

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

**ANTI-DUMPING AND SAFEGUARDS IN THE
EURO-MEDITERRANEAN ASSOCIATION AGREEMENTS**

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

**ANTI-DUMPING AND SAFEGUARDS IN THE
EURO-MEDITERRANEAN ASSOCIATION AGREEMENTS**

UNCTAD Technical Cooperation Project on Trade Relations and
Economic Cooperation in the Mediterranean Region

(INT/93/A34)

(i)

ACKNOWLEDGMENT

This present study has been carried out by Messrs: Driessen and Vermulst, Vermulst & Waer, Brussels, Belgium in collaboration with the UNCTAD Technical Cooperation Project on Trade Relations and Economic Cooperation in the Mediterranean Region (INT/93/A34).

FOR FURTHER INFORMATION, PLEASE CONTACT:

United Nations Conference on Trade and Development

Mr. S. Inama, Project Manager (Room E.8054)

Technical Cooperation Project on Trade Relations and

Economic Cooperation in the Mediterranean Region

Palais des Nations

ch - 1211 Geneva 10

Switzerland

Tel: (++)41 22) 907 49 44

Fax: (++)41 22) 907 00 44

E-mail: Stefano.Inama@UNCTAD.ORG

The views expressed here are those of the authors and do not necessarily reflect the views of the UNCTAD secretariat.

PREFACE

This study is published under the auspices of the UNCTAD Technical Cooperation Project on Trade Relations and Economic Cooperation in the Mediterranean Region (INT/93/A34). It is part of a series of publications aimed at assisting exporters, producers and government officials to utilize the trade opportunities available to Mediterranean countries under the Euro-Mediterranean Association Agreements signed with the European Community. The series comprises the following handbooks and studies:

Handbooks:

- Handbook for exporters from Mediterranean countries and territories to the European Union markets - Part A: Algeria, Egypt, Jordan, Lebanon and Syrian Arab Republic (UNCTAD/ITCD/TSB/Misc.3, 8 April 1997)

- Handbook for exporters from Mediterranean countries and territories to the European Union markets - Part A, Addendum: Algeria, Egypt, Jordan, Lebanon and Syrian Arab Republic (UNCTAD/ITCD/TSB/Misc.3/Add.1, 23 May 1997)

- Handbook for exporters from Mediterranean countries and territories to the European Union markets - Part B: Morocco and Tunisia (UNCTAD/ITCD/TSB/Misc.7, 1 August 1997)

- Handbook for exporters from Mediterranean countries and territories to the European Union markets - Part B, Addendum: Morocco and Tunisia (UNCTAD/ITCD/TSB/Misc.7/Add.1 - to be published in early 1998)
- Handbook for exporters from Mediterranean countries and territories to the European Union markets - Part C: West Bank and Gaza Strip (to be published in 1998)

Studies:

- Access to EC markets for agricultural products after the Uruguay Round and export interests of the Mediterranean countries (UNCTAD/ITCD/TSB/Misc.5, 9 April 1997)
- A preliminary analysis of the implication of the competition law provisions in the Euro-Mediterranean agreements (ITCD/TSB/Misc.8, to be published by the end of 1997)
- Anti-dumping and safeguards in the Euro-Mediterranean Association Agreements (ITCD/TSB/Misc.10, present study)
- Issues of intellectual property rights protection in the Euro-Mediterranean Agreements (to be published in 1998)
- The MEDA Regulation: Implications for small and medium-size enterprises (to be published in 1998)

(ii)

CONTENT

ANTI-DUMPING AND SAFEGUARD IN THE EURO-MEDITERRANEAN AGREEMENTS

Introduction

This study reviews the provisions on anti-dumping and safeguards contained in the Euro-Mediterranean Association Agreements (EMAs) concluded or in the course of negotiation between the European Community (EC) and its Mediterranean Partners. In the context of this study, the expression “Mediterranean Partners” is utilized to indicate Algeria, Egypt, Jordan, Israel, Lebanon, Morocco, the Palestinian Authority, Syria and Tunisia. In view of the special characteristics of the EC’s relationship with Malta, Cyprus and Turkey, the EC’s association agreements with these countries are not reviewed in this study.

The content of this study is as follows. Section 1 discusses the provisions in the EMAs on anti-dumping and compares them with other trade agreements concluded by the European Community with third countries. Section 2 discusses the provisions on safeguards and section 3 analyses some other special measures in the EMAs.

After the European Community concluded far-reaching association agreements with a large number of Central European countries,¹ pressure increased in the Southern European EC Member States for a similar effort towards their Mediterranean neighbours.

1. Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.

Mediterranean non-member countries are the EC's third largest trade partners after the US and the former European Free Trade Association (EFTA) countries. The trade relations between these two blocks represent 7.8% of the total EC external trade. The Mediterranean countries' trade is also strongly orientated to the EC. The Maghreb countries have a total of 70% of their exports to the EC and 66% of their imports from the EC.²

This resulted in a review of the EC policy *vis-à-vis* the Mediterranean countries based on “*political dialogue, free trade and economic, financial, social and cultural cooperation*” which in turn led to the initiative of the EMAs.³

The European Community is currently negotiating, or has concluded, such second-generation EMAs with Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, the Palestinian Authority, Syria and Tunisia, as can be seen from the following table:

Overview of the state of negotiations (as of August 1997)

Country	State of negotiations	Date
---------	-----------------------	------

² European Parliament's "Report on economic trade relations between the European Community and the countries of the Mediterranean basin", Rapporteur: Mrs Maria Izquierdo Rojo, European Parliament session documents (A4-0271/95) of 31 October 1995.

³ *idem* paragraph M 2.

Tunisia	Agreement signed	July 1995
Israel	Agreement signed	November 1995
Morocco	Agreement signed	January 1996
Palestinian Authority of the West Bank and the Gaza Strip	Agreement signed	February 1997
Jordan	Agreement initialed	May 1997
Egypt, Lebanon, Algeria	Under negotiation	—
Syria	Exploratory talks	—

The agreements follow a standard model which makes it relatively easy to compare them. In particular, the clauses concerning anti-dumping and safeguard measures are similar to a large extent.

The agreements aim at the establishment of free-trade areas under the provisions of Article XXIV of GATT 1994. To achieve this objective, the EMAs provide that all quantitative

restrictions affecting trade in industrial products will be eliminated upon the entry into force of the agreements. Mediterranean countries already enjoy duty and quota-free treatment on their industrial exports to the European Community since the conclusion of their respective cooperation agreements with the EC, with the exception of processed agricultural products and certain categories of textile products. Mediterranean countries will now also be required to dismantle tariff protection of their industrial sector *vis-à-vis* the European Community within a transition period of twelve years. As regards agricultural products, although the agreements entail only partial liberalization,⁴ further liberalization is envisaged after 1 January 2001, and should be the subject of negotiations between the parties starting no later than 1 January 2000.

Each of the Parties to the EMAs may impose trade policy instruments under the conditions laid down in the agreements. This especially concerns the following trade policy instruments:

- (1) *special protective measures in order to protect infant industries in Morocco/Tunisia* (Article 14 of the agreement concerned).⁵ These measures may take the form of a 25% *ad valorem* customs duty on imports into Morocco/Tunisia. The EMAs give the conditions under which Morocco and Tunisia may impose such additional duties. There is no equivalent for this provision in the EC-Israel EMA. Furthermore, this is an asymmetrical right: the Community has no corresponding right.

⁴ For a detailed description of the preferential market access provisions applying to Mediterranean countries' agricultural exports, see *Handbook for exporters from Mediterranean Countries and Territories to the European Community markets*, UNCTAD 1997, UNCTAD/ITCD/TSB/Misc.3. For an analysis of the implications of these provisions, see S. Tangermann, *Access to European Community Markets after the Uruguay Round and export interests of the Mediterranean Countries*, UNCTAD 1997, UNCTAD/ITCD/TSB/Misc.5.

⁵ A similar clause features in, *e.g.*, the Interim Agreement concluded with the Palestinian Authority (EC-Palestinian IA) and the draft EC-Jordan EMA.

