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Of Trade and Beer: NAFTA, The Comeau Case and Regulatory Cooperation

Maureen Irish

OF TRADE AND BEER: NAFTA, THE *COMEAU* CASE AND REGULATORY COOPERATION

Maureen Irish†

ABSTRACT: This article is adapted from the 11th Canada-United States Law Institute Distinguished Lecture given by Professor Maureen Irish at Western University Faculty of Law on October 2, 2017. The Supreme Court of Canada is hearing a case that deals with the nature of the internal market in Canada. This paper discusses trade law relating to regulatory cooperation in NAFTA, the European Union, the Canadian Free Trade Agreement and other recent Canadian international initiatives. It examines the ways in which these treaties and other arrangements respond to regulatory differences between importing and exporting jurisdictions. The challenge of how to deal with cross-border commerce involves a balance between territorial control and the practical need to cooperate.

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I. INTRODUCTION

The *Comeau* case before the Supreme Court of Canada[1] raises many questions about the nature of the internal market in Canada. At the time of

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† Professor Emerita, Faculty of Law, University of Windsor. I am deeply honored to be invited to deliver the 11th CUSLI Annual Distinguished Lecture. I express my thanks to Dr. Chios Carmody, the Canadian National Director of the Canada-United States Law Institute, for his dedication to the work of the Institute. I am also grateful to the late Professor Henry King of Case Western Reserve University School of Law for his enthusiastic guidance of CUSLI activities over many years. I received many helpful comments from audience members at the time of the lecture at the Faculty of Law, Western University on October 2, 2017, as well as at a Dean's Lunch and Learn seminar later that month at the University of Windsor. The paper has benefited from the assistance of Anthony D'Angelo, with funding provided by the Faculty of Law, University of Windsor.

[1] R. v Comeau, 2016 N.B.P.C. 3, [2016] NBJ No. 87 (Can.) (QL); leave to appeal denied [2016] NBJ No. 232 (Can.) (QL); leave to appeal granted [2017] S.C.C.A No. 25 (Can.).

writing, pleadings have been filed and arguments have been presented. Legal analysis has focused on constitutional law doctrine governing the powers of the provincial and federal governments. This paper takes a different approach. Based in international trade law, it discusses several ways in which trade treaties and similar agreements respond to cross-border regulatory differences. Assuming governments with appropriate regulatory authority have arrived at rules that differ from each other, can commerce take place across borders? If so, in what circumstances and with what qualifications?

In the fall of 2012, Gérard Comeau, a resident of New Brunswick, bought 15 cases of beer, 2 bottles of whiskey and 1 bottle of liqueur in the province of Quebec. The prices he paid were lower than the prices from the New Brunswick provincial monopoly, the New Brunswick Liquor Corporation. When he drove back to New Brunswick, his vehicle was intercepted and the goods were seized. He was charged with possession of liquor not purchased from the Liquor Corporation, in a quantity beyond the permitted limit. The amount of the fine was $292.50 (Canadian dollars). Mr. Comeau contested the charge, arguing that it was contrary to section 121 of the *Constitution Act, 1867*. The trial judge decided in his favour. The New Brunswick Court of Appeal declined to hear an appeal. Leave to appeal was granted by the Supreme Court of Canada.

The New Brunswick Liquor Corporation has a monopoly on importing liquor into the province, pursuant to section 3(1) of the federal *Importation of Intoxicating Liquors Act*,[2] which was originally adopted in 1928. That legislation provides that liquor may be imported into a province only by the provincial monopolies, with some exceptions, none of which applied in this case. The *Gold Seal* decision of the Supreme Court of Canada in 1921 affirmed that the federal government has the power to prohibit the importing of liquor into a province pursuant to section 91 of the Constitution Act, exercising its jurisdiction over trade and commerce as well as over the peace, order and good government of Canada.[3]

Section 121 of the *Constitution Act, 1867* provides as follows:

> 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.[4]

In his decision in *Comeau*, LeBlanc J. of the New Brunswick Provincial Court heard evidence on the understanding of the phrase "admitted free" in 1867. Some *dicta* in the *Gold Seal* decision[5] interpreted that phrase as referring only to customs duties or charges, which would be prohibited in trade between provinces in the new Dominion. LeBlanc J. determined that, at the time, "admitted free"

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[2] R.S.C. 1985, c. I-13 (Can.).

[3] Gold Seal Ltd v Alberta (Attorney General), [1921], 62 S.C.R. 424 (Can.) [hereinafter *Gold Seal*]. The Privy Council had previously ruled that provinces did not have jurisdiction to prohibit the importation of intoxicating liquor: Attorney General (Ontario) v Attorney General (Canada), [1896] A.C. 348 (Can.); [1896] U.K.P.C. 20.

[4] 30 & 31 Vict., c.3 (U.K.), *reprinted in* R.S.C. 1985, app II, no 5 (Can.).

[5] Gold Seal, *supra* note 3.

had a wider meaning than merely "admitted free of duty."[6] Part of the impetus for Confederation had been a reaction to the abrogation of the Elgin-Marcy Reciprocity Treaty (1854-1866),[7] under which free trade had taken place between the British North American colonies and the United States. The British colonies had experienced unfettered trade in natural products pursuant to the treaty, which the United States first undermined by search and seizure procedures and other border impediments, before finally abrogating the treaty in 1866. LeBlanc J. concluded that the colonies wanted unfettered trade within the new Union without non-tariff barriers:

> I have been convinced that their intent was to replace the loss of the free trade American market with a free trade Canadian market. The strong and harmonious economic union envisaged by our Fathers of Confederation had to have been based on free trade, not on punishing internal non-tariff barriers, such as had been put in place by the Americans.[8]

LeBlanc J. found that the New Brunswick provision violated section 121 of the *Constitution Act* and dismissed the charge against Mr. Comeau.

In the appeal before the Supreme Court of Canada, those opposed to LeBlanc J.'s conclusion have presented constitutional arguments in support of provincial regulatory power, using case law since *Gold Seal.*[9] In contrast, the focus of a trade law analysis is not on the validity of regulatory power, but rather on whether goods can cross a border and gain market entry in the territory of import. If there are regulatory differences between the home jurisdiction and the intended market, are goods nevertheless admissible? Must they meet all regulations in the host market, or is compliance with the law of the home jurisdiction sufficient? If market access is available, what conditions can be imposed and how will a decision be made?

The paper examines this issue of admissibility of goods in several contexts. The first section discusses the trade model, using the North American Free Trade Agreement as an example.[10] The second section addresses the common market of the European Union, where the free movement of goods among Member-States is one of the EU's foundational principles. The third section is the regulatory model in the Canadian Free Trade Agreement among the federal, provincial and territorial governments, which took effect on July 1, 2017. Next, the paper

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[6] Comeau, *supra* note 1, at 69.

[7] Treaty between Great Britain and the United States of America on Fisheries, Commerce, and Navigation in North America, signed at Washington June 5, 1854, in force September 9, 1854, terminated March 17, 1866, *Bevans, Treaties and Other International Agreements of the United States of America, 1776-1949*, vol 12, p 116.

