Osgoode Hall Law Journal

Volume 57
Issue 2 *Volume 57, Issue 2 (Fall 2020)*

Article 4

1-14-2021

Internalizing International Trade Law: A Critical Analysis of the Canadian Free Trade Agreement's National Treatment Jurisprudence

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Abstract

The Canadian Free Trade Agreement 2017 (CFTA), which replaced the Agreement on Internal Trade 1995 (AIT), provides a forum to resolve internal trade disputes against provinces, territories, and the federal government. Under its predecessor, the AIT, thirteen dispute panels and two appeal panels convened to adjudicate such claims; to date, no cases have yet been brought under the CFTA. Despite its lengthy lifespan and repeated use, little literature exists that critically examines the substantive findings and analytical methods found in the AIT's jurisprudence (case law now inherited by the CFTA). Academic dialogue on the legal reasoning found within the body of rulings of Canada's unique dispute forum can offer future CFTA adjudicators insights so as to improve the coherence, clarity, and consistency of their decisions. This article focuses, in particular, on the state of CFTA jurisprudence on the national treatment obligation, which is analogous to article III of the World Trade Organization's General Agreement on Tariffs and Trade 1994 (GATT). By investigating the trajectory of CFTA case law on the national treatment obligation, while interweaving insights from WTO jurisprudence, this article is able to identify the current state of doctrine, as well as continued shortcomings and uncertainties. In addition, this method of research can identify possible insights from WTO jurisprudence to fill analytical gaps. Especially in light of the Supreme Court of Canada's firm 2018 pronouncement in R v Comeau, which essentially shuttered court doors to domestic trade disputes, this research is of particular relevance as CFTA dispute panels going forward will only take on a heightened significance as a means to address internal barriers to trade.

Internalizing International Trade Law: A Critical Analysis of the Canadian Free Trade Agreement's National Treatment Jurisprudence

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This article focuses, in particular, on the state of CFTA jurisprudence on the national treatment obligation, which is analogous to article III of the World Trade Organization's *General Agreement on Tariffs and Trade* 1994 (GATT). By investigating the trajectory of CFTA case law on the national treatment obligation, while interweaving insights from WTO jurisprudence, this article is able to identify the current state of doctrine, as well as continued shortcomings and uncertainties. In addition, this method of research can identify possible insights from WTO jurisprudence to fill analytical gaps. Especially in light of the Supreme Court of Canada's firm 2018 pronouncement in *R v Comeau*, which essentially shuttered court doors to domestic trade disputes, this research is of particular relevance as CFTA dispute panels going forward will only take on a heightened significance as a means to address internal barriers to trade.

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OVER THE TWENTY-FIVE YEAR lifespan of the nation's internal trade agreement regime, litigants have sought resolution to internal trade conflicts from the proffered adjudicatory process fifteen times.[1] In each of these cases, ad hoc panels or appeal panels were convened to interpret and analyze the *Agreement on Internal Trade* 1995 (AIT) obligations in the context of the dispute at hand. The reports issued by the dispute resolution bodies at the conclusion of the adjudicatory proceedings provide disputing parties the reasoning for the decisions. However, perhaps more consequentially, this collection of fifteen decisions issued by adjudicatory panels serves as the accumulated jurisprudence of the AIT (which was then inherited by the CFTA upon its replacement of the AIT in 2017). This set of case law provides meaningful guidance to Canadian governments and private parties as it clarifies the contours of the obligations providing for free trade within Canada.

In the years since its creation, almost no secondary literature has been published that examines the reasoning and analysis found within the amassed CFTA jurisprudence. In seeking to initiate a scholarly dialogue on the content

1. *Canadian Free Trade Agreement–Consolidated Version*, 24 April 2020, art 201(1), online (pdf): *Internal Trade Secretariat* <www.cfta-alec.ca/wp-content/uploads/2020/04/CFTA-Consolidated-Text-Final-English_April-24-2020.pdf> [perma.cc/HXB2-CU25] [*CFTA*].

of internal trade dispute reports, this article explores in detail the trajectory of CFTA case law on one underpinning obligation in particular, found at article 201(1) of the CFTA: national treatment.[2] This article examines in detail seven key cases that have propelled the state of the CFTA's national treatment doctrine to where it stands today.

Before assessing the progression of panel and appellate panel interpretations of the national treatment obligation, this article will first describe the origins of the CFTA and build the case for robust scholarly literature in this domain.[3]

I. IMPETUS FOR AN INTERNAL TRADE AGREEMENT

At section 121 of the *Constitution Act, 1867*, the drafters of Canada's foundational document included a provision that, read literally, should have created a nation where unfettered internal free trade prevailed. The text of the section provides that "[a]ll 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] Though the text of section 121 might have suggested that Canada would grow up to become a tightly integrated economic unit, by the time the CFTA came into existence in 1995, this had not become the case. In the 1980s, at a time when nations were liberalizing trade with one another, a number of scholars attempted to calculate the economic cost of internal barriers to trade. In 1983, John Whalley estimated that existing barriers to the flow of goods cost Canada one-half of one per cent of Canadian GNP each year (590 million CAD in today's dollars).[5] Later, in 1991, Todd Rutley estimated economy-wide effects on all trade flows, not just on those of goods, of 6.5 billion CAD per year.[6] The story of the CFTA's origin stems from this disconnect between theorized national

2. *Ibid*.
3. Where the standalone word "agreement" is used in this article, it refers to the CFTA. References to the AIT will be made explicit.
4. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 121.
5. John Whalley, "Induced Distortions of Interprovincial Activity: An Overview of Issues" in Michael Trebilcock et al, eds, *Federalism and the Canadian Economic Union* (Ontario Economic Council, 1983) 161 at 190-92.
6. Kathleen Macmillan & Patrick Grady, "Inter-Provincial Barriers to Internal Trade in Goods, Services and Flows of Capital: Policy, Knowledge Gaps and Research Issues" (2007) Industry Canada Working Paper No 2007-11, citing Todd Rutley, "'Canada 1993': A Plan for the Creation of a Single Economic Market in Canada," (Canadian Manufacturers' Association, 1991) at 3, online (pdf): <www.mpra.ub.uni-muenchen.de/8709/1/MPRA_paper_8709.pdf> [perma.cc/HEN2-D4VE].

economic unity as manifested in the Constitution and the economic reality that empirical economics could quantify.

Internal barriers to trade can largely be explained by the Supreme Court of Canada's delicate navigation of the division of power between the federal government, the provinces, and the territories, in its narrow construction of section 121's meaning. In narrowly interpreting its implication, the Court has sought to preserve the ability of provinces to regulate trade, even at the expense of national economic integration. Jurisprudence stemming as far back as *Gold Seal Ltd v Dominion Express Co* in 1921 severely circumscribes the power of section 121. The most recent articulation of its narrow scope comes from the 9–0 decision of *R v Comeau* which ruled that for a law to violate section 121, it must "in essence [restrict] trade across a provincial border."[7] A litigant may use section 121 to fight a tariff or its functional equivalent, but not much else. Without further guidance from the legislative branch of government, the Court is highly unlikely to deviate from its nearly one-hundred-year understanding of the provision.

This state of affairs stands in marked contrast with that which has come to exist in the United States. Over the course of nearly two-hundred years, dating back to *Gibbons v Ogden* in 1824, the United States Supreme Court has cultivated and employed a doctrine known as the Dormant Commerce Clause (DCC).[8] Sourcing to the US federal government's authority over commerce in article I of the US Constitution, the DCC's underlying principle is that state and local laws are unconstitutional should they unduly burden interstate commerce.[9] Even in the absence of US federal law, the US Court deploys the doctrine to deny protectionist rule making of the states.

With the unavailability of an analogous judicial remedy to strike down those protectionist laws and regulations erected by Canadian governments that impede on the flow of goods, services, people, and investments, the Canadian polity came together and negotiated a political agreement that might serve almost the same purpose.

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7. *Gold Seal Ltd v Alberta (AG)* (1921), 62 SCR 424; *R v Comeau*, 2018 SCC 15 at para 8.
8. *Gibbons v Ogden*, 22 US (9 Wheat) 1 (1824).
9. US Const, art I, § 8, cl 3. See generally Donald H Regan, "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause" (1986) 84 Mich L Rev 1091.

II. THE CANADIAN FREE TRADE AGREEMENT

As a result of the judicial impasse before the Court, as well as the failure of constitutional amendment at the Charlottetown Accords which may have otherwise strengthened constitutional free trade structures, the provinces, the territories, and the federal government came together in the spirit of cooperative federalism and crafted a political solution.[10] Initially termed the *Agreement on Internal Trade* (AIT) at its genesis in 1995, but renamed the *Canadian Free Trade Agreement* at its re-negotiation in 2017, the CFTA imposes an additional set of internal trade rules on Canadian governments.[11] These rules do not carry the force of law, nor do they displace constitutional obligations.[12] Rather, they are simply a set of rules that each party to the agreement has agreed to comply with. Parties can exit the agreement with relative ease after providing the other parties twelve months' notice, and the penalties for non-compliance—in practice—have been *de minimis* (though the text of the Agreement does technically allow for penalties of up to ten million dollars in certain circumstances).[13] In a contemporary context, the CFTA obligations provide a norm for government actors to follow, rather than a binding rule.

