AN INTERNATIONAL BIND: ARTICLE XXIV:12 OF GATT AND CANADA

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In this article the author examines both the historical and current interpretations of Article XXIV:12 of GATT, especially as they relate to Canada. Article XXIV:12 is a federal state clause designed to provide flexibility to central governments in the fulfilment of GATT obligations where such commitments involve matters within the legislative competence of provinces or states. The vague wording of the clause makes uncertain the extent to which central governments must effect the compliance of state or provincial units.

Article XXIV:12 was historically intended to be applied in a manner that would minimize the imbalance in obligations of federal and unitary states inherent to such a clause. The author concludes, however, that recent GATT Panel interpretations of Article XXIV:12 have not strived to merely minimize such imbalances, but to eliminate them. The result of these interpretations, the author concludes, have essentially rendered Article XXIV:12 a meaningless instrument.

The Federal Government of Canada is now in the position of being forced to assume responsibility for matters that are clearly within the constitutional competence of provincial units in order to retain good standing within the GATT community. While some other federal nations, such as Australia and the United States, have judicial determinations establishing their central government's authority to implement treaties regardless of whether the matters involved normally fall within state competence, no such

Dans cet article, l'auteure examine les interprétations qu'on a données par le passé et celles qu'on donne actuellement à l'article XXIV § 12 de l'Accord général sur les tarifs douaniers et le commerce (GATT) et traite en particulier des aspects touchant le Canada. L'article XXIV § 12 est une clause fédérale qui vise à assurer une flexibilité aux gouvernements centraux dans l'exécution des obligations contractées en vertu du GATT, lorsque ces engagements concernent des affaires qui relèvent de la compétence législative de provinces ou d'États. La formulation de la clause étant imprécise, on ne sait pas dans quelle mesure les gouvernements centraux doivent faire respecter ces obligations par les gouvernements régionaux ou provinciaux.

Au départ, l'article XXIV § 12 devait être appliqué de manière à minimiser le déséquilibre entre les obligations des États fédéraux et celles des États unitaires, déséquilibre propre à ce genre de clause. Cependant, l'auteure conclut que dans leurs interprétations récentes de l'article XXIV § 12, les Groupes spéciaux du GATT n'ont pas cherché simplement à minimiser ces déséquilibres, mais à les éliminer. Selon l'auteure, ces interprétations ont eu pour effet essentiellement de rendre l'article XXIV § 12 inutile.

Le gouvernement fédéral du Canada est maintenant dans une position où il est obligé d'assumer des responsabilités qui sont manifestement du ressort des provinces afin de garder une bonne réputation au sein du GATT. Bien que les

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conclusion has been reached in Canada. It is the author's conclusion that Canada is in need of judicial clarification of whether its federal government has the constitutional power to compel provincial compliance with GATT obligations.

tribunaux d'autres États fédéraux, tels que l'Australie et les États-Unis, aient rendu des décisions établissant le pouvoir du gouvernement central en matière d'exécution des traités, que les affaires en jeu relèvent normalement de la compétence de l'État ou qu'elles l'excèdent, aucune décision de ce genre n'a été rendue au Canada. L'auteure en arrive à la conclusion qu'il faudrait que les tribunaux canadiens se prononcent sur la question de savoir si le gouvernement fédéral du Canada a le pouvoir constitutionnel de forcer les provinces à s'acquitter des obligations contractées en vertu du GATT.

I. INTRODUCTION

Canada's participation in the General Agreement on Tariffs and Trade (GATT) signifies its participation in and support for the global liberalization of trade. Canada's role in GATT is consistently analyzed from an "international" perspective —that is, Canada's international rights and obligations in its capacity as a sovereign nation. The aspect of Canada's participation in GATT that is less frequently addressed is the impact of Canada's unique brand of federalism upon these international rights and obligations. This paper is designed to shed some light on this important, but often overlooked, issue.

The Canadian federal system is comprised of sovereign powers distributed between the central government and the governments of each of the provinces. The nature of the division of powers to each of these units is such that they are "coordinate" with one another.[1] The drafters of the *Constitution Act, 1867*[2] designated the matters over which the provincial legislatures would exercise control under section 92 and those over which Parliament would prevail under section 91 of the Act. It is in accordance with this allocation of powers that Canada orders its legal affairs. All laws must respect the boundaries laid out in the Constitution. On the occasions that one level of government attempts to legislate respecting matters within the competence of the other, such legislation will, generally speaking, be considered *ultra vires*.[3]

Although different in many respects, Canada's constitutional structuring does share similar characteristics with those of the United States and Australia. The constitutions of those countries also prescribe divisions of legislative power between central and state governments. Federal structuring gives rise to legal and political difficulties when central governments implement international agreements and treaties, since the obligations contained in the treaties often involve matters within the legislative competence of provinces or states. To counter such difficulties, federal governments have resorted to the use of "federal state clauses". These clauses are designed to limit the scope of the central governments' responsibility for matters falling within the competence of the country's other level of government. A federal state clause of sorts is contained in Article XXIV:12 of GATT which states that "[e]ach contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments within its territory."[4]

The purpose of this paper is twofold. First, the author will examine the extent to which Article XXIV:12 operates in a manner consistent with the general notion

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[1] It has been noted, however that "to the extent that the provinces and the central government are not coordinate, it is the provinces that are subordinate to the central government." P. Hogg, CONSTITUTIONAL LAW OF CANADA, 3d ed. (Toronto: Carswell, 1992) at 101.

[2] (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

[3] This principle is subject to valid "trenching" found by the courts to be necessarily incidental to a valid legislative purpose.

[4] Text of General Agreement, *General Agreement on Tariffs and Trade* (Geneva, July 1986).

of federal state clauses. Second, an attempt will be made to determine the international obligations imposed on federal states through GATT Panel interpretations of the clause.

Part I of the paper consists of an overview of the constitutional position of Canada, the United States, and Australia regarding the implementation of international agreements. In Part II, some of the more common forms of federal state clauses are canvassed as a backdrop to the examination of Article XXIV:12. Part III of the paper reviews the treatment accorded Article XXIV:12 in GATT Panel decisions. Following this overview, an analysis of GATT's federal state clause is developed in Part IV. Finally, in the concluding portion of the paper, the author argues that the trend of interpretation revealed through the preceding analysis suggests that Article XXIV:12 offers very little, if any, protection to the central governments of federal states.

II. Federal States: Implementation of International Agreements

A. *Canada*

Section 132 of the *Constitution Act, 1867* empowers the Parliament of Canada to enact legislation that is necessary to implement British Empire treaties. This provision is indicative of the fact that the framers of the *Constitution Act, 1867* did not foresee Canada becoming a fully independent nation within the international community. The extent to which section 132 can be used by Canada to implement treaties was addressed in the *Labour Conventions*[5] case. In that decision, the Privy Council denied the federal government the right to impinge upon the legislative competence of the provinces by striking down federal legislation in the areas of working hours of employees and minimum wages, despite the fact that Canada had ratified a number of International Labour Organization Conventions in those areas. The federal government argued that it possessed such powers under section 132 and pursuant to its authority to make laws for peace, order and good government respecting matters of national concern. These arguments were rejected by the Privy Council, which upheld the preservation of provincial sovereignty in matters traditionally falling within section 92 of the *Constitution Act, 1867*. In so doing, the Privy Council is seen to have vindicated the notion of watertight departments of provincial and federal power. Although the reasoning in the *Labour Conventions* case has been criticized,[6] the decision continues to reflect the law in Canada regarding the federal government's capacity to implement treaties.[7]

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[5] *Ontario (A.G.)* v. *Canada (A.G.)*, [1937] A.C. 326, 1 D.L.R. 673 (P.C.).

