JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

17 November 2009 *

In Case T-143/06,

MTZ Polyfilms Ltd, established in Mumbai (India), represented by P. De Baere, lawyer,

applicant,

v

Council of the European Union, represented by J.-P. Hix, acting as Agent, and G. Berrisch, lawyer,

defendant,

* Language of the case: English.

supported by

Commission of the European Communities, represented by N. Khan and K. Talabér-Ritz, acting as Agents,

intervener,

APPLICATION for annulment of Council Regulation (EC) No 366/2006 of 27 February 2006 amending Regulation (EC) No 1676/2001 imposing a definitive anti-dumping duty on imports of polyethylene terephthalate (PET) film originating, inter alia, in India (OJ 2006 L 68, p. 6),

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

composed of J. Azizi, President, E. Cremona (Rapporteur) and S. Frimodt Nielsen, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 9 December 2008,

gives the following

Judgment

Legal context

1 Article 2(8) and (9) 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), as amended in particular by Council Regulation (EC) No 461/2004 of 8 March 2004 (OJ 2004 L 77, p. 12) ('the Basic Regulation'), provide:

'8. The export price shall be the price actually paid or payable for the product when sold for export from the exporting country to the Community.

9. In cases where there is no export price or where it appears that the export price is unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or, if the products are not resold to an independent buyer, or are not resold in the condition in which they were imported, on any reasonable basis.

...'

2 Article 8(9) of the Basic Regulation provides:

9. 'In case of breach or withdrawal of undertakings by any party to the undertaking, or in case of withdrawal of acceptance of the undertaking by the Commission, the acceptance of the undertaking shall, after consultation, be withdrawn by Commission Decision or Commission Regulation, as appropriate, and the provisional duty which has been imposed by the Commission in accordance with Article 7 or the definitive duty which has been imposed by the Council in accordance with Article 9(4) shall automatically apply, provided that the exporter concerned has, except where he himself has withdrawn the undertaking, been given an opportunity to comment …'

3 Article 11(3), (6), (9) and (10) of the Basic Regulation provide:

'3. The need for the continued imposition of measures may also be reviewed, where warranted, on the initiative of the Commission or at the request of a Member State or, provided that a reasonable period of time of at least one year has elapsed since the imposition of the definitive measure, upon a request by any exporter or importer or by the Community producers which contains sufficient evidence substantiating the need for such an interim review.

An interim review shall be initiated where the request contains sufficient evidence that the continued imposition of the measure is no longer necessary to offset dumping and/or that the injury would be unlikely to continue or recur if the measure were removed or varied, or that the existing measure is not, or is no longer, sufficient to counteract the dumping which is causing injury.

In carrying out investigations pursuant to this paragraph, the Commission may, inter alia, consider whether the circumstances with regard to dumping and injury have

changed significantly, or whether existing measures are achieving the intended results in removing the injury previously established under Article 3. In these respects, account shall be taken in the final determination of all relevant and duly documented evidence.

…

6. Reviews pursuant to this Article shall be initiated by the Commission after consultation of the Advisory Committee. Where warranted by reviews, measures shall be repealed or maintained pursuant to paragraph 2, or repealed, maintained or amended pursuant to paragraphs 3 and 4, by the Community institution responsible for their introduction. Where measures are repealed for individual exporters, but not for the country as a whole, such exporters shall remain subject to the proceeding and may, automatically, be reinvestigated in any subsequent review carried out for that country pursuant to this Article.

…

9. In all review or refund investigations carried out pursuant to this Article, the Commission shall, provided that circumstances have not changed, apply the same methodology as in the investigation which led to the duty, with due account being taken of Article 2, and in particular paragraphs 11 and 12 thereof, and of Article 17.

10. In any investigation carried our pursuant to this Article, the Commission shall examine the reliability of export prices in accordance with Article 2. However, where it is decided to construct the export price in accordance with Article 2(9), it shall calculate it with no deduction for the amount of anti-dumping duties paid when

conclusive evidence is provided that the duty is duly reflected in resale prices and the subsequent selling prices in the Community.'

