Les Cahiers de droit

Coveting thy Neighbour's Beer: Intergovernmental Agreements Dispute Settlement and Interprovincial Trade Barriers

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Volume 33, numéro 2, 1992

URI : https://id.erudit.org/iderudit/043149ar
DOI : https://doi.org/10.7202/043149ar

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Éditeur(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (imprimé)
1918-8218 (numérique)

Découvrir la revue

Citer cet article

Culat, D. (1992). Coveting thy Neighbour's Beer: Intergovernmental Agreements Dispute Settlement and Interprovincial Trade Barriers. *Les Cahiers de droit*, *33*(2), 617–638. https://doi.org/10.7202/043149ar

Résumé de l'article

Récemment, les gouvernements provinciaux et fédéral du Canada ont négocié des ententes intergouvernementales afin de réduire les barrières au commerce interprovincial. Ces ententes contiennent un nouvel élément : un mécanisme de règlement des différends. Le mécanisme de règlement des différends de l'*Accord sur les pratiques de commercialisation de la bière* s'inspire de celui de l'*Accord général sur les tarifs douaniers et le commerce*. Cette analyse comparative des mécanismes de règlement des différends recommande, en se basant sur l'expérience du modèle international, des améliorations au processus de l'*Accord sur les pratiques de commercialisation de la bière* afin d'assurer un règlement des différends efficace.

Coveting thy Neighbour's Beer: Intergovernmental Agreements Dispute Settlement and Interprovincial Trade Barriers

Didier CULAT*

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Recent developments have led the governments of Canada to negotiate intergovernmental agreements lowering interprovincial trade barriers. Those agreements include a new element; a dispute settlement mechanism. The dispute settlement mechanism included in the recently concluded Beer Marketing Agreement *was inspired by that found in the* General Agreement on Tariffs and Trade. *This article conducts a comparative analysis of these dispute settlement mechanisms and recommends, on the basis of the international model's experience, refining the process in the* Beer Marketing Agreement *to ensure an effective dispute settlement mechanism.*

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Les Cahiers de Droit, vol. 33 n° 2, juin 1992, p. 617–638

On September 24th, 1991, the federal government tabled in the House of Commons its latest constitutional proposals. The wide ranging document sought to address many concerns in Canada. Among those concerns were interprovincial trade barriers which impede the free flow of goods in Canada. The proposal brought forward called for an « Economic Union » which would reduce interprovincial trade barriers and expand the domestic Canadian economy[1].

However, this idea of reducing the interprovincial trade barriers is not a new concept. In 1987, at the Premiers Conference in Toronto, the Premiers of the Provinces agreed to negotiate a reduction in the trade barriers between their provinces[2]. In addition, in 1988, the *General Agreement on Tariffs and Trade*, following a complaint by the European Economic Community, ruled[3] that the preferential marketing practices[4] of the provincial liquor commissions were in violation of the GATT. In 1989, the signing of the Canada — United States *Free Trade Agreement* created a situation where there would be less trade barriers between Canada and the United States than there exists between the Canadian provinces[5]. In re-

1. CANADA, *Building Together Canada's Future : Proposals*, Ottawa, Supply and Service Canada, 1991, p. 55. The proposed reforms to section 121 of the *Constitution Act. 1867*, 30 & 31 Vict., (U.K.), c. 3 would : 1) widen the definition of the Canadian economic union to include the free flow of goods, people, capital, and services, independent of barriers based on territorial delimitations of provinces and territories ; and, 2) render illegal any law or practices which contravened the principle of the newly defined economic union.
2. CANADA, *Report of the Initiatives linkéd to the Public Sector Market*, Annual First Ministers Conference, Toronto, Ontario, November 26 and 27, 1987.
3. GATT, *Canada-Importing, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, (1988) B.I.S.D. 35th Supp. 37.
4. A form of interprovincial trade barriers, as we will see below.
5. The provinces are not included in several chapters of the *Free Trade Agreement*, L.C. 1988, c. 65, such as Chapter 13 on Government Procurement or Chapter 17 on Financial Services.

sponse to these pressures and commitments, the provincial governments have negotiated intergovernmental agreements committing themselves to the reduction of interprovincial trade barriers.

The negotiations for the elimination of interprovincial trade barriers has proceeded on a sectorial basis. Among the first sectors targeted were Beer Marketing Practices and Government Procurement. While some intergovernmental agreements concerning government procurement have been concluded on a regional basis[6], the *Intergovernmental Agreement on Beer Marketing Practices* has been ratified[7] by all the provinces.

These agreements on the abolishment of interprovincial trade barriers have included a dispute settlement mechanism. This is a new element in intergovernmental agreements. Previously, as in the *Intergovernmental Agreements concerning the Canada Assistance Plan*[8], there were no dispute settlement mechanisms. If a dispute arose between the parties, the parties were forced either to agree or to terminate the agreement. Now, with a dispute settlement mechanism, the parties foresee the long term duration of an intergovernmental agreement and the possibility that those commitments arising out of the intergovernmental agreement, with the passage of time, could change.

This article will describe the dispute settlement process of the *Beer Marketing Practices Agreement*, compare it to the international model on which, we believe, it was based, and suggest modifications to the process based on the experience of the international model and the Canadian economic situation.

1. Intergovernmental agreements

Before proceeding any further, a preliminary concern must be addressed : What is the legal nature of an intergovernmental agreement ? This is a complex question to which there is no definitive answer. Given that it is a written document between two or more distinct parties which mutually engages those parties to rights and obligations, and that it is subject to the

6. Agreements have only been concluded on a regional basis : Nova Scotia, Prince Edward Island, New Brunswick Memorandum of Agreement : *Reduction of Interprovincial Trade Barriers ; Government Procurement*, October 30, 1990 ; British Columbia, Alberta, Saskatchewan, Manitoba, Memorandum of Agreement : *Western Agreement on Government Procurement*, March 6, 1989.
7. *Intergovernmental Agreement on Beer Marketing Practices*, (1991) 123 *G.O.* II, 2966.
8. *Canada Assistance Plan*, R.S.C. 1985, c. C-1, s. 8 (2).

interpretative rules of contract law[9], it could be seen as a contract between governments. However, given that: 1) these distinct parties are government entities concluding an agreement emanating from their sovereign jurisdictions; and, 2) each government has been empowered to conclude the intergovernmental agreement by an Act of its own legislature, subject to the constitutional principle of the supremacy of parliament[10]; perhaps an intergovernmental agreement could be characterized as being subject to the international law of treaties. It would be our submission, given that intergovernmental agreements, as those to which we will be referring, were concluded between governments inside a federation, that intergovernmental agreements have a hybrid legal nature encompassing aspects of both the law of contracts and the international law of treaties.

