

**DISPUTE RESOLUTION IN AGREEMENT ON INTERNAL TRADE:  
A CONSUMER PERSPECTIVE**



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A Consumer Perspective

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## EXECUTIVE SUMMARY

This evaluation of the dispute resolution mechanism of the Agreement on Internal Trade (AIT) has determined a series of amendments are required in order for the Agreement to meet its objectives in a more efficient manner. These objectives include the promotion of an open, efficient and stable domestic market for long-term job creation, economic growth and stability by reducing and eliminating to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada. The AIT appears to focus on the prevention of new barriers to trade, while providing little incentive for the removal of existing barriers. We contend the recommendations enclosed in this report adhere to a series of the guiding principles first articulated in the Memorandum of Understanding on Procedures for the Elimination or Reduction of Interprovincial Barriers. As a result, the AIT dispute resolution mechanism, if amended as recommended, will improve its *credibility, transparency, effectiveness, accessibility, timeliness*, and its *public nature*.

The current AIT dispute settlement mechanism emphasizes consultation and mediation between governments, moving to *ad hoc* arbitration. The existing AIT dispute settlement process appears to place greater emphasis on dispute avoidance rather than resolution. This approach has resulted in the perception the Agreement appears to focus on the prevention of new barriers to trade, while providing little incentive for the removal of existing barriers. We contend structural elements of the AIT's dispute settlement mechanism, such as the primacy of negotiation and conciliation, priority of government-to-government dispute settlement, and non-binding voluntary compliance, result in undermining the dispute mechanism's credibility, transparency, and ultimately, its effectiveness.

The current consultation requirement of the dispute resolution mechanism make the process susceptible to both manipulation and compromise on the norms and principles of the Agreement. The process, which is closed to the public, exposes the negotiating process to acquiescence and quid pro quo exceptions by parties to the commitments of the Agreement. Moreover, this lack of transparency and third party oversight does little to ensure the consultation process is productive and effective.

In short, the structured interaction of the chapters in Part IV of the Agreement are an Attorney's dream. It's time to do away with the late night card game antics of vertical chapter commitments contained in chapter 9 and chapter 11 of the agreement "trumping" all other commitments, vertical or horizontal, as well as the notion any vertical chapter commitments "trump" those listed as horizontal chapter commitments. We propose to let the panels evaluate the consistency of a measure based on the merits of a case. The uneven nature of the AIT's applicability to governmental bodies, or municipal governments just adds another layer of ambiguousness to an already convoluted process.

At the other end of the spectrum, we note the existing uncertainty regarding the applicability and influence of other legal regimes and interpretive norms on an AIT panel's interpretation. We contend that due to the unique juncture the AIT occupies between both domestic and international, and public and private law, a more explicit identification of the role of the interpretive norms and principles of external legal systems would increase the Agreement's predictability.

The duration of the AIT's dispute resolution process was a cause for concern. For 13 cases resolved at the consultation phase, the average consultation phase was 35.2 months. For those cases where a panel was established, the average time to resolve a dispute was 41.2 months. The AIT has the expedient resolution of disputes as one its central objectives, therefore, the limited data indicates the goal of timeliness is not being met under the current regime.

Due to the current non-binding and voluntary nature of AIT compliance, private persons may have little incentive to use the AIT's dispute settlement procedures. That there is no recourse to appeal determinations by a Compliance Panel only exacerbates this sentiment. Moreover, the use of screeners employed by a Party to the Agreement to evaluate potential cases has proven to be a less than transparent process. An independent evaluation, based on objective criteria, would increase predictability, certainty, and accessibility of the dispute settlement mechanism. Moreover, such an assessment would assist the persons to evaluate the strength of their case and the likelihood of successful provincial intervention on their behalf. In short, an independent evaluation process removes political considerations from a province's decision whether to take up a dispute on behalf of a Person.

The AIT still limits the participation of third parties such as public interest advocates. A panel may only consult experts if all participating parties to a dispute give consent. AIT panels are resolving disputes based on measures implemented by democratically elected governments, or bodies empowered by legislation. As a result, the accessibility and participation of public interest groups is essential to enhancing the public, transparent, and accessible nature of the dispute resolution mechanism and the legitimacy of panel decisions.

We contend the AIT attempts to settle the balance between the liberalization of internal trade and respect for the province's legislative sovereignty through the "Legitimate Objectives" exception. A dispute resolution mechanism driven by those subject to injury or denial of benefit as a result of a breach of the Agreement may be the most effective system for identifying and resolving the scope and application of the commitments made by Parties. Unlike other federal states, Canada's internal economic union lacks an institutional support that plays an active role in lowering impediments to trade. As a result, we argue Canada's internal economic boundaries are similar to international ones, with each province functioning as a state with sovereign legislative authority. It is against this backdrop mechanisms currently operating in other jurisdictions designed to resolve disputes between sovereign political entities were reviewed.

A comparison to International Investment Agreements (IIA) revealed the AIT provides a more limited right of appeal for private persons to bring claims than most IIAs. The limitation is the lack of direct standing for private persons under the AIT. Requiring the advanced consent of a party to the AIT in order to proceed with a complaint invites the potential for strong-arming tactics and potentially places the province being asked for consent in a conflict of interest. It appears IIAs have attempted to depoliticize international economic disputes by gradually moving them from the diplomatic state-to-state framework to the realm of private economic dispute settlement.

Contrary to the AIT, most IIA's as well as internal trade agreements such as the New West Partnership Trade Agreement (NWPTA) employ a negative-list approach to investment obligations. Parties pursuant to IIA's safeguard their legislative autonomy through exception

clauses. The result is a much simpler approach than the confusing approach employed under the AIT. Many IIA's also make it clear states are responsible for the actions their affiliated bodies in the instance they cause a dispute. The AIT has a variable approach to applicability dependent upon which chapter of the agreement applies to the dispute in question. This approach creates the potential for a body exercising authority delegated by a Party to the AIT to implement a measure inconsistent with the party's commitments, but for which no recourse would be available.

Numerous IIA's have a consultation requirement before parties to an agreement can initiate arbitration proceedings. The purpose of the waiting period is to encourage settlement when possible, but not impede arbitration proceedings where a settlement is impossible. The AIT imposes two different procedural requirements for consultations upon complainants, depending on whether they are a party, or person seeking to initiate dispute resolution proceedings. A party must request consultation through a written notice specifying actual or proposed measure complained of, the relevant provision of the AIT and a brief summary of the complaint. Although the AIT imposes no requirements regarding the fulfillment of the parties' obligation to consult, a request to establish a panel before 120 days after delivery of a request for consultation is not possible. However, a person is not required by the Agreement to enter into negotiation or consultation, where a Screener has approved them to initiate dispute proceedings. Interestingly, the procedural requirements to submit a request for consideration of a dispute to a Screener do not explicitly make clear what the requirements for initiation of an application to Screener require.

Arbitral tribunals under IIA's have been criticized for producing inconsistent interpretations based on the notion the legal principle of *stare decisis* does not apply. This has led to uncertainty of the meaning of key treaty obligations. This uncertainty also exists under the AIT, and we contend Parties to the AIT were concerned future interpretation of obligations by ad-hoc panels may lead to agreements being imbued with interpreted meaning contrary to the parties' original intentions.

While the AIT has historically made little to no effort to welcome input from third parties, third party participation in panel hearings plays an important role in increasing the transparency of the arbitral process. NAFTA, the Canada Model FIPA and the ICSID all permit third party participation. We maintain that in light of the broad scope the agreement, the AIT should, in the interest of transparency, have opportunities for third parties to intervene and make submissions at various stages of the dispute settlement proceedings. It is with these thoughts in mind the recommendations found at the end of this report were suggested to address the following:

- the overall structure of the dispute mechanism;
- the jurisdictional rules applicable to Chapter Seventeen; and
- the procedural mechanisms available to dispute participants.

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## GLOSSARY

AIT	Agreement on Internal Trade
BIT	Bilateral Investment Treaty
CAES	Workshop of the Canadian Agricultural Economics Society
CETA	Comprehensive Economic and Trade Agreement
CGCAAC	Certified General Accountants Association of Canada
DSU	WTO Dispute Settlement Understanding
FIPA	Foreign Investment Promotion and Protection Agreement
FPATPC	Federal-Provincial Agricultural Trade Policy Committee
FTA	Canada-US Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
ISDS	Investor-state dispute settlement
MOU	Memorandum of Understanding
NAFTA	<i>North American Free Trade Agreement</i>
NWPTA	<i>New West Partnership Trade Agreement</i>
TCA	<i>Ontario-Quebec Trade and Cooperation Agreement</i>
TILMA	<i>Trade, Investment and Labour Mobility Agreement</i>
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization

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## INTRODUCTION

Are you an apprentice in a skilled trade in one Canadian province and wish to move to another to enhance your employment prospects? Perhaps you are a fan of a Canadian wine you tried while on vacation, yet have difficulty purchasing that vintage where you live. Maybe you are simply tired of paying more than you think you should for milk. If you are a Canadian consumer, chances are you have been affected by an internal trade barrier on an almost daily basis.

The Agreement on Internal Trade (AIT) came into force on July 1, 1995 and was designed to eliminate barriers to trade, investment and mobility within Canada. In theory, the AIT provides the means to further liberalize trade within Canada. Moreover, the agreement contains dispute resolution procedures that are accessible to individuals and businesses as well as governments.

In practice, however, we are uncertain what exactly the AIT provides through its dispute resolution system. Critics contend the current system is ineffective and provides only moral comfort to those launching a complaint. Given that AIT panels are resolving disputes based on measures implemented by democratically elected governments, or bodies empowered by legislation, it can be argued that for resolution to occur, more than moral comfort should be offered. As a result, one is left asking if the AIT provides nothing more than moral comfort, should it, and if it should, how does it need to be amended to ensure it achieves the lofty goals assigned to it in 1995?

We suspect an effective internal trade agreement, complete with a dispute resolution system working as a deterrent, would contribute to numerous improvements for Canadian consumers. The removal of trade barriers may reduce production costs for a series of goods and services offered in Canada. These savings could theoretically be passed on to Canadians in the form of lower prices. An amended agreement may also effectively align standards and regulations allowing Canadians who have trained for employment in one province to be hired more easily in another. Improvements of this nature may also make Canadian jurisdictions more attractive to economic investment, further contributing to the overall well-being of Canadians.

The purpose of this examination is to review the dispute resolution provisions of the AIT to inform any future agreements. To meet this objective, this study reviews the origins of the AIT in general as well as the Agreement's dispute resolution provisions. Section 3 of the report examines the Chapter Seventeen provisions of the AIT, and the dual procedural avenues through which a complaint may be adjudicated. The section also investigates the 56 cases initiated under Chapter Seventeen to identify any patterns. Furthermore, this section reviews the implications of the Agreement's non-binding enforcement status and compliance mechanisms for the resolution of disputes.

Thus, a series of questions can be addressed relating to the AIT's dispute resolution systems effectiveness in meeting the goals of the Agreement. For instance, while the AIT's dispute resolution system emphasizes consultation and mediation between governments, can this process can be more effectively managed? Do provisions in the Agreement need to be amended to ensure the movement of a dispute to *ad hoc* arbitration occurs without undue delay? When private persons employ their circumscribed right of action against Parties to the AIT where their government

declines to move a dispute through the system, are they being well-served? These are a few of the inquiries this report expects to answer.

Section 4 of this report provides a comparative analysis of dispute settlement mechanisms in international trade and investment agreements. Since Canada's internal economic union lacks the institutional support to actively enforce commitments for the removal of trade barriers found in other federally-based jurisdictions, Canada's internal economic boundaries function in a similar manner as international economic borders. Therefore, a comparative overview of mechanisms employed in other jurisdictions may provide useful insights and best practices for modifying the AIT's dispute mechanism. These include an exploration of the main characteristics of the two most prevalent international dispute settlement systems—Investor-State Dispute Settlement and the World Trade Organization's Dispute Settlement Understanding.

Unlike a majority of investigations into the operation of the AIT, this review will be conducted from a consumer perspective. Since the AIT was the product of executive federalism in Canada, no one knows what, if any influence consumers or their advocates had on the final text of the AIT. Since the AIT still severely limits the participation of third parties such as public interest advocates, in panel proceedings, we enter this study with the preconceived notion the AIT still has outstanding challenges related to its accessibility, transparency, and ultimately, its legitimacy.

### *Methodology*

In order to prepare this report, a number of research methods were employed by the authors. A literature review provided the historical overview of the issues as well as past positioning of stakeholders. In addition, a comparative analysis of the relevant provisions of other trade agreements supplied a series of policy alternatives that were considered for application to the existing measures of the AIT. These provisions were evaluated to determine their applicability to the Canadian inter-provincial landscape for the benefit of Canadian consumers. Finally, consultation with domestic stakeholders, including industrial and retail business representative associations, were conducted. The organizations contacted were those the authors identified as having an association with the AIT dispute resolution process. This identification was aided by reviewing AIT disputes tabled during the past 2 decades. The resulting stakeholder interviews were conducted in-person and by telephone.



# 1. THE AGREEMENT ON INTERNAL TRADE

## 1.1. ORIGINS AND HISTORY OF THE AIT

The origin of a national discussion and subsequent agreement on internal trade in Canada emerged out of recognition that provincial market intervention policies negatively impacted interprovincial trade. In 1964, as part of the Workshop of the Canadian Agricultural Economics Society (CAES), Wood outlined the effects of farm income subsidies and marketing boards on interprovincial trade. Conference participants recognized that provincial market intervention distorted interprovincial trade, but agreed that while regrettable, the benefits of such programs exceeded what negligible costs were considered to exist.

It was felt that, although most marketing board legislation is enacted at the provincial level, hence potentially disturbing the competitive balance between producers in different provinces, the actual distortions were not great in terms of social costs.<sup>1</sup>

Throughout the 1970s, discussion and significant public debate on the issue of market intervention policies, such as supply management, focused on concerns about their effects on consumer prices,<sup>2</sup> with little attention given to interprovincial trade.<sup>3</sup> However, by 1981, public attention focused on the breadth and severity of the economic cost of barriers to agriculture caused by provincial policies.<sup>4</sup> “[A]wareness of these interprovincial trade barriers was part of a larger trend in the concern about non-tariff barriers to trade and in the deregulation that was sweeping North America.”<sup>5</sup>

The federal and provincial governments encountered constitutional barriers in an early attempt to develop an AIT. In February 1985, at the First Ministers meeting in Regina, the Ministers agreed to an initiative to examine barriers to interprovincial trade and to find ways to reduce, or eliminate, their effects. In September 1985, the report of the MacDonalld Royal Commission on the Economy recommended a cautious incremental approach to implementing internal free trade. The *Constitution* had proven ineffective in furthering the integration of the Canadian economy. While Section 121 explicitly excluded tariff barriers between provinces, non-tariff barriers could discriminate based on provincial origin. Additionally, there is an absence of any clear authority in the constitutional structure to settle interprovincial trade disputes.<sup>6</sup> Integrating internal free trade

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<sup>1</sup> GI Trant, “The Implications of Interregional Competition in Canadian Agriculture for Federal and Provincial Development Programs” Report of the Ninth Annual Workshop of the Canadian Agricultural Economics Society: Interregional Competition in Canadian Agriculture (26–30 June 1964, St. Anne de Bellevue, Quebec).

<sup>2</sup> Food Prices Review Board, *Telling It Like It Is: Final Report of the Food Prices Review Board* (Ottawa: Food Prices Review Board, 1976).

<sup>3</sup> Barry E Prentice, “Interprovincial Barriers to Agricultural Trade” in Filip Palda ed, *Provincial Trade Wars: Why the Blockade Must End* (Vancouver: The Fraser Institute, 1994) 83 at p 94-95.

<sup>4</sup> Economic Council of Canada, *Reforming Regulation* (Ottawa: Minister of Supply and Services, 1981); EL Menzie, *Interprovincial Barriers to Trade in Agricultural Products* (Ottawa: Economic Working Paper, Agriculture Canada, 1981); RE Haack, DR Hughes and RG Shapiro, *The Splintered Market: Barriers to Interprovincial Trade in Canadian Agriculture* (Ottawa: Canadian Institute for Economic Policy, 1981).

<sup>5</sup> Barry E Prentice, “Interprovincial Barriers to Agricultural Trade” at p 97 (references omitted).

<sup>6</sup> Despite the fact that the original provisions of the Constitution have proven ineffective in fostering greater national integration the role of the provisions, including the “Trade and Commerce power” (s. 121) have played important

would require either a constitutional amendment or a non-constitutional policy instrument to remove barriers to interprovincial trade.

The Commission determined that negotiating free-trade norms into the *Constitution* would create extensive exceptions that would undermine the purpose of that amendment. The proposed federal-provincial “Economic Code of Conduct” on internal trade would be enforced through political pressure, developing confidence in a system of integration. In addition, the dispute-settling mechanism would be established with the authority to make legally binding orders. The intended result was that over time, federal and provincial governments would become comfortable to agree to a formal constitutional amendment.<sup>7</sup>

The Federal-Provincial Agricultural Trade Policy Committee (FPATPC) identified barriers to interprovincial trade, which supported a framework for their removal. By the end of 1986, the Agriculture Ministers established the FPATPC in a national effort to eliminate barriers. FPATPC developed an inventory of interprovincial trade barriers, identified categories of technical and non-technical barriers to trade, and clarified the different requirements needed for their removal.<sup>8</sup> In 1992, in a prelude to the AIT, the Agriculture Ministers endorsed a Memorandum of Understanding (MOU) establishing a framework to eliminate or reduce barriers to interprovincial trade.

In an effort to assist in removing technical barriers to trade, the MOU included a detailed dispute settlement mechanism.<sup>9</sup> The MOU described a two-stage dispute resolution mechanism—consultations between the governments, which, if unsuccessful would be followed by a dispute settlement. The MOU outlined *credibility, transparency, effectiveness, accessibility, timeliness, and public nature*<sup>10</sup> as underlying values of the dispute resolution system.

The dispute settlement mechanism in the AIT reflects similar mechanisms in the international sphere. In 1988, the conclusion of the Canada-US Free Trade Agreement (FTA) emphasized the economic barriers to interprovincial trade in agricultural products. However, the FTA potentially made it easier for producers to compete in the US markets rather than between other Canadian provinces. Further, the AIT’s dispute settlement provisions are influenced and similarly reflect the North American Free Trade Agreement (NAFTA) and the Tokyo Round of the General Agreement on Tariffs and Trade (GATT). Similarly, the Agreement on Internal Trade does not include a provision for binding enforcement through an award of damages, an injunction, or some equivalent

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roles in power dynamics at play in the negotiation of dispute settlement and enforcement provisions, discussed below.

<sup>7</sup> Bryan Schwartz, "Assessing the Agreement on Internal Trade: The Case for a ‘More Perfect Union’" in Douglas M Brown and Jonathan W Rose, eds, *Canada: The State of the Federation 1995* (Institute for Intergovernmental Relations, Queen's University, 1985) 189 at p 191.

<sup>8</sup> Barry E Prentice, "Interprovincial Barriers to Agricultural Trade" at p 98.

<sup>9</sup> Barry E Prentice, "Interprovincial Barriers to Agricultural Trade."

<sup>10</sup> *Agreement on Internal Trade*, 1 July 1995, "Annex 903.1 - Memorandum of Understanding on Procedures for the Elimination or Reduction of Interprovincial Barriers" at p 120, <http://www.ait-aci.ca/en/ait/AIT%20Original%20with%20signatures.pdf>.

order.<sup>11</sup> However, all three international agreements strongly emphasize the settlement of disputes by consultation and mediation between governments. If diplomatic channels flounder, *ad hoc* panels of experts, rather than a permanent tribunal or courts, can attempt to resolve the dispute between the Parties.

The agreement was concluded 1 July 1995. Since then, there have been thirteen protocols of amendment. Relevant changes to the Dispute Resolution Chapter are addressed in section 2.1 below.

## 1.2. OVERVIEW OF THE OBLIGATIONS IN THE AIT

The AIT is divided into seven parts:

- Introductory context-setting
  - Part I: General provisions (Chapters One and Two)
  - Part II: Constitutional authorities (Chapter Three)
  - Part III: General rules (Chapter Four)
- Sectoral provision
  - Part IV: Specific sectoral provisions (Chapters Five–Fifteen)
- Final provisions
  - Part VI: Institutional provisions (Chapters Sixteen and Seventeen)
  - Part VII: Final provisions (Chapter Eighteen)

The AIT’s objective, operating principles (Chapter One), constitutional context (Chapter Three), and general rules that define obstacles to trade in Canada (Chapter four), all frame the overall Agreement. Part IV, contains eleven specific sectoral chapters to which the general rules apply. Article 400 states that the general rules (Chapter four) apply only to matters covered in the eleven sectoral. Each of these chapters delineate the extent to which the general rules apply to the matters covered in the respective chapter, and further define additionally applicable rules.

The Sectoral chapters are divided into two categories: horizontal commitments and vertical commitments. The vertical commitment cover specific sectors, including agricultural and food goods, alcoholic beverages, natural resource processing, energy,<sup>12</sup> communications, and transportation. The horizontal commitment chapters cover issues of procurement, investment, labour mobility, consumer-related measures and standards, and environmental protection. These issues cut across multiple industry sectors. As a result, the chapters are applicable to all matters

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<sup>11</sup> Robert Howse, “Between Anarchy and the Rule of Law: Dispute Settlement and Related Implementation Issues in the Agreement on Internal Trade” in Michael J Trebilcock and Daniel Schwanen, eds, *Getting There: An Assessment of the Agreement on Internal Trade*, Policy Study No 26, (Toronto: CD Howe Institute, 1995) 171 at p 171–172.

<sup>12</sup> *Agreement on Internal Trade as modified by the Fourteenth Protocol of Amendment, 18 February 2015*, 1 July 1995, online: AIT Secretariat <[http://www.ait-aci.ca/en/ait/ait\\_en.pdf](http://www.ait-aci.ca/en/ait/ait_en.pdf)> at p 119. No specific commitments have been made under the energy sector.

within their scope and, “*where applicable*, to matters that fall within the scope of a vertical chapter.”<sup>13</sup>

Vertical Commitments	Horizontal Commitments
<p><b>Chapter 9—Agricultural and food products:</b> examines supply management systems for dairy, poultry and eggs; removes technical barriers between provinces such as differing product and grade standards and plant and animal health regulations</p>	<p><b>Chapter 5—Procurement:</b> eliminates local price preferences, biased technical specifications, unfair registration requirements and other discriminatory practices for non-resident suppliers in order to ensure equal access to procurement for all interested Canadian suppliers</p>
<p><b>Chapter 10—Alcoholic beverages:</b> prohibits discriminatory practices in areas such as product listing, pricing, distribution and merchandising between liquor control boards and retail outlets of provinces.</p>	<p><b>Chapter 6—Investment:</b> ensures Canadian businesses can make investment decisions based on market conditions by eliminating barriers to investment based on head-office location, prohibiting local content and purchasing conditions, reducing local residency requirements, and standardizing corporate registration requirements</p>
<p><b>Chapter 11—Natural resources processing:</b> prohibits introduction of new barriers to processing of forestry, fisheries, mineral resource products</p>	<p><b>Chapter 7—Labour mobility:</b> enables qualified workers to practice their occupation anywhere in Canada by eliminating residency requirements; requires licensing, certification and registration to be based primarily on competence; commits to recognizing worker's occupational qualifications and reconciling differences in occupational standards</p>
<p><b>Chapter 12—Energy:</b> intends to harmonize treatment of energy goods and services</p>	<p><b>Chapter 9—Consumer-related measures and standards:</b> reconciles consumer protection requirements of different provinces which act as non-tariff barriers in order to allow Canadian firms to capitalize on economies of scale by servicing larger markets with same products</p>
<p><b>Chapter 13—Communications:</b> ensures equal access to public telecommunication networks and use of public telecommunications services</p>	<p><b>Chapter 15—Environmental protection:</b> ensures that federal or provincial protection measures do not become non-tariff trade barrier.</p>
<p><b>Chapter 14—Transportation:</b> harmonizes regulations applicable to commercial vehicles such as safety standards and weight/dimension rules</p>	

**Table 1. Overview of the sectoral chapters and their coverage.**<sup>14</sup>

<sup>13</sup> Annex 1813(3), (emphasis added).

<sup>14</sup> Janet Lo, *The Consumer Perspective of Trade & Commerce Powers* (Ottawa: Public Interest Advocacy Centre, 2009), <http://www.piac.ca/wp-content/uploads/2014/11/interprovincialtrade.pdf>

Annex 1813 explains how the two types of commitments interact. The horizontal chapters apply to the vertical chapters “where applicable.” Rule 4 further refines this by specifying that “[i]n 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.”<sup>15</sup>

### 1.3. OBJECTIVE AND PRINCIPLES OF THE AGREEMENT ON INTERNAL TRADE

The principles and objectives of the AIT inform the role of dispute settlement mechanisms in the Agreement. While the provinces have agreed to work together to achieve a set of commonly agreed upon goals, the substantive obligations of the agreement are not legally binding; that is, a province cannot be compelled by mechanisms within Canada’s domestic legal system to change a policy or practice where a dispute panel finds the policy or practice to be in breach of its obligations under the Agreement.

At its core, the objectives and operating principles—the purpose of the Agreement—aim to promote “an open, efficient and stable domestic market for long-term job creation, economic growth and stability,” by committing “to reduce and eliminate to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada.”<sup>16</sup> The Agreement also aims to “promote equal economic opportunity for Canadians” and enhance competitiveness, promote sustainable environmental development, and better consultation on internal trade matters.<sup>17</sup>

The basic components (the general rules) that fulfill the operating principles include:

- an agreement to a general *reciprocal non-discrimination* principle - provinces must accord to goods, services, persons and investments of other provinces no less favourable treatment than they accord goods, services, persons, and investments in their own jurisdiction;
- an agreement to recognize the *right of exit and entry*—provinces may not adopt any measures that restrict or prevent the movement of persons, goods, services, or investments across provincial boundaries;
- an agreement that *provincial regulatory measures will not operate to create obstacles to inter-provincial trade*;
- an agreement to continue negotiations and *reconcile standards* to harmonize difference and reduce indirect barriers to the movement of persons, goods, services, and investments.

Exceptions temper the liberalized trade principles. The agreement provides that *governments may maintain measures designed to achieve legitimate provincial objectives*—regulatory measures inconsistent with the principles, yet permissible when the purpose of the measure is to achieve legitimate objectives that are not unduly restrictive:

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<sup>15</sup> Annex 1813.

<sup>16</sup> Article 100: Objective at p 3.

<sup>17</sup> Article 100: Objective at p 3.

“Legitimate objectives include the pursuit of public security and safety, public order, protection of human, animal or plant life or health, protection of the environment, consumer protection, protection of the health and well-being of workers and affirmative action programs.”<sup>18</sup>

As the panel report in *Quebec – Coloured Margarine* elaborated:

AIT’s drafters intended that each Party would retain a substantial measure of discretion to pursue legitimate objectives as it alone sought to define them and that each Party could choose to set standards differently from the others in accordance with its own conceptions of public policy and necessity. Diversity of approach in setting standards is an accepted feature of international trade regulation and domestic trade regulation under the AIT”<sup>19</sup>

Finally, Parties committed in the Agreement to continue negotiations on components not originally concluded,<sup>20</sup> and provided measures for a non-judicial system for the settlement of disputes.

The *Constitution* informs interpretative principles of the Agreement. In addition to the objectives, operating principles, and general rules defining what constitutes an obstacle to internal trade, the federal constitutional context forms one of the basic components of the Agreement. The preamble of the AIT recognizes “the diverse social, cultural and economic characteristics of the provinces” supporting that basic principle. As Lenihan notes:

This commitment to balance diversity with common interests, or to recognize some things as legitimate objectives rather than unnecessary obstacles, demands that we ask the following question: When conflict occurs, what is the right balance? For example, what is the right balance between, on one hand, measures that may restrict economic freedom by restricting labour mobility, and, on the other, the right of citizens from a particular province, say, to promote local economic interests by giving preferences to local workers or suppliers in government contracts?<sup>21</sup>

Chapter three explicitly reaffirms the legislative authority of federal and provincial legislatures, and their rights and authority under the *Constitution*. As Doern and MacDonald characterize it, “[t]he Agreement, in short, although not an exercise in constitutional change, may be tantamount to a ‘side deal’ on the constitution.”<sup>22</sup>

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<sup>18</sup> David Cohen, "The Internal Trade Agreement: Furthering the Canadian Economic Disunion" (1995) 25 Can Bus LJ 257 at p 262.

<sup>19</sup> Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Québec Regarding Québec’s Measure Governing the Sale in Québec of Coloured Margarine (June 23, 2005), *Agreement on Internal Trade*, online: AIT Secretariat <[http://www.ait-aci.ca/en/dispute/2\\_eng.pdf](http://www.ait-aci.ca/en/dispute/2_eng.pdf)> [*Quebec - Coloured Margarine, 2005*].

<sup>20</sup> Only the Chapter Twelve (Energy) remains to be concluded.

<sup>21</sup> Donald G Lenihan and David Hume, "Governance in the Agreement on Internal Trade," *Changing Government*, Volume 12 (Ottawa: KTA Centre for Collaborative Government and Certified General Accountants Canada, 2004), [http://www.cga-canada.org/en-CA/ResearchReports/ca\\_rep\\_2004-07\\_AIT.pdf](http://www.cga-canada.org/en-CA/ResearchReports/ca_rep_2004-07_AIT.pdf) at p 5.

<sup>22</sup> Bruce Doern and Mark MacDonald, "The Liberals' Internal Trade Agreement: The Beginning of a New Federal Assertiveness?" in Gene R. Swimmer, ed, *How Ottawa spends, 1997-98: Seeing red, a Liberal report card* (Ottawa: Carleton University Press, 1997) 135 at p 140.

The constitutional authority of provincial and federal governments' interests to legislate and regulate in pursuit of legitimate public interests is balanced against the underlying principle of trade liberalization in the Agreement. The dispute settlement mechanism mediates the balance between the polarizing interests of constitutional authority and trade liberalization.

Differing interpretations of the balance that the Agreement strikes are readily apparent. The Certified General Accountant's Association of Canada framed the principles of the Agreement from a perspective that emphasizes business interests in the liberalization of trade barriers:

“The Agreement is based on the principle that, in general, the businesses and individuals that have to deal with domestic barriers to trade and commerce should drive it. In effect, all measures that may be inconsistent with the Agreement are not barriers. Only those that are a problem for a business or a person need to be addressed”<sup>23</sup>

Others have interpreted the balance within the Agreement as maintaining important rights protections for the provinces:

[i]s the ultimate goal to remove as many impediments as possible? Or, to put it differently, insofar as the governance legacy conflicts with the AIT, do we want to remove it altogether? ... The answer is no. The very fact that Canada is a federal rather than a unitary state testifies to our collective commitment to respect other values, which can and often do conflict with our shared economic interests. Federalism strikes a balance between, on one hand, a variety of social, cultural and economic differences among Canadians and, on the other hand, their shared or common interests. ... When our interest in diversity conflicts with our shared interests, federalism requires that a balance be struck. The AIT recognizes the need for balance through a distinction between two key concepts: a ‘legitimate objective’ and an ‘unnecessary obstacle.’”<sup>24</sup>

Beaulieu *et al.*, emphasize the use of the phrase “to the extent possible” in the Parties’ commitment to eliminate trade barriers, in arguing that the balance of interests the Agreement strikes “creates uncertainty concerning governments’ commitment to open domestic trade and confusion about what is actually covered by the AIT.”<sup>25</sup>

The contrasting forces of trade liberalization and provincial legislative authority contained in the Agreement raise the critical question of how best to mediate the interests contained in the Agreement. As Lenihan notes:

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<sup>23</sup> Robert Knox, *Canada's Agreement on Internal Trade: It Can Work If We Want It To* (Vancouver: Certified General Accountants Association of Canada, 2001), [http://www.cga-canada.org/en-ca/ResearchReports/ca\\_rep\\_2001-05\\_ait.pdf](http://www.cga-canada.org/en-ca/ResearchReports/ca_rep_2001-05_ait.pdf) at p 15.

<sup>24</sup> Donald G Lenihan and David Hume, "Governance in the Agreement on Internal Trade."

<sup>25</sup> Eugene Beaulieu, Jim Gaisford and Jim Higginson, *Interprovincial Trade Barriers in Canada: How Far Have We Come? Where Should We Go?* (Calgary: The Van Horne Institute for International Transportation and Regulatory Affairs, 2003) at p 36.

“In our view, then, it is not enough to call for changes to the consensus rule or to insist on a dispute resolution mechanism with teeth in the hope of forcing a speedier application of the principles and rules. We must have confidence that the governance will result in a legitimate implementation of the rules—that is, a better balancing of the values of federalism and the principles and rules of the Agreement.”<sup>26</sup>

The dispute settlement mechanism of a trade agreement may benefit or impair the interests of certain stakeholders. Part of the role of an effective dispute settlement is to foster confidence to the parties and constituents subject to the agreement that the process will result in the legitimate implementation of the agreed upon rules. How do we get a decision making procedure that results in “a better balancing of the values of federalism and the principles and rules of the Agreement”?<sup>27</sup> For example, “in interpreting whether the means to an objective unnecessarily limits free trade, dispute-settling panels will have to make some subtle judgment calls.”<sup>28</sup> The structural and procedural framework that provides the context for interpretation of the Agreement will influence the interpretation, framing, and weight given to the contrasting principles, objectives, and interests represented in the Agreement.

## 1.4. STAKEHOLDERS

### 1.4.1. The Federal Government

The historical record and constitutional division of powers between the federal and provincial/territorial governments underscore the federal government’s primary interest in the AIT as a tool for achieving greater economic integration among the provinces.

It has been argued that the federal government stood to enhance its power over internal trade through the Agreement at the expense of the provinces.<sup>29</sup> However, the interests and role of the federal government in any agreement on internal trade must be considered in light of the constitutional context.

The *Constitution Act, 1867* established the economic powers of the federal and provincial governments to regulate trade with restrictions on conduct. The *Constitution Act, 1867*, is seemingly designed to create an economic union by vesting power in the federal government to exercise leadership to achieve this end. Overall, the *Constitution* guarantees the free movement of goods and persons across provincial boundaries. Negotiation of the Agreement on Internal Trade was, and remains, influenced by the contextual reality of the ongoing debate and uncertainty surrounding the federal government’s use of its section 91 constitutional powers. In particular, the “trade and commerce power,” are the most pertinent in the internal trade context, in addition to the federal government’s powers of “peace, order and good government” and mobility rights under

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<sup>26</sup> Donald G Lenihan and David Hume, "Governance in the Agreement on Internal Trade" at p 6.

<sup>27</sup> Donald G Lenihan and David Hume, "Governance in the Agreement on Internal Trade" at p 6.

<sup>28</sup> Bryan Schwartz, “Assessing the Agreement on Internal Trade: The Case for a ‘More Perfect Union’” at p 203.

