Chapter Seven: Internal Markets in Federal or Multi-level Systems

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[A] Overview

This volume has examined the experiences of four federations and the European Union in dealing with their internal markets. In every case, the idea of creating a common economic space within the system[1] has had a large measure of acceptance and found some expression in the founding or basic documents. However, none has achieved a barrier-free or perfectly integrated internal market, and they all have seen the issue in distinct ways. For the EU, initially the European Common Market, the internal market has always been its "core business" and it started in the 1950s far behind the federal countries in terms of integration. Given this, it has developed a more systematic conceptualization of the issues, objectives, and instruments around its internal market than have the federations. Its achievement has been impressive, notably in the goods and capital markets and with many regulations, though in some other areas of its internal market, such as labour regulations and some services, it is still less integrated than are the four federations. The EU distinguishes between negative integration (the removal of barriers) and positive integration, which includes common policies and regulation in pursuit of the "proper functioning of the internal market." The only federation that has a conceptual approach as developed is Australia, which has aimed to improve its competitiveness and productivity through three waves of microeconomic reforms—the second and third of which have involved intergovernmental co-operation and drawn some of their inspiration from the EU's "single-market" initiatives. The latest wave has a component whose mantra is a "seamless national economy". In both the EU and Australia, the internal market has been at or near the centre of politics and policy for many years.

This contrasts markedly with the situations in the United States, Canada, and Switzerland, where the issues of the internal market have not had a comparable level of sustained attention and action for many years. The US is a special case: there is currently no systematic debate or even policy consciousness around internal-market issues, though there have been both in the past. Despite this, it has achieved a highly integrated internal market, largely by "federalizing" the regulation of sectors through periodic ad hoc actions of Congress, which has been done unilaterally without the co-operation of the states. Canada and Switzerland have both focused on these internal-market issues recently, but with a low priority and relatively modest results.

These very different situations reflect objective differences in the economic challenges and opportunities of these systems, as well as in their politics and institutions. The fact that the EU and Australia have the most ambitious or developed concepts and objectives does not mean they have the most integrated markets. Indeed, it has been the size of their challenges, including their international competitiveness, that has made the issue as salient as it has been. The level of economic integration between and within the five systems also varies a good deal by sector or

functional area;thus, investment incentives might be strictly controlled in some systems, while networks or tax regimes are highly regulated or harmonized in others.

In every system, significant political reform efforts have most often arisen around major precipitating events, such as an economic crisis, an international trade negotiation, or a high-profile report demonstrating the need for policy change. Thus, the timing of reform efforts has varied a good deal; so too have the approaches to reform of internal market policy: they have been systematic or sectoral; consistent over time or sporadic; led from the centre or co-operative.

The role and mandate of the courts has varied greatly in the five systems and has often operated on a separate (even contrary) track from political efforts. In the US and EU, the constitution or foundational legal documents contain, or have been interpreted to contain, basic principles governing the internal market, which have given the courts an important role regardless of legislation. In addition, in multi-level systems the courts—when judging legislation—must do so in relation to the jurisdictional authorities of the central institutions versus those of the constituent units or member states. The courts' legal philosophies differ greatly, with the courts in Canada and Switzerland being least disposed to expansive interpretations of basic principles or central authority in relation to internal markets. Over time, the US constitution has been interpreted to include a dormant commerce power, while the powers of the federal government have been interpreted to include broad readings of the general supremacy clause, a pre-emptive power, and of the commerce power. Thus, the courts and the Congress have been equipped to address an exceptionally wide range of issues, from limiting barriers to imposing common policies. This contrasts with the much more limited instruments available to the Canadian and Swiss central governments. Australia falls somewhere in between, in that the courts have found that the Commonwealth government has legislative power over some economic functions important to the internal market (banking, insurance, corporations, labour disputes, unemployment, telecoms) and that the constitution contains internal-market principles, but their interpretation of the latter has been relatively restricted. In the EU, the courts have important market principles which they enforce, while the legislative powers of the council and Parliament are deep on core issues of the internal market; however, these principles and powers are typically much weaker than in the federal regimes in areas such as environmental or social policy, which are important for the functioning of the market.

A central message in all cases is the importance of politics. This includes both the general politics that characterize each system, but also the politics of the particular issues. Thus, the Canadian and Swiss federal governments are not only relatively less equipped with constitutional powers than the US and Australian governments, but they also find the politics of addressing these issues much more difficult because of strong traditions of autonomy by their constituent units as well as the political leverage of some key, vested interests. Institutional innovations and supports can be critical. In a number of systems, the politics of developing the internal market have been facilitated by handing sectoral issues off to regulatory agencies that may have considerable autonomy and be able to drive reforms, based on a principled approach to the proper functioning of the sector, which would be difficult for politicians. As well, strong commissions—including the Commission itself in Brussels, the competition commission in

Switzerland, and the productivity commission in Australia (all quite different)—also demonstrate how a well-staffed and mandated institution can play a major role in shaping the broader debate around internal-market issues and help create a climate for reform. Canada stands out as being relatively weak in such institutional supports, and even its national regulatory agencies have often been cautious in exercising their powers.

