ISSN: 1023-0939

SAFEGUARD MEASURES

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EDRC Information Paper 11

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The textile industry will be governed by a quota system, fixed over three years, while both parties are pledged to implement the GATT-sponsored fifteen-year agreement on the liberalization of the international trade in textiles.

The Mediterranean countries facing the challenges of free trade insist on four fundamental aspects to be included in their agreements with the EU, these aspects being:-

1) the need for long transitional mechanisms and secure safeguards;
2) the need to obtain improved access for their agricultural exports;
3) the need for increased financial flows from public and private sources to boost their economies;
4) the possibility to count on the community's help to accelerate the modernization of their social and economic systems. [3]

In trade agreements, contracting parties generally grant each other better market access through the abolition of quantitative import restrictions and import tariffs, the most classical protectionist instruments. Most trade agreements also contain safeguard clauses, which under specified conditions allow a contracting party temporarily to withdraw market access concessions.

Safeguard clauses are standard for Free Trade Area Agreements and operate against the background of GATT rules and the Community's own legislation implementing those rules. Essentially these clauses preserve the right of the parties to take unilateral action under their own internal legislative procedures subject to a commitment to prior consultation with the Association Committee set up by the Agreement. In the case of safeguard measures, the Association Committee may take 'any decision needed to put an end to difficulties.'

Safeguard clauses are essential for upholding a trade agreement. During its functioning, unforseeable difficulties may arise which objectively justify a contracting party in derogating temporarily from what has been agreed. If such a derogation were not possible under any circumstance whatsoever, the agreement could eventually collapse under too strong domestic pressure.

A safeguard clause allows a contracting party to a trade agreement to protect its domestic producers from imports that are not 'unfair' but that are simply too voluminous for domestic producers to cope with. Thus, it could be held that a specific safeguard clause allows discriminatory action on the part of a contracting party.

Examples of Safeguard Measures

In GATT, safeguard measures are dealt with in Article XIX, which is the standard of reference for this kind of clause. Under GATT 1947[4], trade partners injured by the safeguard measures had to be given trade compensation and, according to the prevailing

[3] Bulletin of the EU - Supplement 2/95
[4] pre-Uruguay Round Agreement GATT rules

opinion, measures were to be applied on a non-discriminatory basis, that is against all imports of a certain product irrespective of their country of origin. The WTO Safeguards Code has reinforced GATT discipline by adding further procedural and substantive rules.

A typical GATT Article XIX-type safeguard clause holds that :

"Where any product is being imported in such increased quantities and under such conditions as to cause or threaten to cause:

- serious injury to domestic producers of like or directly competitive products in the territory of one of the Contracting Parties, or

serious disturbances in any sector of the economy or difficulties which could bring about serious deterioration in the economic situation of a region,

the Community or Tunisia [Israel], may take appropriate measures under the conditions and in accordance with the procedures laid down in Article 27 [25]"[5]

The first requirement for the taking of measures ('serious injury . . . . .') constitutes a classic safeguard clause formula. The second clause ('serious disturbances . . . . .') resembles Article 226 EC Treaty, a safeguard clause that was applicable within the European Community until the end of 1969. In article 226 of the EC Treaty, safeguard measures were foreseen for EC member States during the transitional period.

An agreement on Safeguards is included in Council Decision 94/800/EC of 22 December 1994[6]. Article 2 of this Agreement provides that :

"A member may apply a safeguard measure to a product only if that member has determined, pursuant to the provisions set out below, that such product 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."

Article 4 of the agreement then provides for 'the determination of serious injury or threat thereof' and it lays down that:

"1. For the purpose of this Agreement:

a) 'serious injury' shall be understood to mean a significant overall impairment in the position of a domestic industry;

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[5] Euro-Med Agreements with Tunisia and [Israel]

[6] concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round Multilateral negotiations (1986-1994). OJL 336/1 Vol 37 23 December 1994

Community or of all of its Member States to be exercised and fulfiled at international level, particularly those relating to trade in primary products. These provisions are contained in Reg. 518/94 : the basic regulations relating to imports and exports liberalized at the Community level. These regulations contain a national safeguard measures clause which parallels the terms of Article 36 EC. Thus each of the Member States is entitled to introduce quantitative restrictions justified on the grounds of public policy, public morality, public security; the health and life of humans, animals and plants; the protection of national treasures possessing artistic, historic or archeological value; or the protection of industrial and commercial property.

