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Governance in the Agreement on Internal Trade

By

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With

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Acknowledgements

Before thanking our contributors, we would first like to state that the views expressed in this study are the responsibility of the authors and are not attributable to any of the individuals in the resource group, their organizations or their governments, or the views of CGA-Canada.

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Introduction 1

With the recent founding of the Council of the Federation, the elimination of internal trade barriers between the provinces is receiving renewed attention. In addition, July of this year will mark the 10th anniversary of the signing of the Agreement on Internal Trade (AIT)[1]. These events make it timely to revisit some of the key themes and issues that have shaped the debate since the Agreement was first signed.

Many AIT discussions proceed by choosing one or more of its sector chapters and then trying to determine how much progress has been made on removing barriers. By most accounts, after ten years the answer is: not much. Reasons range from political unwillingness to give up cozy arrangements to uncertainty over how to fairly and appropriately harmonize or reduce complex tangles of regulations and standards. Yet, as Robert Knox has argued, we can make it work—*if we want to*[2]. But what will that take? What must we want to do?

In responding to such questions, the KTA Centre for Collaborative Government, in partnership with the Certified General Accountants Association of Canada, assembled a resource group of about 10 individuals from a number of relevant sectors. Although the group contained some trade experts, it also had members from other areas, including business, the public service and politics. The group met by conference call in June of 2004 to discuss whether the Agreement needs more effective *governance* arrangements, that is, changes to the set of processes and mechanisms by which decisions are made. Through a series of three roundtable sessions it considered three basic questions:

- How are the principles and rules of the AIT being implemented within the various sectors that it covers?
- Should some stakeholders play a more influential role in decision making within the different sectors?
- What sort of dispute resolution mechanism is needed to implement the AIT?

This paper addresses these questions, first, by drawing attention to the governance practices that now underlie the AIT—what we will call its *governance legacy.* Discussions around, for example, the consensus rule and dispute resolution would benefit from a clearer focus on the role this legacy plays in decision making. Second, we discuss why implementation has been comparatively successful in two particular areas—trucking and labour mobility—and ask what lessons this might hold for other ones. In brief, our conclusion is that governments could take steps to transfer more of the responsibilities for implementing the Agreement to stakeholders. Finally, the paper comments on what this might mean for some issues around dispute resolution.

A final word before beginning: the views expressed in this study are the responsibility of the authors and are not attributable to any of the individuals in the resource group, their organizations or their governments, or the views of CGA-Canada. We do, of course, offer many thanks to the resource group and CGA-Canada for committing the time, effort, resources and insight that has led to the writing of this paper.

[1] For a brief backgrounder on the Agreement, please see the appendix at the end of this paper.

[2] Knox, Robert H., *Canada's Agreement on Internal Trade: It Can Work If We Want It To,* position paper prepared for the Certified General Accountants Association of Canada, April 2001. www.cga-canada.org

It is widely agreed that progress on implementing the AIT has been disappointing, at best. Most of the targets and goals included at its signing have not been met. Commentators cite two key reasons: first, its reliance on a consensus model of decision making, and, second, an ineffective dispute resolution process. Regarding the first, any changes to the Agreement involve all parties to it—that is, federal, provincial and territorial governments. With fourteen governments potentially at the table, small points of dissension easily become large obstacles to progress. Regarding the second point, dispute resolution is handled by the governments concerned. But the process has proved slow, there is no real mechanism to enforce a decision and third parties have had almost no opportunity to access the mechanism. As a result, in the decade since the AIT was signed, the governance around it has been the target of much criticism, with repeated calls to revise the consensus rule and/or strengthen dispute resolution.

Is the consensus rule a major flaw in the AIT? Does dispute resolution need to be strengthened?

Our resource group looked beyond the consensus rule and the dispute resolution mechanisms to the constellation of structures, processes and interests that drive decision making.

In responding to these questions, our resource group looked beyond the consensus rule and the dispute resolution mechanisms to the constellation of structures, processes and interests that drive decision making in the various sectors. As one participant noted, the AIT did not appear out of thin air. It was imposed on a heterogeneous mix of economic sectors, each with its own set of stakeholders and issues and its own decision-making arrangements. Often they have evolved over generations and, as a result, reflect the unique history of the sector. By contrast, the AIT commits these sectors to respect common principles, rules and standards aimed at establishing a level playing field. In effect, the AIT embodies a new vision of the Canadian economic union.

Not surprisingly, many long-standing practices and arrangements in the sectors covered by the AIT run afoul of this vision. For example, efforts on the part of governments to protect local workers from out-of-province competition have a long history in most provinces. The Agreement seeks to overturn such practices by subordinating them to its principles and rules. At the same time, it seeks to prevent new ones from emerging by committing policy-makers to the new rules and principles. Nevertheless, even if there is good reason to believe that the short-term pain will lead to long-term gain, the pain is often intense enough to dissuade governments from acting to remove barriers or refusing to introduce new ones. We should not be surprised, then, that they have been slow to implement many of the commitments, such as harmonizing labour standards with their neighbours. Expecting them suddenly to become uncompromising champions of a vision that conflicts with long-standing practices in the communities they govern is politically naive.

If the real challenge is to get governments to implement the principles and rules of the AIT, we should look more closely at each of the sectors to see how decisions are really made there. In fact, we find that non-governmental stakeholders, such as businesses, labour unions and environmental groups, often play very influential roles. Their support for or resistance to change is often the deciding factor in a government's willingness to act.

