

Agreement on Internal Trade

**Report of the Article 1704 Panel Concerning the Dispute
Between Alberta and Canada Regarding the Federal
*Bank Act - Cost of Borrowing (Banks) Regulations***

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ABBREVIATIONS

AIT	<i>Agreement on Internal Trade</i>
HA	<i>Agreement for Harmonization of Cost of Credit Disclosure Laws in Canada – Drafting Template</i>
CBR	<i>Bank Act-Cost of Borrowing (Banks) Regulations</i>
MRCA	Ministers Responsible for Consumer Affairs
CMC	Consumer Measures Committee
APR	Annual Percentage Rate
AIR	Annual Interest Rate

1. INTRODUCTION

The subject of this report is a dispute brought forward by Alberta under Article 1704 (Request for Panel) of the *Agreement on Internal Trade* (AIT)¹ regarding the federal *Bank Act-Cost of Borrowing (Banks) Regulations* (CBR).

British Columbia and Québec joined Alberta in its dispute with Canada. The AIT allows other Parties with a substantial interest in the matter in dispute to join the proceedings.² A Panel was duly established under the provisions of the AIT. Its terms of reference are to examine whether the measure at issue is inconsistent with the AIT.³ As provided in paragraph 2 of Article 1707 (Report of Panel), the Panel report shall contain:

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

2. COMPLAINT PROCESS

In accordance with Article 809P4.2 (Consultations) of Chapter Eight (Consumer-Related Measures and Standards), by letter dated December 20, 2002, Alberta formally requested that Canada enter into consultations on the matter in question. Alberta cited consultations on the matter that had already taken place between the two Parties, as well as other consultations that had involved other Parties to the AIT. In light of such consultations, Alberta requested that Canada agree to reduce the timeframes for two of the steps under the Article 809P4 consultation process with a view to proceeding to the final step in the process: a request for the assistance of the Ministers Responsible for Consumer Affairs (MRCA). By letter dated January 7, 2003, Canada agreed that all of the steps in the Article 809P4 consultation process prior to a request for the assistance of the MRCA had been satisfied.

By letter dated February 11, 2003, Alberta formally requested the assistance of the MRCA in resolving the matter. The Ministers met by conference call on May 12, 2003. They were unable to resolve the matter but agreed to refer it to their Deputy Ministers for further consideration. Deputy Ministers were given until June 11, 2003 to find a

¹ *Agreement on Internal Trade*; Entered into force July 1, 1995. Unless otherwise specified “Articles” and Annexes” refer to the articles and annexes of the AIT. A consolidated version of the AIT is available on the website of the *Agreement on Internal Trade*: www.ait-aci.ca.

² Article 1704.9.

³ Article 1705.4.

solution to the dispute. On that date, the Deputy Ministers informed Ministers in writing that they had been unable to find a solution.

By letter dated November 7, 2003, Alberta requested the establishment of a panel under Article 1704 (Request for Panel).

A hearing of the Panel, which was open to the public, was held in Ottawa, Ontario on March 15 and 16, 2004.

3. THE COMPLAINT⁴

Article 807 (Reconciliation of Consumer-Related Measures and Standards) obliges the Parties, for the purposes of Article 405 (Reconciliation), to reconcile, to the greatest extent possible, their respective consumer-related measures and standards listed in Annex 807.1 (Reconciliation of Consumer-Related Measures and Standards). Paragraphs 7 to 10 of Annex 807.1 specify that the Parties are obliged to adopt harmonized legislation respecting cost of credit disclosure and identifies objectives that the harmonized legislation must meet, the forms of credit to which it must apply, the relevant federal legislation and the deadlines for completing negotiations on harmonization and implementing the harmonized legislation.

The Agreement for Harmonization of Cost of Credit Disclosure Laws in Canada – Drafting Template (HA) was negotiated by the Parties pursuant to Article 807 and Annex 807.1. The HA was approved by the MRCA at their November 13, 1998 meeting. Alberta contends that the HA represents the Parties’ consensus on reconciliation “to the greatest extent possible” with respect to cost of credit disclosure legislation. Alberta alleges that the federal CBR adopted in September 2001 are inconsistent with the AIT in that they deviate in at least two substantive ways from the HA:

- they do not require the disclosure of the Annual Percentage Rate (APR) for lines of credit; and
- they dispense with the requirement that a borrower obtain legal advice in order to waive a two-day cost of credit disclosure on mortgages.

In addition to the CBR’s alleged inconsistency with Article 807 and Annex 807.1, Alberta maintains that Canada breached Article 406.2 (Transparency) by not notifying Alberta

⁴ The complaints of Alberta, Québec and British Columbia are described more fully in their respective submissions to the Panel which can be found on the Internal Trade Agreement website: www.ait-aci.ca. The submissions are entitled: 1) Submission by the Complaining Party, Government of Alberta, December 22, 2003 (hereinafter Alberta’s Submission); 2) Written Submission from the Government of Québec, Intervening Party, January 22, 2004 (hereinafter Québec’s Submission); 3) Submission by the Intervening Party, the Government of British Columbia, January 23, 2004 (hereinafter British Columbia’s Submission).

and the other Parties to the AIT that the CBR would “materially affect the operation”⁵ of the AIT.

Finally, Alberta asserts that by creating disharmony between the federal and Alberta cost of credit disclosure laws, the CBR have created an obstacle to internal trade in contravention of Article 403 (No Obstacles).

Alberta alleges that Alberta regulated financial institutions have been injured because federally regulated financial institutions do not have to meet the same stringent cost of credit disclosure obligations as their provincial counterparts. In Alberta’s view, this places Alberta regulated institutions at a competitive disadvantage.

Furthermore, Alberta alleges that the disharmony between cost of credit disclosure requirements between federally regulated and Alberta regulated institutions has adversely affected consumer protection for Alberta residents.

Alberta asked the Panel to find that the two provisions of the CBR at issue:

- are an obstacle to internal trade as set out in Article 403;
- are inconsistent with Article 406’s transparency obligations;
- are not justified as a legitimate objective under Article 803; and
- do not to the greatest extent possible reconcile cost of credit disclosure legislation contrary to Articles 405 and 807 and Annex 807.1.

Alberta asked the Panel to recommend that the CBR be amended in accordance with the HA to require:

- that the 2-days advance notice provision on cost of credit disclosure on mortgages before the credit consumer incurs any obligation that would affect the APR be only properly waived upon the borrower obtaining independent legal advice; and
- that there be full disclosure of the APR for line of credit agreements, such disclosure including interest and non-interest costs where applicable as set out in the HA.

Québec agrees with Alberta’s allegations regarding the CBR’s alleged inconsistencies with the AIT. In addition, Québec alleges that the CBR are inconsistent with paragraphs 3(a) and 4(e) of Article 101 (Mutually Agreed Principles) and Article 102 (Extent of Obligations). Québec also alleges that the CBR establish a level of consumer protection below that established by the HA and current Québec cost of credit disclosure legislation. As the AIT does not oblige a Party to lower its current level of consumer protection in order to achieve harmonization of the measures listed in Annex

⁵ Article 406.2.

807.1, Quebec asserts that it does not intend to adjust its regulations to harmonize with the CBR.

Québec contends that the CBR cause significant harm to Québec consumers and businesses. In addition to the remedy requested by Alberta, Québec asked the Panel to direct the Government of Canada, as an interim measure until the CBR are amended, to immediately take all necessary measures to suspend the application and effects of paragraphs 7(2) and 10(1)(b) of the CBR.

British Columbia agrees with Alberta's and Québec's allegations regarding the CBR's alleged inconsistencies with the AIT. In addition, British Columbia alleges that the CBR are inconsistent with paragraph 3(b) of Article 101 and Article 1808 (Non-Conforming Measures).

British Columbia contends that by providing a competitive advantage to federally regulated institutions in the highly competitive financial market, the CBR impair internal trade and cause injury to provincially regulated institutions. British Columbia argues that, based on a prior panel's holding that proof of a demonstrable dollar amount is not necessary to establish injury, this Panel can make a finding of actual or potential injury by a common sense consideration of the significant shifts in market share that the CBR would cause.

4. THE RESPONSE⁶

Canada maintains that the CBR are consistent with the AIT and do not violate Articles 101, 102, 403, 405, 406, 807, and 1808 or Annex 807.1.

Canada contends that it has complied with the reconciliation requirements of Articles 405 and 807 and Annex 807.1 by minimizing any differences between the CBR and the HA to the greatest extent possible. The CBR's two deviations from the HA were made in response to concerns raised by stakeholders during consultations on a draft of the CBR and Canada contends that they provide a superior level of consumer protection to that provided by the comparable provisions of the HA.

Canada submits that the two deviations from the HA fall within the margin of flexibility afforded by the AIT and the HA, specifically, by subsection 1(4) of the HA.

Canada contends that it conformed to the transparency requirements of Article 406 by circulating the draft CBR to the provinces and territories in February 2000 and pre-publishing them in the *Canada Gazette* several months before they were registered on March 15, 2001.

⁶ Canada's response to the complaint is more fully described in *Submission of the Responding Party, Government of Canada, February 16, 2004* (hereinafter Canada's Submission) which can be found on the *Agreement on Internal Trade* website: www.ait-aci.ca.

Canada submits that the differences between the CBR and Alberta's cost of credit disclosure laws are so minor as to have minimal, if any, impact on internal trade. Further, the failure of other provinces and territories to amend their legislation to conform with the HA cannot be attributed to the differences between the HA and the CBR. Canada argues that even if the harmonization process has been impeded by the federal government's adoption of the CBR, it does not follow that an obstacle to trade has been created.

Canada argues that Alberta, Québec and British Columbia have not provided any documented evidence that provincially regulated financial institutions have been injured as a result of the alleged competitive advantage of federally regulated financial institutions. Canada submits that evidence of a shift in market share in favour of the federally regulated institutions with documentation of causation would be required to support the allegations of injury.

Canada submits that:

- the Panel should not find that the CBR are inconsistent with the AIT;
- no recommendations are required from the Panel; and
- the Panel should dismiss the complaint.

In the event that the Panel did find a breach of the AIT, Canada requested that, should the Panel recommend that the CBR be amended, it set out precisely how that should be effected:

- With respect to disclosure for APR for lines of credit, would it be acceptable for the regulations to stipulate the assumptions to be made on the part of banks with respect to the terms of the loan and the amount?
- With respect to the waiver of the cooling-off period, what advice must the borrower seek from a lawyer? Is it acceptable for the regulations to establish other conditions under which the borrower may waive the cooling-off period? If so, what is the nature of those conditions?

Canada also requested the Panel to provide direction on:

- how the Parties are to interpret subsection 1(4) of the HA; and
- how cost of credit legislation is to deal with frequently changing conditions in the credit market.

5. PANEL FINDINGS

5.1 Introduction

When the AIT entered into force in 1995, it could best be described as a work in progress. Throughout the AIT there were directives to the Parties to complete negotiations by a specified date or to ensure that their respective measures covered by the AIT complied with it. Chapter Eight (Consumer-Related Measures and Standards) was no exception to this general observation.

5.1.1 The AIT's Provisions on Cost of Credit Disclosure

Part IV of the AIT, which includes Chapter Eight, contains a number of "Specific Rules" dealing with various aspects of trade within Canada. Recognizing that standards can operate as obstacles to trade, the Parties assumed obligations respecting licensing, registration, and certification fees (Article 805), residency and local presence requirements (Article 806), and the reconciliation of consumer-related measures and standards (Article 807). At the same time Article 804, Right to Establish Consumer-Related Measures and Standards, confirmed each Party's respective right in pursuit of a legitimate objective to establish the level of consumer protection that it considers appropriate.

Article 807 is a chapter-specific version of a more generally worded provision found in the AIT's "General Rules". Article 405 (Reconciliation) provides:

- "1. In order to provide for the free movement of persons, goods, services and investments within Canada, the Parties shall, in accordance with Annex 405.1, reconcile their standards and standards-related measures by harmonization, mutual recognition or other means.
2. Where a difference, duplication or overlap in regulatory measures or regulatory regimes operates to create an obstacle to internal trade, the Parties shall, in accordance with Annex 405.2, cooperate with a view to addressing the difference, duplication or overlap."

Article 807 (Reconciliation of Consumer-Related Measures and Standards) elaborated upon Article 405:⁷

- "1. For the purposes of Article 405 (Reconciliation), the Parties shall, to the greatest extent possible, reconcile their respective consumer-related measures and standards listed in Annex 807.1 to a high and effective level of consumer protection. No Party shall be required by such reconciliation to lower the level of consumer protection that it maintains as at the date of entry into force of this Agreement.
2. The list of measures and standards in Annex 807.1 may be expanded in accordance with Article 809."

⁷ Article 800.2 states: "For greater certainty, Articles 400 (Application) ... 405 (Reconciliation) ... apply to this Chapter, except as otherwise provided in this Chapter."

While Article 807 did not expressly state that a federal-provincial/territorial negotiation would be initiated, all Parties understood that this is what the harmonization process would entail. Annex 807.1(7) (Reconciliation of Consumer-Related Measures and Standards: Cost of Credit Disclosure) listed the objectives of adopting harmonized legislation in this area and contemplated the conduct of negotiations:

“7. The Parties shall adopt harmonized legislation respecting the disclosure of cost of credit in accordance with the following objectives, among others:

- (a) to ensure that, before making a credit-purchasing decision, consumers receive fair, accurate and comparable information about the cost of credit;
- (b) to ensure that, with respect to non-mortgage credit, consumers are entitled to repay their loans at any time and, in that event, to pay only those finance charges that have been earned at the time the loans are repaid; and
- (c) to ensure that the disclosure is as clear and as simple as possible, taking into account the inherent complexity of disclosure issues related to any form of credit.

