

17 September 1985

CANADA - MEASURES AFFECTING THE SALE OF GOLD COINS

Report of the Panel
(L/5863)

I. INTRODUCTION

1. In a communication dated 25 June 1984, circulated to the contracting parties on 3 July 1984, South Africa requested bilateral consultations with Canada under Article XXIII:1 concerning the application of the retail sales tax by the provincial government of Ontario to the sale of gold coins in a manner which afforded protection to domestic production of gold coins (L/5662). Consultations held between the parties on 24 September 1984 did not lead to a mutually satisfactory solution. South Africa therefore referred the matter to the CONTRACTING PARTIES in October 1984 and requested the urgent establishment of a Panel to investigate the matter and give an appropriate ruling (L/5711). At its meeting of 6-8 and 20 November 1984, the Council agreed to establish a Panel to examine South Africa's complaint. The Chairman of the Council was authorized, in consultation with the parties concerned, to decide on appropriate terms of reference and to designate the Panel members (C/M/183).

2. The following terms of reference were announced by the Chairman of the Council on 29 January 1985 (C/M/185):

"To examine, in the light of relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by South Africa, that is, whether the action taken with effect from 11 May 1983 in respect of the levying of the retail sales tax on gold coins by the Province of Ontario accords with the provisions of Articles III and II of the General Agreement whether Canada has carried out its obligations in terms of Article XXIV:12 of the General Agreement whether any benefits a

the Council at the same Council meeting: "It is my understanding that agreement on these terms of reference has been reached on the basis of the understanding that, in its proceedings, the Panel will hear arguments as to whether the Ontario provincial retail sales tax measure on gold coins referred to in the terms of reference accords with the provisions of Articles III and II of the General Agreement, and will provide its view thereon to the parties involved, before proceeding to hear any additional arguments related to the remaining elements outlined in the terms of reference."

3. The composition of the Panel was announced on 19 February 1985 (C/131):

Chairman: Mr. P.-L. Girard
Members: Mr. M. Ikeda
Mr. M. Shaton

4. The Panel met on 16 April, 23-24 May, and 13-14 June 1985 to hear arguments from the parties to the dispute. Pursuant to the understanding on its terms of reference, the Panel first gave its view to the parties

II. FACTUAL ASPECTS

5. In May 1983, as part of its Budget, the government of the Province of Ontario presented a Bill to amend the provincial Retail Sales Tax Act. The resulting Act of the provincial legislative assembly received the Royal Assent on 26 May 1983. Under this Act, Subsection 5(1) of the provincial Retail Sales Tax Act was amended to exempt from the tax "Maple Leaf Gold Coins struck by the Canadian Mint and such other gold coins as are prescribed by regulation"; under an

- (ii) to find that benefits accruing to South Africa under the General Agreement had been nullified or impaired; and
- (iii) to request the CONTRACTING PARTIES to recommend that Canada take immediate steps to terminate the discrimination against the Krugerrand.

10. Canada argued that the government of Canada had not acted in any way inconsistent with its obligations under the General Agreement. Canada's view was that its GATT obligation, taking into account Canada's specific constitutional structure and with respect to the Ontario measure, was that contained in Article XXIV:12, i.e. to take "such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments within its territory." Canada pointed out that the Ontario measure in question was not taken by Canada, but by a provincial government which was not a contracting party. If it had been intended that a contracting party, which is a federal state such as Canada, was to be deemed to have automatically and directly violated a specific GATT obligation as a result of a measure taken by another level of government falling within its territory and which did not observe that provision, then the obligation contained in Article XXIV:12 would be unnecessary. It would be left empty of practical meaning. As an integral part of GATT, Canada felt that the Article XXIV:12 obligation must have practical content. Canada further stated that it had fulfilled its Article XXIV:12 obligation. Canada therefore asked the Panel to find that Canada had not acted in a manner inconsistent with its obligations under Articles III and II, that Canada's obligation in the matter being examined by the Panel was limited to that contained in Article XXIV:12, and that Canada had fully complied with its obligation under that paragraph.

