Cambridge Law Journal, **71(3)**, November 2012, pp. 537–566
doi:10.1017/S0008197312000815

FREE MOVEMENT, FEDERALISM AND INSTITUTIONAL CHOICE: A CANADA-EU COMPARISON

ALICIA HINAREJOS*

ABSTRACT. *Although very different in many respects, the EU and Canada nevertheless confront common problems in certain areas. One such common problem is how to manage inter-state regulatory diversity within a federal (or federal-like), multinational system. This paper compares the different ways in which the EU and Canada have chosen to address the problem of national barriers to trade within their internal markets, and the consequences of these choices. It is somewhat counterintuitive for EU lawyers that a full-fledged state may have an internal market that is less integrated than that of the EU; and yet that is the case in Canada. The comparison is illuminating as to the different possible approaches of federal polities to the problem of state regulatory choices and barriers to trade, the paramount importance of institutional choice, and the significance of historical and political circumstances.*

KEYWORDS: *EU constitution, Federalism, inter-state trade, Canada*

I. INTRODUCTION

This paper will compare the different ways in which the EU and Canada—now in the process of negotiating a Comprehensive Economic and Trade Agreement—have chosen to address the problem of national barriers to trade within their internal markets, and the consequences of these choices.[1] The comparison is illuminating as to the different possible approaches of federal polities to the problem of state regulatory choices and barriers to trade, the paramount importance of institutional choice, and the significance of historical and political circumstances.

* Faculty of Law and Downing College, University of Cambridge. The author is grateful to Stephen Weatherill, Armand de Mestral, Michael Blome-Tillmann and two anonymous referees for their comments, as well as to Andrew Deak for research assistance. Address for correspondence: Downing College, Cambridge CB2 1DQ. Email: ah428@cam.ac.uk.

[1] The first round of negotiations took place in Brussels in January 2010; the latest round of negotiations took place in Ottawa in October 2011. It is expected that a trade agreement will be adopted in 2012: http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/canada/ (accessed July 2012). From the Canadian side, see http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu.aspx (accessed July 2012).

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

The reason for comparing these two jurisdictions may not seem obvious at first: needless to say, Canada and the EU are in many respects different. To start with, Canada is a federal state while the EU is not. The latter does, however, exhibit at least certain federal features,[2] and both Canada and the EU are heterogeneous and multi-national polities.[3] More to the point, both entities are suitable subjects for a careful comparison to the extent that, in some areas, they confront common problems. How to manage inter-state regulatory diversity is one such common problem, and one that has been addressed very differently in each jurisdiction.

On the one hand, the European Court of Justice traditionally regarded the fundamental freedoms and the single market as the constitutional cornerstone of the Community; within the boundaries of its role, the Court sought to bring about the fulfillment of these objectives by curtailing national regulatory autonomy whenever it led to the creation of barriers to trade, even in the absence of discrimination. Part of the process was thus judicially driven. On the other hand, at least to the outside observer, the Canadian constitution seems to offer similar opportunities for judicial involvement in the pursuit of a strong economic union and, more specifically, free movement of goods and labour between the provinces. For various reasons, however, the Supreme Court of Canada chose not to use its role as supervisor of the federal allocation of competences to review provincial regulatory choices that, although non-discriminatory, create barriers to trade. Instead, the eventual lifting of such barriers was left wholly to the political process, which resulted in the adoption of an inter-governmental, non-justiciable agreement between the provinces and the federal government. As a result, the Canadian market is much less integrated than the EU one, which may seem surprising to European lawyers given that Canada is a fully-fledged federal state.

The institutional choice at the heart of both cases has had crucial consequences for the subsequent development of the internal market, the perceived legitimacy of the market-building enterprise and the role of individuals in the process, among others. After carefully laying out the constitutional background and the approach taken in the EU, first, and in Canada, second, the second part of this paper will address the

[2] For an insightful and comprehensive overview of the EU and federalism, see in general R. Schuetze, *"From Dual To Cooperative Federalism: The Changing Structure Of European Law"* (Oxford 2009).

[3] Although obviously a state, Canada has a weak national identity as opposed to, for example, the USA. This makes Canada a much more suitable term of comparison for an entity like the EU. See J.E. Fossum, "The EU-Canada Nexus: Why compare Canada and the European Union—and how?" in P.M. Crowley (ed.) *Crossing the Atlantic: Comparing the European Union and Canada* (London 2004).

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

most significant factors that have influenced the institutional choices made within both polities.

As a general observation, comparative studies—this one hopefully among them—have a healthy side effect, in that they often make us reflect on two interesting aspects of EU integration that are sometimes forgotten: on the one hand, the EU, although a novel and unique experiment, tries to address at least certain questions that are the same the world over. On the other hand, the fact that there are also many possible answers to these ubiquitous questions may throw in even sharper contrast how remarkable the path taken by the EU has often been. Coming back to the particular case of Canada and the EU, for example, appreciation of how disintegrated Canada remains in comparison to the EU sharpens yet again awareness of how momentous *Cassis de Dijon* really was.[4]

II. Approaches to Market Building

The building of a common market necessitates the elimination of barriers to trade, of which there are various kinds. In every each specific market-building exercise, the states involved will have to decide how far they want to go in their pursuit of an unencumbered single market and thus what kinds of trade barriers they will address, as well as what institutions should be trusted with this role.

Very broadly speaking, national or state barriers to trade may appear in the form of fiscal (such as duties, taxes) and non-fiscal (quantitative and non-quantitative) restrictions to trade. The most obvious barriers arise because of the adoption of national measures that are distinctly applicable depending on origin. Indistinctly applicable measures may also constitute barriers: they may be covertly or indirectly discriminatory—as in measures that are not facially discriminatory, but impose requirements that are more easily satisfied by national products or nationals; i.e., their application relies on requirements such as residence or language. But the bulk of "indistinctly applicable measures" will be national technical standards that vary from state to state and that impose a double burden on out-of-state goods or nationals,[5] because the latter need to comply with both home state and host state regulation. These regulatory barriers to trade

[4] Case 120/78 *Rewe Zentrale v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] E.C.R. 649.

[5] It is also possible to label indistinctly applicable measures as "indirectly discriminatory", in the sense that they impose a double burden on out-of-state goods or persons (and thus have a different effect in fact).

There are many different classifications of these measures and many different meanings given to "discriminatory" in the literature. See e.g. C. Barnard, *The Substantive Law of the EU* (Oxford 2010) 80–116; N. Bernard, "Discrimination and free movement in EC law" (1996) 45 I.C.L.Q. 82; C. Hilson, "Discrimination in Community free movement law" (1999) 24 E.L.Rev. 445.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

are often the most problematic, since they are otherwise perfectly legitimate exercises of national regulatory autonomy, and they tend to represent national regulatory choices made by the legislature that are thus heavily context-dependent. A ban on certain kinds of advertisement, for example, or certain rules on how products should be labeled may arise from a certain view of consumer protection. Similarly, the legislature may wish to make sure that people who want to work as lawyers in the state know enough about national law, or that doctors have the necessary insurance coverage. In making these choices, state legislatures try to address local concerns. Such local concerns, as well as the way the legislature chooses to respond, will likely vary from state to state.

It is possible to pursue market integration in different ways; two basic models are often put forward, decentralised and centralised. In the decentralised model, it is possible to allow states to keep exercising their regulatory autonomy fully, as long as they do not discriminate directly (or adopt distinctly applicable measures) between national and out-of-state factors of production. Measures which cannot be properly justified will thus be removed, typically by the courts.

It may be relatively straightforward to push the discrimination model to cover cases of indirect or covert discrimination. But what of truly indistinctly applicable measures, or those national technical standards that vary from state to state? The decentralised model becomes more effective if we also consider indistinctly applicable rules as measures which may create illegitimate obstacles to trade and have to be either justified by Member States, or removed.[6] The decentralised model can address these barriers by imposing a duty of mutual recognition on all states: a duty not to impose their regulatory standards on products that have been lawfully marketed in another Member State. This principle limits national regulatory autonomy dramatically: states are not free to regulate their market anymore, or at least they have to be able to justify such regulation. In general, the decentralised model leads to what is often termed "negative harmonization", in the sense that it gets rid of barriers by rendering national rules inapplicable—without leaving anything else in their place.

The centralised model, on the other hand, would require a centralised effort to adopt market-wide standards or regulations to replace the national ones. This is often called positive or legislative harmonization, because it requires the central legislature to enact measures.

[6] One can either consider these measures as indirectly discriminatory because they have a different effect in fact on imported products than they do on domestic ones (the imposition of a double burden on imports), or abandon the discrimination model altogether and consider these barriers illegitimate merely on the grounds that they prevent or hinder market access (the market access model—which covers, but is potentially broader than, these "double-burden" measures). On the different meanings given to "discriminatory" in the literature, see note 5 above.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

In this case, regulatory autonomy is also taken away from the states to some extent. They may, however, defend their preferences by negotiating and voting on the rules that will be adopted centrally.

III. The European Union

As a general observation, the Treaty rules on the creation of a single market mark the start of the journey for the current European Union. From an intergovernmental agreement on free trade, the current EU emerges as a quasi-federal pact that reaches into almost all areas of national legislation and that has spawned an autonomous legal system with (at least from the point of view of EU law) supremacy over national law and a judicial structure to enforce it.