[6] *See, e.g.*, Hogg, *supra* note 1 at 292-94 and M. Milani, *The Canadian Treaty Power: Decidedly Anachronistic; Potentially Antagonistic* (1979-81) 44 Sask. L. Rev. 195 at 199-200.

[7] Note, however, that some authors maintain the Privy Council's concern for preserving the federal balance is valid. For example, Robert Howse writes: "Why should the economic efficiency concerns that dictate global cooperation necessarily trump provincial autonomy concerns, including social regulation and the protection of underdeveloped communities and regions?" in *Labour Conventions Doctrine in an Era of Global Interdependence: Rethinking the Constitutional Dimensions of Canada's External Economic Relations* (1990) 16 Can Bus L.J. 160 at 171.

There is much debate as to whether recent judicial broadening of Canada's peace, order and good government authority might now support federal implementation of international trade obligations.[8] The same argument may be made respecting the federal government's power over the regulation of trade and commerce pursuant to section 91(2) of the *Constitution Act, 1867*. Although this provision has traditionally been quite narrowly construed, recent judicial interpretations indicate a willingness to broaden its scope.[9] The purpose of this paper, however, is not to debate the likelihood of the Supreme Court reaching such a conclusion. The aim of this section is simply to point out the difficulty facing Canada in the domestic implementation of its international agreements in general and its trade obligations in particular.

B. *United States*

The United States does not face the same legal impediment to implementing treaties as Canada. The American situation is, however, somewhat complex. Simply stated, the U.S. President has some constitutional authority over foreign affairs. In addition, Congress may pass legislation authorizing the President to negotiate, enter into and accept for the United States an international agreement.[10] It was through the latter mechanism that GATT was implemented.

In 1934, as a result of the Roosevelt administration's efforts to repair damage done to the world economy by high tariffs, Congress adopted the *Reciprocal Trade Agreements Act* which allowed the President to negotiate with foreign nations for the mutual reduction of tariffs.[11] This Act, although limited in duration, was renewed regularly until the mid-1960s.[12] GATT was negotiated pursuant to the 1945 renewal, which authorized the President to enter into and proclaim trade agreements on behalf of the United States. Almost all of the language of GATT has been proclaimed,[13] and such proclamation makes the agreement domestic law in the United States.[14]

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[8] For a comprehensive discussion of this matter, *see* Howse, *ibid. See also* R.E. Sullivan, *Jurisdiction to Negotiate and Implement Free Trade Agreements in Canada: Calling the Provincial Bluff* (1987) 24:2 U.W.O.L. REV. 63; P.J. Davidson, *Uniformity in International Trade Law: The Constitutional Obstacle* (1988) 11:2 DALHOUSIE L.J. 677; J.S. Ziegel, *Treaty-Making and Implementing Powers in Canada: The Continuing Dilemma* in B. Cheng & E.D. Brown, eds., CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF GEORG SCHWARZENBERGER ON HIS EIGHTIETH BIRTHDAY (London: Stevens & Sons, 1988) 333; R. Howse, ECONOMIC UNION, SOCIAL JUSTICE, AND CONSTITUTIONAL REFORM: TOWARDS A HIGH BUT LEVEL PLAYING FIELD, vol. 9 (North York, Ont.: York University Centre for Public Law and Public Policy, 1992).

[9] *See, e.g., General Motors of Canada Ltd.* v. *City National Leasing*, [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255.

[10] J.H. Jackson, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (Cambridge, Mass.: MIT Press, 1989) at 62-63.

[11] *Ibid.* at 69-70.

[12] *Ibid.* at 70.

[13] The exception is Part IV, which was added to GATT in the 1960s to deal with problems of developing countries.

[14] Jackson, *supra* note 10 at 75.

American scholars have often debated the specific legal effect of GATT in American domestic law. The issue regarding GATT's superiority or inferiority *vis-à-vis* federal law is a matter of ongoing debate.[15] GATT's status in relation to state law, however, seems clear. State legislation is inferior to GATT. This view is supported by a line of decisions indicating that a valid executive agreement is superior to state law.[16]

It seems clear from this brief overview that the problems posed by federalism in the United States are prompted by political considerations and issues of cooperative federalism rather than by constitutional inability to override state law.[17]

C. *Australia*

Australia's parliament, pursuant to section 51(i) of the Australian Constitution, has power to make laws for the peace, order, and good government of the Commonwealth with respect to trade and commerce with other countries and among its states. In addition, section 51(xxxix) states that the Australian government has power over "[m]atters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the federal Judicature, or in any department or officer of the Commonwealth."[18] The Australian High Court has not given an extremely broad interpretation to the commerce power. Therefore, Australia has been reluctant to attempt to justify an assumption of legislative competence over local activities pursuant to section 51(i).[19]

Recently, however, the Australian parliament's authority to implement treaties has been broadened considerably through judicial expansion of another constitutional provision. Like the Canadian constitution, Australia's constitution does not include express power to implement treaties, although power to execute treaties is within the

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[15] *See* J.H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law* (1967) 66 MICH. L. REV. 250 at 292-97; and R.A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law* (1990) 26 STAN. J. INT'L L. 479 at 489-93.

[16] *See, e.g., United States* v. *Pink*, 315 U.S. 203 (1942); and *United States* v. *Belmont*, 301 U.S. 324 (1937). Note that both Jackson and Brand, *ibid.* conclude that GATT is a valid executive agreement.

[17] For an interesting discussion of this issue, *see* R.B. Looper, *'Federal State' Clauses in Multilateral Instruments* (1955-56) 32 B.Y.I.L. 162. Looper discusses the position taken by the U.S. in negotiations for the International Labor Organization Convention. U.S. delegates made representations as to their constitutional incapacity to implement parts of the Convention which fell under state legislative competence. Looper comments at 168-69:

> [I]t may be wondered whether the American delegation did not misrepresent the American legal position in its arguments....[I]t appears that the American delegates asserted, as constitutional objections to full American participation, a body of doctrine concerning States' rights which had been virtually discarded by the end of the nineteenth century.

[18] *See* G.A. Rumble, *Federalism, External Affairs and Treaties: Recent Developments in Australia* (1985) 17 CASE W. RES. J. INTL L. 1 at 3.

[19] *Ibid.* at 4.

exclusive domain of the federal executive. However, the power vested in the Australian federal parliament under section 51(xxix) to make laws with respect to external affairs has been held to confer some measure of power on the federal government with respect to the implementation of certain treaties. For a number of years, the scope of the section was uncertain.

In 1983, the uncertainty was reduced by *Commonwealth v. Tasmania*.[20] A majority of the High Court held that the external affairs power of the federal government under the Australian constitution authorized legislation to implement any treaty into which the federal executive had entered in good faith.[21] As a result, Australia's federalism concerns now appear similar to those of the United States, being more focused on political harmony than on constitutional incapacity.

The fact that the U.S. and Australian federal systems provide constitutional authority for the infringement of state legislative competence in the implementation of international agreements does not lessen the real political difficulties associated with such infringement. As such, "it has nevertheless been thought desirable to devise a method whereby federal States can participate in international legislation without subjecting their constitutional systems to stress."[22] As alluded to earlier, the means of achieving this goal has been the negotiation by federal states for the inclusion of "federal state clauses" within international treaties. The purpose of these clauses is to allow federal states to validly ratify treaties without subjecting themselves to obligations which would be impossible or difficult to fulfil due to the legislative competence of provincial or state governments. Generally speaking, federal state clauses "limit....the obligations of the signatory federal state with respect to subject matters falling within the jurisdiction of its member states."[23] Thus, for example, where it has not obtained the consent of all provinces to enter into a particular treaty, Canada may still ratify the agreement as long as it contains a federal state clause. The following part examines in further detail particular types of federal state clauses which have been included in various international agreements.

