

**REPORT OF THE ARTICLE 1716 PANEL
CONCERNING A DISPUTE BETWEEN
FARMERS CO-OPERATIVE DAIRY LIMITED OF NOVA SCOTIA**

-AND-

NEW BRUNSWICK

**REGARDING NEW BRUNSWICK'S FLUID MILK
DISTRIBUTION LICENSING MEASURES**

SEPTEMBER 13, 2002

(File No. 98/99 - 9 - FCDNB - P106

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1. INTRODUCTION

On October 16, 2000, Farmers Co-operative Dairy Limited (hereinafter Complainant), a Nova Scotia-based dairy processor and distributor, applied to the New Brunswick Farm Products Commission (hereinafter NBFPC) for a milk distribution licence. The New Brunswick *Natural Products Act, RSNB, Chapter N-1.2* (hereinafter the *NPA* or the *Act*) mandates the NBFPC to control the distribution of fluid milk in New Brunswick through the issuance of Milk Dealer Licences, among other things. Without such a licence, Complainant cannot carry out distribution of its own branded fluid milk products in New Brunswick.

Section 46(2) of the *NPA* establishes that: "No licence shall be issued unless the Commission is satisfied that its issuance is in the interest of the general public or the dairy products trade." On November 29, 2001, the NBFPC notified Complainant that its licence application had been rejected.¹ In its written decision of March 26, 2002,² the NBFPC stated

¹ Letter from Hazen Meyers, Chairman of the New Brunswick Farm Products Commission, to Chris Power, President and CEO of Farmers Dairy Co-operative Limited; Submission to the Internal Trade Panel Concerning New Brunswick's Fluid Milk Licensing Measures, Volume 2, Attachment 14; May 23, 2002.

² Decision of the New Brunswick Farm Products Commission in the Matter of an Application by Farmers Dairy Limited for a Milk Dealer License; March 26, 2002;

that it did not find that granting such a licence would be in the interest of the general public.

The subject of this report is a dispute brought forward by Complainant under Article 1716 (Request for Panel) of the *Agreement on Internal Trade*³ (hereinafter *Agreement*) regarding New Brunswick's fluid milk distribution licensing measures.

A dispute resolution Panel was duly established under the provisions of the *Agreement* to review the dispute.

The *Agreement* allows for private parties to initiate dispute resolution proceedings to resolve a complaint against a government. This is the second time that a panel has been established to review a dispute between a private party and a government and the second time that a panel will review a dispute under the Agriculture and Food Goods Chapter (Chapter Nine) of the *Agreement*.

As provided in paragraph 2 of Article 1718 (Report of Panel) of the *Agreement*, the panel report shall contain:

- (a) findings of fact;
- (b) a determination, with reasons, as to whether the actual measure in question is inconsistent with this *Agreement*;
- (c) a determination, with reasons, as to whether the actual measure has impaired internal trade and has caused injury; and
- (d) recommendations, if requested by either the person or the Party complained against, to assist in resolving the dispute.

2. COMPLAINT PROCESS

In accordance with Article 906 (Consultations) of Chapter Nine, Complainant requested, by letter dated April 10, 2001, that the Province of Nova Scotia undertake consultations with the Province of New Brunswick (hereinafter Respondent) on the issues in question. By letter dated May 8, 2001, Nova Scotia formally requested consultations with Respondent on behalf of Complainant. Consultations between Nova Scotia and Respondent failed to resolve the issue.

(hereinafter NBFPC Decision); Submission to the Internal Trade Panel Concerning New Brunswick's Fluid Milk Licensing Measures, Volume 2, Attachment 15; May 23, 2002.

³ Agreement on Internal Trade; Entered into force July 1, 1995. Unless otherwise specified "Articles" and "Annexes" refer to the articles and annexes of the Agreement. A Consolidated version of the Agreement is available on the web-site of the Internal Trade Secretariat: www.intrasec.mb.ca

In accordance with Article 1711 (Initiation of Proceedings by Governments on Behalf of Persons), by letter dated November 30, 2001, Complainant requested that Nova Scotia initiate the dispute resolution procedures under Part A (Government-to-Government Dispute Resolution) of Chapter Seventeen (Dispute Resolution Procedures) on its behalf. By letter dated January 10, 2002, Nova Scotia declined to initiate the dispute resolution procedures under Part A but offered to facilitate action by Complainant to initiate procedures under Part B (Person-to-Government Dispute Resolution) of Chapter Seventeen.

In accordance with paragraph 3 of Article 1712 (Initiation of Proceedings by Persons), by letter dated January 31, 2002, Complainant gave notice to Respondent, Nova Scotia and the Internal Trade Secretariat of its intent to proceed with a complaint under Part B.

In accordance with Article 1713 (Screening), by letter dated March 11, 2002, Complainant requested leave from the Nova Scotia Screener to commence Chapter Seventeen Person-to-Government dispute resolution procedures. The Screener, by letter dated March 27, 2002, gave Complainant leave to proceed.

By letter dated March 28, 2002, Complainant requested the assistance of the Committee on Internal trade (hereinafter CIT) pursuant to Article 1715 (Assistance of Committee). The dispute was considered by the CIT during a conference call on April 19, 2002. The CIT reached no consensus on assistance it could provide to resolve the dispute.

By letter dated May 23, 2002, Complainant requested the establishment of a panel under Article 1716.

A pre-hearing conference was held by the Panel on July 12, 2002 by conference call to discuss with the disputants the form of the hearing, the materials to be provided and other procedural matters related to the hearing.

The hearing, which was open to the public, was held in Fredericton, New Brunswick on July 30, 2002.

3. THE COMPLAINT

Complainant alleges that the *NPA* and a decision by the NBFPC not to grant Complainant a fluid milk distribution licence under the *Act* are inconsistent with the *Agreement*.

With respect to the *NPA*, Complainant alleges that section 46(2) of the *NPA* allows the NBFPC to exercise its discretion under the *Act* in a way that is inconsistent with Article 401 (Reciprocal Non-Discrimination), Article 402 (Right of Entry and Exit), and Article 403 (No Obstacles) of the *Agreement* and that these inconsistencies with the *Agreement* cannot be

justified under the provisions of Article 404 (Legitimate Objectives). Complainant also alleges that the *NPA* does not satisfy the transparency requirements of Article 406 (Transparency) and paragraph 4(a) of Article 101 (Mutually Agreed Principles). Further, Complainant alleges that Respondent has not met the obligation under Article 102 (Extent of Obligations) to ensure that the manner in which the NBFPC exercises its authority under the *Act* is consistent with the *Agreement*.

With respect to the decision by the NBFPC not to grant Complainant a fluid milk distribution licence, Complainant alleges that the manner in which this decision was made is inconsistent with Article 401, Article 402, and Article 403 of the *Agreement* and that these inconsistencies with the *Agreement* can not be justified under the provisions of Article 404. Complainant also alleges that the manner in which the decision was made does not satisfy the transparency requirements of Article 406 and paragraph 4(a) of Article 101.