11. Moreover, Canada's view was that the language of Article XXIV:12 introduces the concept of "observance" of the provisions of the General Agreement by regional or local levels of government. Canada held that "lack of observance" by another level of government in a federal State like Canada does not in itself entail a failure by the contracting party to act in a manner consistent with its GATT obligations. "Observance" represents a distinct and important GATT concept. Therefore, Canada accepted that it would be appropriate for the Panel to examine whether, in the case at hand, there had been a failure on the part of the Government of Ontario to observe certain GATT provisions.

(b) Articles III and II

12. Purs06.8 Tm/F8 11 Tf((iii)) TjBT1 0 0 1 492 395.76 Tm2i1d

namely the Krugerrand. It was evident that the Ontario measure was not aimed at stimulating total demand for gold coins, but at switching demand to achieve an increase in Maple Leaf gold coin sales. It was thus contrary to the provisions of Article III:1.

14. Secondly, the Ontario measure conflicted directly with the provision of Article III:2 that "products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or charges of any kind in excess of those applied, directly or indirectly, to like domestic products". There was no doubt that the Krugerrand and Maple Leaf coins were "like products" within the meaning of Article III:2. Both coins were produced in quantity, to the same standard based on the fine ounce of gold, and only these two coins shared the fine ounce as the standard of their gold content; both were legal tender in their countries of origin; and the two coins sold in international markets at virtually the same price. Thus the Ontario measure, by subjecting a product of South Africa imported into Canadian territory to internal taxation in excess of that applied to the like domestic product, conflicted with the provisions of Article III:2.

15. Thirdly, the Ontario measure upset the competitive relationship between the domestic and imported product and gave an unfair marketing and promotion advantage to the Maple Leaf coin. The measure thus contravened Article III:4 of the General Agreement. Serious trade losses had occurred in the Ontario market following the introduction of the measure.

16. In relation to Article II, South Africa argued that the measure led to a

what eventually became Article XXIV:12 were redundant. In the context of continuing discussions on this provision, at the 1947 Geneva session, one delegate, reflecting the majority view, referred to local authorities "which

22. In relation to the observance of Article II by Ontario, Canada argued that this Article did not apply to internal measures imposed on imported goods after they had entered the territory of a contracting party but only to measures imposed at the time of importation. The distinction between "imported" goods and "importation" of products had been clearly established in GATT practice, in particular in the Belgian Family Allowance case (BISD 1S/59) and the case regarding EEC measures on animal feed proteins (BISD 25S/67). The Ontario retail sales tax measure was levied at the time of retail sale of goods within the province, not at the time of importation. It did not directly affect the importation of gold investment coins as such, but was an internal measure affecting their sale once within the provincial territory. Canada's view was, therefore, that the Ontario measure did not entail a lack of observance of Article II.

23. With respect to the general question of whether the measure observed the national treatment principle of Article III, Canada agreed that the Krugerrand and Maple Leaf were "like" products as investment coins within the meaning of

of local

31. Articles II and III, in South Africa's view, applied to all commercial exchanges of products between all contracting parties, irrespective of their form of government. There was no provision which would suggest that these obligations applied only in respect of

also noted that the Royal Canadian Mint was not a policy-making body, had no competence to intervene in this case and, in fact, had never suggested discriminatory taxation treatment to Ontario authorities.