III. Federal State Clauses

Canada has been successful in negotiating the inclusion of federal state clauses in several international agreements. During the negotiation of GATT, for example, Canada was among the proponents of Article XXIV:12. The wording of that provision, however, is not representative of the most common types of federal state clauses. More common are the "territorial application clause" and the type of clause which will be referred to herein as the "recommendation clause".

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[20] (1983), 158 C.L.R. 1, 46 A.L.R. 625 (H.C.) [hereinafter *Tasmania*].

[21] For a discussion of the *Tasmania* case, *see* H. Burmester, *Federal Clauses: An Australian Perspective* (1985) 34 I.C.L.Q. 522; and Rumble, *supra* note 18.

[22] Looper, *supra* note 17 at 163.

[23] I. Bernier, International Legal Aspects of Federalism (Hamden, Conn.: Shoe String Press, 1973) at 172.

A. *Territorial Application Clauses*

The type of clause preferred by Canada in negotiation of international agreements is the territorial application clause. A typical example of such clause is that found in the *United Nations Convention on Contracts for the International Sale of Goods*:

> If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.[24]

This clause has also been included in most of the Hague Conventions as well as other international treaties.[25] Although it permits a great degree of flexibility for federal states, it is not appropriate for all types of international agreements. It has been noted that this particular form of clause is only useful where the purpose of the agreement is to promote uniformity of law. It is not effective under circumstances where reciprocity of obligations is an integral element of the agreements.[26]

B. *Recommendation Clauses*

The recommendation clause is one wherein a federal state undertakes to perform only those obligations which are within central executive or legislative competence, and to bring to the notice of the provinces (or states or cantons), with a favourable recommendation for action, those obligations which are within regional competence.[27] An additional element is often added to the recommendation clause, requiring that a federal state supply information to a requesting member state about the extent to which effect has been given to the treaty by the central government and its constituent units.[28]

The recommendation clause is not popular with unitary states, who believe that it creates an imbalance between the rights and obligations of the contracting federal and unitary states.

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[24] *United Nations Convention on Contracts for the International Sale of Goods*, 1 May, 1992, Can. T.S. 1992 No. 2, Art. 93(1).

[25] The clause in Article 14 of *The Hague Convention on Products Liability* is almost identical to the one cited herein. As noted by H.A. Leal, *Federal State Clauses and the Conventions of the Hague Conference on Private International Law* (1984) 8:2 DALHOUSIE L.J. 257 at 274, that clause was "adopted in its precise terms in the UNIDROIT Convention on the Uniform Law on the Form of an International Will at Washington in 1973".

[26] Burmester, *supra* note 21 at 527.

[27] An example of this type of clause is found in the UNESCO *Convention for the Protection of the World Cultural and Natural Heritage*, 23 Oct., 1976, Can. T.S. 1976 No. 45.

[28] This additional type of provision is found at Article 11 of the *Maintenance Convention*, U.N.T.S. 1957, and in the *Convention on the Nationality of Married Women*, Can. T.S. 1960 No. 2.

C. *Article XXIV:12*

Having briefly reviewed the more common types of federal state clauses, I turn to the clause of specific focus for this paper, Article XXIV:12. At the outset, it must be noted that a survey of international agreements reveals that this clause is rarely used. To this author's knowledge, a clause of this type appears only in GATT, a GATT-related agreement titled the Agreement on Technical Barriers to Trade,[29] and paragraph 14(4) of the European Free Trade Association (EFTA).[30] One might first query why this particular form of clause was included in these trade-related agreements, as opposed to one of the other types of clauses described above. Certainly, the territorial units clause would not be useful in these types of agreements since the functioning of the agreements depends on the reciprocal obligations of the signatory states. Likewise, it is arguable that the objective of liberalization of trade would require something more than having central governments simply recommend the adoption of measures to their constituent units. In fact, Jacob Zeigel takes this concern further and states that a federal state clause may not be appropriate in the context of international trade agreements where the success of such agreements depends on both levels of government being bound by the agreement from the beginning.[31] Finally, despite the existence of economic theories suggesting that unilateral liberalization of trade may be beneficial to a country, it is probably trite to say that for unitary states to allow federal states any extended qualification of obligations regarding the liberalization of trade would be an unpopular political move. The clause then, must represent a balancing of federal and unitary state interests.

For many years, Article XXIV:12 lay dormant in GATT jurisprudence. It was first brought to life in the dispute resolution context in 1985 with the decision of the GATT Panel respecting Ontario legislation which imposed a discriminatory retail sales tax on South African Krugerrands sold within that province.[32] Since that time, the clause has been considered on three other occasions. All of these arise from the beer, wine and spirits war waged by the United States and the EEC against Canada, and Canada's counter attack against the United States.

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[29] (1979) 18 I.L.M. 1079, 31 U.S.T. 405. The relevant provision has not been addressed in any interpretations of this Agreement.

[30] The Convention establishing the EFTA was concluded in Stockholm on November 20, 1959, and entered into force on May 3, 1960 by Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the United Kingdom. Finland became an associate member in 1961. For a comprehensive discussion of the European Free Trade Association, *see* J.S. Lambrinidis, THE STRUCTURE, FUNCTION, AND LAW OF A FREE TRADE AREA (London: Stevens & Sons Limited, 1965).

[31] Zeigel, *supra* note 8 at 344. Zeigel's comment was directed specifically to Article XXIV:12.

[32] Annotation from General Agreement on Tariffs and Trade: Analytical Index, Notes on the Drafting, Interpretation and Application of the Articles of the General Agreement (Geneva: Legal Affairs Division of the GATT Secretariat, 1985) XXIV - 41. The annotation to the Gold Coins decision cites the decision as instrument L/5863.

A review of these decisions serves to define the factors employed by the Panels in their interpretation of the nature and extent of the international obligations encompassed by Article XXIV:12.

IV. Treatment of Article XXIV:12 In GATT Panel Decisions

A. *The Gold Coins Panel*

The first Panel to consider Article XXIV:12 was the 1985 Panel Report on "Canada — Measures Affecting the Sale of Gold Coins."[33] Despite its not having been adopted by the GATT Council,[34] the decision is useful for its discussion of the issues.

The matter came before the Panel as a result of a 1983 amendment to the Ontario *Retail Sales Tax Act*.[35] Section 2 of the Act imposed on purchasers of all tangible personal property a tax for the consumption or use thereof in the amount of 7% of the fair value of the property. Section 5 listed items which were to be exempt from the imposition of such tax. The 1983 amendment at issue added "Maple Leaf Gold Coins struck by the Royal Canadian Mint"[36] to the list of exempt items, while maintaining the tax on imported gold coins. South Africa objected to the continued application of the retail sales tax to the Krugerrand.[37] In particular, it argued that the tax violated Article III:2 of GATT, which provides that imported products should not be subject to internal taxes in excess of those imposed on like domestic products. In other words, they should be subject to National Treatment.

The Panel found that the Ontario measure did constitute a violation of Article III:2. It then considered whether Canada had taken reasonable measures to have Ontario bring its legislation in line with GATT obligations. Subsection 92(9) of the *Constitution Act, 1867* empowers the provinces to impose direct taxes for the purpose of creating provincial revenue.[38] As such, Canada would face constitutional

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[33] *Ibid.*

[34] The External Affairs Department has indicated that Canada may be willing to adopt the Report after the Uruguay Round.

[35] R.S.O. 1980, c. 454.

[36] S.O. 1983, c. 27, s. 4(18).

[37] On July 27, 1985, a national news article stated that Krugerrand sales had been dulled in Ontario and Quebec due to the 7% sales tax in those provinces. It further noted that "South Africa has already demanded a formal investigation by GATT into Ontario's decision to scrap the seven-per-cent retail tax on Maple Leaf Coins in 1983 while continuing to apply it to the Krugerrand and other foreign gold coins. South Africa said in a submission to GATT headquarters in Geneva that retail sales taxes must apply equally to foreign and domestic products." (*see* QuickLaw's CP85 — July 24, 1985).

