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A Comparative Analysis of the Regulation of State and Provincial Governments in NAFTA and GATT/WTO

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I. INTRODUCTION

The creation of the World Trade Organization ("WTO") and the proliferation of regional free trade areas have brought trade liberalization to economic disciplines reaching farther and deeper into the sovereign heart of nation-states. While this growth is generally perceived as a natural progression with worldwide economic and welfare benefits, it is increasingly reaching into areas within the constitutional competence of state and provincial governments in federal nation-states. As such, state and provincial actors are in an increasingly better position to influence world trade, both positively and negatively.

This Article reviews the manner in which international trade regimes regulate state and provincial behavior by comparing and contrasting the "federal clauses" of the North American Free Trade Agreement ("NAFTA") and the General Agreement on Tariffs and Trade ("GATT")/WTO. Section II provides an overview of the current aggressive trade agenda and how subfederal actors in the United States and Canada are becoming increasingly involved in trade issues, with potential negative ramifications for the international trade system. Section III explores the constitutional distribution of powers in the United States and Canada and how this impacts the international trade system. Section IV examines the history of GATT/WTO and NAFTA efforts to regulate federal nation-states, including a look at relevant international dispute settlement decisions. Section V concludes with a summary of the challenges facing international regulation of federal nation-states and recommendations for improving regulation in this area.

* LLM 2004, with distinction, Georgetown University Law Center, Washington, DC; JD 1998, cum laude, Loyola University School of Law, New Orleans, LA.
II. Overview of the Current International Trade Environment

NAFTA recently enjoyed its tenth anniversary with all the fanfare one might expect for an international trade agreement understood by few outside of Washington, D.C. That is not to say, however, that NAFTA’s anniversary went unnoticed and without reflection on its political and economic impact. In a somewhat scathing economic analysis, Joseph E. Stiglitz opined that Mexico has failed to realize numerous benefits promised at the outset of the treaty, which now serves as an unfair benchmark for future regional trade agreements. In a more fundamental critical analysis, Senator Charles Schumer and Paul Roberts utilized NAFTA’s anniversary as an occasion to question the continuing viability of global trade liberalization in general, arguing that the economic theory of comparative advantage is no longer tenable in light of the free cross-border movement of factors of production.

While there are certainly varying opinions regarding the distorting effects of regional trade agreements and the continuing efficacy of the traditional economic theory of comparative advantage, there is no question that globalization is here to stay. As Thomas Friedman aptly described it:

I feel about globalization a lot like I feel about the dawn. Generally speaking, I think it’s a good thing that the sun comes up every morning. It does more good than harm, especially if you wear sunscreen and sunglasses. But even if I didn’t much care for the dawn there isn’t much I could do about it.

Despite recent calls for reversion to protectionism, the general consensus is that globalization should be embraced and used as a platform for new and innovative economic development. China is an example of a country that has embraced globalization and utilized its entry into the WTO as an opportunity for economic and political reforms. Russia is another country that is seeking entry into the WTO in order to take full advantage of the economic benefits associated with global trade.

As globalization continues, it is important to consider how far and deep trade liberalization should go. With respect to NAFTA, most commentators

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2 Charles Schumer and Paul Craig Roberts, *Second Thoughts on Free Trade*, NY Times A23 (Jan 6, 2004).
agree that it already goes exceptionally far in terms of trade liberalization, particularly in light of its supplemental side agreements on labor and environment. Despite the fact that the labor and environmental side agreements lack substance, they represent a genuine first effort to liberalize areas that touch the very sovereign heart of nation-states. The WTO appears to be following in NAFTA’s footsteps towards greater inclusion of and more liberalization in nontraditional areas. The Doha Round of trade negotiations includes discussions on twenty-one subjects, including new topics and expansion or readjustment of existing disciplines. The Doha agenda represents an aggressive attempt to further trade liberalization in such areas as services, investment, competition, environment, and labor. In fact, Doha’s optimistic agenda is likely the cause of the current WTO stalemate, evidenced by the recent Cancun ministerial which ended without agreement amid protests by developing countries that perhaps felt that the agenda was moving too fast. These developing countries are demanding greater market access and removal of trade barriers in agriculture, a sore subject in the United States and Europe.

