



INSTITUT **C.D. HOWE** INSTITUTE

COMMENTARY

NO. 573

Internal Trade in Focus: Ten Ways to Improve the Canadian Free Trade Agreement

Key reforms to CFTA's dispute settlement rules could ease access to justice for small businesses and individuals and bolster internal trade in Canada.

Ryan Manucha



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COMMENTARY No. 573
July 2020

\$12.00

ISBN 978-1-989483-37-4

ISSN 0824-8001 (print);

ISSN 1703-0765 (online)



A handwritten signature in black ink that reads "Daniel Schwanen".

Daniel Schwanen
Vice President, Research

THE STUDY IN BRIEF

The recent pandemic has highlighted just how economically interdependent Canadians are with one another, and the extent of the nation's intertwined domestic supply chains. As the economy re-opens, and with global protectionism looming, interprovincial trade barriers take on heightened significance.

Modern barriers to trade often consist of minor variations in regulations and processes that amount to a tyranny of small differences – different rules for truck weights, construction, health and safety, upholstered goods, drug scheduling or food labeling, to name a few. Some progress has been made. For instance, by way of the CFTA, Canada's governments are close to a ground-breaking provisional agreement on harmonized construction codes.

Economic estimates suggest that Canada's GDP would grow 4 percent by eliminating internal trade barriers, and that the patchwork-nature of the Canadian regulatory landscape imposes the equivalent of a near 7 percent tariff on goods crossing provincial boundaries. That being said, some trade barriers are an incidental result of legitimate and worthwhile government regulation.

The main focus of this *Commentary* is on improving access to justice under the CFTA through reforms to the dispute resolution mechanism. Adversarial litigation plays an important role in domestic trade liberalization efforts, even if the heavy lifting is done chiefly through extensive and exhaustive inter-governmental reconciliation.

First, a loser-pays principle for allocating dispute panel operational costs in a successful claim would significantly improve access to the dispute mechanism for individuals and small businesses. Second, the text of the CFTA leaves ambiguous whether monetary penalties awarded to private parties are enforceable in domestic courts. Any such funds go to an Internal Trade Advancement Fund, rather than to successful private parties themselves: making these awards enforceable would further ensure that member governments comply with their CFTA obligations. Third, successful private complainants at the panel and appellate stages should be able to tap into the Internal Trade Advancement Fund to defray the cost of launching their claims. The benefits of a successful CFTA adjudicatory outcome are a public good, meaning a sub-optimal number of claims will be launched. Companies, persons and other governments who did not participate in the litigation (and thus did not bear any cost) stand to reap the benefits stemming from the removal of CFTA-infringing measures. To further mitigate this, CFTA policymakers should consider an opt-in scheme whereby mutually agreeable governments consent to allowing complainants to themselves keep any monetary penalties awarded.

In the same vein, the study argues for reforms that expand the role of the CFTA Secretariat, and identifies best practices for the CFTA's novel Regulatory Reconciliation and Cooperation process. This study also offers reforms drawn from the examination of one regional trade agreement, the *New West Partnership Trade Agreement* (NWPTA), which has certain features that are superior to the CFTA. This study proposes 10 reforms to the CFTA that would enhance its effectiveness in promoting internal trade in Canada.

Policy Area: Trade and International Policy.

Related Topics: Labour Mobility; Political Institutions; Trade Policy and Negotiations.

To cite this document: Manucha, Ryan. 2020. *Internal Trade in Focus: Ten Ways to Improve the Canadian Free Trade Agreement*. Commentary 573. Toronto: C.D. Howe Institute.

C.D. Howe Institute Commentary© is a periodic analysis of, and commentary on, current public policy issues. James Fleming edited the manuscript; Yang Zhao prepared it for publication. As with all Institute publications, the views expressed here are those of the author and do not necessarily reflect the opinions of the Institute's members or Board of Directors. Quotation with appropriate credit is permissible.

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When railroad financier Donald Smith drove the last spike into the Canadian Pacific Railway in 1885, he may have helped establish the physical means of commercial interconnectivity, but true realization of national economic unity would remain elusive.

Now, 135 years later, the recent pandemic has highlighted just how economically interdependent Canadians are with one another, and the extent of the nation's intertwined domestic supply chains. As the economy re-opens after COVID-19, interprovincial trade barriers take on heightened significance.

Frustrated with the prevalence of internal trade barriers, Canadian politicians had tried to achieve greater economic integration by way of constitutional reform in 1992 through the Charlottetown Accord. When this effort failed, politicians passed the proverbial baton to a dedicated group of government officials, who negotiated and implemented the *Agreement on Internal Trade* (AIT), which came into effect on July 1, 1995. Every Canadian government agreed to a comprehensive set of trade obligations covering practices that included many that fell within provincial spheres of competence, along with a dispute settlement mechanism. Arguably, intergovernmental consensus on this scale in Canada was unheard of at the time.

The AIT helped Canadians make genuine progress in accessing procurement markets and having their qualifications more easily recognized in provinces other than their own. Still, it left many

barriers unaddressed, despite early promises and 14 rounds of amendments. Meanwhile, in some ways Canada's international trade agreements left the AIT in the dust, hampered as it was by a relatively weak institutional structure, including its muted dispute settlement mechanism, and coverage limited to a fairly static "positive list" of what was liberalized. The latter increasingly contrasted with the more dynamic negative list approach (wherein everything is liberalized that is not expressly excluded from the negative list) that had become the norm in Canada's international trade agreements.

Canadian governments once more took up the mantle, and began renegotiating in 2014. In 2017, the AIT was officially terminated, and the *Canadian Free Trade Agreement* (CFTA) took its place. The CFTA has existed for scarcely three years, and the overall program of internal trade agreements is but a quarter of a century old. Dispute panels have convened only 15 times to resolve legal arguments, all of which came under the AIT – not a single case has been brought under the CFTA. This *Commentary* recognizes that the national project of internal trade liberalization through trade agreements is still under construction. The new provisions that came online through the

The author gratefully acknowledges the insight, feedback and support of Daniel Schwanen, Ben Dachis, Grant Bishop, Dan Ciuriak and Larry Herman, as well as Timothy Dutton, James Fleming, Yang Zhao, Madeleine Reed, Maria Sheppard, Bradley Manucha, Lucas Manucha, Sean Manucha, Laurie Bellamy and anonymous external reviewers. The author is also thankful for the time and knowledge of innumerable interviewees across Canada. Finally, the author acknowledges the assistance of the Frederick Sheldon Fellowship at Harvard University, which made this research possible.

CFTA need time to work themselves out and bear their fruit. In a spirit of humility, this *Commentary* makes a set of recommendations for Canadian policymakers as they continue their nation-building work on behalf of all Canadians.

The chief focus of this *Commentary* is on improving access to justice under the CFTA through reforms to the dispute resolution mechanism. In the same vein, the study discusses an expanded role for the CFTA Secretariat, and best practices for the CFTA's novel Regulatory Reconciliation and Cooperation process. This study also identifies insights offered by one regional trade agreement, the *New West Partnership Trade Agreement* (NWPTA). Over the course of the discussion, the study proposes 10 reforms to the CFTA that would enhance its effectiveness in promoting internal trade in Canada (listed in online [Appendix A](#)).

PART I: FRAMING THE CONVERSATION ABOUT CANADA'S TRADE BARRIERS

Internal trade barriers divert economic resources away from their most efficient uses. Restrictions imposed on the movement of goods, services, people and investments across domestic borders curtail the enterprise of individual Canadians and

Canadian businesses. Barriers to trade often consist of minor variations in regulations and processes that amount to a tyranny of small differences,¹ whether it be different rules for truck weights, construction, health and safety, upholstered goods, professional qualifications or food labeling, to name a few.

Some progress has been made. By way of the CFTA, the provinces are close to a provisional agreement on harmonized rules for construction codes. Plus, the federal government has removed a final federal barrier to ease the flow of beer, wine and spirits across provincial and territorial boundaries. However, it's up to the provinces and territories to enact changes that would allow for direct-to-consumer sales of alcohol across Canada. In Ontario, for example, a consumer would run afoul of the rules by ordering BC wine online, rather than ordering through the Liquor Control Board of Ontario.

Recent economic estimates suggest that Canada's GDP would grow 4 percent with the elimination of internal trade barriers, and that the patchwork-nature of the Canadian regulatory landscape imposes the equivalent of a near 7 percent tariff on goods crossing provincial boundaries.²

Other arguments for liberalized domestic trade policy extend beyond the insights of economic

1 Term used by the Honourable Perrin Beatty, President and CEO of the Canadian Chamber of Commerce, before a Senate Open Caucus, October 17, 2018.

2 See Jorge Alvarez, Ivo Krznar and Trevor Tombe. 2019. "Internal Trade in Canada: Case for Liberalization," Working Paper 19/158, International Monetary Fund. See also B.J. Siekierski, "Interprovincial Trade Barriers Equal 6.7 per cent tariff: StatsCan Report," iPolitics (Sept 15, 2017) at < <https://ipolitics.ca/2017/09/15/interprovincial-trade-barriers-equal-6-7-per-cent-tariff-statscan-report/> > (accessed Nov 2, 2019).

models.³ Instead of focusing on the numbers, they invoke Canadian expectations of nationhood, as well as ideals such as equality and autonomy.⁴ Support for economic unity is often intertwined with notions of national identity.

These arguments for the “tearing down” of all trade barriers, however, if taken to their extreme, would destroy the federal fabric of Canada. The elimination of every trade barrier is the elimination of regulatory autonomy and experimentation. Each of Canada’s 13 sub-national jurisdictions are legislative laboratories, where governments test different forms of policy and consider the trials of other jurisdictions to discern its optimal form. Additionally, Canada’s 38 million people are spread across the world’s second-largest country by land mass. They face a diversity of challenges that require locally tailored approaches, and provincial legislation will – and must – manifest these differences.

While trade irritants may be a topic of general concern, policymakers should (and do) focus their attention on a specific subset: *unjustifiable* trade barriers. This *Commentary* recognizes the need for provinces and territories to be able to enact laws

that address sufficiently important local concerns but which may incidentally create an obstacle to the flow of commerce. The Canadian project demands decentralized policymaking in certain arenas.

Redress of internal trade barriers has been an ongoing initiative since the time of Confederation.⁵ Drafted as a part of the Constitution itself in 1867, section 121 ostensibly enshrines complete free trade for goods in Canada.⁶ It provides as follows:

“All Articles of the Growth, Produce, or Manufacture of any one of the provinces shall, from and after the Union, be admitted free into each of the other Provinces.”

