Council Regulation (EC) No 1338/2002 of 22 July 2002 imposing a definitive countervailing duty and collecting definitively the provisional countervailing duty imposed on imports of sulphanilic acid originating in India

COUNCIL REGULATION (EC) No 1338/2002

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community[(1)], and in particular Article 15 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 573/2002[(2)] ('provisional Regulation') imposed a provisional countervailing duty on imports of sulphanilic acid originating in India. The Commission by Regulation (EC) No 575/2002[(3)] ('provisional anti-dumping Regulation') also imposed a provisional anti-dumping duty on imports of sulphanilic acid originating in the People's Republic of China and in India.

B. SUBSEQUENT PROCEDURE

(2) Subsequent to the disclosure of the essential facts and considerations on the basis of which it was decided to impose a provisional countervailing duty, a number of interested parties submitted comments in writing. All interested parties who requested a hearing were granted an opportunity to be heard by the Commission.

(3) The Commission continued to seek and verify all information deemed necessary for the definitive findings.

(4) 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 countervailing duty and the definitive collection of amounts secured by way of the provisional countervailing duty. They were also granted a period within which they could make representations subsequent to this disclosure.

(5) The oral and written arguments submitted by the parties were taken into account.

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(6) Having reviewed the provisional findings on the basis of the information gathered since then, the main findings as set out in the provisional Regulation are confirmed.

C. PRODUCT CONCERNED AND LIKE PRODUCT

1. Product concerned

(7) Subsequent to the publication of the provisional Regulation, a number of interested parties claimed that the definition of the product concerned was incorrect. They argued that the technical and purified grades of sulphanilic acid were substantially different in terms of their purity and had different properties and applications. It was claimed that the two grades of sulphanilic acid could not be considered as a homogeneous product and should therefore have been treated as distinct products for the purposes of the investigation. In support of this assertion, it was argued that there was insufficient interchangeability between the two grades of sulphanilic acid. Whilst it was accepted that the purified grade could be used in all applications, the same could not be said of technical grade sulphanilic acid because of the level of impurities it contained, most notably aniline residues. These impurities consequently made technical grade sulphanilic acid unsuitable for use in the production of optical brighteners and food dyes.

(8) It is recalled that purified grade sulphanilic acid results from the purification of technical grade sulphanilic acid in a process which removes certain impurities. This purification process does not alter the molecular properties of the compound or the way in which it reacts with other chemicals. Therefore, technical and purified grades share the same basic chemical characteristics. The fact that interchangeability may only be in one direction in some applications because of concerns about impurities is therefore not considered to be sufficient justification that purified and technical grades constitute different products which should be treated separately in two different investigations. Whilst accepting that the purification process adds certain additional costs to the production process, it is recalled that these were taken into account when making a fair comparison between the different grades produced by the Community industry and those imported from the country concerned for the purposes of calculating the level of price undercutting and the injury elimination level.

(9) Consequently, it was not considered that the comments made by interested parties concerning the definition of the product concerned were sufficient to alter the findings on this issue that had been reached at the provisional stage. It is therefore definitively concluded that both grades of sulphanilic acid should be treated as one single product for the purpose of the present proceeding.

2. Like product

(10) No new elements were brought to the attention of the Commission that would lead it to alter the conclusions reached at the provisional stage, namely that sulphanilic acid produced and sold by Community producers and that produced in India and exported to the Community are like products.

(11) The provisional findings concerning the like product as set out in recital 13 of the provisional Regulation are hereby confirmed.

D. SUBSIDY

(12) The findings made in the provisional Regulation concerning the countervailable subsidies obtained by the exporting producers are hereby confirmed, unless it is otherwise expressly stated bellow.

1. Export Processing Zones (EPZ)/Export Oriented Units (EOU)

(13) No new comments were received under this heading. The findings as set out in recitals 18 to 28 of the provisional Regulation are hereby confirmed.

2. Duty Entitlement Passbook Scheme (DEPB) — post-export

(14) The Government of India (‘GOI’) claimed that the Agreement on subsidies and countervailing measures (ASCM) is infringed both in spirit and letter by the Commission not investigating the practical utilisation of the DEPB in each case. They argued that the Commission's assessment of the benefits under these schemes was incorrect since only the excess duty drawback could be considered a subsidy in accordance with Article 2 of Regulation (EC) No 2026/97 (‘basic Regulation’). Therefore, in order to establish whether a subsidy exists, an examination as to whether an excess exists must be undertaken.

(15) The Commission used the following approach in order to establish whether the DEPB on post–exportbasis constitutes a countervailable subsidy and if so, to calculate the amount of benefit.

(16) Pursuant to Article 2(1)(a)(ii) of the basic Regulation, it is concluded that this scheme involves a financial contribution by the GOI since government revenue (i.e. import duties on imports) otherwise due is not collected. There is also a benefit conferred, within the meaning of Article 2(2) of the basic Regulation, to the recipient since the exporting producers were relieved of having to pay normal import duties. The DEPB subsidy is contingent upon export performance and is thus countervailable under Article 3(4) of the basic Regulation unless one of the exceptions provided for by the basic Regulation applies.

(17) Article 2(1)(a)(ii) provides for such an exception for, *inter alia*, drawback and substitution drawback schemes which conform to the strict rules laid down in Annex I item (i), Annex II (definition and rules for drawback) and Annex III (definition and rules for substitution drawback).