Despite what some perceive as shortcomings in NAFTA’s side agreements and the current WTO lethargy, it is clear that world trade is evolving into new areas that touch not only the sovereign heart of nation-states, but also areas within the constitutional prerogative of subnational governmental units. For example, the WTO effort to reach a single understanding on trade in services raises concerns regarding the political autonomy of subnational governments insofar as most services are regulated at the state and provincial level. Areas such as investment, labor, and the environment raise similar concerns because they are often subject to significant subnational authority.

Even though the United States federal government retains significant power over foreign affairs, including foreign commerce, the states do enjoy some measure of autonomy in certain areas affecting foreign commerce, such as services and the environment. Moreover, as will be discussed in Section III(A), recent United States Supreme Court decisions and evolving notions of sovereignty foretell a resurgence in states’ rights in foreign affairs and commerce. Canada’s federal system is quite different in that it has a fairly weak federal tradition and extensive provincial authority over issues impacting foreign affairs and commerce. Thus, Canada’s system poses an even greater risk to trade liberalization. One commentator aptly summarized Canada’s participation in the evolving international trade system as follows:

In the area of international trade treaties, Canada has been able to muddle through most of the past six decades largely because trade treaties focused primarily on areas of federal jurisdiction. However, the NAFTA, the GATT, and the World Trade Organization’s future agenda have all demonstrated
that international trade liberalization now affects all kinds of areas that are near and dear to the jurisdiction of the provinces.6

There is no question that state and provincial governments are now better positioned to participate in and affect international trade. For example, from 1982 to 1994, state governments in the United States nearly tripled their number of overseas offices for "trade, investment, and tourism promotion purposes, operating nearly 150 offices overseas at the beginning of 1993 . . ."7 As of 1990, eight Canadian provinces maintained overseas offices, spending more on international trade activities than the state governments in the United States.8 In addition to direct market participation, state and provincial governments are now in a unique position to negatively impact trade liberalization through protectionist measures that either fall beyond the reach of current world trade rules or require initiation of a dispute settlement mechanism to rectify.

As an economic matter, nonconforming state and provincial measures can significantly "diminish welfare gains" sought through trade liberalization.9 For example, several states in the United States represent populations greater than many nations in the world. California and New York represent massive economies with the potential to negatively affect millions outside of the United States through protectionist measures.10 The reality of this threat is evident in the antiliberalization comments of New York Senator Charles Schumer cited earlier.11 The threat of nonconforming local measures is also evident in the recent United States presidential election debate, where significant job losses and the highest trade deficit in history have fueled protectionist rhetoric and even some calls for a wholesale review of all current international trade agreements.

The current aggressive trade agenda and evolving notions of sovereignty over foreign affairs and commerce in some federal nation-states require a reassessment of how international trade agreements regulate state and provincial conduct. The key question to consider is whether international trade institutions are capable of responding to an increase in protectionist or nonconforming behavior at the state and provincial level. One prominent scholar framed the issue in the context of the United States federal system and GATT as "whether the General Agreement actually obligates the federal governments to make state

8 Id at 310.
10 Id.
governments comply with GATT rules. If not, then state law inconsistent with GATT rules will not actually be in conflict with US obligations under GATT.'\(^{12}\)

The importance of this question was recently summarized from both the multilateral and regional trade perspectives.

If a multilateral or regional arrangement is to maximize the attainment of its goals, it must apply to and be complied with by governmental actors at all levels. There is both a political and economic element behind the drive to bind sub-national governments to obligations within trade agreements from the “international” perspective. A long-standing controversy in international treaty-making between unitary and federal states has been the extent to which component unit governments in federal states should be bound. To the extent federal states sought to exclude application of an international agreement to their component unit governments, unitary states complained of an “imbalance” in obligations. As a result, unitary governments might be less likely to enter into certain agreements or seek to reduce their level of obligations. Within the trade agreement context, such consequences hinder the attainment of maximum welfare gains.\(^{13}\)

The GATT/WTO has multiple provisions addressing federal members in its various agreements, each modeled after the Article XXIV:12 federal clause of GATT 1947, which requires each member to take such “reasonable measures” as “may be available to it” to ensure observance by regional and local governments.\(^{14}\) NAFTA also contains multiple provisions addressing the distribution of power in its federal parties, all modeled after the Article 105 federal clause, which requires the parties to take “all necessary measures” to ensure observance of the agreement’s provisions by state and provincial governments.\(^{15}\) Both the GATT/WTO and NAFTA federal clauses are subject to varying interpretations as to whether and to what extent they actually obligate the federal governments to force state or provincial compliance. The next Section of this Article explores the various interpretations of the federal clauses in the context of the domestic distribution of powers in the United States and Canada.


