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(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 2093/2002

of 26 November 2002

imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of polyester textured filament yarn (PTY) originating in India

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community [1], and in particular Article 9 thereof,

Having regard to the proposal submitted by the Commission after consulting the Advisory Committee,

Whereas:

A. PROVISIONAL MEASURES

(1) The Commission, by Regulation (EC) No 1412/2002 [2] (the provisional Regulation) imposed a provisional anti-dumping duty on imports into the Community of polyester textured filament yarn (hereinafter PTY) originating in India.

(2) Simultaneously, the Commission also imposed, by Regulation (EC) No 1411/2002 [3], a provisional countervailing duty on the imports of PTY originating in India.

(3) It is recalled that the investigation period of dumping and injury covered the period from 1 October 2000 to 30 September 2001 (IP). A clerical error was found in the provisional Regulation, and it is confirmed that, as showed in the various tables below, the examination of trends relevant for the injury analysis covered the period from 1 January 1996 (and not 1 October 1997 as stated in the provisional Regulation) to the end of the IP (period under consideration). The choice of such period was made in view of analysing the overall evolution of the economic situation of the Community industry considering the impact of the imposition of anti-dumping measures in 1996 against Indonesia, Malaysia, Taiwan and Thailand.

B. SUBSEQUENT PROCEDURE

(4) Following the imposition of a provisional anti-dumping duty on imports of PTY originating in India, some interested parties submitted comments in writing. The parties who so requested were also granted an opportunity to be heard orally.

(5) The Commission continued to seek and verify all information it deemed necessary for its definitive findings.

(6) All parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of a definitive anti-dumping duty and the definitive collection of amounts secured by way of the provisional duty. They were also granted a period within which they could make representations subsequent to this disclosure.

[1] OJ L 56, 6.3.1996, p. 1. Regulation as last amended by Regulation (EC) No 1972/2002 (OJ L 305, 7.11.2002, p. 1).
[2] OJ L 205, 2.8.2002, p. 50.
[3] OJ L 205, 2.8.2002, p. 26.

(7) In addition to the verification visits that were already carried out by the Commission at the provisional stage, the company Unifi Textured yarns Ltd, a Community producer of PTY located in Ireland, was also visited after the imposition of the provisional measures.

(8) The oral and written comments submitted by the parties were considered, and, where appropriate, the provisional findings have been modified accordingly.

C. **PRODUCT UNDER CONSIDERATION AND LIKE PRODUCT**

(9) The Indian exporting producers claimed that the Commission, in its analysis, did not take into consideration the existence of three different market segments for PTY in the Community, which is allegedly evidenced by the significantly different levels of the average sales prices for PTY originating in India, in other third countries and PTY produced by the Community industry. This was, according to these exporting producers, confirmed by the fact that the Community industry's average price during the IP was more than 50 % higher than the Indian import price, which allegedly gives an indication that PTY produced in the Community is not alike in all respects to PTY originating in India.

(10) It should be recalled that it was provisionally established that no significant differences exist in the basic physical characteristics and uses of the different types and qualities of PTY, and that, under these circumstances, all types of PTY should be considered as one single product for the purposes of this proceeding. It was also provisionally concluded that the PTY produced in India and exported to the Community shares similar basic physical characteristics and uses as compared with that manufactured by the Community producers, which should therefore be considered as a like product within the meaning of Article 1(4) of Regulation (EC) No 384/96 (the basic Regulation). In this respect, differences in sales prices cannot by themselves be considered a criterion for the determination of the like product.

(11) In addition, as concerns the argument of market segmentation, no evidence was brought forward or found for a clear dividing line based on objective criteria which could have supported the conclusion that imports from India and the product produced by the Community industry are different products. The sales price as such is not considered a sufficient element for establishing market segments, particularly in view of the dumping and subsidisation practices. As to the difference in product types found, which indeed involve different pricing elements, this is taken into account in the undercutting and injury elimination level calculations as explained below under recital 48 of this Regulation.

(12) For the above reasons, the argument was rejected and the conclusions that PTY should be considered one single product and the overall analysis be made at this level were accordingly confirmed.

(13) In the absence of any further comments, the definition of the product under consideration and of the like product as set out in recitals 11 to 13 of the provisional Regulation are confirmed.

D. **SAMPLING**

(14) No comments concerning the sampling of Indian exporting producers were received and, therefore, the conclusions set out in recitals 14 to 23 of the provisional Regulation are hereby confirmed.

E. **DUMPING**

1. **Normal value**

(15) Following the adoption of provisional measures, the three investigated Indian exporting producers contested, for different reasons, the findings for the determination of cost of production and selling, general and administrative (SG&A) expenses used in the ordinary course of trade test and for the calculation of normal value.

