AGREEMENT ON INTERNAL TRADE
NOTES FOR DEVELOPMENT AND FUTURE NEGOTIATIONS

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The philosophy shaping the original negotiations that resulted in the *Agreement on Internal Trade* was one of openness, and it was based on the understanding that advantages would flow to Canadians across the country from strengthening our domestic market and making it truly accessible to all participants. In the initial negotiations there was a vision of how the Canadian domestic market could and should operate. Parties pursued a goal that was inherently beneficial and accepted as such by all players.

This sense of vision and mutual benefit has been lost to a great extent as Parties have moved deeper and deeper into the details of implementation and a diminishing range of negotiations. That process has encountered reluctance and hesitancy as the Agreement has come to be perceived by some Parties as a burden rather than a framework for shared economic gain.

Parties need to refocus on the underlying intent of the Agreement and remember who the principal stakeholders are – Canadians and Canadian business. This outlook should become the basis for two essential improvements: first, bringing the text into alignment with the intent through further negotiation, and second, ensuring that the Agreement is interpreted and applied with generosity and with the broad vision of a stronger economic union.

A fundamental step in restoring the link to the intent of the Agreement is to give explicit recognition to the rules of Chapter 4 as the framework governing and applicable to the Agreement as a whole. The early history of the AIT has not demonstrated that the non-application of the General Rules or their replacement by slightly modified language in individual chapters of Part IV has created greater clarity or brought meaningful nuance to the implementation of the Agreement. In fact, the variants and exceptions to the General Rules that appear throughout the Agreement are just as likely to confuse as to enlighten. Parties should therefore move to simplify the language of the Agreement by eliminating such variants and affirming the link from all chapters to the General Rules.

In order to set the direction for improvements to the AIT it would be fitting for Ministers to embrace once again the broader goals of the Agreement and the original reasons for its existence. Renewed commitment to the ideals underpinning the Agreement and to the Agreement itself is a first step; the second important step is to recognize and affirm that the Agreement is to be interpreted and applied on the basis of those essential elements.

Exclusions and exemptions undermine the broad purpose of the Agreement. Ministers can improve the AIT by moving to reduce and eliminate exclusions and by requiring that all that remain be fully transparent and subjected to rigorous screening under the legitimate objectives test.

Critical to the success of the Agreement is the familiarity of stakeholders with what it offers. Governments should work in concert with stakeholder groups to disseminate information and provide the information necessary to facilitate use of the AIT for resolving disputes.

With reference to specific aspects of the AIT, the notes on the following pages outline a number of areas in which the text could be strengthened and improved. The discussion is intended to provide highlights rather than to be exhaustive.

1. Dispute Resolution

The dispute resolution mechanism is perhaps the most important of the specific elements of the AIT that should be reviewed and modified. Although in the first instance the Agreement guides governments in forming policy, its usefulness to stakeholders is best measured by its value in resolving disputes. The 1997-98 dispute over the federal government's *Manganese-based Fuel Additives Act* (the "MMT dispute") was the first to follow the full process through Chapter 17 to a panel. The detailed review of the process undertaken by the five Parties involved in the dispute will provide a valuable guide to future directions for improvements and streamlining.

Whether or not the experience of the MMT dispute is taken into consideration it is possible to identify a number of potential areas for improvement:

- Simplify and streamline the process to avoid procedural delays that are costly to business, individuals and governments.

- Clarify and open up opportunities for Parties to bypass, by mutual consent, steps prescribed in the dispute resolution process if they find them unhelpful. Approaches to this might include:
    - providing the option for Parties to move by mutual consent directly to Chapter 17 processes, or
    - moving dispute resolution mechanisms out of sector/issue chapters, leaving Chapter 17 as the sole framework for disputes (with the possible exception of Chapter 5 provisions for bid protest).

- Review whether the Agreement should allow more than one chapter in Part IV to be brought to bear on a given issue in dispute.

- Make explicit the obligation of a Party that is challenged to cooperate in the full dispute resolution process.

- Add the option of a panel awarding damages as well as costs to a person (corporate or individual) who wins a dispute.