Owing to the era of rapid globalization in which it was conceived, the obligations found within the agreement find firm parallels with provisions in the CFTA's international counterparts, such as the *General Agreement on Tariffs and*

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10. See Katherine Swinton, "Courting Our Way to Economic Integration: Judicial Review and the Canadian Economic Union" (1995) 25 Can Bus LJ 280 at 281, 288; Noemi Gal-Or, "In Search of Unity in Separateness: Interprovincial Trade, Territory, and Canadian Federalism" (1998) 9 NJCL 307 at 313.
11. *CFTA*, *supra* note 1; *Agreement on Internal Trade–Consolidated Version*, 18 January 2000, online (pdf): <www.cfta-alec.ca/wp-content/uploads/2017/06/Consolidated-with-14th-Protocol-final-draft.pdf> [perma.cc/6J7S-7H3F] [*AIT*]. This article acknowledges that the CFTA is a re-negotiated form of the AIT. However, as will be justified later in the article, the content of the two agreements is substantially similar, and thus for ease of reference, this article uses the short form CFTA to refer to both the CFTA as well as the period when it was called the AIT. It specifies the AIT only where it is necessary to distinguish it from the CFTA.
12. *CFTA*, *supra* note 1, art 1200.
13. See *CFTA*, *supra* note 1, art 1214. See also *ibid*, Annex 1011.2, 1028.2. To date, the greatest monetary award made publicly available was for 31,191 CAD. See *Report of the Article 1716 Panel Concerning the Dispute Between the Certified General Accountants Association of New Brunswick and Québec Regarding Québec's Measures Governing the Practice of Public Accounting* (19 August 2005) at 24, online (pdf): Internal Trade Secretariat <www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/1_eng.pdf> [perma.cc/D9V4-UYUL].

Trade (GATT) and the *North American Free Trade Agreement*, 1994 (NAFTA).[14] For example, article 201(2) of the CFTA serves as a national treatment provision for investments;[15] a similar provision is found at article 1102 of the NAFTA.[16] Another instance of parallelism is in respect of the most favoured nation obligation imposed on the federal government at article 201(3) of the CFTA, and an analogous most favoured nation obligation found at article I of the GATT.[17]

Not only does the CFTA impose trade obligations akin to those found between sovereign nations, but it also provides for a dispute settlement mechanism similar to those provided by bilateral and multilateral trade and investment agreements. Parties to the CFTA, and even private individuals, may initiate proceedings that ultimately lead to the creation of an ad hoc dispute panel to decide on a trade obstacle.[18] This is similar to that which the World Trade Organization's (WTO) Dispute Settlement Body offers for trade disputes under the GATT, or that which the International Centre for Settlement of Investment Disputes (ICSID) framework provides to adjudicate an investment dispute under an applicable bilateral investment treaty.[19] The current version of the NAFTA also provides an arbitration process for investment disputes at chapter eleven, though this will change following the ratification and implementation of its successor agreement, the *Canada–US–Mexico Agreement* (CUSMA).[20] Under the CUSMA, the investor–state dispute settlement mechanism between the United States and

14. *General Agreement on Tariffs and Trade*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187 (1994) [*GATT*]; *North American Free Trade Agreement between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [*NAFTA*].
15. Article 201(2) of the *CFTA* is the successor to article 401(2)(a) of the *AIT*; *CFTA*, *supra* note 1, art 201(2); *AIT*, *supra* note 11, art 401(2)(a).
16. *NAFTA*, *supra* note 14, art 1102.
17. CFTA Article 201(3) is the successor to AIT Article 401(1)(b). See *CFTA*, *supra* note 1, art 201(3); *AIT*, *supra* note 11, art 401(1)(b). A most favoured nation (MFN) obligation requires a party to accord no less favourable treatment to another party's goods than the treatment it offers a third party's goods.
18. *CFTA*, *supra* note 1, arts 1004, 1018.
19. See *Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401 (entered into force 1 January 1995) [*DSU*]; *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159.
20. *NAFTA*, *supra* note 14, c 11. See also *Canada–United States–Mexico Agreement (CUSMA)*, 30 November 2018, online: *Government of Canada* <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum> [perma.cc/U4WP-MDEJ] [*CUSMA*] (entry into force expected 2020).

Canada will discontinue three years after the termination of NAFTA.[21] Disputes between Canada and Mexico will be governed by the mechanism found in the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP).[22] Notwithstanding this particular development in respect of NAFTA, at its core, the CFTA mimics the international trade and investment law framework and applies an analogous model to the domestic context of Canada.

One novel feature of the CFTA regime that may herald a schism between the systems of internal trade and international trade arose when the CFTA replaced the AIT in 2017. Canadian governments included a regulatory cooperation and reconciliation process at chapter four of the CFTA. This mechanism emphasizes inter-governmental regulatory dialogue amongst Canadian governments to resolve divergent policies that impair trade.[23] This process that the CFTA provides for also encourages the nationwide adoption of common measures.[24] In contrast, the primary emphasis of international structures, such as the GATT, is the mutual recognition of divergent regulation.[25] Over time, the CFTA reconciliation mechanism may serve as the primary means for trade barrier resolution, rather than recourse to litigation. Ultimately, this may erode the analogy between the CFTA and international trade dispute resolution mechanisms.

A. LACK OF SECONDARY LITERATURE EXAMINING CFTA JURISPRUDENCE

In the course of the AIT's lifetime[26] there were fifteen occasions when complainants triggered the dispute resolution mechanism to convene a panel or appeal panel (together, "presiding body") that then ultimately released a report. These reports provide a presiding body's reasoning behind its decisions. CFTA reports are not binding on future cases (this was also true under the AIT). At article 1208, the CFTA provides that a presiding body "*may* take into account any relevant interpretations and findings" contained in the report of a previous presiding

21. *Ibid*, Annex 14-C.
22. *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 18 March 2018, ATS 23 (entered into force 20 December 2018).
23. *CFTA*, *supra* note 1, arts 400-408.
24. *Ibid*.
25. See generally Anabela Correia de Brito, Céline Kauffmann & Jacques Pelkmans, "The Contribution of Mutual Recognition to International Regulatory Co-Operation" (2016) OECD Regulatory Policy Working Paper No 2, online: <doi.org/10.1787/5jm56fqsfxmx-en>.
26. This period is inclusive of the time when the CFTA existed as its predecessor agreement, the AIT.

body established under the AIT or the CFTA.[27] At most, they may be seen as a persuasive authority. Nonetheless, later-in-time presiding bodies convened under the AIT routinely cited the reasoning and doctrine developed in previous AIT dispute reports for authority on an approach to a legal issue. Over the span of the fifteen reports issued by AIT presiding bodies, adjudicators have built upon and refined their interpretations of internal trade obligations in order to manage disputes over domestic trade barriers. This jurisprudence remains relevant for disputes under the CFTA.

Despite repeated use of the internal trade regime's dispute resolution mechanism, there exists little scholarly literature that critically assesses the jurisprudence, developing practices, and emergent doctrines that have inculcated thus far over the lifespan of the AIT/CFTA. Secondary scholarship plays an important role in refining the reasoning and methodology of any judicial system, and the lack of dialogue on CFTA adjudicatory outcomes hinders its efficacy and legitimacy. An uncertain state of CFTA jurisprudence can create two problems. First, it makes it difficult for government policy makers to craft CFTA-compliant measures. Second, it limits the ability of prospective litigants to assess their rights and entitlements under the CFTA in order to make an informed decision on whether to launch a CFTA complaint.

The focus of this article is on the national treatment obligation found at CFTA article 201(1).[28] Though this provision has experienced repeated interpretation by an overwhelming majority of dispute panels that have convened under the AIT, there exists no secondary literature that examines presiding body decisions on this issue in depth. This article explores the development of the jurisprudence on the CFTA's national treatment provision, while interweaving insights from GATT case law on its analogous national treatment provision at article III. In doing so, this article will identify not only the state of the law, but also the sources of continued uncertainty. Drawing on WTO jurisprudence, this article offers insights that may help fill analytical gaps.

The need for robust discussion about the reasoning found within the AIT panel and appeal panel reports is particularly strong in light of the fact that all CFTA presiding bodies (as did those under the AIT) convene on an ad hoc basis. There is no standing adjudicatory body that helps build institutional knowledge; instead, in every case, complainant and respondent parties nominate one adjudicator each to serve on the presiding body, and these two nominated

27. *CFTA*, *supra* note 1, art 1208 [emphasis added].
28. The national treatment obligation under the AIT was at article 401, while its general exceptions clause was at article 404. See *AIT*, *supra* note 11, arts 401, 404.

individuals decide between themselves on a third adjudicator.[29] Though one-third of AIT panelists have occupied over sixty per cent of all adjudicatory roles, very few have participated in the adjudication of more than two internal trade disputes.[30] Thus, unlike in the domestic judicial context where judges who are appointed for lengthy tenures can build a knowledge-base and amass experience deciding disputes, most CFTA panelists will have never participated in a CFTA dispute, and are unlikely to participate in another.[31] At the WTO, though panels are convened in a similar ad hoc fashion, there exists an Appellate Body that hears appeals from panel decisions, and whose members are elected for terms of up to eight years.[32]

The differences between a standing and ad hoc adjudicatory body are meaningful, and they underscore the need for academic scholarship focused on CFTA jurisprudence. A potential first-order distinction is in respect of impartiality, or perceived impartiality, as between panelists appointed by the parties to the dispute and panelists appointed by an external process for a fixed term. Evidence on this issue comes from the international context. Research by Albert Jan Van Den Berg suggests that arbitrators are influenced by the party that appointed them.[33] In the field of investment arbitration, nearly all dissents have been written by the arbitrator appointed by the losing party.[34] In the case of Canadian internal trade dispute adjudication, out of the fifteen published reports, only three of them saw dissenting opinions, though it is impossible to determine if they were written by the arbitrator appointed by the losing side. To help overcome actual or perceived bias, robust secondary literature must engage with the substantive reasoning found within the reports of presiding bodies and offer its own critical assessment.

