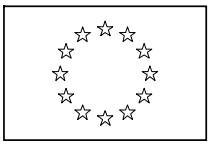

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25.11.1999
COM(1999) 627 final

Proposal for a

COUNCIL REGULATION

imposing a definitive countervailing duty on imports of polyethylene terephthalate (PET) film originating in India and collecting definitively the provisional duty imposed

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. The Commission, by Regulation (EC) No 1810/99[1] of 17 August 1999, imposed provisional countervailing duties on imports into the Community of polyethylene terephthalate ('PET') film originating in India, following an investigation into injurious subsidisation and the Community interest aspects of this case.

2. The Commission considered all the views expressed by interested parties in relation to these provisional measures before drawing their final conclusions.

3. The Commission confirms its provisional conclusions to the effect that imports into the Community of the product under consideration originating in India were being subsidised and were causing material injury to the Community industry, and conclude that it is in the Community's interest to take protective measures in the form of definitive countervailing duties and to collect definitively the provisional duties at the duty rate definitively imposed.

4. The provisional measures were in the form of *ad valorem* duties, ranging from 6,7 % to 37,2 %.

5. In the light of the different claims made by the Government of India and the exporting producers, the calculations of subsidisation and the rates of duty for all co-operating Indian exporting producers were revised downwards for the proposed definitive countervailing duties, but remain for all Indian exporting producers in the range of 3.8% - 19.1%.

6. The level of measures for the co-operating Indian exporting producers corresponds either to the margins of subsidisation found or the injury elimination margins established, whichever was lower. The residual duty was set at the level of the highest rate that has been established for the cooperating companies.

7. The attached draft Council Regulation contains detailed information as regards the data and motivation on the basis of which the proposed measures have been established.

8. The interested parties were informed of the essential facts and considerations on the basis of which the Commission proposes to the Council the imposition of definitive countervailing duties, and were given an opportunity to comment. The comments were taken into account where appropriate.

9. In the Anti-Dumping Committee of 20 October fourteen Member States were in favour of the proposal and one Member State abstained.

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[1] OJ L 219, 19.8.1999, p. 14.

Proposal for a

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imposing a definitive countervailing duty on imports of polyethylene terephthalate (PET) film originating in India and collecting definitively the provisional duty imposed

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[2] and in particular Article 15 thereof,

After consulting the Advisory Committee,

Whereas:

1. PROCEDURE

(1) By Commission Regulation No 1810/99[3] (hereinafter referred to as 'the provisional duty Regulation'), a provisional countervailing duty was imposed on imports of polyethylene terephthalate ('PET') film into the Community originating in India falling within CN codes 3920 62 19 and 3920 62 90.

(2) Subsequent to the imposition of the provisional countervailing duty, the Indian cooperating exporting producers Ester Industries Ltd, Flex Industries Ltd, Garware Polyester Ltd, India Polyfilms Ltd/Jindal Polyester Ltd (related companies), MTZ Polyesters Ltd, Polyplex Corp. Ltd (hereinafter referred to as "the Indian exporting producers"), the Government of India (hereinafter referred to as "GOI"), the complainant Community producers (hereinafter referred to as "the Community industry") and two users of PET film submitted comments in writing.

(3) In accordance with the provisions of Article 11(5) of the Basic Regulation, all above parties except for one user requested and were granted hearings.

(4) One user, which did not make itself known at an earlier stage, reacted further to the imposition of the provisional measures.

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

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[2] OJ L 288, 21.10.1997, p. 1

[3] OJ L 219, 19.8.1999, p. 14.

(6) The oral and written comments submitted after the imposition of provisional measures and after the above disclosures were considered and, where deemed appropriate, taken into account in the definitive findings.

2. PRODUCT UNDER CONSIDERATION

(7) The provisional duty Regulation, recital seven described the product under consideration to be polyethylene terephthalate ('PET') film.

(8) Recital eight of the provisional duty Regulation stated further that the product can be split into a variety of segments typically identified within the industry as magnetic, packaging, electrical, imaging and other industrial segments and that for the purposes of the investigation, the products were grouped in types according to market segment, thickness, coating properties, surface treatment, mechanical properties and clarity/opacity.

(9) After the imposition of provisional measures the Commission received a request by the Community industry to consider not only the types classifiable within CN codes 3920 62 19 and 3920 62 90 as set out in the provisional duty Regulation but also those classifiable under CN codes 3920 62 11 and 3920 62 13 as PET film. The Indian exporting producers opposed to inclusion of the two additional codes claiming that the PET film classifiable under them is not interchangeable with the PET film falling under the other two codes, i.e. 3920 62 19 and 3920 62 90. They pointed out that only these latter codes were included in the complaint of the Community industry and that the two former ones had not been specifically included in the complaint on the grounds that the product categorised under these codes were not interchangeable with those classified under CN codes 3920 62 19 and 3920 62 90.

(10) On the basis of the information collected in the course of the investigation, the Commission decided not to include CN codes 3920 62 11 and 3920 62 13 within the scope of the investigation as no information has been submitted which would suggest that the claim made by the Community industry in the complaint in terms of lack of interchangeability is not correct.

3. SUBSIDIES

3.1 GENERAL SUBMISSIONS

3.1.1 Addition of interest in the calculation of benefits obtained

(11) The exporting producers requested to withdraw the interest element that had been added in order to calculate the total amount of benefit obtained under the various schemes. It was claimed that the addition of interest was unwarranted, beyond the terms of the Agreement on subsidies and countervailing measures (ASCM) and prohibited under Article VI paragraph 3 GATT 1994. The Calculation Guidelines of the Commission would be null and void in this respect.

(12) The legal basis for the addition of interest to the face value of the subsidy is Article 5 in conjunction with Article 6 of the Basic Regulation. Article 5 states that the amount

of countervailable subsidies shall be calculated in terms of the benefit conferred on the recipient which is found to exist during the investigation period for subsidisation. Article 6, which reproduces Article 14 of the ASCM, establishes rules for calculation of the benefit for certain types of subsidies. For all categories of subsidies mentioned in Article 6, i.e. provision of equity, loans, loan guarantees and goods and services or purchase of goods, the benchmark for determining the benefit is the equivalent cost of funds on the commercial market. Therefore, by applying the rationale contained in Article 6 as a general rule to all categories of subsidies, in order to encompass the full benefit, the costs of borrowing the funds at commercial rates must be included.