\(^{13}\) See Schaefer, 23 Can-US LJ at 448 (cited in note 9).


\(^{15}\) North American Free Trade Agreement (1992), art 105, 32 ILM 289, 298 (hereinafter NAFTA).
Generally speaking, the distribution of power over foreign affairs and commerce in federal constitutional systems is an evolutionary process, with central and local prerogatives changing with the political tide. Currently, federal political systems exist in an international climate notable for significant changes in traditional notions of sovereignty, resulting partially from the increasing internationalism of subfederal governmental units. While some scholars are questioning the traditional notion of Westphalian sovereignty as it relates to nation-states, others question the continuing viability of traditional domestic sovereignty as it relates to subfederal governmental entities, which are slowly replacing central governments as the dominant force in foreign affairs and commerce. Regardless of whether one adheres to traditional or modern notions of sovereignty, there is no doubt that state and provincial governments have a significant role to play in the new international economic system. Exactly what that role is, and how the international system reacts to it, remains to be seen. With this background, the distribution of foreign affairs and commerce power in the United States and Canada will now be examined.

A. UNITED STATES

The United States federal government enjoys a near monopoly over the states with respect to foreign affairs and commerce. The Commerce Clause of the United States Constitution grants Congress the authority to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” The United States Supreme Court has ruled that the Commerce Clause “limits the power of the States to erect barriers against interstate trade” and has extended that power into a dormant foreign commerce doctrine emphasizing the importance that the United States “speak[] with one voice” when regulating commercial relations with foreign governments. The Supremacy Clause of the Constitution affords supremacy to

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18 US Const, art I, § 8, cl 3.
all federal laws enacted under the commerce power, including international trade treaties.\(^{21}\)

Despite its various constitutional delegations of power, the federal government's authority over foreign affairs and commerce is not inviolable. One important limitation on all federal power is the Tenth Amendment to the United States Constitution, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."\(^{22}\) The Tenth Amendment's limitation on federal power has been subject to varying interpretations by the Supreme Court. As an appointed political institution, the Supreme Court's view on state power over foreign affairs and commerce has been subject to change over the years. Despite the ongoing validity of cases such as *Lewis* and *Japan Line*, some scholars believe the current Rehnquist Court is softening the "default" rule against state activity implicating foreign affairs and commerce.\(^{23}\) This trend began with decisions involving domestic interstate commerce issues, culminating in the Court's landmark decision in *United States v Lopez*, where it struck down a federal statute enacted pursuant to the Commerce Clause for the first time since 1937.\(^{24}\)

To some extent, the Court's domestic trend has extended to states' rights in matters involving foreign affairs and commerce. Arguably the most important decision was handed down in 1994 in *Barclays Bank PLC v Franchise Tax Board*, which upheld a California multinational corporate tax scheme conflicting with a federal corporate tax scheme.\(^{25}\) Some commentators view the *Barclays* decision as a direct attack on the *Japan Line* "one voice" theory, while others even suggest that it signals the end of all dormant foreign affairs preemption doctrines.\(^{26}\) The Supreme Court's subsequent decision in *Crosby v National Foreign Trade Council* somewhat dimmed the spirits of states' rights commentators by invalidating a Massachusetts law restricting state purchases of goods and services from entities doing business with the Union of Myanmar (Burma).\(^{27}\) While *Crosby* did invalidate the state procurement law at issue, it did so on very narrow

\(^{21}\) US Const, art VI, cl 2.

\(^{22}\) US Const, amend X.


\(^{27}\) 530 US 363, 388 (2000).
preemption grounds; the Court refused to address the law’s efficacy under foreign affairs or foreign commerce doctrines. Because of the Court’s narrow holding and refusal to address the broader issues, many commentators believe the door remains open for state participation in areas implicating foreign affairs and commerce. The Court’s most recent decision in American Insurance Association v Garamendi also failed to address substantive foreign commerce issues by voiding the California’s Holocaust Victim Insurance Relief Act of 1999 solely under an implied preemption theory.

In sum, while the role of the United States federal government in foreign affairs and commerce remains significantly superior to that of the states, recent Supreme Court cases signify a trend towards greater state participation in this area. This constitutional development, coupled with greater direct state interaction with foreign governments and the expanding trade agenda, place state governments in an important position to influence the direction and role of international trade liberalization in the future.