<sup>29</sup> Bruce Doern and Mark MacDonald, "The Liberals' Internal Trade Agreement: The Beginning of a New Federal Assertiveness?"

the *Charter*. In contrast, the provinces are granted economic powers under Section 92, which are limited to matters within the province. Furthermore, a number of provisions limit the provinces' ability to enact measures that encroach on interprovincial trade and commerce. For example, the provinces are barred from legislating with respect to indirect taxes (such as customs and excise taxes) whose effects would be passed on in an identifiable form to parties outside the province.<sup>30</sup> Essentially, the *Constitution* prohibits explicit barriers to interprovincial trade.

Although explicit barriers to interprovincial trade are prohibited, there is significant room for ambiguity regarding non-tariff barriers and measures that indirectly impede greater economic integration. As a result, as Doern explained:

Prior to and during the internal trade negotiations the trade and commerce power debate inevitably raised its head, especially when strategies regarding dispute resolution (but also regarding the Agreement as a whole) were being considered. The trade and commerce power, ... gave the federal government jurisdiction over interprovincial trade in goods, yet the extent of this jurisdiction over other issues, such as services and capital, and the degree to which the power could actually be exercised, had always been circumscribed by the legal uncertainties ... as well as by political realities.<sup>31</sup>

The Supreme Court of Canada broadened the federal trade and commerce power in the mid 1980's, during the negotiations of agreements that eventually formed the basis of the AIT. The Court maintained a narrow interpretation of Parliament's authority to regulate interprovincial trade. Parliament's ability to regulate local trade was limited to incidental measures necessary for the effective regulation of international or interprovincial trade. In *General Motors of Canada Limited v City National Leasing*,<sup>32</sup> the Court broadened the Parliament's general regulation of trade power, suggesting some precedent for the use of the trade and commerce power to enact legislation directed at securing greater national economic integration.

The jurisdiction of provincial legislation must respect the territorial limits of a legislature's powers and due process concerns. In *Morguard Investments Ltd. v De Savoye*<sup>33</sup> and *Hunt v T&N plc*,<sup>34</sup> "the Supreme Court of Canada qualified provincial jurisdiction to legislate on matters that may have an effect on other provinces by requiring provinces to respect minimum standards of order and fairness."<sup>35</sup> The rule of paramountcy applies when valid federal and provincial legislation on the same matter conflict. In effect, the provincial law will be inoperable to the extent of the

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<sup>30</sup> *Constitution Act, 1867*, (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, <http://canlii.ca/t/ldsw>, s 92(2).

<sup>31</sup> Bruce Doern and Mark MacDonald, "The Liberals' Internal Trade Agreement: The Beginning of a New Federal Assertiveness?" at p 149.

<sup>32</sup> [1989] 1 SCR 641, 1989 CanLII 133 (SCC), <http://canlii.ca/t/1ft82>.

<sup>33</sup> [1990] 3 SCR 1077, <http://canlii.ca/t/1fsp7>.

<sup>34</sup> [1993] 4 SCR 289, <http://canlii.ca/t/1frxg>.

<sup>35</sup> PIAC/Janet Lo, *The Consumer Perspective of Trade & Commerce Powers*.

impossibility of simultaneous application or if that legislation or provision frustrates the purpose of the federal enactment.<sup>36</sup>

As Howse suggested in 1996, a national regulatory scheme is unlikely to “simply pre-empt provincial laws but normally will operate concurrently with them.”<sup>37</sup> Thus, as a result of the constitutional context and political realities, Howse’s analysis is pertinent to understanding the federal government’s interest in a functioning dispute settlement mechanism within the AIT.

Cooperative federalism reflects the basis of the dispute settlement solution in the AIT. Howse’s analysis remains cogent as evidenced by the dominant tide of the Supreme Court’s interpretation of the division of powers favouring the principle of cooperative federalism.<sup>38</sup> The federal government’s limited scope to exercise its constitutional authority is, as Doern and MacDonald observe, germane to the dispute settlement mechanism adopted in the AIT; namely, that dispute settlement specifically not involve the courts, but remain a political agreement.<sup>39</sup>

As a stakeholder with an uncertain degree of legal authority to achieve the economic integration of the provinces by other means, the federal government’s power under the *Constitution* serves as framework within which the dispute settlement mechanism ought to ensure that the objectives of the agreement do not fall.

#### **1.4.2. The Provinces**

As Parties to the AIT, the Provinces are a major stakeholder and must balance competing interests of lowering barriers to trade while maintaining a degree of legislative and policy autonomy. The *Constitution* establishes sovereign provincial authority to legislate with respect to contracts, property, and trade within the province. The provinces are vested with a significant scope of potential regulatory authority that results in “a fragmentation of markets which would otherwise be organized without regard to provincial boundaries.”<sup>40</sup>

The AIT has created a tension between Provincial autonomy on the one hand and eliminating barriers to trade on the other. The Provinces face competing interests in seeking to improve the economic profitability of home grown businesses through lowering barriers to trade, and concerns over maintaining the integrity of their legislative authority to use economic policy tools to achieve regional economic and social development goals. This has led to critiques on both fronts: that some Provinces have been reticent to fully commit to lowering barriers to interprovincial trade,

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<sup>36</sup> *British Columbia (Attorney General) v Lafarge Canada Inc.*, 2007 SCC 23, <http://canlii.ca/t/1rmqz>; *Bank of Montreal v Hall*, [1990] 1 SCR 121, 1990 CanLII 157 (SCC), <http://canlii.ca/t/1d69w>.

<sup>37</sup> Robert Howse, "Securing the Canadian Economic Union: Legal and Constitutional Options for the Federal Government," C.D. Howe Institute Commentary, No. 81, June 1996,

<sup>38</sup> For example, most recently on the trade and commerce power in the *Reference Re Securities Act*, 2011 SCC 66, <http://canlii.ca/t/fpdwb>.

<sup>39</sup> Bruce Doern and Mark MacDonald, "The Liberals' Internal Trade Agreement: The Beginning of a New Federal Assertiveness?"

<sup>40</sup> David Cohen, "The Internal Trade Agreement: Furthering the Canadian Economic Disunion" at p 260.

while others view the Agreement as having enhanced the power of the federal government “at the expense of the provinces by disciplining the use of provincial governing powers.”<sup>41</sup>

During the original negotiations, British Columbia and the Atlantic Provinces, were concerned that the AIT would infringe on the freedom to use certain policy instruments, while having the opportunity to gain access to new markets. Quebec too was cautious out of concern for maintaining a wide range of policy instruments.<sup>42</sup> The 2002 Internal Trade Secretariat Report found that:

There was significant polarization as well as differing priorities between business groups and labour/public advocacy groups particularly with respect to the following: the continued use of regional economic development programs, concern about entanglement with international trade agreements, the dispute resolution process and the threat to local autonomy as a result of the pursuit of national standards.<sup>43</sup>

Provinces’ interests as stakeholders in the Agreement are influenced by these polarizing interests that exist predominantly at the local and regional levels. From this perspective, the seeming incongruence of the Agreement as originally negotiated is understandable. The Agreement focuses on the prevention of new barriers to trade, while at the same time provides weak incentives for the removal of existing barriers to trade<sup>44</sup> and a dispute settlement mechanism that lacks a formal legally binding enforcement mechanism.

In analyzing the role of a dispute settlement mechanism within the AIT and potential alternatives, it is integral to consider the competing provincial interests of lowering barriers to trade, while maintaining a degree of legislative and policy autonomy in seeking effective solutions to meet these diverse interests.

### **1.4.3. Private Sector**

Although the private sector may advocate for eliminating barriers, it may be simplistic to ignore both the dichotomy between government action (or inaction) and industry, as well as diverse interests of individual stakeholders in the private sector. The prevalent perception is that the private sector has been the champion of deepening and strengthening the enforceability of commitments made by the Provinces under the AIT. Organizations such as the Canadian Manufacturer’s Association and the Canadian Association of Chartered Accountants were vocal critics of the enforcement mechanism of the AIT from the beginning. Also, many export-oriented businesses have an interest in lowering barriers to trade. However, Lenihan has argued that this singular view is misleading at best:

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<sup>41</sup> Bruce Doern and Mark MacDonald, "The Liberals' Internal Trade Agreement: The Beginning of a New Federal Assertiveness?" at p. 136.

<sup>42</sup> Bruce Doern and Mark MacDonald, "The Liberals' Internal Trade Agreement: The Beginning of a New Federal Assertiveness?" at p 151.

<sup>43</sup> Internal Trade Secretariat, *Report on the Public Consultations Project*, (Winnipeg: Internal Trade Secretariat, Spring 2002), [http://www.international.alberta.ca/documents/About\\_Us/ITS-Rpt\\_on\\_public\\_consultations02.pdf](http://www.international.alberta.ca/documents/About_Us/ITS-Rpt_on_public_consultations02.pdf) at p 7.

<sup>44</sup> David Cohen, "The Internal Trade Agreement: Furthering the Canadian Economic Disunion."

Often [the private sector] is an advocate of the status quo, a defender of barriers and an instigator of restrictive practices. Many successful industries, such as dairy farming, are built around such practices. The reluctance of governments to remove such barriers flows from a fear of reprisals by the organizations within the sector that will be affected-often to the point where governments lose the incentive to act.<sup>45</sup>

As Lenihan argues, the support for or resistance to trade liberalizing measures is often an influential if not determining factor in a provincial government's willingness to fully implement the principles and rules of the AIT. The influence and role of the private sector are essential to assessing the effectiveness of a dispute settlement mechanism. In light of the Agreement's principles of trade liberalization and balancing the legislative interests of the province, an effective dispute settlement mechanism must be able to strike a balance between private interests seeking to sway provincial governments away from their commitments, and private interests seeking to overturn legitimate provincial regulations.

#### **1.4.4. Consumers**

Consumers often bear the costs associated with reducing barriers to interprovincial trade. The Economic Council of Canada's 1981 report on the potential economic costs of regulation categorized various costs associated with provincial regulation.<sup>46</sup> When interprovincial trade barriers increase the cost of conducting business or discourage businesses from expanding and competing in other provinces,<sup>47</sup> the negative impact of such market inefficiencies are often passed on to consumers.

As PIAC argued in its 2009 report, *The Consumer Perspective of Trade & Commerce Powers*:

The removal of interprovincial trade barriers ... increas[es] competition and business' economic performance. Strong economic performance translates into ... consumer benefits such as better products, lower prices, more choices and better services. As well, economists suggest that where there is more competition in the economy, the most competitive firms will survive and pass on the benefits of competition to their consumers.<sup>48</sup>

Despite the fact that the early origins of the AIT were partly rooted in concern that trade barriers would lead to increasing costs for consumers, the civil society and consumer groups were largely kept in the dark during the negotiations of the AIT. As Doern and MacDonald note, unlike other trade agreements or federal-provincial negotiations conducted around the same time, the 1994 negotiation of the AIT had a "decided absence of public and interest group involvement ... Indeed,

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<sup>45</sup> Donald G Lenihan and David Hume, "Governance in the Agreement on Internal Trade" at p 3.

<sup>46</sup> Economic Council of Canada, *Reforming Regulation, 1981* (Ottawa: Canadian Government Publishing Centre, 1981).

<sup>47</sup> Canadian Chamber of Commerce, "Obstacles to Free Trade in Canada: A Study on Internal Trade Barriers" (November 2004), <http://www.chamber.ca/advocacy/issues/internal-trade/> at p. 3.

<sup>48</sup> PIAC/Janet Lo, *The Consumer Perspective of Trade & Commerce Powers* at p 33.

in terms of federal-provincial relations, the decision process was a throw-back to what has been called ‘executive federalism.’”<sup>49</sup>

The federal and provincial governments have consistently been criticized for negotiating the Agreement and its additional protocols without consultation with the public or special interest stakeholder groups.<sup>50</sup> Given its negotiating history, it is not surprising, that the dispute settlement mechanism of the AIT does not include a procedure whereby third-party stakeholders can express their interests in relation to a particular dispute.

For a dispute settlement mechanism to be effective it must address consumer, business, and provincial interests. To assess the role of an effective dispute settlement mechanism within the AIT that is responsive to the range of stakeholder interests it seeks to address, it is necessary to recognize the role such a mechanism plays in enforcing the balance of interests represented within the Agreement. To stress PIAC’s earlier argument, while the goal of removing interprovincial trade barriers are in line with fundamental consumer rights, a dispute settlement mechanism must be cognizant of government’s obligation to maintain laws and regulations that maximize social welfare and protect consumers. As PIAC noted in the Report:

The consumer interest is not always consistent with the parameters of interprovincial trade. It is difficult to define a clear statement of the consumer interest in interprovincial trade, as the consumer interest does not always lie in the lowest price, for example. The costs and benefits of trade cannot be quantified through a simplified calculation to allocate costs. Consumers have a legitimate interest in preserving consumer protection regulations and standards.<sup>51</sup>

A dispute settlement mechanism must effectively parse out the multifaceted interests of consumers, finding a balance between their interests in the benefits of lower barriers to trade, and legitimate provincial legislation and regulation for consumer protection, contained in the AIT.

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<sup>49</sup> Bruce Doern and Mark MacDonald, "The Liberals' Internal Trade Agreement: The Beginning of a New Federal Assertiveness?" at p 153.

<sup>50</sup> PIAC/Janet Lo, *The Consumer Perspective of Trade & Commerce Powers* at p 5. For example, most recently, the AIT Fourteenth Protocol of Amendment, which significantly amended the dispute resolution mechanism, has been negotiated in 2012 and has only been made public in February 2015.

<sup>51</sup> PIAC/Janet Lo, *The Consumer Perspective of Trade & Commerce Powers* at p 34.

## **2. THE DISPUTE SETTLEMENT MECHANISM OF THE AGREEMENT ON INTERNAL TRADE**

The structure of dispute settlement in the AIT provides an escalating multi-stage system for the resolution of disputes. As mentioned, the conclusion of NAFTA and the formation of the WTO in the early 1990s, significantly influenced the development and drafting of the AIT and its dispute settlement mechanism.<sup>52</sup> Language of the AIT Chapter directly parallels approaches taken to resolve trade and investment disputes under NAFTA, the WTO, and other regional trade agreements. The system emphasizes consultation and mediation between governments, moving to *ad hoc* arbitration where such diplomatic channels flounder. Private persons too, are accorded a circumscribed right of action against Parties to the AIT where their government declines to move a dispute through the system. Panels are empowered to issue non-binding determinations of the matters in dispute and encourage the compliance of parties in breach using various tools.

This section provides a comprehensive overview of the way in which the dispute resolution chapter functions within the AIT. Section 2.1 briefly reviews the major developments that have been introduced to Chapter Seventeen. Section 2.2 frames the specific provisions of Chapter Seventeen by reviewing the broader objectives the dispute settlement mechanism seeks to achieve within the Agreement. Section 2.3 comprehensively examines the AIT's dispute settlement mechanism, reviewing the scope of Chapter Seventeen's application, and the dual procedural avenues through which a complaint may be adjudicated. Section 2.5 concludes by exploring some potential patterns that emerge from the 56 cases that have been initiated under Chapter Seventeen, while section 2.6.2 looks at the implications of the Agreement's non-binding enforcement status and compliance mechanisms for the resolution of disputes.

### **2.1. HISTORY AND AMENDMENTS OF THE DISPUTE SETTLEMENT MECHANISM**

In the twenty years since the Agreement entered into force, there have been fourteen protocols of amendment. The Seventh, Tenth, and Fourteen Protocols of Amendment significantly changed the Agreement's dispute settlement mechanism to the extent that the respective previous versions of the chapter were deleted and replaced entirely. Some of the changes have been significant, contributing to an overall evolution both in the commitments contained in the Agreement and to the way in which disputes are resolved.

The Seventh Protocol of Amendment,<sup>53</sup> which was released on 2 May 2007, harmonized dispute settlement procedures to proceed under Chapter Seventeen, with minor exceptions, minimizing what was a convoluted system of having a particularized dispute settlement process, depending on which sectorial chapter a dispute fell under, as well as dispute resolution process through Chapter Seventeen. The Seventh Protocol of Amendment outlined extensive changes to the dispute settlement process. Changes were made to Articles 1702 (*Consultations*), 1703 (*Requests for Panels*), 1704 (*Establishment of Panels*), 1705 (*Rules of Procedure*), 1706 (*Reports of Panels*), 1707 (*Implementation*), 1708 (*Publication*), and 1709 (*Non-Implementation*). With exception of

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<sup>52</sup> See section 1.1 above.

<sup>53</sup> *Seventh Protocol of Amendment* (2 May 2007), <http://www.ait-aci.ca/en/ait/7.pdf>.

Chapter Five (*Procurement*), all disputes were directed to Chapter Seventeen as the central dispute mechanism.

The Tenth and Fourteenth Protocols of Amendment demonstrate a subtle, but important shift in the emphasis the dispute resolution process places on the interests of particular stakeholders. The creation of the Appellate and Compliance Panels was among the most significant changes introduced in the Tenth Protocol, which was released 7 October 2009.<sup>54</sup> Article 1706.1 created a right of appeal for Parties, pursuant to the government-to-government dispute settlement mechanism. The Compliance Panels aimed to strengthen adherence by the Parties to panel decisions. The changes empowered Compliance Panels to issue tiered monetary penalties in the government-to-government (Part A) dispute settlement process, under Article 1707.

The Fourteenth Protocol expanded, what are still limited, powers and procedures of the Appellate and Compliance panels. The Fourteenth Protocol, released 18 February 2015, expanded procedural rights and safeguards for persons seeking to resolve a dispute through the person-to-government (Part B) process. Although these rights were limited in the earlier versions of Chapter Seventeen, it added the needed structure to the consultation phase of the dispute process. Specifically, Appellate and Compliance panel procedures were made available to persons, including the ability of a Compliance panel to award monetary penalties against a Party in breach, under Part B. Panels were also empowered by the amendments to permit persons to join proceedings as Intervenors or Complaining Persons<sup>55</sup> and seek “Additional Costs Orders” against Parties in breach of their obligations.<sup>56</sup>

Overall, the changes indicate a desire to craft a more uniform and accessible dispute settlement mechanism. The cumulative thrust of the amendments has been in favour of a streamlined process that reinforces the weight of a panel’s interpretations of the Agreement by facilitating the ability of Parties and persons to trigger mechanisms designed to induce compliance. While these mechanisms do not undermine the emphasis the Agreement places on the settlement of disputes through mediation and conciliation, they appear to strengthen the mechanisms available to encourage compliance in the event that negotiations fail, and a Panels find a Party in breach. This should encourage parties and persons to negotiate settlements in line with the principles and objectives of the AIT, with the knowledge that a favourable panel ruling has a limited capacity to encourage compliance.

## 2.2. OBJECTIVES

Since the Agreement’s commitments are necessarily drafted in broad terms, the dispute settlement mechanism is critical for refining the extent of obligations in specific contexts, as well as ensuring its effective implementation by holding Parties to their bargain. The AIT aims to lower existing barriers to trade, investment, and mobility, and prevent new ones from emerging. As detailed above in section 1.2, the rules and sectoral chapters set out specific commitments to achieve these

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<sup>54</sup> *Tenth Protocol of Amendment* (7 October 2009), [http://www.ait-aci.ca/en/ait/10\\_en.pdf](http://www.ait-aci.ca/en/ait/10_en.pdf).

<sup>55</sup> *Fourteenth Protocol of Amendment* (18 February 2015), [http://www.ait-aci.ca/en/ait/14\\_en.pdf](http://www.ait-aci.ca/en/ait/14_en.pdf) at Annex 1705(1) and 1718(1), Rule 3.5.4.

<sup>56</sup> Article 1725.

objectives.

The dispute settlement mechanism can lower barriers to internal trade, but it is not the primary method chosen by the AIT. Although the dispute settlement mechanism seeks to facilitate achievement of the Agreement's objectives, the construction of Chapter Seventeen promotes underlying priorities and principles about how to achieve them. While a dispute settlement mechanism can drive liberalization by incentivizing Parties or persons harmed by trade barriers to litigate on broad principles, the Agreement established a wide range of committees and working groups to identify barriers that should be lowered and negotiate the harmonization of divergent standards and regulatory requirements.<sup>57</sup>

The CGAAC identified three general principles contained in the AIT's dispute settlement provisions.—emphasis on consensual dispute resolution, prioritization of the government-to-government dispute resolution over person-to-government, and non-binding nature of the panel decisions.<sup>58</sup>

First, the AIT dispute resolution mechanism places strong emphasis on negotiation and conciliation of disputes, rather than adjudication. Parties are obliged to pursue consultations shortly after raising a complaint and cannot initiate formal, rules based arbitral proceedings for at least 120 days after the request for consultation. Resort to arbitration by a panel is structured as a secondary, if not last resort, for the settlement of a dispute. Some have even argued, that by its design, AIT dispute settlement focuses on dispute avoidance, rather than dispute resolution.<sup>59</sup>

Second, the dispute settlement system prioritizes the resolution of disputes through government-to-government procedures. A non-Party complainant (a person, enterprise, union, etc) may bring a claim against a Party, but as detailed below in section 2.4.2, may only do so after first requesting a Party initiate proceedings on their behalf and represent them.

In the AIT, complaining Persons are secondary to Parties to the Agreement. Chapter Seventeen further requires that the Complaining Persons dispute is first screened before they are permitted to request a panel. Until the ratification of the Fourteenth Protocol, the dispute resolution system provided divergent procedural rights and enforcement mechanisms: Parties had a right of appeal and access a compliance panel capable of issuing monetary penalties, unavailable to Complaining Persons. Thus, while the Agreement extends substantive and procedural rights of access to the dispute settlement mechanism to third parties, the divergent procedural requirements reflect a strong preference that Parties to the Agreement primarily drive dispute settlement.

Third, decisions of a panel are non-binding, and do not carry the force of law. While the Protocols

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<sup>57</sup> Articles 615, 1104, and 1602.

<sup>58</sup> Robert Knox, *Canada's Agreement on Internal Trade: It Can Work If We Want It To* at p 6.

<sup>59</sup> Canadian Chamber of Commerce, *The Agreement on Internal Trade: Taking Stock After Three Years* (1998), <http://global-economics.ca/internaltrade.3years.pdf>. (“The overriding objective of the AIT's dispute settlement provisions is to encourage the resolution of disputes in a conciliatory, cooperative and harmonious manner. The avoidance of disputes, as opposed to the litigation of disputes, was the chief goal underlying the Agreement.” at p 30).

of Amendment have consistently increased the tools available to a panel to encourage compliance with commitments, ultimately adherence to the AIT's trade liberalizing commitments is voluntary.

The principles in Chapter Nine (Agriculture and Food Goods) are reasonably assumed to equally apply to settlement of disputes under the Agreement. Chapter Nine of the original text of the AIT incorporated in Annex 903.1 the “Memorandum of Understanding on Procedures for the Elimination or Reduction of Interprovincial Barriers to Trade in Agricultural and Food Products,” which was signed by the Ministers responsible for Agriculture in December 1989.<sup>60</sup> It was agreed that any dispute settlement mechanism should be “credible, transparent, effective, accessible, timely and public.” Rather than articulating new objectives for assessing the dispute settlement, we have used these underlying objective in our analysis of the dispute settlement under the AIT. As the analysis in section 3 below suggests, however, three principles inferred from the structure of the AIT's dispute settlement mechanism—primacy of negotiation and conciliation, priority of government-to-government dispute settlement, and non-binding voluntary compliance—somewhat undermine an objective that the dispute settlement mechanism also embody values of credibility, transparency, effectiveness, accessibility, timeliness and public availability.

### **2.3. THE STRUCTURE OF THE DISPUTE SETTLEMENT MECHANISM**

Sections 2.3.1 and 2.4 and provide a comprehensive review of the substantive application and procedural mechanisms in the most recent iteration of Chapter Seventeen, released in the Fourteenth Protocol of Amendment on 18 February 2015.

When examining the structure of the Agreement's dispute settlement mechanism we have looked at the jurisdiction of a panel and at the procedural rights available to disputing parties. Jurisdiction of a panel to hear a dispute is broken into two sub-categories: jurisdiction *ratione materiae*—jurisdiction over the substance of a dispute (section 2.3.1) and jurisdiction *ratione personae*—jurisdiction over the parties to the dispute (section 2.3.2). The procedural mechanisms and rights available to disputants can have a significant impact on what disputes may be commenced under the AIT, by whom, and how disputes move forward through the process (section 2.4)

#### **2.3.1. Jurisdiction *Ratione Materiae***

Jurisdiction *ratione materiae* (or subject matter jurisdiction) defines the jurisdiction over the substance of a dispute.

Article 1701 grants a panel jurisdiction with respect to the interpretation and application of the Agreement. Since every dispute must be raised under one of the sectoral chapters, each sectoral chapter delimits the substantive scope of the application of the AIT and the substantive scope of a Chapter Seventeen panel's jurisdiction. For example, Article 902 establishes that Chapter Nine “applies to *technical measures* adopted or maintained by a Party relating to internal trade in

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<sup>60</sup> AIT (1995), Annex 903.1 - Memorandum of Understanding on Procedures for the Elimination or Reduction of Interprovincial Barriers ,Chapter Nine--Agricultural and Food GoodsTrade in Agricultural and Food Products to Agreement on Internal Trade, <https://www.ic.gc.ca/eic/site/ait-aci.nsf/eng/il00010.html#K> at II.3 (dispute settlement).

agricultural and food goods.”<sup>61</sup> Consequently, measures not found to meet the definition of a technical measure within the meaning of Article 902 are excluded from the panel’s substantive jurisdiction. However, where the chapter permits, a panel will retain jurisdiction to interpret the provision defining the substantive scope of application of the relevant sectoral chapter.

Provisions within the Sectoral Chapters and Annex 1813 (Rules of Interpretation) further limit the substantive jurisdiction of a Panel in three ways: first, certain chapters exclude the application of particular rules delimited in Chapter Four (2.3.1.1); second, certain chapters explicitly exclude or limit the application of Chapter Seventeen’s dispute settlement (2.3.1.2); and third, certain chapters and the Rules of Interpretation in Annex 1813 set out a hierarchy for the interpretation and application if there is any inconsistency between sectoral Chapters (2.3.1.3). The scope of application of each Chapter in Part IV of the AIT is outlined in Figure 3 below.

### **2.3.1.1. Exclusion of Chapter Four Commitments from Sectoral Chapters**

The applicability of general or specific rules in each sectoral chapter modify the jurisdiction of the Panel. Each sectoral chapter begins by denoting which of the general rules from Chapter Four are applicable. Article 400 reinforces the priority of a sectoral chapter’s specification of which trade liberalization rules/commitments contained in Chapter Four apply, by specifying that “[i]n the event of an inconsistency between a specific rule in Part IV and a general rule in this Chapter, the specific rule prevails to the extent of the inconsistency.”<sup>62</sup>

In some instances, the overall scope of a panel’s jurisdiction is narrowed, where a sectoral chapter excludes general rules from application to the sectoral chapter. For example, where a measure in dispute relates to the trade in alcoholic beverage products, a panel does not have jurisdiction to consider arguments that the measure restricts or prevents the movement of persons, goods, services or investment across provincial boundaries, as this obligation is explicitly excluded under the sectoral chapter.

On the other hand, some chapters exclude application of specific general rules in order to redefine the obligation, and consequently the jurisdiction of a panel, within a particular sector. For example Chapter Six (Investment) excludes application of Article 404 (Legitimate Objectives), and then subsequently redefines legitimate objective in the investment context.

For the purpose of interpreting a panel’s substantive jurisdiction, the extent to which the general trade liberalization rules apply to a matter in dispute varies depending on the sectoral chapter involved. Figure 2. below identifies how each sectoral chapter in Part IV proscribes or expands upon the general rules provided in Chapter Four.

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<sup>61</sup> Article 902 (emphasis added).

<sup>62</sup> Article 400.

## Chapter 5: Procurement

### Application of General Rules:

- Articles 401 (Reciprocal Non-Discrimination) and 406 (Transparency) **do not apply**.
- Articles 400 (Application), 402 (Right of Entry and Exit), 403 (No Obstacles), 404 (Legitimate Objectives) and 405 (Reconciliation) **apply** to this Chapter.

**Scope of Coverage:** This Chapter applies to measures adopted or maintained by a Party relating to procurement within Canada by any of its entities listed in Annex 502.1A.

**Relationship to Other Chapters:** Nothing Specified

**Application of Chapter Seventeen:**<sup>63</sup>Nothing Specified

## Chapter 6: Investment

### Application of General Rules:

- Articles 401 (Reciprocal Non-Discrimination), 402 (Right of Entry and Exit), 403 (No Obstacles) and 404 (Legitimate Objectives) do not apply.
- Articles 400 (Application), 405 (Reconciliation) and 406 (Transparency) apply to this Chapter, except as otherwise provided in this Chapter.

**Scope of Coverage:** This Chapter applies to measures adopted or maintained by a Party relating to investors and enterprises of a Party.

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

**Application of Chapter Seventeen:** Nothing specified

## Chapter 7: Labour Mobility

### Application of General Rules:

- Articles 404 (Legitimate Objectives) and 405 (Reconciliation) **do not apply**.
- Articles 400 (Application), 401 (Reciprocal Non-Discrimination), 402 (Right of Entry and Exit), 403 (No Obstacles), and 406 (Transparency) **apply** to this Chapter

### Scope and Coverage:

This Chapter applies to measures adopted or maintained by a Party relating to:

- residency requirements for workers as a condition of access to employment opportunities or as a condition of certification relating to a worker's occupation,
- certification requirements, other than residency requirements, for workers in order to practice an occupation or use a particular occupational title, and
- occupational standards.

This Chapter **does not cover**

- social policy measures including, but not limited to, labour standards and codes, minimum wages, employment insurance qualification periods and social assistance, and
- Quebec's measures pertaining to language requirements.

**Relationship to Other Chapters:** Nothing Specified

**Application of Chapter Seventeen:** Chapter Seventeen shall apply to consultations and the resolution of disputes arising out of this chapter.

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<sup>63</sup> Where nothing is specified within the Chapter regarding the application of Chapter Seventeen, it is understood that Chapter Seventeen applies by virtue of Article 1701.

## Chapter 8: Consumer-Related Measures and Standards

### Application of General Rules:

- Article 404 (Legitimate Objectives) **does not apply** to this Chapter.
- Articles 400 (Application), 401 (Reciprocal Non-Discrimination), 402 (Right of Entry and Exit), 403 (No Obstacles), 405 (Reconciliation) and 406 (Transparency) apply to this Chapter, except as otherwise provided in this Chapter.

**Scope and Coverage:** This Chapter applies to consumer-related measures and standards adopted or maintained by a Party.

**Relationship to Other Chapters:** Nothing Specified

**Application of Chapter Seventeen:** Chapter Seventeen shall apply to consultations and the resolution of disputes arising out of this chapter.

## Chapter 9: Agricultural and Food Goods

### Application of General Rules:

- Chapter Four (General Rules) applies to this Chapter, except as otherwise provided in this Chapter.

**Scope and Coverage:** This Chapter applies to technical measures adopted or maintained by a Party relating to internal trade in agricultural and food goods

**Relationship to Other Chapters:** In the event of an inconsistency between a provision of this Chapter and any other provision of this Agreement, this Chapter prevails to the extent of the inconsistency.

**Application of Chapter Seventeen:** Chapter Seventeen shall apply to consultations and the resolution of disputes arising out of this chapter.

## Chapter 10: Alcoholic Beverages

### Application of General Rules:

- Article 402 (Right of Entry and Exit) **does not apply**.
- Articles 400 (Application), 401 (Reciprocal Non-Discrimination), 403 (No Obstacles), 404 (Legitimate Objectives), 405 (Reconciliation) and 406 (Transparency) apply to this Chapter, except as otherwise provided in this Chapter

**Scope and Coverage:** This Chapter applies to measures adopted or maintained by a Party relating to trade in beverage alcohol products.

**Relationship to Other Chapters:** Nothing Specified

**Application of Chapter Seventeen:** Chapter Seventeen shall apply to consultations and the resolution of disputes arising out of this chapter.

## Chapter 11: Natural Resource Processing

### Application of General Rules:

- Chapter Four (General Rules) applies to this Chapter, except as otherwise provided in this Chapter.

**Scope and Coverage:** This Chapter applies to measures adopted or maintained by a Party relating to the processing of natural resources.

**Relationship to Other Chapters:** In the event of an inconsistency between this Chapter and any other chapter in Part IV, this Chapter prevails to the extent of the inconsistency

**Application of Chapter Seventeen:** Chapter Seventeen shall apply to consultations and the resolution of disputes arising out of this chapter.

### Chapter 13: Communications

**Application of General Rules:**

For greater certainty, Chapter Four (General Rules) applies to this Chapter, except as otherwise provided in this Chapter.

**Scope and Coverage:** This Chapter applies to measures adopted or maintained by a Party relating to communications services and telecommunications facilities.

**Relationship to Other Chapters:** Nothing Specified

**Application of Chapter Seventeen:** Nothing Specified

### Chapter 14: Transportation

**Application of General Rules:**

- Articles 401 (Reciprocal Non-Discrimination), 402 (Right of Entry and Exit) and 403 (No Obstacles) **do not apply**.
- Articles 404 (Legitimate Objectives), 405 (Reconciliation) and 406 (Transparency) **apply** to this Chapter, except as otherwise provided in this Chapter.

**Scope and Coverage:**

This Chapter applies to measures adopted or maintained:

- (a) by the Federal Government, that relate to or affect trade in transportation services by carriers of a Province; and
- (b) by a Province, that relate to or affect trade in transportation services by carriers of another Province.

Nothing in this Chapter shall be construed to prevent a Party from providing an essential public transportation service, either by means of a government enterprise or a contract with a private supplier, in a manner that is consistent with this Agreement.

**Relationship to Other Chapters:**

Chapter Six (Investment) applies to this Chapter, except as otherwise provided in this Chapter.

**Application of Chapter Seventeen:**

Chapter Seventeen shall apply to consultations and the resolution of disputes arising out of this chapter.

### Chapter 15: Environmental Protection

**Application of General Rules:**

- Chapter Four (General Rules) applies to this Chapter, except as otherwise provided in this Chapter.

**Scope and Coverage:** This Chapter applies to environmental measures adopted or maintained by a Party that may affect the interprovincial mobility of people or interprovincial trade in goods, services or investments.

**Relationship to Other Chapters:** Subject to Article 1508(3), in the event of an inconsistency between this Chapter and any other chapter, the Parties shall endeavour to reconcile the inconsistency.

**Application of Chapter Seventeen:** Chapter Seventeen shall apply to consultations and the resolution of disputes arising out of this chapter.