(13) When expressed as a face value during the investigation period, all subsidies are effectively equivalent to a grant. Since non-repayable grants are not available commercially, the recipient, in the absence of such a grant, would have had to raise the equivalent amount from commercial sources and repay it with interest over a period of time. It is this element of the benefit which is covered by adding interest to the nominal subsidy amount.

(14) This approach is specifically provided for in the Commission's Guidelines for the calculation of the amount of subsidy in countervailing duty investigations (Calculation Guidelines)[4] and is the Community's standing practice which has been followed in a number of previous cases.

(15) Article VI paragraph 3 GATT 1994, which is reproduced in Article 19.4 of the ASCM, only states that duties must not be levied in excess of the amount of the subsidy. The amount of the subsidy is calculated in terms of benefit found to exist in the investigation period (Article 14 ASCM). Since the company also benefited from the fact that it did not have to source the funds on the financial market, the amount of benefit must also include an interest element. Consequently, since the amount of benefit (including interest) corresponds to the amount of the subsidy and the countervailing duty is calculated in terms of the subsidy margin found, Article VI paragraph 3 GATT 1994 is fully respected by the addition of interest.

(16) For these reasons, the claim to exclude the interest element in the calculation of the benefits obtained under the various schemes is rejected.

3.1.2 Specificity of the various schemes

(17) The exporting producers submitted that the presumption in Article 2.3 of the ASCM rendering subsidies contingent upon export performance specific will not *ipso facto* apply, since Article 27.2 of the ASCM provides that the prohibition of subsidies contingent upon export performance shall not apply to developing countries. India is one of the countries listed in Annex VII of the ASCM, and therefore the export subsidies granted by the Government of India (GOI) would not be prohibited. As a consequence, the Commission would be under obligation to demonstrate on the basis of positive evidence that the schemes in question are specific.

(18) Article 3(4)(a) of the Basic Regulation clearly states that subsidies, including those illustrated in Annex I, shall be deemed to be specific if they are, in law or in fact,

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[4] OJ C 394, 17.12.1998, p. 7. "The face value of the amount of the subsidy has to be transformed into the value prevailing during the investigation period through the application of the normal commercial interest rate".

contingent upon export performance. This condition has been individually examined for each of the subsidy schemes subject to this proceeding.

3.2 INDIVIDUAL SCHEMES

3.2.1 Passbook Scheme (PBS)

(19) The Government of India (GOI) and the exporting producers raised arguments regarding this scheme, which is described in recitals 12 to 19 of the provisional duty Regulation. These arguments need not be addressed, given that the benefits obtained under this were not included in the amounts of duty provisionally established for the reasons given in recital 24 of the provisional duty Regulation. Consequently, no measures will be imposed on benefits under this scheme and, therefore, no definitive finding is required.

3.2.2 Duty Entitlement Passbook Scheme – pre-export basis

(20) The GOI and the exporting producers raised arguments regarding this scheme, which was described in recitals 26 to 30 of the provisional duty Regulation.

(21) In particular, it was claimed that the DEPB pre-export scheme is a permitted remission/drawback scheme within the provisions of the Basic Regulation, and, as such, is non-countervailable. It was also claimed that, should the scheme be found to be countervailable, only actual excess remissions should be used as a basis for the calculation of the benefit, and the Commission should have examined whether there was in fact an excess drawback of import charges on inputs consumed in the production process.

(22) The DEPB on pre-export basis is not a remission/drawback or substitution scheme within the provisions of the Basic Regulation, despite the existence of the 'Actual User Condition'. It is fundamentally a value, and not quantity based scheme. The DEPB rate, which gives rise to import duty exemption, is not calculated in relation to specific physical quantities of inputs actually consumed or to be consumed in the production process. Concretely, inputs are determined on the basis of Standard Input/Output Norms (SION) which set notional costings based on what are considered to be the values of inputs that have to be imported to manufacture a particular product. Once the DEPB rate has been set for a particular finished product, inputs can be imported duty free under a DEPB pre-export licence. There is no mechanism in place which would prevent an exporting producer from shifting the ratios of his inputs actually imported, since he is only required to remain within the overall credit ceiling granted.

(23) In addition, there is no obligation to actually import all different inputs for which credit has been granted. The only limits to the quantity of any particular input that may be imported under the scheme is the value of the licence granted and the corresponding commitment to export the finished product. Therefore, there is no requirement that the imported inputs being substituted must be equal in quantity to, and have the same quality and characteristics as the home market inputs.

(24) A company which can obtain its inputs at a lower value or which sources some of the inputs on the domestic market, would be able to import duty free inputs that could be used for domestic production or sale since the actual imported quantities will have no

relation to those set in the SION. There was no evidence found of an effective system or procedure in place to confirm either which duty-free inputs are actually consumed in the production process of the exported finished product or in what quantities. Furthermore, it has been found that the offset that may take place when goods are exported is not carried out on the basis of actual quantities of duty free imported inputs used in the processing of the exported products, but rather on the basis of standard value assumptions concerning inputs of the exported product.

(25) Even if the DEPB – pre-export basis were to be considered a duty draw-back system, as alleged, Annex II(II)(5) and Annex III(II)(3) of the Basic Regulation provide that, where it is determined that the government of the exporting country does not have a verification system in place, a further examination by the exporting country based on actual inputs involved, or actual transactions, respectively, will normally need to be carried out in the context of determining whether an excess payment occurred. Since, as explained above, no such verification system of actual quantities of imported inputs exists, the GOI was required to undertake an examination. The GOI did not carry out such an examination. Therefore, the Commission did not examine whether there was in fact an excess drawback of import charges on inputs consumed in the production of the exported product.

(26) In any event, 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 has been established that the DEPB pre-export scheme is not a drawback or substitution drawback scheme within the meaning of Annex I (i) and Annexes II and III of the Basic Regulation, the benefit is the total remission of import duties, not any supposed excess remission.