Background to the dispute

4 The applicant, MTZ Polyfilms Ltd, is a company under Indian law producing polyethylene terephthalate (PET) film which it exports to the European Community and to third countries.

5 On 13 August 2001 the Council of the European Union adopted Regulation (EC) No 1676/2001 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of PET film originating in India and the Republic of Korea (OJ 2001 L 227, p. 1). The individual rate of anti-dumping duty applied to the applicant in recital 80 of that regulation was 49%.

6 By Commission Decision 2001/645/EC of 22 August 2001 accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of polyethylene terephthalate film originating in India and the Republic of Korea (OJ 2001 L 227, p. 56), the Commission of the European Communities accepted undertakings offered by the applicant and by four other Indian exporters, whereby they undertook to export PET film to the Community at minimum import prices ('MIPs'). The MIPs were different for each exporter. In the light of those undertakings, the imports into the Community of PET film produced by the applicant and by the four other Indian exporters were exempted from anti-dumping duty, in accordance with Article 2 of Regulation No 1676/2001.

7 On 22 November 2003 the Commission initiated a partial interim review of Regulation No 1676/2001, under Article 11(3) of the Basic Regulation, relating to the form

of the measures applicable to the five Indian exporters subject to MIPs. In that review, the Commission found, inter alia, that the mix of product types sold and the price variance for certain product groupings (the range of product values), and the pattern of sales between the different product groupings had significantly changed following the acceptance of undertakings on MIPs. Since the MIPs had been established on the basis of the mix of product types and their values at the time of the initial investigation period, the Commission considered that the changes observed had rendered the MIPs 'specific' and that the undertakings were now 'inappropriate' to counteract the injurious effect of dumping.

8 As a result of that review the Council adopted Council Regulation (EC) No 365/2006 of 27 February 2006 amending Regulation (EC) No 1676/2001 and terminating the partial interim review of the anti-subsidy measures applicable to imports of PET film originating, inter alia, in India (OJ 2006 L 68, p. 1). In accordance with recital 25 of that regulation, the acceptances of the undertakings on MIPs offered by the applicant and by four other Indian exporters were withdrawn.

9 On 4 January 2005 the Commission initiated a further partial interim review of Regulation No 1676/2001, under Article 11(3) of the Basic Regulation. That review related solely to the dumping practised by the five Indian exporters subject to MIPs and to the level of residual anti-dumping duty. Its purpose was to assess the need for the continuation, removal or amendment of the level of the existing measures.

10 As a result of that review, the Council adopted Council Regulation (EC) No 366/2006 of 27 February 2006 imposing a definitive anti-dumping duty on imports of PET film originating, inter alia, in India (OJ 2006 L 68, p. 6, the 'contested regulation'). The individual rate of anti-dumping duty applied to the applicant in the contested regulation became 18%.

11 In support of the imposition of that definitive anti-dumping duty, the Council states, in recital 27 of the contested regulation, in essence, that as regards the determination of export prices, the purpose of the investigation is to establish whether the levels of dumping have changed and whether these changes can be considered to be of a lasting nature. In that context, the determination of export prices cannot, in the opinion of the Council, be limited to an examination of exporters past behaviour. The Council adds that it has to be determined whether past export prices to the Community are reliable as an indication of the likely development of export prices in the future. The Council states that, in view of the fact that undertakings were accepted in the present case, particular consideration was given to whether the existence of such undertakings influenced the past export prices, so that the future behaviour of exporters could not reliably be extrapolated from them.

12 It is clear from recital 28 of the contested regulation that the reliability of the prices of sales made to the Community by the Indian exporters concerned, including the applicant, was assessed by comparing those prices with the MIPs which were the subject of the accepted undertakings. An analysis was made of whether the weighted average of prices charged by each of those exporters was or was not substantially above the MIPs. Where the export prices were substantially above the MIPs, it was considered that they had been set independently of the MIPs and that they were, therefore, reliable. On the other hand, where the export prices were not sufficiently above the MIPs, it was considered that they were influenced by the undertakings and were not reliable enough to be used for the dumping calculation, in accordance with Article 2(8) of the Basic Regulation.

