Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement
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10 GATT/WTO safeguards and Article XXIV

10.1 Introduction
The chapter is dedicated to a discussion of safeguard measures applied between regional members. To the extent that this topic also concerns the continuing applicability of GATT Articles to members of regional trade agreements, the discussion is not intended to pre-judge the question of whether certain commercial policy instruments are lawful as applied between regional members. It will be re-called from Chapter Three that an argument has been made that the list of GATT Articles (XI through XV and XX) found in paragraph 8 of GATT Article XXIV is an exhaustive listing. By treating the question here as to whether GATT Articles apply to the trade of regional members, one is not conceding that position already developed on the question of the exhaustive listing. Rather, it is recognised that there is a significant body of opinion that considers the listing of the Article to be non-exhaustive, and that safeguard and anti-dumping actions are therefore permissible as between regional members.

Thus, what is attempted here is to establish two points, regardless of the debate over the exhaustive listing. The chapter will first provide a brief note on the GATT-1947 provisions and revisions introduced by the WTO Agreement on Safeguards. What is concluded is that whether or not MFN applied to the original Article XIX in the application of a safeguard, the regime established in the WTO has nevertheless become prescriptive by its new provisions. Next, it will be shown that specialised provisions and regimes within regional agreements do deviate in their legal form from certain GATT and WTO rules. The treatment here will be made by examples as found in the Europe Agreements (EC-CEE) and for the North American Free Trade Agreement (NAFTA). As in the previous chapter, at this juncture of legal developments, it can not be concluded that specialised safeguard regimes employed by regional members in Article XXIV agreements act as a legally-effective suspension of Article XIX provisions as elaborated by the WTO Agreement on Safeguards.

10.2 GATT-1947 Article XIX provisions
GATT-1947's Article XIX, titled "Emergency Action on Imports of Particular Products" provides what is known as GATT's general escape clause. The Article permits a party, in regard to a particular product, to suspend an obligation or to withdraw or modify a concession. This is possible for such time as may be necessary to prevent or remedy an injury, caused, "...as a result of unforeseen developments and the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions." The injury required for implementation is that a "product is being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory..."  

Before taking action, a party seeking to raise emergency measures must notify the contracting parties in writing and afford them an opportunity to consult in respect to the proposed action.  If agreement in regard to the action is not reached, the party seeking the measure shall be free to act. However, the affected parties shall then be free (within 90 days) to suspend equivalent concessions that are not disapproved by the contracting parties.  In addition, there is a provision for critical circumstances whereby delay would cause damage difficult to repair. In this case, although the measure may be introduced without prior consultation, consultation shall in any case be effected immediately on

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1 GATT Article XIX:1(a).
2 GATT Article XIX:2.
3 GATT Article XIX:3(a).
taking action. In this case, the affected party remains free to suspend equivalent concessions as may be necessary to prevent or remedy injury. To summarize, GATT-1947 provided a basis for a contracting party to enact emergency measures according to GATT Article XIX. An import country might raise its tariff or impose a non-discriminatory quantitative restriction when domestic producers were threatened by an unanticipated surge in imports as a result of GATT negotiations.

While the Article was significantly neglected by the practice of GATT parties favoring bilateral export restraint arrangements, orderly market agreements and other so-called grey-area measures, its requirements remained in place. The affected party was granted a right, subject to some contracting party oversight, to retaliatory measures as necessary to adjust the balance of concessions between the parties. In this manner, GATT Article XIX was distinguished by its provisions which granted an affected party the right to draw compensation for the measure invoked, an aspect that is not found in other contingent measures permitted by the GATT, such as antidumping or actions for countervailing duties.

10.3 GATT-1994 Agreement on Safeguards

The WTO Agreement on Safeguards (the Safeguards Agreement) introduced significant changes to the way Article XIX is applied. Overall, a framework for handling emergency measures in the GATT is designated by the Agreement. Aspects of this framework include required notification to a committee, conditions for conducting national investigations, more concise injury tests to be applied, a surveillance mechanism under the authority of a Committee on Safeguards, and a series of provisions that balance the issue of discriminatory application and compensation. A striking feature of the Agreement is its declared prohibition on grey-area measures. As contained in Article 11 of the Agreement,

"Furthermore a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side."

Bronckers has suggested that this provision constitutes a “flat out prohibition of grey area measures,” As discussed below, the viability of this ban must also be considered in light of other GATT regimes which would allow parties to achieve a similar result. One avenue indicated as remaining open by him is that of resolving anti-dumping actions by the use of these similar measures as, “…the new anti-dumping agreement still permits certain grey area measures (price undertakings and export bans) as a means to settle anti-dumping investigations.”