**Figure 2. Jurisdiction *ratione materiae***

### **2.3.1.2. Exclusions and Limitations on the Application of Chapter Seventeen**

The AIT explicitly excludes certain provisions of the AIT from Chapter Seventeen dispute settlement. Section 1701(3)(a) limits the scope of Chapter Seventeen's application to government-to-government consultations with respect to Parties' obligation to avoid certain types of incentives pursuant to the Code of Conduct on Incentives.<sup>64</sup> Sections 1701(2)(b)–(c) remove procurement for commercial entities and the MASH sector ("municipalities, municipal organizations, school boards and publicly-funded academic, health and social service entities"<sup>65</sup>) from the reach of Chapter Seventeen.

Perhaps most significantly, Annex 405 is insulated from the application of Chapter Seventeen.<sup>66</sup> Annex 405(2) provides that the Parties must cooperate to address differences, duplication, or overlap in regulatory measures or regimes that operate to create an obstacle to internal trade. Annex 405.2(4) affirms the right of Parties to adopt or maintain any regulatory measure or regulatory regime "*that it considers necessary or appropriate to achieve a legitimate objective.*" This applies across all sectors when the issue relates to divergence in a regulatory measure or regime.

Thus, while the Parties are mandated to cooperate with a view to resolving the difference pursuant to Article 405, it does not mandate a particular outcome. A dispute panel has jurisdiction to determine whether a Party is in breach of its obligation to cooperate with another Party that has raised a concern regarding regulatory differences that operate to create an obstacle to internal trade, but it will not have jurisdiction to arbitrate the cooperative process itself. Annex 405.2 governs the cooperative process and excludes it from dispute settlement.<sup>67</sup> This is a significant exception from the dispute settlement requirements, given that divergence in regulations can be a disguised barrier to trade.

### **2.3.1.3. Jurisdictional implications of the interaction between Sectoral Chapters**

The sectoral chapters are not mutually exclusive. It is possible that a matter in dispute engages issues that would be subject to more than one sectoral chapter under Part IV, particularly given the horizontal and vertical structure of the sectoral chapters (see section 1.2 above).

The commitments outlined in the horizontal chapters apply to the vertical chapters only "where applicable." Rule 4 of Annex 1813 contains a supremacy clause for situations when the vertical and horizontal chapters conflict: "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." Two vertical chapters—Chapter Nine (Agricultural and Food Products) and

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<sup>64</sup> Annex 608.3

<sup>65</sup> As defined in Annex 502.4.

<sup>66</sup> See Article 1701(2) and Annex 405.2(10).

<sup>67</sup> Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the Federal Bank Act - Cost of Borrowing (Banks) Regulations (4 June 2004), [http://www.ait-aci.ca/en/dispute/4\\_eng.pdf](http://www.ait-aci.ca/en/dispute/4_eng.pdf) at footnote 103. ("Although Annex 405.2 is expressly carved out from Chapter Seventeen dispute settlement, the substantive obligation to cooperate in Article 405(2) is not similarly excluded. A Party requesting consultations under that article ought to be able to take a recalcitrant Party to dispute settlement; hence, Article 405(2) is subject to dispute settlement where there is a failure to cooperate even though the Annex 405.2 consultative process itself is not subject to dispute settlement")

Chapter Eleven (Natural Resource Processing)—contain an additional supremacy clause, should their provisions further conflict with other vertical chapters: “In the event of an inconsistency between this Chapter and any other chapter in Part IV, this Chapter prevails to the extent of the inconsistency.”<sup>68</sup>

This interplay between sectoral chapters effectively modifies a panel’s substantive jurisdiction regarding a Party’s obligations under the relevant sectoral chapter in dispute. Where a matter falls under both a vertical and a horizontal chapter and to the extent of any inconsistency, the obligations of the horizontal chapter will be inapplicable and will be outside the jurisdiction of a Panel.

For example, in *Quebec – Coloured Margarine*,<sup>69</sup> the Panel found that with respect to the defense raised by Quebec, the more liberal “legitimate exception” provision found in Chapter Eight on Consumer Related Measures and Standards was not applicable to Chapter Nine covering Agriculture and Food Goods. This was because Chapter Nine prevailed to the extent of any inconsistency with other chapters and it expressly stipulates that the obligations of Chapter Four are incorporated separately as if they were Chapter Nine obligations. In turn, this was at odds with the broader construction of “legitimate exception” under Chapter Eight, which the respondent, Quebec, was seeking to have the panel apply.

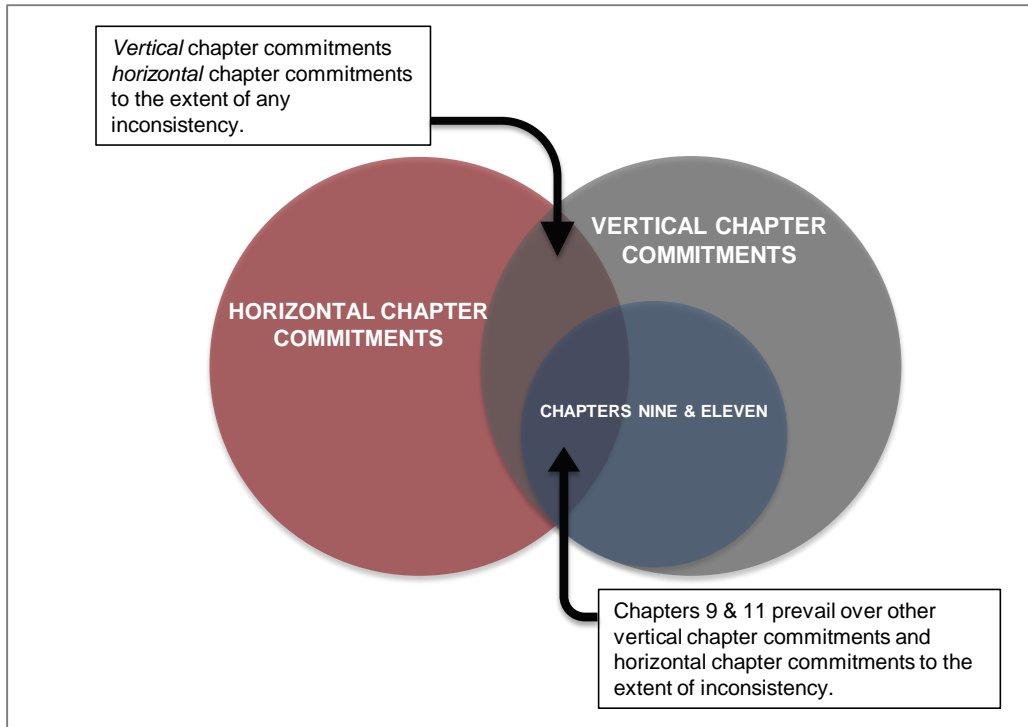
*Quebec – Coloured Margarine* demonstrates how a vertical chapter’s supremacy clause can limit a panel’s substantive jurisdiction to overlapping commitments contained in other sectoral chapters. Most importantly, it reveals that a number of the horizontal chapters provide broader, more particularized, provisions defining legitimate objective exception.<sup>70</sup> A horizontal chapter’s provision on specific legitimate objective exception ends at the water’s edge of the legitimate objective exception of a vertical chapter. Where a Complaining Party is able to file a dispute under a vertical commitment chapter, a Responding Party will be unable to justify a measure on the basis that it meets the divergent definition of legitimate objective contained in Chapter 6 (Investment), Chapter 7 (Labour Mobility) or Chapter 8 (Consumer-Related Measures and Standards).

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<sup>68</sup> Articles 901 and 1101

<sup>69</sup> *Quebec - Coloured Margarine*, 2005 at p 23.

<sup>70</sup> Article 605 (Investment), Article 708 (Labour Mobility), Article 803 (Consumer-Related Measures and Standards)



**Figure 3. Substantive jurisdiction based on sectoral chapter primacy**

### 2.3.2. Jurisdiction of the Panel *Ratione Personae*

On its face, the jurisdiction of a panel over persons is simple. A panel has jurisdiction over the “Parties” to the Agreement and a “Person of a Party” (Persons) that raises a complaint under the Agreement. However, it may not be readily apparent that the Agreement modifies a panel’s jurisdiction over Parties and Persons. Section 2.3.2.1 explains how “Party” is modified by the various sectoral chapters from its basic definition in the AIT. Section 2.3.2.2 explains how “Person of a Party” is more narrowly defined from its basic definition of a Person to a Party in AIT.

#### 2.3.2.1. A “Party” for the purposes of panel’s jurisdiction

AIT defines a “Party” as “party to the Agreement.”<sup>71</sup> Depending on the chapter, this definition of a party is extended, limited, or refined; while there are chapters that do not in any way define the Party.

Article 102 extends the scope of the AIT’s obligations to include:

- Party’s departments, ministries, and similar agencies of government;
- various forms of regional and municipal government, where specified in sectorial chapters;<sup>72</sup> and

<sup>71</sup> Article 200.

<sup>72</sup> Article 102(1) (b).

- other governmental bodies, including Crown corporations and non-governmental bodies that exercise authority delegated by law, where specified in the sectoral chapters.<sup>73</sup>

Depending on the applicable sectoral chapter, the latter two conditions vary the extent of application of the AIT obligations to various levels of regional government, quasi-governmental bodies, or non-governmental bodies exercising delegated authority. Procurement is heavily circumscribed, with parties providing a positive list of government entities to which the procurement commitments will apply. The other chapters, however, vary in the extent to which they incorporate the extended application of the Agreement's obligations pursuant to Articles 102(1) (b) and (c).

Chapter Six (Investment), for example, only extends the commitments contained in the Agreement to "any government enterprise maintained or established by [a party that] exercises any delegated administrative or other governmental authority."<sup>74</sup> The potential result here is that the provision of incentives to encourage investment, covered by Chapter Six, would not extend to regional, local, district or other forms of municipal government of a Party. Chapter Nine (Agricultural and Food Goods) similarly does not appear extend the obligations of the AIT to these forms of government.

Chapters Seven (Labour Mobility) and Fourteen (Transportation) extend Parties' compliance obligations to their other governmental bodies including Crown corporations, and non-governmental bodies that exercise authority delegated by law, and to their regional, local, district or other forms of municipal government. Chapter Fourteen limits this latter extension of the Agreement's obligations only to the obligation to cooperate to reconcile regulatory standards that create an obstacle to trade in transportation services.<sup>75</sup>

Chapters Eight (Consumer Related Measures), Eleven (Natural Resources), Twelve (Energy) and Thirteen (Communications) do not contain provisions extending a Party's obligations under the agreement beyond the departments, ministries, and similar agencies of a Party. This leaves what may be considered a considerable loophole, within which a Party may act contrary to the AIT by delegating authority to arms-length "non-governmental" organization or regional or municipal governments.

The inconsistent application of the degree to which AIT's obligations extend to measures not directly enacted by a Party, but are indirectly attributable to a Party, has operated to the detriment of complainants seeking to avail themselves of the commitments made by the provinces under the Agreement. In 2009 C.E. Network Inc. sought to initiate panel proceedings against Alberta and New Brunswick in relation to changes made by the non-governmental organizations tasked with regulating the real estate credentials in the province; respectively the Real Estate Council of Alberta (RECA) and the New Brunswick Real Estate Association. The screener, in denying the application found that the objections made by C.E. Network Inc. were not to decisions of Alberta,

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<sup>73</sup> Article 102(1)(c).

<sup>74</sup> Article 609.

<sup>75</sup> See Articles 1404(2) and 1408(1). These provisions are subject to Annex 405(2), which are not subject to the jurisdiction of a panel.

and as an “independent board, *established under law*” its decisions were not covered by the AIT.<sup>76</sup> The screener found that once the governments had privatized the enterprises, the decisions of the enterprise are no longer covered by the general rules of Article 401.<sup>77</sup>

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<sup>76</sup> Article 1713 Screener Report: In the Matter of a request made by CE Networks Inc. to commence dispute resolution proceedings vis-à-vis Alberta and New Brunswick (19 October 2009), [http://www.ait-aci.ca/en/dispute/ce\\_en.pdf](http://www.ait-aci.ca/en/dispute/ce_en.pdf) [SR - CE Networks] at para 7.

<sup>77</sup> SR - CE Networks. The screener found that Chapter Seven on labour mobility did not apply CE Networks as a corporation, although it is arguable whether this is the case, as a person (including a corporation) simply needs to demonstrate that a breach of the agreement has resulted in the denial of a benefit (not the specific benefit provided by the chapter).

Chapter	Ch 5	Ch 6	Ch 7	Ch 8	Ch 9	Ch 10	Ch 11	Ch 13	Ch 14	Ch 15
102(1)(a):	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
102(1)(b):	✓	✓	✓	N/A	✓	N/A	N/A	N/A	✓	N/A
102(1)(c):	✓	✓	✓	N/A	✓	✓	N/A	N/A	✓	✓
<b>Additional Compliance Obligations:</b>	Entities listed in Annex 502.1A and Annex 502.3 and for those entities covered by Annex 502.4.	Delegated administrative or gov't authority exercised by an enterprise maintained or established by a Party.	Each Party shall, through appropriate measures, seek compliance with this Chapter by non-gov'tal bodies other than those that exercise authority delegated by law			Competent authorities listed in Annex 1003, and any entity to which those authorities delegate authority.				Bodies listed in Annex 1503.

**Figure 4. Jurisdiction *ratione personae***

Note that a presumption has been made in the interpretation of the extent of obligations. Where an article under a chapter specifies “further to Article 102”, by inference it incorporates the full scope of Article 102 subparagraphs (a) through (c). Alternatively, where no stipulation is made, subparagraphs (b) and (c) are not incorporated by default.

- **Art 102(1)(a):** Compliance by departments, ministries and similar agencies of government
- **Art 102(1)(b):** Compliance by regional, local, district or other forms of municipal government
- **Art 102(1)(c):** Compliance by other governmental bodies and by non-governmental bodies that exercise authority delegated by law

\* N/A: Nothing Provided for in the Chapter

### **2.3.2.2. A “Person of a Party” for the purposes of panel’s jurisdiction**

AIT defines a “person” as “a natural person or an enterprise” and “Person of a Party as “a natural person resident in the territory of a Party or an enterprise of a Party.”<sup>78</sup> However, Chapter Seventeen significantly narrows the definition of a “Person of a Party,” thus making the process significantly less accessible to non-Parties.

First, Persons do not have direct access to the Chapter Seventeen dispute resolution. Rather, a Person must first request that a Party initiate dispute proceedings on their behalf. If the Party rejects to initiate the case on the Person’s behalf, the Person can opt to proceed through the dispute resolution process under Part B. Because the dispute resolution process under Part B is conditional on an unsuccessful attempt to initiate the proceeding under Part A, a Person must cumulatively meet the requirements of both Article 1712 (Initiation of Proceedings by Government on Behalf of a Person) and Article 1713 (Initiation of Proceedings by Persons).

Article 1712 (1) requires that for a government to consider a Person’s request, the Person must have “a substantial and direct connection to the Party,” defined in Article 1703 (6) as someone who “resides or carries on business in the Province, has suffered an actual economic injury or denial of benefit, and the consequences of which are felt in the Province.”<sup>79</sup> Therefore, the Person must demonstrate that the harm or denial of benefit caused by impairment to internal trade is being felt “in the Province.” If a Province rejected or failed to respond to the person on the basis that it did not have a “substantial and direct connection to the Party,” this decision effectively prevents the party from initiating the proceedings under Article 1713. The Screener decision against Saputo in 2008,<sup>80</sup> made clear that Article 1703(6)’s requirement of substantial and direction connection to the province must be fulfilled before the person will qualify under Article 1713. The requirement that “consequences be felt in the Province” significantly narrows the jurisdiction of the tribunal over Persons of a Party and, perhaps more importantly, has a potential to eliminate certain persons from having a recourse under the AIT.

## **2.4. PROCEDURAL RIGHTS AND MECHANISMS FOR DISPUTE SETTLEMENT**

Chapter Seventeen provides two procedural avenues for the resolution of a dispute: Part A: Government-to-Government and Part B: Person-to-Government. The AIT prioritizes the resolution of disputes under Part A, with Part B functioning as an alternative right of access to Persons of a Party, where a Party to the Agreement has declined to initiate proceedings on their behalf.

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<sup>78</sup> Article 200.

<sup>79</sup> See, Article 1703(6) a-c. Article 1703(7)–(8) provides additional requirements applicable to Chapter Seven (Labour Mobility) and when the Complaining Party is the Federal Government.

<sup>80</sup> Article 1713 Report: In the Matter of a request made by Saputo Inc to commence dispute resolution proceedings by a person-to-government complaint against Canada (18 August 2008), <http://www.ait-aci.ca/en/dispute/Saputo%20Inc%20Screener%20Decision.pdf> at para 16 (iv)

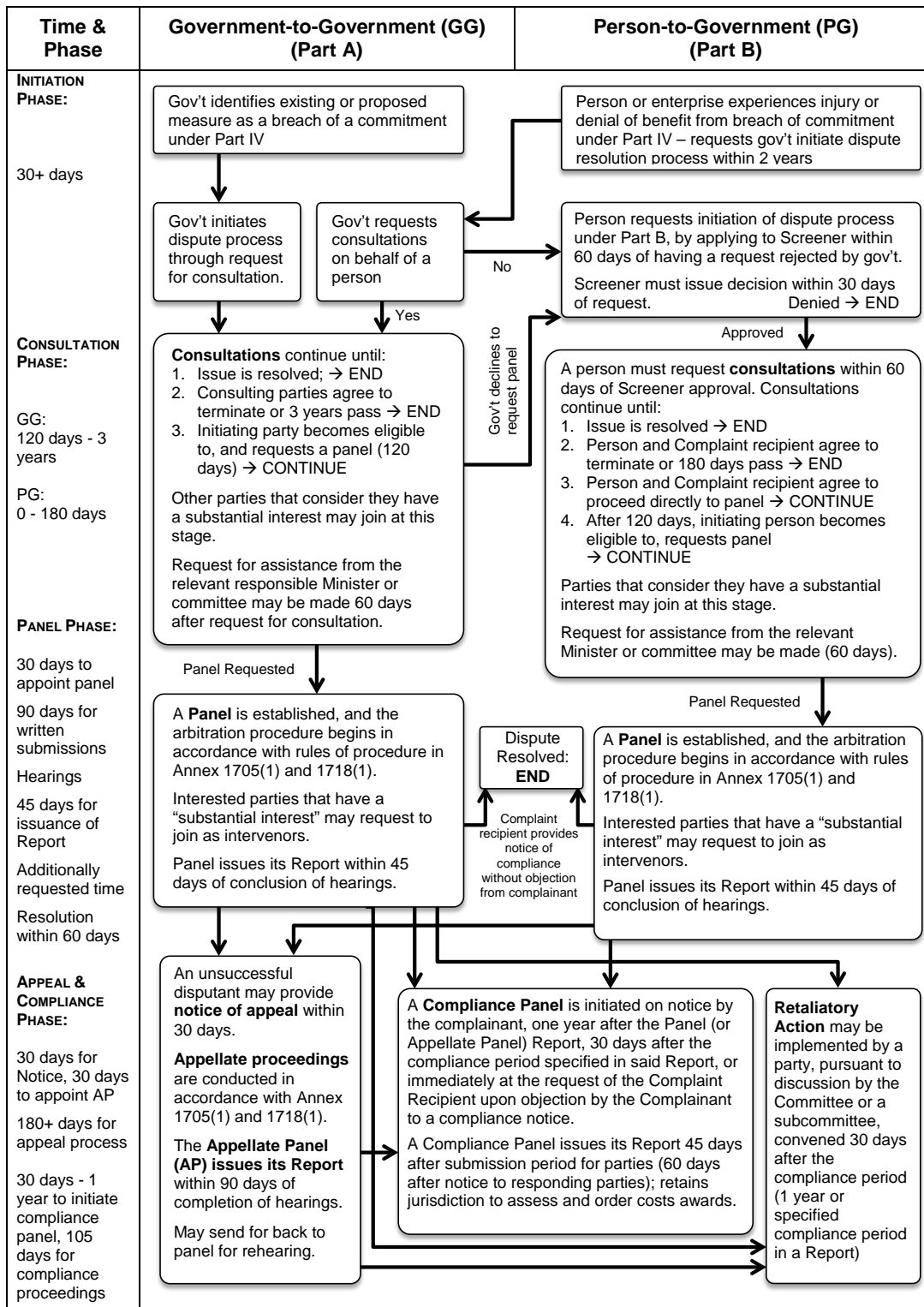


Figure 5. AIT Dispute Resolution Process

### 2.4.1. Part A: Government-to-Government

Part A procedure involves Government-to-Government dispute resolution and is included in Articles 1702.1–1709. As the first step, a government party should to identify a measure it considers inconsistent with another Party’s obligations under the Agreement and the applicable sectoral chapter. All sectoral chapters, with the exception of Chapter Five (Procurement), proceed directly to the dispute resolution mechanism under Chapter Seventeen.<sup>81</sup> The complaining Party must first provide written notice identifying the actual or proposed measure complained of and requesting consultations with the party responsible for the measure.<sup>82</sup> Matters relating to incentives are subject to a limitation period, and parties are prohibited from initiating consultations that have already been the subject of mutually satisfactory consultation or for which a panel report has been issued, within the past three years.<sup>83</sup> The consultation process is confidential and the parties can request assistance of the sectoral working groups established under the AIT, or after 60 days, the assistance of relevant Ministers or members of the Internal Trade Committee.<sup>84</sup>

“A party that *considers itself* to have a substantial interest” in the matter, may join in the consultation process.<sup>85</sup> If the consultations do not resolve the matter to the satisfaction of the Parties (including an intervening consulting Party), they continue until the issue is resolved, the Parties mutually agree to terminate them or the initiating Party, the consulting Party, or the initiating Party and the consulting Party jointly request a panel—no sooner than 120 days after the delivery of the request for consultation.<sup>86</sup> A request to establish a Panel must meet specific form requirements<sup>87</sup> and must be made within the maximum of three years after consultations have been initiated, or the matter will be deemed abandoned.<sup>88</sup>

Article 1703, paragraph 9.1 permits “[a]ny Party that has a substantial interest in the matter in dispute” to join as an intervenor. The determination of whether the party requesting to join as an intervenor at the panel stage is objectively defined. The AIT Secretariat, to whom the request is submitted, presumably makes this determination and, once established, the Panel would have the jurisdiction to assess it. On the other hand, a Party that joined as an intervenor at the consultation stage, on its own subjective determination that it had a substantial interest pursuant to paragraph

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<sup>81</sup> It is unclear, the extent to which Chapter Seventeen applies to Chapter Thirteen (Communications). Unlike every other Chapter under Part IV, there is no Article stipulating the application of Chapter Seventeen for the resolution of disputes. That being said, Article 1701 provides blanket coverage for the avoidance and resolution of disputes and the interpretation and application of the Agreement, subject to the listed exceptions. No part of Chapter 13 is listed in these exceptions.

<sup>82</sup> Article 1702.1(1).

<sup>83</sup> Articles 1702.1(2)–(3).

<sup>84</sup> Articles 1702.1(5)–(11).

<sup>85</sup> Article 1702(10) (emphasis added). A substantial interest is defined in Article 1703(10) as a party that maintains a measure analogous to the one at issue or the party is a province that has a significant number of persons carrying on business in the province who are or will be affected by the measure.

<sup>86</sup> Article 1703(1)–(2).

<sup>87</sup> Article 1703(4) “A request to establish a panel shall: (a) specify the actual or proposed measure complained of; (b) list the relevant provisions of the Agreement; (c) provide a brief summary of the complaint; (d) explain how the measure has impaired or would impair internal trade; and (e) identify the actual or potential injury or denial of benefit caused by the actual or proposed measure.

<sup>88</sup> This structural requirement in Article 1703(2) was added by the Fourteenth Protocol of Amendment.

10, is entitled to be added as a complaining Party, whether or not the Party *in fact* has a substantial interest in the matter in dispute.<sup>89</sup>

Once requested, a three-member panel (or a single person panel if the parties agree to it)<sup>90</sup> is chosen from a standing roster must be appointed within 30 days, or the AIT Secretariat will appoints it. Written submissions must be submitted within 45 days after the initial request for a panel and responding submissions by the Complaint Recipient 45 days after receiving the complainant’s written submission. Oral hearings are conducted within 30 days after the receipt of the last written submission and the panel issues its report within 45 days after the conclusion of oral hearings.<sup>91</sup> All time limits are subject to modification where it is fair and equitable to do so.<sup>92</sup>

Article 1705(3) provides procedural rules that must be followed—“[a]ll proceedings before a Presiding Body shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.”

The presiding body has the prerogative to seek out “information and expert advice from any person or body that it considers appropriate”.<sup>93</sup> However, the Participating Parties (that is, Disputing Parties and all Intervenors) must agree to the presiding body’s consultation of such persons. A panel is required to issue a report based on the submissions of the Participating Parties, and “any other evidence received during the course of the Proceedings.”<sup>94</sup> A panel report must contain:

- findings of fact;
- determinations as to whether the measure at issue is inconsistent with the Agreement, and if so, whether it impaired or would impair internal trade and as or would cause injury or denial or benefit, both with reasons;
- recommendations for resolution of the dispute;
- where applicable and at the discretion of the Panel, stipulation of a compliance period; and
- a determination on the apportionment of Operational Costs.<sup>95</sup>

Article 1707 addresses the resolution and compliance: paragraph two confirms that “wherever possible, a dispute shall be resolved by removing, amending or not implementing the measure that is or would be inconsistent with this Agreement.”<sup>96</sup> The Article encourages the resolution of disputes through negotiation by permitting for the suspension of proceedings “in order to negotiate a mutually satisfactory resolution.”<sup>97</sup>

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<sup>89</sup> Article 1703(9.2).

<sup>90</sup> Article 1704.1.

<sup>91</sup> Annex 1705(1), 1718(1) (Rules of Procedure).

<sup>92</sup> Annex 1705(1), 1718(1) (Rules of Procedure).

<sup>93</sup> Article 1705(2).

<sup>94</sup> Article 1706(1).

<sup>95</sup> Article 1706(3).

<sup>96</sup> Article 1707.2.

<sup>97</sup> Article 1707.4 (The complaining party should re-initiate proceedings within 36 months).

The dispute settlement mechanism contains a number of provisions to address issues arising out of dispute proceedings, the panel's report,<sup>98</sup> and to encourage compliance:

- A panel retains jurisdiction for the purpose of assessing a cost order (Monetary Penalty and Operational Costs) after it issues its Report;<sup>99</sup>
- A Disputing Party may appeal a panel report on the grounds that the panel “erred in law, failed to observe a principle of natural justice, or acted beyond or refused to exercise its jurisdiction”<sup>100</sup> and an appellate panel has the power to “confirm, vary, rescind or substitute the report of the panel in whole or in part, or refer the matter back to the Panel for re-hearing”, and apportion further Operational Costs and, at its discretion, Tariff Costs;<sup>101</sup>
- One year after the issuance of a Panel Report (or the expiry of a stipulated implementation period) a Complaining Party may request that the Secretariat reconvene the Panel as a Compliance Panel to determine whether the Complaint Recipient has complied with the matters addressed in the Report;<sup>102</sup>
- A Compliance Panel has the power to issue a Monetary Penalty against a party in breach of its obligations, to encourage compliance.<sup>103</sup>

#### **2.4.2. Part B: Person-to-Government**

Part B procedure involves Person-to-Government dispute resolution and is included in Articles 1710–1726. Persons of a party may bring a request to initiate dispute settlement proceedings against a Party who *implemented* measures inconsistent with their obligations. The persons of a party are in the best position to experience injury and identify the denial of a benefit when those measures are implemented.

For a Person to initiate dispute settlement proceedings, they must first make a request to a Party, with which they have a “substantial and direct connection.”<sup>104</sup> The request must also meet specific form requirements.<sup>105</sup> The Party *may* require that the Person exhaust all administrative remedies available before agreeing to initiate proceedings on their behalf, in which case, a person must reissue its request after doing so.<sup>106</sup> A Party must respond to a Person's request within 30 days,<sup>107</sup> and where they agree to initiate dispute settlement proceedings, they must do so within 10 days of

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<sup>98</sup> At the Panel, Appellate Panel, and Compliance Panel stages, parties have 10 days to request clarification or correction of errors (Articles 1706(5), 1706.1(9), 1707(13) respectively).

<sup>99</sup> Article. 1706(4).

<sup>100</sup> Article 1706.1(1).

<sup>101</sup> Article 1706.1(4).

<sup>102</sup> Article 1707(9). The Complaining Party must object to a notice of compliance submitted by the Complaint recipient. The Complaint recipient will be deemed to have complied with the Agreement in respect of the matters addressed in the Report, if the Complaining Party fails to object. Upon objection, the Complaint recipient may request a Compliance Panel immediately, while a Complaining Party must wait until the expiry of the one year waiting period, after the panel report was issued, regardless of an objection to a compliance notice by the Complaint recipient.

<sup>103</sup> Article 1707.1. See Section 2.6.1 for a review of Compliance and Enforcement mechanisms.

<sup>104</sup> Article 1712(1).

<sup>105</sup> Article 1712(2).

<sup>106</sup> Article 1712(3).

<sup>107</sup> When a party fails to respond within 30 days to a request to initiate dispute settlement proceedings, they are deemed to have chosen not to initiate Proceedings (Article 1712(4)).

responding to the person. At this stage, the dispute settlement proceeds as if initiated by a Party under Part A.

If a Party declines to initiate dispute settlement proceedings on a Person's behalf, or subsequently declines to request a panel 120 days after initiating consultations, a Person may request that proceedings be initiated or that a panel be established under Part B. A Person of a Party must do this within 60 days of receiving notice of, or being deemed to have received notice of, a Party's refusal to initiate proceedings or establish a panel.<sup>108</sup>

Upon submitting the request, Persons of a Party must acknowledge and consent to an obligation to pay costs, post security for such costs if so ordered by the Presiding Body, and must consent to the dispute settlement process set out in Chapter Seventeen.<sup>109</sup>

A Person must initiate dispute settlement proceedings within two years from the date on which they "acquired, or should have acquired, knowledge of the alleged inconsistent measure *and* knowledge that [they] incurred loss or damage or suffered a denial of benefit,"<sup>110</sup> where the Person was not required to exhaust all administrative remedies. Where a Person was required to exhaust available administrative remedies, this limitation period is extended until two years after this requirement is met.<sup>111</sup> Persons of a Party are also prohibited from initiating proceedings where the measure at issue has been previously resolved to the mutual satisfaction of the relevant parties, or the responding party and another Person of that Party, within the past three years. This prohibition also applies when the matter at issue has been the subject of a panel or appellate panel report within the last three years.<sup>112</sup>

Before proceeding to the dispute settlement process, a Person's complaint request must be approved by an independent, government appointed, screener. This screening process does not exist under Government-to-Government dispute resolution mechanism. Each Party is responsible for maintaining a roster of screeners capable of making independent decisions on the merits of the request, who have expertise in Canadian administrative law.<sup>113</sup> Within 30 days of receiving a request, a Party's screener must determine whether a Person should be permitted to proceed with dispute proceedings. The Screener should consider:

- whether the complaint is frivolous or vexatious;
- whether the complaint has been instituted merely to harass the Party complained against;
- whether there is a reasonable case of injury or denial of benefit to the person or, in the case of a trade union, injury or denial of benefit to its members.<sup>114</sup>

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<sup>108</sup> Article 1713(1). Pursuant to Article 1712(6), a Party is deemed to have chosen not to request the establishment of a Panel, if they fail to provide notice to the Person that they are choosing not to request a panel within 120 days after requesting consultations.

<sup>109</sup> Article 1713(4).

<sup>110</sup> Article 1713(5) (emphasis added).

<sup>111</sup> Article 1713(5).

<sup>112</sup> Article 1713(7).

<sup>113</sup> Article 1714(1).

<sup>114</sup> Article 1714(4).

Pursuant to most recent amendments in the Fourteenth Protocol of Amendment, where a screener permits a dispute resolution proceeding to commence, the screener is not responsible for determining the sectoral chapter under which the Person shall proceed.

Once the screener approves a Person's request, the Person and the Party complained against may agree to proceed directly to the establishment of a panel.<sup>115</sup> If there is no agreement, a Person must request consultations within 60 days, or be deemed to have abandoned her request.<sup>116</sup>

If there was no agreement to skip the consultation requirement, the Person must formally request consultations. If the dispute is not resolved to the satisfaction of the disputing parties within 120 days of the notice requesting consultations, the Person can request the establishment of a panel.<sup>117</sup> A Person has a window of no earlier than 120 days, and no later than 180 days after delivery of the request for consultations, within which they may request the establishment of a Panel. From thereon, the process closely mirrors the dispute resolution process under the government-to-government regime.<sup>118</sup>

In Person-to-Government consultations, any party that considers itself to have a substantial interest in the matter is permitted to participate upon notice. With the exception of the Party of the Person initiating the request for the formation of the panel, any party that has a substantial interest in the matter—either because it maintains a measure analogous to the one at issue or because the Party is a province, and has a significant number of persons carrying on business who are affected by the measure—is entitled to join the Proceeding as an Intervenor.

The Report of a Panel in person-to-government proceedings differs in only two material ways from the report issued by a government-to-government panel:

- panels may only determine whether the measure complained of *has resulted* in an impairment to internal trade, and *has caused* injury or denial of benefit;
- a Panel, at its discretion, has the authority to issue an order awarding Tariff Costs to the Complaining Person.<sup>119</sup>

The most recent amendments in the Fourteenth Protocol of Amendment added a recourse to an Appellate Panel by Disputing Parties following a decision by a panel under Part B of Chapter Seventeen.<sup>120</sup> The Appellate Panel has the same powers as a panel under Part A. In addition, the Appellate Panel has the capacity to issue tariff costs against a person appealing the original panel report, whereas a panel could only issue tariff costs against the responding party.

A Compliance Panel can review whether the Party is complying with the decision of a Panel or Appellate Panel Report and enforce compliance against the Party for failing to comply. One year after the Panel or Appellate Panel issue the report, a Person of a Party may request a Compliance

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<sup>115</sup> Article 1714(11).

<sup>116</sup> Article 1715(2).

<sup>117</sup> Article 1714.1.

<sup>118</sup> See Article 1715(3)–(11).

<sup>119</sup> See Article 1716.

<sup>120</sup> Article 1720.