The four fundamental freedoms (free movement of goods, workers, services and capital) are the cornerstone of the EU single market. The following description of the Court of Justice's role in market-making will focus on the free movement of goods, which led the charge. All these general reflections apply, broadly, to the role of the Court of Justice when interpreting and enforcing the other fundamental freedoms.[7]

The previous section provided a brief introduction to the decentralised and centralised models of market-building. The EC Treaty was drafted with a combination of these two approaches in mind. The first stage of market-making in what was at the time the European Community concerned, unsurprisingly, the elimination of the most obvious barriers to trade, or those that were directly discriminatory or distinctly applicable: this got rid of customs duties or equivalent charges, discriminatory taxes, and other, non-fiscal measures that discriminated against imports. Article 34 TFEU, which lies at the core of the Treaty provisions on the establishment of the single market, bans "[q]uantitative restrictions on imports and all measures having equivalent effect". Initially, though, this provision was only applied to cases where there was an element of discrimination on grounds of origin;[8] leaving indistinctly applicable measures outside its scope. Presumably, the Member States intended to tackle the latter through

[7] The free movement of goods will be used here to exemplify the basic role of the CJEU in market building; this paper does not attempt a full-fledged study of either free movement of goods or the law of the single market in general. It is with this in mind that the following general reflections are said to apply to all fundamental freedoms, across the board. This is despite the fact that the market access approach was apparent in services and persons much earlier than goods, and that the free movement of persons presents us with the added dimension of EU citizenship and its impact on the protection of fundamental rights. For general reference on all fundamental freedoms: C. Barnard, *The Substantive Law of the EU*, 3rd ed. (Oxford 2010); S. Weatherill, *Cases and Materials on EU Law*, 9th ed. (Oxford 2010).

[8] There is however evidence that the Commission was already thinking of the potential reach of this ban to indistinctly applicable measures: Directive 70/50, OJ 1970 L13/29, Article 3. P. Craig and G. de Burca, p. 616.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

positive harmonization, or negotiating and eventually adopting EC-wide standards in all problematic areas. This was set to be an incredibly vast and difficult task, further complicated by the fact that all decisions had to be adopted by unanimity.[9] By the early eighties, it was clear that the single market project had stagnated.[10] The harmonizing process was slow and cumbersome and momentum had been lost, leading to a period of "Eurosclerosis".[11]

Against this backdrop, the Court of Justice was called upon to clarify the boundaries of the single market provisions (specifically, of Art. 34 TFEU, cited above), and it chose to give more weight to the decentralised approach to market-making: in *Cassis de Dijon*,[12] the Court famously gave new impulse to the single market by reading the principle of mutual recognition into the current Article 34 TFEU and ultimately turning this provision into one of the most powerful tools of integration in the EU.[13] The question concerned the definition of "measures having equivalent effect to quantitative restrictions", and whether they included indistinctly applicable measures. In *Cassis*, a German supermarket—wishing to import and sell the French liqueur that gives its name to the decision—had gone before court invoking this directly effective provision against an indistinctly applicable German measure concerning alcohol content in liqueur. Until then, Article 34 TFEU had been held as directly effective or enforceable by individuals in cases involving overt discrimination, i.e. distinctly applicable rules;[14] *Cassis* went further than this. The Court decided that the ban on "measures having equivalent effect to quantitative restrictions" included all national regulatory measures that were indistinctly applicable to all products, regardless of their origin, but which created an obstacle to trade by placing a double burden on imported products (having to comply with home state and host state regulation). Further, individuals were able to rely on this directly effective provision to challenge these regulatory barriers. The Court could have pointed to the harmonizing intentions of the Member States and stated that this provision of the EC Treaty did not, in fact, create an enforceable right

[9] The original provision, requiring unanimity, was Art 100 EEC (then Article 100 EC, then Art 94 EC, now Art 115 TFEU). The Single European Act created Article 100a EEC which needed and needs only QMV in Council—later Art 100a EC, then Art 95 EC, now Art 114 TFEU.

[10] See e.g. K. Alter, *The European Court's Political Power* (Oxford 2009), 152 and ff.

[11] One of the most overused terms of the discipline at the time, according to J Peterson, "The EU: Exportable Model or 'Jagged Little Pill'?" in J.H.H. Weiler, I. Begg and J. Peterson (eds.), *Integration in an Expanding European Union* (Blackwell 2003) 374.

[12] Case 120/78, *Rewe Zentrale v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] E.C.R. 649.

[13] On the significance and different interpretations of Art. 34 TFEU (Art. 30 EC at the time): M. Maduro, *We, the Court* (Oxford 1998).

[14] The current Article 34 TFEU was held to be directly effective for the first time in Case 74/76, *Ianelli & Volpi v Meroni* [1977] E.C.R. 557. For more details (including the distinction between vertical and horizontal direct effect): Barnard, pp. 76–78.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

to not be placed under a double regulatory burden. Instead, of course, the exact opposite happened.[15]

This judicial move changed the nature of market-making in the then EC and had great impact on national regulatory autonomy: the Court alleviated some of the legislature's work by imposing a prima-facie obligation on Member States to accept each other's standards.[16] Of course, deviations from this rule would be allowed, but Member States had to justify them before the Court. The latter thus acquired a more significant role in the market integration endeavor, something that we will explore later. Finally, the duty of mutual recognition gave Member States an incentive to pursue the centralised approach and harmonise particular standards where the cost of having to accept a different state's rules were considered to be higher than the cost of negotiating and agreeing on common rules.

This approach to market-making is two-pronged: first, it relies on reading enforceable rights into the single market provisions of the Treaty, thus recruiting individuals to advance the project through litigation. Second, it relies on a certain general understanding of the system of distribution of competences between the then EC and the Member States. Even when exercising an exclusive competence, Member States have to accept that their actions have to comply with the Treaty provisions on the single market. Member States are within their right to exercise their exclusive competences, but they have to accept that the Court of Justice will be monitoring any interference or overlap with the fundamental freedoms. This monitoring amounts to a justifiability and proportionality test. This means that these legislative restrictions set out in the Treaty (the ban on measures having equivalent effect to quantitative restrictions, the ban on restrictions

[15] The seed had already been planted in earlier cases: in *Dassonville*, where the Court already gave a potentially wide interpretation to "measures having equivalent effect to quantitative restrictions", by stating that they included "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade" (Case 8/74 *Procurer du Roi v* Dassonville [1974] E.C.R. 837, [5]) and in *Van Binsbergen*: Case 33/74 *Van Binsbergen/Bedrijfsvereniging voor de Metaalnijverheid* [1974] E.C.R. 1299. On why Cassis was far more influential than this earlier case law, see K. Alter, "The European Court's Political Power", ch.7.

[16] Following *Cassis*, the Commission reoriented its legislative agenda to focus on those national measures that withstood the Court of Justice's approach: Commission Communication 3 October 1980, OJ 1980 C256/02. Since *Cassis*, the case law of the Court of Justice has continued to evolve, seeking to refine the boundaries of Art. 34 TFEU. Important benchmarks beyond the scope of this paper are *Keck* and its aftermath (Joined *Cases* C-267 and 268/91, *Keck and Mithouard* [1993] E.C.R. I-6097; and e.g. Cases C-69 and 258/93 *Hünermund* [1993] E.C.R. I-6787; Joined Cases C-34/95, C-35/95 and C-36/95 *De Agostini* [1997] E.C.R. I-3843) and the more recent dominance of the market access test (Case C-110/05 *Commission v Italy (trailers)* [2009] E.C.R. I-519; Case C-108/09 *Ker-Optika*, judgment of 2 December 2010, not yet reported). On this evolution, see e.g. S. Weatherill, "After *Keck*: Some thoughts on how to clarify the clarification" (1996) 33 C.M.L.Rev. 885; P. Oliver and S. Enchelmaier, "Free Movement of Goods: Recent Developments in the Case Law" (2007) 44 C.M.L.Rev. 649; E. Spaventa, "Leaving *Keck* behind: The free movement of goods after the rulings in *Commission v Italy* and *Mickelsson and Roos*" (2009) 34 E.L.Rev. 914.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

to labour mobility, etc) are, in a manner of speaking, above the rules on attribution of legislative or positive competence, or at least in a position to affect them. Member States have to comply with these rules, even within an area of exclusive national competence—which means that their exclusive competence is effectively limited. Although EU lawyers have come to accept this "fluidity of the boundaries" whereby EU law may come to be virtually all-pervasive, the next section will show how other federal systems may opt for a very different approach, arguably because of historical circumstances.

The creation of the common market (which is by no means finished) lies at the heart of the constitution of the EU, even if its competences are today far more varied and extensive. Not because the current EU is still only a commercial union at heart, but because the common market rules meant the empowerment of individuals against states and the creation of a new sort of post-state constitutional law that still defines (and, for some, legitimises) the EU today.[17]

IV. Canada

Today, Canada is a highly decentralised federation consisting of ten provinces and three territories. In 1867, Westminster adopted the British North America Act (currently the Constitution Act 1867),[18] which created a federal Dominion consisting of four provinces; the rest of provinces and territories joined Confederation later on. Although this is still a matter of some discussion, it can be argued that the drafters of the Constitution Act 1867 sought to create a strong economic union between the provinces. There are indeed constitutional provisions that conceivably could have played a role similar to the single market provisions in the EC Treaty. This, however, has not happened—for reasons which shall be explored later on in this paper.

The first thing to bear in mind is that the matter of a Canadian economic union or common market has primarily been framed in terms of attribution of competence in the Constitution, rather than in terms of rights granted to individuals. As a consequence, the Supreme Court has been seised most often to adjudicate on a conflict of competences

[17] See e.g. M. Maduro, *We, the Court* (Oxford 1998), 168 and ff, emphasizing the political values of Art 34 TFEU (non-discrimination, representation and solidarity) and the role of this provision as a corrector of national political processes. For similar views on the empowerment of individuals or their liberation from national democratic boundaries, see also D. Halberstam, "The Bride of Messina: Constitutionalism and Democracy in Europe" (2006) 30 E.L.Rev. 775. See also n. 63 below.