13 In recital 30 of the contested regulation, it is, in essence, found that the prices of exports by three Indian exporters, including the applicant, to the Community, were very close to the MIPs, whereas their export prices to third countries were considerably below those charged in the Community, which, according to the Council, makes it likely that, in the absence of undertakings, the export prices to the Community would be aligned with the export prices charged for the same types of products to third countries. Consequently, the export prices of those exporters to the Community could not, in the opinion of the Council, be used to establish reliable export prices, within the meaning of Article 2(8) of the Basic Regulation. According to recital 31 of the contested regulation, it was decided, for that reason, to establish the export prices of those exporters on the basis of the prices charged for their sales to third countries.

14 It is clear from recitals 33 and 34 of the contested regulation, in essence, that the use of export prices charged to third countries rather than those charged to the Community is not based on the application of Article 2(8) and (9) of the Basic Regulation, but is justified by the need, pursuant to the objectives of the interim review under Article 11(3) of the Basic Regulation, to assess the likelihood of the export prices to the Community being maintained in the future and, consequently, the likelihood of recurrence of dumping.

15 According to recital 48 of the contested regulation, the dumping margin was established, for each exporter, on the basis of a comparison of a weighted average normal value with a weighted average export price, in accordance with Article 2(11) of the Basic Regulation. It is clear from reading recitals 49 and 56 of the contested regulation together that the considerable reduction of the individual dumping margins made it appropriate to modify the residual anti-dumping duty, the level of which was established pursuant to Article 11(9) of the Basic Regulation. In the case of the applicant, whose export prices were determined on the basis of prices charged to third countries because of the unreliability of its export prices to the Community, the dumping margin was set at the rate of 26,7% (recitals 50 and 54 of the contested regulation).

16 According to recitals 51 to 56 of the contested regulation, that amendment of the residual anti-dumping duty is essentially based on the finding that the change in circumstances with regard to the dumping, as compared with the situation pertaining at the time of the initial investigation, was of a lasting nature, in accordance with Article 11(3) of the Basic Regulation.

Procedure and forms of order sought by the parties

17 By application lodged at the Court Registry on 19 May 2006, the applicant brought this action.

18 By order of 13 November 2006 the President of the Fifth Chamber granted the Commission leave to intervene in support of the form of order sought by the Council.

19 The case was initially assigned to the Fifth Chamber and then re-assigned to the Third Chamber by decision of the President of the Court of 6 February 2007. When the composition of the chambers of the Court was altered, the Judge-Rapporteur was assigned to the Sixth Chamber, to which this case was, consequently, assigned. Since the Judge-Rapporteur was prevented from attending, the President of the Court, by decision of 17 January 2008, re-assigned the case to the Third Chamber.

20 As a measure of organisation of procedure, the Council was requested to answer written questions. The Council responded to that request within the time allowed.

21 The parties presented oral argument and answered the oral questions put to them by the Court at the hearing on 9 December 2008.

22 The applicant claims that the Court of First Instance should:

— annul the contested regulation;

— order the Council to pay the costs.

23 The Council, supported by the Commission, contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

The extent of the claim for annulment

24 The Court notes, as a preliminary point, that the contested regulation imposes a definitive anti-dumping duty on imports of PET by several undertakings.

25 The applicant seeks the annulment of the contested regulation in its entirety. However, in its pleas in law and arguments the applicant confines itself to challenging the legality of the determination of its own export price.

26 In that regard, it must be held that any illegality in that determination affects the legality of the contested regulation only to the extent that it imposes an anti-dumping

duty on the applicant. On the other hand, it does not affect the legality of other parts of the contested regulation, namely, in particular, the anti-dumping duties imposed on the other undertakings affected by it.