Consider the private sector. The popular view is that it is a champion of change and of the AIT. As we heard in our sessions, however, this is misleading at best. Often it is an advocate of the status quo, a defender of barriers and an instigator of restrictive practices. Many successful industries, such as dairy farming, are built around such practices. The reluctance of governments to remove such barriers flows from a fear of reprisals by the organizations within the sector that will be affected-often to the point where governments lose the incentive to act.

If we are going to make such changes, we should be clear on the problem we are trying to solve.

This pressure is the Gordian knot in the Agreement. It is the biggest obstacle to progress. Taking account of the real and often complex dynamics created by this governance legacy is essential to a more informed discussion of how to strengthen AIT governance, say, by streamlining processes, adding new mechanisms, changing old ones, or building champions. If we are going to make such changes, we should be clear on the problem we are trying to solve. First and foremost, it lies in the pressure governments come under when they want to change long-standing practices to bring the various sectors more in line with the rules and principles of the Agreement.

We said that the AIT aims at strengthening Canada's economic union—and, by extension, Canadians' opportunities for wealth generation and prosperity—by introducing a set of principles and rules that will remove barriers to inter-provincial trade. If so, is the ultimate goal to remove as many impediments as possible? Or, to put it differently, insofar as the governance legacy conflicts with the AIT, do we want to remove it altogether?

The answer is no. The very fact that Canada is a federal rather than a unitary state testifies to our collective commitment to respect other values, which can and often do conflict with our shared economic interests. Federalism strikes a balance between, on one hand, a variety of social, cultural and economic *differences* among Canadians and, on the other hand, their shared or common interests. The former includes a wide range of things, such as linguistic and cultural differences. Let us refer to these as important elements of our "diversity." The latter include things such as the political and legal rights set out in the Charter of Rights and Freedoms or our interest in sharing a common economic space. When our interest in diversity conflicts with our shared interests, federalism requires that a balance be struck. The AIT recognizes the need for balance through a distinction between two key concepts: a "legitimate objective" and an "unnecessary obstacle."

When our interest in diversity conflicts with our shared interests, federalism requires that a balance be struck.

Legitimate objectives are supposed to allow governments to preserve their authority over crucial areas of local interest like public safety, the protection of human or animal life, or the well-being of workers[3]. The concept is meant to ensure respect for the diversity of views and approaches to policy making that exist within a federation like Canada. So, under the agreement, preventing diseased livestock in one province from entering another province would be seen as a legitimate objective, as would insisting that equipment made in one province contain certain safety measures specified by another.

An unnecessary obstacle can take two forms—tariff or non-tariff barriers. Tariff barriers are excluded by section 121 of the Constitution so Canada's limits on trade are all non-tariff barriers. They can be overtly discriminatory or disguised.

An overtly discriminatory obstacle to trade is one that inhibits labour, goods, services, or capital simply because it is from another province. These are usually relatively easy to identify. An example would be a regulation that requires a person to live in a province or territory in order to work or do business there.

A disguised obstacle is often more difficult to identify. It includes measures that appear to promote a legitimate objective when, in fact, their goal is to protect local businesses from out-of-province competition. For example, a government may refuse to recognize the qualifications of professionals from another jurisdiction, claiming that this is necessary to ensure public safety. In such cases, it may be very difficult to establish that the measure is really a barrier.

This commitment to balance diversity with common interests, or to recognize some things as legitimate objectives rather than unnecessary obstacles, demands that we ask the following question: When conflict occurs, what is the right balance? For example, what is the right balance

[3] In fact there are seven areas: public security and safety; public order; protection of human, animal or plant life or health; protection of the environment; consumer protection; protection of the health safety and well being of workers; and affirmative action programs for disadvantaged groups. It should also be noted that certain sectoral chapters of the AIT also describes specific legitimate objectives in relation to sectors like investment, labor mobility and consumer related measures and standards. As a result there is some confusion and debate over what exactly constitutes a legitimate objective.

Who is in the best or most authoritative position to say when something is a legitimate objective, as opposed to an unnecessary obstacle?

between, on one hand, measures that may restrict economic freedom by restricting labour mobility, and, on the other, the right of citizens from a particular province, say, to promote local economic interests by giving preferences to local workers or suppliers in government contracts? This, in turn, raises a second question: Who is in the best or most authoritative position to say when something is a legitimate objective, as opposed to an unnecessary obstacle?

We can call this the *federalism question*. In effect, it asks how we can know when something is a legitimate objective and when it is an unnecessary obstacle. Ensuring that there is an authoritative way of answering the question is as important for the positive task of government policy-making as for the negative one of identifying and removing trade barriers. For example, when creating new regulations that will impact on the free flow of goods, services, labour or capital, officials must be able to say why the measure is a legitimate one. If they cannot, it should not be implemented. Similarly, when a trade panel pronounces on a grievance, it must be able to say whether or not the barrier exists to promote a legitimate objective.

Making such judgements is often a complex and controversial task. It involves applying the abstract rules and principles of the Agreement to real situations. As we have seen, however, the sectors have long and complicated histories. Over the years, in the normal course of managing each sector, governments and stakeholders have evolved practices, made investments, and undertaken commitments—all of which contribute to the governance legacy. *Federalism recognizes the legitimacy of this legacy.* As a result, weighing it against the goals of the AIT can be very controversial, often to a point where governments lose any incentive to act.

