Appeal of the Report of the Panel regarding the Dispute Between Artisan Ales Consulting Inc., a Private Person from Canada, and Alberta Regarding Beer Mark-ups

Designation: 16/17-10 BEER

Appeal Submission of Artisan Ales

December 1, 2017

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Part I – Overview

1. A hearing panel (the "Panel") found that two measures of Alberta did not comply with its obligations under the Agreement on Internal Trade (the "Agreement"). The measures related to the cost of selling beer in Alberta. Artisan Ales, a Calgary business that imports high-quality beer into Alberta from other provinces, was the complainant before the Panel.

2. Like all provinces, Alberta charges an amount on beer sold within its territory (a "mark-up"). In October 2015, Alberta began charging a much higher mark-up on beer originating outside of Alberta, British-Columbia and Saskatchewan. For the beers sold by Artisan Ales, the new mark-up was 525% higher than the mark-up on equivalent Alberta beer.

3. It is no longer disputed that this discriminatory mark-up violated Alberta's obligations in Chapter Ten of the Agreement. In August 2016, Alberta belatedly re-engineered its scheme. Alberta implemented a notionally equal mark-up on all beer and began paying a monthly "grant" for the sale of Alberta beer. The grant is precisely tailored to carry on Alberta's discriminatory scheme.[1]

4. Before the Panel, Alberta conceded that its initial scheme violated the Agreement, and defended its new scheme with only two arguments – one procedural and one substantive.

5. First, Alberta insisted that its amendments – enacted after Artisan Ales began its complaint – required Artisan Ales to launch a second complaint. The Panel reasonably dismissed this objection. Alberta's interpretation lacked textual support in the Agreement and risked crippling the mechanism for private complaints in Chapter Seventeen of the Agreement. Parties could indefinitely defer challenges through a series of cosmetic amendments. Frequently updated measures, such as alcohol mark-ups, could become immune to challenge. It would be surprising if the parties to the Agreement – who affirmed the importance of an

[1] There is an exception to this – For breweries with annual sales between 150,000 HL and 400,000 HL, the 2016 Measure imposes a slightly higher cost than the 2015 Measure. Schedule A to the submission of Saskatchewan on this appeal reflects this. Artisan Ales knows of only three Canadian breweries likely to be in this situation [Record, Artisan, Witness Statement of Mike Tessier, February 27, 2017, para. 21.]

accessible, timely, credible, and effective dispute mechanism[2] – had intended such a result without providing clear direction in the text of the Agreement.

6. Second, Alberta argued that its new measure complied with the Agreement, because any discrimination resided in the payment of grants, which Alberta argued did not need to comply with Chapter Ten. The majority of the Panel reasonably rejected this argument. Nothing in the text of the Agreement carved out such an exception to Chapter Ten's requirement for equal treatment of beer. Like its procedural objection, Alberta's interpretation of Chapter Ten could not be reconciled with the purpose or functioning of the Agreement. In effect, the interpretation would allow provinces to impose discriminatory charges on any products covered by the Agreement, so long as the province followed the two-step process devised by Alberta. Again, it would be surprising if the parties to the Agreement – who expressed a commitment not to establish new trade barriers and to treat Canadian goods equally, irrespective of origin[3] – had intended for this commitment to be so easily circumvented.

7. In this appeal, Alberta attempts to resurrect the same two arguments. This Appeal Panel should dismiss them. The Panel's rejection of these arguments fell well within a range of reasonable outcomes, defensible on the facts and the law.

8. Alberta further takes issue with the fairness of the Panel's process. In particular, Alberta criticizes the quality of the Panel's reasons. This submission should fail too, not least because Alberta waived its right under the Agreement to ask the Panel for clarifications to its report.

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[2] This intention is manifest in Article 1 of the Agreement (Mutually Agreed Principles), which states, in relevant part: "…the Parties recognize the need for supporting administrative, dispute settlement and compliance mechanisms that are accessible, timely, credible and effective…"

[3] This commitment is also found in Article 1 of the Agreement (Mutually Agreed Principles), which states, in relevant part:

> In the application of this Agreement, the Parties shall be guided by the following principles:
>
> (a) Parties will not establish new barriers to internal trade and will facilitate the crossboundary movement of persons, goods, services and investments within Canada
>
> (b) Parties will treat persons, goods, services and investments equally, irrespective of where they originate in Canada;

Part II – Facts

9. Paragraphs 6 to 24 of the appeal submission of Saskatchewan detail the factual context of the proceeding before the Panel, with comprehensive references to the record and submissions before the Panel.

10. Artisan Ales will not repeat all of this context, and will note only the essential factual findings about the measures at issue and the harm they caused. Further, Artisan Ales attaches to this submission only documents not already contained in the record.

11. Finally, although the relevant chapters of the Agreement are contained in the Panel's record, for ease of reference, Schedule A of this submission provides the text of the key provisions of Chapter Seventeen of the Agreement while Schedule B provides the text of the other key provisions of the Agreement.

A. Background

12. Like other provinces, Alberta indirectly controls the wholesale prices for beer through a mark-up regime. This regime influences retail prices.[4] Before October 28, 2015, Alberta imposed a common, graduated mark-up on the beer of all small brewers.[5]

13. On October 28, 2015, Alberta raised the mark-up for the beer of small brewers located outside of British Columbia, Alberta, and Saskatchewan (the New West Partnership) to the maximum mark-up rate of $1.25 per litre (the "2015 Measure").[6]

14. On August 5, 2016 (after Artisan Ales began its complaint under the Agreement), Alberta repealed the 2015 Measure and instituted a new system. Alberta began applying a mark-up of $1.25 per litre to the sale of beer brewed in any province. At the same time, Alberta started paying a grant on the sale of beer brewed in Alberta (collectively, the "2016 Measure").

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[4] Report of the Article 1716 Panel Regarding the Dispute between Artisan Ales Consulting Inc. and Alberta Regarding Beer Mark-Ups (2017) [the "Panel Report"], page 3.

[5] Panel Report, page 3.

[6] Panel Report, page 3.

15. Taken together, the two elements of the 2016 Measure essentially returned small Alberta brewers to the same economic position they were in with the 2015 Measure.[7]

16. To summarize the evolution of the regime through the 2015 Measure and the 2016 Measure, the following table shows the relative cost to sell the beer of small brewers with annual production of 20,000 hectolitres (this reflects the profile of the beer sold by Artisan Ales[8]):

Origin	**Prior to 2015**[9]	**2015 Measure**[10]	**2016 Measure**[11]
Beer from Alberta (assuming brewer sells all beer in Alberta)	$0.20 per litre	$0.20 per litre	Mark-up: $1.25 per litre Grant: $1.05 per litre Net: $0.20 per litre
Beer from Saskatchewan and British Columbia	$0.20 per litre	$0.20 per litre	$1.25 per litre
Beer from provinces other than Alberta, British Columbia, and Saskatchewan	$0.20 per litre	$1.25 per litre	$1.25 per litre

[7] Panel Report, pages 3-4.

[8] Witness Statement of Mike Tessier, February 27, 2017, para. 8. [Record, Artisan].

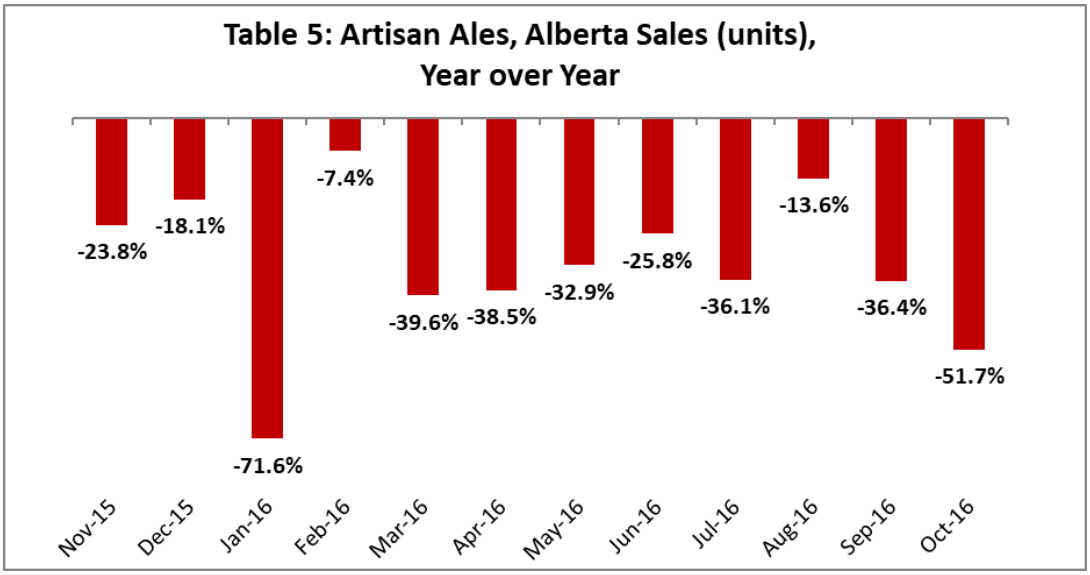
[9] AGLC Mark-up Rate Schedule (March 27, 2015) [Record, Artisan, Tab 13].

[10] AGLC Mark-up Rate Schedule (October 28, 2015) [Record, Artisan, Tab 16].