[38] For a discussion of the validity of provincial sales taxes, *see* Hogg, *supra* note 1 at 608-09. Generally, if such taxes are applied for consumption they will be deemed (valid) direct taxes. When taxes are imposed on the seller of goods, thus becoming analogous to excise taxes, they are *ultra vires* the provinces.

difficulties in mandating a removal of the discriminatory provision in Ontario's *Retail Sales Tax Act*.[39]

The Panel indicated that the purpose of Article XXIV:12 was "to qualify the basic obligation to ensure the observance of the General Agreement by regional and local government authorities in the case of contracting parties with a federal structure."[40] It found that there were two possible manners of construing the application of the qualifying section. The first possibility is that Article XXIV:12 operates to exclude the applicability of GATT provisions to measures taken at the regional or local level, leaving the central government obligated only to take reasonable measures to have subordinate levels of government legislate in a manner consistent with GATT. This interpretation would make the provision's meaning analogous to that of the recommendation clause.

The Panel stated that the second possible interpretation of Article XXIV:12's application is that all GATT provisions remain applicable to local or regional governments, but the obligation of states to ensure that these levels of government observe the provisions may be qualified in certain circumstances.

Having examined the merits of each interpretation, the Panel concluded that the latter explication was preferable. As such, the members stated that Article XXIV:12 was not intended to limit the levels of government to which GATT applied. Rather, the purpose of the provision was to regulate the measures required of states to secure observance by their local governments.[41]

The Panel members had no difficulty in determining that the provinces constituted "regional or local authorities" as referred to in Article XXIV:12.[42] They next stated that in interpreting the Article, it is essential to consider the valid constitutional difficulties that federal states may encounter in ensuring the observance of their GATT obligations by local governments, while minimizing the danger of any imbalance in rights and obligations of contracting parties. The same concern has been raised during many international treaty negotiations. Opponents of federal state clauses argue that they give federal states the advantage of avoiding certain obligations while enjoying all of the benefits of treaties.[43]

The Gold Coins Panel went on to consider the meaning of "reasonable measures" within Article XXIV:12. There is no interpretive note following that

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[39] It might be noted that this challenge arose during a period when Canada and other nations had taken a strong position respecting sanctions against South Africa in an effort to eliminate apartheid. As such, one may assume that the Canadian government was not particularly adverse to the Ontario measure.

[40] Annotation, *supra* note 32 at XXIV - 41, citing para. 53 of the Panel Report.

[41] J.H. JACKSON, WORLD TRADE AND THE LAW OF GATT (New York: Bobbs-Merrill, 1969) at 114, having examined the documentary evidence of the preparatory committees during the negotiation of the provision, concluded that this version of the qualification is most consistent with the original drafters' intentions.

[42] Nor did any of the parties raise this as an issue in any of the Panel decisions discussed herein.

[43] For further discussion of this argument *see* Looper, *supra* note 17 at 164 and Y-L. Liang, *Colonial Clauses and Federal Clauses in U.N. Multilateral Instruments* (1951) 45 A.J.I.L. 108 at 124-28.

paragraph from which to glean interpretive direction. The Panel, however, found it relevant to refer to the interpretive note following Article III:1 of GATT for guidance. Article III:1 states that the contracting parties recognize "that internal taxes and....charges....affecting the internal sale....of products....should not be applied to imported or domestic products so as to afford protection to domestic production."[44] The interpretive note to Article III:1 states:

> The application of paragraph 1 to internal taxes imposed by local governments and authorities within the territory of a contracting party is subject to the provisions of the final paragraph of Article XXIV. The term "reasonable measures" in the last mentioned measure would not require, for example, the repeal of existing national legislation authorizing local governments to impose internal taxes which, although technically inconsistent with the letter of Article III, are not in fact inconsistent with its spirit, if such repeal would result in a serious financial hardship for the local governments or authorities concerned. With regard to taxation by local governments or authorities which is inconsistent with both the letter and spirit of Article III, the term "reasonable measures" would permit a contracting party to eliminate the inconsistent taxation gradually over a transition period, if abrupt action would create serious administrative and financial difficulties.[45]

Simply stated, the interpretive note provides that a contracting party considering the repeal of national legislation which authorizes internal taxation by local governments should take into account the spirit of the inconsistent local tax laws as compared to the administrative or financial difficulties to which the repeal of the enabling legislation would give rise. Although strictly speaking this note does not apply to the situation where provinces have constitutional competence (as opposed to authorization by federal legislation) to impose taxes, the Panel Members attempted to elaborate the explanatory note into a general principle applicable to all measures relating to Article XXIV:12. They stated that to determine which measures taken to ensure the observance of GATT obligations by local governments are "reasonable" within the meaning of Article XXIV:12, one must weigh the effects of non-observance by local governments on the federal governments' trade relations with contracting parties against the domestic difficulties of securing observance.

Applying its test to the Ontario legislation, the Panel concluded that Canada had not taken all reasonable measures to have the offending measure withdrawn. As a result, Canada was obliged to compensate South Africa *until* the withdrawal was secured, for the loss of competitive opportunities resulting from Canada's failure to meet its obligation.[46] The summary nature of the reporting of this decision leaves one wanting in facts. Presumably, however, the Panel expected that Canada could, through negotiation or implementation of paramount legislation, secure the removal of the *Retail Sales Tax Act* provision. In fact, the provision was repealed by an amendment to the *Retail Sales Tax Act, 1986*.[47]

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[44] *Supra* note 4.

[45] Jackson, *supra* note 41, Appendix A at 866.

[46] Annotation, *supra* note 32 at XXIV - 45, citing para. 72 of the Panel Report.

[47] S.O. 1986, c. 1, s. 3(3).

B. *The EEC versus Canada — Beer Case #1*

In the 1988 Panel decision, "Canada — Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies",[48] the EEC asked the Panel to adopt the interpretation of Article XXIV:12 advanced by the Gold Coins Panel. The dispute between the Community and Canada arose over certain provincial regulatory practices in relation to imported beer and wine. Pursuant to the 1928 version of *An Act Respecting Interprovincial and International Traffic in Intoxicating Liquors*,[49] the Federal Government provided that liquor could only be imported into Canada in accordance with provisions established by provincial agencies vested with the right to sell liquor. The right to sell liquor is derived from provincial legislative competence over "Property and Civil Rights within the Province" and "Matters of a merely local or private Nature."[50] This federal import restriction has resulted in a monopoly on the importation into Canada of alcoholic beverages by provincial liquor boards.

Canada had bound duties with respect to the commodities in issue in a schedule to the Tokyo Round negotiations. However, the EEC alleged that the practices of the provinces resulted in a violation of Canada's GATT obligations. The practices which the EEC complained of were: (1) differential mark-up of products between domestic and imported goods; (2) differences in listing requirements between domestic and imported provinces making it difficult for imported liquor and spirits to obtain listing; (3) failure of Canada to adequately meet notification requirements regarding state trading; and (4) discriminatory points of sale whereby in certain provinces domestic products could be sold in grocery stores and licensed retail stores while imported beer and wine could not. In addition, the EEC alleged that Canada had not taken all reasonable measures to secure the observance of the bound duties by provincial governments, and was thus in violation of Article XXIV:12.