Complainant asked the Panel to find that:

- the *NPA* and the way it is interpreted and applied by the NBFPC to license, regulate and administer fluid milk distribution are inconsistent with Articles 401, 402 and 403;
- these inconsistencies are not permissible under Article 404;
- Respondent has not met its obligation to ensure transparency of its measures as required by Article 406(1) and 406(2), and according to the operating principles set out in Article 101(4)(a); and
- Respondent has not met its responsibility established by Article 102 to ensure that the NBFPC complies with the *Agreement*.

Complainant asked the Panel to recommend the following remedies:

- that Respondent take whatever steps are necessary to grant Complainant a fluid milk distribution licence;
- that Complainant's participation in New Brunswick's fluid milk market be regulated and administered in a way that treats Complainant and its fluid milk products in a manner that is consistent with the *Agreement* and equal to Northumberland Dairy and Baxter Foods; and
- that specific actions be taken by the CIT if parties to this complaint do not resolve outstanding issues within 60 days as required by Article 1719 (Implementation of Panel Report).

Complainant asked to be awarded costs pursuant to paragraph 3 of Article 1718 and Annex 1718.3 (Costs). Complainant submitted a statement of costs to the Panel at the end of the Panel hearing, a copy of which was subsequently provided to Respondent.

4. THE RESPONSE

Respondent maintains that the *NPA* and the manner in which the *NBFPC* makes decisions regarding the granting of fluid milk distribution licences are consistent with the *Agreement* and do not violate Articles 401, 402, 403, 406 or 101(4)(a).

Respondent also argues that the decision by the *NBFPC* not to grant a fluid milk distribution licence was made in the interest of consumer protection. Therefore, Respondent argues, if the Panel finds the manner in which the decision was made to be inconsistent with the *Agreement*, it is nevertheless permissible as a Legitimate Objective under Article 404. Likewise, Respondent argues that section 46(2) of the *NPA* is justified on the basis of consumer protection.

Although Respondent did not question the Panel's jurisdiction to decide the case, Respondent questioned whether the *Agreement* applies to the measures at issue because:

- the letter of October 1, 1997 from the co-chairs of the Federal Provincial Agricultural Trade Policy Committee⁴ to the co-chairs of the CIT is "illegitimate"⁵ and insufficient in itself to bring fluid milk distribution under the scope of the *Agreement*; and
- fluid milk distribution is not a "technical barrier to trade" as defined under Chapter Nine and, therefore, the Federal Provincial Agricultural Trade Policy Committee did not have the right to include it in the list of technical barriers to trade with policy implications contained in the October 1, 1997 letter.

⁴ Letter from the co-chairs of the Federal-Provincial Agricultural Trade Policy Committee, dated October 1, 1997, to the Co-chairs of the Committee on Internal Trade; Submission to the Internal Trade Panel Concerning New Brunswick's Fluid Milk Licensing Measures, Volume 2, Attachment 4; May 23, 2002.

⁵ Presentation at the Panel hearing by Mr. Harry Quinlan for Respondent; hearing transcript, page 113. In its supplementary submission to the Panel (Opinion of the Province of New Brunswick; August 6, 2002), Respondent questions the "validity" rather than the "legitimacy" of the letter of October 1, 1997.

Respondent further argues that the decisions of the NBFPC do not fall within the scope of the *Agreement* because:

- Article 102(1)(c), by virtue of the phrase “where provided by this *Agreement*”, requires that “other governmental bodies” and “non-governmental bodies that exercise authority delegated by law” must be specified in the applicable chapter of the *Agreement* in order to be brought within the scope of the Article and that no such bodies are specified under Chapter Nine; and
- a decision by the NBFPC does not fall within the definition of “measure” under Article 200 (Definitions of General Application) of the *Agreement*.

Respondent asked the Panel to:

- reject Farmers’ complaint under Chapter Seventeen of the *Agreement*; and
- confirm that the *NPA* respects the spirit and intent of the *Agreement*.

Respondent opposed the awarding of costs to Complainant and submitted that Respondent should be awarded costs under Article 1718(3).

5. APPLICABILITY OF THE AGREEMENT AND JURISDICTION OF THE PANEL

Although Respondent consented to the jurisdiction of the Panel,⁶ Respondent questioned whether the *Agreement* applies to the measures at issue and put forward two arguments in support of that position, one based on paragraph 3 of Article 902 (Scope and Coverage) and one based on Article 102 of the *Agreement*.

5.1 Fluid Milk Distribution under the Agreement - Article 902(3)

Article 902(3) states:

⁶ Opinion of the Province of New Brunswick, paragraph 16; August 6, 2002.

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

On October 1, 1997, the co-chairs of the Federal-Provincial Agricultural Trade Policy Committee wrote to the co-chairs of the Committee on Internal Trade as follows:

We are writing to you in your capacities as co-chairs of the Federal/Provincial Committee on Trade under the Agreement on Internal Trade (AIT).

Under Article 902.3 of the AIT, the Federal Provincial Agricultural Trade Policy Committee is to notify your Committee of any unresolved measures involving technical barriers with policy implications on or before September 1, 1997. The following technical barriers with policy implications have been identified:

- a) shipment of horticultural products in bulk containers;
- b) absence of a Canada No. 1 Small potato grade;
- c) margarine colouring restrictions and other margarine standards;
- d) standards regarding dairy blends (mixtures of butter and margarine) and imitation dairy products;
- e) fluid milk standards and distribution.

It is recognized that these measures will fall within the scope and coverage of Chapter Nine of the AIT from September 1, 1997. [Emphasis added.]

A definition of "technical barriers to trade" is provided in Article 908 (Definitions) as follows:

technical barriers to trade means a measure that:

- (a) involves product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory;

- (b) deals exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method;
- (c) involves any procedure used, directly or indirectly, to determine that relevant requirements in technical measures are fulfilled; or
- (d) involves a sanitary or phytosanitary measure; but does not include purchasing specifications prepared for production or consumption requirements of the Parties that are addressed in Chapter Five (Procurement), according to the coverage of that Chapter.

The distinction made between technical and non-technical barriers to trade is in Annex 903.1 (Memorandum of Understanding on Procedures for the Elimination or Reduction of Interprovincial Barriers to Trade in Agricultural and Food Products) as follows:

Ministers recognize that interprovincial trade barriers may be classified as technical or non-technical. Technical barriers can arise because of differing product and grade standards, plant and animal health regulations, transportation and other legislation affecting the movement of products between provinces. Non-technical barriers can result from government policies and programs such as price and income stabilization, supply management, credit and other financial assistance programs.⁷

In a verbal presentation to the Panel at the hearing, Respondent called into question the legitimacy of the October 1, 1997 letter from the co-chairs of the Federal-Provincial Agricultural Trade Policy Committee, citing the fact that the letter was from officials to ministers, that a provincial official signed under the letterhead of a federal department, that the letter was addressed to the co-chairs of the CIT when the *Agreement* specifies a single chair and that there was no indication that the letter had been copied to Agriculture Ministers.