However, the Supreme Court’s jurisprudence of section 121 reveals a narrowed interpretation of this constitutional obligation. In the 2018 case of *R v. Comeau*, the most recent decision of the nation’s highest court on the meaning of section 121, the Supreme Court expanded the scope of section 121, but still stopped short of making it equivalent to unfettered free trade.⁷ The Court provided that a trade barrier does not violate section 121 so long as it carries a *primary purpose* of something other than the restriction of trade.⁸

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- 3 For empirical economic research, see generally Delina E. Agnosteva, James E. Anderson, and Yoto V. Yotov. 2014. “Intra-national trade costs: Measurement and aggregation,” National Bureau of Economic Research No. w19872. Lukas Albrecht & Trevor Tombe. 2016. “Internal trade, productivity and interconnected industries: A quantitative analysis.” *Canadian Journal of Economics/Revue canadienne d’économique* 49:1: 237. Patrick Grady and Kathleen Macmillan. 2017. “Inter-Provincial Barriers to Internal Trade in Goods, Services and Flows of Capital: Policy, Knowledge Gaps and Research Issues.” Working Paper, Industry Canada, Ottawa. John Whalley. 1983. “Induced Distortions of Interprovincial Activity: An Overview of Issues” in Michael Trebilcock et al., eds., *Federalism and the Canadian Economic Union*. Toronto, Ontario Economic Council. Eugene Beaulieu and Mustafa Rafat Zaman. 2019. “Do Subnational Trade Agreements Reduce Trade Barriers? Empirical Evidence from Canadian provinces.” *Canadian Pub. Pol.* 45(1):1-15.
- 4 David Schneiderman. 1995. “Economic Citizenship and Deliberative Democracy: An Inquiry into Constitutional Limitations on Economic Regulation.” 21 *Queen’s L.J.* 125, at p. 128. See also Bryan Schwartz. 2002. “Lessons from Experience: Improving the Agreement on Internal Trade.” 2 *Asper Rev. Int’l Bus & Trade L.* 273, at 303-04.
- 5 See P.B. Waite, *The Confederation Debates in the Province of Canada, 1865*, (Montreal: McGill-Queen’s University Press, 2006) at 44-46 (Hon. George Brown speaking to Parliament on February 8, 1865).
- 6 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 121. [henceforth “*Constitution Act, 1867*”].
- 7 *R. v. Comeau*, 2018 SCC 15.
- 8 *Comeau*, at para 111.

The Supreme Court had good reasons to refrain from interpreting section 121 as a call for complete and unfettered free trade. An absolute free trade constitutional obligation would make impossible the ability of governments to regulate and legislate in the best interests of their electorates. Provincial public-health driven prohibitions and environmental controls would have faced immediate invalidation if section 121 carried such a firm meaning.⁹ *Comeau* echoes a long-standing reluctance of the Supreme Court to accord section 121 broad powers.¹⁰

In 1992, aware of the limited power of section 121 to liberalize internal trade, Canadian governments tried to strengthen that provision as part of the Constitutional reform attempt of the Charlottetown Accord.¹¹ When this failed, politicians shifted to an internal trade agreement to help achieve the same ends. Canadian governments came together and implemented the *Agreement on Internal Trade* (AIT) in 1995, which would tackle those obstacles to interprovincial trade that might otherwise survive constitutional challenge,

but which nonetheless injured interprovincial trade flows.¹² From 2014 to 2016, Canadian governments re-negotiated the AIT, culminating in its termination in 2017, and its replacement by the *Canadian Free Trade Agreement* (CFTA).¹³

The CFTA, as did the AIT, imposes a set of internal trade rules on Canadian governments. The Agreement also provides for a dispute resolution process, which allows a panel to hear claims that a party has violated its obligations under the Agreement. These obligations do not carry the force of law, and CFTA provisions do not displace constitutional obligations.¹⁴ In addition to this overarching national Agreement, the CFTA also contemplates and provides for the creation of supplemental bilateral or multilateral agreements amongst parties to the CFTA.¹⁵ One such manifestation of a regional trade agreement (RTA) is the New West Partnership Trade Agreement (NWPTA), to which British Columbia, Alberta, Saskatchewan and Manitoba currently belong.¹⁶

The use of a politically negotiated agreement to inculcate further Canadian economic unity

9 *Comeau*, at para 3.

10 See *Gold Seal Ltd. v. Dominion Express Co.*, 62 S.C.R. 424 (whether the amendments to the *Canada Temperance Act* were violative of section 121); *Atlantic Smoke Shops Ltd. v. Conlon and Attorney-General for Quebec*, [1941] S.C.R. 670 (whether a retail sales tax on tobacco sold within the province violated s. 121); *Murphy v. C.P.R.*, [1958] SCR 626 (whether restrictions on the shipment of wheat out-of-province violated s. 121); *Reference Re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198 (whether certain restrictions on the interprovincial movement of eggs violated section 121).

11 See Christopher P. Manfredi and Michael Lusztig. 1998. "Why Do Formal Amendments Fail? An Institutional Design Analysis." *World Politics* 50:3: 377–400 at p.386.

12 *Agreement on Internal Trade – Consolidated Version*, online: Agreement on Internal Trade < <https://www.cfta-alec.ca/wp-content/uploads/2017/06/Consolidated-with-14th-Protocol-final-draft.pdf> > (accessed 1 September 2019) [henceforth, "AIT"].

13 *Canadian Free Trade Agreement – Consolidated Version*, online: Canadian Free Trade Agreement < <https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf> >, (accessed 1 September 2019) [henceforth, "CFTA"]. See also CFTA Art. 1211.

14 CFTA Art. 1200.

15 CFTA Art. 1203.

16 *New West Partnership Agreement*, online: New West Partnership Agreement < http://www.newwestpartnershiptrade.ca/pdf/NWPTA_Jan_1_2019.pdf >, (accessed 1 September 2019) [henceforth, "NWPTA"].

came at a time when trade policy and multilateral agreements were in aggressive ascendancy.¹⁷ The choice of a political agreement was heavily influenced by the forces of international globalization and the recently completed multilateral trade and investment agreements amongst sovereign states such as the *General Agreement on Tariffs and Trade (GATT)* in 1994 and the *North American Free Trade Agreement (NAFTA)* in 1993.

With the passage of time and 25 years of experience with political agreements as a means to redress internal trade barriers, it is possible to consider some of that regime's strengths and shortcomings.

This *Commentary* advances several reforms for the CFTA, mainly in respect of its dispute resolution mechanism. Adversarial litigation plays an important role in domestic trade liberalization efforts, even if the heavy lifting is chiefly done through extensive and exhaustive interprovincial reconciliation. In numerous interviews with internal trade policy specialists, respondents repeatedly stressed that most trade irritants arise from the complex diversity of Canada's regulatory landscape.¹⁸ They will require extensive reconciliation, now facilitated by the institutionalized Regulatory Reconciliation and Cooperation (RCT) procedure.¹⁹

Notwithstanding the primacy of inter-government dialogue, the dispute mechanism plays a crucial role in Canada's internal trade regime. It provides a rules-based process to resolve disputes, giving Canadian governments an outlet other than ugly trade wars. It also helps mitigate

the imbalances of stronger and weaker provinces and territories, such that rules – rather than relative power – determine outcomes. Dispute resolution also serves as a backstop for issues that go unresolved at the conclusion of attempted reconciliation. And for private parties accustomed to norms of democratic accountability in the Canadian legal landscape, the dispute resolution mechanism offers an additional means to 'check' government regulation against Agreement obligations.

The reforms I propose frame access to the CFTA dispute mechanism as a matter of access to justice, particularly for smaller businesses. The pursuit of fairness and the entrenchment of legal rights drives the recommended reforms. Later on, this *Commentary* also engages in a comparison of the CFTA with the NWPTA, which points the way to possible further reforms for the CFTA's dispute resolution mechanism.

PART II: IMPROVING ACCESS TO JUSTICE UNDER THE CFTA

Proposed Reforms for the CFTA Dispute Resolution Mechanism

i Impediments Created by Cost Rules and Practices

The cost of launching a claim under the CFTA is substantial. When small business owners cannot afford to pay a lawyer the hundreds of thousands

17 G. Bruce Doern and Mark Macdonald. 1999. *Free-Trade Federalism: Negotiating the Canadian Agreement on Internal Trade*. Toronto: University of Toronto Press, at p. 11.

18 Confidential interviews conducted during 2018, 2019 and 2020. Anonymity was sought by and granted to many interviewees in the course of research for this *Commentary*. It allowed for fuller, more frank, discussions about internal trade.

19 CFTA Chapter 4.

of dollars²⁰ required to launch a claim against a barrier that violates a provision of the CFTA, those barriers go unaddressed, and that small business owner never gets her day in court. Compared to the WTO dispute process, the CFTA goes farther in allowing private parties to launch their own cases without needing the approval of a home government. However, certain procedural restraints and protocols impose a hindrance on access to justice.

One type of cost imposed on disputants is the cost to run the dispute panel, which litigants in Canadian courts ordinarily do not incur (though some Canadian courts require filing or court fees).²¹ These “Operational Costs” include the daily salaries of the *ad hoc* panelists and support staff, room rentals, and other related costs of running a tribunal-like panel.²² The CFTA, as did the AIT, allows dispute panels to “apportion Operational Costs among the Participants in such amounts as it considers appropriate.”²³ The

tradition for panels of first instance has been that an unsuccessful respondent pays half, and the complainant shoulders the other half.²⁴ For every intervenor joining the complainant, 5 percent of the cost is reallocated away from the complainant.²⁵ Thirteen cases came before an AIT panel, and in all but two, the panels assigned only 50 percent of the Operational Costs to the respondent, even though in each of those 13 cases the panel found against the respondent in whole or in part.²⁶ In *Ontario – Dairy (II)* the panel awarded the respondent Ontario an unprecedented 70 percent of Operational Costs, but that was in part because Ontario had failed to comply with the panel decision in *Ontario – Dairy (I)*.²⁷

A second form of costs under the CFTA (which also existed under the AIT) are Tariff Costs. The CFTA allows dispute panels to order losing governments to pay Tariff Costs to successful Respondents.²⁸ Tariff Costs in 2020 include legal

20 In discussions with past complainants who had engaged with the CFTA panel process, the legal costs of launching a claim routinely amounted to several hundreds of thousands of dollars. Identities of the interviewees have been withheld for confidentiality reasons.

21 Noel Semple. 2016. “The Cost Of Seeking Civil Justice In Canada,” *The Canadian Bar Review* 93:3: 639-673, at page 647.

22 CFTA Art. 1041.

23 CFTA Annex 1040(2), 1040(6), 1040(10), 1040(15); AIT Annex 1734(2), 1734(6), 1734(10), 1734(15).

24 Concluded from an assessment of the Operational Cost awards in each AIT case before a lower Panel of first instance.

25 See e.g. *Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Quebec Regarding Quebec’s Measure Governing the Sale in Quebec of Coloured Margarine* (23 June 2005), online: Internal Trade Secretariat <https://www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/2_eng.pdf> at 9-10 (accessed 1 September 2019) [henceforth, “*Quebec – Margarine*”], *Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the Manganese-Based Fuel Additives Act*, (12 June 1998), online: Internal Trade Secretariat <https://www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/8_eng.pdf> (accessed 1 September 2019) [henceforth, “*Canada – MMT*”].

26 The two cases were *Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the Manganese-Based Fuel Additives Act*, (12 June 1998), online: Internal Trade Secretariat <https://www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/8_eng.pdf> (accessed 1 September 2019) [henceforth, “*Canada – MMT*”] and *Report of the Article 1702(2) Summary Panel Regarding the Pre-Existing Dispute Concerning Ontario’s Measures Governing Dairy Analogs and Dairy Blends*, (24 September 2010), online: Internal Trade Secretariat <<https://www.cfta-alec.ca/dispute-resolution/ait-dispute-resolution-archive/>> (accessed 15 April 2020) [henceforth, “*Ontario – Dairy (II)*”].

