Council Implementing Regulation (EU) No 1185/2010 of 13 December 2010 imposing a definitive countervailing duty on imports of certain graphite electrode systems originating in India following an expiry review pursuant to Article 18 of Regulation (EC) No 597/2009

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community[(1)] ('the basic Regulation'), and in particular Article 15(1), Article 18 and Article 22(1), (2) and (3) thereof,

Having regard to the proposal submitted by the European Commission ('the Commission') after consulting the Advisory Committee,

Whereas:

A. PROCEDURE

1. Measures in force

(1) The Council, following an anti-subsidy investigation ('the original investigation'), by Regulation (EC) No 1628/2004[(2)], imposed a definitive countervailing duty on imports of certain graphite electrodes currently falling within CN code ex 8545 11 00 and nipples used for such electrodes currently falling within CN code ex 8545 90 90 originating in India ('the definitive countervailing measures'). The measures took the form of an *ad valorem* duty of 15,7 %, with the exception of one company for which the duty rate was 7 %.

(2) The Council, by Regulation (EC) No 1629/2004[(3)], imposed definitive anti-dumping duties on imports of certain graphite electrodes currently falling within CN codes ex 8545 11 00 and nipples used for such electrodes currently falling within CN code ex 8545 90 90 originating in India ('the definitive anti-dumping measures'). The measures took the form of an *ad valorem* duty of 0 %.

(3) Following an *ex officio* partial interim review of the countervailing measures, the Council by Regulation (EC) No 1354/2008[(4)] amended Regulations (EC) No 1628/2004 and (EC) No 1629/2004. The definitive countervailing duties were amended to 6,3 % and 7,0 % for imports from individually named exporters with a residual duty rate of 7,2 %. The definitive anti-dumping duties were amended to 9,4 % and 0 % for imports from individually named exporters with a residual duty rate of 8,5 %.

2. **Request for an expiry review**

(4) Following the publication of a notice of impending expiry[5] of the definitive countervailing measures in force, the Commission, on 18 June 2009, received a request for the initiation of an expiry review of these measures, pursuant to Article 18 of the basic Regulation. The request was lodged by three Union producers of the like product: Graftech International, SGL Carbon GmbH, and Tokai ERFTCARBON GmbH ('the applicants') representing a major proportion, in this case more than 90 % of the total Union production of certain graphite electrode systems.

(5) The request was based on the grounds that the expiry of the measures would be likely to result in a continuation or recurrence of subsidisation and injury to the Union industry.

(6) Prior to the initiation of the expiry review, and in accordance with Articles 22(1) and 10(7) of the basic Regulation, the Commission notified the Government of India ('the GOI') that it had received a properly documented review request and invited the GOI for consultations with the aim of clarifying the situation as regards the contents of the review request and arriving at a mutually agreed solution. The GOI accepted the offer of consultations and consultations were subsequently held on 16 September 2009. During the consultations, no mutually agreed solution could be reached. However, due note was taken of the comments submitted by the authorities of the GOI.

3. **Initiation of an expiry review**

(7) Having determined, after consulting the Advisory Committee, that sufficient evidence existed for the initiation of an expiry review, the Commission announced on 17 September 2009, by a notice published in the *Official Journal of the European Union*[6] ('the notice of initiation'), the initiation of an expiry review pursuant to Article 18 of the basic Regulation.

4. **Parallel investigations**

(8) By a notice of initiation published in the *Official Journal of the European Union* on 17 September 2009[7], the Commission also announced the initiation of an expiry review investigation pursuant to Article 11(2) of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community[8] of the definitive anti-dumping measures.

5. **Investigation**

5.1. *Investigation period*

(9) The investigation of continuation or recurrence of subsidisation covered the period from 1 July 2008 to 30 June 2009 ('the review investigation period' or 'RIP'). The examination of the trends relevant for the assessment of the likelihood of a continuation or recurrence of injury covered the period from 1 January 2006 to the end of the review investigation period ('the period considered').

5.2. *Parties concerned by the investigation*

(10) The Commission officially advised the applicants, other known Union producers, exporting producers, importers, users known to be concerned, and the GOI of the initiation of the expiry review. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set out in the notice of initiation.

(11) All interested parties, who so requested and showed that there were particular reasons why they should be heard, were granted a hearing.

(12) In view of the apparent large number of unrelated importers, it was considered appropriate, in accordance with Article 27 of the basic Regulation, to examine whether sampling should be used. In order to enable the Commission to decide whether sampling would be necessary and, if so, to select a sample, the above parties were requested, pursuant to Article 27 of the basic Regulation, to make themselves known within 15 days of the initiation of the reviews and to provide the Commission with the information requested in the Notice of initiation. However, no unrelated importers came forward to cooperate. Sampling was therefore not necessary.

(13) The Commission sent questionnaires to all parties known to be concerned and to those who made themselves known within the deadlines set in the notice of initiation. Replies were received from 3 groups of Union producers (i.e. the applicants), 1 exporting producer and 17 users, and the GOI. None of the importers came forward during the sampling exercise and no other importers supplied the Commission with any information or made themselves known in the course of the investigation.