[11] AGLC Mark-up Rate Schedule (August 5, 2016) [Record, Artisan, Tab 25]; Alberta Small Brewers Development Program, Terms and Conditions (September 8, 2016) [Record, Artisan, Tab 26].

17. The 2015 and 2016 Measures devastated the business of Artisan Ales. Paragraphs 70-83 of Artisan Ales' submissions to the Panel catalogue the harm to Artisan Ales and the broader marketplace.[12] The majority of the Panel adopted these submissions as part of its reasons.[13]

18. These submissions showed that, in the year following October 2015, the net profits of Artisan Ales fell by 86%. Its sales, in dollar terms, fell by 32%.[14] Beginning in November 2015, units sold by Artisan Ales fell in each month compared to the previous year, an impact shown by Table 5 of its submissions to the Panel:



B. Brief history of the Panel proceeding

19. Alberta's procedural objection necessitates an overview of the Panel proceeding.

20. Alberta enacted the 2015 Measure on October 28, 2015.

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[12] Submissions of Artisan Ales, February 28, 2017, paras. 70-83.

[13] Panel Report, page 10 ("The majority of the Panel accepts the reasoning in paragraphs 70 – 83 of Artisan's written submissions to the effect that the 2016 Measure has impaired internal trade and caused injury and a denial of benefit.")

[14] Submissions of Artisan Ales, February 28, 2017, para. 76.

21. On April 15, 2016, Artisan Ales requested that the federal government initiate proceedings in respect of the 2015 Measure, pursuant to Article 1712 of the Agreement.[15] Artisan Ales asked Canada to initiate proceedings "in respect of a measure of Alberta relating to the mark-up applied to imported beer." The request provided the legislative context for mark-ups in Alberta and described the changes implemented on October 28, 2015.

22. On June 10, 2016, the federal government advised Artisan Ales, pursuant to Article 1712(4), that it chose not to initiate proceedings.[16] On July 13, 2016, Artisan Ales requested the initiation of proceedings pursuant to Article 1713.[17] This triggered the screening of the complaint under Article 1714.

23. On August 5, 2016, Alberta replaced the 2015 Measure with the 2016 Measure.

24. On August 15, 2016, the screener approved the request of Artisan Ales to initiate proceedings.[18] On August 29, 2016, pursuant to Article 1715 of the Agreement, Artisan Ales requested consultations with Alberta.[19] The request for consultations of Artisan Ales stated:

> *Please note that the complaint of Artisan Ales concerns the measure both as of April 15, 2016 and following the implementation of recent changes. In brief, the complaint alleges that these changes, which include the Alberta Small Brewers Development Program, represent the continuation of the measure complained of and remain inconsistent with the Agreement.*

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[15] Request for Canada to Initiate Proceedings, Letter from Benjamin Grant to Stephen Fertuck, April 15, 2016 (without enclosures) [Record, Artisan, Tab 1].

[16] Decision by Canada regarding Request for Proceedings, Letter to Benjamin Grant from David Dunbar, June 10, 2016 [Record, Artisan, Tab 2].

[17] Request for Initiation of Proceedings, Letter from Benjamin Grant to Secretariat, July 13, 2016 [Record, Artisan, Tab 3].

[18] Artisan Ales, Report of the Screener, August 15, 2016 [Record, Artisan, Tab 4].

[19] Request for Consultations, Letter from Benjamin Grant to Shawn Robbins, August 29, 2016 [Record, Artisan, Tab 5].

25. On January 30, 2017, pursuant to Article 1716, Artisan Ales requested that the Secretariat establish a panel.[20] The request of Artisan Ales stated:

> *Actual measures complained of*
>
> *The measures at issue are the mark-ups imposed by the Alberta Gaming and Liquor Commission (the "Commission") on beer 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.*

26. On June 1, 2017, the Panel held a hearing for the complaint. The Panel released its report on July 28, 2017.

C. Findings of the Panel

27. In its report, the Panel first addressed Alberta's procedural objection, unanimously finding that it could examine the 2016 Measure.[21]

28. The majority of the Panel then found that:[22]

a. the 2015 Measures are inconsistent with Article 4.01 and 10.04 of the AIT;

b. the 2015 Measures are inconsistent with Article 4.03 and 10.05 of the AIT;

c. the 2016 Measures (ie. the uniform mark-up and the ASBD grant program) are inconsistent with Article 4.01 and 10.04 of the AIT;

d. the 2016 Measures (ie. the uniform mark-up and the ASBD grant program) are inconsistent with Article 4.03 and 10.05 of the AIT.

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[20] Request for Panel, Letter from Benjamin Grant to Secretariat, January 30, 2017 [Record, Artisan, Tab 6].

[21] Panel Report, pages 5-7.

[22] Panel Report, pages 10-11.

e. 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;

f. Alberta must repeal or amend the Measures 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;

g. the operational costs should be assessed against Artisan, Alberta, and Saskatchewan on the following basis:

Saskatchewan	Five (5%) percent;
Artisan	Forty-Five (45%) percent;
Alberta	Fifty (50%) percent; and

h. Artisan be awarded tariff costs on the basis of Fifty (50%) percent of the permissible cap.

29. One member of the Panel dissented on the Panel's findings about the 2016 Measure and the Panel's recommendation regarding the 2016 Measure.[23] That member also expressed reservations regarding the period and extent of the harm caused by the 2015 and 2016 Measures. Otherwise, the findings of the Panel were unanimous.

[23] Panel Report, pages 15-16.

Part III – Issues on appeal

A. Issues

30. Alberta raises five issues on appeal. Put plainly:

a. Alberta argues that the Panel should not have examined the 2016 Measure.[24]

b. Alberta argues that the Panel did not actually engage in or analyze the requirements of the Agreement as they apply to the 2016 Measure.[25]

c. Alberta argues that the Panel should not have concluded that the 2016 Measure violated the Agreement (specifically, Articles 4.01, 4.03, 10.04, and 10.05 of the Agreement).[26]

d. Alberta argues that the Panel failed to provide reasons.[27]

e. Alberta argues that the Panel failed to give Alberta an opportunity to respond to an argument made by Artisan Ales in oral submissions in reply.[28]

31. Artisan Ales will begin by addressing the first and third arguments, which largely repeat the two arguments Alberta made to the Panel. Artisan Ales will then address the remaining alleged errors, which relate to the fairness of the procedure before the Panel.

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[24] Appeal Submission of Alberta, dated October 12, 2017, paras. 6-12.

[25] Appeal Submission of Alberta, dated October 12, 2017, paras. 13-17.

[26] Appeal Submission of Alberta, dated October 12, 2017, paras. 18-28.

[27] Appeal Submission of Alberta, dated October 12, 2017, paras. 29-34.

[28] Appeal Submission of Alberta, dated October 12, 2017, para. 35.

B. Preliminary issue with notice of appeal

32. Saskatchewan has identified an irregularity with the notice of appeal of Alberta.[29] Saskatchewan correctly notes that Alberta should have requested the establishment of an Appeal Panel under Article 1720 of the Agreement, not Article 1706.1.

33. Artisan Ales does not consider this error to be fatal to the jurisdiction of this Appeal Panel. Dispute resolution under the Agreement is intended to be accessible, timely, credible, and effective.

Part IV – Submissions

A. Apart from issues of procedural fairness, the standard of review is reasonableness,

34. This is an appeal, not a *de novo* proceeding. Accordingly, for each issue, the Appeal Panel must first consider the standard to use to review the Panel's decision.

35. Artisan Ales agrees with Alberta and Saskatchewan that the principles established in the *Dairy Appeal Panel* ought to apply to this appeal.[30]

36. In that decision, two standards were identified.

37. Under the standard of correctness, the Appeal Panel may substitute its decision for that of the Panel.

38. Under the more deferential standard of reasonableness, the Appeal Panel must determine whether the Panel's decision "falls within the range of acceptable outcomes".[31] Drawn from the context of administrative law, the reasonableness standard is animated by the principle that certain questions which come before tribunals can give rise to a number of

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[29] Appeal Submission of Saskatchewan, dated November 27, 2017, paras. 38-41.

[30] Appeal Submission of Alberta, dated October 12, 2017, para. 2; Appeal Submission of Saskatchewan, dated November 27, 2017, paras. 33-37.

[31] *Report of the Article 1706.1 Appeal Panel Regarding the Dispute between Saskatchewan and Quebec Concerning Dairy Blends, Dairy Analogues and Dairy Alternatives* (2015), paras. 28, 29. [Appeal Submission of Alberta, Tab A] ["Dairy Appeal Panel"].

possible, reasonable conclusions.[32] Reasonableness concerns the "justification, transparency, and intelligibility" of the decision-making process.[33]

39. Artisan Ales further agrees with Alberta that *Dairy Appeal Panel* establishes that the standard of review for an error of law, which includes interpretation of the Agreement, is reasonableness, and that the standard of review for matters of procedural fairness (or the "principles of natural justice") is correctness.[34]

40. These principles, applied to the three major issues of this appeal, lead to the following conclusions:

a. 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 Agreement.

b. The Panel's examination of the 2016 Measure concerns the interpretation of the Agreement and should attract a standard of reasonableness.

c. The fairness of the Panel's procedure should be reviewed on a standard of correctness.

