

LESSONS FROM EXPERIENCE: IMPROVING THE AGREEMENT ON INTERNAL TRADE

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A strong economic union benefits a nation in ways which extend beyond the mere increase of material wealth. This article begins by addressing the argument that the gains from economic union are overstated. It then goes on to explore the advantages of a comprehensive Agreement on Internal Trade (AIT) by identifying and discussing some of the advantages to economic union apart from the increased generation of material wealth. They include the promotion of national unity, increased personal opportunity as a result of allowing the movement of ordinary citizens within our domestic economy despite provincial boundaries, discouragement of market domination, increased opportunity to transact with enterprises entering the province or in other provinces, and the promotion of good and honest government by limiting government discretion.

The article moves on to discuss various factors which must be dealt with so as to ensure the effectiveness of the AIT. The partners to the AIT must have a shared sense of long-term mission. The author suggests that incremental steps are the best way of achieving the long-term vision. Incremental growth of this nature is best accomplished by way of super-majoritarian voting as opposed to having to achieve unanimity. It is essential that parties have access to expeditious and impartial dispute-settling mechanisms. The author also notes that organizations of this nature work best when based on the rule of law as opposed to principles of retaliation or force. Finally, in order to be effective the AIT must be kept reasonably simple, coherent and compact. That is, it ought to contain one core set of norms and one single dispute-settling institution.

The article concludes by exploring various ways of strengthening the economic union outside of the AIT.

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I. INTRODUCTION

THE BENEFITS OF A STRONG ECONOMIC UNION extend beyond the material. The gains potentially include a better government, more individual freedom and opportunity, and a stronger sense of national unity. There is a "people's case" for the strengthening of the economic union. A strengthened internal economic union is too often sold as part of a purely economic or big business agenda when in fact some of the most compelling arguments are far more inspiring and inclusive.

The pursuit of an economic union ought not to eclipse other goals, such as the development of a social union. Rather, it should form part of the balanced building of the nation, one in which the social union is as important as the economic union. The economic union should, however, remain an essential element in any long-term strategy of building a country that is strong in all dimensions – including clean government, individual freedom and opportunity, and a sense of national unity.

II. THE PEOPLE'S CASE

BEFORE DEVELOPING THE LARGER, "PEOPLE'S CASE" FOR ECONOMIC UNION, let me address the argument heard several times at this conference: that there is little material gain to be had in devoting further political energy into the Agreement on Internal Trade (AIT).

There are those who argue that the gains from economic union are overstated. Instead of the one percent, or 6.5 billion dollar, increase in gross domestic product (GDP) that the Canadian Manufacturers' Association stated would result with closer economic union, it has been suggested that GDP would only increase by 0.05%.⁷ Others argue that trade within Canada and the efforts of the AIT are overshadowed and made almost irrelevant by potential gains in trade with the United States (US).⁸

⁷ M. Lee, "In Search of a Problem: The Future of the Agreement on Internal Trade and Canadian Federalism" (2000) vol. 1, No. 4 *Canadian Centre for Policy Alternatives Briefing Paper Series: Trade and Investment* 1. The Canadian Manufacturers Association estimates are also quoted in this paper.

⁸ B. Cooper, "Political Strains and the AIT: An Alberta Perspective" (Strengthening Canada: Challenges for Internal Trade and Mobility, Conference of the Internal Trade Secretariat) Toronto, Ontario (1 June 2001) [unpublished].

B. Schwartz & E. Leven, "International Organizations: What Makes them Work?" (1992) 30 *Can. Y. B. Int'l L.* 165.

Just as important as the potential monetary gains from economic union (whatever the correct figure may be), are the potential losses in returning to the "bad old ways." There is a long-standing theory of international trade law, the so-called "shark" or "bicycle theory", that if you do not go forward you will go backwards. Sharks die if they do not move forward and bicycles fall unless they have momentum. Likewise, the tendency is for protectionist habits to reassert themselves if energy is not spent on advancing free trade regimes. The AIT, with its repeatedly missed deadlines and ineffective dispute settlement procedure, is in danger of stagnating and allowing new and innovative methods of protectionism to be developed.

It should be kept in mind as well, that it is not possible to anticipate all of the new forms of protectionism and the techniques used to implement them. The partners to the AIT should attempt to create norms and dispute settlement mechanisms that can adapt to meet many of these new challenges without further political intervention. They should also commit themselves to monitoring the AIT on an ongoing basis to ensure that fresh political decisions are made when new circumstances outstrip the ability of existing norms and institutions to adapt.

III. ADVANTAGES OF A COMPREHENSIVE AGREEMENT ON INTERNAL TRADE

LET ME NOW ATTEMPT TO IDENTIFY more specifically some of the advantages to the economic union apart from the increased generation of material wealth.