In its written, post-hearing "Opinion", submitted to the Panel on August 6, 2002, Respondent listed the following as reasons to question the validity of the October 1, 1997 letter:

- not on shared letterhead, developed by Canada, signed onto by British Columbia;
- no reference as to the authority provided to AG Trade

⁷ Agreement on Internal Trade, Annex 903.1, Section II (Understandings), sub-section 1. Framework to Eliminate/Reduce Barriers, first paragraph.

Policy Co-Chairs by the committee they claim to represent; (no minutes of meeting)

- no indication of consensus, in fact, the opposite is clearly stated in the letter;
- the authors of the letter have taken it upon themselves to apply its contents retroactively;
- the letter references the “Federal/Provincial Committee on Trade” which does not exist;
- the letter is not copied to Agriculture Ministers, which is peculiar as they were charged at the same time with a complete review of the scope and coverage of the Chapter;
- a technical questioning of the validity of the co-chairs as the appropriate recipients of the letter remains. Given Article 1814.1 and 1814.2, the date of entry into force of the AIT was July 1, 1995. This, in combination with Article 1601.4 (which establishes an annual rotation of chairpersons) would mean that Ministers Manley and/or Downey had completed their term of office and were no longer acting in accordance with the AIT;
- no accompanying record of receipt by Ministers Manley and/or Downey, or the Executive Director of the Internal Trade Secretariat, etc.⁸

Respondent further alleged that the decision by Agriculture Ministers to delay the completion of a review of the scope and coverage of Chapter Nine (required to be completed by September 1, 1997 under paragraph 4 of Article 902) invalidated any expansion of the scope of the Chapter by means of the October 1, 1997 letter.

Respondent also took the position that fluid milk distribution does not fall within the definition of a technical barrier to trade. Therefore, Respondent argues, despite the inclusion of “fluid milk standards and distribution” in the list of “technical barriers to trade with policy implications” in the October 1, 1997 letter, fluid milk distribution is not within the scope of the *Agreement*.

With respect to the validity of the October 1, 1997 letter the Panel notes:

- the letter is signed by the then co-chairs of the Federal-Provincial Agricultural Trade Policy Committee, the body mandated by paragraph 3 of Article 902 to identify the

⁸ Opinion of the Province of New Brunswick, paragraph 3; August 6, 2002.

technical barriers to trade with policy implications to be included in the scope and coverage of Chapter Nine as of September 1, 1997;

- the letter specifically references the obligation in paragraph 3 of Article 902 to notify the CIT of technical barriers with policy implications and presents a list of such barriers;
- the letter specifically recognizes that the measures listed would fall within the scope and coverage of Chapter Nine as of September 1, 1997;
- the letter in question dates back almost five years and no evidence has been presented to the Panel to the effect that the Parties were not adequately notified of the letter;
- no evidence has been presented to the Panel that any Party to the *Agreement*, including Respondent, had previously objected to the letter; and
- in a previous dispute panel⁹ under Chapter Seventeen of the *Agreement*, which also reviewed a complaint related to fluid milk distribution, the panel's report records that the Parties to the dispute (Nova Scotia and Prince Edward Island) explicitly agreed that the October 1, 1997 letter met the requirements of Article 902(3) and that measures respecting fluid milk standards and distribution are covered by the Chapter.

With respect to the decision by Agriculture Ministers to delay fulfilling the obligation under Article 902(4) to review the scope and coverage of the Chapter, the Panel finds no connection between that review and the obligation under Article 902(3) to notify the CIT of technical barriers with policy implications. In other words, the Article 902(3) notification is not connected to or dependent on the completion of the review provided for under Article 902(4).

Given the above, the Panel concludes that it must take the October 1, 1997 letter at face value and that the letter legitimately accomplishes its stated purpose. The Panel accepts the validity of the letter and rejects Respondent's position in this regard.

⁹ Report of the Article 1704 Panel concerning a Dispute between Nova Scotia and Prince Edward Island regarding Amendments to the Dairy Industry Act Regulations; Winnipeg, Manitoba; January 18, 2000 (hereinafter NS/PEI Panel Report). Panel reports are available on the web-site of the Internal Trade Secretariat: www.intrasec.mb.ca

With respect to the definition of a technical barrier to trade, the Panel notes:

- Annex 903.1, which is the Memorandum of Understanding signed by Agriculture Ministers on December 11, 1989, states that: “Technical barriers can arise because of ... transportation and other legislation affecting the movement of products between provinces”;
- the October 1, 1997 letter dates back almost five years and no evidence has been presented that any Party to the *Agreement*, including Respondent, has during these years ever raised concerns or objections about fluid milk distribution being included in the list of measures; and
- Article 902(3) refers to measures “involving” technical barriers with policy implications, not to a strict or narrow definition of technical barrier.

In the Panel’s view, by including fluid milk distribution in their list of technical barriers with policy implications, the Federal-Provincial Agricultural Trade Policy Committee (the body specifically mandated to identify such measures), deemed fluid milk distribution licensing requirements to be a technical barrier with policy implications. It is not the role of this Panel to question or second-guess this determination.

While the Panel recognizes that supply management is listed in Annex 903.1 as a non-technical barrier, fluid milk distribution licensing requirements are not intrinsic to supply management of raw milk. Hence, licensing requirements for fluid milk are amenable to being included in a list of technical barriers with policy implications. In other words there is nothing contradictory about excluding supply management from the scope of “technical barriers”, while at the same time including fluid milk distribution licensing requirements.

The wording of Article 902(3) is such that the act of providing notice in writing in itself brought the listed technical barriers within the scope and coverage of the Chapter. No acknowledgment, acceptance or other formality is required to give the list effect. Moreover, Article 902(3) provides for “measures involving technical barriers with policy implications” (emphasis added) to be included in the scope and coverage of Chapter 9. In the Panel’s view the words “measures involving” have a wide scope and support a broad and purposeful interpretative approach to the types of measures that may be legitimately brought under the scope of Chapter 9 by the operation of Article 902(3).

The Panel finds that fluid milk distribution licensing requirements are included in the scope and coverage of the Agriculture and Food Goods Chapter of the Agreement by the operation of Article 902(3) and the letter of October 1, 1997 from the Co-chairs of the Federal-Provincial Agricultural Trade Policy Committee to the Co-chairs of the CIT.

Although not required for the purposes of the findings in this report, the Panel has found the notification method used in Article 902(3) complex and indirect. The uncertainty resulting from this method resulted in questions as to the coverage of the *Agreement* which required careful scrutiny by the Panel. The Panel suggests that the Parties to the *Agreement* use a more transparent and less ambiguous method for subjecting new measures to the disciplines of the *Agreement*.

5.2 Coverage of a Decision by the New Brunswick Farm Products Commission under the Agreement - Article 102

Article 102 (Extent of Obligation) states:

1. Each Party is responsible for compliance with this Agreement:

- (a) by its departments, ministries and similar agencies of government;
- (b) by its regional, local, district or other forms of municipal government, where provided by this Agreement; and
- (c) by its other governmental bodies and by non-governmental bodies that exercise authority delegated by law, where provided by this Agreement.

For greater certainty, "other governmental bodies" includes Crown corporations.