[8] Comeau, *supra* note 1, at para 90.

[9] Cases frequently cited in submissions filed with the Court are: Murphy v Canadian Pacific Railway, [1958] S.C.R. 626 (Can.); Reference re Agricultural Products Marketing Act, [1978] 2 SCR 1198; Canadian Egg Marketing Agency v Richardson, [1998] 3 S.C.R 157 (Can.).

[10] North American Free Trade Agreement, Can-Mex-U.S., art. 1105, Dec 17, 1992, 32 I.L.M. 289 [hereinafter *NAFTA*].

discusses current updates on Canada's involvement in regulatory cooperation initiatives with the United States, and Canada's more recent trade treaties.

The analysis is presented as background for debates over the interpretation of section 121 in *Comeau* and ongoing issues with respect to trade in the North American context. There are several ways in which regulatory differences can be addressed across provincial and international borders. The substantive goals and the relative power of the parties will influence choices made. It is also important to pay attention to the differing procedures, including burdens of proof and roles for private sector interests. Cooperation across borders can take differing forms under various legal frameworks.

II. TRADE MODEL – NAFTA

In international law, countries control their own borders. A country is not required to admit goods that it considers harmful or in breach of domestic rules. A potential import could be unacceptable for a variety of reasons, even if it has met all of the regulations that applied in its home country. The country of import has jurisdiction to decide on matters relating to imported goods and as a result, has the discretionary power to block entry whenever it wishes.

In trade agreements, countries limit their power to refuse imports. Typically, no Party to the trade agreement is permitted to block or put a quantitative restriction on imports except as set out in the agreement.[11] Of course, we now have more regulations than the United States or the British North American colonies had in the mid-nineteenth century. There are many regulations that a potential import could fail to meet, and differences are likely in regulatory choices made by countries. There will be differences in the history and the context for regulation, in the balance of power among interests involved in the establishment of the rules, in the usual ways of making and enforcing laws and regulations, in the views of appropriate regulatory space, in the domestic choices of levels of protection, and in the respect accorded to certain policies and objectives chosen by sovereign governments. Regulatory differences could be large. But if they are small and inconsequential, should they prevent cross-border commerce? More particularly, should they prevent trade in goods?

In international trade law, we can approach the question of regulatory differences in one of three basic ways. For *national treatment*, the imported good is judged in accordance with the rules in the country of import, and those rules must not discriminate against imports. This is the obligation in Article III of GATT, one of the agreements that fall under the World Trade Organization.[12]

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[11] "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party . . . ." General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. XI:1 [hereinafter *GATT*], incorporated into NAFTA by art 309(1).

[12] "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their

The national treatment approach does not require cooperation with other countries, since domestic rules apply; no coordination is necessary. The domestic law in force from time to time has effect, provided that it does not discriminate. The domestic rule governs, whatever that rule may be, so long as it does not accord greater benefits to like-domestic products.

In the second, more forceful approach at the other end of the spectrum, there might be efforts to *harmonize* the rules in the two countries involved, encouraging them to adopt the same provisions through standardization. If regulations are harmonized, once goods meet the rules in the home country then they also meet the rules in the host country of import. Harmonization calls for attention to and knowledge of regulatory developments in other jurisdictions.

A third approach, *recognition of equivalence*, is also possible. It is this middle ground that is the focus of this paper. If equivalence is recognized, the host country decides that the rules in the home country are acceptable and the good can be imported even though it does not meet the importing country's domestic rules. For example, lumber could be sufficiently strong even though strength is measured in a slightly different way, or the nutritional label on food might not conform to every detail of the relevant regulation, but could still contain sufficient information for consumers. The domestic rules contain different requirements, but the goods are nonetheless permitted to enter and circulate freely in the host country. Admissibility of goods that do not meet the domestic regulations in the host country depends on this question of equivalence.

In NAFTA, Canada, the United *States* and Mexico use all three approaches. Goods from another NAFTA country are entitled to *national treatment* that is no less favourable than the treatment of like domestic products in the country of import.[13] The domestic regulations of the host country apply, so long as they do not discriminate against imports and so long as they meet various other requirements for regulatory measures in NAFTA.[14]

NAFTA also contains provisions that use the second approach, promoting *harmonization* of regulations that govern goods. Some provisions in Chapter 7 on sanitary and phytosanitary (SPS) measures encourage NAFTA countries to adopt relevant international standards, guidelines or recommendations.[15] If a NAFTA country uses international standards, then its regulatory measures are presumed to be in conformity with other provisions in Chapter 7.[16] If another Party believes that its trade is harmed by a measure that differs from an international norm, the regulating Party can be obliged to give reasons in writing

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internal sale, offering for sale, purchase, transportation, distribution or use." GATT, *supra* note 11, at art. III:4.

[13] NAFTA, *supra* note 10, at art. 301(1), incorporating GATT art III.

[14] For example, regulatory measures must not present unnecessary obstacles to trade (NAFTA, *Id.* at arts. 712(5) and 904(4)).

[15] *Id.* at art. 713(1). See Agreement on the Application of Sanitary and Phytosanitary Measures, Marrakesh Agreement establishing the World Trade Organization, done at Marrakesh 15 April 1994, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement], art 3(1).

[16] *Id.* at art. 713(2).

for the measure.[17] Procedure and presumptions, thus, are central. A further provision promoting harmonization is the statement that a NAFTA country should consider the SPS measures of its NAFTA partners when it develops its own provisions.[18]

Non-SPS general regulatory measures are governed by NAFTA Chapter 9 on technical barriers to trade [TBT], which displays a similar pattern of presumption and burden-shifting to encourage harmonization through the adoption of international standards.[19] If a NAFTA country uses international standards, then its regulatory measures are presumed to be in conformity with other provisions in Chapter 9.[20] In addition, NAFTA countries are required to make their TBT measures compatible with each other, while taking account of international standardization.[21] Compatibility is defined as meaning that the measures must be identical or equivalent or have the effect of permitting substitution of goods in place of one another for the same purpose.[22] While harmonization is not obligatory, it is promoted through these shifts in burdens of proof. In addition, obligations of consultation apply throughout the NAFTA territory as regulations are being developed. These "notice and comment" provisions are available to interested persons, not only to the Parties (i.e. governments).[23]

NAFTA also has provisions using the third approach, *recognition of equivalence***,** for measures of an exporting NAFTA partner country.[24] For SPS measures, NAFTA countries are obliged to grant such recognition if the partner country demonstrates that its measures meet the level of protection chosen by the country of import.[25] The country of import may refuse recognition on scientific grounds,[26] subject to the obligation of giving written reasons on request.[27] For TBT measures, the importing country must accept a technical regulation[28] of another NAFTA partner as equivalent to its own if the exporting country demonstrates that the regulation is adequate to meet the legitimate objectives of

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[17] *Id.* at art. 713(4).

[18] *Id*. at art. 714(4).

[19] *Id.* at art. 905.

[20] *Id*. at arts. 905(2) and 904. See Agreement on Technical Barriers to Trade, Marrakesh Agreement establishing the World Trade Organization, done at Marrakesh 15 April 1994, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement], art 2(5).