Another important difference between these two forms of adjudicatory bodies that furthers the need for secondary literature is the relative difference in subject-matter fluency and procedural familiarity that members to a standing body gain relative to those members of an ad hoc adjudicatory body. With these

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29. *CFTA*, *supra* note 1, arts 1005, 1019.
30. Ryan Manucha, "Arbitrator Bias and Domestic Trade Disputes" (18 February 2019), online: *Canadian Lawyer* <www.canadianlawyermag.com/news/opinion/arbitrator-bias-and-domestic-trade-disputes/275873> [perma.cc/3F77-XBEX] [Manucha, "Arbitrator Bias"].
31. *Ibid.*
32. DSU, *supra* note 19, art 17.
33. Albert Jan van den Berg, "Dissenting opinions by party-appointed arbitrators in investment arbitration," in Mahnoush H Arsanjani et al, eds, *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff, 2011) 821 at 824.
34. *Ibid*.

two relative strengths, standing bodies such as the WTO's Appellate Body may be better able to create "workable jurisprudence" for interpreting legal texts.[35] The set of interpretations that a fixed, institutionalized structure generates could arguably improve an ad hoc system's coherence and predictability.[36] However, given that the current CFTA model does not have an analogous standing appellate body, it is even more incumbent upon the academic community to cultivate legal academic literature that critically assesses the jurisprudence, so that future ad hoc bodies may have some guidance as they conduct their adjudicatory duties.

III. THE NATIONAL TREATMENT PRINCIPLE

The fundamental objective of a national treatment provision is to prevent a party from treating foreign products less favorably than equivalent domestic products. The existence of this type of non-discrimination clause dates back to at least as early as the twelfth or thirteenth century.[37] There can be both explicit and implicit discrimination. An example of the former is a rule which says that, for example, all foreign-produced widgets may only be sold between midnight and five o'clock in the morning, while domestically produced widgets may be sold at any point in the day. Initially at the WTO, breaches of national treatment obligations were found only in cases of explicit discrimination, otherwise known as de jure discrimination.[38] However, the Dispute Settlement Body of the WTO has increasingly addressed a far more subtle violation of the national treatment principle—implicit discriminatory measures.[39]

Implicit discrimination—otherwise known as de facto discrimination—comes from measures whose text does not necessarily suggest that foreign products are treated any less favourably than domestic "like" products, but in

35. Anna Joubin-Bret, "Why We Need a Global Appellate Mechanism for International Investment Law" (27 April 2015), online (pdf): *Columbia Center on Sustainable Investment* <www.ccsi.columbia.edu/files/2013/10/No-146-Joubin-Bret-FINAL.pdf> [perma.cc/AC7R-EBTS].
36. See Karl P Sauvant, "The International Investment Law and Policy Regime: Challenges and Options" (2015) at 11, online (pdf): *International Centre for Trade and Sustainable Development and the World Economic Forum* <e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Sauvant-Final.pdf> [perma.cc/6FRN-L2H6].
37. See Pieter VerLoren van Themaat, *The Changing Structure of International Economic Law* (Martinus Nijhoff, 1981) at 16-21.
38. Ion Gâlea & Bogdan Biriş, "National Treatment in International Trade and Investment Law" (2014) 44 Acta Juridica Hungarica 174 at 177.
39. *Ibid*.

practice, they are.[40] For example, suppose Country X imposes a law that requires that the sale of beer with an alcohol-by-volume (ABV) in excess of 6 per cent be subject to a 100 per cent surcharge. However, Country X's brewers solely produce beer with an ABV *below* 6 per cent; all beer with an ABV in excess of 6 per cent comes from foreign producers. In this case, even though the measure does not explicitly distinguish the imported from the domestic goods, the effect of the measure is to treat imported beer less favourably than domestic beer.

B. ARTICLE III OF THE GATT

Before exploring the national treatment provision found within the CFTA, a cursory examination of the analogous provision in the GATT will help ground the discussion. It is worth noting that the GATT, and WTO jurisprudence in general, are authoritative sources in the context of the CFTA. There are three arguments in support of this proposition. First, CFTA article 1208(2)(b) explicitly allows CFTA presiding bodies to look to WTO law as a means to interpret provisions of the CFTA.[41] Second, an emergent practice in CFTA case law is to draw on available insight from WTO law and jurisprudence to aid in the interpretation and analysis of CFTA obligations.[42] Finally, as this article will demonstrate in the case of the national treatment provision, much of the language found within the CFTA is *identical* to that which is found in the GATT, 1994, and WTO jurisprudence in general. It is justifiable for, if not incumbent upon, CFTA panelists to look to the well-developed body of law that has developed at the WTO over the course of its nearly four hundred published rulings.

There may be instances where interpretations of the CFTA justifiably depart from those of the GATT. Justification for this comes primarily from discernible intent in the text of the CFTA. Drafters of the CFTA made the explicit requirement that adjudicators sitting on first-instance CFTA panels have

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40. John H Jackson, "National Treatment Obligations and Non-Tariff Barriers" (1989) 10 Mich J Intl L 207 at 213.
41. *CFTA*, *supra* note 1, art 1208(2)(b).
42. See *e.g.* Report of the Article 1704 Panel Concerning the Dispute Between Alberta/British Columbia and Ontario Regarding Ontario's Measures Governing Dairy Analogs and Dairy Blends (10 November 2004) at 18, online (pdf): Internal Trade Secretariat <www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/3_eng.pdf> [perma.cc/Y3VM-FKQ3] [Ontario–Dairy (I)]; Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Québec Regarding Québec's Measure Governing the Sale in Québec of Coloured Margarine (23 June 2005) at 9-10, online (pdf): Internal Trade Secretariat <www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/2_eng.pdf> [perma.cc/TYF5-4BMP] [Québec–Margarine].

"expertise or experience in matters covered by this Agreement."[43] As the CFTA is a domesticated version of an international trade agreement, the implication of this requirement is that panel members must have familiarity with international trade law. In contrast, CFTA appellate panel members must have "experience in Canadian administrative law or the resolution of disputes arising under Canadian administrative law."[44] Rather than install international trade law experts on the appellate panel, the CFTA opts for Canadian administrative law experts. To give meaning to this explicit distinction, it must be the case that drafters intended for tenets of Canadian administrative law to circumscribe or modify the application of international trade law in internal trade disputes. Drafters could easily have required international trade law expertise of appellate panel members. Thus, it may be proper for a CFTA presiding body to depart from GATT jurisprudence.

Departure from extant GATT jurisprudence may also be necessary in light of contemporary political circumstances. At the time of this article's publication, there is no standing Appellate Body at the WTO. As a result of political impasse, no new nominations for Appellate Body members have succeeded, and the Appellate Body cannot achieve quorum sufficient to preside over new cases. This existential crisis for the WTO's Appellate Body may affect CFTA presiding bodies insofar as no new jurisprudential developments by the Appellate Body will be forthcoming until the impasse is resolved.

The GATT national treatment provision is at article III.[45] It serves to prohibit laws that facilitate hidden protectionism, as well as those measures that are functionally equivalent to a tariff barrier.[46] Within article III are two different streams of national treatment analysis—one for tax regulations at article III:2, and the other for non-tax measures at article III:4.[47] Broadly speaking, both of these two streams undertake the same two-step analysis. First, the inquiry is to determine whether the imported and domestic goods are "like." However, article III:2's inquiry is broader than that of article III:4, as the former provision asks whether the two goods are "like, directly competitive or substitutable."[48] However, for both, the basic inquiry for the "like products" analysis is the same.

43. *CFTA*, *supra* note 1, Annex 1005.2(3)(a).
44. *Ibid*, Annex 1005.2(10)(a).
45. *GATT*, *supra* note 14, art III.
46. Peter M Gerhart & Michael S Baron, "Understanding National Treatment: The Participatory Vision of the WTO" (2004) 14 Ind Intl & Comp L Rev 505 at 505-506.
47. *Ibid* at 530.
48. *GATT*, *supra* note 14, art III:2. See also Gerhart & Baron, *supra* note 46 at 530.

It amounts to a determination as to whether the domestic and imported products are in a competitive relationship with one another.[49]

The second step in the GATT's national treatment analysis is to determine whether less favorable treatment has been accorded to the imported good. The adjudicator will seek to determine whether a WTO member has "modified the conditions of competition in the market place to the detriment of imported products vis-à-vis like domestic products."[50] As discussed earlier, the discrimination can come in the form of an explicit or implicit measure implemented by a party to the GATT.

Having explored the WTO framework for analyzing an alleged violation of the GATT national treatment provision, this article can more effectively understand the CFTA's analogous provision, along with the trajectory of domestic jurisprudence.