27 See *Ontario – Dairy (II)* at p. 15.

28 CFTA Annex 1040(3), 1040(7), 1040(11), 1040(16).

fees, expert witness fees and charges for postage and travel.²⁹ Tariff Cost maximums are linked to the Consumer Price Index. In the 13 disputes, four resulted in Tariff Cost awards ranging from \$1,500 to \$31,991,³⁰ representing only a fraction of costs incurred by private parties.

One may roughly analogize the CFTA (and the AIT) to a contract, and thus internal trade disputes are akin to contract disputes. A survey of trial lawyers in the United States found that the average number of hours to prepare for contract litigation ranged between 234 and 440 hours depending on law firm size (there is no similar sufficiently granular survey of Canadian lawyers).³¹ In 2017, the average hourly rate for a civil litigation lawyer in Canada with 6-10 years of experience was \$315.³² This would produce legal costs ranging from \$73,710 to \$138,600. This may be a conservative estimate, as there are no private practitioners of Canadian domestic trade law. Any case brought

under the CFTA requires the lawyer to gain fluency in a 328-page Agreement, as well as principles of international trade law that underlie much of the Agreement. Unlike in ordinary Canadian litigation, where the prospect of damages if successful in court justifies up-front legal cost outlays, there is no such potentiality under the CFTA (any Monetary Penalty awarded to a private party goes to the Internal Trade Advancement Fund). These considerations would diminish the willingness of private parties to engage the CFTA dispute resolution mechanism from the outset.

Indeed, on account of the unique and unparalleled nature of the rules undergirding internal trade litigation, and on the basis of confidential interviews conducted, it is demonstrably the case that legal costs are far in excess of a traditional civil trial. They certainly exceed the \$1,500 handed to the private complainant in the *Crane Operator* dispute, and the approximately \$25,000 awarded to the private

29 CFTA Art. 1041, as amended by January 2020 Tariff Cost Rates, found at <https://www.cfta-alec.ca/dispute-resolution/> (accessed 14 April 2020).

30 See *Report of the Article 1716 Panel Concerning the Dispute Between Farmers Co-operative Dairy Limited of Nova Scotia and New Brunswick Regarding New Brunswick's Fluid Milk Distribution Licensing Measures*, (Sept. 13, 2002), online: Internal Trade Secretariat < https://www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/5_eng.pdf > (accessed 1 September 2019) [henceforth "*New Brunswick – Dairy*"] (\$31,140 awarded to the complainant as AIT Art. 1718(3) costs). See *Report of the Article 1716 Panel Concerning the Dispute Between the Certified General Accountants Association of New Brunswick and Quebec Regarding Quebec's Measures Governing the Practice of Public Accounting*, (Aug. 19, 2005), online: Internal Trade Secretariat < <https://www.cfta-alec.ca/dispute-resolution/ait-dispute-resolution-archive/> > (accessed 14 April 2020) [henceforth, *Quebec – Accounting*] (\$31,991.00 awarded to the complainant as AIT Art. 1718(3) costs). See *Report of the Article 1716 Panel Concerning the Dispute Between Mr. X, a Private Person from Quebec, and Ontario Regarding a Crane Operator Certification*, (Feb. 23, 2012), online: Internal Trade Secretariat < <https://www.cfta-alec.ca/dispute-resolution/ait-dispute-resolution-archive/> >, (accessed 14 April 2020) [henceforth "*Ontario – Crane Operator*"] (\$1500 Tariff Cost awarded). See *Report of Article 1716 Panel Regarding the Dispute between Artisan Ales Consulting Inc. and Alberta regarding Beer Markups*, (Jul. 28, 2017), online: Internal Trade Secretariat < <https://www.cfta-alec.ca/wp-content/uploads/2017/08/Decision-July-28-2017-Signed.pdf> > at 8 (accessed 1 September 2019) [henceforth, "*Lower Panel, Alberta – Beer Mark Ups*"] (50% of the then-permissible cap awarded to Artisan Ales).

31 Paula Hannaford-Agor. 2013. "Measuring the Cost of Civil Litigation: Findings From a Survey of Trial Lawyers." 22 *Voir Dire*. American Board of Trial Advocates: Dallas, Texas.

32 Mallory Hendry. 2017. "Priced for Value." *Canadian Lawyer Magazine*, June. Retrieved at <https://www.canadianlawyermag.com/surveys-reports/legal-fees/june-2017-priced-for-value/270508> (accessed 14 April 2020).

complainant at the panel-level in the *Beer Mark Ups* dispute.³³

There is the possibility of financial relief for a private litigant if a government agrees to bring forth that claim on behalf of the private party. In choosing to do so, the government absorbs the financial cost. However, as the case study below explores, political considerations can bear on a government's decision of whether or not to do so, and may lead that government to refuse, in which case that complainant must shoulder the costs on their own.³⁴

Case Study: In *Alberta – Beer Mark Ups*,³⁵ co-founders of Artisan Ales, a small business selling imported beer, had originally asked the Canadian government to initiate the claim against Alberta's beer mark-up scheme which discriminated against their out-of-province brews.³⁶ However, as Canada refused to do so, Artisan Ales incurred the substantial costs of launching the claim. Artisan Ales was assigned 45 percent of the operational costs for the lower Dispute Panel (where it had been successful against Alberta) and was awarded only 50 percent of the Tariff Cost cap (approximately \$25,000, mainly for their legal fees).³⁷ The government of Canada could have taken on the meritorious case on behalf of Artisan Ales (as it had asked) in which case the substantial costs would have been largely defrayed.

The explanation provided to Artisan Ales was that the federal government was wary of entering into a litigious position with Alberta as it could imperil other goals of the federal government.³⁸ Without the financial assistance of the Canadian Constitutional Foundation, the claim would have never made it before an AIT panel, and Artisan Ales would have gone out of business had the Alberta beer mark-up measure persisted.³⁹ This case study shows how governments are in a unique position to make possible the launching of claims by small businesses, or businesses with insufficient resources. Refusals can raise concerns about the perceived legitimacy of its decision-making. Looking forward, if Canadian governments are truly concerned about supporting and facilitating a reliable institution, and addressing barriers that affect small (not just large) businesses, they should address the ability of government to gate-keep cases such as this one.

The reality that private parties must typically pay 50 percent of their dispute's Operational Costs, combined with the fact that Tariff Costs are capped at an amount that falls well short of the actual legal costs, makes inaccessible the dispute resolution mechanism for smaller businesses, which limits the fairness of the agreement.

Admittedly, a countervailing consideration is that governments justifiably do not want to pre-

33 The figure of \$25,000 is a rough estimate, which halves the maximum compensation for legal fees under the January 2020 Tariff Cost cap schedule, which, though it was not the Tariff Cost Cap in effect at the time, still provides a reasonable approximation.

34 It should be noted that the small business which launched the claim was also based out of Alberta, and thus arguably this was an inappropriate case for the CFTA. The CFTA was designed to give certain powers to those citizens of Province A who could not effect political change in Province B as they were not part of Province B's electorate. Nevertheless, *Alberta – Beer Mark Ups* still demonstrates the power of the purse.

35 *Appeal of the Report of the Panel in the Dispute Between Artisan Ales Consulting Inc. and the Government of Alberta Regarding Mark-Ups on Beer*, (May 11 2018), online: Internal Trade Secretariat < <https://www.cfta-alec.ca/wp-content/uploads/2018/06/GOA-vs.-Artisan-Ale-appeal-report-Final.pdf> > at 15 (accessed 1 September 2019) [henceforth "*Alberta – Beer Mark Ups (Appeal Panel)*"]

36 Interview with Mike Tessier and Bo Vitanov, Artisan Ales Co-Owners, 18 October 2019.

37 *Lower Panel, Alberta – Beer Mark Ups* at page 11.

38 Interview with Artisan Ales Co-Owners, 18 Oct 2019.

39 Interview with Artisan Ales Co-Owners, 18 Oct 2019.

commit themselves to initiating all claims that a private party might submit. The following proposed reforms broker a compromise.

Reform #1: If a private complainant launches a CFTA claim and ultimately obtains an adjudication in its favour, the respondent government should bear all operational costs of the panel. More generally, the ‘loser-pays’ principle should apply in respect of the panel’s operational costs.

The principle that costs should be borne by the unsuccessful participant already has precedent in the NWPTA.⁴⁰ In the international arena, the notion that ‘loser pays’ is also an increasingly prevalent feature of the new generation of comprehensive trade agreements such as the Canada-EU Comprehensive Economic and Trade Agreement (CETA).⁴¹ The ‘loser-pays’ principle is also consistent with appellate panel practice under the AIT itself: in both appellate panels convened under the AIT, the unsuccessful appellants were assessed 100 percent of the operational costs.⁴²

ii *CFTA Success as a Public Good*

The problem of costs deterring a small business from launching an internal trade case are magnified when, typically, many similarly situated businesses

encounter the same trade barrier. Framed as such, any given barrier creates forgone economic opportunities that – in the aggregate – exceed the harm to any one potential litigant.

Moreover, a successful outcome for one particular commercial actor may be enjoyed by others who did not contribute to the cost of obtaining that particular legal ruling. Thus, because a successful CFTA outcome is a public good, private persons and companies are less likely to pay toward a successful outcome. Additionally, the fact that it is one’s competitors who will stand to benefit from the eradication of a trade barrier without having endured any of the considerable legal costs provides a further disincentive to the launch of a CFTA claim.

This insight explains why over the course of the 13 cases ever brought before an AIT panel, the types of complainants who launch a claim fall into one of two categories. The first category consists of complainants that protect the interests of a well-organized and well-financed industry. As an example, the first-ever case, *Canada – MMT*, saw disputed a measure that had direct and consequential impact on the oil and gas industry in Western Canada.⁴³ As a second example, AIT jurisprudence contains a set of cases launched by provincial accountancy associations, which were, in

40 NWPTA Art. 32(1).

41 Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen and Michael Waibel. 2017. “The Political Economy of the Investment Treaty Regime.” Oxford University Press, at p. 245.

42 *Report of the Article 1706.1 Appeal Panel Concerning the Dispute Between Saskatchewan and Quebec Concerning Dairy Blends, Dairy analogues and Dairy Alternatives* (26 January 2015), online: Internal Trade Secretariat < <https://www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/AIT%20Final%20appeal%20decision%20jan%2026.pdf>> (accessed 27 September 2019) [henceforth, “*Appellate Panel, Quebec – Dairy*”]; *Appeal of the Report of the Panel in the Dispute Between Artisan Ales Consulting Inc. and the Government of Alberta Regarding Mark-Ups on Beer*, (May 11 2018), online: Internal Trade Secretariat < <https://www.cfta-alec.ca/wp-content/uploads/2018/06/GOA-vs.-Artisan-Ale-appeal-report-Final.pdf>> (accessed 6 January 2020) [henceforth “*Appellate Panel, Alberta – Beer Mark-Ups*”].

43 *Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the Manganese-Based Fuel Additives Act*, (12 June 1998), online: Internal Trade Secretariat < https://www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/8_eng.pdf> (accessed 27 September 2019) [henceforth, “*Canada – MMT*”].

those cases, fighting to protect the ability of their members to provide accounting services in another province.⁴⁴

The second category are claims from parties who face an existential threat from the impugned measure. For example, in *PEI – Dairy*, Prince Edward Island had revoked the licence of a recently acquired PEI-based subsidiary of a Nova Scotia dairy company, threatening the entire value of that business acquisition.⁴⁵ Similarly, in *Alberta – Beer Mark Ups*, the impugned measure threatened the commercial survival of a foreign-beer agent that operated in the province. In both cases, the complainants were fundamentally threatened by the government measure.

