REFORMING THE ECONOMIC UNION: THE AGREEMENT ON INTERNAL TRADE AND INTERGOVERNMENTAL RELATIONS IN CANADA

by

ERIN LYNN CRANDALL

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ABSTRACT

Significant interest in reforming Canada's economic union emerged in the late 1970s when businesses began pointing to barriers to interprovincial trade as negative impediments to efficiency and growth potential. The process between agreeing that reforms were necessary and their actual implementation, however, proved challenging for the federal and provincial governments and significant progress was not made until the Agreement on Internal Trade in 1995. During this time, reform attempts changed considerably both in terms of method (constitutional vs. intergovernmental agreement) and leadership (federal government vs. provinces). By reviewing past and ongoing attempts to reform the economic union, this thesis analyzes the state of intergovernmental relations and Canadian federalism more generally. This analysis will demonstrate that intergovernmental relations have become increasingly decentralized – appearing to transition to a more confederal model of collective government action. Provincial leadership, since the creation of the Council of the Federation in 2003, indicates a defacto principle of subsidiarity has developed.
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DEDICATION

for my Nanny and Puppy
INTRODUCTION

“The governmental and economic dimensions of Canadian nationhood and of the Canadian federal system are inextricably intertwined.”¹ This observation by D.V. Smiley rightly notes the indivisibility of economy and nationhood; a truism especially apparent in federations. The importance of the economic union - defined as a state of economic integration involving the removal of restrictions to goods, services, capital and labour, as well as a varying degree of harmonization of economic policies amongst union members - for Canada has been a reality faced since the country's inception. For the Fathers of Confederation, political and cultural autonomy, as well as national security were hinged on an integrated national economy and common market.² This same understanding was affirmed some 110 years later by the Royal Commission on the Economic Union and Development Prospects for Canada, which noted, “The objective of building a Canadian economic union has meaning because we are first a national political community. Threats to the economic union are threats to the national community because they erode the ties of affinity and interest that bind Canadians together.”³

The objective to attain and maintain a successful economic union, however, has not come without considerable challenge. The difficulty for any federal government lies in the fact, as noted by KC Wheare, that “the legal and political pluralism of the

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federations is imposed upon the alleged unity of economic affairs." While this is the part of the conversation where British constitutional expert A.V. Dicey would likely jump in to add excessive legalism, conservatism, and wasted political energy to the list of alleged weaknesses of federalism, the division of economic powers between levels of government nonetheless cannot be considered simply in terms of the bottom line of an annual financial report, but in how it facilitates the goals and priorities of both the national and regional governments. If the only interest of political leaders in 1867 had been economic prosperity, it is unlikely that federalism would have been chosen at all. However, while never the only concern, the economy is nonetheless one of, if not the most important priority of any government. The tension in balancing cultural and regional diversity with the economic union, then, is one of the great challenges of federal government.

This tension has meant that internal trade barriers, if not an inherent feature of federalism, are certainly the norm. Historically, member states of a federation prior to joining together are likely to have imposed trade barriers on one another. And as observed in 1940 by the Royal Commission on Dominion-Provincial Relations (Rowell-Sirois Report):

These states or provinces after federation are apt to reach a stage of development at which there is bound to be political pressure in favour of some form of local protectionism. The desire to maintain and to augment the provincial revenue to develop new industries, to ensure employment during a period of depression, to protect wage levels and working conditions against "unfair competition" or

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“social dumping”, may all, at one time or another, contribute to this demand for local protectionism, which may appear even in municipal politics.  

The Commission - charged with examining the economic and financial development of Canada over its then seventy-year existence – left guidance on the economic union deliberately vague, concluding it was an issue best left to the legislatures. Despite its brief assessment of provincial protectionism, the Commission was notably optimistic that the problem could be resolved, observing, “There seems to be every reason why they [the provinces] should agree, for while it is easy to slip into measures which others will think unfair, and difficult to recede from a position which has once been assumed, it is easy to express readiness to abstain from unfair discriminatory use of legislative power provided that other provinces give the same undertaking.” Though demonstrating considerable good faith in political leaders, this sunny optimism may have distracted commissioners from the considerable challenge of collective action when dealing with public goods. Indeed, while the federal and provincial governments have taken up this early call to remove discriminatory trade barriers, the task is still ongoing. It is these attempts to reform the Canadian economic union and their illustration of the state of Canadian intergovernmental relations which will be the focus of this thesis.

For clarity, the concern of this thesis is not a technical one over whether alleged trade barriers in Canada do or do not exist, nor the more normative issue of whether internal trade barriers should be eliminated. Rather, this thesis proposes to analyze how

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7 Ibid., p. 67.

8 For an accessible introduction to rational choice theory see Kenneth A. Shepsle and Mark S. Boncheck,’s Analyzing Politics: Personality, Behavior, and Institutions (New York: W. W. Norton & Company, Inc., 1997).
the federal and provincial governments have addressed the issue of the economic union and what this particular example may tell us about the developing state of intergovernmental relations in Canada. While this task will involve reviewing the historical development of the economic union, its primary focus will concern more recent developments, particularly the Agreement on Internal Trade (AIT) and its ongoing evolution.

The AIT, like many intergovernmental agreements born in the aftermath of the Meech Lake and Charlottetown accords, was an executive-driven response to constitutional failure. Considering previous failed attempts to reach an agreement on the economic union and continued non-consensus on the issue, the achievement of the AIT, reached on July 18, 1994, was considered a significant step in the right direction. Though over 200 pages in length the AIT was nonetheless an unfinished document, still requiring extensive additions and amendments to fill the gaps negotiators were either unable or unwilling to resolve. Until recently, such substantial reforms seemed unlikely; however, the formation of the Council of the Federation (COF) in 2003 - composed of Canada’s thirteen provincial and territorial premiers - meant a significant step forward in the AIT’s struggle against political inertia. As part of its initial agenda, COF set out two tasks: improving health care; and “strengthening the economic union, including enhancing internal trade, improving labour mobility, and harmonizing and streamlining regulation”9 or in other words, fixing the AIT.

When compared to Canada’s first attempts to reform the economic union led by the federal government through constitutional negotiation, this change in approach is especially striking. Intergovernmental relations addressing the economic union have become increasingly decentralized – appearing to transition to a more confederal model of collective government action. The leadership taken by the provinces indicates that intergovernmental relations have developed to follow a *de facto principle of subsidiarity* on the issue. The consequences of this development both in terms of the federal government’s role in the economy and the development of intergovernmental relations in general, appear considerable.

Chapter One will provide a review of the attempts to reform the economic union undertaken from approximately 1980 to the failed Charlottetown Accord in 1992. This review will illustrate how governments’ approaches to the economic union have changed over time both in terms of methods (constitutional vs. intergovernmental agreement) and leadership (federal government vs. provinces). The second chapter will be focused exclusively on the AIT. A review of the negotiations leading to the Agreement and an explanation of the AIT itself will be the main focus of this chapter. Its final section will examine some of the difficulties that have emerged since the AIT has been implemented including, government commitment, slow progress in negotiation of unfinished sectoral chapters, and ineffective dispute resolution procedures. These longstanding deficiencies of the AIT appear the impetus for the renewed focus on internal trade taken by the Council of the Federation. The final chapter of this thesis, then, will focus on the Council of the Federation and its progress towards its stated goal of strengthening the economic union. This up-to-date review of the state of the economic union and governments’
approaches to its reform will then serve as a means to analyze the state of
tergovernmental relations concerning the issue of internal trade and Canadian
federalism more generally.
CHAPTER ONE
THE DEVELOPMENT OF THE ECONOMIC UNION IN CANADA

1.1 INTRODUCTION

Significant interest in reforming the economic union did not emerge until the late 1970s when businesses began pointing to barriers to interprovincial trade as negative impediments to efficiency and growth potential.\textsuperscript{10} Until this point, Canadian businesses had accepted and in some cases encouraged protectionist practices which benefited local trade but weakened any movement towards an integrated national economy.\textsuperscript{11} During this same period of time a series of reports and studies on constitutional change were produced recommending provincial barriers to economic mobility be addressed. In 1978, the Constitutional Committee of the Canadian Bar Association proposed a provision be added to the Constitution so that “goods, services and capital in any province shall be admitted to each of the other provinces free of duties, quantitative restrictions or measures of equivalent effect except as may be necessary for health and safety.”\textsuperscript{12} In 1979, the Task Force on Canadian Unity (the Pepin-Robarts Task Force) recommended that Section 121 of the \textit{BNA Act} be clarified to guarantee free trade between provinces for all goods and services and that interprovincial barriers to capital be prohibited.\textsuperscript{13} As Robert Knox describes, by 1980 “the Canadian economy was less isolated, more diverse,

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\textsuperscript{11} \textit{Ibid.}, p. 140.
\end{quote}

\begin{quote}
\textsuperscript{12} Quoted in Jean Chrétien’s, \textit{Securing the Canadian Economic Union in the Constitution} (Ottawa: Minister of Supply and Services Canada, 1980): p. 49.
\end{quote}

\begin{quote}
\end{quote}
and was beginning to anticipate the pressures of a more open and competitive global economy.\textsuperscript{14} The increasing trend towards a globalized market marked a transition point in economic practice in which the advantages of traditional provincial protectionist policies became increasingly questioned and in turn jumpstarted the movement to reform Canada's economic union. Consensus on the form and extent of such reforms amongst the federal and provincial governments, however, proved difficult to attain, stretching negotiations over approximately fifteen years before a final agreement was reached.

The perceived necessity to strengthen the economic union stemmed in large part from the belief that existing constitutional provisions governing interprovincial trade were not effective and fostered unnecessary and detrimental restrictions to economic mobility.\textsuperscript{15} While protection from tariffs on goods moving between provinces is clearly affirmed in Section 121 of the \textit{CA, 1867}, stating - "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces" - protection against non-tariff barriers,\textsuperscript{16} as well as mobility of services, capital, and labour are not specifically secured. Further, the federal government's power over trade and commerce (section 91(2)), like a number of its constitutional powers, was interpreted narrowly by the Judicial Committee of the Privy Council, Canada's final court of appeal until 1949. Instead, the court preferred an

\textsuperscript{14} Robert H. Knox, "Economic Integration in Canada through the Agreement on Internal Trade," p. 140.

\textsuperscript{15} This position is clearly articulated by then Minister of Justice Jean Chrétien who notes in the federal government's 1980 discussion paper \textit{Securing the Canadian Economic Union in the Constitution}, "Given the deficiencies and uncertainties of our constitutional framework, it should come as a surprise to no one that there exist today numerous restrictions to economic mobility within Canada, originating in both the federal and provincial domains" (p. 22).

\textsuperscript{16} Examples of non-tariff barriers can include procurement, state subsidies, antidumping measures, countervailing duties, and import bans.
expansive approach to section 92(13), strengthening the provinces' jurisdiction over property and civil rights. Compounded onto the weak economic powers of the federal government as compared to other federations such as the United States and Australia, was the developing perception of the time that international treaties and agreements such as the General Agreement on Tariffs and Trade (GATT), and later the Canada-United States Free Trade Agreement (FTA) and the North America Free Trade Agreement (NAFTA), imposed more discipline upon sovereign states than the Canadian Constitution did on the provinces. Together, Canada’s constitutional order and increasing globalized trade left the state of the internal economy outmoded and according to an increasing number of critics, in need of repair.

1.2 THE JOURNEY TOWARD A REFORMED ECONOMIC UNION: 1976-1992

With the election of Pierre Elliot Trudeau in 1968, an era of mega-constitutional politics was also ushered in. Trudeau, considered a top intellectual leader of Quebec’s Quiet Revolution in the 1960s, entered federal politics in large part to combat the rising tide of Quebec nationalism. The solution to this crisis of national unity was, according to Trudeau, a constitutional bill of rights which would entrench the rights of all Canadians

17 The restricted effect of Canadian jurisprudence over the federal government’s regulation of the economic union is especially visible when compared to the evolution of the United States federal government’s power over commerce. Unlike its Canadian counterpart, the United States Constitution is nearly mute on the concept of economic union. Through an expansive interpretation of the Congress’s commerce clause (contained in the third paragraph of section 8 of article 1 of the Constitution), however, the courts have ascribed to the federal government predominant powers in most sectors of the economy. See Ivan Bernier et al., “The Concept of Economic Union in International Law,” Perspective on the Canadian Economic Union, Mark Krasnick, Research Coordinator (Toronto: University of Toronto Press, 1986): pp. 35-131.

