Report of Article 1716 Panel Regarding the Dispute between Artisan Ales Consulting Inc. and Alberta Regarding Beer Mark-ups

28 July 2017

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Panel Decision

This Panel was constituted for the purposes of adjudicating a complaint initiated by Artisan Ales Consulting Inc. to a measure enacted by the Province of Alberta ("Alberta"). The complaint was initiated and prosecuted under the provisions of the Agreement on Internal Trade ("AIT") with Artisan Ales Consulting Inc. ("Artisan") as the Complainant and the Province of Alberta as the Respondent. The Province of Saskatchewan ("Saskatchewan") was granted Intervenor status. Written submissions were provided by Artisan, Alberta and Saskatchewan, to the Panel in respect of the substance of the complaints of Artisan. A second set of written briefs was provided to the Panel prior to the hearing on the specific issues of the award of costs for the proceedings, falling under two main categories of operational costs and tariff costs.

In its written materials, Artisan addressed two issues. The first dealt with the issue of whether Alberta's October 2015 legislation complied with the AIT provisions. The second related to whether the August 2016 provisions, which came into effect after the 2015 legislation had been repealed, complied with the provisions of the AIT.

The hearing was held in Edmonton, Alberta, on June 1st, 2017. As a result of rulings made by the Panel on May 3rd, 2017, prior to the hearing, only Artisan and Alberta were able to make verbal representations at the hearing, and Saskatchewan was not. At the conclusion of the hearing, the Panel reserved and indicated that it would provide its decision in due course.

The two sets of Alberta actions which are the subject of the Artisan complaint will be referred to as the 2015 Measure and the 2016 Measure.

The 2015 Measure

Alberta, like other provinces, has indirectly controlled the levels of wholesale prices for alcoholic beverages, including beer, sold in its province through its mark-up regime. In turn this can influence retail prices. The mark-up regime in place prior to October 28th, 2015, provided for mark-ups that differentiated between beer products of breweries on a graduating scale that varied according to individual brewer's total production/sales (capacity). As in other provinces, these mark-ups were graduated in a manner that benefited smaller brewers a system known as the "Small Brewer Mark-up". The graduated mark-up had to that point applied to beer products whether brewed in Canada or imported, that were sold in Alberta, such that all breweries were treated equally on the basis of their total sales volumes.

Then, on October 28th, 2015, Alberta amended the "Small Brewer Mark-up", essentially revoking this for all suppliers except for brewers in the Provinces of Alberta, Saskatchewan, and British Columbia (the "New West Partnership"). Beer supplied from all other sources was charged the maximum mark-up, which had previously applied only for large commercial brewers, at the rate of $1.25 per litre.

The 2016 Measure

On August 5th, 2016, Alberta repealed the October 28th, 2015 mark-up regime and instituted a new system in which a $1.25 per litre wholesale mark-up was applied to all beer sold in Alberta, regardless of the source or the total sales volumes of supplying breweries. No exception was made for beer produced in Alberta nor for beer produced within the New West Partnership.

Within a few weeks of the application of the "across the board" wholesale mark-up of $1.25 per litre on all beer sold in Alberta, Alberta introduced an Alberta Small Brewers' Development (ASBD) grant program, operated by the Alberta Ministry of Agricultural and Forestry. This program of grants requires annual application and is available, on a

per litre basis, to Alberta brewers based on their qualifying total annual sales. The grants apply on a sliding scale, with the maximum grant of $1.15 per litre accessible to Alberta brewers that have the lowest levels of qualifying sales, and declined to $0.00 for sale volumes of 250,000 hectoliters. The effect of the two initiatives is to essentially return small Alberta brewers to the same economic position they were in with the 2015 measure.

All Written submissions submitted to the Panel by Artisan, Alberta and Saskatchewan, together with their respective exhibits and schedules are matters of public record available on the website of the Secretariat for the AIT. Thus the Panel does not believe that it is necessary to incorporate any of the extensive data submitted into the body of this Decision.