The benefit to national unity is obvious. It ought to be viewed as intolerable that legal and practical situations exist where it is easier to do business on a north-south than east-west basis. The assimilationist pressure on Canada from the US will always be strong in many respects; it is cultural and social, as well as economic. It would be irresponsible not to make every possible effort to ensure that it is as least as easy to do business with compatriots, or move within this country, as it is to trade with residents of the US or to become one of them.

The promotion of personal opportunity is an important, and often under-appreciated, benefit of economic integration. As the size of a person's economic space expands, he acquires more room in which to find employment, carry on a profession, or build a business.

For most Canadians, the limits of one's economic and personal horizons are the boundaries of this country. While this country is large geographically, we have a relatively small population and labour market. A citizen of the US, the European Union (EU), or China has a larger world

by far in which to move, find employment, or do business with compatriots. We should be making every possible effort to ensure that individual Canadians are not confined to the even smaller arena of a single province.

Many international agreements pay little or no attention to the mobility of ordinary citizens. The North American Free Trade Agreement (NAFTA) contains some provisions that make it easier for professionals or business people to cross boundaries, but it does not enhance freedom of individual movement generally. The World Trade Organization (WTO) says little about personal mobility. The EU is a rare exception among trade arrangements in that it does allow for mobility of ordinary labourers. One of the most important contributions of the AIT system could be its liberating effect on the movement of ordinary citizens within our domestic economy, despite provincial boundaries.

Another virtue of open trade regimes is that they can amount to highly effective means of discouraging monopolies or market domination by a few firms. The Canadian economy traditionally has had unreasonable levels of corporate concentration. Canada's large geographic area and relatively small population have allowed some companies in smaller provinces or regions to dominate social, political, and economic life. By opening up these economies to other market-players, the level of choice, not only to governments, but also to individuals increases. If an employer in a field treats its employees poorly, the employees should have the opportunity to take their services elsewhere. Likewise, when individual consumers, or even suppliers, are given the option of exiting, the ability of large and powerful companies to exert undue influence over the marketplace decreases.

Increased choice can come from new enterprises entering the province, or having the opportunity to transact with enterprises in other provinces. The greater mobility that comes with economic union allows people to have more options in response to perceived injustices. If local governments or private enterprises are treating an individual in an unfair fashion and not appreciating the value of his labour, the individual can leave. The current labour unrest and shortages with regard to nurses show how potent a force this can be. It is the exit option for nurses that is finally leading to an increased respect for their value, better pay, and better working conditions.

Good and honest government can also be promoted by the development of a Canadian legal regime that protects the cause of the economic union. Reasonable concerns have been expressed about the extent to which governments' ability to act according to its best judgment is limited. Limitations on government discretion sometimes contribute to good government. The Charter of Rights and Freedoms limits government discretion and although the Supreme Court of Canada (SCC) has made

questionable decisions in the past, no one suggests getting rid of the Charter. Canadians, on balance, are glad their government's actions are disciplined and their human rights are protected to a certain extent from the politically accountable branches of government.

Procurement codes in NAFTA, the General Agreement on Tariffs and Trade (GATT), and the AIT also limit government discretion. On balance, this limitation appears to do more good than harm. Procurement codes, when they are enforceable, limit the ability of governments to engage in patronage and "pork barrel" spending. The CF-18 fiasco in the 1980s saw the federal government blatantly favour one company in a desire to shore up political support in central Canada. Although the deal did not cost a lot of money in terms of immediate procurement costs, the amount of goodwill that was destroyed and the loss of confidence in government institutions were considerable. Procurement codes demand that governments treat all companies, even those without political influence, in an open and equal manner.

Building the Canadian economic union does not require undermining other important values. Governments can be permitted ample room to continue to exercise judgment and leadership. In the context of government procurement, for example, the AIT currently allows for a variety of factors to be considered apart from cost. Provided the tendering documents state the criteria and weight given, governments may evaluate bids on a variety of factors including quality, capacity to fulfill the bid, and any other legitimate objective that can be justified. In addition, a ten percent premium is allowed for Canadian value-added products.

In some respects, the accommodation of non-free trade values may actually go too far. The current Agreement also allows for the wholesale exemption of cultural industries. The protection of "culture" could, if required, be carried out in a more finely focused way. The current Agreement also provides for the partial exemption of regional economic development programs provided they are not any more restrictive than necessary to achieve their objectives and do not unduly impair the market access of another party. The AIT might be more effective if regional development, like Canadian content, was capped at a set premium.