41. Alberta's submissions are consistent with the second and third of these conclusions. Alberta submits, however, that the Panel's decision to examine the 2016 Measure is a matter of jurisdiction, triggering correctness review.[35]

42. The Appeal Panel should reject this submission, and should apply a standard of reasonableness to the Panel's decision to examine the 2016 Measure.

43. At its core, Alberta's procedural objection concerning the 2016 Measure relies on its preferred interpretation of Articles 1712 and 1714 of the Agreement. Alberta essentially argues

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[32] *Dunsmuir v. New Brunswick*, 2008 SCC 9, para. 47 [Appeal Submission of Alberta, Tab C].

[33] *Ibid*, para. 37.

[34] Appeal Submission of Alberta, dated October 12, 2017, para. 3.

[35] Appeal Submission of Alberta, dated October 12, 2017, para. 5.

that these provisions required Artisan Ales to begin a second complaint when Alberta replaced the 2015 Measure with the 2016 Measure. As a matter of interpretation of the Agreement, the Panel's rejection of this submission commands deference.

44. The decision of the *Dairy Appeal Panel* illustrates that a standard of correctness does not automatically apply wherever it is alleged that a panel "acted beyond its jurisdiction". In that case, Quebec alleged that the panel below had acted beyond its jurisdiction by recommending that Quebec refrain from enforcing non-compliant measures. The *Dairy Appeal Panel* first observed:

> *In our view, whether the Panel had the authority to make the impugned recommendations involves a question of interpretation of the scope of Article 1706(3)(d) of the AIT (discussed further below) and the Panel's determination ought to be reviewed on the same standard as its determination of other issues regarding interpretation of the AIT.*[36]

45. After discussion, the Panel concluded:

> *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?*
>
> *In our view, the appropriate standard is reasonableness.*[37]

46. The question here – whether Artisan Ales should have made a second complaint – is no more jurisdictional than the alleged error before the *Dairy Appeal Panel*. Accordingly, the same standard of review should apply.

47. Alberta relies on a reference to "true questions of jurisdiction" in the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, a landmark case in Canadian administrative law. This comment must be read in light of the Supreme Court's caution in

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[36] Dairy Appeal Panel, para. 80

[37] Dairy Appeal Panel, paras. 91-92.

Dunsmuir, quoting the former Chief Justice Dickson, that courts should not "be alert to brand as jurisdictional issues… that which are doubtfully so".[38] It must also be read in light of the comments of the majority of the Supreme Court since *Dunsmuir* casting doubt on the existence of true questions of jurisdiction.[39] The trend of Canadian administrative law jurisprudence is away from semantic debates about jurisdiction and towards a broad presumption of deference.

B. The Panel's decision to examine the 2016 Measure was reasonable

48. The Panel's decision to examine the 2016 Measure fell well within a range of reasonable outcomes, acceptable in light of the facts and the law. Put simply, Chapter Seventeen does not require a complainant, such as Artisan Ales, to begin a fresh complaint each time a responding government amends, augments, repeals, or replaces the measure at issue.

49. On this issue, Artisan Ales agrees with the position taken by Saskatchewan at paragraphs 44-66 of its submissions in this appeal, and paragraphs 45-60 of its submissions before the Panel[40] (the latter of which the Panel adopted as part of its reasons.)[41]

50. Artisan Ales will not repeat the detail of these submissions. In sum, the clearest textual clue in the Agreement – that a private person may request a panel "when the matter in question has not been resolved" to their satisfaction[42] – supports the Panel's interpretation. The Panel's interpretation also accords with the parties' intention that Chapter Seventeen provide an accessible, timely, credible, and effective dispute mechanism. Finally, the

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[38] *Dunsmuir v. New Brunswick*, 2008 SCC 9, para. 35 [Appeal Submission of Alberta, Tab C].

[39] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, para. 26 ("This category is "narrow" and these questions, assuming they indeed exist, are rare…") [Appeal Submission of Artisan, Tab 1].

[40] Panel Submission of Saskatchewan, dated March 21, 2017.

[41] Panel Report, page 5 ("The majority, but not all, of the members of the Panel were also persuaded by the reasoning found in Saskatchewan's written submission, Paragraphs 45 through 60.")

[42] Article 1716 states, in relevant part:

> Subject to Article 1714(11) and paragraph 2, where the matter in question has not been resolved to the satisfaction of the Person, the Person may make a written request to the Secretariat, with a copy to the Committee, to establish a Panel.

interpretation is consistent with the decisions of previous panels whiched rejected restrictive and technical approaches to Chapter Seventeen.[43]

51. Before the panel and again on appeal, Alberta emphasizes the first two steps of a private complaint, found in Articles 1712 and 1714 of the Agreement. No party disputes these steps are mandatory, and the Panel's interpretation does not diminish their importance.

52. Article 1712 obliges a private person to first ask their own government to initiate a proceeding on their behalf. The Panel's interpretation does not waive this requirement. Parties to the Agreement have the discretion to begin (or decline to begin) proceedings on behalf of a private person in respect of a given subject matter. Parties exercise this discretion knowing that the precise measures falling within that subject matter may need adjustment as the dispute moves through the steps of Chapter Seventeen (as happened in this proceeding, in *Ontario – Dairy Analogues*, and in *Quebec-Dairy Blends*).

53. If a party which has declined to begin proceedings believes that a private person has requested consultations or a panel on measures beyond the subject matter of the initial request under Article 1712, that party can register its objection to the Panel. This may be why Chapter Seventeen requires private complainants to notify all parties of a request for consultations[44] and of a request for a panel.[45] The relevant party here, Canada, has known of

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[43] *Report of the Article 1704 Panel Concerning the Dispute Between Alberta / British Columbia and Ontario Regarding Ontario's Measures Governing Dairy Analogs and Dairy Blends* (2004), at page 31 (*Ontario – Dairy Analogues I*) [Record, Artisan, Tab 46); *Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Québec Regarding Québec's Measure Governing the Sale in Québec of Coloured Margarine* (2005), at page 26 [Record, Artisan, Tab 48].

[44] Article 1715 states, in relevant part:

> A Person that has received approval from the Screener to initiate Proceedings may request consultations with the Complaint Recipient respecting the complaint, by delivering written notice within 60 days after receiving such approval to the Complaint Recipient and, on the same date, to all other Parties and to the Secretariat.

[45] Article 1716 states, in relevant part:

> Subject to Article 1714(11) and paragraph 2, where the matter in question has not been resolved to the satisfaction of the Person, the Person may make a written request to the Secretariat, with a copy to the Committee, to establish a Panel.

Alberta's amendments since Artisan Ales delivered its request for consultations on August 27, 2016. Canada was notified again when Artisan Ales delivered its request for panel on January 30, 2017. To date, Canada has not registered any objection that this proceeding engages a different subject matter than Artisan Ales' initial request. No other party to the Agreement has sought to intervene and make submissions on the scope of Article 1712.

54. The Panel's interpretation similarly respects the function of Article 1714. That article creates a screening process for a private complaint. The criteria of Article 1714 show that screening is intended to weed out frivolous, harassing complaints launched by persons who have suffered no injury:

> *In deciding whether the Person should be permitted to initiate Proceedings, the Screener shall take into account only the following:*
>
> *(a) whether the complaint is frivolous or vexatious;*
>
> *(b) whether the complaint has been instituted merely to harass the Complaint Recipient; and*
>
> *(c) whether there is a reasonable case of injury or denial of benefit to the Person or, in the case of a trade union, injury or denial of benefit to its members.*

55. The disputants in this appeal agree that complaints must be screened. The Panel's recognition that the precise measures in question might evolve after screening – driven sometimes by changes made by the responding government – will not lead to a flood of frivolous, bad faith proceedings. *Bona fide* complaints will not transform into abusive ones simply because responding governments make adjustments to their measures in the course of the proceeding.

56. In any event, the text of Article 1712 and Article 1714 cannot be read in isolation. They must be read harmoniously with the balance of the text of Chapter Seventeen, particularly the ability of a person, in Article 1716, to request a panel where the "matter in question has not been resolved to the satisfaction of the person". When the text, context, purpose, and precedent of the Agreement is considered as a whole, the Panel's decision falls well within a range of acceptable outcomes.

57. Finally, it is worth noting that the core of the Panel's reasoning on this point – that the 2016 Measure was functionally identical to the 2015 Measure – resonates with the approach of

panels dealing with similar problems under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") of the WTO. While this jurisprudence does not bind the Appeal Panel, the similarity with WTO practice underscores the reasonableness of the Panel's interpretation.

58. Like the Agreement, the DSU requires a request for consultations followed, if necessary, by a request for a panel. The DSU requires a complaining party to identify the "measures at issue" in its request for consultations[46] and the "specific measures at issue" in its request for panel.[47]

59. The Appellate Body and panels under the DSU have consistently held that the terms of reference of a panel include subsequent amendments where those amendments do not change the substance of the original measure. In *Chile – Price Bands System*, the responding party, Chile, amended its measure after Argentina submitted a request for panel. On appeal, the Appellate Body approved the decision of the panel to examine the amended measure, providing the following reasoning:

> *However, generally speaking, the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a "moving target". If the terms of reference in a dispute are broad enough to include amendments to a measure—as they are in this case—and if it is necessary to consider an amendment in order to secure a positive solution to the dispute—as it is here—then it is appropriate to consider the measure as amended in coming to a decision in a dispute.*[48]

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[46] *Understanding on Rules and Procedures Governing the Settlement of Disputes* (Marrakesh Agreement Establishing the World Trade Organization, Annex 2), Article 4(4) [Appeal Submission of Artisan, Tab 2].