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4 GATT Article XIX:2.
5 GATT Article XIX:3(b), explaining provisions for preference, Article XIX:1(b).
6 WTO, Annex 1A: Multilateral Agreements on Trade in Goods, Agreement on Safeguards. The Committee on Safeguards is established by Article 13 of the Agreement. According to sub-paragraphs (b) and (d), it is granted the authority to determine if the procedural requirements of the Agreement have been complied with on request of a Member, and to examine measures covered by Article 11 of the Agreement.
7 WTO, Safeguards Agreement, Article 11(b). Footnote 4 to the Agreement lists additional “similar measures” as, * export moderation, export-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection." However, footnote 3 does permit import quotas that otherwise comply with GATT-1994 to be administered by the exporting party.
9 M. Bronckers, Ibid., at p. 276, and citing Article 8 of the WTO Agreement on Implementation of Article VI of the GATT (Agreement on Anti-dumping).
10.4 Regional safeguard measures

10.4.1 Introduction

A factor complicating a discussion of regional safeguards is the change noted above in the rules from the GATT-1947 to GATT-1994. This also bridges a large number of interim free-trade areas. For safeguard measures, GATT parties rarely invoked the GATT regime provided in Article XIX formally. With the likely application of MFN and the Article’s compensation provisions, a generation of grey-area measures designed to avoid the Article was the apparent result. Where parties would act according to bilateral arrangements to provide for some workable safeguard mechanism for free-trade areas, they would hardly be blamed for avoiding a GATT regime that was being avoided by everyone else anyway. With the changes brought by GATT-1994 for emergency measures, the legality of opting-out of this regime via the provisions of regional trade agreements is not settled. In point, the relationship between Article XIX and XXIV regarding the legal capacity for regional members to engage regional safeguards could be said to be explicitly unsettled. As Footnote 1 to the Safeguards Agreement states, “(N)othing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994. Thus, there is no intention directed by the drafters of the Safeguards Agreement to interpret paragraph 8 of Article XXIV either as permitting or not permitting the use of safeguards between regional members. As far as the Safeguards Agreement is concerned, the question has been left open. Likewise, it is not explicitly provided that in the event that safeguard measures are lawful to be applied between regional members, that such measures as applied must meet the requirements of Article XIX and the elaboration provided in the Safeguards Agreement. Since the question of legality is not resolved by the introduction of the Safeguards Agreement, certainly this second question is also left open. Thus, one can also say that there is nothing in the Safeguards Agreement that exempts regional members from complying with its requirements.

There are a number of important Article XIX provisions which are raised to illustrate the importance of this last point. The first is notification, as whether or not regional safeguards must be notified to the WTO. The second is the injury test, as to whether regional parties can provide a basis for injury determination that is less strict than Article XIX and as elaborated by the Safeguards Agreement. A third concerns MFN treatment in determining whether non-members who also contribute to the injury must also be included in the remedy when a regional safeguard is introduced. A final consideration relates to the legality of certain remedial measures that are now designated as unlawful between GATT parties, since the Safeguard Agreement’s Article 11(1)(b) prohibition on grey-area measures, recited above, also applies to, “actions under agreements, arrangements and understandings entered into by two or more Members.” Thus, one inquires whether the application of GATT Article XIX and the Safeguards Agreement is to be considered suspended for regional members who have invoked a lex specialis safeguard regime? This inquiry is taken-up, however, without prejudice to the possibility that no safeguards are permitted between regional members as a condition of meeting Article XXIV:8 requirements.

Regional members argue that a lex specialis mechanism is necessary because the parties are advancing toward actual free trade as compared to merely conducting trade at MFN levels. Because the risk of disruption is higher, the safeguard mechanism must be specialised to the circumstances. The following case study regarding the Europe Agreements concluded between the EC and the Countries of Central and Eastern Europe provide evidence of a mechanism designed to deviate from the WTO Safeguards regime.
10.5 EEC safeguard regimes – Central and Eastern Europe

10.5.1 CMEA and EEC safeguards in the GATT
A number of Central and Eastern European countries of the COMECON system acceded to the GATT during the first half of the 1970’s. A central issue on the GATT accession of these state-trading countries, and thereafter, was the continued application of quotas by the western economies upon CEEC exports. The outline of what came to be a significant dispute in the GATT between the United States and the EEC, and between the EEC and the CEEC countries, was centred on this problem. It remains documented in the annual and biennial reviews of working parties relating to the Hungarian accession to GATT. In the Hungarian case, its protocol of accession to GATT called for the progressive removal of quantitative restrictions on Hungarian exports other than for exceptional reasons for the maintenance of quotas by the date of 1 January 1975. The issue of removal was subjected to a series of biennial reviews in the GATT. However, the resolution of the quota problem was not successful in the GATT reviews, which increasingly became a forum for third parties to criticise the EEC on this issue. The issue between Hungary and the EEC was ultimately resolved in the context of bilateral negotiations outside of the GATT framework and the attentions of third parties in the working group reviews. While this route had been proposed by the EEC since 1974, Hungary had long resisted a bilateral solution. According to van den Bossche, there was a general concern about bilateralism in the GATT, and a specific concern that,

"...only the GATT rules could provide Hungary with the necessary protection against unfavourable conditions imposed by the EEC, in the sense that concluding a separate trade agreement outside the GATT would deprive Hungary of its contractual and legitimate rights."