(16) One exporting producer alleged that certain clerical errors had incurred concerning the consumption ratio and occasional double-counting of individual raw materials which affected the cost of production of the product concerned.

(17) This claim was partly rejected in view of the failure of the exporting producer to submit the relevant information for certain raw materials in good time in order to be verified. Some information was only received following the verification visit. Furthermore and in any event, the Commission based its determination on information submitted prior to the on-spot verification.

(18) The same exporting producer argued that it had duly provided the SG&A details for the product concerned but still the Commission overstated these expenses because certain 'establishment expenses' (i.e. administrative expenses), as mentioned in the company's Annual Report, and included in the SG&A, in fact concerned the manufacturing expenses. Also the exporting producer claimed that the foreign exchange profits have been disregarded in the computation of the SG&A expenses.

(19) Article 2(5) of the basic Regulation provides that '(…) Consideration shall be given to evidence submitted on the proper allocation of costs, provided that it is shown that such allocations have been historically utilised.' For the computation of SG&A expenses, the Commission based itself on the audited information included in the Annual Report of the company since the latter had only partially completed the relevant parts of the questionnaire. Therefore, no information was available which could allow the consideration of a different allocation. The establishment expenses in the Annual Report formed part of an account grouping which was distinct and separate from the manufacturing expenses. Therefore, it was concluded that all these establishment expenses have not been incorporated in the cost of manufacturing reported by the company and that they should be incorporated in the SG&A expenses. As far as the foreign exchange profits are concerned, this amount was included in the manufacturing expenses of the Annual Report of the company. It was, therefore, concluded that this amount was already incorporated in the cost of manufacturing reported by the company. Consequently, this claim was rejected and the original calculation with regard to this point is hereby confirmed.

(20) Another exporting producer requested a different method of allocation for the financing costs included in the SG&A expenses. The exporting producer argued that while for working capital turnover was the appropriate method of allocation, in the case of term loans which were taken as an investment for production facilities, the most appropriate method for allocation would be the production of the respective products. Furthermore, it argued that in view of the chain of successive products produced in the same facilities, due account should be taken to avoid double-counting.

(21) The first claim, as to the method of calculation, was accepted because it was shown that it was indeed more appropriate for these costs. The SG&A expenses were therefore revised before being used in the ordinary course of trade test and in the construction of normal value. As to the second claim, it had to be rejected since the information verified during the on-spot verification did not point to any double-counting and therefore such a claim could not be substantiated.

(22) All exporting producers argued that it was not proper to include in domestic selling expenses an amount for ocean freight because no such freight expenses were incurred.

(23) This claim was accepted and the SG&A expenses were revised before being used in the ordinary course of trade test and in the construction of normal value.

(24) Another exporting producer claimed: (1) that the Commission had double-counted and thereby *pro rata* increased financial costs within the SG&A expenses; (2) that the Commission departed from the product or domestic market-wide SG&A expenses allocation and resorted to division-wide SG&A expenses, thus including products other than the product concerned in the allocation; (3) that the

Commission departed from the IP and resorted to the last financial year ending within the IP both for the cost of manufacturing and the SG&A expenses calculation; and (4) that the Commission grouped certain product types and thus departed from its own product control numbers used to ensure a fair comparison.

(25) As far as the first point is concerned, the claim was accepted and therefore the SG&A expenses regarding these costs were modified. As far as the second point is concerned, the provision of Article 2(5) of the basic Regulation as mentioned in recital 19 is again recalled. During the on-spot verification no records were brought to the attention of the Commission demonstrating that the company had historically utilised a product or market-wide allocation of costs. Therefore, this claim was rejected and the division-wide allocation of SG&A expenses was confirmed. As for the third point and with regard to the SG&A expenses, the claim was partly accepted and the Commission having received audited information concerning the most recent financial year which comprised the second half of the IP proceeded to a new calculation of these expenses incorporating the latest relevant information available. As far as the cost of manufacturing is concerned, this claim was rejected because the Commission's calculation was based on the total production of the intermediate product while the exporting producer had provided data regarding only a part of the total production. Therefore, it was considered that the Commission's calculation derived from a more representative basis encompassing all production. As to the fourth point, the claim was rejected because no grouping of different product types outside the scope of the product control numbers used to ensure a fair comparison had been carried out by the Commission. Only groupings of certain types of an intermediate product used for the production of the product under investigation were made in accordance with a table provided by the exporting producer itself in order to calculate the cost of production used in the ordinary course of trade test and the construction of normal value.

2. **Export price**

(26) No claims were made concerning the determination of the export price. On this basis, the findings set in recital 32 of the provisional Regulation are confirmed.

3. **Comparison**

(i) *Duty drawback under Duty Entitlement Passbook (DEPB)*

(27) All Indian exporting producers reiterated their claim that the adjustment requested pursuant to Article 2(10)(b) or alternatively under Article 2(10)(k) of the basic Regulation on the normal value for the benefits received under the DEPB scheme on a post-export basis should have been granted (recital 34 of the provisional Regulation).