This hybrid legal nature creates the situation where some question whether an intergovernmental agreement is in fact an « agreement »[11] since it can be unilaterally abrogated without recourse[12]. At best, it can be submitted that the legal nature of an intergovernmental agreement is akin to that of a « gentleman's agreement ». While the parties to the agreement agree to undertake certain obligations, there are no remedies available in the event of a breach of the agreement by one of the signatories.

The second preliminary question would concern our study of the dispute settlement mechanism. While the intentions of the parties signing the intergovernmental agreement may be manifest from the face of the terms of the accord, it is our submission that the long term viability of the pact will only appear from the strength of the dispute settlement mechanism. A loose dispute settlement mechanism will have little impact on disputes which arise from the non-implementation of the agreement's terms. Conversely, a strong and binding dispute settlement mechanism will

9. *Attorney General British Columbia* v. *Attorney General of Canada*, (1889) 14 A.C. 295 (P.C.); *Re. Canada Assistance Plan*, (1990) 46 B.C.L.R. (2d) 273 (C.A.), rev'd, (1991), 58 B.C.L.R. (2d) 1 (S.C.C.), for other reasons; *State of South Australia* v. *Commonwealth of Australia*, (1962) A.L.R. 547 (H.C.); *Re. Agreement between Canada and Alberta*, (1983) 1 F.C. 567 (T.D.). For a further discussion of the legal nature of an intergovernmental agreement, refer to: A. LAJOIE, *Contrats administratifs : jalons pour une théorie*, Montréal, Éditions Thémis, 1984, pp. 151-158.
10. Whereby the legislature can legislate and repeal any law it wishes, just like any sovereign state, *Re. Canada Assistance Plan*, (1991) 58 B.C.L.R. (2d) 1 (S.C.C.).
11. K. WILTSHIRE, « Intergovernmental Agreements in Canada and Australia », (1980) 23 *Canadian Public Administration* 353; K. WILTSHIRE, *Planning and Federalism : Australian and Canadian Experience*, New York, University of Queensland Press, 1986, p. 150.
12. I. BERNIER, N. ROY, C. PENTLAND et D. SOBERMAN, « The Concept of Economic Union in International Law and Constitutional Law », dans M. Kraswick (dir.), *Perspectives on the Canadian Economic Union*, Toronto, University of Toronto Press, 1986, p. 60.

act as a coercive force to fully implement the agreement in fears of a complaint which might force compliance with the terms of the accord. The choice is between an intergovernmental agreement which provides a feasible framework to achieve the ends identified and one which loosely speaks of grand objectives which are doomed to fail before the ink drys.

While the current intergovernmental agreements are unenforceable, the inclusion of dispute settlement mechanisms into intergovernmental agreements may change their legal nature by granting the courts an avenue by which they may intervene to settle the dispute. By pushing the intergovernmental agreement away from its unenforceable « gentleman's agreement » aspect, towards a contractual basis subject to enforcement by the courts, the means by which governments interact may substantially be altered.

2. Beer marketing agreement dispute settlement process

Many goods produced in Canada are accorded a preferential treatment when they are sold in the province where they are produced. One of the best examples in Canada arises in the beer industry. The production and marketing of beer has been characterized[13] as a provincial concern since all beer sold in one province is produced in that province. The provinces maintain this control, to the exclusion of the federal government's 91(2)[14] inter-provincial trade jurisdiction, by requiring that only beer produced in a province can be sold in that province[15]. This practice fosters the industry in

13. *Labatts Breweries of Canada Ltd.* v. *Attorney General of Canada*, [1980] 1 S.C.R. 914 in an obiter comment at 939.

14. If these barriers were eliminated by way of intergovernmental agreement, the federal government would strengthen its control over the national economy as goods would flow freely between provinces and would be characterized as interprovincial trade and be subject to section 91(2) of the *Constitution Act. 1867*, 30 & 31 Vict., (U.K.), c. 3.

15. The beer purchasing practices of the below listed provinces, favours the provinces producers by requiring a Brewer's License for the manufacturing of beer in the province. The Brewer's Licence permits the beer manufacturer to : 1) sell beer to a liquor commission ; and 2) sell beer directly to licensed premises :

British Columbia	*Liquor Control and Licensing Act*, R.S.B.C. 1979, c. 237, s.57(2).
Alberta	*Liquor Control Act*, R.S.A. 1980, c. L-17, s. 29(1).
Saskatchwan	*Liquor Act*, R.S.S. 1978, c. L-18, s. 37.
Manitoba	*Liquor Control Act*, R.S.M. 1988, c. L-170.
Ontario	*Liquor Control Act*, R.S.O. 1990, c. L-18, s. 3.
Quebec	*Société des alcools du Québec*, R.S.Q. 1989, c. S-13, s. 25
New Brunswick	*Liquor Control Act*, C.S.N.B. 1989, c. L-10, s. 113.
Prince Edward Island	*Liquor Control Act*, R.S.P.E.I. 1988, c. L-14, s. 11.
Nova Scotia	*Liquor Control Act*, R.S.N.S. 1989, c. 260, s. 63.
Newfoundland	*Liquor Control Act*, S.N. 1979, c. 53, s. 2.

the province to the exclusion of the beer industry in other provinces. This is considered to be an interprovincial trade barrier[16].

The current round of negotiations for the elimination of such interprovincial trade barriers was conducted jointly among the provincial governments and the federal government. The agreement aimed at allowing beer producers in one province to market their goods in other provinces without the structural blockages imposed by interprovincial trade barriers.

