

# IMPROVING HOW THE AGREEMENT ON INTERNAL TRADE CURRENTLY WORKS

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I AM GLAD TO HAVE THIS OPPORTUNITY to talk about the *Agreement on Internal Trade* and how it can be improved. At the very least, it is therapeutic for someone who has had his hand on this file since 1986 and who, lately, has been trying to make the *Agreement* work for his clients.

## I. THE ISSUES

LET ME DECLARE MYSELF ON THREE ISSUES.

**First:** My view of the *Agreement* is based on experience.

It is the result of trying to use the *Agreement* to resolve real trade issues for Canadian businesses.

**Second:** I believe the *Agreement* is fundamentally sound.

It seems to me that the *Agreement* is the best approach to managing our internal market. It is more dynamic and flexible than constitutional or legislative solutions and more capable of evolving to respond to the market.

Furthermore, it is anchored in a cooperative arrangement among Canadian governments and, frankly, that is the only thing that really works in a federation like ours.

I don't think it is necessary to legislate the whole *Agreement*, including the rules, to make it work. This would reduce flexibility and the capacity of the *Agreement* to evolve to meet changing market and economic conditions.

There are other options, particularly linking the *Agreement* to the First Ministers Conference process, that would provide the political commitment necessary to make the *Agreement* effective.

The one exception is the dispute resolution process. It needs more accessibility, clarity, responsiveness and discipline both in its operation and in applying the findings of panels.

I will deal with this in greater detail later.

**Third:** Canada's domestic market needs effective trade rules.

Some speakers have questioned this. They say that rules and the *Agreement* are unnecessary because there are few barriers and that, whatever barriers there are, affect less than one percent of Canada's Gross Domestic Product.

The *Agreement* is not about numbers. It is about Canadians' expectations concerning their economic union.

Canadians should be able trade, move and invest anywhere in the country without discrimination. They have the right to expect that Canadian governments will work cooperatively to make the Canadian market open, stable and predictable. Canadians should be assured that, in a domestic economy that is based on reciprocity and a balance of rights and obligations, no Canadian government can act, arbitrarily, to protect a local economic interest and alter this balance.

If there were no barriers we would still need the *Agreement* and its rules.

Those that criticize the *Agreement* say that trade rules and trade agreements are international concepts that have no place in a federation and, further, they are legalistic and fetter the absolute discretion of provinces to use their authority in the interests of their constituents.

This view is puzzling.

First: federal states are as prone to non-tariff barriers as international markets. Why wouldn't federations have rules to deal with them?

Second: We have rules throughout our society. They protect individual and collective rights. We have rules to avoid problems.

Rules define the relationships in our federation that allow diversity and protect it *and* provide stability and predictability in our economic union.

The critics' argument goes that individual rights must be sacrificed for the greater good.

The implication is that trade rules prevent governments from developing and applying necessary policies to protect the public and the environment and to promote social good and local economic development.

There is not a shred of evidence that this is true.

The *Agreement on Internal Trade* allows governments to exempt any policy from the provisions of the *Agreement* that protects consumers and the environment, security, health and public safety, work place safety, the promotion of employment equity and even regional economic development.

The *Agreement* does not compromise the integrity of standards or force any government to lower or compromise standards that they deem are necessary for their constituents.

The *Agreement* requires governments to ensure that their measures,

for whatever purpose, do not unnecessarily restrict trade or operate as a disguised barrier to trade and that economic development programs continue to meet a specific development requirement effectively.

All complaints under the *Agreement*, so far, have concerned measures that were, or are, being used to protect an economic interest.

This includes the federal measures to ban provincial trade in the gas additive MMT. These were found to be inconsistent with the *Agreement* because there was no clear scientific evidence concerning environmental risks associated with MMT and the ban on interprovincial trade was more trade restrictive than necessary to achieve the environmental protection objective.

The federal government could then, and still can, ban MMT through its environmental or other health measures.

## II. THE AGREEMENT NEEDS AN OVERHAUL

HAVING SAID THIS, IT IS ALSO MY VIEW that 6 years after it came into force, the *Agreement* is in trouble and needs an overhaul. The problems are the result of governments' neglect and lack of commitment, compounded by the need for consensus, a problem that bedevils any cooperative undertaking in our federation.

Effectively, the collective initiative of governments can be limited by the active or passive indifference of one or more governments.

The good news is that the *Agreement's* problems are reasonably clear and, to a large extent, relate to process rather than substance.

There are three:

- Public awareness and the accessibility of the *Agreement*;
- Governments' commitment to the *Agreement* and the effectiveness and the role of the Committee of Ministers in operating the *Agreement*;
- The effectiveness and credibility of the *Agreement's* dispute resolution process.

## III. THE AGREEMENT NEEDS EFFECTIVE DISPUTE RESOLUTION

THE *AGREEMENT'S* DISPUTE RESOLUTION MECHANISMS are the critical issue. Effective and credible dispute resolution gives the *Agreement* value, credibility, utility and effectiveness. If they don't work the *Agreement* doesn't work.

Based on my experience, the *Agreement's* dispute resolution mechanisms are not working. As a result, the *Agreement* is truly at risk.

For that reason I will concentrate the rest of my remarks on the *Agreement's* dispute resolution procedures.

If you would like to know my prescriptions for the rest of the *Agreement* please read the report recently published by Certified General Accountants Association of Canada, *Canada's Agreement on Internal Trade: It can work if we want it to*. CGA Canada commissioned me to prepare this analysis for them.