A viable solution to this collective action problem is to make it possible for private parties to tap into the Internal Trade Advancement Fund to help further defray the legal costs of a successful CFTA claim. Upon application following a successful case, complainants, whose legal costs exceeded the maximum amounts set out by the Tariff Cost caps, should be eligible for a grant. Under the CFTA, Parties are already eligible for

“Additional Cost Orders” (orders for the payment of Tariff Costs that exceed the prescribed cap) but only from a compliance panel. These Additional Cost Orders are not available in panel or appellate panel proceedings.⁴⁶

Reform #2: Allow private parties to apply for grants from the Internal Trade Advancement Fund to cover at least some of the legal costs in excess of the Tariff Cost caps at both the panel and appellate panel stages.

iii *Issues of Enforceability*

The third structural reason why a less-than-optimal number of CFTA claims will be launched is in respect of enforceability.

Pursuant to a recent reform to the CFTA, each party agreed to take steps within 18 months of July 1, 2017 to ensure that Monetary Penalties and Tariff Costs⁴⁷ awarded against a government could be enforced “in the same manner as an order against the Crown in the Party’s superior courts.”⁴⁸ At CFTA Articles 1012(2)(a) and 1012(7)(a), drafters of the CFTA clearly articulated that Parties (i.e.,

44 See, e.g. *Report of the 1716 Panel Concerning the Dispute Between the Certified General Accountants Association of Manitoba and Ontario Regarding the Public Accountancy Act (RSO 1990, Chapter P-37) and Regulations*, (5 October 2001), online: Internal Trade Secretariat < https://www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/6_eng.pdf > (accessed 4 November 2019) [henceforth, “*Ontario – Accountants (I)*”]. *Report of the Article 1716 Panel Concerning the Dispute Between the Certified General Accountants Association of New Brunswick and Quebec Regarding Quebec’s Measures Governing the Practice of Accounting*, (19 August 2005), online: Internal Trade Secretariat < https://www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/1_eng.pdf > (accessed 4 November 2019) [henceforth, “*Quebec – Accounting*”]. *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), online: Internal Trade Secretariat < https://www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/Feb_13_2012_Report_Final_En.pdf > (accessed 4 November 2019).

45 *Report of the Article 1704 Panel Concerning the Dispute Between Nova Scotia and Prince Edward Island Regarding Amendments to the Dairy Industry Act Regulations*, (Jan. 18, 2000), online: Internal Trade Secretariat < https://www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/7_eng.pdf > (accessed 1 September 2019) [henceforth, “*PEI – Dairy*”].

46 CFTA Annex 1040.

47 Tariff costs are the reasonable costs incurred by a party or person in a proceeding in respect of: (i) legal fees to prepare for and attend the hearing, (ii) fees to experts, and (iii) charges for postage and travel. See CFTA Art. 1041.

48 CFTA Art. 1001(4).

governments) could seek the enforcement of both types of cost orders (i.e., Monetary Penalties and Tariff Costs) in a court of law.

However, there is no similar clause in the Person-to-Government procedural rules at CFTA Article 1029.⁴⁹ While Article 1030(2)(a) explicitly makes Tariff Cost awards to private parties enforceable, it does not include similar enforcement language for the Monetary Penalties provision at Article 1029. It could be argued that the language of Article 1001(4)(c) enables the enforcement of monetary penalties awarded to private parties, but this argument is dubious at best. A Canadian court is likely to take the notable absence in Article 1029 of a provision analogous to 1012(2)(a) and Article 1030(2)(a) as evidence of the lack of intent of drafters to make enforceable Monetary Penalty awards to private parties.

The Person-to-Government dispute provisions have an unusually wide scope relative to many of the internal trade agreement's international counterparts. Under the WTO framework for instance, private parties do not have a private right of recourse – instead, private parties must persuade their home governments to launch proceedings against a foreign country. Moreover, under NAFTA's successor, the CUSMA, Canadian litigants will have neither private nor state-initiated recourse for disputes under the trade deal after a three-year phase out.⁵⁰ In this respect, the CFTA (as did the AIT) goes well beyond a number of international models.

With the CFTA, as was the case under the AIT, Canadian governments must balance a credible and effective trade agreement with an erosion of their capacity to regulate in the best interests of their residents. Over time, while remaining vigilant

of this balance, the AIT was amended to make the dispute resolution more complainant-friendly. Monetary penalty caps were raised, an appellate panel procedure was introduced, and the Screener stage was eliminated. Canadian internal trade policymakers have made substantial changes to the procedure, making it a more attractive venue for litigants, while also navigating the precarious equilibrium noted above. Making monetary penalties awarded to private parties enforceable in courts would be but one more incremental change to the CFTA dispute procedure framework that is consistent with the trajectory of historical amendments to the AIT.

Amending the CFTA to make explicit that monetary penalties awarded to private disputants are enforceable in a Canadian court would also align with the purpose of CFTA penalties. The main goal of monetary penalties under the Agreement's framework is not to provide compensation for damages, but rather to serve as an incentive for governments to implement an adjudicatory decision. The prospect of penalties also acts as a deterrence for non-compliance. Under the CFTA's dispute resolution mechanism, monetary penalties awarded to private parties are paid to the Internal Trade Advancement Fund (ITAF). This money is used "solely to support special pan-Canadian research, education, or strategic initiatives that advance trade, investment, or labour mobility within Canada."⁵¹ Thus, any funds ultimately secured through the courts do not go to the complainant themselves, but towards the public interest. They do not provide private litigant damages, and their enforcement would further incentivize Agreement compliance. Giving private party complainants the means to force a government to pay what is owed to

49 CFTA Art. 1029.

50 Canada-U.S.-Mexico Agreement [CUSMA] (Draft) November 30, 2018, Annex 14-C.

51 CFTA Art. 1032.

the ITAF only further incentivises compliance with the CFTA, as is the purpose undergirding monetary penalties.

Pursuant to the 2017 reform, Canadian governments were to implement legislation that gave effect to the changes in the Agreement, including the revisions in respect of enforceability. The federal legislation suggests that monetary penalties awarded to private persons actually are enforceable: the *Canadian Free Trade Agreement Implementation Act* provides for the payment of Monetary Penalties or Tariff Costs in favour of a “party to the Agreement” (i.e., a Canadian government) or to “the person” (i.e., private persons).⁵² However, the implementing legislation of most provinces does not, in equivalent fashion, make explicit that awards to private parties are enforceable.⁵³

If it had been the intention of the drafters to make monetary penalties awarded to private parties enforceable, as the text of the agreement insinuates, and as the implementing federal legislation suggests, then Article 1029 should be amended to make this clear. There is no reason to leave this matter to dubious textual interpretation. Provincial statutes may provide for the enforceability of awards, but on account of the CFTA’s textual uncertainty, these alone do not resolve the question whether or not awards to private parties are enforceable. Making the necessary amendment to Article 1029 would also clearly announce this development to prospective litigants considering the avenue of CFTA litigation.

Even if it had not been the intention of drafters to make monetary penalties awarded to private

parties enforceable, the Agreement should still be amended at Article 1029 to allow for this.

Reform #3: CFTA Article 1029 should be amended to incorporate the language found at Article 1012(2)(a) and Article 1030(2)(a), making Monetary Penalties awarded to private parties enforceable in a court of law.

There is room to introduce to the framework of the Agreement the ability for a coalition of willing Canadian governments to take enforceability of monetary penalties one step even farther. Parties to the CFTA should add to the Agreement the framework for a consenting group of governments to opt-in to a scheme whereby private parties themselves are allowed to keep the value of the monetary penalties imposed by a compliance panel (rather than have the money pass through to an Internal Trade Advancement Fund). As noted above, monetary penalties have thus far been framed as a means to incentivize compliance and deter non-compliance. Generally, the CFTA has eschewed a conceptualization of monetary penalties as compensation for damages to private parties. Moreover, the CFTA drafters chose to threaten the access of a Canadian government to the dispute resolution process should they fail to comply with their CFTA obligations, instead of imposing additional monetary penalties on that errant government.⁵⁴

There is a reason why parties have resorted to “monetary penalties” in preference to awarding “damages.” An economic analysis of damages caused by a breach can be extremely complex and add months to an already lengthy process, not to

52 *Canadian Free Trade Agreement Implementation Act*, (S.C. 2017, c. 33, s. 219).

53 See, e.g. *Crown Liability And Proceedings Act*, S.O. 2019 c 7, Sched. 17, s. 28(f). See also, e.g., *Enforcement of Canadian Judgements and Decrees Act*, SBC 2003.

54 CFTA Art. 1033.

mention substantial costs.⁵⁵ Moreover, CFTA panelist credentials may be insufficient, and current rosters of adjudicators may not be competent to evaluate complex economic findings of damages.⁵⁶

However, the current means of calculating monetary penalties does not demand exhaustive economic analysis, nor does it require a compliance panel to equate monetary penalties with economic damages. CFTA adjudicators are granted the authority to impose monetary penalties in an amount that accords with the “seriousness of the inconsistency,” the “magnitude of the impact,” previous findings of inconsistency by other panels, and whether the “Complaint Recipient has made efforts, in good faith, to comply with the Agreement.”⁵⁷ The amount of the monetary penalty is not currently calibrated to the precise extent of economic damage – rather, it is more akin to a totality of the circumstances approach. Consistent with this conceptualization of monetary penalties, even if a monetary penalty could be kept by a private party, it does not need to be calculated on a precise economic basis. Admittedly, as a trade barrier’s aggregate costs typically exceed the costs imposed on a single complainant, it may be inappropriate to allow a complainant to retain the full value of the monetary penalty. But just as the Agreement already entrusts a CFTA compliance panel with discerning a monetary penalty that is contextually appropriate, it can also be relied on to conceive of a monetary penalty that is tailored to the circumstances of an individual complainant.

The purpose of allowing Canadian governments to pre-commit to an alternative dispute resolution mechanism that allows private parties to keep (at least some portion of) a monetary penalty would be to drive further liberalization. Not all Canadian jurisdictions would find this option tempting. However, other jurisdictions might conclude that the gains from liberalized trade are worthwhile. Providing for this option in the CFTA framework is consistent with the principles of Canadian federalism, which prizes subnational regulatory experimentation. Introducing an opt-in form of trade dispute resolution that encourages a greater volume of claims by opening up the possibility of monetary penalties that could be awarded directly to complainants allows those jurisdictions, so willing, to further the process of economic integration under the rules already provided by the CFTA regime.

Private parties are themselves able to retain the financial penalties in many of Canada’s investor-state dispute settlement obligations found in international agreements to which it is a party. For example, arbitral awards under the recently completed CETA are generally enforceable (though the mechanism itself is not yet in force). Canada is also party to the International Centre for Settlement of Investment Disputes (“ICSID”) Convention (the most popular mechanism to resolve investor-state investment disputes),⁵⁸ which is an agreement that essentially makes all investment arbitration awards against Canada

55 According to a survey conducted by the U.S.-based Expert Institute, the average hourly fee of an economics expert witness is approximately \$382.00 USD. Victoria Negron, “2018 Expert Witness Fee Report: National Trends,” (2018) Expert Institute, retrieved at <https://www.expertinstitute.com/resources/insights/2018-expert-witness-fee-report-national-trends/> (accessed 14 April 2020).