8. The harmonized cost of credit disclosure legislation referred to in paragraph 7 shall apply to all forms of consumer credit, including.

- (a) fixed credit such as loans for a fixed sum to be repaid in installments;
- (b) open credit such as lines of credit and credit cards;
- (c) loans secured by mortgage of real property;
- (d) supplier credit such as conditional sale agreements; and
- (e) long-term leases of consumer goods.

9. Federal legislation relevant to costs of credit disclosure includes:

- (a) the disclosure provisions in the *Bank Act* (Canada) and the federal cost of borrowing regulations;
- (b) the cost of credit disclosure provisions in federal legislation governing other federally incorporated financial institutions; and
- (c) the *Interest Act* (Canada).

10. The Parties shall complete negotiations on the harmonization of cost of credit disclosure no later than January 1, 1996, and shall adopt such harmonized legislation no later than January 1, 1997.”

Although the AIT does not define “harmonized legislation” it defines “harmonization” to mean “making identical or minimizing the differences between standards or related

measures of similar scope”.⁸ [Emphasis added.] This definition combines two different forms of collaboration. Governments may seek to establish a common or uniform standard (by making identical standards) or they may seek to minimize differences between their respective standards. In the latter case, continuing differences in regulation are contemplated and tolerated. Both processes are encompassed in the definition of harmonization.

Chapter Eight also established a committee to oversee the process of completing the work contemplated by the Parties. Article 809 established the Committee on Consumer-Related Measures and Standards (CMC) to monitor the Chapter’s implementation and administration, facilitate the process for reconciliation of consumer-related measures and standards, including the identification of such measures and standards for inclusion in Annex 807.1, provide a forum for discussion on issues relating to measures and standards, and to submit to Ministers an annual report relating to Chapter Eight.⁹

Although the cost of credit disclosure negotiations were not completed within the time frame set out in Annex 807.1, the Parties did finally arrive at an agreement. In a CMC conference call held on April 15, 1998, it was noted that the CCDL WG (Cost of Credit Disclosure Law Working Group) had approved a “template”. In an undated letter, the Co-chairs of the CMC reported this progress to the Alberta Minister responsible for this matter¹⁰ (and presumably to other Ministers Responsible for Consumer Affairs) noting that the template was finalized “[a]fter further rounds of consultations with key stakeholders (e.g., the Canadian Bankers Association, Canadian Finance & Leasing Association) and discussions among CMC members...”.¹¹ They mentioned that “Alberta has introduced legislation consistent with this template, to be enacted in the fall of 1998” and in conclusion noted the stakeholders’ continuing interest in the process:

“As you can appreciate, stakeholders are very anxious to see the final version of the template. In addition, they have expressed a keen desire to be able to monitor progress in the implementation of harmonization.”¹²

On June 1, 1998, the CMC formally approved the Agreement for Harmonization of Cost of Credit Disclosure Laws in Canada: Drafting Template (HA).¹³

5.1.2 The HA Briefly Described

The HA addressed “Consumer Loans” in Part I, which dealt with 10 subjects:

⁸ Article 200.

⁹ Article 809.

¹⁰ Alberta’s Submission, Annex 1, Tab 7.

¹¹ *Id.*

¹² *Id.*

¹³ Alberta’s Submission, CMC Minutes of April 15 Conference Call, Annex 1, Tab 6.

- (i) Annual Percentage Rate or APR;
- (ii) Disclosure Statements;
- (iii) Subsequent Disclosure;
- (iv) Prepayment of Loans;
- (v) Default Charges;
- (vi) Credit Cards;
- (vii) Brokered Loans;
- (viii) Cancellation of Optional Services;
- (ix) Informal Credit Arrangements; and
- (x) Advertisements.

Part II, which is not relevant to the issues in dispute here, dealt with Leases.

The HA's format warrants some description, particularly since it is a somewhat unusual product of negotiations with its "Introduction" section reflecting multiple objectives and purposes.

After recounting that the Ministers Responsible for Consumer Affairs had agreed "in principle" with the harmonization proposals of July 1996 and that they had requested the CMC to develop a technical template expressing the proposals in sufficient detail to guide legal drafting and to conduct technical consultations with stakeholders, the HA then describes its format:

"Format of this Paper

The following *draft agreement* reflects *recommendations by Consumer Affairs Ministers* and consultations by the Consumer Measures Committee with industry and consumer representatives on draft proposals issued in July of 1996. It provides the *policy decisions made in the course of the negotiations and approved by Ministers*, as well as a *boxed template* to assist individual jurisdictions in giving common legislative effect to these policy decisions.

Additional policy clarifications and items proposed by the Working Group as a result of stakeholder comments and deliberations subsequent to the September 1996 Ministers' Meeting are in bold text.¹⁴ [Bolding in original; italics added.]

The HA thus simultaneously comprises a "draft agreement" with "recommendations" by Ministers, "policy decisions", a "boxed template" to assist jurisdictions to give common legislative effect to the policy decisions, and "additional policy clarifications and items"

¹⁴ Harmonization Agreement, p. 1, "**Format of this Paper**". [Bolding in original.]

proposed by the Working Group of officials who drafted the agreement on behalf of the CMC.

The HA then sets out the objectives of the proposed reforms, namely, “to harmonize laws and develop uniform cost of credit disclosure requirements in order to reduce compliance costs and provide uniform consumer protection across Canada, to clarify and, where possible, simplify cost of credit disclosure rules; and to modernize laws to take account of developments in credit markets in recent years”. It “is intended that consumers will benefit from a consistently high standard of protection and that businesses will be able to use the same procedures, credit advertisements, disclosure statements and disclosure in contracts in all parts of the country”. Finally, the paper notes that the “harmonization agreement is intended to cover a core subject matter of cost of credit and long term leasing disclosure to consumers” and “[j]urisdictions reserve the right to apply the harmonized standard more broadly, to otherwise engage in substantive regulation of credit and leasing practices, and to address enforcement and compliance issues individually in ways that do not reduce the practical level of harmonization on the core subject of consumer disclosure”.¹⁵ The next section, entitled “Application”, states that “[h]armonization will apply to all federal and provincial laws governing disclosure of the cost of consumer loans” and identifies the relevant federal financial institutions laws (and the *Interest Act*) and provincial consumer protection and financial institution laws as the subjects of the harmonization process.¹⁶

This is followed by a section entitled “Compliance”, which states in bolded text:

“Individual jurisdictions will have the discretion to decide how they will enforce the harmonized provisions.”¹⁷

The Introduction then presents the first of a series of “Drafting Template Proposal(s)”, setting out a suggested section 1 of a jurisdiction’s regulation on cost of borrowing disclosure:

“Drafting Template Proposal:

S.1

(1) *In this section, “borrower”, “credit grantor” and “credit agreement” include a lessee, lessor and lease, respectively.*

(2) *Subject to the following paragraphs, these harmonized provisions only applies to*

a) *a credit agreement made by a credit grantor in the course of carrying on a business, or*

b) *credit agreement arranged by a broker whether or not the credit grantor enters into the agreement in the course of carrying on a business.*

¹⁵ *Id.*, pp. 1-2.

¹⁶ *Id.*, p. 2.

¹⁷ *Id.*, p. 2.

- (3) *The harmonized provisions do not apply if,*
- a) *the credit agreement is a business credit agreement; or*
 - b) *the borrower is not a natural person.*

(4) *The Regulation making authority may, by regulation, exclude any class of credit agreement or class of credit grantor or broker from the application of the harmonized provisions or modify the application of any the (sic) provisions with respect to any class of credit agreement or class of credit grantor or broker.* [Italics in original; underlining added.]

The Panel will revert to the underlined subsection 1(4). For present purposes, it warrants noting that this sub-section assumes pivotal importance in the present dispute and that it appears to stand in contrast to the HA's previously-stated objectives. While the negotiations were aimed at uniformity and consistency of credit disclosure legislation, subsection 1(4) states that a jurisdiction may *exclude* credit agreements or credit grantors from the application of the harmonized provisions or modify the application of its provisions to any class of credit agreement or credit grantor. This power to exclude appears to reflect an intent to retain each jurisdiction's discretion to act differently from other jurisdictions and underscores the fact that the drafters were contemplating harmonization rather than a model law to be implemented in accordance with its terms by each AIT Party.¹⁸

Finally, the Introduction contains a concluding section based on paragraph 7 of Annex 807.1 entitled, "Purpose of Cost of Credit Disclosure Law":

"The objectives of the harmonized laws are those which have guided development of cost of credit disclosure legislation in the past. They are to ensure that:

¹⁸ Canada's Submission, Tab 25, pp. 4-5, contains a submission by the Ontario branch of the Canadian Bar Association on an earlier version of the HA released for public comment by the CMC on September 26, 1997. In its submission, the CBA-Ontario criticized the template approach and foreshadowed the present dispute: "...Rather than working toward a uniform or model statute which would integrate the principles agreed to by the Ministers, the Drafting Template merely provides what are essentially disjointed provisions even though they are cosmetically arranged in sequentially numbered sections. *Clearly, these provisions are nowhere close to a statute.* It seems to be contemplated that each of the individual jurisdictions will from this genesis draft its own statutory language. The prospect of provisions being separately drafted in ten or more jurisdictions is not an attractive one. This process for developing legislation Canada-wide belies consistency. Inconsistent legislation will likely contribute to consumer uncertainty and inequalities. *...It will also perpetuate the problems currently faced by credit grantors who carry on business in more than one jurisdiction. The Drafting Template itself highlights in a great number of places the fact that individual jurisdictions have expressly reserved the right to deal with a topic as they see fit.* This apparent lack of consensus is reflected further by the fact that the Drafting Template also contemplates many matters which are to be addressed in regulations. *For example, regulations are to address significant matters such as classes of credit agreements or classes of credit grantors to be exempted from the provisions, modifications of the provisions with respect to certain classes of agreement or credit grantor, 'default charges', the meaning of 'plain language', and so on. Presumably, each jurisdiction is to set its own policies as to such important matters, and then draft its own regulations in its own fashion ...*". [Emphasis added.]

- consumers receive fair, accurate, timely and comparable information about the cost of credit in order to obtain the most economical credit for their needs;
- disclosure and disclosure requirements be as clear and simple as possible, given the inherent complexity of the subject matter;
- consumers be entitled to pay off loans (other than mortgages) at any time, and if they do so, incur only those finance charges earned up to the time at which the loan is paid off. Collateral mortgage loans are subject to the same prepayment rights as regular loans.”

The HA then notes that given the complexity of credit transactions, it is important that disclosure documents be in plain language (and sets out the second drafting template proposal in that regard) and thereafter addresses the various components of the cost of credit disclosure harmonization agreement, beginning with the Annual Percentage Rate (APR).

The APR is one of the matters at dispute in this proceeding. The APR measures the cost of borrowing for a credit agreement and is expressed as an annual percentage rate that includes the Annual Interest Rate. It is an important means by which the comparability of different credit offers can be ascertained. The idea is that the lender must disclose not only the interest rate but all non-interest charges that may be levied. The policy concern is that if Lender A stipulates an APR of, for example, 9% and Lender B stipulates an Annual Interest Rate of 8%, plus charges, the consumer may be led to conclude that Lender B is offering cheaper credit than Lender A, when this may not be the case.

5.1.3 The HA’s Implementation

Having concluded the HA, the next step in the intergovernmental consultation process was to secure ministerial approval of the drafting template.

A Draft Report to Ministers prepared by the Office of Consumer Affairs, Industry Canada, dated October 6, 1998, addressed the projected timelines for implementation by governments.¹⁹ It noted that Alberta’s 1998 *Fair Trading Act* was scheduled to be proclaimed on September 1, 1999 along with its accompanying regulations. In Canada’s case, reference was made to the 1997 amendments to the regulation-making power in the *Bank Act*. As for the federal regulations, the Report indicated that: “Bank Act Regs are in the drafting stage: implementation is scheduled for 1999.”²⁰ At that time both Canada and Alberta appeared to have similar timelines for producing their regulations.

¹⁹ Alberta’s Submission, Annex II, Tab 1, p. 2

²⁰ *Id.*

Section III of the Report, entitled, "Implementation Issues" addressed a number of issues. Of particular interest to this dispute are items b., "*Who implements first?*", and c. "*True harmonization.*"²¹

With respect to "*Who implements first?*," the Report stated:

"CMC discussions indicated a reluctance by some smaller jurisdictions to move ahead with implementation in advance of larger jurisdictions. They expressed concern about finding themselves alone with new rules.

There was agreement among CMC members on the importance of having a critical mass of larger jurisdictions moving forward with implementation and there had been progress on this front. Alberta has already moved ahead with new legislation and has shared its *Fair Trading Act* with all jurisdictions. The federal government has amended legislation and *shared draft regulations with all jurisdictions*. Ontario and Québec have both indicated that they plan to amend (or introduce) legislation later this year and regulations by June 1999. This gives smaller jurisdictions more certainty with respect to the substance and timing of implementation in a critical mass of larger jurisdictions." [Emphasis added.]

With respect to "*True harmonisation*" the Report stated:

"*Stakeholders have expressed concern that different jurisdictions may implement different rules.* While the template provides a significant degree of direction regarding harmonisation, there are issues of interpretation by drafters which could lead to different language in the legislation and regulations.