B. CANADA

The distribution of powers over foreign affairs and commerce in Canada is quite different than the United States. Canada’s Constitution was drafted when Canada was a British colony and all international treaties were negotiated by Britain. The Canadian Constitution is “silent on the treaty implementation power of the [federal] government,” addressing only the federal government’s power to implement treaties entered into by the British government. The landmark 1936 decision in the Labor Conventions case clarified that, while the Canadian federal government has the ability to enter into international trade agreements, Section 132 of the 1867 British North America Act does not provide the federal government with the ability to implement such agreements. Rather, the Canadian Constitution allocates implementation power to both the federal and provincial governments.

In order to determine the appropriate governing authority, one must first examine the substantive subject matter of the discipline at issue. Although there

28 Id at 374 n 8.
29 See Spiro, 63 Ohio St L J at 696 (cited in note 17). See also, Pascoe, 35 Vand J Transnatl L at 318 (cited in note 23).
33 Id.
34 AG Canada v AG Ontario, [1937] 1 DLR 673, 682 (Jan 28, 1937) (stating that Canada’s federal government does not have the ability to implement international labor convention that substantively falls within provincial legislative jurisdiction under the Constitution).
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is no precise delimitation, Section 92 of the Constitution Act of 1867 maps out certain areas within provincial jurisdiction, many of which pose potential hurdles to international trade regulation. Examples include provincial authority over procurement, export subsidies, alcohol, labor, and certain agricultural issues.

There is no clear distinction between federal and provincial spheres of jurisdiction over foreign affairs and commerce in Canada. As a result, the federal government does not enjoy broad foreign affairs and commerce power and does not have a dormant foreign commerce doctrine like in the United States. The end result is that Canadian provinces are in a better constitutional position than the state governments in the United States to directly participate in foreign affairs and commerce and to negatively impact the trade liberalizing goals of international trade agreements.

IV. INTERNATIONAL REGULATION OF FEDERAL NATION-STATES

Customary international law imposes responsibility on federal nation-states for acts or omissions of their component governmental units that violate international obligations of the nation-states. This obligation exists even where the internal law of the federal nation-state does not provide authority to compel compliance by its component governmental units. These customary international rules apply unless a contrary intention is evidenced in the text of the international treaty. Thus, the first question one must ask when examining the international regulation of federal nation-states is whether the international treaty language evidences an intention to “opt out” of the default rule of nation-state responsibility for subfederal governmental units. While there was some early doubt with respect to the intentions of the Contracting Parties in GATT, there is now no question that federal GATT/WTO Members and NAFTA Parties remain fully responsible for the actions of their component governmental units. However, there is no international customary law rule regarding what measures, if any, central governments must take to seek compliance at the local level. The GATT/WTO and NAFTA contain dissimilar provisions regarding what remedial action federal governments must undertake

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37 Id, art 27. See also Schaefer, 23 Can–US L J at 462–63 (cited in note 9).
to ensure compliance at the local level. This distinction significantly separates the two international trade agreements and is the basis of the remaining discussion in this Article.

A. GATT/WTO REGULATION OF FEDERAL MEMBERS

The GATT/WTO system is the earliest example of an international trade treaty regulating federal nation-states. To one degree or another it has influenced and served as the basis of international regulation in subsequent trade treaties. It is therefore appropriate to begin with an analysis of the GATT/WTO regulatory system. All of the NAFTA parties are also WTO members and played integral parts in the early development of the GATT/WTO provisions discussed herein.

The GATT/WTO federal clause directly descends from the early GATT and International Trade Organization ("ITO") negotiations following World War II.\(^{40}\) The negotiators foresaw the unique problem federal nation-states posed to international governance. To prevent, or at least minimize, potential trade distortions inherent in federal forms of government, the negotiators searched for ways to "convince" federal governments to ensure compliance at the local level. As noted previously in this Section, federal nation-states have a customary international law obligation of responsibility for acts or omissions of their subfederal governmental units. The early GATT negotiating history illustrates a genuine struggle to balance this customary international law obligation with the political reality of federal nation-states which, to one extent or another, may lack sufficient constitutional authority to require observance at the local level.