(14) Only one of the two known exporting producers in India, namely HEG Limited ('HEG'), fully cooperated in the review by submitting a response to the questionnaire. It should be noted in this regard that in the original investigation the full, official name of that company was Hindustan Electro Graphite Limited. Subsequently, the company changed its name into HEG Limited. The second exporting producer cooperating in the original investigation, namely Graphite India Limited ('GIL'), decided not to submit a questionnaire reply in the present review.

(15) The Commission sought and verified all the information it deemed necessary for a determination of the likelihood of continuation or recurrence of subsidisation and resulting injury of the Union interest. Verification visits were carried out at the premises of the following interested parties:

(a) Union producers:
- SGL Carbon GmbH, Wiesbaden and Meitingen, Germany,
- Graftech Switzerland SA, Bussigny, Switzerland,
- Graftech Iberica S.L., Ororbia, Spain,
- Tokai ERFTCARBON GmbH, Grevenbroich, Germany,

(b) Exporting producer in India:

— HEG Limited, Bhopal,

(c) Government of India ('GOI').

B. PRODUCT CONCERNED AND LIKE PRODUCT

(16) The product concerned by this review is the same as the one in the original investigation, namely graphite electrodes of a kind used for electric furnaces, with an apparent density of 1,65 g/cm^3 or more and an electrical resistance of 6,0 μΩ.m or less, currently falling within CN code ex 8545 11 00, and nipples used for such electrodes, currently falling within CN code ex 8545 90 90, whether imported together or separately originating in India ('the product concerned').

(17) The investigation confirmed that, as in the original investigation, the product concerned and the products manufactured and sold by the exporting producer on the domestic market in India, as well as those manufactured and sold in the Union by the Union producers, have the same basic physical and technical characteristics as well as the same uses and are, therefore, considered to be like products within the meaning of Article 2(c) of the basic Regulation.

C. LIKELIHOOD OF CONTINUATION OR RECURRENCE OF SUBSIDISATION

1. Introduction

(18) On the basis of the information contained in the review request and the replies to the Commission's questionnaire, the following schemes, which allegedly involve the granting of subsidies, were investigated:

Nationwide schemes

(a) Advance Authorisation Scheme ('AAS');

(b) Duty Entitlement Passbook Scheme ('DEPBS');

(c) Export Promotion Capital Goods Scheme ('EPCGS');

Regional Scheme

(d) Electricity Duty Exemption Scheme ('EDES').

(19) The schemes specified in points (a) to (c) above are based on the Foreign Trade (Development and Regulation) Act 1992 (No 22 of 1992) which entered into force on 7 August 1992 ('Foreign Trade Act'). The Foreign Trade Act authorises the GOI to issue notifications regarding the export and import policy. These are summarised in 'Foreign Trade Policy' documents, which are issued by the Ministry of Commerce every 5 years and updated regularly. Two Foreign Trade Policy documents are relevant to the RIP of this case, i.e. FT-policy 04-09 and FT-policy 09-14. The latter entered into force in April 2009. In addition, the GOI also sets out the procedures governing the FT-policy 04-09 and FT-policy 09-14 in a 'Handbook of Procedures, Volume I' ('HOP I 04-09' and 'HOP I 09-14' respectively). The Handbook of Procedures is also updated on a regular basis.

(20) The scheme specified in point (d) above is managed by the authorities of the State of Madhya Pradesh.

2. **Advance Authorisation Scheme ('AAS')**

(21) In the course of the investigation it was found that the cooperating Indian producer did not obtain any benefits under the AAS scheme during the RIP. It was therefore not necessary to further analyse this scheme in this investigation.

3. **Duty Entitlement Passbook Scheme ('DEPBS')**

(a) *Legal Basis*

(22) The detailed description of the DEPBS is contained in paragraph 4.3 of the FT-policy 04-09 and FT-policy 09-14 as well as in Chapter 4 of the HOP I 04-09 and of the HOP I 09-14.

(b) *Eligibility*

(23) Any manufacturer-exporter or merchant-exporter is eligible for this scheme.

(c) *Practical implementation of the DEPBS*

(24) An eligible exporter can apply for DEPBS credits which are calculated as a percentage of the value of products exported under this scheme. Such DEPBS rates have been established by the Indian authorities for most products, including the product concerned. They are determined on the basis of Standard Input Output Norm ('SION'), which is a norm taking into account a presumed import content of inputs in the exported product and the customs duty incidence on such presumed imports, regardless of whether import duties have actually been paid or not.

(25) To be eligible for benefits under this scheme, a company must export. At the point in time of the export transaction, a declaration must be made by the exporter to the authorities in India indicating that the export is taking place under the DEPBS. In order for the goods to be exported, the Indian customs authorities issue, during the dispatch procedure, an export shipping bill. This document shows, *inter alia*, the amount of DEPBS credit which is to be granted for that export transaction. At this point in time, the exporter knows the benefit it will receive. Once the customs authorities issue an export shipping bill, the GOI has no discretion over the granting of a DEPBS credit. The relevant DEPBS rate to calculate the benefit is that which applied at the time the export declaration was made. Therefore, there is no possibility for a retroactive amendment to the level of the benefit.

(26) It was found that in accordance with Indian accounting standards, DEPBS credits can be booked on an accrual basis as income in the commercial accounts, upon fulfilment of the export obligation. Such credits can be used for payment of customs duties on subsequent imports of any goods unrestrictedly importable, except capital goods. Goods imported against such credits can be sold on the domestic market (subject