CMC has a strong commitment to true harmonisation and supports stronger informal cooperation among officials and drafters across jurisdictions. *Much of the template is likely to be covered in regulations so cooperation on drafting regulations is recognized as particularly important.* [Emphasis added.]

Efforts to date include:

- The federal Department of Finance shared confidential draft regulations with provinces and territories to seek comment.
- Valuable input was received from Alberta, Québec and Ontario. Alberta plans to send its draft regulations to CMC members and their drafters early this fall.
- Alberta's Chief Legislative Counsel will be sharing Alberta's draft regulations with his counterparts from other jurisdictions during this group's annual meeting in September."²²

The Draft Report also commented on the staging of implementation across the country, given the obvious interest of stakeholders in terms of modification of their contracts and disclosure practices, etc.:

²¹ *Id.*, pp. 3-4.

²² *Id.*, p. 4.

“Stakeholders have a particular interest in the date which new regulations go into force in the larger jurisdictions. Based on the table in Section II, the federal government, Alberta, Ontario and Québec will be implementing the new regulations in 1999. *Close cooperation among these jurisdictions on the timing and substance of their regulations will help to provide some certainty and direction to stakeholders...*”²³ [Emphasis added.]

Finally, the communications strategy to be implemented by the Parties contemplated that the CMC would play a role both in monitoring and independently assessing how each Party’s legislation and regulations implemented the HA:

“The CMC will be monitoring implementation on an ongoing basis to assess the degree of “real harmonization” and will sponsor an independent assessment based on draft regulations available in the late spring...

The Consumer Connection section of Industry Canada’s Strategies website is proposed as the focal point for ongoing information-sharing with stakeholders...”

And:

“Conclusions from CMC’s *proposed independent assessment* of new legislation and regulations could be shared with stakeholders through the *Consumer Connection* website.”²⁴ [Emphasis added.]

The CMC submitted the Report to Ministers on the Cost of Credit Disclosure Legislation Harmonization at their meeting in Charlottetown on November 13, 1998. The Ministers accepted and approved the Report and also “endorsed the common communication strategy.” According to the “Summary of Proceedings” of that meeting, the Federal Minister, the Hon. John Manley:

“...encouraged all governments to continue the progress in bringing the legislation to law.

He indicated that the communications strategy in the documentation suggests posting provincial legislative and regulatory developments on the Consumer Connections Website at Industry Canada. He said that the harmonization effort provides a good example of what can be achieved through federal-provincial-territorial cooperation. He added that the objective is to have consumers better informed and allow them to learn what is involved in discerning the cost of credit.”

As the October 1998 Draft Report to Ministers contemplated, Alberta was the first jurisdiction in Canada to implement the HA and it duly shared its draft legislation with the other Parties to the AIT. Alberta’s *Fair Trading Act* and related *Cost of Credit Disclosure Regulation* both entered into force on September 1, 1999. Alberta followed the HA closely, requiring the APR to be disclosed in all forms of credit agreement for open credit and implementing the waiver of the 2-day cooling off period for mortgage loans if the borrower obtained independent legal advice. Alberta added two other means by which the 2-day cooling off period could be waived and there was some dispute as to whether this was as faithful to the HA as Alberta claimed. Canada asserted that Alberta did not implement the waiver period in the manner contemplated

²³ *Id.*, p. 5.

²⁴ *Id.*

by the HA.²⁵ Alberta responded at the hearing that it had merely provided for more favourable conditions for its borrowers, as expressly permitted by the HA.²⁶ For the purposes of this dispute, which focuses on Canada's measure, this argument need not be resolved.

The timing of Alberta's implementation warrants noting. It brought its legislation and regulations into force shortly after receiving the first draft of the *Cost of Borrowing (Banks) Regulations* (CBR) from the federal Department of Finance. (By letter dated August 20, 1999, the Department of Finance transmitted its draft CBR to each province.) As shall be seen, this first version of the CBR was HA-consistent. Alberta's complaint concerns the second version of the regulations which ultimately entered into force on September 1, 2001.

Canada was the next jurisdiction to implement the HA. After the first draft of the CBR had been drafted and distributed to the provinces for comment, the federal Department of Finance initiated its own stakeholders' consultations as required by the *Government of Canada Regulatory Policy*.

Following such consultations, Canada chose to exclude lines of credit from the HA's requirement that the APR be disclosed. Canada required that banks disclose all non-interest charges in addition to interest charges, but did not go the further step of requiring that they be disclosed as an APR.²⁷ Canada also varied the 2-day cooling off period waiver for mortgages. Instead of requiring the borrower to obtain independent legal advice in order to waive the 2-day period, the CBR permitted the borrower to simply waive the period.²⁸ These are the two aspects of the Canadian measure at issue in this dispute.²⁹

Although some provinces took initial steps to implement the HA, since Canada's CBR have been promulgated, none have brought legislation or regulations into effect.

²⁵ Canada's Submission, paras. 90-95.

²⁶ Hearing Transcript, pp. 63-64.

²⁷ Canada's Submission, paras. 55-56.

²⁸ *Id.*, para. 64.

²⁹ The dispute centered on the *Cost of Borrowing (Banks) Regulations*. However, Canada also promulgated cost of borrowing regulations for other federally regulated financial institutions such as Canadian insurance companies, foreign insurance companies, and trust and loan companies. In each instance, the regulations mirrored the CBR in exempting lines of credit from the APR disclosure requirement and relaxing the waiver requirements for mortgages. See Canada's Submission, Tab 14, where the Regulatory Impact Analysis Statement notes at p. 2901 of the *Canada Gazette*: "New *Cost of Borrowing (Trust and Loan Companies) Regulations* ..., which will provide for a disclosure regime for federally regulated trust and loan companies and federally regulated insurance companies identical to that set forth in the new *Cost of Borrowing (Banks) Regulations*, are now required to implement the federal government's commitments under the harmonization exercise."

Alberta's view (one shared by Québec and British Columbia) is that Canada's action has stalled the reform process.³⁰ Alberta asserts that its:

"...concern ... relates to Finance Canada's action in weakening the commitment to cooperative action and cooperative federalism. The unannounced retreat from the jointly negotiated Harmonization Template, particularly after Alberta's expeditious legislated commitment to the Harmonization Template ... has seriously damaged provincial and territorial perspectives as to the resolve of Canada in cooperative federal efforts such as the Agreement on Internal Trade."³¹

Alberta relied in this respect on a number of letters from other provinces and territories in reply to a questionnaire dispatched to them by Alberta.³²

For its part, Canada denies that its action has impaired internal trade or the harmonization process:

"168. ... only minor differences exist between the *CBR* and the proposals in the Harmonization Document. The AIT and the Harmonization Document contemplate these minor differences. If any territory and province feels it cannot proceed with its own cost of credit disclosure measures, their failure to act cannot be attributed to the federal government's adoption of the *CBR*. Rather, the failure of other governments to act flows either from an inability to accommodate the flexibility provided in the Harmonization Document and the AIT or from local conditions.

172. While Alberta believes that the harmonization process has stalled, it comes as some surprise that minor differences between the *CBR* and the Harmonization Document caused this to occur. As demonstrated above, the Harmonization Document allowed for some degree of difference between measures adopted by each jurisdiction. These differences are also minor relative to the still outstanding obligations under the AIT of the other parties (including the intervening parties in this dispute). They have not met their obligations under the AIT to any extent. Nothing in the evidence or in logic or common sense excuses them from complying with the AIT and the Harmonization Document to the greatest extent possible.³³ [Underlining in original.]

³⁰ British Columbia's Submission, p. 26, "This lack of harmonization was the deciding factor in British Columbia not proclaiming this legislation."

³¹ Alberta's Submission, p. 7.

³² Annex III of Alberta's Submission includes letters to this effect from:

- Ontario, dated August 28, 2003 and December 04, 2003,
- Nova Scotia, dated December 9, 2003,
- New Brunswick, dated November 27, 2003,
- British Columbia, dated August 19, 2003,
- Saskatchewan, dated December 8, 2003,
- Northwest Territories, dated August 27, 2003 and December 12, 2003, and
- Yukon Territory, dated December 3, 2003.

³³ Canada's Submission, paras. 168, 172.

5.2 Alberta's Complaints

Alberta, joined by the intervenors Québec and British Columbia, asserts that the CBR offend both the HA and the AIT. Alberta's Submission is lengthy and complex. There is considerable discussion of the relationship between harmonization under AIT Article 807 and Annex 807.1 generally, as well as detailed description of the HA, Alberta's measures, and those features of the CBR which are said to offend Canada's obligations. For purposes of addressing Alberta's central arguments, the Panel has found it convenient to group them as follows:

- (i) The CBR are inconsistent with the express terms of the HA;
- (ii) The process by which the CBR were put into force is contrary to AIT Article 406, the "Transparency" provision;
- (iii) The resulting disharmony with Alberta's HA-compliant legislation is an obstacle to trade contrary to AIT Article 403, the "No Obstacles" provision; and
- (iv) The measure's inconsistencies with the HA cannot be justified under Article 803's "Legitimate Objectives" exclusion clause.³⁴

The Panel will address each in turn.

By way of introduction to its analysis, the Panel wishes to make some general comments about standards such as those at issue in this case.

Standards, be they consumer-related or other technical standards, have presented very difficult challenges for governments seeking to liberalize trade at the international level and, in Canada's case, at the domestic level. Setting standards raises sensitive issues of sovereignty. Each government wishes to legislate and regulate according to its own conception of the public interest (which of course is not static and will change over time). Due to differing conceptions of what is in the public interest and how such interest should be protected, differences in regulation routinely and naturally occur. Yet sometimes such regulatory differences can act as barriers to trade. Hence, at the international level (and now within Canada), governments have addressed the problem essentially in five ways:

- first, they have established rules that set out when barriers to trade are *prima facie* impermissible;
- second, they have agreed that it may still be possible for a Party to justify a measure that acts as a barrier to trade if the Party can demonstrate that the measure's purpose is to achieve a "legitimate objective" and meets certain other criteria;

³⁴ This follows the order of argument at pp. 1-29 of Alberta's Submission.

- third, they have provided for the requirement of “transparency” so as to enable other Parties to ascertain what measures a Party has taken that might affect the operation of the agreement;
- fourth, they have contemplated a process for conducting further negotiations on standards-related matters without pre-judging the outcome of such negotiations; and
- fifth, they have provided for consultations and in some cases dispute settlement in the event that a dispute arises over a standard.

The AIT follows this approach.

Chapter Four, entitled, “General Rules”, sets out the basic obligations undertaken by each Party,³⁵ establishes a “legitimate objectives” test that may allow a Party to justify an otherwise impermissible measure,³⁶ and provides for the further reconciliation of Parties’ standards by harmonization, mutual recognition, or other means.³⁷ Generally speaking, the obligations set forth in this chapter are subject to the AIT’s Chapter Seventeen dispute settlement mechanism.³⁸

Chapter Eight, entitled, “Consumer-Related Measures and Standards”, modifies Chapter Four’s general rules with respect to a particular category of standards. The basic obligations against trade barriers are carried forward from Chapter Four “except as otherwise provided in this Chapter”.³⁹ The Article 404 “Legitimate Objectives” provision does *not* apply because it is superseded by a chapter-specific provision in Article 803.⁴⁰ The Article 405 “reconciliation” obligation continues to apply, albeit as modified and supplemented by Article 807.⁴¹ Finally, Annex 807.1 sets out three matters for further negotiation.⁴²

The Parties’ collective undertaking to conduct certain negotiations on differing standards should be distinguished from the other Chapter Eight obligations. Whereas Articles 401-403 set out obligations that apply to each Party’s own measures, Article 405 establishes the obligation to reconcile standards when different Parties regulate differently:

³⁵ In Articles 401-403.

³⁶ Article 404.

³⁷ Article 405.

³⁸ Although, as shall be seen, there is an important exception contained in Annex 405.2, paragraph 10.

³⁹ See Article 800.2.

⁴⁰ Article 800.1.

⁴¹ Article 807, Reconciliation of Consumer-Related Measures and Standards.

⁴² Annex 807.1, Reconciliation of Consumer-Related Measures and Standards.

“Article 405: Reconciliation

1. In order to provide for the free movement of persons, goods, services and investments within Canada, the Parties shall, in accordance with Annex 405.1, reconcile their standards and standards-related measures by harmonization, mutual recognition or other means.
2. Where a difference, duplication or overlap in regulatory measures or regulatory regimes operates to create an obstacle to internal trade, the Parties shall, in accordance with Annex 405.2, cooperate with a view to addressing the difference, duplication or overlap.” [Emphasis added.]

This provision is aimed at promoting the free movement of persons, etc. within Canada. Since different jurisdictions can regulate differently, the reconciliation of such differences takes place either through the negotiations contemplated in Annex 405.1 or, where the difference operates to create an obstacle to trade, through the consultative process set out in Annex 405.2.

Article 807 builds upon this basic obligation in the specific case of consumer-related measures and standards:

“Article 807: Reconciliation of Consumer-Related Measures and Standards

1. For the purposes of Article 405 (Reconciliation), the Parties shall, to the greatest extent possible, reconcile their respective consumer-related measures and standards listed in Annex 807.1 to a high and effective level of consumer protection. No Party shall be required by such reconciliation to lower the level of consumer protection that it maintains as at the date of entry into force of this Agreement.
2. The list of measures and standards in Annex 807.1 may be expanded in accordance with Article 809.”

It was pursuant to Articles 405 and 807 that the Parties conducted the cost of credit disclosure negotiations.