In these cases the Council is entitled to adopt appropriate measures, acting by a qualified majority on a proposal from the Commission; these may include the reintroduction of Community quantitative restrictions. If the community interest in cases of shortages or disturbance of the market requires immediate action then the Commission may take the necessary measures, including the requirement of import authorizations. These measures may be subject to review by the Council if referred by a Member State within one month of their adoption (although they take effect immediately); in these circumstances the Council may substitute its decision (confirming, amending or revoking) for that of the Commission. Clearly, the Community, in adopting safeguard measures on economic grounds, is bound by its relevant international obligations, particularly relating to contracting parties to the GATT and the relevant provisions of the GATT such as Article XIX.

National competence to take safeguard measures against imports remains, although the number of instances in which it is possible has significantly declined. There is an additional urgent procedure whereby Member States may adopt conservatory measures - until the Commission or the Council has adopted protective measures - where they are justified by a protective clause in a bilateral agreement between the Member State concerned and a third country.

Association Agreements

Article 310 of the Treaty of Amsterdam provides that *"the Community may conclude with one or more States or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure."* In theory each Association Agreement is a sui generis agreement which is the result of negotiation between 2 or more parties. In practice, however, the Community has adopted a policy of offering "model" Association Agreements to groups of countries.

Association Agreements generally provide for free trade in a number of products between the European Union and its partner and safeguards and other trade protection mechanisms are a characteristic feature of such agreements. Here again, these clauses reflect GATT-based rules.

Even the Agreement establishing the European Economic Area (EEA), although modelled on the EC Treaty in respect of free movement of goods, has a safeguard measures clause:

"1. If serious economic, societal or environmental difficulties of a sectoral or regional nature liable to persist are arising, a Contracting Party may unilaterally take appropriate measures under the conditions and procedures laid down in Article 113.

2. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Agreement.

3. The safeguard measures shall apply with regard to all Contracting Parties.[8]"

Protection of the Agricultural Sector by Israel

A major change is to occur in Israel, both politically and economically while this country adjusts to the European Union's Single Market[9]. Israel is moving from a free trade area with the EU to a Customs Union. In 1995 the EC-Israel Euro-Mediterranean Association Agreement was signed.

One of the most difficult areas in the negotiations between Israel and the EC was agriculture. Agriculture constitutes a small share in the GDP and labor force of Israel and the EU, yet both parties consider it an important sector. The agricultural sector is supported by both parties. Israel supports its agricultural sector by subsidizing factors of production such as water and capital while it restricts agricultural imports through import quotas, licensing requirements, variable levies and different import prohibitions.

In the 1995 Agreement each party granted some preferential treatment to specific agricultural products. Most of Israel's agricultural exports to the EC enjoyed some customs concessions but the majority of exports were still subject to various restrictions.

Following the conclusion of this Agreement, the EC gave new concessions to other non-member countries of the EU and the preferences granted to Israel eroded further when parallel concessions were given to Eastern European States and with the establishment of the EEA.

The only way in which Israel could overcome these problems seems to be by joining the Common Agricultural Policy (CAP). Upon joining the CAP Israel's agricultural sector will receive the support given to the EU's Agricultural sector. EU subsidies will lead to a lowering of the price of many agricultural products in the Israeli market this to the advantage of the Israeli consumers. Economically therefore, for Israel, joining the CAP can be a positive thing.

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[8] Article 112 EEA
[9] paper by Tal Sadeh in P.G. Xuereb ed., The Mediterranean's European Challenge (EDRC, 1998)

conditions and prospects rather than by the right of free movement and, therefore, fears that mass migration would 'flood' the labor markets do not seem justified.