Efforts to implement the AIT must take account of the stakeholders' interests and, ideally, win their support and agreement.

In such circumstances, efforts to implement the AIT must take account of the stakeholders' interests and, ideally, win their support and agreement. In practice, this means that decision-making cannot ignore the governance legacy. Indeed, the idea being proposed in this study is that more of the responsibility for implementing the Agreement should be transferred to the stakeholders. Encouraging them to make their own choices about how to strike a better balance between traditional practices and the rules and principles of the AIT would take some pressure off governments. It is an evolutionary strategy that aims at transforming the governance legacy over time to bring it more in line with the vision in the AIT.

In our view, then, it is not enough to call for changes to the consensus rule or to insist on a dispute resolution mechanism with teeth in the hope of forcing a speedier application of the principles and rules. We must have confidence that the governance will result in a legitimate implementation of the rules—that is, a better balancing of the values of federalism and the principles and rules of the Agreement. *The real governance question, then, is not how do we get a decision making procedure with enough teeth to impose the Agreement on unwilling sectors, but how do we achieve a better alignment between the governance legacy and the rules and principles in the AIT?*

To help the members of our resource group respond to the question, two cases were presented at our roundtable sessions. They were selected because we thought that they contained some useful lessons about how the two sectors have made progress in implementing the AIT. The cases are:

Trucking—although the federal and provincial governments share responsibility for regulation of the trucking industry, they have an exceptionally good working relationship with the industry itself, which plays a major role in discussions around regulation. As a result, there has been real progress in implementing the AIT. The case suggests that in some sectors a serious effort by governments to transfer more of the responsibility for implementing the Agreement onto industry could lead to progress. Our discussion explores the conceptual foundations for developing such a strategy.

Labour mobility—although setting occupational standards is a provincial responsibility, in many cases governments have turned it over to professional associations—so-called *self-regulation.* In the past, these associations often used this authority as a tool to restrict out-of-province competition. Today they are making significant progress on harmonizing standards and regulations to permit the free flow of labour. The case suggests that in some key areas self-regulation is an effective strategy for transferring more responsibility to stakeholders for implementing the AIT. It could be used more widely.

Since the early seventies, the Council of Ministers Responsible for Transport and Highway Safety (CoMT) has worked to harmonize standards on roadways across Canada. Involving all provinces and territories as well as the federal government, the Council works to enhance trade and mobility in the transport industry.

The Council typically has two provincial/territorial ministers per jurisdiction (often highway safety and transport are separate ministries in provincial governments) while the Minister of Transport represents the federal government. Collectively, they examine issues of provincial jurisdiction, such as safety standards, hours of operation, and weight and dimensions of vehicles, as well as issues of federal jurisdiction, such as the transportation of dangerous goods. The CoMT operates on a consensus rule, with the majority of their discussions focusing on how to harmonize standards in these subject areas.

The work of the CoMT is supplemented by the Council of Deputy Ministers, which undertakes research on behalf of the Council of Ministers. In addition, a standing committee is in place that brings industry and government representatives together to ensure that the work of both Councils remain responsive to industry needs.

Finally, there is the Canadian Council of Motor Transport Administrators (CCMTA), a not-for-profit organization that was established to implement the wishes of the CoMT. It brings together federal, provincial and territorial governments, as well as industry representatives, to work to harmonize standards. The CCMTA is particularly active in examining issues around licensing and driver standards, and in conducting road safety research.

To date, this infrastructure-which, it should be noted, predates and is separate from the AIT—has worked very well. Experts from the CoMT tell us that much progress has been made in terms of the harmonization of standards in relation to trucking and transport in Canada. Indeed, the goals[4] that the Agreement lays out in its transport chapter have for the most part been met, and the rapid growth of the trucking industry in Canada is a testament to the success of these various regulators.

[4] According to section 1402 of the Agreement, the goals of the chapter are:
(a) to ensure a seamless, integrated Canadian transportation system that:
(i) is safe, secure and efficient;
(ii) is responsive to the needs of shippers and travelers; and
(iii) promotes a competitive, productive and sustainable economy throughout Canada;
(b) to affirm competition and market forces, whenever possible, as the prime agents in providing viable and effective transportation services;
(c) to build on the progress already achieved by the Parties in reducing barriers to trade in transportation services through existing consultation mechanisms and agreements;
(d) to further eliminate obstacles to trade in transportation services in Canada and thereby facilitate internal trade in goods and services; and
(e) to create effective procedures for:
(i) the implementation and application of this Chapter; and
(ii) consultations to cooperatively resolve issues related to the application of this Chapter and to expand and enhance its benefits.

The experts who presented the trucking case to our resource group told us that it was a relatively bright spot in the AIT and that progress on harmonizing regulations and standards has been significant. As we saw, most of the goals set out in the original Agreement have now been met. Our discussion thus opened with the following question: Why has trucking been so much more successful than some other areas in implementing the Agreement?

A participant remarked that the case shows that it is possible for governments and industry to work together to harmonize regulations and foster growth in an industry. It shows that the private sector can play a key role in helping governments implement the AIT, he said. The comment launched a long and interesting discussion over how, where and why government and industry should work together to harmonize standards and regulations.

Private sector spokespersons can serve as a useful guide for government regulators.