The differences between Article 807 and other Chapter Eight obligations warrant comment. Article 807 commits the Parties to a reconciliation process but does not oblige them to attain a particular result. This is consistent with the international agreements that influenced the structure and content of the AIT.

The AIT preserves a margin of appreciation for each Party. For example, a province that felt strongly about a particular standard that was more stringent than those maintained by other provinces would not be obliged to sacrifice its own standard in the interests of harmonization and liberalized trade. To make it clear that standard reconciliation would not lead to the so-called “race to the bottom” feared by some critics of standards negotiations, the second sentence of Article 807.1 confirmed that no Party shall be required by such reconciliation to lower the level of consumer protection that it maintained at the time of the AIT’s entry into force. This text holds significance for each Party because it preserves its right to act in the public interest as it so defines it. The AIT’s treatment of standards recognizes and legitimizes a Party’s right to disagree with

other Parties as to what the appropriate level of protection should be and the best way to attain such protection.

This flexibility is reflected further in Annex 807.1, the reconciliation annex, which set out three negotiations to be conducted after the AIT entered into force on: (i) direct selling, (ii) upholstered and stuffed articles measures, and (iii) harmonized legislation on cost of credit disclosure, the matter that occupies this Panel. Paragraph 7 of the Annex listed three objectives of the negotiations “among others” not expressly listed:

“Annex 807.1: Reconciliation of Consumer-Related Measures and Standards

Cost of Credit Disclosure

7. The Parties shall adopt harmonized legislation respecting the disclosure of cost of credit in accordance with the following objectives, among others:

- (a) to ensure that, before making a credit-purchasing decision, consumers receive fair, accurate and comparable information about the cost of credit;
- (b) to ensure that, with respect to non-mortgage credit, consumers are entitled to repay their loans at any time and, in that event, to pay only those finance charges that have been earned at the time the loans are repaid; and
- (c) to ensure that the disclosure is as clear and as simple as possible, taking into account the inherent complexity of disclosure issues related to any form of credit.”

Paragraph 8 listed the forms of consumer credit to which the harmonized cost of credit disclosure legislation would apply. Paragraph 9 listed the federal legislation relevant to cost of credit disclosure and paragraph 10 established a deadline for completion of negotiations and adoption of harmonized legislation.

However, nothing was said about the details of the negotiations, what form the harmonized legislation should take, whether there should be a uniform law or something less, and so on. These matters were left for the negotiations.

Finally, as noted earlier, in defining “harmonization” for the purposes of the AIT, the Parties conjoined two different notions. Article 200 states:

“**harmonization** means making identical or minimizing the differences between standards or related measures of similar scope.” [Bolding in original.]

During the cost of credit disclosure negotiations, the Parties opted for the latter form of harmonization; rather than employing a uniform or model law approach (such as that undertaken by the Uniform Law Conference), they chose to seek to minimize the differences between standards or related measures of similar scope.

Having recorded these general observations, the Panel now turns to Alberta’s main contentions.

5.2.1 The CBR Are Inconsistent with the Express Terms of the HA

Alberta's first allegation is that the CBR were inconsistent with the requirements of the HA. It asserts:

"The regulation equates disclosure of cost of borrowing respecting lines of credit to only require a reporting of the annual interest rate. Non-interest costs as set out in the s. 5(1)(a) through (e) (sic) are not disclosed to consumers of credit as a cost of borrowing if the credit arrangement is a line of credit. The Harmonization Template includes these categories of non-interest costs as a cost of borrowing within the APR formula. The Harmonization Template requires the disclosure of the APR to consumers of credit agreements that include lines of credit agreements. This inconsistency materially affects the operation of the AIT as it relates to cost of credit disclosure harmonization. The deliberate inconsistency with the Harmonized Template also causes a disharmony of cost of credit disclosure with respect to federal and Alberta consumer-related measures and standards. The disharmony is an obstacle to internal trade."⁴³

Alberta goes on to assert that the CBR's deviation from the HA's requirement of obtaining independent legal advice prior to waiving the 2-day cooling off period for mortgages was also inconsistent with the HA:

"The regulation allows for a waiver of the two clear business days cooling off period between disclosure and entering into an enforceable mortgage (or the making of a payment other than a disbursement) if the borrower simply has received the disclosure and consents to a waiver of time.

Again, the Harmonization Template requires a two-day cooling off period for mortgage loans, between disclosure and the earlier date of enforceability of the credit agreement or the first (non-disbursement related) payment under the credit agreement. The two-day period for receiving the disclosure statement may be waived by the borrower if the borrower obtains independent legal advice. The regulation provides a waiver of time through simple consent.

The inconsistency materially affects the operation of the AIT as it relates to cost of credit disclosure harmonization. The deliberate inconsistency with the Harmonized Template also causes a disharmony of cost of credit with respect to federal and Alberta consumer-related measures and standards. The disharmony is an obstacle to internal trade."⁴⁴

Canada admits that its CBR excluded lines of credit from the requirement that the APR be disclosed to would-be borrowers and that they changed the terms of the waiver of the cooling off period for mortgages. Canada contends that it complied with the AIT by minimizing any differences between its regulations and the proposals in the HA "to the greatest extent possible". This approach, it says, achieves the level of consumer protection and harmony with other cost of credit disclosure regimes mandated by Article 807 of the AIT.⁴⁵

⁴³ Alberta's Submission, pp. 21-22.

⁴⁴ *Id.*, p. 22.

⁴⁵ Canada's Submission, para. 3.

Canada points out further that subsection 1(4) of the HA was added to provide flexibility to the Parties:

“148. Although it appears that some members of the CMC would have liked to go beyond the harmonization requirements of the AIT by having parties agree in the Harmonization Document to legislate *uniform* cost of credit disclosure requirements, in the end the members of the CMC allowed considerable flexibility.”⁴⁶ [Canada then quotes subsection 1(4).]

Canada says therefore that the modification of HA proposals 2.1.2 and 10.2 (regarding APR and lines of credit) is clearly allowed by subsection 1(4).⁴⁷ Canada takes the same position with respect to the waiver of the 2-day cooling off period.⁴⁸

The question of whether Canada’s CBR are consistent with the HA requires the Panel to interpret the HA in its entirety, and subsection 1(4) in particular, in light of the AIT’s provisions setting out the scope of the cost of credit disclosure negotiations. Alberta (together with British Columbia and Québec) argues that subsection 1(4) is not an unqualified right to exclude any class of credit agreement or class of credit grantor from the basic requirements of the HA template. It relies on the HA’s objectives as well as the negotiating history to assert that it was not the negotiators’ intent to allow a Party to take exclusions of the type taken by Canada because this would undermine the HA’s trade liberalizing, consumer protection, and related objectives.

For its part, Canada asserts that the right was not qualified in the sense asserted by the three provinces, that the Parties were engaged in a harmonization process which contemplated differences in implementation (rather than a uniform law approach requiring complete uniformity in implementation), and that it has reconciled its consumer-related measures in this case to the greatest extent possible. Canada submits that after it engaged in further stakeholder consultations and internal policy discussions, it concluded that the two ways in which the CBR deviated from the HA template were appropriate in the circumstances.

As noted earlier in the Panel’s description of the HA, subsection 1(4) of the HA states:

*“(4) The Regulation making authority may, by regulation, exclude any class of credit agreement or class of credit grantor or broker from the application of the harmonized provisions or modify the application of any [of] the provisions with respect to any class of credit agreement or class of credit grantor or broker.”*⁴⁹ [Italics in original.]

Canada argues its two actions fall into this exclusion clause:

- The exclusion of lines of credit from the requirement to specify the APR falls into the “Regulation making authority [Canada] ... by regulation,

⁴⁶ *Id.*, para. 148.

⁴⁷ *Id.*, para. 157.

⁴⁸ *Id.*, paras. 96-97.

⁴⁹ Harmonization Agreement, subsection 1(4).

exclud[ing] any class of credit agreement [lines of credit] ... from the application [of] the harmonized provisions [regarding the APR] ... ”.

- The insertion of a less rigorous waiver provision for mortgages (e.g., waiver with consent of the borrower rather than after having obtained independent legal advice) falls into the “Regulation making authority [Canada] by regulation, ... modify[ing] the application of any [of] the provisions [the waiver] with respect to any class of credit agreement [mortgage] ... ”.

Alberta, Québec and British Columbia sought to qualify the unambiguous and broad language of section 1(4).⁵⁰ They emphasized the negotiations’ objectives and other language in the HA indicating that the purpose was to develop uniform cost of credit disclosure requirements in order to improve comparability of information, reduce compliance costs and provide uniform consumer protection across Canada, etc.

There was evidence that what became subsection 1(4) was transplanted to the HA from a draft uniform law on cost of credit disclosure.⁵¹ Oddly, the negotiators did not see fit to change subsection 1(4) by including language that required each Party to implement the main provisions of the HA for each of the classes of credit and classes of credit grantors that were the subjects of negotiation. Alberta’s view is that subsection 1(4) was simply never intended to be exercised in the fashion that Canada employed it and that its action fell outside of the Parties’ intent. The Panel has no reason to disagree with Alberta’s view of the subsection especially given its active role in the negotiations (its Mr. Solkowski was co-chair of the CMC Working Group and its leadership in being first to implement the HA). However, Canada disputes Alberta’s view that this was the shared intention of the Parties and relies on the plain wording of the subsection. The Panel is thus confronted with sharply divergent views of what is permissible action under subsection 1(4).

The issue is not free from doubt. On the one hand, the history of the negotiations of the HA and stated objectives of both paragraph 7 of Annex 807.1 and the HA emphasize the desirability of comparability, consistency in disclosure (with the related benefits of harmonizing and simplifying different disclosure requirements across the country), and consumer protection, and the decision by Canada to exclude lines of credit from the APR and the change in the 2-day waiver provision for mortgages goes against those stated objectives. On the other hand, the Parties did not see fit to qualify subsection 1(4), they clearly intended to harmonize rather than to engage in a uniform law-making exercise, and, as noted above, when the CMC submitted its reports to Ministers, it envisaged that it would both monitor and independently assess each Party’s implementation of the HA “to assess the degree of ‘real harmonization’” to quote the October 1998 Draft Report, the implication being that Parties could diverge in how they

⁵⁰ Hearing Transcript, pp. 28-29, 115-118, 147-148.

⁵¹ Hearing Transcript, pp. 30, 325. Post-hearing submission from Alberta, Document 2. At the hearing the Panel asked the disputing Parties to provide it with any additional documents that might shed light on what eventually became subsection 1(4) of the HA.

implemented the HA. The difficulty is in determining the tolerable limits of divergence or, to put it another way, the margin of flexibility available to each Party when implementing the HA.

What is clear to any reader of the HA is the apparent inconsistency between subsection 1(4) and the overall objectives of the HA. At the hearing Canada acknowledged that subsection 1(4) is: "...rather extraordinary..."⁵²

On its face, and considered independently of the rest of the HA, subsection 1(4) essentially allows any Party to the HA to ignore important obligations it has undertaken within the HA, without consequence. The Panel finds it difficult to believe that this was the Parties' intent, because such an interpretation could, if employed by different Parties in different ways, effectively neuter the HA. The Panel considers that the HA must be interpreted in light of the AIT's general objective, any relevant mutually agreed principle, any applicable substantive obligation, and the stated objectives of the cost of credit disclosure negotiations. These include:

"Article 100: Objective

It is the objective of the Parties to reduce and eliminate, to the extent possible, barriers to the free movement of person, goods, services and investments within Canada and to establish an open, efficient and stable domestic market. All Parties recognize and agree that enhancing trade and mobility within Canada would contribute to the attainment of this goal.

Article 101: Mutually Agreed Principles

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

Article 102: Extent of Obligations

1. Each Party is responsible for compliance with this agreement:
- (a) by its departments, ministries and similar agencies of governments;

Article 405: Reconciliation

1. In order to provide for the free movement of persons, goods, services and investments within Canada, the Parties shall, in accordance with Annex 405.1 reconcile their standards and standard related measures by harmonization, mutual recognition or other measures."

Article 807: Reconciliation of Consumer-Related Measures and Standards

1. For the purposes of Article 405 ... , the Parties shall, to the greatest extent possible, reconcile their respective consumer-related measures and standards listed in Annex 807.1 to a high and effective level of consumer protection..."

⁵² Hearing Transcript, p. 229.

The Panel is also mindful of the observations of the *Farmers Dairy/ NB* Panel regarding the effect of AIT Article 300. Article 300 provides:

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

In the *Farmers Dairy/NB* dispute⁵³, New Brunswick argued that the AIT is a “political” agreement and, as confirmed by Article 300, cannot override the province’s authority to legislate as it sees fit. While agreeing with New Brunswick’s interpretation of the relationship between the AIT and the Constitution, the Panel rejected the argument that Article 300 allowed the Parties to ignore their AIT obligations:

“... the Panel notes that the *Agreement* contains the solemn undertakings of the signatory governments. By entering into the *Agreement*, the Parties agreed that past legislation, practice or policies may no longer be appropriate given the stated goals of the *Agreement*. ... In signing the *Agreement*, the Parties recognized that constitutionally valid measures may be contrary to the *Agreement* and may need to be changed in order to achieve the objectives of the *Agreement*. Having themselves emphasised the importance of the *Agreement*, the Parties ought to rigorously respect the commitments it contains.”