(27) As the DEPB pre-export scheme involves government revenue that is otherwise due being forgone, the scheme is considered to confer a subsidy under Article 2.1(a)(ii) of the Basic Regulation. Since benefit under the scheme cannot be obtained without an export commitment, the scheme is contingent in law upon export performance within the meaning of Article 3.4(a) of the Basic Regulation, and is therefore specific.

Calculation of the subsidy amount

(28) The benefit to the exporting producers has been calculated as explained in recital 23 of the provisional duty Regulation, taking additionally into account application fees which have been claimed by the exporting producers. These additional amounts had, however, no influence on the provisionally calculated subsidy margins.

(29) Two companies benefited from this scheme during the investigation period and obtained subsidies of 1,31% and 6,84%.

3.2.3 Duty Entitlement Passbook Scheme – post-export basis

(30) The GOI and the exporting producers raised arguments regarding this scheme, which was described in recitals 37 to 39 of the provisional duty Regulation.

(31) In particular, it was claimed that the DEPBS on post-export basis would be a permissible substitution drawback scheme since DEPB post-exports credits would be granted only in accordance with notified SION. Under paragraph (I) of Annex I of

the Basic Regulation, a drawback scheme may permit the use of a quantity of home market inputs equal to, and having the same quality and characteristics as the imported inputs. It was also claimed that the Excise Authorities would be in a position to verify which imported inputs are incorporated into the exported product. Accordingly, the DEPBS on post-export basis would be a permissible substitution drawback scheme under Annex II of the Basic Regulation.

(32) It should be recalled that, contrary to the DEPBS on pre-export basis, no 'actual user condition' exists. The credits on the DEPBS on post-export basis are calculated as a percentage of the value of exported finished products. Credits thus obtained can be used to offset customs duties normally due on imports of any goods (excluding those on the negative list of imports). There is no restriction to goods for use in the production of the exported product. Imported goods may be sold on the domestic market or used in any other way. Moreover, licences, and thus credits, are freely transferable.

(33) Consequently, it can be concluded that the DEPBS on post-export basis is not a drawback or substitution drawback scheme within the meaning of Annex I (i) and Annexes II and III of the Basic Regulation.

(34) The GOI also claimed that the scheme constitutes an export subsidy only to the extent that it provides a drawback of import charges in excess of those actually leviable in imported inputs that are used in export production, and that the Commission has failed to discharge its obligation of determining the extent of this excess.

(35) This claim has to be rejected for the same reasons as stated above in recital 26.

Calculation of the subsidy amount

(36) The GOI submitted that, in the case of licences being sold, the Commission would be required to determine the actual value of the benefit derived by the exporting producers through these sales transactions, and not on the basis of the amount of credit granted in the licence.

(37) As already explained in recital 43 of the provisional duty Regulation, this claim cannot be granted since the benefit granted by the GOI to the exporting producer in terms of revenue foregone is properly reflected in the value of the licence. Selling a licence at a price different (i.e. higher or lower) than its value represents a purely commercial transaction which does not alter the amount of benefit originally received from the scheme.

(38) The benefit to the exporting producers has been calculated as explained in recitals 41 to 44 of the provisional duty Regulation. In this respect, it should be noted that a number of claims were made by four exporting producers and accepted by the Commission. Subsequently, additional costs necessarily incurred to obtain the licence have been taken into account. Also, corrections have been made to the amounts of credit granted. These corrections result in minor changes of the subsidy margins.

(39) Four companies benefited from this scheme during the investigation period and obtained subsidies of between 2,34% and 17,68%.

3.2.4 Export Promotion Capital Goods Scheme (EPCGS)

(40) The GOI submitted that the objective of the EPCG scheme, which was described in recitals 46 to 50 in the provisional duty Regulation, would be to permit the technological upgrading of plant and equipment by enterprises across the economy while also preserving India's scarce foreign exchange resources. It was claimed that the EPCG benefit is not contingent upon export performance because EPCG licences are available regardless of previous export performance. Moreover, an EPCG licence-holder can always purchase domestic rather than imported capital goods.

(41) In regard to this claim, it should be noted that to avail itself of the EPCGS, a company must make a commitment to export a certain value of goods within a certain time period. This scheme is therefore contingent in law upon export performance since no benefit can be obtained without a commitment to export goods. As such, it is deemed to be specific under the provisions of Article 3(4)(a) of the Basic Regulation and, therefore, countervailable.

(42) The exporting producers claimed that, under the EPCGS, the Government revenue is not foregone, but only postponed. If an importer of capital goods fails to fulfil his export obligation by the end of the period that the scheme provides, any differential duty will be collected with interest. Thus, the question whether an importer had enjoyed any duty remission at all and whether the Government revenue is foregone and, thereby a benefit is conferred, will arise only at the end of the given period for fulfilment of the export obligation under this scheme. It would therefore be premature to consider the import of capital goods under the scheme during the period of investigation.

(43) In regard to this claim, it is considered that, when a company applies for this scheme and thereby gives a commitment to export goods, it must be presumed that the export obligation will be met and final exemption from the payment of the import duties will be obtained. Indeed, there must be an expectation on the part of the companies that they will finally not have to pay duties. To assume otherwise would render the scheme meaningless.

(44) Moreover, the investigation has positively established that the GOI in fact grants extensions of the period of export obligation to companies that are unable to meet their export obligation within the period initially established.

(45) For these reasons, it is considered that Government revenue is foregone at the time of importation of capital goods and the importing company receives a benefit in the form of the total amount of unpaid duties.

Calculation of the subsidy amount

(46) The benefit to the exporting producers has been calculated as explained in recital 53 of the provisional duty Regulation. In this respect, it should be noted that a number of claims were made by all exporting producers, which were in part accepted by the Commission. Most notably, costs necessarily incurred in order to qualify for, or to obtain the subsidy and for which substantiated evidence was provided were taken into account. Those costs were notably linked to application fees and bank guarantees. The application fee is a one time operation whereas the bank guarantees can be a one time operation covering a period of several years for the bank guarantee

or can be composed of several yearly instalments to be paid throughout the period of the validity of the bank guarantee.