56 This is especially the case for Appellate Panel Rosters, which need not be composed of individuals with expertise in “matters covered by this Agreement” (i.e., trade law) unlike panel roster members, but rather, in Canadian administrative law. See CFTA Annex 1005.2(10).

57 CFTA Art. 1011, 1028.

58 The ICSID has hosted the majority of all known international investment cases. See [https://icsid.worldbank.org/en/Documents/ICSID_Web_Stats_2019-2_\(English\).pdf](https://icsid.worldbank.org/en/Documents/ICSID_Web_Stats_2019-2_(English).pdf).

enforceable in a Canadian court. Coupled with its ICSID membership, Canada is also party to a number of international investment and trade agreements where both Canadian and foreign litigants have a private right of recourse. These include the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, the CETA (though the ISDS mechanism is not as of yet in force), and a significant number of bilateral investment treaties between Canada and foreign countries.⁵⁹ Canada willingly makes enforceable those penalties owed to citizens and corporations of international partners – this same privilege should be extended domestically.

Another counterexample to the CFTA on this point is the NWPTA. The text of the NWPTA is explicit: “[e]ach Party shall provide under its laws that any monetary award...or any award of costs...shall be enforceable in the same manner as an order issued by that Party’s superior court.”⁶⁰ The NWPTA does not make a distinction between awards to private parties and awards to governments, unlike the CFTA. One interviewee noted that many had anticipated that the floodgates would open with NWPTA claims in light of its allowance for private parties to enforce and retain penalties, though this has not been the case.⁶¹ Thus far, only one dispute panel report has been issued under the NWPTA.

Allowing private parties to not only enforce monetary penalties made in CFTA cases in a court of law, but also to retain the amount of the monetary penalty, aligns with values that underpin a just and fair adjudicatory system, and introduces a self-commitment device that further incentivizes adherence to trade agreement obligations.

Reform #4: The CFTA should be amended to allow for governments to ‘opt in’ to a reciprocal arrangement of allowing the CFTA Monetary Penalties (or a portion thereof) awarded against them in favour of private parties be kept by those private parties, instead of passing through to the Internal Trade Advancement Fund. This would give private parties from Province A the ability to themselves keep monetary penalties, so long as Province A gives a similar privilege to private parties from Province B. Such a reform both propels the CFTA further in the direction of serving as an institution of justice, but also ensures that parties must offer such a privilege to out-of-province Canadians before allowing their own private parties to take advantage of it elsewhere inside the country.

To summarize, this section discussed reforms that can improve Canadians’ ability to seek recourse under the Agreement’s dispute resolution mechanism. First, the ability of smaller businesses to access the dispute mechanism would significantly improve with a loser-pays principle for the allocation of operational costs at the panel level in successful claims. This already occurs at the appellate panel stage, so making this the case for the panel stage is not a substantial departure from CFTA practices. Access would also improve by making available, on application, monies in the Internal Trade Advancement Fund to help defray the legal costs of successful litigants whose costs exceed Tariff Cost caps.

Second, the CFTA provisions on enforcement of monetary penalties by private parties are lacking. The text of the CFTA and the implementing federal legislation leaves ambiguous whether or not monetary penalties awarded to private parties are

59 See, e.g., *Agreement Between the Government of Canada and the Government of the Republic of Argentina for the Promotion and Protection of Investments*, *Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments*.

60 NWPTA Art. 32(4).

61 Confidential interview, January 2019.

enforceable in courts. Even if the drafters had not intended for these awards to be enforceable in a court, they should do so as it furthers the purpose of monetary penalties under the CFTA.

As a general proposition, the benefits of a successful CFTA adjudicatory outcome are a public good. Companies, persons and other governments who did not participate in the litigation (and thus did not bear any cost) stand to reap the benefits stemming from the removal of CFTA-infringing measures. In light of this, a third proposal was that CFTA policymakers should consider an opt-in scheme whereby government parties may consent to allowing complainants to themselves keep monetary penalties in return for reciprocal privileges for their own private parties.

If the cost to launch a CFTA claim for an individual firm in a particular industry exceeds the private benefit from striking down a barrier, then that barrier and its *aggregate* costs will go un-resolved under the CFTA dispute system. The concept of market failure explains how a less-than-optimal number of CFTA claims will be raised. Broadly speaking, launching a CFTA claim relies on a cost-benefit calculus; reforms that either lower costs or raise the expected benefits of launching a claim will mitigate structural barriers hindering access to justice under the CFTA.

That every case brought before an AIT panel has resulted in a ruling in a complainant's favour could be evidence of structural problems in the dispute resolution mechanism.⁶² One interpretation of this finding is that the disincentives to launching a claim are so substantial that actors are only willing

to advance claims if they know with absolute certainty that they will prevail. This leaves a great many barriers that happen to fall within a zone of uncertainty un-litigated and unresolved at least in part on account of the cost, the uncompensated advantage it offers to competitors, and the dubious enforceability of monetary penalties.

PART III: EXPANDING THE ROLE OF THE INTERNAL TRADE SECRETARIAT

When the AIT was originally negotiated, Alberta and the federal government pushed for an independent secretariat, akin to the WTO Secretariat, that would undertake research and policy-formation functions.⁶³ However, these two parties stood alone on this matter, as the other Canadian governments – especially Ontario and Quebec – preferred a minimalist institution.⁶⁴

There are legitimacy concerns with a large and proactive Secretariat. This issue has been examined in detail in the international context of the WTO Secretariat. For example, smaller and developing countries may perceive that Secretariat as another vehicle for larger, developed countries to achieve their own trade agendas.⁶⁵ Meanwhile, larger and wealthier WTO member states may grow concerned about its potential for the bureaucratization of the WTO, diminished organizational efficiency, and a weakening of member nations' oversight and control.⁶⁶

Concerns cited by critics of a strong WTO Secretariat are analogously applicable to a

62 Ryan Manucha. 2019. "A Court Where the Complainant Always Wins," *The Lawyer's Daily*, Lexis Canada March 11.

63 Douglas M. Brown, 2002. "Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada." McGill-Queen's Press-MQUP at p. 157.

64 *Ibid.*

65 Gregory Shaffer. 2005. "The role of the director-general and secretariat: Chapter IX of the Sutherland report." *World Trade Review*, 4:3 at pp. 429-438.

66 *Ibid.*

conversation about the ideal nature of Canada's own internal trade secretariat located in Winnipeg. The Secretariat is headed by a Managing Director, who reports to a Board of Directors. This Board is composed of individuals appointed by Canadian governments (each government appoints one Board member).⁶⁷ Consequentially, there is a lack of direct democratic oversight, which makes it preferable that the Secretariat maintains a relatively muted role in the context of internal trade policy. However, there is still room for the role of the CFTA Secretariat to expand without triggering concerns of democratic accountability. And one may look to the initiatives undertaken by the WTO Secretariat for precedent.

The WTO Secretariat performs a number of functions on behalf of its members that find no overlap in its Canadian counterpart. For one, it undertakes a host of public education initiatives, and disseminates widely accessible information about the international institution. Every year, the WTO Secretariat organizes its annual *Public Forum*, an event regularly attended by over 1,500 representatives from civil society, academia, business, the media and national governments.⁶⁸ The *Public Forum* conference provides a platform for participants to discuss world trade law developments and to propose ways of improving the multilateral trade system.⁶⁹ In comparison, the information services of the AIT/CFTA Secretariat is relatively limited. The Secretariat is

charged with publishing the final reports issued by dispute panels, responding to inquiries, revising its website, uploading updated texts of the Agreement, and composing annual reports.⁷⁰ In the past, the Secretariat has, on occasion, funded forums and reports on internal trade.⁷¹ However, there is nothing of the sort produced regularly.

The CFTA Secretariat, if provided the resources to do so, could host an annual conference to discuss pertinent topics of internal trade. The event could be held on the sidelines of the mid-year Council of the Federation meeting when Canada's First Ministers and their advisors are already travelling to the same location, and where internal trade is often a dominant theme. The forum could easily allow for online participation to enable maximal engagement. Speakers, legal practitioners, and trade law specialists from Canada's governments or across the world could be invited to address contemporary issues in trade law, and their application to Canada's domestic circumstances. Not only would the event raise issue salience for trade barriers or trade irritants, but it would raise the profile of the CFTA Secretariat, and the internal trade system as a whole.

The limiting factors of personnel and funding preclude the Canadian Internal Trade Secretariat from undertaking similar research and analysis to that provided by the WTO Secretariat, such as the annual *World Trade Report and World Trade Statistical Review*. The WTO Secretariat is composed of 630 persons many of whom are

67 Annual Report 2018–2019, Internal Trade Secretariat, (Canadian Free Trade Agreement) at page 6 (retrieved at <https://www.cfta-alec.ca/annual-reports/>).

68 WTO Public Forum, World Trade Organization, https://www.wto.org/english/forums_e/public_forum_e/public_forum_e.htm (accessed 14 April 2020).

69 WTO Public Forum, World Trade Organization, https://www.wto.org/english/forums_e/public_forum_e/public_forum_e.htm (accessed 14 April 2020).

70 Annual Report 2018–2019, Internal Trade Secretariat, (Canadian Free Trade Agreement) at pages 10–12 (retrieved at <https://www.cfta-alec.ca/annual-reports/>).

71 Christopher J. Kukucha. 2015. "Internal Trade Agreements in Canada: Progress, Complexity and Challenges." *Canadian Journal of Political Science* 48:1 at p. 199.

economists belonging to information divisions responsible for research and statistics.⁷² The Canadian Secretariat is staffed by five individuals and runs on a budget of \$600,000.⁷³

Properly resourced, the CFTA Secretariat could produce an annual publication for a general readership to explain current trends in trade law, ongoing initiatives of Canadian governments, and achievements over the past year. These publications would provide an opportunity to celebrate and elaborate on the monumental reconciliation being achieved by the RCT process. The Annual reports that the Secretariat already produces offer a fantastic framework from which to compose a derivative publication that brings life and colour to the work of the CFTA in a manner comprehensible to a general lay audience.

Reform #5: The CFTA parties should endow in the Internal Trade Secretariat the funds and direction to create and enhance its public-facing communications and information dissemination role. An annual conference and an annual publication for a general lay audience are two potential, concrete, suggestions.

PART IV: BEST PRACTICES FOR OPTIMAL EFFICACY OF THE REGULATORY RECONCILIATION AND COOPERATION TABLE

An innovation coming out of the 2017 re-negotiation of the AIT and its replacement by the CFTA was the Regulatory Reconciliation and Cooperation Table (RCT). It serves two

functions. For novel issues such as autonomous vehicles, it provides a means for the coordination of regulatory approaches across the country. And for extant regulatory conflict, it creates a venue for the reconciliation of differences found amongst jurisdictions. The RCT process helps Canadian governments arrive at mutually agreeable stances on particular regulatory divergences that may be both costly and unnecessary.