[21] *Id.* at arts. 906(2) and 906(3).

[22] *Id.* at art. 915.

[23] *Id.* at art. 718(1) (comment by "interested persons," not solely another government); art. 909(1) (comment by "interested persons," not solely another government), art. 909(2).

[24] See Shirley Coffield, "Commonality of Standards – Implications for Sovereignty – A U.S. Perspective" 24 *Canada United States L.J.* 235 (1998).

[25] NAFTA, *supra* note 10, at art. 714(2)(a).

[26] *Id.* at art. 714(2)(b).

[27] *Id.* at art. 714(2)(c). The WTO SPS Agreement is not as demanding. There is an obligation to recognize, but no duty to give reasons if recognition is refused (SPS Agreement, *supra* note 15, at art, 4.1).

[28] A technical regulation is one that requires mandatory compliance: NAFTA, *supra* note 10, art. 915.

the importing country.[29] The importing country may refuse to recognize the technical regulation, subject to the obligation to provide written reasons on request.[30] In addition, NAFTA countries are obliged to make their TBT measures compatible.[31]

Recognition of equivalence involves awareness of rules in other territorial jurisdictions and a tolerance for minor differences. To operate on a reliable commercial basis, recognition must also be dynamic, as regulatory practice is subject to change. Consultation with other regulators is crucial, along with opportunities for the receipt of information from the private sector.[32] NAFTA contains carefully-drafted provisions on burdens of proof and other procedural issues. This attention to the administrative process is a common feature in more modern developments in trade law on regulatory cooperation.

In the *Comeau* decision, it appears that the alternatives for border measures are limited to either barriers or unfettered free trade. The analysis of the NAFTA trade model illustrates, however, that there are more possibilities. In NAFTA, cross-border commerce involves a complex web of presumptions, standardization, rules, explanation of reasons, and consultations. In *Comeau*, there was no evidence that the imported products failed to meet regulatory standards in New Brunswick. The issue was control by the provincial import monopoly. If the reasoning of LeBlanc J. is affirmed in the Supreme Court of Canada, however, many provincial regulations could be at risk. In addition to liquor policies, these would include agricultural marketing boards, product labelling and standards, and future regulations on the sale of cannabis. For any goods crossing borders, the structure for regulatory cooperation would need to be addressed.

The *Comeau* case involves a constitutional claim presented by a private party. In contrast, in NAFTA, regulatory cooperation is largely government-controlled. If LeBlanc J.'s decision is affirmed, private claimants will have a much-enhanced role in the operation of the internal market across Canada. Private sector interests are clearly affected by regulatory differences. On October 2nd, 2017, workers at the Fiat-Chrysler Assembly plant in Windsor, Ontario began a four-week layoff due to regulatory changes. The 2017 Dodge Caravan vehicles produced at the factory did not meet new U.S. standards for side airbags. They could be sold in Canada and Mexico, but not in the United States. The layoff provided time for re-design and re-tooling to bring the 2018 model

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[29] *Id.* at art. 906(4). Legitimate objectives are defined in art. 915(1) as including safety, protection of human, animal or plant life or health, the environment, consumers, and sustainable development. Consideration may be given to appropriate fundamental climatic or other geographical factors, technological or infrastructural factors and scientific justification, but not to the protection of domestic production. The WTO TBT Agreement is not as demanding as NAFTA. Members are to give positive consideration to measures of other Members, but there is no obligation to grant equivalence. (TBT Agreement, *supra* note 20, art. 2.7.)

[30] NAFTA, *supra* note 10, at art. 906(5).

[31] *Id.* at art. 906(2), art. 906(3). Measures must be identical or equivalent or have the effect of permitting substitution of goods in place of one another for the same purpose: *Id.* art. 915.

[32] *Id.* at arts. 718(1), 909(1), and 909(2).

into conformity with the requirements in all three NAFTA partners.[33] The next section discusses the law of the European Union, in which private parties have a major role in the recognition of equivalence among the Member-States.

III. COMMON MARKET MODEL – EUROPEAN UNION

In the law of the European Union (EU), the free movement of goods in the internal market is a fundamental principle. The EU has stronger central institutions than those in the regional trade model, with rule-making power. These institutions have the power to adopt regulations and directives with force throughout the EU, displacing regulatory power in Member States. In the European Union, thus, *harmonization* of rules occurs through the central institutions.[34]

The European Union has a counterpart of GATT Article XI/NAFTA Article 309 banning prohibitions and restrictions on imports, but goes further than those provisions. Article 34 of the Treaty on the Functioning of the European Union (TFEU)[35] is the source of the *equivalence* function. It bans not just quantitative restrictions, but also measures equivalent to quantitative restrictions:

> Article 34: Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Members States.

There are some exceptions to TFEU Article 34:

> Article 36: The provisions of Article 34 . . . shall not preclude prohibitions or restrictions on imports . . . justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

The meaning of these provisions has been examined in decisions of the European Court of Justice (ECJ) interpreting EU law.[36] The EU Commission

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[33] Mary Caton, "Windsor Assembly Plant facing four-week shutdown," WINDSOR STAR, (Sept.13, 2017), http://windsorstar.com/news/local-news/windsor-assembly-plant-facing-four-week-shutdown.

[34] See Lorna Woods, Philippa Watson & Marios Costa, STEINER & WOODS EU LAW, 25-43, 55-84 (13th ed. 2017) [hereinafter *Woods et al.*, STEINER & WOODS].

[35] Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2012 O.J. (C 326) 1). The material is this section refers to the European Union intending to cover the current Union as well as its predecessor institutions, the European Economic Community and the European Community. References are to current Article numbers in the TFEU.

[36] The material in this section mentions several cases to illustrate the operation of Articles 34 and 36. For more comprehensive analysis, see: Stephen Weatherill, THE INTERNAL MARKET AS A LEGAL CONCEPT (2017); *see also* Jarrod Tudor, "Consumer Protection and the Free Movement of Goods in the European Union: The Ability of Member-States to Block the Entry

may bring proceedings before the Court alleging that a Member-State is failing to abide by its treaty obligations. Proceedings may also be brought by another Member-State. In EU law, regulations are directly applicable in the Member-States and other parts of delegated legislation are also capable of having direct effects for private parties. In the result, private parties may have claims based on EU law against governments or against other private parties. In domestic litigation in the Union, if a private party makes an argument based on EU law, the domestic tribunal may refer a question to the ECJ for interpretation. In those references, the ECJ rules on the interpretation of EU law, and the domestic tribunal then uses that ruling to make its own decision in the case before it. The European Union has a strong centralized institutional structure. Judicial and legislative functions occur at the centre. Private parties may have rights and obligations in EU law.[37]

There are many decisions of the ECJ interpreting Articles 34 and 36. Three are key: *Dassonville* (1974),[38] *Cassis de Dijon* (1979),[39] *Keck and Mithouard* (1993).[40] The *Dassonville* decision involved a Belgian law requiring a certificate of authenticity for imported spirits bearing a designation of origin. The scotch whisky at issue in the case was imported from France. A certificate of authenticity was difficult to obtain once the goods were already in circulation in the EU and were not imported directly from the country of production, the United Kingdom. The ECJ ruled that Article 34 was violated and stated that:

> All trading rules . . . which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.[41]

Thus, Article 34 has a wide scope. It does not require proof of discrimination between imports and domestic goods, and the effect of the hindrance to trade can be indirect and merely potential.