It is striking just how different the experiences of these five systems have been, in approaches, priorities, and results. While none have achieved a "seamless economy," they all have rich and successful economies and have found their own approaches to balancing economic objectives with accommodating differences. However, as the world evolves, they all face continuing challenges in terms of productivity and competitiveness and their approaches to managing their internal markets will be important in determining their success.

[B] Institutional and Political Nature of the Five Systems

The five systems vary greatly in population, economic scale, social and linguistic complexity, and institutional arrangements. But they all have multi-tier political institutions, with some division of responsibilities among levels of government as well as areas of significant jurisdictional overlap and a broad commitment to market principles.

Four of the five systems are federations in which there is no role in federal law-making for the governments of the constituent units.[2] While there are intergovernmental relations in all four federations, they vary greatly in their character and importance. Two of the federal governments, Australia and Canada, have classic Westminster-style parliamentary regimes, in which the executive is responsible to the lower house of the legislature. This typically makes for strong executives and in both countries there is a flourishing network of inter-governmental relations conducted through "executive federalism" and a regular practice of negotiating agreements between the federal and state or provincial governments. By contrast, the US has a presidential regime, in which legislative power is shared by the Congress and the Executive. The president is heavily preoccupied with the international responsibilities of a superpower and does not have much to do with the states. The US system has little "executive-to-executive" interaction. Major policy decisions affecting federal-state relations are typically made unilaterally in Congress, which the states try to influence through lobbying; federal-state agreements are a minor feature of the system (except when needed for conditional transfers of funds). Switzerland has a unique, hybrid regime. It is parliamentary but with an autonomous executive; the dominant factor in Swiss political life has been the citizens' right to require that any issue be put to referendum, and to deal with this, political parties traditionally put a high priority on seeking consensus. The seven-member executive—the Federal Council—includes all parties, and once elected by the lower house, it serves a fixed term and is not responsible to the legislature, as in the US. The cantons have similar arrangements. Most federal laws are administered by the cantons. Thus, Switzerland does have dense intergovernmental networks and

there are many intergovernmental agreements, but the executives are weaker and less coherent than their counterparts in Australia and Canada.

The relative powers of the federal and constituent units vary greatly among the four federations. Both the US and Australia have become highly centralized, with the federal governments having a wide range of legal powers and a vigorous spending power to bind or bend the states to the federal will, though the political character of the two countries differs greatly because the legislature plays a much greater role in the US. Both countries are unilingual and their regional differences do not put much of a brake on centralizing trends. The US Supreme Court, as the ultimate interpreter of the principles of the US constitution, has also played a significant role in ensuring uniformity on certain matters; the Australian High Court has also done so, but to a lesser degree. By contrast, Canada and Switzerland remain relatively decentralized. This reflects both their constitutional arrangements, the jurisprudence of their courts, and the strong centrifugal forces given their linguistic and regional diversity.

The EU is not a federation, but has evolved into a unique amalgam of federal and confederal features, along with an international treaty union. Its central decision-making mechanisms vary according to the subject, and it is on matters directly associated with the functioning of the internal market where its mandate is strongest and it functions in its most "federal" manner. In these cases, both the members states—typically through weighted majority voting in the European Council—and the directly elected Parliament legislate and the European Court is the supreme arbiter. On core, internal-market issues, the EU can be more decisive and effective than the federations, but it has nothing like the substantive breadth of a federation: it has no taxing power and minimal revenues; its role on social issues, the environment, defence, and foreign policy is very limited and much more "confederal," or consensual, than federal. Moreover, while it has central institutions, it has no "government" as such, and the whole character of its functioning is sui generis, reflecting its deeply disparate composition of nation states.

[C] Comparing Levels of Market Integration in the Five Markets

As one would expect, the United States and EU, with their huge internal markets, are less export dependent (with exports representing about 20 percent of GDP) than Canada and Australia (about 33 percent) and Switzerland (about 50 percent). Thus, the internal market is relatively more important for the larger economies.

Whatever, the importance of the internal market, there is no simple metric for comparing levels of market integration or market barriers across five such different systems. Certainly, a simple measure of internal cross-border trade would not provide such a metric (if the data were available). The amount of such trade will be, in part, a function of the number and configuration of units or members states: the more units or states, the greater will be internal, cross-border trade; the more the economy is concentrated in one or two large units, the lower will be the

internal, cross-border trade. Thus, the United States, with 50 states, the largest of which is only 12 percent of the economy, should have a substantially higher level of internal, cross-border trade as a percentage of GDP than will Australia, with only six states, the largest of which represents one-third of the economy. Switzerland and the EU, with 26 and 27 constituent units respectively, are significantly more internally fragmented than Australia and Canada, with 6 and 10 constituent units respectively. However, this degree of political fragmentation is only one factor to consider in trying to assess the importance of barriers within the internal market.