Panel be formed.<sup>121</sup> Finally, in addition to being able to issue a Monetary Penalty Order against a party that has failed to comply with a Panel Report, the Compliance Panel also has the authority to issue “Additional Costs”.<sup>122</sup>

## 2.5. EXISTING PATTERNS OF USE

The existing patterns of use of the AIT’s dispute settlement mechanism do not definitely determine whether the AIT dispute resolution process, as currently designed, is effective. The patterns of use, however, may assist in evaluating inferences about the strengths and weaknesses of certain provisions derived from the subsequent endogenous and comparative analyses provided in this report. We acknowledge that any inferences drawn should be considered in light of the limited data set available.<sup>123</sup>

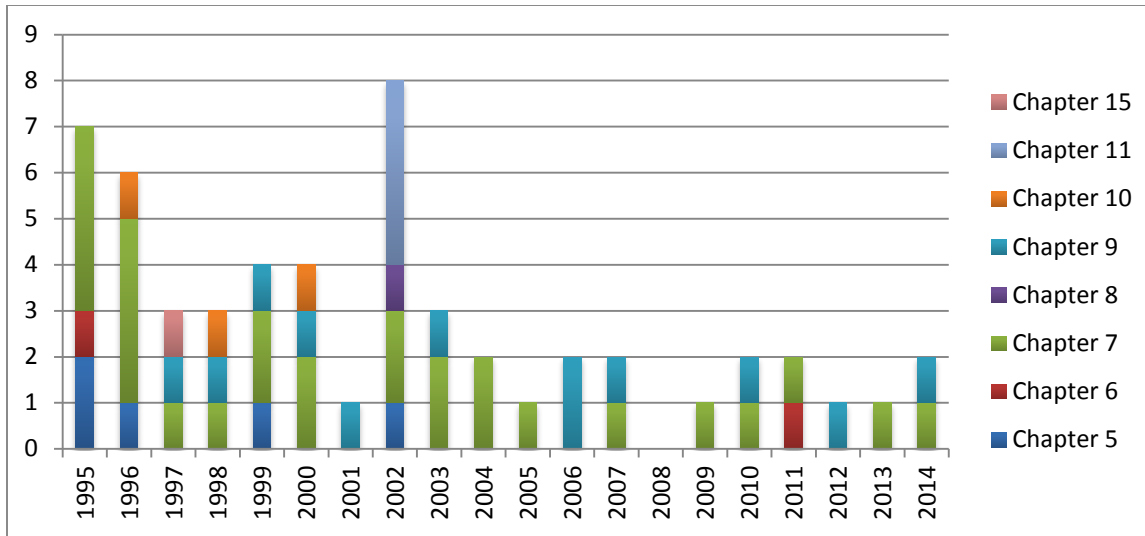
Since the AIT was concluded 20 years ago, 56 complaints were raised under the AIT dispute resolution process, with a noticeable decline in the number complaints since 2002. Chapter Seven (Labour Mobility) and Chapter Nine (Agriculture and Food Goods) make up a majority of complaints raised, accounting for 28 and 12 respectively, or just over 70% of all cases. With the exception of 2002, when Nova Scotia brought three separate claims related to Snow Crab Processing under Chapter Eleven, the number of complaints raised under the AIT dispute settlement process has noticeably decreased. As Figure 6 demonstrates, in the first eight years of the Agreement disputants raised complaints under a diversity of chapters. In the subsequent 12 years, disputes have been raised almost exclusively under Chapters Seven and Nine.

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<sup>121</sup> Article 1721(9).

<sup>122</sup> Article 1721. Additional Costs are defined in Article 1734 as those reasonable costs over and above tariff costs in a Compliance Panel hearing for counsel or agent’s fees to prepare for and attend the hearing, disbursements to experts, postage and courier fees and travel expenses.

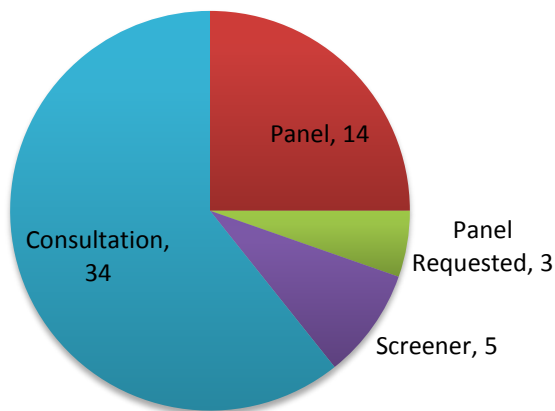
<sup>123</sup> All Data on dispute status is from AIT Secretariat, *Status of AIT disputes by chapter (2014)*, [http://www.ait-aci.ca/en/dispute/dispute\\_en.pdf](http://www.ait-aci.ca/en/dispute/dispute_en.pdf).



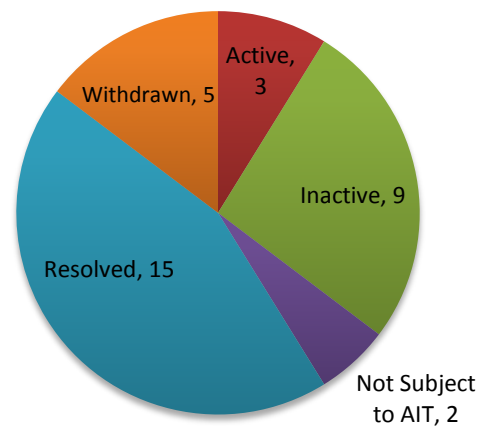
**Figure 6. Disputes Proceedings Initiated by Chapter Over Time**

Of all cases initiated, 60% were concluded at the consultation stage because they were resolved, were deemed inactive, or were still active at the consultation stage as of November 2014. Only a quarter (14 cases) were terminated at the panel stage. If one includes disputes that concluded after a panel was requested but not formed, or denied by a screener, disputes that entered into the quasi-judicial phase of the AIT’s dispute settlement process account for 40% of all disputes. (See figure 4).

Of the 31 complaints that concluded at the consultation stage, however, only half were in fact resolved by mutual agreement of the parties. The remainder, with the exception of two disputes found not be subject to the AIT, were either withdrawn or deemed inactive.

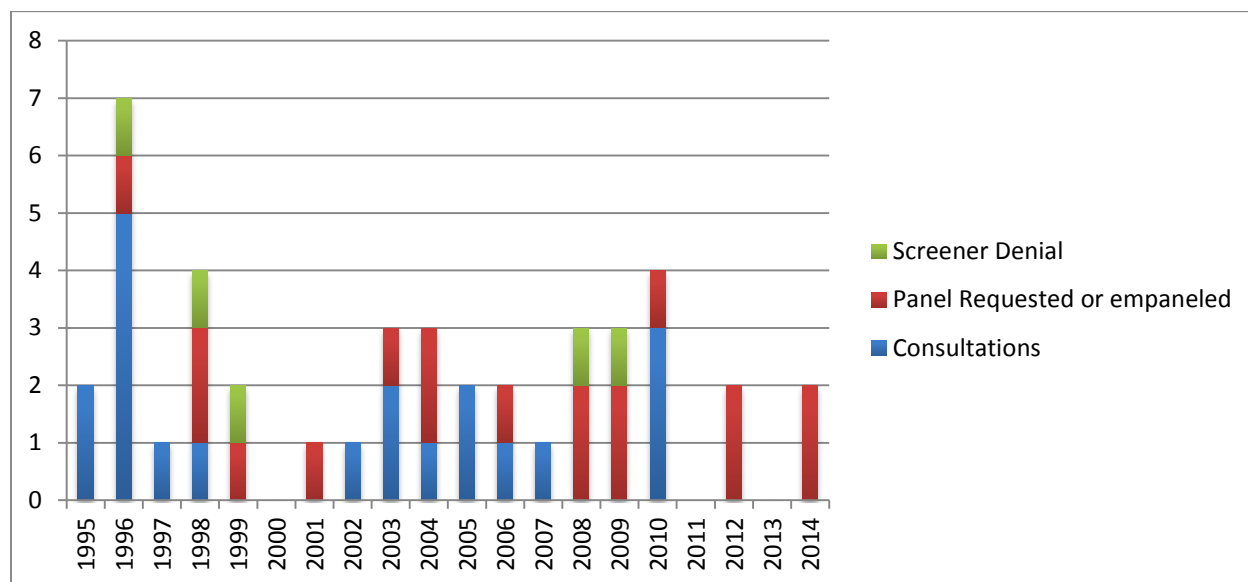


**Figure 7. Disputes by Settlement Phase at Disposition**



**Figure 8. Disposition of Consultations**

When examining the stage at which disputes reached their final disposition, either through mutual resolution of the dispute, denial by a screener, a decision by a panel, or withdrawal of the dispute,<sup>124</sup> there is an observable increase in the number of disputes that concluded after a panel was requested or formed. (See Figure 6). There is an even distribution of cases over the years: twenty disputes concluded at the consultation stage, while eighteen concluded only after a panel was either requested or formed, and five were denied by screeners. There has been a total of 10 screener decisions.<sup>125</sup>



**Figure 9. Stage of Dispute Settlement at Final Disposition**

Disputing parties and persons are permitted, encouraged even, to mutually resolve a dispute, even after a panel has been formed to determine the matter in issue. Interestingly, there have been 14 disputes for which a panel was formed and 13 panel reports issued. The one panel that did not issue a report is listed as inactive by the AIT Secretariat. This would indicate that once a panel has been formed, the likelihood of resolving a dispute through consensus and negotiation is quite low. Having said that, in one instance, a case was mutually resolved after a panel was requested.<sup>126</sup>

The data does suggest that the decision of a panel encourages the resolution of the disputes. Of the 12 disputes for which a panel has issued a report, the AIT secretariat lists eight as having been resolved, meaning the “disputants reached a mutually satisfactory resolution of the complaint.”<sup>127</sup> Four are listed as having been upheld by a Panel, meaning that a Chapter Seventeen panel found

<sup>124</sup> Some disputes were inactive or found not to be subject to the AIT at either the consultation stage, panel stage, or after a panel was requested and were not included in these calculations.

<sup>125</sup> AIT Secretariat, *Status of AIT Disputes by Chapter* (2014).

<sup>126</sup> See AIT Secretariat, *Status of AIT Disputes by Chapter* (2014), Construction Worker Mobility - Canada [ADAT] (February 2002) QC-ON, 1711(1) request.

<sup>127</sup> AIT Secretariat, *Status of AIT Disputes by Chapter* (2014).

in favour of the Complainant. It also means that the Complaining Party had not indicated to the Secretariat whether that the matter has been resolved after the report was issued. For at least one of these case—*Québec-Dairy Blends*,<sup>128</sup> an Appeal Panel upholding the findings of the original Panel was issued on 26 January 2015, and at the time of writing, Quebec would not have had the time to respond to the decision through legislative amendment.

The time it takes to resolve a dispute under the AIT is significant because one of the central objectives of the AIT is the expedient resolution of disputes. Looking at the 13 disputes that were resolved at the consultation stage,<sup>129</sup> consultation period ranged from one month to 90 months. The average was 35.2 months. This average time increases to 41.23 months when looking at the 13 disputes that concluded after a panel was established. In part this average is raised by a dispute between the Manitoba-CGAA and Ontario that lasted 14 years and 1 month.<sup>130</sup> The shortest dispute to conclude at the panel stage lasted nine months. Disputes that settle at the panel stage are expected to take longer than those that settle earlier in the dispute settlement procedure. Overall however, it would appear that it takes significantly longer to facilitate the resolution of disputes than expected, given the structure of the AIT.



**Figure 10. Average Time for Resolution of Disputes at various stages**

Finally, we considered the patterns of use and the length of time for three main dispute resolution mechanisms: Government-to-Government (“GG”), Government-to-Government on behalf of a Person (“GG(P)”), and Person to Government (“PG”).

The data indicates that of all the available procedural mechanisms, PG disputes, all four of which concluded at the panel stage, take the longest, averaging 73.5 months. Even excluding the outlying dispute between Manitoba-CGAA and Ontario, the average for the remaining three disputes is 41.7 months, second only to GG disputes that resolved at the consultation stage, at 43.1 months (from a total of seven disputes<sup>131</sup>). Although these case studies are insufficient to draw any definitive conclusions, the results indicate that: (1) for persons that are required to go through the entire dispute procedure, the system is lengthy and inefficient, and (2) the government-to-government

<sup>128</sup> Report of Article 1706.1 Appeal Panel Regarding the Dispute between Saskatchewan and Québec Concerning Dairy Blends, Dairy Analogues and Dairy Alternatives (26 January 2015), <http://www.ait-aci.ca/en/dispute/AIT%20Final%20appeal%20decision%20jan%2026.pdf> [*Quebec - Dairy Blends*].

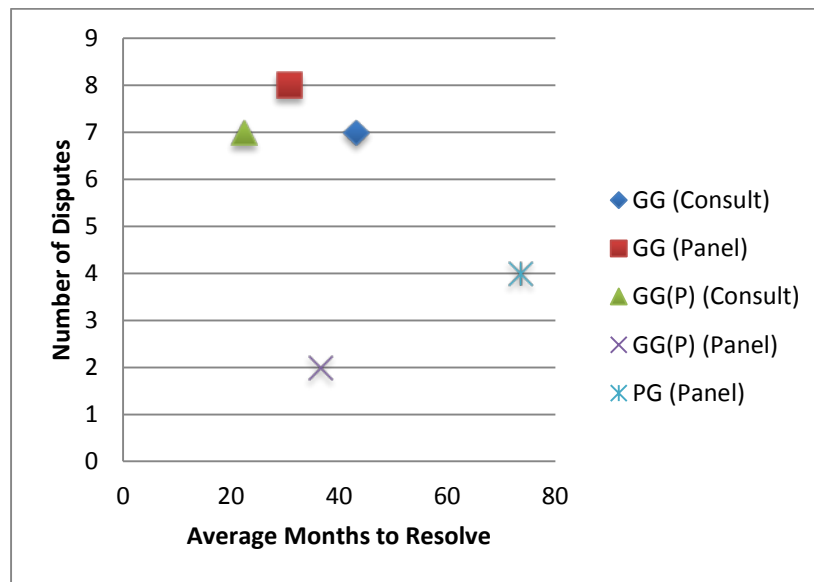
<sup>129</sup> The first two disputes raised in 1995 were not included because they resolved within the same in which they were raised.

<sup>130</sup> AIT Secretariat, *Status of AIT Disputes by Chapter* (2014), Public Accounting - CGA Association of MB (December 1999), ON, Panel.

<sup>131</sup> The shortest disputes lasted 1 month and the longest lasted 90 months.

consultation phase is often prolonged, unless it is escalated to a panel with the prescribed time frame outlined in Chapter Seventeen.

Where GG disputes moved to and were concluded at the panel stage, the eight disputes averaged 30.8 months, ranging from 9 to 87 months, significantly reducing the time for the conclusion of GG disputes by over a full year. Similarly, where a Party initiated the dispute consultation process on behalf of a Person, the dispute process was considerably more expedient with the seven disputes resolving in an average 22.4 months.<sup>132</sup> Only two GG(P) disputes concluded at the panel stage, taking 34 and 39 months. (See Figure 7).



**Figure 11. Dispute Type by frequency and length**

## 2.6. IMPLICATIONS OF THE LEGAL STATUS AND ENFORCEMENT MECHANISMS OF THE AIT

This report assesses the effectiveness of the AIT’s dispute settlement provisions by comparatively analyzing the procedural dispute settlement mechanisms of the AIT against dispute settlement mechanisms in international economic agreements. An in-depth review of the implications of the enforcement provisions (or lack thereof) within the AIT is beyond the scope of this report.

The legal status of the Agreement and enforceability of panel decisions, however, hold important implications for the potential effectiveness of the Agreement’s procedural mechanisms. This section briefly considers how the AIT’s legal status and the mechanisms designed to encourage a Party’s compliance with its commitments may impact the effectiveness of the dispute settlement’s procedural mechanisms. Section 2.6.1 provides a brief overview of the legal status and compliance provisions provided under Chapter Seventeen, as well as a brief comment, in comparative

<sup>132</sup> The disputes ranged from two months to 58 months.

perspective, on the effectiveness of retaliatory sanctions. Taking into consideration the objectives and principles of the Agreement, section 2.6.2 provides several examples on how the effectiveness of the current AIT dispute resolution mechanism may be undermined.

### **2.6.1. Legal Status and Enforcement Provisions**

The AIT provides four mechanisms to encourage compliance with a Panel's report as alternatives to legally binding enforcement.

First, a Panel has the authority to award various costs against Parties. These include a Monetary Penalty, Operational Costs, and Tariff Costs awards. Parties are responsible for ensuring that such orders are enforceable in the "same manner as an order for costs against the Crown in that Party's superior courts" or through Standby deposits in the case of monetary penalties.<sup>133</sup> The most recent amendments in the Fourteenth Protocol of Amendment introduced a Monetary Penalty, Tariff Costs, and Additional Costs awards that may be granted under the Person-to-Government dispute settlement process.

The obligations contained in the Agreement do not have the force of law, but monetary awards by the Panel do have legal force through federal legislation. In 2012, a provision was added to the federal implementing legislation, the *Agreement on Internal Trade Implementation Act* making it possible for a successful complainant to have a monetary penalty or tariff costs order of a panel, made under Chapter 17, turned into an order of the Federal Court.<sup>134</sup> Conversely, a court cannot enforce the obligations contained in the Agreement, if breached, such as requesting the Parties to remove or reverse the legislation or regulation causing the breach. The findings and recommendations of a Panel are enforceable only to the extent that the party against whom the decision is rendered takes action to comply with the decision—with one exception. This has the somewhat disjointed effect of making the penalty for finding of a breach legally enforceable, but not the actual breach for which the penalty is awarded.

Second, under Part C, a Party is prohibited from participating in dispute resolution proceedings under the Agreement, where the Party has failed to comply with a Monetary or Tariff Costs Award or a Compliance Panel has determined that a Party has not brought itself into compliance with the Agreement.<sup>135</sup> Persons of a Party too, are prohibited from initiating or participating in any consultations or Proceedings under Part B, where that Party had failed to comply with a Panel Report or cost award.

Third, panel reports detailing decisions are made public after 30 days. Presumably, this requirement adds a level of public scrutiny and pressure if a Party resists complying with a ruling, exposing it to potential political pressure.

Finally, retaliation as a dispute mechanism can be used by Complaining Parties, but is practically difficult to use and has been criticized. Following a discussion with the Internal Trade Committee, the Complaining Party is permitted to suspend benefits of equivalent effect or impose retaliatory

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<sup>133</sup> Article 1707.1, Article 1707.2.

<sup>134</sup> *Agreement on Internal Trade Implementation Act*, SC 1996, c 17, <http://canlii.ca/t/522fs>, s 8.

<sup>135</sup> Article 1727.

measures of equivalent effect against the Complaint recipient, if within one year from when the Panel issued its report, the Party has failed to bring an inconsistent measure in line with the Agreement. Retaliation, as a mechanism to encourage compliance, is functionally only available to Complaining Parties. As a practical mechanism, retaliation has been criticized for its tangible negative harm in the domestic context. Retaliation harms the interests of the retaliating party by increasing costs for consumers of the goods and services for which trade is restricted through the retaliatory measure. More critically, in the context of the AIT, retaliation is a far less effective tool than it is at the international level and cannot simply be grafted into the context of Canadian federalism.

Under the GATT, tariffs between countries enable contracting parties to, in principle, withdraw tariff concessions against a specific offending country. In the absence of the ability to enact explicit tariffs pursuant to section 121 of the *Constitution Act 1867*,<sup>136</sup> offending measures under the AIT are likely to manifest in general statutory schemes. Retaliation by a province would likely involve amending a statutory scheme. Additionally, it would likely be unable to single out and punish the beneficiaries of the province found to be in breach, and as a result, would likely restrict trade from all provinces, harming consumers from the retaliating province.<sup>137</sup>

The Agreement also contains an explicit privative clause, excluding the right of disputing Parties and Persons to seek judicial review of a Panel or Appellate Panel's report.<sup>138</sup> It could be argued an internal appeal mechanism may be sufficient to protect against any unreasonable interpretations of the AIT or errors of law. However, if a disputing Party or Person of a Party is subject to unfair procedures or an unreasonable or incorrect decision by a Compliance Panel, it will not have any further recourse. After a panel issues its Report, the Party should modify the offending measure to reflect the recommendation from the Panel Report. A Compliance Panel will consider whether the modified measure continues to be a breach of the Party's AIT commitments. While the Compliance Panel's assessment of a new measure is akin to a new process, it does not come with the same procedural safeguards—mainly the lack of appeal. The complaining Party or Person is further barred from raising the same issue for three years.

### **2.6.2. Effectiveness of Chapter Seventeen's Procedural Mechanisms**

The fact that the commitments in the Agreement are not legally binding or enforceable has the potential to undermine procedural mechanisms designed to encourage the use and consequent development of the dispute settlement mechanism.

A robust consultative process, for example, that is supposed to encourage amicable resolution of a dispute in a manner consistent with the rules and principles of the Agreement, is likely to be less

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<sup>136</sup> Robert Howse, "Between Anarchy and the Rule of Law: Dispute Settlement and Related Implementation Issues in the Agreement on Internal Trade" at p 179. ("As is stated explicitly in Article 1710(10), [now 1709(10)] even authorized retaliation must be constitutional. This requirement further limits the kinds of measures available, since they must not constitute an undue interference with interprovincial trade and commerce, must be consistent with territorial limitations on provincial jurisdiction, and also must not violate the guarantees of mobility rights in section 6 of the Charter of Rights and Freedoms.")

<sup>137</sup> See Robert Howse, "Between Anarchy and the Rule of Law: Dispute Settlement and Related Implementation Issues in the Agreement on Internal Trade" at p 179.

<sup>138</sup> Article 1728 (Limiting Judicial Review).

effective in encouraging such results where both parties are aware that the Party in breach will not be required to comply with a solution that does not align with its interests. This context inherently creates an asymmetric bargaining system, in which the Party in breach is in a position of power.

Additionally, with the exception of having their complaint vindicated and a potential for gaining the benefit of the removal of a trade barrier, private parties (Persons) have little incentive to use the AIT's dispute settlement procedures. Even where the procedural mechanism for the settlement of disputes encourages coherent and consistent agreement on the scope of the Parties' obligations, a private party is unlikely to be motivated to use the mechanism where compliance is uncertain, even upon vindication. This is particularly so when there is no appeal against the determinations of a Compliance Panel.

As the Chapter Seventeen jurisprudence demonstrates, panels have expended significant resources addressing and readdressing disputes over the same matters, and subsequent non-compliant, but modified measures by Parties.<sup>139</sup> Given the importance of a Compliance Panel in facilitating the final resolution of a dispute, the disputants need assurance that the Compliance panel decision, which may incorrectly or unreasonably determine whether a party has brought an impugned measure into compliance with its commitments, will be subject to a review. Without this, the procedural protections of appellate review within the Agreement fail to extend to modified measures that remain inconsistent with the Party's obligations, which, in turn, undermines confidence that the dispute settlement mechanism can be relied upon to correctly determine the substantive obligations under the AIT.

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<sup>139</sup> See, for example, *Quebec - Dairy Blends, 2015* and *Quebec - Coloured Margarine, 2005*. See also; Report of the Article 1716 Panel Concerning the 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 (5 October 2001), [http://www.ait-aci.ca/en/dispute/6\\_eng.pdf](http://www.ait-aci.ca/en/dispute/6_eng.pdf) [*Ontario - Public Accountancy, 2001*] and Report of Article 1703 Panel Regarding the Dispute between Manitoba and Ontario Concerning Ontario's Notice of Measure with respect to Public Accountants (13 January 2012), *Agreement on Internal Trade*, [http://www.ait-aci.ca/en/news/Feb\\_13\\_2012\\_Report\\_Final\\_En.pdf](http://www.ait-aci.ca/en/news/Feb_13_2012_Report_Final_En.pdf) [*Ontario - Public Accountants, 2012*].

### 3. ANALYSIS

This section evaluates the coherence and effectiveness between the specific provisions and their objectives. In the broader context of the Report's comparative analysis of the AIT's dispute settlement mechanism with other international trade and investment agreements, a stand-alone assessment of the AIT dispute resolution mechanism identifies potential inherent weaknesses and gaps between the objectives of Chapter Seventeen, the structure of the AIT dispute settlement mechanism, and the substantive provisions of the Agreement.

In 2001, the AIT dispute resolution mechanism was criticized by stakeholders for being “slow, complicated, expensive, and ... not respected by all governments.”<sup>140</sup> This perception is concerning. A dispute mechanism should bolster the integrity and credibility of the substantive commitments in the AIT, not undermine them. In order to encourage increased interprovincial trade flow, a robust dispute settlement mechanism should increase the certainty to those affected by the AIT substantive obligations.

The position underlying the analysis in this section is that the dual (and to some degree competing) interests of trade liberalization and legislative sovereignty, ought to be balanced within the AIT's dispute settlement system for the benefit of consumers. Section 3.1 begins by considering the challenge of balancing the diplomatic underpinnings that lay at the heart of the dispute settlement mechanism, a political accord, and the legalism of a third party adjudication. Subsection 3.1.1 delves further into the evolving legalism of the Agreement's dispute resolution, considering the implications of the lack of precedent for the coherent and consistent interpretation and application of the Agreement. Section 3.1.2 considers the potential challenges that negotiated dispute resolution can pose to the development and consistent interpretation and application of the parties' commitments.

Sections 3.2 and 3.3 consider the implications for the AIT's accessibility, given the complexity of a panel's jurisdiction and ambiguity regarding the Agreement's relationship to other legal systems. Section 3.4 highlights inconsistencies in the substantive and procedural rights in government-to-government dispute resolution procedures, where a party initiates the process on their own versus on behalf of a person. Section 3.5 similarly considers the disparities in procedural rights between the person-to-government and government-to-government processes, including the requirement for assessment by a screener (3.5.1).

Section 3.6 looks at the limited roles available for intervenors and experts in the dispute process. Section 3.7 reviews how subsequent interprovincial trade agreements have modified the dispute provisions. Finally section 3.8 addresses arguments raised by provincial labour and other civil society groups related to the negative implications of relinquishing the interpretation and application of the Agreement to third-party arbitration.

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<sup>140</sup> Robert Knox, *Canada's Agreement on Internal Trade: It Can Work If We Want It To* at p 3.

### 3.1. THE COMPETING INFLUENCE OF THE CONSULTATIVE AND ADJUDICATIVE REQUIREMENTS

In 1995 Robert Howse noted:

[s]ince the AIT does not have the status of law and does not formally bind the parties, ... the legitimacy conferred on the agreement in political practice will be a major determinant of its ultimate impact in liberalizing interprovincial trade. This heightens the importance of dispute settlement; the higher the quality of dispute rulings and *the more they are grounded in a coherent and consistent interpretation of the agreement*, the more politically difficult it will be for governments to walk away from their commitment to free internal trade.<sup>141</sup>

The AIT provides a legal framework that shapes provincial commitments to trade liberalization. Since its inception, and with each of the modifications implemented in the Protocols of Amendment, the AIT's dispute settlement mechanism has become increasingly legalized.<sup>142</sup> A significant component of the dispute resolution approach is the exceptional premium of resolving disputes through informal consultations and negotiations. The resolution of disputes through the application of reasonable, rules-based legal determination remains a solution of secondary importance.

Howse's initial assessment of the balance of interests in the AIT dispute continues to be germane:

[t]he provisions in the agreement seem to hark back to earlier eras, when the implementation of trade obligations depended much more on power politics between states and the practice of diplomacy than on the force of legal order and legal reasoning.<sup>143</sup>

Experience from dispute resolution rules governing other trade agreements highlights the importance of clear standards of conduct through consistent legal interpretation of the agreement.<sup>144</sup> Maintaining a normative consensus among parties on what constitutes "cheating" under the Agreement is central to establishing a "cooperative equilibrium"<sup>145</sup> necessary for advancing the dual principles of protecting the achievement achieve a legitimate objective and lower barriers to trade liberalization.

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<sup>141</sup> Robert Howse, "Between Anarchy and the Rule of Law: Dispute Settlement and Related Implementation Issues in the Agreement on Internal Trade" at p 171 (emphasis added).

<sup>142</sup> Anna Maria Magnifico, "What has gone wrong on interprovincial trade" (November 2014) *Inside Policy* 21, <http://www.macdonaldlaurier.ca/files/pdf/201411InsidePolicywebready.pdf> at p 23.

<sup>143</sup> Robert Howse, "Between Anarchy and the Rule of Law: Dispute Settlement and Related Implementation Issues in the Agreement on Internal Trade" at 193.

<sup>144</sup> Robert Howse, "Between Anarchy and the Rule of Law: Dispute Settlement and Related Implementation Issues in the Agreement on Internal Trade" at p 194.

<sup>145</sup> Michael Trebilcock, Marsha Chandler & Robert Howse, *Trade and Transitions* (New York: Routledge, 1990), Conclusion

However, the ability for both the Parties and the stakeholders to clearly define and identify violations of the Agreement is a result of coherent and consistent legal interpretation and the application of the AIT rules. This is strained, to a degree, by the bargain struck in the AIT that attempts to balance the interests of provincial legislative sovereignty and trade liberalization. Emphasis on extensive consultation in conjunction with non-binding panel arbitration has the potential to undermine achieving a clear normative consensus on applying and implementing obligations contained in the Agreement—the “persistent use of diplomatic saw-offs to settle trade disputes will impede the creation of the kinds of interpretive norms and principles that allow governments and persons to rely with confidence on the Agreement.”<sup>146</sup>

### 3.1.1. The impact of the lack of precedent on consistency of dispute resolution

The common law principle of *stare decisis* (“standing by things decided”), or doctrine of precedent, is not applied in the AIT Panel decision-making. A consistent and coherent interpretation of the agreement is considerably undermined since the Panels are not bound by the decisions of previous Panels.<sup>147</sup> At common law, the principle of *stare decisis* describes how the law relies on precedent in its system of legal interpretation:

Precedent economizes on information and minimizes idiosyncratic conclusions. It thus serves a variety of purposes: it aids in the stability and coherence of the law, making it more predictable; it provides fairness in decision making; it promotes efficiency and eliminates sources of error, such as judicial bias; and it fulfills a symbolic role by recognizing the relationship between courts and the legislature. It therefore has independent value.<sup>148</sup>

Unlike precedent at common law, which is structured through the hierarchy of the domestic court system, the AIT’s ad hoc panel system lacks a defined hierarchy. While this, on its own, is not critical to the consistency of interpretation of the Agreement, it engenders uncertainty that imposes intangible costs on decision makers seeking to rely on Party’s commitments and obligations contained in the Agreement.

Based on Articles 1706 and 1719, a Panel’s report is based on the submissions of the participants to the dispute and “any other evidence received during the course of the Proceeding.” As a result, Panels have found the decisions of other panels persuasive, if not determinative, in their reasoning:

The absence of *stare decisis* in AIT dispute settlement does not mean however that panels should not examine how the same issues have been treated by other panels. There is considerable value in jurisprudential consistency because it contributes to greater common understanding of the AIT. Moreover, as Alberta noted, a finding by this Panel that the October 1, 1997 letter is of no legal effect could raise questions about the validity of the

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<sup>146</sup> Robert Howse, “Between Anarchy and the Rule of Law: Dispute Settlement and Related Implementation Issues in the Agreement on Internal Trade”

<sup>147</sup> *Quebec - Dairy Blends*, 2015 at p 12.

<sup>148</sup> Neil Craik and Craig Forcese, eds, *Public Law: Cases, Commentary and Material*, 2d ed (Toronto: Emond Montgomery, 2011) at p 55.

three reports where panels acted on the basis that the letter, although late, was still operative.

While the dispute settlement procedure provides for an appeal, Appellate panels too are *ad hoc*. So far, only one Appellate Panel, under Article 1706.1, has been convened.<sup>149</sup> As a result, it is yet to be seen whether the legal interpretations of Appellate panels will be *de facto*, if not *de jure*, binding upon panels of first instance.

### 3.1.2. The Consultation Requirement

The consultation process under the AIT is a departure from a dispute system that encourages consistent interpretation and application of the obligations. Understandably, there is an entrenched reluctance to fully commit to binding and enforceable legal mechanisms for interpreting and applying the Agreement. As Lee explains, “provincialists take the position that measures which are designed to benefit local consumers should not be subject to any constraints which, while potentially increasing overall economic well-being in Canada, would almost certainly result in a net loss to local residents.”<sup>150</sup>

Provinces are in the most appropriate position to effectively address local needs. The notion, however, that provinces can and should be free to correct economic imbalances through trade restrictive measures, is counter to the spirit and purpose of the AIT.

A comparative analysis of dispute settlement provisions in international economic agreements in section 4 below, will demonstrate that there are alternative and comparative mechanisms that provide checks and balances against concerns that the provinces are relinquishing their ability to legislate in the public interest, without undermining the role of the dispute resolution system in reinforcing the AIT obligations.

The consultation process, as currently structured, has the potential to undermine the integrity of the Agreement itself. The negotiations between parties that are “in the shadow of the law,”<sup>151</sup> including the availability of a *binding, independent, third party, arbitration*, ought to result in settlements that are consistent with a reasonable interpretation of the rules of the Agreement.

Certain features of the consultation process make the process susceptible to both manipulation and compromise on the norms and principles of the Agreement. The confidentiality of the consultation process, which should encourage compromise without prejudice to the arbitration process, exposes the negotiating process to acquiescence and *quid pro quo* exceptions by parties, potentially diluting the Parties commitments of the Agreement.

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<sup>149</sup> Report of Article 1706.1 Appeal Panel Regarding the Dispute between Saskatchewan and Québec Concerning Dairy Blends, Dairy Analogues and Dairy Alternatives.

<sup>150</sup> Marc Lee, “In Search of a Problem: The Future of the Agreement on Internal Trade and Canadian Federalism” (2002) 2 *Asper Rev Int'l Bus & Trade L* 225 at pp 225–226.

<sup>151</sup> The concept of “bargaining the shadow of the law,” where the law provides “a framework within which the [parties] can determine their ... rights and responsibilities” was first articulated in Robert N Mnookin and Lewis Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 *Yale L. J.* 950.

A number of stakeholders expressed the view increased transparency during the consultation process would reassure them that their concerns and positions were reflected in negotiations. Further, the stakeholders thought additional transparency would lend credibility to the consultation phase, by providing the stakeholders with a greater understanding of the end resolution of a dispute.<sup>152</sup>

When a Party initiates dispute proceedings on its own, or on behalf of a person, there is no formal mechanism to ensure the interests of other stakeholders, such as the Persons of the Party or civil society groups, are represented. It is feasible that the interests of the negotiating Party—the Province—may be at odds with the Person who raised the complaint and who is seeking to have a measure of another Province brought in line with the commitments of the Agreement. If the negotiating Parties resolve the issue through negotiation, the dispute settlement process comes to a close; whether or not the resulting settlement is to the satisfaction of the Person who commenced the proceeding complaint or aligned with the spirit of the Agreement. The Person of the Party is subsequently barred from raising the claim under the dispute process for three years.<sup>153</sup>

The exclusion of Persons from negotiations, which often involve pertinent and significantly technical matters, may result in ineffective or prolonged consultation. The experience of the Certified General Accountants of Manitoba, which attempted to resolve technical barriers faced by its members in practicing in Ontario, demonstrates the challenges of a private party pursuing resolution of a complaint through a Party to the Agreement. After receiving a request to initiate consultations in December 1999, Manitoba delayed pursuing the issues for almost a year, holding only one formal meeting with their Ontario counterparts in that time.<sup>154</sup> Despite agreeing with the CGA-Manitoba's complaint, Manitoba declined to move the complaint forward, taking the position that given the technical nature of the issue, it would better pursued by provincial CGA Associations directly with Ontario. The Certified General Accountant's Association of Canada (CGAAC), however, had previously sought to negotiate directly with Ontario over the same issue. In its 2001 report, the CGAAC noted, "Ontario declined to engage in consultations with CGA-Canada because the Agreement only requires that government consult with other governments and there is no obligation to consult with private parties."<sup>155</sup>

A stakeholder consulted by PIAC explained that despite having a direct interest in ongoing consultations between Provinces, they were removed from the consultations and not directly involved. Of greater concern, the same stakeholder recalled that on occasion, the consultation period ended before they were even aware that consultations were ongoing.<sup>156</sup>

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<sup>152</sup> PIAC Stakeholder Interviews.