The *Cassis de Dijon* decision involved liqueur imported into Germany from France. The goods did not contain sufficient alcohol to conform to the German rule setting a minimum alcohol level for fruit liqueurs. The court decided that:

> Obstacles to movement within the Community resulting from disparities between the national laws . . . must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal

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of Goods across Borders" 39:3 Houston J. Int'l L. 557 (2017); *see also* Alicia Hinarejos, "Free Movement, Federalism and Institutional Choice: A Canada-EU Comparison" University of Cambridge Faculty of Law Legal Studies Research Paper Series 1 (December 2012).

[37] See generally, Woods et al., STEINER & WOODS, *supra* note 34, at 113-45.

[38] Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837 (EU), [hereinafter *Dassonville*].

[39] Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649 (EU), [hereinafter *Cassis de Dijon*].

[40] Joined Cases, C-267 & C-268/91, Keck v Mithouard, 1993 E.C.R. I-6097 (EU), [hereinafter *Keck and Mithouard*].

[41] Dassonville, *supra* note 38, at 852.

> supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.[42]

Germany argued that its measure prevented consumer confusion over the alcoholic content of similar beverages, which could lead to overconsumption and negative health effects. The ECJ was not persuaded and ruled that a minimum content requirement was inconsistent with Article 34. The products, therefore, could enter and circulate freely in Germany since they met the requirements that were set in France, the home country. It may be noted that the list of permissible justifications mentioned by the ECJ in *Cassis de Dijon* is wider than the list of public policy grounds in Article 36. Since Article 34 has received an expansive interpretation, it is appropriate that the reasons to justify a measure would not be restricted.

The decision in *Keck and Mithouard* limits the wide application of Article 34 somewhat. The case involved prosecutions in French competition law for reselling goods at a loss. The ECJ ruled that:

> [T]he application . . . of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States . . . so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.[43]

The decision confirms that certain measures that do not impede market access are too remote from trade to be within the scope of Article 34.[44] For these measures, and for Article 34 measures that are found to be justified by the host state, there is no obligation to recognize equivalence, and goods are subject to the host country's regulations as if they were domestically produced. To eliminate the regulatory difference between the two states, an effort of harmonization or cooperation will be required at a political level. If Article 34 forces recognition of equivalence, it has some deregulatory effects since the host country's measure is not sufficient to block nonconforming imports. The central EU institutions retain general regulatory power, however, should they wish to exercise it.[45]

If a measure is covered by Article 34 and not justified by the host state, then the nonconforming goods can enter and circulate freely. In EU law, the onus is on the host state to justify its measure. It is not the responsibility of the complaining party (which could be the home country or a private entity) to convince the host state to grant recognition. In the EU, the free movement of goods is one of the fundamental principles. This is quite different from the

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[42] Cassis de Dijon, *supra* note 39, at 662.

[43] Keck and Mithouard, *supra* note 40, at I-6131.

[44] *See* Case C-221/15, Etablissements Fr. Colruyt NV, 2016 (EU) (prohibition on selling tobacco products for less than the amount on the revenue stamp not a measure having an effect equivalent to a quantitative restriction and thus not prohibited by Article 34).

[45] Stephen Weatherill, *The Principle of Mutual Recognition: It Doesn't Work Because It Doesn't Exist*, EUR. L.J. 1, (2017).

approach in the NAFTA trade model, where the onus is on the home country to justify its measure and the host country merely needs to give written reasons if it refuses to allow entry.

If a measure is determined to be equivalent to a quantitative restriction, the ECJ could find that it is justified. For example, a ban on a cheese additive by the Netherlands was a measure equivalent to a quantitative restriction because the additive was used in cheese circulating elsewhere in the EU. The Court, however, found that the ban was a measure taken to protect health and the Netherlands was not required to allow the nonconforming cheese to enter.[46] Health and environmental protection justified the regulatory requirement that renewable energy be purchased from local suppliers.[47] Similarly, a system for the registration of chemicals was also justified by policies promoting health and environmental protection.[48] Worker safety and the protection of animals have permitted regulatory differences that would otherwise be contrary to Article 34.[49] An Italian prohibition on trailers for mopeds was covered by Article 34, but upheld by the Court as it promoted road safety.[50]

In some cases, the ECJ might give its interpretation of EU law and then leave it to the courts of the Member State to determine whether the measure is justified. For example, a Swedish ban on the use of jet skis, except in designated waterways, was equivalent to a quantitative restriction because the designated waters were so limited that the actual possible use was negligible. The Court determined that a general prohibition on use was not necessary to achieve the aim of protecting the environment. The task of overseeing the designation of additional waterways was left to the national court.[51] A Scottish measure setting a minimum price per unit of alcohol for retail sales of alcoholic beverages was covered by Article 34 because it hindered access to the market by cheaper imports. The aim of the measure was to protect health by reducing consumption. A proportionality analysis was needed to determine whether a suggested alternate measure, in this case an excise tax, would be just as effective in meeting the intended level of protection while being less restrictive of trade. That analysis was left to the national court with the guidance that other potential benefits of a tax such as revenue generation would not be determinative.[52]

In the *Visnapuu* decision,[53] a seller from an adjacent Member-State was avoiding excise taxes while operating without a retail license from the

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[46] Case 53/80, Officier van Justitie v. Koninklijke Kaasfabriek Eyssen BV, 1981 E.C.R. 410 (EU).

[47] Case C-379/98, PreussenElektra AG v. Schleswag AG, 2001 E.C.R. I-2099 (EU); *see also* Case C-573/12, Ålands Vindkraft AB v Energimyndigheten, 2014 (EU) (requirement to surrender some tradable certificates annually in accordance with amount of energy produced was justified, not disproportionate).

[48] Case C-472/14, Canadian Oil Company Sweden AB v. Anders Ranté, 2016 (EU).

[49] Case 188/84, Commission v. France, 1986 E.C.R. 431 (EU); Case C-219/07, Nationale Raad van Dierenkwekers en Liefhebbers VZW v Belgishche Staat, 2008 E.C.R. I-4475 (EU).

[50] Case C-110/05, Commission v. Italy, 2009 E.C.R. I-519 (EU).

[51] Case C-142/05, Åklagaren v. Mickelsson and Roos, 2009 E.C.R. I-4273 (EU).

[52] Case C-333/14, Scotch Whisky Association v. Lord Advocate, 2015 (EU).