36. Canada recalled that the drafting history of Article XXIV:12 clearly recognized that the obligation placed on federal states such as Canada was to take "such reasonable measures as may be available to it" to ensure observance of GATT provisions by local governments. During the 1946 London preparatory meeting, the question of local government measures was raised in the context of discussions on national treatment. The subcommittee charged with this issue suggested extending the obligation by adding a clause that read: "Each Member agrees that it will take all measures open to it to assure that the objectives of this Article are not impaired in any way by taxes, charges, laws, regulations or requirements of subsidiary governments within the territory of the member ~~governments~~" (UN doc.E/PC/T/C.II/54.Add 6). But Canada noted that this proposed tightening, in the context of the discussion on national treatment, of what would subsequently become, in substantially different form, the Article XXIV:12 obligation, did not survive. During the New York conference in early 1987, a delegation suggested the obligation of taking such reasonable measures as may be available and it was this language which prevailed. Moreover, during the Havana Conference, several states had unsuccessfully proposed firmer language. In particular, an amendment to the effect that "Each Member shall take all necessary measures to assure observance of the provisions of this Charter by the regional and local governments and authorities within its territory and shall be responsible for any act or omission to act contrary to the provisions of this Charter on the part of any such government or authorities", subsequently modified to "Each Member in accordance with its constitutional system shall take measures to assure ...", (UN docs. E/CONF.2/C.6/12 and Add. 18 respectively) were rejected by the Conference.

37. The General Agreement had been accepted by Canada with Article XXIV:12 as an integral part of it; it was fully known and accepted that this provision applied to federal states, in a manner which varied with the specific constitutional structure of the contracting party, when measures taken by provincial or local governments were to be examined. Canada's ~~provisions~~ provisions under GATT were not direct obligations under Article III, but rather obligations to take such reasonable measures as may be available to it to ensure observance of GATT by regional and local governments. Canada's view at the time of the Havana Conference - which it still held - was that there was no obligation on a contracting party to take any measure which, that contracting party considered to be unreasonable. Clearly, "reasonable" must mean something less than "all measures open" to the federal authority or "all necessary measures". Canada accepted that it must undertake in persistent fashion reasonable

the federal Minister for International Trade and the Ontario Minister for Industry and Trade, the Ontario government was again urged to remove the differential treatment, if possible before the 7 November 1984 GATT Council meeting. Following that Council meeting, the federal government continued to urge Ontario, clearly and unequivocally, to modify the retail sales tax measure. Most recently, the Canadian Minister of International Trade had written to the new Ontario Minister of Industry and Trade in February 1985, reiterating that it was urgent that Ontario move quickly to remove the differential treatment on gold coins. Canada stated that it has continued to urge Ontario to modify appropriately the retail sales tax measure. Canada had thus fully complied with its Article XXIV:12 obligations.

39. Canada argued, moreover, that having regard to Canadian constitutional practice and the nature of the Canadian federation, it could not be considered a "reasonable measure" under Article XXIV:12 for the Federal authorities to take court action against Ontario in order to challenge the constitutional validity of the measure in the Canadian courts. Initiative in bringing the constitutionality of provincial legislation before the courts in Canada was, in contemporary Canadian practice, normally the responsibility of private parties directly affected by the legislation: i.e. in this case, any party, whether or not a Canadian national, with a direct commercial interest. In such ordinary litigation undertaken on private initiative, moreover, the federal government had the right to intervene on constitutional issues and had done so in the past.

(a) that the central obligation of a federal government to ensure observance of GATT by local or provincial governments, was not challenged and fully recognized by the drafters of those provisions; and

(b) that federal governments were not expected to assume more severe, or lesser, obligations under GATT than other contracting parties. The retention of the words "... in accordance with its constitutional system" would have limited the scope of a federal government's obligations, whereas the phrase "... and shall be responsible for any act or omission to act contrary to the provisions of this Charter on the part of any such governments or authorities" would have prejudiced such a contracting party's rights and obligations under GATT. The deletion of both the above-quoted phrases from Article XXIV:12 enables an objective assessment by the CONTRACTING PARTIES of "reasonable measures"

had accounted for 47 per cent of their total sales in Canada in the first five months of 1983; in 1984 Ontario represented only three per cent of the Canadian market for Krugerrands. There was a large increase in the sales of Maple Leaf coins in Ontario between 1982 and 1984, starting in the second half of 1983; South Africa contended that this dramatic rise was largely the result of the mid-1983 tax measure. Retailers' experiences supported the evidence of a severe drop in Krugerrand sales and corresponding increase in Maple Leaf purchases following the measure and confirmed that the tax differential had an important influence on buyers' decisions to purchase Maple Leafs instead of Krugerrands. South Africa stated that the investor was interested only in buying the gold embedded in the Krugerrand and the Maple Leaf and therefore he would naturally prefer to

