ORDER OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
25 May 1998 *

In Case T-267/97,

Broome & Wellington Ltd, a company incorporated under English law, having its registered office in Manchester (United Kingdom), represented by Fiona M. Carlin, Barrister, of the Northern Ireland Bar, with an address for service in Luxembourg at the offices of Arendt and Medernach, 8-10 Rue Matthias Hardt,

applicant,

v

Commission of the European Communities, represented by Viktor Kreuschitz, Legal Adviser, and Nicholas Khan, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of a notice of initiation of an anti-dumping proceeding concerning imports of unbleached cotton fabrics originating in the

* Language of the case: English.

People's Republic of China, Egypt, India, Indonesia, Pakistan and Turkey, published on 11 July 1997 (OJ 1997 C 210, p. 12),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Third Chamber, Extended Composition),

composed of: V. Tiili, President, C. P. Briët, K. Lenaerts, A. Potocki and J. D. Cooke, Judges,

Registrar: H. Jung,

makes the following

Order

Facts of the case and procedure

1 On 26 May 1997, pursuant to Article 5 of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1, 'Regulation No 384/96'), as amended by Council Regulation No 2331/96 of 2 December 1996 (OJ 1996 L 317, p. 1), the Committee of the Cotton and Allied Textile Industries of the European Union ('Eurocoton') lodged a complaint with the Commission alleging that imports of flat unbleached cotton fabric originating in the People's Republic

of China, Egypt, India, Indonesia, Pakistan and Turkey were being dumped and were thereby causing material injury to the Community industry.

2 On 11 July 1997 the Commission published a Notice of Initiation of an anti-dumping proceeding concerning imports of unbleached cotton fabric originating from those countries (OJ 1997 C 210, p. 12, 'the Notice of Initiation').

3 By application lodged at the Registry of the Court of First Instance on 6 October 1997, the applicant, which imports into the Community products of the same type, brought this action for the annulment of the Notice of Initiation, on the basis of the fourth paragraph of Article 173 and Articles 174 and 176 of the EC Treaty.

4 By a document lodged on 16 December 1997, the Commission raised an objection of inadmissibility within the meaning of Article 114(1) of the Rules of Procedure.

5 By document lodged on 6 January 1998, the Foreign Trade Association ('FTA'), an association of European importers established in Brussels, represented by Ursula Schliessner, Rechtsanwältin, Düsseldorf, with an address for service in Luxembourg at the offices of Arendt and Medernach, 8-10 Rue Mathias Hardt, sought leave to intervene in support of the form of order sought by the applicant, pursuant to Article 115 of the Rules of Procedure.

6 By document lodged on 19 February 1998, the applicant lodged its observations on the Commission's objection of inadmissibility.

Forms of order sought by the parties

7 The applicant claims that the Court should:

— annul the Notice of Initiation of an anti-dumping proceeding;

— order the Commission to pay the costs.

8 The Commission contends that the Court should:

— dismiss the application as inadmissible;

— order the applicant to pay the costs.

Admissibility

9 Under Article 114(3) of the Rules of Procedure, the remainder of the procedure on an objection of inadmissibility is to be oral, unless the Court decides otherwise.

10 The documents in this case contain all the elements necessary for the Court to reach a decision; there is therefore no need to open the oral procedure.

11 In support of its objection of inadmissibility, the Commission puts forward three pleas, namely that there is no act open to challenge under Article 173 of the Treaty, that the action is time-barred, and the absence of direct and individual concern to the applicant.

Plea of inadmissibility owing to the absence of an act open to challenge

Arguments of the parties

12 The Commission contends that the initiation of an anti-dumping proceeding is a preparatory act and, as such, no action for annulment lies against it (see, in particular, Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 19; T-134/95 *Dysan Magnetics and Review Magnetics* v *Commission* [1996] ECR II-181, paragraph 23, and T-75/96 *Söktaş* v *Commission* [1996] ECR II-1689, paragraph 31).

13 The applicant, on the other hand, claims that the Commission's decision to initiate the proceeding is an act producing binding legal effects capable of affecting its interests. Should the Court of First Instance consider it to be a preparatory act, the applicant nevertheless asks it to exercise judicial review since the decision is vitiated by serious defects such as misuse of powers.

14 It explains the background to the Notice of Initiation of a proceeding and points out that this was the third proceeding initiated in respect of the same products, originating from the same countries, since 1994.

15 The first, initiated following a complaint by Eurocoton lodged in September 1993 (OJ 1994 C 17, p. 3), was terminated by Commission Decision 96/167/EC of 19 February 1996 (OJ 1996 L 42, p. 16) on the formal ground that the complaint had been withdrawn.

16 The second, initiated on the basis of a complaint lodged by Eurocoton on 8 January 1996, was opened the day after the previous investigation was terminated (OJ 1996 C 50, p. 3). On 18 November 1996 the Commission adopted Regulation (EC) No 2208/96 imposing a provisional anti-dumping duty on imports of unbleached (grey) cotton fabrics originating in the People's Republic of China, Egypt, India, Indonesia, Pakistan and Turkey (OJ 1996 L 295, p. 3). Although the Commission had proposed the adoption of definitive duties, in accordance with Article 9(4) of Regulation No 384/96, the Council did not introduce such duties, since there was not a majority in favour. The provisional anti-dumping duties therefore lapsed on 20 May 1997, despite repeated attempts by one national delegation to reopen discussion of the proposal.