Regardless of the precise balance between free trade norms and competing values, the routine practice should endeavour to be as explicit as possible about where the balance lies. It may be obvious to technocrats drafting the agreements that governments' ability to act is not unduly hindered. Likewise, experts may feel confident that generally stated concepts will be interpreted together in a satisfactory way in response to particular problems. But given the recondite drafting style of the AIT, members of the general public may be understandably anxious. We should go much farther in spelling out what the Agreement does and does not do. It

is sometimes better to restate the "obvious" than to create unnecessary anxiety and doubt among members of the public.

It was pointed out during this conference, for example, that in the area of long-term nursing care, continuity of staffing may be very important to the well-being of patients. A government should not feel obliged to displace an existing supplier merely because there might be some modest price advantage. It would make good sense to explicitly identify such concerns in the text of the AIT and expressly provide that governments may take appropriate steps to address them.

Canada is a democracy. If government actions and agreements are to succeed, ultimately people must feel confident that their interests are being advanced. Explicitly identifying in the AIT the importance of values such as labour standards, environment protection, and anti-corruption, to name but a few, is a way of ensuring that free trade does not become a race to the bottom, but rather reaffirms some of our most important values.

An additional benefit of being more specific is that dispute-settling panels would have better guidance. What may be obvious to those who create norms may be far less obvious to those who must interpret them. The more specifics provided in the AIT, the less anxiety there will be about leaving its application in particular cases to third-party adjudication.

IV. WHAT CAN BE DONE?

WHAT CAN BE DONE INSTITUTIONALLY AND NORMATIVELY to advance the AIT? Although the Agreement is internal to Canada, it is helpful to examine international models and experiences to recall any analogies that can be made. International organizations vary from the successful and effective, such as the EU, to spectacular failures like the United Nations Educational Scientific and Cultural Organization. In an earlier article, "International Organizations: What Makes Them Work?"⁹ I examined several key factors that are indicative of organizational successes and failures. By examining the AIT in light of these factors, direction as to how to make the Agreement more effective may be discovered.

⁹ B. Schwartz & E. Leven, "International Organizations: What Makes them Work?" (1992) 30 *Can. Y. B. Int'l L.* 165.

A. Shared Sense of Long Term Mission

Collaborations among sovereign states or federal units work best when the partners have a *shared sense of the long-term mission* of the particular project. Perhaps the most successful example of such a vision is the EU. From the beginning, it was understood that greater economic integration could lead to both prosperity and peace in Europe. Eventually, it was hoped that some kind of "United States of Europe" might emerge. From its humble beginning as the European Coal and Steel Community this vision has been developed and expanded into the European Economic Community, and later into the European Community. The EU is the current receptacle of this vision of European integration. At each step along the way, the vision of greater integration has become more comprehensive in its scope and more sophisticated in its institutions.

The AIT currently has as its goal the reduction and elimination, to the extent possible, of barriers to the free movement of persons, goods, services, and investments.¹⁰ But this mission statement could be usefully made more specific in several areas.

First, the long-term vision of the AIT should be defined by reference to external trade agreements. Specifically, *the quality of any internal trade regime must always match or exceed the quality of any external trade regime to which Canada belongs*. To have anything less creates a paradoxical situation in which foreign firms have a greater right to complain about Canadian governments while Canadian firms are placed at a competitive disadvantage.

The extent of this competitive disadvantage can be seen by examining performance requirements to investing under the AIT and NAFTA. Although performance requirements are contrary to Article 1106 of NAFTA and Article 607(1) of the AIT, they can be justified under the AIT if they are part of regional economic development. Newfoundland justified its demands that Inco, a Canadian company, develop a processing plant along with its proposed mining facilities at Voisey's Bay by claiming that these requirements are part of regional economic development. For the past five years the Voisey's Bay site has remained undeveloped as Inco and Newfoundland were unable to reach agreement as to the level of investment which ought to take place.

An American or Mexican company would be better able to resist these demands by relying on the prohibition against performance requirements

¹⁰ "A Consolidation of the Agreement on Internal Trade," online: Internal Trade Secretariat <http://www.intrasec.mb.ca/pdf/consol_e4.pdf>.

and demands for national content in NAFTA. Although regional economic development programs can exist under NAFTA, these programs cannot impose performance requirements. A foreign company that is unable to thwart government attempts at performance requirements, would be able to use the dispute mechanism in the investment chapter of NAFTA to press a claim for compensation.

Canada should not be playing catch-up with international agreements. Our internal economic union should be at least as liberal as any external regime in which Canada participates.

There is a perception that bringing internal Canadian trade policies to the level that currently exists externally would result in a further loss of sovereignty and control by the provinces, the federal government, and the people of Canada. Canadian governments have already accepted the discipline of international agreements such as the GATT, NAFTA, and the proposed FTAA. If governments are willing to limit their actions with regard to foreign sovereigns or companies, they should, by any rational standard, be at least as willing to do so with respect to fellow Canadians.