[18] British North America Act of March 29, 1867, now called the Constitution Act 1867. The Statute of Westminster 1931 granted the Dominion independence. An Act of Westminster was however still necessary in order to amend the Canadian Constitution. This ended with the "patriation" of the latter in 1982: Westminster passed the Canadian Act 1982, which contained the text of the Constitution Act 1982. The latter includes, for the first time, a Charter of Rights.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

between the federal and the provincial level, and not to enforce or protect an individual's economic rights.[19]

The federal pact attributed to the federal level the power to regulate matters such as defense, banking, legal tender, criminal law and, most importantly for the present discussion, trade and commerce.[20] On the other hand, the provinces retained exclusive power to regulate, among other things, "property and civil rights".[21]

This way of attributing competences is unusual in federal systems, where the constitution normally enumerates the competences of one level of government (either the centre or the states) and attributes residual power to the other one.[22] In Canada, however, the Constitution creates two lists of enumerated exclusive powers: one for Parliament (the federal level) and another one for the provincial legislatures.[23] The impression at the time was that US federalism, which attributed only enumerated powers to the centre, had led to undesirable results: states that were too strong, a federal level that was too weak, and a civil war as a result. The drafters of the Canadian Constitution thought they would create a stronger federal level by enumerating the exclusive powers of both levels of government;[24] the effect this has had is that courts have tended to interpret each exclusive competence as excluding all others, in order to keep everyone's powers in check. This fairly rigid separation of powers is in keeping with the classic federal notion of single ownership of fields.[25]

Be this as it may, the fact is that, when it comes to the single market and free movement, there is almost always a conflict between two heads of exclusive competence: the federal power to regulate trade and commerce, and the provincial one to regulate property and civil rights. It is thus the courts that must adjudicate on this matter and, in general, the judicial approach to the separation of competences in this area favours the provinces. Many point to the historical roots of this approach, which dates back to the decisions of the Judicial Committee of the

[19] This is not to say that the Court has not been seised by individuals; the latter were always able to challenge the validity of a measure before the Court, but this had to be done on grounds of lack of competence.

[20] For a complete list, see s. 91 of the Constitution Act 1867.

[21] Section 92 of the Constitution Act 1867.

[22] This is, for example, the way it is done in the US, Australia, the EU and Germany.

[23] The federal level is given a certain residual power with the "Peace, Order and Good Government" clause, which has been narrowly defined. On the interpretation of this clause, see P.W. Hogg, *Constitutional Law of Canada* (Toronto 2009), ch. 17.

[24] Ironically, of course, the US system of attribution of competences led, later on, to a very strong Congress; the Canadian system has, conversely, led to a weak Parliament and very strong provinces.

[25] "…[T]he method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent" K.C. Wheare, *Federal Government*, 3rd ed. (Oxford 1953), 10. It should be borne in mind that the Canadian federation dates back to 1867; its constitution and formal separation of powers are anchored in a classic or dual version of federalism. Another result of this rigid separation of powers is that no inter-delegation is possible: *A.-G.N.S. v A.-G. Can.* (Nova Scotia Inter-delegation) [1951] S.C.R. 31.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

Privy Council, traditionally criticised for its disregard for what seemed to be the intent of the constitutional drafters.[26] After the Privy Council stopped receiving appeals from Canada, the role of adjudicating on these competence disputes fell to the Supreme Court. By then, however, the tone had been set,[27] and although the Court expanded some areas of federal competence, it did not turn the tables when it came to the Canadian single market.

But let us come down to specifics: the prevailing approach to these conflicts is that any single piece of legislation falls either within exclusive federal or provincial power. There is no shared competence when it comes to the single market or the economic union.[28] When faced with any piece of legislation, the Court will decide solely on the central matter of the measure (its "pith and substance"),[29] and it will check whether that matter falls within one of the competences of the enacting level of government. Another way of expressing this is that the Court poses the question "what does this law regulate?". If there are several subject-matters or objects of regulation, the Court will choose the most important or central one. Of course, there is the problem of "regulating" vs. "affecting": as long as a law is deemed to be aimed at regulating something that is within your competence, it does not matter if it has incidental effects on other areas that are not. A provincial law regulating labeling standards in the province, for instance, will affect interprovincial trade—and that will be fine, because this law does not attempt to regulate interprovincial trade but simply affects it. There is no further review—in the form of a proportionality test, etc.—of this spill-over.[30] This means that one level of government may enact laws that have important effects on areas that are within another level of government's jurisdiction.

[26] E.g. F.R. Scott, "Centralization and Decentralization in Canadian Federalism" (1951) 29 Canadian Bar Review 1095; B. Laskin, "Peace, Order and Good Government Re-Examined" (1947) 25 Canadian Bar Review 1054. It has been argued more recently that the decisions of the Privy Council were in tune with the political circumstances of the times, and consistent with other tendencies in Canada towards a less centralised federal system than that of the US or Australia: Hogg *Constitutional Law of Canada*, pp. 128-129, with further references, and A.C. Cairns "The Judicial Committee and its Critics" (1971) 4 Canadian Journal of Political Science 301.

[27] Termed "irreversible" by Hogg, *Constitutional Law of Canada*, p. 129. For a concise historical overview of Canadian federalism in the courts: G. Baier, *Courts and Federalism* (Vancouver 2006), 55–62. Baier notes that, since becoming the court of last resort in 1949, the Supreme Court has tempered decentralization slightly, but it has not shifted dramatically to a centralised view of federalism (pp. 58ff). See also G. Baier, "The Courts, the Division of Powers and Dispute Resolution" in H.Bakvis and G. Skogstad (eds.), *Canadian Federalism: Performance, Effectiveness, Legitimacy*, 2nd ed. (Don Mills Ontario, 2003), 24ff.

[28] Although exclusivity is the rule, there are exceptions. There are concurrent powers in these areas: export of natural resources; old age pension and supplementary benefits; agriculture and immigration (ss. 92A, 94A and 95 of the Constitution Act 1867, respectively).

[29] Hogg *Constitutional Law of Canada*, pp. 372–387.

[30] But in the area of overlap, powers will be considered concurrent rather than exclusive: ibid., 412–413. For an argument in favour of a proportionality test within the legislative overlap, A. Vegh, "The Characterization of Barriers to Interprovincial Trade under the Canadian Constitution" (1997) 34 Osgoode Hall L.J. 355.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

It has already been said that the Supreme Court has sought to avoid overlap by narrowing down each competence to exclude the others.[31] When it comes to the economic union, the federal power of trade and commerce has been narrowed down to the regulation of interprovincial trade and the "general regulation of trade and commerce" (which is far narrower than it sounds, and does not allow Parliament to regulate any particular trade),[32] and the provincial power of property and civil rights to the regulation of intraprovincial trade. This means that, for example, regulation of all contracts, marketing, manufacture or production, labeling, etc will be a provincial matter—even though this may affect goods that are destined for interprovincial trade or that come from out of the province.[33] The competence of the provinces to set product standards because of consumer protection, environmental standards, etc, seems beyond doubt.[34] In general, provinces may not ban the import of out-of-province goods, or directly regulate how these products enter the province. But they may regulate plenty of matters that will affect or even impede this flow.[35]

Although, as it has been mentioned above, the matter of the economic union has appeared before the Court most often as a question of legislative competence, there are further constitutional provisions which do not attribute competence, but rather impose more specific legislative restrictions. First, the Constitution Act 1867 prohibits provincial barriers to trade in the following terms: "All Articles of the

[31] Often referred to as a process of "mutual modification": W.R. Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto 1981), 243.

[32] International/interprovincial trade and general trade and commerce affecting Canada as a whole are the two legs of the federal trade and commerce power, identified in *Parsons*: *Citizen's Insurance Company of Canada v Parsons* (1881) 7 App. Cas. 96. The second leg was ignored until 1949, and given a narrow interpretation thereafter. A five-part test has been defined: federal action must be in the form of a general regulatory scheme; it must be enforced by a regulatory agency; it must regulate trade and commerce as a whole, not a specific industry; it must be something that the provinces are not able to do jointly or separately; and it must be the case that failure to include one or more provinces would jeopardise the whole scheme. For further details: Baier *Courts and Federalism*, pp. 143ff.

[33] Cases where the province regulates marketing are less clear-cut: where the province has adopted a measure setting up a marketing board controlling the conditions under which a particular product is sold within the province, the measure will be deemed *ultra vires* if it seems to regulate and not merely affect the entrance of out-of-province goods into the provincial market. *AG Manitoba v Manitoba Egg and Poultry Association* [1971] S.C.R. 689; *Burns Foods Ltd. et al. v Attorney General for Manitoba et al.* [1975] 1 S.C.R. 494. In both of these cases, the marketing board had been set up to protect the local procedures' interests and was controlled by them.

[34] There is no federal power to create any national product standards for the sake of uniformity; there are some federal product standards in order to avoid a health and safety risk that has been considered worrying enough to allow Parliament to use its criminal law competence (The Food and Drugs Act). Parliament has been able to regulate, for example, that all products have to be labeled in English and French; it has also banned the use of some dangerous substances. Apart from these basic health and safety requirements, provinces are free to introduce any other labeling requirements (as long as they comply with federal intellectual property laws) or composition requirements.