2. Each Party shall adopt and maintain measures to ensure the compliance referred to in paragraph 1.

Article 200 (Definitions of General Application) states:

measure includes any legislation, regulation, directive, requirement, guideline, program, policy, administrative practice or other procedure;

Respondent argues that Article 102(1)(c) means that unless a government body is explicitly identified as covered by the *Agreement*, it, and any measure it takes, are not subject to the *Agreement*. The Panel disagrees.

With respect to Article 102, the Panel finds that the undertaking of the Parties to ensure compliance by the types of entities mentioned in the Article brings those entities within the scope and coverage of the *Agreement*. In the Panel's view, the phrase "where provided by this *Agreement*" is a recognition that in some chapters of the *Agreement*, some governmental bodies are excluded from some of the disciplines of the *Agreement*.

The Panel notes that Chapter 1 of the *Agreement* deals with the operating principles and objectives of the *Agreement*. In the Panel's view, these principles and objectives should be given a broad and purposeful interpretation. Accordingly, the approach suggested by Respondent is too narrow and is not supported by the language of the *Agreement*. In particular, the Panel rejects the suggestion that the phrase "where provided by this *Agreement*" requires that "other governmental bodies" and "non-governmental bodies that exercise authority delegated by law" must be specified in the applicable chapter of the *Agreement* in order for their actions to be brought within the scope and coverage of the *Agreement*.

Limitations on the application of Article 102 are specified in a number of chapters¹⁰ by listing the entities or types of entities to which the chapter applies. This suggests that, within each sectoral chapter of the *Agreement*, all entities within the types mentioned in Article 102 are included unless excluded by a chapter-specific article.

Given that no governmental bodies are specifically listed in Chapter Nine, the logical extension of Respondent's argument is that the obligations under Chapter Nine would not apply to the measures of any governmental bodies that exercise authority delegated by law, thus thwarting the purpose of the Chapter. This clearly was not the intent of the Parties.

The Panel finds that the NBFPC actions under review by this Panel are within the scope and coverage of the *Agreement*.

With respect to the definition of "measure", the Panel finds that the act of granting a licence can be considered an "administrative practice or

¹⁰ See Chapters Five (Procurement) Article 503, Seven (Labour Mobility) Article 703(1), Ten (Alcoholic Beverages) Article 1003 and Fifteen (Environmental Protection) Article 1503.

other procedure” as those terms are used in the definition of “measure” in Article 200 of the *Agreement*. This interpretation is consistent with the stated objectives of the *Agreement*.

The Panel further notes that two previous panels¹¹ reviewed complaints related to the application of legislation by governmental bodies, thus accepting that the application of legislation falls within the definition of “measure”. The Panel sees no reason in the present case to alter that approach.

The Panel finds that a decision by the NBFPC with respect to fluid milk distribution licensing is a “measure” as that term is defined in the *Agreement*.

6. ALLEGED INCONSISTENCIES WITH THE AGREEMENT

With respect to consistency with the *Agreement*, the Panel will consider the *NPA* and the decision of the NBFPC separately. The consistency or lack thereof of legislation does not predetermine whether or not its application has been consistent. In other words, even if the *NPA* were held to be consistent, its application might be held to be inconsistent, and vice versa.

The Articles alleged by Complainant to have been breached by Respondent provide 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.

[...]

¹¹ NS/PEI Panel Report, *supra*, note 9 and Report of the Article 1716 Panel concerning a Dispute between the Certified General Accountants Association of Manitoba and Ontario regarding the Public Accountancy Act (R.S.O., 1990, Chapter P-37) and Regulations; Winnipeg, Manitoba; October 5, 2001 (hereinafter CGA/ON Panel Report).

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

Article 402: Right of Entry and Exit

Subject to Article 404, no Party shall adopt or maintain any measure that restricts or prevents the movement of persons, goods, services or investments across provincial boundaries.

Article 403: No Obstacles

Subject to Article 404, no Party shall adopt or maintain any measure that restricts or prevents the movement of persons, goods, services or investments across provincial boundaries.

Article 406: Transparency

1. Each Party shall ensure that its legislation, regulations, procedures, guidelines and administrative rulings of general application respecting matters covered by this Agreement are made readily accessible.

2. A Party proposing to adopt or modify a measure that may materially affect the operation of this Agreement shall, to the extent practicable, notify any other Party with an interest in the matter of its intention to do so and provide a copy of the proposed measure to that Party on request.

[...]

Article 101: Mutually Agreed Principles

[...]

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;

[...]

The Panel examined first whether the *NPA* itself was consistent with each of these Articles and then examined the application of the *NPA* by the NBFPC.

6.1 The Natural Products Act

Section 46(2) of the Natural Products Act (*NPA*) states:

No license shall be issued unless the Commission is satisfied that its issuance is in the interest of the general public or the dairy products trade.

6.1.1 Article 401(1)

The question before the Panel is whether the text of section 46(2) of the *NPA* itself is in breach of the non-discrimination obligation in Article 401(1) of the *Agreement*.

The Panel notes that two previous panels¹² held that two factors must be considered in determining whether a measure is inconsistent with Article 401(1):

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

This Panel adopts the same criteria in the present case.

With respect to the second criterion, there is no doubt that Complainant's products are "like, directly competitive or substitutable". Respondent did not contest this point.

With respect to the first criterion, the previous panels concluded that there must be a geographical component to the discrimination for a measure to be inconsistent with Article 401(1). Further, those panels

¹² Report of the Article 1704 Panel concerning a Dispute between Alberta and Canada regarding the Manganese-Based Fuel Additives Act; Winnipeg, Manitoba; June 12, 1998 (hereinafter MMT Panel Report), at page 6 and NS/PEI Panel Report, *supra*, note 9, at page 8.

concluded that this geographical component can be direct, where goods from one Party are favoured over identical goods from another Party, or indirect, where goods produced predominately in the territory of one Party are favoured over directly competitive or substitutable goods produced predominately in the territory of another Party. The Panel accepts this reasoning.

In the Panel's view, section 46(2) of the *NPA* does not expressly mandate geographic discrimination. However, within the context of the purpose of the *Act* and given the phrase "the dairy products trade", the Panel is of the view that section 46(2) makes it extremely difficult for the *Act* to be applied in a manner that is geographically neutral, so much so as to make geographic neutrality unlikely. In practice, in order for the *NBFP* to apply section 46(2) in a manner consistent with the *Agreement*, it would have to act as if this phrase did not exist when making a decision on a licence application from an out of province applicant. This places the *NBFP* in an awkward position and could expose it to allegations of breach of administrative law principles (i.e. failing to consider legislatively mandated factors in exercising its discretion). The Panel concludes that section 46(2) facilitates and encourages restricting or preventing the movement of goods across provincial boundaries and operates to create a barrier to internal trade.

The Panel finds that section 46(2) of the *NPA* is inconsistent with Article 401(1) of the *Agreement*.

6.1.2 Article 401(4)

By finding section 46(2) of the *NPA* inconsistent with Article 401(1), the Panel does not need to rule on the Complainant's allegation that it is also inconsistent with Article 401(4).