Ultimately the resolution of the issue was formed by the provisions included in the 1988 Trade and Co-operation Agreement between the EEC and Hungary. In resolving the Community’s interest in the agreement, Van den Bossche cites as one of the goals to be achieved, a safeguard clause to be included to, “provide adequate protection to the Community’s internal market in cases of market disruption.” Due to the extensive GATT history between the two parties leading to the bilateral Agreement, Van den Bossche also segregated its provisions into those which she characterised as *lex generalis*, where the bilateral provisions are situated into the multilateral GATT context, and "clearly indicating that the bilateral agreement basically provides an additional, complementary framework

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14 van den Bossche, Supra note 11 at p. 160, reciting a number of EEC justifications posed for the quantitative restrictions, but most of them oriented to the "exceptional economic situation prevailing, particularly in sensitive sectors." Citing, GATT BISD S27 (1980), sub 4.
15 van den Bossche, Supra note 11 at p. 151.
and the GATT remains the *lex generalis* for relations..." This is to contrast with those aspects of the agreement intended to be *lex specialis*.

"In cases of this type the Agreement is not a complementary, but a substituting, framework in the sense that the Agreement (the *lex specialis*) has preference over the GATT (the *lex generalis*)."

Thus are provided the "made to order provisions" which reflected the resolution of the EEC-Hungary particularities which could not be accommodated under the General Agreement. Her conclusion on this point is that both the inclusion of the safeguard clause and the provisions for dealing with quantitative restrictions were both *lex specialis* to the GATT Agreement. For safeguards, Article 7 of the EEC-Hungary Agreement provided that a bilateral system of consultations leading to the measures to be taken and their duration be implemented in full between the parties prior to any recourse to the GATT. In regard to removal of quantitative restrictions for the most sensitive products, the safeguard clause applies unilaterally in favour of the Community and, "recourse to GATT is plainly excluded."

Without addressing the GATT legality of these provisions, this example provides a description of how a bilateral agreement seeks to suspend the operation of the General Agreement between two parties. As we take this example forward, it is also illustrative to see how the deviation is accommodated in European Community law and its implementing legislation which enacts GATT Article XIX. Here the evidence of an approach *lex specialis* is confirmed by the separate regulatory framework established for dealing with regional safeguards in the European Agreement context, the successor agreements to the first generation trade and co-operation agreements.

10.5.2 The general Community safeguards regime

At the time of the trade and co-operation agreements, the EC legislation authorising the use of emergency measures according to EEC Article 113 was Council Regulation (EEC) No. 288/82, titled, Common Rules for Imports. This Regulation provided two procedures for safeguards. The first was the "normal" procedure providing for internal consultation between Member-state authorities and the

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18 Continuing, "(T)hese references indicate how indispensable the GATT has been for concluding the bilateral agreement. In other words, the ultimate reasons for concluding a bilateral agreement on – to use early Hungarian terminology – 'already contracted rights and obligations' appear perfectly clearly here." Van den Bossche, Supra note 11 at p. 153.

19 "(a)ll specific bilateral remedies must have been exhausted first." Van den Bossche, Supra note 11 at p. 154.

20 van den Bossche does not consider that the provisions of this agreement would form a pattern for other CMEA arrangements. While she notes that the Czechoslovakian government also made a demand to eliminate quantitative restrictions, this country's position in GATT as an original contracting party suggested that the solution for Hungary which grew out of the biennial reviews on its GATT accession might be unique to Hungary. Van den Bossche, Supra note 11 at p. 155.

21 Council Regulation, (EEC) No. 288/82 of 5 Feb 1982, repealed by Council Regulation (EC) No. 518/94 of 7 March 1994 on Common Rules for Imports, Official journal NO. L 067, 10/03/1994, pp. 0077-0087. The purpose of the repeal of 288/82 was not directed to a change in the GATT regime, as the regulation was promulgated prior to the conclusion of the Uruguay Round. Rather, the legislative program for the completion of the EC internal market made amendments necessary. As according to the preamble of Reg. 518/94: "Whereas in order to achieve greater uniformity in the rules for imports it is necessary to eliminate the exceptions and derogations resulting from the remaining national commercial policy measures and in particular the quantitative restrictions maintained by Member States under Regulation (EEC) No 288/82. By this time the CEEC countries were not subject to state trading provisions. "It is worth noting that in the application of EC safeguard measures the passage from the NME (non market economy) to the common rules was already effectuated for reference periods which largely predated the entry into force of the relevant IA's (Interim Agreements). Maresceau M., and Montaguti E., *The Relations Between the European Union and Central and Eastern Europe: A Legal Appraisal*, Common Market Law Review, V. 32, 1995 pp. XXX –1327 at p. 1351, their note 79.

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Commission and following that consultation, the opening of investigation by the Commission. This investigation is accompanied by publication in the Official Journal and, where a safeguard is found to be necessary, action by the Commission within nine months of the opening of the investigation. Within certain restrictions, interested parties have a right to investigate information supplied and to supply information. Also, a limited right to be heard is provided. The injury necessary to justify a safeguard is provided by Article 14 and copies the GATT Article XIX text, "(W)here a product is imported into the Community in such greatly increased quantities and/or on such terms or conditions as to cause, or threaten to cause, serious injury to Community producers of like or directly competing products."