In essence, the *Farmers Dairy/NB* Panel stated that a Party’s right to legislate as it sees fit within its constitutional authority cannot be used as a defence when it acts contrary to its AIT obligations. As signatories to the AIT, the Parties have voluntarily agreed to balance their right to independent action with their responsibility to their partners in the AIT.

It is the view of this Panel that the AIT is an important achievement given the history of Canada, its constitutional system and the tensions that have arisen from time to time between and amongst our federal, provincial and territorial governments. By and large, the AIT has worked to the benefit of Canadians and it should be maintained, enhanced and supported. It is worth preserving and all Parties to the AIT have a responsibility to act in ways that contribute to its preservation.

The Panel appreciates Canada’s point that it has a much broader responsibility for financial services regulation than simply cost of credit disclosure and that it may have regulatory imperatives that are not shared by the provinces. In this regard, Canada reminded the Panel of the “need to allow parties the necessary flexibility to respect requirements of their legislation- and regulation-making process, as well as flexibility to respond to rapid changes in the financial sector and financial products”.⁵⁴ Canada argued further that “parties also require flexibility to make cost of credit regulations

⁵³ *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 Licensing Measures*, Winnipeg, Manitoba; September 13, 2003 (hereinafter *Farmers Dairy/NB* Panel Report).

⁵⁴ Canada’s Submission, para. 198.

consistent with their wider regulatory contexts” and that the CBR “must fit within broader federal disclosure regulations, federal consumer regulations and overall statutory and regulatory regimes for the financial sector, none of which are governed by the AIT”.⁵⁵

Canada’s point about the AIT’s very limited coverage of federal financial services regulation is well taken. Article 1806 of the AIT confirms that “[e]xcept for measures referred to in paragraphs 7 through 10 of Annex 807.1, nothing in [the AIT] ... applies to measures adopted or maintained by a Party ... that exercises regulatory or supervisory authority delegated by law in relation to financial institutions or financial services”.⁵⁶

The Panel also accepts Canada’s point about the need to preserve flexibility to respond to changing circumstances; this point is recognized above in the discussion of the AIT’s treatment of standards generally.

Finally, the Panel accepts that the Department of Finance subsequently found that the HA did not fit as easily into the federal government’s overall regulation of financial services as perhaps originally anticipated when the HA was negotiated and indeed when the first draft of the CBR was prepared.

All of that being said, this is not a case where one Party has sought to dictate a standard to another; rather, the cost of credit disclosure negotiations, their objectives, and the relevant federal legislation were all identified by the drafters of the AIT, including the federal negotiators, as suitable matters for negotiation. Moreover, the HA itself took years to formulate and the federal government was actively involved in the conduct of those negotiations. The Panel considers that the federal government must be taken to have carefully considered both the APR and the 2-day waiver period issues during the HA’s negotiation. It participated fully in the negotiations (they were in fact administered by Industry Canada) and there was inter-departmental consultation prior to the HA’s finalization.

In the final analysis, the Panel finds that the balance is tipped against Canada’s interpretation because of its inconsistency with the agreed objectives of the cost of credit disclosure negotiations, particularly, paragraph 7(1) of Annex 807.1. Canada’s interpretation of subsection 1(4) makes it more difficult for consumers to receive “fair, accurate and comparable information about the cost of credit” when they examine competing offers on open lines of credit. Similarly, the comparability of mortgage terms is affected by the CBR’s waiver provision.

On balance, therefore, given the mandate established in Annex 807.1 and the HA’s emphasis on comparability, clarity and simplicity of cost of credit information and consumer protection, the Panel considers that Canada’s exercise of subsection 1(4) fell outside the reasonable expectations of the Parties to the HA and the AIT. As discussed further below, the two changes made to the CBR were material in all of the circumstances and the HA suggests that the APR and the 2-day waiver period were

⁵⁵ *Id.*

⁵⁶ Article 1806.1.

important features of credit comparability. A Party's decision to vary both provisions under subsection 1(4) is at variance with the HA and with the negotiations' objectives stipulated in Annex 807.1.

Accordingly, the Panel finds that Canada acted inconsistently with its implementation rights and obligations under the HA as interpreted in light of the objectives set out in Annex 801.7.

5.2.2 The Process by which the CBR Were Put into Force Is Contrary to AIT Article 406, the "Transparency" Provision

Alberta then asserts that in making the two changes to the CBR, Canada violated Article 406.2 of the AIT. That article provides that:

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

In Alberta's view, the changes that Canada proposed to make and in fact did make to its first draft of the CBR were material in that they went to the fundamentals of the bargain struck in the cost of credit disclosure negotiations. It also has specific complaints about how the final regulations were disclosed to the provinces:

"...Article 406 (Transparency) requires that Parties adopting or modifying a measure that may materially affect the operation of the AIT must notify and provide copies of the measure upon request. In the present instance, Canada provided Draft 16a of the regulation to Alberta (and other Parties) on August 20, 1999. [Tab F] Draft 16a was compliant with the Harmonization Template. Bolstered by the show of good faith, Alberta's *Fair Trading Act* and the *Alberta Cost of Credit Disclosure Regulation* came into effect September 1, 1999. Relying upon Draft 16a, Alberta was comfortable that there would be no variations that would cause undue hardship to the Alberta Credit Unions or Alberta Treasury Branches as compared to the federally chartered regulated Banks.

Notwithstanding the Harmonization Template and the requirements of Article 406, and without consulting Alberta, the regulation was published in the March 28, 2001 edition of the *Canada Gazette*, Part II, Volume 135, Number 7 and came into force September 1, 2001. *Alberta submits that Finance Canada was aware of the inconsistent Harmonization Template (and AIT) provisions of the regulation and yet did not advise Alberta or the other provinces and territories of the measure.* Publication of federal measures in the *Canada Gazette*, particularly when Alberta was encouraged by Draft 16a, cannot in any reasonable sense of the word constitute a notification of Alberta "to the extent practicable". *The process used by Canada as represented by Finance Canada, while administratively convenient, ensured that Alberta and other interested Parties would not have the opportunity to comment on the draft. This approach is completely contrary to the general principle of transparency as set out in Article 101(4)(a) above.*⁵⁷ [Emphasis added.]

⁵⁷

Alberta's Submission, p. 26.

As this dispute developed, it became evident that there was an unfortunate miscommunication between Canada and Alberta and some other provinces. Alberta asserted that it never received the second set of regulations from Ottawa. The senior Alberta official responsible for the cost of credit negotiations, Mr. Solkowski, stated that he never saw a copy of the letter and regulations.⁵⁸ It cannot be established whether the letter went missing in the Department of Finance, in transit, or was misplaced after receipt in Edmonton.

Canada responded that it did transmit a copy of the second version of the regulation by letter dated February 22, 2000 to each of the provinces and territories and it provided file copies of the letters and enclosures to Alberta, B.C. and Québec with its pleadings.⁵⁹ In its Submission, Canada also sought to assure Alberta and each of the provinces and territories that it did not use the federally required consultation process to circumvent its consultations with them and that it was unaware “of any differences in the interpretation of the AIT and the Harmonization Document until Alberta raised its concerns with the Minister of Finance in May of 2002”.⁶⁰

The Panel accepts that there was some form of miscommunication with respect to the February 22, 2000 letter and enclosed draft regulations. Such a situation could easily give rise to suspicion, concern and misjudged reactions which were liable to worsen the dispute. Unfortunately, the communications breakdown exacerbated some provinces’ reactions when they finally discovered that the CBR, as promulgated, differed from the first draft that they had received and commented on. The evidence shows that some provinces did receive the letter⁶¹ and it is difficult to believe, and the Panel is not willing to conclude, that Canada did not dispatch the letter to all of its AIT partners.

Indeed, the evidence shows that in addition to attempting to communicate by letter, Canada pre-published the second version of the CBR on May 20, 2000 and extended the comment period from 30 days to ten months.⁶² The second version of the draft regulations were thus in the public domain for seventeen months before they were promulgated. The regulations were registered on March 15, 2001 and finally published in the *Canada Gazette*, Part II, on March 28, 2001 with entry into force on September 1, 2001. Thus, they were available in the *Gazette* from May 20, 2000 onward.

That being said, in the circumstances of this case, the Panel considers that the changes that Canada proposed to make and ultimately did make were material and that Canada’s notification (even if the letter would have been received by all relevant provincial officials) was inadequate in the circumstances of this case. The Panel’s reasons are based on the context of the negotiations and consultations.

⁵⁸ Hearing Transcript, pp 34, 39.

⁵⁹ Canada’s Submission, Tab 10.

⁶⁰ *Id.*, paras. 139-140.

⁶¹ Hearing Transcript, p. 192.

⁶² Canada’s Submission, para. 128.

The Panel notes in this regard that while the HA was being negotiated, there were consultations between the CMC and the key stakeholders and no doubt between each Party and its respective stakeholders. Canada's decision to make the two changes complained of resulted from a second set of consultations conducted by the Department of Finance *after* the HA was completed.

The record shows that there was a sense in the CMC that it was important that progress be made in the implementation of the HA, particularly by the larger jurisdictions. This explains why Alberta's legislation was enacted in the spring of 1998.⁶³ The October 1998 Draft Report to Ministers (discussed earlier) observed that the Parties to the HA were working closely and cooperatively together on both their legislation and their regulations. The Report specifically stressed the importance of cooperation in drafting the regulations. The Parties were keeping each other informed. They were also clearly aware of stakeholder concerns about different jurisdictions implementing different rules. (While the Report did not explain what is meant by different rules, the essence of this dispute is that, in promulgating the second version of the CBR, the federal government deviated from the HA in the interest of establishing uniform regulations for all federally regulated institutions.)⁶⁴

The importance of working cooperatively was reflected in the various Annual Reports submitted by the CMC to Ministers Responsible for Consumer Affairs as required by Article 809⁶⁵ of the AIT. The CMC Annual Reports give brief descriptions in the form of progress reports on the specific requirements the CMC is mandated to address under Chapter Eight, including cost of credit disclosure harmonization.

The CMC Annual Reports for the fiscal years 1997 and 1998 were written as a single report. The language of the Annual Reports is similar in content to what is included in the 1998 CMC Report to Ministers on the Cost of Credit Disclosure Legislation Harmonization referred to earlier. In particular, it was noted that "... excellent progress is being made in four large jurisdictions – Ontario, Québec, Alberta and the Federal Government – which are collaborating closely with each other in the drafting of their new rules and are sharing drafts with other jurisdictions."⁶⁶ While acknowledging that legislative action on this matter "...will be long after the deadline in the AIT Annex [807.1]," the Annual Report also said "it reflects a formidable effort, given the arduous negotiations and consultations over this difficult material."⁶⁷ Alberta's oral submissions

⁶³ Canada's Submission at p.18 implies that the Alberta legislative action was somewhat premature. While the Alberta *Fair Trading Act* received Royal Assent on 30 April 1998, it did not come into force until September 1999. It was constantly used to make the point that progress was being made in the intergovernmental negotiations.

⁶⁴ See footnotes 29 and 82 of this Panel's report.

⁶⁵ The CMC Annual Reports for fiscal years ending March 31, 1997 and March 31, 1998, and March 31, 1999 are contained in Alberta's Submission, Annex 11. During the hearing, Alberta and Canada, as a result of a request from the Panel, agreed to provide the Panel with all other Reports. Reports for fiscal years ending March 31, 2000, 2001 and 2002 were provided.

⁶⁶ *Id.*, p. 3.

⁶⁷ *Id.*, p. 4. Material in [] added.

during the hearing underscored that the intergovernmental negotiations were indeed "arduous."⁶⁸

In the first such Annual Report, Section 2 entitled, "General Progress on Chapter Eight", gives a general overview. Section 2 indicates that:

"There has been excellent progress towards meeting the objectives outlined in Chapter Eight. This progress has been the result of maintaining *open and frank lines of communication* through regular meetings and conference calls of CMC representatives and through annual Ministers' meetings."⁶⁹ [Emphasis added.]

This same spirit of cooperation is further reflected in the 2000, 2001 and 2002 CMC Annual Reports. As the working relationships became more fully established, the following comment was inserted into Section 2, General Progress on Chapter Eight, of the 2000, 2001 and 2002 Annual Reports:

"It should be noted that the CMC and the Ministers' meetings have proved to be effective fora for issues of importance to consumers but which lie outside the strict limits of Chapter Eight. These include collection agencies, market-based consumer redress, electronic commerce, and the alternative consumer credit market."⁷⁰

The principal differences in the content of the CMC Annual Reports were notes on the progress on legislation and regulations achieved in the previous year. For example, the 2001 Annual Report indicated that "as of the last report (covering up to March 31, 2000), Alberta's legislation had come into force, and the Federal Government had tabled its legislation (regulations)."⁷¹ The 2002 Annual Report, dated May 24, 2002, noted that "[a]s of the last report (covering up to March 31, 2001), the Federal and Alberta legislation and necessary regulations had come into force."⁷²

It can thus be concluded that from an intergovernmental relations perspective, the Parties were working closely together. To be sure, the negotiations were "arduous", but the governments appeared to be pulling in the same direction, as envisioned by the HA. From the 2001 and 2002 CMC Annual Reports there is nothing to indicate or suggest that there was a sharp difference of opinion with respect to the federal regulations or that the provinces and territories had discerned the differences between the CBR draft

⁶⁸ Hearing Transcript, pp. 13, 26, 44, 92-93, 100.

⁶⁹ CMC Annual Report, for fiscal years ending March 31, 1997 and March 31, 1998, p. 1. This same sentence is found in all subsequent CMC Annual Reports. CMC Annual Reports for the fiscal years 1999, 2000, 2001 and 2002, p.1. The only variation is the inclusion of a reference to Deputy Ministers.