- (2) *anti-dumping measures* (Article 24 of the Moroccan and Tunisian EMAs). The anti-dumping clauses are discussed in more detail below.
- (3) *safeguard actions* (Article 27 of the Moroccan and Tunisian EMAs). This is discussed in more detail below.
- (4) *restrictions to exports* (Articles 35 and 28 of the Moroccan and Tunisian EMAs).

The very explicit legal regimes concluded in the Uruguay Round form a second reference framework of relevance to the comparison of these agreements. The rules contained in the WTO Anti-Dumping Agreement⁶ (WTO, World Trade Organization) and in the WTO Agreement on Safeguards limit the European Community more in its actions *vis-à-vis* the Mediterranean countries than those contained in the EMAs.

Nevertheless, there is some limited manoeuvring room for Mediterranean governments that are still negotiating and for those that are now implementing the EMAs. This study is also partly intended to assist such governments in their negotiation strategies and implementation and in formulating an active commercial policy *vis-à-vis* the European Community.

1. Anti-dumping

1.1 Introduction

⁶ In full: *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.

Anti-dumping has always been the major commercial defence instrument for the European Community, although the number of anti-dumping proceedings targeted at Mediterranean countries⁷ has remained very limited.⁸

Article 24 of the EC-Morocco EMA and the concomitant provision in the other agreements⁹ provides for a general clause allowing anti-dumping actions by either Party. Anti-dumping measures are, however, put in the framework of Article VI of GATT 1994 and the WTO Anti-Dumping Agreement; moreover and more important, the procedure described in Article 27 of the EC-Morocco EMA¹⁰ must be followed if anti-dumping measures are to be imposed.

With respect to anti-dumping measures, Article 27 provides for a conciliation procedure in the framework of the Association Committee before any measure is taken. This body will seek to reach a solution acceptable to both parties. If no end is put to the dumping or no other satisfactory solution is agreed to by the parties, the importing Party must inform the Association Committee of the fact that an anti-dumping investigation has been initiated. Anti-dumping measures may only be imposed if the Parties have not reached a satisfactory solution within thirty days of the notification of the investigation's initiation.¹¹

⁷ With the exception of Turkey, which has been subjected to EC anti-dumping actions quite regularly.

⁸ Throughout the following discussion it must be remembered that the Mediterranean countries are obviously equally entitled to impose anti-dumping measures on products from the European Community under the conditions laid down in the association agreement and WTO law. The agreements in this respect also provide an opportunity to producers in the Mediterranean countries. In order to avoid WTO challenges from the side of the European Community, administrations in Mediterranean countries would be well advised to follow scrupulously WTO rules in detail whenever they intend to impose anti-dumping duties on EC products.

⁹ For instance: Article 24 of the EC-Tunisian EMA; Article 20 of the EC-Palestinian Interim Agreement; Article 23 of the draft EC-Jordan EMA, and Article 22 of the EC-Israel EMA.

¹⁰ Article 27 of the EC-Tunisian EMA; Article 26 of the draft EC-Jordan EMA; Article 23 of the EC-Palestinian IA, and Article 25 of the EC-Israel EMA.

¹¹ Article 25 of the EC-Israel EMA and Article 27 of the EC-Tunisian EMA.

These provisions are quite standard in trade agreements concluded by the European Community.

The anti-dumping clause featured — in a somewhat differently worded form — in the 1970s generation free-trade agreements concluded by the Community with its Mediterranean partner countries, for example in the following agreements:

- the 1978 Co-operation agreement between the EC and Algeria,¹²
- the 1978 Co-operation agreement between the EC and Morocco,¹³
- the 1978 Co-operation agreement between the EC and Syria,¹⁴
- the 1978 Co-operation agreement between the EC and Tunisia,¹⁵ and
- the 1978 Co-operation agreement between the EC and Egypt.¹⁶

Similarly, an anti-dumping clause was also included in the agreements concluded with EFTA countries,¹⁷ in the association and interim agreements concluded with Central European

¹² Official Journal L 263/2 of 27 September 1978. Article 34(1) thereof:
“If one of the contracting parties finds that dumping is taking place in trade with the other Contracting Party, it may take appropriate measures against this practice in accordance with the Agreement on implementation of article VI of the General Agreement on Tariffs and Trade, under the conditions and in accordance with the procedures laid down in Article 16.”
 See also the 1975 Agreement between the EC and Israel, Official Journal L 136/3 of 28 May 1975. Article 14 thereof is identical to Article 34(1) of the 1978 Agreement between the EC and Algeria.

¹³ Official Journal L 264/2 of 27 September 1978. Article 36(1) thereof is identical to Article 34(1) of the 1978 Agreement between the EC and Algeria.

¹⁴ Official Journal L 269/2 of 27 September 1978.

¹⁵ Official Journal L 265/2 of 27 September 1978. Article 35(1) thereof is identical to the corresponding provision in the EC-Algerian agreement.

¹⁶ Official Journal L 266/2 of 27 September 1978.

¹⁷ For instance: the 1972 Agreement between the EC and Austria, Article 25 thereof contains literally the same text as the EC-Algerian Agreement (Official Journal L 300/2 of 31 December 1972, now defunct

countries,¹⁸ and with the Baltic countries.¹⁹ In certain other agreements the Community has strayed from this well-trodden path and has concluded differently worded provisions on the applicability of the anti-dumping instrument.

For example, Article 8(1) of the *1973 EC-Cyprus association agreement*²⁰ contains more extensive provisions.²¹ After the usual clause allowing Parties to adopt anti-dumping measures in accordance with GATT law, that agreement provides that “[*In case of urgency*]” provisional measures may be taken as long as the association Council is informed. Consultations must be held

¹⁸ as a consequence of Austria’s accession to the EC); the 1972 Agreement between the EC and Portugal (Official Journal L 301/165 of 31 December 1972) the 1973 Agreement between the EC and Finland (Official Journal L 328/2 of 28 November 1973, now defunct as a result of Finland’s accession to the EC, Article 25 of the agreement was identical to the corresponding provision in the EC/Algeria agreement); the 1972 Agreement between the EC and Iceland Official Journal L 301/2 of 31 December 1972, Article 26 thereof is identical to its corresponding provision in the EC-Algerian agreement; the 1973 Agreement between the EC and Norway (Official Journal L 171/2 of 27 June 1973, Article 25 thereof is identical to the corresponding provision of the EC-Algerian agreement); the 1972 Agreement between the EC and Switzerland (Official Journal L 300/97 of 31 December 1972 (now defunct as a result of Sweden’s accession to the EC), Article 25 was identical to the corresponding clause in the EC-Algeria agreement. Such as, for example, the 1993 Interim Agreement between the EC and Bulgaria, Official Journal L 323/2 of 23 December 1993, Article 24 thereof (Article 30 of the Europe Agreement) provides that: “*If one of the Parties finds that dumping is taking place in trade with the other Party within the meaning of Article VI of the General Agreement on Tariffs and Trade, it may take appropriate measures against this practice in accordance with the Agreement relating to the application of Article VI of the General Agreement on Tariffs and Trade, with related internal legislation and with the conditions and procedures laid down in Article 28.*”

The 1992 Interim Agreement between the EC and Czechoslovakia Official Journal L 115/2 of 30 April 1992, same text as the agreement with Bulgaria; the 1993 association agreement between the EC and Hungary, Article 29 of the EC Hungarian association agreement (Official Journal L 347/2 of 31 December 1993, Article 23 of the Interim Agreement: Official Journal L 116/2 of 30 April 1992) is identical to the corresponding provision in the EC-Bulgarian interim agreement; the 1993 association agreement between the EC and Poland Article 29 of the EC-Polish association agreement (Official Journal L 348/2 of 31 December 1993, Article 23 of the Interim Agreement: Official Journal L 114/2 of 30 April 1992) is identical to the corresponding provision in the EC-Bulgarian interim agreement; the 1993 Co-operation agreement between the EC and Slovenia Official Journal L 189/153 of 29 July 1993 (Article 29).