C. ARTICLE 201(1) OF THE CFTA

Canada's domestic trade agreement maintains a national treatment provision for goods at article 201(1). Embedded within the text of article 201(1) is a most favoured nation (MFN) obligation in addition to the national treatment obligation; however, a full analysis of the MFN component to 201(1) is outside the scope of this article. Therefore, it will only be discussed to the extent that it provides the basis of subsequent panel interpretation of the national treatment obligation. CFTA article 201 reads:[51]

> Non-Discrimination
>
> 1. Each Party shall accord to goods of any other Party treatment no less favourable than the best treatment it accords to its own like, directly competitive or substitutable goods and to those of any other Party or non-Party.

The text of article 201(1) is equivalent, though not identical, to its predecessor found in the AIT at article 401(1). As can be seen below, the only difference is

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49. *Border Tax Adjustments*; *Japan–Alcohol*; Gerhart & Baron, *supra* note 46 at 530-31.
50. Ming Du, "'Treatment No Less Favorable' and the Future of National Treatment Obligation in GATT Article III:4 after *EC–Seal Products*" (2016) 15 World Trade Rev 129 at 142 (examining the *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef* Appellate Body report); WTO, *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (2000), WTO Doc WT/DS161/AB/R at para 137 (Appellate Body Report), online: WTO <www.wto.org/english/tratop_e/dispu_e/cases_e/ds161_e.htm> [perma.cc/A37J-5X6G].
51. *CFTA*, *supra* note 1, art 201.

that article 401(1) subdivides into the national treatment obligation at 401(1)(a) and the MFN obligation at 401(1)(b). AIT article 401 reads:[52]

> Reciprocal non-Discrimination
>
> 1. Subject to Article 404, each Party shall accord to goods of any other Party treatment no less favourable than the best treatment it accords to:
>
> (a) its own like, directly competitive or substitutable goods; and
>
> (b) like, directly competitive or substitutable goods of any other Party or non-Party.

As a result of the textual similarities, this article's conclusions and analysis of dispute reports produced under the predecessor AIT in respect of article 401(1)(a) are applicable to article 201(1) of the CFTA.

1. COMPARISON WITH THE TEXT OF GATT ARTICLE III

A preliminary textual comparison between the CFTA and GATT shows that the national treatment provision of CFTA imports the standard of GATT article III:2, rather than article III:4, when comparing imported and domestic products under the first part of the national treatment analysis. At 201(1), a party is not to accord less favourable treatment to the goods of another party that are "like, directly competitive or substitutable."[53] This standard of comparison is identical to that found at GATT article III:2. In contrast, as discussed above, article III:4 of the GATT merely asks if the products are "like" and does not include the "directly competitive or substitutable" language of article III:2. The panel in *Korea–Taxes on Alcoholic Beverages* clarified that "like products" are a *subset* of "directly competitive and substitutable" products.[54] As such, the article III:2 "like, directly competitive or substitutable" assessment is broader than the article III:4 "likeness" assessment.

Given that CFTA article 201(1) imports the language of GATT article III:2, CFTA panels may more appropriately find WTO authority for the imported versus domestic product comparison pursuant to a national treatment analysis in the WTO's jurisprudence for article III:2 rather than article III:4. However, this is a peculiar result. Article III:2 of the GATT is the national treatment obligation for measures that are internal taxes or charges, while article III:4 is directed towards measures that are non-tax regulations. Given that article 802 of the

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52. *AIT*, *supra* note 11, art 401.
53. *CFTA*, *supra* note 1, art 201.
54. *Korea–Taxes on Alcoholic Beverages* (1999), WTO Doc WT/DS75/AB/R at para 118 (Appellate Body Report), online: WTO <www.wto.org/english/tratop_e/dispu_e/cases_e/ds75_e.htm> [perma.cc/VV9D-MUP3].

CFTA essentially excludes any measure relating to taxation from falling within the scope of the agreement, a CFTA panel will never address a national treatment complaint against a taxation measure.[55] Thus, drafters of the CFTA (and the AIT) opted for the more expansive "like, directly competitive or substitutable" standard of GATT article III:2, whose jurisprudence is not relevant to any potential CFTA national treatment case, and eschewed the narrower "like" standard of article III:4 along with its more relevant jurisprudence.

D. THE TRAJECTORY OF CFTA JURISPRUDENCE ON THE NATIONAL TREATMENT PROVISION

The internal trade regime's national treatment obligation was invoked by complainants and interpreted by dispute panels on a number of occasions throughout the AIT's existence. These rulings now inform the identical obligation found in the CFTA. This article will now examine these interpretations and establish the state of national treatment jurisprudence under the CFTA. However, in order to understand the trajectory of the national treatment case law, this article must first start by examining the interpretation of the AIT/CFTA's MFN obligation in *Canada—MMT*.[56]

1. CANADA–MMT

Though the panel in *Canada–MMT* introduced the test for a violation of the federal government's MFN obligation under the AIT (and now, the CFTA), later-in-time AIT dispute panels referred to and imported substantially the same MFN test crafted in *Canada–MMT* to interpret the AIT's national treatment obligation. As such, though there are important differences between the principles of MFN and national treatment, the assessment of the CFTA's national treatment jurisprudence necessarily starts here.

In this case, the Alberta government submitted that the federal government's new law prohibiting the import and interprovincial trade of manganese tricarbonyl (MMT)—a common additive to gasoline used to increase octane levels—violated the federal government's MFN obligation found at article

55. *CFTA*, *supra* note 1, art 802. The *AIT* had an almost identical provision at article 1805. See *AIT*, *supra* note 11, art 1805.

56. *Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the* Manganese-Based Fuel Additives Act (12 June 1998), online (pdf): Internal Trade Secretariat <www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/8_eng.pdf> [perma.cc/AX6G-K9YG] [*Canada–MMT*].

401(3).[57] This provision of the AIT (which persists in the CFTA) states that the federal government must accord goods of a province or territory treatment "no less favourable than the best treatment it accords like, directly competitive or substitutable goods" of any other province.[58]

The panel examined AIT article 401(3) and interpreted it to call for a two-part test.[59] First, the presiding body is to inquire whether there existed discrimination against the goods of another party.[60] This discrimination could come as either "direct" or "indirect" discrimination.[61] Direct discrimination is "where goods from one Party are favoured over identical goods from another Party."[62] Indirect discrimination is where "goods produced predominantly in the territory of one Party are favoured over directly competitive or substitutable goods produced predominantly in the territory of another Party."[63] Second, after establishing one of the two forms of discrimination, the panel is to determine whether the goods are "like, directly competitive or substitutable."[64]

In construing the analysis in this fashion, the AIT panel adopted an approach that is the reverse of that which is set forth in WTO MFN case law. In the WTO jurisprudence for the GATT MFN provision provided at article I, in practice it is only *after* establishing likeness between the goods of a complainant and a third party that a WTO panel will determine if a nation accorded better treatment to the goods of a third party than that extended to the goods of the complaining party.[65] The WTO's MFN analysis is more complex than what has been described

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57. *Ibid* at 1-2.
58. *AIT*, *supra* note 11, art 401(3). This was the predecessor to article 201(3) of the *CFTA*. See *CFTA*, *supra* note 1, art 201(3).
59. *Canada–MMT*, *supra* note 56 at 6-7.
60. *Ibid* at 7.
61. *Ibid*.
62. *Ibid*.
63. *Ibid*.
64. *Ibid*.
65. *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products* (2014), WTO Doc WT/DS400/AB/R at para 5.99 (Appellate Body Report), online: WTO <www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm> [perma.cc/779M-5VSU]. In WTO jurisprudence, just as is the case for national treatment allegation analysis, panels and the Appellate Body always examine "likeness" in the MFN analysis before determining whether the impugned measure constituted discrimination in violation of the MFN obligation. GATT MFN discrimination in the sense of article I:1 cannot arise if the products are not "like," functionally making it a precondition—as such, a finding of likeness precedes any MFN discrimination analysis. See *Canada–Certain Measures Affecting the Automotive Industry* (2000), WTO Doc WT/DS139/R at para 6.15 (Appellate Body

here, but any further expansion is outside the scope of this article which is focused on the interpretation of the AIT/CFTA's national treatment provision.

Setting aside the panel's inverted formulation of the MFN test found within WTO case law, there were a number of weaknesses in the way that the *Canada–MMT* panel formulated the MFN test, all of which had direct implications on subsequent panels' interpretation of the CFTA's national treatment obligation. The first has to do with its definition of "direct discrimination." The panel provided that, in order to constitute direct discrimination, the imported and domestic goods needed to be "identical."[66] However, this standard of "identical" does not have any basis in the text of AIT article 401(1)(a) (or its successor, CFTA article 201(1)). Not only does the standard of "identical" lack textual authority, but it creates internal incoherence with the second step of the test outlined by the *Canada–MMT* presiding body: That the goods need to be "like, directly competitive or substitutable."[67] Is "identical" the same as "like, directly competitive or substitutable"? The *Canada–MMT* panel left the standard of comparison uncertain in a direct discrimination analysis.