(47) It should be noted that, one of these companies, MTZ Polyesters Ltd, claimed that the method applied in the provisional duty Regulation is not appropriate in its specific case, since it had been in a totally different situation during the investigation period than the other companies involved in the investigation. Most notably, it was claimed that, due to unforeseen events, among which was a natural disaster, commercial production only started in October 1998. This led to very low domestic and export sales during the investigation period and consequently to a high subsidy margin. The company therefore proposed and requested to use a different calculation methodology.

(48) It should be noted that no such claim had been submitted to the Commission during the investigation until the disclosure of provisional findings. However, with its request, the company submitted detailed and substantiated evidence concerning the start of commercial production and the effect that such late start had on its operations.

(49) After careful scrutiny of this submission, the Commission concluded that the request to adopt different calculation methodologies as proposed by the company was not justified. However, the Commission considered that, given the specific and exceptional circumstances affecting this company, the application of the same denominator (i.e. actual exports) to this company as that applied to the companies which were in a normal commercial production situation led to results of such a disproportionate nature that they did not adequately reflect the benefit obtained by this company from the countervailable subsidy under this scheme. Accordingly, the Commission, while maintaining the same calculation methodology, made an adaptation of the production and export sales figures of this company, based on verified data from companies in a normal commercial production situation in order to allocate the benefit conferred by the subsidy during the investigation period.

(50) In summary, six companies have availed themselves of this scheme during the investigation period and obtained subsidies of between 1,42% and 8,75%

3.3 EXPORT PROMOTION ZONES / EXPORT ORIENTED UNITS (EPZ/EOU)

(51) The GOI submitted that it does not forgo any revenue under this scheme, which was described in recitals 55 to 58 of the provisional duty Regulation, because customs duties on capital goods are only suspended during the period of bonding. This means that, on imports of capital goods for use within EPZ/EOU units, the importer is not required to pay customs duty. However, when the capital goods are sold, or de-bonded, the customs duty becomes payable, at a rate proportionate to the depreciated value of the capital goods at the time of sale or de-bonding.

(52) This claim is similar to the one made by the exporting producers concerning the EPCG scheme, i.e. revenue would not be foregone, but merely postponed. However, to presume that capital goods would be imported duty free and then re-sold on the domestic market, duty paid, would render the scheme meaningless. In any event, even if capital goods were to be re-sold at a given moment in the future, revenue would be foregone in an amount proportional to the accrued depreciation. If and

when such capital goods are sold is a merely commercial decision taken by the company.

(53) For these reasons, it is considered that Government revenue is foregone at the time of importation of capital goods and the importing company receives a benefit in the form of the total amount of unpaid duties.

(54) The exporting producer made a similar claim, and additionally presented arguments relating to the imports of inputs for exported products. Since the EPZ/EOU scheme was used exclusively for the import of capital goods, these additional arguments need not be addressed.

(55) This subsidy is contingent in law upon export performance within the meaning of Article 3(4)(a) of the Basic Regulation, since it cannot be obtained without the company accepting an exporting obligation, and therefore deemed to be specific.

Calculation of the subsidy amount

(56) The benefit of the exporting producer has been calculated as explained in recital 63 to 65 of the provisional duty Regulation. One company received benefits under this scheme at a rate of 0,7%.

3.3.1 Income Tax Exemption Scheme

(57) As already established in the provisional duty Regulation, no exporting producer made use of this scheme. Consequently, no measures were imposed and no definitive finding is required in the context of the investigation.

3.4 REGIONAL SCHEMES

3.4.1 Sales tax

(58) The exporting producers submitted that the benefit bestowed under the Sales Tax Exemptions of the States of Gujarat and Maharashtra and the Trade Tax Incentive Scheme of the State of Uttar Pradesh is conferred to the purchaser of the goods, and not the seller.

(59) Sales or trade tax in these States is a tax levied on sales of goods, and added to the sales prices on the invoice. The seller thereby acts as a tax collector. The sales/trade tax system differs from VAT systems in that sales/trade tax paid cannot be offset against sales/trade tax collected.

(60) It has been claimed that the Sales or Trade Tax Exemptions have been used by the companies exclusively for sales transactions, and not for any substantial purchases of goods.

(61) The Commission, during the verification visit, has found no evidence to the contrary. It was also established that all major suppliers of inputs for the exporting producers are located outside the States concerned. Therefore, sales tax was payable on purchases of goods by the exporting producers.

(62) It can therefore be concluded that the Sales Tax Exemptions granted by the States of Gujarat and Maharashtra and the Trade Tax Incentive Scheme granted by the State of Uttar Pradesh conferred no benefit upon the exporting producer.

(63) No measures will be imposed and, therefore, no definitive findings on these schemes are required. Finally, it should be noted that these findings do not prejudice findings concerning the usage of these schemes for purchase transactions.

3.4.2 Regional schemes - Electricity duty exemption

(64) The GOI and one exporting producer, MTZ Polyesters Ltd, submitted that this scheme, which was described in recitals 80 and 81 of the provisional duty Regulation, would not be specific, since it would be available to all new enterprises in Gujarat, regardless of where they are located.

(65) The Commission analysed the evidence submitted in order to substantiate this claim. After a careful examination, it can be concluded that, even though some unclear wording in the relevant legislation appears to have been used, notably in the context of defining 'service undertakings' and setting differential duty rates, this scheme is indeed available to all new industrial undertakings within the State on an equal basis and during a period of five years.

(66) Article 3(2)(b) of the Basic Regulation stipulates that where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist provided that eligibility is automatic and such criteria and conditions are strictly adhered to. Such objective criteria and conditions should, *inter alia*, be horizontal in application and not favour certain enterprises over others.

(67) In the light of the submissions received and evidence verified in this investigation, it is considered that the scheme meets the criteria of Article 3(2)(b) of the Basic Regulation, including *inter alia* because it is horizontal in application, since it is available to enterprises in the whole State, and based on objective criteria, namely the creation of new industrial undertakings.

(68) It is therefore concluded that this scheme is not specific and therefore not countervailable.