18 Peter Russell, Constitutional Odyssey: Can Canadians Become a Sovereign People, 3rd ed. (Toronto: University of Toronto Press, 2004): p. 75, distinguishes two features unique to mega-constitutional politics as opposed to ordinary constitutional reform. First, proposed reforms address the very nature of the political community on which the constitution is based. Following from this, because it strikes at the values and very identity of citizens, mega-constitutional politics tend to dwarf all other political concerns and is notably emotional and intense.
as democratic citizens in a bilingual country. It was his belief that the recognized
equality of persons regardless of province or language was the needed change to squelch
the rise of Quebec nationalism. Though the importance of Trudeau’s constitutional
objective never waned, the task of patriating the Constitution proved to be a dauntingly
difficult and emotional endeavour that in retrospect ignited as many clashes in national
unity as it attempted to resolve. The economic union did become a topic of reform
towards the end of Trudeau’s constitutional odyssey, but, as it would in later attempts of
mega-constitutional reform, was heavily disputed and played second fiddle to issues
considered of greater importance.

Trudeau’s first attempt at constitutional reform, the Victoria Charter, resulted in
failure in 1971 with no immediate plans to restart negotiations. The election of the Parti
Québécois for the first time in November 1976, however, brought to the public eye the
strength of Quebec nationalism and became the needed impetus for Trudeau’s second
round of reform. The addition of the economic union to the constitutional agenda actually
entered late in negotiations - after the February 1980 election victory of the federal
Liberals and the federalist victory in the Quebec referendum of May 1980. As noted by
Peter Russell, the mood of the Trudeau government after its electoral and referendum
successes was far less accommodating to the devolutionary demands of the provinces19
and its proposals to reform Canada’s economic union, contained in the 1980 discussion

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19 Provincial demands for other economic policy issues during constitutional negotiations included
clarification of provincial ownership of natural resources; jurisdiction over fisheries; regulation of
telecommunication; ownership and management of offshore mineral resources; indirect taxation; and the
federal declaratory and spending powers. See Douglas Brown, Market Rules: Economic: Union Reform and
paper, *Securing the Canadian Economic Union in the Constitution*, reflect this more aggressive disposition.\textsuperscript{20}

Produced by then-Minister of Justice Jean Chrétien, the discussion paper proceeds from the assumption that existing constitutional measures were inadequate for Canada’s economic development and that the federal government was the most appropriate actor to fill this power vacuum. Because the House of Commons represents the national interests of Canada, Chrétien held, the ability of the federal government to disregard common market principles is restrained, whereas no such restraint exists for the provinces that at best react based on “enlightened self-interest.”\textsuperscript{21} Three recommendations were thus presented: (1) entrenching in the Constitution mobility rights of citizens; (2) revising and expanding section 121, placing limitations upon the ability of governments to use their legislative and executive powers to impede economic mobility; and (3) broadening federal power concerning all measures necessary for economic integration to ensure that laws and regulations apply uniformly throughout Canada.\textsuperscript{22} Though all provinces agreed with the principle of the economic union, the form of its regulation was highly contested. With the exception of Ontario, all provinces objected to the federal government’s suggested reforms to internal trade, which would have increased the powers of both the federal government and judiciary. Manitoba Minister of Finance Donald Craik, in fact, suggested Ottawa’s proposed solutions were potentially a great deal worse than the

\textsuperscript{20} Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People*, p. 110.

\textsuperscript{21} Jean Chrétien, *Securing the Canadian Economic Union in the Constitution*, p. 25.

\textsuperscript{22} Ibid., p. 29.
problem itself.\textsuperscript{23} Though mobility rights were successfully entrenched in the \emph{Charter of Rights and Freedoms} (section 6), the federal government's two other proposed reforms for the economic union, which were also those with the greatest centralizing potential, were eventually abandoned when political consensus proved unattainable.

Approximately seven months after the \emph{Canada Act} was signed into force, officially patriating the \emph{CA, 1867 \& 1982}, Prime Minister Trudeau launched the Royal Commission on the Economic Union and Development Prospects for Canada - known as the MacDonald Commission – which was heralded as the largest Royal Commission in the country’s history. Although the idea of a royal commission on Canada’s economy had been discussed by the Prime Minister’s Office and Privy Council Office for many years, the impetus for the Commission at the time it was launched can be found in the incomplete constitutional legacy of the prior few years. As Donald MacDonald the chair of the Commission recalls, "There was a strong feeling at that time that insufficient progress had been made on the question of inter-provincial barriers to trade, and on the struggle within the economic union generally...a lot of work had been done, they [government] felt some progress had been made, but it didn’t gel into anything, so that they wanted to continue on that."\textsuperscript{24} While the MacDonald Commission is most well known for giving momentum to the free trade agenda, its recommendations on the

\textsuperscript{23} Canadian Intergovernmental Secretariat, \emph{Federal-Provincial Conference of First Ministers on the Constitution} (Verbatim Transcript) vol. II (Ottawa: 8-13 September, 1980): p. 866.

\textsuperscript{24} Quoted in Gregory J. Inwood, \emph{Continetalizing Canada: The Politics and Legacy of the MacDonald Royal Commission} (Toronto: University of Toronto Press, 2005): p. 54.
economic union “formed an early blueprint for domestic intergovernmental agreement in Canada.”25

The Commission’s recommendations on the economic union were as follows:

- An addition to section 121 to cover services as well as goods.
- An intergovernmental Code of Economic Conduct to identify acceptable and unacceptable policies and practices in the economic union.
- The creation of a federal-provincial Council of Ministers for Economic Development, established under the umbrella of the First Ministers’ Conference to develop and implement the Code.
- The creation of a Commission on the Economic Union, consisting of experts appointed by the Council, charged with research, receiving complaints from private actors affected by government action affecting the economic union, investigating and reporting on such alleged action, and making recommendations to the public and the ministerial council.

Departing from the 1980 recommendations of the federal government, the Commission avoided wherever possible expanding the role of the judiciary, emphasizing instead the use of intergovernmental cooperation. The Commissioners noted, “[b]alancing the economic union against other goals is an essentially political process that should take place in a political forum. Because the policies at issue are those of both orders of government, the appropriate vehicle is an intergovernmental body [the Council of Economic Development].”26

In the three years between the creation of the Commission and its final report, Trudeau resigned from federal politics, new Liberal leader John Turner was defeated at the polls, and Brian Mulroney’s Conservatives formed the new government and brought with them a marked change in attitude to intergovernmental relations, committing to

25 Douglas M. Brown, Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada, p. 120.

work in cooperation with the provinces and lessen central government intervention in the economy.

Though discussions leading to the Meech Lake Accord began in May 1985, unlike Trudeau, Mulroney’s first attempt to reform the economic union was not via the Constitution. Rather, intergovernmental agreements became the interim method of choice, with consensus on reform goals emerging from the First Ministers’ Conferences on the Economy held in February and November 1985.\(^27\) By the August 1986 Premiers’ Conference, agreement had been reached: to have a moratorium on new barriers subject to considerations of provincial economic development; establish a permanent mechanism to reduce existing trade barriers; establish an inventory of barriers; and establish a set of Guiding Principles for reducing barriers.\(^28\) These commitments, however, were notably less than what had been recommended by the MacDonald Commission and reflected the provinces’ nervousness as to “how far the process should or could go.”\(^29\) Though during this time period several meetings were held by the premiers and ministers of internal trade, by 1991 substantive progress had not been made and commitments poorly kept.\(^30\) Douglas Brown attributes the failure of this attempt at intergovernmental reform to the low priority internal trade was assigned by government leaders during a time when the


\(^{30}\) Robert H. Knox, “Economic Integration in Canada through the Agreement on Internal Trade,” p. 142.
Constitution and international trade reform nearly overwhelmed the political agenda.\footnote{Douglas M. Brown, Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada, p. 122.} The failure to substantially reform the economic union, then, hardly brought with it a major rebuke from the electorate.

With the return to power in December 1985 of Robert Bourassa and the Liberal Party in Quebec, an opportunity to bring Quebec into the constitutional fold emerged and was officially made a top priority by all premiers at their annual conference in August 1986. By April 1987, an agreement in principle was reached by all First Ministers on a package of amendments that would be known as the Meech Lake Accord. In comparison to the reforms of the CA, 1982 and the Charlottetown Accord which would follow it, Meech Lake was relatively limited in scope, though certainly not in effect, and beyond entrenching a yearly first ministers conference on the economy, did not directly address issues of the economic union. Rather, the Accord was designed primarily to meet the demands of Quebec, which included the following: recognition of the province as a “distinct society;” increased provincial powers with respect to immigration; regulation of the federal spending power in areas of exclusive provincial jurisdiction; expansion of the provincial right to constitutional veto; and provincial input in appointing Supreme Court judges.

As the three-year time limit for the ratification of Meech Lake wound down and ultimately expired without the endorsement of Manitoba and Newfoundland, the entire undertaking undoubtedly did significant damage to the state of national unity, further alienating Quebec from the rest of Canada. A poll conducted in April 1990 reported that 59 percent of Canadians opposed Meech Lake, and while the Accord was more popular in
Quebec where it received 49 percent support, Quebec independence became even more popular. Sovereignty-association was by this time favoured by two-thirds of Quebecers.32

The Meech Lake Accord has been termed the Quebec Round of constitutional politics for its wide concessions to the province and almost singular focus. The state of national unity after the defeat of Meech Lake made another round of mega-constitutional politics inevitable, however unappealing the prospect to the public and politicians alike. By the nature of its defeat, however, the next round could be in neither substance nor method another Meech Lake.33 The highly criticized executive-driven nature of the Accord (which had been drafted behind closed doors and required approval of the elected assemblies of the provinces and federal government, rather than the general public) had to change. Both the scope of reforms and the approach to drafting the Charlottetown Accord, the product of this so-called Canada Round, were expanded to engage all Canadians and included nearly two years of public consultations and a national referendum for its ratification.

Despite the breadth of public engagement that accompanied the Charlottetown Accord, the economic union was not a prominent public issue and the final agreement reached on July 12, 1992 presented no substantial reforms, but rather a broadly phrased commitment to the social and economic union. Despite a less than impressive end product, reform of the economic union was a major priority of the federal government and the business community throughout the negotiations. Additionally, the economic


union became part of the larger debate on national unity with both federalists and Quebec nationalists articulating its importance. For sovereigntists, a strong economic relationship with the rest of Canada was seen as a necessity for a successful secession, while federalists saw a strong economic union as a key benefit of the federation and therefore an essential element for the nation’s viability. Though the Charlottetown Accord was ultimately rejected on October 26, 1992, by 54.3 percent of Canadians, the Canada Round, like the negotiations of the CA, 1982, demonstrates the difficulty of achieving substantial reform on an issue via constitutional change when general consensus does not already exist.

The federal government’s position on the economic union in this new round of constitutional politics was presented in the September 1991 public document, *Shaping Canada’s Future Together: Proposals*. Despite the otherwise decentralizing bent of the Charlottetown Accord, the federal government’s suggested reforms to the economic union bestowed power primarily onto itself. The suggested reforms included the following:

- The expansion of section 121 to include persons, capital, services and goods, while allowing for exceptions for reasons of national interest, regional development or equalization.
- The creation of section 91A, which would give the federal government constitutional authority to oversee the economic union. Federal legislation under this provision, however, could not be enacted without the approval of at least seven of the provinces representing 50 percent of the population. A province which did not support the legislation would be given the opportunity to opt-out of the federal law for up to three years by

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35 With a national turnout of 71.8, Newfoundland, New Brunswick, Prince Edward Island, the Northwest Territories, and (by the slimmest of margins - 50.1 percent) Ontario, were the only provinces and territory to approve the accord.
passing a resolution with the support of 60 percent of the members of the provincial legislature.