[47] *Ibid*, Article 6(2).

[48] Excerpt, *Chile – Price Band System And Safeguard Measures Relating To Certain Agricultural Products*, Report of the Appellate Body, September 23, 2002, Para. 144 [Appeal Submission of Artisan, Tab 3].

60. In language similar to the Panel in this dispute, the Appellate Body said: "Chile's price band system remains essentially the same after the enactment of [the amendment]."[49]

61. The same reasoning was followed, *inter alia*, by the panel in *EC – Fasteners*. There, the panel held that it could examine an almost identically-worded replacement to the original regulation at issue. The panel rejected the strict interpretation of the responding party, with reasoning which aptly applies to Alberta's objection here:

> *…we consider the European Union's objection to be formalistic, rather than substantive. In the circumstances of this dispute, the due process rights of the European Union cannot be considered to have been undermined by allowing the dispute to go forward challenging the replacement measure rather than the measure named in the panel request. Indeed, to sustain the European Union's objection would not be consistent with the effective functioning of the WTO dispute settlement system, as it might lead to inappropriate legal manoeuvres to avoid dispute settlement, inconsistent with the obligation of Members to engage in dispute settlement "in good faith in an effort to resolve the dispute".*[50]

62. Sustaining Alberta's objection would similarly thwart the effective functioning of the dispute resolution mechanism of the Agreement. It could lead to inappropriate legal manoeuvres, inconsistent with the undertaking of parties in the Agreement "to resolve disputes in a conciliatory, cooperative and harmonious manner."[51] The Panel reasonably rejected Alberta's rigid interpretation of the private complaint process under Chapter Seventeen, and this decision should not be disturbed.

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[49] *Ibid*, para. 139.

[50] *European Communities – Definitive Anti-Dumping Measures On Certain Iron Or Steel Fasteners From China, Report Of The Panel,* December 3, 2010**,** Report of the Panel, December 3, 2010, para. 7.34 [Appeal Submission of Artisan, Tab 4].

[51] Article 1700(1) (Cooperation) states:

1. The Parties undertake to resolve disputes in a conciliatory, cooperative and harmonious manner.

C. The Panel's examination of the 2016 Measure was reasonable

63. Alberta does not challenge the Panel's finding that the 2015 Measure violated Alberta's commitments under Articles 4.01, 4.03, 10.04, and 10.05 of the Agreement. Alberta challenges only the Panel's finding that the 2016 Measure violated the same commitments.

64. The Appeal Panel should reject this challenge. The Panel's determination fell within a range of reasonable outcomes, defensible in light of the facts and the law.

65. On this point, the Panel began by considering the features of the 2016 Measure as a whole. The Panel concluded that the 2016 Measure substantially replicates the 2015 Measure:

> *The majority of the Panel 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 grant 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.*[52]

66. Having already found that the 2015 Measure did not comply with the Agreement, the Panel concluded that the 2016 Measure led to the same result.

67. The Panel's common-sense approach is intelligible, defensible, and justifiable. The Panel was entitled to assess the 2016 Measure as a single policy. Artisan Ales agrees with the position of Saskatchewan on this point, found in its appeal submissions at paragraphs 25 to 32. As described there, overwhelming evidence before the Panel – from Alberta, Alberta brewers, and the design of the 2016 Measure – demonstrated that the two aspects of the 2016 Measure dovetailed to form a single coordinated measure. Before the Panel, Alberta made legal arguments about the 2016 Measure but didn't deny the factual link. It was well within the

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[52] Panel Report, page 8.

range of reasonable outcomes for the Panel to examine the 2016 Measure for what it was, a single measure.

68. Even if the Panel parsed out and examined the grant aspect of the 2016 Measure alone, the Panel's finding of a violation remains a reasonable outcome. The relevant provisions of the Agreement would operate on the grant as follows:

a. By making payments for the sale of Alberta beer, the grant represents a measure "relating to trade in beverage alcohol products". It thus falls within the scope of Chapter Ten by operation of Article 1001.[53]

b. Via Article 1000, the non-discrimination obligation in Article 401 of the Agreement applies to the grants and other measures covered by Chapter Ten.[54] Article 1004 further clarifies that parties must not discriminate in measures "in respect of" pricing.

c. Alberta pays grants when Alberta beer is sold in Alberta but not when the beer from other provinces is sold in Alberta. Thus, Alberta treats the beer of other provinces less favourably than the beer of Alberta, contrary to Article 401.

69. It is worth noting that the parties negotiated specific exceptions and reservations in Chapter Ten. For example, New Brunswick and Quebec reserved the right to impose differential fees or charges on the beer of other parties where justified by the fees or charges imposed on their own beer.[55] Chapter Ten provides no exception or reservation permitting Alberta to impose a higher cost on the sale of beer of other provinces.

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[53] Article 1001 states:

> This Chapter applies to measures adopted or maintained by a Party relating to trade in beverage alcohol products.

[54] The relevant part of Article 1000: Application of General Rules states:

> For greater certainty, Articles 400 (Application), 401 (Reciprocal Non-Discrimination), 403 (No Obstacles), 404 (Legitimate Objectives), 405 (Reconciliation) and 406 (Transparency) apply to this Chapter, except as otherwise provided in this Chapter.

[55] Article 1010(3).

70. Before the Panel, Alberta focused its submissions on the provisions of Chapter Six of the Agreement. Chapter Six addresses investment and, in some places, the provision of incentives. Under Alberta's interpretation, Chapter Six authorizes Alberta to pay grants on the sale of beer, operating in effect as an exception to the non-discrimination obligations found in Chapter Ten and elsewhere in the Agreement.

71. The Panel rejected Alberta's interpretation, finding that this interpretation would significantly reduce the scope and effectiveness of Chapter 10 and the Agreement as a whole.[56] The Panel's rejection of this interpretation was reasonable and supported by the text, structure, and purpose of the Agreement.

72. Alberta's argument depends on the mistaken premise that Chapter Six operates as an exception to obligations elsewhere in the Agreement, including Chapter Ten. It does not. Rather, Chapter Six and Chapter Ten contain different and complementary obligations. Chapter Ten applies to the alcohol marketplace and requires, in particular, non-discrimination in measures related to the trade and pricing of beer. The incentive provisions of Chapter Six limit the most pernicious incentives in any of the economic sectors covered by the Agreement. Chapter Six acts as a *limit* on the ability of provinces to adopt incentives, not as *permission* to implement all incentives except those so egregious as to violate the terms of Chapter Six.

73. None of the provisions of Chapter Six identified by Alberta support its position.

74. Alberta points first to Article 600, which states:

> *Articles 401 (Reciprocal Non-Discrimination), 402 (Right of Entry and Exit), 403 (No Obstacles) and 404 (Legitimate Objectives) do not apply to this Chapter.*

75. Artisan Ales agrees that that this provision signals that Article 401 and 403 do not modify the obligations contained in Chapter Six. But Chapter Six and Chapter Ten are not watertight compartments. Indeed, the metaphor in the Agreement of a "horizontal chapter" (Chapter Six) and a "vertical chapter" (Chapter Ten) implies that the two chapters overlap, that some measures must comply with both chapters. As a measure which relates to trade in beer, the 2016 Measure must comply with Chapter Ten. The grant component of the 2016 Measure

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[56] Panel Report, page 10.

may also need to comply with obligations in Chapter Six related to incentives, but that does not detract or alter Chapter Ten's requirement for equal treatment in the trade of beer.

76. Alberta next relies on Article 601, which states:

> *Except as otherwise provided in this Chapter, in the event of an inconsistency between this Chapter and any other chapter in Part IV, the other chapter prevails to the extent of the inconsistency.*

Alberta submits that this language "clearly provides that a measure permitted under Chapter 6 cannot be found to be inconsistent with the other chapters in Part IV, including Chapter 10".[57]

77. This submission does not work with the plain meaning of Article 601, which on its face *subordinates* Chapter Six to the other chapters of Part IV. Moreover, Chapter Six does not "permit" incentives. It restricts them, via obligations in Articles 607 and 608.

78. Finally, Alberta suggests that Article 607(2) means that the Agreement generally permits a party to tie incentives to economic activities in its territory.[58] Article 607(2)[59] qualifies Article 607(1), which prohibits parties from imposing certain performance requirements within their incentives. Alberta makes a similar argument about Article 608(2),[60] which states:

> *Nothing in this Agreement shall be construed to require a Party to provide incentives for activities undertaken outside its territory.*

79. Both of these assertions misunderstand the nature of the 2016 Measure, the complaint of Artisan Ales, and the decision of the Panel. Artisan Ales (a Calgary business) does not seek for Alberta to incentivize brewing in other provinces. Nor does the Panel's interpretation require

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[57] Appeal Submission of Alberta, dated October 12, 2017, para. 25.

[58] Appeal Submission of Alberta, dated October 12, 2017, para. 27.

[59] Article 607(2) states:

> For greater certainty, nothing in paragraph 1 shall be construed to prevent a Party from conditioning the receipt of an incentive on any requirement to carry out economic activities in its territory or to create or maintain employment.

