legitimate objective. As currently framed in the AIT, Articles 607 and 608 and Annex 608.3 do not constitute exceptions to Articles 401 and 403 of that Agreement.⁴¹

101. For the above reasons, we find that the incentive provisions of Chapter Six of the AIT do not provide an exemption for the ASBD Program from the findings of inconsistency with Articles 401 and 403.

C. Principles of Natural Justice

1. Failure to Provide Reasons

102. Alberta has argued that the Panel failed to provide reasons for its findings, which it believes constitutes a failure to observe a principle of natural justice.⁴² Alberta bases its reasoning on

⁴¹ We are not at liberty to consider arguments relating to the CFTA which does not apply to this case. As a future-in-time agreement, it has no interpretive value in interpreting the previous agreement, the AIT, which must be interpreted based on its own terms. Therefore, we have not included any analysis of the provisions of that CFTA.

⁴² Alberta Appeal Submission at paras. 29-34 (failure to provide reasons).

Articles 1706.3 and 1719 of the AIT, which “specifically require a panel to give reasons for its determination of whether the measure in dispute is inconsistent with the AIT.”⁴³

103. In the present appeal, we do not believe that it is necessary for this Appellate Panel to determine whether or not there was a breach of natural justice because the reasons of the Panel decision were insufficient. This Appellate Panel had the Panel’s conclusions, the complete record before the Panel, including the submissions of all participating parties, as well as Saskatchewan as Intervenor. The Appellate Panel also heard each party’s oral argument. All of the foregoing constituted a sufficient record to allow the Appellate Panel to fully review and determine the issues in a fair and equitable manner and to render an informed decision and reasons.

104. The Supreme Court in *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (“*Newfoundland Nurses*”), stated that:

Reasons need not include all the arguments or details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result. If the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.⁴⁴

105. We do not believe that it is necessary to determine the adequacy of the Panel’s reasons. Accordingly, we dismiss Alberta’s claim that the Panel failed to observe the principles of natural justice.

2. Opportunity to be Heard – Audi Alteram Partem

106. Alberta also submits that the Panel failed to observe the natural justice principle of *audi alteram partem* by relying on the oral submission of Artisan Ales’ counsel in finding that the Panel had jurisdiction to consider the 2016 Mark-Up and the ASBD Program. Alberta believes that this finding has created a significant prejudice to Alberta.⁴⁵

107. We do not agree. The principle of *audi alteram partem* is the requirement that the decision maker – in this case, the Panel – provide an adequate opportunity for a party to the proceeding to present its case and respond to the evidence and arguments advanced by other parties. As the Supreme Court stated in *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 SCR 221, the Appellant bears the burden of demonstrating an *actual breach* in invoking the *audi alteram partem* rule (emphasis added).⁴⁶

108. In this case, Artisan Ales’ and Saskatchewan’s arguments that the 2016 Measures (including the 2016 Mark-Up and the ASBD Program) violated the AIT are not novel issues that arose during the oral hearing before the Panel, as Alberta contends. As we examined in Part A of this Section – Jurisdiction, Artisan Ales included the 2016 Measures in its request for consultations as well as its request for establishment of a panel, which were shared with Alberta. Accordingly,

⁴³ *Ibid.* at para. 30.

⁴⁴ *Newfound Nurses* at p.3.

⁴⁵ Alberta Appeal Submission at para. 35.

⁴⁶ *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 SCR 221 at para. 49 (citing Gonthier J. in *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282).

Alberta had ample notice to respond to this allegation either in its written or oral submissions before the Panel.

109. Alberta has not demonstrated an actual breach of the *audi alteram partem* rule. We therefore find that Alberta's opportunity to be heard was not violated and, therefore, the Panel did not fail to observe the principles of natural justice.

VI. COSTS

A. Operational Costs

110. The award of Operational Costs is governed by AIT Rule 15 of Annex 1734 of the AIT, which reads, in relevant part, as follows:

15.1 Operational Costs of an Appellate Panel Proceeding shall be paid by the Appellant or Respondent or both, or by any one or both of the foregoing together with one or more Intervenors. Subject to Rule 15.4, an Appellate Panel shall apportion Operational Costs with a view to discouraging non-meritorious appeals.