(28) It should be borne in mind that Article 2(10) chapeau refers to '… due allowance, [t]o be made in each case, on its merits, for differences in factors which are claimed, and demonstrated, to affect price comparability …'. Pursuant to Article 2(10)(b) of the basic Regulation an adjustment is granted provided two conditions are met cumulatively: first, import charges are borne by the like product and by materials physically incorporated therein when intended for consumption in the exporting country and second, these import charges are refunded or not collected when the product is exported to the Community. These conditions provide the basis on which any difference affecting price comparability shall be established for the factors in question. As at the provisional stage, no conclusive evidence was found with regard to the first requirement. Consequently, an adjustment for duty drawback could not be granted. Pursuant to Article 2(10)(k) 'an adjustment may also be made for differences in other factors … if it is demonstrated that they affect price comparability as required under this paragraph, in particular that customers consistently pay different prices on the domestic market because of the difference in such factors.' In the current case, none of the above-mentioned requirements were demonstrated since the exporting producers did not produce any conclusive evidence that would substantiate their claim. Therefore, an adjustment for differences in other factors could not be granted either and the findings set out in recital 34 of the provisional Regulation are hereby confirmed.

(ii) *Duty drawback under Advance License Scheme (ALS)*

(29) Two Indian exporting producers reiterated their claim that the adjustment requested pursuant to Article 2(10)(b) or alternatively under Article 2(10)(k) of the basic Regulation on the normal value for the benefits received under the ALS scheme should have been granted (recital 34 of the provisional Regulation). Furthermore, both exporting producers argued that in the context of the parallel anti-subsidy proceeding, the Commission had investigated in greater detail and accepted the said scheme as non-countervailable. Therefore, and in order to remedy this alleged contradiction between the two proceedings, the said allowance should have been granted. The exporting producers additionally argued that the requirement to demonstrate that the input raw materials for production in the exporting country contain a duty component imposed an undue burden of proof.

(30) It is recalled that each anti-dumping proceeding is assessed on its own merits and is examined on the basis of its own factual and legal circumstances which may differ from all other proceedings. Therefore, the argument regarding the parallelism between two different proceedings was considered irrelevant. In any event, in recital 66 of Commission's Regulation (EC) No 1411/2002, it was stated that '… both schemes (Advance Licence and Advance Licence for intermediate supply) can be considered countervailable. However, the investigated companies were able to demonstrate that the quantities of imported materials, which were exempted from import duties, did not exceed the quantities used for the exported goods.' This quotation, however, only set out a general principle. In this respect, the requirements of Article 2(10) chapeau, 2(10)(b) and 2(10)(k) of the basic Regulation as stated in recital 28 are recalled. Again as in the case of the provisional Regulation, the requirements of the basic Regulation were not demonstrated since the exporting producers did not produce any conclusive evidence that would substantiate the full amounts of their respective claims. It is also noted that to require the exporting producers to demonstrate that the input raw materials for production in the exporting country contain a duty component did not impose an undue burden of proof. At the time of adoption of the provisional measures due allowance was granted for such charges when substantiated by the accounting records of the exporting producers; otherwise the claims were rejected. This indicated that the companies were in a position to demonstrate as requested in the questionnaire the existence of any import charges borne by the like product and by materials physically incorporated therein, when indented for consumption in India. Consequently and for the reasons stated in recital 28, an adjustment for duty drawback could not be granted and the findings set out in recital 34 of the provisional Regulation are confirmed.

(iii) *Excise duty*

(31) One exporting producer reiterated its claim for an adjustment pursuant to Article 2(10)(b) for an amount corresponding to an indirect tax borne by the like product when intended for consumption in India and refunded in respect of the product exported to the Community.

(32) At the time of the adoption of the provisional measures, it was found that the company was indeed refunded excise duty upon export of the product concerned. However, since the company had failed to demonstrate that the full amount of this indirect tax was refunded, the claim had been adjusted downwards. Following the adoption of the provisional measures, the exporting producer in question submitted, as requested by the Commission, further supplementary information and documentation to substantiate the claim which was verified. In the context of the present case, this information was considered conclusive and therefore the full amount of the claim was granted. Consequently, the findings set out in recital 35 of the provisional Regulation were modified.

(iv) *Sales tax*

(33) Another exporting producer reiterated its claim that as a result of the Indian Government's policy to encourage the setting up of plants in less developed areas, companies were exempted from the payment of sales tax and requested an adjustment to be granted to that effect. The information submitted and the on-spot verification showed that all domestic sales invoices stated that the exporting producer in question was exempt from the payment of this tax, which was not recovered