<sup>153</sup> Article 1713(7)(a).

<sup>154</sup> Robert Knox, *Canada's Agreement on Internal Trade: It Can Work If We Want It To*.

<sup>155</sup> Robert Knox, *Canada's Agreement on Internal Trade: It Can Work If We Want It To* at p 13. Equally concerning is the fact that Ontario introduced the replacement Public Accounting Act in 2004 which essentially maintained the barrier to mobility for accountants, by different means. Manitoba registered its consideration of the dispute as resolved in only in 2014, after Ontario lost again in a 2012 panel ruling and finally brought its measures in line with the Agreement.

<sup>156</sup> PIAC Stakeholder Interviews.

The recent amendment introduced in the Fourteenth Protocol of Amendment, presents a positive development, since Persons of a Party may now engage in direct consultations with a Party, once a Screener approves their claim.<sup>157</sup> For a Person of a Party to bring a dispute through the Person-to-Government mechanism, however, remains a resource-intensive endeavour that favours large private enterprises, such as firms or professional associations that have the financial means to file a complaint. The process is less accessible to individuals facing trade or mobility barriers.<sup>158</sup>

The consultation process under Chapter Seventeen lacks structure. In 2004, New Brunswick's Deputy Minister of Training and Employment Development, declined to initiate consultations on behalf of the Certified General Accountant's Association of New Brunswick, explaining that, "the Government of New Brunswick would not initiate consultations because they would not be 'expedient,' based on Manitoba's prior experience in trying to resolve a similar public accountant mobility issue with Ontario."<sup>159</sup>

The CGAAC has argued that the consultation process is flawed, since "there are no milestones, timelines, or other structural elements in consultation processes; and there is no third party oversight or engagement to assist the parties to resolve a dispute through mediation or other means and to ensure that the consultation process is productive and effective."<sup>160</sup> Specifically, the consultations should be structured to "(1) establish deadlines with the parties to the complaint; (2) ensure that timelines are met; (3) chair consultation meetings; [and] (4) make recommendations for resolving disputes and for terminating or continuing consultations."<sup>161</sup>

Some stakeholders believe the 120 day minimum requirement for consultations is susceptible to abuse as a delay tactic. In their experience, consultation frequently did not take place. The stakeholders believed that the consultation would benefit greatly from a referee or facilitator to give structure and move the process along.<sup>162</sup> Some form of structure could also play a beneficial role in effectively incorporating and coordinating the participation and consultation with stakeholders during government-to-government consultations, as one stakeholder recounted a maze of communication between various provincial ministerial departments before they were able to make comments on negotiations.

The Fourteenth Protocol of Amendment introduced only minor reform--a time limit of three years for a complaining party to move a dispute from the consultation phase to a panel.<sup>163</sup> By

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<sup>157</sup> Article 1715.

<sup>158</sup> Anna Maria Magnifico, "What has gone wrong on interprovincial trade."

<sup>159</sup> Article 1713 Screener Report: In the Matter of a request made by the Certified General Accountants Association of New Brunswick to commence dispute resolution proceedings vis-à-vis Québec (21 October 2004) *Agreement on Internal Trade*, online: AIT Secretariat <[http://www.ait-aci.ca/en/dispute/09\\_2005/Screener%20Decision%20CGA-NB%20english.pdf](http://www.ait-aci.ca/en/dispute/09_2005/Screener%20Decision%20CGA-NB%20english.pdf)> [SR - CGAANB].

<sup>160</sup> Certified General Accountants Canada, *Making Trade Dispute Resolution in Canada Work: Certified General Accountants' Experience with Canada's Agreement on Internal Trade* (Vancouver: CGA-Canada, 2006) at pp 11–12, [http://www.cga-canada.org/en-CA/ResearchReports/ca\\_rep\\_2006-05\\_ait.pdf](http://www.cga-canada.org/en-CA/ResearchReports/ca_rep_2006-05_ait.pdf).

<sup>161</sup> Certified General Accountants Canada, *Making Trade Dispute Resolution in Canada Work: Certified General Accountants' Experience with Canada's Agreement on Internal Trade* at p 12.

<sup>162</sup> PIAC Stakeholder Interviews.

<sup>163</sup> Article 1703(2).

comparison, in consultations in “Person of a Government” process under Part B, a disputant has a only 60 days to request a panel.<sup>164</sup> While negotiations at a government level are inherently more complex and logistically challenging, it is not clear why Parties, particularly when they may be advancing disputes on behalf of a Person, are granted a considerably longer time limit than Persons under the Person-to-Government mechanism (36 months as opposed to 2 months).

### **3.2. JURISDICTION OF A PANEL OVER DISPUTES ARISING UNDER THE AGREEMENT**

As outlined in sections 2.3.1 and 2.3.2 above, the Agreement varies the substantive and procedural jurisdiction of a dispute settlement panel from sector to sector, and between sectors, where a matter may fall under multiple sectoral chapters. The divergent definitions of “legitimate objectives” across different sectoral chapters frame the exceptions to the AIT commitments and the scope of legislative discretion to enact measures in the public interest.

The sectoral chapters inconsistently modify the extent to which the obligations apply to various forms of government. This leads to an inconsistent application of AIT commitments to quasi-governmental bodies or regional and municipal governments. Also, the extent of the Parties’ obligations lacks a coherent principle of attribution to determine when an entity or a measure of an entity falls within the purview of the commitments made under the Agreement.

The nuances in jurisdiction across sectors leads to a dispute settlement procedure that is less accessible to stakeholders. When the Agreement’s dispute settlement process is made more legalistic, it becomes complex and cumbersome. The added value of nuanced variations in the substantive and procedural jurisdiction across sectors remains unclear, particularly in the broader context of ensuring that the dispute settlement system effectively facilitates a Party’s adherence to the AIT commitments.

The language of the AIT only prohibits parties from maintaining a measure that “restricts or prevents the movement of persons, goods, services or investments across provincial boundaries.”<sup>165</sup> It is not clear from this language whether it requires parties to not maintain measures that make trade, commerce, and mobility indirectly more difficult. A dispute settlement panel has since ruled that “obstacle[s] to internal trade”<sup>166</sup> covers not just direct restrictions, but also *impediments* to trade.<sup>167</sup> Clarity on this issue is essential for the effectively defining the scope of application of Chapter 17.

Furthermore, even if the AIT’s dispute settlement mechanism applies to measures that both impede and restrict trade, its application is restricted to issues that fit within one of the sectoral chapters in Part IV of the Agreement. As Knox has argued “[t]he fact that the application of the AIT is limited

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<sup>164</sup> Article 1716(1).

<sup>165</sup> Article 402.

<sup>166</sup> Article 403

<sup>167</sup> *Quebec - Coloured Margarine*, 2005 at p 26.

to what is specifically covered and further limited by exceptions does not create the clarity and certainty that an open and predictable domestic market requires.”<sup>168</sup>

During PIAC's consultations, one stakeholder noted that although many of the issues their organization faced in relation to internal trade barriers neatly fit under Chapter Seven, the requirement that disputes fit within one of the chapters of Part IV gave the perception that the Agreement was incomplete in some way.<sup>169</sup>

Although it would certainly represent a major departure from the underlying approach to trade liberalization, adopting a negative-list approach, akin to that adopted under TILMA, it would be a natural extension towards the uniform application of Chapter Seventeen to the sectoral chapters. Concerns by parties about extending the Agreement's trade liberalization rules to areas that have yet to be negotiated, indicate a desire by parties to reserve the right to maintain trade restrictive measures in as yet unforeseen areas of the economy. While understandable, this demonstrates a degree of mistrust in the ability of the dispute resolution mechanism to determine that legislation with a “legitimate objective” is entirely permissible under the Agreement. Maintaining the consultation and negotiation phases, while implementing measures that facilitate consistent and coherent legal interpretation of the Agreement by panels (that are already appointed by the parties) would foster a more appropriate balance of the interests and principles contained in AIT.

### **3.3. THE AIT'S RELATIONSHIP TO DOMESTIC AND INTERNATIONAL LEGAL SYSTEMS**

Further clarity is required on the relationship between the Agreement and domestic principles of legal interpretation; more specifically, the proper and appropriate influence of other legal regimes and interpretive norms on a Panel's interpretation. Article 1706.1 does afford the Panels a broad interpretive power, since the Panel report can be based on “any other information received during the course of the Proceeding.” However, the degree to which the Panels may look at sources outside the text of the Agreement is ambiguous, if not dubious.

In *Quebec-Coloured Margarine*<sup>170</sup> the Panel wrote:

Québec has submitted that the Panel should be guided by the rules of interpretation customarily used to interpret the international trade agreements from which many provisions of the AIT are derived. Other AIT panels have referred to such rules and to the decisions of WTO panels and the Appellate Body. The Panel will do likewise.<sup>171</sup>

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<sup>168</sup> Robert Knox and Amela Karabegović, *Studies in Trade Policy: Myths and Realities of TILMA* (February 2009), <https://www.fraserinstitute.org/WorkArea/DownloadAsset.aspx?id=3333> at p 16.

<sup>169</sup> PIAC Stakeholder Interviews.

<sup>170</sup> *Quebec - Coloured Margarine*, 2005.

<sup>171</sup> *Quebec - Coloured Margarine*, 2005 at p 14.

Despite this, no other Panel report relies upon, or even references the interpretations of a WTO Panel or Appellate Body decisions. The *Quebec-Coloured Margarine* Panel went on to directly incorporate legal interpretations established by the WTO directly into the reasoning in its report.<sup>172</sup>

In *Quebec-Dairy Blends*, Quebec argued that Article 2(5) of the WTO Agreement on Technical Barriers to Trade—which states that a measure consistent with an international standard will be presumed not to create an obstacle to international trade—is analogous to Annex 405.1 regarding harmonization of standards and, specifically, paragraph 17, which states that: “each party shall, where appropriate and to the extent practicable, base its standards on relevant national standards, de facto national standards or *international standards*.” As a result, Quebec submitted that where an alleged barrier to internal trade is a measure consistent with an international standard, the measure should be presumed to be compliant with the AIT. The Panel, however, found that “[c]ompliance or consistency with a national or international standard may be used as an evidentiary basis to establish consistency with the provisions of the AIT but does not automatically equate to such consistency.”<sup>173</sup> On appeal, the Appellate Panel considered that the determination of the Panel of first instance on “the relationship between WTO jurisprudence and the AIT”<sup>174</sup> warrants deference, given the Panel’s area of expertise.

With respect to the influence and application of domestic norms of interpretation, it could be argued that the requirement that Appellate Panels be composed of members who have expertise in Canadian administrative law, may infer that the administrative law jurisprudence should influence Panel’s reasoning and interpretation. Indeed, the appellate panel in *Quebec-Dairy Blends* looked at administrative law decisions in determining the standard of review of the decision of the Panel of first instance.

Importantly, however, the Appellate Panel noted that unlike administrative law jurisprudence, which involved review by appellate administrative bodies created by legislation, the AIT “is not a statute but an agreement and its dispute resolution procedures resemble in some respects a codified negotiation and arbitration process.”<sup>175</sup> As a result, the standard of review “must be found in the legislation (or in our case Agreement) creating the two tribunals or other relevant factors; not in jurisprudence governing the relationship between the courts and administrative tribunals in a judicial review context.”<sup>176</sup>

The Appellate Panel implied that as a matter of contractual interpretation, a Panel must rely first on the ordinary meaning of the words used in their context. If the language of a written contract is clear and unambiguous, no extrinsic parol evidence can be admitted to alter, vary, or interpret in any way the words used. Without addressing the nuances of contract interpretation and the challenges of overcoming the parol evidence rule, the Appellate panel’s view emphasizes the

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<sup>172</sup> *Quebec - Coloured Margarine*, 200, at p 28.

<sup>173</sup> *Quebec - Dairy Blends 2015* at para 22.

<sup>174</sup> *Quebec - Dairy Blends 2015* at para 22.

<sup>175</sup> *Quebec - Dairy Blends 2015* at para 57.

<sup>176</sup> *Quebec - Dairy Blends 2015* at para 73 The panel found that the agreement gave it the authority to review a Panel decision for failure to respect rules of natural justice. As a matter of Canadian Administrative Law in which the Appeal Panel has greater expertise than the Panel (at para 78).

unique interpretative challenge posed by the nature of the AIT, especially the influence of legal norms developed through the interpretation of international trade agreements and domestic legal regimes.<sup>177</sup>

It could be argued that the AIT relationship to external principles of legal interpretation, both domestic and international, can be inferred from the internal structure of AIT dispute settlement mechanism and its historical foundations. However, such interpretive ambiguity would be detrimental to the contractual interpretation of the AIT's obligations. At the international level, there is a hierarchy of sources for the interpretation of commercial arbitration contracts. As a result of the unique position that the AIT occupies at the juncture of domestic and international trade regimes and public and private law, a more explicit interpretative structure, identifying the interpretive role of norms and principles of external legal systems would increase the Agreement's predictability.

### **3.4. DISPUTE SETTLEMENT BY A PARTY, ON BEHALF OF A PERSON**

There are two concerns that arise out of the procedural mechanism requiring a Person to request that a Party commence dispute resolution proceeding on her behalf. First, the Agreement places considerable emphasis on the priority of Parties in dispute resolution. At the same time, Persons are most often in a better position to directly identify the negative impact of another Party's trade restrictive measure. It could be argued that the requirement that a Party be given the opportunity to initiate proceedings on a Person's behalf exists to promote the efficiency of the Agreement. This also promotes the resolution of disputes that affect individuals, who might not otherwise have the financial means to raise a dispute.<sup>178</sup> While this requirement potentially increases the accessibility of the AIT dispute settlement process, there are no clear, uniform, and transparent criteria used by the Parties to assess whether to initiate proceedings on behalf of a person.

In 2011, for example, the Quebec Ministère de l'Emploi et de la solidarité sociale declined to initiate proceedings over divergent Crane Operator certification standards between Quebec and Ontario, a case in which the Panel issued a decision in favour of the Person. The Minister's justification was that "following discussion of the issue with the authorities in Ontario, it was impossible to obtain Ontario certification to operate tower cranes other than by completing the [Demonstration of Skills Test]."<sup>179</sup>

Second, in order for a Party to initiate proceedings on behalf of a Person, the Party has to have "substantial and direct connection" to the Person. Under Article 1703(5), where a Party cannot

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<sup>177</sup> *Vienna Convention on the Law of Treaties*, 23 June 1969, 1155 UNTS 331, UN Doc. A/Conf.39/27, [https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch\\_XXIII\\_01p.pdf](https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01p.pdf). By contrast Articles 31 and 32 of the *Vienna Convention* provide a clear hierarchy of interpretive sources to which an interpreting body may turn to determine the meaning of a treaty's text.

<sup>178</sup> Response to PIAC Stakeholder Questionnaire.

<sup>179</sup> Article 1713 Screener Report: In the Matter of a request made by Mr. X of Québec to commence dispute resolution proceedings vis-à-vis Ontario (15 February, 2011), [http://www.ait-aci.ca/en/dispute/crane\\_en.pdf](http://www.ait-aci.ca/en/dispute/crane_en.pdf) [SR - Mr. X of Quebec].

establish that it has such a “substantial and direct connection” to the person on whose behalf the party is seeking to initiate the panel, “the Panel shall immediately dismiss the complaint for lack of standing.”<sup>180</sup> A substantial and direct connection can only be established if the consequences of the economic injury or denial of benefit that the Person has suffered are being experienced in the Province of the Party bringing the claim. Howse has argued that this requirement is conceptually confusing, since it “appears to conflate the idea of a connection between the province and the injured person with the notion of a connection between the province and the location of the injury itself.”<sup>181</sup>

The requirement that Party has “substantial and direct connection” to initiate proceedings is disconnected from the economic reality of interprovincial trade. Disputes initiated under Chapter Seven (Labour Mobility) demonstrated the difficulty of localizing an injury in a Province when a measure unduly restricts the mobility of a person in Province A from working in Province B. As Howse noted, some interests, in particular mobility, are attached to the individual. A requirement that an injury or denial of benefit be experienced in the province, when a Person is already connected to the Province by being its resident or carrying on business in the province, is unduly restrictive and disconnected from the economic reality of interprovincial trade. It is also unlikely that a Province would initiate dispute settlement proceedings on behalf of a Person whose interests are not affected within its borders.

The “substantial and direct connection” requirement adds an additional barrier for the Persons to access the AIT dispute settlement mechanism, since under the Government-to-Government process, a Party may initiate dispute proceedings for *any breach* of the Agreement’s commitments, regardless of whether the effects experienced within the initiating Parties borders. Additionally, under Government-to-Government process, a Party must “explain how the measure has impaired *or would impair* internal trade” and “identify the actual *or potential* injury or denial of benefit caused by the actual *or proposed* measure.”<sup>182</sup>

The “substantial and direct connection” requirement potentially creates a procedural loophole for Persons seeking to bring a complaint through the dispute settlement system that may deny them very recourse to that system. A Person can directly initiate dispute proceedings only when a Party with which she has a “substantial and direct connection” has rejected her request. When a Party initiates proceedings, yet is denied standing on the basis of the lack of “real and substantial connection,” the Person has not technically been rejected. In this context, “the person does not possess any right under the Agreement to apply to a screener for permission to take proceedings on the person’s own behalf.”<sup>183</sup> To date, stakeholders that have been interviewed, have not encountered this problem.<sup>184</sup>

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<sup>180</sup> Art. 1703(5).

<sup>181</sup> Robert Howse, “Between Anarchy and the Rule of Law: Dispute Settlement and Related Implementation Issues in the Agreement on Internal Trade” at p 182

<sup>182</sup> Article 1703(3) (emphasis added).

<sup>183</sup> Robert Howse, “Between Anarchy and the Rule of Law: Dispute Settlement and Related Implementation Issues in the Agreement on Internal Trade” at p 185.

<sup>184</sup> PIAC Stakeholder Interviews.

Interviewed stakeholders expressed that there is a need for a greater reform to this aspect of the AIT dispute settlement mechanism. They viewed the requirement that private Persons first request that their Province initiate dispute proceedings on their behalf as an ineffective barrier to dispute resolution, one that added complexity, length of time that resolution took, and increased the likelihood that issue would be politicized. At least one stakeholder cited a need for private persons to have direct access to the dispute resolution mechanism.<sup>185</sup>

### 3.5. PERSON-TO-GOVERNMENT DISPUTE RESOLUTION

The dispute settlement system is designed to allow access to the dispute settlement process to the Persons, even when a Party has declined to initiate the proceeding on their behalf. The Fourteenth Protocol of Amendment made significant advancements in levelling the procedural playing field for persons proceeding under Part B of Chapter 17, opening up the available mechanisms for appeal, as well as the award and enforcement of monetary penalties in Person-to-Government proceedings.

In addition to being required to seek the approval from a screener to initiate a panel hearing (see section 3.5.1 below), Persons lack certain procedural rights that are available to Parties, which limit their access to the dispute settlement mechanism and may impact the integrity of the dispute settlement mechanism. Person's requests are limited to only actual, not potential, impairment to internal trade and subject to a limitation period.

Persons may only request a panel hearing on the basis of an actual impairment to internal trade that has resulted in an injury or denial of benefit, caused by the measure.<sup>186</sup> Parties are able to initiate the proceedings based on pending legislation and the potential injury or denial of benefit. Persons seeking to initiate dispute proceedings are subject to a limitation period of two years from "the date on which the person acquired, or should have acquired, knowledge of the alleged inconsistent measure and knowledge that the person incurred loss or damage or suffered a denial of benefit."<sup>187</sup> Parties are not subject to such a limitation.

These restrictions do not limit the scope of matters that can be raised in dispute, only the avenues through which they can be brought. Both Parties and Persons have an interest in the advancing the rules and norms of the Agreement, by holding Parties responsible to their AIT commitments. Limiting who can challenge potentially infringing behaviour dilutes the integrity of the AIT and its commitments.

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<sup>185</sup> PIAC Stakeholder Interviews.

<sup>186</sup> *AIT 2015*, Art 1713((3) in conjunction with Art 1712(2). See also, Article 1713 Screener Report: In the Matter of a request made by Mr. X of Québec to commence dispute resolution proceedings vis-à-vis Ontario (15 February, 2011), [http://www.ait-aci.ca/en/dispute/crane\\_en.pdf](http://www.ait-aci.ca/en/dispute/crane_en.pdf) [*SR - Saputo*] at p 6 ("it appears that the intention under the AIT is that a person, wishing to initiate a person-to-government dispute resolution process is required to actually have suffered an economic injury or denial of benefit rather than speculating that it will suffer an economic injury or denial of benefit if or when measures are implemented").

<sup>187</sup> Article 1713(5)(a).

### 3.5.1. Screeners

A screener must first evaluate the Person's complaint to ensure that the complaint is not baseless, frivolous, or vexatious, or that the proceeding is not intended to harass a Party. Screeners must also determine whether a claim presents "a reasonable case of injury or denial of benefit to the person."<sup>188</sup> The requirement that a Person submit her complaint to a screener, after a Party has declined to initiate proceedings on Person's behalf, potentially works at cross purpose to the objectives of establishing an effective, accessible, and timely dispute settlement process.

Roger Bilodeau appropriately assessed the role of the screener, stating that "the Screener is not required (or indeed permitted) to conduct an indepth analysis of the merits of the case, nor to consider the likelihood of success of the case. Rather, the Screener is simply required to satisfy himself that the case is not devoid of merit."<sup>189</sup> Although screeners are technically prohibited from pronouncing, concluding, or speculating on the merits of a complaint, their determination necessarily overlaps with the merits of a claim.

When a screener determines whether there is a reasonable case of injury or denial of benefit, this determination inevitably requires her to assess whether there is a causal relationship between the alleged violation of the Agreement and a particular injury or denial of benefit. Similarly, assessing whether a claim is frivolous or vexatious engages an analysis of whether the claim has basis in law. Even questions of standing and jurisdiction can engage substantive interpretations of how the facts interact with the Agreement.

Screener reports widely vary in the degree at which they have assessed whether a claim was vexatious or if there was a reasonable case of injury, encroaching on the jurisdiction of the related Panel. For example, party's requests have been denied after screeners determined: the government measure at issue was not inconsistent with their interpretation of provisions of the Agreement;<sup>190</sup> or that the legislation met the definition of legitimate objective under the Agreement.<sup>191</sup> These decisions inherently engage with substantive determinations, which are more appropriate for the Panels.

When Persons receive a successful screener report, effectively they are required to twice present their case on its merits—first before a screener and again before the Panel. This is neither efficient nor expedient. One stakeholder interviewed by PIAC contended that the Screener process, although intended to be a summary proceeding, required persons to go through a process almost

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<sup>188</sup> Article 1714(8).

<sup>189</sup> *SR - CGAANB* at p 3.

<sup>190</sup> Article 1713 Screener Report: In the Matter of a request made by the Hewitt Rand Corporation to commence dispute resolution proceedings vis-à-vis Saskatchewan (15 January 1998) *Agreement on Internal Trade*, [http://www.ait-aci.ca/en/dispute/09\\_2005/Hewitt%20Rand%20Screener%20Report.pdf](http://www.ait-aci.ca/en/dispute/09_2005/Hewitt%20Rand%20Screener%20Report.pdf) [*SR - Hewitt Rand*].

<sup>191</sup> Article 1713 Screener Report: In the Matter of a request made by the Canuk Sales Ltd to commence dispute resolution proceedings vis-à-vis Ontario (26 November 1999), [http://www.ait-aci.ca/pdf/canuk\\_e.pdf](http://www.ait-aci.ca/pdf/canuk_e.pdf) [*SR - Canuk Sales*].

equally as rigorously, just to be able to bring their complaint before a panel. The general view among the stakeholders was that the screening process should be eliminated.<sup>192</sup>

Additionally, the AIT does not provide a hearing before a screener, nor an appeal of a screener's determination. In 2000, the Committee on Internal Trade declined to clarify screeners' mandates citing that the decisions were not subject to appeal.<sup>193</sup>

### 3.6. INTERVENORS AND EXPERTS

Until the Fourteenth Protocol of Amendment, only a Party to the AIT could intervene in Part A proceedings, after demonstrating that it had a substantial interest in the matter in dispute. Since the amendment, the Parties can intervene in dispute proceedings upon written notice, in both government-to-government and person-to-government proceedings.<sup>194</sup>

Additionally, once a dispute reaches the panel stage, a Panel has the discretion to "add a Person as an Intervenor or a Complaining Person to a Proceeding if it is reasonable in the circumstances and consistent with principles of fairness to do so."<sup>195</sup> This is welcome change and allow other interested persons to provide their views, thus contributing to the AIT jurisprudence.

However, the Agreement still limits the participation of third parties, both experts and public interest advocates. While a panel has the discretion to seek out expert advice from any person or body that it considers appropriate, in practice this discretion has been rarely used.<sup>196</sup> Further, the Panel's ability to consult experts is significantly limited, since it requires consent of Participating Parties. Effectively, the Parties have the ability to block any third-party participant. One stakeholder expressed a view that in practice, the Panel did not have the authority to independently consult outside sources, regardless of permissiveness of the AIT's language.<sup>197</sup>

The Agreement does not explicitly prohibit or permit a panel to permit public interest advocates as intervenors. The language of Article 1705(2) and 1718(2), permitting a Presiding Body to seek information from any "body," may be sufficiently broad to allow Panels to include intervenors on a case-by-case basis.

Stakeholders interviewed by PIAC expressed a view that extending greater participation and consultation to technical experts and other interested intervenors would be beneficial. In particular,

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<sup>192</sup> PIAC Stakeholder Interviews.

<sup>193</sup> Robert Knox, *Canada's Agreement on Internal Trade: It Can Work If We Want It To* at p 11.

<sup>194</sup> See 1703(9.1). A party that joins as a complaining party at the consultation stage, where it does not have to demonstrate a substantial interest, can also become a Complaining party at the stage where a panel is established and 1716.2

<sup>195</sup> Rule 3.5.4 of Annex 1705(1) and 1718(1)

<sup>196</sup> See Articles 1705(2) and 1718(2). The only panel report to refer to, and have used experts was *Ontario - Public Accountants, 2012*.

<sup>197</sup> PIAC Stakeholder Interviews.

their participation would assist a Panel in gain a greater understanding of the potential impacts of a measure under dispute.<sup>198</sup>

The AIT was negotiated in the context of executive federalism. Consultation with outside stakeholders during the drafting of the Agreement or the Additional Protocols was limited, which has a potential to produce a democratic deficit.<sup>199</sup> In light of this, public interest participation in the dispute resolution process, which shape the interpretation and application of the commitments undertaken by the Provinces and Federal Government, has the potential to provide legitimacy to the process and the Agreement overall.

### 3.7. EMERGENCE OF INTERPROVINCIAL ALTERNATIVES

A number of pluri-lateral provincial trade agreements have been concluded since the AIT was negotiated in 1995. These agreements embody divergent positions on the extent of the commitments and mechanisms for the resolution and enforcement of disputes in inter-provincial trade. A brief review of the dispute settlement mechanisms in these agreements, provides a backdrop for assessing potential modification of the AIT dispute settlement mechanism.

It has been argued that the Trade, Investment and Labour Mobility Agreement (TILMA) initially signed between Alberta and British Columbia, emerged out of a dissatisfaction of those provinces with the AIT's (in)effectiveness in lowering barriers to inter-provincial trade.<sup>200</sup> Changes in the dispute settlement provisions indicate that, in part, this dissatisfaction came from the role that Chapter 17 was playing in achieving the objectives of the Agreement.

Unlike the AIT, TILMA is based on a negative list or an open trade approach. TILMA's dispute panel has jurisdiction across all trade, investment, and labour related measures; unlike AIT, where the jurisdiction is limited to areas positively identified sectoral chapters. Under TILMA, the complainants do not have to fit within a specifically identified sector or industry. A complaint can be brought even when the issue is not explicitly mentioned in the agreement. Whenever a measure restricts or prevents trade and even when the measure simply impairs trade, or makes it less open, it can be brought under TILMA's dispute settlement mechanism. In comparison to the AIT, as Knox points out, the broader scope of application of TILMA's dispute settlement provisions "to measures that impair trade make the agreement even more comprehensive."<sup>201</sup>

In 2009, Ontario and Québec concluded Trade and Cooperation Agreement (TCA). While the dispute resolutions provisions in the TCA are more narrowly construed than those of the AIT, the

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<sup>198</sup> PIAC Stakeholder Interviews.

<sup>199</sup> See Howse, "Between Anarchy and the Rule of Law: Dispute Settlement and Related Implementation Issues in the Agreement on Internal Trade," citing Stein (1993) ("transparency and democratic participation should be institutionalized within executive Federalism. Even in international law, there is increasing recognition that, for a regulation to have democratic legitimacy, the intergovernmental process that produces the regulation must be open to participation by nongovernmental actors" at fn 11).

<sup>200</sup> Robert Knox and Amela Karabegović, *Studies in Trade Policy: Myths and Realities of TILMA*.

<sup>201</sup> Robert Knox and Amela Karabegović, *Studies in Trade Policy: Myths and Realities of TILMA* at p 17.

process is accessible and award more robust penalties. The narrow dispute provisions do not provide a private right of action against a party under the Agreement. The language of the dispute resolution chapter is noticeably more streamlined and condensed, making it more accessible. Compliance panels convened under the TCA have the authority to award monetary penalties of up to \$10 million, double that permitted under the AIT, and on more comprehensive criteria, than the criterion used in the AIT (the population of the offending provincial party).<sup>202</sup>

The New West Partnership Agreement (NWPTA) between British Columbia, Alberta, and Saskatchewan builds on the previously concluded TILMA. Unlike other agreements, NWPTA adopts the UNCITRAL Arbitration Rules as the panel's rules of procedure. It similarly permits a Party or a natural or legal person from one of the provinces to raise a question of the proper application of or interpretation of the NWPTA before an arbitral panel. Article 27 of the UNCITRAL Arbitration Rules also provides a broader capacity to appoint and consult experts. The NWPTA also permits parties to resort to mediation and other dispute resolution options by mutual agreement during the consultation phase. The consultative process only lasts for 30 days; considerably shorter than the minimum of 120 days under the AIT, before the complaining party may request a panel. This time limit is a departure from the significant period of time a Party can maintain measures in breach of the AIT while the negotiations are ongoing. The NWPTA also provides for up to \$5 million in monetary penalties, when the party fails to comply with a panel finding, with the amount determined by flexible criteria including economic injury and "any other" relevant factors.

### **3.8. CONCERNS OVER STRENGTHENING THE ROLE OF THIRD-PARTY ARBITRATION UNDER THE AIT**

A number of civil society actors have raised concerns over the strengthened role of the AIT's dispute resolution mechanisms to hold the provinces to their commitments. The concerns focus on the increased role of arbitration to resolve internal trade barriers as opposed to interprovincial negotiations, and the ability of Persons to drive the process by requesting a panel, which then has the ability to interpret and define the scope of the Provinces obligations under the AIT.

Disagreement about the extent to which AIT emphasizes trade liberalization, equally apply to the concerns about the Agreement's dispute settlement mechanisms. As Lee argued,

Focusing the discussion on "trade barriers" diverts attention from the real issue: the presence of laws, regulations and policies at the provincial level that exist to promote economic development; protect consumers, workers and the environment; and, to set minimum standards that businesses must abide by.<sup>203</sup>

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<sup>202</sup> Article 1707.1 (the Compliance panel shall consider "(a) the seriousness of the inconsistency with the Party's obligations under the Agreement; (b) the commercial prejudice caused by the inconsistency on the market or markets; (c) whether the Party has made efforts, in good faith, to comply with the Report; and (d) any other factor the Compliance Panel considers relevant" in determining the amount of the penalty).

<sup>203</sup> Lee, "In Search of a Problem: The Future of the Agreement on Internal Trade and Canadian Federalism" at p 228.

Lee's concern is that the obligation not to enact or maintain measures that create an obstacle to internal trade, investment, or mobility will discourage regulatory diversity among the provinces, and potentially create a race to the bottom.

[U]nder attack is the ability of provincial governments to set higher standards for environmental protection, labour regulation, consumer protection, not to mention the ability of provinces to influence regional economic development ... The danger in current negotiations is that legitimate standards in the public interest will be undermined by challenges from corporations or other governments with lower standards.<sup>204</sup>

Provinces will be disinclined or "chilled" in their willingness to introduce such measures faced with the prospect of such measures being challenged in private arbitration.<sup>205</sup> As Gary Schoenfeldt explained, in presenting the Saskatchewan Federation of Labour's Trade Committee position on TILMA, they are "not against interprovincial trade, investment or labour mobility. It is simply of the opinion that decisions on those matters should left to democratically elected governments, certainly not by means of the Trade, Investment and Labour Mobility Agreement with its NAFTA-style enforcement mechanisms."<sup>206</sup>

The AIT attempts to balance the liberalization of internal trade with legislative sovereignty of provinces through Article 404 "legitimate objectives" exception. Leaving aside the merits of the trade liberalizing commitments in the Agreement, the concern, when it comes to moving dispute settlement out of the hands of the parties, and into the realm of a third-party arbitration panel, is that panels favour deregulation and hold provinces to an unattainable standard for demonstrating that "the measure is not more trade restrictive than necessary to achieve that legitimate objective," over respecting provincial initiatives enacted in pursuit of such legitimate objectives.<sup>207</sup>

The AIT dispute settlement provision have been criticized for allowing corporations to bypass Canadian courts and directly challenge government policies before unelected, unaccountable, private trade panels.<sup>208</sup> Private corporations challenging the validity of government policies implemented in the public interest is viewed as antithetical to "basic notions of democracy."<sup>209</sup> Further, suggestions to remove the screening process have been viewed to further "bolster the hand of corporations that want to challenge provincial regulations."<sup>210</sup>

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<sup>204</sup> Lee, "In Search of a Problem: The Future of the Agreement on Internal Trade and Canadian Federalism" at pp 225–226.

<sup>205</sup> Ellen Gould, *Asking for Trouble: The Trade, Investment and Labour Mobility Agreement* (Vancouver: Canadian Centre for Policy Alternatives, Feb 2007), <https://www.policyalternatives.ca/publications/reports/asking-trouble> at p 23 (talking about TILMA but in regards to identical provision language as found in the AIT).