15.2 In exercising its discretion, the Appellate Panel shall ordinarily order:

(a) that Operational Costs be borne by the Appellant where an appeal is unsuccessful;
or

(b) that Operational Costs be borne equally by the Appellant and Respondent where an appeal is successful.

15.3 The Appellate Panel may apportion Operational Costs between the Appellant and Respondent differently than provided in Rule 15.2 where justified by other relevant considerations, including:

(a) the conduct of an Appellant or Respondent; and

(b) the extent of an Appellant's or Respondent's success.

15.4 If there are one or more Intervenors in an appeal, Operational Costs may also be allocated to Intervenors commensurate with the Operational Costs incurred as a result of their participation, but in no instance shall Intervenors collectively be responsible for more than one-third of Operational Costs.

111. Operational Costs must be paid by one or more of the parties (including the intervenor). The only discretion this Appellate Panel has is to apportion the costs between the parties and the intervenor. Rule 15.1 speaks to the Appellate Panel's discretion to award costs to discourage non-meritorious appeals. Rules 15.2 and 15.3 speak to the Appellate Panel's discretion in apportioning costs between the Appellant and the Respondent. Rule 15.3 also addresses the issue of allocation of Operational Costs where an intervenor has been involved in an appeal.

112. We do not consider that Alberta’s appeal could be properly considered as non-meritorious. The Panel decision in this case was not unanimous, and the fact that a panelist dissented on certain issues would lead a reasonable person to believe that an appeal could succeed. Consequently, the goal of discouraging non-meritorious appeals is not a concern in allocating Operational Costs in this appeal.

113. Rule 15.2 provides the general rule for apportionment of costs, and Rule 15.3 provides for exceptions to that Rule. Rule 15.2 provides that “ordinarily”, Operational Costs will be borne by the Appellant where the appeal is unsuccessful and by both the Appellant and the Respondent equally where the appeal is successful. Rule 15.3 provides that the Operational Costs may be apportioned differently to that provided for in Rule 15.2 “*where justified by other relevant considerations*”, including the conduct or success of either the Appellant or the Respondent.

114. In the present appeal, we see no basis for departing from the general rule set out in Rule 15.2 that Operational Costs shall ordinarily be borne by the Appellant when the appeal is unsuccessful. In particular, we do not consider there are any relevant considerations that would suggest we apportion any of the Operational Costs to Artisan Ales.

115. The intervention of Saskatchewan was a limited and a positive contribution to the appellate process. The Appellate Panel is grateful to Saskatchewan for its helpful contribution. We do not consider that any of the Operational Costs should be apportioned to Saskatchewan.

B. Tariff Costs

116. The award of Tariff Costs is governed by Rule 16 of Annex 1734 of the AIT, which reads, in relevant part, as follows:

16.1 Subject to Rules 16.2 to 16.10, an Appellate Panel may order Tariff Costs to be paid in such amount, up to but not exceeding the maximum allowable amounts for the calendar year in which the order is made, as it considers appropriate.

16.2 The primary objective of an order of Tariff Costs is to discourage non-meritorious appeals.

16.3 Where an appeal is unsuccessful, the Appellate Panel shall ordinarily order the Appellant to pay the Tariff Costs of the Respondent.

16.4 Where an appeal is successful, the Appellate Panel shall ordinarily make no order respecting Tariff Costs.

16.5 Notwithstanding Rules 16.3 and 16.4, the Appellate Panel may make a different order respecting Tariff Costs where justified by other relevant considerations, including:

- (a) the conduct of the Appellant or Respondent during the Proceeding;
- (b) the extent of the Appellant’s or Respondent’s success;

(c) the reasonableness of the costs based on the complexity of the complaint and the duration of the Proceeding.