⁷⁰ CMC Annual Reports for the fiscal years, 2000, 2001 and 2002, p. 1.

⁷¹ CMC Annual Report for the fiscal year ending March 31, 2001, p. 2. While the Annual Report refers to legislation, the Panel assumes the reference is to the regulations found in the *Canada Gazette*, May 20, 2000. See Canada's Submission, Tab 13 for the regulations. It should also be noted that the 2001 CMC Annual Report was drafted in May 22, 2002.

⁷² CMC Annual Report for the fiscal year ending March 31, 2001, pp. 2-3.

circulated in August 1999 by the federal government and that which ultimately entered into force on September 1, 2001.

The 2002 CMC Annual Report is of particular interest. The Ministers Responsible for Consumer Affairs for the governments of Manitoba, Newfoundland and Labrador and Alberta respectively sent letters to the Minister of Finance, the Hon. Paul Martin, expressing their concern about the federal regulations before the 2002 Annual Report was finalized.⁷³ Whether these letters would have led to changes in the Annual Report is unknown. It is clear, however, that the federal government was made aware of provincial concerns.

Why and how did such an apparently successful and cooperative intergovernmental negotiation and relationship suddenly become so disharmonious? The answer in part is attributable to the federal government's perception of and approach to the consultation and implementation process. As already indicated, the HA was the result of consultations between the CMC and industry and consumer groups and intergovernmental negotiations. Canada's Submission to the Panel included a Section entitled "Federal requirements for consultations."⁷⁴ The first paragraph in the Section stated that "in making the CBR, the *Government of Canada Regulatory Policy* (of November 1999) required Canada to consult with stakeholders."⁷⁵ There follows a description of some of the consultation requirements included in the *Regulatory Policy* document.

One part of the *Regulatory Policy* to which this Section did not refer was the policy requirement that "international and intergovernmental agreements are respected."⁷⁶ The policy requirement is expanded upon in Appendix A. One of the *Regulatory Policy*'s "Specific Requirements" is:

"When developing or changing technical regulations, federal regulatory authorities must:

3. adhere to those procedural and substantive obligations agreed to by the Government of Canada through intergovernmental agreements such as the Canadian Agreement on Internal Trade (AIT) Article 405 provisions relating to specific sectors of the economy."⁷⁷

The inclusion of this provision indicates the importance the federal government attaches to intergovernmental agreements and to the AIT in particular. The provision also qualifies the *Regulatory Policy* guidelines.

⁷³ Alberta's Submission, Annex 1, Tabs 11, 12, and 13. The letters were dated April 9, 2002, May 1, 2002 and May 9, 2002, respectively.

⁷⁴ Canada's Submission, paras. 104-119.

⁷⁵ *Id.*, para 104. (of November 1999) added. The footnote, 52, which gives a brief history of the requirement to consult is omitted. The various federal consultation policies are found at Tabs 5, 6, and 7 of Canada's Submission.

⁷⁶ *Id.*, Privy Council Office, Government of Canada Regulatory Policy, November 1999, p. 3. Tab 5.

⁷⁷ *Id.*, p. 6.

Canada's Submission in Section A.6.3, entitled, "Federal requirements for consultations", contains a description of the Department of Finance's view of the consultation process leading to the HA. For example:

"110. Consultations on the Harmonization Document were limited in scope. Not all Canadians were consulted during the initial development of the harmonization proposals in 1995. The details of those proposals were then set out in a draft of the Harmonization Document and CMC conducted only one round of consultations with stakeholders on that draft Harmonization Document in September of 1997. There was no further consultation with respect to the June 1998 final version of the Harmonization Document.

112. Although changes were made to the Harmonization Document after the September 1997 consultations, no further consultations took place on those changes. An iterative process of consultation was not followed for the Harmonization Document.

113. Stakeholders who made significant comments in the September 1997 consultations received no response or explanation of why some changes were made and not others.

119. When stakeholders raised valid concerns during the consultations on the August draft of the CBR, Finance was required to take these concerns into account. Canada *could not rely on the consultations* that had taken place with respect to the 1997 draft of the Harmonization Document." [Emphasis added]

Whether or not this description of the consultation process is valid, these concerns were not reflected in the 1998 CMC Report to Ministers to which Canada was a signatory. That report included a communications strategy with the objective of keeping consumers and businesses informed. If Canada believed further consultations were needed, *i.e.*, an iterative process, as required by the PCO *Regulatory Policy*, the time to raise its concerns was in the context of the 1998 Ministerial discussions or in the August 1999 letter from the Department of Finance informing Alberta and the other provinces of the final round of consultations, and certainly not during the presentation to the Panel.

In light of the close cooperation and communication forged within the CMC, the essential problem with Canada's conduct can be summarized as follows: The initial version of the CBR were fully consistent with the substance of the HA; that is, they applied the APR to lines of credit and contained a clause that required a waiver to be given for the 2-day cooling off period only in the event that the borrower obtained independent legal advice.⁷⁸ Any province that reviewed the initial draft federal regulations would have concluded that Canada intended to fully implement the HA.

The August 20, 1999 covering letter accompanying the first version of the draft recorded the fact that the Department of Finance had completed draft regulations based upon the drafting template developed by the CMC after extensive consultations with concerned stakeholders.⁷⁹ The letter written to the Alberta representative indicated that the next step was to hold a final round of consultations with "provincial governments, territories,

⁷⁸ Alberta's Submission, Tabs E and F, contain the first draft of the CBR and the covering letter to Alberta.

⁷⁹ *Id.*, Tab E.

and other key stakeholders” and requested Alberta’s comments on the attached draft regulations. The letter emphasized that:

“Since these draft regulations adhere closely to a drafting template that was arrived at after an extensive round of consultations, we would prefer to limit the depth of the remaining consultations to *technical rather than policy-related matters*.”⁸⁰ [Emphasis added.]

Since the Department of Finance was interested in technical comments only, not policy comments, it set a rather short period of time for responses from the provinces (approximately one month).⁸¹

The August 1999 letter from the Department of Finance warrants close attention. It should be clearly understood that this consultation initiated by the Department of Finance was a unilateral federal initiative as opposed to an intergovernmental consultation conducted by the CMC. Moreover, the round was considered to be final, implying the end of an iterative process. Since it was a federal initiative, in reality it represented the start of a new process. Since it was "final" it can hardly be seen to be iterative. To be sure, it built on the earlier consultations, but the responses were sent to the Department of Finance, which, as noted above, “could not rely on the earlier consultations”. If the earlier consultations with stakeholders could not be relied upon, why should the Parties to the HA and the AIT rely upon the results of unilateral consultations?

The letter makes no criticism of the earlier consultations. Indeed, the Panel is left with the opposite impression. The letter includes two references to the fact that consultations were extensive. The first states that "after extensive consultations with concerned stakeholders, a drafting template was arrived at in June 1998." The second states: “these draft regulations adhere closely to a drafting template that was arrived at after extensive consultations ...”.

The letter was sent to "provincial governments, territories and other key stakeholders." Canada’s Submission revealed that "key stakeholders" did not include credit unions: "Although credit unions did not, of course, participate in the consultations on the CBR as they are provincially regulated ...".⁸² Thus, the federal consultation was more limited in scope than the 1997 CMC consultations.

The natural inference to be drawn from the HA-consistent first draft of the CBR, together with the August 1999 covering letter, was that Canada had taken the policy decision to implement fully the HA’s requirements including those relating to lines of credit and mortgages issued by banks.⁸³ It appeared that the policy decision had been taken to

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Canada’s Submission, para. 120.

⁸³ The letter stated that: “Once these Bank Act regulations are put in final form, we plan to proceed with similar regulations for other federally-regulated financial institutions.”

implement the HA in its entirety and that the Department of Finance wished to receive technical drafting comments only.

Yet as a result of the subsequent stakeholder consultations, the Department of Finance made the two contested changes to the CBR.⁸⁴ However, when the second version of the proposed regulations was dispatched to the provinces, Canada's covering letter stated that:

"You will note that the ordering of the sections of the regulations has been modified somewhat, in order to group similar concepts together."

And:

"As a general comment, I should re-emphasise that our objective in putting forward these regulations has been to support and to promote the harmonization of disclosure regulations across the country. You should be aware that any suggestions arising from the federal government's stakeholder consultations *that departed in a significant way from the framework* contained in the Consumer Measures Committee's drafting template *were not included in this draft.*"⁸⁵ [Emphasis added.]

Thus, even if the responsible Albertan and other provincial officials had received the letter, the implication was that the revised regulation continued to "adhere closely to ...[the] drafting template" (to use Canada's previous words) by applying its provisions to all forms of consumer credit when in fact Canada had actually decided to exclude lines of credit from the APR requirement and had made the 2-day cooling off period for mortgage loans waivable by the borrower without having to obtain independent legal advice.⁸⁶

In the Panel's view, these were not technical, but rather policy changes. They were material in the circumstances of the negotiations and the covering letter was deficient in failing to notify the CMC and the other negotiating partners that following stakeholder consultations, Canada had concluded that the two changes were warranted. The cost of credit disclosure negotiations were long and arduous with concessions being made on all sides. The negotiations' mandate, set out in AIT Annex 807.1, indicated that the resulting legislation "shall apply to all forms of consumer credit, including: (b) open credit such as lines of credit...[and] loans secured by mortgage of real property".⁸⁷

Ironically, Alberta had resisted the extension of the APR requirement to lines of credit only to ultimately concede to its inclusion.⁸⁸ Having enacted legislation that required its own financial institutions to disclose the APR in lines of credit, it could reasonably be

⁸⁴ The record shows that it received a letter dated October 4, 1999 from Canada Trust and a letter from the Canadian Bankers Association dated October 18, 1999.

⁸⁵ Canada's Submission, Exhibit 10.

⁸⁶ Those provinces that did receive the latter and relied upon it rather than reviewing the regulations would reasonably have taken the letter to mean that only minor drafting changes were made.

⁸⁷ Annex 807.1(8)(b).

⁸⁸ Hearing Transcript, p. 26.

expected to be highly interested in the federal government's decision *not* to so require. This is perforce the case given the commercial importance of federally regulated banks in credit markets across the country. The federal government's decision to exercise what it viewed as an unqualified right of exclusion carried greater consequences than any provincial government's decision to do so.

Canada's exclusions were a material change to the previous version of the draft regulations and, in the Panel's opinion, Canada was obliged to bring them to the attention of the CMC and its AIT partners. This was particularly important given that Alberta had already implemented the HA with both features (having waited to review Canada's first draft regulations before doing so),⁸⁹ and the other provinces were either beginning to draft regulations or legislation and were awaiting the federal government's implementation.

In the circumstances of this case, therefore, the Panel considers that Canada had a duty under Article 406.2 to fully and plainly notify its AIT partners directly and through the CMC of its intention to exercise what it viewed as its rights under subsection 1(4). This was not the ordinary issuance of a federal regulation that might affect the operation of the AIT. Quite the contrary, the regulation was specifically intended to implement the results of a lengthy AIT-based negotiation that held great promise to consumers, lenders, and to the AIT Parties themselves in terms of cooperative federalism.

The Panel therefore considers that, given the negotiations' purpose⁹⁰, Canada's invocation of subsection 1(4) carried with it a duty to notify other Parties of the proposed exclusions by bringing them to their attention expressly and directly.

In its Submission and at the hearing, Canada argued that the stakeholders' consultations revealed good and valid reasons for excluding the operation of the HA's provisions to lines of credit and to mortgages respectively.⁹¹ It pointed out that Section 10 of the federal regulations requires disclosure of all non-interest charges to would-be borrowers; the section simply does not require the information to be disclosed by way of the APR.⁹² Canada also pointed out why the mandatory requirement of obtaining independent legal advice may not make good policy and may be unduly restrictive.

The Panel has no reason to question Canada's considerations. However, after the give and take of negotiations in which Canada was fully engaged, the Parties agreed on these matters and it is not for this Panel to decide that the Parties were in error.

⁸⁹ Alberta brought its Act and regulations into force on September 1, 1999 approximately 10 days after receiving the first draft of the federal CBR.

⁹⁰ It is observed that AIT Article 200 defines harmonization in both senses: "**harmonization** means making identical or minimizing the differences between standards or related measures of similar scope;"

⁹¹ Canada's Submission, pp. 23-36.

⁹² *Id.*, para. 55.

The Panel does not take issue with Canada's reasons. What the Panel considers amounts to a breach of the AIT is the manner in which the exclusions were notified. In all of the circumstances, Canada should have at a minimum expressly informed each of its negotiating partners of the two exclusions it proposed to make. Indeed, given the negotiations' history and objectives and the significance of its proposed action for federally regulated financial institutions vis-à-vis their provincially regulated counterparts, Canada could reasonably have gone further to formally raise the matter with the CMC itself so that all interested Parties could: (i) evaluate its reasons for invoking subsection 1(4); (ii) discuss the merits of the two proposed exclusions; and (iii) either seek to persuade Canada *not* to make the exclusions or adjust their own implementation processes so as to comport with the new CBR.

At the hearing, Canada acknowledged that its consultations with the other Parties to the HA may not have been adequate:

"The point has been made that perhaps we ought to have consulted the CMC before we passed these regulations into law. That may, in fact, be an appropriate recommendation for the Panel to make along the following lines and perhaps consider some of the elements that we have raised as questions in our submission to you."⁹³

While the Panel considers that in the ordinary course of events (e.g., outside of a negotiation aimed at standards harmonization), Canada's notification would have fully complied with Article 406.2, in the circumstances of this case, its action fell short.