There is a second respect in which the mission of the AIT regime should be made more specific. Not only should the AIT's vision be expanded to match external trade regimes, *its scope should also be expanded to include all levels of government and governmental organizations.*

The current lists of excluded government entities and services ought to be reduced, including the comprehensive exclusion for First Nation governments. Because of the special status of First Nation governments, the Agreement cannot be imposed as it has been with municipalities, academic institutions, social service entities, and health care organizations (MASH).¹¹ Instead, negotiations and modifications would have to take place before First Nation governments could be included. Canada is not doing the Aboriginal peoples a favour by excluding their governments entirely from the AIT. All citizens of Canada, including Aboriginal people, ought to be able to benefit from more rational, transparent, and open governments that are limited in their ability to engage in patronage and "pork barrel" spending.¹²

¹¹ *Ibid.* at Annex 502.4.

¹² In developing the legal regimes in Canada that deal with economic affairs generally, we might aim at yet another objective: that the level of protection that a Canadian enjoys vis-a-vis his own federal or provincial government matches that afforded to residents of other provinces or countries. If a government cancels, without compensation, a contract with its own citizen, the latter may have no effective rights or remedies. A resident of the United States, by contrast, might have a remedy under Chapter 11 (investment) of NAFTA. If a resident of Alberta can complain under the AIT about how Manitoba conducts procurement, a resident of Manitoba should have the same right.

B. Incremental Steps

Another lesson from the study of international organizations is *that incremental steps are the best way to achieve the long-term vision*. The only way to test the value of human institutions is through actual practice. Ideas that seem good in theory often have surprising consequences – sometimes for good, sometimes for ill – when implemented in practice. As steps are taken to implement the long-term vision of a collaborative project, like the AIT regime, partners should monitor what has worked and what has not. Successful features should be rendered more permanent, or extended to new contexts. Failed norms of institutions must be reformed or abandoned.

Incremental steps are also needed because collaborative projects depend upon mutual trust and confidence. Partners must, from time to time, be willing to accept norms or decisions with which they do not agree. They may do so if they believe that their partners will be similarly compliant. Trust (or distrust) is learned through an extended series of incidents.

The Internal Trade Secretariat's report on last year's regional consultations suggests that people were generally frustrated with the dispute mechanisms in the AIT.¹³ In contrast to the general dispute mechanisms, however, there has been one marked success: the use of the Canadian International Trade Tribunal (CITT) as a dispute mechanism for federal government procurement disputes. The CITT has produced decisions expeditiously, in relatively high volume, and with a reputation for independence. Although not technically binding, the CITT's quasi-judicial decisions are reasonably succinct, accessible, and appealable to the Federal Court of Canada (FCC).

The CITT provides a successful base upon which the effectiveness of the AIT can be improved. In keeping with Article 516(4), which calls for the harmonization of bid protest procedures, the jurisdiction of the CITT ought to be expanded to include provincial and MASH procurement disputes. Eventually, all dispute resolution in the AIT might be funneled to the CITT. By shifting dispute resolution to the CITT, the AIT system would be able to take advantage of an institution that has proved effective in practice.

The expansion of the jurisdiction of the CITT would also require modification of the way in which the tribunal is structured. If disputes against

¹³ "Report on the Regional Consultations and Next Steps," online: Agreement on Internal Trade, Internal Trade Secretariat (April 2001) <http://www.intrasec.mb.ca/pdf/conslt_e.pdf>.

provinces are to be heard, then the provinces ought to have a voice in who sits on the tribunal and how it is to be structured. Although the tribunal usually hears cases in Ottawa, if it is to have national breadth it should hear cases across all of Canada.

C. Super-Majoritarian Voting

Incremental growth is easier *when the partners to an international or federal collaboration can proceed by way of majoritarian or super-majoritarian voting, rather than having to achieve unanimity.* The comparative study of international and federal collaborations teaches that placing a veto in the hands of a single partner tends to hamper decision-making and institutional development. Until the 1990s and the end of the cold war, the Security Council of the United Nations was rendered largely ineffective by the requirement of unanimity among the five permanent members. In Canada the presumed requirement of unanimous support among the provinces frustrated repeated attempts to bring home the constitution until the Patriation Reference determined that unanimous support was not needed. Constitutional developments in the EU in the past decade have increased the number of areas in which decisions can be made by a weighted majority of members, rather than allowing a proposal to die at the hands of a single objector.

Super-majoritarian voting, with the right of opting out by dissenting provinces, may be a means of expediting the growth of the AIT. The expansion of government procurement standards to the MASH sector was resisted by British Columbia and the Yukon. Instead of allowing this resistance to halt the expansion of the AIT, these two governments have opted out of this part of the Agreement.