[35] See *Labatt Breweries of Canada Ltd. v Attorney General of Canada* [1980] 1 S.C.R. 914 for an example of a failed federal attempt at regulating product requirements (in this case, for light beer and its labelling) at the central level in order to avoid obstacles to trade because of diverse provincial regulation. Unsurprisingly, this was held to be outside Parliament's competence.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

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" (s.121). This section was first interpreted as prohibiting customs duties on the transit of goods across a provincial boundary and,[36] later on, as "a limit on the competence of either the provinces or the federal government to pass legislation which interferes with the entry of goods into a province".[37] It has not been interpreted as granting a right to individuals to engage in unencumbered interprovincial trade, and the question has not been taken beyond the matter of legislative competence.[38] For provinces, this section means that they are not able to adopt "a trade regulation that in its essence and purpose is related to a provincial boundary"[39]—but this would have been beyond their competence in any case. They are still able to adopt a measure that incidentally impinges on the flow of goods and services across provincial boundaries.[40]

Second, the Charter of Rights, introduced by the Canada Act 1982, set out some new rules that would affect the Canadian economic union, initially as regards labour mobility,[41] and more broadly later on. Although the case-law had already indicated that Canadian citizens could not be deprived by provinces of the right to reside and engage in work in any province,[42] the Charter codified this right, which amounts to a ban on discriminatory measures. This provision was later interpreted to protect interprovincial economic activity of any kind—i.e., not only a person's right to move to a different province and to work there, but also to import goods to any province (again, a right not to be discriminated against).[43] Much could depend on the scope of "discrimination" on this point—we have already seen that it is possible

[36] *Gold Seal Ltd. v Attorney-General for Alberta* (1921) 62 S.C.R. 424, *per* Anglin J., at p. 466; and *per* Duff J., at p. 456.

[37] *Canadian Egg Marketing Agency v Richardson* [1998] 3 S.C.R. 157, para 63.

[38] Proposals were made to strengthen s. 121 in the Charlottetown round of constitutional negotiations, making it more similar to the EU Treaty provisions and potentially imposing a duty of mutual recognition on the provinces. These proposals were part of a failed, wider attempt to reform Canadian federalism: see section 5(d), "Political Tensions". K Swinton, "Courting our Way to Economic Integration: Judicial Review and the Canadian Economic Constitution" (1995) 25 Canadian Business L.J. 280, 288–293; F. Vaillancourt, "Canada's Internal Markets. Legal, Economic and Political Aspects" in J. Pelkmans, D. Hanf & M. Chang (eds), *The EU Internal Market in Comparative Perspective* (Brussels 2008), 281, 299–301.

[39] Rand J., concurring in *Murphy v Canadian Pacific Railway Co.* [1958] S.C.R. 626 at p. 642.

[40] *Canadian Egg Marketing Agency v Richardson* [1998] 3 S.C.R. 157, *per* McLachlin J. dissenting, para. 123; *Murphy v Canadian Pacific Railway Co*. [1958] S.C.R. 626, at p. 642 *per* Rand J.; *Reference re Agricultural Products Marketing Ac.* [1978] 2 S.C.R. 1198, at p. 1268 *per* Laskin C.J. interpreting s. 121.

[41] On mobility rights in Canada, see generally A. de Mestral & J. Winter "Mobility Rights in the European Union and Canada" (2001) 46 McGill L.J. 979; S. Choudhry, "Strengthening the Economic Union: the Charter and the Agreement on Internal Trade" (2002) 12 Constitutional Forum 52; K. Swinton, "Courting our Way to Economic Integration: Judicial Review and the Canadian Economic Constitution" (1995) 25 Canadian Business L.J. 280.

[42] *Winner v S.M.T. (Eastern)* [1951] S.C.R. 887 per Rand J. at 919–920.

[43] *Canadian Egg Marketing Agency v Richardson* [1998] 3 S.C.R. 157. See Choudhry, "Strengthening the Economic Union", pp. 55ff.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

to argue that indistinctly applicable rules or dual-burden measures of the kind at stake in *Cassis* are indirectly discriminatory because of the imposition of a double regulatory burden on out-of-state actors. Nevertheless, the Charter itself seems to preclude this, by explicitly allowing for the limitation of mobility rights by provincial laws of general application other than those that discriminate *primarily* on the basis of province of present or prior residence (s.6(3)(a)). This seems to hint at a narrower conception of "discriminatory measures", one that would still consider dual-burden rules legitimate. The Supreme Court has adopted this view also.[44]

In general, then, these legislative restrictions have been interpreted very narrowly; they do not have the power to affect the rigid separation of competences set out in the Constitution. This approach to competence varies, of course, from the one adopted in the EU, where restrictions of this kind have been interpreted to limit any national exclusive competence.

The result of all this is that Canada does not have a very integrated internal market.[45] This may seem surprising to observers from the EU, a supranational entity that cannot be considered a federal state, but that has a more integrated single market than Canada, a proper federal state. What may seem even more remarkable is that a literal reading of the constitutional provisions would make one expect a higher level of integration, or at least a stronger federal competence to realise the economic union. Yet practice has differed—and continues to do so—widely.

In trying to understand the reasons for this, one's first reaction is to turn to the courts, and their interpretation of the constitutional rules that directly affect the single market. There has indeed been very little judicially-driven integration, if any. As it has already been established, the Supreme Court has played a very different role from that of the EU Court. As opposed to the latter, the Supreme Court has not interpreted the relevant constitutional provisions as market-making cornerstones that impose judicially enforceable obligations on provinces. It has rather chosen a secondary role for itself, leaving the creation of an internal market to the political process. There

[44] It has been argued that, in *Black*, the court had opened the door to considering dual-burden rules as indirectly discriminatory in the future: Choudhry, "Strengthening the Economic Union", pp. 54ff. In later case-law, however, the Court has adopted a narrow definition of "discriminatory measures" for the purposes of defining the scope of s.6 (2) of the Charter. *Canadian Egg Marketing Agency v Richardson* [1998] 3 S.C.R. 157. See Choudhry, ibid. at p. 56, and K. Swinton, "Courting our Way to Economic Integration" (1995) 25 Canadian Business L.J. 280, 284.

[45] For empirical evidence, see Vaillancourt, "Canada's Internal Markets. Legal, Economic and Political Aspects", p. 281, with further references. Statistical data compiled by Statistics Canada on interprovincial flows available here: http://www.ait-aci.ca/en/progress/flow_en.xls (accessed Nov. 2010).

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

is bound to be many different reasons for this; the next section of this paper will point at some of them.

The result of leaving the creation of the single market to the political process in Canada was the Agreement on Internal Trade (AIT), an intergovernmental agreement signed in 1995 by all provinces and territories, plus the federal government. The AIT is a political compromise that is not judicially enforceable;[46] it is a manifestation of a wider trend of cooperative and executive federalism that has by now overshadowed judicial interpretation as a way to update the Constitution.[47] The AIT centers around six general principles: first, non-discrimination on grounds of origin (no distinctly applicable rules); second, the provinces would not limit the right of exit and entry; third, the provinces agreed that provincial regulatory measures should not create obstacles to trade; fourth, all these liberalising principles would be subject to exceptions for legitimate purposes;[48] and fifth, the parties agreed to the creation of a non-judicial mechanism of dispute settlement and to continue negotiating in order to fill in the (many) gaps present in the agreement. All these principles are only applicable to the extent foreseen in each sectoral chapter.[49] The scope of the agreement is limited. In general, in those areas in which it applies, it forbids direct discrimination against out-of-province actors or goods, and has sought to eliminate non-discriminatory barriers to trade by opening ways of communication and fostering cooperation in the creation of common standards.[50] The agreement thus adopts a narrow view of what constitutes a discriminatory measure and, at least until the recent reform that will be studied below, no duty of mutual recognition.

It has already been mentioned that the AIT is not judicially enforceable; the Agreement created a dispute resolution mechanism that was neither efficient nor easily accessible to individuals. The parties to the Agreement agreed to submit their disputes before an arbitration panel, whose recommendations could not be enforced. Individuals

[46] This was corroborated in a 1999 Quebec court decision on Quebec's competence to require all margarine sold in the province to be colourless (contrary to all other provinces): *UL Canada Inc. c. Québec (Procureur général)* [1999] R.J.Q. 1720 (C.S.). The judgment was appealed to the Quebec Court of Appeal and, finally, to the Supreme Court. None of them disagreed with the first court's categorization of the AIT: *UL Canada Inc. v Quebec (Attorney General)* [2005] 1 S.C.R. 143, 2005 SCC 10. (Appeal from a judgment of the Quebec Court of Appeal [2003] R.J.Q. 2729, 234 D.L.R. (4th) 398, 10 Admin. L.R. (4th) 36, [2003] Q.J. No. 13505 (QL)).

[47] These intergovernmental agreements, negotiated and adopted by the executives, appeared as a way to "make federalism work", since amending the Constitution was seen as unfeasible. Baier, *Courts and Federalism*, pp. 11ff.

[48] Legitimate objectives include public security and safety, public order, protection of human, animal or plant life or health, protection of the environment, consumer protection, protection of the health and well-being of workers and affirmative action programs.

[49] The sectoral chapters cover: procurement, investment, labour mobility, consumer-related measures and standards, agricultural and food goods, alcoholic beverages, natural resources processing, energy, communications, transportation, environmental protection.

[50] On what has been achieved from the entering into force of the AIT until September 2010: http://www.ait-aci.ca/en/progress/progress_en.pdf (accessed Nov. 2010).