Also, existing regulations would probably suffice to limit adjustment strains. For example, safeguard mechanisms against excessive migration exist where article 56 EC Treaty provides that *"the provisions on free movement of workers and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health."*

Under the Association Agreement between the European Union and Turkey signed in Ankara in 1963[18], freedom of movement for workers between the Member States of the Community and Turkey is catered for. While ensuring that no discrimination arises on grounds of nationality between workers who are of Turkish nationality and those who are nationals of other Member States of the Community, article 38 of the Agreement provides that:

"While freedom of movement for workers between Member States of the Community and Turkey is being brought about by progressive stages, the Council of Association may review all questions arising in connection with the geographical and occupational mobility, in particular the extension of work and residence permits, in order to facilitate the employment of those workers in each Member State."

Under this Agreement between the Community and Turkey, Turkish workers are granted certain residence rights in the Community. In the Court of Justice judgment of December 16, 1992, Kazim Kus v. Landeshaupstadt Wiesbaden [1993][19], the Court established that a Turkish worker in a Member State entitled to a work permit under a Decision of the Association Council has the right to obtain a residence permit. Such Turkish workers seem to be in an intermediate position between nationals of States with no formal connection with the Community and nationals of the Member States. It would seem that once such a worker is lawfully settled in a Member State, he is entitled to the full protection of Community law in all social respects.

Following this Agreement in 1963 which provided for the free movement of Turkish workers within the Community, the Association Council issued a Decision in 1980 which accorded rights to Turkish workers who are "duly registered as belonging to the labour force of one of the Member States of the Community." After one year's legal employment, such workers would have the right to a renewal of their work permit, if they are employed by the same employer and if a job is available. After four years of legal employment, such workers have the right to take up any paid employment. In case 12/86 Demirel v. Stadt Swabisch Gmund [1987][20] the Court of Justice had, in line with its previous case law on international agreements, held that it had jurisdiction in the

[18] agreement establishing an Association between the European Economic Community and Turkey and the additional Protocol signed on 12th September 1963 at Ankara - OJL 293 29-12-1972 (French), OJ C113 24-12-1973 (English)
[19] C-237/91
[20] E.C.R. 3719

interpretation of the Agreement which was an integral part of the Community legal order but that the provisions contained within the Agreement relating to free movement were incapable of creating direct effects.

The decision of the court in Kus provides a further development in the case-law and provided a great step forward in affording protection to the large number of immigrant Turkish workers who are currently employed within the Community. The Kus decision clarifies the status of Turkish workers within the Member States of the Community. The internal status of such workers is now clear : once lawfully settled, they are to be treated in all respects like other community nationals in all social respects.

The Textiles Industry

In the Council Decision of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round Multilateral negotiations (1986- 1994)[21] the Members, recognizing that it may be necessary to apply a specific safeguard mechanism to protect textiles and clothing have, in article 6.2 of the Agreement on Textiles and Clothing laid down that :

"Safeguard action may be taken under this Article when, on the basis of a determination by a Member[22], it is demonstrated that a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products. Serious damage or actual threat thereof must demonstrably be caused by such increased quantities in total imports of that product and not by such other factors as technological changes or changes in consumer preference."

Article 3 of the same Agreement on Textiles and Clothing lays down that the determination of serious damage, or actual threat thereof shall be assessed by examining: *"the effect of those imports on the state of the particular industry, as reflected in changes in such relevant economic variables as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment; none of which, either alone or combined with other factors, can necessarily give decisive guidance."*

Acquisition of Property

In order to control the purchase of property by nationals of other Member States, every State is individually allowed to take the measures it deems appropriate in its

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[21] OJL 336/1 Vol. 37 23-12-1994

[22] "A customs union may apply a safeguard measure as a single unit or on behalf of a Member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious damage or actual threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a Member State, all the requirements for the determination of serious damage, or actual threat thereof, shall be based on the conditions existing in that Member State and the measure shall be limited to that Member State." -- OJL 336/1 Vol 37 23-12-1994

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