Table 7.1: Degree of Integration by Subject Area

	Australia	Canada	Europe	Switzerland	USA
Goods	High	High	High	High	High
Services	Partial	Partial	Partial	Partial	Partial
Capital	High	Partial	High	High	Partial
Taxes	High	Partial	Low/Partial	Partial/Low	Partial/Low
Regulations	Partial	Partial	High	Partial	Low
Standards	Partial/High	High	High	High	Partial
Procurement	High	High	High/Low	Partial	Partial
Investment incentives	Low	Low	High	Low	Low
Land ownership	High	Low	High	Low	Low
Labour qualifications	Partial	Partial	Partial	Partial	Partial
Benefits portability	High	High	Partial/High	Partial	Partial
Knowledge market	High	High	Partial	High	High

An alternative angle of vision is to compare the systems in terms of their degree of integration in a number of specific areas, as is done in Table 7.1. The table is subjective and necessarily tentative so it should be interpreted with a good deal of caution. Its assessments give significant weight to co-ordinated or harmonized efforts between orders of government, so the US scores relatively lowly because its system is weak in this regard; however, the US economy is actually quite strongly integrated, with a lower overall level of barriers between US states than

between member states of EU, in part because so many subjects have been "federalized." With these caveats, some interesting points do emerge from the table. The integration of goods markets has proceeded further across all systems than those for services. The relative performance of the systems varies a good deal by subject, with different areas of high integration or lesser performance: for example, the EU performs higher than any of the federations in controlling investment on subsidies to investment, but lags in harmonizing taxes and the knowledge market (patents). Australia's high score on taxes largely reflects the significant federalizing of tax collection. Canada has achieved a degree of harmony in both its income and value-added tax (VAT) regimes, while the EU has defined some parameters for the VAT regime, but has virtually no role otherwise. The US has failed to address its dysfunctional sales tax regime. Capital markets are highly integrated in most systems: the exceptions are security markets in Canada and insurance in the United States. Labour markets typically have a high level of benefits portability (less in the EU), but lower levels of integration in terms of qualifications for certain classes of work. Standards are well integrated in most markets, with the notable exception of the United States. Finally, the federal systems have had only partial or limited success in harmonizing regulations, though again the US has often "federalized" the regulation of key areas. The EU has been highly successful in identifying regulations that should be market wide and then instituting them. This table gives a sense of the range of issues that arise when governments address the functioning of their internal markets. The table is static in that it tries to capture the current situation not the areas of relative movement.

[D] How Internal-market Issues Have Arisen and Been Shaped

It is striking how differently the five systems have come at the issue of the functioning of their internal markets. In the four federations, internal-tariff barriers and transportation infrastructure were typically important at the time of the federation being formed (all are so-called "coming-together" federations, composed of previously separate units); since then, the nature of the internal-market issues has broadened, just as their salience waxed and waned with circumstances. There were periods of long neglect in all of these countries, but then a crisis or set of precipitating circumstances brought it to the fore.

In the United States, there were three waves: first in the late nineteenth century with a series of initiatives to address cartels and consumer protection, then as part of the New Deal's response to the Depression, and subsequently with a vigorous wave of post-war reform, especially up to the mid-1950s, but which progressively lost its force and had dried up by the late 1980s. Since then, the issue has had little profile and been dealt with sporadically in relation to specific sectors. In Canada, likewise, there were reforms in response to the Depression, but then little focus on internal-market issues until a Royal Commission report in the 1980s tied it in with the larger issue of North-American integration. It got some momentum as a follow on to the free-trade agreements with the United States and Mexico. In recent years, there has been a more

systematic focus on the issue in Canada than in the United States in that there have been several attempts to quantify the potential benefits of addressing internal barriers, whereas there has been none in the United States. This may appear paradoxical, in that there appear to be a number of continuing barriers within the United-States market, but no private group has chosen to take on the global issue, nor has the government. While the issue has had champions in Canada, their enthusiasm has been limited, perhaps because of the modest estimates of potential gains from addressing barriers.

Switzerland turned to these questions partly because of growing concerns over low economic growth in the 1980s, but also in response to the sense of crisis when it failed to win public endorsement for joining the European Economic Area. The need to constantly adapt to the demands of the EU also brought issues of the domestic market into focus.

Of the federations, Australia's story is perhaps the most dramatic and also impressive. The country found itself in a crisis in the 1980s, with lagging productivity, declining relative living standards, and a realization that it was, in many ways, less integrated than the European Union. The federal government, backed by a good deal of pressure from the business community, led with radical liberalizing reforms, including unilateral tariffs reductions, that soon forced a dialogue with the states regarding a larger agenda. The Australian reforms have now gone through three major phases, each of which has been backed by strong policy analysis, an integrated approach, and sustained, political direction. The country has impressive results to show for it. Right from the outset, the Australian reform exercises were cast in terms of enhancing productivity and competitiveness, not addressing internal-market barriers. The analytic studies in support of the reform programs showed potentially large gains (and these estimates were much greater than most of those in the Canadian cases because the scope of reforms, which were structural, was broader and actually did not include the reduction of internal barriers). The Australian approach has had a greater scope and energy than has been evident with the recent reform exercises in the other federations.