Accordingly, the Panel concludes that, contrary to AIT Article 406.2, Canada failed to properly notify other Parties with an interest in a measure that would materially affect the operation of the AIT.

5.2.3 The Resulting Disharmony with Alberta's HA-Compliant Legislation Is an Obstacle to Trade Contrary to AIT Article 403

Alberta argues further that Canada's action also breached Article 403 of the AIT.⁹⁴ That article states:

"Subject to Article 404, each Party shall ensure that any measure it adopts or maintains does not operate to create an obstacle to internal trade."

Since the AIT does not define "obstacle", Alberta relies upon its dictionary meaning as "something that impedes progress or achievement".⁹⁵ Alberta asserts that:

"...the regulation's critical variance from the Harmonization Template has caused an obstacle to internal trade and that Alberta financial institutions have been injured while

⁹³ Hearing Transcript, p. 261.

⁹⁴ Alberta's Submission, pp. 22-26.

⁹⁵ *Id.*, p. 23.

federal financial institutions need not comply with the same stringent cost of credit reporting requirements for lines of credit or cooling off periods for mortgages.”⁹⁶

Alberta says that Canada’s modifications of the CBR made federally regulated financial institutions more competitive in Alberta than their provincially regulated counterparts.⁹⁷ To be precise, the argument is that both Canada and the province regulate (different) entities which collectively compete in Alberta’s financial services marketplace. Since those entities compete for the same business of granting credit, a federal measure that relieves a bank of having to disclose the APR or allows a borrower to waive the 2-day cooling off period for mortgage loans is said to have created an obstacle to trade in Alberta for provincial credit unions and the Alberta Treasury Branch (“ATB”), both of which must disclose the APR and for which the 2-day period may not be waived (unless one of the other two means of waiver conferred by Alberta law is employed).

Alberta’s complaint has another dimension to it. It refers to various responses to the questionnaire that it circulated to other provinces⁹⁸ and claims that Canada’s action decreases the practical level of harmonization on the core subject of consumer disclosure and that this has stalled the national legislative reform process across the country.⁹⁹

Does the AIT contemplate trade barriers between provinces only or does it also encompass trade barriers within provinces? Normally one thinks of barriers as being between jurisdictions rather than, as in this case, between federally and provincially regulated institutions. The facts of the present case are unusual. When viewed through the lens of consumer protection, the intraprovincial characteristics of this dispute become more salient. The financial transactions take place within the province or territory. It is the *interaction* of a federal measure (that in itself does not purport to limit or restrict trade in financial services either by federally or provincially regulated financial institutions¹⁰⁰) with a provincial measure that is said to create an obstacle to trade. Both measures regulate persons who compete in the provincial financial services marketplace.

One of the objectives of the negotiations was to equalize the terms of competition and enable consumers to make comparisons between competing financial products. It seems possible that a measure of one Party that implemented the federal-provincial harmonization agreement in such a way so as to affect the terms of competition by

⁹⁶ *Id.*, pp. 22-23.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Provincially regulated financial institutions fall outside of federal jurisdiction and the federal measure does not purport to apply to them. It is concerned solely with institutions falling within federal jurisdiction. AIT Article 300 records that nothing in the Agreement alters the legislative or other authority of the Government of Canada or of the provincial governments and there is no suggestion here that Canada sought to encroach on matters of exclusive provincial jurisdiction.

hindering cost of credit comparability and therefore the competitiveness of financial institutions could amount to an obstacle to internal trade.

In the written submissions and at the hearing, the Parties focused on Alberta's characterization of the federal measure as an obstacle to trade contrary to Article 403. Upon consideration, the Panel concluded that the matter is more properly viewed as an obstacle to trade in Alberta resulting from the interaction of the federal and Alberta measures, and thus more appropriately governed by Article 405, the AIT provision that deals with the reconciliation of Parties' measures that may operate to create an obstacle to trade. It is noted in this regard that the HA negotiations were conducted pursuant to the Article 807 reconciliation provision. From the very beginning, the negotiations focused on harmonizing different Parties' approaches to cost of credit disclosure.

Reference to the Parties' submissions confirms that when Alberta and the intervenors complained of the federal action creating an obstacle to trade, they argued that it is the *interaction* of the federal measure with the Alberta measure that created the claimed breach. Alberta's Submission stated:

"This inconsistency materially affects the operation of the AIT as it relates to cost of credit disclosure harmonization. The deliberate inconsistency with the Harmonized Template also causes a *disharmony of cost of credit with respect to federal and Alberta consumer-related measures and standards. The disharmony is an obstacle to trade.*

Alberta asserts that the regulation's critical variance from the Harmonization Template has caused an obstacle to internal trade and that *Alberta financial institutions have been injured while federal institutions need not comply with the same stringent cost of credit reporting requirements for lines of credit or cooling off periods for mortgages.*" [It then quotes Article 403.]¹⁰¹ [Emphasis added.]

Thus, the argument is that each measure regulates different persons who collectively compete in each province's financial services marketplace. Alberta, joined by British Columbia and Québec, argued that since a bank discloses only the Annual Interest Rate (AIR) but the credit union and the ATB disclose the APR, the bank's terms of credit will appear to be lower, thus giving the impression that the bank offers credit on better terms when this may not be the case.¹⁰² Alberta also argued that banks can move comparatively more quickly under the CBR when it comes to granting mortgages.

The facts of this case and the Parties' submissions thus confirm that it is not the federal measure *per se*, but rather the interaction of its subjects with provincially regulated subjects that is said to create the obstacle to trade.

¹⁰¹ Alberta Submission, pp. 22-23.

¹⁰² At the hearing, B.C. submitted a letter from the Credit Union Central of British Columbia dated 3 March 2004 which asserted that if "a consumer were to simply compare the rates, s/he might be misled (sic) into believing that the bank was providing a better rate than the credit union, although the rates are in fact identical."

Article 405 deals specifically with the interaction of different Parties' measures. Paragraph 2 states:

"Where a difference, duplication or overlap in regulatory measures or regulatory regimes operates to create an obstacle to internal trade, the Parties shall, in accordance with Annex 405.2, cooperate with a view to addressing the difference, duplication or overlap."
[Emphasis added.]

There is no duplication or overlap in regulatory measures in this case because the federal and provincial measures relate to different types of financial institutions and neither Party purports to apply its measure to persons falling within the jurisdiction of the other Party. However, it may fairly be said that, at least as between the two jurisdictions that have implemented the HA -- Alberta and Canada -- there *is* a difference in regulatory measures and this could be seen to operate so as to create an obstacle to trade. The AIT prescribes a process for addressing this special set of circumstances.

The legal consequences of Article 405 differ from those of Article 403. If a measure is governed by Article 405, the legal consequence is a duty to cooperate with a view to resolving the difference. If a measure is governed by Article 403 and a breach is found, the inquiry shifts to whether a *prima facie* impermissible measure can be justified under the legitimate objective test.

Article 405.2 provides that in accordance with Annex 405.2, the Parties have a duty to "*cooperate with a view to addressing the difference*". [Emphasis added.] This is an obligation mandating a Party's conduct but it does not mandate a particular outcome. That is, a Party might be found to have breached this obligation if, at the request of another concerned Party, it simply refused to cooperate (because paragraph 2 states that "*the Parties shall ... cooperate...*"). However, the Party cannot be found to be in breach of the AIT if it does cooperate with the other concerned Party and they still fail to resolve the obstacle to trade. This is confirmed by the fact that Annex 405.2, which sets out how the cooperation is to occur, expressly removes the cooperative process aimed at resolving the obstacle to trade from the class of subjects that may be taken to dispute settlement under the AIT:

"10. Chapter Seventeen (Dispute Settlement Procedures) does not apply to this Annex."

Since the Annex governs the cooperative process and excludes it from dispute settlement, it follows that, unless a Party simply refuses to cooperate upon the request of another Party, the failure to resolve the obstacle to trade that may result from different measures cannot give rise to a breach of Article 405(2).¹⁰³

¹⁰³ Although Annex 405.2 is expressly carved out from Chapter Seventeen dispute settlement, the substantive obligation to cooperate in Article 405(2) is not similarly excluded. A Party requesting consultations under that article ought to be able to take a recalcitrant Party to dispute settlement; hence, Article 405(2) is subject to dispute settlement where there is a failure to cooperate even though the Annex 405.2 consultative process itself is not subject to dispute settlement.

This applies equally to a measure governed by Chapter Eight.¹⁰⁴

Did Canada fail in its duty to “cooperate with a view to addressing the difference, duplication or overlap” as required by Article 405(2)? Alberta did not frame its complaint on this basis (arguing instead with respect to Article 405 that Canada’s measure did not harmonize “to the greatest extent possible”).¹⁰⁵ However, had Alberta put the complaint in this way, the Panel would be inclined to find a breach of the duty to cooperate. After Alberta identified the changes in the CBR, it sought to raise the matter with federal ministers and officials.¹⁰⁶ The record evidence shows a perfunctory response by federal ministers. One does not see much evidence of a willingness on the federal government’s part to address the issues raised by Alberta in its consultation requests. Rather, the view seemed to be that Canada had promulgated the CBR, it was within its rights to vary them from the terms of the HA, and it had done so, full stop. In light of the lengthy negotiations that had taken place to arrive at the HA, the fact that this was a negotiation between different jurisdictions comprising the same State (as opposed to an international consultation between two or more sovereigns), and the implementation process agreed by ministers, this seems too perfunctory. Governments sometimes view their duty to consult under an agreement as a minimal one, easily discharged, but in the special circumstances of this case, with the potential denouement of an ambitious attempt to harmonize cost of credit disclosure across the country, Canada should have been more responsive in the consultations.

Accordingly, had Alberta advanced a claim based upon a breach of the duty to cooperate in Article 405(2), the Panel would have been inclined to find that, in the circumstances of this case, Canada failed to cooperate with a view to addressing the difference as required by Article 405.

Accordingly, on the facts of this case, the Panel finds that, Alberta’s complaint is better treated as an Article 405 complaint, rather than as an Article 403 complaint.

¹⁰⁴ Article 400 confirms that the general rules established in Chapter Four apply to matters covered by Part IV (which includes Chapter Eight), except as otherwise provided in the Agreement. In the event of any inconsistency between a specific rule in Part IV and a general rule in Chapter Four, the specific rule prevails to the extent of any inconsistency. There is no inconsistency between a specific rule in the Article 807 reconciliation provision and the Article 405 reconciliation provision and therefore, Article 405(2) and the annex continue to apply with the effects described above.

¹⁰⁵ Alberta’s Submission, p. 32.

¹⁰⁶ Alberta’s Submission at Tabs 15-17 contains the responses of Minister Bevilacqua to the letters of complaint. During the hearing, Alberta’s Mr. Solkowski stated that: “Now, I had requested that they [officials in Industry Canada involved in the CMC] intervene with their counterparts in that Department of Finance and see what we were going to do about this. At the officials’ level, there was no way we were going to get this resolved. I mean we were told at the time, because you ask the question: ‘It wasn’t our minister that signed this Agreement’ which I found flabbergasting because Industry Canada represented the Government of Canada as far as all the signatories to that Agreement were concerned. So for us to hear that through a third party, it was shocking and we were quite dismayed by it, quite frankly.” Transcript, p. 40, l. 12-25, p.41, l. 1.

The Panel finds that Canada's measure interacts with Alberta's measure so as to create an obstacle to trade within the meaning of Article 405 and that Canada's response to Alberta's request for consultations was perfunctory.

Had Alberta framed an Article 405(2) complaint in the manner described above, on the facts of this case, the Panel would have been inclined to find Canada in breach of its duty to cooperate.

5.2.4 The CBR's Inconsistencies with the HA Cannot be Justified under Article 803's "Legitimate Objectives" Exclusion Clause

Alberta argues further that the CBR's inconsistencies with the HA could not be justified under Article 803's conditions. That article is a savings clause which permits measures that otherwise offend certain Chapter Four obligations to be justified if the respondent Party can demonstrate that they meet certain tests. A measure need not be justified unless a finding of breach of one of Articles 401, 402 or 403 has been made.

Since Article 405 is not subject to the Article 803 justification process, it is unnecessary to interpret this Article.

6. PANEL OBSERVATIONS

6.1 The AIT and Process

The first Panel convened under the AIT issued its report in June 1998.¹⁰⁷ Among other things, the Panel determined that "process is an integral part of the *Agreement*."¹⁰⁸ In particular, the Panel stated:

"The general emphasis of the *Agreement* is on cooperative resolution of outstanding issues, *including an obligation to consult* and seek joint action where appropriate. The *Agreement* has in fact changed the policy context facing governments by requiring a greater level of consultation or "process" when introducing measures affecting internal trade." [Emphasis added]

The fourth Panel convened under the AIT made the following observation:

"The Panel notes that the *Agreement* contains the solemn undertakings of the signatory governments. By entering into the *Agreement*, the Parties agreed that past legislation,

¹⁰⁷ *Report of the Article 1704 Panel concerning the Dispute between Alberta and Canada regarding the Manganese-Based Fuel Additives Act*, Winnipeg, Manitoba; June 12, 1998 (hereinafter MMT Panel Report). Panel reports are available on the website of the *Agreement on Internal Trade*: www.ait-aci.ca.

