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Transforming the Agreement on Internal Trade through binding enforcement

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Overview

At the most recent meeting of the Council of the Federation (CoF), held in Moncton in August 2007, the provincial premiers pledged to expand the Agreement on Internal Trade (AIT) and to toughen its dispute resolution system.

In the run-up to the Moncton meeting, Alberta and B.C. had pressed for the other provinces to embrace the controversial B.C.-Alberta Trade, Investment and Labour Mobility Agreement (TILMA) nationally. Even with the backing of the federal Conservative government (which does not participate in the CoF), the two Western provinces could not muster sufficient support for adopting TILMA.

Instead, the premiers agreed on a "five-point plan" to expand the AIT and toughen its enforcement. They set deadlines for: mobility guarantees in all regulated professions (April 2009); the harmonization of transportation regulations, including trucking weights and dimensions (July 2008); and completing the long-deadlocked energy and agriculture chapters of the AIT (December 2007).

Most significantly, the premiers committed to develop a binding AIT dispute settlement system, with fines of up to $5 million. The CoF communiqué directs ministers to focus first on government-to-government dispute resolution, with future work on the person-to-government mechanism "to be informed by the results of this work." Ministers were directed to "incorporate amendments on the dispute resolution process" by December 2007.[1]

Up until now, the AIT has been a "political agreement," with limited enforcement teeth. Applying fines, especially in person-to-government disputes, would, in effect, import TILMA's most dangerous element into the AIT.

TILMA critics have been rightly alarmed that the agreement creates sweeping investor rights that allow dispute settlement panels to second-guess democratic decision-making and overrule important public policies.[2] While the AIT is a more nuanced agreement than TILMA, its core obligations are also broadly worded. Attaching binding enforcement and cash penalties to the AIT could similarly weaken governmental authority and interfere with a wide range of public policies and regulations.

Such a transformation of the AIT from a political agreement into one with binding enforcement would pose a very serious threat to democratic decision-making, alongside the parallel risk of other provinces joining the B.C.-Alberta TILMA.

Despite compelling evidence that inter-provincial trade barriers are not a significant economic concern[3] and that Canada's internal market is already very open, corporate lobby groups, including the Canadian Chamber of Commerce and the Canadian Council of Chief Executives, have campaigned relentlessly on this issue. Before the ink on the 1994 Agreement

on Internal Trade was even dry, these groups began complaining that the agreement did not go far enough, that its enforcement was toothless, and that decision-making was hamstrung by the need for consensus.

The election of a new deregulation-minded Conservative government in Ottawa and the signing of the B.C.-Alberta agreement have reinvigorated these corporate-led calls to transform the AIT into a home-grown version of NAFTA's notorious investor-state dispute mechanism.

It is crucial that other interests and citizens at large now make their voices heard and refuse to go along with this attempt—under the guise of eliminating internal trade barriers—to augment corporations' power to roll back regulation and frustrate democratic decision-making.

Background

The AIT was signed by all provinces and territories in July 1994 and entered into force on July 1, 1995. The stated objective of the AIT is to "reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market" (Article 100). Many provisions of the AIT apply not only to government departments and agencies, but also to municipal governments, Crown corporations, and to certain non-governmental bodies.

The AIT sets out six general rules (reciprocal non-discrimination, right of entry and exit, no obstacles, legitimate objectives, reconciliation and transparency) which, in principle, apply to all sectors covered by the agreement. Eleven sectoral chapters, however, contain specific rules that spell out how these general rules are to be applied to each sector.

The 11 sectoral chapters cover procurement, investment, labour mobility, consumer-related measures and standards, agriculture and food goods, alcoholic beverages, natural resources processing, communications, transportation, and environmental protection. The proposed energy section would be the 12th chapter, but negotiations to conclude it have been stalemated for over 10 years.

With the exception of disputes involving the federal procurement, the enforcement of the AIT relies more on persuasion than force. In government-to-government disputes, the complaining party may retaliate by withdrawing equivalent benefits if a party fails to implement a panel ruling. The AIT also permits private persons to initiate disputes, but if a party fails to implement a panel ruling the only remedy is publicizing this non-implementation.

Outside of federal procurement issues (see below), there has been limited recourse to dispute settlement under the AIT. There have been eight formal government-to-government disputes since the agreement came into effect in 1995. Four of these complaints were brought by Alberta, the most vociferous supporter of a tougher AIT and binding enforcement.

In the first AIT dispute, a panel ruled against the federal government's ban on the inter-provincial trade of the gasoline additive MMT. This ruling set the stage for the federal government's disastrous deal to settle Ethyl Corporation's parallel NAFTA investor-state suit under which it repealed the ban, issued a formal apology, and paid Ethyl $13 million (US) in compensation.[4]

There have also been a number of cases where losing governments have ignored or worked around adverse AIT rulings. While critics of the AIT dispute resolution system will point to these outcomes as evidence that the dispute settlement mechanism needs to be toughened, reasonable arguments can be made that in most of these cases governments acted legitimately, and within their jurisdiction, by not implementing the AIT panel decisions.

Interestingly, the federal government designated the Canadian International Trade Tribunal (CITT), which generally deals with complaints under international trade rules, as the body responsible for procurement challenges under the AIT. The CITT has considerable powers. It can recommend starting the entire procurement over, re-evaluating the submissions, awarding the contract to the complainant, or providing compensation to the complainant. In the last five years, the Tribunal has received 330 procurement complaints. Of those 330 complaints, 315 (or more than 95%) were filed by Canadian suppliers under AIT rules. This strongly suggests that, if other aspects of the AIT rules

are made binding and subject to fines, as proposed, there will be a significant increase in recourse to AIT dispute settlement.