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

could ask their government to take their complaint to such a panel; if their government refused to do so, it could still grant permission to the individual to bring the complaint herself. This has rarely happened since, even if the individual's complaint were successful, there would be no reimbursement of costs and no guarantee of enforcement of the panel's recommendation. In general, the dispute resolution mechanism has not been used often, and there have been cases where it has even failed notoriously.[51] The Quebec margarine case is a good example of this: since 1997, the provinces have been trying to reach an agreement on a uniform rule with respect to the colouring of margarine. Margarine is normally coloured yellow in order to resemble butter and appear more appealing. Quebec, however, has traditionally banned the colouring of margarine,[52] with the result that producers of margarine from outside Quebec would have to adapt to different technical standards to enter this particular market. The competence of a province to maintain this restriction was challenged before the courts without success.[53] Two AIT panels were convened to address this issue, but they were ineffective for different reasons: the first time because Quebec refused to nominate a member of the panel, and the second time because, although the measure was found to be against the AIT, the recommendation was never enforced.[54] The law was finally repealed voluntarily by Quebec in 2008.

The AIT has been considered a weak agreement in need of reform for quite some time now.[55] In 2009, perhaps because of the momentum afforded by the impending negotiations with the EU on a comprehensive trade agreement, the AIT was substantially reformed.[56] Its scope

[51] For a summary of all disputes from the entering into force of the AIT until September 2010: http://www.ait-aci.ca/en/dispute/summary_en.pdf (accessed Nov. 2010).

[52] Quebec dairy farmers are an important lobby within the province, and the Quebec ban on yellow margarine would seek to protect the sales of butter. See e.g. Vaillancourt, "Canada's Internal Markets. Legal, Economic and Political Aspects", pp. 291–292.

[53] *UL Canada Inc. c Québec (Procureur général)* [1999] R.J.Q. 1720 (C.S.). The judgment was appealed to the Quebec Court of Appeal and, finally, to the Supreme Court. None of them disagreed with the first court's decision: *UL Canada Inc. v Quebec (Attorney General)*, note 46 above.

[54] The first one was in 1997/98, and the claim was brought by Unilever and the province of Ontario. In 2003/04, Alberta brought again the same complaint against Quebec. For a summary of all disputes from the entering into force of the AIT until September 2010: http://www.ait-aci.ca/en/dispute/summary_en.pdf (accessed Nov. 2010).

[55] For a classic critique, see e.g. R. Howse, "Between Anarchy and the Rule of Law: Dispute Settlement and Related Implementation Issues in the Agreement on Internal Trade" in M.J. Trebilcock and D. Schwanen (eds.), *Getting There: An Assessment of the Agreement on Internal Trade* (Howe Institute, Toronto, 1995). But for a positive appraisal, see M. Macdonald, "The Agreement on Internal Trade: Trade-Offs for Economic Union and Federalism" in H. Bakvis and G Skogstad (eds.), *Canadian Federalism*, ch. 8.

[56] This is not the first amendment to the AIT, of course. The latest Protocol of October 7, 2009 (concerning the dispute settlement mechanism) is the Tenth Protocol of Amendment. The parties signed both the Tenth and the Ninth Protocol (on the labour mobility chapter) in January 2009. The Ministers declared that the reforms would come into force "upon execution by all ministers responsible for internal trade once duly authorised by [their] respective governments". The declaration is available here: http://www.ait-aci.ca/en/progress/fmm_en.pdf (accessed Nov. 2010).

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

was widened (notably, it now includes a full-fledged chapter on labour mobility) and its approach changed from the former fostering of cooperation between provincial regulatory bodies to the adoption of the principle of mutual recognition. This may not be as revolutionary as it sounds, since many years of communication and cooperation between provincial regulatory bodies have yielded, by now, a certain degree of harmonization of standards, at least in certain fields.[57] The change of approach is nevertheless noteworthy—and so are the changes to the dispute resolution mechanism, which has been significantly strengthened: first, the panel can now impose financial penalties. Second, further steps have been taken to guarantee the enforcement of panel recommendations. Notably, if a party fails to enforce, the Agreement foresees the adoption of retaliation measures. In short, while still falling short of judicial enforcement, the 2009 dispute resolution mechanism is much stronger and it represents a change in attitude towards the Agreement and the commitments it contains.

V. Some Reflections: Matters of Institutional Choice

The historical background, political setting, and various other circumstances of market regulation in the EU and Canada differ widely. This should warn us against drawing conclusions from hasty comparisons. It is still the case, however, that a guarded comparison may be useful precisely because it reminds us of the transcendence of historical circumstances, constitutional arrangements, and institutional choices in any instance of market regulation or market-building.

The first, crucial difference between the EU and Canada is that, in the EU, the task of market-making has been taken up by the judiciary, to different degrees at different moments in time. To the contrary, Canadian courts have resisted taking this task upon themselves, leaving it instead to the political process. At the core of each different approach to market-making lies an institutional choice. As Swinton so precisely put it:

> [I]n a federal system it is not enough to conclude that a practice is discriminatory or unduly burdensome; rather one must go on to ask how integration will most feasibly and legitimately result: through judicial prohibitions of the practice; through unilateral federal action; through intergovernmental co-operation and negotiations; through new institutional reforms; or through formal constitutional change.[58]

[57] See e.g. the work of the Canadian Standards Association, a membership-based private association that works towards developing standards across different market sectors.
[58] Swinton, "Courting our Way to Economic Integration", p. 292.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

Both the Court of Justice of the EU and the Canadian Supreme Court could have adopted different readings of the provisions with a bearing on the internal market or the economic union; different readings would have meant different institutional choices.[59] The consequences of opting for a (at least partially) judicially driven or politically driven market-making process can be seen in the EU and Canada cases.

In the case of the EU, constitutional adjudication led the charge. This changed the integration process irremediably, with the subsequent legislative agenda focusing on those areas that remained outside the scope of control of the Court of Justice (i.e., those instances where the Court was not going to put the exercise of national regulatory autonomy to the test of proportionality).[60] The Court acted as a revulsionary in a period of legislative stalling and acquired a very important role in the market-building process: since Member States are made to justify their regulatory choices before the Court, it is the Court of Justice that will strike the balance between integration and national regulatory autonomy, between legitimate and illegitimate national regulation. The EC legislature's relative inability to perform a certain function meant that the Court was better positioned to act, with the result that the Court of Justice claimed a more predominant role in driving the project of market integration. At the same time, reliance on judicially-driven integration also meant the recruitment of individuals to act as agents of change, who pushed the integrationist agenda through litigation. As a result, there was an understandable quickening of the process, which became more efficient in removing barriers to free movement. This may be considered an advantage from the point of view of creating a single market and achieving economies of scale.

There are also, of course, clear disadvantages to heavy judicial involvement in the process. The extensive interpretation of the free movement rules has important consequences for the allocation of competences in the Union and it is vulnerable to criticisms that question the legitimacy of the Court's approach. In general, the Court's preeminent role faces us with a problem that many federal systems grapple with: whether the question of how to organise federalism needs to be answered by law or politics. Furthermore, any interpretation of free movement rules has implications for the relationship between the state and the market, and the place of the market in our societies, in general. A typical point of contention is that a non-elected, supranational institution has arrogated itself the power to decide where the

[59] On the institutional choices underlying different interpretations of Art. 34 TFEU (Art. 30 EC at the time) and, by extension, the single market provisions: see Maduro, *We, the Court*. On institutional choice analysis or comparative institutional analysis more generally, see N.K. Komesar, *Imperfect Alternatives. Choosing Institutions in Law, Economics, and Public Policy* (Chicago 1994).

[60] The Commission reoriented its legislative agenda following the *Cassis* decision: Commission Communication 3 October 1980, OJ 1980 C256/02.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

limits of legitimate national regulatory autonomy lie—a further twist on the well-known problem of the anti-democratic nature of judicial review,[61] made more acute by the fact that this is not a typical constitutional adjudicator within a federal state, but a supranational court that was created by a treaty that originally envisaged an economic union.[62] Nevertheless, to the extent that individuals have been given a central role in enforcing their fundamental freedoms through litigation, many have countered objections to the democratic legitimacy of the Court by arguing that the latter obtains its legitimacy in this area by defending the rights of out-of-state actors, whose choices are not represented in the national democratic process.[63] On the other hand, the reliance of the process on individual litigation may also be considered a weakness of the system, since this mechanism is prone to being captured by big corporations, rather than individual citizens.

On the Canadian side, the Supreme Court's approach meant deference to the political process. The latter resulted in the 1995 Agreement on Internal Trade, a non-justiciable, "soft" intergovernmental agreement that nevertheless spurred, to some extent, communication and cooperation on at least some regulatory standards.[64] The fact that, overtime, some approximation of these standards has

[61] The legitimacy problems of constitutional adjudication—most notably, the counter-majoritarian difficulty—are well known and have long been the focus of academic discussion in the US. For two recent and compelling overviews from opposite standpoints and further references, see: J. Waldron, "The Core of the Case against Judicial Review" (2006) Yale L.J. 1346; R. Fallon, "The Core of an Uneasy Case for Judicial Review" (2008) 121 Harvard L.Rev. 1693. There is a long tradition of challenging constitutional review in the US, contrary to what happens in Europe—see, for example, M. Tushnet, *Taking the Constitution away from the Courts* (Princeton 1999); R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass. 2004). Judicial review has often been defended on substantive or procedural conceptions of minority protection: R. Dworkin, *Taking Rights Seriously* (London 1977); J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass. 1981).

At any rate, the classic counter-majoritarian argument against constitutional adjudication apply to the Court's role as a protector of individual rights, and as a federal court that has to enforce the vertical distribution of powers: A. Stone, "Judicial Review without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review" (2008) 28 O.J.L.S. 1.