[53] Case C-198/14, Visnapuu v. Kihlakunnansyyttäjä, 2015 (EU), [hereinafter *Visnapuu*].

government monopoly in Finland for the sale of alcoholic beverages. The seller took orders for alcoholic beverages in Estonia on "www.alcotaxi.eu" and then arranged for delivery of the products to consumers in Finland. The ECJ determined that Article 34 covered the licensing requirement. The Finnish government argued that the licensing system protected health as it permitted limits on the sale of alcohol to minors and inebriated persons and controlled the hours of retail operation. The government also argued that an exception from licensing for sales by certain manufacturers using traditional, artisanal methods did not undermine the goal of health protection and was not proof of arbitrary discrimination or a disguised restriction on trade between Member States. The ECJ determined that the licensing system could be justified, and left to the national courts the task of assessing whether the objective could be achieved by less restrictive means and whether the exception involved arbitrary discrimination or a disguised restriction.[54]

If the measure is covered by Article 34 and is not justified by the host state, then recognition of equivalence is required. Despite nonconformity, goods can be imported and will circulate freely in the market of the host state. For example, in the *Walter Rau* case, shortly after the *Cassis de Dijon* decision, a Belgian rule that margarine could only be sold in cube-shaped blocks was held to be a measure equivalent to a quantitative restriction that Belgium was unable to justify under Article 36.[55] Preventing consumer confusion between margarine and butter could be accomplished through adequate labelling, a less restrictive measure. The nonconforming goods thus could circulate freely in the Belgian market, as there was no need to require that margarine be sold only in one particular form.[56] Similarly, a German rule limiting the permitted ingredients in beer was not effective to ban imports from elsewhere in the common market that contained other additives,[57] and an Italian rule that pasta could only be made from durum wheat did not block imports of other pasta.[58]

In the *Danish Beer Bottles* decision,[59] a deposit and return system for beer and soft drink bottles was generally supported by the objective of environmental protection. Nevertheless, a quantity limit on the use of non-approved containers by any single producer did not pass proportionality review, since it would apply to all containers outside the general system even if a producer could guarantee the effectiveness of its own system for returns.[60] The Court will consider the justification advanced and determine whether the measure is necessary, or whether the objective could be obtained by using measures less restrictive of trade. Recently, the Court ruled that while Hungary could require customers buying contact lenses to have appropriate medical advice, it could not ban sales

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[54] *Id.*

[55] Case 261/81, Wallter Rau Lebensmittelwerke v. De Smedt PvbA, 1982 E.C.R. 3961 (EU) [hereinafter *Walter Rau*].

[56] *Id.*

[57] Case 178/84, Commission v. Germany, 1987 E.C.R. 1227 (EU).

[58] Case 407/85, 3 Glocken GmbH v. USL Centro-Sud, 1988 E.C.R. 4233 (EU).

[59] Case 302/86, Commission v. Denmark, [1988] E.C.R. 4607 (EU), [hereinafter *Danish Beer Bottles*].

[60] *Id*.

over the internet.[61] Spain could not prohibit retailers of tobacco from importing directly rather than buying from approved domestic wholesalers.[62] Proportionality often has a central role in the decision on justification of a measure (i.e. whether the measure is necessary to meet the stated objective and whether the objective can be achieved by other means that are less restrictive of trade).[63]

Given the importance of the free movement of goods in the EU, the host state bears the burden of defending any measure found to infringe Article 34. In addition to proportionality, justification may require the availability of a procedure for any intended importers who want to argue for recognition of equivalence for their goods. In the recent *Noria* decision, the ECJ ruled that a French prohibition on food supplements whose vitamin or mineral content exceeded national limits was not justified.[64] The supplements were lawfully in circulation elsewhere in the common market. One reason why the ban was not upheld was that it failed to offer a procedure for recognition that was readily accessible to traders and could be completed in a reasonable time.[65]

For matters covered by Article 34, there is a significant burden on the host state if it refuses recognition and denies entry to goods. It must show justification linked to a ground listed in Article 36 or another important public policy. The European Court of Justice and domestic courts can test the proportionality of the justification advanced and the availability of less restrictive measures. If the justification is ruled inadequate, equivalence must be recognized and goods will circulate freely. The disputes arise in a legal framework that allows private parties to raise issues by way of domestic litigation. Those private parties must have access to a reasonably prompt procedure for requests to have equivalence recognized.

Article 34 can be seen as having a deregulatory effect, but analysis must be respectful of a Member State's legitimate regulatory objectives and chosen level of protection. As well, the central institutions in the EU have rule-making power to address regulatory differences. It may be noted that if Article 34 has a wide

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[61] Case C-108/09, Ker-Optika bt v. ÀNTSZ Dél-dunántúli Regionális Intézete, 2010 E.C.R. I-12213 (EU).

[62] Case C-456/10, Asociación Nacional de Expendedores de Tabaco y timbre (ANETT) v. Administración del Estado, 2012 (EU).

[63] For other recent instances in which measures were not justified because they were not proportionate, see: Case C-421/09, Humanplasma GmbH v. Republik Österreich, 2010 E.C.R. I-12869 (EU): import prohibition on blood products from donations that were not entirely unpaid or without reimbursement of costs; *see also* Case C-161/09, Kakavetsos-Fragkopoulos AE Epexergasias kai Emporias Stafias v. Nomarchiaki Aftodioikisi Korinthias, 2011 E.C.R. I-915 (EU): prohibition on transport of currants outside area of production; *see also* Case C-481/12, UAB 'Juvelta' v. VI 'Lietuvos prabavimo rūmai', 2014 (EU): prohibition on marketing of precious metals not bearing a hallmark stamp from the home country.

[64] Case C-672/15, Noria Distribution SARL v. Procureur de la République, 2017 (EU), [hereinafter *Noria*].

[65] *Id*. This dispute between France and the Commission is a longstanding one: Case C-344/90, Commission v. France, 1992 E.C.R. I-4719 (EU); Case C-24/00, Commission v. France, 2004 E.C.R. I-1277 (EU); Case C-95/01, Greenham v. Abel, 2004 E.C.R. I-1333 (EU); Case C-333/08, Commission v. France, 2010 E.C.R. I-757 (EU).

scope, then goods circulate without the need for making regulations identical in detail and fewer differences are left to be addressed through harmonization at the centre.

The burden on the host state in the EU common market model differs significantly from the much lighter burden in the trade model, where central institutions are weaker. In the NAFTA trade model outlined above, the main burden is on the exporting state, while the host state must provide written reasons if it decides to refuse recognition.

IV. REGULATORY MODEL – CANADIAN FREE TRADE AGREEMENT

In Canada's internal market, constitutional law determines the distribution of regulatory powers among the federal, provincial and territorial governments. On July 1, 2017, the Canadian Free Trade Agreement (CFTA) entered into force among those levels of government,[66] replacing the Agreement on Internal Trade of 1995.[67] The CFTA is intended to reduce barriers to the free movement of persons, goods, services and investments across the country. It is a political agreement that does not alter the regulatory authority of the federal, provincial or territorial governments,[68] and respects their legislative competences.[69]

Guiding principles of the CFTA are listed in Article 102, including the need to reconcile regulatory measures. At the same time, the Parties recognize that:

> [T]he right to regulate is a basic and fundamental attribute of government and the decision of a party not to adopt or maintain a particular measure shall not affect the right of any other Party to adopt or maintain such a measure.[70]

Like other agreements on trade in goods, the CFTA prohibits discrimination against imports, subject to legitimate objectives.[71] In contrast to other agreements, it does not require recognition of equivalence.[72] Instead, the CFTA has a separate chapter on regulatory cooperation.[73]

Chapter 4 of the CFTA provides notice and comment obligations for new regulations that will have a significant effect on trade or investment.[74] To

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[66] Canadian Free Trade Agreement S.C. 2017, c. 33, s. 219 (repealing Agreement on Internal Trade, Can. Gaz. 1995.1.1323) available at https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf [hereinafter *CFTA*].