¹⁹ Such as for instance, the 1994 free-trade agreement between the EC and Latvia Official Journal L 374/2 of 31 December 1994 (Article 23) and the 1994 free-trade agreement between the EC and Lithuania, Official Journal L 375/2 of 31 December 1994 (Article 23).

²⁰ See further Article 56 of the 1978 Additional Protocol to the Agreement establishing an association between the EC and Greece consequent to the accession of new member States to the Community, Official Journal L 161/2 of 19 June 1978.

²¹ Official Journal L 133/2 of 21 May 1973.

on such measures not later than two weeks after their implementation.²² In view of the fact that in EC anti-dumping practice, definitive anti-dumping duties are always preceded by provisional measures, the term “*urgency*” would appear somewhat stretched to describe usual Community practice.

Article 10 of the *1974 Agreement between the EC and Lebanon*²³ goes even further by providing for more guarantees on the consultation process. The first sentence of the first paragraph contains the more or less standard clause that either Party may impose “*protective measures against such practices*” as long as these are in accordance with GATT law. “*In urgent cases*” the Contracting Party concerned may, after notifying the joint committee, apply the “*interim*” measures provided for by that agreement. As is the case in the 1973 EC-Cyprus agreement, such consultations must take place within two weeks after the “*implementation*” of such measures. It may be assumed that “*implementation*” here means imposition.

The 1974 EC/Lebanon Agreement does contain, however, a third paragraph:

“At the request of either contracting party, consultations shall take place every three months in the joint committee on any observed dumping practices, bounties or subsidies and on measures taken in regard thereto.”

This provision has not been repeated in other agreements. To what extent the provisions in the agreements with Cyprus and Lebanon would have led to a different practice is hard to say,

²² A similar provision was contained in the *1970 Agreement between the EC and Spain*, Official Journal L 182/2 of 16 August 1970 (defunct since Spain’s accession to the Community).

²³ Official Journal L 18/2 of 22 January 1974.

as there have been no EC anti-dumping proceedings against either country.

Even more elaborate is the *1991 Framework agreement for co-operation between the EC and Mexico*.²⁴ Article 13 of this agreement provides for a general exchange of information on (*inter alia*) issues relating to anti-dumping. Article 15 obliges the EC authorities if “*allegations arise of dumping*” to “*do their utmost*” to bring about “*a constructive solution*” to the case by “*examining] requests made by the other Party in connection with the case in question*”. “*Allegations*” would seem to mean *complaints* within the meaning of Article 5 of the basic anti-dumping Regulation.²⁵ Article 15 further provides that “*interested parties*” must be informed “*at their request of the essential facts and considerations which will serve as the basis for a solution.*” The details to implement this do not add much in substance to existing EC anti-dumping legislation other than the requirement that the European institutions “*do their utmost to bring about a constructive solution*” before definitive anti-dumping duties are imposed. The limited number of anti-dumping proceedings vis-à-vis Mexican products do not convey the impression that Mexico got any special treatment in practice.

Lastly, Article 46 of the *1995 EC-Turkey customs Community decision* must be mentioned, which provides that the European Community may impose anti-dumping measures on imports from Turkey (and vice versa), if dumping is determined. A condition for the imposition is that the Customs Community Joint Committee is informed accordingly.

1.2 Practical value of the anti-dumping clause

²⁴ Official Journal L 340/2 of 11 December 1991.

²⁵ Council Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community.

Article 24 of the EC-Morocco EMA, quoted above, refers to “*the procedures laid down in Article 27.*”²⁶ This provision requires the Community authorities to supply the Association Committee with

“all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.”

The Community Institutions are obliged to do this before taking the measures or, where exceptional circumstances requiring immediate action make prior information or examination impossible, as soon as possible.²⁷ Since the EC basic anti-dumping legislation never allows for immediate action without prior examination,²⁸ this latter option will, at least as far as EC anti-dumping measures are concerned, largely remain a dead letter.

One important instruction contained in Article 27 must be noted: in the selection of appropriate measures, priority must be given to those which least disturb the functioning of the

²⁶ Article 27 corresponds with Article 27 in the EC-Tunisia EMA, with Article 26 of the draft EC-Jordan EMA and with Article 23 of the EC-Palestinian IA.

²⁷ Article 27(3)(d) adds that “*where exceptional circumstances requiring immediate action make prior information or examination, as the case may be, impossible, the Party concerned may, in the situations specified in Articles 24, 25 and 26 apply forthwith such precautionary measures as are strictly necessary to remedy the situation, and shall inform the other Party immediately.*”

²⁸ Article 7(1) of the basic anti-dumping Regulation provides in this respect that:
“[provisional duties may be imposed if proceedings have been initiated in accordance with Article 5, if a notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments in accordance with Article 5 (10), if a provisional affirmative determination has been made of dumping and consequent injury to the Community industry, and if the Community interest calls for intervention to prevent such injury. The provisional duties shall be imposed no earlier than 60 days from the initiation of the proceedings but not later than nine months from the initiation of the proceedings.]”

In effect, this means that the Commission will be precluded from imposing provisional anti-dumping duties before the verification visits have taken place. The provision is partially based on Article 7.3 of the WTO Anti-Dumping Agreement, which provides that provisional measures may not be applied sooner than 60 days from the date of initiation of the investigation.

EMA. EC anti-dumping measures can take the form of anti-dumping duties or undertakings. Anti-dumping duties normally take the form of *ad valorem* additional customs tariffs, although other forms (i.e. a fixed duty per weight unit) occasionally are used. Undertakings are agreements between the exporter concerned and the European Commission in which the exporter agrees to maintain a certain minimum price level.²⁹ Normally, undertakings are less onerous for exporters than anti-dumping duties. It would seem, however, that Article 27 does not impose a *legal* obligation for the European Commission to choose undertakings instead of anti-dumping as the proper anti-dumping remedy. The reason for this is that it may often be impractical to monitor undertakings, or impossible to calculate one minimum price.³⁰

Article 27(3)(a)³¹ lays down some procedural requirements which, however, are of secondary importance to those laid down in the EC basic anti-dumping Regulation. The Community Institutions are obliged to inform the Association Committee as soon as the investigation is initiated. Since Article 5.5 of the WTO Anti-Dumping Agreement requires the Community to notify the authorities of the exporting country *before* a proceeding is initiated, this provision adds little to existing rules.

In any event, it appears that the obligation, at least as far as the EC Court of First Instance is concerned, does not go beyond an obligation to inform the Association Council: in 1996 the Turkish exporter Söktas appealed the initiation of the first anti-dumping proceeding concerning

²⁹ Agreements limiting exported quantities have occasionally been applied in the past but now seem disfavoured by the Commission.

³⁰ For instance, in the first proceeding concerning *Unbleached cotton fabrics from China, Egypt, India, Indonesia, Pakistan and Turkey* one very major obstacle to undertakings was the enormous variety of exported types of unbleached cotton fabrics, with a corresponding variety of normal values.

³¹ ... and its corresponding provision in the other EMAs.

Unbleached cotton fabrics from China, Egypt, India, Indonesia, Pakistan and Turkey. Söktas argued that the conditions for initiating anti-dumping proceedings under Article 47 of the EC-Turkish Customs Community Decision were not met. The President of the EC's Court of First Instance disagreed: Article 47 merely requires the Community to inform the EC-Turkey Association Council, but does not make the initiation of the case as such dependent on the approval of that Council. Moreover, the President held that the sheer initiation does not prejudice the intervention of the Association Council.³²

Regrettably, EC anti-dumping practice has never seen application of the “*satisfactory solution*” option in the second sentence of Article 27(3)(a) of the EC-Moroccan EMA, which provides that:

“[If no end has been put to the dumping or no other satisfactory solution has been reached within thirty days of the notification being made, the importing Party may adopt the appropriate measures . . .”