The previous point was followed by the comment that, if the goal of the AIT is to remove barriers to the free flow of goods, services, labour and capital, the private sector is well positioned to identify where the barriers lie. After all, it is active in the marketplace on a daily basis. Companies are the ones who encounter the obstacles. Private sector spokespersons thus can serve as a useful guide for government regulators, alerting them to obstacles that impede the smooth operation of an industry. Trucking is a case in point. Its success, we were told, is partly explained by the fact that the private sector has been such an effective spokesperson for change.

Does this mean that government should look to business for more guidance, or that, if the Agreement has not been successfully implemented, it is because governments are not listening to business?

Although the claim is sometimes heard in discussion around the AIT, some of our group members were quick to point out that, if the flow of information from the private sector to government is an important catalyst for change, in practice the message is often fragmented, confusing or unclear. For instance, two sister organizations, one local and the other national, may have opposing views on the direction that regulation should take. Decision-makers in government then find themselves unsure who speaks authoritatively on behalf of the industry and, as a result, may be reluctant to act.

Another participant carried the point further. According to him, reluctance on the part of government to deal with such uncertainty not only explains the lack of progress in some areas, but after 10 years of indecision many industry spokespersons are on the point of giving up altogether. They are increasingly disinclined to dialogue with government because they see little real results from their efforts and little political will to act on their recommendations.

If this is true, a potentially dangerous downward spiral could be forming. On the one hand, government has a hard time listening to the industry because it is unsure which voices really represent it. On the other hand, industry representatives are increasingly unwilling to take the time to speak to government because they feel that it is not listening. How is the problem to be solved?

Some in our group worried that there was no clear answer to the question of who government should listen to. Others thought that government could and should make some choices. If the criteria for selection are developed in consultation with industry, they will likely be perceived as legitimate. As the discussion progressed, however, it became clear that the situation is more complicated than this suggests. A range of other issues around health, safety and the environment also must be discussed. But the spokespersons for them cannot come from industry alone. Instead, they involve a whole cast of new characters in the debate.

Increasingly, for a decision to be seen as legitimate, a large number of stakeholders must be consulted.

The term "stakeholder" was used to identify the range of spokespersons who claim to represent various perspectives that will be brought to bear on government decision making. Increasingly, for a decision to be seen as legitimate, a large number of stakeholders must be consulted. As a result, the trade-offs between competing issues quickly become complex and highly controversial.

This turn in the discussion seemed to lead our group into a kind of dilemma. On one hand, governments feel obliged to consult with stakeholders in order to ensure that decisions will be seen as legitimate. On the other hand, launching such consultations easily and quickly balloons into large, complex and potentially controversial discussions. The group spent considerable time discussing how government should respond to the challenge.

One strategy called for government to recognize and admit, first, that such consultations are essential for legitimacy; and, second, that to use them to make progress on the AIT the agenda must be limited and focused. In effect, public consultations must involve a wide enough cross-section of stakeholders to make the process legitimate and, as a consequence, government can manage only a few issues at a time. We can call this the ***stakeholder consultation*** approach.

One participant recalled that the purpose of the AIT was to remove barriers to freer internal trade. Are we in danger of turning the AIT into too broad a governance instrument?

At least one member of the group worried about the approach. Although he did not object to the idea that there should be such consultations, he noted that they are slow, costly and difficult to manage. His underlying worry seemed to stem from a question about whether too great a focus on consultations by governments would leave them feeling forced to put large areas of the Agreement on hold. He recalled that the purpose of the AIT was to remove barriers to freer internal trade. Most of these, he said, have to do with practical questions over efficiency. Was it really necessary to become bogged down in large, complicated stakeholder processes that threatened to go nowhere in order to remove many of these barriers? Can't we focus on efficiency and the removal of obstacles to trade without getting into all of the other issues, he wondered? Are we in danger of turning the AIT into too broad a governance instrument?

We can call this view the ***industry-specific*** approach. It argues that many issues are specific to a given sector and can be discussed independently of concerns over the environment, health or safety.

The distinction between the two models is a useful one and reflects the group's overall discussion around the different kinds of regulations. It took a particularly interesting turn when a participant began to explore the idea that concerns around the environment, public safety or health are not unique to any particular sector but cut across all of them. In effect, there seem to be at least two quite different kinds of regulatory issues, he noted. What is the difference between them and does it matter?

Some issues are industry-specific in the sense that they reflect specific concerns about the working relationship between stakeholders in the industry. By contrast, public interest issues cut across the entire spectrum of government activity.

One way to understand the difference is to treat many of the issues around, say truck licensing fees or weights and measures as concerns that are largely internal to the industry itself. They are *industry-specific* in the sense that they reflect specific concerns about the working relationships between stakeholders in the industry. They regulate the manner in which they engage one another and participate in the marketplace. For example, such regulations might focus on ways to ensure that the industry is operating as efficiently as possible or that everyone is being treated fairly—in other words, that the industry constitutes a "level playing field."

By contrast, *public interest* issues cut across the entire spectrum of government activity. They include areas such as health, public safety or the environment. They are not about how efficiently or fairly the market is working in this or that sector. Rather, they aim to protect the public as a whole against possible harm from industry activity.