The ability to opt out, however, ought generally to be linked to the idea of reciprocity. The jurisdiction of the International Court of Justice (ICJ), the "world court," is based on this concept. State A might, for example, accept the jurisdiction of the ICJ over all matters of international law, except for those involving oceans. State B might accept the jurisdiction of the Court without qualification. State A can then bring legal claims over state B – unless the matter involves oceans. The immunity that a state claims for itself may be applied against it. By widening its exposure to the authority of the ICJ, a state acquires more opportunities to make claims against other states.

The same principle of reciprocity could be applied to an enhanced role for the CITT within the AIT system. Suppose that the partners to the AIT agreed that the CITT should be the general dispute-resolution body. To make this innovation more tolerable to doubters, the AIT might allow AIT partners to "opt out" of the jurisdiction of the CITT in various respects. If

a province then exercised its option to do so by declining to accept the jurisdiction of the CITT over procurement matters, for example, that province and its residents would be precluded from bringing claims against other AIT partners. Residents of the province might then put pressure on their government to change course and accept the jurisdiction of the CITT more fully. By doing so, the province would expose itself to a dispute-settling authority; by the same token however, the province would be enabling its own residents to take advantage of that dispute-settling authority when they feel wronged by the action of another AIT partner.

D. Expeditious and Impartial Dispute-Settlement Mechanisms

Another lesson from the comparative study of collaborative projects is as follows: international and federal projects *work better when the parties have access to expeditious and impartial dispute-settling mechanisms*. The development of the EU has been greatly assisted by the active role of the European Court of Justice. Its course of decisions, which have been accepted by the EU partners, have clarified norms established by the political partners, enforced them in the context of concrete disputes, and to some extent provided supplementary norms that have promoted integration.

Let us now have a further look at how impartial dispute-settlement mechanisms are working – and not working – in the context of the existing AIT system. Currently disputes arising out of federal government procurement practices are adjudicated by the CITT. (Provinces are subject to the authority of the CITT only when they list a procurement area in the context of the General Agreement on Purchasing).¹⁴ Of the complaints that the Internal Trade Secretariat has documented in the past three years, 84% have been resolved by the CITT.¹⁵ These disputes are routinely dealt with in less than six months and the CITT's decisions are reviewable by the FCC.

The other dispute resolution mechanisms in the AIT have been less successful. Thirty percent of all disputes, excluding federal government procurement, are still pending.¹⁶ The regional consultations undertaken

¹⁴ *Canadian International Trade Tribunal Act*, S.O.R./93-602, s. 3(2)(c) as amended by S.O.R./95-300, s. 4; S.O.R./96-30, s. 2.

¹⁵ "Dispute Complaint Tracking-Summary Tables," (23 March 2001), online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/table.htm>>.

¹⁶ *Ibid.*

by the Internal Trade Secretariat conclude that there is a considerable dissatisfaction with the slow, complicated, and expensive process of dispute resolution under the AIT.¹⁷ Although the report suggests that there is no consensus on making the AIT legally binding, there is a growing recognition that something needs to change.¹⁸

Increasingly, international trade agreements recognize that dispute resolution in economic matters must be done expeditiously. The Uruguay Round of the GATT reforms put tight time lines on dispute settlements. Waiting years for a decision from Geneva is no longer acceptable. Likewise, procurement issues under NAFTA are on a tight time frame. Justice delayed is often justice denied. Undue delays affect the credibility and performance of an institution. The AIT is hampered by the political nature of the Agreement, the failure of several provinces to appoint panelists, and the open-ended dispute system.

E. Rule of Law

International organizations, like federal unions, *work best when they are based on the rule of law rather than force or retaliation*. A natural evolution for an institution is to begin with non-binding rules and, as confidence builds, move toward binding rules and procedures. At first, the member-nations of the EU merely wanted a political body to make recommendations with respect to human rights. As the institution gained credence, it was able to develop. Now most states accept the authority of the European Court of Human Rights.

The WTO experienced a similar evolution. Originally there was the somewhat failed system of helpful suggestions from dispute panels under GATT. This was ineffectual, as any state that was not satisfied with the results could veto the panel report. The GATT has now moved toward the rule of law model. The Agreement on Government Procurement, for example, makes up part of the current jurisdiction of the CITT.

The CITT tends to move toward being legally binding, while in actuality it only issues recommendations with regard to procurement. According to s. 30.18(2) of the Canadian International Trade Tribunal Act (CITTA), the government has the right to:

¹⁷ *Supra* note 7.