Australia initially voiced its concern with respect to the draft National Treatment rule on internal taxes. Australia noted that there were "[d]ifferences in treatment of domestic and imported goods" in both the Commonwealth and individual States, but that it would nevertheless agree to use its "best efforts" over time to bring such measures into compliance.\(^{41}\) A United States negotiator raised a similar concern regarding the draft government procurement rule, tentatively stating that although procurement generally involved both federal and state governments, the United States might be able to control the actions of states.\(^{42}\) Reporting on these concerns, a technical subcommittee noted that although "[s]everal countries emphasized that central governments could not in many cases control subsidiary governments in this regard," they nevertheless "agreed that all should take such measures as might be open to them to ensure

\(^{41}\) UN Doc EPCT/C.II/5 at 1 (1946).
\(^{42}\) UN Doc EPCT/C.II.27 at 1 (1946).
the objective." The technical subcommittee recommended the addition of a clause to the National Treatment article accounting for this reality. The proposed article required that the parties take "all measures" open to them to ensure fair application of taxes and other regulations by subcentral governments within their territories.

Without explanation in the negotiating history, the "all measures" language was later altered to charge the parties with taking "such reasonable measures as may be available" to ensure observance by local governments. The "federal clause" was also moved from the National Treatment article to a general miscellaneous article, reflecting the application of the "federal clause" to other GATT substantive provisions. The change from "all measures" to "reasonable measures" is significant and, although no explanation is given in the preparatory history for the alteration, there is evidence that several countries attempted to strengthen the "reasonable measures" language during the negotiations.

The negotiators finally adopted the language contained in GATT Article XXIV:12, which provides 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 and authorities within its territories." Throughout GATT's application under the Protocol of Provisional Application, Article XXIV:12 was generally considered to contain inherent ambiguities allowing for two divergent interpretations. One interpretation was that certain matters in federal systems are within the constitutional prerogative of subfederal entities and beyond the control of the central government. In those situations, the central government would not be in violation of its GATT obligations when subfederal entities enact nonconforming measures, as long as the central government does everything in its power to seek compliance.

A second interpretation was that GATT was not intended to apply to subfederal governments at all, and even where the central government has the authority to force compliance, it is under no obligation to do so but merely to

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43 UN Doc EPCT/C.II/54 at 4 (1946).
44 Id at 6.
46 Id.
47 See EPCT/TAC/PV/19 at 33; E/CONF.2/C.6/12.
50 See Jackson, Davey, and Sykes, eds, Legal Problems at 242 (cited in note 49).
take "reasonable measures" to seek compliance.\textsuperscript{51} To the extent that the second interpretation was correct, GATT could not be invoked as a matter of law to address nonconforming state measures.\textsuperscript{52} Several state courts in the United States adopted the first interpretation by finding that GATT, as part of federal law, prevails over conflicting state laws.\textsuperscript{53}

The Uruguay Round negotiators attempted to address the inherent ambiguities in Article XXIV:12 by adopting an Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994. With respect to Article XXIV:12, the Understanding provides that "[e]ach Member is fully responsible under the GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory."\textsuperscript{54} The Understanding also makes clear that the provisions of the Dispute Settlement Understanding "may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member."\textsuperscript{55}

While the Understanding on Article XXIV:12 clarifies the responsibility of all GATT/WTO federal nation-states for the nonconforming behavior of their component units under the GATT/WTO, it leaves open the question of what constitutes "reasonable measures" to seek compliance. This is a particularly important question to consider in areas that fall within exclusive state or provincial authority. Four GATT panels have addressed Article XXIV:12, but none have provided any significant guidance on the interpretation of this key phrase. The first panel decision in \textit{Canada—Measures Affecting the Sale of Gold Coins}\textsuperscript{56} was never adopted and devoted much of its discussion to the issue of nation-state responsibility for nonconforming provincial measures. At issue was an Ontario sales tax on gold coins which applied uniformly to all gold coins except those minted in Canada, which were exempt from the tax. The Panel ruled that the tax violated GATT's National Treatment article.\textsuperscript{57}