This distinction helps us see that governments should not treat concerns over the public interest in the same way that they treat concerns over how the marketplace is operating. In the latter case, government is a relatively disinterested party. Although it may have a general interest in ensuring, say, that everyone has a fair chance to participate in the marketplace through a level playing field, when it comes to deciding what sort of regulations will best achieve that goal, the experts are the members of the industry themselves. Striking the right balance between the various interests requires an expert knowledge of the history of the industry and of the various commitments and arrangements that have been made in the past—what we have called the governance legacy. Industry representatives are best positioned to provide advice on this and to make recommendations on how to improve efficiency or level the playing field. After all, *it is their industry.*

Where industry-specific issues are in question, the goal of regulators thus is not to protect the broader public interest but to increase the efficiency of the industry—to make it easier or less costly, say, for truckers to do their job no matter where they are in the country. In such cases, having industry representatives at the table to explain the business is the most effective means of arriving at the best solutions. Indeed, there is no obvious reason why they should not be *leading* such discussions. Government's job here is to act more as a referee or a facilitator than as an enforcer or protector of the public good.

Nevertheless, helping to maximize the private interest of the members of a particular industry is not the only—or even primary—concern of governments. They also have the *public interest* to maintain. Regulations around the transportation of dangerous goods, for instance, impact more than just the trucking industry. Such standards are guarantees that protect the health and safety of the environment and of the general public. In such cases, it is not enough for governments to follow the direction of industry. They may recommend less rigorous standards than what is needed to protect the public because it will save them money. At such times, a different approach is necessary, one that will factor in the views of other interested parties who will approach, say, the transportation of dangerous goods from a variety of perspectives—whether it is public health, environmental, or safety oriented. Our second case on labour mobility sheds further light on these issues.

Labour Mobility 9

In Canada, occupational standards are a provincial responsibility. Consequently, they can and do vary significantly from province to province in professions such as teaching, nursing, pipe-fitting, welding or accounting. The labour mobility chapter of the AIT addresses this situation. It aims at making it easier for qualified individuals to move between provinces. The basic principle is that all jurisdictions should allow qualified people from other provinces to practice their professions anywhere in Canada. We were told that progress on this front has been fairly good and that a number of the issues originally targeted in the chapter have been resolved. However, licensing and certification problems still exist between the provinces.

Two basic approaches ensure that the principle of mobility is maintained. First, jurisdictions must ensure that licensing and certification requirements are based on competency rather than educational requirements. In effect, this makes demonstrated ability or experience the licensing standard rather than, say, the completion of a specific course of study that may not be offered in institutions outside a particular province. Second, where occupational standards exist but no formal licenses are issued, relevant professional bodies will cooperate to develop Mutual Recognition Agreements (MRAs) to ensure that workers' qualifications are recognized and that they can move freely between jurisdictions.

While constitutional responsibility for certifying and training professionals falls to provincial governments, in practice these responsibilities increasingly have been delegated to the professions themselves. For example, bar associations are responsible for overseeing the training and conduct of lawyers, while registered nurses must abide by occupational standards set by their provincial associations. These associations are thus well positioned to determine the best approach to alignment or harmonization of standards to ensure labour mobility.

Of these MRAs, the most successful have enabled a number of groups within a professional designation to come together to outline and mitigate the differences between them. For example, an MRA could allow a group in New Brunswick to require that its members have a degree before they will be considered fit for work, but also allow an individual from Manitoba who does not have a degree but does have similar competencies, to work in New Brunswick.

Once developed, the MRAs are submitted to the Labour Mobility Co-ordinating Group (a group made up of government representatives) for review. Once one is approved, it is recognized as a governing document by the various jurisdictions it affects. Any further changes to it are dealt with by the professional designation itself, subject to government approval.

Progress in this area is seen to be fairly good. According to reports from the Internal Trade Secretariat, the fifty-two occupations in Canada that required an MRA, 35 have been signed, fourteen are partially complete, meaning they have not been signed by all regulatory jurisdictions, and three do not have an agreement. These three occupations are: hunting guides, public accountants, and social workers.

According to experts, a remaining challenge for this section of the Agreement is to deal with professions involving more than one organization or designation. For instance, at present, the accounting profession has three designations: Chartered Accountants, Certified General Accountants and Certified Management Accountants (though the CAs and the CMAs are in merger talks). Managing the differences between these three organizations is clearly more difficult than managing the internal interests of a single designation and its relationship to government.

In our discussion of the trucking case we suggested that the task of regulating private exchanges can often be disentangled from that of regulating businesses for safety or the environment.

Some members of our resource group questioned the usefulness of the distinction. Although none seemed to oppose the idea that private interests exist, a few wondered how far they could be disentangled from the public interest—notwithstanding the apparent success of the trucking example. The labour mobility case helps us see more clearly how the distinction can be drawn, but it also raises a new issue along the way.

Consider the case of licensing requirements for operating a trucking firm. If a government makes it more difficult for a company from out-of-province to operate in that province, say, by charging it higher licensing fees, that measure is mainly of concern to the trucking industry—it is what we called "industry-specific." In other words, it is not of concern to the public at large, except, perhaps, insofar as competition might be thought to lead to lower prices. But high licensing fees do not put the public's overall well-being at risk.

Professional services play a critical role in our well-being. Bad services from financial advisors or health care professionals therefore undermine the public interest.

However, many professional services, such as accounting or medicine, make a critical contribution to the overall public interest. The public relies on them to carry out essential tasks, such as planning our retirement, protecting our investments or maintaining our health. They play a critical role in our well-being. Bad services from financial advisors or health care professionals therefore undermine the public interest.

This difference between the two fields is already well established in government's approach to regulation. On one hand, governments do not regulate industries such as trucking for the quality of the services they provide to their customers. In a free market, it is the buyer who must beware. By contrast, in professions such as accounting and medicine, the public is not responsible to protect themselves from charlatans. Medicine is no place for a let-the-buyer-beware approach.