The second fundamental problem with the *Canada–MMT* panel's formulation of the test was that an inverted version of the WTO's MFN analysis inherently renders the second part of the test superfluous. The definitions of "direct" and "indirect" discrimination at the first stage of the national treatment analysis, according to the *Canada–MMT* report, explicitly require a panel to undertake a comparison of the imported and domestic products. In the case of direct discrimination, the products must be "identical" in the first stage of the analysis; for an instance of indirect discrimination, the products must be "directly competitive or substitutable" at the first stage.[68] The second stage of the MFN analysis, according to the *Canada–MMT* report, then requires a finding that the imported and domestic product are "like, directly competitive or substitutable."[69] Ignoring the fact that the *Canada–MMT* panel uses different language to describe the standards of comparison for the first and second stage of both an indirect or direct discrimination assessment, the second stage becomes irrelevant given that the comparison already took place in the first stage.

Report), online: WTO <www.wto.org/english/tratop_e/dispu_e/cases_e/ds139_e.htm> [perma.cc/R6JZ-S5J9].

66. *Canada–MMT*, *supra* note 56 at 7.
67. *Ibid.*
68. *Ibid.*
69. *Ibid.*

The final shortcoming to the *Canada–MMT* MFN analysis is in the implementation of its own test that it had created earlier in the same panel report. The *Canada–MMT* panel did not find discrimination in the first stage of its analysis, so it ruled that it was not required to proceed to the second step of the MFN analysis and make a determination as to whether MMT-infused gasoline was "like, directly competitive or substitutable" to MMT-free gasoline.[70] Regardless of whether there was discrimination, the panel's own formulation of the first stage of the test, provided at page seven, necessarily required the panel to have already examined the likeness of the imported and domestic products to make a first-stage conclusion.[71] Had the panel properly undertaken its own first-stage analysis, it should have already had to come to a conclusion as to the likeness of the products. Thus, the panel either incorrectly applied its own test, or was disingenuous in refusing to provide its conclusion as to the likeness of MMT-free and MMT-infused gasoline.

Though the panel report in *Canada–MMT* was a landmark issuance as the first report produced under the then-new AIT, the strength of its MFN test was lacking. As will be observed in subsequent cases, because later adjudicatory panels nearly replicated the MFN test from *Canada–MMT* for the AIT/CFTA's national treatment test, the analytical faults permeated successive findings of national treatment obligation violations.

2. PEI–DAIRY

PEI–Dairy,[72] the second panel convened under the AIT, converted the *Canada–MMT* panel's MFN test into a national treatment test. In the text of the opinion, the panel explicitly noted that it was adopting the "same criteria" for its national treatment analysis as that which had been used in *Canada–MMT*'s MFN analysis, but the panel does not justify why this is appropriate.[73] Moreover, by importing the test from *Canada–MMT*, the panel imported those same analytical shortcomings identified in Part III(C)(1), above, such as the inconsistent likeness standards and the redundant second-step in a two-part analysis. In addition, as Part III(C)

70. *Ibid*.
71. *Ibid*.
72. Report of the Article 1704 Panel Concerning the Dispute Between Nova Scotia and Prince Edward Island Regarding Amendments to the Dairy Industry Act Regulations (18 Jan 2000), online (pdf): Internal Trade Secretariat <www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/7_eng.pdf> [perma.cc/4CQN-8AXQ] [*PEI–Dairy*].
73. *Ibid* at 8.

(2) will describe below, the panel decision in *PEI–Dairy* generated its own set of uncertainties.

The panel in *PEI–Dairy* was convened to address the complaint by Nova Scotia that Prince Edward Island had indirectly discriminated against Nova Scotia fluid milk.[74] In 1997, PEI had revoked all existing licenses for dairy processors and distributors, and required producers to reapply.[75] A Nova Scotia company, which previously held a licence, was denied a new one upon reapplication.[76] As part of its complaint, the Nova Scotia company claimed that "like, directly competitive or substitutable" Nova Scotia fluid milk was subjected to worse treatment than that of PEI.[77]

In its analysis, the panel employed the MFN test from *Canada–MMT* to the case of PEI's alleged national treatment obligation violation.[78] Thus, the panel in *PEI–Dairy* seemingly collapsed the national treatment and MFN tests under the AIT into a single test, and the panel did not even announce that it had done so. The panel even suggests that the MFN test from *Canada– MMT* is the applicable test for all claims under the AIT article 401 (non-discrimination) but neglects to discuss the fact that the non-discrimination clause subdivides into an MFN and a national treatment provision.[79] As a result, the panel in *PEI–Dairy* merged two fundamentally unique concepts in the domain of trade law, and no presiding body has, as of yet, clarified or distinguished this decision.

In addition to generating confusion within CFTA jurisprudence by collapsing the national treatment and MFN concepts, the panel generated further uncertainty as the national treatment test it employed was an inverted formulation of its GATT counterpart, just as was the MFN test established by the panel in *Canada–MMT*. Whereas the GATT's national treatment test under article III:4 first asks whether the goods are "like"—or in the case of article III:2, whether the goods are "like, directly competitive or substitutable"—according to this AIT panel's formulation of the test, the "like, directly competitive or substitutable" analysis commences only *after* a panel establishes discrimination.[80] This inversion made it difficult for domestic trade dispute panels to accurately employ WTO jurisprudence to support their analysis of a claim under the AIT. It was not until the most recent presiding body report, issued pursuant to the

74. *Ibid* at 1-2.
75. *Ibid*.
76. *Ibid*.
77. *Ibid* at 2.
78. *Ibid* at 8-9.
79. *Ibid* at 8.
80. *Ibid* at 8-9.

appeal case of *Alberta–Beer Mark Ups (Appeal Panel)*, that a dispute panel flipped the order of the AIT/CFTA's traditional national treatment test so that it aligned with the WTO's national treatment test.[81]

One additional issue in respect of the AIT/CFTA's national treatment obligation was raised but left uncertain by the panel in *PEI–Dairy*. The panel provided that a claim of indirect discrimination must show a "geographical component to the discrimination for a measure to be inconsistent" with a government's national treatment obligation.[82] The notion of a "geographical component" was first mentioned in *Canada–MMT* but the panel in that case did not significantly develop the concept.[83] There is no textual authority in the AIT nor the CFTA that the measure of a province or territory must have a "geographical component" for it to constitute indirect discrimination. Though the panel in *PEI–Dairy* discusses the concept at greater length than the panel in *Canada–MMT*, it does not clarify the nature or substance of the term "geographical component." In *PEI–Dairy*, the panel did not have to discuss the term "geographical component" as PEI admitted to the panel that "geography was the fundamental factor" in their withdrawal of certain Nova Scotia dairy licenses.[84] Moreover, the panel wrote that the "geographical component" was satisfied as a result of the evidence demonstrating that "the only fluid milk imports allowed were products that did not compete with PEI-produced products."[85] Left uncertain, however, is both the nature of the "geographical component" as well as the means to identify it. The next case, *New Brunswick–Dairy*, attempts to clarify the concept but creates other ambiguities in doing so.[86]

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81. *Appeal of the Report of the Panel in the Dispute Between Artisan Ales Consulting Inc. and the Government of Alberta Regarding Mark-Ups on Beer* (11 May 2018) at 15, online (pdf): Internal Trade Secretariat <www.cfta-alec.ca/wp-content/uploads/2018/06/GOA-vs.-Artisan-Ale-appeal-report-Final.pdf> [perma.cc/R29W-GNPY] [*Alberta–Beer Mark Ups (Appeal Panel)*].
82. *PEI–Dairy*, *supra* note 72 at 8.
83. See *Canada–MMT*, *supra* note 56 at 7.
84. *PEI–Dairy*, *supra* note 72 at 9.
85. *Ibid*.
86. *Report of the Article 1716 Panel Concerning the Dispute Between Farmers Co-operative Dairy Limited of Nova Scotia and New Brunswick Regarding New Brunswick's Fluid Milk Distribution Licensing Measures* (13 September 2002), online (pdf): Internal Trade Secretariat <www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/5_eng.pdf> [perma.cc/SR79-33TQ] [*New Brunswick–Dairy*].

3. NEW BRUNSWICK–DAIRY

The panel report for *New Brunswick–Dairy* expanded CFTA jurisprudence on the concept of the "geographical component" to include a claim of indirect discrimination in the context of the AIT/CFTA's national treatment obligation. At issue was a New Brunswick law (the *Natural Products Act*), neutral on its face, which stated that the New Brunswick Farm Products Commission (NBFPC) was not allowed to issue a licence for fluid milk distribution unless doing so was "in the interest of general public or dairy products trade."[87] In *New Brunswick–Dairy*, the NBFPC rejected a Nova Scotia dairy producer's fluid milk licence application.[88] However, the panel ultimately held that in light of the "context of the purpose" of the New Brunswick legislation, it did not believe that the *Act* would be applied in a non-discriminatory manner.[89] Specifically, the panel held that it was "extremely difficult for the Act to be applied in a manner that is *geographically neutral*."[90] The panel in *New Brunswick–Dairy* thus advanced AIT (and thus CFTA) jurisprudence on indirect discrimination by clarifying that the "geographic component" discussed in *PEI–Dairy* is a standard of geographic neutrality.

Though the panel creates the standard of "geographically neutral" to assess a claim of indirect discrimination under the national treatment obligation, it leaves the standard's meaning ambiguous and uncertain. Does it mean that 50 per cent of all licences should be given to provincial dairy producers, and the other 50 per cent to out-of-province dairy producers? Or perhaps that licences are distributed on a basis of the percentage of dairy producers headquartered in New Brunswick relative to the rest of the country? The panel in *New Brunswick–Dairy* improves the analytical approach to an indirect discrimination claim, but it leaves the contours of the new "geographically neutral" standard undefined.