Canada denied that the provincial practices were discriminatory, and relied on a "Provincial Statement of Intentions with Respect to Sales of Alcoholic Beverages by Provincial Marketing Agencies in Canada."[51] The Statement of Intent was issued in 1979 by all ten provinces during the Tokyo Round of negotiations. It provided, *inter alia*, that provincial governments would not increase the differential in mark-ups between domestic and imported wines beyond then-current levels, and that they would entertain applications for listing of foreign beverages on a non-discriminatory basis. Canada argued that it had met all of the obligations set out in the Statement of Intent, and that the Statement was a modification of Canada's obligations in accordance with Article II:4. This provision provides that where any party establishes a monopoly of the importation of a product, the monopoly shall not "*except....as otherwise agreed between the parties which intially negotiated the concession*",[52]

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48 Report of the Panel adopted on March 22, 1988, GATT BISD 35S/37.

49 S.C. 1928, c. 31.

50 Respectively, subsections 92(13) and 92(16) of the *Constitution Act, 1867*.

51 *Supra* note 48 at 94.

52 *Supra* note 4.

operate so as to afford protection on the average in excess of the amount of protection provided for in the applicable schedule. Canada argued that the Statement of Intent constituted such an agreement between itself and the EEC.[53] In addition, it was Canada's position that the Statement evidenced the fact that Canada had taken all reasonable measures required by Article XXIV:12.

The Panel concluded that the EEC's complaints against Canada's provincial marketing boards were valid, with the exception of the complaint concerning notification requirements, and that the Statement of Intent did not constitute an agreement within the meaning of Article II:4. The latter conclusion was based on several factors. First, the Canadian Government had, in correspondence respecting the Statement of Intentions, made specific reference to the Statement's non-binding nature. In addition, the Statement of Intentions and related letters had not been included among the texts listed in the Procès-Verbal which embodied the results of the Tokyo Round, and the letters were classified as confidential and had not been notified to the CONTRACTING PARTIES.[54] Since the documents could not be held to constitute an agreement in terms of Article II:4 and did not, therefore, modify Canada's obligations arising from the inclusion of alcoholic beverages in its GATT Schedule,[55] Canada was in violation of its obligation under Article II to accord the EEC National Treatment. It had also violated its obligations under Article XI, which prohibits quantitative restrictions on the importation of products.

In addressing the question of compliance with Article XXIV:12, the Panel found that Canada's violation of Articles II and XI was evidence that Canada had misinterpreted its obligations under these provisions. Having misinterpreted the actual obligations which were the subject matter of the duty under Article XXIV:12, the Panel reasoned that Canada could not have taken all reasonable measures to secure the observance of these obligations. Therefore, the Panel recommended that the CONTRACTING PARTIES request Canada "to take such reasonable measures as may be available to it to ensure observance of the provisions of Articles II and XI of the General Agreement by the provincial liquor boards in Canada".[56]

The Panel neither specifically adopted nor rejected the reasoning of the Gold Coins Panel. There are two principles, however, to be derived from this decision regarding the interpretation of Article XXIV:12. The first is that in order to take reasonable measures as dictated by the Article, a country must be given an opportunity to clarify the extent of the obligations. Presumably, such clarification will be derived from a Panel hearing. Second, the Panel found, contrary to Canada's submissions, that the challenged party will be required to demonstrate to the CONTRACTING PARTIES that it has met its Article XXIV:12 obligations, and it will be the CONTRACTING PARTIES who will determine whether reasonable measures have been taken by the challenged party.

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[53] Canada had negotiated similar statements with the United States, Australia, New Zealand and Finland.

[54] *Supra* note 48 at 86, para. 4.7.

[55] *Ibid.* at para. 4.8.

[56] *Ibid.* at 92, para. 4.36.

C. *The U.S. Complaint against Canada — Beer Case #2*

In 1991, the United States lodged a complaint against Canada, again respecting the practices of Canada's provincial liquor agencies.[57] The United States followed the EEC's precedent in relying on Article XXIV:12 as part of its complaint.

Part of the United States' complaint made reference to the 1988 Panel decision respecting Canada and the EEC. The United States argued that since 1988, Canada had been under an obligation to ensure that the provincial agencies were brought into line with GATT obligations, and that it still had not done so. In particular, the U.S. stated that Canada still employed discriminatory practices relating to listing, mark-ups and distribution outlets, and that Canada had not fulfilled its obligation under Article XXIV:12. As a result, the continued application of these practices had the effect of nullification and impairment of benefits accruing to the U.S. under GATT. The United States alleged additional violations that had not been addressed in the 1988 complaint. They included packaging requirements, restrictions on private delivery, minimum prices, and taxes on beer containers. Canada argued that subsequent to the 1988 Panel decision, it had entered into an agreement with the EEC dealing with the problems in issue. The agreement was, argued Canada, being implemented on a Most Favoured Nation basis, and thus applied to the U.S.

Canada alleged that it had dealt with the matter of listing and delisting practices in the agreement, in that such practices now accorded National Treatment to beer that was the product of the Community (and, by virtue of its application on a Most Favoured Nation basis, to beer that was a product of the U.S.). In addition, listing and delisting of alcoholic beverages was, according to the agreement, to be non-discriminatory, based on normal commercial considerations, transparent, and not a creation of disguised barriers to trade. Finally, listing requirements were to be published and made available to interested persons.

In response to allegations of ongoing violations by way of differential mark-ups, Canada stated that this problem had been resolved by virtue of the provision of the agreement that Canadian authorities would not increase any mark-up differentials that existed on December 1, 1988 between domestic and imported beer.

Canada's response to the issue of beer pricing differed from that described above. Canada undertook in its agreement with the EEC that measures for pricing of beer were to be brought into conformity with its GATT obligations. This undertaking was contingent on and was to follow the conclusion of federal-provincial negotiations regarding the reduction or elimination of interprovincial barriers to trade in alcoholic beverages. Canada stated that it had entered into an agreement with the provinces for the elimination of interprovincial trade barriers, and that this agreement was designed to constitute an adjustment process for the domestic market which would lead to Canada being able to meet its GATT obligations. The interprovincial agreement had set a deadline of 1993 for the

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[57] *Canada — Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies: Report of the Panel*, adopted by GATT Council on February 18, 1992, DS17/R.

elimination of the remaining discriminatory practices in each province. Canada argued that the provinces needed time to adjust their practices which had in some instances existed before Canada's entry into GATT. Finally, Canada had proposed to consult with the EEC in the second half of 1993 for the purpose of attempting to resolve issues regarding any remaining problems relating to access of foreign beer to private distribution systems. Canada again argued that the resolution of this matter with the EEC would be applied on a Most Favoured Nation basis, and as such, would resolve any concerns of the United States.

Based on the agreement with the EEC and the federal-provincial agreement, Canada stated that it was continuing to take such reasonable measures as were available to it with respect to its obligations under Article XXIV:12.

The United States argued that although liquor board practices may have changed since 1988, they still had an adverse impact on imported beer. In addition, the United States asserted that Canada had not in fact accorded National Treatment to imported beer in listing and delisting practices; that the agreement with the EEC did not effectively deal with the mark-up problem in that it merely included an undertaking not to increase differentials — it did not take any measures to eliminate discriminatory mark-ups; that the points of sale issue was not addressed in the agreement at all; and that not all ten provinces were signatories to the interprovincial agreement. In addition, the United States argued that the interprovincial agreement did not address access of imported beer to the Canadian market. Finally, the United States stated that the interpretation of "reasonable measures" under Article XXIV:12 should include the assessment of an appropriate time frame for local governments to be brought into line with international obligations.

The United States proposed a specific example of what it considered a reasonable measure to be taken by Canada. It stated that if Canada had the power to declare regulations for the implementation of provisions of the *Free Trade Agreement*[58] (FTA) relating to the internal sale and distribution of wines and spirits, it would also have the power to amend provincial liquor board practices relating to beer.[59]

The FTA was implemented in Canada pursuant to the *Canada-United States Free Trade Agreement Implementation Act.*[60] Section 9(1) of the Act provides that the Governor in Council may make any regulations required to give effect to Chapter Eight of the Agreement. This chapter deals with Wine and Spirits. Section 9(2) further states that regulations will not be placed in force where the provinces are carrying on practices in conformity with Chapter Eight obligations. In effect then, section 9 is a fairly non-intrusive bill including what "amount[s] to legislated warnings about federal jurisdiction."[61]

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[58] (1988), 27 INT'L. LEG. MAT. 281.