Standards that ensure a high level of competence must be set by individuals who themselves have a high level of expertise in the area.

This difference in approaches exists because the quality of professional services is based on *competence*. The whole point of calling someone a "professional" is that they have a level of expertise that the normal user does not. By definition, then, the public lack the competence that would be needed to judge whether the service provider really is an expert. This gives rise to a problem. On one hand, the public must rely on these services to manage their affairs. On the other hand, they cannot be expected to know when the services are good and when they are bad. The problem is solved by requiring professional services to meet standards that will ensure a high level of competence. These standards must be set by individuals who themselves have a high level of expertise in the area.

So, as the argument shows, the distinction between private and public interests is already well established in government's overall approach to regulation. Our distinction above between industry-specific and public interests simply builds on it. However, on closer inspection, the analysis raises a different sort of problem for the AIT, which is the subject of the next section.

Consider the following question: When the experts in a field disagree on whether a particular standard is there to protect the public interest or to protect a profession from competition, as they often do, what authority can we appeal to in order to resolve the dispute?

For example, suppose that the (fictitious) New Brunswick Association of Midwives insists that a particular study course is necessary to practice in that province. Suppose further that the course is only available in that province. In effect, it means that those who have trained in another province will have to take the course before they can practice in New Brunswick. But they may reply that the measure is really a barrier to prevent them from working there. How will we decide who is right?

In fact, once the experts disagree, there is no authoritative way to decide whether a standard is appropriate. In the context of the AIT, it means that, if the experts disagree, governments have no reliable way of distinguishing a legitimate objective from an unnecessary obstacle. Sometimes governments can use this as an excuse for inaction, claiming that they do not have enough information to act responsibly. One way to address the problem is to turn to some form of self-regulation, whereby professional associations that have the expertise to set these standards can make these distinctions, with government overseeing the process.

The AIT imposes a new vision on self-regulatory organizations. Today they are expected to implement its rules and principles.

Self-regulation, of course, is not new. Professional associations in particular have a long history of it in many fields. Indeed, in the past they were often used to protect local professionals from outside competition. But the AIT imposes a new vision on them. Today they are expected to implement its rules and principles. The labour mobility case shows that progress is being made. As such, self-regulation may be emerging as a relatively effective strategy for managing professional disagreements through a simple principle: Where disagreement cannot be solved by an appeal to authority—such as a panel of experts—negotiation is required. In such cases, the parties to the disagreement—typically, stakeholders—are usually the best candidates to carry out the negotiations. The labour mobility and trucking cases are evidence for the effectiveness of this principle. Their relative success in implementing the Agreement is linked to a sharing with, or transferring of, responsibilities to stakeholders.

To summarize, the last section opened with some questions about our ability to separate private and public interests. We saw there why it is so difficult to do in professions such as medicine or accounting. On the other hand, we have just seen that, even though these professions are so closely identified with the public interest, the stakeholders are still well-positioned to play a lead role in implementing the AIT through self-regulation. The next section provides some preliminary thoughts on how a new governance strategy for the AIT might be developed.

Let's begin by recapping the argument so far. At the outset we said that many trade barriers were created to provide an advantage to some cluster of private or non-governmental organizations within a sector. More often than not, the real resistance to change comes from them, that is, from outside government, rather than from within. It is what we have called the governance legacy. The reluctance of governments to remove such barriers flows from a fear of reprisals by the organizations within the sector that will be affected-often to the point where governments lose the incentive to act. We called this the "Gordian knot" in the Agreement. It is the biggest obstacle to progress.

Stakeholders should be encouraged to negotiate with one another on how to strike a better balance between their particular legacies and the AIT.

We have suggested that one way to take some of the pressure off governments is to transfer to stakeholders more responsibility for implementing the Agreement. They should be encouraged to negotiate with one another on how to strike a better balance between their particular legacies and the AIT, and then make recommendations to government. Government could act on the stakeholders' advice, secure in the knowledge that it would not face reprisals from them. We draw three main conclusions from these reflections to suggest how such a transfer might work.

First, governments should look for areas within sectors where it is possible to circumscribe a range of industry-specific issues in order to ***initiate a series of narrower, more exclusive kinds of consultations with industry representatives.*** For instance, they might consult with the industry to select a few legitimate representatives to create a working group to help them decide what priorities should be addressed. Such a group could identify key barriers and inefficiencies in the regulation of a given industry. In some cases, it may be possible to go even further and discuss the prospects for experimenting with new kinds of government/industry partnerships aimed at strengthening AIT governance by sharing it more formally.

Second, in some areas, such as medicine and accounting, it is far more difficult, if not impossible, to circumscribe the more narrow, industry-specific issues. The public and private interests are woven tightly together. Where this is so, ***self-regulation*** may be a good strategy but it may also need to be ***supported by what we called the stakeholder consultation*** approach. Given that standards and regulations are based on competence, it is often difficult to assess whether a particular association is creating barriers to others in the same field or acting to protect the public good. In effect, a broader, more inclusive consultation process would help ensure that all voices are heard and that standards and regulations are really there to protect the public interest.

A more flexible and open dispute resolution process would allow stakeholders to raise grievances against one another.