4. ONTARIO–DAIRY (I)

The sixth panel report issued under the AIT, *Ontario–Dairy (I)*, was the first to explicitly draw the links between the AIT/CFTA's national treatment obligation and that of the WTO.[91] The panel provided that AIT article 401 "provides a broad non-discrimination obligation akin to the national treatment obligation

87. *Ibid* at 1.
88. *Ibid*.
89. *New Brunswick–Dairy*, *supra* note 86 at 13.
90. *Ibid* [emphasis added].
91. See *Ontario–Dairy (I)*, *supra* note 42.

contained in a variety of international trade agreements such as the [WTO] agreements."[92] Though panels had long imported the language and concepts from the domain of international trade law, this was the first time that a panel explicitly drew the link in the text of an opinion.

Though the panel in *Ontario–Dairy (I)* explicitly links the AIT/CFTA's national treatment provision to its counterpart found inside of the GATT, it proceeds to evaluate it on the basis of a standard that is not found within the WTO's Dispute Settlement Body jurisprudence under the GATT. The panel wrote that the impugned Ontario legislation "fail[ed] to provide to the producers of these products from other provinces the best treatment it accords to producers of dairy products in Ontario."[93] In GATT article III jurisprudence, the national treatment obligation does not mandate that parties provide the "best treatment" to that of other producers. Contrastingly, the standard of "best treatment" found in both the text of the AIT/CFTA's national treatment obligation, as well as attendant jurisprudence, is a firm deviation from the explicit language of the GATT article III which requires treatment that is "no less favourable."[94] CFTA jurisprudence has yet to clarify if and how this difference in language between the two national treatment obligations is meaningful.

A shortcoming in the panel's analysis of the complainant's national treatment claim is in respect of its "like, directly competitive or substitutable" analysis. The faults in *Ontario–Dairy (I)*'s analysis on this particular issue pervades CFTA national treatment jurisprudence and warrants greater attention by future panels. At issue in the case were Ontario's restrictions on the trade of dairy analogs and dairy blends.[95] Dairy analogs are imitation dairy products that are actually vegetable based, while dairy blends are vegetable oil products that are combined with any amount and any kind of milk ingredient to create a good that resembles a dairy product.[96] The complainants in this case—Alberta and British Columbia—alleged that Ontario measures discriminated against their "like, directly competitive or substitutable" dairy analogs and dairy blend products and gave better treatment to pure Ontario dairy products.[97] In a deficient analysis, the panel summarily concludes that the two sets of goods are "like."[98] At no point in the opinion does the panel undertake any form of analysis or interpretation of the

92. *Ibid* at 18.
93. *Ibid*.
94. See *GATT*, *supra* note 14 at art III.
95. *Ontario–Dairy (I)*, *supra* note 42 at 1.
96. *Ibid* at 1.
97. *Ibid* at 1-5.
98. *Ibid* at 18.

phrase "like, directly competitive or substitutable" to determine whether or not dairy analogs or blends were indeed sufficiently similar to pure dairy products. This differs substantially from WTO jurisprudence wherein the Appellate Body has identified a set of four factors that a panel must examine in order to determine likeness.[99] In a WTO likeness assessment, a panel must consider each of the four following factors: (1) Physical characteristics, (2) Consumer tastes and habits, (3) End uses, and (4) Tariff classification.[100] The WTO's Appellate Body has even ruled that a panel must examine the evidence relating to *each* of those four criteria.[101]

Arguably, the respondent, Ontario, was deprived of informed reasoning when the panel report that was issued did not contain a meaningful "likeness" analysis. Not only does the panel provide scant justification in the instant case, but it also leaves uncertain the requisite analysis for a conclusion of "likeness" in a CFTA national treatment analysis. Without a factor-based test, the concern arises that a determination of "likeness" will be the product of a panel's subjective intuition, rather than a fact-based analysis. This case was the first instance in which an AIT panel encountered two products that were sufficiently different to warrant a more searching analysis than had been conducted in the past.

5. QUÉBEC–MARGARINE

The panel in *Québec–Margarine* commits the same fault as the panel in *Ontario–Dairy (I)* in undertaking an inadequate "likeness" analysis when conducting its national treatment assessment.[102] Moreover, some of the writing in the report suggests that the panelists may have misread WTO case law. However, the panel improved the AIT/CFTA jurisprudence on the identification of the "comparator" class of goods in its national treatment test.

At issue in *Québec–Margarine* was a Quebec measure that required out-of-province margarine producers to colour their product white, which effectively made the margarine look similar to lard and less appetizing to the

99. *European Communities–Measures Affecting Asbestos and Products Containing Asbestos* (Complaint by Canada) (2001), WTO Doc WT/DS135/AB/R at para 101 (Appellate Body Report), online: WTO <www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm> [perma.cc/WXS8-UZ5C] [*EC–Asbestos*].
100. *Ibid*.
101. *Ibid* at para 109 [emphasis in original].
102. See *Québec–Margarine*, *supra* note 42.

consumer than butter.[103] It was argued that the measure was implemented to protect the Quebec dairy industry and its sales of butter.[104]

The panel provides an inadequate likeness analysis, just as the *Ontario–Dairy (I)* panel had done. The panel offers little justification for its determination that butter and margarine are "like, directly competitive or substitutable" to one another. The only rationale for a finding of "likeness" provided in the opinion is that because the impugned Quebec regulation repeatedly treats margarine as a substitute for butter, it is thus in a "like" relationship with butter.[105] None of the four WTO factors are cited or used by the panel in its determination. It leaves a reader, or respondent, unsatisfied as to the reasons provided for the conclusion that the two products exist within a "like, directly competitive or substitutable" relationship with one another. It does not meaningfully advance the case law or the test for use by future panels, and it does not offer much guidance to potential future litigants.

In addition to the shortcomings of its likeness analysis, the panel also misinterprets WTO case law on the GATT national treatment obligation (article III). The panel spends part of the report attempting to discern the proper test of comparison as between the imported and domestic product. It provided that "[i]n contrast to the formulation of GATT Article III, which deals with the treatment accorded to imported products in comparison to 'like domestic products,'" the AIT predecessor to CFTA article 201(1) maintained that "the class of comparators includes not only like goods but 'directly competitive or substitutable goods.'"[106] While the panel accurately writes that the CFTA test asks not merely whether the products are "like" but also whether the two products are "directly competitive or substitutable," it incorrectly claims that the GATT article III test only employs a "like" products test. As described in Part III(B), above, the GATT article III:4 national treatment provision indeed only asks the panel to determine whether the imported and domestic product stand in a "like" relationship with one another.[107] However, the GATT article III:2 national treatment provision imposes the exact same test as the AIT/CFTA: Do the domestic and imported products exist in *either* a "like" *or* "directly competitive or substitutable" relationship with one another.[108] It is true that GATT article III:2 applies to taxation measures and

103. *Ibid* at 3.
104. *Ibid* at 4.
105. *Ibid* at 25.
106. *Ibid* at 24.
107. *GATT*, *supra* note 14, art III:4, Annex I at para 2.
108. *Ibid,* art III:2.

GATT article III:4 applies to non-taxation measures. Nonetheless, the "like, directly competitive or substitutable" analysis of the products themselves can still inform a CFTA national treatment analysis. The panel's unfortunate proclamation on WTO case law obscures the fact that GATT article III, in part, does maintain an identical test to that of the (former) AIT article 401(1).[109] *Québec–Margarine* erroneously suggests that a panel or complainant may not validly look to GATT article III:2 case law to help determine whether two products are "like, directly competitive or substitutable" in the course of a CFTA dispute.[110]

Despite the report's analytical shortcomings, the panel does accurately identify that the product comparison is not just whether the two products are "like." Rather, the drafters provided for a more expansive standard of comparison in the national treatment analysis by providing the standard of "like, directly competitive or substitutable." Though it remains unclear why AIT drafters and CFTA re-negotiators opted for a broader version of the product comparison test, the panel in this case clarifies for future panels that the nature of the language meaningfully impacts the "like products" analysis in a national treatment claim.

6. QUÉBEC–DAIRY

The panel report in *Québec–Dairy*[111] resurfaces the uncertainty caused by the notion of "geographically neutral" measures in a national treatment analysis that had first been generated by *PEI–Dairy* and *New Brunswick–Dairy*. At issue in *Québec–Dairy* was a facially-neutral measure that restricted the sale of vegetable-based dairy alternatives as well as dairy blends.[112] The literal text of the impugned Quebec measure did not suggest that imported products would incur discriminatory treatment relative to domestic products.[113] However, the complainants claimed that the operation of the measure nonetheless discriminated against imported products—namely dairy blends and dairy alternatives.[114] Thus, this was a case of alleged "indirect" discrimination. However, the panel's analysis

109. See *CFTA*, *supra* note 11, art 201(1).
110. *Québec–Margarine*, *supra* note 42.
111. *Report of Article 1703 Panel Regarding the Dispute between Saskatchewan and Québec Concerning Dairy Blends, Dairy Analogues and Dairy Alternatives* (21 March 2014), online (pdf): Internal Trade Secretariat <www.cfta-alec.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/PANEL%20REPORT%20-FINAL%20VERSION.pdf> [perma.cc/WT73-RS7R] [*Québec–Dairy*].
112. *Ibid* at 4.
113. *Ibid* at 4-6.
114. *Ibid* at 6.

as to whether the measure produced indirect discrimination in violation of the AIT/CFTA's national treatment obligation was severely lacking.