The Issues

At the hearing on June 1st, 2017, counsel for Alberta effectively conceded that the 2015 Measure was not in compliance with the provisions of the AIT. Alberta took the position, however, that as the 2015 Measure had been repealed, there was nothing for the Panel to determine. This is important in the sense that it narrowed the issues to be determined by the Panel to:

1. **Does the Panel have jurisdiction to adjudicate upon the 2016 Measure?**

2. **In the event the Panel assumes jurisdiction, whether the Panel can properly consider both the 2016 Mark-up Revision and the ASBD grant program, whether these be viewed as separate actions, or as an aggregate whole or, alternatively, whether the Panel is restricted to assessing solely whether the revised mark-up regime of 2016 is in compliance with the AIT.**

1. Jurisdiction

The question of the Panel's jurisdiction to deal with the 2016 Measure consists of two sub-issues. The first of these is whether or not the Panel has jurisdiction to address the issues of compliance with respect to the 2016 revisions to the mark-up regime itself. The second sub-issue is, if the Panel does have jurisdiction, whether it is entitled to look at the impact of the two separate actions by Alberta, being the revisions to the mark-up system, as well as the implementation of the ASBD grant program, whether as a whole, or separately. Alternatively, is the Panel restricted to looking solely at the revisions to the mark-up in 2016?

Artisan suggests that the Panel does have jurisdiction to deal with the 2016 Measure essentially arguing that together the mark-up change and grant program are simply a continuation of the 2015 Measure. This is also the position taken by Saskatchewan.

Alberta, on the other hand, has taken the position that the 2016 Measures involves two separate actions taken by the Government of Alberta which stand or fall on their own merit and ought not to be looked at as a combination. One aspect of Alberta's position is simply that, given the fact that Alberta repealed the 2015 legislation (which Alberta concedes offended the provisions of the AIT), and given the fact that Artisan's complaint was initiated with respect to that 2015 Measure, there is nothing for the Panel to determine.

All parties thoroughly presented their respective views and justifications in the written submissions and again at the hearing. The Panel has concluded that it has jurisdiction to consider the 2016 revision to the mark-up regime in part because the main point of Artisan's appeal was that the 2015 regime disadvantaged Artisan by excluding them from the advantages of lower markups and that this feature of the 2015 markup system continued to apply to Artisan in the 2016 Mark-up system. 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. In summary,

Saskatchewan argues that functionally the 2016 Measure and the 2015 Measure are identical, and further that the 2016 Measure should simply be considered by the Panel as a continuation of the 2015 Measure. Saskatchewan also argued that bifurcating the 2016 Measure into its constituent elements of the mark-up and the ASBD grant program should be considered in combination as a trade-distorting policy that offends the AIT. Third, Saskatchewan argued that the wording of the request for the Panel clearly encompassed both the 2015 Measure and the 2016 Measure and that there was precedent supporting that argument.

Alberta counsel, in both the written submissions and at the hearing, argued a contrary view. It was Alberta's position that for this Panel to be seized with jurisdiction to review the 2016 Measure, in whole or in part, Artisan would have had to have filed a second letter of complaint specifically relating to the 2016 Measure in order to initiate proceedings culminating in the convening of a panel to review the 2016 Measure.

It should also be noted in reply to Alberta's oral argument, counsel for Artisan added arguments that were not contained in the written material previously provided to the Panel.

Dealing with the jurisdiction of the Panel to consider the 2016 Measure, counsel argued that there is no question that Artisan is entitled to a ruling that the 2015 Measure contravenes chapter 10 (transcript of proceedings p. 110, 1.11). Counsel for Artisan then went on to suggest that, with such a ruling, Artisan would be entitled, under Article 1721 (9), after a specified period of time, to ask the Secretariat to reconvene the Panel and seek a determination whether Alberta had remedied the non-compliance of the 2015 Measure. As a result,

> "… you would hear exactly the submissions you heard to-day about the August 2016 changes. So we say, what value does it serve to delay those submissions and your determination of those submissions…" (transcript, p. 113, 1.17).

The Panel found comfort in the fact that Artisan specifically referred to both the 2015 Measure and the totality of the 2016 Measure in the letter it filed when requesting the establishment of a panel. Alberta cannot be taken to have been surprised by the position taken by Artisan on this issue. On balance the Panel believes that sufficient features of the 2016 Measure were properly before the Panel for its consideration of this.

Alberta further suggested that if the Panel determined that it had jurisdiction to deal with the 2016 Measure, that jurisdiction should extend only to dealing with the revised mark-up regime, and not the revised mark-up regime together with the ASBD grant program. Counsel for Alberta advocated that the 2016 mark-up regime was applied universally to all sales of beer in the Province of Alberta and this was, therefore, in compliance with its AIT obligations. This suggested that the ASBD grant program was separate and apart from the 2016 mark-up measure, and should not be considered to be part of the 2016 Measure. 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, and therefore within the jurisdiction of the Panel to review.