- The development of procedures with the provinces for more open and visible federal and provincial budget-making processes and improved coordination of fiscal policies.
- The creation of a Council of the Federation which would act as an intergovernmental forum of federal, provincial, and territorial governments. All proposed reforms carrying the stipulation of approval of seven of the provinces representing 50 percent of the population (proposed federal legislation under section 91A, guidelines for fiscal harmonization and coordination; the use of the federal spending power in areas of exclusive provincial jurisdiction) would fall under the mandate of the council.\(^{36}\)

Though, compared to what had been presented in 1980, the federal government’s proposal, with its emphasis on intergovernmental cooperation (an emphasis also prominent in the MacDonald Commission’s recommendations), was less centralizing, the provinces’ reactions to the proposed amendments were similar to those received by Chretien’s *Securing the Canadian Economic Union in the Constitution*. Despite the inclusion of the Council of the Federation and the 7/50 standard, most provinces balked at the perceived power grab by the federal government. Aside from the displeasure aroused by the proposal’s general centralizing bent, the suggested Council of the Federation also proved unpopular, being seen as the entrenchment of executive federalism and not fitting with the democratic mood that in part defined the Charlottetown Accord. As Peter Russell notes, “a Brussels on the Ottawa” was simply not in tune with other reforms.\(^{37}\)

The proposed expansion of section 121 as well drew the concerns of critics apprehensive about the expanded role the judiciary would play in the economy. In the time between


the entrenchment of the *Charter of Rights and Freedoms* in 1982 and the negotiations of the Charlottetown Accord, the courts’ growing influence and power over social policy had created a strand of “Charter phobia,” making any potential expansion of the courts’ role in government especially suspect and discouraged.38 There was little, then, in the federal proposal that provinces could concede and so with relative ease suggested reforms were discarded and diluted, leaving by the end only the semblance of change and vague commitments for the future.

Despite a “barren” end product, the economic union was one of the key priorities of the federal government and the expansion of section 121 in particular was defended to the very end. Ottawa’s ultimate retreat on its own constitutional priority, Peter Russell points out, was indicative of the provinces’ domination over the entire multilateral process.39 In the rolling drafts leading up to the final agreement, the provinces succeeded in adding “thirteen qualifications protecting virtually every conceivable form of [provincial] government intervention in the economy” and in essence “…accepted the federal government’s priority proposal by making a mockery of it.”40 Though in the last push to reach a constitutional agreement, Mulroney did make some headway, Quebec Premier Robert Bourassa refused to have “an economy managed by judges” and the

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38 Peter Russell and Douglas Brown both note a greater disinclination by the provinces to increase the courts’ power over internal trade post-Charter. *Constitutional Odyssey: Can Canadians Become a Sovereign People*, p. 174, and *Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada*. Katherine Swinton offers a slightly more nuanced explanation, holding there was discomfort at the prospect that acceptable limitations (such as regional development) to the proposed constitutional guarantee of mobility for labour, goods, capital, and services would be determined by the courts. “Courting Our Way to Economic Integration: Judicial Review and the Canadian Economic Union.” *Canadian Business Law Journal* 25.2 (1995): p. 290.


provision was dropped.\textsuperscript{41} With fragile consensus already achieved on Senate reform, aboriginal rights and the transfer of powers to the provinces, continuing divisiveness on the issue of the economic union meant it was once again sidelined. As one federal official noted, “With everything in place, it was not worth risking the whole accord in a continued fight on economic management. It was never likely we would end up regulating the economy in this constitution.”\textsuperscript{42} Thus, on August 28, 1992 when the Charlottetown Accord was signed by all first ministers, only a broadly worded commitment “to the principle of the preservation and development of the Canadian social and economic union” was included, while the effort to reduce interprovincial barriers was made one of fifteen matters to be dealt with through political accords. When on October 26, 1992 the Charlottetown Accord was rejected, efforts to reform the economic union through constitutional means were, after a painful and crippling journey, officially dead.

Two consecutive and unsuccessful rounds of mega-constitutional politics left both citizens and politicians alike politically exhausted and uninterested in another attempt at constitutional change. With the election of Jean Chrétien’s Liberals in 1993 the constitutional door was at least temporarily closed and to date has shown no serious signs of reopening. The journey for Canada’s economic union, however, was not yet conceded as complete and as will be discussed in the following chapter, the political accord on the economic union of the failed Charlottetown Accord would be quickly picked up as the framework for a new round of intergovernmental negotiations.

\subsection*{1.3 Analysis of Outcomes}

\textsuperscript{41} Graham Fraser, “Compromises were crucial in making deal Leaders ran the gamut of emotions in reaching pact,” \textit{The Globe and Mail}, 24 August 1992, A1.

The push to reform the economic union ran temporally parallel to the constitutional journey of the 1980s and early '90s, making its inclusion as part of the constitutional agenda almost inevitable. The economic union was not, however, the impetus for constitutional reform, nor was it ever a key priority for all political actors involved. Given the divergent positions of the provinces and the federal government on the topic during both the negotiations of the CA 1982 and the Charlottetown Accord, constitutional reform of the economic union alone would not have been launched. Most likely, internal trade became part of constitutional negotiations simply because the negotiations were already there. When going to the grocery store to get a jug of milk it only makes sense to buy the Cheerios when you know a new box will be needed soon anyway.

Although in some respects pragmatic, the temptation to address all problems to all people when undertaking constitutional reform lacks what Jennifer Smith terms “constitutional sensibility.”[^43] Not everything is meant to be put in a constitution and to think otherwise likely underestimates the fundamental principles of justice which underlie it. This is not to say that the economic union is one of these things that should not be addressed constitutionally, but the problems encountered by the federal government to reform the economic union do highlight the difficulty of constitutional change. As Keith Banting and Richard Simeon explain, “Lack of consensus makes constitutional change necessary. The same lack makes resolution supremely difficult.”[^44]


Irrespective of the success or failure of the overall constitutional package, both constitutional attempts to reform the economic union were effectively abandoned when meaningful consensus could not be reached. It was an issue of acknowledged importance, but one which greatly divided governments. The proper role of the federal government, courts, and the traditional protectionist policies of the provinces were all in dispute and not simple issues to resolve. The attempt at reform through non-constitutional intergovernmental agreement occurring between the two mega-constitutional rounds was equally doomed to failure. The effectiveness of a political agreement, which is both non-justiciable and non-enforceable, rests solely in the commitment and cooperation of its parties. Given that there was no consensus on what form an improved economic union should take, success at this time could not even be properly defined.

While there was no agreement between the provinces about reforms, there was near unanimity that regardless of form, changes should not place extensive power over the economy into federal hands. During constitutional negotiations it was Ottawa’s maintained position that jurisdiction over the economic union should logically be placed with the federal government. Considering that comparatively, the central governments of federations generally have greater control over the economy than does Canada, the position itself is not unfounded. Though the federal position did become diluted over the course of the Charlottetown Accord, some attribute this more to the leadership of Joe Clark, who as the federal minister in charge of constitutional negotiations adopted a conciliatory approach to the provinces, rather than a turnaround of the federal position.45 Regardless, the position itself was ultimately a non-starter with most provinces.

Coming out of the Charlottetown Accord, then, the prospects for a renewed economic union were not particularly bright. With constitutional politics decommissioned for the near to distant future and the longstanding divide between the federal government and the provinces on the issue of the economic union still present, its quick reform seemed an unlikely accomplishment. Continuing pressures from the business community and the compelling timeline created by the looming election victory of the Parti Québécois, however, propelled the provinces and federal government back into negotiations. Unlike previous attempts in which the economic union garnered minimal public attention and was considered an expendable item by governments, failure in this round would not come without significant political costs.
CHAPTER TWO
THE AGREEMENT ON INTERNAL TRADE

2.1 MAKING THE AIT

Interest in the economic union by 1992 had never been so great. Canada/U.S. and then North American free trade had been implemented, the World Trade Organization was soon to emerge from the Uruguay Round, and major Canadian business associations had made the reduction of internal barriers a policy priority. And unlike in 1980 when the economic union agenda was unexpectedly thrust into the constitutional playing field by the federal government, “the years of work on domestic trade issues, particularly the recent constitutional discussions, had clarified the essentials of the problem and developed a cadre of informed and knowledgeable ministers and officials with clear negotiating positions.” Occurring against the backdrop of two important political-economic events - the 1986-93 negotiations on internationalized free trade - and the perceived national unity crisis resulting from the failed constitutional reforms of approximately the same time period - the negotiations of the AIT were the first time that the economic union was a priority for all governments.

The achievement of the FTA in 1987, followed by the NAFTA and the WTO five years later, created new pressure to remove longstanding barriers to internal trade. The

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47 Ibid.

48 According to Gilbert Winham, the FTA and NAFTA offered a rationale for initiating and continuing domestic economic reform, which “would have been much more difficult to effect politically without the crutch of a bargained relationship with a larger trading partner.”
concept of free trade, however, was still a matter of great controversy for both private and political actors and this first underlying concern of the AIT negotiations created a divide between governments - those who perceived a domestic economic union as a necessary and natural extension of recent free trade agreements (the federal government, Alberta, and Manitoba) - and those concerned by the effects brought by liberalized trade (British Columbia and Saskatchewan). Meanwhile, the negotiation’s second underlying concern, a perceived crisis in national unity, created a substantial incentive for all parties to come to a quick and acceptable agreement. While significant division existed in terms of what the agreement should be, as had been the case in all previous attempts at reform, in this instance the economic union was of first priority and held as a symbolic example of the workability of federalism in Canada. Additionally, the cooperative approach to the addressing the economic union, first proposed in concept by the MacDonald Commission, continued with the AIT. For Douglas Brown, the relative absence of issues of constitutional jurisdiction brought by this cooperative approach was one of the significant contributors to the successful negotiation of the AIT.49

The division between those who saw the AIT as primarily a trade agreement, and consequently preferred a document with clearly defined and enforceable measures, versus those who preferred it to be a general agreement on governance and advocated for a brief text containing general principles based on mutual, cooperation - was, according to Bruce

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Doern and Mark MacDonald, the core battle of the negotiation process.\textsuperscript{50} While consensus was reached that the Agreement should be a comprehensive document (the preference of those most in favour of free trade), this ironically allowed more opportunity for deal making and special exceptions than a minimalist agreement would have likely produced. The Agreement is designed so that specific rules prevail when inconsistencies between the general and specific rules of the eleven sectoral chapters arise. Paramountcy is given to the document's exceptions, rather than its general intent (Chapter 4), advantaging those parties most worried about a strong trade agreement.\textsuperscript{51} However, even with this point in mind, for the advocates of the comprehensive approach, including government officials\textsuperscript{52} and expert commentators,\textsuperscript{53} despite its significant gaps, the final agreement still had the most potential to gain political legitimacy and government compliance. That said, even those most optimistic about the AIT's potential understood that significant work had to be undertaken after the Agreement's implementation.

More practically, all parties to the negotiations, especially those whose ideological positions on free trade were not steadfast, were informed by their own specific interests and conditions. For British Columbia, with an NDP government and the largest interprovincial-trade deficit of the provinces, this resulted in a particularly

\textsuperscript{50} Mark R. MacDonald and G. Bruce Doern, \textit{Free Trade Federalism: Negotiating the Canadian Agreement on Internal Trade} (Toronto: University of Toronto Press, 1999).