[60] Appeal Submission of Alberta, dated October 12, 2017, para. 25.

that. The Panel's interpretation requires only that Alberta permit Artisan Ales to sell its beer in Alberta on the same terms as beer originating from Alberta.

80. The only activity, if any, incentivized by the grants paid under 2016 Measure is the *sale* of beer in Alberta, not its manufacture. An Alberta brewer which sold all of its beer into Saskatchewan would receive no grant from the 2016 Measure.[61] Only beer sold in Alberta – on which Alberta has already collected $1.25 – is eligible for the return of a portion of the mark-up as a grant.

81. The Panel was rightly concerned with the implications of Alberta's interpretation for the effectiveness of Chapter Ten and the Agreement generally.[62] Alberta's interpretation would allow provinces to impose discriminatory charges, fees, taxes, or tariffs so long as they adopt Alberta's two-step approach. Indeed, before the Panel, Alberta was asked whether a province could impose a 10% tax on the sale of raspberry jam and refund the tax to local producers. Alberta confirmed that, in its view, such a measure would comply with the Agreement.[63] With minimal effort, the non-discrimination obligations of the Agreement could be hollowed out for taxes, levies, fees, or charges.

82. In contrast, the Panel's common-sense approach strikes a balance between the ability of provinces to pursue economic development and their Chapter 10 obligations to treat beer equally in their markets. There is a suite of supports that Alberta could provide to its brewing industry which would likely comply with Chapter Ten, including start-up assistance, employment supports, education funding, promotion, and research. Chapter Ten simply prevents Alberta from creating discriminatory terms for the sale of beer in Alberta.

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[61] This flows from the definition of "cumulative sales" in the terms and conditions of the grant: Alberta Small Brewers Development Program, Terms and Conditions (September 8, 2016) [Record, Artisan, Tab 26].

[62] Panel Report, page 10 ("To accept the argument of counsel for Alberta concerning the interaction between Chapter 10 and 6 would significantly reduce the scope and effectiveness of Chapter 10 and the AIT as a whole.")

[63] Excerpts of Hearing Transcript (June 1, 2017), Page 88-90 [Appeal Submission of Saskatchewan, Tab 2].

83. Finally, to the extent there is any ambiguity in the relationship between Chapter Ten and Chapter Six, the interpretative rule in paragraph 4 of Annex 1813 removes this ambiguity, stating:

> *In the event of an inconsistency between a vertical chapter and a horizontal chapter, the vertical chapter prevails to the extent of the inconsistency, except as otherwise provided.*

As a result, even if Chapter Six could be interpreted as "permitting" the scheme of the 2016 Measure, Alberta's obligations in Chapter Ten would take precedence.

84. In its written submission on this appeal, Alberta raises a provision of the new *Canadian Free Trade Agreement*, suggesting that the 2016 Measure complies with that agreement.[64] While Artisan Ales disputes this assertion, this is not the appropriate place to address the issue. The transition provisions of the CFTA make clear that the Panel and this Appeal Panel should consider only provisions of the Agreement in discharging their mandate. Article 1014 of the CFTA states, in relevant part:

> *1. If, before the effective date, a Complaining Person in a Pre-existing Dispute has requested that proceedings be initiated under Article 1712(1) (Initiation of Proceedings by Government on Behalf of Persons) or Article 1713(1) (Initiation of Proceedings by Persons) of the Agreement on 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.*
>
> *2. For greater certainty, a Presiding Body established under Article 1717 (Establishment of Presiding Body), Article 1720 (Appellate Panel: Jurisdiction and Process), or Article 1721 (Mutually Satisfactory Resolution, Confirmation of Compliance and Request for Compliance Panel) of the Agreement on Internal Trade for the purposes of the Pre-existing Dispute <u>shall determine the matter in</u>*

[64] Appeal Submission of Alberta, dated October 12, 2017, para. 28.

> *accordance with the provisions of the Agreement on Internal Trade*.[65] [emphasis added]

85. Given this unambiguous direction, it would have been inappropriate for the provisions of the CFTA to play any role in this complaint.

D. The Panel followed a fair procedure

i. The Panel met its duty to provide reasons

86. Alberta alleges that the Panel breached the rules of natural justice by failing to provide reasons.[66] This submission focuses on the Panel's examination of the 2016 Measure and its award of tariff costs. In a similar vein, Alberta submits that the Panel, after wrongfully assuming jurisdiction over the 2016 Measure, failed to exercise that jurisdiction.[67] These submissions should be rejected for three reasons.

87. First, Alberta in essence is challenging the adequacy of the Panel's reasons. The Panel gave reasons following the hearing, issuing a 17-page report. This discharged the Panel's duty of fairness. As the Supreme Court has explained, when reasons are given, challenges to their adequacy is a matter of substance, not procedural fairness:

> *It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there are reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.*[68] [emphasis added]

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[65] Excerpt, *Canadian Free Trade Agreement* [Appeal Submission of Artisan, Tab 5].

[66] Appeal Submission of Alberta, dated October 12, 2017, para. 29-34.

[67] Appeal Submission of Alberta, dated October 12, 2017, para. 13-17.

[68] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, para. 22 [Appeal Submission of Artisan, Tab 6].

88. Second, when considering the overall reasonableness of the Panel's decision, the Appeal Panel should consider the reasons together with the record and the outcome of the proceeding. Again, as the Supreme Court explains:

> *In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (Dunsmuir, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.*
>
> *Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn., 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 391). In other words, 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.*[69]
> [emphasis added]

89. The Panel's reasons in respect of the 2016 Measure satisfy this standard. The Panel's reasoning was straightforward. Reading the Panel's reasons together with the record, including Alberta's late concession that the 2015 Measure violated the Agreement, and read together with the legal context outlined in this submission and in Saskatchewan's submission, this Appeal Panel can determine that the Panel's decision regarding the 2016 Measure fell within a range of acceptable outcomes.

90. Third, even if any aspect of the Panel's reasons could be considered a matter of natural justice, Alberta has waived any right to make this objection. It is well established in Canadian

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[69] *Ibid*, paras. 15-16.

administrative[70] and appellate[71] jurisprudence that a party must raise a violation of natural justice at the earliest opportunity. Failure to do so will generally be treated as a waiver of the right to object.[72]

91. Alberta had the opportunity to clarify the reasons of the Panel. The Panel provided its report to the parties on July 28, 2016. In the email attaching the report, the Secretariat alerted the parties to their right, under Article 1719(5), to request clarifications from the Panel.[73] Article 1719(5) states:

> *Within 10 days after the receipt of the Report, any Participant may, with notice to the chairperson of the Panel, the Secretariat and all other Participants, request that the Panel:*
>
> *(a) clarify one or more aspects of the Report, in which case the Panel shall, within 15 days of receipt of the notice, provide the clarification; or*
> *(b) correct in the Report any errors in computation or translation, any clerical or typographical errors, or any errors of a similar nature, in which case the Panel may, within 15 days of receipt of the notice, make such corrections as it considers appropriate.*

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[70] See e.g. *Restrepo Benitez v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 461, para. 220 ("From the above discussion, I would take the principle that an applicant must raise an allegation of bias or other violation of natural justice before the tribunal at the earliest practical opportunity. The earliest practical opportunity arises when the applicant is aware of the relevant information and it is reasonable to expect him or her to raise an objection.") [Appeal Submission of Artisan, Tab 7].

[71] See e.g. *Harris v. Leikin Group Inc.,* 2014 ONCA 479, para. 53 ("As a general rule, a party to a civil action cannot appeal on the basis of some aspect of trial procedure to which it did not object or sit on an objection only to raise it once it learns of an unfavourable result.") [Appeal Submission of Artisan, Tab 8].

[72] *Restrepo Benitez*, para. 212 ("As observed by the Federal Court of Appeal in *Kozak*, above at paragraph 66, parties are not normally able to complain of a breach of a duty of procedural fairness by an administrative tribunal if they did not raise it at the earliest reasonable moment.") [Appeal Submission of Artisan, Tab 7].

[73] Email from Patrick Caron to the parties, July 28, 2017, [Appeal Submission of Artisan, Tab 9].

92. Rather than exercise this right, Alberta remained silent. It is unfair to the Panel and to the other parties for Alberta to have waited until now to complain that the Panel's reasons are unclear.

93. In paragraphs 98 to 103 of its submission, Saskatchewan observes that the Panel does not appear to offer reasons with respect to Articles 403 and 1005 (the "no obstacles" rules) distinct from its reasons on Articles 401 and 1004 (the "non-discrimination" rules).

94. Read in their entire context, it is clear that the Panel's reasons for concluding that the 2016 Measure created an obstacle to trade were the same reasons the Panel concluded the 2016 Measure was discriminatory. This is a reasonable conclusion. Most if not all discriminatory measures are, by definition, obstacles to trade. There is no need for the Appeal Panel to substitute its own finding or to require the Panel to provide further reasons for the finding with respect to no obstacles.

ii. Alberta had a full opportunity to be heard

95. Alberta alleges a breach of its right to be heard stemming from the oral submissions of Artisan Ales in reply, which referred to an article of the Agreement (Article 1721) not raised in written submissions. The point related to Alberta's procedural objection about the 2016 Measure.