6.1.3 Article 402

As noted in section 6.1.1 above, section 46(2) of the *NPA* facilitates and encourages restricting or preventing the movement of goods across provincial boundaries and can operate to create a barrier to internal trade. This makes it exceedingly difficult, and arguably impossible, for the application of section 46(2) to be consistent with the obligation under Article 402.

The Panel finds that section 46(2) of the *NPA* is inconsistent with Article 402 of the *Agreement*.

6.1.4 Article 403

Article 403 creates an obligation for Parties to “ensure” that their measures do not operate to create an obstacle to internal trade. Given that the Panel has found that section 46(2) of the NPA is inconsistent with Article 402, this obligation has not been met by Respondent.

The Panel finds that section 46(2) of the NPA is inconsistent with Article 403 of the Agreement.

6.1.5 Articles 406(1), 406(2) and 101(4)(a)

Complainant alleges that respondent has not met its obligation to ensure transparency in the NPA as required by Article 406(1) and (2) and according to the operating principles set out in Article 101(4)(a).

In the Panel’s view, Articles 406(1) and 101(4)(a) impose upon the Parties an obligation to ensure that measures to which the *Agreement* applies are transparent. The words “readily accessible” in Article 406(1) should be given a broad and purposeful interpretation. In the current case, this means that the obligation is not discharged simply by making the legislation, regulations and the decisions of the NBFPC publicly available. The Panel believes that Article 406(1) also imposes an obligation to ensure that legislation, regulations, guidelines and policies respecting matters covered by the *Agreement* are intelligible and not unduly vague. In order for measures to comply with the *Agreement*, applicants must be able to comprehend, with some measure of certainty, what is required in order to obtain a licence.

Given the breadth and vagueness of the conditions an applicant must meet under section 46(2) of the NPA, the absolute necessity for an applicant to successfully demonstrate that they meet those conditions and the scope of discretion given the NBFPC under the NPA, the Panel is of the view that further guidance from Respondent to both applicants and the NBNPC is required to meet the obligation under Articles 406(1) and 101(4)(a). The Panel can find no such guidance in the NPA, its regulations or any other material on record. In fact, the uncontradicted evidence from Complainant was that no such guidance exists.

The Panel finds that section 46(2) of the NPA is inconsistent with Articles 406(1) and 101(4)(a) of the Agreement.

With respect to Article 406(2), the Panel notes that this obligation is to other Parties to the *Agreement* and that a complaint that it has been

breached can, therefore, be made only by a Party, not a Person of a Party as defined in Article 200. More fundamentally, however, the Panel assumes that the *NPA* went through all the phases of public notification normally associated with the passage of legislation and this, in itself, is sufficient to satisfy the obligation under Article 406(2).

The Panel finds that the *NPA* is not inconsistent with Article 406(2) of the *Agreement*.

6.2 Application of the *Natural Products Act* - the Decision by the New Brunswick Farm Products Commission

6.2.1 Article 401(1)

In sections 6.1.1 and 6.1.3 of this report, the Panel found that section 46(2) of the *NPA* makes it difficult, and arguably impossible, for the NBFPC to make licensing decisions in a manner that is consistent with the *Agreement*. This results from the requirement that the NBFPC be satisfied that a licence will be either in the interest of the general public or of the (New Brunswick) dairy products trade.

In its decision,¹³ the NBFPC held that granting a licence would not be in the interest of the general public. In explanation, the NBFPC said (under Decision, point 4) that “unfettered competition for market share is therefore more likely to have a negative impact on price to consumers” (i.e. consumers could face higher prices). The Decision (at point 10) also stated that “the Commission does not consider protecting the capacity of existing licencees from decreased use as a valid reason for rejecting an application, neither does it consider increased utilization of the capacity of the applicant as a valid reason for approval.”

However, when asked during the hearing to explain how the higher prices to consumers would come about, Mr. McLean, the General Manager of the NBFPC, said that the entry of Complainant would cause the existing processors to find their margins decreased by loss of market.¹⁴ Through the price-setting mechanism adopted by the NBFPC, these higher unit costs, due to the lower volumes, would be passed on to consumers, so that “the current savings ...enjoyed by consumers would be diminished by the entry of another licencee”. This argument would

¹³ NBFPC Decision.

¹⁴ Presentation at Panel hearing by Mr. Clint McLean for Respondent; hearing transcript, pages 89-90.

presumably apply to any applicant who did not already own processing capacity in the province, and would rule out any out-of-province entrant except via the purchase of existing processing capacity. No evidence was offered by Respondent that such restriction of new entrants into the fluid milk market was likely to be the most effective way to achieve long run economies of scale needed to assure the lowest possible long run costs and prices to consumers.

The Panel has insufficient information to determine whether or not the NBFPC required of Complainant a greater burden of proof (that a licence would be in the interest of the public or the dairy industry) than required of other applicants. The Panel notes, however, that compared to the other NBFPC decisions filed by Respondent, the evaluation of the Complainant's application seemed more detailed and exacting. In no other case made available has the NBFPC provided in its ruling any detail on the information it expected of applicants. The very limited documentation provided by Respondent indicates that no out-of-province application has been approved in the last 25 years. This evidence does not help to rule out the Complainant's claim of geographic bias.

In the Panel's view, the cumulative effect of the exceedingly broad and vague discretionary power created by the *NPA*, the logic applied by the NBFPC as to the impact on prices, the apparently more exacting requirements placed on the Complainant (as compared to existing licencees), and the lack of successful out-of-province licence applications is sufficient for the Panel to conclude that the NBFPC's decision was not made in accordance with Article 401(1).

The Panel finds that the application of the *NPA* by the NBFPC is inconsistent with Article 401(1) of the *Agreement*.

6.2.2 Article 401(4)

Having concluded in section 6.2.1 of this report that the NBFPC did not treat Complainant and local licence applicants in an identical manner, there is no need to proceed with an analysis under Article 401(4).

6.2.3 Article 402

Given that the decision of the NBFPC effectively bars the Complainant from shipping its brand-name products into New Brunswick, it is a measure that "prevents the movement of persons, goods, services or investment across provincial boundaries". Accordingly, it is in breach of Article 402.

Respondent maintains that Complainant already sells some of its fluid milk into New Brunswick (through an agreement to supply milk under the Northumberland label). Thus, Respondent argues, Complainant has access to the New Brunswick market and, therefore, no breach of Article 402 has occurred. The Panel disagrees.

The fact that some of Complainant's products may find their way into New Brunswick via a private label deal with an existing licensee is no defense under Article 402. The fact remains that the decision of the NBFPC effectively bars Complainant from distributing its brand-name products in New Brunswick.

The Panel finds that the application of the *NPA* by the NBFPC is inconsistent with Article 402 of the *Agreement*.

6.2.4 Article 403

For the same reasons as for Article 402, the Panel finds that the NBFPC decision creates or maintains an obstacle to internal trade.

The Panel finds that the application of the *NPA* by the NBFPC is inconsistent with Article 403 of the *Agreement*.

6.2.5 Articles 406(1), 406(2) and 101(4)(a)

In section 6.1.5 of this report, the Panel states its views with respect to Articles 406(1) and 101(4)(a) imposing upon the Parties an obligation to ensure that measures to which the *Agreement* applies are transparent. Those views apply equally to the application of the *NPA* by the NBFPC.