A second procedure permits a faster response by the Commission granting a five-day period for the Commission to make a decision. Within a month following, a member state may refer such a decision to the Council, which can confirm by qualified majority, or may amend or revoke the Commission decision. If after three months there is no Council decision, the Commission measure is deemed revoked. Thus, an affirmative act of the Council is required to continue the temporary measure in force.

While the safeguard regulation is dedicated by its Preamble to respect the GATT Article XIX provisions, it also is not intended, according to its terms, to be applicable to bilateral trade agreements made between the Community and third countries. The first point is indicated by the preamble, "Whereas it is for the Commission and the Council to adopt the safeguard measures called for by the interests of the Community with due regard for existing international obligations..." The second point is made by Article 18(1) stating that, "(T)his Regulation shall not preclude the fulfilment of obligations arising from special rules contained in agreements concluded between the Community and third countries."

In regard to the special rules incurred in the Interim Agreements between the EC and the individual CEEC countries, these obligations did indeed vary from those provided by Regulation 288/82 and the GATT Article XIX, as they continued, in certain respects, the lex specialis nature of the original EEC-Hungary bilateral settlement.

10.5.3 Safeguards in (CEEC) Interim Agreements for Association.

The test for the later Interim Agreements is stated in Article 24 of the Interim Agreement. They are permitted where there is shown,

1) an increase in the quantities of imports;
2) which cause or threaten to cause injury;
3) to domestic producers or,
4) a serious disturbance in any sector.

While this test also follows generally the one provided in GATT Article XIX, there is a clear deviation from the GATT test in regard to the final criteria (4), as it permits a broader sectoral treatment without reference of injury to producers. As a remedy under the Interim Agreement, a party may take "appropriate" measures, but Article 27 of the agreement requires that they must be those which are the least disturbing and be accompanied by a timetable for their abolition. Without

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24 Council Regulation, (EEC) No. 288/82, Article 5(4). "The Commission may hear the interested parties. Such parties must be heard where they have applied in writing within the period laid down in the notice published in the Official Journal of the European Communities, showing that they are actually likely to be affected by the outcome of the investigations and that there are special reasons for them to be heard orally."
26 It is considered that this may be an agriculture-oriented provision where the number of producers in the sector is so large as to be non-identified via distinct producer organisation.
further provisions, this clause would suggest that "appropriate measures" would be those same measures as would be accorded by GATT Article XIX, the suspension of a concession (suspension of a preference) in the form of a duty increase, or a quantitative restriction, or perhaps a minimum price or price undertaking.

What is significant in this regional regime is the role of MFN as to the regional partner. Where Kenneth Dam made the case that MFN was legally required by GATT Article XIX to be accorded on the original suspension, this is not provided in the regional safeguard legislation. This suggests that selectivity is granted outright to the parties to invoke a safeguard without any reference to whether other GATT parties or other regional parties share any responsibility for the underlying increase in imports. For retaliation, there is no basis in the regional context to apply it at all. What is made explicit in GATT Article XIX appears to be not accorded between the regional parties in any manner. Logically, this may flow from the nature of the free-trade commitment as it differs from the contractual binding of a GATT negotiated tariff cut. In the GATT, concessions are equivalent and conditioned upon other parties' performance of their promises to engage in tariff cuts. Where one suspends a commitment by application of a safeguard, the affected party has a right to withdraw a comparable concession. Free-trade agreements may not exhibit the same type of contractual relationship. Both parties can be said to be dedicated to achieving the end goal of free trade, and safeguards provisions are mutually agreed upon to allow flexibility to achieve this end without undue market disruption. Thus, it may not be unreasonable to prohibit retaliation that would act to unwind the course of preferences to be given affect over time.

On the other hand, retaliation, or the threat of it, also reflects a certain spirit which reflects the mutuality of GATT provisions, that what is breached is then capable of being redressed by the suspension of a concession. While all parties retain the power, this would understandably tend to confine the degree of initial suspensions undertaken according to the Article. This consideration is absent between the free-trade parties in this EC-CEEC regional setting, where they have apparently agreed to grant a unilateral right of initial suspension without according any right to compensation. This suggests not only that a higher degree of flexibility to apply safeguards has been sought to be preserved by the regional members, but that one party's unilateral determination of imposing a safeguard can never operate as a breach of the agreement. This may well reflect the end-point of the agreements in seeking to establish free trade together with the recognition of the difficulties of adjusting domestic protection along the way. At the same time, however, it can call into question the degree of free-trade commitment in meeting the substantially-all trade test within the particular framework, since more flexibility would permit parties to restrict more trade without incurring the risk of retaliation or the need to generate compensation.