\textsuperscript{51} For example, Chapter 10 of the AIT covering alcoholic beverages allows Quebec to require that all wine sold in grocery stores be bottled in Quebec (Article 1011).


combative approach, while the Atlantic provinces - with minimal negotiating influence and a flexible approach to trade liberalization – took a typically pragmatic approach, looking for the greatest return for the least cost.\footnote{Brown divides players' negotiation positions into four categories: 1) Those committed to free trade (Alberta, Manitoba, the federal government); 2) Those skeptical of free trade but willing to continue negotiations primarily out of concern for national unity (British Columbia and Saskatchewan); 3) Ontario, which had interests in trade liberalization, but for ideological concerns of its NDP government, resisted giving the document institutional strength; and 4) Those who took a pragmatic approach seeking managed reciprocal arrangements and special deals, as much as trade liberalization (the Atlantic provinces, the Northwest Territories, the Yukon, and Quebec). \textit{Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada}, p. 154.}

While there was clear interest amongst many of the governments to reach a trade agreement, the accelerated timeline that negotiations followed was not set exclusively by trade concerns, but those of national unity. The possibility of a Parti Québécois victory (an election was expected in late-1994) was, according to Bruce Doern and Mark MacDonald, "the unstated bottom line for those provinces which otherwise might be tempted to walk away from the negotiations."\footnote{Mark R. MacDonald and G. Bruce Doern, \textit{Free Trade Federalism: Negotiating the Canadian Agreement on Internal Trade}, p. 82.} The assumed necessity for unanimity, combined with the Agreement's positioning as an example of Canadian federalism's workability, meant one party's refusal to join the AIT was accompanied by a considerable package of political disincentives.\footnote{According to Brown, the Agreement's position as an issue of national unity may have been what finally led British Columbia to sign on. Glen Clark, the minister in charge of negotiations (and later to become premier) apparently recommended against signing the AIT. \textit{Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada}, p. 160.} That said, the political incentives for creating a comprehensive and enforceable agreement for those governments skeptical of a strong AIT, were few. With prolonged or unsuccessful negotiations not an appealing option for any party and with the AIT's coverage and power of enforcement being a divided issue, the result was unsurprisingly a text with gaps in areas of the greatest
contention and significant exceptions. In short, while the AIT was heralded as a step forward for Canada's economic union when presented on July 18, 1994, perhaps in retrospect its greatest asset was that the Agreement could not be touted by Quebec separatists as another failure in an unworkable federation.57

2.2 THE FEDERAL GOVERNMENT AND THE AIT

Of particular interest to the conduct of intergovernmental relations is the role played by the federal government during negotiations. Unlike previous attempts to reform internal trade, during negotiations of the AIT the federal government did not seek to expand its jurisdiction over the economic union, nor bind the provinces more fully than itself. Combined with the appointment of Arthur Mauro, an experienced lawyer and businessperson as the neutral chair, the federal government was more an equal player than the dominant senior partner at the negotiating table. As Andrew Coyne expressed at the time, the role of the federal government "seems rather to have been somewhere between caterer and the Harvard Conflict Resolution Group."58

Though the federal government was a more equal player in the negotiations of the AIT than in previous reform attempts, the possibility that Ottawa would assert its constitutional authority over internal trade was still present. As the June 30, 1994 negotiation deadline to the AIT approached and provincial exemptions continued to be added, Minister of Industry John Manley showed an interest in enacting federal


58 Andrew Coyne, "Federalism works - We have it on the highest authority," The Globe and Mail, 25 June 1994, A10.
legislation to exercise its power over trade and commerce. Manley, who can be described as a “free trade hawk,” continued to be vexed by the progress of the AIT during his tenure as Minister of Industry (1993-2000) and co-chair of the Committee on Internal Trade (CIT). At a CIT meeting held in February 1998 he noted this frustration to the media. Minister of Trade Sergio Marchi, at the same meeting, took a far more aggressive approach in assessing the poor progress of AIT negotiations, exclaiming, “Some have suggested – including provincial officials during different points – that if this [stalemate in internal trade talks] continues to provide failure, that the Government of Canada consider unilateral action to try to obviously get conformity in the country. I would certainly urge our officials to consider that as a possible future settlement.”

Though frustrated, Manley dismissed the idea of threatening to assert the federal government’s power over internal trade: “Yes, we have constitutional authority with respect to interprovincial trade in goods and perhaps in services, but that isn’t the extent of the problems we’re trying to deal with under the internal trade agreement. It would disrupt the current process.”

The federal government’s change in strategy presumably reflects its shifted understanding of its own constitutional powers over internal trade. While during negotiations of the CA, 1982 the federal government maintained that expansion of its constitutional authority over the economic union was needed, by the negotiations of the


62 Ibid.
AIT it instead held that recent decisions by the courts indicated sections 91(2) and 121 could be used for greater federal control of the economic union than was currently asserted.\textsuperscript{63} When attempts to reform the economic union turned to non-constitutional alternatives, the federal government used this generally recognized power over economic regulation as a tool when provinces proved unwilling to cooperate. It did not, however, make any serious attempt to assert this power. The approach of the federal government during negotiation of the AIT and proceeding talks has consistently been to work with the provinces cooperatively, despite the fact that poor cooperation amongst the provinces has in the past impeded progress and limited effectiveness.

\textbf{2.3 WHAT IS THE AIT?}

The basic objective of the AIT, which came into effect July 1995, is the “reduction and elimination, to the extent possible, of barriers to the free movement of goods, services, persons, and investment in Canada”\textsuperscript{64} and to do so in “a conciliatory, cooperative and harmonious manner.” The structural framework into which these objectives are placed has been described as a hybrid between an international trade


\textsuperscript{64} The AIT distinguishes between technical and non-technical interprovincial trade barriers. Technical barriers are created by differing product and grade standards, plant and animal health regulations, transportation and other legislation affecting the movement of products between provinces. Non-technical barriers are created by government policies and programs such as price and income stabilization, supply management, credit and other financial assistance programs.
agreement and a Canadian style of intergovernmental agreement. It is as Douglas Brown notes, an “odd mix” - a comprehensive text composed of legally-styled regulations much like NAFTA, but one in which all dispute rulings are treated as non-justiciable political agreements, typical of Canada’s traditional approach to intergovernmental agreements.

Even beyond this, however, it is a political text reflective of the tensions between the harmonizing objectives of an economic union and the flexibility required to maintain wanted differences, a fundamental feature of federalism. So while the goal of the AIT is an open domestic market, it also allows governments to pursue “legitimate objectives” including - public security and safety, public order, protection of human, animal or plant life or health, protection of the environment, consumer protection of the health safety and well-being of workers, and affirmative action programs for disadvantaged groups (Article 200). Further, the Agreement does not apply to any measure related to regional economic development (Article 1801), Aboriginal peoples (1802), culture (Article 1803), and national security (Article 1804). The incompleteness of the original document, the cultural and regional exceptions it entrenches, and the slow process toward outlined reforms, are all a reflection of these competing interests. The priorities placed on AIT reform, the methods undertaken, by whom, and their eventual outcomes to reconcile these tensions, then, are informative in terms of understanding trends in intergovernmental relations in Canada. Before launching into the major AIT reform effort undertaken by the Council of the Federation (which will be the focus of the following chapter) and how this

65 The ‘legitimate objective’ provision allows measures inconsistent with the AIT if it can be demonstrated that (1) the purpose of the measure is to achieve a legitimate objective, (2) the measure does not operate to impair unduly the access of persons, goods, services or investments of a Party that meet that legitimate objective, (3) the measure is not more trade restrictive than necessary to achieve that legitimate objective, and (4) the measure does not create a disguised restriction on trade (Article 404) - has been compared in its potential application to the Oakes Test. See Sujit Choudry, “Strengthening the Economic Union: The Charter and the Agreement on Internal Trade,” Constitutional Forum 12.2 (2002): pp. 52-59.
initiative reflects changes in intergovernmental relations, it is first necessary to review briefly the Agreement's components - most importantly the measures which remain incomplete and those implemented but criticized for their results.

The AIT is made up of eighteen chapters divided into six parts. Part I (Chapters 1 & 2), sets out the broad operating principles and general definitions of the Agreement, while Part II (Chapter 3) simply confirms that the AIT's implementation does not alter the legislative authority of Parliament or provincial/territorial legislatures.

Part III (Chapter 4) sets out the six general rules guiding the Agreement: reciprocal non-discrimination, right of entry and exit of persons, goods, services or investments across provincial boundaries; forbiddance of adoption or maintenance of obstacles to internal trade; validity of measures constituting legitimate objectives; reconciliation of standards; and transparency. As noted earlier in this chapter, while general rules do set out the working principles of the Agreement, it is the specific rules which have paramountcy.

Part IV (Chapters 5-15), which both in size and content makes up the bulk of the AIT, contains a set of obligations governing conduct in eleven specific horizontal and vertical sectors. Most sectoral chapters contain their own dispute resolution mechanism to be used by both governments and private citizens before the formal dispute resolution process of Chapter 17 can be initiated. The steps identified in the specific sectoral chapters entail

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66 All descriptions of the AIT provided in this chapter address its composition prior to the creation of the Council of the Federation in 2003.

67 Sectors and practices covered in Part II (in order of chapter) are as follows: procurement, investment, labour mobility, consumer-related measures and standards, alcoholic beverages, natural resources processing, energy (yet to be adopted), communications, transportation, and environmental protection.
consultations and, in some cases, reference of an issue to a quasi-judicial panel and/or a body of ministers.

Part V (Chapters 16 & 17), sets out the institutional provisions and dispute resolution procedures. Chapter 16 establishes the Committee on Internal Trade (CIT), which is the primary decision making body of the AIT, and the Internal Trade Secretariat (located in Winnipeg, Manitoba) which provides administrative and operational support to the CIT and other committees.

The CIT is composed of the federal and provincial ministers responsible for internal trade and has the broad mandate to supervise the implementation of the AIT, assist in the resolution of disputes arising out of its interpretation and application, approve the annual operating budget of the Secretariat, and consider any matter that could potentially affect its operation (Article 1600). The CIT is prescribed to meet annually and, except as otherwise noted, decisions and recommendation are made according to consensus.

Chapter 17 sets out the dispute resolution procedures, which emphasize both in tone and process the importance of cooperation and dispute avoidance in the AIT. A party, in fact, cannot initiate a complaint under the Chapter 17 process until it has first complied with dispute avoidance and resolution mechanisms provided in the applicable sectoral chapter.

While there is opportunity for both governments and private parties to launch complaints concerning an alleged trade barrier, the process for private parties is by design

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68 Currently the Secretariat is made up of five employees.
more cumbersome. Taking for example alcoholic beverages (Chapter 10), before procedures set out in Chapter 17 can be accessed, a government must request consultations with the alleged offending party. If in sixty days no resolution is deemed to have been reached, recourse through Chapter 17 can be taken. For private parties, a written letter outlining the grounds of the complaint must first be issued to the competent authority. If the matter is not resolved within thirty days of the date of the written complaint, the private party may request their government engage in consultations with the authority in question. Finally, if sixty days after the date of request the dispute is not settled to the private party’s satisfaction, recourse through Chapter 17 can be taken. In the case of alcoholic beverages unsuccessful consultations add an additional sixty days to the complaint process for governments, while for private parties this number climbs to 120 days before Chapter 17 dispute resolution procedures are even engaged. Chapter 17 dispute resolution procedures include: consultation, assistance by the Committee on Internal Trade, and, finally, if an issue remains unresolved, the striking of an independent panel of experts to examine the issue and make legally non-binding recommendations for its resolution.

In government-to-government disputes which proceed to the panel stage, the respondent government is expected to make necessary changes to comply with a panel’s decision within 60 days of its release. If a government fails to change or remove a measure that a panel has ruled inconsistent with the Agreement within a year, the complaining party has the opportunity to take retaliatory action after consultation with the CIT.
Conversely, person-to-government disputes face increased barriers to reach the panel stage and weaker measures for the enforcement of a panel’s decision. First, an individual must request the level of government with the most “substantial connection” with the complainant to pursue his or her case. If a government refuses to act on behalf of a complainant, the individual may initiate the person-to-government procedures. The individual must then take the further step of submitting the complaint to an independent “screener.” Should the complaint not be found frivolous by the screener, the private party may then follow steps similar to the government-to-government process. In the case that an unacceptable trade barrier is found to exist by the panel and a government fails to bring in necessary measures to comply with its report within sixty days, the report is released publicly. Should public wrath prove ineffective, the CIT is mandated to annually review the progress of non-compliant governments to conform to panels’ recommendations.