On January 1, 1991, a final text on the *Beer Marketing Practices* was agreed upon. This ageement provides for the elimination of the preferential treatment accorded to the intra-provincial beer industry and includes a dispute settlement mechanism:

Dispute Settlement

11 (1) Any producer of Canadian beer or beer products, from a province that is party to this Agreement, that believes that another party is not conforming to this Agreement will inform his government which will seek a solution directly with the party against which the complaint has been made.

(2) Any party to this Agreement, who believes that another party is not conforming to this Agreement will seek a solution directly with that party.

(3) Failing a resolution of the issue, the parties involved will establish a panel of not more than three (3) neutral and qualified people acceptable to these parties.

(4) The Panel will make a determination of the case and report its findings to the parties involved.

(5) If a party does not implement the Panel determination, the other party to the Agreement involved may suspend the application of

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For a further discussion of provincial discriminatory practices in the marketing of alcoholic beverages see: I. BERNIER, « Le GATT et le problème du commerce d'état dans les pays à économie de marché : le cas des monopoles provinciaux des alcools au Canada », (1975) 13 *Can. Y. B. Int'l L.* 98, 102-106.

16. Complaints have been directed against Canada at the GATT concerning this practice in the beer industry. See GATT, *Canada-Importing, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies, supra*, note 3. Currently the United States is petitioning the GATT on a complaint concerning the Canadian marketing practices in the beer industry.

> equivalent concessions made under this Agreement to the non-complying party[17].

In short, the complaint of the industry would be subrogated to the industry's home province which would attempt to negotiate a settlement with the impugned province. Failing a negotiated settlement, the parties would establish a Panel charged with making a determination concerning the dispute. The determination would then be reported to the disputing provinces which would then obligate the province found in violation of its *Beer Marketing Agreement* obligations to implement the findings of the panel or suffer the loss of the equivalent concessions made under the *Agreement* by the other province in the dispute.

It is the goal of the Canadian governments to set up a dispute settlement process which is similar in nature to that of the GATT. The parties will benefit from a long consultation process and a gradual increase in pressure on the contravening party in hopes of reaching a negotiated settlement. However, the process will also be plagued by the shortcomings of the GATT process when trying to enforce a decision through retaliatory action.

3. *General Agreement on Tariffs and Trade*

3.1 Dispute settlement process

The *General Agreement on Tariffs and Trade* (GATT) is an international trade arrangement in which Member States (called Contracting Parties) negotiate and implement uniform rules and procedures for the free flow of trade. The GATT has developed a dispute settlement mechanism which is based on political consultations and negotiations. The process facilitates the inter-communication of Member States of the GATT when one member complains of GATT agreement infringements by another Member State. This section of the paper will describe the GATT dispute settlement process, commencing with the internal complaint process and concluding with the adjudication procedure. Further, it will offer some critical comments on the GATT procedure and relate those comments to the dispute settlement procedure modeled on the GATT which is proposed in the *Intergovernmental Agreement on Beer Marketing Practices*.

The GATT dispute settlement process is a combination of internal law and international law. The process begins with a complaint by a person within a Member State. In Canada, while there are no formal complaint procedures, a person who complains that it was denied GATT benefits in

17. *Intergovernmental Agreement on Beer Marketing Practices*, *supra*, note 7, s. 11.

its foreign trade transactions with a Member State would complain to the Federal Minister of International Trade[18]. Individuals do not have standing before the GATT, only governments of Member States can petition the GATT to settle a dispute[19]. This lack of formalized process is to be compared to the structured procedure which has been established in the United States.

In the United States, a complaint is submitted to the United States Trade Representative (USTR) who examines the complaint by virtue of the jurisdiction granted by section 301 of the *Trade Act of 1974* as amended by the *Omnibus Trade and Competitiveness Act of 1988*[20]. The USTR then makes a determination, based on a consultation process with a cross-section of the United States Federal Government[21], whether to accept or reject the complaint. If the complaint is accepted, the process allows for 150 days of consultation and negotiations in which the United States government and the government of the State against which the complaint is directed attempt to reach a negotiated settlement[22]. If no negotiated settlement is achieved, the USTR then directs the complaint to the GATT process. We would submit that the internal complaint process in Canada, while not as formalized as that of the United States, would in effect follow a similar procedure.

The GATT complaint process is governed by Article XXIII of the *General Agreement*[23]. This article provides that the complaining government must show, to the impugned government, in writing, that an objective of the *GATT Agreement* is being nullified or impaired to its detriment[24]. This difficult onus of proof is lessened by the practice of presuming that, when there is a breach of a GATT obligation, it necessarily follows that there is a nullification or impairment of a GATT objective[25].

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18. There are no regulations or laws which specify to whom the complaint must be directed. However, given that the negotiations and implementations of international trade agreements (GATT, *Free Trade Agreement*) are the responsability of the International Trade Minister, it is safe to presume that he would be responsible for GATT complaints.
19. J.-G. CASTEL, « The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures », (1989) 38 *I.C.L.Q.* 835.
20. *Omnibus Trade and Competitiveness Act of 1988*, 19 U.S.C. 2411.
21. *Determinations Regarding Petitions*, 15 C.F.R., s. 2006.3
22. *Omnibus Trade and Competitiveness Act of 1988*, *supra*, note 20, s. 303 (a) (2) (B)
23. *General Agreement on Tariffs and Trade*, (1969) B.I.S.D., art. XXIII (hereinafter: *GATT*)
24. *Id.*, art. XXIII.1.
25. J.C. BLISS, « GATT Dispute Settlement Reform in the Uruguay Round : Problems and Prospects », (1987) 23 *Stan. J. Int'l L.*, 31 ; J.-G. CASTEL, *loc. cit.*, note 19, 836.

The impugned government must give « sympathetic consideration to the representations or proposals made to it[26] ». In common language this requires that the impugned government receive the representation of the complaining government and negotiate with that government in the hope that a settlement can be achieved. This would, under the United States 301 procedure, correspond to the 150 days negotiating period[27].