10.5.4 Procedural variations

One should also examine the procedural and institutional arrangements provided between the Association parties. These aspects are not found within the Interim Agreement, but are provided by further detail for each individual CEEC party according to the (Commission) Regulation.27 According to the Regulation, an EC member state is provided a right to request a safeguard of the Commission. If the Commission decides unfavourably on this request, the member-state may then appeal to the Council, which shall consider the application on the basis of qualified majority. If the Council decides against the Commission (and in favour of the safeguard), then the Europe Agreement party is then notified for the purposes of joint consultation. The Council can reverse its decision 20 days after consultation, but apparently not thereafter. This procedure is at variance from that provided by the general Regulation 288/82 (and later Regulations) While Council action is to be taken by qualified

27 For Poland, Reg. 518/92 of 27 Feb. 1992, OJ No L 56/3, "on certain procedures for applying the Interim Agreement on trade and trade-related matters between the EEC and the ECSC, of the one part, and the Republic of Poland of the other part" The Poland provisions are cited for convenience. They do not vary as to the other Association agreements.

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majority in both instances, in the general procedure inactivity by the Council for three months terminates the measure. There is no corresponding provision in the special CEEC provisions. Also, where Council does reverse the Commission and endorses the measure, a twenty-day period of consultation is only possible prior to the Council losing its right to reverse its decision or assumedly to modify it. This 20-day limit is not raised in the general procedure and there is no indication that the Council cannot reverse or modify its own decision at any time.

This procedure also involves a significant variation from GATT Article XIX in that one party pre-determines the necessity of the safeguard and prescribes the measure to be applied prior to consultation with the affected country. The Europe Agreement arrangement reflects an expedited procedure whereby one party has already taken its legislative action, which implementation is automatic within a short prescribed time period, except in the case where the affected party takes some affirmative action regarding the underlying trade problem. The emphasis is not on the joint undertaking to resolve the difficulty, but on a unilateral action taken by one party that must then be addressed by the other. As the non-EC party is notified after the measure is passed, it would seem that the only reasonably response would be to seek to convert the import measure which has already been legislatively approved into some type of export control measure.

10.5.5 Europe Agreement safeguards conclusion

The evolution of the safeguard clause applied by the Community toward Central and Eastern Europe was derived in the context of the GATT accessions of these countries. This was resolved essentially in favour of the preservation of the clause in the "New Generation" trade and co-operation agreements concluded between the EC and several CEEC countries in 1990 and 1991. As these agreements became outdated by political events, the Europe Agreements were then initiated to form free-trade areas between the Community and the CEECs, as individual signatories. These agreements have been submitted for exception to MFN according to Article XXIV. Since GATT Article XXIV is not currently interpreted to prevent safeguard measures between free trade partners, the inclusion of safeguard provisions in the agreements is not reviewed by a GATT/WTO working group to determine whether safeguard provisions should be included or whether provisions, when included, should meet particular conditions. The conclusion that safeguard provisions, as provided, vary from the GATT Article XIX should however be of interest in the process of review. However, the perspective here is likely to be directed from the position of whether regional parties can invoke external safeguards while relieving regional partners of the burden of invoking them. To the contrary, a more likely scenario is where safeguards are directed internally without any reference to the external trade. This may satisfy trade interests in the preservation of external trade, but it is problematic for the legal conditions of the exception as located in Article XXIV:8. If Article XIX procedures, old or new, are not invoked by regional safeguard actions, then the facility to enact safeguards is enhanced and the transparency which the GATT-1994 Understanding has sought to bring to the problem is decreased. Overall, there is always a question whether a regional formation covers substantially all trade. The number of safeguards enacted between these parties and the degree of trade affected should be relevant to that determination, both during the interim period and after.

Since the European Community is not the only customs territory that operates regional safeguards, we turn now to another example as indicated in the NAFTA context. Here the attention is on the process of notification and whether parties retain a right to self-characterise measures in such a manner as to avoid the possibility of invoking certain WTO Safeguard Agreement prohibitions.
10.6 NAFTA Countervailing duty action: Canadian softwood

10.6.1 Introduction

The Canadian softwood trade issue with the United States has been the basis of a number of distinct actions before and after the formation of NAFTA.\(^\text{28}\) The first action commenced in 1982 with a filing of a formal countervailing duty complaint with the United States International Trade Commission (USITC) by the U.S. Coalition for Fair Canadian Lumber Imports. In May of 1983 the International Trade Administration (ITA) rejected the preliminary ruling of the USITC in finding that the stumpage fee program did not constitute a countervailable subsidy according to United States law.\(^\text{29}\) According to the ITA, since Canada's stumpage program was generally available, it could not be construed as a domestic subsidy.

A second complaint was filed by the Coalition in 1986 in order to seek reversal of the earlier finding. Although there had been no change in either the nature of the industries or the management of the program by the Canadian provinces, in this second action the ITA made a positive finding that softwood lumber imported from Canada was subsidised through administratively set stumpage prices and via the provision of public resources.\(^\text{30}\) The subsidy was calculated to equal 15% ad valorem. A material injury finding was made and the CVD duty of 15% was to be applied as from December 30, 1986. According to Meilke and Sarker, the market share of Canadian softwood equalled 33% of the U.S. market at the time of the second complaint. No other producer country exported to the U.S. market. In 1991, 70% of Canada's production was exported to the U.S.\(^\text{31}\) This CVD duty did not go into effect as a result of a bilateral negotiated settlement, known as the Memorandum of Understanding on softwood lumber between the two governments.\(^\text{32}\) Effective January 8, 1987, Canada agreed to impose an export tax of 15% on softwood. On September 3, 1991, Canada renounced this arrangement after review of the programs and declared that stumpage fees had risen so that there was no longer a need to collect the export tax. As a response, the United States Trade Representative self-initiated the third CVD case. While pending, a 15% import duty would be applied for contingency protection prior to administrative findings to be made in the case. These actions resulted in a subsidy and injury determination on May 28, 1992 that led to an imposed CVD of 6.51% ad valorem.\(^\text{33}\)