16.6 When determining the amount of Tariff Costs to be paid to a Complaining Person, the Appellate Panel shall not take into account:

- (a) whether or not it has ordered a Party to pay a Monetary Penalty; or
- (b) the amount of any Monetary Penalty it has ordered a Party to pay.

16.7 When determining the amount of Tariff Costs to be paid to a Complaining Person, the Appellate Panel shall ensure that the limitation in Article 1723(2) will not be exceeded.

16.8 The Appellate Panel shall make no order respecting the Tariff Costs of an Intervenor. An Intervenor shall bear its own Tariff Costs.

117. Unlike the award for Operational Costs, an award of tariff costs is purely discretionary. One or more of the parties to the appeal must pay the operational costs, and the Appellate Panel's discretion extends simply to how those costs are apportioned. There is no requirement to award Tariff Costs, and the Appellate Panel has the discretion to decide whether to award such costs.

118. Alberta has objected to any award of Tariff Costs against it on the grounds that its appeal did not lack merit and therefore no Tariff Costs should be awarded. In the alternative, Alberta objects to certain elements contained in the Statement of Costs presented by Artisan Ales for a number of reasons as follows:

- (a) The claim for legal fees is unreasonable because Artisan Ales is only liable to pay its counsel a lower legal fee than that claimed in its Statement of Costs;
- (b) The amounts claimed for preparation for the hearing are excessive and should be limited to the thirty (30) hours specifically spent preparing for the oral hearing, and should not include all of the other activities such as preparing pleading materials and the like;
- (c) When Harmonized Sales Tax (HST) is added to the amounts claimed for all pre-hearing steps, the amounts claimed exceed the maximum threshold;
- (d) The maximum amounts set out in Annex 1734 are reserved for complex cases, and this was not a complex case;
- (e) Artisan Ales' claim for HST on legal fees is not a true disbursement but makes up part of the legal fees; and
- (f) The claim for meals, travel, and accommodation for two representatives of Artisan Ales to attend the hearing is not a permissible disbursement.

119. Rule 16.1 states that the primary objective of an order of Tariff Costs is to discourage non-meritorious appeals. As noted above, the present appeal cannot be considered non-meritorious. Consequently, the primary objective for an award of Tariff Costs is absent.

120. However, Rule 16.1 does not state that the only objective of an award of Tariff Costs is to discourage non-meritorious litigation. Other objectives may be served by an award of Tariff Costs.

121. While the principal objective of an award of Tariff Costs is to discourage non-meritorious appeals, that does not represent the test for awarding or refusing Tariff Costs. Whether or not an appeal has some merit, an award of costs may still promote the principle objective of discouraging non-meritorious appeals by attaching a financial cost to pursuing any appeal, meritorious or not, that is unsuccessful.

122. Tariff Costs are a long-standing element of any litigation, and it should not surprise any unsuccessful litigant that it may be required to pay the Tariff Costs of the successful litigant in question.

123. Rules 16.3 and 16.4 provide that: “[w]here an appeal is unsuccessful, the Appellate Tribunal shall ordinarily order the Appellant to pay the Tariff Costs of the Respondent”; and “[w]here an appeal is successful, the Appellate Panel “shall ordinarily make no order respecting Tariff Costs”.

124. In the present appeal, we see no compelling reason to depart from the principle that an unsuccessful Appellant should pay the Tariff Costs.

125. We will now examine Alberta’s arguments concerning the amounts Artisan Ales has included in its Statement of Costs.

126. Artisan Ales’ agreement with its counsel requires it to pay a lower hourly rate fee than is being claimed in the Statement of Costs. That agreement also provides for a higher hourly fee in the event Artisan Ales is successful in resisting the appeal and an award of Tariff Costs is made in favor of Artisan Ales.

127. Such alternative fee arrangements are becoming commonplace in the legal profession, and should be recognized and encouraged as they facilitate participation in the justice system. We, therefore, recognize Artisan Ales’ counsel’s right to claim legal fees at the higher rate based on its fee arrangement, its success in the appeal, and the Appellate Panel’s discretion to award Tariff Costs.

