C.D. Howe Institute
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Communiqué

Embargo: For release *Friday*, June 14, 1996.

Ottawa could use powerful legal and constitutional levers to strengthen Canadian economic union, says C.D. Howe Institute study

The federal government could use existing legal and constitutional options to strengthen the Canadian economic union, says a *C.D. Howe Institute Commentary* released today. In particular, it should give the Agreement on Internal Trade (AIT) greater political and legal legitimacy and encourage full implementation of the commitments the AIT contains. As the First Ministers prepare to meet in Ottawa on June 20–21, Ottawa should consider broadening access by private parties to dispute settlement mechanisms, educating the public about the AIT's importance, and undertaking a comprehensive study of remaining barriers to trade within Canada.

The study, *Securing the Canadian Economic Union: Legal and Constitutional Options for the Federal Government*, was written by Robert Howse, Associate Professor of Law and Associate Director of the Centre for the Study of State and Market at the University of Toronto.

Howse says the AIT, a nonbinding political accord among the federal, provincial, and territorial governments that aims to remove internal trade barriers in Canada, needs federal and provincial implementing legislation to give it legal force. However, most such existing or proposed legislation does not make the AIT's provisions directly applicable nor does it give them a legal status superior to that of ordinary statutes.

According to Howse, Ottawa has many legal instruments at its disposal for enhancing the economic union. The idea of Canada as an economic union is implied in the existing Constitution, he says. The Charter of Rights and Freedoms contains provisions with respect to mobility rights which could be used to strengthen the union by removing barriers to internal trade. In addition, Howse notes, the Supreme Court of Canada now takes a broader view of the federal government's general "trade and commerce" and "peace, order, and good government" powers, which would give Ottawa wider scope to pursue economic integration through harmonizing legislation, as well as increased leverage to effect consensus among the provinces.

At the same time, Howse says, Ottawa and the provinces should remember that globalization and international trade obligations have an impact not only on international trade barriers but on interprovincial ones as well. The trend toward globalized regulation in areas such as food safety could, Howse says, prod the provinces into cooperating with the federal government to develop a single national approach that reflects emerging international standards while seeking to influence these standards in Canada's interest.

With this publication, the C.D. Howe Institute launches its postreferendum research agenda, which comprises two *Commentary* series. The first series, "The Canadian Union Papers," focuses on ways to enhance Canada's political, economic, and social union. The first paper in the series examines some of Ottawa's legal and constitutional options for strengthening the economic union. Other papers will offer analysis and recommendations aimed at improving Canada's political institutions, enhancing economic citizenship rights, protecting the social union in a "disentangled" federation, and devolving primary responsibility for language and culture to the provinces.

Complementing this effort is another *Commentary* series called "The Secession Papers," which will examine issues relating to the following areas:

- the terms and conditions of a possible future referendum on Quebec sovereignty;
- the circumstances which the country might confront after a Yes vote, together with the processes by which the secession of Quebec might be addressed;
- the means by which a new Canada without Quebec might be established, should Quebec leave Confederation.

The papers will be guided by the following principles: respect for democratic norms and the rule of law; the necessity for an authoritative decision and a stable outcome; and minimizing the social and economic costs of any transition. In the light of the results of the recent referendum in Quebec, "The Secession Papers" aim to assist Canadians to "think about the unthinkable."

Both series are being published under the supervision of David Cameron, a political scientist at the University of Toronto.

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The C.D. Howe Institute is Canada's leading independent, nonpartisan, nonprofit economic policy research institution. Its individual and corporate members are drawn from business, labor, agriculture, universities, and the professions.

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For further information, contact:
Robert Howse (416) 978-4201
Susan Knapp (media relations), C.D. Howe Institute
phone: (416) 865-1904
fax: (416) 865-1866
e-mail: cdhowe@cdhowe.org
Internet: http://www.cdhowe.org/eng/pr/new.html

Securing the Canadian Economic Union: Legal and Constitutional Options for the Federal Government, C.D. Howe Institute Commentary 81, by Robert Howse (C.D. Howe Institute, Toronto, June 1996). 20 pp.; $6.00 (prepaid, plus postage & handling and GST — please contact the Institute for details). ISBN 0-88806-399-7.

Copies are available from: Renouf Publishing Company Limited, 1294 Algoma Road, Ottawa, Ontario K1B 3W8 (stores: 71$^{1}/_{2}$ Sparks Street, Ottawa, Ontario; 12 Adelaide Street West, Toronto, Ontario); or directly from the C.D. Howe Institute, 125 Adelaide Street East, Toronto, Ontario M5C 1L7. The full text of this publication will also be available on the Internet.

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Institut C.D. Howe

Communiqué

Embargo: à diffuser *vendredi*, le 14 juin 1996

Ottawa pourrait user de pouvoirs juridiques et constitutionnels étendus pour renforce l'union économique, affirme une étude de l'Institut C.D. Howe

Le gouvernement fédéral pourrait faire usage des options juridiques et constitutionnelles existantes afin de renforcer l'union économique canadienne, soutient un *Commentaire de l'Institut C.D. Howe* publié aujourd'hui. Il devrait plus particulièrement accorder plus de poids et de légitimité politique à l'Accord sur le commerce intérieur (ACI) et encourager une pleine mise en œuvre des engagements qu'il contient. Alors que les premiers ministres sont à la veille de se rencontrer à Ottawa le 20 et 21 juin, plusieurs choix s'offrent à Ottawa, à savoir : offrir aux entités privées un meilleur accès aux mécanismes de règlement des différends, informer le public sur l'importance de l'ACI et entreprendre une étude approfondie des barrières commerciales qui persistent encore au Canada.

L'étude, intitulée *Securing the Canadian Economic Union: Legal and Constitutional Options for the Federal Government (La préservation de l'union économique canadienne : les choix d'ordre juridique et constitutionnel qui s'offrent au gouvernement fédéral)* est rédigée par Robert Howse, professeur agrégé de droit et directeur associé du Centre for the Study of State and Market à l'Université de Toronto.

Howe indique que l'ACI, une entente politique non contraignante entre les gouvernements fédéral, provinciaux et territoriaux qui vise à éliminer les obstacles au commerce intérieur au Canada, nécessite une loi de mise en vigueur tant au niveau fédéral que provincial. Or, les lois actuelles ou envisagées ne rendent pas les dispositions de l'ACI directement applicables et ne lui confèrent pas un statut juridique supérieur à celui des lois ordinaires.

Selon Howse, Ottawa dispose de plusieurs instruments pour améliorer l'union économique. Ainsi, l'idée du Canada en tant qu'union économique est suggérée par la Constitution actuelle, dit-il. La *Charte des droits et libertés* comporte des dispositions portant sur la mobilité qui pourraient servir à renforcer l'union en éliminant les obstacles au commerce intérieur. De plus, indique Howse, la Cour suprême du Canada adopte maintenant une vue plus large des pouvoirs généraux du gouvernement fédéral touchant au commerce et à « la paix et l'ordre ainsi que le bon gouvernement », conférant ainsi à Ottawa une meilleure marge de manœuvre pour poursuivre l'intégration économique par le biais de lois sur l'harmonisation, ainsi que pour établir un consensus entre les différentes provinces.

Dans un même temps, affirme Howse, Ottawa et les provinces devraient garder à l'esprit que la mondialisation et les obligations du commerce extérieur entraînent des répercussions non seulement sur les barrières commerciales internationales mais également sur les barrières commerciales interprovinciales. Il ajoute que la tendance vers les règlements à l'échelle mondiale dans des domaines comme la sécurité alimentaire pourrait inciter les provinces à coopérer avec le gouvernement fédéral dans l'élaboration d'une approche nationale unique qui tiendrait compte des nouvelles normes internationales tout en tentant d'influer sur celles-ci dans l'intérêt du Canada.