Failing a negotiated settlement, the complaining government can make an application to the Council of GATT to appoint a Panel to adjudicate the dispute[28]. The request for a Panel, unless opposed by a Member State, will be granted according to the standard practice of the GATT[29]. The Panel will be made up of either three or five neutral international trade experts who are not objectionable to the Member States who are party to the dispute[30]. After consulting with the parties the GATT Council will then give the Panel its Terms of Reference which will be the basis of its investigation and its recommendations. Next, the Panel will conduct a « formal and adversarial[31] » process where the complaining Member State and the impugned Member State make submissions explaining their relative positions. In addition, third parties, who feel that they have a « substantial interest » in the proceedings can be granted intervenor status and make a submission before the Panel[32]. The Panel will then make a finding and report its recommendations in writing to the GATT Council[33]. The Panel determination and reporting should take between three and nine months[34].

While the Panel is hearing the submissions and making its determination, the governments in dispute are invited to negotiate and attempt to achieve a settlement. Often a dispute will be settled to mutual satisfaction before the Panel has a chance to make its full determination[35].

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26. GATT, *supra*, note 23, art. XXIII.1.
27. While normally speaking the GATT Consultation period would follow the 301 Complaint Consultation period, the 301 procedure was drafted in conformity with the GATT to include the GATT preliminary consultation period and insure that the complaint not only had a fixed period of consultations/negotiations, but also proceeded directly to a Panel.
28. *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, (1978-79) B.I.S.D. 26th Supp. 210, para. 10 (hereinafter: *1979 Understanding*)
29. J.-G. CASTEL, *loc. cit.*, note 19, 836.
30. R.E. HUDEC, « Reforming the GATT Adjudication Procedure: The Lessons of the DISC Case », (1988) 72 *Minn. L. Rev.* 1443.
31. J.C. BLISS, *loc. cit.*, note 25, 38.
32. *1979 Understanding*, *supra*, note 28, para. 15.
33. *Id.*, para. 16.
34. *Id.*, para. 20.
35. J.-G. CASTEL, *loc. cit.*, note 19, 837.

If the Panel's findings are adopted by the GATT Council, the Member State which is found in violation of its GATT obligations is under a duty to implement the recommendations within a reasonable period of time[36]. In the alternative, the Member State may use the Panel findings as the basis of a negotiated settlement with the complaining government[37]. If the Member State which is found in violation of its GATT obligations, fails to implement the recommendations within a reasonable period of time, the complaining government may request the GATT Council authorization to take retaliatory action against that Member State[38]. Retaliatory action has only been used once in the history of the GATT[39]. If the GATT obligations and concessions forming the uniform rules for the free flow of goods, enjoyed by a Member State are suspended, that Member State will be free to withdraw from the GATT[40].

The GATT panel dispute settlement model can be summarized as a consultation process which facilitates communication and negotiations between complaining Member States. As these negotiations are underway, the pressure on the Member States to settle the dispute is increased. The Panel in its adversarial process and findings assists the negotiating parties to crystalize the crux of the litigious issues. From this focused basis, the parties usually find common grounds on which to settle the dispute. The determination process of a GATT panel can further increase the pressure to settle the complaint as the parties in dispute can perhaps better achieve a compromise among themselves than be forced to accept an imposed settlement from a third party. The panel determination is the basis of a finding from which the GATT proposes to settle the dispute. The ultimate sanction which can be imposed, against the recalcitrant Member State which does not implement a GATT finding, is a withdrawal of GATT benefits.

3.2 GATT: Learning from experience

The above described GATT dispute settlement model has undergone some reforms in the current Uruguay Round of GATT negotiations[41].

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36. *Id.*, 838.
37. In the recent West Coast Salmon Fishing Dispute between Canada and the United States, Canada used the Panel findings of the GATT and the *Free Trade Agreement* as the basis of a negotiated settlement of the dispute in which the demands of the United States were addressed.
38. GATT, *supra*, note 23, art. XXIII.2.
39. J.-G. CASTEL, *loc. cit.*, note 19, 838; J.-C. BLISS, *loc. cit.*, note 25, 38; *Netherlands* v. *United States*, (1955) B.I.S.D. 3rd Supp. 46.
40. GATT, *supra*, note 23, art. XXIII.2.
41. *Ministerial Declaration*, (1987) B.I.S.D. 33rd Supp. 19.

These reforms took effect on a trial basis May 1, 1989[42]. The most significant change has been the imposition of time limits for each step of the process. Where before there were no time limits and a dispute could, in an extreme case, take as long as 12 years to wend through the process[43], now only 15 months would elapse between the request for consultations and the decision of the GATT Council to adopt a Panel's report[44]. In addition, arbitration was added as a possible alternative dispute settlement process to the traditional model[45].

Previous reforms had taken place within the GATT. The formal structure established by the *GATT Agreement* was streamlined by the actual practices of the dispute settlement mechanism. The following are examples of some of the reforms previously undertaken by the GATT.

A first area of reform was the selection of panelists. The problem stemmed « not from finding international trade specialists » but from « finding enough panelists of any kind, qualified, acceptable to the parties and within a reasonable period of time »[46]. This problem was further multiplied by the increase in GATT litigation[47]. This created delays in the appointment of panels[48] and backlogged the settlement of the dispute.

To overcome this difficulty, the GATT developed a list of available qualified panelists. The panelists would « preferably be governmental[49] » and the « citizens of the countries who were in dispute would not be members of the panel[50] » Further, the panelists would « sit in their individual capacity and not as representatives of their government[51] ». The panel would be nominated within 30 days of the complaint to the GATT Council[52]. In addition, once the panelists have been selected the governments in dispute would have 7 days to raise compelling reasons to oppose their nominations[53].

The GATT was very uncomfortable with its dispute settlement process. This was due to the loose temporary structure of the GATT which

42. J.-G. CASTEL, *loc. cit.*, note 19, 844, citing the *Ministerial Declaration* of 1988 MTN.TNC/7 (MIN), 9 December 1988, pp. 26-33.
43. R.E. HUDEC, *loc. cit.*, note 30, 1444.
44. J.-G. CASTEL, *loc. cit.*, note 19, 847.
45. *Id.*, 845.
46. R.E. HUDEC, *loc. cit.*, note 30, 1465.
47. *Ibid.*
48. *Ibid.*
49. *1979 Understanding*, *supra*, note 28, para. 13.
50. *Id.*, para. 11.
51. *Id.*, para. 14.
52. *Id.*, para. 11.
53. *Id.*, para. 11.

favoured a diplomatic resolution to the dispute rather than an adjudication by an international body[54]. There were fears that if the GATT became an international police force of tariffs and trade, the organization itself would be rejected and fail[55]. In response to those fears, the determinations of the panels, were according to Robert Hudec, for the first 30 years, not very helpful, imprecise and ultracautious[56].