27 Further, it is clear from the case-law that, where a regulation which introduces an anti-dumping duty imposes different duties on a series of undertakings, an undertaking is individually concerned only by those provisions which impose on it a specific anti-dumping duty and determine the amount thereof, and not by those provisions which impose anti-dumping duties on other undertakings; consequently, an action brought by that undertaking will be admissible only in so far as it seeks the annulment of those provisions of the regulation that exclusively concern it (see Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraph 22 and case-law there cited).

28 In those circumstances, having regard to the pleas in law and arguments put forward by the applicant in support of its action, the claim for annulment must be treated as seeking only partial annulment of the contested regulation, to the extent that it imposes a definitive anti-dumping duty on the applicant.

Substance

29 The applicant challenges, in essence, the methodology applied by the Council in the contested regulation in order to determine the export price. The applicant raises three pleas in law challenging that methodology: first, infringement of Article 2(8) and (9) of the Basic Regulation; second, infringement of Article 2(1) and (3) and Article 11 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT) (OJ 1994 L 336, p. 103), which is contained in Annex 1A to the Agreement establishing the World Trade Organisation (WTO) (OJ 1994 L 336, p. 103); and third, a lack of legal basis and infringement of the principle of legal certainty.

The lack of legal basis

30 In the first and third pleas in law, the applicant advances several arguments intended to show the lack of a legal basis for the methodology used in the contested regulation to determine the export price of the applicant. The Court considers it expedient to examine those arguments together.

— Arguments of the parties

31 By its third plea in law, concerning the lack of legal basis, the applicant claims that, in the contested regulation, the Council does not indicate the legal basis for the methodology used to determine the export price and merely states, in recital 34, that that methodology is not based on Article 2(8) and (9) of the Basic Regulation. The Council's choice of Article 11(3) of that regulation as the relevant legal basis is made for the first time in its statement of defence. However, given that all interim reviews must be carried out pursuant to Article 11(3) of the Basic Regulation, that provision has no bearing on the choice of the relevant legal basis upon which the applicant's export price was established.

32 In its first plea in law, on the infringement of Article 2(8) and (9) of the Basic Regulation, the applicant claims, first, that calculation of the export price is governed by those provisions and that their applicability to interim review investigations is explicitly provided for by Article 11(9) and (10) of the Basic Regulation, there being no methodology for that calculation which is specific to such investigations. The applicant submits, next, that the analysis of the likelihood of recurrence of dumping carried out by the Commission during a review investigation is irrelevant and should not affect the calculation of the dumping margin. Lastly, the applicant observes that Article 11(3) of the Basic Regulation is not a valid legal basis for the calculation of the export price, since there is not a single sentence in it from which it might be possible to determine the methodology for the calculation of a dumping margin and, *a fortiori*, an export price.

33 The Council contends that, in the present case, Article 11(3) of the Basic Regulation is the relevant legal basis for the methodology used to determine the export price.

34 That methodology had to be chosen because of the need, referred to in Article 11(3) of the Basic Regulation, to assess, in the interim review investigation, whether the circumstances relating to the dumping had changed significantly. Accordingly, the institutions rejected the export prices to the Community charged by the applicant on the ground that those prices did not reflect a lasting change in the applicant's pricing policy because they were merely a consequence of the MIPs. That conclusion was based on the finding that the applicant's export prices to the Community were, on average, only 7% above the MIPs, whereas they were 12% above its export prices to third countries. Since the applicant's export prices to the Community were not set independently of the MIPs, they were not reliable and could not be used to establish an export price. The 'most logical' approach therefore was to establish the export price on the basis of the applicant's prices for sales to third countries.

35 As regards the applicant's argument that the applicability of Article 2 of the Basic Regulation to review investigations is laid down in Article 11(9) and (10) of that regulation, the Council contends, in its statement of defence, that Article 11(9) allows the institutions to apply, in a review, a methodology other than that used in the initial investigation if the circumstances have changed. The Council states, in that regard, that the influence which the undertakings on MIPs applicable during the investigation period have on the applicant's prices is a change in circumstances within the meaning of Article 11(9) of the Basic Regulation. Further, the Council contends that paragraphs (9) and (10) of Article 11 do not remove the need for the institutions to assess whether any changes concerning dumping or injury are lasting and thus justify an amendment of the measures.