Avec ce *Commentaire,* l'Institut C.D. Howe amorce une nouvelle série intitulée « Les cahiers de l'union canadienne » qui portera sur les manières d'améliorer l'union politique, économique et sociale du Canada. Cette série fait partie du programme de recherche postréférendaire de l'Institut. Les « cahiers de l'union canadienne » reposent sur l'hypothèse que les Canadiens choisiront de rester unis. Le premier document de la série porte sur certains des choix d'ordre constitutionnel et juridique dont dispose Ottawa pour améliorer l'union économique. Parmi les autres figureront des recommandations sur l'amélioration des institutions politiques, sur la mise en valeur des droits économiques de la citoyenneté, sur la protection de l'union sociale au sein d'une fédération ayant un minimum de chevauchements et sur la délégation des responsabilités afférentes à la langue et à la culture aux provinces.

Cette série s'assortira d'une autre série de *Commentaires* intitulée « Les cahiers de la sécession », qui reposera sur l'hypothèse que les Québécois voteront pour la séparation. Ces documents se pencheront sur les questions entourant :

- les termes et conditions d'un possible référendum à venir sur la souveraineté du Québec ;
- les circonstances auxquelles le pays fera face après un vote pour le « oui », ainsi que le processus même par lequel la sécession du Québec pourrait être abordée ;
- les procédés selon lesquels un nouveau Canada pourrait se former sans le Québec, si le choix de ce dernier était de quitter la confédération.

Ces documents seront guidés par les principes suivants : le respect des principes démocratiques et la primauté du droit, le besoin d'une décision qui fasse autorité et d'une conclusion stable, et la minimisation des coûts sociaux et économiques de la transition. Étant donné les résultats du récent référendum québécois, « Les cahiers de la sécession » ont pour but d'aider les Canadiens à « penser à l'impensable » .

Ces deux séries sont dirigées par David Cameron, un politicologue de l'Université de Toronto.

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Renseignements : Robert Howse : 416 978-4201
Susan Knapp (relations avec les médias), Institut C.D. Howe
téléphone : 416 865-1904
télécopieur : 416 865-1866
courrier électronique : cdhowe@cdhowe.org
Internet : http:/ / www.cdhowe.org

Securing the Canadian Economic Union: Legal and Constitutional Options for the Federal Government, Commentaire n^{o} 81 de l'Institut C.D. Howe, par Robert Howse, Toronto, Institut C.D. Howe, juin 1996, 20 p., 6,00 $ (les commandes sont payables d'avance, et doivent comprendre les frais de manutention et d'envoi, ainsi que la TPS — prière de communiquer avec l'Institut à cet effet). ISBN 0-88806-399-7.

On peut se procurer des exemplaires de cette publication auprès des : Éditions Renouf ltée, 1294, chemin Algoma, Ottawa ON K1B 3W8 (librairies : 71$^{1}/_{2}$, rue Sparks, Ottawa ON et 12, rue Adelaide ouest, Toronto ON), ou encore en s'adressant directement à l'Institut C. D. Howe, 125, rue Adelaide est, Toronto ON M5C 1L7. La version intégrale sera disponible sur l'Internet (en anglais seulement).

Securing the Canadian Economic Union:

Legal and Constitutional Options for the Federal Government

by

Robert Howse

The Agreement on Internal Trade (AIT) is a nonbinding political accord among the federal, provincial, and territorial governments that aims to remove internal trade barriers in Canada. While federal and provincial implementing legislation is needed to give legal force to the AIT, most such existing or proposed legislation does not make the AIT's provisions directly applicable nor does it give them a legal status superior to that of ordinary statutes. The federal government's role now should be to use the various means at its disposal to give the AIT greater political legitimacy and weight and to encourage full implementation of the commitments it contains. This includes broadening access to dispute settlement mechanisms for private parties, educating the public as to the AIT's importance, and undertaking a comprehensive study of the barriers to trade within Canada.

The idea of Canada as an economic union is implicit in the existing Constitution; it may also be possible to use the mobility rights provisions of the Charter of Rights and Freedoms to remove barriers to internal trade. In addition, the Supreme Court of Canada now takes a broader view of the federal government's general "trade and commerce" and "peace, order, and good government" powers, which would give Ottawa wider scope to pursue economic integration through harmonizing legislation, as well as increased leverage to effect consensus among the provinces.

Globalization and international trade obligations have an impact not only on international trade barriers but interprovincial ones as well. The trend toward globalized regulation in areas such as food safety could prod the provinces into cooperating with the federal government to develop a single national approach that reflects emerging international standards, while seeking to influence these standards in Canada's interest.

Main Findings of the Commentary

- The Agreement on Internal Trade (AIT) is a nonbinding political accord among the federal, provincial, and territorial governments that aims to remove internal trade barriers in Canada. While federal and provincial implementing legislation is needed to give legal force to the AIT, most such existing or proposed legislation does not make the AIT's obligations directly applicable nor does it give them a legal status superior to that of ordinary statutes.
- The federal government's options for giving the AIT greater political legitimacy and weight and encouraging full implementation of the commitments contained in the AIT include:

    - broadening access to dispute settlement mechanisms by private parties through the establishment of a federal challenges program to assist with legal costs and advice, supplemented with a legal aid hotline using the legal expertise of federal government employees;
    - raising the consciousness of individual Canadians about the importance of the AIT by producing something like a Citizen's Charter of Economic Opportunity within Canada, which states and explains the provisions of the AIT in terms of Charter values of personal mobility, equality of opportunity, and individual freedom, and which emphasizes the real and symbolic importance of access to dispute settlement for nongovernmental actors; and
    - undertaking a comprehensive study of the barriers to trade within Canada, incorporating first-rate empirical research, which could help persons advance their dispute settlement complaints, including providing them with proof that trade barriers are causing them economic harm.

- The Canadian economic union has a constitutional basis that has been reaffirmed by the Supreme Court of Canada in a number of recent decisions. It is possible to use the mobility rights contained in the Charter of Rights and Freedoms to remove some barriers to internal trade.
- The Supreme Court has begun to take a broader view of the federal government's constitutional "trade and commerce" and "peace, order, and good government" powers, which would give Ottawa wider scope to pursue economic integration through harmonizing legislation, as well as increased leverage to effect consensus among the provinces.
- Globalization and international trade obligations have an impact not only on international trade barriers but interprovincial ones as well. Once a province is put into a position where, under international trade law, it must eliminate discrimination against imports from abroad, then continuing to discriminate against imports from other Canadian provinces may well be futile.
- The trend toward globalized regulation in areas such as food safety will prod the provinces into cooperating with the federal government to develop a single national approach that reflects emerging international standards and that seeks to influence these standards in Canada's interest.

In the wake of failed attempts to strengthen the economic union provisions of the Constitution, the federal government proceeded in 1993 to initiate multilateral negotiations for reducing interprovincial trade barriers. The resulting Agreement on Internal Trade (AIT), signed by the First Ministers in 1994 and in force since July 1995, concluded a year-long period of intense federal-provincial dialogue which, for the first time, addressed concurrently a comprehensive range of internal barriers to the mobility of goods, capital, and services across Canada.

The AIT, though a nonbinding political understanding among the federal government, the provinces, and the territories, tracks closely the kinds of obligations or commitments that one finds in international trade treaties with respect to trade between sovereign countries. Thus, in many areas such as services, investment, and government procurement, provincial measures that discriminate against out-of-province economic actors are prohibited or disciplined, subject to various exceptions or saving clauses. At the same time, the AIT sets out a large number of commitments to harmonization or regulatory rapprochement which are meant to address situations where nondiscriminatory measures have the effect of creating barriers to trade.

As various commentators, including Katherine Swinton and Armand de Mestral, have noted, the AIT states nonlegal obligations or commitments in legal language. It also contains a formal dispute settlement mechanism, to which private parties have limited access and governments have broader access. However, the formal rulings of these dispute panels have no legal effect.