Statement by the EEC

48. In a statement to the Panel, the European Economic Community expressed its concern that no precedent should be established in relation to Article XXIV:12 which could affect contracting parties' confidence in obligations undertaken by federal states. It would be unacceptable if the Panel found that Article XXIV:12 could allow a local or regional authority to free itself from any GATT obligation undertaken by the central government. GATT obligations are addressed to governments. In international law, a government represented a country in its entirety. Article XXIV:12 simply recognized the fact that federal states may have difficulties in implementing their GATT obligations because of their particular administrative or legal structures. In the opinion of the Community, even if it were to be determined to the complete satisfaction of the parties to the dispute that "reasonable measures" had been taken, there would be an unacceptable gap in the implementation of the General Agreement if the Panel were to interpret Article XXIV:12 in such a way as to limit the obligations of certain contracting parties. The Note to Article III:1 furthermore confirmed that contracting parties were not allowed to maintain under Article XXIV:12 measures which are inconsistent with the letter and spirit of GATT; the only relief from the obligation to eliminate such measures was that, in case of serious administrative and financial difficulties, some time could be allowed for their elimination.

IV. FINDINGS

49. The agreement on the terms of reference for the Panel was reached on the basis of the understanding that the Panel would provide its views to the parties on the question of whether the Ontario provincial sales tax measure on gold coins accorded with the provisions of Articles III and II of the General Agreement before proceeding to hear additional arguments relating to the remaining elements outlined in the terms of reference (see para. 2 above). The Panel therefore divided its examination of the case into two stages. In the first stage the Panel limited itself to the question of whether the Ontario measure accords with the provisions of Articles III and II.

50. The Panel noted that

- (b) The Maple Leaf and Krugerrand gold coins are produced to very similar standards, have the same weight in gold, and therefore compete directly with one another in international markets. The Panel therefore considered that the Maple Leaf and Krugerrand gold coins were "like" products within the meaning of Article III:2, first sentence.
- (c) Ontario had exempted the Maple Leaf gold coin from its retail sales tax but not the Krugerrand gold coin. The internal taxes to which Krugerrand gold coins imported into Canadian territory were subject in Ontario were thus in excess of those applied to a like domestic product.

52. For these reasons, the Panel found that the Ontario retail sales tax measure did not accord with the provisions of Article III:2, first sentence, which states that "the products of the territory of any contracting party imported into the territory of any

A sub-committee reported that:

"Several countries emphasized that central governments could not in many cases control subsidiary governments in this regard, but agreed that all should take such measures as might be open to them to

59. The

be "observed" by them. This suggests that Article XXIV:12 was not meant to regulate the scope of application of the provisions of the General Agreement but merely the measures to secure their observance by local governments. The Panel further noted that Article XXIV:12 is an exception to the general principle that a party to a treaty may not invoke its internal law as a justification for not performing its treaty obligations (see para. 42 above), that it grants a special right to federal States without giving an offsetting privilege to unitary States and that it could therefore lead to imbalances in rights and obligations between unitary and federal States if the latter encounter constitutional difficulties in carrying out their obligations under the General Agreement.

64. The Panel considered that, as an exception to a general principle of law favouring certain contracting parties, Article XXIV:12 should be interpreted in a way that does not create constitutional difficulties which federal States may have in ensuring the observance of the provisions of the General Agreement by local governments, while minimizing the danger that such

1000173