2. 2016 Measure

The positions taken by Artisan and Saskatchewan are that the 2016 Mark-Up Measure when taken in conjunction with the ASBD grant program, are a clear violation of the principles of the AIT. They allege that the result of this combination is to provide a preferential treatment on pricing for Alberta brewers over the pricing for non-Alberta brewers. They allege that Alberta, having recognized the lack of compliance of its 2015 Measure with the provisions of the AIT because it discriminated in pricing between brewers within the New West Partnership and those outside of it, attempted to rectify the program in the 2016 Measure by applying a consistent mark-up to all beer sales in Alberta and then separately through the ASBD grant program essentially putting the Alberta brewers into the same financial position as they would have been under the

2015 Measure. Documentary evidence was provided in the schedules to the written submissions of both Artisan and Saskatchewan supporting that argument.

Alberta, on the other hand, argued that the Panel did not have jurisdiction to assess the ameliorating effects of the ASBD grant program, and that this was an initiative of Alberta that was separate from the 2016 mark-up measure. Alberta represented that even if the Panel was to consider the ASBD grant program, this was in compliance with the AIT as the grants program is "an incentive" program permitted under Chapter 6 of the AIT. See Paragraphs 26 through 34 of Alberta's written submissions.

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.

The majority of the Panel concludes, therefore, that the only issue remaining is to determine in regards to the 2016 Measure whether the ASBD grant program should be considered as an incentive under Chapter 6 of the AIT, and whether that incentive is therefore exempted, under Chapter 6 of the AIT from application of the provisions of Chapter 10 of the AIT. Alberta's counsel relied upon the provisions of Paragraph 4 of Annex 1813, Interpretation of Agreement, which provides:

> 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.
>
> Quoting from Paragraph 39 of Alberta's Brief:

> "In the context of the AIT, all parties to the dispute agree that, in accordance with Annex 1813, Chapter 6 is a horizontal chapter and Chapter 10 is a vertical chapter. Vertical chapters apply to matters within their scope and horizontal chapters apply to matters within their own scope and matters that fall within the scope of a vertical chapter. If there is an inconsistency between a vertical and horizontal chapter, the vertical chapter prevails to the extent of the inconsistency. The key issues is what is meant by "inconsistency".

Alberta's counsel argued that there was no inconsistency. Therefore there was no need to apply the provisions of Paragraph 4 of Annex 1813. Therefore, Alberta's counsel argued that the ASBD grant program fell squarely within the confines of Chapter 6, and there being no inconsistency, Chapter 10's provisions should not override Chapter 6 and the ASBD program should survive a compliance review under the AIT.

Artisan and Saskatchewan argued that there was in fact an inconsistency in this particular ASBD grant program, and while this might be permissible under Chapter 6, it offended the provisions of Chapter 10 and as result there was an inconsistency and the provisions of Paragraph 4 of Annex 1813 should apply.

Again, counsel for Artisan commented in oral argument on the interaction between Chapter 10 and Chapter 6 as follows:

> "… I think essentially Alberta is asking, you know, is it plausible that the parties would have clearly accepted some measure of subsidies and incentives in their economies, and then through Chapter 10 remove the ability to do that in the alcohol sector?
>
> I think the position of Artisan Ales can be best summarized as, is it plausible that the parties would have prohibited discriminatory mark-ups in Chapter 10, which we say is clear, and permitted each other to achieve exactly the same result in substance by providing grants back to their producers for the sale of the beer." (transcript, p. 117, 1.24).

The majority of the Panel believes Artisan's argument to be the more plausible. 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.

The majority of the Panel adopts the reasoning in Saskatchewan's written submission commencing at Paragraph 108. The Panel majority is of the view that there is an inconsistency between the two chapters and that in accordance with the interpretation provisions of Paragraph 4 Annex 1813, the Chapter 10 requirements must be complied with by Alberta. Alberta therefore is in breach of the AIT in relation to the 2016 Measure.

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 (see also Sask. Submission paragraphs 123 – 127).

3. Majority Conclusions

The majority of the Panel determines as follows:

1. That the 2015 Measures are inconsistent with Article 4.01 and 10.04 of the AIT.

2. That the 2015 Measures are inconsistent with Article 4.03 and 10.05 of the AIT.

3. That 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.

4. That 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.

5. That Artisan, 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.

6. 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.