The AIT deals with matters that are the subject of legal rights and obligations in other trade agreements, such as the General Agreement on Tariffs and Trade/World Trade Organization (GATT/WTO) and the North American Free Trade Agreement (NAFTA). It also seeks to constrain or guide law and regulation by governments in a wide range of areas. One would think, therefore, that the nonlegal status of the AIT would be a major liability in achieving its goals. Not all commentators, however, see the political character of the AIT as a drawback. Swinton, for instance, has argued that, despite its political status, the AIT

> is likely to have an important impact on Canadian law and government policy. Most of its effects will come because governments feel an obligation to comply, whether or not they have the legal ability to do otherwise.[1]

Nevertheless, almost a year after coming into effect, the AIT has more or less sunk into obscurity. Admittedly, there is quiet, behind-the-scenes work on a number of the regulatory harmonization initiatives proposed in the AIT, along with implementation more generally.[2] But one hardly has the impression of significant momentum toward deeper economic integration within Canada. Of course, for those who have maintained that the economic impact of provincial barriers to trade is rather modest,[3] this outcome may be both predictable and desirable. For others who have hoped for a much more liberal economic union, this must be a major disappointment.

This Commentary is concerned with the question of how, given the apparent limited potential of the AIT as it now stands to remove barriers to economic mobility in Canada, we should best proceed to strengthen the Canadian economic union. My own perspective is that, regardless of the actual magnitude of economic welfare losses from barriers to trade within Canada, these barriers are in many instances at odds with the idea of a common Canadian citizenship, and undermine equality of economic opportunity within the federation, a principle I believe is implicit in the Charter of Rights and Freedoms as well as other parts of the Constitution, such as section 36.[4]

The Commentary is divided into five parts. The first considers options for giving legal force to the AIT itself, or at least to some of its provisions. Here, I note that the courts have given some legal instruments, such as human rights codes, priority over normal legislation, despite the absence of constitutional entrenchment.

The second part reviews the options for giving greater political legitimacy and weight to the AIT, so that it influences governments in the nonlegal manner Swinton suggests. These options include undertaking new research on barriers to trade within Canada and their impact on particular economic interests; providing financial and other support for private parties who wish to challenge barriers through the dispute settlement mechanism; and mobilizing stakeholders (such as industry and consumer groups) in support of the various harmonization initiatives proposed in the AIT.

The third part considers the alternative of constitutional litigation as a means of removing barriers to internal trade, and briefly examines recent jurisprudence of the Supreme Court of Canada with respect to Charter mobility rights, as well as the limits of provincial jurisdiction implicit in general constitutional requirements of order and fairness in the Canadian union.

The fourth part reviews the federal government's constitutional powers to pursue economic integration through harmonizing legislation that may impinge on areas of provincial jurisdiction. Here, I argue that recent jurisprudence concerning both the federal "trade and commerce" power and the "peace, order, and good government" power provides Ottawa with rather wide scope to act, particularly where cooperative federalism has failed to produce a solution that adequately addresses the interprovincial effects of provincial regulation. In both parts three and four, I address the issue of whether the existence of the AIT, as an alternative mechanism for integration, should make the courts more or less willing to entertain constitutional claims related to strengthening the economic union.

In the final part of this Commentary, I address what is an often-cited but infrequently analyzed dimension of the challenge of strengthening the Canadian economic union — the impact of globalization and international trade obligations on barriers to interprovincial trade. To the extent that barriers to trade from other provinces also affect international trade, they will continue to come under challenge on the basis of international trade agreements, which in large measure apply to provincial laws and regulations as well as to federal ones. Once impugned in international forums, the sustainability, not to mention legitimacy, of these barriers as barriers to interprovincial trade becomes highly questionable. Moreover, whether in the area of product standards, food safety, or environmental regulation, international trade liberalization increasingly is being linked to harmonization at the global level or through plurilateral institutions such as the Organisation for Economic Co-operation and Development. It is the federal government that is at the table in these processes and is responsible for advancing a conception of the national interest that takes into account the interests of all provinces. At the current juncture, it is perhaps the federal government's role as the interface between provincial regulation and the process of globalization that provides it with the most scope to shape the future of the Canadian economic union.

Options for Legalizing the AIT

In the framework of Canadian public law, the only manner in which governments can enter into binding arrangements with each other that genuinely constrict the will of future legislatures is through constitutional amendment.[5] Swinton, who has written the authoritative discussion of this doctrine in the context of the AIT, perhaps underestimates the importance of translating the AIT's obligations into law, even if this law can always be repealed or amended by an individual legislature in the future.

The strongest form of legalization along these lines would be to make the obligations of the AIT directly applicable. This would require, as is the case for some human rights codes, stipulating (for instance in the provincial Interpretation Act) that, unless specifically provided for, the obligations of the AIT take precedence over any conflicting statutes and

regulations. Normally, courts and other bodies would defer to such a provision. This kind of legalization would probably also entail, as a matter of form, embodying the obligations of the AIT itself in a statute.[6] Thus, as a technical matter, courts and other bodies would apply the statute containing these obligations as a kind of superior law. It should be noted that, in the European Union, direct interpretation and application of the norms of the Treaty of Rome by domestic courts of the member states was an important integrating influence. In the Canadian case, the unity of the Canadian court system would ensure consistent judicial interpretation of the AIT across Canada (a function served in the EU case by references to the European Court of Justice).

This kind of legalization would, it should be emphasized, do little or nothing to prevent a legislature from simply rescinding, with a subsequent ordinary vote, any legal effect that the AIT may have within its jurisdiction. There are, however, important legitimacy dimensions to legalization that do not depend on the ability to bind future legislatures. Aside from the advantage of the AIT's becoming part of the normal functioning of the legal and regulatory processes within the jurisdiction, Canadians take the rule of law very seriously, and it is my impression (although I am no pollster) that they take legal rules much more seriously than political promises or commitments that have no legal impact. While repeal of the legal status of the AIT might not attract the same degree of scrutiny as the invocation of the override to suspend Charter rights, it would almost certainly provoke public debate both within the jurisdiction as well as nationally.

The steps that several provinces and the federal government have taken to date toward legalization reflect a quite different and much more modest approach. Instead of establishing a framework that would empower the courts and other bodies to determine the consistency of existing law with the AIT, most of the four provinces that have passed or are about to pass implementing legislation have attempted to make quite minor changes to provincial laws, deeming these to be sufficient to bring their laws into compliance with the AIT.[7] Three other provinces — New Brunswick, Prince Edward Island, and Manitoba — and the Northwest Territories have made a number of minor adjustments to existing statutes and regulations in order to bring the existing provincial legislative and regulatory framework into compliance with the AIT.

Only Nova Scotia's implementing legislation (section 2) makes any mention of the principles or objectives of the AIT itself. Inasmuch as they do not simply purport to consolidate minor changes to other statutes, the implementing acts (or draft legislation in the case of Quebec) mostly embody housekeeping provisions, such as providing ministerial authority for appointments under the AIT. One notable exception is that the implementing legislation in Alberta and Nova Scotia, as well as the draft legislation in Quebec, allows for cost awards to individuals with respect to dispute settlement actions to be legally binding and enforceable in court.

The federal government's implementing legislation (Bill C-19, An Act to Implement the Agreement on Internal Trade), which is currently in the final stages of passage in the Senate,[8] is disappointing in that it fails to make the AIT directly applicable in federal law or to give it a legal status that would normally be superior to other statutes. Given such a failure, it hardly stands up as a model for the provinces to follow. Section 7 of the draft implementing legislation merely states that "[t]he Agreement is hereby approved."

Moreover, in section 5, there is an attempt to limit the ability of an individual to bring administrative law or civil law proceedings to enforce the AIT. Thus, para. 5(2) states:

> There is no cause of action and no proceedings of any kind shall be taken, without the consent of the Attorney General of Canada, to enforce or determine any right or obligation that is claimed or arises solely under or by virtue of the Agreement.