¹⁸ This idea was also presented at this conference by N. Hughes Anthony, "Internal Trade in Canada: A Matter of National Importance" (Strengthening Canada: Challenges for Internal Trade and Mobility, Conference of the Internal Trade Secretariat) Toronto, Ontario (1 June 2001) [unpublished] and N. Nankivell, "Unfinished Agenda: Freeing Up Canada's Internal Trade Market" (Strengthening Canada: Challenges for Internal Trade and Mobility, Conference of the Internal Trade Secretariat) Toronto, Ontario (1 June 2001) [unpublished].

advise the Tribunal, in writing, of the extent to which it intends to implement the recommendations and, if it does not intend to implement them fully, the reasons for not doing so.¹⁹

This right, however, was judicially limited in *Wang Canada v. Canada (Minister of Public Works and Government Services)*.²⁰ In *Wang*, the FCC decided that the government's obligation to implement the tribunal's recommendations to the greatest extent possible, as found in s. 30.18(1) of the CITTA. The implication of *Wang* is that the CITT has more than mere moral authority. Its recommendations are close to being as legally binding as typical decisions of a court or of other administrative bodies.

The CITT has a variety of powers available with regard to procurement. It can recommend that new bids be accepted, that existing bids be re-evaluated, that the contract be terminated, that the contract be awarded to the complainant, and/or order the payment of damages.

There is room for discussion about whether governments should be locked into implementing the CITT's recommendations or whether they ought to always have the option of paying damages instead. Under the WTO, governments have the option of paying damages and buying their way out of a ruling. Provincial governments might find the CITT more palatable if they were not locked into implementing the CITT's recommendations. The option of paying damages would allow governments to evaluate the competing interests and act accordingly.

Making the AIT legally binding, or at least as binding as the CITT currently is on the federal government, does not pose any major constitutional difficulties, as long as AIT partners concur. Joint marketing boards, authorized by both the federal and provincial governments, have existed for some time and been found to be constitutional by the SCC.²¹ A legally binding dispute mechanism can be created for the AIT where interlocking federal and provincial legislation has empowered a tribunal, such as the CITT, to hear disputes arising under either authority.

F. Economy of Design

Finally, *effective international or federal projects require that norms and institutions be kept reasonably simple, coherent, and compact.* This

¹⁹ *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47, s. 30.18(2).

²⁰ (1998), 10 Admin L.R. (3d) 296.

²¹ *Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198.

factor is not one identified in my 1992 study of international organizations. Further study and reflection, however, have convinced me that collaborative enterprises tend to be more effective when their architecture – the set of key norms and institutions – maintains a shape that is reasonably clear, simple, and tight.

The old GATT system, for example, became more and more complicated and incoherent through time. Different states entered into a variety of multilateral and bilateral side deals. In the Uruguay Round, the decision was made that the GATT partners would either accept or reject a single package of agreements.

It is difficult – almost impossible, for bureaucrats in smaller provinces and local organizations to monitor and comply with all of Canada's obligations under different national and international agreements. Besides the AIT, Canada has bilateral agreements with Israel, Chile, and the US; agreements on investment with 60 or 70 countries; obligations under NAFTA and GATT; and negotiations underway for the FTAA and Pacific Rim free trade area. Institutions and agreements ought to be designed to take advantage of existing standards and dispute resolution processes. If negotiators of the FTAA consider it appropriate to include a chapter on labour standards, they ought to adopt the existing International Labor Organization standards instead of creating yet another set of competing standards.

Although the AIT should have one core set of norms and one or two central dispute-settling institutions, its framers can still provide for some flexibility. If First Nations are to be included in the AIT, it might not be necessary to negotiate a whole new side-agreement. Rather, appropriate modifications could be written into the core AIT text.

In the context of the AIT, a single central dispute resolution body (a modified CITT would be the best candidate) could contribute to the effectiveness and credibility of the system. A reasonably coherent and internally consistent body of interpretation could emerge – something that is less likely to happen when different bodies address different types of disputes. A single dispute-resolution body should be able to develop a grasp of the Agreement as a whole and interpret individual elements in a way that does justice to the entire framework of norms. A tribunal whose members also deal with disputes arising under various NAFTA or WTO norms may bring to disputes under the AIT a welcome sophistication and depth of learning. Governments and citizens who are tracking the impact of the AIT will find it easier to do so if the spotlight is on one central dispute-settling body.

V. STRENGTHENING THE ECONOMIC UNION OUTSIDE THE AGREEMENT ON INTERNAL TRADE

LET ME CONCLUDE BY LOOKING AT SOME OPTIONS for strengthening the economic union outside of the AIT and its related institutions. One approach would be to *enact a constitutional amendment* that would entrench economic rights and provide a variety of prohibitions against restrictions of free trade. The European Community's constitution, for example, plainly prohibits states from discriminating against the people, goods, services, and investments of another state.²² Likewise, the American constitution's interstate commerce clause has been interpreted by the courts as prohibiting a variety of protectionist measures by American states.²³

In Canada, there appears to be little desire among the provinces to create a constitutional amendment that would entrench an economic union and be likely to give greater powers to the federal government. Proposed amendments have failed both when the constitution was patriated and in the proposed Charlottetown Accord. The hesitant and non-legal nature of the AIT is itself a testimony to the lack of consensus in support of a strong internal economic union.

