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(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 3 August 1994

accepting a modified version of the undertaking offered by the Royal Thai Government in connection with the countervailing duty proceeding concerning imports of ball bearings with a greatest external diameter not exceeding 30 mm, originating in Thailand

(94/639/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community [1], as last amended by Regulation (EC) No 522/94 [2] and in particular Articles 10 and 14 thereof,

After consultations within the Advisory Committee,

Whereas :

A. PREVIOUS PROCEDURE

(1) In June 1988 the Commission initiated an anti-subsidy proceeding concerning imports of certain ball bearings originating in Thailand [3], following a complaint lodged by the Federation of European Bearing Manufacturers' Associations (Febma). The product has been defined as ball bearings with a greatest external diameter not exceeding 30 mm (hereinafter referred to as 'ball bearings'), originating in Thailand.

(2) The Commission found that the above imports were being subsidized and causing material injury to the Community industry. In the light of these findings, the Royal Thai Government offered an undertaking to eliminate the effect of the subsidy. This undertaking involved the levying of an export tax of 1,76 baht, equivalent to the amount of countervailable subsidy found, for each ball bearing exported to the Community.

(3) In June 1990, by Decision 90/266/EEC [4], the Commission accepted the undertaking offered and terminated the investigation.

(4) In July 1993, the Commission, following a review, established that the amount of subsidy had fallen to 0,91 baht per piece. Having been informed of these findings, the Royal Thai Government changed the export tax rate to 0,91 baht per ball bearing exported to the Community, and offered a modified version of the undertaking to this effect. This was accepted by Commission Decision 93/381/EEC [5].

(5) In addition, in order to prevent the export tax being circumvented by indirect imports, the Council, by Regulation (EEC) No 1781/93 [6], imposed a definitive countervailing duty of imports of ball bearings originating in Thailand, but exported to the Community from another country.

[1] OJ No L 209, 2. 8. 1988, p. 1.
[2] OJ No L 66, 10. 3. 1994, p. 10.
[3] OJ No C 147, 4. 6. 1988, p. 4.
[4] OJ No L 152, 16. 6. 1990, p. 59.
[5] OJ No L 163, 6. 7. 1993, p. 35.
[6] OJ No L 163, 6. 7. 1993, p. 1.

B. REOPENING OF INVESTIGATION

(6) Following the above, the Commission became aware of:

(i) certain evidence indicating a change in the amount of subsidy; and

(ii) information with regard to a possible change in circumstances, to the effect that the alleged removal by the Royal Thai Government of the requirement to export 100 % of the exporters' production could mean that the subsidies granted were no longer countervailable.

(7) In these circumstances, the Commission initiated a review of Decision 93/381/EEC and of Regulation (EEC) No 1781/93 in October 1993, by notice published in the *Official Journal of the European Communities* (1).

(8) The Commission officially advised the Royal Thai Government, the exporters and importers known to be concerned, as well as the complainant in the original investigation (Febma) and gave the parties directly concerned the opportunity to make their views known in writing and request a hearing. The Royal Thai Government, the exporters located in Thailand and the Community producers, represented by Febma, made their views known in writing.

(9) The Commission sought and verified all information it deemed to be necessary for the purposes of a determination and carried out an investigation at the premises of the following:

(a) *Royal Thai Government:*

— Department of Foreign Trade, Bangkok,

— Board of Investment, Bangkok,

— Department of Revenue, Bangkok;

(b) *Thai Exporters:*

— NBM Thai Ltd, Ayutthaya, Thailand,

— Pelmec Thai Ltd, Bang Pa-In, Thailand,

— NMB Hi-Tech Ltd, Bang Pa-In, Thailand.

All these exporting companies are wholly-owned subsidiaries of Minebea Co Ltd, Japan.

C. COUNTERVAILABILITY OF SUBSIDIES

(10) In previous investigations it was established that the Thai exporters were issued with Certificates of Promotion by the Board of Investment (BOI), which granted them subsidies on condition that they exported virtually 100 % of their production. Since these subsidies were contingent upon export, they were found to be export subsidies and countervailable.

(11) In the course of the current review investigation, the exporters alleged that the BOI had now removed the export requirement from the Certificates of Promotion, and therefore the conditions which led to the findings of the countervailability in the original investigations no longer existed. They alleged that since the subsidies were no longer contingent upon export, they should not be subject to countervailing measures.

(12) In view of the fact that in previous investigations the subsidies had been found to be legally contingent upon export performance, it was considered appropriate in the present investigation to first examine the question of whether there was still a legal requirement relating to export performance, without prejudice to the issue of whether such subsidies, in the absence of any legal export requirement, would constitute *de facto* export subsidies or countervailable domestic subsidies.