[67] Agreement on Internal Trade, Can. Gaz. 1995.1.1323 (as repealed by the Canadian Free Trade Agreement S.C 2017, c. 33, s. 219) available at https://www.ait-aci.ca/agreement-on-internal-trade/.

[68] CFTA, *supra* note 66, at art. 1200.

[69] *Id*. at Preamble.

[70] *Id*. at art. 102(2)(a).

[71] *Id*. at arts. 201 and 202.

[72] Except for Article 302(8) dealing with recognition of conformity assessment procedures for technical barriers to trade (TBT).

[73] CFTA, *supra* note 66, at Chapter 4, Regulatory Notification, Reconciliation, and Cooperation.

[74] *Id*. at art. 402.

encourage reconciliation and cooperation, the chapter establishes the Regulatory Reconciliation and Cooperation Table (RCT).[75] The RCT leads work on the negotiation of reconciliation agreements among the Parties and cooperation on future measures. The outcome of a reconciliation agreement is that regulatory measures are no longer a barrier to trade.[76] The agreement can achieve this result through harmonization, mutual recognition, equivalence or other means.[77] In accordance with Article 102(2)(a), a government may choose not to enter a reconciliation agreement and, in that case, identify its measures as an exception.[78] A reconciliation agreement shall include a process to address changing circumstances.[79]

The RCT process is gentler than the trade model and the common market model, since the host state is not required to give an explanation, or carry any burden at all, large or small. The process may be effective in encouraging governments to work together to lower barriers to trade in goods. Since regulators decide on the sectors for negotiation, their work will be policy-based and not governed by unpredictable choices made in litigation among private parties. Joint development of future regulations may be easier within a federation than between two sovereign countries. The RCT process emphasizes the role of regulatory authorities, giving them control and encouraging cooperation.

The CFTA provides for dispute settlement between governments and also dispute settlement that is person-to-government. In both cases, monetary penalty orders are possible. In government-to-government dispute settlement, the amount of a monetary order is paid to the winning party.[80] In the case of person-to-government disputes, the amount of any monetary order is paid to the Internal Trade Secretariat for deposit into a fund to promote trade, investment and labour mobility in Canada.[81] A reconciliation agreement negotiated pursuant to Chapter 4 of the CFTA may include provisions for dispute resolution such as mediation.[82] Person-to-government dispute settlement does not apply to Chapter 4,[83] but that may not prohibit all consideration of private interests in a reconciliation agreement. The role for private litigants in the CFTA is significantly more restricted than in the common market model of the European Union.

If a province enters into a CFTA reconciliation agreement and then fails to bring the result into its legislation and regulations, or if it is alleged that there are discrepancies between the provincial rules and the reconciliation agreement, does a private party have any recourse? Would the reconciliation agreement be relevant in a court proceeding? The Alberta Court of Appeal dealt with this issue concerning the Trade, Investment and Labour Mobility Agreement (TILMA)

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[75] *Id*. at art. 404.
[76] *Id*. at Chapter 13, Definitions, "reconciliation."
[77] *Id*. at Annex 404 (14)(b).
[78] *Id*. at art. 405.
[79] *Id*. at Annex 404 (14)(e).
[80] *Id*. at art. 1012(1).
[81] *Id*. at arts. 1029(3) and 1032.
[82] *Id*. at Annex 404 (15).
[83] *Id*. at art. 1001(2).

between British Columbia and Alberta,[84] negotiated pursuant to the previous Agreement on Internal Trade. A dentist registered to practise in British Columbia applied for registration in Alberta. The application was denied due to a history of complaints in British Columbia. The Registrar determined that the applicant had not shown evidence of good character and reputation, as required by the relevant regulation in Alberta. The applicant argued that, due to TILMA, his registration in BC should be accepted as *prima facie* evidence meeting that requirement. He cited a dispute settlement panel report under TILMA which concluded that there was a reverse onus on the incoming jurisdiction to disprove good character and reputation if a worker was already registered in a reciprocating jurisdiction.[85]

The Alberta Court of Appeal looked to the presumption that since the legislature intends to comply with its obligations in international law, any statutory ambiguity should be resolved in favour of an interpretation that is consistent with those obligations. The Court did not find ambiguity, however, in the Alberta regulation. It clearly put the burden of proof on the applicant to demonstrate good character and he had failed to meet that burden.[86]

While the result in the case is unsurprising, it is odd to treat TILMA, the AIT and, by extension, the CFTA as if they create international legal obligations. They are political agreements that are not intended to be binding in domestic or international law. The statutory presumption that applies to international law is thus out of place. Unless a new presumption is developing for agreements such as the CFTA, they are simply part of persuasive authority that might be cited to a court but do not create an onus or a burden pointing in any particular direction. When these agreements are carefully drafted in legal language that clearly borrows from international treaties, it is not out of the question that a presumption of consistency would be appropriate, at least in some cases. Whether or not there is such a presumption, if the statutory language is unambiguous (as it was in the case before the Alberta Court of Appeal) then the statute governs and parties are left to whatever dispute settlement procedures are provided in the CFTA or similar agreement.

The CFTA is a political agreement among Canada's provincial, territorial and federal governments. Its provisions concerning regulatory cooperation are less onerous than those of both the trade model and the common market model

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[84] Trade, Investment and Labour Mobility Agreement, into effect April 1, 2007, text available at www.tilma.ca. See further: New West Partnership Trade Agreement, into effect July 1, 2010, text available at www.newwestpartnership.ca; *see also* Robin Hansen & Heather Heavin, *What's New in the New West Partnership Trade Agreement – The NWPTA and the Agreement on Internal Trade Compared* 73/2 Sask L Rev 197 (2010).

[85] *Report of the Article 27 Panel Concerning the Dispute Between Alberta and British Columbia Regarding a Measure by the British Columbia College of Social Workers* (September 28, 2012), available at www.tilma.ca.

[86] Lum v. Council of Alberta Dental Association and College, Review Panel, 2016 ABCA 154, [2016] AJ No 485 (Can). In the labor mobility provisions of the CFTA, a regulatory authority may require evidence of good character as a condition for recognition of certification (CFTA, *supra*, note 66, at art. 705(3)(e)). Note the CFTA definition: "worker means an individual, whether employed, self-employed, or unemployed, who performs or seeks to perform work for pay or profit" (set out in CFTA Chapter 13).

outlined earlier. In the CFTA, emphasis is on the regulatory authorities and on structures to encourage cooperation among them.