The EU is, of course, a case apart. A central motivation in creating the common market was a desire to bring stable peace to Europe after two terrible wars, but it was the creation of a "common market" that was chosen as the means to this end and the internal market has been the core business of the European project ever since. Like Australia, the EU has defined its task in broader terms than the removal of internal barriers (negative integration) to embrace a whole series of measures to promote the healthy functioning of the internal market (positive integration). The EU, with the Commission always taking a lead, has taken a systemic view of its challenge and it has developed key concepts, such as subsidiarity, conferral, and proportionality to guide its approach. It has also had an optimistic view of the economic benefits, supported by huge numbers of studies. Progress has not been even, and successful reform has often emerged only when a major challenge or crisis has needed to be addressed.

Thus, Australia and the EU stand out in terms of the coherence and energy of their approach. The United States had periods of major reform in the past, but its successes in recent years largely reflect the legal ability of Congress to force uniformity when specific problems

arise; there has been no strategy. Canada and Switzerland have both been much more self-conscious about an integrated reform agenda than the US, but the scope and imaginative conception of their efforts has been narrow by Australian or European standards and hobbled by the legal and political features of their federal systems.

]E[The Legal Framework for Addressing Internal-market Issues

While the broader nature and the economic challenges of these five systems obviously have shaped their different approaches to issues of their internal markets, their fundamental constitutional principles, the legislative powers of the centre, and the role of the courts have been critical for establishing the context and even the need for reform efforts at the political level.

<H2>Fundamental Judiciable Principles

The four federal constitutions and the basic treaties (the quasi-constitution) of the EU differ in the extent to which they have judiciable principles that relate to the functioning of the internal market. Such principles permit the courts to act in the absence of legislation or any governmental action if they find the principles are being abused. They have been an important factor in shaping markets in the United States and the EU, but not in Australia, Canada, or Switzerland.

In the American case, the critical principle is captured in the so-called "dormant-commerce clause," which evolved early in the jurisprudence of the republic as deriving from the federal power to regulate commerce and the prohibition of state duties on trade. While contested by various legal scholars over time, it has proven remarkably robust and been used both to strike down a variety of state laws that were deemed to be in restraint of interstate trade and to strengthen the federal commerce power. Other constitutional provisions, such as the full faith and credit clause, and the equal protection and due process clauses of the fourteenth amendment, have also served to liberalize interstate labour markets and commerce. That part of the dormantcommerce clause which is deemed to prohibit states from creating impediments to interstate commerce and the other constitutionalized principles have been significant but not central in the legal disciplines on the American internal market—court interpretations of federal legislation, bolstered by a broad interpretation of the federal commerce power, have played a greater role. However, the role of constitutional principles in protecting the internal market in the absence of federal legislation is unique amongst the four federations—in none of the others have constitutional principles had a comparable, direct effect on the operation of the internal market.

The Australian constitution does contain a provision that "trade, commerce and intercourse among the states shall... be absolutely free," but the High Court has given a restrictive interpretation to this, limiting it effectively to prohibiting explicitly protectionist discrimination. The Canadian constitution provides that manufactures "be admitted free into each of the other Provinces," though this has not proven significant. Similarly the Swiss constitution

establishes the rights to freedom of commerce and establishment, but neither right has been the source of major court rulings. In 1999, the constitution created an obligation on the confederation to bring about a uniform economic area, but this is less a principle to be enforced by the courts than a modest strengthening of the federal role in addressing internal barriers.

The closest case to the US, and even more robust in this regard, is the EU, which is not a federation. The EU does not have a constitution as such, but, as Pelkmans writes, the EC treaty "creates rights, which are effectively constitutionalized, with respect to the internal market, encapsulated in the four 'free movements' (goods, services, capital, persons if not workers) and the 'right of establishment' anywhere in the Union," as well as non-discrimination as to nationality. These provisions go to the heart of the EU's functioning because the commission and courts are empowered to protect them against transgressing member states. Of course, a whole superstructure of EU legislation and regulations has been added as well, but the case law and principles developed around these constitutionalized rights have been a central feature of the architecture of the EU and its internal market.

<H2>Powers of the Centre

Federations are classically based on the allocation of different legislative powers to the two orders of government. Some powers are exclusive, some concurrent, with the federal government normally having paramountcy in the event of conflict. In addition, there can be some general powers—such as the supremacy clause in the US—which permit the federal government to legislate in an area not specifically assigned to it. The four federal governments also have a "spending power," which means the right to spend on any object, and they may use it to oblige constituent units to bring their legislation into compliance if they are to receive conditional fiscal transfers. The range of such powers available to the four federal governments in relation to their internal market varies considerably among them. Within each federation, there have also been changes over time, both through constitutional amendment and court interpretations of the constitution.