\begin{thebibliography}{99}
\bibitem{51} Id.
\bibitem{52} Id.
\bibitem{53} See \textit{Hawaii v Ho}, 41 Hawaii 565, 573 (1957) (holding that Hawaii territorial law requiring signage indicating sale of foreign eggs contravenes GATT national treatment obligation); K.S.B. \textit{Technical Sales Corp v North Jersey D Water Supply Commn}, 381 A2d 774, 778–89 (1977) (recognizing GATT as superior to conflicting state law but finding no conflict between local measure and GATT obligations).
\bibitem{54} Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, ¶ 13, 33 ILM 1161, 1163 (Apr 15, 1994).
\bibitem{55} Id, ¶ 14.
\bibitem{57} Id, ¶ 72.
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With respect to Canada's obligation under Article XXIV:12, the Panel found that Canadian domestic law was unresolved as to whether taxation of coinage was within the jurisdiction of the provinces or the federal government. Nevertheless, Canada still had an Article XXIV:12 obligation to take "reasonable measures" to ensure provincial compliance. As to what constitutes "reasonable measures" under Article XXIV:12, the petitioner argued that Canada could simply refer the matter to its Supreme Court under its reference procedure to determine jurisdiction over coinage. The Panel essentially evaded the issue, ruling that it could not determine whether reference of the issue to the Canadian Supreme Court constituted a "reasonable measure" under Article XXIV:12.

The second Panel decision involved a claim by the United States regarding certain practices of Canadian provincial liquor boards which allegedly violated GATT's National Treatment provisions. In this case, the Panel concluded that the provincial practices violated GATT Article III:4.58 With respect to Canada's obligations under Article XXIV:12, the Panel provided the most incisive, yet ultimately insufficient, look at what constitutes "reasonable measures" to ensure provincial observance. The Panel ruled that Canada "would have to show that it had made a serious, persistent and convincing effort to secure compliance by the provincial liquor boards with the provisions of the General Agreement."59 The Panel ultimately concluded that Canada did not take "reasonable measures," but it failed to discuss what would constitute a sufficiently "serious, persistent and convincing effort" to comply with Article XXIV:12. Indeed, it is hard to imagine what could possibly constitute such an effort where the subject matter falls within the exclusive jurisdiction of the provincial entity at issue.

The last Panel to look at Article XXIV:12 involved a claim by Canada with respect to excise taxes levied on imported beer and wine by the United States federal government and numerous state governments. In United States—Measures Affecting Alcoholic and Malt Beverages, the Panel found that the taxes violated the national treatment obligations of GATT Article III:2.60 In contrast to its position in the prior Canadian alcoholic beverages dispute, the United States argued that Article XXIV:12 provides a limitation on the duty of federal nation-states to bring local laws into compliance. Canada countered with the argument

that the United States had broad constitutional authority to preempt state law and therefore compel state adherence to GATT. Addressing United States law, the Panel concluded that the United States had the constitutional authority to preempt state law in this field, and that the United States failed to take “reasonable measures” to ensure observance by the states of GATT obligations.

Perhaps as a response to the GATT Panel conclusion in United States—Measures Affecting Alcoholic and Malt Beverages, the United States’ implementation of its obligations under the Uruguay Round Agreements addresses the issue of GATT/WTO preemption of state laws. The Statement of Administrative Action submitted with the Uruguay Round implementing legislation specifically declares that “[t]he Uruguay Round agreements do not automatically ‘preempt’ or invalidate state laws that do not conform to the rules set out in those agreements—even if a dispute settlement panel were to find a state measure inconsistent with such an agreement.” While this declaration is binding federal law, it nevertheless should be considered in light of the political circumstances needed to secure domestic support to enter into the Uruguay Round Agreements, which many argued was an unprecedented, unconstitutional surrender of national sovereignty. The full impact of this declaration remains to be seen; nevertheless, it adds to the difficulty posed by the continuing ambiguity of Article XXIV:1.

All of these unresolved issues pose a significant challenge for WTO Members as the trade agenda increasingly reaches areas involving subfederal conduct. Although the United States has made significant progress regarding state observance of the GATT/WTO—including obtaining consent from almost forty states to enter into the Agreement on Government Procurement and the General Agreement on Trade in Services—the Doha Round trade agenda poses new and more difficult challenges that must be considered in order to avoid trade distortions.

B. NAFTA REGULATION OF FEDERAL PARTIES

NAFTA’s regulation of its federal parties is markedly different from, but ultimately equally as troublesome, as the GATT/WTO approach. NAFTA Article 105 provides that “[t]he Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.” NAFTA Article 105 replicates Article 103 of the

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62 NAFTA, art 105 (cited in note 15).
Canada–United States: Free-Trade Agreement ("CFTA"). The NAFTA article seeks to remove any doubt regarding the responsibility of federal governments to take remedial measures to ensure subfederal compliance with the substantive provisions of the agreement. In this regard, the article intentionally avoids the weaker "all reasonable measures" language contained in the original GATT, in favor of the stronger "all necessary measures" obligation. Mexico originally proposed the "all necessary measures" language during the GATT negotiations but withdrew it in response to complaints from federal nation-states.