This provision does, however, offer some hope for legalization through the judicial process,

since it suggests that the AIT could be invoked in a proceeding without the consent of the attorney general as long as there is some other independent ground for the action — for example, a Charter mobility rights claim or even an administrative law claim of error of law based on a tribunal interpretation of a statute. At a minimum, it could be argued, on the basis of the language of the statement "the Agreement is hereby approved," that, where two interpretations of a statute or regulation are possible, the court or tribunal should adopt the interpretation most consistent with the AIT. (This, of course, would fall considerably short of the kind of direct applicability discussed above, where, in the event of a direct conflict between one statute and another incorporating AIT obligations, the AIT obligations would prevail.)

Nonlegal Options for Enhancing the AIT's Legitimacy and Effectiveness

Quite apart from the possibilities of legalization, a number of concrete measures can be taken to enhance the AIT's contribution to securing the Canadian economic union.

One measure would be to facilitate access of private parties to dispute settlement mechanisms. So far, the provinces — perhaps set in the ways of old-style, "behind closed doors," Meech/Charlottetown executive federalism — have shown little enthusiasm for resolving their trade disputes through a rules-based, transparent, public dispute settlement mechanism. Indeed, as I have suggested elsewhere,[9] the dispute settlement chapter itself may in some ways reinforce these tendencies, since it requires or at least provides the possibility of all kinds of consultation and mediation arrangements before formal dispute settlement starts. The key, therefore, to a meaningful activation of the norms in the AIT could well be person-to-government dispute settlement.

There are two ways a person (including a corporation) may have access to dispute settlement. One way is for a government to pursue the complaint on the person's behalf. Unfortunately, under the AIT, Ottawa has little scope, despite its overall constitutional responsibility for the Canadian economic union, to take up complaints on behalf of private parties. It can do so only where the "person" who has suffered an economic injury or denial of benefit is a federally constituted entity, a federal work or undertaking, or otherwise under federal authority (1704(8)).

Another way for a person to gain access to dispute settlement is through direct person-to-government means. Here, however, the complaint must pass a cumbersome vetting mechanism whereby a government-appointed screener decides if the complaint has sufficient merit to proceed. The limits of person-to-government dispute settlement are further evident when one considers that, while a person bears the risk of having to pay considerable legal costs to bring a dispute before a panel, he or she cannot obtain any kind of award for damages that is directly enforceable. A year ago, I predicted that

> it seems highly improbable that an individual or corporation would have much interest in pursuing dispute settlement where, in effect, publicity or moral suasion are the only instruments available to address noncompliance with a successful dispute settlement outcome.[10]

This prediction shows every sign of being fulfilled. Thus, I reiterate my proposal that the federal government initiate a challenges program that would assist persons bringing actions before the dispute settlement mechanism with legal costs or advice. Moreover, the federal government could provide a legal aid hotline to individuals and firms that believe they have suffered from violations of the AIT's norms. In fact, much of the best legal expertise on trade rules of the kind found in the AIT is located in federal government offices, so this service could be highly effective without entailing significant expenditure outlays.[11]

While major industry and trade associations have the resources to identify barriers to trade that have a negative effect on their members, significant difficulties arise when some

members are being disadvantaged by particular barriers to trade while others are gaining economic rents from those barriers. Nevertheless, some such associations (such as the Construction Association) have already lobbied effectively to dismantle barriers. A different problem is that many provinces are "small worlds" where business and governmental elites are closely entwined, and a firm that has major economic interests in a particular province may feel uncomfortable challenging the provincial government head on in public dispute settlement.

As subsidies and regulatory rents decrease with the restructuring of government, this may start to change. But I predict that it is small and medium-sized businesses' simply wanting to get their services and products into a province on equal competitive terms that are the most likely to press disputes and to seek the removal of regulatory barriers through positive integration, including harmonization. Yet these businesses may be unwilling to risk the costs of a dispute resolution whose concrete impact is so uncertain. Moreover, these businesses are, individually, unlikely to have the resources to undertake the kind of studies that would identify subtler regulatory barriers and attempt to estimate their impacts. And, as diffuse and sometimes competing actors, small and medium-sized businesses face considerable challenges in working together to lobby governments effectively to fulfill their commitments under the AIT (harmonization or rapprochement of divergent regulations).

Here, as well, there is arguably a case for federal leadership to address the problem. Indeed, it is my understanding that Industry Canada is considering, or may actually be close to, commissioning a comprehensive independent study of barriers to economic mobility within Canada, which will entail extensive surveys of the private sector. This would be an important initiative, if the resources necessary for first-rate empirical work are put into it. A model for this type of initiative is the Cecchini Report,[12] which, despite some methodological shortcomings, played an important role in the debate over harmonization in Europe. In some instances, rigorous empirical work on barriers to trade within Canada could also help persons advance their dispute settlement complaints, including providing them with proof that trade barriers are causing them economic harm. Indeed, an important barrier to dispute settlement may well be that smaller actors face prohibitive costs in generating the sophisticated economic evidence required in some cases to pursue a complaint effectively.

Finally, the federal government should raise the consciousness of individual Canadians about the AIT. It should consider producing something like a Citizen's Charter of Economic Opportunity within Canada, which states and explains the provisions of the AIT in terms of Charter values of personal mobility, equality of opportunity, and individual freedom, and which emphasizes the real and symbolic importance of access to dispute settlement for nongovernmental actors. It is important that Canadians understand that the AIT affects them and (if somewhat indirectly) that it purports to confer on them, at least as a matter of political commitment, rights to trade —that is, that the AIT is not just another arcane federal-provincial talkshop.

Negative Integration through Constitutional Litigation: Alternative or Supplement to the AIT?

It is worth recalling that the AIT did not emerge out of intergovernmental anarchy, as do international trade treaties, but in the context of a single nation, with a constitution that, as Justice LaForest has suggested in a number of Supreme Court decisions,[13] can be interpreted as already implying or requiring an economic union within Canada. Armand de Mestral has suggested that the norms of the AIT should have been directly grounded in Canadian constitutional law and has commented, "Canada has been a federation with an intense economic union since 1867, a fact of which the Agreement's negotiators appear to have been unaware."[14]

Mobility Rights

Various provisions of the AIT may overlap with the mobility rights entrenched in section 6 of the Charter of Rights and Freedoms. Under that section, Canadians are guaranteed the right to take up residence and to gain a livelihood in any province. These rights are subject to the general "reasonable limits" provision of the Charter (section 1) and to a special limitation clause that exempts general nondiscriminatory provincial laws, reasonable residency requirements for the receipt of public services within a province, and programs aimed at countering the social and economic disadvantage of individuals in high-unemployment provinces. Mobility rights are a fundamental part of the Charter and are not subject to the "notwithstanding" clause (section 33) or "legislative override," as this section is often called.

In the early Charter case of Law Society of Upper Canada v. Skapinker,[15] the Supreme Court held that section 6(2)(b) did not confer a right to earn a livelihood independent of some element of mobility. The Court suggested, however, that this element need not always be the taking up of residence in the province concerned by the individual who is asserting a right to earn a livelihood. The notion that one does not have to "move to and take up residence" in a province implies that mobility rights in section 6 could be extended to economic activity by out-of-province actors who nevertheless do not have an ongoing personal presence in the province where the economic activity in question is conducted. On this reading, the concept of economic mobility is already embedded in section 6.

In the case of Black, the Supreme Court of Canada went quite far toward adopting such a view of section 6. This case concerned an attempt by the Toronto-based law firm of McCarthy and McCarthy (now McCarthy Tétrault) to create an interprovincial law firm by setting up an office in Calgary in association with lawyers who were resident in Alberta. The challenged provisions prevented Alberta lawyers from entering into partnerships, associations, or "other arrangements" for the joint practice of law in that province with a nonresident member of the Alberta bar.