It would be possible to modestly further the goals of the AIT through consensus-building institutions like the Uniform Law Commission. The commission has been helpful in harmonizing laws between the provinces on a variety of subjects by proposing non-binding model laws which governments are encouraged to enact. History suggests, however, that there is not always consensus among the provinces in implementing proposals that emerge.

The courts may have some opportunity to promote the economic union by adopting liberalizing interpretations of some of the existing constitutional provisions. These include the guarantee of free trade in goods in s. 121 of the Constitution Act 1867, and the guarantees of free association, equality, and mobility rights under the Charter.

As it exists, s. 121 does not provide for free trade in services, invest-

²² *Treaty of Rome*, 25 March 1957, Article 3, online: Treaty Establishing the European Community as Amended by Subsequent Treaties <<http://www.tufts.edu/departments/fletcher/multi/texts/rome/contents.html>>.

²³ *United States Constitution*, Article 1, s. 8(3), online: The Constitution of the United States of America <<http://www.access.gpo.gov/congress/senate/constitution/toc.html>>. To search the constitution access the Emory University website online: United States Constitution Search <<http://www.law.emory.edu/FEDERAL/usconser.html>>.

ments, or labour-only goods. Case law suggests that even the guarantee of free trade for goods is rather limited. Originally s. 121 was found to only prohibit custom duties between provinces. This was expanded to include any "trade regulation that in its essence and purpose is related to a provincial boundary."²⁴ The track record so far suggests that the courts are not prepared to interpret and apply the section in a bold manner.²⁵

Freedom of association and equality rights have also proven to be unfruitful in advancing the economic union. Although freedom of association in s. 2(d) of the Charter was used in *Black v. Law Society of Alberta*²⁶ to invalidate rules that prohibited inter-provincial law partnerships, the Court later rejected the idea that economic activity and the association it denotes involved a constitutionally protected right.²⁷ It is possible that in some future case, courts will use s. 15 to strike down provincial laws – for example, those concerning the licensing of professionals – that discriminate against individuals on the basis of their province of origin or ordinary residence.

The Charter's mobility rights in s. 6 were limited by the SCC in *Canadian Egg Marketing Agency v. Richardson*,²⁸ when it aggressively applied the stated exceptions. Section 6(3)(a) states that the right to move and pursue a livelihood is subject to all laws of general application which do not *primarily* discriminate on the basis of residence. Because most of the barriers the AIT seeks to eliminate have a legitimate purpose, litigation under s. 6 remains unlikely to advance the economic union.

If the courts are unwilling or unable to develop the idea of an economic union in Canada, it remains *open to the federal government to implement AIT-like provisions by unilateral legislation*. I have argued and continue to believe that the federal government has the constitutional

²⁴ *Murphy v. Canadian Pacific Railway Co.*, [1958] S.C.R. 626 at 642 as quoted in *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R.157.

²⁵ Perhaps the widest interpretation was given by La Forest J., in *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591, where, in obiter, he argued that s. 121 reflected the drafters' dominant intent to create a national economy and common market as part of our new nation. The trade and commerce clause, presumably along with the other enumerated powers of the federal government over business interests such as banking, interest, copyrights, and bankruptcy, shows the drafters' attempt to pull down existing internal barriers to the free flow of business. Quoting from Rand J., La Forest appears to be arguing that with the exception of purely local and private concerns, the free flow of business interest is a matter beyond the scope of the provinces. In its latest ruling, the Supreme Court of Canada has returned to a narrower interpretation of s. 121.

²⁶ *Ibid.*

²⁷ *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R.157.

²⁸ *Ibid.*

right to take unilateral action under the trade and commerce clause as it was expanded in *General Motors v. City National Leasing*.²⁹ The federal government could theoretically enact provisions similar in effect to the AIT. Political sensitivities with regard to unilateral federal action – especially concerns about inflaming separatist sentiment in Quebec – make it unlikely that Parliament will adopt this course anytime soon.