NAFTA’s "all necessary measures" language has not been subject to challenge in a NAFTA dispute settlement panel. It remains unclear how Article 105 will apply to the federal systems of the United States and Canada. The obvious and easy situation is where a state or provincial measure treads upon federal authority. In that instance, Article 105 unambiguously requires the federal government to exert its authority to eradicate the measure or otherwise bring it in compliance. Because the subject matter of the measure falls within federal jurisdiction, "all necessary measures" could be interpreted to require the central government to bring suit to force a recalcitrant state or provincial government to conform.

The more complicated question arises when the nonconforming state or provincial measure falls within an area of state or provincial competence. Is the NAFTA Party required to amend its constitution to ensure observance? If that were the solution, then no sovereign nation would ever enter into a trade agreement. Outside of a constitutional amendment, what other measures are available to a federal government to rein in a recalcitrant state or provincial government? To the extent that nothing can be done, the NAFTA Party will certainly owe compensation or face retaliation from the affected Party. While compensation or retaliation is certainly a valid remedy, it is not an efficient way to address a crack in the international regulatory system. Potential solutions to this quandary will be addressed in Section V, below.

This regulatory problem is not generally perceived as a major issue in the United States because of federal predominance over foreign affairs and commerce. However, federal predominance in this area is not a foregone conclusion, particularly in light of recent Supreme Court precedent. Moreover, as noted in the context of the Uruguay Round Agreements, the United States’ implementing legislation and Statement of Administrative Action ("SAA") submitted in connection with NAFTA indicate that NAFTA does not automatically ‘preempt’ or invalidate state laws that do not conform to NAFTA’s rules—even if a NAFTA dispute settlement panel were to find a state

measure inconsistent with the NAFTA."64 Unlike the state court decisions referenced in note 53, above, the only decision regarding preemption of state law in the context of a regional trade agreement reached a different result.

The Third Circuit case Trojan Technologies, Inc v Pennsylvania involved the CFTA, which contains provisions analogous to those in NAFTA.65 At issue was the Pennsylvania Steel Products Procurement Act, which conflicted with the provisions of the CFTA. The Court considered Section 102 of the United States–Canada Free-Trade Agreement Implementation Act,66 which, unlike the NAFTA implementing legislation, provides that the CFTA prevails over conflicting state laws.67 Despite the nonpreemption language of the CFTA, the Court ruled that the statute was not preempted because the CFTA did not expressly mention “buy-American” statutes and because similar statutes are maintained by the provinces in Canada.68 While the continuing efficacy of this specific holding is doubtful in the context of NAFTA’s government procurement rules, it is noteworthy for the Court’s failure to recognize preemption despite the unambiguous language of the relevant implementing legislation.

Canada’s constitutional system provides a ripe atmosphere for disputes under Article 105 in light of its unique, and unsettled, distribution of foreign affairs and commerce power. An interesting question is whether the federal government would be required to utilize the Canadian reference procedure to refer the issue to the Canadian Supreme Court for a determination of which branch of government has authority over that particular subject matter. As noted in Section IV.A., above, this issue was addressed but not resolved in the context of the GATT federal clause in the rejected GATT panel decision in Canada—Measures Affecting the Sale of Gold Coins. The more likely result is that a dispute settlement panel will simply refuse to rule on what “necessary measures” should be taken and simply order compensation or retaliation for failure to comply.

V. CONCLUSION AND RECOMMENDATIONS

While admittedly neither the NAFTA nor the WTO trade systems are facing an epidemic of nonconforming state and provincial measures,
globalization and the progression of world trade into areas regulated at the
subfederal level provide state and provincial governments with a greater ability
to impact trade liberalization, both positively and negatively. NAFTA Article 105
contains stronger language than GATT Article XXIV:12 with respect to
supranational regulation of subfederal governmental behavior. At the end of the
day, however, neither Article can adequately address measures that fall outside
federal competence. For example, even though it can be construed as a
“necessary measure,” it is almost unthinkable that a sovereign nation-state will
amend its constitutional structure to ensure state or provincial compliance with
an international treaty. Even the stronger “all necessary measures” language
insufficiently addresses this issue and there is very little chance that any language
could ensure conformity by a recalcitrant state or provincial government that is
acting within the limits of its constitutional authority.