3.4.3 Regional schemes - Octroi refund

(69) Concerning the Octroi refund, which was described in recitals 88 to 89 of the provisional duty Regulation, the GOI submitted that the Octroi is an indirect tax levied by local authorities in India on goods that enter the territorial units of a town or a district. It was argued that the 'Guidelines on consumption of inputs in the production process' in Annex II of the ASCM would permit indirect tax rebate schemes of prior stage cumulative indirect taxes levied on imports that are consumed in the production of exported products. Therefore, this scheme would not be countervailable.

(70) This argument has to be dismissed, since the Octroi refund scheme has no link whatsoever to export production.

(71) No substantiated claims regarding specificity of this scheme have been submitted. It is therefore confirmed that this scheme is specific in accordance with Article 3(2)(a) and (c) of the Basic Regulation since it is explicitly limited to certain enterprises, which are located in designated areas, within the jurisdiction of the granting authority.

(72) One exporting producer, Garware Polyester Ltd, submitted that it had obtained no benefit under this scheme during the IP since the State Authorities of Maharashtra had not yet actually fulfilled his repayment obligation.

(73) This argument has to be rejected, since the benefit obtained is the accrued claim against the State of Maharashtra, to which the company is legally entitled.

(74) The GOI, supported by the exporting producers, reiterated a general green-light claim and submitted that the Commission, especially in the case of developing countries, would be under an obligation to establish that backward regions are not eligible under Article 4(3) of the Basic Regulation, rather than making a determination based on facts available.

(75) In this respect, it should be noted that, in so far as this scheme is concerned, which was used only by one company located in the area of Aurangabat within the State of Maharashtra, no evidence was submitted within the deadlines applicable to this proceeding by the GOI or by any other party in relation to the fulfilment of the requirements contained in Article 4(3) of the Basic Regulation. Certain evidence, which was limited to data stemming from 1981/82, was submitted considerably beyond the deadline. In these circumstances, the Commission is neither under an obligation nor in a position to establish that the criteria required for a determination under Article 4(3) of the Basic Regulation, including *inter alia* those relating to the measurement of economic development based on statistical evidence, are met in the case of this scheme.

(76) Under these circumstances, the Commission is under an obligation to confirm the findings as outlined in recital 93 of the provisional duty Regulation. It is therefore definitively concluded that this scheme is countervailable.

Calculation of the subsidy amount

(77) The benefit to the exporting producer has been calculated as explained in recital 94 of the provisional duty Regulation. However, the company provided evidence that it was not entitled to a refund of the full amount of tax, which consequently led to a lower subsidy margin.

(78) One company benefited from this scheme during the investigation period and obtained subsidies of 1,08%.

3.4.4 Capital incentive

(79) The Government of India (GOI) and the exporting producers raised arguments regarding this scheme, which is described in recitals 96 and 97 of the provisional Regulation. These arguments need not be addressed, given that the benefits obtained under this were not included in the amounts of duty provisionally established for the reasons given in recital 24 of the provisional duty Regulation. Consequently, no

measures will be imposed on benefits under this scheme and, therefore, no definitive finding is required.

Amount of countervailable subsidies

(80) The amount of countervailable subsidies in accordance with the provisions of the Basic Regulation, expressed ad valorem, for each investigated exporter is as follows.

In %	PBS	DEPB		EPCGS	EPZ/EOU	State schemes				TOTAL
		Pre-export	Post-export			Sales-tax	Capital-ince ntiv e	Octroi Ref und	Electricity-refu nd	
ESTER Industries Ltd		6.84	2.34	2.87						12.0
FLEX Industries Ltd			10.44	2.13						12.5
Garware Polyester Ltd		1.31		1.48				1.08		3.8
INDIA Polyfilms Ltd & JINDAL Polyester Ltd			4.82	1.52	0.70					7.0
MTZ Polyesters Ltd				8.75						8.7
POLYPLEX Corporation Ltd			17.68	1.42						19.1

4. INJURY

4.1 DEFINITION OF THE COMMUNITY INDUSTRY

(81) Recital 106 of the provisional duty Regulation states that four complainant producers fulfil the requirements of Article 10(8) of the Basic Regulation, since they account for more than 80% of total Community production of the product concerned and are therefore deemed to constitute the Community industry within the meaning of Article 9(1) of the said Regulation.

(82) The Indian exporting producers have alleged that the proceeding should never have been initiated, as the complaint did not include sufficient evidence to prove that the requirements of Article 10(8) were filled. They claimed that the fact that the captive production of PET film was left out in the complaint means that the Commission could not estimate the total production of PET film in the Community on the basis of the complaint. This allegation was considered unfounded as the captively produced PET film never entered the open Community market as PET film but as a downstream further processed product. In any event, the level of non-captive production of the complainant producers was substantially sufficient for standing to be established.

(83) Therefore, the findings set out in recitals 105 and 106 of the provisional duty Regulation are hereby confirmed.

4.2 COMMUNITY CONSUMPTION, IMPORT VOLUMES AND MARKET SHARE

(84) The conclusions reached by the Commission at the provisional stage, notably the existence of significant increases of total Indian exports of the product concerned, and a substantial increase of their share of the Community market were confirmed.

(85) Therefore, the findings set out in recitals 107-110 of the provisional duty Regulation are hereby confirmed.

4.3 PRICES OF SUBSIDISED IMPORTS

(86) The Indian exporting producers have alleged that the price comparison of the provisional duty Regulation leads to unfair results for them, as it does not take into account the difference in price between commodity and special types of PET film. They have claimed that the Indian exports consist mainly of commodity type PET film whereas an important part of PET film produced by the Community industry is of special type. This argument had to be rejected as the aspects of commodity and special type of PET film were taken into account in the product grouping used for the price comparison.

(87) The Indian exporting producers have claimed further that the exclusion of certain parts of the structure of the product grouping as defined in the questionnaire has caused higher undercutting margins for them. They objected to the simplification of the product type grouping after the disclosure of the provisional findings, claiming that the simplification led to incorrect comparison for PET film types of different quality. They claimed further that Indian product tends to be of higher shrinkage in terms of thermal properties, narrower width and more hazy as compared to the Community product and therefore the Indian product is of lower quality and less expensive.