But shifting some responsibilities for implementation of the AIT from government to stakeholders provides no guarantee that they will rise to the occasion and work together to solve problems, which brings us to our third conclusion: if this strategy of transferring responsibility to stakeholders is to be effective, ***changes around dispute resolution*** would likely be needed. At present, only governments engage one another through that process. A more flexible and open dispute resolution process would allow private companies, NGOs and individual citizens to raise grievances against one another. This would help ensure that there is an incentive for them to work through their differences. Failure to do so would expose them to the risk of having a decision imposed by a tribunal. To ensure that they arrive at the best outcome, they should negotiate their own arrangements.

Although most members of our group may not have agreed with this last point, most did agree that we need a more effective dispute resolution mechanism. The final section of this paper recounts some of their thoughts on the subject.

Some of our group members thought that the consensus-based approach behind AIT governance was necessary. In this view, consensus is needed to ensure that any decisions taken under the Agreement—such as those regarding disputes—will be enforced across the country. Without it, it would be difficult if not impossible to implement panel decisions in all jurisdictions.

If dispute resolution is supposed to provide stakeholders and government with an effective mechanism to bring barriers down, it has failed the test.

On the other hand, many of the same individuals were concerned over the inaccessibility, length and complexity of the dispute resolution process. Most agreed that, if it is supposed to provide stakeholders and government with an effective mechanism to bring barriers down, it has failed the test. More optimistically, they also felt that governments have got the message and are responding. As one of our trade representatives noted, improving dispute resolution is a key goal of the Council of the Federation. Another participant added that, after 10 years of working with the Agreement, governments have learned enough about the process to separate the necessary from the unnecessary steps. As a result, he was hopeful that the process would be streamlined to make it more accessible and easier to use.

Picking up on the 10-year theme, some participants suggested that after 10 years, the AIT has had a significant impact on the culture of governments and businesses that is not well appreciated. In fact, it is difficult to find good examples of new trade barriers, they argued, because governments have adopted the principles of the Agreement to such an extent that few true barriers are created anymore. An analogy was suggested here with the impact of the Charter of Rights and Freedoms. Most governments now speak of "Charter-proofing" policy and legislation as they are developing it. Many of our participants agreed that most governments now "AIT-proof" initiatives, as a matter of course. Furthermore, when real disputes do arise, governments and the private sector are getting better at resolving them before they get to the stage of going to a panel. As a result of these advancements in learning and the adaptation of culture, fewer disputes are going to panel than in the past.

At least one member was not convinced. We need a dispute resolution mechanism with real teeth, he insisted. One way to get this, he continued, would be for the federal government to act unilaterally under section 91.2 of the British North America Act (which stipulates that the Parliament of Canada has jurisdiction over the regulation of trade and commerce) and appoint the courts to enforce the decisions of the panel, with or without the consent of provincial governments.

Reaction to this proposal was strong. Some felt that, even if it were possible—which they doubted—it would intrude unacceptably on the right of provincial governments to make their own decisions and pursue legitimate objectives. Such a strategy would lead to conflict, not solutions, they said.

Still others maintained that, while the status quo is unacceptable, simply taking the decisions out of the hands of governments and giving them to the courts was even less so. They proposed a number of alternatives to this approach, including:

- adding timelines for implementation as an element of panel decisions;
- creating formal mechanisms that would use the Council of the Federation to move implementation; and
- getting jurisdictions to make legislation subordinate to panel decisions, thus giving them authority similar to that of the courts.

It may be useful to speculate on the priorities and values that underlie the various views of how to improve dispute resolution.

In concluding, it may be useful to speculate on the priorities and values that underlie the various views of how to improve dispute resolution.

First, the proposal for a strong intervention by the federal government seemed to be justified by an appeal to the need for efficiency and fairness in the treatment of all companies and individuals, especially in the dispute resolution process. Such values come at a cost, however, since this strategy would likely anger the provinces, and diminish the authority and autonomy of their legislatures. The position seems to originate from a view that the system should work for its users, and that what governments often call legitimate objectives are more often than not protectionist barriers.

The second position takes the opposite view. It emphasizes the need to respect the diversity of governments and their decisions above other needs—possibly even users of the system. It places a high value on respecting the ability of governments to define legitimate objectives as they see fit, while leaving users with a status quo that they insist often treats them unfairly. Arguments from this point of view originate from a very strong commitment to the federalism principle.

Finally, the third suggestion may best be viewed as an effort to occupy the middle ground. On the one hand, it recognizes that governments must continue to have some say in how disputes are resolved. On the other hand, it recognizes that the process must be effective enough to achieve results.

In closing, it should be mentioned that, while our participants agreed that consensus cannot always be achieved, they thought it important to recall that there is another avenue open for progress. Article 1800[5] of the Agreement allows interested parties to hold negotiations that reach beyond the scope of the Agreement, and move ahead as a group on the basis of that agreement. But such side agreements have no authority to force governments to bring other barriers down.

[5] **Article 1800: Trade Enhancement Arrangements**

1. The Parties recognize that it is appropriate to enter into bilateral or multilateral arrangements in order to enhance trade and mobility.
2. This Agreement shall not prevent the maintenance or formation of a trade enhancement arrangement where:
   (a) the arrangement liberalizes trade beyond the level required by this Agreement;
   (b) there is full disclosure of the details of the arrangement to all other Parties at least 60 days prior to its implementation; and
   (c) the signatories to the arrangement are prepared to extend the arrangement within a reasonabletime to all other Parties willing to accept the terms of the arrangement.