V. INTERNATIONAL REGULATORY COOPERATION

This section discusses three initiatives in which Canada is involved – two international treaties and one informal international arrangement. Recent international trade treaties are moving beyond the NAFTA structure to require more detail and more dialogue. In response to the reality of global supply chains, it appears that regulators are strengthening cooperation with their counterparts in other jurisdictions.

A. Regulatory Cooperation Council

Canada and the United States have a long history of intergovernmental cooperation, including border management initiatives involving treaties and less formal arrangements.[87] After the terrorist attack of September 11, 2001, the two countries signed a Smart Border Declaration on December 12, 2001.[88] The Declaration was accompanied by a 30-point Action Plan designed to promote collaboration in identifying and counteracting security threats while expediting the flow of low-risk traffic. The United States and Mexico signed a similar Border Partnership Agreement and Action Plan in March 2002. Many proposals were made for reform around this time. Trade-related suggestions included a customs union, a common market, a common security perimeter and a North American approach to regulation.[89] In March 2005, the three NAFTA countries announced the Security and Prosperity Partnership of North America to facilitate cooperation on security and economic issues. As part of the prosperity agenda, the leaders of the three countries released a regulatory cooperation framework in August 2007, which emphasized transparency in rulemaking and the goal of minimizing "unnecessarily divergent or duplicative requirements" in North America.[90]

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[87] See, for example, *Agreement Between Canada and the United States of American Regarding Mutual Assistance and Co-operation Between their Customs Administrations*, June 20, 1984, Can TS 1985/23 (entered into force Jan. 8, 1985.); *see also* Canada-United States Accord on Our Shared Border (announced Feb. 25, 1995). The 1995 Accord was guided by a coordinating committee made up of officials from international affairs, immigration, and customs agencies from both countries.

[88] "The Smart Border Declaration: Building a Smart Border for the 21st Century on the Foundation of A North American Zone of Confidence", in Canada, *Canada-US Border Summit: Background Information - Detroit, September 9, 2002,* (Ottawa: Foreign Affairs and International Trade, 2002) at 19, text available online at http://gac.canadiana.ca/view/ooe.b3697162E/19?r=0&s=1.

[89] Maureen Irish, *Regulatory Convergence, Security and Global Administrative Law in Canada-United States Trade* (2009) 12:2 *Journal of International Economic Law* 333; *Building a North American Community*, Report of an Independent Task Force, Co-Chairs John P. Manley, Pedro Aspe, William F. Weld, Council on Foreign Relations, 2005, 22-26; John Noble, *Fortress America or Fortress North America?* (2005) 11 Law and Business Review of the Americas 461.

[90] Security and Prosperity Partnership of North America, Common Regulatory Principles, Principle #5, August 21, 2007, Montebello, Quebec.

In February 2011, Canada and the United States issued the Beyond the Border Declaration.[91] The Action Plan on security issues addressed early identification of threats, risk management, enforcement cooperation, and infrastructure. At the same time, the two countries launched the United States-Canada Regulatory Cooperation Council to enhance economic competitiveness through cooperation designed to reduce unnecessary regulatory differences and align future regulations to the extent possible and appropriate, consistent with domestic law. On May 19, 2010, the United States and Mexico established the United States-Mexico High Level Regulatory Cooperation Council, which issued a Work Plan on February 28, 2012. On May 1, 2012, U.S. President Obama issued an executive order on international regulatory cooperation.[92] For regulatory actions having significant international impact, the order directs federal agencies to consider regulatory approaches of foreign governments with which the United States has a regulatory cooperation council work plan. For 2016-17, there are 23 technical work plans under the US-Canada Regulatory Cooperation Council covering several topics, including pharmaceuticals, medical devices, workplace chemicals, pesticides, meat inspections, motor vehicle standards, rail safety, marine safety, chemicals management, energy efficiency standards and alternative fuel use in transportation.

These efforts by Canada, the United States and Mexico to enhance regulatory cooperation can be seen as flowing from the obligations in NAFTA to consult and to make technical measures compatible if possible. The intensity of regulatory cooperation may vary over time and by administrations. The Regulatory Cooperation Council is not a binding arrangement but there is a base for cooperation in NAFTA. If NAFTA's provisions on recognition of equivalence have a mild deregulatory effect, then perhaps this consultation initiative is somewhat re-regulatory, as it emphasizes the role of governments and cooperation among them. It is clear that harmonization and centralization in the Regulatory Cooperation Council are much less demanding than in the European Union.

In 2006, Michael Hart suggested that Canada pursue regulatory convergence with the United States through the preparation of a database listing regulations made by the Canadian federal and provincial governments, along with suggested counterpart regulations in the federal and state systems of the United States.[93] The two countries could then work to address what he called the "tyranny of small differences", such as rules about which drugs require prescriptions or what equipment is mandatory on new car sales.[94] The Regulatory Cooperation Council

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[91] Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness (February 4, 2011). Public Safety Canada, text available at https://www.publicsafety.gc.ca/cnt/ brdr-strtgs/bynd-th-brdr/ctn-pln-en.aspx.

[92] *Promoting International Regulatory Cooperation*, Executive Order 13609 of May 1, 2012, Federal Register, vol. 77, no. 87, Friday May 4, 2012, p. 26413.

[93] Michael Hart, *Steer or Drift? Taking Charge of Canada-US Regulatory Convergence*, C.D. Howe Institute Commentary, No 229, March 2006. Hart endorses a greater use of mutual recognition, as well as the NAFTA emphasis on compatibility, rather than full harmonization (at 25-26).

[94] *Id*. at 3, 19-21.

that eventually emerged does not go that far. It is more gradual and flexible, which may be suitable in an area that is subject to constant change. Robert Wolfe has cautioned against approaches to security and border management that are overly institutional, in contrast to decades of experience in Canada-United States relations that has involved more informal cooperation among officials of the two countries.[95] Cooperation between the two governments can, of course, take place with or without NAFTA. The Regulatory Cooperation Council is an example of regulatory cooperation controlled solely by governments, without a formal role for the private sector.[96]

1. Comprehensive Economic and Trade Agreement (Canada-European Union)

The Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA) took effect provisionally on September 21, 2017.[97] The CETA provisions on regulatory cooperation reflect current thinking that is not limited to harmonization and recognition of equivalence as the only available techniques. In a world of global supply chains, national regulators will have difficulty inspecting and controlling products through the whole production process. It becomes almost a practical necessity to rely on inspections done by others elsewhere, whether by other governments or by private entities. As production crosses borders, it is possible for administrators to share technical data for risk assessment. If supply chains are integrated within one corporate structure or if inputs are from a common source, information exchanges among regulators can lead to cost savings whether or not regulations are fully harmonized.[98]

The CETA chapter on SPS measures is similar to NAFTA in that it contains a requirement to recognize equivalence if the country of export demonstrates that its measure meets the level of SPS protection chosen by the host country. Annex 5-E to the Agreement lists the SPS measures that are recognized as equivalent for exports from the EU to Canada and exports from Canada to the EU.[99] In addition, CETA deals with the challenge of regulatory change. If a listed measure is modified, the unmodified measure should continue to apply until the importing Party communicates the modification, along with any special conditions that

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[95] Robert Wolfe, Where's the Beef? Law, Institutions and the Canada-US Border in Thomas J Courchene, Donald J Savoie and Daniel Schwanen (eds.), *Thinking North America, The Art of the State,* vol. II, no. 6 (Institute for Research on Public Policy, Montreal, 2004).