The most powerful of the federal governments in this regard is that in Washington. It is equipped with a whole arsenal of constitutional powers that permit it to intervene on virtually all aspects of internal-market law-making. While the explicit list of federal powers in the US constitution is remarkably short, the Supreme Court has come, over time, to give a very broad interpretation to them, whether by permitting direct federal action to regulate an economic sector or in allowing federal constraints on the law-making of the states, notably through the power of pre-emption. The most directly relevant federal power is the commerce power, which has been expansively interpreted since the 1930s. Almost as important has been the Supremacy Clause of article VI, which guarantees that treaties and valid federal laws override those of the states, and the associated right of the federal government to pre-empt state laws. Finally, the federal government's authority to spend "for the general welfare" provides a potent legal tool for attaching conditions to federal transfers. While the constitution does not give the federal

government legislative authority over specific sectors, these other powers have been found adequate to permit extensive sectoral regulation.

Each of the other three federations has a trade and commerce power, but in none has it been interpreted as expansively as in the United States, and most other federal powers are also more constrained. In Australia, the High Court has limited the extent to which the trade and commerce power can reach into the regulation of intrastate trade, unless it very strongly affects interstate trade. The federal government has a corporation's power with considerable reach, including over labour matters, and it has a treaty-making power, which the High Court has found have paramountcy over state legislation, so that the federal government can enter treaties and effectively bind the states, even on subjects normally assigned to them. The federal spending power in Australia is clear and unlimited.

The Swiss and Canadian cases are characterized less by general, federal powers and more by specific sectoral competencies. In both countries, the trade and commerce power has proven weak (though in Canada an important case is now before the Supreme Court), as have more general federal powers (such as the "Peace, order and good government" federal power in Canada). The Canadian federal government has a spending power, which has been used politically to develop the country's social programs, but rarely in relation to the internal market (an exception being large, federal, fiscal incentives for the provinces to harmonize with the federal value-added tax). In Switzerland, the federal government has (since 1999) a weak mandate to bring about a "uniform economic area," and has clear authority to legislate on a series of specifics, such as road and rail transport, major public works, the environment, energy supply and transmission, cartels and restraints on competition, employee protection, and federal taxes with general principles of taxation binding on the cantons. Similarly, in Canada, the federal government has authority to "regulate trade and commerce," but this has proven of limited force against the provincial power over "property and civil rights." The federal government has specific power over fisheries, rail, banking, patents, unemployment insurance (since 1940), and uranium and atomic energy (since 1946); it shares power over agriculture and (since 1951) pensions. Attempts to strengthen the federal trade and commerce power were not agreed in the constitutional changes of 1982 (or in the abortive constitutional rounds that came later), while the provinces did get enhanced authority over natural resources.

Thus, of the four federations, the United States is that with the strongest federal powers over the internal market, while in the other three, federal powers exist in certain sectors, but are relatively weak in relation to the broader issue of internal commerce. This means that in Australia, Canada, and Switzerland, addressing many internal-market issues must be done through co-operative means.

The EU, with the central role of the Council of Ministers, necessarily requires working with the member states on major legal initiatives. Compared with the federations, the EU's powers relative to the internal market are stronger in some regards but weaker in others. They are very strong on trade policy, competition policy (including state aids), agriculture and fisheries, regulations, and some aspects of transport. They are relatively weak in relation to

energy policy, knowledge markets, and labour markets, as well as to all of the various social programs that characterize modern welfare states. The EU's biggest contrast with a federation's normal responsibilities is the absence of central taxation, which imposes major constraints both for the harmonization of tax regimes within the EU (though it has a framework for coordinating VATs) and in depriving the EU of the fiscal weight and spending clout, which could be used, with conditions attached to important fiscal transfers, as a lever to achieve its objectives.

Role of the Courts

Courts in the five systems have played important roles both in determining the extent to which fundamental principles have teeth and in delineating the respective powers of the federal government (or EU institutions) versus those of the constituent units (or member states).

The courts in the United States and the EU have given a broad interpretation to fundamental principles underlying the basic documents—in the American case, demonstrating a particularly broad reach with the invention of the "dormant commerce power"—and have played a central role in shaping the internal market. The European Court invented the critically important doctrine of mutual recognition and has made significant political findings, such as the "failure to act" by transport ministers in developing a common transport policy. The very active role of the Commission in terms of EU law implementation has further bolstered the role of the Courts and thousands of cases are dealt with, at one stage or another, by the Commission and the Courts. Their role is not always to strengthen European jurisdiction; moreover, the member states make use of the doctrine of subsidiarity and the mechanisms around it (including impact assessments) to discipline and put a brake on central rule making. Finally, the European court interprets law—it is not engaged in dispute resolution. This gives it a very strong role in interpreting market rules and enforcing them, including the right to levy fines on member states.