The corresponding provisions in the EC-Tunisian EMA is virtually similarly worded; moreover, the association agreements with Central European countries contain virtually the same text.³³

32. *Case T-75/96 R, Söktas Pamuk Ve Tarım Ürünlerini Değerlendirme Ticaret Ve Sanayi A.S. vs Commission, Order of the President of the Court of First Instance of 26 August 1996, not yet published.*

33. For instance the association agreement concluded between the EC and Hungary (Official Journal L 347/2 of 31 December 1993, Article 33):

“2. before taking the measures provided for therein or, in cases to which paragraph 3 (d) applies, as soon as possible, the Community or Hungary, as the case may be, shall supply the Association Council with all relevant information with a view to seeking a solution acceptable to the two Parties. In the selection of measures, priority must be given to those which least disturb the functioning of this Agreement.

3. . . . (b) as regards Article 29, the Association Council shall be informed of the dumping case as soon

Even though the experience of exporters from the Mediterranean countries concerned with EC anti-dumping law is limited, proceedings against other countries associated with the Community may thus to some extent serve as a guideline.

The proceeding laid down by the association agreements requires the Commission to actively discuss any anti-dumping proceeding against Mediterranean countries in the framework of the respective Association Committee or Association Council before taking the measures. It is incumbent on the Community to supply “*all relevant information*”; such discussion must be geared to finding “*a solution acceptable to the Parties*”; in any event, if the Community decides to adopt anti-dumping measures, “*priority must be given to those which least disturb the functioning of the Agreement.*”

In practice these provisions are barely lived up to and this is largely a consequence of two factors. First, the Parties are limited under WTO law in their choice of possible solutions: the panel in the *Trade in semiconductors* case³⁴ found Japanese export restrictions intended as a solution to a dumping situation to be a violation of Article XI of the General Agreement. In other words, the solution should normally be imposed by the *importing* country. That proceeding involved semiconductors, a highly strategic and technical product with relatively few production sources in the world. In the case of exports from Mediterranean countries, however, it would seem unlikely that other countries would make similar complaints.

as the authorities of the importing Party have initiated an investigation. When no end has been put to the dumping or no other satisfactory solution has been reached within 30 days of the matter being referred to the Association Council, the importing Party may adopt the appropriate measures; (d) where exceptional circumstances requiring immediate action make prior information or examination, as the case may be, impossible, the Community or Hungary whichever is concerned may, in the situations specified in Articles 29, 30 and 31, apply forthwith the precautionary measures strictly necessary to deal with the situation.”

³⁴ Japan — *Trade in semiconductors*, 35 BISD 116.

Second, the dynamics caused by the internal legislation of the Community play an important role. In the following paragraphs the normal relevant procedures are described as they would be applied to the Mediterranean countries under the current anti-dumping practice of the Commission (or any other country other than the European Economic Area (EEA) states).³⁵

Once a complaint has been officially lodged by the (purported) EC industry, the Commission has 45 days to decide whether or not to initiate the proceeding. If the Commission decides that the complaint contains sufficient *prima facie* evidence, it will consult the EC's Anti-Dumping Committee of member State representatives.³⁶ For example, in the first *Unbleached cotton fabrics* proceeding mentioned above, the complaint was officially submitted on 8 January 1996. However, informal versions had already circulated as early as December 1996. The European Commission terminated the then still ongoing *Cotton fabrics* proceeding on 20 February 1996, and initiated the first *Unbleached cotton fabrics* proceeding one day later (and 44 days after the official submission of the complaint).

After the Anti-Dumping Committee has been consulted, but before the initiation (*i.e.*, before the 45 days' term lapses)³⁷ the Mission to the EC of the country concerned is officially informed by a *note verbale* that the Community intends to initiate an anti-dumping proceeding in

³⁵ The EEA states are (besides the European Community itself) Iceland, Norway and Liechtenstein. Under the EEA Agreement, only anti-dumping measures against these countries in the area of fish products are allowed. This obviously only concerns Iceland and Norway.

³⁶ Article 5(9) of the EC's basic anti-dumping Regulation provides in this respect that:
 "[where, after consultation, it is apparent that there is sufficient evidence to justify initiating a proceeding the Commission shall do so within 45 days of the lodging of the complaint and shall publish a notice in the Official Journal of the European Communities. Where insufficient evidence has been presented, the complainant shall, after consultation, be so informed within 45 days of the date on which the complaints is lodged with the Commission.]"

³⁷ The Commission and the complainant can play around a little bit with the 45 days' deadline by withdrawing and resubmitting the complaint. In fact, in the first *Unbleached cotton fabrics* proceeding a draft complaint circulated at least one month before the official submission.

the near future pursuant to a complaint containing sufficient *prima facie* evidence. Since it is the European Commission policy to keep the initiation secret as long as possible, in practice, this *note verbale* tends to come at most some days before initiation.

The matter is normally not, however, discussed at that stage in the framework of the relevant Association Council or Association Committee, nor does Article 24 require a discussion at that stage; mere *notification* of the initiation by the European Community Institutions suffices.

After the proceeding is initiated through the publication of a notice in the *Official Journal of the European Communities* (a “*notice of initiation*”), the European Commission commences the investigation. The Commission will investigate the exporters who have made themselves known. In the first *Unbleached cotton fabrics* proceeding the number of exporters in all countries involved was so large that the Commission decided to investigate a representative sample and to apply the weighted average dumping margin found for the sample on the companies which had expressed their cooperation in time. Since in Egypt virtually all unbleached cotton fabric is produced by four companies, these were selected for the sample.

The Commission may determine in the course of its investigation that the conditions for anti-dumping measures exist, i.e.:

- the existence of dumping above the 2% *de minimis* threshold;
- the existence of injury;
- causality between the dumping and the injury;
- a Community interest in imposing anti-dumping measures.

If these conditions are fulfilled, the Commission will normally, after consulting the EC Anti-Dumping Committee, impose provisional anti-dumping measures. Under current EC anti-dumping law provisional anti-dumping measures must be imposed within nine months after the initiation. Normally,³⁸ immediately after the publication of the provisional anti-dumping measures the Commission provides *disclosure of the details underlying the essential facts and considerations on the basis of which provisional measures have been imposed* to the companies/trade associations concerned.³⁹ The Commission will normally also inform the Mission of the exporting country concerned. Whereas the companies concerned are entitled to copies of the calculation sheets showing how the Commission calculated their dumping margins, the notification to the Mission normally contains little more than a copy of the Regulation imposing provisional anti-dumping duties. In practice, the Mission concerned will already have obtained a copy on the day following publication, either from the Official Journal publication office or from the lawyers for the exporters.

There has been only very little experience with the anti-dumping clauses in the EMAs. It may therefore be helpful to look at experiences in Central EUROPE. For instance, Article 29 of the Hungarian association agreement is virtually identical to Article 24 of the Moroccan and Tunisian EMAs. Article 33 of the Hungarian association agreement, which corresponds virtually literally to Article 27 of the EC-Moroccan EMA, obliges the Community, before it imposes provisional anti-dumping measures on Hungarian products, to *“supply the Association Council with all relevant information with a view to seeking a solution acceptable to the two Parties.”*

³⁸ But not always: sometimes the Commission provides disclosure some weeks before the publication of the measures (as in, *e.g.*, the first *Unbleached cotton fabrics* proceeding).

³⁹ Article 20 of the basic anti-dumping Regulation.

In practice “*seeking a solution acceptable to the two Parties*” appears to be a rather stretched expression: the experience with the Central European countries shows that the Commission case handlers will not conduct any kind of serious discussion of specific anti-dumping proceedings in the Association Council concerned. There are several possible reasons for this.

First, the structure of the European Commission barely allows it. Anti-dumping policy is administered by the European Commission’s Directorates I.C (dealing with dumping issues) and I.E (dealing with injury and Community interest issues). The nature of anti-dumping proceedings requires a high level of protection of confidential company data. For this reason, the case handlers in Directorates I.C and I.E will not normally discuss confidential company data with officials outside these Directorates. The confidentiality requirements surrounding anti-dumping proceedings imply that even Commission officials in departments other than Directorates I.C or I.E have no access to such information. *A fortiori*, Commission case handlers will be reluctant to discuss the proceeding (or in any event, the dumping aspects of it) in any detail with representatives of foreign missions. Moreover, the relative information monopoly of case handlers means that, apart from the lawyers representing the companies concerned, normally no one really is able to discuss the dumping side of the proceeding with the case handlers in much detail.