\(^{29}\) This finding of no countervailable subsidy by the Department of Commerce is commonly known as "Lumber I". The alleged subsidy related to the Canadian provincial stumpage program. The Department found that the advantage of the system did not inure to the benefit of any specific industry or group in Canada and did not provide goods at preferential rates. See for summary, in the Matter of: Certain Softwood Lumber products from Canada, Extraordinary Challenge Committee Memorandum Opinions and Order, (U.S-Canada Free-trade Agreement), ECC-94-1904-01USA, August 3, 1994, Introduction.

\(^{30}\) Extraordinary Challenge Committee, Ibid. This determination is known as "Lumber II". The finding was based upon a "purported comparison between stumpage charges and the provincial government's cost of administering their stumpage systems." Ibid.

\(^{31}\) Meilke and Sarker, Supra note 28 at p. 13. They attribute the difference in findings between the first and second actions to a change in U.S. law permitting subsidised inputs to be considered, and possibly, to a new U.S. provision providing for assistance to complainants in the preparation of their actions.

\(^{32}\) "The Department thereupon terminated its investigation and declared its preliminary determination to without legal force and effect." Extraordinary Challenge Committee, Supra note 29, Introduction.

\(^{33}\) This determination is known as "Lumber III". This Decision by the Department of Commerce is characterised as a "final affirmative countervailing duty determination." According to the Committee, the Department found that the programs were specific and provided for preferential rates. Extraordinary Challenge Committee, Supra note
By this point in time, the Canada-US Free-Trade Area (CUSTA) was in force and Canada appealed the US agency determinations to the newly established bi-national panel as according to Article 1904 of that Agreement. On July 26, 1993, this panel remanded (in part unanimously and in part by majority) the factual and legal findings, and requested the U.S. Department of Commerce to consider a number of factors, including clarification of the appropriate legal standard. After the Commerce Department made its remand determination (and increasing its countervailable duty) the bi-national panel ruled again by majority on January 28, 1994 that the subsidy determination was “unsupported by substantial evidence and otherwise not in accordance with the law,(...) and the countervailing subsidies could not be maintained.” Thus, the bi-national panel dismissed the CVD case against Canada.

This rejection of the third CVD action by the bi-national panel led to a period of unilateral gestures by the United States, including the threat, not acted upon, to bring the dispute under the GATT (Tokyo Round) Subsidies Code dispute settlement procedures. Finally an export restraint was agreed upon by negotiations that were completed as announced on April 2, 1996. According to the United States Trade Representative, the five-year agreement provided that,

"Canada has committed to reduce its softwood lumber exports to the United States in exchange for a U.S. commitment to refrain from trade action in this sector." To administer the export restraint,

"Canada began implementing on April 1 a nationwide program for export licensing and permitting, allowing both countries to track volumes and province of origin."

10.6.2 The U.S-Canada measure according to GATT rules

In determining whether or not the export restraint as agreed by the parties is GATT legal, there is first a need to characterise it. Given that Canada promised by the agreement to implement a control system for export licenses and permits, it would seem reasonable that the action taken was an export quantitative restriction in the form of a voluntary export restraint. As such, GATT’s provision of Article XI prohibiting measures other than duties should apply in the first instance, subject only to Article XI’s stated exceptions. However, “undertakings” are permitted by Article 18 of the WTO Agreement on Subsidies and Countervailing Measures. This would permit a voluntary undertaking undertaken by the exporting government agreeing to either eliminate or limit the subsidy or, “take other measures concerning its effects.” According to Article 18.3 of the Subsidies Agreement, if the U.S. has made its preliminary affirmative determinations regarding the subsidy and its injury, then perhaps Canada’s undertaking in the form of a quantitative restraint might fall under the remedies permitted by way of an undertaking.

29, Introduction.
34 Prior to the free-trade agreement, Canada’s recourse would have been according to review of the Decision by the Court of International Trade (U.S.), and then the U.S. Appellate Court system. Under the U.S.-Canada FTA, a binational panel of five experts would review the Decision. According to the Agreement, there is no basis for appeal from the panel and their decision is binding upon the parties. Extraordinary Challenge Committee, Supra note 29, Introduction.
35 Extraordinary Challenge Committee, Supra note 29, Introduction.
37 The specific volume commitment from combined shipments of 16.2 billion board feet to 14.7 billion board feet, plus provision for additional imports to enter at a tax rate of $50/1000 board feet. Kantor statement, Ibid., at p. 1.
38 WTO Agreement on Subsidies and Countervailing Measures, Article 18 titled "Undertakings": *18.1- Proceedings may be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of satisfactory voluntary undertakings...*
However in this case, although a determination had been made by the U.S. Department of Commerce, this determination was not accepted upon review, and the action itself was no longer pending as the bi-national panel had not adopted the U.S. determination. As provided according to Article 1904 of the U.S. and Canada Free-trade Agreement, “the Parties shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review.” Thus, as required by Article 18 of the Subsidies Agreement, countervailing duty proceedings were not being “suspended or terminated” by the acceptance of a voluntary undertaking. As indicated by the USTR above, the measure was being agreed upon, “to refrain from trade action in this sector...” This reference must refer to future trade action, perhaps in the WTO under the Subsidies agreement itself. It seems clear from the facts that the previous trade action, of which the U.S. determination had been a part, had already been resolved in Canada’s favour.