After briefly summarizing how the RCT process works, I provide a set of best practices for future working groups tasked with reconciling discordant laws and regulations. It is too early in the RCT's lifespan for the recommendation of reforms.

i How the RCT Process Works

Since the RCT was first established, experience has given way to a more fluid process. The exact procedural mechanics of the RCT were never laid out in the text of the Agreement. At the time of its creation, that it was included in the CFTA at all was a success, and had procedures been codified inside of the CFTA, the CFTA parties might never have been able to agree to the RCT.⁷⁴ Moreover, unlike the rest of the CFTA, which drew on CETA to serve as its basis, the RCT was conceived of “from scratch” in the sense that it was not derived from any model found elsewhere, either domestically or internationally.

Under the current informal procedures, the designated Internal Trade Premiers (Manitoba and Nova Scotia at the time of writing) have taken the lead on the implementation of the RCT. These premiers give instructions in respect

72 Gregory Shaffer, “The role of the director-general and secretariat: Chapter IX of the Sutherland report,” (2005) *World Trade Review*, 4:3 at pp. 429-430.

73 Internal Trade Secretariat, Canadian Free Trade Agreement, at <https://www.cfta-alec.ca/internal-trade-secretariat/>; Sarah Pittman, Carlo Dade, Martha Hall Findlay. 2019. “Toilet Seats, Trucking, and Other Trade Tie-Ups: A New Solution to the Old Problem of Canadian Internal Trade.” Canada West Foundation, November 27, at page 5.

74 Confidential interview, November 2019.

of the RCT on behalf of all premiers. Issues identified since 2017 have included inter-provincial corporate registration, agricultural inspections, and upholstered goods regulations, amongst many others. They are each specific issues that the political branches of government have designated for the RCT process. Many of the issues sent to the RCT process are not novel, such as varying regulatory requirements for upholstered and stuffed articles (which have persisted for some time), and industry has played a role in re-focusing the attention of political leaders to particular issues for reconciliation before this new venue.

These issues are then assigned to a working group that has relevant technical and policy capacity. Canada has many inter-jurisdictional bodies that preside over almost every legislative or regulatory issue in Canada. Commonly called Federal-Provincial-Territorial (FPT) working groups, these subject-matter groups are run by ministerial appointees from the various jurisdictions, who each have familiarity in the subject matter, and who themselves are accountable to their respective ministers. The RCT process typically assigns the job of reconciliation to the applicable existing FPT working group.

After a working group arrives at an agreement, the council of RCT representatives must then endorse it.⁷⁵ This ensures that the agreement was within the range of expected outcomes. The process of endorsement typically happens quickly.⁷⁶ Next, each government is to obtain the necessary signatures to give effect to the agreement arrived at by the working group. Depending on the jurisdiction and the issue at hand, this may require

ministerial or even cabinet sign-off, which may take many months or years.

However, as the following case study shows, even after a particular working group under the RCT framework comes to some agreement, it is not necessarily the case that parties will even adhere to it. Parties may choose to remove themselves from the reconciliation exercise prior to signing the agreement. This feature prevents the RCT process from forcing upon Canadian governments any measure or legislation.

Case Study: In 2019, a working group of the Regulatory Reconciliation and Cooperation Table arrived at agreement in respect of organic aquaculture.⁷⁷ One central issue was whether agricultural practices which use no soil, but instead use a closed-circuit system of water flow that nevertheless can grow produce without chemical supplements were entitled to use the designation of “organic.” After consultations with industry, the CFTA working group imported the industry standard as the applicable standard. As this issue fell under the jurisdiction of the federal government, the federal agency responsible incorporated by reference into its regulations the standard that would govern. Though this particular RCT process was unique (the federal government undertook limited consultation with other parties) the point of this example is to show how one party, or a coalition of parties, cannot force another government to adopt a particular measure under the RCT process. The Quebec agency in charge of the provincial “organic” designation inside Quebec announced after the RCT round table agreement that it would not employ the federal regulations which extended availability of “organic” to aqua-farmed terrestrial produce.⁷⁸ This is a defensible proposition: the European Union does not allow

75 CFTA Annex 404.

76 Confidential interview, November 2019.

77 Confidential interview, November 2019.

78 Press release, “Le CARTV Prend Position Sur L’Agriculture Biologique en Aquaculture,” *Conseil des Appellations Reservees et des Termes Valorissants*. 22 May 2019.

it, and *Codex Alimentarius*, the food standards issued by the UN and WHO, has not made proscriptions as of yet. Nevertheless, out-of-province producers of aqua-farmed agricultural products that send their product into Quebec may not benefit from the provincial “organic” label even though it would in every other Canadian jurisdiction.

It is not a bad thing that mere signing of an RCT Agreement does not give that policy legal effect. In fact, if RCT Agreements were enforceable after provincial RCT representatives gave their sign-off (without elected provincial officials giving their own sign-off) one might grow concerned about the way in which the RCT process could serve as a “back door” for imposing regulatory change in a particular province.

The RCT process serves two functions in the overall interprovincial trade regime. First, it provides an institutionalized forum to raise regulatory matters for reconciliation or coordination. Framed as such, it mitigates the limiting effects of ‘siloed’ governmental operation. Second, it offers a means of resolving differences without resorting to costly and adversarial dispute resolution. That being said, Canadian governments may have legitimate differences in opinion in respect of many of the issues brought forth to a working group under the RCT process.

There is no equivalent to the RCT process under the NWPTA. Instead, members of that Agreement pledged to reconcile regulatory differences, but do not have an institutionalized framework such as the RCT. This is one advantage of the CFTA over the NWPTA, in that the latter does not provide a framework for reconciliation.

ii *Best Practices for a Successful RCT Working Group Process*

The case study of the RCT process in respect of disharmonious construction codes across the country highlights a number of best practices that designated RCT working groups should employ.

Case Study: Construction codes across Canada evolved organically in response to local conditions, local material availability, local events/accidents, and path dependency. Provinces maintain constitutional authority over construction codes (though over time, there has been a move towards national model codes). Codes balance safety standards with economic development goals; disharmonious codes can create additional costs and frictions for builders, and ultimately, homeowners or renters. The task of harmonizing construction codes under the CFTA’s RCT framework was delegated to the Provincial/Territorial Policy Advisory Committee on Codes (PTPACC), which has a forthcoming provisional agreement. The PTPACC was originally formed several decades ago to harmonize various codes across the country, and it was determined to be the best choice for the RCT process for construction codes. Widely commended as a highly successful instance of the RCT process in action, the construction codes RCT working group provides a set of best practices for optimal RCT outcomes. The harmonization coming out of this particular RCT process is expected to provide cost savings of several billions of dollars within five years.⁷⁹

Best Practice #1: Political support from the Premier’s office is essential for the success of an RCT Working Group.

Political leadership at the highest levels of government proved crucial to the success of the RCT process for construction codes. Whether or not an RCT working group successfully completes

79 Confidential interview, November 2019.

its assigned tasks is highly contingent on political support and encouragement from the highest levels of government. The instruction coming from the offices of the premiers towards their applicable designee compels action in respect of harmonization, and precipitates solutions to coordination problems (both within a particular government, and also across governments). The added pressure, with the premier as the issue-champion, is more likely to generate solutions.

Best Practice #2: The designated federal-provincial-territorial working groups should assign technical work to a smaller, regionally diverse sub-committee.

Critical to the success of the PTPACC was that instead of having all members of the PTPACC work on construction code harmonization, the Committee created a sub-committee to take chief responsibility for technical work in respect of code harmonization. In the case of PTPACC, five jurisdictions (four provinces and the federal government) were members of the subcommittee, and it was its smaller size and regional diversity that drove the success of the RCT process. Though the other members of the PTPACC were routinely liaised with, the day-to-day technical work of harmonization was more effectively completed with a smaller, more focused group of representatives. Importantly, this mitigated unnecessary frictions and prevented work from slowing as naturally occurs when coordinating fourteen different entities. The regionally diverse composition of sub-committees is important to ensure wide-spread buy-in.

Best Practice #3: Adoption of strict but manageable working group deadlines and timelines

Important to the success of the building code working group was the creation of a manageable but strict timeline to coordinate the efforts of the relevant parties.

Best Practice #4: Consensus-based decision-making by the working group

At its essence, participation in the CFTA process is entirely voluntary. Canadian governments can theoretically back out at any time – although it is important to note that the agreement does not add to, but of course does not replace, existing constitutional rights or obligations of Canadian governments with respect to trade and mobility. A willingness to engage in the regulatory harmonization process relies on good faith and a spirit of collaboration. As such, the optimal mode of decision-making by a working group ought to be consensus-based. This is not new – the entire project of an internal trade agreement is rooted in consensus-based decision-making, which in the context of an RCT working group, can promote interpersonal and party-based harmony in the course of what can often be a highly complex and technical exercise.

Best Practice #5: Where applicable, self-binding via automatic adoption of reconciled agreements should be strongly considered

In the case of construction codes, Alberta unilaterally instituted automatic code adoption, and this proved highly effective for the entire process undertaken by PTPACC. What automatic adoption means is that when the RCT codes are published, whatever form they are in automatically takes effect within the province of Alberta. This was made possible by provincial legislation promulgated by the democratically elected members Alberta legislature – automatic adoption could not have happened otherwise. This legislation was enacted in advance of the RCT codes' publication, providing industry sufficient lead time to learn of the automatic adoption law. It effectively acts as a pre-commitment device. This automatic adoption was an important variable in driving harmonization in respect of building codes. It (i) gives certainty

to industry for planning and business development purposes, (ii) allows educational institutions to prepare to instruct the next generation of skilled labour by being able to rely on the draft code to revise curricula, and (iii) allows for the training of building inspectors in advance of promulgation so that they are prepared for day one. Automatic code adoption in Alberta also meant that the entire committee was more attentive to the issues, and especially to what was being changed. Fears that automatic code adoption cedes provincial control to an intergovernmental working group are unfounded: the relevant minister in each province still retains the authority to delay implementation of the code if need be. As such, the provinces that institute an automatic code-adoption provision retain a safety valve.

Best Practice #6: Where possible, working groups should convene in-person on a periodic basis

An important contributing variable to the success of the construction code RCT working group were periodic physical in-person meetings in various provincial capitals. The basis of voluntary harmonization rests on good faith and trust. Physical meetings are more likely to produce confidence amongst members of the working group.

PART V: THE VALUE OF THE NEW WEST PARTNERSHIP TRADE AGREEMENT

Within Canada, a flurry of regional trade agreements sprang up in the wake of the AIT in 1995.⁸⁰ The CFTA is thus complemented by other compacts that liberalize trade between certain provinces. The most important of these is the *New West Partnership Trade Agreement* (NWPTA) between four western provinces. The NWPTA serves an important supplementary function in the ongoing national project of economic growth and unity.