(18) The analysis revealed that DEPB on post-export basis is not a drawback or a substitution drawback scheme. This scheme lacks a built-in obligation to import only goods that are consumed in the production of the exported goods (Annex II of the basic Regulation) which would ensure that the requirements of Annex I item (i) were met. Additionally, there is no verification system in place to check whether the imports are actually consumed in the production process. It is also not a substitution

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drawback scheme because the imported goods do not need to be of the same quantity and characteristics as the domestically sourced inputs that were used for export production (Annex III of the basic Regulation). Lastly, exporting producers are eligible for the DEPB benefits regardless of whether they import any inputs at all. In order to obtain the benefit, it is enough for an exporter to simply export goods without showing that any input material was imported. Thus, exporting producers which procure all of their inputs locally and do not import goods which can be used as inputs are still entitled to the DEPB benefits. Hence, the DEPB on post-export basis does not conform to any of the provisions of Annexes I to III. Since the above exception to the subsidy definition does not therefore apply, the countervailable benefit is the remission of total import duties normally due on all imports.

(19) From the above it clearly follows, according to the basic Regulation, that the excess remission of import duties is the basis for calculating the amount of the benefit only in the case of bona fide drawback and substitution drawback schemes. Since it is established that the DEPB on post-export basis does not fall in one of these two categories, the benefit is the total remission of import duties, not any supposed excess remission, since all duty remission is deemed to be in excess in such cases.

(20) For the above reasons, the claim of the GOI cannot be accepted and the provisional findings regarding the countervailability of this scheme and the calculation of the benefit, as set out in recitals 35 to 40 of the provisional Regulation, are confirmed.

3. Income Tax Exemption Scheme (ITES)

(21) The cooperating company claimed that when calculating the benefit under this scheme, the actual amount of tax paid by the company was not fully taken into account because only the Minimum Alternative Tax (MAT) was included in the original calculation and not the prepaid income taxes of previous years.

(22) This claim was found to be valid. The benefit to the company was recalculated and was found to be negligible.

4. Advance Licence — Advance Release Orders (ARO) Scheme

(23) The GOI submitted that the ARO is merely a legitimate extension of a legitimate substitution drawback scheme (Advance Licence). According to the GOI this is proved by the fact that there is an unbreakable link between the licences gained (even if subsequently exchanged for AROs) and the importation of the necessary inputs for the manufacture of exported goods. Furthermore, the system is organised and administered by the GOI in such a way as to prevent there being any possibility of excess drawback occurring.

(24) In this respect, the GOI argued that a substitution drawback scheme does not require that a company obtaining duty drawback benefits against imported inputs need consume those exact inputs in the production of the relevant exported goods. According to the GOI, the company may consume domestically procured inputs in the manufacture of the exported product provided they are consumed in equivalent volumes as the inputs on which the benefit of remission of import duty is taken. The GOI further argued that

a user of an ARO may only exchange it for the input product (procured indigenously) indicated on the advance licence and that the advance licence was obtained by reference to an exported product which has already consumed a matching quantity of the same input.

(25) When addressing these arguments, it should be recalled that advance licences are available to exporters (manufacturer-exporters or merchant-exporters) to enable them to import inputs used in the production of exports, duty-free. The advance licences measure the units of authorised imports either in terms of their quantity or in terms of their value. In both cases the rates used to determine the allowed duty free purchases are established, for most products including the product covered by this investigation, on the basis of the Standard Input Output Norms (SION). The input items specified in the advance licences are items used in the production of the relevant exported finished product.

(26) The advance licence holder intending to source the inputs from indigenous sources, in lieu of direct import, has the option to source them against AROs. In such cases the advance licences are validated as AROs and are endorsed to the supplier upon delivery of the items specified therein. In accordance with the 'export and import policy' document, the endorsement of the ARO entitles the supplier to the benefits of deemed export such as deemed exports drawback and refund of terminal excise duty.

(27) In this case, the cooperating company made very limited use of advance licences to import duty-free inputs. Instead, the company converted the licences into AROs and endorsed them to local suppliers obtaining commercial benefits. The commercial benefits of the AROs correspond to the amount of duties that the AROs enable the supplier to forgo under the deemed export drawback facility.

(28) It is acknowledged that duty drawback systems can allow for the refund or drawback of import charges on inputs which are consumed in the production process of another product and where the export of the latter product contains domestic inputs having the same quality and characteristics as those substituted for the imported inputs. It would for instance be allowed for a company, in case of a shortage of duty-free inputs, to use domestic inputs and incorporate these in the exported goods, and then, at a later stage, import the corresponding quantity of duty-free inputs. In this context, the existence of a verification system or procedure is important because it enables, in this case, the GOI to ensure and demonstrate that the quantity of inputs for which drawback is claimed does not exceed the quantity of similar products exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported inputs in question.

(29) As stated in the provisional Regulation, the verification established that there was no system or procedure in place to confirm whether and which inputs, sourced against AROs, are consumed in the production process of the exported product or whether an excess benefit of import duties occurred within the meaning of item (i) of Annex I and Annexes II and III of the basic Regulation. In particular, the exporter is under no obligation to actually consume the inputs sourced against AROs in the