<sup>206</sup> Gary Schoenfeldt, "The Trade Investment and Labour Mobility Agreement: A Massive Attack on Democracy" (Submission to the Standing Committee on the Economy, Government of Saskatchewan, 2007), <<http://www.sfl.sk.ca/public/images/documents/Trade%2520Cttee%2520Submission%2520to%2520Sask%2520Government%25202007.pdf>.

<sup>207</sup> See Ellen Gould, *Asking for Trouble: The Trade, Investment and Labour Mobility Agreement* at p 23.

<sup>208</sup> Canadian Environmental Law Association, "Trade ministers urged to deny corporations ability to sue provincial, territorial governments" (Dec 03 2010), <http://www.cela.ca/tradeministers-urged-deny-corp-sue%20>.

<sup>209</sup> Canadian Environmental Law Association, "Trade ministers urged to deny corporations ability to sue provincial, territorial governments"

<sup>210</sup> Lee, "In Search of a Problem: The Future of the Agreement on Internal Trade and Canadian Federalism" at pp 234–235.

Concerns over the procedural right of action granted to Persons to bring claims before a private arbitral body are misplaced. A dispute resolution system driven by those subject to injury or denial of benefit as a result of a breach of the Agreement is still the most effective mechanism for identifying and resolving the scope and application of the commitments made by Parties. Courts have also long accepted that private arbitration panels are no less capable of making independent impartial determinations of contractual commitments, such as those made by the provinces under the AIT.

Concerns about the AIT balance between commitments to liberalization and provincial legislative sovereignty are somewhat justified. The dispute system does not engender a democratic deficit because it permits persons to initiate arbitration before a private panel, to interpret the scope of party's obligations. The Agreement embodies a commitment by the Parties to adhere to a higher standard than their legislation would otherwise be obliged to, where a measure inhibits trade, discriminates on the basis of residence, or restricts or prevents entry or exit. Specifically, where a measure is challenged, the burden is on the government to demonstrate that the means used are rationally and reasonably connected to the desired legitimate objective.

Where interpretation of this standard imposes a burden that goes beyond the intention of the parties, such an interpretation can be viewed to undermine the AIT's democratic legitimacy as a deal negotiated by elected governments. However, this has little to do with the procedural rights. For example, the Panel's authority to require the government of Ontario to repeal legislated restrictions on the sale of dairy blend products<sup>211</sup> is not contrary to "basic notions of democracy," rather the government is being held to a commitment it freely entered into to not restrict trade in the interest of protecting certain interest groups.

In our recommendations (see section 6 below), we include additional mechanisms to ensure that the balance of interests remains within the scope the parties intentions, without undermining the effectiveness of a rules based system of adjudication. Granting a private right of action to non-party stakeholders does have the potential to increase challenges to government regulation.<sup>212</sup> Unlike the diplomatic resolution of disputes, however, a rules based system that encourages consistent interpretation has the benefit of defining the scope of application of the Agreement's commitments, enabling a Panel to quickly dispose of frivolous claims and discouraging future ones.

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<sup>211</sup> Report of Article 1702(2) Summary Panel Regarding the Pre-Existing Dispute Concerning Ontario's Measures Governing Dairy Analogs and Dairy Blends (24 September 2010, <http://www.ait-aci.ca/en/dispute/panel%20report%20Sept.%202024.pdf> [*Ontario - Dairy Blends, 2010*]).

<sup>212</sup> Response to PIAC Stakeholder Questionnaire.

#### 4. COMPARATIVE ANALYSIS OF DISPUTE SETTLEMENT MECHANISMS IN INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS

Even though similar challenges to eliminating internal trade barriers exist in other federated states (such as the United States, Australia) or unions (such as the European Union), the analysis of the AIT applicable to Canada's constitutional context draws on dispute resolution mechanisms of international trade and investment regimes.

The Canadian Constitution's federal "trade and commerce" power has a poor record of protecting against internal barriers to trade enacted by Provinces through their constitutional authority to legislate in relation to "property and civil rights"<sup>213</sup> By comparison, the regimes in the United States (the Commerce and Supremacy clauses), European Union (Treaty of Rome prohibition against measures "capable of hindering directly, or indirectly, actually or potentially, intra-Community trade"), and Australia appeals to Australia's Supreme Court) have been effective in challenging and removing internal barriers to trade.<sup>214</sup>

Additionally, Canada's internal economic union lacks the institutional support found in these jurisdictions. The European Commission and Australia's Productivity Commission, for example, both play active roles in lowering impediments to trade.<sup>215</sup> In contrast, Canada has no similar institutional support to actively enforce commitments for the removal of trade barriers and the AIT lacks the legal structure necessary to enforce such commitments.<sup>216</sup>

Therefore, Canada's internal economic boundaries function in much the same way to the international economic borders do—breaking along sovereign political lines, each province functions as a state with sovereign legislative authority. The AIT Secretariat lacks the legal authority and coercive capacity to enforce commitments of provincial parties, similarly to international institutions relying on the good-will, cooperation, and self-interest of States—parties to an international agreement, for its effective implementation. The similarity in structure between international institutions and the AIT is apparent. Since the international mechanisms are arguably effective in resolving disputes between sovereign political entities, a comparative overview of those mechanisms provides useful insights and best practices for modifying the AIT's dispute mechanism, so it would to better contribute to lowering trade barriers and preventing the new impediments from forming.

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<sup>213</sup> Kathleen MacMillan, "A Comparison of Internal Trade Regimes: Lessons for Canada" (Paper prepared for Canada's Public Policy Forum and the Internal Trade Secretariat, 10 September 2013), <http://www.ppforum.ca/sites/default/files/MacMillan%20Final.pdf> at p 14, citing Kathleen Macmillan and Patrick Grady, *Interprovincial Barriers to Internal Trade in Goods, Services and Flows of Capital: Policy, Knowledge Gaps and Research Issues* (2007), <http://mpr.ub.uni-muenchen.de/8709/>.

<sup>214</sup> Kathleen MacMillan, "A Comparison of Internal Trade Regimes: Lessons for Canada"

<sup>215</sup> Kathleen MacMillan, "A Comparison of Internal Trade Regimes: Lessons for Canada" at pp 14–15.

<sup>216</sup> In the 2015 Budget, The government announced the creation of "federal Internal Trade Promotion Office within Industry Canada," which "will act as the federal hub for research and analysis to enhance our collective understanding of the impact of barriers to internal trade." *Strong Leadership: A Balanced-Budget, Low-Tax Plan For Jobs, Growth And Security*, Tabled in the House of Commons By the Honourable Joe Oliver, P.C., M.P., Minister of Finance (21 April 2015), <http://www.budget.gc.ca/2015/docs/plan/budget2015-eng.pdf> at p 207.

Section 4.1 reviews international dispute resolution theory and its dispute resolution spectrum—from diplomatic to legalistic modes of resolving disputes, and considers the factors that impact the placement of a particular dispute resolution along the spectrum. Section 4.2 briefly examines some of the dispute resolution tools that move a mechanism away from purely diplomatic resolution along the spectrum, using increasingly legalistic tools. Sections 4.3 and 4.4 explore the main characteristics of the two most prevalent international dispute settlement systems—Investor-State Dispute Settlement and the World Trade Organization's Dispute Settlement Understanding.

#### **4.1. DISPUTE RESOLUTION SPECTRUM IN INTERNATIONAL ECONOMIC AGREEMENTS**

Dispute resolution in any context, including the international-domestic economic relations, is presented along a spectrum—from interest-based conciliatory processes to rights-based adjudicative processes. The processes range from direct negotiation between the disputants at one end, to third-party adjudication at the other.<sup>217</sup> In designing dispute settlement processes in trade agreements, the parties choose where along the spectrum from diplomacy to legalism should the dispute settlement mechanism to fall.

The value judgment that underlies the choice between diplomacy and legalism, involves a trade-off between flexibility and compliance. With respect to facilitating compliance, parties to reciprocal trade liberalization agreements face a dual problem of motivation and information.<sup>218</sup> Parties are motivated to accede to trade liberalization agreements because the aggregate benefits outweigh the costs for consumers and producers. However, such benefits are diffuse, while the costs are often concentrated, often leading to organized political opposition and incentive to violate treaty obligations in order to provide protection to domestic groups. The more the agreement's disputes are settled using diplomacy, the greater the party's discretion to find solutions that effectively address the costs that may arise. These arrangements, however, often compromise the compliance with the substantive obligations of the Agreement.

Parties' compliance with the substantive obligations of the trade liberalization agreements leads to lowering aggregate economic costs. The aggregate economic costs are achieved only if compliance is high. Not only are parties faced with partners that have a motivation to deceive, but the prevalence and complexity of non-tariff barriers presents a significant information challenge for determining whether a commitment has been breached. The cost of overcoming this information challenge may be sufficient to undermine the expected benefits of trade liberalization.

The likelihood of compliance increases with the use of legalistic, rights-based, adjudicative mechanisms to hold parties to their obligations. For example, legalized (rule-based) dispute

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<sup>217</sup> James McCall Smith, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts. International Organization" (2000) 54:01 *International Organization* 137 at 139.

<sup>218</sup> James McCall Smith, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts. International Organization" at footnote 29.

settlement bodies can discourage defection through monitoring mechanisms.<sup>219</sup> Further, since trade agreements are a result of a compromise and the parties can not foresee all possible future scenarios, the agreements are drafted in broad terms. Independent third-party adjudication assists in defining the terms of the agreement in light of changing circumstances.<sup>220</sup> Legalistic dispute settlement serves as an institutional commitment to consistent interpretation of the principles embodied in a trade liberalizing agreement. This reduces risk and bolsters private sector confidence, encouraging increased trade and investment.<sup>221</sup>

The problem, however, is that legalism comes at the expense of policy discretion. A legalistic dispute settlement mechanism inherently constrains the ability of parties to adapt to costs that arise in unforeseen sectors as a result of the party's commitment to liberalization. Domestic policy autonomy to provide regulatory relief or protection to specific groups injured by trade liberalization may further be limited where an arbitral body finds such measures inconsistent with treaty commitments to eliminate non-tariff barriers to trade.

Concerns about the need to maintain legislative autonomy are not without merit. However, a significant body of research advocates in favour of agreements that have legalistic dispute settlement provisions when parties have made "deep" commitments to liberalization.<sup>222</sup> The obligations in the AIT, like those of a common market or economic union, aim for a high degree of economic integration.

Smith's research,<sup>223</sup> and subsequent studies<sup>224</sup> have found strong correlation between the depth of liberalization commitments in treaties and the legalism within the dispute provisions of the agreement. The deep commitment to liberalization through the removal of almost all economic barriers moves beyond quantitative restrictions and tariffs to regulatory and other non-tariff barriers. The technical complexity of such barriers may, in fact, require legalistic dispute settlement both because in a complex agreement a breach of a party's obligations is more likely and a legalistic dispute settlement process is required to evaluate and interpret the applicability of the agreement to certain government measures.<sup>225</sup>

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<sup>219</sup> The World Trade Organization has a Trade Policy Review Mechanism whereby all WTO members are periodically reviewed to assess compliance with their commitments. See *Trade Policy Reviews*, [https://www.wto.org/english/tratop\\_e/tpr\\_e/tpr\\_e.htm](https://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm).

<sup>220</sup> James McCall Smith, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts. International Organization" at p146

<sup>221</sup> James McCall Smith, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts. International Organization" at p147 ("Other things being equal, they prefer minimum uncertainty, prizing a stable policy environment in which to assess alternative business strategies")

<sup>222</sup> Todd Allee and Manfred Elsig, "Why Do Some International Institutions Contain Strong Dispute Settlement Provisions? Evidence from Preferential Trade Agreements" (Paper delivered at the 7th Annual Conference on the Political Economy of International Organizations, Princeton University, 16–18 January 2014), [http://wp.peio.me/wp-content/uploads/2014/04/Conf7\\_Alee-Elsig-02.09.2013.pdf](http://wp.peio.me/wp-content/uploads/2014/04/Conf7_Alee-Elsig-02.09.2013.pdf) at p 4.

<sup>223</sup> James McCall Smith, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts. International Organization,"

<sup>224</sup> Todd Allee and Manfred Elsig, "Why Do Some International Institutions Contain Strong Dispute Settlement Provisions? Evidence from Preferential Trade Agreements."

<sup>225</sup> James McCall Smith, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts. International Organization" at p 172.

Echoing the views expressed in PIAC's 2009 Report, this Report also takes the position the adherence to the trade liberalizing rules and norms of the AIT will have an aggregate positive impact for consumers.<sup>226</sup> Therefore, this section assesses dispute settlement tools that encourage compliance within the AIT against equivalent tools used in international economic agreements. Additionally, we consider tools that may assuage governments' concerns regarding relinquishing a degree of policy autonomy without undermining compliance.

#### 4.2. ASSESSING INTERNATIONAL DISPUTE SETTLEMENT MECHANISMS

International economic treaties provide a range of dispute settlement instruments. Most agreements implement a staged dispute settlement mechanism that incorporates both consensual and adjudicative dispute resolution. The agreements, however, differ as to when and how the emphasis shifts away from consensual to adjudicative-legalized dispute settlement.

In assessing the degree to which an agreement legalizes dispute settlement, we have considered "how much authority is delegated to judges and arbiters, do aggrieved parties have the full ability to pursue their claims, and can sanctions be used to implement awards;"<sup>227</sup> how third party dispute panels are selected, and whether they are *ad hoc* or permanent.<sup>228</sup> Combined, these factors signal the degree to which the agreement emphasizes conciliation over adjudication.<sup>229</sup> Additionally, we have implemented Smith's classification of factors which determine where on the diplomacy-legalism spectrum a particular dispute settlement in a trade agreement is located:<sup>230</sup>

- Explicit right to third-party review of complaints regarding treaty application and interpretation. Agreements that provide only for consultations and perhaps mediation or conciliation, imply a very low level of legalism because the disputing parties retain the right to reject any proposed settlement lawfully.
- The number, term, and method of selecting arbitrators or judges in a treaty will influence the legal nature of the dispute settlement. The *ad hoc* appointment of arbitrators to address a particular dispute, and disband upon determination of an issue, falls toward the diplomatic end of the spectrum. Agreements that create a standing tribunal which rules collectively on any and all disputes falls on the legalistic end of the spectrum. As Smith notes, "[e]ven in the absence of explicit *stare decisis*, decisions made by a standing tribunal are likely to be

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<sup>226</sup> PIAC/Janet Lo, *The Consumer Perspective of Trade & Commerce Powers*.

<sup>227</sup> Todd Allee and Manfred Elsig, "Why Do Some International Institutions Contain Strong Dispute Settlement Provisions? Evidence from Preferential Trade Agreements."

<sup>228</sup> Todd Allee and Manfred Elsig, "Why Do Some International Institutions Contain Strong Dispute Settlement Provisions? Evidence from Preferential Trade Agreements."

<sup>229</sup> Todd Allee and Manfred Elsig, "Why Do Some International Institutions Contain Strong Dispute Settlement Provisions? Evidence from Preferential Trade Agreements."

<sup>230</sup> James McCall Smith, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts. International Organization." Only the ones relevant to the analysis of international agreements in comparative relation to the AIT have been included.

more consistent over time—and thus more legalistic—than rulings by ad hoc panels whose membership changes with each dispute.”<sup>231</sup>

- Who has standing and can bring a claim is particularly important. “In general, the more expansive the definition of standing, the more legalistic the dispute settlement mechanism.”<sup>232</sup> Agreements that permit individual access to dispute settlement essentially let compliance be driven by those who directly experience the injury or loss of benefit arising from a breach of the agreement. As a result, “alleged violations are likely to be more frequent than if standing is accorded only to states, whose multiple diplomatic considerations make them reluctant to pursue certain cases.”<sup>233</sup>

### 4.3. DIRECT ACCESS SYSTEMS: INVESTOR-STATE ARBITRATION

The key dispute settlement norm that has emerged from the proliferation of international investment agreements<sup>234</sup> is the right of individuals to bring an action against a state party that has breached its obligations under a treaty. In the international context, it is argued that for an individual to be fully recognized as a subject of international law, his or her substantive rights must be accompanied by the capacity to, at the very least, challenge a state when it violates those rights:

Substantive and procedural rights are two sides of the same coin, the coin being that of a complete and articulated subjectivity of international law, whereby the individual could fully enjoy an adequate and effective protection and participate in the process of international law.<sup>235</sup>

The AIT similarly accords persons resident in a province, who are not Parties to the AIT, substantive rights by virtue of the obligations that the provinces have entered into; namely, the right to be free from obstacles to movement, investment, and trade, except where such obstacles seek to achieve a legitimate objective. In comparison to many bilateral investment agreements, however, the AIT provides a more limited right for private persons to bring claims for alleged violations of the AIT substantive obligations.

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<sup>231</sup> James McCall Smith, “The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts. International Organization” at p 140.

<sup>232</sup> James McCall Smith, “The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts. International Organization” at p 141.

<sup>233</sup> James McCall Smith, “The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts. International Organization.”

<sup>234</sup> UNCTAD, “Investor-State Dispute Settlement: A Sequel” (2014) *UNCTAD Series on Issues in International Investment Agreements II*, [http://unctad.org/en/PublicationsLibrary/diaeia2013d2\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf) (“[s]ince the conclusion of the first bilateral investment treaty (BIT) in 1959, the number of agreements designed to regulate a host of issues related to foreign investment has risen to nearly 3,200 by the end of 2012” at p 19).

<sup>235</sup> Roberto Bruno, “Access of Private Parties to International Dispute Settlement: A Comparative Analysis, [www.jeanmonnetprogram.org/papers/97/97-13.html](http://www.jeanmonnetprogram.org/papers/97/97-13.html) at Introduction.

The international investment agreements shift disputes from a political to a more private settlement process. The institutional framework that includes the International Centre for the Settlement of Investment Disputes (ICSID) and the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) “create[s] a neutral forum that offers the possibility of a fair hearing before a tribunal unencumbered by domestic political considerations.”<sup>236</sup> Although the product of a diplomatic bargain, international investment agreements have, to some extent, depoliticizing international economic disputes by moving them away from diplomatic state-to-state framework and into the realm of private investor-state economic dispute settlement.

Direct standing for private persons allows investors to bypass the need to convince their home State to initiate a claim on their behalf. Requiring advanced consent to arbitration takes the decision out of the hands of home states, avoiding the strong-arming tactics by economically powerful states when faced with politically inconvenient claims by an economically inferior party.<sup>237</sup>

The dispute resolution tools used by the international investment agreements prioritize the ability of private commercial interests to seek redress for breaches of the substantive benefits owed to them under an agreement have proven effective in advancing private interests.

At the same time, however, disputes over rights under the agreement engage issues of public policy, including environmental protection, public health, and consumer protection and other issues of governance. Dispute settlement mechanisms that permit private interests to challenge government measures and encourage compliance, raise concerns about the suitability of *ad hoc* non-state arbitration tribunals to address issues under the agreement that essentially engage issues of public policy and public interest.<sup>238</sup> Most recently, civil society groups have raised these criticisms regarding the investor-state dispute settlement (ISDS) in the Trans Pacific Partnership<sup>239</sup> and the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union.<sup>240</sup> While valid, these criticisms do not equally apply to the AIT, since it is an *internal*, rather than an international agreement. Therefore, in our analysis, we have considered procedural mechanisms in investor-state dispute settlement which could improve the AIT dispute settlement and balance the competing interests of increasing access of non-parties to the AIT dispute settlement, encouraging compliance with the substantive obligations of the AIT, and maintaining the legislative autonomy of the Provinces.

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<sup>236</sup> UNCTAD, "Investor-State Dispute Settlement: A Sequel" at p 13.

<sup>237</sup> UNCTAD, "Investor-State Dispute Settlement: A Sequel" at p. 24.

<sup>238</sup> Michael Waibel, Asha Kaushal, Liz Kyo-Hwa Chung, and Claire Balchin, eds, *The Backlash against Investment Arbitration* (Kluwer Law International, 2010); Pia Eberhardt & Cecilia Olivet, "Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom" (November 2012), <http://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf>.

<sup>239</sup> "Letter to Ambassador Froman and Commissioner De Gucht" (16 December 2013), [http://corporateeurope.org/sites/default/files/attachments/ttip\\_investment\\_letter\\_final.pdf](http://corporateeurope.org/sites/default/files/attachments/ttip_investment_letter_final.pdf).

<sup>240</sup> Canada–European Union Summit in Ottawa: Over a Hundred Organizations on Both Sides of the Atlantic Strongly Oppose an Agreement that will Enrich Multinational Corporations at the Expense of Citizens’ Rights (25 September 2015), <http://www.tradejustice.ca/over-100-canadian-and-eu-groups-strongly-oppose-cetas-corporate-rights/>.

### 4.3.1. Consent to Arbitrate

All international investment agreements that include an investor-state dispute mechanism share a set of common fundamental features, including provisions defining the parties' consent to arbitrate, the scope of application of the treaty, and available arbitral forums.<sup>241</sup> Arbitration under the ICSID and UNCITRAL rules are the two options that appear most frequently in international investment agreements.

Agreement to arbitrate is a contract between the parties by which they agree to submit their future disputes to adjudication by an independent third-party arbitrator. States are the only parties to international investment agreements and private persons lack privity of contract to bring a claim under the agreement. The agreement to arbitrate under international investment agreements, therefore, is somewhat different. The States must give their consent to be brought to arbitration by an investor. In an international investment agreement, the States give a unilateral offer of consent to arbitrate through the relevant dispute settlement clause in the agreement. This standing consent can be implicit or explicit, depending on the language of the agreement. However, the offer to arbitrate is perfected if and when the investor raising the dispute accepts it<sup>242</sup> and cannot be revoked unilaterally.

An alternative formulation provides that a State "shall agree," indicating that consent must be given once a request for arbitration is made.<sup>243</sup> This means that the arbitration tribunal does not gain jurisdiction to hear a dispute until the defending party to the agreement gives its consent. Failure of the party to give consent, however, would be a breach of the agreement, triggering a need for State-to-State dispute settlement.<sup>244</sup> A more restrictive approach under bilateral investment treaties gives full control over whether to settle disputes through arbitration to the parties by requiring consent of both parties, before a private person can initiate arbitration.

The AIT implies that the Party consent to establish an arbitration panel is conditional upon the person being granted standing by a screener. As noted in section 3.5.1 above, the screener mechanism is somewhat of a redundant hurdle to initiate arbitration. Using the phrase "shall consent" may create the default position in which the Parties permit private persons to initiate arbitration. If a Party refuses to participate in an arbitration commenced by a private person, the refusing Party would have to account to the other Parties to the Agreement, similarly to the State-to-State mechanisms in the international investment agreements.

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<sup>241</sup> UNCTAD, "Investor-State Dispute Settlement: A Sequel" at p 30.

<sup>242</sup> Jan Paulsson, "Arbitration without privity, ICSID Review" (1995) 10 Foreign Investment Law Journal 232 at pp 236–241, 255–257.

<sup>243</sup> *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289, (entered into force 1 January 1994), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/text-texte/toc-tdm.aspx?lang=eng>, at Art 1102: National Treatment.

<sup>244</sup> UNCTAD, "Investor-State Dispute Settlement: A Sequel" at p 33.

### 4.3.2. Scope of Application

The definition of “investment” in an international investment agreement establishes the type of transactions to which its dispute settlement mechanism will apply. “Most BITs have very broad and open-ended definitions of “investment,”<sup>245</sup> which has prompted tribunals to take an expansive approach towards the kinds of transactions and assets that qualify as investments.”<sup>246</sup>

### 4.3.3. Temporal Application

The temporal scope of some international investment agreements extends beyond the existence or presence of an actual investment in the host country. The obligations of some investment treaties apply in relation to the “acquisition and establishment of an investment.”<sup>247</sup> This means that barriers to establishing an investment may fall within the jurisdiction of the tribunal.

Compared to the international investment agreements, the AIT takes a somewhat paradoxical approach to addressing barriers to trade and investment. Parties are to refrain from implementing measures that create obstacles to internal trade, restrict the movement of persons, goods, services, or investments across provincial borders, and discriminate (either directly or indirectly) against goods, persons, services, and investments flowing from another party. The Agreement broadly defines areas of investment and services in the present and future tense. “Service of a party means a service supplied, or *to be supplied*, by a person of a Party,” and “Investment includes: (a) the *establishment, acquisition* or expansion of an enterprise; and (b) financial assets, such as money, shares, bonds, debenture, partnerships, receivables, inventories, capital assets, options and goodwill.”<sup>248</sup>

These definitions in AIT create a degree of ambiguity over the temporal scope of the AIT application to Persons. While AIT Parties are permitted to bring complaints before a panel for pending measures, private persons are not. Yet, it is conceivable, that the basic proposal of certain measures by a Party could present an obstacle to establish or acquire an investment, or the intended supply of goods.

### 4.3.4. Sectoral Application

While trade and investment have been defined broadly in the AIT—expanding the applicable scope of the dispute provisions—the Agreement limits jurisdiction of a Panel to hear disputes to the defined horizontal and vertical sectoral chapters in Part IV (see section 2.3.1 above). A Party or private person must fit their claim within one of these chapters.<sup>249</sup>

The AIT adopts a positive-list approach to define the scope of its application to enumerated

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<sup>245</sup> See for example, Article 1139 of the *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States* or Article 1 of *Treaty Between United States of America and The Argentine Republic concerning the Reciprocal Encouragement And Protection of Investment*, 14 November 1991 (entered into force 20 October 1994), <http://2001-2009.state.gov/documents/organization/43475.pdf>.

<sup>246</sup> UNCTAD, “Investor-State Dispute Settlement: A Sequel” at p 50.

<sup>247</sup> For example, NAFTA.

<sup>248</sup> Article 200, definitions (emphasis added).

<sup>249</sup> It is possible that a dispute may not fit within one of the defined sectors.

sectoral chapters. This approach is rare in the international investment agreements, which take a negative-list approach to investment obligations: parties safeguard their legislative autonomy through exception clauses, explicitly carving out the instances to which the rules of the investment agreement do not apply. By comparison, in addition to limiting the sectors to which the rules of the AIT apply, the Agreement permits parties to take measures aimed at achieving a “legitimate objective” (see section 4.3.5 below).

The approach of combining a positive list with multiple exceptions clauses not only limits the substantive jurisdiction of a panel, but also unnecessarily complicates the AIT dispute settlement process. The horizontal chapters (Procurement, Investment, Labour Mobility, Consumer-Related Measures, and Standards and Environmental Protection) are applicable across all industry sectors, making the applicable scope of the AIT’s dispute settlement provisions appear broad on their face.<sup>250</sup> However, the vertical sector specific chapters override the applicable obligations of a horizontal chapter, to the extent that the former is inconsistent with the later. This is significant, as a number of the horizontal chapters (Investment, Labour Mobility and Consumer-Related Measures) contain “legitimate objectives” exception provisions defined in broader terms than those applicable to the vertical sectoral chapters.

Under a horizontal chapter, where a tribunal’s jurisdiction to determine a breach of a Party’s obligation under the Agreement applies broadly, the “legitimate exceptions” provisions are drafted more liberally, therefore expanding the substantive exceptions that a defending party may rely on when there is a claim for a breach of AIT obligations. To avoid applying broader exceptions under the Investment, Labour Mobility, and Consumer-Related Measures chapters, a complainant is forced to fit their complaint within the purview of one of the vertical sectoral chapters.<sup>251</sup>

#### **4.3.5. “Legitimate Objectives” Exception**

In international investment agreements, “non-precluded measures” clauses carve out exceptions to a State party’s substantive obligation to foreign investors and investments in particular sectors. Such provisions are designed to preserve the authority of the host State to take measures essential to areas such as national security, public order, public health, and the environment.<sup>252</sup>

The use of exception clauses in international investment agreements is rare. Burke-White and von Standen estimated that they appear in only about 200 out of the roughly 3,000 agreements.<sup>253</sup> While somewhat less prevalent, there is an increasing trend in drafting international investment agreements<sup>254</sup> to use language that ensures that non-precluded measures clauses are “self-

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<sup>250</sup> According to Annex 1813 (Rules of Interpretation), a horizontal chapter applies “both to matters within its scope and, where applicable, to matters that fall within the scope of a vertical chapter.”

<sup>251</sup> *Quebec - Coloured Margarine*, 2005.

<sup>252</sup> Nothing in the treaty precludes a State’s resort to measures necessary for achieving certain objectives listed in the provision. See UNCTAD, “Investor-State Dispute Settlement: A Sequel” at p 44.

<sup>253</sup> William Burke-White and Andreas von Standen, “Investment Protection in Extraordinary Times: The Interpretation of Non-Precluded Measure Provisions in Bilateral Investment Treaties” (2008) 48:2 *Virginia J Int’l L* 307 at p 313.

<sup>254</sup> For example, the most recent iterations of the US Model Bilateral Investment Treaty and Canada Model Foreign Investment Protection Agreement both contained such clauses.

judging”. Whether an impugned measure falls within the scope of being necessary for the protection of a legitimate objective, and is therefore not precluded by the obligations of the agreement, is determined by whether the host state considers the measure necessary.

“Self-judging” exceptions are designed to provide a backstop to protect Parties’ legislative autonomy in areas that are considered of greater importance than the investment protection obligations contained in the Agreement. Article 18 of the *United States Model Bilateral Investment Treaty* provides that “Nothing in this Treaty shall be construed ... to preclude a Party from applying measures that *it considers necessary* for ... the protection of its own essential security interests.”<sup>255</sup> In this way, the application of the exception from the Party’s obligation is unconditional and the language is unambiguous with respect to who determines when a measure is precluded from the obligations of the Treaty.

In comparison, the AIT’s approach to the application of exception clauses, and whether they are “self-judging” is more complex. Parties under the AIT are permitted to take measures that breach the obligations contained in Articles 401, 402, and 403, when they qualify as measures that seek to achieve a “legitimate objective” as defined under the Agreement. In a number of instances, the AIT provides that the Party is permitted to adopt or maintain measures that it considers necessary or appropriate for the purpose of pursuing a legitimate objective.<sup>256</sup>

Including the self-judging language “it considers” within the Agreement is problematic for two reasons. First, while Article 200 defines the term “legitimate objective,” its subcomponents, which encompass objectives such as “public order and safety,” are not defined. It is not clear from this construction whether the party or a panel has jurisdiction to appropriately determine whether a measure is properly claimed as falling within the purview of a “legitimate objective”.

Second, unlike non-precluded measures clauses in international investment agreements, the enactment of measures with a legitimate objective is a qualified exception under the AIT. In order to qualify as a permissible exception to a Party’s obligations, the measure must also meet the requirements of Article 404 (b)–(d). While the most recently released Panel report interpreted the obligations of Article 404 (b)–(d) as external to the self-judging language of Article 905,<sup>257</sup> the construction of the self-judging language outside of Article 404, and being applicable only to the “legitimate objective” aspect of the exception clause is unnecessarily complex and increases the

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<sup>255</sup> United States, *United States Model Bilateral Investment Treaty* (2012) at Art 12(5), <http://www.italaw.com/sites/default/files/archive/ita1028.pdf> [*US Model BIT*].

<sup>256</sup> Annex 405.1(4) (“[f]or greater certainty, a Party may, in accordance with this Agreement, adopt or maintain any standard or standards-related measure to achieve a legitimate objective and may, in pursuing that objective, establish the level of protection that it considers to be appropriate” (emphasis added)); Annex 405.2(4) (“[a] Party may adopt or maintain any regulatory measure or regulatory regime that it considers necessary or appropriate to achieve a legitimate objective” (emphasis added)).

<sup>257</sup> *Quebec - Coloured Margarine*, 2005 at p 28 (“Article 404 The AIT’s drafters plainly intended to vest dispute settlement panels with the jurisdiction to determine whether a measure that has as its purpose the pursuit of a legitimate objective also meets the additional requirements set forth in paragraphs (b) to (d). A Panel must be satisfied that the measure’s purpose is to achieve a legitimate objective. While satisfying such a test is necessary, it is not sufficient to defend the measure.”).

risk for inconsistent interpretation in the future.

#### **4.3.6. Attribution of measures to a State**

In bilateral investment agreements, the State is responsible for actions by organs of the State, which are inconsistent with the commitments made under the Treaty. Where the agreement fails to conclusively define the circumstances in which a particular entity will be considered an organ of the State, for the purposes of assigning responsibility for an inconsistent measure, tribunals can use the rules of attribution in the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*.<sup>258</sup>

Article 4 of the *Draft Articles* provides for the primary means of attribution, specifying that the conduct of any State organ shall be considered an act of the State for the purposes of international responsibility. Article 8 goes further, including the acts and omissions of a legal entity where the entity's conduct is authorized by the State, either directly or indirectly.<sup>259</sup> Where an entity is generally, but not completely controlled by a State, and that entity engages in an operation that constitutes a breach of the State's commitments under the treaty, a tribunal will determine whether the operation in question was effectively controlled by the State.

The AIT distinguishes between various levels of State authority and that potentially create a loophole, through which an entity exercising authority delegated by a Party to the AIT may implement a measure inconsistent with the Party's commitments, but for which no recourse would be available. The broad rules of attribution provide a principled approach that ensures a State is unable to escape responsibility for actions that constitute a breach of its obligations by delegating authority to an arms-length non-state entity. In contrast, the "extent of obligations" laid out in Article 102 of the AIT distinguishes between various levels and forms of direct and delegated State authority, and each sectoral chapter modifies the extent to which these various levels of government must comply with the obligations contained therein.

#### **4.3.7. Limitation periods**

Limitation periods are increasingly being included in the international investment agreements. An agreement will require that an investor raise an objection to an alleged breach and the loss or damage arising from that breach within a specified period of time. The triggering event for the limitation period is usually defined from the time that the investor knew, or should have known, of the breach and knowledge of the loss or damage they suffered as a result.

For example, Article 22 of Canada's *Model Foreign Investment Protection Agreement* stipulates that "[a]n investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."<sup>260</sup>

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<sup>258</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (November 2001), [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

<sup>259</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts* at p 47.

<sup>260</sup> Canada, *Canada Model Foreign Investment Protection Agreement* (2004), <http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf> at Art 22 [Canada Model FIPA].

The AIT limitation period applies when a person seeks to bring a claim for breach of the Agreement. The significant difference, however, is that the limitation periods in the international investment agreements are critical for the calculation and mitigation of damages. Since parties are potentially responsible for the entire amount of losses arising out of a breach, the limitation period exists to limit the ability of a person or enterprise to stand by while they incur losses from a breach, only to claim damages later on. The limitation period on claims brought by individuals under the AIT essentially acts as a mechanism that permits Parties to maintain breaches of their obligations, where a person failed to raise objection to such a breach within the prescribed time. This runs contrary to the principle enshrined in the Agreement to lower barriers to trade to the extent possible.