First, regional agreements such as the NWPTA allow those governments that wish to pursue a more ambitious program of unlocking the benefits of liberalized trade to do so in the company of other like-minded governments, under a scheme of reciprocal privileges. In the era prior to the CFTA, the NWPTA was viewed as farther-reaching than the AIT: in a report of the Standing Senate Committee on Banking, Trade and Commerce, the NWPTA provinces were commended “for the progress [they have] made.”⁸¹ The Committee went on to provide that “[t]his Agreement has been more successful at removing internal trade barriers than has the AIT.” The committee also professed the view that the NWPTA’s dispute resolution

80 For example: (1) the New West Partnership Agreement between British Columbia, Alberta, Saskatchewan and Manitoba; (2) the Trade and Cooperation Agreement between Ontario and Quebec; (3) the Labour Mobility and the Recognition of Qualifications, Skills and Work Experience in the Construction Industry Agreement between New Brunswick and Quebec; (4) the Agreement on the Opening of Public Procurement between New Brunswick and Quebec; (5) the Economic and Regulatory Partnership Agreement between New Brunswick and Nova Scotia; (6) the Labour Mobility and Recognition of Qualifications, Skills and Work Experience in the Construction Industry Agreement between Ontario and Quebec; and (7) the Atlantic Procurement Agreement between New Brunswick, Newfoundland and Labrador, Nova Scotia, and Prince Edward Island.

81 Report of the Standing Committee on Banking, Trade and Commerce, “Tear Down These Walls,” Senate of Canada (June 2016) <[https://sencanada.ca/content/sen/committee/421/BANC/Reports/2016-06-13_BANC_FifthReport_SS-2_tradebarriers\(FINAL\)_E.pdf](https://sencanada.ca/content/sen/committee/421/BANC/Reports/2016-06-13_BANC_FifthReport_SS-2_tradebarriers(FINAL)_E.pdf)> at page 5.

mechanism should be considered in place of the one found in the AIT.

Second, the ecosystem of regional agreements can serve to “pull” other jurisdictions forward in the enterprise of trade liberalization by demonstrating the advantages of alternative instruments or structures. One such example was when the NWPTA predecessor, the *Trade, Investment and Labour Mobility Agreement* (TILMA), was crafted using the negative list approach (wherein everything is considered to come within the scope of the agreement unless explicitly carved out). AIT parties, in contrast, used a more limited positive list approach (wherein policy areas or sectors had to be explicitly included to fall within the scope of the agreement). NAFTA, which was negotiated at the same time as the AIT, was a readily available example of a negative-list agreement, and yet Canadian governments opted against the same approach for its internal markets. However, the negative list approach of the TILMA/NWPTA had worked well, and CFTA parties would go on to adopt a negative list structure when they replaced the AIT. Just as Canada’s decentralized form of federalism allows for provincial laboratories of policy experimentation, the same can be said about experimentation in domestic bilateral and multilateral trade agreements.

Not all Canadian governments have the same incentives and motivations as one another in respect of the internal trade regime as a whole, or in respect of particular rules. One of the virtues of

Canada’s form of federalism is that provinces are endowed with substantial autonomy. This gives provincial governments the requisite sovereignty to pursue, or opt out of, a regime such as the NWPTA. During the original negotiation of the AIT, Doern and Macdonald (1999) noted how there were three camps of governments: “those interested in maintaining their ability to govern freely within their jurisdiction,” “those with a strong desire for internal trade,” and “those with a more mixed position.”⁸² For example, negotiators in 1995 widely noted that British Columbia was the most apprehensive and resistant to the idea of internal free trade.⁸³ Ironically, 15 years later, British Columbia was one of the founding parties to the even-more liberalizing predecessor to the NWPTA, the TILMA.

The ability of one regulatory regime to “pull” another towards greater trade liberalization is underpinned by the theory of “regulatory arbitrage.” This theory holds that private actors will geographically re-locate (or threaten to re-locate) to take advantage of a better regulatory environment elsewhere.⁸⁴ In some industries, a firm can remain physically present in their home jurisdiction and simply opt into another’s regulatory jurisdiction.⁸⁵ Canada and its network of trade agreements is one of many dimensions for regulatory arbitrage. Canadian legal scholar Albert Breton (1998) suggested that efficient competition in Canada is a desirable goal, as it ensures that public policies are designed in such a way as to maximize the national

82 Doern and Macdonald, at page 54.

83 *Ibid.* at p. 68.

84 Bruce G. Carruthers, and Naomi R. Lamoreaux. 2016. “Regulatory Races: The Effects of Jurisdictional Competition on Regulatory Standards.” *Journal of Economic Literature* 54(1).

85 Amir N. Licht. 1997. “Regulatory arbitrage for real: international securities regulation in a world of interacting securities markets.” 38 *Va. J. Int’l L.* 38, at p. 85.

welfare.⁸⁶ Competition amongst Canada’s internal trade agreements is one dimension of policy contest which may optimize Canadian public welfare.

The NWPTA is different in a number of respects from the CFTA, with the capacity to provide a competitive force and an experimental venue for different trade agreement structures. Below, I will explore the key ways in which the NWPTA differs from the CFTA.

Differences in Scope between the NWPTA and the CFTA

The NWPTA and CFTA do converge in scope, and this can be ascertained in part by what is excepted from these two negative-list agreements. For instance, government measures in respect of water and Aboriginal peoples are included as general exceptions in both agreements.⁸⁷ As well, some exceptions are merely different in terms of wording, rather than substance (i.e., the “social services” CFTA exception and the “social policy” NWPTA exception).⁸⁸

However, on other issues, the two agreements diverge in scope. In some cases this is simply a function of federal government membership: national security (an exception found in the CFTA) is solely within Ottawa’s constitutional jurisdiction, and thus a similar exception is appropriately absent in the NWPTA, to which the federal government is not a member.⁸⁹ In other cases, however, there

are more consequential distinctions in scope. For instance, the CFTA disciplines only those goods procurements by Crown corporations in excess of \$500,000; in contrast, the threshold under the NWPTA is much lower, which disciplines Crown corporation goods procurements in excess of \$25,000.⁹⁰ As another example, business subsidies/incentives are not disciplined by the CFTA’s non-discrimination obligation for goods, services and investment.⁹¹ Dissimilarly, there is no such carveout under the NWPTA.⁹² Of key significance however, the NWPTA provides that where there is overlap between the two agreements, the provision that is more liberalizing prevails; in that sense, the NWPTA provides for deeper liberalization.⁹³

Key Differences between NWPTA and CFTA

Key Differences Between the NWPTA and the CFTA
Speedier Dispute Resolution
Enforceability of Monetary Penalties by Private Parties
Private Parties May Personally Take Receipt of Funds Paid by a Jurisdiction Pursuant to a Monetary Penalty

1 Speedier Dispute Resolution Mechanism

The NWPTA dispute resolution mechanism provides for a faster resolution of claims than the CFTA. Though this difference is in part because

86 Albert Breton. 1998. *Competitive Governments: An Economic Theory of Politics and Public Finance*. Cambridge University Press.
 87 NWPTA Part V(A)(1); CFTA Art. 800, 803.
 88 CFTA Art. 805; NWPTA Part V(A)(f).
 89 CFTA Art. 801.
 90 CFTA Art. 504(3); NWPTA Art. 14.
 91 CFTA Art. 319; See also Ryan Manucha, and Ben Grant. 2020., “A Landmark Case on the Canadian Free Trade Agreement: Alberta – Beer Mark-Ups.,” *Canadian Business Law Journal*, 63:2 at page 233.
 92 NWPTA Art. 12.
 93 NWPTA Art. 1. However, the CFTA does have an analogous clause for inconsistencies with other domestic trade agreements in respect of labour mobility provisions. See CFTA Art. 703.

the CFTA offers appellate panel review, even the release of a report by a panel of first instance takes less time under the NWPTA than under the CFTA. A speedier process tilts the cost-benefit analysis of launching a meritorious claim further in favour of doing so.

The length of time it takes for a case to proceed through the dispute resolution mechanism can pose a substantial deterrence for a number of reasons. First, an elongated process entails higher legal costs for a litigant. And second, a prolonged process is a greater distraction from the ordinary operation of one's business. Additionally, a faster dispute resolution mechanism means that the harm stemming from a non-conforming measure is more quickly mitigated so that damages are substantially less in magnitude by the end of the proceedings than under the CFTA mechanism. By comparing the procedural rules of the CFTA with the NWPTA (and the WTO) below, it is possible to identify a number of CFTA procedural windows that may be shortened. There is no evidence that the NWPTA, with its faster dispute mechanism, deprives litigants of fundamental justice.

For a revealing comparison of dispute-settlement lifecycles under the two agreements, see online [Appendix B](#).

i Government response to a private person requesting that government initiate proceedings.

The first observation is the difference in the length of time given to a government to respond

to a private party who has requested that that government initiate the case on its behalf. Under the NWPTA, this process is allowed to take up to 21 days, and under the CFTA, this process can take up to 30 days.⁹⁴ Notwithstanding these prescribed timeframes, precedent demonstrates that CFTA parties have disregarded and exceeded the 30-day timeline. For example, in *Alberta – Beer Mark Ups*, Artisan Ales requested the government of Canada to initiate proceedings on its behalf on April 15, 2016.⁹⁵ Canada did not respond to Artisan Ales' request until June 10, 2016 – a full 56 days after the request was lodged.⁹⁶ Artisan Ales could have certainly proceeded earlier under the authority of 1016(2)(a). However, doing so would have been without the support of the federal government, and thus it is with reason that Artisan Ales waited to hear back from the Canadian government before choosing to move forward with a private complaint.

Reform #6: Amend CFTA Article 1015(3) to reduce the number of days given to a government to respond to a request to initiate proceedings by a private party.

ii Earliest date to request formation of a panel.

Under the CFTA, the text does not permit a party nor a private plaintiff to request the formation of a panel until 120 days after the request for consultations was made.⁹⁷ In contrast, under the NWPTA, a panel is to be established within 25 days of completing consultations (which means

94 NWPTA Art. 25; CFTA Art. 1015(4).

95 *Appeal of the Report of the Panel in the Dispute Between Artisan Ales Consulting Inc. and the Government of Alberta Regarding Mark-Ups on Beer*, (May 11 2018), online: Internal Trade Secretariat < <https://www.cfta-alec.ca/wp-content/uploads/2018/06/GOA-vs.-Artisan-Ale-appeal-report-Final.pdf> > at 2 (accessed 1 September 2019) [henceforth "*Appeal Panel, Alberta – Beer Mark Ups*"].

96 *Alberta – Beer Mark Ups (Appeal Panel)*, at 3. Note that even though this case was brought under the former AIT, even that agreement had stipulated that the party should take no more than 30 days to provide written notice about whether or not it would initiate proceedings. AIT Art. 1712(4).

97 CFTA Art. 1018.

Table 1: Comparing Timelines for Disputes

	Number of Days under the CFTA	Number of Days under the NWPTA	Number of Days under WTO Rules
Government response to private parties requesting that government initiate proceedings	30	21	N/A (Every country has its own regime)
Earliest date to request formation of a dispute panel	120	As few as 55	60
Maximum amount of time for appellate panel to issue appeal panel report	210	N/A (No appeal panel process under the NWPTA)	60 days, though up to 90 upon request*
Maximum amount of time for response to request for compliance panel	105	30	90

Note: * DSU Article 17.
Source: Author's compilation.

that a panel could be formed as few as 55 days after the initiate request for consultations was made).⁹⁸ This remarkable difference between the CFTA and NWPTA suggests that the pre-panel strictures as they stand arguably work to the advantage of governments seeking to stave off CFTA complaints. Some have argued that this 120-day minimum serves as a ‘cooling-off’ period.⁹⁹ However, the process of forming a legal claim and traversing the machinations of the CFTA process themselves are a lengthy procedure, and demands rational calculus rather than emotional impulse. Another argument is that 120 days is necessary to give enough time to conduct proper consultations. However, just because the formal consultation period has technically ended, this need not terminate consultations. Similar to how settlement arrangements are reached by parties in the course of ongoing litigation in the Canadian court system after the adversarial process has already started, CFTA parties are not precluded from arriving at mutually agreeable

outcomes with complainants with respect to trade barriers once panels have been formed. The full 120-day minimum is an unnecessary roadblock that unjustifiably interferes with the progression of meritorious claims against CFTA parties.