With respect to the matter at hand, the Panel notes that licence applicants are provided very little guidance at the beginning of the licensing process by the NBFPC on the information they are required to submit, how the information will be evaluated or how the evaluation process will be carried out. Respondent argues that applicants have access to the *NPA* and the regulations and that past decisions are publicly accessible. In the Panel's view this is not sufficient to meet the transparency obligations under Articles 406(1) and 101(4)(a), particularly given the very vague terms of the *NPA* itself. Based on the documentation provided by Respondent related to past decisions, it appears that virtually no guidance is provided to applicants regarding why an application is accepted or rejected.

The Panel finds that the application of the *NPA* by the NBFPC is inconsistent with Articles 406(1) and 101(4)(a) of the *Agreement*.

The Panel notes that Article 406(2) does not apply in this circumstance for the reasons outlined in section 6.1.5 of this report.

6.3 Justification on the Basis of a Legitimate Objective

Where a measure has been found to be inconsistent with the Agreement, it may still be permissible under the provisions of the *Agreement* related to Legitimate Objectives. These provisions read as follows:

Article 404: Legitimate Objectives

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

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

Article 200: Definitions of General Application

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

- (a) public security and safety;
- (b) public order;
- (c) protection of human, animal or plant life or health;
- (d) protection of the environment;
- (e) consumer protection;
- (f) protection of the health, safety and well-being of workers; or
- (g) affirmative action programs for disadvantaged groups;

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

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

[...]

6.3.1 Respondent Must Demonstrate Legitimate Objectives

Respondent contends that, if section 46(2) of the *NPA* and the decision of the NBFPC in denying a fluid milk distribution licence to Complainant are found by the Panel to be inconsistent with the *Agreement*, they are permissible on the basis of a Legitimate Objective under Article 404 of the *Agreement*. Respondent cites consumer protection as the Legitimate Objective, specifically the protection of New Brunswick consumers from higher milk prices.

Pursuant to Article 404, in order for an *Agreement*-inconsistent measure to be permissible on the basis of Legitimate Objectives, it must be "demonstrated" that the measure is in conformity with each of paragraphs (a) to (d) of Article 404. In the Panel's view, it is the responsibility of the Party asserting Legitimate Objectives to demonstrate that each paragraph of Article 404 is satisfied.

The Panel agrees with the ruling of previous panels¹⁵ that a Party must do more than simply assert that it has a Legitimate Objective to meet whenever it wishes to maintain a measure that is inconsistent with the *Agreement*. The onus is on the Party to demonstrate that the measure pursues a Legitimate Objective; does not unduly impair access of persons, goods, services, or investments that meet the Legitimate Objective; is not more trade restrictive than necessary; and does not create a disguised restriction to trade.

Having determined that both section 46(2) of the *NPA* and its application by the NBFPC are in breach of Articles 401 to 403, the Panel must analyse whether these measures are permissible as pursuing Legitimate Objectives. In other words, the Panel must decide if it has been

¹⁵ MMT Panel Report, *supra*, note 12, at page 8 and CGA/ON Panel Report, *supra*, note 11, at page 19.

demonstrated that the requirements of Article 404 have been met.

6.3.2 Section 46(2) of the *NPA*

In the Panel's view, Respondent has failed to demonstrate that section 46(2) of the *NPA* is justified on the basis of Legitimate Objectives. As the Panel explained in section 6.1 of this report, section 46(2) facilitates breaches of the *Agreement* by the NBFPC and makes it very difficult, and arguably impossible, for the NBFPC to be truly geographically neutral. In short, the measure is inconsistent with reciprocal non-discrimination, it restricts or prevents the movement of goods across provincial boundaries and it operates to create an obstacle to internal trade.

Respondent argued that the wording "in the interest of the general public" used in section 46(2) is tantamount to "consumer protection" and that the section, therefore, pursued a Legitimate Objective under the terms of the *Agreement*, i.e. consumer protection. According to Respondent, the measure is, therefore, permissible under Article 404. The Panel disagrees.

The Panel notes that the phrase "in the interest of the general public" is broader than "consumer protection" and could encompass subjects beyond what is normally understood to constitute "consumer protection". If the purpose of section 46(2) is truly and only "consumer protection", then it would have been a simple matter for Respondent to limit the NBFPC's discretion in section 46(2) to granting licences only when consistent with "consumer protection". Instead, the discretion granted by section 46(2) is much broader, thereby facilitating *Agreement*-inconsistent decisions of the NBFPC on licence applications. Accordingly, it is not possible for the Panel to find that the measure is not more trade restrictive than necessary. Consequently, as provided in Article 404(c), the measure is not permissible.

The Panel also notes that even if it were to accept that the terms "interest of the general public" can be equated with "consumer protection", this still does not explain nor justify the terms "or the dairy products trade" in section 46(2). The addition of these words in section 46(2) confirms that the NBFPC's discretion is not limited to the pursuit of consumer protection, or even the broader "interest of the general public". In light of this, even accepting that consumer protection is the Legitimate Objective justifying the measure, it is, again, not possible for the Panel to conclude that the measure is not more trade restrictive than necessary as provided in Article 404(c).

The Panel finds that section 46(2) of the NPA, which it has found to be inconsistent with Articles 401(1), 402 and 403 of the Agreement, is not permissible under the provisions of Article 404(a) to (d).

6.3.3 Application of the NPA - the Decision by the New Brunswick Farm Products Commission

As noted in section 6.2 of this report, the Panel has concluded that the NBFPC decision is inconsistent with Articles 401(1), 402 and 403. As with respect to section 46(2) of the NPA, Respondent claims that the NBFPC decision on the Complainant's licence application was justified by the Legitimate Objective of consumer protection. The Panel does not agree that Respondent has demonstrated that the decision meets the requirements of Article 404 (a) to (d).

Under Article 404(a), the "purpose" of the NBFPC decision must be a Legitimate Objective. In this regard, the Panel is mindful that the NBFPC repeatedly stated in its decision that it was not convinced that the granting of the licence to Complainant would be in the interest of the general public. The Panel also notes that the NBFPC did not specifically make a finding with respect to the interests of "the dairy products trade". As such, if the equation of the "interest of the general public" with "consumer protection" is accepted, the purpose of the NBFPC decision could be arguably construed as "consumer protection", i.e. a Legitimate Objective.

The Panel notes, however, that it has already concluded that the "interest of the general public" is a broader concept than "consumer protection". As such, the Panel is not convinced that Respondent has demonstrated that the purpose of the decision was solely, or even predominantly, "consumer protection".

With respect to the purpose of the NBFPC decision, the Panel also notes that there are a number of statements in the NBFPC decision that lead it to conclude that purposes other than "consumer protection" were being pursued by the NBFPC in refusing the Complainant's application. For example, paragraph 22 of the decision states as follows:

The Commission finds no evidence to support the statement "...as a result of the [AIT], New Brunswick processors are no longer limited to the [New Brunswick] provincial market." The Commission notes that licensing authority exists in several provinces, including Nova Scotia, and that New Brunswick processors are not permitted to sell their products in other jurisdictions.