(88) On the basis of the information received in the investigation, at the provisional stage the Commission had decided to simplify the grouping in types of different PET film as compared to what was foreseen by the questionnaires sent to the parties concerned. Therefore, the width, the thermal properties and the distinction between hazy and clear film were not considered. In this respect it has to be noted that, as in all investigations, in particular given the stage of the information collection, the product type grouping set out in the questionnaire in this case was indicative and open to modification. The present investigation has shown that a product grouping

differentiation by PET film width would have multiplied the number of product types to be compared significantly without a clear impact on price comparison. Furthermore, the inclusion of thermal properties and the distinction between hazy and clear film was not possible as for haziness it turned out that no clear definition exists for this characteristic and for thermal properties the definition given in the questionnaires was not consistently followed by the parties concerned. This led to a situation in which both the Community producers and the Indian exporting producers had used different and incomparable definitions for them.

(89) The above allegation of the Indian producing companies has been disregarded, not only because the simplification of the product grouping was inevitable to guarantee a manageable undercutting exercise with representative comparisons of the product groupings declared by both parties concerned (actually around 400 Community industry product grouping codes were compared with about 160 PCN codes of the Indian exporting producers), but also as the undercutting determination already in a simplified form reflects sufficiently the differences in terms of physical characteristics between the types produced by the Indian exporting producers and by the Community industry.

(90) All the Indian exporting producers also requested a level of trade adjustment. They argued that whereas they sell a major proportion of their PET film to importers in the Community, the Community industry is mainly selling directly to converters of PET film. Therefore, they claimed that the comparison for the purposes of undercutting should be made between the importers' resale prices to converters and the prices offered by the Community industry. They submitted that the margin an importer receives from its sales to converters is about 25%, which represents the requested level of trade adjustment.

(91) In this respect it has to be noted that in the questionnaire the Commission defined the levels of trade as being 1) distributors, 2) converters, 3) OEM, 4) end users and 5) others. The Indian exporting producers have declared in their questionnaire replies that a major proportion of their sales of PET film in Europe is sold to group number five, i.e. "others", without any further clarification. After the disclosure on provisional findings the Indian exporting producers have confirmed that their sales to importers declared under "others" should be considered as sales to distributors. However, the investigation has shown that some of these distributors are also converting the product, indicating that the clarifications submitted by the Indian exporting producers concerning the level of trade are inaccurate. Furthermore, the investigation did not confirm the 25% price difference between the two levels of trade. In fact as far as the Community industry's sales are concerned, the average selling price to distributors is higher than the price charged to the converters. In the circumstances of the Indian exporting producers, this would mean that any adjustment to be made would actually increase the price undercutting rates determined. The fact that prices to distributors are higher than those to converters in the case of the Community industry is explained by the fact that the converters buy larger quantities and therefore receive a quantity discount. In the case of the Indian exporting producers five companies out of six sold at higher prices to converters than to distributors as submitted by them. However, one company sold at clearly higher prices to distributors and the price difference between the two levels of trade for the rest of the companies was far below 25%.

(92) The investigation has also shown that the two major levels of trade are not clearly separated due to the fact that some major companies act both as a distributor and as a converter. It was noted further that there is no clear price difference between the two levels as the quantity ordered seems to be a more important price factor than the level of trade. Finally, and contrary to the allegation put forward by the Indian exporting producers, the investigation has shown that the Community industry also sells the product under consideration to distributors as well as to converters. Therefore it was concluded that there are no grounds to grant the Indian exporting producers an adjustment for a level of trade.

(93) One of the Indian exporting producers, MTZ, also requested an adjustment for a quality difference. They submitted that they had included off grade film in their transaction listing used for undercutting calculations and that the off grade film types should be granted an adjustment by way of an increase of their sales price by 100%. In this respect it should be noted that the questionnaire reply of MTZ states that the company produces three qualities of film: A- grade, B-grade and off grade. However, in the transaction listing no reference to different grades was made. After the disclosure of the provisional measures, MTZ provided further information on how to identify the off grade products in the transaction listing. Having received this information, the Commission compared the prices between the alleged off grade product types with the rest of the product types and concluded that there is no price difference between the two groups of types. Therefore the request of MTZ for a quality adjustment could not be accepted.

(94) Finally, the Indian exporting producers claimed that the Commission should have offset negative margin of price undercutting by positive ones in their undercutting calculations. Since this was not done, they stated that a higher injury elimination margin had been determined. It should be noted that, in the methodology described in recitals 112 to 114 of the provisional duty Regulation for the calculation of the price undercutting margins, the weighted average net sales prices of the subsidised imports were compared on a model–by-model basis with the weighted average net sales price by model of the Community industry on the Community market. Therefore, this methodology allowed the amount by which the exporting producers' price in an export transaction exceeded that of the Community industry's weighted average price to be taken into account on a per model basis. The argument was therefore rejected.

(95) It follows from the above that the provisional finding set out in recital 114 of the provisional duty Regulation of undercutting ranging between 28.2% and 50.5% are confirmed.

4.4 SITUATION OF THE COMMUNITY INDUSTRY

(96) The GOI claimed in general terms that based on the non-confidential responses of the complainants the Community industry is not suffering any injury at all. In this respect as stated in recitals 115 to 125 of the provisional duty Regulation, the investigation has shown that the overall trends for the Community industry are negative, notably in relation to market share and prices as well as profitability, giving a clear indication of material injury. This trend is sufficiently confirmed in the non-confidential responses of the Community industry.

(97) The Indian exporting producers have alleged that the choice of 1995 as a starting year for data collected for the investigation has distorted the analysis in favour of a finding of injury to the Community industry. They have submitted that, since 1995 was an exceptionally good year due to very high demand, it is only natural that the injury indicators show a negative trend after that. The Indian exporting producers claim that fixing year 1993 as a starting year would have given a more fair view as to the evolution of the injury factors. However, the purpose of the investigation is to evaluate the effect of the countervailable imports on the economic situation of the Community industry during the IP. In order to make such an analysis; trends are established for a number of indicators on the basis of information relating to a number of years (usually three) preceding the IP. The purpose of this analysis is therefore not to compare the starting year with the IP but rather to assess the annual developments within the entire period considered. In any event it should be noted that at the time the decision on the period considered was taken there was no information available of the possibility that the injury indicators would have shown a different pattern had an earlier starting year been chosen. Finally, it should be noted that choosing an earlier starting year would not have been favourable to Indian exporting companies as there has been a strong increase in their market share in the time periods leading to the IP.