[62] Generally, it may be said that the Court of Justice does not enjoy the same social legitimacy that national constitutional courts do in Europe. A. Hinarejos, *Judicial Control in the European Union. Reforming Jurisdiction in the Intergovernmental Pillars* (Oxford 2009), ch.1 (esp. pp. 10–12).

[63] Maduro, for example, argued that the adoption of each possible reading of what is nowadays Art. 34 TFEU would have led to a different institutional choice (the national legislature, the EC legislature, the Court). His comparative institutional analysis aimed to show, at the time, that the Court was the institution that was best placed to, to some extent, take control of this cornerstone of the single market: this allowed this provision (and by extension, much of EC law) to become more than a neo-liberal tool of deregulation. Instead, it gained a new legitimacy as a tool that corrects the national political process by defending the rights of out-of-state actors, whose choices are not represented in such process. See generally Maduro, *We, the Court*: pp. 168ff, the author emphasises the political values of Art 34 TFEU (non-discrimination, representation and solidarity) and the role of this provision as a corrector of national political processes. For similar views on the empowerment of individuals or their liberation from national democratic boundaries, see also D. Halberstam "The Bride of Messina" (2006) 30 E.L.Rev. 775.

[64] On what has been achieved from the entering into force of the AIT until September 2010: http://www.ait-aci.ca/en/progress/progress_en.pdf (accessed Nov. 2010).

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

been achieved, may be the reason why the parties have recently agreed to give the agreement "more teeth" by strengthening its dispute settlement mechanism. Nevertheless, the new, non-judicial dispute resolution mechanism is still not likely to attract many complaints from individuals, and the parties may still avail themselves of public interest exceptions without being judicially monitored.[65] One of the obvious drawbacks of this politically driven process is that it is relatively slow, and in any case reliant on political will and momentum. What is more, individuals are almost entirely excluded from this process, at least when acting as anything other than voters or lobbyists. On the other hand, the advantage of such a process is the flip side of the EU case: there is no acute need to find a new legitimacy, since the process relies on the traditional democratic legitimacy of national processes, and there is no backlash against constitutional courts "turned legislators". Nevertheless, the democratic credentials of these intergovernmental agreements, adopted as a result of opaque negotiations, are not without detractors either.[66]

There are many factors that are likely to have influenced the institutional choice at the core of each of these two cases. The following reflections will focus on, arguably, the most significant ones. Some of these factors have already been hinted at in the preceding sections.

1. Competence in the constitutional text

A very different judicial approach to competence lies at the heart of the discrepancies between the two cases studied in this paper. Among other things, the approach adopted by each court is necessarily influenced by the way the system of competences is set out in their constitution; in the case of the Canadian Court, there is also an element of judicial path-dependence because of the approach to this matter adopted, first, by the Privy Council.

"The establishment of a single market" is recognised as a heading of legislative competence within the constitutional framework of the EU—this is a shared competence that allows the Union to legislate as necessary, subject to the principles of conferral, subsidiarity and proportionality. This competence was written into the EC Treaty from the outset; it did not have to be recognised as such by the courts. But beyond the matter of legislative competence, we have already seen that Member States have to comply with the fundamental freedoms even

[65] It is also highly unlikely that they will be strictly monitored by an arbitration panel.

[66] See e.g. G. Di Giacomo, "The Democratic Content of Intergovernmental Agreements in Canada" (2005) SIPP Public Policy Paper 38, available at: http://www.uregina.ca/sipp/documents/pdf/PPP38_%20DiGiacomo.pdf (accessed Nov. 2010).

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

when exercising their exclusive competences.[67] The European Court exercises a strict control in these instances, ensuring that the national action is both justified and proportionate. These Treaty restrictions (which have been interpreted widely by the Court) are thus allowed to prevail, in a sense, over the rules on the attribution of legislative competence. The result is an extension of judicial control and fluid boundaries between the two levels of government, often with centralizing results.

When it comes to legislative competence, the Canadian Constitution does not mention an explicit "market-making competence". Possibly such competence could have been read into the federal level's power to regulate trade and commerce, but this would have necessitated a certain judicial interpretation, and the arrogation of a role that the Constitutional Court has not been willing to take. As a result, the power to legislate on a certain subject-matter which affects the internal market may belong to the federal or provincial level, depending on whether a certain measure's aim is deemed to be to regulate interprovincial or intraprovincial trade. Furthermore, the Supreme Court has eschewed the possibility of controlling the degree to which the exercise of an exclusive provincial competence may interfere with a federal competence. This "rigidity" emanates, in part, from the way in which the Canadian Constitution enumerates the (all exclusive) competences of both the federal and national levels.[68] This, it has been argued, makes it more likely for any court to feel the need to limit the scope of each competence so as to exclude all others and avoid overlap,[69] and to abandon all idea of further control once a piece of legislation has been deemed to fall within the appropriate heading of

[67] Which are therefore only "exclusive" in the sense that legislative intervention by the EU is precluded. In *Salzmann*, the Court stated that "although the legal regime applicable to property ownership is a field of competence reserved for the Member States under Article 222 of the EC Treaty (now Article 295 EC), it is not exempted from the fundamental rules of the Treaty". Case C-300/01 *Salzmann* [2003] E.C.R. I-4899 [39]. It is possible to find further examples of the Court's approach in the fields of social security, taxation, sport, etc. Cases C-372/04 *Watts* [2006] E.C.R. I-4325 and C-512/03 *Blanckaert* [2005] E.C.R. I-7685 on social security; C-446/03 *Marks & Spencer* [2005] E.C.R. I-10837 on taxation; C-415/93 *Bosman* [1995] E.C.R. I-4921 on sport. For two recent and notorious examples of this reasoning, see also Cases C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* [2007] E.C.R. I-10779; C-341/05 *Laval un Partneri* [2007] E.C.R. I-11767.

[68] To the contrary, the EU Treaties take a different approach by listing only EU competences, the bulk of which is shared between the EU and the Member States, and leaving all other powers with the Member States. The principle of subsidiarity is, in theory, the tool to help us decide when it should be the EU or the Member States that exercise one of the shared competences. In general, the EU system of attribution of competences seems to aspire less to a clear-cut separation than the Canadian system does. See generally R Schütze, "From Dual to Cooperative Federalism" (n 2).

[69] G. Baiers, "The EU's Constitutional Treaty: Federalism and Intergovernmental Relations—Lessons from Canada" (2005) 15 Regional & Federal Studies 205, 208. Tushnet also gives a clear explanation of this phenomenon: M. Tushnet, "Judicial Enforcement of Federalist-Based Constitutional Limitations: Some Skeptical Comparative Observations" (2007–08) 57 Emory L.J. 135, 140. Note that Tushnet's general conclusion, however, is that constitutional language alone cannot account for the very different approaches to competence taken by the US Supreme Court and the Supreme Court of Canada.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

legislative competence, in order to preserve the autonomy of each level of government.[70]

A crucial difference between the Treaties and the Canadian Constitution concerns the existence of legislative restrictions that act as a check on the competences of both federal and the state levels. In the case of the EU, the Treaty has very specific legislative restrictions on measures (either from the EU or the Member States) that may restrict the fundamental freedoms. It has been argued above that these restrictions have been allowed to affect the system of distribution of competences, since the single market provisions act as a limit to the Member States' exclusive competences. In the Canadian constitution, s. 121 could have been such a restriction, but it was allowed a very limited reach. The only other legislative restriction was introduced by the Charter in 1982, in the form of mobility rights for workers. None of these legislative restrictions have been allowed to affect the very rigid system of separation of competences.

The relative importance given to these legislative restrictions and whether they are allowed to affect the distribution of competences may be partly determined by whether they grant rights to individuals or not. In the European case, a conflict arose most often not directly as a conflict of competences, but because the EC Treaty had granted economic rights on individuals, and these individuals claimed that a Member State was encroaching upon these rights. The attribution of rights to individuals may have made it easier for the Court to affect or even override the system of distribution of competences. By contrast, the Canadian constitutional court was, from the beginning, faced with this issue in the form of a conflict of competences—i.e. the Court was always asked to adjudicate directly on delimitation of competences, rather than to protect individuals' economic rights. This is because the Canadian Constitution did not grant such rights until the Charter was introduced in 1982. In fact, until then, the Constitutional Court was not called upon to review laws for violation of any individual rights.[71] Even after the introduction of the Charter, things did not change that much in the realm of market rights, since we have seen that this document only introduced a right to labour mobility. Only very recently has this provision been interpreted as giving a right to "general economic

[70] This is in keeping with the classic federal notion of single ownership of fields (see note 25 above). It should be borne in mind that the Canadian federation dates back to 1867; its constitution and formal separation of powers are anchored in a classic or dual version of federalism.

[71] This is not to say that individuals had no access to the Court before the adoption of the Charter. Individuals were always able to challenge the validity of a measure before the Court, but this had to be done on grounds of lack of competence.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

activity", i.e. allowing individuals to claim a right to import goods into a province.[72]

Finally, let us not forget that the Supreme Court of Canada only became a court of last resort in 1949. Until then, matters could go to the Judicial Committee of the Privy Council, in London. The Supreme Court's interpretation of the system of competences has not varied extensively since this interpretation was first adopted by the Privy Council; there seems to be a degree of historical path dependence in this regard. The Judicial Committee of the Privy Council sought to avoid centralization, in the name of protecting provincial sovereignty.[73] After the Council stopped receiving appeals from Canada, the role of adjudicating on these competence disputes fell to the Supreme Court. By then, however, many would say that the tone had already been set.[74] Subsequently, the Court expanded some areas of federal competence slightly, but it never adopted a radically different approach to the system of distribution of competences, in general, or to the economic union provisions, specifically.