In its reasoning as to whether the Quebec measure indirectly discriminated against imported "like, directly competitive or substitutable" products, the panel in *Québec–Dairy* stated that it was "mindful" of the findings in *New Brunswick–Dairy*, wherein that earlier panel provided that there must be a "geographical component" to a case of indirect discrimination.[115] Notably, the panel in *Québec–Dairy* did not explicitly note the new standard of "geographical neutrality" that *New Brunswick–Dairy* had created.

In its finding that the measure violated Quebec's national treatment obligation under the AIT, the panel failed to interpret the AIT in light of the facts of the case at hand. The panel report does not explain *how* the measure discriminates against imported goods. The panel merely provided that the prohibition of dairy alternatives and dairy blends "discriminates in favour of [Quebec's] domestic dairy producers and processors."[116] It provided, at best, a circular argument rather than substantive reasoning. If the complainant, Saskatchewan, and the respondent, Quebec, both have producers of dairy products, as well as dairy blends and alternatives, then how can the Quebec measure be said to unfairly discriminate against imported products, when the measure necessarily discriminates against domestic Quebec products as well? The report does not provide enough information for a reader to draw the conclusion that the panel did.

7. ALBERTA–BEER MARK-UPS (APPEAL PANEL)

The fifteenth and most recent dispute report issued under the AIT—the appeal panel report from Artisan Ales' complaint against Alberta's beer measures—substantially improves the case law on the national treatment obligation under the CFTA.

One of its most important contributions to the CFTA case law is the appeal panel's criticism of the adequacy of the written reasons in the lower panel's decision. It disapproved of the lower panel's report for "its findings that were perfunctory at best."[117] The appeal panel wrote that "[t]he majority did not interpret or analyze the Articles of the AIT that it found in its conclusions were violated" by Alberta's measures.[118] Looking back to the lower panel's report, this is indeed the case. Firstly, the majority's writing in the lower panel's report was

115. *Ibid* at 16.
116. *Ibid* at 17.
117. See *Alberta–Beer Mark Ups (Appeal Panel)*, *supra* note 81 at para 63.
118. *Ibid* at para 64.

a mere ten pages, while the preponderance of dispute panel reports have thus far registered at nearly thirty pages. In respect of the alleged national treatment violation, the full extent of the lower panel's assessment was that the cited measures were "inconsistent" with AIT article 401.[119] Absolutely no reasoning is given for the national treatment violation.[120] Though the panel report on this matter was particularly lacking in its written findings relative to the reports of all prior panels up to that point, the appeal panel firmly pronounced the initial panel failed to interpret or analyze the AIT articles. This analysis for CFTA articles moving forward should help to improve the nature of the findings of all panels. As this article has thus far discussed, there have been many instances where panel reports fail to expand on the reasons for their conclusions.

Another important contribution of this case to CFTA jurisprudence is its reversal of the order of the national treatment test found in prior CFTA jurisprudence. A determination of whether the measure discriminates against imported products now comes *after* the test of whether the imported and domestic products are "like, directly competitive or substitutable."[121] This re-formulation is now consistent with the national treatment test found in WTO jurisprudence of GATT article III. By correcting the order, *Alberta–Beer Mark-Ups (Appeal Panel)* has given greater legitimacy and authority to WTO national treatment jurisprudence as it relates to the CFTA national treatment obligation.

In addition to re-ordering the CFTA national treatment test to align with WTO national treatment case law, the adjudicators in *Alberta–Beer Mark Ups (Appeal Panel)* also tethers the CFTA's "no less favorable treatment" analysis to GATT article III jurisprudence. In the body of its report, the appeal panel provided for a fundamental underlying principle to the CFTA's national treatment obligation that is identical to that which is found in WTO national treatment case law. In doing so, the appeal panel implicitly encourages CFTA panels to consider the robust body of law on GATT article III. The appeal panel stated that an impugned Alberta measure provided less favorable treatment to imported products as it "does not provide equality of competitive opportunities" as between Alberta and out-of-province beer.[122] This concept of "equality of competitive conditions" as the core inquiry guiding a national treatment analysis is a bedrock

119. *Report of Article 1716 Panel Regarding the Dispute between Artisan Ales Consulting Inc. and Alberta regarding Beer Markups* (28 July 2017) at 10, online (pdf): Internal Trade Secretariat <www.cfta-alec.ca/wp-content/uploads/2017/08/Decision-July-28-2017-Signed.pdf> [perma.cc/8RUR-5GXR] [*Alberta–Beer Mark Ups*].
120. *Ibid* at 10.
121. *Ibid* at para 82.
122. *Ibid* at para 88.

of WTO national treatment analysis under GATT article III.[123] By linking the essential exercise of a CFTA panel and the WTO panel in assessing a claim of national treatment, future CFTA panels may more authoritatively draw upon reasoning and conclusions from the domain of WTO jurisprudence.

Finally, the *Alberta–Beer Mark Ups (Appeal Panel)* report provided the most comprehensive analysis of a national treatment allegation to date. The report clearly demonstrated the connection between the measure at issue and the discrimination that it produces so as to violate the CFTA's national treatment obligation. For the first time, an AIT report does not leave a reader to make logical inferences in order to arrive at the report's conclusion. The report carefully explains to the reader the causal connection between Alberta's provision of monetary grants to domestic Albertan microbrewers and the consequential discrimination that out-of-province microbrewers experienced in the Alberta marketplace.[124] If taken as a template, this appeal panel report will elevate the reasoning and clarity of future CFTA reports in respect of the national treatment obligation.

E. CONTINUED UNCERTAINTIES IN CFTA DOCTRINE AND POTENTIAL SOLUTIONS

Part III(C), above, explored the trajectory of CFTA jurisprudence concerning the national treatment obligation, now found at CFTA article 201(1). Due respect must be accorded to the work of the panellists—these individuals were tasked with the job of identifying, interpreting, and implementing a foreign set of rules and principles in a novel dispute forum. To date, Canada is the only country that has created a trade agreement and dispute settlement body for domestic parties to litigate internal trade barriers.

This investigation has identified a number of shortcomings and uncertainties generated by some of the findings in these panel reports. The most recent report issued by the appeal panel from the *Alberta–Beer Mark-Ups (Appeal Panel)* dispute did help to clarify a number of points in respect of the CFTA's national treatment obligation, as was discussed in Part III(C)(7), above. However, two key elements of a CFTA panel's national treatment analysis remain unresolved: the requirements of a "like, directly competitive or substitutable" assessment at the first stage of the analysis, and the meaning of "geographic neutrality" in assessing an indirect discrimination claim in the second stage of the analysis. This article

123. *Japan–Alcoholic Beverages (II) (Complaint by the European Communities)* (1996), WTO Doc WT/DS8/AB/R at 16 (Appellate Body Report), online: *WTO* <www.wto.org/english/tratop_e/dispu_e/cases_e/ds8_e.htm> [perma.cc/STD3-8FFQ].

124. See *Alberta–Beer Mark Ups (Appeal Panel)*, *supra* note 81 at para 88.

will now proceed to explore both the implications and possible remedies to these two continued uncertainties.

1. A CFTA "LIKE, DIRECTLY COMPETITIVE OR SUBSTITUTABLE" ANALYSIS

To date, no claim of a national treatment obligation violation has failed on the "like, directly competitive or substitutable" stage of the analysis. However, the extent and quality of the assessments at this stage have been modest throughout CFTA jurisprudence. In some cases, AIT panels have simply asserted "likeness" without any analysis whatsoever, such as in the case of *Ontario–Dairy (I)*.[125] In other cases, the panel may have reasoned why the imported and domestic products are like, but the panel did not cite authority for the means or framework by which it concluded likeness.[126] That there is no consistent test applied in the CFTA "likeness" analysis not only deprives the litigating parties of fulsome reasoning, but it also makes it difficult for Canadian governments to create CFTA-compliant laws and regulations.

Despite the parallels between the CFTA and GATT national treatment obligations, in no case has an AIT/CFTA presiding body cited the four factors routinely employed by WTO panels to ascertain likeness. These four factors, concisely re-expressed in *EC–Asbestos*, are: (1) Physical characteristics, (2) Consumer preferences, (3) End uses, and (4) Tariff classification.[127] In GATT jurisprudence, these factors are requisite elements of a likeness examination.[128] No one factor is decisive.[129] It is this approach that CFTA panels should adopt in the course of the first stage of a national treatment analysis.