In striking down these provisions, Justice LaForest suggested the following as a basis for interpreting section 6(2)(b):

> The concept of Canada as a single country comprising what we would now call a common market was basic to the confederation arrangements and the draft resolution of the *British North America Act* attempted to pull down the existing control barriers that restricted movement within the country.[16]

There are two main limits, however, to the potential of rights in section 6 to secure the Canadian economic union. First, the section does not apply to corporations, the most obvious litigants with respect to many barriers to economic mobility. (Nevertheless, the Supreme Court has not explicitly foreclosed the possibility that a person, such as an employee or shareholder, who has a direct economic interest in a corporation's capacity to trade freely can make a mobility rights claim, even if the effects of the barrier are, in the first instance, felt by the corporation as an economic actor.) Second, in Devine v. Quebec (P.G.),[17] the Supreme Court suggested that provincial measures that are not purposely discriminatory but are "simply conditions of doing business in the province with which anyone must comply" are not violations of mobility rights, an interpretation recently, if laconically, reaffirmed by the Court in Walker v. Prince Edward Island.[18]

Since the Black decision, there has been little high-profile section 6 litigation. Two recent Court of Appeal cases merit particular attention, however, as they show the promise of section 6 in helping to secure the Canadian economic union.

In Canadian Egg Marketing Agency v. Richardson,[19] the Northwest Territories Court of Appeal held that the federal interprovincial egg marketing scheme violated section 6 to the extent that it prohibited Northwest Territories' egg producers from selling their eggs elsewhere in Canada, thus preventing the applicant from the pursuit of a livelihood in another province. The court stressed that the scheme

did not merely regulate exports of eggs from the Northwest Territories into the rest of Canada, but that it rendered such exports illegal in all cases.[20] The court also emphasized that personal mobility across provincial borders need not always be an important component of the applicant's section 6 claim.

In Canadian Egg Marketing Agency, the court relied in part on an earlier decision of the Prince Edward Island Court of Appeal, Island Equine Clinic Ltd. v. Prince Edward Island.[21] In that case, a provincial regulation granting subsidies to a closed list of veterinary clinics was found to violate section 6 since, in creating a "preferred class" of veterinary clinics, it excluded the applicant who had moved to Prince Edward Island from Ontario. What is interesting here is that the court found a violation of section 6 even though one could have argued that the recently arrived applicant was being treated no worse than long-standing PEI veterinarians who were not on the particular list in question. Nevertheless, the regulation clearly had a disparate impact on newcomers by creating a competitive advantage for some PEI residents.

As these cases illustrate, the potential for mobility rights litigation to strike down barriers to trade within Canada is not insignificant. The federal government could exploit this potential through referring to the courts lists of barriers to mobility in Canada (particularly in areas such as occupational qualifications, certification, and licensing) in a series of omnibus reference actions. The kind of state-of-the art empirical study advocated above would provide a concrete context for the Supreme Court to consider the effects of such measures on mobility rights. Perhaps less aggressively, the federal government could at least provide financial assistance for court challenges on mobility rights that might have significant implications for the Canadian economic union. This could hardly be seen as unfair to the provinces since, as Canadian Egg Marketing Agency illustrates, federal laws and regulations that impede mobility are equally as susceptible to challenge under section 6 as are provincial ones.

The existence of the AIT should lead to a less deferential standard of review in section 6 cases, for several reasons. First, many of the measures challenged in such litigation may well be those that also violate norms to which all governments have agreed in the AIT — thus, the Supreme Court may have to worry less that it is imposing its own interpretation of the foundations of the economic union on the political branches.

Second, the limitations clauses in the AIT itself can help guide and narrow the Court's analysis of whether measures found to violate section 6 are "reasonable limits" to rights within the meaning of section 1 of the Charter.

Third, in setting out a process for positive integration through harmonization or regulatory rapprochement, the AIT provides assurance that judicially imposed constraints on policy measures need not lead to an overall retreat of democratic regulation.[22] In the AIT, Ottawa and the provinces have committed themselves to various processes of regulatory cooperation, which may allow a political avenue for addressing the Supreme Court's concerns about mobility while respecting the democratic will of governments to protect their citizens through economic and social regulation.[23] (Unfortunately, however, the processes contemplated in the AIT seem heavily based on the "closed door," Meech / Charlottetown model of executive federalism.)

Morguard and Hunt: Toward a Canadian Version of Cassis de Dijon?

As cases such as Devine and Walker make clear, section 6 mobility rights do not as such imply that a province must recognize or accept another province's regulations (for example, with respect to licensing of professionals) as a basis for a resident of that other province doing business intraprovincially — that is, a province can impose its own regulatory scheme on out-of-province providers of goods and services as long as it does not discriminate against

them in favor of its own providers. As students of the European Union are well aware, however, it was precisely such a court-imposed requirement of recognition that — beginning with the famous Cassis de Dijon case — was of crucial importance to deeper and, ultimately, positive integration in Europe through mutual recognition arrangements combined with minimum regulatory criteria as a basis for recognition.[24] In two cases that concern interprovincial aspects of civil justice, the Supreme Court of Canada has gone a long way toward constitutionalizing the concept of mutual recognition.

In Morguard, the Court held that the idea of the Canadian economic union — as embodied in various constitutional provisions (including the ban on interprovincial tariffs [section 121]), the federal "trade and commerce" power, and the mobility rights under section 6 — implies that the court of one province must recognize and enforce the judgment of the court of another province, provided the other province's court has taken jurisdiction on the basis of a real and substantial connection with the defendant (that is, not arbitrarily or unreasonably).

In Hunt, the Court held that the constitutional principles of order and fairness implicit in the conception of Canada as a common market or economic union also bind legislatures, not just courts. In that case, the Court found that a Quebec statute that purported to block the removal from the province of litigation-related documents was unconstitutional inasmuch as it might be applied to other Canadian provinces rather than foreign powers. A crucial dimension of the Court's reasoning was that the frustration of interprovincial civil litigation in this fashion would unduly increase the "transaction costs" of doing business across provincial boundaries. Justice LaForest noted:

> The resultant higher transaction costs for interprovincial transactions constitute an infringement on the unity and efficiency of the Canadian market-place.

If the Court further develops the approach it took in both Morguard and Hunt, it will have to craft some reasonable limits to the requirement of recognition, or at least find a means of balancing the effects on the economic union of provincial barriers against the legitimate policy goals that those measures purportedly serve.[25] In Hunt, however, the Court clearly saw that some limits were needed on judges' having the final say on such a balance, emphasizing in obiter dicta that it was constitutional for the federal government to legislate on the recognition and enforcement of judgments and related matters, pursuant to its "trade and commerce" and "peace, order, and good government" powers. It is to these powers that we now turn, in part because they offer considerable potential for positive integration, which advances the economic union by harmonizing, rather than simply constraining, government action.

Federal Harmonizing Regulation in Areas of Provincial Jurisdiction

In a number of regulatory fields, such as telecommunications, banking, and intellectual property rights, the federal government has exclusive jurisdiction under the Constitution as interpreted by the courts. However, the legacy of the Privy Council era of jurisprudence was to establish most areas of economic and social regulation as matters of provincial jurisdiction, including the regulation of any single industry or trade, the intraprovincial environment, labor relations, and so forth. Generally speaking, the courts have interpreted the federal "peace, order, and good government" and "trade and commerce" powers extremely narrowly, with the former increasingly limited to situations of national emergency and the latter limited to the regulation of flows of goods across international and interprovincial borders. Thus, the federal government was seen as having very little scope to enact national legislation where divergent provincial regulatory approaches undermined the Canadian economic union. Over the past few years, how-

ever, decisions of the Supreme Court have indicated the emergence of a very different, broader view of the federal general powers, as well as an explicit recognition of the importance of federal legislative activity to the securing of the Canadian economic union through harmonization.[26]

In Crown Zellerbach,[27] the Supreme Court revived the notion that Ottawa could invoke its "peace, order, and good government" power to deal with a matter of national concern. According to Justice LeDain for the majority,

> [f]or a matter to qualify as a matter of national concern...it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.[28]

In clarifying the concept of "singleness, distinctiveness and indivisibility," Justice LeDain emphasized the consequences of "a provincial failure to deal effectively with the control or regulation of the inter-provincial aspect of the matter." In addition, he stipulated that "a national dimension justifies no more federal intervention than is necessary to fill the gap in provincial powers."[29] Thus, as the Court would emphasize in the subsequent case of Oldman,[30] the national dimensions branch of the "peace, order, and good government" power does not provide a basis for plenary federal jurisdiction over a very broad regulatory field, such as the environment in general.