In this extract, the NBFPC appears to be supporting its decision to reject Complainant's application on the basis that New Brunswick entities do not have access to the fluid milk market of other provinces. Respondent has not demonstrated how this relates to "consumer protection".

Paragraph 15 of the decision is also telling with respect to the purposes of the decision:

The Commission heard argument that the purpose of the Act, and/or the intent of the Commission in enforcing Subsection 46(2) thereof, is to protect the production of fluid milk by dairy producers and/or processors in the Province of New Brunswick. No evidence was introduced to support this. The Commission notes that the production of fluid milk within New Brunswick, as in other provinces, is in accordance with a quota system as part of the Canadian system of supply-management, and federal statute including the *Canadian Dairy Commission Act*. This quota was originally allocated to provinces based on several factors, including historical production and processing infrastructure. While individuals hold this quota, it is in fact the property of the Province of New Brunswick, and may not be sold or allocated to individuals from outside the province. Retention of this quota within the Province is in the interest of the general public, producers, transporters, processors and others engaged in the dairy products trade in New Brunswick. [Emphasis added.]

This extract implies that the decision to refuse the licence application was justified, at least in part, on the basis that if a licence is granted, New Brunswick quota allocation may be prejudiced, and that this would not be in the interest of "the general public, producers, transporters, processors and others engaged in the dairy products trade in New Brunswick" (emphasis added). Again, the Panel finds evidence that the purpose of the decision was, therefore, not solely (or even predominantly) "consumer protection".

For these reasons, the Panel is unable to conclude that Respondent has demonstrated that the purpose of the decision was "consumer protection". It is conceivable that "consumer protection" was one of the purposes the NBFPC had in mind in making its decision, but in the Panel's view, other purposes also came into play which have not been demonstrated to be Legitimate Objectives.

Moreover, even if the Panel accepted that the decision pursued solely "consumer protection", Respondent has not demonstrated that the refusal of Complainant's licence application was the least trade restrictive way in which to achieve that Legitimate Objective.

Regardless, the Panel notes that, although consumer protection is included in the definition of a Legitimate Objective under Article 200 of the *Agreement*, the means chosen to achieve that objective, protection of the production of a Party, is specifically excluded under Article 200 from the meaning of Legitimate Objective. The Panel is of the view that the use of an excluded measure under the *Agreement* to achieve a Legitimate Objective invalidates the Legitimate Objective defense and, in this case, creates a disguised barrier to trade.

In this regard, the Panel notes paragraph 2 of the NBFPC's decision which reads as follows:

While the applicant has argued that the granting of a licence would not have an impact on milk prices to consumers, the Commission disagrees. In exercising its mandate under the *Natural Products Act*, the Commission is responsible for establishing prices of fluid milk products in the Province of New Brunswick. In balancing the interests of producers, processors and consumers, the Commission analyses returns to producers, processors and retailers, thereby establishing prices based on what it determines to be a fair return to each party.

In section 6.2.1 of this report, the Panel has already reviewed the evidence offered by the General Manager of the NBFPC which explains how the NBFPC sets prices, and the Panel has concluded that this results in the effective exclusion of out-of-province licence applicants. As the Panel determined above, no evidence was offered by Respondent that such restriction of new entrants into the fluid milk market was likely to be the most effective way to assure the lowest possible long run costs and prices to consumers.

The Panel finds that the application of the NPA in the decision of the NBFPC, which it has found to be inconsistent with Articles 401(1), 402 and 403 of the *Agreement*, is not permissible under the provisions of Article 404 (a) to (d).

6.3.4 Articles 406(1), 406.2 and 101(4)(a)

As explained in sections 6.1 and 6.2 of this report, the Panel has found that the measures at issue are inconsistent with Articles 406(1) and 101(4)(a) of the Agreement. Breaches of these Articles can not be justified as Legitimate Objectives under Article 404. Article 404 only applies to measures inconsistent with Articles 401 to 403; it does not operate to permit measures inconsistent with other Articles. Accordingly, the Legitimate Objectives provisions of the Agreement cannot be used to justify measures found to be inconsistent with Articles 406.(1) and 101(4)(a).

7. DETERMINATION OF IMPAIRMENT TO TRADE AND INJURY

Article 1718(2)(c) requires that the Panel's report contain a determination, with reasons, as to whether the measures under review have impaired internal trade and caused injury.

As noted earlier in this report with respect to Articles 402 and 403, the Panel has found that the measures at issue have impaired internal trade.

With respect to injury, Complainant alleges that the denial of a fluid milk distribution licence in New Brunswick has caused significant injury to Complainant's prospects for growth and eroded its capability to respond to competition in the future. Complainant admits that it is difficult to quantify the extent of injury and submitted no documentation in that regard. The Panel notes that a complainant is not required under the *Agreement* to prove a demonstrable dollar amount to establish injury, nor is a panel required to rule on the extent of injury. It is the view of the Panel that the denial of the opportunity to be considered for a fluid milk distribution licence in a manner that is fair and consistent with the *Agreement* is injury in itself, as is the denial of the opportunity to participate on an equal footing in the New Brunswick market.

The Panel finds that the New Brunswick *Natural Products Act* and the manner in which it was administered by the New Brunswick Farm Products Commission in denying a fluid milk distribution licence to Complainant have impaired internal trade.

The Panel finds that the New Brunswick *Natural Products Act* and the manner in which it was administered by the New Brunswick Farm Products Commission in denying a fluid milk distribution licence to Complainant have caused injury to Complainant.

8. OTHER ISSUES

8.1 Constitutional Authorities

In its written submissions and at the hearing, Respondent argued that the *Agreement* is a “political”¹⁶ agreement, carefully drafted so as not to override the legislative authority of the province under the Constitution. According to Respondent, it has fulfilled its obligations under the *Agreement* and it is not up to this Panel to question the validity of provincial legislation or its application. Further, at the hearing, Respondent indicated that it is New Brunswick’s absolute right to determine if, how and to what extent it will implement or respond to the Panel’s recommendations.

The Panel agrees that the *Agreement* does not in any way modify, limit or override the constitutional powers of the Parties to pass legislation within their areas of constitutional authority. In this regard, the Panel is mindful of Article 300 of the *Agreement* which provides as follows:

Nothing in this Agreement alters the legislative or other authority of Parliament or of the provincial legislatures or of the Government of Canada or of the provincial governments or the rights of any of them with respect to the exercise of their legislative or other authorities under the Constitution of Canada.

The Panel is also mindful of Article 1722 of the *Agreement* which provides that the Panel has “no authority to rule on any constitutional issue”.

Respondent has asserted its right to implement or not to implement the Panel’s recommendations.¹⁷ Should Respondent not comply with the Panel’s recommendations, the sanctions are those that the Parties have specifically provided for in the *Agreement*. For the purposes of Person-to-Government Dispute Resolution, under Part B of Chapter Seventeen, implementation is provided for in Articles 1719 and 1720 of the *Agreement*.