In certain cases, the two products at issue were literally the same. For example, in *New Brunswick–Dairy*, the discrimination was in respect of Nova Scotia fluid milk products which were treated less favorably than New Brunswick fluid milk products. An implementation of the *EC–Asbestos* four-factor test could not have resulted in any finding other than that the imported and domestic products were "like." However, in *Québec–Margarine*, the two products were not the same: Domestic Quebec butter received more favourable treatment than the foreign Alberta margarine. The four-factor analysis from *EC–Asbestos* suggests that the *Québec–Margarine* panel's determination that butter and margarine were "like" was not necessarily obvious. Margarine and butter have different tariff

125. See *e.g. Ontario–Dairy (I)*, *supra* note 42 at 18.
126. See *e.g. Québec–Dairy*, *supra* note 111 at 16.
127. *EC–Asbestos*, *supra* note 99 at para 101.
128. *Ibid* at para 109.
129. *Japan–Alcoholic Beverages (II)*, *supra* note 124 at 21.

classifications: their end-uses can differ, consumer preferences may not be the same, and physical characteristics are not necessarily similar either. A panel that considers and weighs each factor must think through its reasoning for a finding of likeness, which may elevate the quality of the panel's decision making. And a standard set of "likeness" factors would also bring consistency and coherence to the first stage of the national treatment analysis. The WTO's four-factor test, which has been repeatedly used in GATT adjudication, could serve as that framework. Finally, a comprehensive framework would give greater guidance to Canadian governments hoping to craft measures that are consistent with their CFTA national treatment obligations.

2. STAGE TWO "INDIRECT DISCRIMINATION" ANALYSIS

A more complex uncertainty that remains unresolved in CFTA jurisprudence is the precise nature of the "indirect discrimination" analysis. Specifically, CFTA case law has identified that in order to remain in compliance with the national treatment obligation, the impact of a government's measure on trade in goods must abide by a standard of "geographic neutrality."[130] Though this is an important development, the contours of the "geographically neutral" requirement remain obscure in CFTA national treatment jurisprudence.

There are many ways in which the phrase "geographic neutrality" can be interpreted, each of which can have a different impact on the conclusion of a national treatment analysis. Does "geographically neutral" mean that, for example, where a measure implemented by Province X requires that licences be held by producers of a particular good, the licences should be divided equally to every province and territory? But what if, just prior to the enactment of the measure, Province X had ten-times more producers of that good than Province Y? On a conceptual level, geographic neutrality makes sense in the context of national treatment obligations: A measure should not produce an effect that harms out-of-province producers more than domestic provincial producers, all things being equal. However, it can be a significant challenge to isolate and assess the trade flow effect of a legislative or regulatory measure *on its own*. A look towards the WTO's approach to an indirect discrimination analysis may help guide future CFTA panels on the issue of "geographic neutrality."

The WTO's dispute settlement body has identified two relevant means of testing for indirect discrimination. The Appellate Body in *EC–Seal Products* firmly established the "disparate impact" test as one way to undertake an article

130. See *New Brunswick–Dairy*, *supra* note 86 at 13.

III national treatment analysis.[131] In GATT jurisprudence, a measure inflicts "disparate impact" on imported and domestic goods when it hurts the competitive opportunities of imported goods relative to those of domestic goods.[132] Indeed, international trade scholars have suggested that the *effects* of a measure wield great importance in determining whether it will be deemed to accord protectionism.[133]

In addition to an "effects" analysis, a WTO panel also looks to the "design, structure, and expected operation of the measure at issue."[134] Though the effect of a measure can be important in determining whether it accords "less favorable treatment" to imported "like, directly competitive or substitutable" goods, the WTO's Appellate Body has provided that a finding of discrimination need not be based on the actual effects of the measure.[135]

Thus, drawing on WTO jurisprudence, a CFTA panel has at least two means to identify a measure that facilitates indirect discrimination: an "effects" test, and a "design and structure" test. Indeed, in at least one instance, an AIT panel did not consider an impugned measure's effects, and instead employed a version of this latter "design, structure and expected operation" test to identify indirect discrimination.[136] Rather than examine the effects of the measure, the panel held that the challenged measure's wording "makes it extremely difficult for the *Act* to be applied in a manner that is geographically neutral" and thus remain in compliance with the CFTA's national treatment obligation.[137]

Unfortunately, CFTA jurisprudence has thus far systemically implemented the "effects test" in a manner that generates concern for, and uncertainty about, the CFTA's national treatment case law. The CFTA dispute panel reports released have not adequately explained or justified *why* the measures were not geographically neutral, which is a necessary intermediate conclusion to their

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131. See Julia Y Qin, "Accommodating Divergent Policy Objectives Under WTO Law: Reflections on EC—Seal Products" (2014-15) 108 AJIL Unbound 308.
132. Joost Pauwelyn, "Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO" (2004) 15 Eur J Intl L 575 at 582.
133. See generally Ming Du, *supra* note 50 at 155; Gâlea & Biriş, *supra* note 38 at 177.
134. *Thailand–Customs and Fiscal Measures on Cigarettes from the Philippines (Complaint by the Philippines)* (2011), WTO Doc WT/DS371/AB/R at para 134 (Appellate Body Report), online: WTO <www.wto.org/english/tratop_e/dispu_e/cases_e/ds371_e.htm> [perma.cc/X2AQ-6J7B].
135. *United States—Tax Treatment for Foreign Sales Corporations (Complaint by the European Communities)* (2002), WTO Doc WT/DS108/AB/RW at para 215 (Appellate Body Report), online: WTO <www.wto.org/english/tratop_e/dispu_e/cases_e/ds108_e.htm> [perma.cc/NC7V-4KYW] [*US–FSC*].
136. *New Brunswick–Dairy*, *supra* note 86 at 13.
137. *Ibid*.

ultimate findings that the measure produced indirect discrimination. The case of *Ontario–Dairy (I)* can help illustrate this common analytical shortcoming that appears throughout CFTA jurisprudence.

The panel in *Ontario–Dairy (I)* concluded that the Ontario measure had the effect of discriminating against vegetable-oil based dairy alternatives or dairy blends.[138] However, without ever establishing why discrimination against dairy alternatives and blends was not "geographically neutral," the panel concluded that the measure indirectly discriminated against foreign goods and thereby violated the national treatment obligation.[139] Because the Ontario measure was neutral on its face, for the panel's conclusion to logically follow, the reader of the report is forced to assume that there are very few, if any, producers of dairy blends or dairy alternatives in Ontario. Thus, by discriminating against such products, Ontario was primarily discriminating against "like" foreign products (*i.e.*, dairy blends and dairy alternatives). However, the panel report does not provide for this necessary logical link in the body of the report. If 99 per cent of all Canadian producers of dairy alternatives or dairy blends were based out of Ontario, would an Ontario policy discriminating against dairy alternatives or dairy blends have violated the CFTA's national treatment clause? The failure of the panel in *Ontario–Dairy (I)* to establish the lacking "geographic neutrality" of an indirectly discriminatory measure—an essential conclusion for a finding of national treatment violation—is a consistent feature of CFTA national treatment jurisprudence. A measure may validly discriminate against a "like" product and remain consistent with the CFTA's national treatment obligation. It is only those discriminatory measures that fail to remain "geographically neutral" that cause a violation of the agreement.

There need not be a numerical threshold to surpass for a panel to reach a conclusion as to whether the policy is geographically neutral. Moreover, the WTO has not created a numerical "test" for a measure to satisfy that would allow it to deem that the disparate impact has reached discriminatory levels. However, the WTO's Appellate Body requires a panel to undertake "careful analysis of the contested measure and of its implications in the marketplace" to justifiably establish a finding that a party violated its national treatment obligation.[140] Carefully constructed reasoning that shows how the CFTA panel arrived at its conclusion that the measure not only discriminated against a particular product, but that the discriminated product was chiefly an import relative to its

138. *Ontario–Dairy (I)*, *supra* note 42 at 18.
139. *Ibid* at 17-18.
140. *US–FSC*, *supra* note 136 at para 215.

better-treated domestic counterpart, is a necessary part of a conclusion of indirect discrimination.

This article does not advance the argument that CFTA panels should create a bright line test to determine whether or not a measure satisfies a test of geographical neutrality. Instead, this article argues that a panel should be required to make explicit its reasoning so that the justification is clear and transparent, so that over time the CFTA national treatment jurisprudence may offer a fair and consistent approach and provide future disputants greater predictability.

IV. CONCLUSION

Largely untouched for over twenty-five years, the collective jurisprudence of the CFTA is ripe for analysis and constructive criticism by the legal academic community. This is especially true with the CFTA's dispute forum taking on heightened importance as a result of the Court's 2018 ruling in *R v Comeau*, wherein the Court effectively ruled that it would not strike down non-tariff measures notwithstanding their detrimental effects on internal trade. This article aims to spark a scholarly dialogue on the contents of domestic trade dispute rulings, and to that end, focuses on the jurisprudence of one obligation under the agreement in particular: The national treatment requirement.

The contours of the national treatment obligation under the CFTA have gained greater coherence over the AIT's lifetime. The most recent case, *Alberta–Beer Markups*, provided much needed clarity and analytical rigour to the national treatment analysis. Though *Alberta–Beer Markups* improved the state of national treatment jurisprudence, it left unresolved the means to answer two key questions. First, when are two products "like, directly competitive and substitutable" in the context of the CFTA? Second, when is an indirectly discriminatory measure "geographically neutral"? To fill these analytical gaps, this article advanced proposals that drew from GATT jurisprudence.

Opaque internal trade obligations make it difficult for policy makers to craft measures that comply with the strictures of the CFTA. In addition, domestic commercial actors who encounter trade barriers may aver from engaging with the CFTA's dispute resolution process if the jurisprudential uncertainty weighs against the cost of litigation. Neither of these outcomes helps bring to bear the economic unity that the nation's internal trade agreement regime was meant to improve in the first place.