As the role of the GATT increased and became more predominant, it became more legalistic in its panel findings[57]. This was in response to demands from Member States which wanted comprehensive, impartial and focused determinations by the Panels. A Panel finding which stated that there was a dispute between X and Y country and that they should negotiate a resolution to the dispute was not very useful. Instead the « rise to legalism » brought panel determinations which were sufficiently comprehensive and detailed that they could actually be applied by the Member States as the basis of resolving the dispute[58].

While it seems that the GATT dispute settlement process has had its short comings, the fact that it has responded to these criticisms and reformed itself speaks to the flexible and adaptable nature of the organization. With the regular scheduled Rounds of Negotiations, the GATT is able to address its problem areas and reform them.

The GATT has institutionalized communication between the disputing parties. By forcing the governments to consult each other before proceeding to the formation of a panel, the GATT ensures that the parties start seeking a solution early in the dispute settlement process. Further, prior to the panel stage, the parties must agree in proceeding to the GATT dispute settlement process and in the selection of panelists. While the parties may have difficulties in resolving the actual dispute, the process is structured in such a way that they must continue to communicate with each other. In addition, during the panel submissions, the respective governments continue to communicate. While they may not be talking to each other, they are talking at each other and in this way are working towards a settlement. When the panel report is produced, the disputing parties have an objective third party which has attempted to encapsulate the dispute and propose a workable alternative solution. Here the report becomes the basis of more negotiations which ultimately resolve the dispute.

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54. R.E. HUDEC, *loc. cit.*, note 30, 1469.
55. *Ibid.*
56. *Id.*, 1470.
57. *Id.*, 1471.
58. *Id.*, 1472.

In addition to facilitating communication, the GATT dispute settlement dynamics increases the pressure on the disputing Member States to resolve the impass. It would be an oversight to disregard the potential power of a panel finding which has been adopted by the GATT Council. If a negotiated settlement is not forthcoming, the Member State which is found in violation of its GATT obligations will be forced to implement the panel findings. The implementation of a third party's determination may not best address the particular situation of the states in dispute. As such the findings, or the potential threat of findings, are sources of pressure on the disputing parties to negotiate a settlement which is based on a mutual compromise. Hence pressure to negotiate a settlement between Member States increases as the dispute settlement process progresses.

Since the GATT dispute settlement model is keyed on negotiations, it forces governments to approach the dispute with a flexible perspective. While there will be the traditional pre-negotiating posturing and the post-negotiation claims of victory, the actual negotiations are a mutual give and take, the result of which is generally acceptable to both parties[59]. In this way there is an inter-linkage of issues which are discussed and settled in the search for a mutual compromise. Hence the Member State with the most economic levers runs the lesser risk in a GATT dispute settlement negotiations as the impact of one concession will be minuscule compaired to the relative cost which would be imposed on the smaller undiversified economy of another Member State.

3.3 Learning from the GATT in Canada

These criticisms and advantages of the GATT must be compared to the structure in the *Beer Marketing Agreement* which has adopted a similar dispute settlement process[60].

When a dispute arises, the disputing parties must mutually agree not only to form a panel, but also to appoint three acceptable panelists. Given the problems encountered by the GATT in the selection of panelists, perhaps the governments which are parties to the agreement should establish a list of qualified, acceptable, and available candidates. Without this type of information the formation of a Panel will be delayed as the parties attempting to resolve the dispute are searching for panelists.

The Panel's mandate in making a determination is unclear. Is it to make a simple determination stating that a party to the agreement is in violation of the agreement ? Or is it to suggest, comprehensively a way of

59. J. CARTER, « Principles of Negotiation », (1986) 23 *Stan. J. of Int'l L.* 1.
60. See section on the *Beer Marketing Agreement*, *supra*, s. 2.

remedying the violation of the agreement ? As seen with the GATT, the dispute settlement process went from imprecise determinations of violations to a legalistic analysis which formed the basis of a negotiated agreement between the Member States. Perhaps the mandate of the Panel should be clarified.

The proposal is silent concerning the time periods for each stage of the process. How long should the provinces consult among themselves before proceeding to the formation of a Panel ? How long does the Panel have to make its findings ? No guidance can be found in the Agreement to answer these questions. This could lead to protracted dispute settlement as was found by the GATT in the DISC case[61].

There are no alternative dispute settlement procedures available to the parties of the Agreement. At the GATT, the parties can either submit themselves to the Panel or opt for arbitration. This option is not available in the Agreement.

However, by adopting the GATT dispute settlement model the *Beer Marketing Agreement* will benefit from a flexible process which encourages communication between governments which are party to the agreement. This communication will facilitate negotiations and, it is hoped, will settle the dispute.

How well would the GATT dispute settlement model operate within Canada ? The principal question concerns the ability of provinces to negotiate.

As previously discussed the pressure to negotiate at the GATT is the fear of being imposed a settlement to the dispute by a third party. This acts as a stimulus to negotiate as the Member States would usually prefer to settle the dispute by a mutual compromise rather than be forced to implement a GATT finding. Finally, the imposition of retaliatory action by the Member States acts as the highest form of pressure to negotiate. How well will this be transplanted in Canada ? How effective will this be considering that the agreement only covers one industry (beer) while the GATT covers trade in general ?