17 On 21 May 1997 a Commission spokesman stated that the Commission 'would immediately open a procedure if a new complaint was lodged'. The Commission thus acted outside the applicable regulatory framework. Thus, even before Eurocoton had lodged its new complaint on 26 May 1997, the Commission had publicly and politically undertaken to carry out a new investigation. By the contested Notice of Initiation, it initiated a third proceeding, in accordance with that undertaking.

18 The context thus explained shows, according to the applicant, first, that the Commission undertook to initiate the proceeding even before the complaint was lodged and not in the light of the evidence contained in the complaint, as Article 5(2) of Regulation No 384/96 requires, and, secondly, that the assessment that the Commission will arrive at on this matter will be substantially identical to that which it has already set out in Regulation No 2208/96 of 18 November 1996, cited above, and which the Council did not adopt.

19 The procedure followed by the Commission is not, therefore, the normal procedure, in which a complaint precedes the initiation of an investigation. In the circumstances, neither the order in *Dysan Magnetics and Review Magnetics* v *Commission* nor that in *Söktaş* v *Commission*, cited above, are relevant.

20 In those orders the Court held that there were three determinant factors that would lead to a conclusion that a notice of initiation of a proceeding was only a preparatory act and therefore not an act open to challenge within the meaning of Article 173 of the Treaty.

21 First, the initiation of a proceeding does not automatically entail the imposition of anti-dumping duties, since the proceeding may be terminated without any measures being adopted. In this case the applicant states that it is clear from the circumstances that it is certain that the Commission will adopt provisional duties.

22 Secondly, undertakings are in no way compelled to alter their commercial practices as a result of the initiation of a proceeding. In that connection the applicant does not dispute the fact that, in theory, the initiation of an anti-dumping proceeding does not entail the obligation to alter commercial practices. However, *de facto*, initiation of a proceeding does lead to changes in those practices, in particular as regards pricing and volumes of trade, given the uncertainty that the proceeding entails for traders.

23 Thirdly, undertakings cannot be required to cooperate in an investigation. Admittedly in theory the initiation of an investigation does not mean that traders are required to cooperate in it. However, such cooperation is essential for any party with a substantial financial interest in the outcome of the proceeding in order to safeguard its rights under that proceeding, including that of bringing an action against the final decision of the institutions.

Findings of the Court of First Instance

24 In accordance with settled case-law (see, in particular, the orders in *Dysan Magnetics and Review Magnetics* v *Commission* and *Söktaş* v *Commission*, cited above), measures whose legal effects are binding and are capable of affecting the applicants' interests by clearly altering their legal position constitute acts which may be the subject of an action for annulment under Article 173 of the Treaty.

25 In the case of acts adopted by a procedure involving several stages, in principle only measures definitively laying down the position of the institution on the conclusion of the procedure, not intermediate measures intended to pave the way for the final decision, constitute acts which may be contested.

26 The Court must therefore determine whether, in this case, the contested act is in itself such as to produce legal effects capable of affecting the applicants' interests or whether, on the contrary, it is merely a preparatory measure whose illegality could be raised in an action brought against the final decision, such an action providing sufficient protection for the parties concerned.

27 It is settled case-law that only measures immediately and irreversibly affecting the legal position of the undertakings concerned are of such a nature as to justify, before completion of the administrative procedure, the admissibility of an action for annulment.

28 It follows from the provisions of Regulation No 384/96 that the Commission is responsible for carrying out investigations and deciding, on the basis of those

investigations, to terminate the proceedings or to continue them, either by adopting provisional measures or by proposing to the Council that it adopt definitive measures.

29 Consequently, the act by which the Commission initiates anti-dumping proceedings is a purely preparatory act which is not capable of immediately and irreversibly affecting the applicant's legal position.

30 That conclusion cannot be called into question by the fact that, even before Eurocoton had submitted its complaint on 26 May 1997, the Commission's spokesman had stated that the Commission would immediately open a procedure if a new complaint were lodged. That is a matter which falls to be examined in connection with the substantive legality of the Notice of Initiation, but is not capable of affecting the Court's assessment of the admissibility of an action brought under Article 173 of the Treaty against that Notice.

31 In addition, whatever the degree of certainty claimed by the applicant as regards the imposition, in this case, of provisional anti-dumping duties, it must be pointed out that, in law, the initiation of an anti-dumping proceeding does not necessarily result in anti-dumping duties being imposed. Furthermore, even assuming that anti-dumping duties were in fact introduced, the Notice of Initiation would be, precisely, one of the preparatory acts on the basis of which the Commission might have decided to introduce them.

32 Moreover, the Notice of Initiation of an anti-dumping proceeding does not have the legal effect of compelling the undertakings concerned to alter their commercial practices or to cooperate in the investigation.

33 In those circumstances, the initiation of the contested proceeding does not produce legal effects such as to affect the applicant's interests, but is a preparatory measure whose alleged illegality, in particular because of the serious defects by which it is supposedly vitiated, could if necessary be raised in an action brought against the final decision, such an action providing sufficient protection for the applicant.

34 Consequently, the initiation of the anti-dumping proceedings at issue cannot be regarded, in terms of its nature or its effects, as an act against which an action for annulment may be brought under Article 173 of the Treaty.

35 It follows from the foregoing that this application must be dismissed as inadmissible; there is no need to give a ruling on the other pleas of inadmissibility put forward by the defendant.

36 Accordingly there is no to rule on FTA's application to intervene.

Costs

37 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber, Extended Composition)

hereby orders:

1. The application is dismissed as inadmissible.

2. There is no need to adjudicate on the application to intervene.

3. The applicant is ordered to pay the defendant's costs.

Luxembourg, 25 May 1998.

H. Jung — Registrar

V. Tiili — President