[59] *Supra* note 57 at 48, para. 4.81.

[60] S.C. 1988, c. 65.

[61] D.M. Brown, *The Evolving Role of the Provinces in Canadian Trade Policy* in D.M. Brown and M.G. Smith, eds., CANADIAN FEDERALISM: MEETING GLOBAL ECONOMIC CHALLENGES? (Kingston: Queen's University Institute of Intergovernmental Relations, 1991) at 97.

Under Chapter Eight, Canada has agreed to eliminate discriminatory pricing on wine and spirits, although certain discriminatory practices relating to distribution outlets are allowed to continue pursuant to Articles 802.2 and 804 of the Agreement.

Related to the issue of implementation of the FTA is Article 103 of the Agreement, which is a federal state clause of sorts. Pursuant to Article 103, Ottawa is obliged to "ensure that all necessary measures are taken to give effect to provisions [of the Agreement] by state, provincial and local governments".[62] There has been some debate concerning the effect of Article 103 of the FTA and the validity of the Federal Government promulgating legislation respecting areas of the Agreement falling within provincial legislative competence.[63] None of the provinces have sought a judicial ruling respecting Ottawa's constitutional authority, but some have voiced protests.[64] Therefore, the validity of the federal legislation and whether it constitutes proof of Canada's constitutional ability to fulfil GATT obligations remain uncertain.[65]

In arguing the second "Beer Case", Canada again advanced the argument that the country facing an Article XXIV:12 challenge should be the party to assess whether all reasonable measures available to it to ensure observance of its GATT obligations had been or were being taken. Once again, Canada's position was rejected. The Panel Members adopted the finding of the 1988 Panel that although it was up to the challenged federal state to determine what measures were reasonable within the domestic sphere, that state would have to demonstrate to the CONTRACTING PARTIES that these measures were "reasonable" in accordance with its international obligations under Article XXIV:12.[66]

The Panel did not go to the extent of recommending that Canada attempt to enact legislation to overturn existing provincial marketing practices as suggested by the United States. It did, however, accept the American argument that an element of timing should be incorporated into the determination of what is reasonable. In doing so, the Panel relied on the last sentence of the interpretive note to Article III:1[67] which provides, *inter alia*, that the term "reasonable measures" may be interpreted to permit the elimination of inconsistent measures "gradually over a transition period, if abrupt action would create serious administrative and financial difficulties." Applying this test to the issue of elimination of differential mark-ups, the Panel found that Canada's proposed 1994 date for final elimination of such mark-ups

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[62] Article 105 of the North American Free Trade Agreement (NAFTA) is virtually identical. *See North American Free Trade Agreement* (Ottawa: Minister of Supply & Services, 1992).

[63] *See, e.g.*, G. Stevenson, *The Agreement and the Dynamics of Canadian Federalism*, in M. Gold and D. Leyton-Brown, eds., TRADE-OFFS ON FREE TRADE: THE CANADA-U.S. FREE TRADE AGREEMENT (Toronto: The Carswell Company Limited, 1988) 134. At 136, Stevenson notes that Ontario suggested it might have the power to prevent implementation of the FTA.

[64] As pointed out by Brown, *supra* note 61 at 97, Alberta tabled a bill and Quebec issued a "decree" which proclaimed the FTA's implementation within its jurisdiction.

[65] For a variety of opinions respecting Parliament's constitutional authority to implement the FTA, *see* Gold & Leyton-Brown, eds., *supra* note 63, ch. 4.

[66] *Supra* note 57 at 67-68, para. 5.36.

[67] For the text of the interpretive note, *see* text accompanying *supra* note 44.

effectively meant a six year transition period. In the Panel's opinion, this period was too long.[68] As far as administrative difficulties were concerned, the provinces had, in most cases, introduced a system of cost of service charges which would compensate for administrative complexities. With respect to potential losses in the transition period alleged by Canada, the Panel concluded that these could be resolved by increasing the mark-up uniformly for both imported and domestic beer.

Finally, the Panel indicated that in determining whether the actions of a country constituted reasonable measures, one should look to whether that country had made "serious, persistent, and convincing efforts" to ensure observance of the provisions of the General Agreement.[69] With respect to the issue of distribution outlets, given that neither the agreement with the EEC nor the interprovincial agreement had addressed the issue, and despite the fact that Canada had been found in violation of its obligations in this respect by the 1988 Panel, it could hardly be said that Canada had taken such efforts. However, the Panel found that the United States had not established that the new listing practices implemented pursuant to Canada's agreement with the EEC were in violation of GATT obligations.

The Panel dealt with the "new" complaints brought by the United States[70] in a method similar to that adopted by the 1988 Panel. Respecting packaging obligations and private delivery of imported beer, the Panel Members found Canada in violation of the General Agreement. Because these issues had not been addressed by the 1988 Panel, Canada could not be said to have taken all reasonable measures pursuant to Article XXIV:12 since it had misinterpreted its obligations. Therefore, the Panel concluded that Canada should be given an opportunity to take reasonable measures now that its obligations had been clarified.

D. *The Canadian Complaint against the U.S. — Beer Case #3*

The third "Beer Case" to come before GATT was the complaint of Canada against the practices of the United States.[71] Canada alleged that U.S. federal excise tax measures, state tax measures, distribution barriers, licensing fees, transportation requirements, alcohol content regulations and listing/delisting policies, all operated to create significant discrimination against Canadian beer, wine, and cider in the United States.

The United States argued that it was not in violation of any GATT obligations, and in the event that it was, it had taken all measures required to bring its states in line with the United States' obligations. Whereas in the previously discussed case, Article XXIV:12 was employed by the U.S. to emphasize the extent of Canada's

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[68] One can assume that Canada was probably also advocating an interpretation in line with the last sentence of the interpretive note, but that it expected the time limit for adapting its measures to be very flexible.

[69] *Supra* note 57 at 68, para. 5.37.

[70] Those not addressed in the 1988 Panel Decision, as noted in Part IV. C, above.

[71] GATT, *United States — Measures Affecting Alcoholic and Malt Beverages: Report of the Panel* (adopted 16 March, 1992) DS23/R.

breach of GATT obligations, in this case, the U.S. sought to use the provision as a shield which limited the extent of its responsibilities under GATT. The Panel found, however, that the U.S. had not adduced evidence that reasonable measures were unavailable to it to ensure the observance by the state authorities of the relevant provisions of the General Agreement.[72]

The Panel noted with approval the general principle of international treaty law that a party may not use the provisions of its internal law as justification for its having failed to perform treaty obligations. This principle is contained in Article 27 of the Vienna Convention on the Law of Treaties.[73] Parties who wish to establish an exception to this general principle must expressly do so within the relevant treaty.[74]

Having considered the principle set out in Article 27 along with their review of the legislative history of Article XXIV:12, the Panel Members reasoned that it was proper to interpret Article XXIV:12 as applying only to measures by regional or local governments, which central governments are unable to control due to constitutional legislative incapacity. The Panel went on to cite the Gold Coins Panel in support of the view that Article XXIV:12 grants a special right to federal states without giving any offsetting privilege to unitary states, and as such it should be construed narrowly so as to avoid any undue imbalance in the rights and obligations of unitary and federal states.[75]

The Panel further concluded that GATT law is part of United States' domestic law, and that the U.S. has the constitutional authority to ensure that state measures inconsistent with the provisions of the General Agreement are altered so as to comply with GATT obligations.[76]

The notice taken by the Panel of the supremacy of United States' constitutional law over state measures serves to further clarify the "reasonable measures" test. Where the federal state does have the constitutional authority to override state measures that are inconsistent with GATT provisions, any lesser measure which does not result in the withdrawal of the offending measure will not be sufficient to meet the obligation imposed by Article XXIV:12.[77] Thus, political concerns

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[72] *Ibid* at 97, para. 5.78.