Second, the Commission is generally unwilling to reveal the proposed level of provisional anti-dumping duties before the publication of the provisional anti-dumping measures Regulation concerned⁴⁰ on the grounds that such disclosure to *some* parties could have distorting effects for other economic operators. Many anti-dumping proceedings cover several countries; if now the Commission would discuss the proposed measures with certain states, but not with other countries

⁴⁰ Or before the provisional disclosure, if that takes place earlier.

affected by the proceeding, then the effect could be highly distorting. That means that the interested parties, including the Missions, will normally be informed only *after* the measures have been imposed — at which stage it is very difficult to convince the Commission case handlers that no measures should have been imposed in the first place.

A *third* possible reason for the Commission's refusal to discuss in detail any proposed anti-dumping measures is time pressure. The basic anti-dumping Regulation, following the WTO Anti-Dumping Agreement, lays down very strict time limits. Among others, the Commission has nine months from the date of initiation to impose provisional anti-dumping duties. In practice, this period is not very long in view of the procedural steps which must be taken. For instance, in the first *Unbleached cotton fabrics* proceeding, the notice of initiation was published on 21 February 1996. The Regulation imposing provisional anti-dumping duties was published on 20 November 1996, only two days from the deadline. The deadline for the imposition of the definitive anti-dumping measures (15 months from initiation) was even missed.

Notwithstanding these problems, it would seem that, in general, partner countries of the Community do not sufficiently exploit the possibilities in the free-trade agreements to fight anti-dumping actions against their products. It seems that this is partly due to a lack of understanding of the workings of the EC's anti-dumping instrument; often, when a proceeding is initiated, partner countries tend to adopt a "wait and see" attitude when assertiveness is called for. By the time the Commission's provisional findings become public, it often is too late to seriously start lobbying.

This situation is regrettable since the free-trade agreements do oblige the Commission to

“supply the Association Committee with all relevant information required” “with a view to seeking a solution acceptable to the Parties,” and to do this *before* the measures are imposed.

In its anti-dumping practice towards Central EUROPE, the Community has favoured minimum price undertakings over anti-dumping duties as the appropriate means of settling an anti-dumping proceeding. Under such undertakings exporters oblige themselves to maintain a certain minimum price calculated by the Commission. It is not certain that this policy will be extended towards the Mediterranean countries; if the first *Unbleached cotton fabrics* proceeding, or the second *Bed linen* case (both against *inter alia* Egypt) can serve as an indication, it appears that the Commission may be less willing to accept undertakings from Mediterranean countries than from Central European countries. Mediterranean countries - and specially those still engaged in the EMA negotiations - may wish to lobby for a political commitment that anti-dumping proceedings be in principle terminated by price undertakings. The future will have to show to what extent the Commission will be prepared to change its policy in this direction.

1.3 Anti-dumping practice

There have been relatively few anti-dumping proceedings concerning Mediterranean countries.⁴¹

⁴¹ The very first anti-dumping determination affecting Israel, Morocco or Tunisia was a proceeding concerning aluminium foil from, among others, Israel. This proceeding was terminated for Israel in 1982 after the sole exporter there ceased to exist (Commission Decision of 25 November 1982 terminating the anti-dumping procedure concerning imports of aluminium foil for household and catering use originating in Austria, the former German Democratic Republic, Hungary and Israel, Official Journal L 339/58 of 1 December 1982.)

The second proceeding affecting Israel concerned acrylic fibres. In this case the proceeding did end with anti-dumping measures, namely undertakings in which the exporter concerned undertook to maintain a certain minimum price (Council Decision of 22 September 1986 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain acrylic fibres originating in

In 1987 the Community imposed a definitive anti-dumping duty of 34% on urea from Libya (the only Mediterranean country with which the Community did not conclude or is negotiating a cooperation agreement or an EMA).⁴²

Algeria was one of the countries targeted in an anti-dumping proceeding concerning iron or steel coils. This proceeding ended in 1988 with a definitive anti-dumping duty of 15 ECU per tonne being imposed on the Algerian producer.⁴³

Last, an anti-dumping proceeding was initiated in 1992 concerning imports of *Portland cement* from (among others) Tunisia into Spain.⁴⁴ This proceeding was terminated without imposition of anti-dumping measures five years later, in 1997.⁴⁵ This makes the Portland cement proceeding one of the longest reviews in EC anti-dumping history.

A first conclusion must be that, compared with other beneficiary countries, the Mediterranean countries — other than Egypt and Turkey — have been relatively successful in staying clear from EC anti-dumping actions. Turkey and — increasingly — Egypt⁴⁶ have had a

Israel, Mexico, Romania and Turkey and terminating the investigation, Official Journal L 272/29 of 24 September 1986).

⁴² Council Regulation (EC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in the former Czechoslovakia and the German Democratic Republic, Kuwait, the former USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations, Official Journal L 317/1 of 7 November 1987.

⁴³ Commission Decision No 2132/88/ECSC of 18 July 1988 imposing a definitive anti-dumping duty on imports of certain iron or steel coils, originating in Algeria, Mexico and Yugoslavia and definitively collecting the provisional anti-dumping duties imposed on those imports, Official Journal L 188/18 of 19 July 1988.

⁴⁴ Notice of initiation of an anti-dumping proceeding concerning imports into Spain of certain Portland cement originating in Turkey, Romania and Tunisia, Official Journal C 100/4 of 22 April 1992.

⁴⁵ Official Journal L 67 /27 of 7 March 1997.

⁴⁶ Council Regulation (EC) No 3642/92 of 14 December 1992 imposing a definitive anti-dumping duty on imports of ferrosilicon originating in Poland and Egypt and authorizing the definitive collection of the provisional anti-dumping duty, Official Journal L 369/1 of 18 December 1992, undertaking Official

larger share of EC anti-dumping measures directed against their exports (which may be explained by their larger exports to the Community).

One rather eye-catching proceeding involving both Egypt and Turkey concerned the first *Unbleached cotton fabrics from Egypt, China, India, Indonesia, Pakistan and Turkey*. That proceeding was initiated in February 1996;⁴⁷ it was one of very few anti-dumping proceedings to end undecided after the EC Council of Ministers voted against the proposed definitive anti-dumping measures. A new, third anti-dumping proceeding concerning cotton fabrics was initiated in July 1997. Egypt and Turkey are again involved in this proceeding.

1.4 WTO-compatibility of Article 24 of the EC-Moroccan EMA and its equivalents

Anti-dumping instruments nowadays have to conform to the *WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*. The EC's basic anti-dumping Regulation follows the text of the Anti-Dumping Agreement quite closely. There are, however, some discrepancies.

The WTO Anti-Dumping Agreement does not require the Community Institutions to consult with the countries concerned before anti-dumping measures are imposed (although Article

Journal L 183/40 of 3 July 1992; Commission Decision of 31 August 1992 terminating the anti-dumping proceeding concerning imports of wire-rod, originating in Argentina, Egypt, Trinidad and Tobago, Turkey, Croatia, Slovenia, Bosnia and Herzegovina and the former Yugoslav Republic of Macedonia, and Yugoslavia (Serbia and Montenegro), Official Journal L 256/13 of 2 September 1992; Commission Decision of 23 March 1992 terminating the anti-dumping proceeding concerning imports of cotton yarn originating in Egypt, Official Journal L 82/70 of 27 March 1992; Commission Decision of 16 June 1983 terminating the anti-dumping proceeding concerning imports of non-alloyed unwrought aluminium originating in Egypt, Official Journal L 161/13 of 21 June 1983.

⁴⁷ It followed a first *Cotton fabrics* proceeding against a number of Asian countries in which Egypt was not involved.