[96] See Armand de Mestral and Jan Winter, "Giving Direct Effect to NAFTA: Analysis of Issues" in Thomas J Courchene, Donald J Savoie and Daniel Schwanen (eds.), *Thinking North America, The Art of the State,* vol. II, no. 6 (Institute for Research on Public Policy, Montreal, 2004).

[97] Comprehensive Economic and Trade Agreement, Oct. 30, 2016, text available at www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux [hereinafter *CETA*]. (Entered into force provisionally Sept. 21, 2017); *see also* Stanko S. Krstic, *Regulatory Cooperation to Remove Non-Tariff Barriers to Trade in Products: Key Challenges and Opportunities for the Canada-EU Comprehensive Trade Agreement,* 39/1 Legal Issues of Economic Integration 3 (2012).

[98] Robert Carberry, Remarks at the Canada – US Regulatory Cooperation and Food Safety discussion panel, Oct. 23, 2017, Canada Institute, Woodrow Wilson Center, Washington, DC.

[99] CETA, *supra* note 97, at Annex 5-E.

must be met.[100] The chapter sets out processes for regulatory cooperation including access for testing, audits and inspection as needed, information exchanges, and a joint management committee to monitor annual progress.[101] The CETA chapter on TBT measures encourages cooperation to promote compatibility and equivalence of technical regulations, especially through requirements for exchanges of information among states during the development of regulations, as well as procedures for comments from private parties.[102] Supervision is done through the CETA Committee on Trade in Goods. Technical ad hoc working groups may be established to resolve any disputes.[103]

CETA chapter 21 on regulatory cooperation recognizes regulatory compatibility, recognition of equivalence and convergence as ways to encourage competitiveness and innovation.[104] In the chapter, cooperation activities may include wide-ranging information sharing, concurrent or joint risk assessment, cooperation on data collection, adoption of similar assumptions and methodologies, cooperative research and exchanges of expertise.[105] In rulemaking, the Parties shall consider each other's comparable regulations or initiatives.[106] They are also expected to allow sufficient time for comments by interested persons.[107] A Regulatory Cooperation Forum is established to promote the implementation of the chapter.[108]

2. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

Canada has agreed to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), a new free trade agreement with Australia, Brunei Darussalam, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.[109] On regulatory cooperation, the CPTPP bears many similarities to the CETA. The SPS chapter contains obligations on the recognition of equivalence. On request, the host country is to explain the

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[100] CETA, *supra* note 97, at Annex 5-D 2. See art. 5.6. As well, the Party intending to modify should give notice of this intention in time to allow for comments and amendments: Annex 5-D para 1(b). A Party should also give notification for general rule-making in an area for which it has recognized equivalence: *id.*

[101] CETA, *supra* note 97, at arts. 5.7 and 5.14.

[102] *Id.* at arts 4.3 to 4.6.

[103] *Id.* at art. 4.7.

[104] *Id.* at arts. 21.1(4)(b) and 21.3(d).

[105] *Id.* at art. 21.4.

[106] *Id.* at art. 21.5.

[107] *Id.* at art. 21.4(e).

[108] *Id.* at art. 21.6.

[109] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Feb. 2016 (entered into force, Mar. 8, 2018, and incorporating, by reference, The Trans-Pacific Partnership Agreement, Feb. 2016) text available at http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng [hereinafter *CPTPP*]. The United States was involved in initial negotiations for the agreement, but withdrew in early 2017. For background, see Yong-Shik Lee, "Future of Trans-Pacific Partnership Agreement: Just a Dead Trade Initiative or a Meaningful Model for the North-South Economic and Trade Integration?" (2017) 51/5 *J World Trade* 907.

objective of its SPS measure and identify the risk. It shall also explain the equivalence process. If equivalence is refused, the host country must provide the rationale for its decision.[110] The TBT chapter contains detailed obligations on regulatory dialogue and information exchange.[111] Both chapters provide for notice and comment by private parties.[112] The chapter on regulatory coherence also requires opportunities for private sector input and encourages countries to take account of the regulatory measures of other Parties.[113]

When compared to NAFTA, both CETA and the CPTPP impose a greater burden on the host state for transparency and information exchange. Both reflect work on regulatory cooperation taking place in the WTO Committee on Sanitary and Phytosanitary Measures[114] and the WTO Committee on Technical Barriers to Trade.[115] At least, it appears that thinking on regulatory cooperation has evolved in the more than twenty years between NAFTA and the CPTPP negotiations.[116]

VI. BORDERS

This paper has discussed regulatory cooperation across interprovincial and international borders. The *Comeau* decision involves potentially another border, since Mr. Comeau did not make all of his purchases from the Quebec provincial liquor authority, la Société d'Alcools and its agents, but rather some were from a vendor on the Listuguj First Nation Reserve at Pointe-à-la-Croix, Quebec. Regulatory cooperation is an important topic in international trade and may also arise in the external relations of First Nations. The paper has examined several ways of designing the legal frameworks.

NAFTA contains some obligations to recognize equivalence, and a requirement of written reasons if the host country declines to recognize. In the EU, the duty to recognize is much stronger and the relevant procedures are subject to significant control by the private sector. The CFTA, in contrast, has little private sector involvement, but emphasizes the role of regulatory agencies and procedures for transparency, information and comments. Recent international initiatives demonstrate the response to global supply chains, with enhanced information exchanges and opportunities for cooperation in inspections and risk assessment where appropriate. Facts inevitably spill across borders. The question of how to deal with commercial relations involves a balance between

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[110] CPTPP, *supra* note 109, at art. 7.8.

[111] *Id.* at arts. 8.7, 8.9 to 8.10.

[112] *Id.* at arts. 7.13.4 and 8.7.1.

[113] *Id.* at arts. 25.2.2(d), 25.8, and 25.5.8.

[114] See WTO Committee on Sanitary and Phytosanitary Measures, Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures (adopted 26 Oct. 2001), G/SPS/19/Rev.2, 23 July 2004.

[115] See WTO Committee on Technical Barriers to Trade, Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement, G/TBT/9, Nov. 2000, para 20 and Annex 4 (G/TBT/1/Rev.13, at 54-56).

[116] See further David Gantz, The Spaghetti Bowl Revisited: Coexistence of Regional Trade Agreements Such as NAFTA with the Trans-Pacific Partnership, 48/2 *Geo J Int'l L* 557 (2017).

territorial control and the need to cooperate in some way. Effective regulation requires at least an awareness of developments elsewhere and some means for exchanges of information and comments. In a commercial context, procedures for involvement of the private sector are important. Trade agreements and similar arrangements provide examples of approaches to regulatory differences that can inform the discussion of cooperation across borders in general, including those among the Canadian provinces, whatever the result in the *Comeau* litigation.