Finally Part VI (Chapter 18) outlines the general exceptions, mentioned earlier in this summary, and also mandates the undertaking of future negotiations to extend the Agreement and to review annually its coverage and scope.

2.4 WHAT HASN'T WORKED?

Before entering into what has not worked in the AIT, it should be fairly noted that progress in the reduction of interprovincial/territorial trade barriers has been made. The goal of the AIT is not just to oversee trade disputes, but rather promote the reduction and elimination of trade barriers through government cooperation. There is much evidence to

69 Retaliation of equivalent effect is not an available option for private citizens, though the panel may award costs to a successful private complainant.
indicate that in certain sectors this is exactly what has occurred. Trucking, for example, has made significant progress in harmonizing regulations and standards and most goals set out in the original Agreement have been met.\(^70\) Further, in interviewing a number of government and private sector AIT experts, Donald Lenihan and David Hume noted an opinion amongst interviewees that the AIT has had a significant impact on the culture of governments and businesses difficult to quantify. Because governments have adopted the principles of the Agreement, they hold, few new barriers are now created.\(^71\) Much like governments now attempt to “Charter-proof”\(^72\) incoming policy and legislation, the act of “AIT-proofing” initiatives has also come into practice.\(^73\) Significant barriers to internal trade are still, however, an ongoing challenge for Canadian businesses. A survey identifying barriers to trade conducted by the Canadian Chamber of Commerce in 2004 found that of the 106 responses by its members, 37 companies (34%) had experienced barriers to trade within Canada and for respondents operating in more than one province


\(^71\) Ibid., p. 16.


\(^73\) Though parallels can be drawn, “AIT-proofing” does not seem to be as institutionally formalized as that of “Charter-proofing.” A representative of the Government of British Columbia noted that upon bringing all provincial policy and legislation into compliance with the AIT in March 2002, it is now a more simple matter of making sure new barriers are not created. While receiving calls “fairly frequently” about proposed courses of action, and whether they would be in contravention of national or international trade obligations, a formal review process does not exist. (British Columbia, being one of the most compliant governments of AIT regulations, is likely representative of the extreme end of the “AIT-proofing” spectrum.) The procedural differences between AIT and Charter proofing likely highlight the consequences of their differing levels of enforceability. “Charter-proofing” has evolved as a means for governments to preemptively avoid legal challenges enforceable in court; whereas governments who are challenged under the AIT cannot be legally obligated to change policy found to create an unjustified trade barrier. Author’s email correspondence with official from the B.C. Ministry of Economic Development, 8 June 2006.
this number increased to 42%. Thus, while certain measures of the AIT have been successful, significant barriers to trade still remain; when combined with ongoing problems of government commitment, slow progress in continuing AIT negotiations, and a weak dispute resolution mechanism, the effectiveness and perceived credibility of the AIT has been limited.

The AIT at the time of its signing was an unfinished document still requiring substantial work including - the extension of open procurement provisions to the municipalities, municipal organizations, school boards and the publicly-funded academic, health and social service (MASH) sector, reduction of the list of entities excluded from the Procurement Chapter (principally Crown Corporations), completion of the Energy Chapter; review of the scope and coverage of the Agriculture Chapter, a revised Code of Conduct on investment incentives, and review by several specific working groups on harmonization of regulations. Between 1995–2001, four protocols of amendment were implemented, the most significant addition being the inclusion of “MASH” entities under the Procurement Chapter. Negotiations on both the Energy Chapter and inclusion of Crown Corporations over this time, however, stalled. The consensus requirement has allowed provinces to impede progress; in fact, the MASH Protocol was attained only by taking the exceptional measure of allowing British Columbia and the Yukon to “opt-out.”

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75 At the 1997 Premiers’ Meeting in which the addition of the MASH sectors to the AIT was discussed, B.C. Premier Glen Clark stated: “British Columbia ferries will always be built in British Columbia as long as I am Premier. I’m not going to allow subsidized shipyards in Quebec or New Brunswick to build B.C. ferries.” Jeffrey Simpson, “The Isolation of British Columbia’s Glen Clark,” *The Globe and Mail*, 12 August 1997, A16. And indeed Mr. Clark remained committed to this position. When Liberal Leader Gordon Campbell formed government in June 2001, however, B.C.’s agreement to adhere to the annex
As significant as the poor progress in filling the gaps of the original Agreement, were the evident weaknesses in the dispute resolution procedures both in terms of accessibility and effectiveness. While based on early impressions Douglas Brown noted that, “the dispute settlement mechanisms have been used frequently, with twenty disputes registered in the first nine months and a total of eighty-four in the first five years,”\textsuperscript{76} these statistics present a false reality. By 2001, 84 complaints were registered by the Internal Trade Secretariat; however, 57 of these complaints (68% of all complaints and 90% of all bid protests) were bid protests concerning federal procurement made to the Canadian International Trade Tribunal (CITT).\textsuperscript{77} Also handling procurement issues under NAFTA, the CITT is a quasi-judicial third party and unlike dispute panels formed under Chapter 17 of the AIT, has the authority to reverse procurement decisions and provide compensation. As Robert Knox rightly asks, why would anyone bother to use the AIT given the alternative?\textsuperscript{78} When disputes undertaken by the CITT are removed, in fact, only 43 disputes have been initiated under the AIT up to June 2006. Beyond this, the frequency of AIT complaints appears to be decreasing. While 27 complaints were initiated between 1996-2000, only 16 have been undertaken from 2000-present. Though it is nearly impossible to say whether this 41% drop in AIT usage is a result of governments and private parties avoiding the AIT dispute process or reflective of a decrease in actual


\textsuperscript{78} \textit{Ibid.}
trade barriers, given the AIT’s poor dispute resolution record for both governments and private parties alike (as will be seen below), a cynical assessment of the numbers does not seem unreasonable.\textsuperscript{79}

A closer analysis of the initiated disputes reveals further weaknesses in the process. Based on the summary of AIT disputes provided by the Internal Trade Secretariat, only 14 of these 43 disputes (33\%) can be considered resolved.\textsuperscript{80} Further, of the 10 disputes that have so far advanced to the panel process only 2 decisions have been fully implemented.\textsuperscript{81} Beyond this poor record, what appears even more striking is that of the 8 complaints that have gone through the panel process,\textsuperscript{82} 100\% of these decisions have been upheld in the complainants’ favour, indicating respondent governments in such cases are consistently dismissing the legitimate grievances of the complainants throughout the AIT process. Further, of the 3 complaints that have been taken forward by

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\textsuperscript{79} The number of complaints initiated by provinces and territories also appears disproportioned. Alberta has submitted 14 (33\%) complaints on behalf of itself and private parties, while Ontario and Quebec - that together constitute 61.75\% of Canada’s GDP (between 2001-05) - have only initiated a total of 4 complaints.


\textsuperscript{81} It appears that two private party complaints launched by the Manitoba (99/00-7 CGA MAN) and New Brunswick (02/03-7 CGA NB) Associations of Certified General Accountants are moving towards implementation. Ontario, Quebec, In June 2006 the Ontario Attorney General accepted new standards for licensed public accountants that in principle will allow professional accountants other than CAs the ability to access public accounting licenses. Because implemented standards cannot be assessed until an out of province CGA applies for an Ontario license, the AIT panel’s recommendations are not yet considered implemented. (It should be noted that the Manitoba launched its complaint against the Government of Ontario in December 1999.) Soon after the August 2005 panel decision against the Government of Quebec in favour of the New Brunswick association, Quebec announced its intention to abide by the panel’s recommendations asking the Office des professions du Québec to work with the three professional accounting organizations (CAs, CGAs, and CMAs) to recommend necessary changes. There has been no public statement on the matter since the fall of 2005, though the CGA remains optimistic the issue will be resolved. In 2003 and 2004 Prince Edward Island and Nova Scotia, the only other non-compliant provinces, changed their measures or the way they are administered to ensure that CGAs have access to public accounting in their jurisdictions.

\textsuperscript{82} In the other 2 cases, the respondent government has refused to appoint panelists to the panel.
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a private party alone (2 private party complaints were dismissed during the screener process), all have proceeded to the panel process, indicating less willingness on the part of respondent governments to cooperate with private parties.

These numbers appear to be consistent with the experiences of private parties who have engaged the AIT in attempting to resolve disputes. For the Certified General Accountants Association of Canada (CGAAC), whose Manitoba and New Brunswick associations have initiated two of the three private party complaints that have gone to panel, the governments complained against have “tended to be defensive and largely unresponsive sometimes to the point of being obstructive.” Further, the CGAAC describes a strong impression that “consultations are regarded by some governments as a means of delaying formal dispute resolution processes” and “in these cases there appeared to be little interest on the part of government whose measures were the subject of the complaint in trying to resolve the issues that were the basis for the dispute.” The dispute resolution procedures have, in general, been found to be “slow, complicated, expensive and apparently not respected by all governments.” Alberta, one of the strongest government advocates of free internal trade, has also been critical of the dispute resolution process noting, “the process has not been effective in getting governments to

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85 Robert H. Knox, *Canada’s Agreement on Internal Trade: It Can Work if We Want it to*, p 3.
change their behaviour. It is also long and complicated, often inaccessible to people and businesses, and, in the end, it is not enforceable.”

The poor record of resolved complaints and apparent poor attitude amongst some governments to cooperate and abide by panel decisions bring to light the AIT’s weaknesses in terms of enforceability. For private parties that undertake an AIT complaint which proceeds all the way to the panel stage, their only tools to enforce a panel’s decision are the public release of the panel’s report and the review of the complaint’s status at annual CIT meetings. While there was some question at the time of the AIT’s implementation as to whether it might eventually be legally enforceable, an attempt by the company Unilever to compel Quebec to remove its ban on butter-coloured margarine was been dismissed by the Supreme Court in 2005. Though governments have the added option of retaliatory action, none have taken such measures. Further, given the AIT’s purpose, the rational of a retaliatory action, which in face of fact is merely the creation of another trade barrier, is a questionable solution.

By 2003, then, with progress towards filling the remaining gaps limited and resolution of disputes having minimal success, the AIT faced its upcoming ten year anniversary with very little to show. With the creation of the Council of the Federation, however, the AIT has been given a much needed shot in the arm – bringing renewed attention by political leaders on the necessity of AIT reform. It is this development and

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86 Gary Mar, Minister of Alberta and Intergovernmental Relations, “Speech to the Richmond Chamber of Commerce,” Richmond, British Columbia, 6 June 2006.

its consequences in terms of intergovernmental relations in Canada that will be the focus of the next chapter.
CHAPTER THREE
COUNCIL OF THE FEDERATION: TRYING TO MAKE THE ECONOMIC UNION WORK

3.1 COF’s BEGINNINGS

When in July 2003 Canada’s premiers announced their intention to create a Council of the Federation (COF), “a new institution for a new era in collaborative intergovernmental relations” was heralded to have arrived.88 While the Council of the Federation in its current and realized form can be directly traced to the 2001 Quebec Liberal Party report A Project for Quebec –Affirmation, Autonomy and Leadership,89 it is not a new idea, but rather one which has floated about in various formations since the beginning of Canada’s modern era of constitutional reform.90

According to the Quebec Liberal Party, the Council of the Federation was made necessary by the state of intergovernmental relations, which were “characterized mainly by diffusion and uncertainty.”91 This lack of cohesion, the report argued, sometimes allowed “the federal authorities to appropriate the leadership, and set the agenda for meetings as well as the fundamental objectives the country should pursue.”92 The proposed Council of the Federation, whose members were to be the prime minister, the


89 Quebec Liberal Party, A Project for Quebec –Affirmation, Autonomy and Leadership, October 2001. Available from the Quebec Liberal Party Website: <http://www.plq.org/en/informez_vous/programme.html>. (Also commonly known as the Pelletier Report after its Chairman Benoît Pelletier, now Quebec Minister of Canadian Intergovernmental Affairs.)


