

**WHERE DO WE GO FROM HERE? -
PRESENTATION TO THE
NATIONAL CONFERENCE
"STRENGTHENING CANADA:
CHALLENGES FOR
INTERNAL TRADE AND MOBILITY"**

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IF THERE HAS BEEN A CONSTANT OVER THE PAST DECADE in the debate about the *AIT* (and all trade agreements), it is that opinions vary widely, are strongly held, and are drawn from and reinforced by quite different kinds of evidence and world views.

This makes the task of summarizing what we have heard over the past two days difficult. The various panellists have given us a great many suggestions about where we should go from here.

I am reminded in such circumstances of the answer that a distinguished social philosopher (Michael Foucault) gave to an interviewer who asked him why he always seemed so negative in his political commentaries. The philosopher's response was that the essential point about politics was not whether things were good or bad but, instead, that everything is dangerous.

This statement reminds us that all policies set in motion their own unique series of events and that we must be ever mindful of the unintended consequences of our policy choices.

So some of my remarks today are going to take the form of a cautionary tale from a political scientist about the dangerous of forgetting about the fundamentals of our political system and of choosing to make the free flow of commerce the primary priority of policy making.

The worthy goals of the *AIT* will surely not be met if the full complexity of domestic policy objectives and democratic accountability are subordinated to the blunt determination of a so-called internal trade barrier.

Governance and the formation of policy instruments such as the *AIT* are responses to perceived problems. Governments are in the business of problem-solving. Indeed, the history of Canada can be read as the discovery of a series of problems to be governed, beginning as Douglas Brown pointed out yesterday, with Confederation itself and the creation of an East-West economic union.

Shut out of the American market by high tariffs and set adrift by British free traders, the Fathers of Confederation took, in the language of the Macdonald Commission of the 1980s, a "leap of faith" and created an institutional and physical infrastructure for the flow of trade among the former British colonies. Their solution to the problem of promoting internal trade, of course, was to vest the federal government with what were then considered to be the most critical powers of commerce and to shut foreign competitors out with a high tariff wall.

In today's international economy the tariff solution to the challenge of building an internal market is no longer an option, either realistically or legally. In the present milieu, the challenge is to advance both internal and external trade flows.

When the *AIT* was negotiated in the early 1990s, it too was framed as a solution to a series of problems, indeed some would say crises. It followed on the heels of the Macdonald Commission which argued that Canada had painted itself into an economic corner with no option left to it but to negotiate a free trade agreement with the United States, the negotiation of a continental free trade deal and the combined crises of: 1) national unity, as evinced by a separatist party, a separation referendum, and the collapse of the Meech Lake and Charlottetown Accords; 2) the crises of persistently high levels of unemployment and low levels of economic growth; and 3) the combined strains of the debt and deficits.

Rightly or wrongly, in the spring of 2001 all of these crises seem distant, but over the course of the past two days some of our speakers have returned to crisis talk to argue for the strengthening of the *AIT*. We have heard that "the clock is ticking" and that "the world is passing us by." Others, in contrast, have cautioned us that there is no crisis in internal trade flows and to argue otherwise is simply not credible. Indeed, crisis talk leads us away from rather than closer to the practical solutions that this round of consultations seeks to find.

Yet the idea of solutions begs the question: what exactly is the problem with the *AIT* today? According to both our speakers and the comments from participants, we have numerous problems in search of a solution, among them, a lack of political will, a lack of a stable and open market, a neglect of the agreement, and a threat to national unity caused by impediments to labour mobility.

The various solutions offered, however, are informed by very different, almost polar policy options, choices between:

- harmonization and diversity
- centralization and decentralization
- rule-making and consensus-building
- legalism and politics

- public and market
- sectoral and universal
- public interest and commercial efficiency
- economic and social policy and the list goes on.

In fact, if this round of consultations is about finding practical solutions to the problems of internal trade and the *AIT*, there seems to be little consensus about the problems or the way forward, beginning with the central issue of whether there are indeed significant barriers to internal trade flows in this country. Is the *AIT*, as one speaker suggests, a solution looking for a problem? Or does the fact that internal trade grows more slowly than external trade evince the existence of barriers to be eliminated?

These competing claims, from the outset seem to provide a formula for stalemate and deadlock. On the one hand, building a crisis out of anecdotal and testimonial evidence encourages solutions which are disproportionate to the problems at hand. There is also the problem of growing suspicion and resistance to the perceived underlying agenda of trade agreements which we have seen in Seattle and Quebec City. On the other hand, it also serves little purpose to say that nothing needs to be fixed. There is no good reason, I am sure, why an undertaker can not ply her trade equally well in Moncton or Moose Jaw. A number of speakers have pointed that, in the case of mutual recognition of established occupations, obstacles to labour mobility have been progressively diminished under the *AIT*.