Because “forced compliance” is not really an option in this situation, one
solution is to reduce or eliminate the likelihood of nonconformity through
“encouraged or educated compliance.” This approach seeks to decrease the
likelihood of nonconforming protectionist behavior by giving the local
governments a stake in the agreement. As it stands now, many local entities feel
estranged from the trade process and therefore have no incentive to comply.
This is especially true because the local entities feel the brunt of the negative
effects of trade liberalization (for example, job losses). The mechanism for this
internal domestic approach is providing increased input in negotiations,
increased involvement in implementing legislation, and a larger role in the
administration of the trade disciplines impacting state and provincial measures.69

The United States adopted this approach in a formal regulatory framework
for state education and participation in international trade. The regulatory
mechanism is the Intergovernmental Policy Advisory Committee (“IGPAC”),
which consists of approximately thirty-five members representing the states and
other nonfederal entities.70 The IGPAC dates back to the 1974 Trade Act71 and
works directly with the Office of the United States Trade Representative
(“USTR”) “to provide overall policy advice on trade policy matters that have a
significant relationship to the affairs of state and local governments within the

69 See Matthew Schaefer, Note on State Involvement in Trade Negotiations, the Development of Trade
Agreement Implementing Legislation, and the Administration of Trade Agreements, in Jackson, Davey,
and Sykes, eds, Legal Problems § 3.6(D) at 137–39 (cited in note 49).
70 See Office of the United States Trade Representative, Charter of the Intergovernmental Policy
Advisory Committee, enacted pursuant to 19 USC § 2155(c)(2), as amended, available online at
71 See 19 USC § 2101 et seq.
jurisdiction of the United States.”\textsuperscript{72} The IGPAC meets with US trade negotiators throughout trade negotiations to receive updates and to offer advice.

During the GATT/WTO and NAFTA negotiations, the United States federal government provided the states with an enormous amount of information, both to keep them abreast of the negotiations and to ensure their agreement with the various agreements impacting areas within state or provincial control. While this approach worked remarkably well with respect to the GATT/WTO Technical Barriers to Trade, Sanitary and Phytosanitary Measures, Government Procurement, and Services Agreements, it achieved less success with NAFTA’s supplemental labor and environmental side agreements.

Several additional domestic achievements were reached in the NAFTA implementing legislation and accompanying SAA. First, an additional process for federal-state consultation was created. As required by the NAFTA implementing package, the USTR appointed a “NAFTA Coordinator for State Matters” to act as a single contact responsible for distribution of information to the states.\textsuperscript{73} Second, the USTR is charged to keep states involved “to the greatest extent possible in the development of U.S. positions with respect to issues subject to state jurisdiction that are addressed by the various committees and working groups established by the NAFTA.”\textsuperscript{74} This second directive represents the first time states were “guaranteed” a right to be informed and to participate in trade negotiations.\textsuperscript{75} Similar legislation and directives are contained in the Uruguay Round implementing legislation and accompanying SAA.\textsuperscript{76}

Despite the achievements reached by the United States with respect to state education and participation in the negotiation and implementation of international trade agreements, the system is inherently flawed because it is limited to advice. The states have no veto power and no ability to submit binding advisory opinions in areas where they have constitutional authority. As it stands now, the states are asked to voluntarily agree to commitments in these areas. This approach is inefficient, at best, and trade distorting, at worst, because it allows states to commit in areas on a piecemeal basis. To obtain a single commitment or undertaking by states in all areas, a different and more “state-empowering” approach may be needed.

As of now, the issues presented in this Article remain more of an academic exercise than a political or economic necessity. However, to the extent the trade process continues to move in more diverse areas, subnational barriers to trade

\textsuperscript{72} Id.
\textsuperscript{73} See NAFTA SAA B.1.e., in HR Doc No 159 at 459 (cited in note 64).
\textsuperscript{74} Id at 460.
\textsuperscript{75} See Schaefer, 23 Can–US L.J at 485 (cited in note 9).
\textsuperscript{76} See GATT/WTO SAA B.1.e., in HR Doc No 316 at 670–75 (cited in note 61).
will increase and may become the last outlet of protectionism. At that time, both the multilateral and regional trade regimes must face the tension and current ambiguities in international regulation of federal nation-states.