128. Amounts that may be claimed for preparation for the hearing are not limited to only those efforts to specifically prepare for the oral hearing. Research, drafting, and participation in case management efforts, for example, are all necessary preparatory steps for a hearing and can be the subject of an award for Tariff Costs. We consider all of the amounts claimed for prehearing preparation to be fees in respect of the preparatory work for a hearing.

129. We are not convinced by Alberta’s argument that the maximum amounts for costs set out in Annex 1734 are reserved for complex cases, and that less complex cases should, in effect, be discounted. That is not to say that this appeal was a simple matter, it had its own complexities, and

we do not consider it appropriate to establish a discount in this appeal. The amounts claimed by Artisan Ales are not, in themselves, excessive, and we see no compelling reason to reduce them to reflect the level of complexity in this appeal.

130. We disagree with Alberta's argument that awards for travel expenses should not include amounts for the travel expenses of representatives of Artisan Ales. Where necessary, the definition of Tariff Costs distinguishes between fees for "counsel", "agents", and "experts". However, with respect to travel expenses, the definition simply reads "reasonable costs incurred by a... Person in a Proceeding in respect of... disbursements, including travel expenses."⁴⁷ The definition does not limit travel expenses to counsel's travel expenses and we see no compelling reason to read such a limitation into the definition.

131. Artisan Ales has included amounts for HST in its Statement of Cost. HST is not a true disbursement for anyone but a consumer. Either Artisan Ales or its counsel is in a position to claim input tax credits for all HST disbursements made in respect of this appeal. We will not therefore include any HST amounts in our award of Tariff Costs.

132. In the present appeal, a corporation that was affected by Alberta measures it considered violated the terms of the AIT, successfully challenged Alberta in a long and arduous procedure. There is a strong case for some compensatory measure to relieve that person of the costs that such efforts entailed. Tariff Costs are a mechanism for providing some compensation to Artisan Ales for the costs of litigating this appeal.

133. Therefore, we will award Artisan Ales its Tariff Costs in accordance with its Statement of Costs,⁴⁸ but excluding all amounts claimed for HST.

⁴⁷ AIT, Article 1734.

⁴⁸ Artisan Ales Appeal Submission at paras. 111-112.

VII. SUMMARY OF DISPOSITION

134. In accordance with Article 1720(4) of the AIT, the Appellate Panel:

- (a) Finds that the Panel had jurisdiction to consider the 2016 Measures;
- (b) Reverses the determination of the Panel that the 2016 Measures, taken as a whole, “replicate” the 2015 Measure;
- (c) Finds that the 2016 Measures consist of: the 2016 Mark-Up and the ASBD Program;
- (d) Reverses the determination of the Panel that the 2016 Mark-Up is inconsistent with Article 401 of the AIT, and finds that the 2016 Mark-Up is not inconsistent with Article 401 of the AIT;
- (e) Reverses the determination of the Panel that the 2016 Mark-Up is inconsistent with Article 403 of the AIT, and finds that the 2016 Mark-Up is not inconsistent with Article 403 of the AIT;
- (f) Upholds the determinations of the Panel that the ASBD Program is inconsistent with Articles 401 and 403 of the AIT;
- (g) Finds that the incentive provisions of Chapter Six of the AIT do not provide an exemption for the ASBD Program from the determinations of inconsistency with Articles 401 and 403 of the AIT;
- (h) Reverses the determinations of the Panel relating to Articles 1004 and 1005 of the AIT;
- (i) Dismisses the Appellant’s claims that the Panel failed to observe the principles of natural justice;
- (j) Awards Operational Costs against the Appellant, Alberta; and
- (k) Makes an award of Tariff Costs, in accordance with the Respondent, Artisan Ales’, Statement of Costs, excluding all amounts claimed for HST.

A handwritten signature in cursive script that reads "Peter Kirby".

Peter E. Kirby (Chair)

A handwritten signature in cursive script that reads "Debra Steger".

Debra P. Steger

A handwritten signature in cursive script that reads "Milos Barutciski".

Milos Barutciski