(98) Therefore, the findings stated in recitals 115 to 125 of the provisional duty regulation are confirmed.

4.5 CONCLUSION ON INJURY

(99) Based on the above considerations, it is confirmed that the Community industry has suffered material injury within the meaning of Article 8(1) of the Basic Regulation.

5. CAUSATION

5.1 EFFECT OF THE SUBSIDISED IMPORTS

(100) The Indian exporting producers and GOI claimed that there was no obvious correlation between the Indian subsidised exports and the injury suffered by the Community industry. They claimed that there has been globally a negative price development for PET film caused by a worldwide surplus of the product coupled with a decrease in the price of the key raw materials. The Indian exporting producers claimed further that the PET film prices in the Community have just followed the global negative price trend and the fact that the average price of the Community producers declined in 1996 when the market share of the Indian exporting producers

decreased should prove the claim. However, it should be recalled that India is one of the major contributors to the worldwide surplus on the PET film market and that according to EUROSTAT figures India cut its prices on the European market as early as 1996 while the other major exporting countries the USA, Japan and South Korea increased their prices. The fact that they lost market share in 1996 does not mean that they were not causing injury to the Community industry through increased price pressure resulting in a 3% decrease in the average price of the Community industry. Finally, it should be recalled that the injury analysis is made on the basis of the IP and that the previous years are mainly used for setting the trend.

Thus, the arguments put forward by the Indian exporting producers and GOI must be rejected.

5.2 EFFECT OF OTHER FACTORS

(101) The findings made as set out in recitals 134 to 144 of the provisional duty Regulation are hereby confirmed with the following additions:

5.2.1 Imports from other third countries

(102) The Indian exporting producers and GOI maintained their argument about the discriminatory aspect of investigating only imports originating in India while the import volumes from South Korea have increased and the Korean average prices have declined during the period considered. The Indian exporting producers claimed that the increase in the import volumes from South Korea is likely to be even higher than officially reported by EUROSTAT as the importers of Korean PET film are likely to do the customs clearance occasionally under CN code 3920 6900 (other polyesters) just as they have done for the PET film of Indian origin.

(103) The Commission maintains the arguments presented in the provisional duty Regulation, namely that the absolute and relative increase in South Korea's market share has been smaller than that of India and that the prices of South Korean PET film have systematically stayed on a higher level than the Indian prices. Furthermore, the Korean exporting producers reduced their prices only one year later than the Indians. As for the imports under CN code for other polyesters the Commission has not received any evidence implying that Korean PET film could have been cleared through customs through that code.

(104) Finally, and most importantly, it should be noted that the Commission has seen no reason to initiate an investigation against South Korea as no evidence of unfair trade in the form of dumping or subsidised exports being practised by the Korean exporting producers has been brought to their attention.

(105) As based on the above, the situation with respect to imports originating in India and South Korea are different, a situation of discrimination can not have occurred.

5.2.2 Fluctuation in the price of raw materials

(106) The Indian exporting producers have argued that on the basis of the non-confidential questionnaire replies of the Community industry one can conclude that the average decline in the raw material prices during the period considered has been more like one third than 17% as stated in the provisional duty Regulation. This, they claim, is confirmed by the publicly available information on raw material price developments. They repeated their previous argument that a one third decrease in the price of raw

materials permits the Community industry to reduce its prices without a corresponding decrease in profitability and that the imports from India therefore did not trigger the price reductions of the Community industry.

(107) It should be noted that the Commission on the basis of confidential questionnaire replies investigated price development of all PET film raw materials as stated in recital 140 of the provisional duty Regulation arriving at the decrease of 17%. Furthermore, it is true that the non-confidential questionnaire replies of the Community industry concentrated on the price development of dimethyl terephthalate (DMT) or terephthalic acid (PTA). As the price of these raw materials decreased more than the prices of other raw materials a decrease of 17% in total cost of raw material is consistent with a higher decrease in the costs of DMT and PTA. Therefore the conclusions of recital 140 of the provisional duty Regulation are consistent with the replies to the questionnaire received from the Community industry and are therefore confirmed.

5.2.3 General difficulties in the polyester sector

(108) The Indian exporting producers submitted that the decreasing prices of bi-axially orientated polypropylene (BOPP) film would have a direct effect on PET film prices in the packaging sector as the products are interchangeable from a PET film users perspective. Therefore, they claimed that the prices would have in any case have decreased with or without the increased imports of PET film into the Community.

(109) The Commission had to reject this argument as no evidence to support the claim has been brought forward.

5.3 CONCLUSION ON CAUSATION

(110) In view of the above, the conclusion of recital 145 of the provisional duty Regulation is confirmed.

6. COMMUNITY INTEREST

6.1 PRELIMINARY REMARK

(111) No new facts or arguments were submitted by any party with regard to the interest of the Community industry, other Community producers or importers of PET film.

The findings of the provisional duty regulation are therefore confirmed, notably the conclusions that the impact of measures on those groups would either be beneficial (Community industry and non-captive other Community producers), neutral (captive producers) or at most negative to a limited extend (importers).

6.2 INTEREST OF USERS OF THE PRODUCT CONCERNED

(112) As mentioned in recital 2, the Commission received comments from two users of the product under consideration after the disclosure of the finding having led to provisional measures. In the submissions of the users it was claimed that on the contrary to the provisional findings PET film is an important raw material cost factor for them and that production of downstream products based on PET film accounts for

an important proportion of their total production. They claimed further that the price increases of the Community industry would make it difficult for them to compete on the downstream market against imports from South Korea, People's Republic of China and the USA. It was claimed further that there have been occasions when the Community industry has refused to deliver certain quantities of PET film indicating the existence of a lack of capacity. The Community industry was also alleged to have refused to develop a non-standard film for the specific needs of one of the users where an Indian producer has agreed to do so. Therefore, they claim that it is in the interest of the users to maintain an alternative source of PET film originating in India.