12.2 of the Agreement requires notification). There is, on the other hand, an obligation to have regard to the interests of developing countries. Article 15 of the WTO Anti-Dumping Agreement obliges the European Community to give “*special regard*” to “*special situation of developing country Members*”. Moreover, the WTO Anti-dumping Agreement obliges the Community to explore “[*possibilities of constructive remedies provided for by this Agreement*]” before anti-dumping duties are applied which affect “*the essential interests of developing country Members.*”

However, until now, there have been very few cases where the Community Institutions have explicitly applied this provision. In this respect the Community’s stance in the 1987 *Binder and baler twine* proceeding is relevant and deserves to be quoted *in toto*:

"[It was argued that it was not in the Community's interest to take action, mainly because the region in Brazil where the industry concerned is situated is highly dependent on the production of sisal fibre and twine and should therefore be given preferential treatment.

The Commission considered that this argument is to be examined in the light of Article 13 of the GATT Anti-Dumping Code providing that special regard must be given by developed countries to the special situation of developing countries when considering the application of anti-dumping measures. In particular, it is provided that possibilities of constructive remedies shall be explored before applying anti-dumping duties where they would affect the essential interests of developing countries.

*It results from this Article that the stage of development of exporting countries should be taken into account when examining what measures are most appropriate in a particular case, but should not determine whether or not it is appropriate to take protective measures at all. That interpretation is also considered to be in line with Article 14 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT.*⁴⁸

As shown in this decision, the Community Institutions will — at most — be prepared to take developing country status account in the context of establishing the nature of measures, but not in the context of determining whether measures should be imposed at all. Moreover, the *Binder and baler twine* remains one of very few exceptions in EC practice where developing country status had a tangible impact on the outcome of the case.

Recent anti-dumping proceedings such as *Unbleached cotton fabrics from Egypt, China, India, Indonesia, Pakistan and Turkey* and *Bed linen from Egypt, India and Pakistan* suggest that, for European Community practice, this is unlikely to change in the future as a result of Article 15 of the WTO Anti-Dumping Agreement.⁴⁹ Although, for example, unbleached cotton fabrics is a strategic export commodity for many of the countries involved in that proceeding, the European Community did not take account of this when imposing provisional anti-dumping measures. The first proceeding finally came to an end because the EC Council of Ministers was

⁴⁸ Council Decision of 19 January 1987 accepting undertakings given in connection with imports of binder and baler twine originating in Brazil and Mexico, and terminating the investigations, Official Journal L 34/55 of 5 February 1987.

⁴⁹ In this context it must be noted that the panel in *EC — Imposition of anti-dumping duties on imports of cotton yarn from Brazil* (ADP/137 of 4 July 1995 at §§ 582-590) did not consider that Article 15's predecessor contained many concrete obligations *vis-à-vis* developing countries.

unable to muster the majority of votes necessary for the imposition of definitive anti-dumping duties, but the background of this was rather concern about the position of the EC consumers of unbleached cotton fabrics than concern about the impact of the measures on the economies of Egypt and the other countries involved.

1.5 Practical consequences of the anti-dumping provision for the Mediterranean countries

As discussed above, the number of anti-dumping proceedings targeting the Mediterranean countries has been limited in the past (with the exception of Egypt and Turkey). Much of the exports of the Mediterranean countries to the European Community consists of agricultural products or textile products.

Until now the Community has used its anti-dumping instrument only sporadically against imports of agricultural products.⁵⁰ This apparent reluctance on the part of the Community industry to bring, or on the part of the Community authorities to accept, anti-dumping complaints involving agricultural products would seem to be at least partially a result of the very high level of protection of the Community agricultural sector. This might make it difficult to find injury. Furthermore, both the EC authorities and industries might be concerned about tit for tat retaliation by third countries.

⁵⁰ *Salmon from Norway*, Official Journal L 69/31 of 16 March 1991 (definitive); *Pears in Syrup from Australia, China, South Africa*, Official Journal L/22 of 20 July 1983 (termination; undertaking). A new proceeding concerning *Salmon from Norway* is currently underway: Official Journal C 253/18 of 31 August 1996 (initiation).

The restructuring and opening up of the Community's agricultural sector pursuant to the WTO Agreement on Agriculture may lead to an increased willingness to use the anti-dumping instrument against imports of agricultural products. It is expected, however, that it will take some more years before the effects of this will become visible.

There is a more immediate possibility of Mediterranean countries being targeted in anti-dumping proceedings concerning textile products. Until now the Community has used the anti-dumping instrument rather aggressively in this industrial sector. The countries mainly targeted were major suppliers such as China, India, Indonesia and other Far Eastern states. Most Mediterranean countries have many advantages over these countries when exporting to the Community: geographical proximity, no quantitative restrictions, and no customs tariffs. It is well possible that in the future Mediterranean countries will become more of a force to be reckoned with in the textile field and, concomitantly, will be targeted more in EC anti-dumping proceedings.

1.6 Possible future developments and recommendations

The WTO Anti-Dumping Agreement provides in practice a more tangible framework to limit the Commission's actions than the association agreements will do. Anti-dumping law is, and to a large extent will remain, WTO law.

In the context of the association agreements concluded with the Central European countries, the replacement of anti-dumping measures by competition law has been suggested.⁵¹

⁵¹ "The International Contestability of markets - economic perspectives: issues paper" OECD, Paris, 14 February 1996.

Indeed, it appears that, in the very long run, this is also Commission policy. However, although in recent years there has been a marked decline in new anti-dumping proceedings against Central European countries, it seems too early to conclude that the European Commission considers competition law in Central EUROPE sufficiently developed to take over the trade-protecting role currently fulfilled by anti-dumping law. *A fortiori*, it will take even longer before competition law instruments will be a viable alternative to anti-dumping actions against Mediterranean countries.

Therefore, governments in Mediterranean countries who get involved in EC anti-dumping actions would be well advised to actively use and insist on using the possibilities of the Association Council to the letter and spirit.

As a short-term practical aim, it would seem more important for the Mediterranean negotiators of the EMAs to attempt to obtain a commitment from the Commission that, where possible, price undertakings be favoured as the preferred solution of anti-dumping proceedings.

Having said this, it would in general seem that — with the exception of the textile sector in Egypt and Turkey — the number of anti-dumping actions against Mediterranean exporters will probably remain moderate in the intermediate future in comparison with proceedings targeted against other regions.

2. Safeguards

2.1 Introduction

Quantitative measures have a long history in EC trade law. Under the Uruguay Round Agreements virtually all quantitative measures are being abolished, with the regime concerning agricultural products and the WTO Agreement on Textiles and Clothing counting as the most notable examples.

The EMAs contain several provisions relating to safeguards. The obligations of the European Community concerning safeguards are quite similar *vis-à-vis* all Mediterranean countries. This is the case of Article 26 of the draft EC-Jordan EMA and Article 23 of the EC-Palestinian IA. Similar provisions can also be found in the Association agreements with the Central European countries and the Baltic countries, *inter alia*, Article 28 of the Interim Agreement with Bulgaria (Article 34 of the association agreement); Article 27 of the Interim Agreement with Czechoslovakia, Article 33 of the association agreements with Hungary and Poland; Article 27 of the free-trade agreements with Latvia and Lithuania.

Article 25 of the EC-Moroccan EMA and its equivalents in the other EMAs**** will be discussed in this section. The other provisions will be discussed in Section 3.

Article 25 of the EC-Morocco EMA allows the Community⁵² to take “*appropriate measures*” under the following conditions:

⁵² Of course, the Mediterranean countries have vice versa the same right *vis-à-vis* the European Community.

- there must be serious injury to domestic producers of like or directly competitive products in the territory of the Community, or
- serious disturbances in any sector of the economy, or
- difficulties which could bring about serious deterioration in the economic situation of a region in the Community⁵³
- the safeguard measures must be taken in accordance with Article 27 of the EMA.⁵⁴

This provision is not new; it features in almost identical terms in many recent free-trade agreements.⁵⁵

⁵³ This particular sub-paragraph is missing in the draft EC-Jordan EMA.