7. That 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

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

David McKeague, Chair of the Panel

Ron Perozzo, Panelist

Michele Veeman, Panelist

4. Dissenting Opinion (member Veeman)

While I agree that the 2015 Alberta "Small Brewer Mark-up" charges are clearly not consistent with the obligations of the AIT, I do not agree with my Panel member colleagues' conclusion that this is also the case for the 2016 measures. The major basis for this is my disagreement with the position of Artisan and Saskatchewan, relative to this dispute, that where there is conflict in the provisions of the AIT, the specifications of "vertical" Chapter 10 (Alcoholic Beverages) should invariably overwhelm those of "horizontal" Chapter 6 (Investment). This effectively leads to the conclusion of Artisan and Saskatchewan that Alberta currently contravenes provisions of the AIT.

In considering the relative power of specific articles of AIT Chapters 6 and 10, I note that Artisan and Saskatchewan essentially ignore the provision specified in Article 6.01 (in bold here): "**Except as otherwise provided in this Chapter,** in the event of an inconsistency in any other Chapter in Part IV, the other chapter prevails to the extent of the inconsistency". Of importance in this context, AIT Chapter 6 unambiguously provides an exception to the power of the provisions of Chapter 10 in specifying that: "**Nothing in this Agreement shall be construed to require a Party to provide incentives for activities undertaken outside its borders**." (Article 6.08(2).

The lack of ambiguity of Article 6.08(2) is particularly noteworthy relative to the function and effect of the mark-up systems for small brewers maintained by most Canadian provinces. These apply graduated wholesale-level, concessional charges that increase, from relatively low levels to higher levels, as the sales volumes of individual small breweries increase. Relative to the higher level of the "standard" mark-up generally charged on sales of larger ("commercial") brewers, "Small Brewer Mark-ups" are phased incentives provided in the form of a degree of graduated price support to small brewers, effectively reducing Parties' revenues from alcohol regulation. Small brewer mark-up programs are, then, consistent with the definition of "Incentive" given in Article 6.16 (b): **"any form of income or price support which results directly or indirectly**

in a draw on the public purse." Consequently, these concessional mark-ups are subject to Article 6.08(2).

Obviously this does not rescue the 2015 Alberta mark-up system which is recognized, by all associated with this dispute, to have contravened the AIT. The Alberta system of small brewer mark-ups that came into force in October 2015 restricted concessional mark-up charges to qualified shipments from small brewers in the three provinces that then comprised the New West Partnership. For all other beer shipments, from all other provinces, regions and nations, payment of the standard (non-concessional) mark-up was required. This clearly contravened AIT Articles 4.01 and 10.04 as well as 4.03 and 10.05 (reciprocal non-discrimination and no obstacles), in addition to being inconsistent with Canada's obligations under the General Agreement on Tariffs and Trade.

Alberta's 2015 small brewer mark-up system was substantively changed, in August 2016, by the complete removal of concessional mark-ups for all beer, irrespective of origin. Although this change is contested by Artisan and Saskatchewan, it is clear from Articles 4.01 and 10.04 that the deletion of the small brewer markup system in 2016 does not in itself offend the AIT, since any discrimination in mark-ups across different sources of shipments (such as applied in the 2015 small brewer mark-up regime) is corrected by the 2016 change which applies the standard mark-up to all beer sold in Alberta. In this context, it should be noted that proposals by Artisan and Saskatchewan that Alberta reinstate the pre-2015 Small Brewers Mark-up System are not credible: according to Article 6.08(2), no Party can be required to provide incentives for activities undertaken outside its borders.

Shortly after the complete elimination of all concessional small brewer mark-up provisions in Alberta, the program of ASBD grants to small-scale brewers was introduced. Whether these two changes in policy, considered together, represent cosmetic changes explicitly designed with the intent to harm the competitive position of out-of province craft brewers, as maintained by the Complainant and Intervener, or whether these are simply two policy changes motivated by a need to increase revenues

during a recession, when income and employment were falling, without unduly harming employment in its craft beer industry, should not be the focus of this dispute settlement process. Rather, the issues at hand are whether or not Alberta's policy changes are valid in terms of the specific rules of the AIT. Since Alberta rectified its 2015 error of discriminatory mark-ups by completely deleting the "Small Brewer Mark-ups" in a manner that is consistent with the AIT provisions for reciprocal non-discrimination and obstacles, one of the remaining issues concern whether Alberta's 2016 ASBD grant program contravenes the AIT.