91 Ibid., p. 92.

92 Ibid.
premiers, and federal and provincial ministers (depending on the issue), was presented as a forum for better consultation and joint-decision making. The role of the Council’s secretariat was considerable, with a General Secretariat, as well as an Economic Union and Internal Trade Secretariat, a Social Union Secretariat, and an International Relations Secretariat to be created. The proposed Economic Union and Internal Trade Secretariat was meant to replace the AIT’s Internal Trade Secretariat and would have been tasked with encouraging intergovernmental (federal-provincial and interprovincial) cooperation on economic, fiscal and budgetary matters.\footnote{Ibid., p. 95.}

With the election of Liberal Leader Jean Charest as Quebec premier in April 2003, the proposal was soon presented to Charest’s provincial counterparts at the Annual Premiers’ Conference in July of the same year, becoming part of a plan to “revitalize the Canadian Federation.” The Founding Agreement of COF, signed by all thirteen provincial and territorial premiers\footnote{Nunavut is a member of the Council of the Federation, but not a signatory to the Agreement on Internal Trade.} on December 3, 2003, however, has a number of notable differences from the Council originally envisioned by the Quebec Liberals. Rather than including all levels of government, COF is made up exclusively of the premiers of the provinces and territories. The expansive role envisioned for the secretariats was reduced and only a single secretariat created, currently with three employees.\footnote{Council of the Federation, \textit{Council of the Federation Founding Agreement}, 3 December 2003.} Rather than becoming the “focal point for the continuous dialogue and cooperation between the provinces and the federal government,”\footnote{Quebec Liberal Party, \textit{A Project for Quebec –Affirmation, Autonomy and Leadership}, p. 96.} the Council of the
Federation which emerged appears more a formalization of Canada’s longstanding Annual Premiers’ Meetings than the creation of a new executive institution for national co-decision making.

The form and mandate of COF reflects the provinces’ own conception of their role in the federation – as equals to the federal government. It is an institution designed to better coordinate and therefore strengthen the policy positions of the provinces and act as a counterweight to a strong federal government. The premiers’ plan for a renewed federation presented in July 2003, of which the creation of COF is one of five points, further illustrates this. The four other proposals of the plan include - annual First Ministers’ Meetings co-chaired by the prime minister and chair of COF, provincial/territorial consultation on federal appointments, devolution of powers to the territories, and establishment of federal-provincial-territorial protocols of conduct.97 The “new era of constructive and cooperative federalism” envisioned in the plan is premised almost entirely on increased provincial consultation and a more responsive and deferential federal government.

3.2 **COF AND THE ECONOMIC UNION**

Despite failing to create a new Economic Union and Internal Trade Secretariat, COF has from the beginning taken internal trade as one of its key priorities. At its December 2003 meeting, Premier Bernard Lord of New Brunswick and Premier Gary Doer of Manitoba were tasked with leading work to strengthen the economic union. The pairing of the two premiers is not surprising given their good working relations and well

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known friendship. Together Lord and Doer have made considerable progress in creating
closer ties between their provinces, signing an agreement for interprovincial cooperation
in 2002,\(^98\) undertaking joint trade missions to Illinois, Georgia, and Texas, creating a
reciprocal youth exchange program, and opening a joint Manitoba-New Brunswick office
in Ottawa. The two premiers’ stated commitment to match their own level of
interprovincial collaboration with that of the other provinces via COF \(^99\) made Lord and
Doer likely choices for the task.

The work of the two leaders culminated in the Internal Trade Workplan approved
at the following COF meeting in February 2004. The Workplan is the most ambitious set
of reforms addressing the economic union since the AIT itself was signed in 1994. While
it is too soon to say whether COF will effectively address internal trade barriers or merely
produce a new round of political rhetoric, early results reveal limited success.

3.3 **THE INTERNAL TRADE WORKPLAN**

The Internal Trade Workplan sets out COF’s reform objectives into three main
categories: immediate actions, short-term objectives, and long-term objectives. Actions
within each section are assigned a province or provinces responsible for its
implementation, a target date of completion, and provides background information on

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\(^{98}\) Section 2.5, which concerns economic development, states: “The parties are interested in co-operating in the area of economic development and are committed to the principles of eliminating business barriers within Canada, including those that may exist between provinces. Both parties are committed to the Agreement on Internal Trade and, as such, agree to: communicate and share information in areas of trade policy and trade practices; make best efforts to avoid the use of incentives that may result in artificial and unproductive “bidding” competition for new businesses and which place an undue burden on taxpayers; and communicate and share information on innovative alternative approaches to generating new economic development for their respective communities and regions and to champion community economic development models nationally.” Manitoba and New Brunswick, *Memorandum of Understanding on Interprovincial Cooperation*, 23 January 2002.

within each section are assigned a province or provinces responsible for its implementation, a target date of completion, and provides background information on each agenda item - a formal acknowledgement of the failures and weaknesses of the AIT to date.

3.3.1 Immediate Actions

Immediate actions under the Internal Trade Workplan are meant to "reinvigorate the process of addressing internal trade barriers" and were assigned a five month completion target - the COF meeting in July 2004. Action items were placed under three goals: recommitting to honour all obligations under the current AIT; completing the provincial/territorial negotiations on Crown procurement; and reporting to COF on progress.

Items under the first objective, recommitting to honour all objectives, include the following: a commitment to reinstate annual meetings of the Committee on Internal Trade (CIT); completion of all party-specific outstanding obligations; and proper communication of the Workplan to relevant government officials. By the January 2004 Progress Report, objectives set under immediate actions were assessed as complete or near completion. The objective to meet all outstanding commitments, however, is the major exception. By the January 2006 Report, Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Saskatchewan and the Yukon were in compliance with the AIT. For the other governments, states of incompleteness ranged from two missing annual reports for New Brunswick and Nova Scotia to a missing 2004/2005 Annual


Report on Procurement, an incomplete roster of procurement and Chapter 17 panelists, and failure to appoint a panelist to the construction restrictions dispute (99/00-5 ONT CON), on the part of Ontario.

The second objective, the completion of negotiations on Crown procurement, had originally been given a June 1996 completion date at the time of the AIT’s implementation. This long unresolved issue, however, quickly found a successful conclusion; an agreement was reached at the subsequent meeting of provincial/territorial (P/T) ministers responsible for internal trade in April 2004 and came into effect for provincial governments January 1, 2005 and April 1, 2005 for the federal government. The quick resolution to the longstanding issue of Crown procurement is certainly the most impressive of the objectives achieved, though, it seems unlikely that it would have been placed in the immediate actions section if a quick resolution had not been anticipated. Tempering the success of the quick negotiations on Crown procurement, however, are the significant government entities excluded from the provision. Hydro-Quebec, the New Brunswick Power Corporation, Saskatchewan Telecommunications, Saskatchewan Power Corporation, and the Bank of Canada are just a small number of the exceptions some provinces have included. Despite this, the successful conclusion of Crown procurement negotiations is the Internal Trade Workplan’s only substantive and therefore most significant accomplishment to date.

Finally, the third general task, which was simply to prepare a public progress report, was successfully completed on time.

3.3.2 Short-Term Objectives
resolution mechanism; assessing gaps between the AIT and issues outside the scope of the Agreement; and developing a comprehensive communications plan. With the exception of actions concerning the assessment of gaps in the AIT, which were to be completed by the July 2005 COF Annual Meeting, all short-term objectives were assigned an April 2004 date for completion.

The first goal, providing flexibility in decision-making, addresses the unanimity rule operating under the AIT. The requirement for consensus has been one of the main roadblocks to finalizing long-running negotiations, such as the still elusive Energy Chapter. Rather than change the operating rules of the AIT to allow for a more flexible qualified majority requirement or an opt-out provision, the ministers agreed that Article 1800 of the AIT concerning trade enhancement arrangements - which allows for trade liberalizing agreements among provinces outside the AIT - should be promoted.102 While this approach will allow interested governments to exceed the standards of the AIT without the necessity of unanimous agreement, it also means that substantive reform of the AIT will likely remain limited.

Frustrated by the slow progress of reforms to the AIT, this option was recently undertaken by the provinces of Alberta and British Columbia.103 Signed in April 2006, The British Columbia – Alberta Trade, Investment, and Labour Mobility Agreement (TILMA) has the potential, according to The Conference Board of Canada, to add $4.8

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103 Author’s phone interview with official from the B.C. Ministry of Economic Development, 2 August 2006.
billion to real GDP and create 78,000 new jobs in British Columbia alone. Compared to the AIT, TILMA's coverage is considerably more expansive and once fully implemented in April 2009, trade, investment, and labour mobility will be covered in all sectors of the provinces' economies, including energy. In practical terms businesses will only need to register once for both provinces, investment rules will be uniform, and workers certified for an occupation will have their qualifications recognized in both provinces. Also significant, TILMA's dispute resolution mechanism, though similar to the AIT's format, is equally accessible to both government and private parties, consultations and panel proceedings follow a comparatively accelerated time frame, and panel decisions are considered binding. Should a party fail to comply with a TILMA panel's report, a monetary award of up to $5 million can be assessed by the original panel and such rewards are subject to judicial review (Article 31). While parties still have the choice of engaging the AIT dispute resolution process, the significant differences in terms of enforcement makes this choice exceedingly unlikely.

The second category, improving the procedural fairness of the AIT dispute resolution mechanism, includes the following action items: appointing panelists in any outstanding disputes; appointing a committee of provincial and territorial solicitors to assess the issues of procedural fairness and impartial process under Chapter 17; an initial review of possible reforms for short-term improvements; and creation of a status report on any unresolved disputes. The panel report was adopted by the P/T ministers of internal trade in June 2004 and recommendations were, like the Workplan itself, divided into

three categories: immediate actions, short-term action by all parties, and long-term considerations.

To address the issue of procedural fairness, the recommended immediate action for the provinces was to ensure panelists have “expertise, experience or working knowledge of administrative law or dispute resolution.” Though appointing qualified panelists is obviously to be desired, it does appear a bit redundant to formally articulate such an interest when most would already assume this to be a goal, stated or not. Such broadly worded commitments, which produce no obligatory change in government action, appear an early warning that the Internal Trade Workplan is at risk of producing more political rhetoric than substantive reform. Recommendations falling under the short- and long-term categories involved formal changes to the AIT and therefore required the approval of the federal government, which by the June 2004 meeting of P/T ministers of internal trade had yet to be asked to participate in the Workplan. These recommendations were carried over into the long-term objective – improving the AIT dispute resolution mechanism.

The third subject, assessing gaps between the AIT and issues outside its scope, include the following action items: preparation by provincial and territorial internal trade officials of a report concerning the gaps and exemptions in coverage of the AIT; preparation by P/T ministers responsible for internal trade of a Workplan to address any gaps and exemptions; and preparation of recommendations by provincial and territorial trade officials to ministers regarding the streamlining of the AIT. The report on gaps and exemptions was presented at the April 2004 meeting of P/T ministers and officials at that time were instructed to prepare a prioritized list of gaps and exemptions.

with a view of developing options to address them as well as examine options for streamlining the AIT. None of this work was addressed in the January 2006 Progress Report and presumably remains at some stage of incompletion.

Finally the fourth category, concerning the development of a communications plan includes - a strategy to engage the public, development of a “whole of government” approach to intra-governmental communications, and communication with the federal government. A draft communications plan was approved at the April 2004 meeting for P/T ministers responsible for internal trade and full development of the plan was ordered. As of the January 2006 Progress Report, the CIT has approved in principle a comprehensive communications plan and a final version is set to be reviewed at the next CIT meeting in September 2006. To date, however, the only work actually completed under the communications strategy has been the redesign of the AIT website.

Concerning the development of a “whole of government” approach to intra-governmental communications, governments could not reach consensus on what the term meant in actual practice and it was agreed at the April 2004 meeting that it would be left to each party to design and implement independently. The extent to which this approach actually results in improved intra-governmental communications, then, will be entirely contingent on the choice of the government.