¹⁶ Submission of the Province of New Brunswick, paragraph 46, 49 and 68; July 3, 2002.

¹⁷ Presentation at the Panel hearing by Mr. Harry Quinlan for Respondent; hearing transcript, page 75.

That being said, the Panel notes that the *Agreement* contains the solemn undertakings of the signatory governments. By entering into the *Agreement*, the Parties agreed that past legislation, practice or policies may no longer be appropriate given the stated goals of the *Agreement*. These objectives are the reduction or elimination of barriers to the free movement of persons, goods, services and investment within Canada and the establishment of an open, efficient and stable domestic market.¹⁸

In signing the *Agreement*, the Parties recognized that constitutionally valid measures may be contrary to the *Agreement* and may need to be changed in order to achieve the objectives of the *Agreement*. Having themselves emphasised the importance of the *Agreement*, the Parties ought to rigorously respect the commitments it contains.

8.2 Burden of Proof

During the course of the proceeding, Respondent sought guidance from the Panel as to the burden of proof that must be met by the disputing parties in order to be successful. Respondent directed the Panel to paragraph 10 of Annex 1813 (Rules of Interpretation), which reads as follows:

Where a Party considers that a measure or standard is inconsistent with this Agreement, that Party bears the burden of proving its contention.

On this basis, Respondent argued that in light of Annex 1813, Complainant bears the burden of proving that the *Agreement* has been breached.

The Panel notes, however, that the capitalised term "Party", used twice in paragraph 10 of Annex 1813 and defined in Article 200, refers to the entities that signed the *Agreement*, i.e. the provinces, territories and the federal government. It says nothing about the burden of proof that must be met by persons in Person-to-Government Disputes, under Part B of Chapter Seventeen.

Furthermore the Panel notes that the *Agreement* is silent as to the extent of the burden of proof borne by the respective parties. Thus, even accepting that Complainant bears the burden of proof, the *Agreement* is silent on whether the burden is discharged by proving a contention on a *prima facie* basis, on the balance of probabilities, or beyond a reasonable

¹⁸ Agreement on Internal Trade, Article 100.

doubt. The *Agreement* is also silent as to the form in which the evidence must be presented and the allowable grounds for excluding or including evidence.

Article 1717(4) of the *Agreement*, providing the terms of reference of the Panel, mandates simply that the panel shall "examine whether the actual measure at issue is inconsistent with this *Agreement*". Article 1718(1) goes on to state that the Panel is to issue a report "based on the submissions of the person and the Party complained against and any other information received during the course of the proceeding".

The Panel is of the view, therefore, that the *Agreement* does not contemplate a legalistic or technical application of evidentiary burdens. In the Panel's view, in order to succeed on a given point, a disputing party must convince the Panel, based on the material filed, of the soundness of that party's position. In the present case, Complainant has presented material sufficient to convince the Panel that breaches of the *Agreement* have occurred.

9. SUMMARY OF PANEL DETERMINATIONS¹⁹

The Panel finds that the New Brunswick *Natural Products Act* and the manner in which it was administered by the New Brunswick Farm Products Commission in denying a fluid milk distribution licence to Complainant are inconsistent with Articles 401, 402, 403, 406 and 101 of the *Agreement* and that the inconsistencies are not permissible under the Legitimate Objectives provisions in Article 404.

The Panel also finds that the measures at issue have impaired internal trade.

The Panel further finds that the measures at issue have caused injury to Complainant.

10. PANEL RECOMMENDATIONS

The Panel recommends that Respondent take whatever steps are necessary to ensure that the *NPA* and the manner in which it is administered by the NBFPC with respect to the licensing of fluid milk distributors are made consistent with the *Agreement* and the findings of this Panel.

The Panel further recommends that, pending such action, Respondent ensures that, should Complainant wish to reapply for a

¹⁹ A full listing of the Panel's findings is included in Appendix A.

fluid milk distribution licence, the NBFPC administers the licensing process in a manner free from the deficiencies identified by the Panel in this report.

Complainant requested that the Panel recommend actions that the CIT might take if, within 60 days, the disputants are not able to agree on a resolution of the dispute which should normally conform with the Panel's recommendations as provided under Article 1719(1).

Respondent took great pains, both in its written submissions and during the Panel hearing, to emphasize New Brunswick's strong commitment to the *Agreement*. Any reluctance by Respondent to implement the Panel's report is therefore likely to signal some competing interests, perhaps relating to the NPA's support of current milk distributors in New Brunswick. The Panel has concluded both that the *Agreement* has been breached and that there are likely to be less trade-restrictive and lower-cost ways of supporting the long run interests of New Brunswick milk consumers. The likelihood of successful resolution is thus likely to be raised by the prospect of publicity, as envisaged by Article 1720 (Non-Implementation - Publicity) of the *Agreement*. The timely issuance of a news release by Respondent on its intentions with respect to implementation of the Panel's recommendations would be a useful start to this process.

The Panel recommends that in the absence of resolution within 60 days, or within a mutually agreed extension to 120 days, any non-compliance should be added to the agenda of the annual meeting of the CIT, as stipulated in Article 1720, and also made the subject of more widespread and continuing publicity by the CIT and the disputants.

The Panel also notes that the existence of fluid milk distribution licensing in other Atlantic provinces might deter any one Party from pursuing changes in these measures that would be *Agreement*-consistent. The Panel also notes its previous observation that fluid milk distribution licensing is not intrinsic to supply management for raw milk.

The Panel also recommends that the CIT lead a timely process to encourage changes by all Parties to ensure that fluid milk distribution in all provinces is *Agreement*-compatible. This recommendation should in no way delay the implementation of the Panel's other recommendations.

11. AWARD OF COSTS

Article 1718(3) of the *Agreement* gives a Panel the discretion to award costs to a successful person in a proceeding. Complainant has requested

such an award in the amount of \$31,140.00 and has submitted a statement of costs to the Panel in support of the request.

The Panel agrees that an award of costs to the Complainant is justified in this case.

The Panel awards costs to the Complainant in the amount of \$31,140.00 to be paid by Respondent.

Respondent submitted that it should also be awarded costs in that Complainant initiated proceedings under the *Agreement* before the NBFPC had the opportunity to render its decision regarding Complainant's application and failed to provide proper evidence to substantiate its application. No statement of costs was submitted by Respondent. The Panel notes that there are no provisions in the *Agreement* for awarding costs to a Party. Indeed, paragraph 1 of Annex 1718.3 states that "costs may be awarded only to a successful person in a panel proceeding" (emphasis added).

The Panel denies Respondent's claim for an award of costs.

Rule 52 of Annex 1706.1 (Panel Rules of Procedure) stipulates that operational costs shall be divided equally between disputants. Operational costs are defined as "all per diem fees and other disbursements payable to panellists for the performance of their duties as panellists including costs incurred by the panel for retaining legal counsel to provide advice on procedural issues." The Panel confirms that the operational costs of the panel proceedings are to be divided equally between Complainant and Respondent in accordance with Rule 52 of Annex 1706.1. For greater certainty, the award of costs to be paid by Respondent is in addition to the operational costs to be paid by Respondent.