⁵⁴ Article 25 of the EC-Tunisian EMA, Article 23 of the EC-Palestinian IA, and Article 23 of the EC-Israel EMA are worded similarly.

⁵⁵ See, for instance, Article 25 of the Interim Agreement (Europe Agreement Article 31) with Bulgaria, Article 24 of the Interim Agreement with Czechoslovakia, Article 30 of the association agreements with Hungary and Poland, and Article 24 of the free-trade agreements with Latvia and Lithuania.

Articles 30 and 32 of the EC-Slovenian cooperation agreement are worded differently:

Article 30: *"If serious disturbances arise in any sector of the economy or if difficulties arise which might bring about a serious deterioration in the economic situation of a region, the contracting party concerned may take the necessary safeguard measures under the conditions and in accordance with the procedures laid down in Article 32."*

Article 32: ". . .

2. In the cases specified in Article 30, before taking the measures provided for therein or, in cases to which paragraph 3 applies, as soon as possible, the contracting party in question shall supply the Co-operation Council with all relevant information required for a thorough examination of the situation, with a view to seeking a solution acceptable to the

Article 27 of the EC-Moroccan EMA⁵⁶ contains the applicable procedural rules. It provides in its first paragraph that the Community must inform the Mediterranean country concerned if it subjects its products to surveillance.

The second paragraph of Article 25 provides that the Party adopting safeguard measures must supply “*all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties*” to the Association Council. Such information must in principle be supplied before the measures are adopted. The Association Council has in principle 30 days to take a decision. If no decision is taken within that time, the country concerned may take unilateral measures. Once adopted, the safeguard measures must be notified immediately to the Association Council. They must be discussed periodically within the Council “*particularly with a view to their abolition as soon as circumstances permit.*”

contracting parties. Consultations shall take place in the Co-operation Council before the contracting party concerned takes the appropriate measures, should the other contracting party so request.

3. Where exceptional circumstances require immediate action making prior examination impossible, the contracting party concerned may, in the situations specified in Articles 29 and 30, apply forthwith such precautionary measures as are strictly necessary to remedy the situation.

4. In the selection of measures, priority must be given to those which least disturb the functioning of the Agreement. Such measures must not exceed the limits of what is strictly necessary to counteract the difficulties which have arisen.

The safeguard measures shall be notified immediately to the Co-operation Council, which shall hold periodic consultations on them, particularly with a view to their abolition as soon as circumstances permit.”

⁵⁶

Corresponding with Article 27 of the EC-Tunisian EMA, Article 26 of the draft EC-Jordan EMA, Article 23 of the EC-Palestinian IA and Article 25 of the EC-Israel EMA.

As far as the substantive side of the matter is concerned, the Community or Mediterranean country is obliged to give priority to measures:

“which least disturb the functioning of this Agreement . . . These measures must not exceed the scope of what is necessary to remedy the difficulties which have arisen.”

In case of “*exceptional circumstances requiring immediate action*”, the Party concerned may apply “*precautionary measures*”; these must be “*strictly necessary to remedy the situation*”. Again, the other Party must be informed immediately.

2.2 Different kinds of measures

In the field of industrial products the safeguards instrument has mostly been applied in the textile area, a sector counting in the EC as among the most sensitive.⁵⁷

The Community has not often adopted outright safeguard measures on textile products. Article 25 of the EC-Moroccan EMA and its equivalent in the other EMAs do not define what “*appropriate measures*” are. In EC practice, these tend to be either quantitative restrictions or surveillance, which is a lighter form of measure. An import license is required for the import of products subject to surveillance measures.⁵⁸ Such import licence must be issued by the European

⁵⁷ The following discussion is restricted to industrial products.

⁵⁸ See now Article 12 of Council Regulation (EC) No 3285/94 of 22 December 1994 on the common rules for imports and repealing Regulation (EC) No 518/94, Official Journal L 349/53 of 31 December 1994.

Community authorities free of charge, for any quantity requested and within a maximum of five working days of receipt of the request.

While surveillance does not restrict the quantity that may be imported, it does provide the European Community with the necessary statistics to monitor import developments. For importers it implies some additional red tape required for the importation.

The WTO Agreement on Safeguards does not foresee the possibility of surveillance measures and it is not entirely certain that such measures do not constitute a kind of discriminatory measure for the countries concerned. However, probably because surveillance measures themselves do not limit the amount that may be imported, importers have been reluctant to challenge the validity of surveillance measures in court, leading to little relevant litigation on the issue.

2.3 Practice in the field of safeguard measures

Until 1994, the European Community's basic safeguards Regulation was 288/82,⁵⁹ under which several surveillance measures were adopted affecting textile products from Morocco and Tunisia.⁶⁰ We understand that these safeguard measures were notified by the European

⁵⁹ Council Regulation (EC) 288/82 of 5 February 1982 on common rules for imports, Official Journal L 35/1 of 9 February 1982.

⁶⁰ For industrial products this concerns: Commission Regulation (EC) No 2417/82 of 3 September 1982 introducing retrospective Community surveillance of imports of certain textile products originating in Tunisia and Morocco, Official Journal L 258/8 of 4 September 1982; Commission Regulation (EC) No 3636/83 of 19 December 1983 introducing retrospective surveillance of the re-importation after outward processing of certain textile products originating in Morocco,

Commission to the countries concerned.⁶¹ As mentioned above, under the EMAs the European

Portugal, Spain and Tunisia, Official Journal L 360/24 of 23 December 1983; Commission Regulation (EC) No 795/84 of 27 March 1984 amending Regulation (EC) No 3636/83 introducing retrospective surveillance of the re-importation after outward processing of certain textile products originating in Morocco, Portugal, Spain and Tunisia, Official Journal L 86/17 of 29 March 1984; Commission Regulation (EC) No 1568/87 of 4 June 1987 amending Regulation (EC) No 2417/82 introducing retrospective Community surveillance of imports of certain textile products originating in Tunisia or Morocco, Official Journal L 145/45 of 5 June 1987; Commission Regulation (EC) No 1884/89 of 28 June 1989 amending Regulation (EC) No 2819/79 making imports of certain textile products from certain third countries subject to Community surveillance, Official Journal L 182/18 of 29 June 1989; Commission Regulation (EC) No 2985/89 of 2 October 1989 introducing retrospective Community surveillance of imports of certain textile products originating in Tunisia or Morocco, Official Journal L 286/5 of 4 October 1989; Commission Regulation (EC) No 3714/89 of 11 December 1989 introducing retrospective surveillance of the re-importation after outward processing of certain textile products originating in Malta, Morocco, Tunisia and Turkey, Official Journal L 363/14 13 December 1989; Commission Regulation (EC) No 2876/90 of 4 October 1990 extending Regulation (EC) No 2985/89 introducing retrospective Community surveillance of imports of certain textile products originating in Tunisia or Morocco, Official Journal L 275/34 of 5 October 1990; Commission Regulation (EC) No 372/91 of 15 February 1991 extending Regulation (EC) No 3714/89 introducing retrospective surveillance of the re-importation after outward processing of certain textile products originating in Malta, Morocco, Tunisia and Turkey, Official Journal L 43/16 of 16 February 1991; Commission Regulation (EC) No 2928/91 of 4 October 1991 extending Regulation (EC) No 2985/89 introducing retrospective Community surveillance of imports of certain textile products originating in Tunisia or Morocco, Official Journal L 278/10 of 5 October 1991; Commission Regulation (EC) No 3660/91 of 16 December 1991 extending Regulation (EC) No 3714/89 introducing retrospective surveillance of the re-importation after outward processing of certain textile products originating in Malta, Morocco, Tunisia and Turkey, Official Journal L 348/43 of 17 December 1991.

61. Article 37 of the 1978 EC-Morocco Cooperation agreement provided that:

"If serious disturbances arise in any sector of the economy or if difficulties arise which might bring about serious deterioration in the economic situation of a region, the contracting party concerned may take the necessary safeguard measures under the conditions and in accordance with the procedures laid down in Article 38."