[73] (1969) I.L.M. 8. Canada acceded to the Vienna Convention in October, 1970. It came into force on January 27, 1980.

[74] This principle is also set out in the Vienna Convention at Article 29.

[75] *Supra* note 71.

[76] The Panel relied in part on the conclusion of Robert Hudec that GATT law is part of the domestic law of the United States. As noted earlier, both Jackson and Brand, *supra* note 15, reached the same conclusion. In Jackson, *supra* note 10 at 75, the author refers to GATT's status as domestic U.S. law.

[77] At least one author approves of this interpretation as it applies to the U.S. In *To Compel or Encourage: Seeking Compliance with International Trade Agreements at the State Level* (1993) 2 MINN. J. GLOBAL TRADE 143 at 156, Kenneth Cooper states:

> The limitations of Article XXIV:12 were meant to apply only where there is either no legal power over subnational units of government, or where eliminating a state measure is disruptive to government. Arguments that either qualification applies to the United States cannot withstand scrutiny.

regarding cooperative federalism in this form of federal state clause, as opposed to some others, appear to bear little if any weight.

V. ANALYSIS

The foregoing survey of Panel decisions suggests a number of interpretive guidelines respecting GATT's federal state clause. The Reports suggest a stringent test to be met before Article XXIV:12 will provide respite to a federal state. In fact, one might even go so far as to predict that the trend of interpretation is such that Article XXIV:12 may ultimately prove to be totally ineffective as a defensive mechanism. As will be discussed in this section, the Uruguay Round draft "Understanding on Rules and Procedures Governing the Settlement of Disputes under Articles XXII and XXIII of the General Agreement on Tariffs and Trade"[78] supports this position. Before further discussion of this point, however, it is useful to discuss the factors that emerge from the Panel decisions as relevant to the interpretive process.

It should be noted that parties are instructed by the above noted principle to seek to *minimize* imbalances that may arise from the operation of the provision. This is surely not synonymous with totally *eradicating* the imbalances. Returning for a moment to the traditional purpose of federal state clauses, it is to be recalled that such purpose is to relieve the federal state from compliance in some circumstances. John Lambrinidis, in discussing Article 14, paragraph 4 of the EFTA, which bears a striking resemblance to Article XXIV:12 of GATT, states:

> [I]n the absence of a specific provision regulating responsibilities of Member States with regard to discriminatory policies of their regional or local authorities or enterprises, Member States would be held responsible for any violation of Article 14 effected by such authorities.
>
> Paragraph (4), however, limits these responsibilities of Member States to the degree that they must only *"endeavour to ensure"* that those authorities....comply with the provisions of this Article.
>
> If, therefore, a complaint lodged....is based on the violation of Article 14 by a local government authority and it is established, during the proceedings, that, although the alleged violation has occurred, the defendant Member State *had used the means available* to its central government under its constitution in order to secure observance of the provisions of Article 14 by the local government in question, *then no breach of the Convention will have taken place....*[79]

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[78] See *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN.TNC/W/FA (20 December 1991) at S. 1 - S.23.

[79] Lambridinis, *supra* note 30 at 157 (emphasis added).

Assuming that one can draw an analogy between the EFTA provision and Article XXIV:12,[80] the inclusion of Article XXIV:12 in GATT would presumably relieve federal states from responsibility for any violation by local governments where they had taken the measures available to them to ensure observance with the obligations under the Agreement.

Reference to the history leading to the inclusion of Article XXIV:12 in the GATT text, seems to suggest that the Member States who anticipated constitutional difficulties respecting implementation of the Agreement were seeking some relief from responsibility for non-compliance. The language of Article XXIV:12 was drawn directly from an identical provision in the draft Havana Charter at the time GATT was being formulated.[81] The historical documentation relating to the creation of this Article, although quite limited, indicates that the issue of treaty application to federal subdivisions arose soon after the beginning of the first preparatory committee in London in 1946. Regarding a draft commitment against internal taxes and regulatory discrimination against imported goods, a subcommittee of the Preparatory Committee reported that:

> Several countries emphasized that central governments could not in many cases control subsidiary governments in this regard, but agree all *should take such measures as might be open to them to ensure this objective.*[82]

At this point, a new clause was proposed which read:

> Each Member agrees that it will take all measures open to it to assure that the objectives of this Article are not impaired in any way be taxes, charges, laws, regulations or requirements of subsidiary governments within the territory of the member governments.[83]

The principle that reasonable measures will be determined with reference to both the constitutional difficulties for the offending state in ensuring observance of local governments and the desire to minimize imbalances accruing in rights and obligations of other states raises interesting questions. The primary one is whether there could ever be a situation where, for example, Canada will be excused from its obligation by virtue of the fact that it has taken all reasonable measures available to it but a province or provinces still refuse to comply with Canada's GATT obligations.

At one stage, the clause was inserted as part of the "National Treatment" Article but at the New York meeting of the Preparatory Committee in 1947, it was moved out of this Article to a general miscellaneous Article near the end of the draft,[84] and was re-worded to state: "Each accepting government shall take such reasonable measures as may be available to it to assure observance of the provisions of this

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[80] In particular, assuming that the term "endeavour to ensure" can be positively compared to "take all reasonable measures".

[81] *See* Jackson *supra* note 41 at 111-17 for a discussion dealing with the Havana Charter.

[82] U.N. Doc. E.P.T.C./C.II/54 at 4 (1946) (emphasis added).

[83] *Ibid* at 6.

[84] U.N. Doc. EPCT/C.6/6 at 3 (1947).

Charter by subsidiary governments within its territory.[85] It was noted by Canada, during its argument in the first "Beer Case", that an amendment attempting to broaden the scope of the obligation was proposed on two subsequent occasions[86] at the Havana Conference and that each time, the amendment was withdrawn since several delegations could not accept it.[87]

Despite the historical purpose of federal state clauses and the apparent intent of the drafters of Article XXIV:12, there is no indication in the Panel decisions of the type of situation that could relieve Canada of responsibility for the acts of its provinces. The proposition that there may be no circumstance that would totally exonerate Canada is supported by the "Understanding on Rules and Procedures Governing the Settlement of Disputes under Articles XXII and XXIII of the General Agreements on Tariffs and Trade", Draft Uruguay Round Agreement.[88] Clause 20.7 of that Agreement provides that the dispute settlement provisions of GATT may be invoked in respect of measures affecting its observance taken by regional or local governments, and that where the CONTRACTING PARTIES have ruled that a GATT provision has not been observed, the responsible contracting party shall take such reasonable measures available to it to ensure its observance. The final sentence of this clause goes on to state: "[t]he provisions relating to compensation and suspension of concessions or other obligations apply in cases *where it has not been possible* to secure such observance".[89]

The wording of clause 20.7 suggests that it refers to the situation where it has not been possible for the federal state to bring its subsidiary governments into compliance. In this situation, that country will be subject to the same duty to pay compensation or face retaliation by way of withdrawal of concessions as a contracting party which has simply been found to have failed to bring a measure into compliance and which is not subject to any Article XXIV:12 considerations. This effectively removes any real distinction in the positions of federal and unitary states. In addition, this interpretation nullifies any purported effect of Article XXIV:12 since the same results could be reached without reference to it.