Can the GATT dispute settlement process transplanted into the Canadian economic context act as a pressure on the provinces to negotiate with each other. Hypothetically, if New Brunswick complains about the beer marketing practices of the Province of Quebec, what can New Brunswick offer in the negotiations to settle the dispute ? If the dispute is unresolved and proceeds to a withdrawal of New Brunswick benefits to

61. R.E. HUDEC, *loc. cit.*, note 30.

Quebec manufacturers, will this make much difference to Quebec which could be described as the second largest market in Canada ? Further, will the withdrawal of benefits make any difference since the manufacturers of beer in Quebec are the same companies as the manufacturers of beer in Ontario against which New Brunswick has not withdrawn its benefits ? One has to wonder how effective the GATT type dispute settlement mechanism will operate given the economic disparities in Canada and the dynamics of imposing a dispute settlement mechanism over one industry which is dominated by two or three companies. At best, the inclusion of the GATT dispute settlement process will stimulate some negotiations and perhaps be the basis of a political settlement of the trade dispute.

4. Arbitration

It appears that the *Intergovernmental Agreement on Beer Marketing Practices,* while being inspired by the GATT dispute settlement process, has sought to settle disputes by arbitration. The similarities drawn from the GATT are the subrogation by the provincial governments of the producer's claim[62], the consultation process before the formation of a panel[63], and the suspension of equivalent concessions in the event of non-compliance with the panel's findings[64]. However it could be submitted that the panel determination process is a departure from the existing GATT model and adopts an arbitration procedure. *Black's Law Dictionary* defines arbitration as :

> The reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard[65].

If we analyse this definition against the actual text of the *Agreement* we see :

(3) Failing a resolution of the issue, the parties involved will establish a panel of not more than three (3) neutral and qualified people acceptable to these parties.

(4) The Panel will make a determination of the case and report its findings to the parties involved.

(5) If a party does not implement the Panel determination[66]...

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62. *Intergovernmental Agreement on Beer Marketing Practices, supra,* note 7, s. 11(1) ; J.-G. CASTEL, *loc. cit.*, note 19, 836.
63. *Intergovernmental Agreement on Beer Marketing Practices, supra,* note 7, s. 11(2) ; GATT, *supra,* note 23, art. XXIII.1.
64. *Intergovernmental Agreement on Beer Marketing Practices, supra,* note 7, s. 11(5) *in fine* ; GATT, *supra,* note 23, art. XXIII.2.
65. H.C. BLACK, *Black's Law Dictionnary,* 5e éd. St-Paul, West Pub, 1979.
66. *Intergovernmental Agreement on Beer Marketing Practices, supra,* note 7, s. 11(3)-(5).

We thus see a modification from the GATT model : where in the GATT the parties must petition the GATT Council for the formation of a Panel[67], the Agreement specifies that the parties in dispute will decide the formation of the Panel themselves[68] ; where at the GATT, the Panel reports its findings to the GATT Council[69], in the Agreement the Panel reports directly to the parties in dispute[70]. On the face of it these modifications would not in themselves lead to defining the process as arbitration. However, the executory nature of the Panel's determination[71] appears to fall into the above definition requiring that the parties « agree in advance to abide by the arbitrator's award[72] ». When the executory nature of the Panel's determination is combined with the above modifications it forms a convincing argument that the intent of the *Agreement* is to proceed by arbitration.

If in fact the dispute settlement process in the *Agreement* is arbitration, it is perhaps possible to have the Panel's determination (arbitral award) adopted by the superior court of the province party to the dispute. The effect of the adoption is to transform the arbitral award into a judgment of the court. Such a judgment is a key element in forcing the government to act as « The government will not ignore a decision of the court[73] » and « It is the duty of the Crown and of every branch of the Executive to abide by and obey the law[74] ».

However, the problem remains in the adoption of the arbitral award in another jurisdiction. Once the arbitral award has been adopted by the superior court of the complaining province[75] it may not be recognized by the impugned province's superior court. This problem could be resolved according to principles of conflicts of laws. In the recent Supreme Court of Canada judgment of *De Savoye* v. *Morguard Investments*[76], it was found that a final judgment in one province should not be treated as a foreign judgment in another province's court, given the federal structure of the Canadian constitution[77]. Moreover, this adoption of the arbitral award

67. *1979 Understanding*, *supra*, note 28, para. 10.
68. *Intergovernmental Agreement on Beer Marketing Practices*, *supra*, note 7, s. 11(3).
69. *1979 Understanding*, *supra*, note 28, para. 16.
70. *Intergovernmental Agreement on Beer Marketing Practices*, *supra*, note 7, s. 11(4).
71. *Id.*, s. 11(5).
72. H.C. BLACK, *op. cit.*, note 65.
73. *Prince Edward Island* v. *Canada*, (1978) 1 F.C. 533 (A.D.), 559.
74. *Eastern Trust Company* v. *McKenzie, Mann and Co. Ltd.*, (1915) A.C. 750 (P.C.), 759.
75. Who would of course have a vested interest in having a determination against the impugned province executed.
76. *De Savoye* v. *Morguard Investments Ltd.*, (1990) 52 B.C.L.R. (2d) 160 (S.C.C.), 180.
77. This general statement of the court was subject to the condition that the court rendering the original judgment had correctly and conveniently exercised its jurisdiction *De Savoye* v. *Morguard Investments Ltd.*, *supra*, note 76, 181.

could be further facilitated by the use of either the *Reciprocal Enforcement of Judgements Act* or the United Nations Model Law on International Commercial Arbitration.

The *Reciprocal Enforcement of Judgments Act*[78] is not a viable alternative since the Act does not apply to judgments against the Crown and because Quebec does not have a reciprocal enforcement of judgments agreement with the other jurisdictions in Canada.

The International Commercial Arbitration Acts, which adopt the United Nations Model Law on International Commercial Arbitration are found in every Canadian jurisdiction[79] and are also problematic. Such Acts, in all Canadian jurisdictions save Quebec, limit the jurisdiction for judicial adoption to disputes stemming from « commercial legal relationships, whether in contract or not ». The arbitration provisions of the Quebec *Code*

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78. British Columbia — *Court order Enforcement Act*, R.S.B.C. 1979, c. 75, ss. 30-41.
Alberta — *Reciprocal Enforcement of Judgments Act*, R.S.A. 1980, c. R-6.
Saskatchewan — *Reciprocal Enforcement of Judgments Act*, R.S.S. 1978, c. R-3.
Manitoba — *Reciprocal Enforcement of Judgments Act*, R.S.M. 1987, c. J-20
Ontario — *Reciprocal Enforcement of Judgements Act*, R.S.O. 1990, c. R.5.
New Brunswick — *Reciprocal Enforcement of Judgments Act*, R.S.N.B. 1973, c. R-3.
Prince Edward Island — *Reciprocal Enforcement of Judgments Act*, R.S.P.E.I. 1988, c. R-6.
Nova Scotia — *Reciprocal Enforcement of Judgments Act*, R.S.N.S. 1986, c. 388.
Newfoundland — *Reciprocal Enforcement of Judgments Act*, R.S.N.F. 1970, c. 327.