Thus, one is presented here with either a violation of GATT Article XI or with a safeguard action that might fall under the provisions of GATT Article XIX and the WTO Safeguards Agreement. However, this Agreement, including its prohibition against grey-area measures, is said according to Article 1 to apply to those measures provided for in Article XIX of GATT 1994. GATT Article XIX permits emergency action for two types of circumstances. As according to paragraphs 1 (a) and (b), either to address the result of unforeseen developments and the effect of the obligations incurred by a contracting party under this (GATT) Agreement, or alternatively, for a product which is the subject of a concession with respect to a preference. Thus, whether the problem caused to the U.S. resulted either from the operation of GATT bound tariff rates, or due to a preference possibly extended in the NAFTA, Article XIX can apply in principle for the measures.39

10.6.3 Article XIX notification of the measure

This raises the question of whether the voluntary export restraint should have been notified according to the Safeguards Agreement and then regulated according to its procedures. One argument against notification would refer to the illegality of the agreement made. Since the Article XIX understanding prohibits these arrangements according to Article 11, it has been argued that notification would never be required since the arrangement was unlawful. This would seem to be a difficult construction since without a requirement of transparency, the Safeguards Agreement and its provisions for monitoring would be rendered non-effective. Since the expressed intent of the Agreement according to its preamble is to "re-establish multilateral control over safeguards and eliminate measures that escape such control", a conclusion that prohibited measures need not be notified would easily undermine the objective of the Agreement.

A second argument against notification, and submission of the measure for control by the Committee on Safeguards, would relate to the existence of the CUSTA (later NAFTA) as it might have controlled with speciality the rights and obligations between these regional members. Here it could be argued that NAFTA provides its own safeguards regime which did not in this case result in a referral to the Article XIX procedure. This is the lex specialis argument. Such an interpretation if correct, would provide the widest latitude for regional members to activate restraint arrangements outside the purview of the WTO Agreement on Safeguards, and further outside the purview of its prohibition on grey-area measures. For NAFTA Emergency Actions in particular, Article 801 of the Agreement provides a set remedy for imports causing injury during the transition period. The parties are permitted to suspend the rate of duty reduction as scheduled by the Agreement, and then to impose an increase in the rate of duty to the MFN rate applicable at the time action is taken or to the immediately

39 This, unless the measure undertaken was "sought, taken or maintained" according to some other provision of GATT-1994, an annexed Agreement or, "pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994," WTO, Safeguards Agreement, Article 11.2.
prior to the Agreement, whichever is lesser.\footnote{NAFTA, Article 801, para. 1, Supra note 28.} Thus, according to NAFTA, an export volume restraint would not in any case comply with the provisions of the Chapter on Emergency Action.

Whether or not lex specialis applies to permit regional members to except the application of the Safeguards Agreement turns also on the issue of notification. If notification is required, then the Agreements monitoring provisions and tests and rules governing application among WTO Members should also apply. It is clear that the Safeguards Agreement establishes rules for application of "safeguard" measures, which are, "understood to mean those provided for in Article XIX (GATT 1947)". What types of measures are at hand? The original Article XIX does not use the terms "safeguards", but paragraph XIX:2 of GATT-1947 requires that before any party shall take an action pursuant to the provisions of paragraph 1, it shall give notice in writing. As indicated above, paragraph 1 (a) and (b) contemplates application both for tariff concessions in accord with the GATT and concessions in respect of a preference. Preference granted within Article XXIV arrangements is not excluded by GATT Article XIX, rather referring only to the action undertaken by a contracting party. Article 11 (c) of the Safeguard Agreement subjects the application of the Agreement and its prohibition of certain measures only to those measures which are not authorised by other GATT provisions and protocols and agreements and arrangements concluded within the framework of GATT 1994. It can be suggested that a safeguard regime which excepts the application of Article XIX and is concluded within an Article XXIV agreement is such an agreement or arrangement". Except however, that Article XXIV itself provides explicitly for the adoption of such measures only within the context of application of GATT Article XI-XV and XX. In other words, there is no express authorisation within the Article to adopt measures that fall outside of Article XIX's control.