In Crown Zellerbach, the issue was the constitutionality of federal legislation regulating marine pollution in intraprovincial waters. While existing constitutional doctrine permitted the federal government to regulate pollution within the province to the extent necessary to prevent the flow of pollution between provinces[31] or into the seas and oceans, the legislation in question was much broader than that, extending as it did to all intraprovincial marine waters.

What, then, would be the "extraprovincial effects" of a provincial failure to regulate all intraprovincial marine pollution even if the federal government possessed sufficient authority (apart from the "peace, order, and good government" power) to regulate actual spillovers or externalities across provincial boundaries? Justice LeDain's response hinged on the fact that marine pollution is treated as a single, indivisible subject in an international convention (The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters) to which Canada is a signatory. This reasoning would seem to imply that the failure of any province to regulate intraprovincial pollution of marine waters could compromise Canada's adherence to the obligations of this international agreement, which benefits the entire country.

In a vigorous dissenting judgment, Justice LaForest, writing for himself and three other members of the Court, placed in question not so much the general approach in the majority judgment as whether it had been accurately applied. In particular, he raised concerns about whether the test with respect to intensity had really been applied at all: the federal legislation was so broad that it extended well beyond pollution as such to the dumping of any substance in marine waters. Thus, it was far from clear that the federal intervention was limited to the minimum necessary to fill a gap or to obviate the extraprovincial effects of a provincial failure to regulate. Nevertheless, there was empirical evidence (cited in the majority judgment) that the statute was drawn in such broad terms due to the monitoring and enforcement advantages of not having to identify the specific substance dumped in order to identify an infringement of the regulations. Permitted dumping of waste would be confined to license holders, and regulators could focus their intention on the content and quantity of the waste being dumped.

The General Motors Case and the "Trade and Commerce" Power

In *General Motors*,[32] the Supreme Court moved beyond the restrictive approach to the "trade

and commerce" power taken by the Judicial Committee of the Privy Council and activated the long dormant "general regulation of trade" dimension of this power. At issue in General Motors was the constitutionality of federal competition law, which, in the past, had been justified as an exercise of the federal criminal law power. The impugned provisions in General Motors, however, purported to create a civil right of action for violations of the Competition Act, thus arguably constituting an interference in provincial jurisdiction over property and civil rights.

Chief Justice Dickson, writing on behalf of a unanimous Court, elaborated the following criteria for determining whether a federal regulatory scheme that infringes provincial jurisdiction can be sustained as "a general regulation of trade affecting the whole dominion":

- the legislation must be part of a general regulatory scheme;
- the scheme must be monitored by a regulatory agency;
- the scheme must not constitute the regulation of a single industry or trade;
- the matter of the legislation must be such that joint action by the provinces would be constitutionally impossible; and
- the refusal of one or more provinces to participate in a joint federal-provincial regulatory effort would put the whole scheme in jeopardy.

While the first three criteria primarily reconcile the Court's decision in General Motors with previous constitutional jurisprudence, the fourth and fifth are clearly closely analogous to the provincial inability test established in Crown Zellerbach.

The Court went on to distinguish between minor and major intrusions into exclusive provincial jurisdiction. In the case of a minor intrusion, it would be necessary to show only a functional or rational relationship between the interference with provincial jurisdiction and the national purposes reflected in the regulatory scheme as a whole. By contrast, for an intrusion to be considered "major," a close fit would be required between the particular intrusive feature of the scheme being impugned and the national purposes of the whole scheme.

Both Crown Zellerbach and General Motors clearly afford the federal government some scope to sustain constitutionally harmonizing regulation that impinges on areas of provincial jurisdiction, whether in consumer protection, environment, or financial services. Subsequently, even in cases such as Hunt, where no federal statute has been at issue, the Supreme Court has emphasized the importance of federal jurisdiction to securing the economic union. In Hunt, the Court even went so far as to suggest that the federal government could set rules for the recognition and enforcement of private law judgments by provincial courts where necessary to ensure order and fairness within the Canadian economic union.[33] I do not think one could ever expect a clearer statement by the Court on the link between the expanded scope of the federal government's general powers and the need for harmonization of provincial laws to secure the Canadian economic union.

Given Ottawa's legal scope to act in a range of areas where harmonization would support the economic union, a unilateral alternative exists where the intergovernmental processes contemplated in the AIT do not succeed in producing a satisfactory result.

An important limitation, however, is that a national regulatory scheme enacted pursuant to the general trade power or the national concern branch of the "peace, order, and good government" power will not simply pre-empt provincial laws but normally will operate concurrently with them — except in cases of explicit conflict, where the paramountcy doctrine would operate to trump the provincial law in question. Thus, there is the risk that, without cooperation from the provinces, any such national scheme would actually create more, not less, regulatory diversity and possibly higher transaction costs for internal trade.[34]

This risk may be somewhat lower if one assumes a broad judicial interpretation of the paramountcy doctrine (toward which the Supreme Court seems to be inching).[35] Such a risk could also be addressed by carefully drafting federal laws to provide, for example, that goods and services shall enter freely every province and territory as long as they comply with federal regulatory requirements. However, the political rhetoric of federalism adopted by Ottawa is at odds with the assertion of its legal powers. This rhetoric tends to suggest that, if anything is to be done about the economic union, it must be done with the consent of the provinces. Indeed, David Cohen, Dean of the University of Victoria, attributes the "overall weakness" of the AIT itself to "the practical and political inability of the federal government to use its legal authority to act unilaterally to create a common market in Canada."[36]

It is understandable and appropriate that the federal government should seek a consensus-based approach to eliminating obstacles to trade within Canada. The AIT is often touted as an example of the success of such an approach but, as we have seen, in many respects it is merely an agreement to agree, and is far from producing concrete results. It is sometimes argued that the GATT/WTO agreements are examples of the deep economic integration that can be achieved by consensus among a large number of parties without the need for a supranational government to herd uncooperative ones into line. In fact, however, the supposed consensus-based achievements of the GATT/WTO owe a great deal to the leadership — some would say bullying — of a few major powers that have unilateral options should consensus fail. Indeed, the entire Uruguay Round of multilateral trade negotiations depended for its success on an eleventh-hour deal between two such powers, the United States and the European Union.

At a minimum, the federal government should consider actively using the jurisprudence of the Supreme Court as a basis for enhancing the legitimacy of its leadership and weight in intergovernmental negotiations on harmonization or national approaches in areas such as food safety or consumer protection. It is perhaps the central insight of law and economics that the ultimate effect of legal rules is seen in the bargains that people strike in light of those rules under circumstances where transaction costs are above zero (the Coase theorem). It is quite conceivable that, at a crucial juncture in an intergovernmental negotiation, the prospect of unilateral federal action in the event of failure could persuade a recalcitrant province to come onside. In this respect, the leverage that Ottawa has as a result of its constitutional powers may actually help to produce a consensus-based outcome by overcoming holdouts.

Thus, the federal government should not view unilateral and consensus-based alternatives as mutually exclusive, in the belief that to advance the latter it must delegitimize the former. At the same time, the fact that a consensus-based approach has been tried and found wanting may be an important support to Ottawa's case should it ultimately have to defend unilateral action in court. Here, it should be recalled that, in Crown Zellerbach, a key requirement for justifying the federal government's exercising its "peace, order, and good government" power nationally was if the provinces appeared to be incapable of addressing, singly or jointly, the interprovincial dimensions of the matter. As well, the more specific commitments to harmonization in the AIT constitute an admission by the provinces that there is a legitimate need for a national approach in many regulatory areas in order to remove or reduce barriers to trade.