Even though the current AIT is generally non-binding, there is a clear risk it could set the standard for national treatment under international agreements that are enforceable through fines or trade sanctions. The standards of treatment agreed to in the AIT set a floor for the national treatment standards under the NAFTA and WTO agreements. AIT article 1809 specifically anticipates this issue, but the safeguards proposed there (authorizing the CIT to retrospectively declare AIT provisions that give rise to claims under international agreements as of "no force and effect") are likely ineffective.

Key issues

The AIT purports to solve a problem that has been greatly exaggerated.

The economic impacts of internal trade barriers have been greatly exaggerated. Most credible studies have shown that the economic impact of inter-provincial trade barriers is quite small—ranging from 0.05% to 0.10% of Canadian GDP.[5]

That there is sound empirical support for the view that internal trade barriers are small is not surprising. After all, there are no check-points at provincial borders; taxes or tariffs on interprovincial trade are unconstitutional; Canadians have a common currency and common legal and financial institutions. Canadians are also free to move and work anywhere in the country (and these mobility rights are now constitutionally entrenched in Section 6 of the Charter of Rights and Freedoms).

Despite this, business lobbyists, some business economists, certain provincial premiers and the media continue to make exaggerated claims about the costs of internal trade barriers. Alberta premier Ed Stelmach, for example, was recently reported saying that inter-provincial trade barriers cost the Canadian economy $14 billion a year.[6] This figure, approximately 1% of GDP, is 10–20 times higher than the best estimates.

The real agenda is limiting the role of government to intervene in the economy, not strengthening internal trade.

Canada is, of course, a federal state. A federal system encourages diversity, including regulatory and policy diversity. Much of the controversy about alleged "internal trade barriers" is not really about trade. It is a debate about the role of governments in a federal system, and specifically about how much flexibility governments should have to intervene in private markets.

It is simply inappropriate to label differences in approach to environmental protection, regional economic development, public services, consumer protection or other policies and regulations as "internal trade barriers." Many so-called internal trade barriers, such as agricultural supply management or limits on truck weights and dimensions, are deliberate and legitimate public policy choices. While they may result in additional costs for some businesses, they also have significant benefits.[7]

Binding AIT enforcement would give corporate interests a powerful tool to challenge a wide range of government policies and regulations that they oppose. This, not strengthening already close internal trade ties, is the underlying motive for persistent corporate pressure to make AIT enforcement binding.

Applying fines in government-to-government disputes would almost certainly lead to the application of fines in person-to-government disputes.

Once fines are adopted for government-to-government disputes, it will likely be only a matter of time until they are also applied in person-to-government disputes. Adopting fines in person-to-government disputes would sharply increase the number of disputes and even further limit the role of government.

The imposition of $5-milliion fines would unfairly and disproportionately affect smaller jurisdictions.

Some smaller provinces, particularly Newfoundland and Labrador, have argued that any penalties must be pro-rated according to provincial GDP, which would mean significantly smaller maximum penalties for

smaller provinces. This appears to be one of the major remaining points of disagreement among the premiers.

Expanding the AIT would increase the risk of NAFTA challenges to legitimate public policies and enable the federal government to implement international trade commitments in areas of provincial jurisdiction.

A stronger AIT enforcement mechanism would heighten the risk of claims under NAFTA and other international commercial agreements. A foreign investor could argue that the federal government must take "all necessary measures" (NAFTA Article 105), including the enforcement of the AIT, to ensure NAFTA compliance by provincial or local governments. AIT Article 1809 acknowledges this possibility, but provides inadequate safeguards.

Alternative approaches would be simpler, more effective, and more democratic.

The federal and provincial governments should abandon their focus on broadening and deepening the AIT and efforts to transform it from a political agreement to one with binding enforcement. Instead, governments should adopt a pragmatic, problem-solving approach to addressing the few remaining internal trade barriers. A pragmatic, step-by-step approach has already, for example, successfully addressed most inter-provincial labour mobility issues. Genuine internal trade barriers or differing regulations that have outlived their usefulness should be removed. But a diplomatic, problem-solving approach is far more likely than an inflexible, litigious stance to weigh both the costs and benefits of a specific measure and to craft solutions that balance all legitimate interests.

Notes

1 Council of the Federation, "Premiers strengthen trade," Moncton, August 10, 2007, available at http://www.gnb.ca/cf.

2 See Ellen Gould, "Asking for Trouble: The B.C.-Alberta Trade, Investment and Labour Mobility Agreement," Canadian Centre for Policy Alternatives, February 2007, available at www.policyalternatives.ca.

3 Marc Lee and Erin Weir, "Behind the Numbers: The Myth of Interprovincial Trade Barriers & TILMA's Alleged Economic Benefits," Canadian Centre for Policy Alternatives, February 2007, available at www.policyalternatives.ca.

4 See Scott Sinclair, Table of NAFTA Investor-State Disputes, updated to March 1, 2007," available at www.policyalternatives.ca.

5 See Brian Copeland, "Interprovincial Barriers to Trade: An Updated Review of the Evidence," for the B.C. Ministry of Employment and Investment, 1998.

6 Jim Macdonald, Canadian Press, "Stelmach wants trade barriers dropped," CP News wire, November 9, 2007.

7 For example, supply management systems ensure farmers have a stable income, while limits on truck sizes and dimensions improve highway safety and reduce highway maintenance costs.