2. Market-making as a constitutional value

The Canadian Supreme Court and its EU counterpart may also feel bound or entitled to a different role depending on to what extent the creation of a single market is considered a constitutional aim. If this is the case, one can indeed envisage a court feeling the need or the justification to choose the interpretation of any constitutional rule that would most further the attainment of such aim.

There is no doubt as to the constitutional status of the aim of creating a common market in the EU: Market integration was an important part of the European Economic Community project from the beginning, as set out in the original provisions of the Treaty of Rome in 1957,[75] and it came to dominate the political agenda. Since then, the idea of market-building has been central in driving the pattern of development in the European Union. Thus the European Court

[72] *Canadian Egg Marketing Agency v Richardson* [1998] 3 S.C.R. 157. See Choudhry, note 43 above, pp. 55ff.

[73] The Privy Council has been traditionally criticised for its disregard for what seemed to be the intent of the constitutional drafters (to create a strong central government): see references in note 26 above. It has been argued more recently that the decisions of the Privy Council were in tune with the political circumstances of the times, and consistent with other tendencies in Canada towards a less centralised federal system than that of the US or Australia: Hogg *Constitutional Law of Canada*, pp. 128–129, with further references, and A.C. Cairns "The Judicial Committee and its Critics" (1971) 4 Canadian Journal of Political Science 301.

[74] Termed "irreversible" by Hogg, *Constitutional Law of Canada*, p. 129. For a concise historical overview of Canadian federalism in the courts: Baier, *Courts and Federalism*, pp. 55–62. Baier notes that, since becoming the court of last resort in 1949, the Supreme Court has tempered decentralization slightly, but it has not shifted dramatically to a centralised view of federalism (pp. 58ff). See also Baier, "The Courts, the Division of Powers and Dispute Resolution," pp. 24ff.

[75] Old Art. 2 EEC/EC. Nowadays, market-building appears in Art. 3 TEU, as part (albeit a very significant one) of a more comprehensive mission statement.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

of Justice gravitated towards a certain interpretation of the free movement rules in the EC Treaty; an interpretation that would contribute most towards the achievement of the aim of market-building. This aim also determined the Court's reading of the system of delimitation of competences between the Union and the Member States.

In Canada, however, free movement of goods or persons has always been considered a constitutional aim to a very limited degree, or at least a constitutional aim of limited importance when compared to others. Thus the Supreme Court has not treated the issue of practical overlap between heads of competence affecting the creation of a single matter as a matter of constitutional adjudication. In short, the lack of a certain constitutional status for the aim of creating a single market meant that the Court did not feel the need to be more creative in its interpretation of the system of attribution of competences in order to achieve that aim.

3. The original pact

This takes us to a more general reflection: the very different origins of Canada and the EU. The first one emerged as a full-fledged federal pact, whereas the other one started as a sectoral project that grew in its scope over time. This is bound to affect the attitudes of all actors involved. Consider the following: with any full-fledged federal pact, the constituent units give up any claim to competence in areas such as the conducting of international affairs, defence, or currency. In fact, the regulation of intraprovincial trade, of professional qualifications, etc are the competences they have left after many other competences that are at the core of state sovereignty have been taken off the table.[76] As a general claim, it stands to reason that the constituent units of such a pact would have a greater incentive to keep their competences exclusive, as opposed to the "exclusive with a caveat" model of the EU. This is not to say, of course, that all federal systems are bound to be as decentralised as regards their internal market as Canada is (in fact, we know that this is not the case). Rather, this would also depend on a myriad of historical and political circumstances that would determine the relative political strength and attitude towards centralization of the constituent units overtime. But it does constitute a very different starting point from that of the European Union.

The European Union (the European Community, at the time) started as an ambitious but nevertheless sectoral project, with economic integration dominating, in practice, the agenda. This project has widened and deepened since then, no doubt. But, at the time, there may

[76] And even outside the federal powers to legislate, the federal government's expansive powers to tax and spend have resulted in enormous federal influence even in areas of provincial jurisdiction: K. Swinton, "Federalism under Fire: The Role of the Supreme Court in Canada" (1992) 55 Law and Contemporary Problems 121,124.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

have been a feeling that all other Member State competences were "safe"; because they were not explicitly included within the scope of the Treaty, as some have been since then, and because there may have been a—somewhat naïve—conception that the single market and economic integration, in general, could indeed be severed from other areas of national regulation, and thus that the scope of EC law could be more or less neatly contained. As a result, all actors may have been more willing to make stronger commitments in order to achieve the aim of building a single market; after all, it may have seemed at the time that that was all that was at stake.

The federal origins of Canada play an essential role also from this perspective: just like at the inception of any full-fledged, classic federal state, there have always been two distinct centres of power within Canada, the centre and the constituent parts or provinces. The latter did not directly determine what the federal level would decide to do with its powers; in that sense, they could be outvoted from the beginning. In these circumstances, the correct delimitation of competences becomes, from the outset, the natural battlefield between the two levels of government—since once a particular area was deemed to fall within the federal level's powers, such area might be "lost" to the control of the province. Not so within the initial EC, where the Luxembourg Agreement kept consensus decision-making in place until the mid-eighties. At the outset, the EC was not an organization with two centers of power: in Weiler's words, "the constituent units' power *was* the central power".[77] In those circumstances, delimitation of competences is not likely to be a battlefield (and it was not, at the time). This may have influenced the Court of Justice's approach to delimitation of competences, in that it may have allowed all actors involved to be more cavalier in the matter and, ultimately, to adopt a more permissive approach towards the exercise and expansion of EC competence.[78] Of course, the Member States' reason to accept this—the fact that they are still firmly in control and may never be outvoted, even if something is considered within the EC's competence—disappeared as soon as Qualified Majority Voting was "re-instated" with the Single Economic Act. By then, however, a particular judicial approach had taken hold, and other reasons that had also contributed to its adoption remained in place.[79]

[77] J.H.H. Weiler, *The Constitution of Europe* (Cambridge 1999), 59.

[78] It is of course true that in *Cassis* and such cases, the ECJ took some control away from Member States by making them accept the product standards from another Member State. But the fact that these matters were declared within the sphere of EC competence meant that Member States could endeavour to adopt harmonised standards under Art. 95 EC if they preferred.

[79] It is not my intention to suggest that this "still being in control anyway" is the only reason that we have the approach that we have nowadays to competence attribution in the EU, but that it may have been one of several reasons at least in the beginning.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

4. Political tensions

Constitutional adjudicators are not, and arguably should not be, blind actors. They are embedded in a particular political and social framework. The choices that they have to make are often policy choices, albeit within a certain set of possible interpretations allowed by the constitution, and there is an awareness of the wider consequences of those policy choices afforded by the letter of the law. It is thus necessary to acknowledge the role of political considerations in the Supreme Court of Canada's approach to delimitation of competences as regards the internal market.

It has been pointed out above that the provincial power to address local concerns by enacting and maintaining regulatory barriers to trade becomes understandably more precious when one bears in mind how many powers have already been given over to the centre as part of the federal pact. Depending on the circumstances—for example, to what extent local nationalisms still persist within the federal state—the states or provinces of such a federal state may be very wary of (judicially sanctioned) federal encroachment. Equally, the constitutional adjudicator within such a system is more likely to tread lightly in competence disputes when it is generally perceived that the survival of the federal pact itself may be at stake.

This seems to have been the case in Canada since the 1960s and Quebec's Quiet Revolution "unleashed a progressive nationalism that transformed Quebec and challenged traditional assumptions about Canadian federalism".[80] The public sector (at both federal and provincial level) had seen unparalleled growth since the end of World War II and the building of the welfare state. This growth meant that both levels of government were more likely than ever to come into conflict with each other as regards the rightful use of their competences. Growing regionalism added to the pressure; in general, provinces became more competitive towards the federal government. But the towering ideological conflict was that between Quebec, on the one hand, and the federal government and most other provincial capitals, on the other.[81] The eighties hailed the sharpening of a very public constitutional crisis that continues to define Canadian federalism to this day.

This sharpening came with the need to "patriate" the Canadian Constitution. The British North America Act, 1867, contained no provision for its own amendment and, as a consequence, every amendment had to be enacted through subsequent legislation adopted

[80] D. Cameron and R. Simeon, "Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism" (2002) 32 Publius: The Journal of Federalism 49, 51.
[81] Ibid.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

by the UK Parliament.[82] In order to achieve the "patriation" of the Canadian Constitution, the federal government requested that the UK Parliament adopt the Canada Act 1982, which establishes a procedure for the Constitution to be amended within Canada and eliminates the role of the UK Parliament. But the agreement on the Canada Act was reached over the objections of Quebec—in fact, the Quebec National Assembly refused to ratify the text, and has not done so to this day.[83] It is still, however, bound by the Act, which affects the powers of the provinces substantially.[84]

Quebec's alienation was a matter of grave concern due to the on-going threat of separatism. In 1980, a referendum proposing a mandate to negotiate sovereignty-association had been defeated by a narrow margin.[85] The federalist campaign for the "no" had promised reforms to better accommodate the aspirations of Quebec within Canada; yet no more than two years later, in 1982, the patriation of the Constitution and the historical changes introduced by the Canada Act had taken place despite open opposition from Quebec.