96. The Appeal Panel should reject this submission for two reasons.

97. First, if any part of the reply submissions of Artisan Ales took Alberta by surprise at the hearing on June 1, 2017, Alberta was obligated to object at the time. Had Alberta done so, the Panel could have permitted Alberta to make surreply on the point and avoided any concern of natural justice.

98. Alberta did not object, either at the hearing or in the eight weeks between the hearing and the Panel's report. Having chosen to remain silent, Alberta cannot now complain for the first time that the Panel did not afford it the opportunity to be heard.

99. The decision of *CEPU Local 141 v. Bowater Mersey Paper Co*. is illustrative, as it featured very similar facts.[74] In that case, after an unsuccessful labour arbitration, the company involved complained that the union made a new submission on rebuttal without an opportunity for the company to respond. The company sought judicial review of the arbitral award on that basis. The Nova Scotia Court of Appeal rejected this late objection, holding that the company had available procedures to deal with new submissions on rebuttal. First, the company could have objected immediately that the submission was not proper rebuttal.[75] Second, the company could have requested the opportunity to make surrebuttal.[76] Having exercised neither of these procedures, it was too late for the company to attempt to invalidate the arbitral award based on a "minor procedural problem". The company had declined to take advantage of its full opportunity to be heard.[77]

100. Second, even if Alberta could establish a breach of procedural fairness, the breach would not be serious enough to warrant a remedy on appeal such as a re-hearing. Like a court on judicial review, the remedial jurisdiction of the Appeal Panel under Article 1720(4) is discretionary – the Appeal Panel "*may* confirm, vary, rescind, or substitute the Report in whole or in part, or refer the matter back to the Panel for re-hearing". In administrative law, a breach of procedural fairness will not require a re-hearing where the error "occasions no substantial wrong or miscarriage of justice" or where the error does not affect the outcome of the hearing.[78]

101. The alleged error here had no apparent impact on the outcome of the hearing. The Panel simply noted the argument of Artisan Ales regarding Article 1721 without expressing any

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[74] *Communications, Energy and Paperworkers Union of Canada Local 141 v. Bowater Mersey Paper Co. Ltd.*, 2010 NSCA 19 (CanLII) [Artisan Ales Appeal Submissions, Tab 10].

[75] *Ibid*, para. 50.

[76] *Ibid*, para. 52.

[77] *Ibid*, para. 55 ("Bowater chose to neither object nor request surrebuttal. This was not a denial of Bowater's "full opportunity". This was Bowater's own choice not to exercise its full opportunity.")

[78] *Nagulathas v. Canada (Citizenship and Immigration)*, 2012 FC 1159, para. 24 ("Where there may be a breach of the rules of fairness, the court should assess whether the error "occasions no substantial wrong or miscarriage of justice"..."). [Appeal Submission of Artisan, Tab 11].

specific reliance on it.[79] The core reason of the Panel in deciding to examine the 2016 Measure was the functional equivalence of the 2015 and 2016 Measure, a finding repeated throughout the Panel's report.[80] As discussed above, this reasoning fell within a range of reasonable outcomes.

E. Costs

i. All of the operational costs of this Appeal should be apportioned to Alberta

102. The Agreement requires that the Appeal Panel make a determination as to the apportionment of its "operational costs", which represent the out-of-pocket costs of holding the appeal hearing. Annex 1734 of the Agreement provides rules for the determination of operational costs (as well as tariff costs).

103. The apportionment of operational costs is discretionary. However, Annex 1734 of the Agreement provides some rules to guide the Appeal Panel's discretion.

104. First, Rule 15.2 provides that, ordinarily, the Appeal Panel shall exercise its discretion to order all of the operational costs against an unsuccessful appellant. In the case of a successful appeal, the Appeal Panel shall ordinarily order the operational costs to be borne equally by the Appellant and Respondent.

105. Second, Rule 15.3 further provides that the Appeal Panel may exercise its jurisdiction differently than provided in Rule 15.2 where justified by other relevant circumstances, including the conduct of the parties and the extent of the parties' success.

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[79] Panel Report, page 6.

[80] Panel Report, page 4 ("The effect of the two initiatives is to essentially return small Alberta brewers to the same economic position"); page 5-6 ("The majority, but not all, of the members of the Panel were also persuaded by the reasoning found in Saskatchewan's written submission… In summary, Saskatchewan argues that functionally the 2016 Measure and the 2015 Measure are identical…"); page 7 ("The majority of the Panel determined that the 2016 mark-up measure and the changes in the ASBD grant program announced within a few weeks of the 2016 revision to the mark-up measures are part of a series of measures essentially revising the 2015 Measure..").

106. Third, Rule 15.4 of Annex 1734 permits the Appeal Panel to apportion operational costs to intervenors in an amount commensurate with their participation, to a maximum of one third.

107. Finally, Rule 15.1 indicates that the Appeal Panel should apportion operational costs with a view to discouraging non-meritorious appeals.

108. Artisan Ales takes the following position regarding operational costs:

a. If Alberta is unsuccessful in whole or in large part on this appeal, the Appeal Panel should apportion all of the operational costs of this appeal to Alberta. There is no reason to depart from the ordinary rule. Alberta points only to the fact of a partial dissenting opinion in the Panel report. As noted by Saskatchewan in its submission, apportioning all of the costs to Alberta is consistent with the result of the Dairy Appeal Panel (which likewise featured a dissenting opinion in the Panel report).[81]

b. If Alberta is successful on all issues on this appeal, the Appeal Panel should apportion operational costs equally between Alberta and Artisan Ales. Again, there is no basis to depart from the ordinary rule. Alberta offers none. However, Artisan Ales submits it would be appropriate to apportion some operational costs to the intervenor, Saskatchewan, in an amount commensurate with its participation and which does not exceed one third.

c. If Alberta is successful on some issues on this appeal but not others, the Appeal Panel should apportion the majority of operational costs to Alberta, in an amount reflective of the degree of success. For example, the Panel could apportion 75% of operational costs to Alberta. Again, in this scenario, it would be appropriate to apportion some operational costs to the intervenor, Saskatchewan.

ii. Artisan Ales should be awarded tariff costs

109. The Appeal Panel has discretion to order Alberta to pay tariff costs to Artisan Ales. Tariff costs represent the legal fees and disbursements incurred by a private person.

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[81] Dairy Appeal Panel, para. 137.

110. As with operational costs, Annex 1734 provides guidance for the exercise of the Appeal Panel's discretion. The rules are as follows:

a. Rules 16.3 provides that, ordinarily, the Appeal Panel shall exercise its discretion to order an unsuccessful appellant to pay the tariff costs of the respondent.

b. Rule 16.4 provides that, in the case of a successful appeal, the Appeal Panel shall ordinarily make no order regarding tariff costs.

c. Rule 16.5 provides that the Appeal Panel may depart from the rules of 16.3 and 16.4 where justified by other relevant considerations, including the conduct of the parties, the extent of the parties' success, and the reasonableness of the costs based on the complexity of the complaint and the duration of the proceeding.

d. Rule 16.2 provides that the primary objective of tariff costs is to discourage non-meritorious appeals.

111. The position of Artisan Ales regarding tariff costs is:

a. If Alberta is unsuccessful in whole or in large part, the Appeal Panel should order Alberta to pay the tariff costs of Artisan Ales. There are no circumstances justifying a departure from the ordinary rule in 16.3.

b. If Alberta is successful on all issues, Artisan Ales does not ask for an award of tariff costs for the appeal.

c. If Alberta succeeds on some issues but not others, Artisan Ales submits that it is appropriate to order Alberta to pay the tariff costs of Artisan Ales in a degree commensurate with its success.

112. Rule 20 of Annex 1734 indicates that a party claiming tariff costs must submit a statement of its costs within such time as required by the Appeal Panel. Artisan Ales will not incur all of its legal costs and disbursements until the hearing of this appeal. Accordingly, Artisan Ales proposes to submit its statement of costs within 7 days of the hearing of this appeal. Alberta could then object to any item in the statement of costs in writing thereafter. This process would enable the Appeal Panel to fix the amount of tariff costs in its report. Artisan Ales proposes to discuss this issue in the pre-hearing conference.

iii. If the appeal succeeds, the Panel award of tariff costs should not be disturbed

113. Whether or not Alberta succeeds on this appeal, the Panel's award of tariff costs to Artisan Ales should stand. No matter the outcome of this appeal, Artisan Ales succeeded below in establishing that the 2015 Measure violated the Agreement. Alberta declined, until its oral submissions, to concede that the 2015 Measure violated the Agreement.

F. Alberta should bring itself into compliance with the Agreement within 30 days

114. The Panel stipulated that "Alberta repeal or amend the Measures 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."[82] This deadline falls on January 28, 2018. By operation of Article 1720(1), the requirement for Alberta to comply with this deadline is suspended while this appeal is underway,[83] and it is unlikely that this appeal will conclude prior to January 28, 2018.

115. In light of the impact of this appeal on the Panel's deadline, it is appropriate for the Appeal Panel to vary this aspect of the Panel's report and stipulate an updated deadline. If the appeal is dismissed, Artisan Ales asks that the Appeal Panel stipulate that Alberta bring itself into compliance with the Agreement within 30 days of the delivery of the appeal report to the parties. No further delay can be justified in the circumstances:

a. An immediate deadline best preserves the intent of the Panel that the non-compliance be remedied by early 2018. An unsuccessful appeal should not extend the time for compliance stipulated by the Panel any more than strictly necessary. Artisan Ales notes that, in this appeal, Alberta does not challenge the reasonableness of the Panel's original six-month deadline.