Conclusion 14

our discussion suggests that the "level playing field" is a vision that will not be fully realized.

The task of this paper has been, first, to probe some of the deeper assumptions around the governance of the AIT and, second, to explore different ways of addressing the tension between what we have called its governance legacy, on one hand, and the vision of the level playing field that is embodied in its principles and rules, on the other. In fact, our discussion suggests that the "level playing field" is a vision that will not be fully realized. In the end, it must be balanced against the vision behind federalism, with its commitment to respect diversity.

As a result, just how "level" any sector's playing field should get is always partly a matter of negotiation and agreement between the various stakeholders. The absolutely level playing field is an abstraction. In the end, "level" is the result of a balancing of interests that can be negotiated but not declared. There is no single, authoritative way to define when the field is level that does not take account of what the stakeholders have agreed to. A community's governance legacy is part of its social contract. If we really want to change the outcomes of the AIT's governance process—that is, the decisions that get made—maybe we should focus more closely on aligning the inputs before clamouring to change the mechanisms.

We have argued for a strategy that would take some of the pressure off governments to make controversial decisions and place it on the stakeholders

In keeping with this, we have argued for a strategy that would take some of the pressure off governments to make controversial decisions and place it on the stakeholders. It is an evolutionary strategy that aims at transforming the governance legacy over time to bring it more in line with the AIT. At the same time, it would bring about an evolution in the culture of the sector. Over time, stakeholders would stop depending on barriers to protect themselves and would begin to plan for an environment in which they must compete with others in the field.

We think that the distinction between industry-specific and public interests helps us execute such a strategy because it clarifies the roles and responsibilities of various stakeholders in the sectors. At bottom, it tells us that government should not treat concerns over the broader public interest in the same way as private interests. This, in turn, allows us to consider how and where different kinds of governance processes could be introduced to implement the Agreement. Perhaps the new Council of the Federation could become a forum for such discussions and a champion of some new governance approaches.

Appendix: Backgrounder on the Agreement on Internal Trade

The Agreement on Internal Trade was signed on July 18th, 1994, and came into effect July 1st 1995.

In essence, the Agreement provides a framework for bringing down trade barriers within the Canadian federation for the purposes of establishing an open, efficient and stable domestic market. According to Industry Canada's Strategis website, the Agreement provides:

- general rules which prevent governments from erecting new trade barriers and which require the reduction of existing ones in areas covered under the Agreement;
- specific obligations in 10 economic sectors—such as government purchasing, labour mobility and investment—which cover a significant amount of economic activity in Canada;
- for the streamlining and harmonization of regulations and standards (e.g. transportation, consumer protection);
- a formal dispute resolution mechanism that is accessible to individuals and businesses as well as governments; and
- commitments to further liberalize trade through continuing negotiations and specified work programs[6].

Components of the Agreement

The basic components of the Agreement include its objectives and operating principles, its constitutional context as well as the definition of general rules defining a barrier to trade. As Robert Knox notes, these include:

> *non discrimination* (Canadian governments must treat businesses and individuals from other Canadian jurisdictions as if they were within their own jurisdiction), *right of entry and exit* (Canadian governments must not restrict the movement of people, goods, services and investment), and *no obstacles* (Canadian governments must ensure that rules and regulations do not operate as a barrier to trade).[7]

Furthermore, the Agreement provides for governments to maintain barriers to achieve legitimate objectives in seven areas: public security and safety; public order; protection of human, animal or plant life or health; protection of the environment; consumer protection; protection of the health safety and well being of workers; and affirmative action programs for disadvantaged groups.

The scope and coverage section of the Agreement explains how these rules apply to ten areas of the Canadian economy, including: procurement, labour mobility, consumer—related measures and standards, agriculture and food, alcoholic beverages, natural resources, communications, transportation, and environmental protection.

[6] Industry Canada. 2003. Summary of the Agreement on Internal Trade. Accessed July 12th, 2004 http://strategis.ic.gc.ca/epic/internet/inait-aci.nsf/en/il00020e.html.

[7] Knox, Robert H., *Canada's Agreement on Internal Trade: It Can Work If We Want It To,* position paper prepared for the Certified General Accountants Association of Canada, April 2001. 5. www.cga-canada.org

Each section, as mentioned, has obligations associated with the relevant economic sector. The particular obligations are outlined in the agreement itself, copies of which can be found at the Internal Trade Secretariat's website at www.intrasec.mb.ca.

Finally, the Agreement lays out administrative and operating mechanisms that established the Committee on Internal Trade (that is, the respective Ministers responsible for the AIT), as well as the Internal Trade Secretariat, whose role is to provide administrative and operational support to the functioning of the Agreement. In addition, the Agreement establishes provisions for future negotiations of the Agreement as well as for accession and withdrawal.

Dispute Resolution

Another area covered by the administrative and operating mechanisms in the Agreement is dispute resolution. In the model proposed in the Agreement, attempts to resolve disputes should start through consultation and mediation within a sector, then between governments, and should, if necessary, be resolved at a trade panel as a last resort.

Complaints can only be brought forward through governments. Private citizens or businesses can only advance a complaint if governments refuse to respond, and if a screener judges it to be serious enough to be considered.

Finally, implementation of panel decisions by governments is voluntary, and penalties are limited if governments refuse or are too slow to implement these decisions. Since the AIT is not a legally binding document, it does not have the status of law, and issues cannot be referred to the courts.

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