On the last item, communication with the federal government, in August 2004 premiers Lord and Doer requested Ottawa’s participation in COF’s Internal Trade Workplan. The federal government’s agreement to cooperate given its longstanding interest in strengthening the economic union was not surprising; what is notable here is

106 Author’s phone interview with official from the B.C. Ministry of Economic Development, 2 August 2006.
not Ottawa’s participation, but rather its complete exclusion from the reform process for approximately six months. It was COF alone which initiated, drafted and approved the Internal Trade Workplan, removing the federal government as an actor in AIT reform until it became necessary for the continued progress of the COF initiative. This is a marked difference from the federal government’s dominant position as agenda setter on issues of internal trade throughout the 1980s and early 1990s. It is now the federal government responding to the proposals of the provinces and territories.

Upon the release of the August 2004 Progress Report premiers Lord and Doer announced that all immediate and short-term actions identified in the Internal Trade Workplan were implemented. Considering the limited progress on reforms to the AIT prior to COF’s initiative, this achievement is impressive; however, it is also factually inaccurate. There are a number of items, including Ontario and Quebec’s failure to appoint panelists to long-running disputes and the task of addressing gaps between the AIT that remain incomplete. Further, aside from the negotiations on Crown procurement, most immediate actions and short-term objectives can be achieved with simple procedural improvements (or reports on procedural improvements). Without also addressing the gaps and exceptions that limit the Agreement’s effectiveness, the value of objectives such as “recommitting to honour all obligations under the current AIT” is limited at best.

3.3.3 Long-Term Objectives

Long-term objectives set out in the Workplan are placed into nine sections: recommitting to honour all obligations under the AIT; completion of the Energy Chapter; full review of the AIT dispute resolution mechanism for its improvement; assessing and

addressing issues related to business subsidies; addressing labour mobility issues including mutual recognition of foreign credentials; acceleration of the harmonization of regulations and standards; review of the scope and coverage of the Agriculture Chapter; and improvement of the Procurement Chapter. The August 2004 Progress Report noted these long-term objectives were “mostly in the organizational stage”\textsuperscript{108} with lead jurisdictions focused on the development of terms of reference. By the January 2006 Progress Report, meetings with relevant ministers had taken place to address all objectives and work was ongoing, though none of the objectives are yet complete. Rather than reviewing in detail the progress of all long-term objectives, which is not absolutely necessary for the purposes of this thesis, one objective, the full review of the AIT dispute resolution mechanism, will be addressed for its particular relevance to intergovernmental relations.

The Internal Trade Workplan acknowledges the AIT dispute resolution mechanism has received considerable criticism for its complexity, fairness, length of process and enforceability.\textsuperscript{109} As discussed in Chapter Two, the dispute resolution process has earned an unimpressive record with only 14 of 43 disputes (33\%) fully resolved and has been a particular point of contention among the AIT’s critics. The Internal Trade Secretariat’s public consultations project undertaken in 2000-2001, which brought together representatives of the business, labour and non-governmental organizations, and research communities, found in general that participants believed the


dispute resolution process "too slow, costly and complex." As well, business organizations such as the Canadian Chamber of Commerce and the Certified General Accountants of Canada have called for the dispute resolution mechanism to be binding and more accessible to private parties. Indeed any substantial reform initiative of the AIT which did not address the dispute resolution process would undoubtedly be criticized by the business community and likely a number of provinces such as Alberta and British Columbia.

The full review of the dispute resolution process is led by Saskatchewan, which has been tasked with drafting a report to the ministers responsible for internal trade. By the August 2004 Progress Report, work on the short-term objective of improving the procedural fairness of the dispute resolution mechanism had been completed. The long-term objectives of this report were used as the starting point for the in-depth review of the dispute resolution mechanism. In the time between the 2004 and 2006 Progress Reports, the initial review of the dispute resolution mechanism was completed and at the June 2005 meeting of the CIT a number of suggested revisions to the process were accepted.

The elimination of the formal consultation requirements of the AIT's sectoral chapters (with the exception of procurement bid protest procedures) to create a single consultation mechanism under Chapter 17 is proposed. As discussed in Chapter Two, the consultation requirements set by sectoral chapters prolong what can already be a slow dispute resolution process. A provision is also proposed guaranteeing that if a

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government fails to name a panelist one will be chosen by lot by the Secretariat is also proposed. Failure by a government to appoint a panelist has occurred on two occasions and allows uncooperative respondents to bring the dispute resolution process to a standstill. Creation of a mechanism that would allow the original panel to determine whether its report has been complied with is proposed as well. Currently, it is the job of the CIT to review the progress made by governments to abide by a panel’s report; however, there is no provision for a formal review of whether a report has actually been complied with. It is assumed that the two parties of a dispute will come to a mutual agreement concerning whether an adequate resolution has been achieved; however, with only two of ten panel reports fully implemented to date, this is not what has resulted in practice.  

The CIT also accepted that measures “to introduce more consistency, rigour and certainty into the dispute resolution process” should be adopted, but resolution on what such measure should be was not reached by the June 2005 meeting. These options, which stand to be the crux of the dispute resolution mechanism’s effectiveness include, reliance on the renewed good faith of parties, enhancement of retaliatory measures under Chapter 17, the removal of dispute resolution privileges from non-compliant parties, and potential imposition of monetary consequences and/or enforceability in the courts. Unlike the other proposed reforms to the dispute resolution mechanism, many of these options would

112 Other proposed reforms and ongoing considerations include: that within ten days of the issuance of a panel report, a participant may request a panel to provide an interpretation of one or more aspects of the report and that any clerical errors be corrected; guaranteeing that discussions in which a party argues a dispute is not within the scope of the AIT be complete within one year; the per diem rate for AIT panel members be increased to $800 per day; and consideration of issues respecting the costs of an AIT dispute panel hearing. Council of the Federation, Internal Trade Workplan: Progress Report, January 2006.

affect the enforceability of the AIT, rather than simply its procedural efficiency. The move from a dispute resolution mechanism reliant on the goodwill of parties to one that could impose more significant penalties or be enforced through the courts would more than any other single reform alter the nature of the AIT.

The AIT along with the Social Union Framework Agreement (SUFA) are two of the most cited products of the executive-driven collaborative federalism that has emerged in the post-Charlottetown Accord era, defined by the use of intergovernmental agreements to renew the federation in lieu of constitutional reform. Accountability in collaborative arrangements, such as the AIT, is reliant on the shared commitment by the federal and provincial governments for their overall results,\(^\text{114}\) which presents an obvious weakness – any agreement is only as strong as its weakest signatory. Because of the low political costs associated with violating intergovernmental agreements, which tend to be less visible and less accessible to the public, this can lead to (and has proven the case with the AIT) governments avoiding an agreement’s rules and obligations. For scholars critical of the low level of accountability inherent to intergovernmental agreements, such as Gerald Baier, the AIT’s dispute resolution process has to date “simply exaggerated the already negative tendencies of cooperative federalism.”\(^\text{115}\) Should the AIT become independently enforceable - therefore increasing the political and potentially monetary costs for non-compliant governments - many of the dangers associated with intergovernmental agreements would be substantially restrained. Entrusting an

\(^{114}\) Richard Simeon and David Cameron, “Intergovernmental Relations and Democracy: An Oxymoron if There Ever was One?” Canadian Federalism: Performance, Effectiveness and Legitimacy, Herman Backvis and Grace Skogstad, eds. (Don Mills: Oxford University Press, 2002).

independent body to determine what constitutes a “legitimate” trade barrier, however, would significantly alter the level of control provinces have over their own economies. Because of the potentially significant political consequences such changes could bring, it is not surprising that this particular measure of the dispute resolution mechanism appears to be the last on which governments have reached consensus on.

The CIT is scheduled to meet in September 2006 and will likely consider a 7th Protocol of Amendment to the AIT. While some changes to Chapter 17 are virtually guaranteed either in this protocol or the near future, the likelihood that enforceability of the AIT will be changed is far less promising. The precedent set by TILMA is illustrative of the trend strong enforcement of internal trade will more likely follow. Taking their cue from Alberta and British Columbia, governments seeking more stringent measures to eliminate internal trade barriers may join TILMA or alternatively choose to create other agreements outside of the AIT. If this was indeed to happen, the AIT would come to reflect the standards of the lowest common denominator, while scattered bilateral and multi-lateral trade agreements would become the preferred choice of governments. While Alberta and British Columbia should be lauded for their work on internal trade, such bilateral agreements, if made the norm, do pose a potential threat to the economic union. As noted in the Introduction, a strong economic union is important not just in terms of the fiscal benefits it can bring, but for the national community it helps to build and maintain. If internal trade in Canada comes to be regulated by a series of bilateral agreements, the economic interests of the country as a whole on this issue could become

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116 Changes to Chapter 17 have been made in previous Protocols of Conduct, none, however, addressed enforceability. Changes and additions include the following: panel rules of procedure; a code of conduct for panelists; award of costs procedures, and reduction of the number of panelists on panels from five members to three.
a secondary consideration. While promoting further trade agreements outside the AIT is a pragmatic option for strengthening internal trade, governments should be wary that such agreements do not serve to make the AIT obsolete.

3.4 **ANALYSIS**

3.4.1 **The Council of the Federation**

At the time of its creation in 2003, commentators were unsure of the role the Council of the Federation would play in intergovernmental relations. Possible outcomes ranged from the “substantial improvement of relations among the provinces and territories, and between them and the federal government”\(^{117}\) to merely “a more dignified version of the ‘ganging-up’ and ‘fed-bashing’ strategy”\(^{118}\) previously employed by the provinces. COF is still new – holding only its third annual conference in July 2006 – and an assessment of its role in intergovernmental relations must still rely on a large degree of conjecture; however, its work on internal trade does provide a good starting base for consideration and is certainly informative in terms of the development of Canada’s economic union.

Since the implementation of COF’s Internal Trade Workplan, provincial leaders have exhibited a renewed interest in addressing barriers to internal trade. Actual commitment to substantively reform the AIT, however, still varies amongst

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governments. The ultimate test of whether the provinces’ work will result in anything more than political rhetoric will be the success or failure of the Workplan’s long-term objectives. Progress on this front appears less than promising. While meetings with relevant ministers have taken place to address all the long-term objectives, actual reforms have yet to result. On issues such as subsidies, energy and agriculture, progress has not moved beyond general discussion and in some cases governments are actually pushing for less coverage than what already exists under the current provisions of the AIT.

3.4.2 The Economic Union

When the work of COF on internal trade is compared to previous initiatives addressing the economic union, perhaps the most striking difference is the role played by the federal government. In the approximately thirteen years that have marked the time between the negotiations of the Charlottetown Accord and the creation of COF, the federal government has moved from being the dominant agenda setter on the issue of internal trade to a secondary player, following COF’s lead. The Internal Trade Workplan was an initiative begun by COF alone, with the federal government not being approached until the plan had been drafted and work had reached a stage where its cooperation was needed.