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[82] Panel Report, page 11.

[83] Article 1720(3) reads:

> Upon receipt by the Secretariat of a notice of appeal, any requirement for a Complaint Recipient to comply with the Agreement within a stipulated time or to pay Tariff Costs or for a Participant to pay Operational Costs is suspended until such time as the appeal, and any subsequent re-hearing by the Panel that may be required, are concluded.

b. Artisan currently suffers under the measures – paying the discriminatory mark-up, losing sales and profits, and losing market share. The injury is irreparable, as no civil claim is available for Artisan Ales to recover damages for a violation of the Agreement. An unsuccessful appeal should not continue the injury to Artisan Ales any longer than absolutely necessary.

c. While Artisan Ales provided the Panel with detailed evidence of its injury, Alberta provided the Panel with no evidence to show any practical constraints preventing Alberta from immediately bringing itself into compliance with the Agreement. Indeed, Alberta did not make submissions to the Panel on this issue.

d. The evidence in the record demonstrates that 30 days is a reasonable timeframe for Alberta to make changes to its mark-up. On July 11, 2016, the Finance Minister of Alberta wrote to the Alcohol Gaming and Liquor Commission. The one-page letter directed the Commission to implement a mark-up change (part of the 2016 Measure) which came into effect on August 5, 2016, less than four weeks later.[84]

e. In any event, Alberta has had adequate time since July 28, 2017, when it received the Panel report, to make any necessary preparations to bring itself into compliance with the Agreement.

G. The Appeal Panel does not need to impose a publication ban

116. As a final, procedural point, Alberta asks the Appeal Panel to order Artisan Ales to hold the report of the Appeal Panel confidential until the Secretariat publishes the report on its website (which – per Article 1730(1) – must be done 30 days after the date of the report).[85]

117. Artisan Ales disputes the implication that it acted inappropriately upon the receipt of the Panel report. From the perspective of Artisan Ales, the Agreement does not provide for a

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[84] Letter from Joe Ceci to Susan Green, dated July 11, 2016 [Artisan, Record, Tab 22].

[85] Article 1730 reads:

> The Secretariat shall make public any report issued by a Presiding Body under this Chapter 30 days after the date on which it was issued, or sooner if the Disputing Parties or the Disputants agree.

publication ban or sealing order, expressly or by necessary implication. Even if the Agreement did provide for such an order, the legal effect of such an order on a private person, Artisan Ales, is not necessarily clear. Finally, any order curtailing the expression of Artisan Ales and, by implication, third parties such as the media would likely need to comply with the requirements of the *Charter*, which would include giving notice of the proposed restriction to the media.

118. However, it is not necessary for the Appeal Panel to resolve these issues. For the purpose of streamlining the issues on this appeal, Artisan Ales undertakes not to publish or disseminate the Panel's report for 30 days following its delivery to the parties.

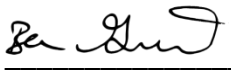
Part V – Relief requested

119. Artisan Ales asks the Appeal Panel to:

a. To confirm the report of the Panel, with the exception that the time stipulated in the Report for Alberta to repeal or amend the Measures is varied to 30 days following the issuance of the Appeal Panel's report;

b. Apportion all of the operational costs of the Appeal Panel against Alberta; and

c. Award Artisan Ales its tariff costs of this appeal in an amount not to exceed the permissible cap.



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Index of Tabs of Artisan Ales (Appellate Proceeding)

Schedule A: Relevant provisions of Chapter Seventeen (Dispute Resolution Procedures)

Article 1712: Initiation of Proceedings by Government on Behalf of Persons

1. A Person of a Party may request that a Party with which the Person has a substantial and direct connection within the meaning of Articles 1703(6), (7) or (8) initiate, on the Person's behalf, Proceedings under Part A regarding the actual measure of another Party.

2. The request shall be in writing and shall:

(a) specify the actual measure complained of;

(b) list the relevant provisions of the Agreement;

(c) provide a brief summary of the complaint;

(d) provide a description of the administrative remedies pursued or other steps taken, if any, to attempt to resolve the dispute, and the dates, outcomes and current status of these;

(e) explain how the measure has impaired internal trade; and

(f) identify the actual injury or denial of benefit caused by the measure.

3. Before deciding whether to initiate such Proceedings on behalf of the Person, the Party may require the Person to exhaust all administrative remedies available to the Person by written notice given within 30 days after the date of delivery of the Person's request. If after having exhausted all available administrative remedies, the Person still wishes the Party to pursue Proceedings under Part A on the Person's behalf, it may reissue its request made under paragraphs 1 and 2 by further written notice to the Party.

4. The Party shall decide whether to initiate Proceedings on behalf of the Person:

(a) within 30 days after the date of delivery of the Person's request, where no notice was given to the Person pursuant to paragraph 3; or

(b) within 30 days after the date of delivery of the Person's notice to the Party to reissue its request pursuant to paragraph 3, and shall, within that period, provide written notice to the Person of the decision. If the Party chooses not to initiate Proceedings, the notice shall include reasons for the decision. Failure to provide such notice to the Person within the 30-day period is deemed to be notice that the Party has chosen not to initiate Proceedings, for the purposes of Article 1713(1)(a).

[…]

Article 1713: Initiation of Proceedings by Persons

1. Subject to Article 1701(2) and (3) and paragraphs 5 and 7, a Person of a Party may request that Proceedings be initiated in respect of matters, other than those covered by Chapter Five (Procurement), within 60 days after receiving or being deemed to have received:

(a) notice under Article 1712(4) that a Party will not initiate Proceedings on the Person's behalf; or

(b) notice under Article 1712(6) that a Party will not request the establishment of a Panel.

[…]

Article 1714: Screening

1. Subject to Article 1701(2) and (3) and paragraphs 5 and 7, a Person of a Party may request that Proceedings be initiated in respect of matters, other than those covered by Chapter Five (Procurement), within 60 days after receiving or being deemed to have received: (a) notice under Article 1712(4) that a Party will not initiate Proceedings on the Person's behalf; or (b) notice under Article 1712(6) that a Party will not request the establishment of a Panel.

[…]

7. Where a request is provided under Article 1713(3), the Screener of the Party of the Person shall first review the request and accompanying documents to determine whether the Person is prohibited from initiating Proceedings pursuant to Articles 1713(5), (6), (7) or (8), or Article 1727(6) and if not, to determine whether the Person should be permitted to initiate Proceedings.

8. In deciding whether the Person should be permitted to initiate Proceedings, the Screener shall take into account only the following:

(a) whether the complaint is frivolous or vexatious;

(b) whether the complaint has been instituted merely to harass the Complaint Recipient; and

(c) whether there is a reasonable case of injury or denial of benefit to the Person or, in the case of a trade union, injury or denial of benefit to its members.

[…]

Article 1715: Consultations

1. A Person that has received approval from the Screener to initiate Proceedings may request consultations with the Complaint Recipient respecting the complaint, by delivering written notice within 60 days after receiving such approval to the Complaint Recipient and, on the same date, to all other Parties and to the Secretariat. The notice shall specify the actual measure complained of, the relevant provisions of the Agreement and provide a brief summary of the complaint.

[…]

Article 1716: Request for Panel

1. Subject to Article 1714(11) and paragraph 2, where the matter in question has not been resolved to the satisfaction of the Person, the Person may make a written request to the Secretariat, with a copy to the Committee, to establish a Panel. A request to establish a Panel shall be made no sooner than 120 days after the Person delivered a request for consultations to the Complaint Recipient that complies with Article 1715(1), and no later than 180 days after delivery of the request for consultations. If a request to establish a Panel has not been made within 180 days after delivery of the request for consultations, the Person is deemed to have abandoned the matter that was the subject of the complaint.

[…]

3. A request to establish a Panel shall:

(a) specify the actual measure complained of;

(b) list the relevant provisions of the Agreement;

(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.

Article 1716.1: Terms of Reference

The terms of reference for a Panel shall be to examine whether the actual measure at issue is inconsistent with the Agreement.

Article 1719: Report of Panel

1. The Panel shall issue a Report based on the submissions of the Participants and any other evidence received during the course of the Proceeding.

[…]

3. The Report shall contain:

(a) findings of fact;

(b) a determination, with reasons, as to whether the measure in question is inconsistent with the Agreement;

(c) if an affirmative determination has been made under (b), a determination, with reasons, as to whether the measure has impaired internal trade and has caused injury or denied a benefit;

(d) recommendations, if requested by a Disputant, to assist in resolving the dispute;

(e) where applicable, and at the discretion of the Panel, a stipulation of the period within which the Complaint Recipient shall comply with the Agreement;

(f) where applicable, and at the discretion of the Panel, an order awarding Tariff Costs to the Complaining Person, as provided for in Annex 1734; and

(g) a determination as to apportionment of Operational Costs as provided for in Annex 1734.