- Encourage the movement of disputes, where practical, to arbitrators or mediators rather than to full panels.

2. Labour Mobility

No chapter in the Agreement has a greater impact on individuals than the Labour Mobility chapter. Its express purpose is to enable any worker qualified in one jurisdiction to work in another – the chapter's version of the AIT goal of an open, barrier-free market. Individuals are even more vulnerable to the vagaries of interprovincial relations than are businesses, yet the benefits of the Labour Mobility chapter are severely circumscribed by the reluctance of Parties to make the chapter truly effective.

Chapter 7 should be revisited with a view to ensuring that in its practical application it responds adequately to the needs of those it purports to serve. Ministers can significantly improve the chapter by moving to:

- Establish mechanisms to ensure compliance by regulatory bodies and require that they honour the date of July 1, 2001 set by First Ministers in the Social Union Accord;
- Formalize provisions for handling complaints by former residents of a province; and
- Mandate negotiations to establish automatic accreditation as the norm for professions.

3. Investment

Provisions of the Investment chapter such as the obligation to end residency requirements have been largely fulfilled. However, what is perhaps the most important part of the chapter – the Code of Conduct on Incentives (Annex 608.3) – is surrounded by doubt and handicapped by the need for definitive interpretation. Following the abandonment of an early dispute Parties have been reluctant to test the provisions of the Code and it has fallen into a state of paralysis.

In August 1997 Premiers directed the CIT to explore ways to "clarify and improve" the Code. Officials subsequently made excellent progress in identifying weaknesses and possible areas for negotiation. The CIT can provide the impetus necessary for this project to be carried to a profitable conclusion that will provide clear direction to governments and pave the way for the successful resolution of disputes. To achieve a truly effective Code of Conduct, Ministers can take the initiative to:

- Provide guidance to officials (the Working Group on Investment) by establishing parameters for their negotiations for clearer and more effective language in the Code. Direction from Ministers may lead to the revision of certain existing "best-efforts" provisions (*e.g.,* avoidance of bidding wars) to make them firm obligations; and
- Ensure that the revised Code reflects the principle of value-added to the Canadian economy as a whole.

The range of coverage by Chapter 6 has also been called into question, specifically in relation to its application to the Agriculture chapter. Ministers can put this question to rest with a firm and explicit confirmation that Chapter 6 does indeed apply across the Agreement. If Trade Ministers believe Chapter 9 or any other chapter requires amendment to deal with possible ambiguities, they can instruct Internal Trade Representatives to negotiate suitable language and bring it forward for adoption.

4. Procurement

Total annual procurement by the public sector is in excess of $100 billion, the highest measurable value of trade associated with the Agreement. Suppliers with access to the full Canadian market, which includes governments, have an opportunity to prosper and provide benefits to their communities.

The Procurement Chapter has been implemented with a reasonable degree of success and the MASH Annex is now in place. However, both the chapter and the annex lack clear, strong guidelines for the resolution of disputes. It would therefore be desirable to establish rules of procedure for bid protest panels and for the pursuit of MASH-related disputes.

The present stumbling-block is the inclusion of Crown corporations and similar government agencies (government entities of a commercial or industrial nature) under the disciplines of the Procurement chapter. Like other issues, this must be resolved with the prime beneficiary in mind. That will not be done by binding private sector utilities under the Agreement to make them more like Crown corporations, which would be a retrograde step, but by bringing the government agencies under the terms of the Procurement chapter and thereby opening their portion of the market to suppliers from across Canada.

5. Electronic Commerce

Although electronic commerce is in its infancy, the growing awareness of its impact must be brought to bear on future negotiations under the Agreement. The support technology raises new questions in areas such as Labour Mobility (where suppliers of services are increasingly able to provide their services outside the home territory without physically changing locations) and Investment, where enterprises may operate effectively across provincial boundaries without establishing a physical presence.

6. Additional Areas for Negotiation

The CIT should begin considering, or should re-visit, a number of other areas for possible inclusion in the Agreement, or re-evaluation of their present status:

- Financial services
- Cultural industries
- Duplicate or overlapping taxation