79. British Columbia — *International Commercial Arbitration Act*, S.B.C. 1986, c. 14.
Alberta — *International Commercial Arbitration Act*, S.A. 1986, c. I-6.6.
Saskatchewan — *International Commercial Arbitration Act*, S.S. 1988-89, c. 10.2.
Manitoba — *International Commercial Arbitration Act*, R.S.M. 1988, c. L-151.
Ontario — *International Commercial Arbitration Act*, S.O. 1988, c. 30.
Quebec — *Code of Civil Procedure*, R.S.Q. 1989, c. C-25, ss. 940-952.
New Brunswick — *International Commercial Arbitration Act*, S.N.B. 1986, c. I-12.2.
Prince Edward Island — *International Commercial Arbitration Act*, R.S.P.E.I. 1989, c. I-5.
Nova Scotia — *International Commercial Arbitration Act*, R.S.N.S. 1989, c. 234.
Newfoundland — *International Commercial Arbitration Act*, S.N. 1986, c. 45.
Yukon Territory — *International Commercial Arbitration Act*, R.S.Y. 1986, c. 70.
Northwest Territory — *International Commercial Arbitration Act*, S.N.W.T. 1986, c. 6.
Canada — *International Commercial Arbitration Act*, R.S.C. 1985 (2nd Supp.), c. 17.

of Civil Procedure[80] place no limitations concerning the subject matter of an arbital sentence. A dispute arising from the *Intergovernmental Agreement on Beer Marketing Practices* would be at its root commercial since the process is commenced by a complaint from a beer producer who is denied access to a market. However, given that the producer's complaint is subrogated by the provincial government, the argument could be maintained that the commercial aspect of the dispute has been put aside in favour of political dispute weakening the commercial aspect to the point of denying the courts the jurisdiction to adopt the arbitral sentence.

The « commercial legal relationship » limitation of the International Commercial Arbitration Acts, can be avoided by the utilization of the Arbitration Acts[81] which similarly provides for the adoption of arbitral sentences on application to a superior court, but without any set limitations. However, this may not prove to be an adequate approach since the Crown is not uniformly bound by the Arbitration Acts[82]. This must be compared with the *International Commercial Arbitration Act* which binds the Crown in all Canadian jurisdictions[83].

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80. *Code of Civil Procedure*, R.S.Q. 1989, c. C-25, ss. 940-952.

81.

British Columbia	*Arbitration Act*, R.S.B.C. 1979, c. 18.
Alberta	*Arbitration Act*, R.S.A. 1980, c. A-43.
Saskatchewan	*Arbitration Act*, R.S.S. 1980, c. A-24.
Manitoba	*Arbitration Act*, R.S.M. 1987, c. A-120.
Ontario	*Arbitration Act*, R.S.O. 1990, c. A-24.
Quebec	*Code of Civil Procedure*, R.S.Q. 1989, c. C-25, ss. 940-952.
New Brunswick	*Arbitration Act*, C.S.N.B. 1987, c. A-10.
Prince Edward Island	*Arbitration Act*, R.S.P.E.I. 1988, c. A-16.
Nova Scotia	*Arbitration Act*, R.S.N.S. 1989, c. 19.
Newfoundland	*Arbitration Act*, S.N. 1985, c. 8.

82. Each jurisdiction's *Arbitration Acts* set out the Crowns status:

Crown is bound	Crown is conditionnally bound	Crown is not bound
Quebec	Nova Scotia	Newfoundland
Ontario	New Brunswick	Saskatchewan
Manitoba	Prince Edward Island	Alberta
Brisith Columbia*		

* British Columbia's *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 14(1), reverses the Common Law presumption that grants the Crown immunity in the absence of the legislation explicitly binding the Crown.

83.

British Columbia	*International Commercial Arbitration Act*, S.B.C. 1986, c. 14.
Alberta	*International Commercial Arbitration Act*, S.A. 1986, c. I-6.6, s. 11.
Saskatchewan	*International Commercial Arbitration Act*, S.S. 1988-89, c. 10.2, s. 10(1).
Manitoba	*International Commercial Arbitration Act*, R.S.M. 1988, c. L-151, s. 11(1).

To enforce a panel's determination stemming from the *Intergovernmental Agreement on Beer Marketing Practices* through arbitration will require either uniform amendments to either the Arbitration Acts in order that the Crown be bound in all jurisdictions, or to the International Commercial Arbitration Acts to expand the jurisdiction beyond matters charaterized as « commercial legal relationships ».

Conclusion

The dispute settlement mechanism found in the *Intergovernmental Agreement on Beer Marketing Practices*, since it is partially inspired from the GATT, should seek to learn from the GATT's experience and incorporate those reforms[84]. While there are those who would be hesitant to reopen the negotiations of the *Agreement*, a procedural clarification of the dispute settlement mechanism could be contained in a protocole of understanding annexed to the *Agreement*.

Such a protocole would incorporate the obligation on the parties to the *Agreement* to establish a criteria of selection and a list of acceptable panelists who could be drawn upon to constitute a panel. The criteria would establish the preferable attributes of candidates placed on the list of acceptable panelists. Such a list would facilitate the formation of the Panel as the parties would have agreed in advance, to the Panelist charged with making a determination concerning the dispute.