Instead of unilaterally enacting a comprehensive AIT-like statute, the federal government could supplement the economic union with federal statutes in discrete substantive areas of law. An example of this kind of federal action is the Personal Information Protection and Electronic Documents Act of 2000 (PIPEDA).³⁰ Although the regulation of firms that act solely within a province has traditionally been the purview of provincial governments' authority under property and civil rights, the PIPEDA provides for a national standard for the gathering and use of personal information. The Act provides for a uniform minimum standard for the protection of information throughout all of Canada that can be relied on by Canadians and foreigners alike.³¹

²⁹ [1989] 1 S.C.R. 914. A discussion of this argument was more fully developed in B. Schwartz, "Assessing the Agreement on Internal Trade: The Case for a 'More Perfect Union'" in D. M. Brown and J. W. Rose eds. Canada: *The State of the Federation* (1995) (Kingston: Queen's University, 1995) 189.

³⁰ S.C. 2000, c.5.

³¹ My prediction is that PIPEDA will be upheld in the courts under the federal trade and commerce power. In the *General Motors* test, the Supreme Court of Canada laid out five indicia of whether a federal statute can be upheld under the trade and commerce power. PIPEDA clearly meets the first three tests – it is a national regulatory scheme, there is a national regulatory agency, and the statute addresses trade and commerce in general rather than imposing detailed regulations on an industry-by-industry basis. The fourth test is whether the "legislation is of a nature that the provinces jointly or severally would be constitutionally incapable of enacting." Obviously, there would be huge gaps in a joint provincial scheme to protect privacy; inter-provincial transactions and the federal private sector, which includes banks, television, radio, and telecommunications, would be exempt. The fifth test is whether "the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country." If one or more Canadian provinces had lax privacy laws it would frustrate the underlying goals of PIPEDA in several respects. Canada is an economic union, and a company with a base in one province may routinely share information about consumers or employees with a branch in another province. Once information ends up in a privacy-law haven, it might be difficult to prove that it originated in a privacy-safe province. The privacy-safe province, where the information originated, might have little ability to provide remedies once information is leaked in a privacy-haven province. Residents of foreign jurisdictions that have tough privacy laws, such as the European Union, may be much more willing to send information to Canada for data processing or other purposes if they are confident that the entire country is privacy-safe.

The application of the statute on provincially regulated firms is delayed for three years to allow provinces to pass similar regulations if desired. The federal cabinet can then exempt provinces, such as Quebec, which pass substantially similar legislation. Individual provinces are prompted to either pass tougher standards, make minor local exceptions that might be important to that province, or accept the default federal law. The Act allows provinces that favour devolution of powers away from the federal government to save face and pass their own legislation.

Although this kind of subject-specific federal action would not create a comprehensive economic union, it would create greater integration in some economic areas. If political agreement cannot be found to give the AIT more substance and legal weight, unilateral federal action under the general branch of trade and commerce clause could further this end. Similar acts could be used in areas such as electronic commerce generally, and internet transactions in particular.

VI. CONCLUSION

THE CAUSE OF THE ECONOMIC UNION remains one that is undersold by politicians. There is a strong people's case, not just a business case, for strengthening the Canadian economic union. A stronger economic union would contribute to prosperity, but more than that, to enhanced individual opportunity and mobility, to less dependence on enterprises or governments that may dominate a local economy, to cleaner and more open governments, and to a strengthened sense of national unity.

The lessons that emerge from other federal and international projects can be applied in thinking about ways to strengthen the AIT. The long-term vision should be strengthened in two ways: we should be clear that the level of internal free trade must constantly match or exceed those levels contained in our foreign trade agreements; and we should aim to include the whole range of Canadian governments, including those pertaining to First Nations.

We should implement the vision in steady increments, a process that includes building on past successes and abandoning past failures. Among other things, we should be making more use of permanent institutions with binding, or quasi-binding authority (like the CITT) and less use of ad hoc panels that only have the power to make recommendations. The system as a whole should be moving more strongly towards respect for the rule of law, and less on antiquated techniques such as permitting retaliation. The political process for building the AIT should make more use of super-majoritarian decision-making, rather than requiring unanimity - although judicial provision might be made for dissenting

provinces to "opt out" of certain collective decisions.

The core institutions and norms of the AIT should be reviewed with a view to making its architecture more clear, simple, and compact. One centralized dispute-settling body, such as the CITT for example, could handle procurement disputes generally, rather than allowing for different processes depending upon which government is carrying out the purchase. A centralized dispute-settling body might eventually handle disputes generally.

The drafting of AIT norms should also be done in a way that provides a reasonable level of explicitness and precision in addressing sensitive values apart from free trade. The anxieties of critics of the AIT might be addressed to a large extent by stating more plainly the ways in which the Agreement does, or does not, interact with other Canadian values.

The people's case for the AIT is there to be made. What is now needed are government leaders who are willing to press it. Bolstered by a new level of public understanding and support, governments would be in a better position to improve and refine the AIT, and it could emerge as a vital element in an improved federal system.