(13) The Commission's investigation established that all the Certificates of Promotion had been amended to remove clause 13.4 which stated that all production had to be exported. In the case of NMB Hi-Tech, the amendments were made on 12 March 1992 and for NMB Thai and Pelmec Thai the certificates were amended on 24 March 1993. In the case of Pelmec Thai, an 80 % export requirement was retained for bearings destined for general industry, as opposed to the electronics sector. However, since these account for less than 0,1 % of Minebea's bearing production in Thailand, it is concluded for the purposes of this review investigation that the Certificates of Promotion effectively contain no constraint on domestic sales and that consequently the conditions laid down in the certificates involve no element of export requirement.

(14) However, the investigation at the BOI revealed that according to paragraph 4.3 of the BOI Announcement No 1/1993 setting out the general criteria for investment promotion, wholly foreign-owned companies (such as the three Thai exporters of ball bearings) are required to export at least 80 % of their production in order to qualify for incentives and approval of their projects. The BOI informed the Commission that this requirement may be waived (on a case-by-case basis) if foreign-owned firms locate in one of the regions which is most remote from Bangkok, known as Zone 3 regions. However, the Minebea companies are located in intermediate regions (Zone 2), where the 80 % export requirement is mandatory.

(1) OJ No C 286, 22. 10. 1993, p. 6.

(15) The exporters alleged that at the time of their establishment in Thailand (1982 to 1989), the regions where they are located would have been classified as Zone 3 rather than Zone 2, since the standard of living in the regions concerned has improved in recent years. In these circumstances, the fact of being situated in a Zone 3 would have meant that the 80 % export requirement was not mandatory.

(16) This argument cannot be adopted because the exporters have produced no concrete evidence to demonstrate that they would have been located in the equivalent of Zone 3 ; in any event, since the investment promotion zones were not defined in the same way at the time of their establishment, the whole issue is a matter of hypothesis and therefore not relevant to the question of countervailability.

(17) The exporters have further claimed that since the amendments to remove the 100 % exports requirement from their Certificates of Promotion were made before the entry into force of BOI Announcement 1/1993 on 1 April 1993, the general 80 % export requirement for foreign-owned companies contained in paragraph 4.3 did not apply to them, especially since the amendments were made with retroactive effect.

(18) The Commission cannot accept this argument for the following reasons :

(a) an identical provision to paragraph 4.3 of BOI Announcement 1/1993 existed in BOI Announcement 1/1992, which applied from 1 April 1992. Therefore, since the amendments to the certificates of NMB Thai and Pelmec Thai took place during the period covered by Announcement 1/1992, the 80 % export requirement clearly applies to these companies. In this respect, the fact that the amendments were made with retroactive effect is irrelevant, both in principle and in fact, because :

(i) the exporters continued to receive benefits up to the day on which the amendments were made, on the understanding that in order to obtain such benefits 100 % of production had to be exported. Consequently, they continued to operate in this way. A decision to make the amendments to the certificates retroactive is meaningless, since benefits have been received and the previously understood conditions complied with ;

(ii) in any event, the effective dates fixed retroactively for the certificates of NMB Thai and Pelmec Thai fell in October and November 1992 i.e. within the period covered by BOI Announcement 1/1992 ;

(b) the amendment to NMB Hi-Tech's certificates took place slightly before the entry into force of BOI Announcement 1/1992. However, the BOI guidelines which applied before 1 April 1992, originally set out in a BOI Announcement of January 1983, stipulated that wholly-owned foreign investors must export 100 % of their production.

NMB Hi-Tecs's certificates were also amended with retroactive effect to February and November 1990, but for the reasons stated in (a) (i), such retroactivity is irrelevant, and in any case the effective date still falls within the period of application of the relevant BOI Announcement.

(19) It has been alleged that the general conditions for investment promotion in BOI Announcements do not override the specific provisions in the Certificates of Promotion, which now contain no export requirement.

In this respect, the Commission has already noted that the Certificates of Promotion have been amended to eliminate such a requirement, but conclude that if the exporters had been obliged to reapply for the benefits that they continued to receive, they would, as wholly foreign-owned companies, have been subject to the general export requirements set out in the various BOI Announcements. It should be remembered that the latter are legal documents, which are required to be drawn up in accordance with Section 16 of Thailand's Investment Promotion Act of 1977.

(20) In conclusion, although a specific export reqirement is no longer contained in the Certificates of Promotion, the investigation has established that the general conditions for investment promotion in Thailand contain a legal requirement that wholly foreign-owned firms export 80 % of their production. The exporters have produced no evidence to demonstrate that these general conditions, or in the case of NMB Hi-Tech, even stricter ones imposed by the BOI prior to 1 April 1992, do not apply to them, and neither has any such evidence been supplied by the Royal Thai Government. Therefore, it must be concluded that none of the exporters could have continued to obtain the same incentives without meeting this requirement, and that consequently the subsidies received are in law granted contingent upon export performance and continue to be countervailable.