[…]

5. Within 10 days after the receipt of the Report, any Participant may, with notice to the chairperson of the Panel, the Secretariat and all other Participants, request that the Panel:

(a) clarify one or more aspects of the Report, in which case the Panel shall, within 15 days of receipt of the notice, provide the clarification; or

(b) correct in the Report any errors in computation or translation, any clerical or typographical errors, or any errors of a similar nature, in which case the Panel may, within 15 days of receipt of the notice, make such corrections as it considers appropriate.

Article 1721: Mutually Satisfactory Resolution, Confirmation of Compliance and Request for Compliance Panel

[…]

9. Upon the expiry of one year following the issuance of a Report, or, where applicable, upon the expiry of an alternate implementation period stipulated by the Panel in the Report, either of the Disputants may request that the Secretariat reconvene the Panel as a Compliance Panel to make a determination as to whether the Complaint Recipient has complied with the Agreement in respect of the matters addressed in the Report.

[…]

11. The Compliance Panel shall issue a Compliance Report containing:

(a) a determination on whether or not the Complaint Recipient has, with regard to the matter in dispute, brought itself into compliance with the Agreement;

(b) where the determination is that there has not been compliance, a Monetary Penalty order made in accordance with Article 1722;

[…]

Schedule B: Other Relevant Provisions of the Agreement

Chapter Four – General Rules

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.

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.

Chapter Ten – Alcoholic Beverages

Article 1000: Application of General Rules

1. Article 402 (Right of Entry and Exit) does not apply to this Chapter.

2. For greater certainty, Articles 400 (Application), 401 (Reciprocal Non-Discrimination), 403 (No Obstacles), 404 (Legitimate Objectives), 405 (Reconciliation) and 406 (Transparency) apply to this Chapter, except as otherwise provided in this Chapter.

Article 1001: Scope and Coverage

This Chapter applies to measures adopted or maintained by a Party relating to trade in beverage alcohol products.

Article 1004: Reciprocal Non-Discrimination

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.

2. Without limiting the generality of Article 401 (Reciprocal Non-Discrimination), each Part shall accord to beverage alcohol products of any other Party treatment no less favourable than the treatment is accords to beverage alcohol products of non-Parties under existing international trade agreements to which Canada is a party.

Article 1005: No Obstacles

1. Article 403 (No Obstacles) applies to measures such as:

(a) administrative procedures, requirements and decisions;

(b) labelling and packaging regulations and requirements;

(c) oenological regulations, requirements and standards; and

(d) advertising regulations and requirements.

2. Each Party shall ensure that decisions related to the entry of beverage alcohol products or producers of another Party into its territory are expedited and communicated in a timely manner.

Article 1010: Non-Conforming Measures

1. Newfoundland and Labrador reserves the right to deny beer and beer products of any other Party access to outlets of brewers' agents until it determines, in consultation with the other Parties, that the existing system is no longer necessary. Other Parties reserve the right to restrict access to beer brewed in Newfoundland and Labrador. This will be subject to review by the Parties before December 1, 1999.

3. New Brunswick and Quebec reserve the right to apply a differential cost of service, fees or other charges to beer and beer products of any other Party where it can be demonstrated that beer and beer products originating from New Brunswick or Quebec, respectively, encounter higher cost of service, fees, other charges or handling requirements than beer and beer products of that Party. Any implementation of this reservation will be subject to review by the Parties no later than March 31, 1997.

5. Ontario reserves the right to apply its Canadian grape content requirements, pursuant to its 1988 grape and wine adjustment program, to the wine and wine products of a producer of any other Party until December 31, 1999. Ontario will review these requirements before the earlier of March 31, 1997, and the date of adoption of the Canadian Wine Standards in respect of these requirements by the grape and wine industries. Ontario reserves the right to restrict access of wine and wine products produced by government entities.

Article 1011: Exceptions

Nothing in this Agreement prohibits the application to any Party of non-conforming measures specifically authorized by international trade agreements, as follow

(a) Ontario and British Columbia may maintain measures requiring private wine store outlets (in existence on October 4, 1987) to discriminate in favour of wine of Ontario and British Columbia to a degree no greater than the discrimination required by such measures as they existed on October 4, 1987;

(b) Quebec may require any wine sold in grocery stores to be bottled in Quebec, provided that alternative outlets are provided in Quebec for the sale of wine of other Parties, whether or not such wine is bottled in Quebec. British Columbia and Quebec agree to negotiate by March 31, 1997, equivalent access for wine and wine products of the other Province. Until an agreement is implemented, British Columbia retains the right to apply measures of reciprocal effect to wine and wine products produced in Quebec;

(c) British Columbia may maintain automatic listing measures for British Columbia estate wineries in existence on October 4, 1987, producing less than 30,000 gallons of wine annually and meeting existing content requirements; and

(d) a Party may maintain or introduce a measure limiting on-premise sales by a producer of beverage alcohol products to those beverage alcohol products produced on its premises.

Chapter Six – Investment

Article 600: Application of General Rules

1. Articles 401 (Reciprocal Non-Discrimination), 402 (Right of Entry and Exit), 403 (No Obstacles) and 404 (Legitimate Objectives) do not apply to this Chapter.

2. For greater certainty, Articles 400 (Application), 405 (Reconciliation) and 406 (Transparency) apply to this Chapter, except as otherwise provided in this Chapter.

Article 601: Relationship to Other Chapters

Except as otherwise provided in this Chapter, in the event of an inconsistency between this Chapter and any other chapter in Part IV, the other chapter prevails to the extent of the inconsistency.

Article 607: Performance Requirements

1. No Party shall impose or enforce, in relation to an investor of a Party or an enterprise in its territory, or condition the receipt of an incentive by an enterprise on compliance with, any requirement to:

(a) achieve a specific level or percentage of local content of goods or services;

(b) purchase or use goods or services produced locally;

(c) purchase goods or services from a local source; or

(d) achieve a certain level of sales in the territory of another Party.

2. For greater certainty, nothing in paragraph 1 shall be construed to prevent a Party from conditioning the receipt of an incentive on any requirement to carry out economic activities in its territory or to create or maintain employment.

3. A Party may, under exceptional circumstances, adopt or maintain a measure inconsistent with paragraph 1 for regional economic development purposes, provided that:

(a) the measure does not operate to impair unduly the access of persons, goods, services or investors of another Party;

(b) the measure is not more trade restrictive than necessary to achieve its specific objective; and

(c) the Party promptly notifies the other Parties of the details of the measure.

Article 608: Incentives

1. No Party shall, in the provision of incentives to enterprises located in its territory, discriminate against an enterprise on the basis that:

(a) the enterprise is owned or controlled by an investor of another Party; or

(b) the head office of the enterprise is located in the territory of another Party.

2. Nothing in this Agreement shall be construed to require a Party to provide incentives for activities undertaken outside its territory.

3. The Code of Conduct on Incentives set out in Annex 608.3 applies to the Parties.

Article 616: Definitions

In this Chapter:

[...]

incentive means:

(a) a contribution with a financial value that confers a benefit on the recipient, including cash grants, loans, debt guarantees or an equity injection, made on preferential terms; or

(b) any form of income or price support which results directly or indirectly in a draw on the public purse;

[...]

Chapter One – Operating Principles

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.

Article 101: Mutually Agreed Principles

1. This Agreement applies to trade within Canada in accordance with the Chapters of this Agreement.

2. This Agreement represents a reciprocally and mutually agreed balance of rights and obligations of the Parties.

3. In the application of this Agreement, the Parties shall be guided by the following principles:

   (a) Parties will not establish new barriers to internal trade and will facilitate the cross-boundary movement of persons, goods, services and investments within Canada;

   (b) Parties will treat persons, goods, services and investments equally, irrespective of where they originate in Canada;

   (c) Parties will reconcile relevant standards and regulatory measures to provide for the free movement of persons, goods, services and investments within Canada; and

   (d) Parties will ensure that their administrative policies operate to provide for the free movement of persons, goods, services and investments within Canada.

4. In applying the principles set out in paragraph 3, the Parties recognize:

   (a) the need for full disclosure of information, legislation, regulations, policies and practices that have the potential to impede an open, efficient and stable domestic market;

   (b) the need for exceptions and transition periods;

   (c) the need for exceptions required to meet regional development objectives in Canada;

   (d) the need for supporting administrative, dispute settlement and compliance mechanisms that are accessible, timely, credible and effective; and

   (e) the need to take into account the importance of environmental objectives, consumer protection and labour standards.

Annex 1813 – Interpretation of Agreement

1. In this Annex:

horizontal chapter means ay of the following chapters:

(a) Chapter Five (Procurement);

(b) Chapter Six (Investment);

(c) Chapter Seven (Labour Mobility);

(d) Chapter Eight (Consumer-Related Measures and Standards); and

(e) Chapter Fifteen (Environmental Protection);

vertical chapter means any of the following chapters:

(a) Chapter Nine (Agricultural and Food Goods);

(b) Chapter Ten (Alcoholic Beverages);

(c) Chapter Eleven (Natural Resources Processing);

(d) Chapter Twelve (Energy);

(e) Chapter Thirteen (Communications); and

(f) Chapter Fourteen (Transportation).

2. A vertical chapter applies to matters within its scope.

3. A horizontal chapter applies both to matters within its scope and, where applicable, to matters that fall within the scope of a vertical chapter.

4. In the event of an inconsistency between a vertical chapter and a horizontal chapter, the vertical chapter prevails to the extent of the inconsistency, except as otherwise provided.

[…]