The Panel Reports provide that time limits will be applicable in determining reasonable measures *vis-à-vis* the difficulties for the offending state in ensuring observance of local governments. As observed in the review of the Second "Beer Case", this principle was derived from the interpretive note to Article III:1. It is arguable that this note has little relevance in interpreting the term "reasonable measures" for the general purposes of Article XXIV:12. The interpretive note to Article III:1 was drafted in 1948, some months after GATT was signed. During the

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[85] U.N. Doc. EPCT/34 at 52 (art. 88, para. 5, of the New York draft of the ITO Charter), 79 (Art.XXV, para. 5 of the then GATT draft) (1947).

[86] The amendment was to read "Each Member....shall be responsible for any act or omission to act contrary to the provisions of this part on the part of any such governments and authorities."

[87] *Supra* note 46 at 28, para. 3.59. For a further historical overview of Article XXIV:12, *see* Jackson, *supra* note 41 at 11-117.

[88] *Supra* note 78.

[89] *Ibid* at XXII-106 (emphasis added).

second session of the contracting parties, amendments were made to certain parts of GATT, including Article III, dealing with national treatment. Reports of the Havana Conference[90] suggest that the interpretive note resulted from the wish to accommodate several countries who were concerned that negative political and administrative consequences would flow from the immediate revocation of discriminatory taxes. As a result, it was agreed that the elimination of such taxes could be gradual.[91] Given the particular circumstances surrounding the interpretive note, it may be argued that it was not intended to provide interpretive guidance for "reasonable measures" as encompassed in Article XXIV:12.

The Draft Understanding also allows time limits for complying with obligations. Clause 19.3 provides that where it is impracticable for any government to comply immediately with the recommendations and rulings of the Panel and Council, the contracting party will have a reasonable period of time to do so. This provision adds to the redundancy of an Article XXIV:12 determination.

The time limit implies that a federal government must, at some stage, achieve compliance with GATT obligations or face penalties. In the event that Canada is not able to effect the necessary changes of provincial regulation within a "reasonable time frame", and if one does not have reference to the Understanding, it should be noted that the Gold Coins Panel decision suggested that non-compliance with GATT provisions should attract compensation from the offending country until compliance is achieved. The specific form of compensation intended is not clear. However, in keeping with that term as applied elsewhere in GATT,[92] it would seem that compensation entails the reduction of tariffs by the offending country on other goods of export interest to the aggrieved country reflecting an equivalent value of concessions. It must be noted that in the Gold Coins Panel decision the recommendation was made on the basis that Canada had not taken reasonable measures. The question is whether compensatory measures would be considered appropriate where Canada is found to have taken reasonable measures. Given the approach of the Panels and the trend in the Draft Understanding, it appears the answer may well be affirmative.

Another possible method of achieving the same result is for the CONTRACTING PARTIES to simply continue finding that no measures short of those which achieve compliance are reasonable. If this is so, the constraints of Canadian federalism could work to penalize the federal government in its international trade relations since it will be required to provide compensation to other contracting parties or suffer the withdrawal of concessions despite its incapacity in the domestic sphere to effect the required measures. Although this may not seem unfair from an international

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[90] U.N. Conference on Trade and Employment, Reports of Comm. and Principle Subcomm., U.N. Doc. ICITO/1/8 at 62.

[91] This historical overview of the interpretive note relies heavily on the account provided in Jackson's article, *supra* note 15 at 307-08.

[92] For example, Article XIX of GATT authorizes safeguard measures where domestic industry is suddenly and seriously threatened by fair trade. However, the exporting countries affected by safeguard measures (such as withdrawal of concessions) may ask that the importing country provide compensation.

perspective given the importance of reciprocity of obligations in GATT, it is arguably not consistent with the understanding of the parties who originally negotiated Article XXIV:12.

It is clear that it will be the responsibility of the offending state to satisfy the CONTRACTING PARTIES that it has taken all reasonable measures available to ensure observance by its subsidiary governments. Canada's steadfast position during each of the Panel decisions discussed, that the challenged federal government should evaluate what constitutes reasonable measures under Article XXIV:12, indicates that the issue is significant to Canada. As a means of avoiding the situation where a state is able to simply assert that it has taken all reasonable measures available to it whether it has actually taken any measures or not, the approach taken in the Panel decisions is reasonable. It does, however, leave Canada in a rather vulnerable position. In examining both the Panel decisions and the Draft Understanding, it is clear that the CONTRACTING PARTIES will not be inclined to accept anything less than relatively rapid and total compliance with obligations as being "reasonable measures". Therefore, as alluded to above, if Canada is constitutionally incapable of effecting the change, and unable to negotiate the changes with the provincial bodies involved, it will be required to bear certain costs by way of compensatory measures or withdrawal of concessions by other contracting parties as a result of its federal structure.

Where a complaint comes before a Panel for the first time and a state is found to have violated a provision of GATT by virtue of the actions of its subsidiary governments, it will be found not to have taken all reasonable steps pursuant to Article XXIV:12 since it had been taking action on the basis of a mistaken interpretation of its obligations. This requirement raises the question of whether the original intention of the drafters of Article XXIV:12 was that it be used in support of an additional alleged violation of GATT standards, or to create a protective device to be used by federal states as a defence to non-compliance by subordinate governments. The history leading up to Article XXIV:12, referred to earlier in the paper, suggests that the latter interpretation is more plausible. As it stands, using Article XXIV:12 as a "sword" at first instance[93] leads to a rather artificial finding that the parties could not have taken reasonable measures because they did not have the benefit of the proper interpretation of the provisions in question.

It is arguable that the original notion of the provision's function was that it would be used solely as a shield in the event that a contracting party's subordinate government had acted in violation of GATT. Thus, for example, if Canada was found to have violated certain provisions, different consequences would flow according to the findings respecting Canada's efforts to bring the provinces in line with GATT obligations. If Canada failed to prove that it had used all measures available to ensure observance of the provisions by the provinces, it would be required to take whatever measures were necessary to eradicate the offending legislation within a reasonable amount of time. Failure to do so would lead to the withdrawal of concessions by parties who had suffered as a result of the breach of

[93] As, for example, was done by the EEC in the 1988 complaint.

obligations. If, however, Canada had adduced sufficient evidence to show that it had taken all reasonable measures available to it, presumably the traditional understanding of federal state clauses would indicate that it would be relieved of its obligations to the extent that compliance with the provisions by the provinces was beyond Canada's control.

The issue of whether Article XXIV:12 was originally intended to provide aggrieved parties with a sword or offending nations with a shield was not raised by any of the Panel Members. As a result its use as a sword will probably also be accepted in future disputes.

VI. Conclusion

Where does this analysis leave one in terms of defining Canada's international obligations and rights pursuant to Article XXIV:12? Despite the traditionally understood meaning and purpose of federal state clauses, Article XXIV:12 may not work to relieve Canada from responsibility for violation of GATT standards by its provincial governments. At the very least, the clause has a much more restrictive application than the territorial units clause or the recommendation clause. Those two types of federal state clauses allow federal states to respect commitments to cooperative federalism in a fairly effortless manner. The Panel decisions, however, indicate that political difficulties of federal systems will not ultimately attract relief under Article XXIV:12. Therefore, it appears that the United States and Australia, having the constitutional powers previously discussed herein, will never have occasion to successfully invoke this provision. Despite this author's predictions, the extent to which Canada's constitutional division of powers will attract the protection of Article XXIV:12, and the extent of the protection to be afforded in such a case, remain to be clarified by future adjudication.[94]

[94] On August 5, 1993, Canadian and U.S. Trade representatives entered into a memorandum of understanding aimed at settling the beer war. As a result, it is possible that the questions raised in this paper will not be answered through further adjudication of this longstanding controversy. However, it is likely that the same issues will arise in future trade disputes to which federal states are parties.