D. RECALCULATION OF SUBSIDY AMOUNT

(21) Having established that the subsidies granted to the exporters were still granted contingent upon export performance and therefore constituted countervailable export subsidies, the Commission calculated the amount of subsidy during the financial year preceding the initiation of the review (1 October 1992 to 30 September 1993).

(a) Exemption from corporate income tax

(22) All the exporters continue to benefit from a 100 % exemption from tax on their taxable income which is covered by BOI promotion. This exemption is granted in accordance with Section 31 of Thailand's Investment Promotion Act. The amount of subsidy is this taxable income multiplied by the tax rate of 30 %, and amounts to the following for each exporter:

(in million baht)

NMB Thai	192,2
Pelmec Thai	5,0
NMB Hi-Tech	103,7

(23) In addition, two of the exporters, NMB Thai and NMB Hi-Tech, made use of a subsidy granted under Section 36 (4) of the Investment Promotion Act, which entitles them to deduct from taxable income an amount equal to 5 % of the increment in export earnings over the previous year. Since this is the first time either exporter had claimed this subsidy, the increase in export earnings has been calculated retroactively from the date of their establishment in Thailand, and not just with reference to the previous year.

(24) Consequently, both exporters have been able to claim a sufficient allowance to exempt themselves from the tax payable on their income not covered by BOI promotion (income derived from BOI Activities is already exempt under Section 31).

(25) Non-BOI income usually results from the expiry of certain Certificates of Promotion, which means that the capacity covered by the remaining certificates is less than the firm's total production or sales. Income derived from the excess portion (calculated on a pro-rata basis in turnover) is no longer eligible for income tax exemption under Section 31, and for this reason the two exporters have resorted to Section 36 (4) in order to obtain a tax exemption.

(26) The Section 36 (4) subsidy is countervailable for reasons independent of those in recitals 10 to 20, since this subsidy is granted on the basis of the increase in export earnings only, is therefore clearly contingent upon export performance, and is consequently an export subsidy.

(27) The calculation method is the same as for the Section 31 exemption, and the subsidy amounts are as follows:

(in million baht)

NMB Thai	19,8
NMB Hi-Tech	1,7

(b) Customs duty exemption on imports of machinery and essential materials

(28) All the exporters continue to benefit from a 100 % exemption from customs duty on imports of machinery and essential materials. As in the original investigation, the subsidy amount with regard to machinery was calculated on a depreciation basis, with value of the exemption being allocated over a period of 10 years, and the amount for essential materials (including machine parts and tools) was established on an expense basis. The amount of subsidy was as follows:

(in million baht)

NMB Thai	122,3
Pelmec Thai	110,8
NMB Hi-Tech	68,5

(c) Total amount of subsidy

(29) The total amount of countervailable subsidy was therefore as follows:

(in million baht)

NMB Thai	334,3
Pelmec Thai	115,8
NMB Hi-Tech	173,9

(30) When expressed as an amount per ball bearing exported from Thailand, and then weighted according to the relative volume of exports of each Thai exporter to the Community, the subsidy is equivalent to 0,72 baht per piece.

(31) The Royal Thai Goverment, the exporters and the complainant in the original investigation were informed of the facts on which these findings had been based, and were granted an opportunity to comment.

The written comments submitted by the parties were, where appropriate, taken into consideration.

E. MODIFICATION OF UNDERTAKING

(32) The Royal Thai Government has offered the Commission a modified undertaking in which the rate of the export tax levied on ball bearings exported to the Community has been adjusted to 0,72 baht per piece. The Commission is satisfied in view of its findings that this rate is sufficient to eliminate the effect of the subsidy, and should therefore accept this modified version of the undertaking offered by the Royal Thai Government.

(33) This modified version of the undertaking would apply only to ball bearings of Thai origin exported directly from Thailand to the Community. Ball bearings of Thai origin imported into the Community via non-member countries will continue to be subject to the definitive countervailing duty in order to safequard the effectiveness of the undertaking and to prevent the evasion of the export tax as referred to in recital 5. This duty is set by Council Regulation (EC) No 2271/94 [1], amending Regulation (EEC) No 1781/93, at the rate of 5,3 % of the net, free-at-Community-frontier, price of the product.

(34) This proposal met with no objection from the Advisory Committee,

HAS DECIDED AS FOLLOWS:

Sole Article

A modified version of the undertaking given by the Royal Thai Government in connection with the countervailing duty proceeding concerning imports of ball bearings with a greatest external diameter not exceeding 30 mm originating in Thailand is hereby accepted.

Done at Brussels, 3 August 1994.

For the Commission

Leon BRITTAN

Member of the Commission

[1] See page 1 of this Official Journal.