119 Author’s phone interview with official from the B.C. Ministry of Economic Development, 2 August 2006.

120 Ibid.

121 The removal of the federal government as co-chair of the CIT is illustrative of its diminished role as well. One of the first acts of P/T ministers of internal trade was to institute the provision calls for a single rotating chair for the CIT. Serving as co-chair from 1995-2004, the federal government must now wait its turn and will not serve as chair again until 2013. Council of the Federation, Internal Trade Workplan: Progress Report, 11 August 2004.
The development of the economic union, then, has witnessed a rather dramatic
turn in events. In the 1980 discussion paper, *Securing the Canadian Economic Union in
the Constitution*, the Trudeau government proposed it be given constitutional jurisdiction
over all measures of economic integration, arguing existing constitutional measures were
inadequate for Canada’s economic development. Today, when generally accepted legal
opinion holds that the federal government does have primary jurisdiction over internal
trade, it is the provinces that have taken leadership and filled the power vacuum via COF.
With every indication pointing to the federal government’s willingness to cooperate with
COF on the issue, it appears that despite its legal advantage the federal government will
be at most an equal player to COF on the issue.122

Recalling Chapter One’s review of the history of the economic union, this change
in leadership, made especially apparent by COF’s Internal Trade Workplan, is not a
complete departure from past practice, but rather the outcome of the gradual evolution of
governments’ approaches to internal trade. While during both the constitutional
negotiations of 1980-81 and the 1992 Charlottetown Accord the federal government was
the political actor pushing the internal trade agenda and seeking primary jurisdiction over
the economic union, these were the peak moments in the federal government’s pursuit of

122 The difference between the Conservative Party’s platform position on the economic union in the 2004
and 2006 federal elections is likely illustrative of COF’s action on the issue. In 2004 the Conservative
Party platform stated: “A Conservative government will renegotiate the Agreement on Internal Trade to end
provincial exclusions, create a prompt and binding dispute settlement process, and allow greater mobility
for workers. If voluntary agreement cannot be achieved, we will use the Constitution to ensure that trade
among the provinces is at least as free as trade with the United States and Mexico under NAFTA.”
Conservative Party of Canada, *Demanding Better*, 2004 Election Platform, p. 15. In the 2006 platform,
however, the Conservative Party stated: “[it would] support the important contribution the Council of the
Federation is making to strengthening intergovernmental and interprovincial cooperation, expanding the
economic and social union in Canada, and advancing the development of common standards and objectives
of mutual recognition by all provinces.” Conservative Party of Canada, *Stand Up For Canada*, 2006
Election Platform, p. 42. (The 2000, 2004, and 2006 Liberal Party election platforms include no mention
of either the Agreement on Internal Trade or the economic union.)
dominant authority over internal trade. Unlike previous constitutional negotiations, the negotiations of the AIT in 1994 were marked by the federal government’s willingness to act as an equal player, not seeking to expand its jurisdiction over the economic union, nor bind the provinces more fully than itself. Though threats of intervention were made by the federal government early on in response to the AIT’s considerable exceptions and lingering gaps, such threats proved empty and instead the issue was left to stagnate.

Today, the economic union has not only had a change in leadership via COF, but from the perspective of the provinces, it is an area of provincial jurisdiction. Speaking just before the opening of the 2006 COF conference in St. John’s, Newfoundland, New Brunswick Premier Bernard Lord expressed the opinion that COF meetings should focus primarily on issues falling under provincial control, such as internal trade. “That’s something [internal trade barriers] we can do on our own, we don’t need the federal government, we don’t need to ask anybody else, we just need to do it.”  

### 3.4.3 Intergovernmental Relations

Beginning in the 1990s intergovernmental relations moved into a model often termed as collaborative. According to Richard Simeon and David Cameron, the key element of this new form of collaborative federalism is the understanding that governance in Canada is to be conducted as a partnership between equals, with neither level of government subordinate to the other. Two political developments in particular have been cited as the driving forces which moved intergovernmental relations towards a


124 Richard Simeon and David Cameron, “Intergovernmental Relations and Democracy: An Oxymoron if There Ever was One?,” p. 279.
collaborative model, the failure of the Meech Lake and Charlottetown accords (which encouraged governments to find informal ways to renew federal relations) and the significant budget cuts to social policy transfers made by the federal government in the mid-1990s. According to Thomas Courchene, as the federal government reduced its transfers to the provinces during this time period, both its moral authority and its financial capability to enforce unilateral top-down standards were diminished, resulting in a substantial and unprecedented decentralization of social policy. The means to adjust Canada’s economic and social unions in light of this decentralization, Courchene argued, must come from the provinces who “have to be brought more fully and more formally into the key societal goal of preserving and promoting social Canada.”

The financial state of the federal government has rebounded considerably from the debt load it faced in the mid-1990s, with 2005-2006 marking its ninth consecutive balanced budget. On more stable financial grounding, Ottawa has faced considerable pressure to return federal transfers to their former levels and has begun to reassert a greater financial stake in provincial programming. In 2004 the federal government committed $41 billion over ten years in new spending for healthcare and is expected in the near future to increase significantly its equalization payments to the provinces to remedy the so-called fiscal imbalance.

125 Ibid., p. 280.


127 Ibid., p. 78.

With the returned strength of the federal government’s spending power in the late 1990s, its willingness to defer to the provinces was accordingly lessened. The 1999 Social Union Framework Agreement\textsuperscript{129} - which had originally started as an initiative by the provinces to develop a common front on federal financial policies - is cited as a demonstration of the federal government’s resumed interest in financing provincially run social programs.\textsuperscript{130} In earlier proposals drafted by the provinces, the SUFA followed a strong provincialist model and would have required the federal government to gain a majority of the provinces’ consent before initiating new social programs in areas of provincial responsibility and gave provinces the ability to opt-out with compensation from federally initiated programs. What emerged in the final agreement, however, is in most respects a continuance of the status quo, with no significant obligations placed on the spending power of the federal government. In place of the tough measures included in earlier proposals are broadly worded commitments to “collaborate on implementation of joint priorities” and “offer to consult prior to implementing new social policies and programs that are likely to substantially affect other governments.”

Given this, could Canada be moving away from the decentralization of intergovernmental relations begun in the 1990s? While the factors which were the original impetuses for decentralization have dissipated, decentralization, at least in the case of the economic union, has not. Instead, this thesis proposes that intergovernmental relations dealing with the economic union have developed to follow a \textit{defacto principle of subsidiarity}. The principle of subsidiarity holds that powers should be delegated to the

\textsuperscript{129} Quebec participated in the negotiations of the SUFA, but is not a signatory.

\textsuperscript{130} Richard Simeon and David Cameron, “Intergovernmental Relations and Democracy: An Oxymoron if There Ever was One?,” pp. 280-81; Jennifer Smith, \textit{Federalism} (Vancouver: UBC Press, 2004): p. 100.
lowest level of government capable of exercising them effectively and generally means a move towards decentralization of intergovernmental relations. In terms of the economic union, this has meant the provinces have taken a leadership role on the issue via COF and the federal government has been engaged only when its involvement has been required. As advocated by Courchene, intergovernmental relations addressing the economic union have transitioned to a more confederal model of collective government action.

The question of whether the provinces have in fact *effectively* exercised their power over the economic union is not yet clear, though progress on the Internal Trade Workplan indicates provincial leadership has resulted in few substantive results. In terms of the development of the defacto principle of subsidiarity what seems more important is that the provinces *appear* to be effectively exercising their power over the economic union. The success COF has had in asserting leadership stems in large part from the united front provinces have publicly demonstrated on the issue. While little progress has been made, all governments agree that progress *should* be made. The objective to enhance internal trade is alone non-divisive, making it a fairly easy initiative for provinces to commit to in principle and so long as work appears ongoing, there is very little the federal government can publicly object.

This same cohesion on other issues of joint interest is of course not always present. Disagreement amongst provinces as to the best policy approach for securities regulation, for example, has provided the federal government leverage to propose a national securities regulator. While nine provinces and the three territories, through the Council of Ministers of Securities Regulation, have undertaken reforms to create a passport system (which would maintain the current thirteen separate jurisdictions),
Ontario advocates the creation of a single securities regulator. The Crawford Panel, commissioned by the Government of Ontario to develop a model for a securities regulatory framework, released its final report in June 2006\(^{131}\) and the proposal was quickly picked up by the federal government. In a June 19, 2006 speech to the Halifax Chamber of Commerce, Minister of Finance Jim Flaherty stated, “I believe, along with the Purdy Crawford Panel and the vast majority of Canadian businesses and financial experts, that Canadians would be best served by a common securities regulator responsible for a single set of rules... I believe it’s a sound proposal that can contribute to reform of securities regulation in Canada.”\(^{132}\)

The contrast between the development of internal trade and securities regulations is particularly useful for the analysis of intergovernmental relations in Canada. Compared to other federal countries, Canada’s approach to both issues is notably decentralized. Canada, in fact, is the only industrialized country without a common securities regulator.\(^{133}\) In both cases as well, Ottawa has previously proposed constitutional reforms, which would have expanded federal jurisdiction, without success. While at present both internal trade and securities regulations are being led by the provinces, only the proposed reforms to internal trade have the support of all provincial governments. Ontario’s split from the rest of the group on the issue of securities regulations has left an opening for the federal government to become involved - an opportunity that Ottawa appears willing and able to take. This difference in approach by the federal government

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\(^{133}\) *Ibid.*
conforms to the defacto principle of subsidiarity. On the issue of internal trade, the provinces have demonstrated a capacity for leadership and the federal government has consequently supported the effort, while division on the issue of securities regulation has allowed the federal government to engage in the issue and endorse its preferred solution. The federal government, while appearing prepared to let the provinces assert greater leadership on issues of national interest, has not devolved a carte blanche.
**CONCLUSION**

In their review of intergovernmental relations and the environmental union, Patrick Fafard and Kathryn Harrison note “there are comparatively few academic studies of the impact of the particulars of Canadian federalism and intergovernmental relations on specific policy fields.” This thesis - which has examined how the federal and provincial governments have addressed the economic union and what this particular example reveals about the developing state of intergovernmental relations in Canada – is a modest contribution towards filling this gap in the study of Canadian federalism and intergovernmental relations.

As chapters one to three have shown, governments’ approaches to the economic union have changed considerably over the past twenty-five years and have become increasingly decentralized. While early attempts to reform the economic union were led by the federal government, which proposed to expand its own constitutional powers over internal trade, today it is the provinces asserting leadership on the issue and leading reforms through intergovernmental means. This decentralization of intergovernmental relations has led to a defacto principle of subsidiarity being followed.

At least in the case of the economic union, it appears the most important factor determining whether a defacto principle of subsidiarity will emerge is the provinces’ appearance of capable leadership, rather than an ability to actually work effectively. While early results of the Internal Trade Workplan have not been particularly promising, progress reports, annual meetings and procedural improvements maintain the appearance

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of ongoing progress. The gap between political leaders’ public commitments to address internal trade barriers and the positions taken by some provincial trade officials at the negotiating table (who are trying to actually reduce the coverage of some AIT sectoral chapters), indicates that the appearance of progress is the extent of some governments’ interest in reform.

There does, however, appear a limit to how far avoidance of internal trade reform can be taken. The negotiations which culminated in TILMA were begun by British Columbia and Alberta in large part out of frustration of the slow movement to eliminate internal trade barriers via the AIT. The high standards set by TILMA will make it increasingly difficult for other political leaders to hide behind the AIT in its current form. This position was confirmed by Manitoba Premier Gary Doer at the July 2006 COF annual conference who noted the next meeting of the CIT would be a “fish-or-cut-bait” gathering; either a national deal will be struck or provinces will begin negotiating their own deals.\footnote{Murray Campbell, “Interprovincial trade woes get short shift as leaders prattle on,” \textit{Globe and Mail}, 29 July 2006.} The leadership demonstrated by British Columbia and Alberta further illustrates the decentralized nature of intergovernmental relations addressing the economic union. It is the provinces themselves, not the federal government, who have intervened in the work of COF in an attempt to accelerate reform on internal trade.

It is likely too early to tell whether the principle of defacto subsidiarity will become the norm for intergovernmental relations addressing the economic union and the work of COF should be monitored to track this development. More broadly, further research to determine whether this approach is being used in other policy fields and its effects on policy outcomes would appear the next logical step in this line of research.
In terms of the economic union, the principle of defacto subsidiarity does not seem to have pushed the provinces to lead more effectively, but rather to appear to lead effectively. This, however, has been a longstanding problem facing the reform of the economic union and is not unique to COF. The general trend towards the decentralization of intergovernmental relations has rather uniquely allowed individual provinces to emerge as leaders on the issue and pressure from Canada’s business community will make the outcomes of this leadership virtually impossible to ignore by other governments. Thus, intergovernmental relations addressing the economic union appear to be following an increasingly confederal model of collective government action; whether this will actually result in substantial reform of the economic union is still unclear.

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