A contrary argument, of course, would be that, by entering into the AIT, the federal government has given the provinces some legitimate expectation that it is renouncing a unilateral approach to securing the Canadian economic union, or at least that it is demonstrating the view that consensus-based political approaches are adequate to the task. This is at odds, however, with the very explicit affirmation of existing constitutional powers in

Article 300 of the AIT. In any case, such an argument would also imply the legitimacy of exercising federal powers should other governments fail to uphold their commitments in the AIT with respect to harmonization. To rely on the AIT as a kind of political estoppel of unilateral federal action, one must surely have to honor one's own commitments under the Agreement.

Globalization, International Trade Law, and the Canadian Economic Union

Article 105 of the NAFTA states:

> The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.

On its face, this provision is stronger than the comparable GATT obligation, which refers to the requirement to take "such measures as may be available" to ensure compliance of subnational governments.[37]

With respect to the vast majority of NAFTA and GATT/WTO obligations that affect the provinces, the federal government rightly does not intend to pursue a strategy of pre-empting provincial jurisdiction. Instead, it could wait until provincial measures are found by a dispute panel to be in violation of the NAFTA, then seek the provinces' agreement to a solution that is satisfactory from the perspective of the complaining party — which is what has already happened with respect to violation by the provinces of GATT and Canada-US Free Trade Agreement provisions on alcoholic beverages. Ultimately, should a province fail to agree, the complaining party may, under some circumstances, be permitted to retaliate against Canada by withdrawing trade concessions to Canada under the NAFTA. It will usually be in the complaining party's interest to withdraw concessions so as to have a maximum impact on the economy of the offending province.

In the Labour Conventions case,[38] it was held that the federal government has no general constitutional authority to implement treaties by legislating in areas of exclusive provincial jurisdiction. Therefore, any federal legislative or regulatory action to ensure provincial conformity with the GATT or the NAFTA must be consistent with the distribution of legislative powers in sections 91 and 92 of the Constitution Act (1867 and 1982). In contemporary circumstances, Ottawa's power to regulate with respect to international trade and commerce (section 91 (2)) extends to measures that would otherwise be within exclusive provincial jurisdiction, where necessary and incidental to the regulation of international trade and commerce. Elsewhere,[39] I have suggested that recent Supreme Court interpretations of the general "trade and commerce" power (General Motors) and the "peace, order, and good government" power (Crown Zellerbach)[40] might provide, in some circumstances, additional avenues for the federal government to legislate in otherwise exclusively provincial fields in order to assure compliance with Canada's international obligations.

Ultimately, however, no matter how much importance one attaches to Labour Conventions today, the federal government may not even have to attempt to flex its constitutional muscles since, as the beer saga illustrates, the threat of retaliation from trading partners can be an extremely powerful incentive to bring a province to the table and work with Ottawa toward a solution that ensures compliance with international trade law.[41]

Once a province is put into a position where, under international trade law, it must eliminate discrimination against imports from abroad, then continuing to discriminate against imports from other Canadian provinces may well be futile. In this connection, it should be stressed that, given the interpretation of "national treatment" adopted by GATT panels in the beer cases, the provinces cannot use the defense that they are treating foreign

imports just as badly as products from other provinces. In effect, Canadians have US beer makers and GATT dispute panels largely to thank for opening up the internal beer market in this country!

A second international trade dispute — between Canada and the United States over the entry of UHT milk from Quebec into Puerto Rico — illustrates a different but equally important way in which globalization may be overtaking the AIT initiative as a force for securing the Canadian economic union.[42] In this case, Puerto Rican and US authorities insisted that, for such imports to continue, Quebec or Canada would have to join a US regulatory regime for milk safety or undertake costly and time-consuming measures to persuade US authorities of the equivalence of the Quebec-Canada system. Key to the US claim that it could not simply recognize the Canadian regime as equivalent was the notion that "the Quebec/Canada system does not include the federal oversight and verification elements that are essential components of the US system."[43] Although the panel ruled in favor of Canada on one of the legal issues, the ultimate resolution of the dispute involved Ottawa's assurances that Quebec milk exporters were meeting the equivalent of US standards.

More generally, inconsistencies in federal and provincial approaches to standards and inspection will make it increasingly difficult to justify controls on imported food based on scientific risk-assessment criteria (as required by the GATT Agreement on Sanitary and Phytosanitary Measures) or to justify measures otherwise inconsistent with GATT provisions (for example, national treatment as "necessary" for the protection of human or animal health under Article XX (b) of the GATT). Thus, this is one area where, despite virtually nothing having been agreed to in the AIT, progress is being made toward harmonizing divergent provincial standards and procedures. Indeed, there is the possibility that the First Ministers will agree to a National Dairy Code when they meet in late June 1996.

A final example is trade in electricity. Discussions have gone on for many years about facilitating interutility trade in electricity across Canada through the creation of a national grid, or at least significant interprovincial wheeling capability, but with no concrete result. However, as provinces begin to open up their electricity markets to intraprovincial competition, the national treatment and related obligations of international trade agreements apply to those markets as well.[44] In fact, some Canadian utilities may already have joined regional groupings of US utilities intended to manage interface and access issues that are crucial to interjurisdictional trade in electricity, on the basis of ground rules set by regulators in Washington. The ultimate result of Ottawa's unwillingness to take the lead and the usual provincial intransigence and bickering may be the bypassing of the Canadian economic union and the eventual wheeling of power across Canada largely according to a regulatory design made in the United States.

These three examples relate to an even more broadly based trend of globalized regulation and standards setting, as reflected in the Codex Alimentarius in the case of food safety, the ISO with respect to product standards, and various global environmental regimes. International trade agreements now link up to these globalized regulatory processes by requiring that a country strictly justify the adoption of regulations not based on international norms, at least where such regulations are likely to have a trade-restricting impact.

As has often been the case in the past, the provinces may call on the federal government to shelter them from such trends. But this is no longer possible: the simple result of not complying with international standards or internationally recognized national standards is that one's products and services will have an ever more difficult time entering foreign markets. Moreover, even in the absence of formal barriers, the products and services of an offending country may not enjoy the confidence of increasingly wary and informed consumers in markets such as the European Union.

Of course, globalized regulation and standards setting is made in forums where national governments have a major role — although, in the case of the ISO, one cannot underestimate the extent to which the process is private sector driven. And such regulation does not often simply pre-empt domestic regulatory regimes. Thus, the federal government now has a window of opportunity to lead in developing or consolidating distinctly Canadian approaches to interactions with global regulatory processes. If the provinces choose not to cooperate in the development of a national approach, they will find themselves subject, willy-nilly, to whatever is negotiated at these forums. The question the provinces now face is: Would they prefer to be seen as contributors to a distinctive Canadian approach to globalization through the concentration of Canadian will and imagination, or are their concerns about pride and power within the federation so important that they would prefer simply being buffeted by the winds of global change?

Notes

I am grateful to Sven Milelli for excellent research assistance, including many useful insights on the constitutional jurisprudence of economic union. I have also learned much from comments by David Schneiderman and Kathy Swinton on my earlier work on the economic union, and by the latter on an earlier draft of this *Commentary*. Responses to the earlier draft when it was presented at the C.D. Howe Institute, especially from Armand de Mestral and Daniel Schwanen, were also most helpful.

1 K. Swinton, "Law, Politics, and the Enforcement of the Agreement on Internal Trade," in M.J. Trebilcock and D. Schwanen, eds., *Getting There: An Assessment of the Agreement on Internal Trade*, Policy Study 26 (Toronto: C.D. Howe Institute, 1995), p. 209.