Ontario	*International Commercial Arbitration Act*, S.O. 1988, c.30, s. 12.
Quebec	*Code of Civil Procedure*, R.S.Q. 1989, c. C-25, s. 94.
New Brunswick	*International Commercial Arbitration Act*, S.N.B. 1986, c. I-12.2, s. 11.
Prince Edward Island	*International Commercial Arbitration Act*, R.S.P.E.I. 1989, c. I-5, s. 11(1).
Nova Scotia	*International Commercial Arbitration Act*, R.S.N.S. 1989, c. 234, s. 12(1).
Newfoundland	*International Commercial Arbitration Act*, S.N. 1986, c. 45, s. 12.
Yukon Territory	*International Commercial Arbitration Act*, R.S.Y. 1986, c. 70.
Northwest Territory	*International Commercial Arbitration Act*, S.N.W.T. 1986, c. 6, s. 11(1).
Canada	*International Commercial Arbitration Act*, R.S.C. 1985 (2nd Supp.), c. 17, s. 10.

84. A contrary opinion is expressed by Robert Hudec in his recent book concerning the GATT. He suggest's that a strong commitment to a trade agreement with a flexable conflict resolution approach and not rigourous procedures in a dispute settlement mechanism are the keys to a successful implementation of the trade agreement, R.E. HUDEC, *The GATT Legal System and World Trade Diplomacy*, 2e éd., Salem, Butterworth Legal Publications, 1990, p. 296.

In addition, the protocole would clarify the mandate of the Panel. In the present text of the *Agreement*, it is unclear whether the Panel is to simply accuse a party of having violated the *Agreement* or if the Panel is mandated to comprehensively analyse the violations of the *Agreement* and to suggest possible alternatives which could rectify the situation. While the parties are free to choose the role which they want the panel to adopt, a comprehensive approach would stimulate a greater understanding of the economic and industrial dynamics involved and lead to long term recommendations rather than short term stop-gap measures.

Finally the protocole would establish a time table setting out maximum time delays for the different steps of the dispute settlement mechanism. One possibility would be to give the parties 30 days to negotiate a settlement, failing which the parties would proceed to a panel which would be formed within 7 days. The Panel would then have 90 days to conduct their hearings and report their determination to the parties in dispute. The impugned party would then benefit from 60 days to implement the panel's determination. The whole process would take 6 months. These forced delays would act as a form of pressure on the parties to negotiate a settlement.

Aside from the shortcomings of the dispute settlement process which can be addressed through a protocole, the larger question concerning the efficacy of the GATT dispute settlement process within the Canadian context needs to be addressed. We are sceptical with regard to the impact that the dispute settlement process can have when it is applied only to the beer industry which is dominated by two or three major players which operate in most provinces of Canada. The withdrawal of equivalent concessions between two disputing provinces will have no impact on the beer industry which operates in a third province and can have unobstructed access to the disputing provinces via that third province.

To overcome this limited impact, the *Beer Marketing Practices Agreement* could be incorporated into a larger multi-sectorial agreement. A multi-sectorial agreement would reduce the trade barriers over a wide range of goods and industries. This would end the two company domination found in the beer industry. Moreover, this would permit the linkage of issues in the dispute settlement process creating a greater area for manoeuvre in the negotiations.

The multi-sectorial agreement could possibly entail a gradual transfer of provincial regulatory powers to the federal government. The removal of trade barriers between the provinces, would perhaps force some industries to restructure themselves from a provincial structure to regional/inter-provincial structures. A classic example would be the beer industry. Cur-

rently, as discussed above, the beer sold in one province is, because of a trade barrier, brewed in that province. When the trade barriers are removed, the beer industry will more than likely restructure itself from provincial brewers to regional brewers serving several provinces' needs from one brewery. Chances are, that an aspect of this will involve trade over provincial boundaries, and that aspect will consequently fall under the federal government's 91(2) interprovincial trade jurisdiction[85]. This potential loss of provincial power is confirmed by both Privy Council[86] and Supreme Court of Canada[87] decisions stating, in the interpretation of section 91(2) of the *Constitution Act, 1867*, that extra-provincial trade was the exclusive jurisdiction of the Federal government since the provincial jurisdiction was limited to the regulation of local matters. This is not to say that the provinces will lose their regulatory jurisdiction concerning the sale of beer within the province but rather that the federal government, within its existing regulatory jurisdiction concerning inter-provincial trade, will play an augmented role in the beer industry. The provinces will thus have been stripped of an aspect of its regulatory jurisdiction, to the benefit of the federal government. This is an undeniable aspect of the reduction of interprovincial trade barriers. However the significant difference between a sectorial agreement limited to an industry and a multi-sectorial agreement, is that while both agreements involve a transfer of an aspect of provincial regulatory powers, the sectorial agreement does so on a piecemeal basis, leaving the remainder of the provincial regulatory jurisdiction unaddressed by the agreement, intact for the provincial governments. This must be compared to the multi-sectorial agreement which would have the indirect effect, given the expansiveness of such an agreement, and the importance of the industries involved, of a larger transfer of provincial regulatory powers.

As an alternative to the multi-sectorial agreement, the *Beer Marketing Practices Agreement* could be substantially strengthened in its impact by drawing on the arbitration aspect of its procedure. As stated earlier, it is our submission that the procedure could be characterized as arbitration. If in fact this is an arbitration process, the arbitral award could be adopted by the courts as a judgment if the laws of all the provinces party to the *Agreement* were uniform. The International Commercial Arbitration Acts could be amended to re-define the court's jurisdiction to adopt an arbitral

85. The federal government would strengthen its control over an aspect of the national economy as goods and services would flow freely between provinces and would be characterized as interprovincial trade and be subject to section 91(2) of the *Constitution Act. 1867*, 30 & 31 Vict., (U.K.), c. 3.

86. *Citizens Insurance* v. *Parsons*, (1881) 7 A.C. 96 (P.C.).

87. *Dominion Stores* v. *The Queen*, [1980] 1 S.C.R. 844.

award beyond the current limitation of « commercial legal relationship ». In the alternative, the Arbitration Acts of those provinces which do not bind the Crown could be amended so as to find the Crown bound, and a arbitral award could be adopted against the government.

In the final analysis we must ask ourselves, « Do we want this dispute settlement process to work ? ». If the answer is yes, the bold first step of establishing a dispute settlement process in the *Intergovernmental Agreement on Beer Marking Practices* may be « much ado about nothing » if the process is not refined beyond its current form. This important first step requires some fine tuning which may make the *Agreement* a powerful initiative in re-defineing the economic order in Canada.