#### 4.3.8. Consultation

Like the AIT, many international investment agreements requires a form of consultation before parties are able to initiate arbitral proceedings. Typically, the investor claiming a breach of the treaty is required to attempt to amicably settle the dispute. For example, the 2003 *China-Germany Bilateral Investment Treaty* stipulates: “Any dispute concerning investments between a Contracting Party and an investor of the other Contracting Party *should* as far as possible be settled amicably between the parties in dispute.”<sup>261</sup>

The precise nature of this obligation is sometimes unclear, with the requirement being more akin to what has been labelled a “waiting period.” The *China-Germany BIT* further provides: “If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other Contracting State, be submitted for arbitration.”<sup>262</sup> This requirement notably does not impose any specific obligation to enter formal negotiations, other than that the complaining investor raises the dispute with the host state. Other international investment agreements are more specific in their consultation and negotiation obligations, requiring that parties “*shall*” endeavor to settle their disputes.<sup>263</sup> “While this type of provision clearly encourages the disputing parties to engage in negotiations, what constitutes “negotiations” is not clearly defined.”<sup>264</sup>

International investment agreements contain varying degree of specificity regarding the requirements for notification of a dispute and the procedures for negotiation or consultation. The *Mexico-Singapore BIT*,<sup>265</sup> for example, includes a requirement that investors file a written notice of dispute or a notice of intent to submit a claim to arbitration. The investment chapter of the

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<sup>261</sup> *Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments* (1 December 2003), 2362 UNTS 253 (entered into force 11 November 2005), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/736> at Article 9(1).

<sup>262</sup> *China-Germany BIT*, Article 9(2)

<sup>263</sup> See for example Ethiopia-Spain BIT (2006), Article 10(1) or Lebanon-Slovakia BIT of 2009, Article 8(1).

<sup>264</sup> UNCTAD, “Investor-State Dispute Settlement: A Sequel” at p 56.

<sup>265</sup> *An Agreement between the Government of the United Mexican States the Government of Singapore on the Promotion and Reciprocal Protection of Investments*, 12 November 2009, (entered into force 3 April 2011), <http://investmentpolicyhub.unctad.org/IIA/country/136/treaty/2538>.

*Canada-Colombia Free Trade Agreement* requires that the consultations and negotiations “shall be held within 30 days of the submission of the Notice of Intent to Submit a Claim to Arbitration ... unless the disputing parties otherwise agree.”<sup>266</sup>

Investment arbitration tribunals have rendered conflicting decisions on whether the requirement that parties attempt amicable settlement is one of jurisdiction or procedure. In *Burlington Resources v Ecuador*, the tribunal found that an investor’s claim was inadmissible, because the investor had only notified the host state of the dispute at the time it was submitted to ICSID arbitration. This was a breach of the obligation under the *US-Ecuador BIT* requiring that parties wait six months from notification before submitting a dispute to arbitration. The tribunal noted that this breach of the agreement deprived the “Respondent of the opportunity ... to redress the dispute before it [was] submitted to arbitration.”<sup>267</sup>

While starting from the same premise, that the purpose of the six month waiting period in the *UK-Tanzania BIT* was to “facilitate opportunities for amicable settlement,” the tribunal also found that the purpose of the waiting period was “not to impede or obstruct arbitration proceedings, where such settlement is not possible.”<sup>268</sup> Another tribunal explained that such provisions may be disregarded “particularly where it follows from the facts of the case that any attempted consultation or negotiation would have been futile.”<sup>269</sup> Dolzer and Schreuer note that the decisive question in such cases appears to be “whether there was a promising opportunity for a settlement.”<sup>270</sup>

The AIT imposes two different procedural requirements for consultations, depending on whether they are a party- or a person-complainant. As outlined in section 3.1 above, a party must request consultation through a written notice specifying actual or proposed measure complained of, the relevant provision of the AIT, and a brief summary of the complaint.<sup>271</sup> Despite the fact that the Agreement imposes no procedural requirements regarding for the obligation to consult, a request to establish a panel cannot be made sooner than 120 days after the delivery of a request for consultation.<sup>272</sup>

A Person, on the other hand is not required by the Agreement to enter into negotiation or consultation, when, pursuant to Article 1714, a Screener has approved their request to initiate the proceeding. Further, the requirements to submit a request to a Screener under Article 1714 do not

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<sup>266</sup> *Free Trade Agreement Between Canada and the Republic of Colombia*, 21 November 2008 (entered into force 15 August 2011), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/can-colombia-toc-tdm-can-colombie.aspx?lang=engat> at Article 821 (emphasis added).

<sup>267</sup> *Burlington v Ecuador* (2 June 2010), ICSID Case No. ARB/08/5, Decision on Jurisdiction, <http://www.italaw.com/sites/default/files/case-documents/ita0106.pdf> at paras 312, 315.

<sup>268</sup> *Biwater Gauff v Tanzania*, Award, (24 July 2008), ICSID CASE NO. ARB/05/22, Award at paras 343–344.

<sup>269</sup> *Occidental v Ecuador* (9 September 2008), ICSID Case No. ARB/06/11, Decision on Jurisdiction, <http://www.italaw.com/sites/default/files/case-documents/ita0577.pdf> at para 94.

<sup>270</sup> Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2d ed (Oxford: Oxford University Press: 2012) at p 270.

<sup>271</sup> Article 1702.1(1)

<sup>272</sup> Article 1703(1).

explicitly and directly make clear what is required to initiate an application to a Screener.<sup>273</sup> Notwithstanding this procedural gap in the Agreement, the ability to bypass consultations is subject to the willingness of the responding party to waive the Consultation requirement.

As currently constructed, the Parties cannot avoid 120-day waiting period, before commencing an arbitration. This procedural requirement enables a Party to delay the establishment of a panel, without having to engage in good faith consultations in an attempt to resolve the dispute.

#### 4.3.9. *Stare Decisis*

One of the main criticisms of international investment arbitration is the inconsistency of tribunal decisions, which results in panels' divergent interpretations of identical or similar treaty provisions. "Inconsistent interpretations have led to uncertainty about the meaning of key treaty obligations and a lack of predictability of how they will be applied in future cases."<sup>274</sup>

The absence of a formal principle of *stare decisis* from investment arbitration jurisprudence is justified by the fact that the tribunals, with a few exceptions, are interpreting different bilateral investment treaties. While applying consistent principles of interpretation may be appropriate, automatically applying the same meaning to different treaties would not be. Even when the tribunals are interpreting the same treaties, there is no hierarchy of authority among *ad hoc* tribunals. As a result, the system lacks formal structure that would facilitate consistent and coherent interpretation of the meaning of particular provisions.

In part, this reluctance may be due to a concern among States, parties to the international investment agreements, that interpretation of obligations in an agreement by an *ad hoc* arbitral tribunals may lead to interpretations that would be contrary to the parties' original intentions. The same concern may be the reason why the AIT panel's rulings do not have precedential weight.

As a way to prevent tribunals from adopting varying interpretation of treaty rules, in certain instances, some international investment give contracting parties a right to provide authentic and authoritative interpretations of the treaty.<sup>275</sup> For example, in 2001, the NAFTA Free Trade Commission issued an interpretive note on the parties' obligation to provide "fair and equitable treatment" to investors pursuant to NAFTA Chapter 11.<sup>276</sup>

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<sup>273</sup> To initiate dispute proceedings under Article 1712, a person must first request a party initiate proceedings on her behalf, which can only be done where the person has a "substantial and direct connection" to the province of the Party. This is a precondition added to those found in Article 1713(3).

<sup>274</sup> UNCTAD, "Investor-State Dispute Settlement: A Sequel" at p 27.

<sup>275</sup> Article 17(2) of the Mexico-Singapore BIT (2009) provides: "An interpretation jointly formulated and agreed upon by the Contracting Parties with regard to any provision of this Agreement shall be binding on any tribunal established under this Section." Interpretation through IIA institutional processes: the Japan-Mexico FTA (2004) creates a Joint Committee which is entitled to, inter alia, adopt interpretations of the FTA that are binding on tribunals (Articles 84 and 165).

<sup>276</sup> NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng>.

#### 4.3.10. *Amici Curiae*

The ability of third parties (*amici curiae*, or “friends of the court”) to participate in panel hearings is essential in increasing the transparency of the arbitral process.<sup>277</sup> A NAFTA Chapter 11 tribunal was the first investment arbitration tribunal to permit the participation of *amici curiae*.

The NAFTA parties subsequently issued a guidance note on criteria that tribunals should apply in deciding whether to permit amici to participate in proceedings, including whether:

- (a) the submission would assist the tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the submission would address matters within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the arbitration; and
- (d) there is a public interest in the subject-matter of the arbitration.<sup>278</sup>

These provisions were also included in the Canada *Model FIPA*. In 2006, ICSID amended its rules, explicitly allowing the tribunals to permit *amicus* participation in ICSID Convention and ICSID Additional Facility cases.<sup>279</sup>

By contrast, the AIT provides no mechanism by which third parties may make submissions of relevance to a panel. Provincial parties are often faced with conflicting interests in a trade dispute under the Agreement. The parties have made a commitment to liberalization, while at the same time, representing certain local or regional interests that may need or want protection. In light of the broad scope the agreement provides for parties to take measures in pursuit of legitimate objectives, there is significant merit, in the interest of transparency, to have opportunities for third parties to intervene and make submissions at various stages of the dispute settlement proceedings.

#### 4.3.11. Summary Proceedings

International investment agreements include varying procedures to avoid frivolous claims. Some treaties establish an expedited procedure, in which the tribunal determines preliminary question in response to any objection by a responding state that an investor’s claim is legally defective. For the purpose of assessing the objection, the tribunal assumes that the facts alleged by the respondent are true. The onus is on the objecting state to demonstrate that even where all the facts as alleged are true, the claim “is not a claim for which an award in favour of the claimant may be made”.<sup>280</sup> In other words, the circumstances deprive the claim of a legal foundation, making it “fatally flawed”.<sup>281</sup>

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<sup>277</sup> For an overview of *amici curiae* in investment arbitration see J Anthony VanDuzer, “Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation” (2007) 52 McGill L J 681, <http://ssrn.com/abstract=1140865>.

<sup>278</sup> NAFTA Free Trade Commission, Statement of the NAFTA Free Trade Commission on non-disputing party participation (7 October 2004), [http://www.sice.oas.org/tpd/nafta/Commission/Nondispute\\_e.pdf](http://www.sice.oas.org/tpd/nafta/Commission/Nondispute_e.pdf) at para 6.

<sup>279</sup> International Centre for the Settlement of Investment Disputes, “ICSID Convention, Regulations and Rules” (April 2006), [https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf) at Rule 37(2).

<sup>280</sup> *US Model BIT*, Art 28(4).

<sup>281</sup> Lee Caplan and Jeremy Sharpe, “2012 Model BIT of the United States” in Chester Brown ed, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) at p 835.

By contrast, Canada's *Model FIPA* contains a narrower clause, limiting the possible range of objections to those relating to "jurisdiction and admissibility." Article 37 provides: "Where issues relating to jurisdiction or admissibility are raised as preliminary objections, a Tribunal shall, wherever possible, decide the matter *before proceeding to the merits*."<sup>282</sup> The tribunal is left to decide whether an objection to its jurisdiction should be addressed as a preliminary question.<sup>283</sup>

Similarly, in 2006, ICSID added a mechanism to its arbitration rules, permitting a respondent to object to claims on the basis that it is "manifestly without legal merit." Where parties have not provided an expedited mechanism for addressing preliminary objections within the treaty, ICSID Arbitration Rule 41(5) requires that a party objecting that a claim is "manifestly without legal merit" must "specify as precisely as possible the basis for the objection." Parties are given an opportunity to present their observations and make submission on the objection. The decision of the Tribunal "shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit." The term "manifestly" has been interpreted to apply to "patently unmeritorious claims."<sup>284</sup>

#### 4.4. STATE-INITIATED DISPUTE SETTLEMENT SYSTEMS

The World Trade Organization's Dispute Settlement Understanding emerged as the leading mechanism for the settlement of disputes among all regional, bilateral, and plurilateral trade agreements. While the proliferation of regional trading agreements in recent years has seen an accompanying expansion in dispute settlement mechanisms, their use in comparison to that of the WTO DSU, has been minimal. With the exception of NAFTA Chapter 11 (Investment) and Chapter 19 (Antidumping and Countervailing duties), there are only five regional trade dispute settlement mechanisms that have shown any significant activity.<sup>285</sup> This lack of activity is partly attributed to the fact that trading partners have chosen to use the WTO rather than the dispute settlement mechanisms available through their regional trade agreement. The World Trade Report 2011, found that 82 of the 443 disputes brought to the WTO up until 2010 were between members who were also partners in a separate regional trade agreements with their own dispute settlement mechanisms.

The emergence of what has been categorized as the WTO's "quasi-judicial" dispute settlement mechanism in the mid-1990s represented a significant change in the approach to international

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<sup>282</sup> Canada Model FIPA 2004.

<sup>283</sup> Newcombe, Andrew and Celine Lévesque, "Canada" in Chester Brown ed., *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013).

<sup>284</sup> *Trans-Global Petroleum, Inc v The Hashemite Kingdom of Jordan* (12 May 2008) ICSID Case No. ARB/07/25, The Tribunal's Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, <http://www.italaw.com/sites/default/files/case-documents/ita0872.pdf>.

<sup>285</sup> Claude Chase, Alan Yanovich, Jo-Ann Crawford and Pamela Ugaz, "Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements - Innovative or Variations on a Theme?" (10 June 2013), World Trade Organization Economic Research and Statistics Division Staff Working Paper ERSD-2013-07, [https://www.wto.org/english/res\\_e/reser\\_e/ersd201307\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201307_e.pdf).

dispute settlement—toward a more judicial and away from political and diplomatic mechanisms.<sup>286</sup> Since then, regional trade agreements have considerably shifted towards incorporating dispute settlement mechanisms based, in large part, on the Dispute Settlement Understanding contained in the General Agreement on Tariffs and Trade (GATT). The provisions of Chapter 17 of the AIT were similarly based on the current dispute settlement mechanism.

Given the similarities in many of the procedural mechanisms of dispute settlement between the WTO Dispute settlement mechanism, regional trade agreements, and the AIT, this section compares how the AIT dispute settlement diverges from WTO dispute settlement model. Differing and innovative approaches of the regional trade agreements will be considered only to the extent that they differ from the WTO dispute settlement model.

The underlying principles of any dispute settlement system are to settle disputes equitably, expediently, effectively, and with the objective of achieving a mutually acceptable outcome. In its own words, the WTO recognizes the dispute settlement system as “the central pillar of the multilateral trading system... Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced.”<sup>287</sup> While the system encourages the consultation between the governments concerned, and the dispute process permits for the possibility of arriving at a negotiated solution, it also recognizes that in order to benefit from the liberalization commitments of the GATT, the system must be able to promptly and effectively enforce the obligations of its members.

The dispute settlement mechanism is central to the enforceability of the WTO’s obligations as it makes it easier to detect, prove, and retaliate against violations. The enforcement of trade rules, through dispute settlement mechanism, in turn, promotes capacity and enforceability. While capacity goes to the ability of the system to use coercive force to make a party comply, enforceability relates to “verifiability (where the complaining party can point to a provision in the international trade agreement and prove its violation); observability (the ability to detect the infringement in the first place); and quantifiability (the ability to quantify the damage incurred as a result of the breach).”<sup>288</sup>

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<sup>286</sup> Claude Chase *at el*, Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements - Innovative or Variations on a Theme?" at p 13: ([s]ince 2000, the number of RTAs using the quasijudicial model has grown at more or less the same pace as the overall growth of RTAs, while those using the political model have declined in relative terms. In 2005, the number of RTAs applying the quasi-judicial model exceeded those applying the political model for the first time. As of the end of 2012, the quasi-judicial model was employed in 147 RTAs, while the political model accounted for 69 RTAs."

<sup>287</sup> World Trade Organization, "Chapter 3, Settling Disputes" in *Understanding the WTO* (Geneva: World Trade Organization, 2011), [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/understanding\\_e.pdf](https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf).

<sup>288</sup> Claude Chase *at el*, Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements - Innovative or Variations on a Theme?"; citing WTO Secretariat, "World Trade Report 2007: Six Decades of Multilateral Co-operation – What Have We Learned?" (WTO, 2007) at pp 155-162.

#### 4.4.1. Standing

A defining feature of the quasi-judicial model of international dispute settlement is the “automatic” right of access to third party adjudication at some stage of the dispute settlement process.<sup>289</sup> Parties to the trade agreement do not have the ability to indefinitely block a complaining party from initiating dispute proceedings before a third party adjudicator.

The WTO, like majority of regional trade agreements, limits the right of action to States party to the GATT. Unlike investor-State dispute settlement, regional trade agreements rarely provide damages that arise as a breach of the agreement. Trade agreements focus on upholding obligations to specific and defined reductions in tariff barriers. States are in a position to verify, observe, and quantify that damage from a breach of obligation.<sup>290</sup>

The obligations contained in investment protection agreements are significantly more amorphous, requiring that state parties refrain from measures that result in discrimination against a foreign investor, whether or not the measure is discriminatory on its face. Similarly, because the Canadian *Constitution* prohibits the use of tariff barriers between provinces, barriers to trade between provinces often emerge as a result of divergent government standards and regulation, and not as a result of direct forms of discrimination against persons or enterprises from other provinces. Private persons are directly affected by such barriers and are, therefore, in the best position to observe the loss of benefits and quantify the harm caused by a breach of the obligations. Thus, while the dispute settlement mechanisms of most regional trade agreements limit the right of action to states-parties to the agreement, permitting a right of access to private persons is reasonable given the nature of the rules and obligations contained in the AIT.

#### 4.4.2. Consultations

Like the AIT, the WTO DSU encourages consultation as a first step in the dispute settlement process. In fact, dispute settlement mechanism in all trade agreements that fall within the categorizations of “quasi-judicial” processes, contain provisions regarding the consultations in advance of the adjudication stage of dispute resolution.<sup>291</sup>

Parties are enjoined to exercise judgement “as to whether action under these procedures would be fruitful.”<sup>292</sup> Under Article 3(7) of the WTO DSU the parties should ensure that the mutually acceptable solution through consultation is “consistent with the covered agreements.”

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<sup>289</sup> Amelia Porges, “Dispute Settlement,” in Jean-Pierre Chauffour & Jean-Christophe Maur, eds, *Preferential Trade Agreement Policies for Development: A Handbook* (The International Bank for Reconstruction and Development/The World Bank, 2011), <https://openknowledge.worldbank.org/handle/10986/2329> at 473 (this model is based on the WTO's dispute settlement system – originally developed in the GATT – in which a panel is convened on an ad hoc basis, with terms of reference limited to that dispute”).

<sup>290</sup> Arguably the majority of trade disputes in the modern era relate to less explicit non-tariff barriers, for which States are in a relatively disadvantaged position to private actors to detect and quantify.

<sup>291</sup> Claude Chase *at el*, Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements - Innovative or Variations on a Theme?" at p 24.

<sup>292</sup> *Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (1999) 1869 UNTS 401 at Art 3(7), 33 ILM 1226, [https://www.wto.org/english/docs\\_e/legal\\_e/28-dsu.pdf](https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf) [DSU].

While it is presumed that parties engaged in good faith consultations with respect to the principles and rules of the AIT, an inherent weakness of the consultation phase is that provinces have multiple political interests impinging on their negotiating position. This increases the likelihood of a negotiated compromise that does not reflect the rules or principles of the AIT, or address the harm caused to a specific private person who is then left without recourse.

From the outset, the WTO DSU establishes that the prompt settlement of disputes is essential to the effectiveness of the WTO as a whole. This is achieved through a rigorous timetable that disputing parties must meet from the moment a party raises a dispute. Before bringing a case to the WTO Dispute Settlement Board, parties are required to request consultation with the respective member. The member is obliged to respond within 10 days after receipt of the request, and must enter consultations in good faith within 30 days after the receipt of the request.<sup>293</sup> If a member fails to respond within 10 days, or fails to enter into consultations within 30 days, the initiating member has the right to proceed directly to request the establishment of a panel.

Despite the significant influence that the GATT dispute settlement mechanism had on the drafting of the AIT dispute settlement mechanism, AIT Article 1702.1 does not contain such a rigorous structure for the consultation process. This has led protracted ineffective negotiations that undermine the value of the AIT commitments.

The WTO DSU mandates that parties have 60 days from the receipt of a request for consultation to settle a dispute. This encourages the responding party to engage in negotiations quickly. It should also be noted that these timelines are subject to agreement by both disputing parties. The complaining party may also “request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute.”<sup>294</sup>

#### **4.4.3. Selection and Composition of Arbitral Panels**

The AIT takes similar approach to many regional trade agreements—*ad hoc* panels are selected from a standing roster of possible arbitrators. The minutia of how panellists are appointed to the roster or selected from the roster for a particular panel under the does not significantly differ from other similar agreements. The selection of panelists stays “in the first instance, in the hands of disputing parties.”<sup>295</sup> If a party fails to select a panellist within 30 days, the secretariat will select a panelist. The critical issues in the appointment of a panel is to ensure that a recalcitrant party does not paralyse the process.

However, the AIT’s procedure for appointing panellists at the appellate level significantly departs from the WTO DSU. The WTO DSU establishes a standing panel of arbitrators for the determination of appellate cases. In their mapping of dispute settlement features in regional trade agreements, Chase *et al.* found that “[a]ppellate review is not a typical feature” of dispute

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<sup>293</sup> DSU, Article 4(3).

<sup>294</sup> DSU Article 4(7).

<sup>295</sup> Claude Chase *et al.*, Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements - Innovative or Variations on a Theme?" at p 26.

settlement mechanisms in regional trade agreements. AIT does include an appellate review, but it is not a standing body, unlike the WTO, MERCOSUR, SADC, and ASEAN dispute settlement mechanism.<sup>296</sup>

The only substantive difference between first-level and appellate-level AIT panelists is that all appellate panel members are required to have expertise in administrative law. The AIT only requires that Panels established in the first instance have one member with experience in administrative law. By contrast, the WTO's appellate mechanism is a seven person standing Appellate Body, and the members serve in rotation on three-person panels.<sup>297</sup> The members are appointed to a term of four years, with the possibility of being reappointed once. To protect members' impartiality, the opinions expressed in an Appellate Body report are kept anonymous.<sup>298</sup>

#### **4.4.4. The powers of appellate tribunal**

Under the WTO DSU, a party may appeal a panel report on an issue of law or legal interpretation. Article 1706.1(1) of the AIT provides somewhat broader grounds on which parties may appeal. It also includes the right to appeal when the panel "failed to observe a principle of natural justice or acted beyond or refused to exercise its jurisdiction." While the DSU Appellate Body has the power to "uphold, modify or reverse the legal findings and conclusions of [a] panel,"<sup>299</sup> an AIT Appellate Panel has a broader power to "substitute in whole or in part the Report of the Panel, *or* refer the matter back to the Panel for a re-hearing."<sup>300</sup> In this context, it is possible to infer that the capacity of an Appellate Panel to remit a decision back for reconsideration leaves open the question of the *stare decisis*.

Notably, the WTO Appellate Body does not have the power to send back the report to the panel of first instance, although recommendations have been made to introduce it. In some instances, the Appellate Body was obliged to leave certain claims unresolved due to insufficient factual findings contained in panel reports.<sup>301</sup> Since the Appellate Body, like an Appellate Panel under the AIT, is limited to addressing questions of law, it has been argued that the ability to remit certain issues back to a panel for further fact-finding would save both time and resources.<sup>302</sup>

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<sup>296</sup> Claude Chase *at el*, Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements - Innovative or Variations on a Theme?" at p 30.

<sup>297</sup> DSU, Article 17(1).

<sup>298</sup> DSU, Article 17(11)

<sup>299</sup> DSU Art 17(13).

<sup>300</sup> Article 1706.1(4)(a) (emphasis added).

<sup>301</sup> See for example Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products (1999), WT Doc WT/DS103/AB/R (Appellate Body Report), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds103\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds103_e.htm).

<sup>302</sup> Steger, Debra, "Improvements and Reform of the WTO Appellate Body" in Ernst-Ulrich Petersmann, ed, *Preparing the Doha Development Round: Improvements and Clarifications of the WTO Dispute Settlement Understanding* (2002) 41, <http://ssrn.com/abstract=2467284> at pp 62–63.

#### 4.4.5. *Stare Decisis*

The Appellate Body only applies WTO law as contained in the covered agreements. It does not have the jurisdiction to vary the rights and obligations provided in the WTO agreements,<sup>303</sup> akin to a court's power to expand the common law, in the absence of legislation. The Appellate Body's conclusion that a measure is inconsistent with a Party's obligation under an Agreement is a declaration of the prevailing legal obligations imposed by the Agreement.

However, the Appellate Body in *Mexico-Steele*<sup>304</sup> stated the following regarding to the value of *ratio decidendi* for the development of a "coherent and predictable body of jurisprudence":

158. It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB....

160. Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. *Ensuring "security and predictability" in the dispute settlement system ... implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.*

161. In the hierarchical structure contemplated in the DSU, panels and the Appellate Body have distinct roles to play.... The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues *undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements* as contemplated under the DSU....(emphasis added)

In part, the existence of a standing Appellate Body results in *de facto stare decisis* system because it has demonstrated the willingness to strike down any panel decision inconsistent with its interpretation of the covered Agreements.

In the absence of a standing appellate panel, the role of an *ad hoc* Appellate Panel under the AIT in the development of a "coherent and predictable body of jurisprudence" is unclear. In light of the objectives of the AIT, the relationship between the panels and appellate panels ought to be

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<sup>303</sup> DSU, Articles 3.2 and 19.2.

<sup>304</sup> US — *Final Anti-Dumping Measures on Stainless Steel from Mexico (Complaint by Mexico)* (2008) WTO Doc WT/DS344/AB/R, Appellate Body Report, <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/DS/344ABR.doc> at paras 158, 159-162 and fn 309.

structured in such a way so as to encourage the consistent and coherent interpretation of parties' obligations under the AIT.

#### 4.4.6. *Amici Curiae*

Acceptance of participation by third-party *amici curiae* in the dispute settlement process is prevalent among “quasi-judicial” regional trade agreements although, the degree of acceptance varies. Chase *et al* found that:

[U]nder the quasi-judicial model, 28 RTA-DSMs explicitly provide for the acceptance of amicus curiae briefs; 43 RTA-DSMs explicitly provide for public oral hearings and/or the publication of disputing parties' written submissions; and 34 RTA-DSMs explicitly require the submission of non-confidential summaries in cases where information submitted by disputing parties is classified as confidential.

Article 13(2) of the WTO DSU similarly permits a WTO panel to “seek information from *any relevant source* and may consult experts to obtain their opinion on certain aspects of the matter. In *US — Shrimp*, the Appellate Body interpreted the terms “seek” and “any relevant source” as being “comprehensive in nature”:

We consider that a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case, to ascertain the *acceptability* and *relevancy* of information or advice received, and to decide *what weight to ascribe to that information or advice* or to conclude that no weight at all should be given to what has been received.”<sup>305</sup>

The Appellate Body's interpretation extended to a discretionary power of a panel to accept unsolicited *amicus curiae* briefs. The Appellate Body held that the word “seek” in the phrase “seek information” should not be interpreted in an excessively “formal and technical” manner. The Appellate Body stated that, while this discretion perhaps should include consultation with the parties to the dispute, given the breadth of a panel's mandate to seek information without “unduly delaying the panel process,” “for all practical and pertinent purposes, the distinction between ‘requested’ and ‘non-requested’ information vanishes”:

A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*. The fact that a panel may *motu proprio* have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted. The amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation makes clear that a panel will *not* be deluged, as it were, with non-requested material, *unless that panel allows itself to be so deluged*.<sup>306</sup>

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<sup>305</sup> *United States — Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by Malaysia)* (1998) WTO Doc WT/DS58/AB/RW, Appellate Panel Report, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds58\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm) at para 104.

<sup>306</sup> *US — Shrimp* at para 108.

Participation in the dispute settlement process by *amicus curiae* is considered an important procedural mechanism for increasing the transparency and legitimacy of the process.<sup>307</sup> While the AIT permits a Presiding Body to “seek information and expert advice from any person or body that it considers appropriate”—the wording equal in breadth to that of the WTO DSU, the potential value of this provision is undermined by the ability of any of the Participating Parties to block the participation of such third parties.

#### **4.4.7. Interim Review**

The WTO DSU process establishes an interim review stage, whereby a panel will issue a preview of their decision to the parties containing the descriptive section (a summary of the facts and arguments presented) and the panel’s findings and conclusions. The panel sets a time limit during which parties may “submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments.”<sup>308</sup> The interim review was intended to offer parties a chance to “negotiate in the shadow of the law” and settle differences in light of a panel’s determinations, as well as to offer a less onerous procedural mechanism to deal with a panel’s conclusion. It has been argued that the interim review failed to achieve the latter goal,<sup>309</sup> with parties declining to provide feedback at the interim stage, so as to preserve arguments from being addressed by the panel and raised upon appeal.

Nevertheless, approximately 60% of regional trade agreements, whose dispute settlement mechanisms Chase *et al* classified as “quasi-judicial” provide for an interim review stage in dispute proceedings.<sup>310</sup>

#### **4.4.8. Adoption of Panel Reports by the DSB**

One of the key structural innovations of the WTO DSU is that the determinations made by a dispute settlement panel are, in fact, only recommendations. A panel is assisting the Dispute Settlement Body in make rulings or recommendations. Before a report becomes official, the Dispute Settlement Body must adopt it. The system, however, is predisposed toward adoption, requiring a consensus among members to reject a panel or Appellate Body report. Members of the DSU do, however, have the opportunity to provide written objections to a panel report prior to its consideration and adoption.<sup>311</sup>

Default adoption of a report in the absence of a consensus by the DSB functions both to encourage adoption and discourage radical departures from the intended obligations enshrined in the text of

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<sup>307</sup> Claude Chase *at el*, Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements - Innovative or Variations on a Theme?" at p 41.

<sup>308</sup> DSU, Article 15(2).

<sup>309</sup> Robert Hudec, "The New WRO Dispute Settlement Procedure: An Overview of the First Three Years" (1999) 8:2 Minn J Global Trade 1 at p 41.

<sup>310</sup> Claude Chase *at el*, Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements - Innovative or Variations on a Theme?" at p 29.

<sup>311</sup> DSU, Article 16(2).

the Agreement. It acts as an additional safeguard, permitting the WTO to control interpretations of the Covered Agreement, should they feel that it strays too far from the intention of the members.

The AIT has no equivalent provision permitting the provinces to consider, object, or reject the report of a Panel. Even though a Panel's report does not have binding interpretive force on subsequent interpretation or binding legal force on the members, a provision similar to the WTO one would give AIT Parties the control over the interpretation of the Agreement.

#### **4.4.9. Initiating parties claim**

Finally, the DSU provides somewhat of a unique approach with respect to the burden of proof. Article 3(8) provides:

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge

This stands in marked contrast from the approach taken under the AIT, where the onus remains on the initiating party to lay out and establish both the relevant provisions of the Agreement that are claimed to have been breached and to identify the actual or potential injury or denial of benefit caused by the measure.

## 5. CONCLUSION

This evaluation of the dispute resolution mechanism of the Agreement on Internal Trade was undertaken to ascertain if the mechanism required amending to more effectively meet the objectives of the Agreement. The purpose of the Agreement is the promotion of an open, efficient and stable domestic market for long-term job creation, economic growth and stability by reducing and eliminating to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada. The implementation of the AIT is an effort to balance the interests of consumers, private sector entities and those of the federal, provincial, and territorial governments. Moreover, the dispute resolution mechanism appears to be a microcosm of the friction originally housed in Canada's *Constitution* between the federal government's "trade and commerce power" (section 91) and the economic powers granted to the provinces under section 92. As a result, the Agreement appears to focus on the prevention of new barriers to trade, while providing little incentive for the removal of existing barriers. The original AIT also established a dispute settlement mechanism without a legally binding enforcement mechanism.

The current AIT dispute settlement mechanism emphasizes consultation and mediation between governments, moving to *ad hoc* arbitration. In fact, the limited evidence available suggests the existing AIT dispute settlement process concentrates on dispute avoidance versus resolution. The analysis presented here indicates the three principles inferred from the structure of the AIT's dispute settlement mechanism—primacy of negotiation and conciliation, priority of government-to-government dispute settlement, and non-binding voluntary compliance—may contribute to undermining the dispute settlement mechanism's objective to also embody values of credibility, transparency, effectiveness, accessibility, timeliness and public availability.

The analysis here also suggests the consultation requirement of the dispute resolution mechanism as currently formulated potentially undermines the integrity of the Agreement itself. Normally, negotiations between parties, in the shadow of a set of rules and norms subject to *binding independent third party arbitration*, would result in settlements that are consistent with a reasonable interpretation of the rules and norms of the Agreement. However, features of the consultation requirement in Chapter 17 make the process susceptible to both manipulation and compromise on the norms and principles of the Agreement. For instance, the consultation process is closed to encourage compromise without prejudice to the arbitration process. This exposes the negotiating process to acquiescence and quid pro quo exceptions by parties to the commitments of the Agreement. Some stakeholders consulted note increased transparency during the consultation process would provide greater assurance their concerns were being reflected during negotiations as well as a greater understanding of the end resolution of a dispute. There is also concern the lack of third party oversight does little to ensure that the consultation process is productive and effective. It was suggested the consultation process should be moderated to establish deadlines among parties to the complaint, ensure deadlines are met, chair consultation sessions and make recommendations for resolving disputes. This would alleviate fears that the 120 day minimum requirement for consultations is being employed as a delay tactic.

Contributing to the lack of public transparency concerning the current AIT dispute settlement mechanism are the structured interaction of the chapters in Part IV of the Agreement. The AIT contains both vertical as well as horizontal chapter commitments. Vertical chapter commitments

cover specific sectors, such as agricultural and food goods and alcoholic beverages. Horizontal chapter commitments cover issues that cut across multiple industry sectors including procurement, investment, and labour mobility. Like a late night card game, we find that vertical chapter commitments trump horizontal chapter commitments, while vertical chapter commitments contained in chapter 9 and chapter 11 of the agreement trump all other commitments, vertical or horizontal. Since an AIT dispute resolution panel will only review the obligations found under the highest ranking chapter, a chapter's positioning in the hierarchy of consideration is paramount.

Adding to the complexity of the AIT is the notion the sectoral chapters modify the extent to which the obligations apply to various forms of government. Therefore, provinces will extend applicability of AIT provisions to quasi-governmental bodies, or regional and municipal governments, under some chapters, but not others. This lack of a coherent system of application results in the AIT dispute settlement procedures becoming more legalistic and ultimately less accessible to stakeholders.