36 In its response to the Court's written questions and in its observations at the hearing, the Council states that it does not propose to base its defence on Article 11(9) of the Basic Regulation as the legal basis for the method of calculating the export price as

was applied in the present case, and that the reference, in its statement of defence, to a change in circumstances should not be so interpreted by the Court, nor interpreted as, by itself, justifying the omission to use the methodology for the calculation of the dumping margin prescribed by Article 2 of that regulation.

37 The Council considers, lastly, that the distinction between the analysis of the likelihood of the recurrence of dumping and the calculation of a dumping margin, as proposed by the applicant, is misconceived, since the objective of the review investigation is to establish whether the dumping margins have changed and whether any such changes can be regarded as lasting, which would justify the termination or amendment of the existing anti-dumping measures.

— Findings of the Court

38 The Court notes, as a preliminary point, that the applicant complains that the institutions did not base their assessment of the reliability of the applicant's export prices to the Community on the criteria laid down in Article 2(8) and (9) of the Basic Regulation. The Council, for its part, contends in essence that the reason for the departure from the methodology laid down in Article 2(8) and (9) of the Basic Regulation was the need to determine, in accordance with Article 11(3) of that regulation, whether any change was lasting and thus would lead to the termination or possible amendment of the existing measures as part of an interim review.

39 It is therefore necessary to assess whether Article 11(3) of the Basic Regulation constitutes a sufficient legal basis for not using the criteria which govern the determination of the export price, as they are laid down in Article 2(8) and (9) of that regulation.

40 In that regard, it is clear that the contested regulation was adopted on the conclusion of an interim review under Article 11(3) of the Basic Regulation, the provisions of which set out the conditions for initiating such a review and its principal objectives. Thus, under the second subparagraph of Article 11(3): 'An interim review shall be initiated where the request contains sufficient evidence that the continued imposition of the measure is no longer necessary to offset dumping'. The third subparagraph of Article 11(3) provides that in the review investigation, 'the Commission may, inter alia, consider whether the circumstances with regard to dumping and injury have changed significantly'

41 In the present case, it is not disputed that the Council could justifiably rely on Article 11(3) of the Basic Regulation to find that there were significant changes in the circumstances with regard to the dumping, and that the Council was entitled, after confirming that those changes were lasting, to conclude that it was appropriate to amend the residual anti-dumping duty (recital 56 of the contested regulation). On the other hand, it is not provided in Article 11(3) of that regulation that the Council has the power in an initial review to use, as it has done in the present case, a methodology for the determination of the export price which is incompatible with the requirements laid down in Article 2(8) and (9) of the Basic Regulation, by referring to the need to make a prospective assessment of the prices charged by the exporters concerned.

42 It is clear from Article 11(9) of the Basic Regulation that, as a general rule, in a review, the institutions are required to apply the same methodology, including the method of determining the export price under Article 2(8) and (9) of the Basic Regulation, as that used in the initial investigation which led to the imposition of the anti-dumping duty. The same provision contains an exception whereby the institutions may apply a methodology other than that used in the initial investigation only where the circumstances have changed, an exception which must however be interpreted strictly. Furthermore, it is clear from Article 11(9) of the Basic Regulation that the methodology applied must take account of the provisions of Articles 2 and 17 of the Basic Regulation.

43 Accordingly, in an interim review, just as in an initial investigation, the institutions are, as a general rule, required to determine the export price in accordance with the criteria established by Article 2 of the Basic Regulation.

44 However, despite the explicit reference to Article 11(9) of the Basic Regulation in recital 49 of the contested regulation and the Council's statement that, once the influence of the undertakings on MIPs had taken effect, the circumstances determining the applicant's export prices had indeed changed, the Council has clearly stated, in its written replies to the written questions of the Court and in its remarks at the hearing, that it does not intend to rely on the exception provided for by Article 11(9) of that regulation. On the contrary, in order to justify the application of a methodology to determine the export price which departs from that which was applied in the initial investigation and from the criteria laid down by Article 2(8) and (9) of that regulation, the Council has simply relied on the provisions of Article 11(3) of that regulation.