Third is the question of which substantive types of suspensions must be notified. By Article XIX, Members have arguably obliged themselves to notify (at the latest) upon a decision to suspend an obligation or withdraw or modify a concession. However, this may not be occurring in the case of a regional framework where a regional preference that is not a GATT concession is at issue. Thus for example, between GATT parties a bound tariff duty of 20% may be at issue for suspension, while between regional parties a 0% duty may be under consideration. If the preference has gone beyond the GATT concession, the entire Article XIX Agreement may not be seen to apply in any manner unless regional parties have incorporated it or have failed to designate a lex specialis provision.

However, there is an additional question where the preference being suspended also acts to suspend the underlying GATT MFN concession. Thus as above, if the 0% preference duty is being suspended in favour of a quantitative restriction, then both the preference and the GATT concession are affected. Likewise, if the suspension is made in favour of a duty increase, then any increase above the GATT binding would also impinge the underlying concession. Perhaps this indicates the dividing line between the operation of Article XIX and Article XXIV for these cases.

10.6.4 Conclusion on the Canada softwood safeguard measure

Footnote 1 to the 1994 Safeguards Agreement states that "nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV. This does not say either that Article XXIV:8 formations are exempt from Article XIX procedures or that Article XIX procedures apply to regional formations. What can be said is that The Agreement applies to WTO Members and does not by its terms exclude any parties. Article 12 of the Agreement requires a WTO notice on commencements of investigations, the finding of injury, or the taking of a decision to apply a safeguard. Both the U.S. and EU have provisions for these procedures in their regional agreements. At the point in time when these procedures are invoked according to the regional framework, arguably a WTO notice is then required, at least if the action contemplated might result in the suspension of a GATT obligation or in "modifying or withdrawing a concession." Finally, even while the negotiators did not pre-judge the relationship between the two regimes as noted above, the
10.7 Chapter Conclusion: safeguards and regionalism

The threat of terminating internal trade is most aptly considered in cases of protective measures employed where an exclusion occurs during the operation of an agreement. This may occur between regional partners after the interim period because Article XXIV:8(b) has not been interpreted by any consensus decision of the GATT Contracting Parties or the WTO members to exclude the use of contingent protective instruments between regional partners. However, where regional parties do reserve the right to apply contingent measures internally, there is little question that the effect of this reservation would serve as a basis to eliminate trade from the coverage of the free-trade area that otherwise would be subjected to a free movement commitment. Working group reviews have traditionally passed on considering this problem, although retention of contingent commercial power between partners does relate to the legal capacity of partners to eliminate barriers to trade for substantially all the trade. A number of free-trade area working group reviews have raised the collateral concern of whether regional partners have a right to relieve each other from safeguard measures which remain in place against outsiders, thereby providing for more favourable treatment between regional partners relative to other GATT partners. Here, attention has been drawn to the reverse scenario where outsiders are not made subject to a measure that is applied by regional partners to their trade internally.

Since dozens of WTO members are parties to regional agreements with special safeguard provisions, it is not a trivial matter as to whether such provisions are under the jurisdiction of the WTO, and therefore covered by the GATT and its Agreement on Safeguards. As indicated in a background note by the WTO Secretariat, emergency safeguards are found in virtually all of the 68 regional trade agreements, and for all of these, only 6 limit the use of safeguards to the interim period. In nearly all of the 68, increased imports alone can trigger a safeguard. The majority of agreements allow safeguards based on more than a single criterion, and many criteria posed in agreements are less stringent than the multilateral rules. Regional trade agreements in general do not specify whether the measure may be imposed as linked to concessions granted in the agreement. Only a few agreements are said to include parameters referring to prevailing GATT disciplines.

This is the environment within which the new WTO Agreement on Safeguards has taken effect. Since 45 of the 68 agreements listed have also taken effect since 1990, one may conclude that GATT parties, if not actively opting out of Article XIX, certainly have provided the legal frameworks by which to accomplish this across a large quantity of their trade. If lex specialis is permitted to be designated to relegate the WTO safeguard regime, then one would expect the bulk of safeguard actions to appear at the regional level and notices to the Article XIX procedure by regional parties to become somewhat more rare over time. Regional safeguard regimes may require some response that can address surges of imports which occur as a result of scheduled tariff decreases. However, this does not make an argument that regional measures should be exempt from GATT Article XIX and its procedures. If the regional preference is in fact the cause of the injury, then other GATT parties need not be caught by the measure in any case where the new procedures permit certain selectivity. If

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42 WTO, Committee on Regional Trade Agreements, Inventory of non-tariff Provisions in Regional Trade Agreements, WT/REG/N/26, 5 May 1998, Annex VI, paras. 41-44.
external trade is a contributing factor, then the WTO Article XIX procedures appear sufficient to allocate safeguards between regional members and non-members alike according to its provisions. In the alternative, if Article XIX has no lawful application to regional parties, then the prospect remains that regional members will be compelled to pay for the adjustment costs for injuries that should have been remedied elsewhere. The cause for this diversion of treatment to members rather than non-members would be found in the relative ease of invoking a regional procedure as contrasted to the more rigorous multilateral procedures within the WTO.

As the discussion turns to consider the dispute resolution cases in the WTO, one can determine that legal developments are occurring which appear to press new interpretations of GATT Article XXIV. These may well have a bearing on the presumed flexibility of regional members regarding the availability of internally trade-restrictive measures.