Are grants that partly compensate small brewers for their higher levels of unit costs, in industries in which there are economies of larger scale operations, discriminatory according to the AIT? Grants that are directed to the general purpose of aiding growth and employment in the craft beer sector certainly are used in other provinces, including Saskatchewan. Of more relevance than the form of any such grant, however, is that grants are not indicated as measures of concern in the text of the AIT, either in Chapter 4 of the AIT, which specifies the general rules of the AIT, nor in any of the Articles of Chapter 10, which provide detail on potential contraventions of these rules for alcoholic beverages (including in terms of practices associated with concerns regarding discrimination; obstacles; and costs of services, fees and other charges). Based on these features of Chapters 4 and 10, it appears that the AIT does not restrict Parties' decisions to apply grants. On this basis, the 2016 introduction by Alberta of ASBD grants does not contravene the AIT.

Overall, if each of the two contested policies relating to small brewers that were introduced by Alberta in 2016 cannot be judged to be invalid in terms of the specific rules of the AIT, is it logical to conclude that in combination these policies are invalid? In terms of the current rules of the AIT, I conclude that that the answer to this question is "no".

As a final comment on the submissions: both Artisan and Saskatchewan claim injury, demonstrated by lower levels of sales of beer to Alberta from late 2015 through 2016, than was the case earlier. Relative to the extent of this sales decline, it is not surprising that shipments of craft beers to Alberta declined as income and employment fell in the context of substantive economic pressures on Alberta's economy that had arisen from the collapse in oil prices. The extent of the cited decline in Alberta's inward shipments of craft beer is likely also accentuated by the feature that, prior to the 2015 and 2016 measures, the Alberta small brewer mark-up system tended to provide relatively larger incentives to small brewers' shipments of beer to Alberta than to some other regions. [To see an example of this tendency, compare the March 27 2015 figures given in column 2 of Table 3, p 9 (for Alberta) with those in Table 1, p 13 (for Saskatchewan) in the Saskatchewan submission]. While it may not be possible to disentangle various influences on shipments of beer to Alberta during the time periods discussed, in view of these features, the extent of lower shipments that arose from Alberta's 2015 and 2016 measures seem likely to be overstated. As well, it is not clear that the 2016 change in government policy that completely removed a universal incentive program from goods produced both within and outside Alberta's territory, constitutes legal harm.

Considering the findings of the majority of the Panel:

1. I agree that the 2015 measures are inconsistent with Articles 4.01 and 10.04 of the AIT.

2. I agree that the 2015 measures are inconsistent with Articles 4.03 and 10.05 of the AIT.

3. I do not agree that the 2016 Measures (uniform mark-up and ASBD grant program) are inconsistent with Articles 4.01 and 10.04 of the AIT.

4. I do not agree that the 2016 Measures (uniform mark-up and ASBD grant program) are inconsistent with Articles 4.03 and 10.05 of the AIT.

5. I have reservations on the period and extent to which Artisan, as well as others importing beer into Canada or producing beer for export into Alberta, have suffered injury due to the Measures.

6. I disagree that Alberta must repeal or amend the 2016 Measures of its beer-related mark-ups and related grant programs.

7. I agree that 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

8. I agree that Artisan be awarded tariff costs on the basis of Fifty (50%) percent of the permissible cap.

APPENDIX A: Participants in the Panel Hearing

Panel:

David McKeague (Chair)
Ron Perozzo
Michele Veeman

Complaining Person: Artisan Ales Consulting Inc.

Benjamin Grant, Counsel for Artisan Ales Consulting Inc., Conway Baxter Wilson LLP
Mike Tessier, President of Artisan Ales Consulting Inc.
Boriana Vitanov, Vice- President of Artisan Ales Consulting Inc.

Complaining Recipient: Government of Alberta

Shawna K. Vogel, Counsel to the Government of Alberta, Dentons Canada LLP
Lorraine Anders, Acting Executive Director, Trade Policy- Domestic, Government of Alberta
Richard Skelton, Senior Trade Policy Officer, Government of Alberta

Also present in audience:

Intervenor: Government of Saskatchewan

Arla Cameron, Senior Trade Analyst, Executive Council – Intergovernmental Affairs Government of Saskatchewan
Theodore Litowski, Crown Counsel, Ministry of Justice and Attorney General, Government of Saskatchewan

Supporting the Hearing:

Internal Trade Secretariat

Patrick Caron, Managing Director
Patrick Fortier, Internal Trade Officer