After the constitutional changes of 1982, and with the threat of another separatist referendum looming large, it became a priority to orchestrate reconciliation between Quebec and the rest of Canada. Two attempts at constitutional reform in order to accommodate Quebec within the Canadian federation were made without success. In both cases, a strengthening of the provisions on the internal market was part of the general reform proposed.[86] The Meech Constitutional Accord (1987) represented a peace offering that recognised Quebec's distinct status within Canada. The Accord encountered great public opposition and failed to be approved by all the provinces; a second attempt at reforming federalism, the Charlottetown Constitutional Accord of 1990, was defeated in provincial referendums.

From then on, it has been more or less accepted that a general reform of the federal pact is far too difficult to accomplish; the focus has therefore been on more specific intergovernmental agreements that allow the federal government and the provinces to "make federalism work" without attempting any extensive constitutional reform. These agreements are political, rather than legal, in nature, and they are not

[82] In 1930, the Prime Ministers of the UK and all the dominions agreed that the UK Parliament would only adopt a statute applying to a dominion if requested by the latter.

[83] But the Supreme Court ruled that the provinces did not have a power of veto over the process: *Re Objection by Quebec to Resolution to Amend the Constitution* [1982] 2 S.C.R. 793.

[84] Especially through the new Charter of Rights, which introduced new restrictions on the powers of the provinces. In particular, the Charter restricted the power of Quebec to, for example, implement French language policy. See Hogg, pp. 73–74.

[85] The referendum took place in May 20, 1980. The "no" won with a vote of 59.5 per cent against a vote of 40.5 per cent.

[86] For a seminal benchmark of the academic debate at the time: M.J. Trebilcock, J.R.S. Prichard, T.J. Courchen, J. Walley (eds.) *Federalism and the Canadian Economic Union* (Toronto 1983).

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

judicially enforceable.[87] The AIT is one of the paradigmatic examples of this "executive federalism".[88] At the time, the two failed constitutional accords were recent, and the threat of another Quebec referendum on separatism was about to materialise.[89] The AIT was presented as a symbol of the ability of both levels of government to work co-operatively to further the national good, and of a new and more flexible brand of federalism that offered more autonomy to Quebec as part of Canada.[90] Indeed, the AIT was hailed by some as proof that federal-provincial relations could be orchestrated in a way that included Quebec.[91]

It is hoped that this historical digression shows how the debate on the Canadian economic union has always been part of a wider discussion on federalism as a whole in this country, a discussion that continues to this day. The political climate in Canadian federal relations has made it exceedingly difficult to achieve a wide-ranging constitutional reform, to the point where nowadays executive federalism, with its focus on flexible intergovernmental agreements and avoidance of formal constitutional reform, has become the norm. The constitutional provisions on the economic union were always part of these attempts at constitutional reform; with both Meech Lake and Charlottetown Accords, the result would have been the strengthening of the federal market-making powers and of the limitations placed on provincial power because of the internal market.[92] These proposals, however, failed. With this in mind, it becomes easier to understand why the Canadian Supreme Court, faced with a conflict of competences concerning the single market, would choose to stick with the traditional (and province-friendly) reading of the constitutional text rather than to enact what some would consider a constitutional reform through judicial means. After all, such a decision would have undoubtedly upset the precarious equilibrium between the provinces and the federal government. Unsurprisingly, the Court preferred to be seen as a

[87] This was corroborated in a 1999 Quebec court decision on Quebec's competence to require all margarine sold in the province to be colourless (contrary to all other provinces): *UL Canada Inc. c Québec (Procureur général*, [1999] R.J.Q. 1720 (C.S.). For the appeal in this case, see note 46 above.

[88] Cooperative and executive are defining features of Canadian federalism: Baier *Courts and Federalism*, p. 11; the AIT as a perfect example of both, p. 148.

[89] The second Quebec referendum took place in October 30, 1995. The result was closer than in 1980: the proposal was defeated by 50.6 per cent to 49.4 per cent.

[90] D. Cohen, "The Internal Trade Agreement: Furthering the Canadian Economic Disunion?" (1995) 25 Canadian Business L.J. 257, 261.

[91] Macdonald, "The Agreement on Internal Trade: Trade-Offs for Economic Union and Federalism", note 55 above, p. 142. According to Macdonald, the symbolic importance of the AIT also had consequences for its content: "federalism was in need of a victory—any victory", which meant that the parties were less likely to press for specific and strong rules. The result was a non-binding and very general political document (p. 143).

[92] Section 121, for one, would have been widened to include a potential duty of mutual recognition among the provinces: Swinton, "Courting our Way to Economic Integration", pp. 288–293; Vaillancourt, "Canada's Internal Markets. Legal, Economic and Political Aspects", pp. 299–301.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

guardian of "balanced federalism", thereby safeguarding the stability of the federal pact, and to leave the matter of the economic union to high politics.

The argument that constitutional adjudicators are and should be sensitive to the political circumstances around them applies to the Court of Justice of the European Union as well. It seems, however, that the difficult situation of Quebec within Canada does not have a direct parallel within the EU. Let us not forget that the Treaties and all their amendments have been freely negotiated and adopted by all Member States. There is no Member State that can claim to never have accepted the constitutional rules that the Court of Justice interprets so widely. It also bears repeating that the Treaties represent the firm will of the Member States to make some compromises in order to reap the economic benefits of a single market, although they may disagree on how much they need to compromise. This basic commitment is lacking in the case of at least one Canadian province. And finally, the reality is that there is no conflict in the EU that is as polarised and long-standing between one fixed Member State and the rest of the Union. In short, political conflicts within the EU, though significant at times, have not threatened the very existence of the federal pact in the way they continue to do in Canada, and have not had the same bearing on the Court of Justice's choices.[93] This is not to say that the Court of Justice is not sensitive to the possible consequences of its judgments with respect to other institutional actors; a more tenuous comparison could perhaps be drawn between the Canadian Supreme Court's cautious attitude as regards the political conflict in Canada and the attitude of the Court of Justice of the EU towards national constitutional courts in Europe: the Court also needs to be sensitive to the anxieties of these national constitutional courts (which do not wholly agree with the CJEU's vision of the EU legal order) in order to avoid an open conflict.

VI. Conclusions

This paper compares the regulation of the internal market within a proper federal state, Canada, and within a sui-generis constitutional order of states[94] with several federal features, the European Union. The comparison is timely because of the negotiations towards a comprehensive trade agreement that are current underway, and which have brought to the fore again the fundamental differences in the approaches taken by both potential trade partners to attribution of

[93] Many would say that, even if the threat of dismantlement were the same, what is at stake is more in the case of a federal state created in 1867 than in the case of an entity like the European Union.

[94] Dashwood's now classic definition: A.A. Dashwood, "States in the European Union" (1998) 23 E.L.Rev. 201.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

competences and establishment of an internal market. More importantly, however, both Canada and the EU, although different in many respects, confront similar problems in certain areas. One such common problem is how to manage inter-state regulatory diversity within a multinational polity. For EU lawyers, in particular, it is illuminating to see how differently this problem may be addressed in other parts of the globe. This awareness may even remind us, yet again, of how remarkable the particular path taken by EU integration really is.

The first part of this paper offers an overview of the constitutional provisions that regulate or affect the internal market or economic union in both the EU and Canada, as well as a description of the role taken by their constitutional adjudicators, the Court of Justice of the European Union and the Supreme Court of Canada, in interpreting those provisions.

On the one hand, the European Court of Justice adopted a very extensive view of the Treaty restrictions on national competence, extending judicial control and curtailing national regulatory autonomy whenever it led to the creation of barriers to trade, even in the absence of discrimination. An essential part of the process was thus one of judicially-driven, negative integration that relied heavily on individuals bringing their cases to court. On the other hand, the Canadian constitution offered similar opportunities for the judicial elimination of barriers to trade in pursuit of a strong economic union. For various reasons, however, the Supreme Court has always favoured a limited reading of these constitutional provisions and of its role, choosing instead to leave the task of lifting provincial trade barriers and creating a single market to the political process. This resulted in the adoption of an intergovernmental, non-justiciable agreement between the provinces and the Federal government that encouraged a slow and piecemeal negotiation towards the adoption of common standards, or positive integration. As a result, the Canadian internal market is much less integrated than one would expect from a fully-fledged federal state, and less integrated than that of the EU. The institutional choice that lies at the heart of the difference in approach of these courts has also had important consequences for the level of involvement of individuals in the process.

Many factors have influenced the choices made by the constitutional adjudicator in each system. The second part of this paper has focused on the most significant of these factors, reflecting first on the different ways in which the system of competences is set up in the EU Treaties and in the Canadian constitution, the different role of rights in each of these documents, and the powerful hold that a very classic conception of federalism and the doctrine adopted by the Privy Council have on the Canadian Supreme Court; on the status of

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press

"market-making" as a constitutional value in and of itself; on why being a fully-fledged federal state rather than a sectoral entity may, paradoxically, increase resistance to the establishment of an economic union; and finally, on the paramount significance of political and historical circumstances: in Canada, a continuous crisis of federalism has threatened the integrity of the state itself for many years. This has resulted in a precarious equilibrium that the Supreme Court does not wish to upset by adopting an activist interpretation of the Canadian economic union.

All these factors together go a long way towards explaining the fundamental differences in both institutional approaches and results in the establishment of a single internal market in Canada and the EU. Needless to say, this paper does not draw conclusions that apply to all federal systems—to the contrary, it shows that there is an institutional choice underlying each instance of market-making or regulation of the internal market within a federal system, and that that choice is inextricably tied to the federal pact within that system, as well as to its historical and political circumstances.

https://doi.org/10.1017/S0008197312000815 Published online by Cambridge University Press