At the other end of the spectrum, we note the existing uncertainty regarding the applicability and influence of other legal regimes and interpretive norms on an AIT panel's interpretation. We contend that due to the unique juncture the AIT occupies between both domestic and international, and public and private law, a more explicit identification of the role of the interpretive norms and principles of external legal systems would increase the Agreement's predictability.

Since the AIT was concluded, 56 complaints have been raised pursuant to the provisions of the agreement. This limited data set prevents the identification of definitive trends. However, it is worthy to note 20 disputes concluded at the consultation phase, while 18 were terminated after a panel was requested or formed and 5 were denied by screeners. What can be measured with more certainty is the duration of the dispute resolution process. For 13 cases resolved at the consultation phase, the average consultation phase was 35.2 months. For those cases where a panel was established, the average time to resolve a dispute was 41.2 months. The AIT has the expedient resolution of disputes as one its central objectives, therefore, the limited data indicates this goal of timeliness is not being met under the current regime.

Another irritant raised by stakeholders during this examination was the lack of legally binding enforcement of the AIT in its current form (especially before the Fourteenth Protocol). The Agreement provides four mechanisms through which to encourage compliance with a Panel's report:

- A panel has the authority to award various costs against parties, including a Monetary Penalty, Operational Costs and Tariff Costs awards;
- A Party is prohibited from participating in dispute resolution proceedings under the Agreement, where the Party has failed to comply with a Monetary or Tariff Costs Award, or a Compliance Panel has determined that a Party has not brought itself into compliance with the Agreement;
- Panel reports detailing decisions are made public after 30 days; and,

- If within one year from the date on which the Panel issued its report, the Party has failed to bring an inconsistent measure in line with the agreement, following discussion with the Internal Trade Committee, the Complaining Party is permitted to suspend benefits of equivalent effect or impose retaliatory measures of equivalent effect against the Complaint recipient.

Given the non-binding and voluntary nature of AIT compliance that exists, we contend private persons have little incentive to use the AIT's dispute settlement procedures. There may be examples where the procedural mechanism for the settlement of disputes encourages coherent and consistent agreement on the scope of the parties' obligations. However, we suspect a private party will be less motivated to use the AIT dispute mechanism since compliance is uncertain, especially where no recourse to appeal determinations by a Compliance Panel exists. Moreover, a private person remained subject to a two-year limitation period from the date on which they acquired knowledge of alleged inconsistent measure, as well as the screener process. These measures can act as a deterrent to individuals inclined to pursue dispute resolution through the AIT.

A concern specific to a request for a panel by a party on behalf of a person of a party is the existence of the "substantial and direct connection" requirement. That a panel shall immediately dismiss a complaint for lack of standing if the requirement a party have a "substantial and direct connection" to the person cannot be established is unnecessary. A party's ability to initiate dispute proceedings for *any breach* of the Agreement's commitments, regardless of whether the effects of such a measure are felt within the initiating parties' borders, should render the "substantial and direct connection" requirement redundant.

The provision in Fourteenth Protocol of Amendment allowing parties to intervene in dispute proceedings upon written notice is a welcome change. Also under the Fourteenth Protocol, a panel may use its discretion to add an intervenor or a complaining person to a proceeding once a dispute reaches the panel stage. However, the Agreement still limits the participation of third parties such as public interest advocates. A panel may only consult experts if all participating parties to a dispute give consent. The existence of these restrictions is a stark reminder of the historical negotiating context of the agreement that smacked of the undesirable era of executive federalism. The extension of participation to technical experts and other interested intervenors has the potential to provide legitimacy to the dispute resolution process, and the Agreement overall.

Since the AIT has been introduced, other trade agreements amongst provinces have been established, such as the Trade, Investment and Labour Mobility Agreement (TILMA), The New West Partnership Agreement ("NWPTA") and the Trade and Cooperation Agreement ("TCA") between the province of Ontario and Québec. TILMA, initially signed between Alberta and British Columbia, is based on negative list, or open trade approach. Therefore, TILMA's dispute panel has jurisdiction across all trade, investment and labour related measures. The NWPTA between British Columbia, Alberta and Saskatchewan employs a similar approach, and adopted the UNCITRAL Arbitration Rules as an established panel's rules of procedure. As a result, broader allowance for the appointment and consultation of experts is provided during procedures under the purview of the NWPTA, while the consultative process only lasts for 30 days—a fraction of the time allotted for this process under the AIT.

The TCA contains a dispute resolution chapter that is arguably more streamlined when compared to existing AIT provisions. Although there is no private right of action against a party under the Agreement, compliance panels convened under the TCA can award higher monetary penalties of than permitted under the AIT. Moreover, these penalties can be based on more comprehensive criteria than simply the population of the offending provincial party.

This study acknowledges concern the increased role of arbitration to resolve internal trade barriers as opposed to interprovincial negotiations may persuade motivated stakeholders to trigger the formation of panels to remove provincial government standards relating to environmental protection or consumer protection. An associated fear is that corporations will attempt to use unaccountable panels to define the scope of the provinces obligations under the AIT, rather than go to court. We contend the AIT attempts to settle the balance between the liberalization of internal trade and respect for the province's legislative sovereignty through the "Legitimate Objectives" exception. Moreover, a dispute resolution mechanism driven by those subject to injury or denial of benefit as a result of a breach of the Agreement is the most effective system for identifying and resolving the scope and application of the commitments made by Parties.

When compared to other federation-based jurisdictions, the use of the Canadian Constitution's federal "trade and commerce" power has a poor record of success in protecting against and removing internal barriers to trade enacted by provinces. As well, unlike other federal states, Canada's internal economic union lacks an institutional support that plays an active role in lowering impediments to trade. Thus we find Canada's internal economic boundaries are similar to international ones, with each province functioning as a state with sovereign legislative authority. It is against this backdrop we reviewed mechanisms currently operating in other jurisdictions designed to resolve disputes between sovereign political entities. This was undertaken to determine how the AIT's dispute mechanism could be modified to more effectively identify and lower trade barriers, while preventing new ones.

The initial comparative exercise between the AIT and International Investment Agreements (IIA) revealed the AIT provides a more limited right of appeal for private persons to bring claims than most IIA's. The limitation is the lack of direct standing for private persons under the AIT. Requiring the advanced consent of a party to the AIT in order to proceed with a complaint invites the potential for strong-arming tactics and potentially places the province being asked for consent in a conflict of interest. It appears IIAs have attempted to depoliticize international economic disputes by gradually moving them from the diplomatic state-to-state framework to the realm of private economic dispute settlement.

In an international investment agreement, the States give a unilateral offer of consent to arbitrate through the relevant dispute settlement clause in the agreement. However, the offer to arbitrate is perfected if and when the investor raising the dispute accepts it and cannot be revoked unilaterally by a State. The AIT implies that the Party consent to establish an arbitration panel is conditional upon the person being granted standing by a screener.

The temporal application of the AIT was also found to be a cause of concern. While under some IIA's, barriers to the establishment of an investment may fall within the jurisdiction of the tribunal, the AIT approach is convoluted. Parties under the AIT are obliged to refrain from implementing

measures that create obstacles to internal trade, restrict the movement of persons, or discriminate against goods, persons, services and investments flowing from another party. However, the definitions provided in the agreement indicate investment and services are alluded to in the present and future tense. As a result, although parties are permitted to bring complaints before a panel for pending measures, private persons are not. Uniformity of application and a clarification of the language contained in the AIT may serve to reduce this apparent level of ambiguity.

Unlike the AIT, most IIA's (as well as the NWPTA mentioned above) employ a negative-list approach to investment obligations. Parties pursuant to IIA's safeguard their legislative autonomy through exception clauses. The AIT, however, prefers a system of considerations that can be most generously described as confusing, and at worst actively obstructionist, in terms of public access to apply the provisions of the Agreement. Adding to this uncertainty, parties under the AIT are permitted to take measures that breach the obligations contained in Articles 401, 402 and 403, where they *qualify* as measures that seek to achieve a "legitimate objective". While Article 200 defines the term "legitimate objective", its subcomponents remain undefined.

Many IIA's also make it clear that states are responsible for the actions their affiliated bodies in the instance they cause a dispute. As mentioned, the AIT has variable approach to applicability dependent upon which chapter of the agreement applies to the dispute in question. This approach creates the potential for a body exercising authority delegated by a Party to the AIT to implement a measure inconsistent with the party's commitments, but for which no recourse would be available.

Our comparison revealed that both IIA's and the AIT contain limitation periods for persons seeking to bring a claim for breach of the agreement. However, the inclusion of limitation periods appear to have divergent effects. Under many IIA's, limitation periods are used for the calculation and mitigation of damages. Conversely, limitation periods in the AIT essentially act as a mechanism permitting parties to maintain breaches of their obligations if a person failed to raise objection to such a breach within the allotted period.

Many IIA's have a consultation requirement before parties to an agreement can initiate arbitration proceedings. While variances exist regarding the level of obligation required and duration of the consultation period, in general the purpose of the waiting period is not to impede arbitration proceedings where a settlement is impossible. In contrast, the AIT imposes two different procedural requirements for consultations upon complainants, depending on whether they are a party, or person seeking to initiate dispute resolution proceedings. A party must request consultation through a written notice specifying actual or proposed measure complained of, the relevant provision of the AIT and a brief summary of the complaint. Although the AIT imposes no requirements regarding the fulfillment of the parties' obligation to consult, a request to establish a panel before 120 days after delivery of a request for consultation is not possible. However, a person is not required by the Agreement to enter into negotiation or consultation, where a Screener has approved them to initiate dispute proceedings. Interestingly, the procedural requirements to submit a request for consideration of a dispute to a Screener do not explicitly make clear what the requirements for initiation of an application to a Screener require.

Arbitral tribunals under IIA's have been criticized for producing decisions and interpretations that

have been inconsistent. Since the legal principle of *stare decisis* does not apply to IIA dispute resolution proceedings, uncertainty about the meaning of key treaty obligations as well as the unpredictability of their application has ensued. This uncertainty also exists under the AIT. We surmise there is a concern by Parties to the AIT that future interpretation of obligations by ad-hoc panels may lead to agreements being imbued with interpreted meaning contrary to the parties' original intentions.

While the AIT has historically made little to no effort to welcome input from third parties, third party participation in panel hearings plays an important role in increasing the transparency of the arbitral process. NAFTA, the Canada Model FIPA and the ICSID all permit third party participation. We maintain that in light of the broad scope the agreement, the AIT should, in the interest of transparency, have opportunities for third parties to intervene and make submissions at various stages of the dispute settlement proceedings.

The second comparative analysis in this study considered the extent to which dispute resolution provisions of the AIT diverge from those of the World Trade Organization's Dispute Settlement Understanding. For instance, the WTO DSU contains a regimented structure designed to produce prompt settlement of disputes. Although the DSU influenced the drafting of the AIT's dispute settlement mechanisms, none of the DSU's consultation structure can be found in the AIT.

Another divergence was found in the selection and composition of panelists at the appellate level. The DSU establishes a standing panel of arbitrators for the determination of appellate cases, while an appellate review under the AIT is ad-hoc in nature with the provision that all appeal panel members are required to have expertise in administrative law. While under the DSU a party may appeal a panel report on an issue of law or legal interpretation developed by the panel, the AIT provides broader grounds for appeal. For instance, an AIT panel decision can be appealed on the grounds the panel "failed to observe a principle of natural justice or acted beyond or refused to exercise its jurisdiction". Moreover, the DSU Appellate Body has the power to uphold, modify or reverse the legal findings and conclusions of a panel. In contrast, an AIT Appellate Panel can substitute in whole or in part the Report of the Panel, *or* refer the matter back to the Panel for a re-hearing. It is with these conclusions in mind the recommendations that follow were determined.

## 6. RECOMMENDATIONS

The analysis of the AIT dispute settlement and proposed recommendations are based on two premises: (1) that the AIT dispute settlement mechanism, with proposed recommendations, is the most appropriate dispute resolution tool for the AIT disputes and (2) the foundational values and objectives, first articulated in the Memorandum of Understanding on Procedures for the Elimination or Reduction of Interprovincial Barriers should remain as guiding principles.

The MOU identified, but did not define, the following underlying values and objectives: *credibility, transparency, effectiveness, accessibility, timeliness, and public nature*.<sup>312</sup> These objectives are distinct, interrelated, and self-reinforcing. For example, increased transparency in dispute resolution can contribute to its credibility and accessibility; timeliness can contribute to increased effectiveness and credibility. However, effectiveness is the gravitational force of the dispute settlement mechanism; it is both girded by and underpins the achievement of the others.

These objectives can be achieved through the implementation of substantive rights and procedural mechanism; for example, direct standing of persons or strictly enforced time limits. However, too much emphasis on the fulfillment of a particular objective, may disturb the delicate balance between the objectives and interests. For example, while enhancing the accessibility of dispute proceedings may assist in increasing its credibility, adding too many procedural steps to facilitate this, may negatively impact the overall timeliness of the resolution.

Thus, while each proposal should be evaluated in light of its contribution to the objectives of dispute resolution, it must also be take into consideration the Agreement's broader balance of interests. Specifically, the concern of the Provinces that a third party arbitration of their commitments to trade liberalization will inadvertently result in the relinquishment of their legislative sovereignty to enact measures in the public interest. In light of this, one of the main considerations we have taken into account is the criticism that the current dispute resolution mechanism in Chapter 17 protects the Provinces' legislative sovereignty at the expense of achieving a more effective dispute settlement system. In particular, the implicit secondary status of Persons subject to injury as a result of trade restrictive measures has the potential to undermine the credibility and effectiveness of the AIT in identifying breaches, defining party commitments, and ultimately lowering trade barriers.

Against that backdrop, the recommendations propose an alternative balance. While maintaining the Provincial control over the interpretation and application of the commitments in the Agreement, the recommendations aim to eliminate several barriers that might otherwise hinder the identification of breaches, defining the parameters of the AIT's obligations, and the Agreement's overall credibility and accessibility.

The following recommendations are broken into three sections: recommendations regarding (1) the overall structure of the dispute mechanism; (2) the jurisdictional rules applicable to Chapter Seventeen; and (3) the procedural mechanisms available to dispute participants. Each section

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<sup>312</sup> Annex 903.1 - Memorandum of Understanding on Procedures for the Elimination or Reduction of Interprovincial Barriers ,Chapter Nine--Agricultural and Food Goods Trade in Agricultural and Food Products to Agreement on Internal Trade, <https://www.ic.gc.ca/eic/site/ait-aci.nsf/eng/il00010.html#K> at II.3 (dispute settlement).

identifies areas of potential concern, and how they may impact on the achievement of the identified objectives—*credibility, transparency, effectiveness, accessibility, timeliness, and public*. The proposals consider, where appropriate, similar dispute mechanisms at the international level. The recommendations, which are proposed as a bundle, consider how they balance the existing interests and contribution to the dispute resolution objectives.

The recommendations are grouped into three broad categories: the overall structure of the dispute mechanism in relation to the Agreement (section 6.1); jurisdictional limitations (section 6.2); and procedural mechanisms identified as potential opportunities to refine and improve Chapter Seventeen’s capacity to achieve the goals of dispute (section 6.3).

## SUMMARY OF RECOMMENDATIONS

### *Structure*

- Establish a permanent, limited, rotating roster appellate panel.
- Council must approve, on a reverse consensus basis, all panel, appellate panel, and compliance panel decisions.
- Approved decisions of the Appellate panels should be binding on the panels of first instance.

### *Jurisdiction*

- Remove the interpretive priority of vertical sectoral chapters over horizontal ones, and permit panels to evaluate the consistency of a measure with the Party’s commitments based on the merits of a case
- Where a measure is inconsistent with the commitments made in Chapter Four (General Rules), but does not fall within one of the defined sectoral chapters, permit a dispute to be initiated under Part A of Chapter Seventeen
- Consolidate or unify the definition of “legitimate objective” in the sectoral chapters and where necessary, issue interpretive notes regarding the application to particular sectors
- Permit Persons to initiate proceedings in relation to prospective measures that have not resulted in injury or denial of benefit through the “government-to-government, on behalf of a person” mechanism
- Eliminate the limitation period that applies to Persons seeking to initiate proceedings under Chapter Seventeen.

### *Procedure*

- Negotiated resolutions (through consultation) must be consistent with the substantive rules of the AIT
- Develop a mechanism whereby Persons can formally contribute to or participate in the consultation process under Part A process.
- Develop a limited appeal mechanism available to Persons, on the basis that a negotiated settlement between parties is not in accordance with the substantive rules of the AIT.
- Introduce facilitators upon request during the consultation stage.
- Establish a formal, objective, and independent system for evaluating Person’s request to commence the proceedings under the “Government-to-Government on behalf of a person.”
- In “Government-to-Government on behalf of a person” dispute settlement, remove the requirement that an injury or denial of benefit must be experienced by the Person “in the

province” and establish a rebuttable presumption that a measure inconsistent with the Agreement’s commitments constitutes an injury or denial of benefit.

- Remove and replace the screening process in Part B, with a summary procedure by a Panel, at the request of the defendant Party.
- Remove disputant’s ability to block a panel’s consultation with experts and other third parties not subject to the Agreement, and formalize a mechanism that facilitates submissions to a panel by public interest groups.

## **6.1. STRUCTURE OF THE DISPUTE MECHANISM**

### **6.1.1. Establish a permanent, limited, rotating roster appellate panel**

Panels or Appellate panels that decide AIT disputes are ad hoc panels. While an Appellate and Compliance Panel have the explicit authority to reverse or overrule the findings of a Panel of first instance, there is little in the Agreement to establish a coherent system of interpretation from Panel to Panel, or even among an Appellate panel and a subsequent ad hoc Panel of first instance.

### **6.1.2. Council must approve, on a reverse consensus basis, all panel, appellate panel, and compliance panel decisions**

Subordinating Panel and Appellate Panel decisions to the approval of the Council of First Ministers on a reverse consensus basis, similar to the WTO, would effectively assuage concerns about the development of interpretive norms that may be contrary to the intention of the parties. Rather than being binding upon release, panel’s decision would be subject to approval by the AIT Parties. The reverse consensus model requires that for a panel decision to be rejected by the Council, it would have to be rejected by all members. Additionally, it may be appropriate to negotiate a more refined calculus for the consensus necessary to reject a panel decision, taking into account regional, economic or other interests of the various AIT members. While such a system may raise concerns about timeliness given the infrequency with which the Council convenes, it may be possible to implement mechanisms by which the panel can encourage removal of the inconsistent measure (or some similar, non-binding injunction) in the interim.

### **6.1.3. Approved decisions of the Appellate panels should be binding on the panels of first instance**

The interpretive authority of a Panel is removed from the democratic legitimacy granted to the Agreement and its governance by the Council of First Ministers. The Council is charged with the task of working to lower trade barriers. It has the capacity to issue protocols of Amendment varying the obligations of the Agreement and interpretive notes, to guide arbitrators in their interpretation of the Agreement.

The absence of a precedent-based system, in which the decisions of an appellate panel are directly binding on the panels of first instance, undermines the dispute settlement mechanism’s ability to develop a coherent and consistent interpretation of the scope and extent of the AIT commitments.

Lack of precedential value does not promote predictability and certainty, affecting the accessibility of the dispute settlement process, since potential complainants may not be in a position to assess prospect of success.

Notwithstanding the ability of the Council to issue “Interpretive Notes,” Provinces may be concerned that a binding hierarchical system may entrench interpretations of the Agreement that run counter to the intentions of the Parties. As currently designed, the decisions of Panels or Compliance panels are not legally binding and there are limited enforcement tools to encourage compliance. This may allow a Party that disagrees with a panel’s determination to delay or thwart compliance, which negatively affects the credibility of the system.

It is therefore recommended that the AIT adopt explicit interpretive hierarchy whereby the decisions of the Appellate panels are binding on the panels of first instance. This will encourage consistent and reliable interpretations of the AIT obligations, refine the scope of the dispute mechanism’s jurisdictional limitations, and increase certainty and predictability for the disputants. This would necessarily involve the establishment of a permanent, if rotating, roster of panelists to serve as appellate panelists, similarly to the structure of the WTO Appellate Body system. The WTO Appellate Body system has been criticized for a high percentage of appeals, which lead to significant delays. Against that background, in the AIT context, it is recommended to consider additional mechanisms to encourage the timely resolution of disputes or limit the number of cases that can be appealed. For example, by narrowing the right of appeal and/or conferring on Appellate Panel’s the capacity to grant leave to appeal in certain circumstances, limiting the number of cases that can be appealed.

## **6.2. JURISDICTION**

### **6.2.1. Remove the interpretive priority of vertical sectoral chapters over horizontal ones, and permit panels to evaluate the consistency of a measure with the Party’s commitments based on the merits of a case**

The Agreement’s current approach of defining and limiting Parties’ commitments to vertical sectors and horizontal categories for the purpose of liberalizing trade has the benefit of ensuring that the Parties remain in control by limiting their commitment to liberalization within defined parameters. This approach, however, misses a significant opportunity presented by the dispute mechanism—to identify and resolve disputes outside of the defined categories and expand the Agreement’s capacity to lower trade barriers.

Where a measure fits within more than one category, rather than permitting the commitments of one sectoral chapter to override the commitment of the other chapter, the Agreement should provide Panels with the capacity to evaluate the impugned measure and assess which chapter takes precedence based on an assessment of the evidence and a determination of the primary purpose of the measure in question.

### **6.2.2. Where a measure is inconsistent with the commitments made in Chapter Four (General Rules), but does not fall within one of the defined sectoral chapters, permit a dispute to be initiated under Part A of Chapter Seventeen**

We recommend an additional dispute settlement avenue for disputes that do not fall neatly within one of the sectoral chapters. Such a system would function as a means of testing the application of

the trade liberalization commitments outside of the defined sectoral chapters. This is particularly true, where, as discussed above (See section 2.4.1.3 above) the substantive commitments within particular sectoral chapters function to exclude certain claims. In order to ensure control of the Parties over the interpretative direction of the AIT obligations, this process would be limited only to Government-to-Government disputes and the decisions would be subject to Council approval.

### **6.2.3. Consolidate or unify the definition of “legitimate objective” in the sectoral chapters and where necessary, issue interpretive notes regarding the application to particular sectors**

As outlined in section 2.3.1, where an issue cuts across multiple sectoral chapters, a complex interaction between sectoral chapters defines the scope of a Panel’s jurisdiction. This negatively impacts the accessibility of the Agreement by obscuring the substantive jurisdiction of Panels, making it unclear when injured parties or persons may legitimately seek redress for breaches of AIT obligations, and making the entire dispute process more cumbersome.

This complexity is particularly apparent because varying definitions of “legitimate objective” contained in various sectoral chapters and the primacy of vertical chapters over horizontal ones. It is difficult to determine the added value of this structure regarding protection afforded to provinces within the relevant sectors, at the expense of accessibility.

With a view to reducing complexity, streamlining the dispute settlement process, and increasing the overall accessibility for potential disputants, we recommend to eliminate the definitions of “legitimate objective” in sectoral chapters and to restructure the hierarchy of vertical chapter commitments over the commitments in the horizontal chapters. We recommend a single consolidated definition of “legitimate objective.” Where necessary, interpretive notes or additional provisions can clarify the scope of the legitimate objective exception in relation to particular types of measures.

Further, the issue of whether the qualifying types of measures under the definition of “legitimate objective” are self-judging has not yet been decided by a panel. Regardless, we recommended that the Council of First Ministers engage in dialogue with the objective of clarifying the standard to be applied to this provision of the Agreement.

Finally, each chapter varies the application of “Article 102: Extent of Obligations,” modifying the degree to which the commitments under the relevant chapter extend to various levels of government. This variation from chapter to chapter, further adds complexity to the Agreement, obscures the true extent to which the commitments apply to government measures, and ultimately makes the Agreement less accessible.

Similarly to investor-state dispute settlement mechanism, we recommend that the Agreement take a principled approach to the interpretation of the extent to which the commitments extend to government measures. The extent to which the obligations contained in the agreement apply to government should be based on functional tests that takes into consideration the actual authority and control exercised by the government over the body responsible for the measure.

While this process removes a degree of control and certainty away from Parties with regard to the extent of obligations, a robustly developed functional test of “rules of attribution,” rather than a finite list currently used, would be uniformly applied across all chapters, should make the process more efficient, accessible, and predictable. Additionally, and in line with the overall principles and objectives of the AIT, it would close loopholes that potentially permit other levels of government to implement or maintain trade restrictive measures.

**6.2.4. Permit Persons to initiate proceedings in relation to prospective measures that have not resulted in injury or denial of benefit through the “government-to-government, on behalf of a person” mechanism**

A Person proceeding under either the “Government-to-Government on behalf of a Person” or Person-to-Government dispute settlement can only pursue the process related to an existing measure that has caused them injury or resulted in the denial of benefit. In contrast, Parties are permitted to raise disputes related to present or prospective measures, when they believe that a measure would violate the AIT commitments. This double standard undermines the credibility and effectiveness of the Agreement.

In order to limit the risk of potential frivolous claims, we recommend that prospective claims be brought only through the “Government-to-Government on behalf of a Person” mechanism. Claims could be initiated by a Party at the request of a person without having to meet the requirement of Article 1703(6)(b). In conjunction with a more formalized system for reviewing requests by Persons to initiate proceedings (see section 6.3.5 below), this approach balances the system’s ability to identify potential problems while ensuring that anticipatory claims do not clog the process. This also maintains the Person’s ability to subsequently bring a claim through existing procedures, should the proposed measure result in an injury or a denial of benefit.

**6.2.5. Eliminate the limitation period that applies to Persons seeking to initiate proceedings under Chapter Seventeen.**

Chapter Seventeen imposes a limitation period for Persons to initiate claims. This limitation period does not exist for the Parties. The limitation period is triggered on the basis of an objective standard of knowledge, where the person “acquired, or should have acquired, knowledge of the alleged inconsistent measure.”<sup>313</sup> Since this issue has not yet been addressed by the panels, it is unclear what this objective standard entails. Possibly, the objective requirements has been used as a way to minimize the risk of abuse of process, whereby a Party may delay commencing an action while damages accumulate over time. There is no significant risk or potential for abuse, since, not only are the monetary awards circumscribed, but they are also only available through Compliance Panel’s determination that a party has failed to amend an inconsistent measure.

Therefore, we recommend that the limitation period that applies to Persons be eliminated. Alternatively, if the limitation period is maintained, we recommend that the two-year limitation period is defined subjectively and apply from the time a Person has had knowledge of the inconsistent measure.

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<sup>313</sup> Article 1713(5)(a).

## 6.3. PROCEDURE

### 6.3.1. Negotiated resolutions (through consultation) must be consistent with the substantive rules of the AIT

The procedural balance of power in the AIT dispute remains firmly in favour of the Parties to the Agreement and not with the Persons injured by or denied a benefit as a result of a breach of a commitment. This is quite apparent at the consultation stage.

The consultation phase is integral to the AIT dispute settlement mechanism and the ability of the parties to reach a mutual resolution should be maintained. At the same time, the negotiation process has its risks. It is susceptible to delays. More importantly, a negotiated settlement may potentially undermine the credibility and integrity of the Agreement. The risk is further amplified given that the negotiated settlement—*res pacta* effectively acts as *res judicata*—it prevents the disputants from commencing a subsequent proceeding on the same issue, regardless of whether the resolution was in line with the principles and objectives of the AIT.

We recommend the implementation of a provision in the negotiation mandate, similar to the one in Article 3(7) of the Dispute Settlement Understanding of the WTO—the parties are enjoined to ensure that the negotiated settlement is consistent with the Agreement, in particular, the general rules articulated in Chapter Four.

Consultations ought to remain private in advance of a potential panel hearing, so as not to prejudice any subsequent determination. However, we recommend that the outcome—the negotiated settlement, be made public. This would not only encourage that the resolutions are consistent with the principles and objectives of the AIT, but will also contribute to fostering transparency, credibility, and legitimacy of the dispute settlement.

### 6.3.2. Develop a mechanism whereby Persons can formally contribute to or participate in the consultation process under Part A process.

The dispute resolution process would significantly benefit from facilitating the participation of stakeholders, in particular Persons as defined in the Agreement, at an early stage. Currently, the Parties can engage in consultation regarding the disputed issue without the formal participation of any outside stakeholders. This potentially undermines the credibility of any subsequent resolution, particularly because the negotiations are conducted in, and remain, private. Permitting third parties or other interested stakeholders to participate in the negotiation, should ensure a balanced approach and consideration of non-Party interests in the resolution of the matter.

### 6.3.3. Develop a limited appeal mechanism available to Persons, on the basis that a negotiated settlement between parties is not in accordance with the substantive rules of the AIT.

Additionally, we recommend a limited appeal mechanism to Persons, whereby they appeal the negotiated settlement between the Parties to the AIT, when the Person believes that the negotiated resolution is not consistent with the AIT principles and commitments.

#### **6.3.4. Introduce facilitators upon request during the consultation stage.**

A more structured or managed consultation would increase efficiency, credibility, and the legitimacy of the AIT dispute settlement. While it is unnecessary to impose a rigid formal structure, the process would benefit from an *ad hoc* facilitator or mediator, which could be facilitated or provided by the AIT secretariat. The facilitation would be provided by unilateral request. This has a potential to significantly increase the efficiency of the consultation phase and prevent it from acting as a mandated waiting period. An efficient consultation stage should, in turn, reduce the overall length of dispute, conserve resources, and contribute to the overall effectiveness of the dispute resolution mechanism. However, in order to not create additional inefficiencies, the facilitation should be carefully structured, including appropriate timelines, if unsuccessful the dispute can proceed to the next stage.

#### **6.3.5. Establish a formal, objective, and independent system for evaluating Person’s request to commence the proceedings under the “Government-to-Government on behalf of a person.”**

Currently, a Person wishing to commence dispute resolution proceeding must first request their respective provincial government—a Party to the AIT, to initiate the proceedings on their behalf. There is no standardized formal mechanism by which a province (objectively) evaluates the merits of the Person’s request. This is particularly important for ensuring transparency and accessibility for Persons who might not otherwise have the resources to bring an action through Part B (Person-to-Government).

An independent evaluation, based on objective criteria, would increase predictability, certainty, and accessibility of the dispute settlement mechanism and would assist the Persons to evaluate the strength of their case and the likelihood of successful Provincial intervention on their behalf. An independent evaluation process, based on objective criteria, removes political considerations from a Province’s decision whether to take up a dispute on behalf of a Person. This avoids potential delays and confusion when a Province may justify denial on the grounds that it is seeking to resolve the issue outside of the AIT dispute resolution mechanism.<sup>314</sup> It would also act as an effective preliminary screen against frivolous or vexatious claims, replacing the current screener process, while ensuring that rejected requests are afforded an opportunity for re-consideration through Part B (Person-to-Government).

#### **6.3.6. In “Government-to-Government on behalf of a person” dispute settlement, remove the requirement that an injury or denial of benefit must be felt by the Person “in the province” and establish a rebuttable presumption that a measure inconsistent with the Agreement’s commitments constitutes an injury or denial of benefit.**

The clarity and accessibility of the dispute settlement process would significantly benefit from circumscribing the conceptually ambiguous requirement that there be a “substantial and direct connection” between the Person and the Province bringing the claim. There is no equivalent requirement, when a Party initiates the proceedings on their own behalf. As discussed in section

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<sup>314</sup> Article 1713 Screener Report: In the Matter of a request made by Mr. X of Québec to commence dispute resolution proceedings vis-à-vis Ontario (15 February 2011), [http://www.ait-aci.ca/en/dispute/crane\\_en.pdf](http://www.ait-aci.ca/en/dispute/crane_en.pdf).

3.4, injuries or denial of benefit, particular related to labour mobility, are not necessarily experienced in the province within which the Person or enterprise resides or carries on business.

We recommend establishing a rebuttable presumption by which the breach constitutes an injury or denial of benefit to the person, when the person meets the requirements of residence or carrying on business in the Province. This would be similar to Article 3(8) of the WTO's Dispute Settlement Understanding. This would further the consistency and credibility of the Agreement, since there would be a symmetry between requirements that apply to Parties and Persons.

**6.3.7. Remove and replace the screening process in Part B, with a summary procedure by a Panel, at the request of the defendant Party.**

The screening process ought to act as a floodgate against a deluge of frivolous and vexatious claims. However, as discussed in section 3.5.1, the screening process may negatively impact timeliness, credibility, and effectiveness of the dispute resolution mechanism. The decision of a screener is not subject to any form of review or appeal is perhaps the most detrimental to furthering the credibility of the dispute settlement process and the Agreement itself.<sup>315</sup> In addition, the past decisions by screeners have been quite inconsistent. The potential harm of this inconsistency is compounded by the risk that a screener will blur the line between the substantive matter in dispute and the limited scope of the screener's mandate to determine the eligibility of a Person's request to initiate proceedings. Unlike the decisions of a panel, the procedural guidelines for screener's decisions are minimal at best,<sup>316</sup> affecting the transparency of the system.

We recommend two interrelated processes which would, on the one hand, preserve the integrity of the system by limiting the number of potential cases, while, at the same time, increasing transparency, efficiency, and reducing potential redundancy by enhancing already existing steps in the dispute settlement process. As discussed in section 6.3.5, we recommend bolstering the provincial assessment mechanism for requests by Persons. Additionally, we recommend the implementation of a "summary proceeding" before a panel.

We recommend that Screeners be replaced with a summary proceeding before a panel that can be triggered by the responding party, similar to that of ICSID Arbitration Rule 41(5).<sup>317</sup> Such a process would ensure that baseless, frivolous, or vexatious claims would be disposed of quickly and efficiently. However, if the issue requires determination on the merits, it would be determined in the appropriate forum, by a Panel.

Alternatively, if the screening mechanism is maintained, we recommend introducing a review process of negative determinations by a screener.

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<sup>315</sup> Robert Knox, *Canada's Agreement on Internal Trade: It Can Work If We Want It To* at p 11.

<sup>316</sup> Annex 1714(6)(5).

<sup>317</sup> See section 4.3.11 above.

**6.3.8. Remove disputant's ability to block a panel's consultation with experts and other third parties not subject to the Agreement, and formalize a mechanism that facilitates submissions to a panel by public interest groups.**

While the language of the Agreement permits a Panel to consult third parties, with a particular focus on experts, the Panel's authority is not absolute, since a disputant can block this consultation on any ground. Given the potential impact that panel decisions have on measures implemented by democratically elected governments, or bodies empowered by legislation, the accessibility and participation of public interest groups is essential to enhancing the public, transparent, and accessible nature of the dispute resolution mechanism and the legitimacy of panel decisions.

In order to achieve this, we recommend two inter-related measures. First, strengthen the Panel's independence and control over consulting third parties, by removing the requirement that the disputants must agree to the Panel's decision for consultation of third parties. Second, implement a formal procedure for participation by public interest groups (not just third parties invited by the Panel), akin to the system that has developed over time before the WTO Dispute Settlement Panels.

Panels existing discretion to admit submissions by experts and third parties (based on relevance), ought to act as a sufficient safeguard against potential delays caused by increased access to non-disputant third parties.

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