Reform #7: Amend CFTA Articles 1004 and 1018 to reduce the minimum number of intervening days between the request for consultations, and the request to form a panel.

iii Maximum time for appellate panel to issue appeal panel report.

Under the CFTA, the time from the date a request for an appeal is launched to the date an appellate report is circulated can be up to 210 days. There is no appellate proceeding under the NWPTA to which this time provision can be compared. However, at the WTO, the rules of procedure hold that the Appellate Body ordinarily has 60 days to circulate its report after a party has formally notified

98 NWPTA Arts. 24(4), 24(6).

99 Confidential interview, November 2019.

the body of its decision to appeal, with a potential 30-day extension available (thus a maximum of 90 days).¹⁰⁰

Admittedly, the WTO is a standing body and thus it does not take as much time to coordinate the necessary infrastructure as an *ad hoc* body. But even under the model rules of the Canadian Arbitration Association, which itself puts together *ad hoc* bodies of arbitrators to decide disputes, those arbitrators have 25 days after the conclusion of the hearing to issue their reports.¹⁰¹ Under the CFTA, this same exercise can take up to 90 days.¹⁰²

Notwithstanding the textual prescriptions, in the most recent case to come before the Agreement's dispute resolution mechanism, both the lower panel and appellate panel exceeded the deadlines. In *Alberta – Beer Mark Ups*, the lower panel issued its report 57 days after the hearing (exceeding the 45 days set out in the text), and the appellate panel issued its report 107 days after the appeal hearing (exceeding the 90 days set out in the text).¹⁰³

That the drafters of the CFTA entrusted in a lower panel the duty to arrive at a decision and issue its report at 45 days strongly suggests that it is well within the abilities of a set of adjudicators to arrive at a collective decision within 45 days.¹⁰⁴ The NWPTA also gives panelists 45 days to complete their reports, which is significant because it has no appeals body.

Notably, the maximum number of days to issue a panel or appellate report does not fluctuate regardless of whether the panel or appellate panel was composed of one or three adjudicators. If the

argument is that the length of time allows for internal discussions amongst the panel members, then at the very least the CFTA should limit the length of time a single panelist has to produce its report.

Reform #8: Amend CFTA Annex 1007.1(65) and 1024.1(65) to limit the number of days an appellate panel has to produce its report to 45 days.

iv *Maximum allotted time for compliance complaint recipient to respond.*

Under the CFTA, a recipient of a compliance complaint has up to 60 days to make its written submissions.¹⁰⁵ Because the compliance panel must wait to see whether the recipient party will make its own submissions, this window of 60 days not only unnecessarily lengthens the process, but can also be used as a delaying tactic. In contrast, the NWPTA provides that once a compliance panel has been requested, that panel has 30 days to convene, and inside of that time a compliance complaint recipient must make its submissions.¹⁰⁶

In the two other junctures within the CFTA dispute mechanism wherein a respondent is to make written submissions in response to a complaint (once at the lower panel stage, and again at the appellate panel stage) respondent written submissions are due within 45 days of complainant submissions. The sudden allocation of 60 days is arbitrary when viewed in light of the 45-day deadlines found in other parts of the CFTA dispute procedure.

100 DSU Art. 17(5).

101 Canadian Arbitration Association, "Arbitration Rules" (accessed December 12 2019). https://canadianarbitrationassociation.ca/?page_id=17.

102 CFTA Annex 1007.1(65), 1024.1(65).

103 *Lower Panel, Alberta – Beer Markups; Appeal Panel, Alberta – Beer Markups*.

104 CFTA Annex 1007.1(52), 1024.1(52).

105 CFTA Annex 1007.1(68), 1024.1(68).

106 NWPTA Art. 29(6).

Reform #9: Amend the CFTA Annex 1007.1(66) and 1024.1(66) to cap the number of days a compliance panel complaint recipient may take to make submissions to 45 days.

2 Enforceability of Monetary Penalties by Private Complainants & Ability to Personally Keep these Monies

Unlike the CFTA (as was previously discussed) the NWPTA allows private complainants to seek enforcement of monetary penalties against NWPTA-infringing parties. They may also keep these monies, unlike under the CFTA. However, the NWPTA *does* cap a party's liability. At Article 30(2), the NWPTA provides that "[i]n no circumstances shall a monetary award exceed \$5 million with respect to any one matter under consideration." This monetary penalty cap is actually less than the maximum penalty that can be awarded under the CFTA. For those parties with a population that exceeds 1,500,000 the maximum monetary penalty that may be awarded under the CFTA is \$10 million.¹⁰⁷

A LEGAL UNCERTAINTY: ARE NWPTA PRIVILEGES CFTA-COMPLIANT?

A Technical Legal Issue that May Have Significant Ramifications

It is at best legally uncertain whether or not special privileges accorded to members of the NWPTA must also be extended to other CFTA parties, even if those CFTA parties are not members of the NWPTA. It depends on the interplay between the

Most-Favoured Nation clauses (found at CFTA Article 201(1), for example) and the allowance for regional agreements such as the NWPTA found at CFTA Article 1203. This is a technical legal issue, and until such time as a complaint is lodged before a CFTA dispute panel (if that should ever happen), this ambiguity has no practical effect on the operation of the NWPTA. That being said, as this *Commentary* recommends later on, should Canada's internal trade policy community view Article 1203 Agreements as worthwhile, the CFTA should be amended to lessen the exposure of the NWPTA members (and members of other Article 1203 Agreements), and to ensure that the 1203 Agreements may take effect as envisioned by the drafters of the CFTA as evidenced by its inclusion.

At CFTA Article 201(1), the CFTA imposes the following obligation:

"Each Party shall accord to goods of any other Party treatment no less favourable than the best treatment it accords to its own like, directly competitive or substitutable goods *and to those of any other Party or non-Party.*"

This obligation requires Province A to give to Province B the same trading privileges it gives to Province C. On its own, Article 201(1) would prevent a NWPTA party from granting special trading rules to another NWPTA party without also giving them to a non-NWPTA party.

However, we must also look to CFTA Article 1203. The relevant portion of that provision provides that "[The CFTA] shall not prevent the maintenance or formation of a trade, investment, or labor mobility enhancing arrangement provided that...the arrangement liberalizes trade, investment, or labor mobility beyond the level achieved by this Agreement."¹⁰⁸ Thus, CFTA Article 1203 would suggest that those supplemental bilateral or even

¹⁰⁷ CFTA Annex 1011.2 and 1028.2.

¹⁰⁸ CFTA Art. 1203(2).

multilateral domestic trade agreements such as the NWPTA are allowed to operate notwithstanding the commitments of all Canadian governments under Article 201(1). However, this hinges on the question of what the agreement means by “liberaliz[ing]...beyond the level achieved [by the CFTA].” On the one hand, the NWPTA does liberalize trade more than the CFTA *amongst its members*. On the other hand, because the NWPTA creates preferential treatment for NWPTA-members, arguably it discriminates against trade from non-NWPTA CFTA members.

For instance, if Province A (a NWPTA member) gives Province B (also a NWPTA member) preferential space on its liquor store shelves originally occupied by domestic products, but does not provide this same space to non-NWPTA provinces, can NWPTA truly be deemed to have liberalized beyond levels of the CFTA?

The GATT Article XXIV maintains a provision similar to CFTA Article 1203. The GATT counterpart to the CFTA provision also allows for the creation of free trade zones amongst a subset of parties to the general agreement. However, unlike the CFTA, the GATT is explicit in carving out Article XXIV Agreements as being excepted from the application of the most favoured nation principle found elsewhere in the GATT agreement. In the relevant part, the GATT provides: “[the GATT] shall not prevent, as between [Member states], the formation of a...free-trade area... provided that...the duties and other regulations of commerce maintained...and applicable... to the trade of [GATT parties not member to the free trade agreement]...[are not] higher or

more restrictive [than that which existed prior to the formation of the free trade agreement].”¹⁰⁹ Essentially, the GATT allows for free-trade zone agreements so long as the trade rules with GATT members who are not part of those free-trade zone agreements do not suddenly become more restrictive.

In comparing the relevant portions of the GATT and the CFTA, it becomes clear that the CFTA text leaves relatively uncertain whether the special privileges accorded under Article 1203 Agreements (such as the NWPTA) are even permissible under the CFTA.

Reform #10: If Canada’s trade policy community truly desires a network of 1203 Agreements, which experience suggests work to spur greater liberalization across the country, the ambiguous language of CFTA Article 1203 should be re-written in the fashion of GATT Article XXIV in light of the CFTA’s Most Favoured Nation obligation.

CONCLUSION

Concerns for Canadian economic unity are not novel. Attention to internal trade barriers goes as far back as the era before Confederation in Canada, during which time the colonies of British North America commonly imposed tariffs on goods traveling amongst themselves in order to raise revenue.¹¹⁰ Nor are impediments to internal flows unique to our nation. As just one example, the historical narrative of Australian confederation – another British Commonwealth nation undergirded by many of the same federalism principles found

109 GATT Art. XXIV(5).

110 See P.B. Waite. 2006. *The Confederation Debates in the Province of Canada*, 1865. Montreal: McGill-Queen’s University Press, at 44-46 (Hon. George Brown speaking to Parliament on February 8, 1865).

in Canada – has threads parallel to that of Canada, with domestic economic unity of paramount concern.¹¹¹

It is important to contextualize the discussion of internal trade barriers in both time and space, in order to underscore that there is no single solution, and no single outcome, that Canadian policymakers ought to strive for. There is no “silver bullet” solution, both because there is no one answer, but also because any outcome in respect of the state of internal trade requires the use of many levers of economic and social policy. Canada’s trade policy community is well aware of this. The reforms proposed here for the CFTA Secretariat may serve to underscore this fact to the Canadian polity.

This *Commentary* chiefly focused on the CFTA’s dispute resolution mechanism. It may be the case that the future of Canadian internal trade barrier

resolution lies in the newly minted Regulatory Reconciliation and Cooperation Table (RCT) process, and this *Commentary* also provided a set of best practices for that device. However, an institutionalized dispute venue remains an integral part of Canada’s internal trade framework. It ensures that parties have recourse to a rules-based system to resolve tensions, instead of engaging in trade wars. It also provides private parties in Canada an opportunity to bring attention to unresolved barriers. The reforms proposed here are consistent with and advance the purposes undergirding the CFTA, and appropriately balance the competing concerns of regulatory autonomy with trade liberalization.

111 *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 101. Andrew Bell, “The Missing Constitutional Cog: The Omission of the Inter-State Commission,” (2009) *Bar News: The Journal of the NSW Bar Association*, <<https://search.informit.com.au/documentSummary;dn=571833922747055;res=IELHSS>> (accessed 25 Sept 2019). See also Stephen Gageler. 2017. “Chapter IV: The Inter-State Commission and the Regulation of Trade and Commerce under the Australian Constitution.” *Public Law Review* 28:3.

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