The United States Supreme Court has not only defended broad principles relating to the commerce clause, it has also made numerous findings that have confirmed the broad legislative powers of the federal government. These include both general powers, such as the Supremacy Clause, which has permitted pre-emption of state legislation, and specific powers. The result is that the federal government in the US has much the largest arsenal of central legislative powers of the five systems.

The Australian Court too has generally interpreted the powers of the federal government expansively. While different from the US and the EU in giving a restrictive interpretation to the constitutional provision that commerce "shall be absolutely free," it has given a broad reading to a number of enumerated heads of federal or concurrent power so that the Commonwealth government has been able effectively to govern corporations, banking, insurance, and even labour practices.

The Canadian and Swiss courts are distinguished by the relatively narrow interpretations they have given to federal powers, whether in relation to trade and commerce, other related

economic domains, or general powers. In the Canadian case, many of the critical judgments came before 1948 when its highest court was in the British House of Lords, which paradoxically, perhaps, took a very devolutionary view of Canada's basic law in general and of the commerce power in particular. Since then, the Canadian Supreme Court has largely respected the underlying approach to the commerce power, though moving gingerly to establish criteria regarding its application in particular circumstances. Swiss jurisprudence has been strongly influenced by the role of the cantonal courts as courts of first instance. The Swiss Federal Supreme Court interpreted the first *Internal Market Act* of 1996 so narrowly that the federal Parliament passed a revised and more robust version in 2004. It has been suggested that the history of jurisprudence in both Canada and Switzerland reflects judicial sensitivity to the strongly federal character of the two societies and, perhaps, the lack of integration of economic principles into their jurisprudence.

[F] The Dynamics of Political Reform

While constitutions and court interpretations serve in all five systems to establish basic principles and federal powers, the main story in every case has been political. Even judicially enforced basic principles about the internal market go only so far, and the more critical question is what federal governments or the EU have done with the legislative powers they have and how all governments within the system have dealt with issues that go beyond the competence of the central authorities.

The general picture seems to be the following; a system is more likely to have an effective political approach to developing the internal market, the more it has:

- Strong central legislative powers in relation to the internal market;
- Political leadership committed to a well-conceived reform agenda, with significant private-sector support;
- Significant institutional champions charged with conceptualizing and promoting an internal market agenda;
- A need to undertake reform in response to a crisis or emerging perceptions of a serious problem; and,
- Effective mechanisms and a co-operative approach to managing intergovernmental relations.

Some of the systems have had some of these features, but not others. A system may be constrained in undertaking reform by important, opposing interests that have influence at the centre, by the resistance of constituent units (or member states) because of specific concerns around the reforms proposed or strongly protective policies regarding their powers, by weak

mechanisms of intergovernmental co-operation or, perhaps most fatally, by a sense that the issue is not important.

The United States is clearly the system with the strongest central legislative powers. It has had intense periods of internal-market reform, notably in the thirties and early, post-war period. Internal-market reform in the US has overwhelmingly been conducted through unilateral action by the federal government, drawing on these extensive legal powers. This has included "federalizing" various sectors through the creation of regulatory agencies. There is little tradition of federal-state co-operation on internal commerce. This reflects the more general absence of executive federalism in the country and the weak mechanisms for federal-state policy coordination. The states themselves have done little co-operatively, though there are exceptions, such as the adoption of a uniform commercial sales code in all the states. Mainly, the states pursue their interests by lobbying in Washington, though their views can often differ. Despite the federal government's strong powers, it has not made full use of its powers in addressing all internal barriers, and there is a very low level of awareness or political saliency of "internal-market" issues as such. In recent years, internal-market issues have usually been dealt with by Congress, the administration and the regulatory agencies on an individual or ad hoc basis, if at all. As well, there are significant internal-market issues, such as harmonization of state taxation regimes and the control of dysfunctional tax competition, which are not easily addressed by federal legislative action. There is no institution, either within the federal government or supported by it or the private sector, that has an overview of internal-market issues and serves as a champion of internal-market reform. There is an absence not just of awareness but of general policy on the subject and of a challenge function, including among think tanks and lobby groups.

The EU provides a striking contrast. Not only has the internal market been at the core of the conception of the EU, but its institutions have been organized so as to keep internal-market issues at or near the centre of its agenda. While the EU's legislative powers are not as extensive as the American federal government's (and it has nothing like the breadth of scope that permits the US federal government to reach into virtually any area of American life), the EU's institutional capacity to analyze internal-market issues and to champion political action is structural and consistent. The US internal market is significantly more integrated than that in the EU, though there are exceptions, such as the US's lack of disciplines on investment subsidies and of harmonized standards. In those areas where the EU's legislative power is clear and where its decision making is by weighted majority voting, it has been remarkably successful in developing a properly functioning market. However, there are areas that would still be considered "core," such as services, intellectual property, and some network industries, where progress has been more limited, often because majority decision making has not been agreed. While the EU's most dramatic progress has usually been associated with areas approved for weighted majority voting, it has also been creative in the use of "variable geometry," by which coalitions of the willing have been prepared to proceed with such important policies as the European monetary policy and the Schengen common external border. Where its progress has been most limited has been in areas "beyond core," where the decision mode is full intergovernmental consensus. Even here, such progress as has been made owes a good deal to the resources, priorities and "subtle but

enormous influence" of the Commission. Of course, the crisis that hit the European Union in 2011 around sovereign debt and the integrity of the Euro demonstrated that as much as Europe has achieved an integrated market, it is still far from a fiscal union, which itself has implications for market integration.