45 However, it must be held that Article 11(3) of the Basic Regulation contains no express exception to the rule in Article 11(9) that the export price must be determined in accordance with the provisions of Article 2(8) and (9) of the Basic Regulation.

46 Further, in the present case, there is nothing to suggest that the underlying objectives of Article 11(3) of the Basic Regulation, including the possible need to carry out a prospective analysis of the prices charged by the exporters in question, confer on the institutions concerned an implicit power to substitute a methodology based on such an analysis for the methodology prescribed by Article 2(8) and (9) of the Basic Regulation.

47 It is clear from the case-law that the existence of an implicit power, which constitutes a derogation from the principle of allocation of powers stated in the first paragraph of Article 5 EC, must be appraised strictly. It is only exceptionally that such implicit powers are recognised by case-law and in order to be so recognised, they must be necessary to ensure the practical effect of the provisions of the Treaty or the basic regulation at issue (see, to that effect, Joined Cases 281/85, 283/85 to 285/85 and 287/85 *Germany and Others* v *Commission* [1987] ECR 3203, paragraph 28, and Case T-240/04 *France* v *Commission* [2007] ECR II-4035, paragraph 37 and case-law there cited).

48 It must be observed, in that regard, that the practical effect of Article 11(3) of the Basic Regulation is broadly ensured by the fact that when assessing the need to continue existing measures the institutions have a wide discretion, which includes the option of carrying out a prospective assessment of the pricing policy of the exporters concerned.

49 However, once the institutions have assessed that need and decided to amend the existing measures, they are bound, when determining the fresh measures, by the provision in Article 11(9) of the Basic Regulation which confers on them the express power and obligation to apply the methodology prescribed by Article 2 of that regulation.

50 It follows, first, that when the institutions are determining the export price, their alleged power to carry out prospective analyses is not necessary to ensure the practical effect of Article 11(3) of the Basic Regulation, and indeed is ruled out by Article 11(9) of the same regulation, and, second, that the implicit power which supposedly stems from Article 11(3) could not override the express powers provided for by Article 11(9), read with Article 2 of that regulation.

51 Consequently, Article 11(3) of the Basic Regulation cannot serve as a legal basis allowing the institutions, when determining the export price, not to apply the methodology prescribed by Article 2(8) and (9) of the Basic Regulation. By departing from that methodology and by determining the export price on the basis of criteria not laid down by those provisions, the Council therefore adopted the contested regulation on an incorrect legal basis.

52 Consequently, it is appropriate to uphold the first and third pleas in law to the extent that they claim that there was no legal basis and, therefore, to annul the contested regulation to the extent that it concerns the applicant, and it is unnecessary to examine the pleas in law and complaints in relation to the infringement of Article 2(1) and (3) and Article 11 of the Agreement on Implementation of Article VI of the GATT 1994, or the infringement of the principle of legal certainty.

Costs

53 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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 Council has been unsuccessful, it must be ordered to pay the costs, as applied for by the applicant.

54 In accordance with the first subparagraph of Article 87(4) of the Rules of Procedure, the institutions which have intervened in the proceedings are to bear their own costs. Consequently the Commission, which intervened in support of the Council, must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Annuls Council Regulation (EC) No 366/2006 of 27 February 2006 amending Regulation (EC) No 1676/2001 imposing a definitive anti-dumping duty on imports of polyethylene terephthalate (PET) film originating, inter alia, in India, to the extent that it imposes an anti-dumping duty on MTZ Polyfilms Ltd;**

2. **Orders the Council of the European Union to bear its own costs and to pay those of MTZ Polyfilms and orders the Commission of the European Communities to bear its own costs.**

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 17 November 2009.

[Signatures]