2 The developments are summarized in A. Dimitrijevic, "The Agreement on Internal Trade: Overview and Progress," Internal Trade Secretariat, Ottawa, undated.

3 See, for example, M.J. Trebilcock and R. Behboodi, "The Canadian Agreement on Internal Trade: Retrospect and Prospects," in Trebilcock and Schwanen, eds., *Getting There*, pp. 21–22.

4 I develop this liberal philosophical perspective on economic union at length in R. Howse, *Economic Union, Social Justice, and Constitutional Reform: Towards a High but Level Playing Field* (North York: York University, Centre for Public Law and Public Policy, 1992).

5 *Reference Re Canada Assistance Plan*, (1991) 83 D.L.R. (4th) 297 (S.C.C.). For excellent discussions of this issue, see Swinton, "Law, Politics, and the Enforcement of the Agreement on Internal Trade"; and L. Friedlander, "Constitutionalizing Intergovernmental Agreements," *National Journal of Constitutional Law* 4 (1994): 153.

6 Some of the obligations in the AIT may be difficult to translate into statutory requirements, particularly those which entail governments' collectively committing themselves to various processes with respect to harmonization, for example. Thus, only some subset of the AIT provisions could be appropriately incorporated into statutes in this way. These, however, would certainly include basic nondiscrimination norms as they apply to the various measures and sectors covered by the AIT. I am grateful to Kathy Swinton for this point.

7 Alberta, *Agreement on Internal Trade Statutes Amendment Act* (1995), Bill 36 (passed May 17, 1995); *Agreement on Internal Trade Amendment Act* S.N. 1995, c. A-5.1; *Internal Trade Agreement Implementation Act*, S.N.S. 1996, c. 8; Quebec, *An Act Respecting the Implementation of the Agreement on Internal Trade*, 1996 (Bill 15).

8 This information is based on an interview of a federal government official by Sven Milelli in mid-May 1996.

9 R. Howse, "Between Anarchy and the Rule of Law: Dispute Settlement and Related Implementation Issues in the Agreement on Internal Trade," in Trebilcock and Schwanen, eds., *Getting There*.

10 Ibid., pp. 185–186.

11 Another avenue for raising the profile of dispute settlement and making it more effective would be to strengthen the Internal Trade Secretariat, which at present has few resources at its disposal to support dispute settlement or to advocate for the implementation of the AIT. This useful suggestion is developed in D. Schwanen, *Drawing on Our Inner Strength: Canada's Economic Citizenship in an Era of Evolving Federalism*, C.D. Howe Institute Commentary 82 (Toronto: C.D. Howe Institute, June 1996), which should be viewed as a companion piece to this paper.

12 P. Cecchini, *The European Challenge, 1992: The Benefits of a Single Market* (Brussels: European Community, 1988).

13 *Black v. Alberta Law Society*, [1989] 1 S.C.R. 591; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T & N plc*, [1993].

14 A. de Mestral, "A Comment," in Trebilcock and Schwanen, eds., *Getting There*, p. 96.

15 *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357.

16 *Black v. Alberta Law Society*, [1989] 1 S.C.R. 591.

17 *Devine v. Quebec (P.G.)*, [1988] 2 S.C.R. 790, 55 D.L.R. (4th) 641, at 657–658. Note, however, that this case dealt with mobility rights only in passing. It was primarily concerned with determining the consistency of Quebec's Bill 101 with the guarantees of freedom of expression in the Charter.

18 *Walker v. Prince Edward Island*, [1995] 2 S.C.R. 407.

19 *Canadian Egg Marketing Agency v. Richardson*, [1996] 132 D.L.R. (4th) 274 (N.W.T.C.A.).

20 Ibid., at 303.

21 *Island Equine Clinic Ltd. v. Prince Edward Island*, [1991] 81 D.L.R. (4th) 350 (P.E.I.C.A).

22 This is a concern about court-based economic integration that has been expressed by Kathy Swinton and David Schneiderman, both of whom have criticized my earlier work for being too open or favorable to judicial constraint of barriers to economic mobility. See K. Swinton, "Courting Our Way to Economic Integration: Judicial Review and the Canadian Economic Union," *Canadian Business Law Journal* 25 (1995): 280; and D. Schneiderman, "Economic Citizenship and Deliverative Democracy: An Inquiry into Constitutional Limitations on Economic Regulation," *Queen's Law Journal* 21 (1995): 125.

23 This does *not* imply that section 6 creates a positive obligation to harmonization or regulatory rapprochement. The point is that these instruments of positive integration provide a democratic safety valve, where the Court has struck down legislation under section 6.

24 See, for example, D. Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Cambridge, Mass.: Harvard University Press, 1995), ch. 2.

25 Robert Wisner has argued for a minimum impairment approach, which seems consistent with European Union jurisprudence flowing from *Cassis de Dijon* and with the concept of "reasonable limits" employed in the most doctrinally solid Supreme Court interpretations of section 1 limits on Charter rights. Under this test, the Court would ask whether the provincial measures in question impair the economic union to the minimum extent necessary to advance legitimate provincial policy objectives. See R. Wisner, "Uniformity, Diversity and Provincial Extraterritoriality: *Hunt v. T&N plc*," *McGill Law Journal* 40 (1995): 759.

26 For a view that suggests that these cases, taken together, indicate a much more modest scope for securing the Canadian economic union than I suggest below, see Swinton, "Courting Our Way to Economic Integration."

27 *R v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401.

28 Ibid., at 432.

29 Ibid., at 433.

30 *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.

31 See *Interprovincial Co-Operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477.

32 *General Motors of Canada v. City National Leasing*, [1989] 1 S.C.R. 641.

33 *Hunt v. T&N plc*, at 42.

34 See Swinton, "Courting Our Way to Economic Integration," p. 300.

35 See *Bank of Montreal v. Hall*, [1990] 2 S.C.R. 121. In this case, the Court suggested that the provincial law would be pre-empted not only where the citizen is incapable of obeying both laws, as had been suggested by earlier jurisprudence, but also where there is a significant policy inconsistency, so that the provincial law undermines the policy that underlies the federal law. See also the notion of operational conflict between federal and provincial laws that informs the majority judgment in *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453.

36 D. Cohen, "The Internal Trade Agreement: Furthering the Canadian Economic Disunion?" *Canadian Business Law Journal* 25 (1995): 279.

37 In recent GATT panel jurisprudence, however, the provision in question has been interpreted as imposing a rather stringent obligation on the federal government.

38 *A.-G. Can. v. A.-G. Ont.*, [1937] A.C. 326, 1 D.L.R. 673 (P.C.) [hereafter referred to as *Labour Conventions*].

39 R. Howse, "The *Labour Conventions* Doctrine in an Era of Global Interdependence: Rethinking the Constitutional Dimensions of Canada's External Economic Relations," *Canadian Business Law Journal* 16 (1990): 160; and idem, "NAFTA and the Constitution: Does *Labour Conventions* Really Matter Any More," *Constitutional Forum* 3 (1994): 54.

40 As was noted earlier, in sustaining federal legislation that impinged on exclusive provincial jurisdiction over intraprovincial waters, the majority Supreme Court judgment emphasized the fact that the federal legislation corresponded to the subject matter of a single international convention on marine waters.

41 Here, I have benefited from remarks by my colleague Michael Trebilcock.

42 The following draws on a study on reforming the Canadian food inspection system undertaken for the federal government task force on alternative delivery mechanisms.

43 Letter of Acting US Trade Representative Katz to the Canadian Minister of International Trade, August 24, 1992, as quoted in *In the Matter of Puerto Rico Regulations on the Import, Distribution, and Sale of U.H.T. Milk from Quebec*, Final Report of the Panel, June 3, 1993.

44 See R. Howse and G. Heckman, "The Regulation of Trade in Electricity: A Canadian Perspective," in R.J. Daniels, ed., *Ontario Hydro at the Millennium* (Montreal; Kingston: McGill-Queen's University Press, 1996), pp. 105–155.