The federation whose recent history of dealing with internal-market issues is most comparable to the EU over the past two decades is Australia. Certainly, it is the federation that has demonstrated the most sustained political and institutional commitment to addressing its internal market; its business community's pressure was key to this. As with the EU, the Australian agenda that emerged in the 1980s was broad and long term: the agenda was cast, not in terms of "barriers" to the internal market but in terms of the country's productivity and international competitiveness. This led it to address, in EU parlance, both negative and positive integration—drawing it into intrastate policies as well as interstate issues. While the Australian federal government has extensive legislative powers, these internal-markets issues went beyond its reach. Moreover, the country, as a parliamentary federation, has a tradition of executive federalism where the Commonwealth and states meet and seek agreement. Thus, the core of the Australian agenda was based on co-operative federalism. While the need for a co-operative agenda followed from the effects of the unilateral actions by the federal government to lower tariffs, co-operation did not come quickly or easily. It developed over time with strong, institutional supports focused on the internal-market issues: in the first instance, the independent Hillmer report which led to the national competition policy; subsequently the key roles of the National Competition Council and the Productivity Commission; more recently, and still to be tested, the COAG Reform Council. Agreement on reform required political will from leaders, but in some cases it also depended on the federal government's preparedness to provide several billion dollars in incentives to the states (as well as some flexibility regarding implementation). Progress on developing new regulatory rules was made possible by empowering the ministerial councils to make decisions based on special voting rules (simple majorities to two-thirds), which broke the need for consensus; these ministerial councils were supported by their own advisory bodies and independent experts.

The Canadian and Swiss cases show more modest progress, with less focus on the issues than in the EU and Australia (but more than in the United States), less leadership by the federal governments, and less co-operation by the provinces and cantons. In both cases, their stories reflect the strongly federal character not only of their constitutions, but also of their societies. Both countries are also very extroverted economies, subject to extensive competitive pressures internationally; that said, they both have protected certain sectors from international competition.

Switzerland's recent focus on its internal market was precipitated by its voters' defeat in 1992 of its proposed entry into the European Economic Area. Its economic policy leaders were already concerned with the country's weak growth and poor productivity in certain sectors. Addressing the internal market was seen as a way not just to realize direct benefits at home but also to enhance Swiss productivity and international competitiveness. Switzerland is both highly decentralized and deeply consensual, so it proceeded through extensive federal-cantonal discussions before producing three important laws in 1996: on the internal market; on technical

barriers to trade; and, on barriers to trade and competition. While all three acts were designed to bring Switzerland into harmony with the EU, they fall short in some regards, notably in the lack of disciplines on cantonal subsidies. The internal-market legislation gave a central role to the Competition Authority to monitor enforcement of the act and this role was appreciably strengthened in 2004, when the authority was empowered to file lawsuits against governments or private parties; the Competition Authority's enhanced role now in some ways compares with that of the commission in the EU. The other major driver of progress in Switzerland—more than in any of the other four systems—has been external pressure, in this case from the EU. While not part of the EU, Switzerland has entered scores of specific agreements with the EU, many of which require Swiss compliance with EU law, which can have the effect of requiring the harmonization of cantonal regulations. The cantons have also pursued agreements among themselves on some issues of harmonization that are peripheral to the internal market—such as school curricula—with limited success in that not all have participated. There is no institutional champion that is mandated to analyze and promote reform in areas of continuing internal-market weakness, such as tax competition, health-care rationalization, professional qualifications, government procurement, and cantonal subsidies. Federal leadership is weakened by the multi-party character of the federal executive.