Important challenges remain, however, where provincial standards are substantially, different, inadequate or non-existent. In this case, another speaker has suggested that a national template of standards be negotiated. However, this governing strategy requires agreement about whether standards should be harmonized upward or downward toward a common denominator. We also have heard here that many of the costly irritants in commercial law preventing the free flow of trade are often historical accidents and non-controversial. In this case too, harmonization, although time-consuming, is progressing. Others point to necessity of making the *AIT* disputes process more flexible.

Much of the ongoing debate about interprovincial trade, about what is to be done, is really not about trade at all. Instead, as the panels in this conference attest, much of the debate is about how decentralized the regulatory regime should be and about how much flexibility governments should have to intervene in markets.

Among the much that has been written about the *AIT* in the past few years, I have been greatly swayed by Copeland's work for the British Columbia government. Copeland's argument simply put is that no one is

well-served when a wide range of quite distinct policy problems are masked by and subsumed under the term "trade barrier."

The real issue, he contends, is regulatory reform, especially the current configuration of Canadian federalism (the trade-off between diversity and harmonization) and the proper role for all governments in the economy (the trade-off between consumer rights and citizenship rights). Both are huge topics but I want to conclude by making a few observations about each.

The issue of federalism has been raised in our discussion with respect to 1) provincial regulations being either redundant or as obstacles to interprovincial trade or both and 2) to the value of diversity and the lessons that can be learned from experiments in governance at the provincial level whether in the form of social policy, regional development or, as has been suggested by one speaker, more market-oriented approaches. We also have heard arguments about democratic accountability and subsidiarity – the idea that local governments are best able to respond to local conditions and needs. We have heard that a "one-size-fits-all policy approach is unworkable in a country and economic union as diverse as Canada.

Federalism is undoubtedly the most important fact in our present discussions about internal trade. It simply rules out policy options that are readily available to unitary states. I believe, for example, that federalism rules out recourse to legally-binding enforcement mechanisms.

Although one can not fully anticipate court decisions, I would disagree with the idea raised this morning that the Labour Conventions case of 1936 has been deemed redundant by NAFTA. The Canadian government has signed a number of international agreements and conventions, especially in the area of human rights, and there are no cases, to my knowledge, where the Courts have embraced the idea that these agreements trump either the basic federal jurisdictional bargain or the decisions of democratically elected governments.

This being said, there has been wide divergences in the history of centralization and decentralization in Canadian federalism. Importantly these shifts have been enacted through intergovernmental consensus-building in the face of changing external conditions and not through legal or constitutional fiat. As noted in the previous panel, the first outline of the *AIT* came in the form of suggested amendments to the constitution during the patriation process and the Charlottetown round but these proposals to renew the economic union were rejected as appropriate for constitutional entrenchment. The *AIT* as it now stands and what progress has been made in reducing internal trade barriers has been the result of intergovernmental negotiation and consensus-building.

At the same time, I think we all recognize that continentalization and

globalization as well as the new rules governing the international economy have put increasing pressure on our governments to achieve integration through both negative and positive means. As was emphasized yesterday, national competitiveness in the new global order demand more national integration. The issue is how to achieve this integration effectively and democratically.

The options which have been debated here range from political to legal solution and from consensus-building, to weighted voting systems, to legally-binding rules-based regimes, to the sanction of suing governments. Notwithstanding points raised in the last panel, the legally-binding route has important limitations. First, it is not flexible. Second, as was asked yesterday, what would happen if a province simply decided not to abide by the rules. I have no doubt that, in cases of clear provincial jurisdiction, the courts would side with the offending province every time. And, this leads to a final point, We have heard here many times that the elimination of internal trade barriers will foster a stronger national unity. However, if this involves coercion, the impacts on the political union would be very harmful. I think that we would quite quickly discover that something as trivial as the colour of the margarine on our table could break the political union.

It has been argued here, and rightfully so, that many provincial laws and regulations which are deemed to be trade barriers are, in fact, legitimate policy responses to provincial needs for economic security, environmental and consumer protection and social and safety standards.

And, if these represent the cost of doing business, then so be it.

This draws me to a final point. There have always been political and social trade-offs as a cost of doing business in liberal-democratic systems. It was suggested earlier today that free markets are the most effective way of dealing with the world, leaving people to pursue more lofty goals. Well maybe some people. This formulation of the new liberalized world in which we live leaves out the very real and multiple manifestations of market failure. Markets do not distribute wealth well either among people or regions. They do not generate full employment and they do not preserve the environment. Liberal democratic governance is based on the premise that there is a necessary role for governments to maintain social cohesion, that some things simply are incompatible with market mechanism and that there are other things which can not be left to the chance of market failure.

Governments must have the power to intervene. The question in the current rules-based international liberalized environment is how. I think that the recently completed agreement on e-commerce regulations is a productive example of positive integration and harmonization can be achieved in Canada. Negotiations among federal-provincial and territori-

al governments as well as broad-based consultation may not prove the most direct path to an integrated national economy but surely it is the most prudent.