Community is obliged to notify surveillance measures to the other Party (and *vice versa*).

Regulation 288/82 was succeeded by Regulation 518/94, which in turn was succeeded by Regulation 3285/94.⁶² No measures especially directed against Morocco or Tunisia have yet been adopted under these Regulations.

2.4 WTO-compatibility of the safeguard provisions

2.4.1 Substantive conditions

The 1978 cooperation agreements between the EC and the Mediterranean countries had merely required “*serious disturbances arise in any sector of the economy*” as a precondition for safeguard measures.

In the WTO Agreement on Safeguards the conditions for applying safeguard measures have been drafted more strictly. Such measures are only allowed when the importing Party has determined that the product concerned is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or indirectly competitive products. Moreover, no discrimination as to the source of the product is allowed. The

Article 38 is virtually similarly worded as Article 25 of the EC-Israeli EMA and its equivalents; only did the old Article 38 also require that “[*such measures must not exceed the limits of what is strictly necessary to counteract the difficulties which have arisen.*”

⁶² Council Regulation (EC) No 3285/94 of 22 December 1994 on the common rules for imports and repealing Regulation (EC) No 518/94, Official Journal L 349/53 of 31 December 1994.

text of the EMAs is brought into line with these requirements.

Note that the term “*serious injury*” is defined in Article 4(1) of the WTO Agreement on Safeguards as “*significant overall impairment in the position of a domestic industry.*” A “*threat of serious injury*” is defined as serious injury that is clearly imminent. Article 4(1) adds that a determination of the existence of a threat of serious injury must be based on facts and not merely on allegation, conjecture or remote possibility. The safeguard provisions in the association agreements must be interpreted in a GATT-conforming manner, i.e., following the provisions of the WTO Agreement on Safeguards.

The EMAs still foresee the possibility of safeguard measures in case “*serious disturbances in any sector of the economy*” or “*difficulties which could bring about serious deterioration in the economic situation of a region*” can be proven. In view of the lack of this possibility in the WTO Agreement on Safeguards, it seems questionable whether the Community is entitled to impose safeguard measures solely on this basis; this is even more so now that Article 4(2)(b) of the WTO Agreement on Safeguards requires that the Community Institutions determine that causality exists between the imports in question and the injury suffered (or threat thereof).

2.4.2 Procedural aspects

The WTO Agreement on Safeguards obliges the Community to publish the applicable procedural rules in advance. The relevant legislation currently in force is Regulation 3285/94.

Under that Regulation surveillance measures concerning certain textile products from

Morocco and Tunisia have been prolonged.⁶³ Moreover, the European Community has introduced prior surveillance of imports of certain steel products;⁶⁴ these measures, however, are aimed at all imports.

Since surveillance measures do not constitute a quantitative restriction *strictu sensu*,⁶⁵ it is not certain whether they are covered by the term “*appropriate measures to remedy the problem*” in the EMAs.

As a separate matter, countries initiating an investigation, or adopting safeguard measures are required to notify this to the WTO Committee on Safeguards. In practice this involves rather thorough scrutiny of the measures by that Committee, especially of the injury aspects. Moreover, Article 12(3) of the WTO Agreement on Safeguards provides that a Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned. In the view of this, the obligations under the EMAs are not very stringent.

⁶³ Official Journal L 307/1 at 47 of 28 November 1996.

⁶⁴ Commission Regulation (EC) No 2412/96 of 18 December 1996, Official Journal L 329/11 of 19 December 1996.

⁶⁵ Although, arguably, they have an import-hindering effect and qualify to some extent as a measure having equal effect.

3. Other special measures

3.1 Exceptional measures to protect infant industries

Article 14 of the EC-Moroccan EMA⁶⁶ provides that, by way of derogation, the Mediterranean country concerned may take exceptional measures of limited duration to introduce, increase or re-introduce customs duties. Such measures may only apply to infant industries and to sectors undergoing restructuring or experiencing serious difficulties, particularly where those difficulties entail severe social problems. The customs duties introduced by such measures may not exceed 25 per cent⁶⁷ by value, and must retain a preferential margin for products originating in the Community. The total value of imports of the products subjected to such measures may not exceed 15% of the total imports of industrial products originating in the Community during the last year for which statistics are available. The measures may in principle not last longer than five years.

The Mediterranean country is obliged to inform the Association Council of any such measures. Moreover, the country must provide a schedule for their abolition. The Community may request consultations. In principle such phasing-out should take place in equal annual instalments, starting no later than the end of the second year following their introduction.

Such exceptional measures may only be taken by the Mediterranean countries concerned.

The Community is not entitled to similar measures.

⁶⁶ Similar: Article 14 of the EC-Tunisian EMA. Somewhat differently: Article 10 of the EC-Palestinian IA, Article 13 of the draft EC-Jordan EMA. The clause does not feature in the EC-Israel EMA.

⁶⁷ This percentage is for some other Mediterranean countries still under negotiation.

3.2 Restrictions on exports: balance-of-payments difficulties

Article 35 of the EC-Moroccan EMA⁶⁸ provides for special measures to deal with balance-of-payments difficulties in the Mediterranean country or the Community member State concerned. Such measures must be in conformity with relevant multilateral obligations (GATT 1994 as well as Articles VIII and XIV of the Statutes of the IMF).

Last, Article 28 of the EC-Moroccan EMA⁶⁹ provides that the Parties remain entitled to restrict trade on imports, exports or goods in transit on the following grounds:

- public morality, public policy or public security,
- the protection of health and life of humans, animals or plants,
- the protection of national treasures possessing artistic, historic or archaeological value,
- the protection of intellectual, industrial and commercial property, or
- regulations concerning gold and silver.

However, such prohibitions or restrictions may not constitute a means of arbitrary discrimination or a disguised restriction on trade between the Parties.

4. Conclusions

This paper analysed the anti-dumping and safeguard provisions included in the agreements

⁶⁸ Identical: Article 35 of the EC-Tunisian EMA and Article 26 of the EC-Israel EMA.

⁶⁹ This provision is equivalent to Article 28 of the EC-Tunisian EMA, to Article 27 of the draft EC-Jordan EMA, to Article 24 of the EC-Palestinian IA, and to Article 27 of the EC-Israeli EMA.

between the EC and Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, the Palestinian Authority, Syria and Tunisia, and their practical value in light of the EC practice on anti-dumping and safeguard issues. It seems that the Mediterranean countries concerned may wish to lobby the EC authorities to ensure that they will find satisfactory alternatives to the imposition of anti-dumping duties.

The preliminary “negotiation phase” provided for in Article 27 of the EC-Morocco EMA and its equivalent in the other EMAs, which would normally provide the basic ground for “*seeking a solution acceptable to both Parties*”, seems of little practical value. Procedural and organizational aspects such as the European Commission’s structure, confidentiality requirements and strict deadlines are possible reasons for the Commission’s refusal to discuss in detail the measures it intends to take with the authorities of the import countries. Price undertakings appear to be the preferred form of anti-dumping measures. Governments of Mediterranean countries may wish to strive for a policy statement from the EC expressing preference for such solution where dumping and injury is determined.

On the other hand, the possibility that the EC’s Mediterranean partners will use anti-dumping and safeguard measures against EC imports depends on the adoption of comparable legislation. Any such basic legislative framework would have to be drafted in strict conformity with the WTO rules, notably the WTO Anti-Dumping Agreement and the WTO Agreement on Safeguards.

In relation to the products possibly covered by anti-dumping measures taken by the Mediterranean countries in this context, the agricultural sector seems to be the most likely target.

Finally, special measures seeking to protect infant industries included in the Morocco and Tunisia EMAs, have some potential to be effectively used by the countries concerned. Since they allow the benefiting countries, even if temporarily and under strict conditions, to introduce tariff duties in order to protect infant industries, it creates a legitimate instrument of protection which seems important for developing the Mediterranean competitive industries and off-setting the loss of customs protection arising from reciprocal trade liberalization.