It has become conventional wisdom in Canada that the country is rife with internal barriers and that nothing is being done about them. Neither statement is quite true. Canada's internal barriers are relatively limited and there have been efforts to address them. The issue was put onto the national agenda by a Royal Commission, which saw them and the lack of free trade with the United States as two major impediments to the country's future prosperity. After free trade was negotiated with the United States in 1989, the issue of the internal market was addressed, but with much less energy or vision than had been evident in the international negotiations. While Canada negotiated a federal-provincial agreement on internal trade, the process was managed largely as an extension of normal business and the resultant substance was modest; the federal government's commitment was limited and it offered no financial incentives to the provinces for making a more robust deal. The agreement has no legal standing, an exceptionally weak dispute settlement procedure, and feeble institutional support. The agenda was narrowly defined in terms of "barriers" to internal trade, rather than in the more ambitious terms of productivity and competitiveness, or negative and positive integration, as in Australia and the EU. It is striking that the "internal-trade" file, as it was known, was never truly integrated into a larger microeconomic agenda by the Canadian government even though it did have a broader agenda on various issues relating to the internal market; for example, it introduced a value-added tax at the federal level and invested large amounts of time and significant financial inducements to have the provinces abandon their old sales taxes in favour of new harmonized value-added taxes. It has also promoted pension reform (successfully) and an integrated securities market (so far unsuccessfully). At the same time, the federal government has been complicit in creating its own regional distorted policies in agriculture and unemployment insurance for reasons of regional politics. Canada has not had the types of institutional supports or champions around the issue of the internal market that have existed in the EU or Australia—or even in Switzerland with its Competition Authority; the last royal commission on the economy

reported in 1985 and the country's economic council was dissolved in 1993. Canada's broad debates around productivity and competitiveness have been largely separate from those around the internal market. The federal government has not managed to develop a positive and sustained dialogue on an integrated microeconomic agenda with the provinces. First ministers' meetings have become exceedingly rare and, for several years, served mainly as the occasions for federal cheques to be written, largely for health and social policy. Partly in frustration with the lack of national progress, some provinces are entering their own bilateral agreements on internal trade, while others (those, paradoxically with the smallest internal markets) are very resistant. Canada's poor performance in making progress on the internal market reflects a combination of weak constitutional provisions, a lack of serious institutional support, and the political constraints of an often fractious and sometimes fragile federation.

[G] Some Lessons

This review of experience in five advanced economic systems with multi-level governance contains some possible lessons for those who would embark on a political effort to address internal-market issues in a federal or quasi-federal system. While some factors must be taken largely as given—especially the constitution, the role of the courts, and the basic character of the society and economy—no system need be immune to reform. Success will be more likely if the following elements are included in the approach:

- Institutional champions: The successes in Australia and the EU would not have been achieved without such strong institutions as the EU Commission and Australia's Productivity Commission dedicated to promoting market reforms by providing analysis, encouragement, and even some role in enforcement or monitoring. While Swiss progress has been more modest, it has been substantially advanced by the role given to the Competition Authority. The absence of such institutional champions in both the United States and Canada explains much about their weak commitment or progress in recent years, though the need might be less in the US given the powers of some of the sectoral regulatory agencies and Congress's ability to deal with issues as they arise.

- A broad and deep agenda: Clearly, the scope and focus of an agenda is critical. The development of a broad and deep agenda—whether around productivity or positive as well as negative integration—is more likely to motivate political actors, to promise a large payoff, and to produce visible results. The contrast between the various, modest estimates of benefit made in Canada with the much more optimistic ones in Australia relates significantly to the comparative scope and depth of the two countries' agendas. It is important that the internal reform agenda be seen as part of an agenda to ensure international productivity and competitiveness. Because some policies of central governments can themselves create barriers or impede markets, they too should be included in the reform agenda.

- Creative approaches to decision making: A particularly powerful process innovation, most evident in the EU, is away from consensus decision rules when inter-governmental co-operation is needed. This can be done in stages. Because it is difficult for states or provinces to cede sovereignty, the federal government too can, as in Australia, accept to give up its veto in certain areas to be bound by the majority (however defined) in exchange for the constituent units going along with a weighted majority of some kind. Coalitions of the willing may proceed separately if need be. Creativity in machinery of government can also be helpful, e.g., having separate meetings of heads of government (and sectoral ministers) dedicated to the reform agenda, which is conceived as mutually beneficial, so as to avoid linkages with the usual business of give and take in the system. Finally, money does talk and it can make a real difference in reaching a deal. The onus here is on federal governments to use their substantial financial resources to provide incentives to bring constituent governments along, as has been done in Australia (and in Canada on the value-added tax). This will not work in the EU because the centre lacks the fiscal resources.

- Enshrining reforms in law: Political agreements with weak dispute resolution mechanisms and sanctions are no substitute for legally enshrined rules and principles, as the Canadian agreement on internal trade demonstrates. They can discredit the reform agenda and sap energy for further steps. Legal rules backed with appropriate sanctions are likely to be far more credible. While legal rules need a court or formal adjudicator, they will also be more effective if there is a champion, perhaps at arm's length from politicians, which has the right to initiate court actions to promote compliance with them. This has been central to the EU's success and has more recently been adopted in Switzerland with the strengthened mandate of the Competition Authority.

[1] The word "system" will be used as the generic noun, in that "federation" or "country" do not apply to the EU.

[2] This is not intrinsic to federalism. Germany's Bundesrat gives the lander governments a collective role in approving legislation that affects them directly. The American and Australian Senates were conceived by their founders as representing states' interests, but they now do so only weakly and they are not representative of state governments.