¹⁰⁸ *Id.*, p. 5.

practice or policies may no longer be appropriate given the stated goals of the Agreement."¹⁰⁹

To underscore further the importance of intergovernmental consultation, three of the four Panel reports to date have included a recommendation that governments convene a meeting of the appropriate Ministerial committee referred to in the AIT.¹¹⁰ As shall be seen, the Panel recommends that the MRCA direct the Committee on Consumer-Related Measures and Standards (CMC) to meet to resolve this dispute.

This emphasis on process should in no way be viewed as minimizing the importance of substance. Indeed, this dispute is over major differences in policy with respect to the harmonization of cost of credit disclosure. While the submissions focused on two major policy differences, as has been seen, the Panel has concluded that the underlying cause for the Panel's establishment was Canada's failure to follow "the obligation to consult and seek joint action."

The essential breach in this case is a failure to comply with the processes set out in the AIT in the unusual facts of this case. Canada erred in considering that the changes to the CBR were not material and in failing to explicitly bring them to the attention of the other Parties and the CMC prior to promulgating them.

The findings of fact as set out above in Section 5 of this report outline both the chronology of events and the different positions of Alberta, Québec, British Columbia and Canada with respect to the cost of credit disclosure. The Panel recognizes that Canada has the legal authority to enact the CBR. That being said, the Panel is of the view that this impasse, and its fallout, might have been avoided had further intergovernmental consultations occurred. Since they did not occur, there is little point in speculating as to what the final outcome might have been, other than to suggest that the apparent intergovernmental discord and the potential damage to the viability of the AIT, a "solemn undertaking", could probably have been avoided.

6.2. The Impact on Future Federal-Provincial Negotiations and the AIT

There is no doubt that Alberta, British Columbia and Québec feel strongly about Canada's action; their pleadings and oral submissions were replete with references to injury to trust and cooperation and damage to the AIT process. For example, in its submission to the Panel, Alberta stated:

¹⁰⁹ Farmers Dairy/NB Panel Report, p.28.

¹¹⁰ The MMT Panel recommended that the Council of Ministers of the Environment (CCME) "be used as a forum for discussion and resolution of MMT issue." (p.12) The *Report of the Article 1704 Panel concerning the Dispute between Nova Scotia and Prince Edward Island regarding Amendments to the Dairy Industry Act Regulations*; Winnipeg, Manitoba; January 18, 2000 (hereinafter *NS/PEI Panel Report*) suggested that "The Federal-Provincial Agricultural Trade Policy Committee can be a useful forum for discussion and resolution of these [fluid milk] issues." (p. 11). The *Farmers Dairy/NB Panel*, the second panel to hear a dispute on fluid milk, recommended "that the CIT (Committee on Internal Trade) lead a timely process to ensure that fluid milk distribution in all provinces is *Agreement* compatible." (At p. 31.)

“The unannounced retreat from the jointly negotiated Harmonization Template ... has seriously damaged provincial and territorial perspectives as to the resolve of Canada in cooperative federal efforts such as the Agreement on Internal Trade.”¹¹¹

In its opening statement to the Panel at the hearing Alberta made it clear that its primary complaint related to process:

“Alberta’s primary complaint... is that the years of process invested and the relationship gained and developed through each Party’s course of conduct in negotiating the Harmonized Cost of Credit Agreement... has been cast aside...”¹¹²

And

“Alberta...considers this casting aside to be a grave error that has to be addressed.”¹¹³

In further support of its argument, in its submission Alberta quotes Saskatchewan’s response to question 5 of the Cost of Credit Disclosure Harmonization Jurisdictional Impact Status conducted by Alberta Government Services:

“The second issue concerns the harmonization process itself. In particular, the integrity and usefulness of the harmonization process is jeopardized where Parties fail to report to the Consumers Measures Committee their intention to deviate from a harmonization template. The current status of the matter threatens the success of further harmonization efforts.”

At the hearing Alberta also stated:

“Under Annex III of Alberta’s submission, the letters of support that have come in from the various jurisdictions, from the ministers and Deputy Ministers, the question that is repeated or brought to light is: What is Canada’s resolve with respect to legislative reform and to this process that we all committed to?”¹¹⁴

As long and arduous as it may have been, the negotiation of the HA was a trust-building process with a very positive impact on federal–provincial relations in the area of consumer protection. The positive effect of the negotiation process is evident in the CMC Annual Reports in the years directly following the conclusion of the negotiations and in the success of the CMC in subsequent harmonization initiatives.

However, as stated by Alberta at the hearing:

“When it became known that the federal government deviated on significant points in the template, it caused significant repercussions to the work of the CMC. Harmonization came to a halt for all intents and purposes. Some jurisdictions removed their Bills that

¹¹¹ Alberta’s Submission, p. 7.

¹¹² Hearing Transcript, p. 9.

¹¹³ *Id.*, p. 10.

¹¹⁴ *Id.*, p. 73.

were set to go through their various legislatures. I can say most jurisdictions lost confidence in the process, and I believe that still remain the case today.”¹¹⁵

As part of its "preparation for this complaint,"¹¹⁶ Alberta canvassed the other jurisdictions regarding the status of their legislation and regulations.¹¹⁷ In its written submission Alberta stated that:

“Most jurisdictions report that implementation (either legislation or the bringing into force of legislation) has ground to a halt because of the inconsistency of the [federal] regulation with the Harmonization Template...”¹¹⁸

The Panel is deeply concerned that the negative effect of Canada’s unilateral decision to vary from a federal-provincial agreement reached after lengthy negotiation and compromise goes beyond the area of consumer protection. Canada’s actions have undermined the processes of consultation and negotiation set forth in the AIT. By breaching the trust-ties that are essential for cooperative federal-provincial-territorial action on issues of concern to Canadians, Canada may have damaged the provincial-territorial support essential to the ongoing success, operation and improvement of the AIT. This situation could lead to the perpetuation of unnecessary trade barriers within Canada.

7. DETERMINATION OF IMPAIRMENT TO TRADE AND INJURY

Article 1707.2(c) requires that the Panel’s report contain a determination, with reasons, as to whether the measures under review have or would impair internal trade and have or would cause injury.

7.1 Impairment to Trade

The Panel has found that the CBR created an obstacle to internal trade under Article 405.

7.2 Injury

The Panel considers that the CBR have or would cause injury with respect to:

- the AIT and federal-provincial relations in general;
- provincially regulated financial institutions; and
- consumers.

¹¹⁵ *Id.*, p. 33-34.

¹¹⁶ Alberta’s Submission, p. 8.

¹¹⁷ The responses to the Alberta survey are found in Annex 11, Tab 3 of the Alberta Submission.

¹¹⁸ Alberta’s Submission, p. 8.

In terms of injury to the AIT and federal-provincial relations generally, the Panel has elaborated on its views in Section 6.

On the question of injury to provincially regulated financial institutions, an October 20, 2003 letter from the Credit Union Central of Canada to Hon. Allan Rock, Minister of Industry Trade and Commerce, stated:

“Of particular concern to credit unions is the fact that some aspects of disharmonization actually seem to place them at a competitive disadvantage relative to their most important competitors - the chartered banks of Canada. This clearly was not the intent of the Drafting Template, but we are concerned that further efforts to implement the template could actually worsen the competitive position of credit unions in this area.”¹¹⁹

Alberta, Québec and British Columbia make similar observations in their submissions to the Panel.

In paragraph 180 of its submission to the Panel, Canada argues that no evidence has been presented to support the allegation that the CBR place provincially regulated financial institutions at a competitive disadvantage. In its view, such evidence would have to show a shift in market share and establish causation.

In the hearing on the question of evidence, Mr. Ternes from Alberta stated:

“When we asked the Alberta Treasury Branches to give us some empirical evidence so that we could disclose it to the Panel to make it nice and easy, their response was: “One of the problems is that these are walk-aways. How do we give you empirical evidence with walk-aways?”

So it is a difficult issue to address to provide an empirical study to you because these are walk-aways. The same difficulty with the waiver issue, they are walk-aways. You cannot get the money in the time that you want, you pop over to the Bank of Montreal or to the CIBC, for example.”¹²⁰

For its part, British Columbia noted the decision of the *Farmers Dairy/NB Panel* with respect to proof of injury:

“With respect to injury, Complainant alleges that the denial of a fluid milk distribution license in New Brunswick has caused significant injury to Complainant's prospects for growth and eroded its capability to respond to competition in the future. Complainant admits that it is difficult to quantify the extent of injury and submitted no documentation in that regard. The Panel notes that a complainant is not required under the Agreement to prove a demonstrable dollar amount to establish injury, nor is a panel required to rule on the extent of injury. It is the view of the Panel that the denial of the opportunity to be considered for a fluid milk distribution license in a manner that is fair and consistent with the Agreement is injury in itself, as is the denial of the opportunity to participate on an equal footing in the New Brunswick market.”¹²¹

¹¹⁹ Canada's Submission, Tab 28.

¹²⁰ Hearing Transcript, p. 60.

¹²¹ *Farmers Dairy/NB Panel Report*, p. 27

While the circumstances of the dispute are not identical, the Panel accepts the principle that a complainant is not required to demonstrate a dollar amount in order to establish injury and that the Panel is not required to rule on the extent of injury. Further, this Panel accepts the common sense approach to establishing injury that the *Farmers Dairy/ NB Panel* appears to have used in making its determination.

The Panel considers that consumers are likely to be influenced in their credit decisions as a result of the challenge of comparing information provided by financial institutions that are regulated differently.

On the question of injury to consumers, the issue is not so much one of minimizing the differences between federal and provincial cost of credit legislation but of ensuring comparability, clarity and simplicity. It is evident that the two different methods of calculating interest (APR and AIR) do not provide "comparable information about the cost of credit," as required by paragraph 7 of Annex 807.1 and that this situation is not in the best interest of consumers.

Accordingly, the Panel finds that the CBR cause injury to the AIT and to federal-provincial relations generally, to provincially regulated financial institutions, and to consumers.

8. SUMMARY OF ISSUES AND FINDINGS

The Panel was asked to address the following issues:

- Are the CBR inconsistent with the express terms of the HA and in breach of Article 807 and Annex 807.1?
- Was the process by which the CBR were put into force contrary to Article 406, the "transparency" provision of the AIT?
- Has the disharmony between the CBR and Alberta's HA-compliant legislation created an obstacle to trade contrary to Article 403?
- Can the CBR's inconsistencies with the HA be justified under Article 803's Legitimate Objectives exclusion clause?
- Have or would the CBR cause injury?

With respect to these issues, the Panel has found:

Canada acted inconsistently with its implementation rights and obligations under the HA as interpreted in light of the objectives set out in Annex 807.1.

The obstacle to trade in this case arises from the interaction of measures of different Parties and is therefore more appropriately addressed under Article 405 than Article 403.

Had Alberta framed its complaint as a failure to cooperate under Article 405.2, the Panel would have found such a breach.

Since Article 405 is not subject to the Article 803 justification process, it is unnecessary to interpret this Article.

Contrary to AIT Article 406.2, Canada failed to properly notify other Parties with an interest in a measure that would materially affect the operation of the AIT.

The CBR cause injury to the AIT and to federal-provincial relations generally, to provincially regulated financial institutions, and to consumers.

9. PANEL RECOMMENDATIONS

In summary, this is a regrettable failure of process. Ironically, the AIT was intended to improve the Canadian common market through, among other things, negotiation and consultation. From both the written and oral submissions to the Panel it would appear that the Parties' original timetable for harmonizing cost of credit legislation may have been overly ambitious, but a seven year delay appears excessive, particularly in light of the progress outlined in the October 1998 report to the MRCA. From its written and oral submissions, it appears that Canada, on reflection, has concluded that its efforts were wanting.

The mandate of the Panel is to determine if the measure complained against is inconsistent with the AIT. The Panel has done that. It is not the mandate of the Panel to determine how the concerns regarding specific aspects of the HA raised by Canada and some other Parties should be addressed. That is the role of the Parties. All Parties should resolve to return to the table and revisit the HA implementation process. The expense and time incurred in arbitrating this dispute would be well worth it if all Parties to the AIT returned to the CMC and resuscitated this important endeavour that has gone awry. It would be most regrettable if, after much time, effort, and expense to the taxpayer, the cost of credit disclosure negotiations ended in disarray with only two Parties implementing the HA on different bases.

The Panel therefore recommends that:

- **The MRCA direct the CMC to meet at the earliest opportunity to resolve concerns raised by the Parties with respect to the implementation of the HA, specifically by developing:**
 - **clear guidelines on how APR is to be calculated and what, if any, additional waivers to the 2-day cooling off period are acceptable, such guidelines to be followed by**

all jurisdictions in drafting their cost of credit legislation;

- **an interpretation of subsection 1(4) of the HA that clarifies the limits of flexibility afforded to the Parties in implementing the HA; and**
- **a clear process for notification of deviations and the resolution of any issues that may result from such deviations.**
- **In view of the length of the original negotiation of the HA and the length of this dispute, the CMC initiate negotiations on the above issues on an urgent basis and complete negotiations by October 15, 2004.**

10. ALLOCATION OF COSTS

Rule 53 of Annex 1706.1 (Panel Rules of Procedure) of the AIT gives a Panel the discretion to allocate a portion of the operational costs of a panel to the intervenors in a dispute resolution process.

The Panel considers a fair allocation of operational costs to be:

- 50% to Canada;
- 40% to Alberta;
- 5% to Québec; and
- 5% to British Columbia.

APPENDIX A

Participants in the Panel Hearing

Panel

Bill Norrie (Chair)
Peter Meekison
Chris Thomas

For Alberta

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