You can get this report by contacting CGA Canada or by visiting their Web site at <[www.cga-canada.org](http://www.cga-canada.org)>.

#### **IV. THE PROBLEM WITH THE AGREEMENT'S DISPUTE RESOLUTION MECHANISMS**

**S**O WHAT IS WRONG WITH THE *AGREEMENT'S* DISPUTE RESOLUTION PROCESSES? Just about everything except the principles on which they are based.

They are complex, inaccessible, slow, costly, unpredictable and, ultimately, ineffective because they are unenforceable.

Let's see how they work: The dispute resolution provisions are based on three principles.

- First: Disputes should be resolved through consultation and mediation.
- Second: Trade panels should apply as a last resort.
- Third: Compliance with panel rulings is voluntary.

There are two components to the dispute resolution process: one in the sector chapters, such as labour mobility or agriculture. These usually consist of consultations and a possible reference to the ministers responsible for that sector. These processes are intended to require three months to six months but usually take more.

The second component is a general dispute resolution process in Chapter Seventeen that can be applied if a problem is not resolved through the consultation processes in a "sector" chapter.

The general dispute resolution process consists of three elements; a consultation period, a reference to the Committee of Ministers on Internal Trade and, if these fail, review by a trade panel. All three elements together require nine months or more to produce a panel ruling which a government can then ignore.

This chapter has recently been amended to remove the duplication between the general dispute resolution chapter and the sector chapters.

If a government doesn't wish to pursue the issue a person or a busi-

ness can do so directly but they have to jump through an extra hoop by requesting the permission of a screener who is supposed to assess whether the complaint is frivolous and if there is a reasonable case of injury.

Experience shows the "screener" process to be unpredictable, and there is no appeal.

A business with a problem would have to be determined, well informed, with lots of time and money to take a chance on this process to solve problems. Probably most don't.

Talking to officials, my impression is that most governments find the process equally daunting and they have to consider intergovernmental and other policy issues before proceeding. They seem to be just as averse as businesses to using the dispute resolution processes.

Governments complained against react defensively to protect local interests regardless of how transparently obvious it is that a measure is inconsistent with the *Agreement*.

When the dispute settlement process is applied, governments complained against use every possible means, including abusing the procedures that they accepted when they signed the *Agreement*, to avoid and delay the dispute process.

## V. HOW TO FIX THE DISPUTE RESOLUTION PROCESS

**W**HAT IS THE SOLUTION?

**First:** Simplify the process and make it accessible.

There are a number ways to do this.

The easiest way would be to establish a national internal trade dispute resolution office, or a kind of internal trade "ombudsman".

This office would be accessible to any person or business who believed government measures created a barrier to internal trade. The "ombudsman" would assess the complaint to determine if it had merit. If it did then the office would take responsibility for trying to resolve the problem with the governments involved. There should be specific time lines for both these processes.

If this failed then the issue would go immediately and directly to a panel. The "ombudsman" could argue the issue or the person or business making the complaint could choose to do this themselves.

If the "ombudsman" believed the complaint was not a barrier or not covered by the *Agreement*, the person or business could then pursue the complaint on their own.

**Second:** Establish a single dispute resolution process for all complaints under the *Agreement* except for procurement bid protests.

This could be accomplished by removing the complaint procedures in the sector chapters and streamlining the general complaint process.

Changes to the dispute resolution process could include:

- Making the dispute equally accessible to individuals or businesses and to governments. Businesses could choose to ask a government to represent them;
- Eliminate the “screener” requirement for complaints by businesses and individuals and the two year time limitation;
- Eliminate the requirement for a reference to the Committee of Ministers. This would reduce the dispute resolution process to two stages; a consultation period and reference to a panel;
- Establish a standing Panel;
- Make the timelines mandatory. In other words, if the issue is unresolved within the time established for a stage in the dispute process, the complaint would move immediately to the next stage; *and*
- Introduce a “code” in the *Agreement* setting out the rights and obligations of businesses and individuals making complaints and the responsibility of governments to deal with them.

**Third:** Add discipline to the process.

Through some sort of legislative mechanism Governments should allow themselves to be sued by an individual or a business if they don't implement panel findings or if they fail to follow the defined dispute process or withdraw from it.

Governments would not have access to this mechanism and courts could not oblige governments to implement panel findings but only assess damages for the injury caused by failing to honour the *Agreement*.

For government-to-government complaints the waiting period for retaliation should be eliminated.

**Fourth:** Establish a national bid protest tribunal in Chapter Five based on the current model used by the Canadian International Trade Tribunal (CITT). The federal government would continue using the CITT to avoid duplication.

These or similar changes would make the complaint process in the *Agreement* real and credible.

## VI. SUMMARY

OVERALL, GOVERNMENTS MUST USE THE AGREEMENT TO ADDRESS, directly and practically, the problems businesses and individuals experience in the domestic market.

If they do not, governments should expect scepticism and downright disregard and the *Agreement* will fail.

But the *Agreement* can work.

Its objectives are clear and reasonable. It is based on a practical balance between rights and obligations. The general rules it establishes for the domestic market are clear and unambiguous. The project to develop and negotiate the *Agreement*, in the context of Canadian intergovernmental relations, was bold and resourceful.

Governments showed commitment and flexibility in concluding the *Agreement*. They can do it again.

Thank you for listening.