(113) The Commission maintains the arguments and conclusions presented in recital 153 of the provisional duty Regulation as far as the overall share of PET film out of the total production costs of users overall and the proportion overall of PET film based downstream product of the users' total production are concerned. As the analysis concerned reflects an overall analysis, there can be individual cases in which PET film may be a crucial raw material for a user. This, however, does not alter the average overall results of the investigation. Furthermore, the investigation has shown that even for certain users for whom PET film is an important cost factor, the imports of PET film originating in India had a minor share in their total purchases of PET film. Furthermore, the worries of the users concerning the disappearance of an alternative source of imports in case of capacity shortage or need to develop a new film type are unfounded as the countervailing duties will not exclude the Indian exporting producers from the Community market. The duties will only remedy the effect of an illegal, injurious subsidisation.

6.3 CONCLUSION ON COMMUNITY INTEREST

(114) In examining the various interests involved and all the above aspects, the Commission can confirm that there are no compelling reasons not to take action against the imports in question.

7. DEFINITIVE DUTY

(115) On the basis of the conclusions on subsidisation, injury, causal link and Community interest, the Commission considers it necessary to adopt definitive countervailing measures.

7.1 INJURY ELIMINATION LEVEL

(116) The Community industry suggested that a higher minimum profit margin than 6% (set by the Commission in recital 156 of the provisional duty regulation) was necessary. However, it is not important to define a conclusive percentage in this case as, even on the lower figure used by the Commission, the injury margin is greater than the subsidy margin. The Indian exporting producers made requests for adjustments for level of trade and suggested a correction in the calculation method of the underselling margins required to determine the injury elimination level. In addition, MTZ requested an adjustment for quality differences. As set out in recitals 92 and 93 above, these requests had to be denied.

7.2 FORM AND LEVEL OF DUTY

(117) Changes from the provisional determination of the amount of countervailable subsidies have been made where appropriate. The rate of definitive countervailing duty is accordingly lower than the level of provisional duty for all of the cooperating Indian exporting producers.

(118) In accordance with Article 15(1) of the Basic Regulation, the countervailing duty rate should correspond to the subsidy margin, unless the injury margin is lower. The following rates of duty therefore apply for the cooperating producers:

–	Ester Industries Ltd	12.0%
–	Flex Industries Ltd	12.5%
–	Garware Polyester Ltd	3.8%
–	India Polyfilms Ltd	7.0%
–	Jindal Polyester Ltd	7.0%
–	MTZ Polyesters Ltd	8.7%
–	Polyplex Corporation Ltd	19.1%

(119) Given the high level of cooperation, which covered more than 80% of imports into the Community of the product concerned originating in India, it was considered appropriate to establish the duty rate for non-cooperating companies at the same rate as the highest rate that has been established for the cooperating companies, i.e. 19.1%. This level will ensure that no bonus is granted for non cooperation and that duty evasion will be minimised.

(120) Recitals 159 and 160 of the provisional duty regulation are confirmed.

8. COLLECTION OF THE PROVISIONAL DUTY

(121) In view of the magnitude of the countervailable subsidies found for the exporting producers and in light of the seriousness of the injury caused to the Community industry, it is considered necessary that the amounts secured by way of provisional countervailing duty under Regulation (EC) No 1810/99 be definitively collected to the extent of the amount of definitive duties imposed.

9. PROPOSALS FOR UNDERTAKINGS

(122) Finally, it should be noted that the Commission services also received proposals for price undertakings from five Indian exporting companies. The Commission services investigated the said proposals and concluded that they cannot be sufficiently monitored or managed due to the complexity of the product: About 160 minimum prices would be required to cover all Indian product groupings and there were no guarantees that the suggested organisation for monitoring the undertakings, the Export Inspection Agency of India, has the mandate or the technical means to carry out such a detailed control. Therefore, the Commission services had to reject the received proposals for undertakings.

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive countervailing duty is hereby imposed on imports of polyethylene terephthalate (PET) film falling within CN codes ex 3920 62 19 (TARIC codes 3920 62 19.10, 3920 62 19.15, 3920 62 19.25, 3920 62 19.30, 3920 62 19.35, 3920 62 19.40, 3920 62 19.45, 3920 62 19.50, 3920 62 19.55, 3920 62 19.60, 3920 62 19.65, 3920 62 19.70, 3920 62 19.75, 3920 62 19.80, 3920 62 19.81, 3920 62 19.85, 3920 62 19.87, 3920 62 19.89, 3920 62 19.91) and ex 3920 62 90 (TARIC codes 3920 62 90.30, 3920 62 90.91), originating in India.

2. The rate of duty applicable to the net free-at-Community-frontier price, before duty, shall be as follows:

Produced by:	**Rate of duty (%)**	**TARIC additional code**
Ester Industries Ltd 75-76, Amrit Nagar, Behind N.D.S.E. Part -1, New Delhi –110 003, India	12.0%	A026
Flex Industries Ltd A-1, Sector-60, Noida - 201 301 (U.P.), India	12.5%	A027
Garware Polyester Ltd 50-A Swami Nityanand Marg, Vile Parle (East) Mumbai – 400 057, India	3.8%	A028
India Polyfilms Ltd 112, Indra Prakash Building 21, Barakhamba Road New Delhi –110 001, India	7.0%	A029
Jindal Polyester Ltd 115-117, Indra Prakash Building, 21, Barakhamba Road, New Delhi –110 001, India	7.0%	A030
MTZ Polyesters Ltd Sarnath Centre, Upvan Area, Upper Govind Nagar, Malad (E), Mumbai – 400 097, India	8.7%	A031
Polyplex Corporation Ltd 2 Ring Road, Kilokri, Opposite Maharani Bagh New Delhi –110 014, India	19.1%	A032
All other Indian companies	19.1%	A999

3. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

Article 2

The amount secured by way of provisional countervailing duty pursuant to Regulation (EC) No 1810/99 shall be definitively collected at the duty rate definitively imposed.

Amounts secured in excess of the definitive rate of countervailing duty shall be released.

Article 3

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Communities.*

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at …….., ……1999

For the Council