Commission Regulation (EC) No 1008/2004 of 19 May 2004 imposing a provisional anti-subsidy duty on imports of certain graphite electrode systems originating in India

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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[(1)], as last amended by Regulation (EC) No 461/2004 of 8 March 2004[(2)] ('the basic Regulation'), and in particular Article 12 thereof,

After consulting the Advisory Committee,

Whereas:

A. PROCEDURE

1. GENERAL

(1) On 21 August 2003, the Commission announced, by a notice ('notice of initiation') published in the *Official Journal of the European Union*[(3)], the initiation of an anti-subsidy proceeding with regard to imports into the Community of certain graphite electrode systems originating in India.

(2) The proceeding was initiated as a result of a complaint lodged in July 2003 by the European Carbon and Graphite Association (ECGA), acting on behalf of producers representing a major proportion, in this case more than 50 %, of the total Community production of certain graphite electrode systems. The complaint contained evidence of subsidisation of the said product and of material injury resulting there from, which was considered sufficient to justify the initiation of an anti-subsidy proceeding.

(3) Prior to the initiation of the proceeding, and in accordance with Article 10(9) of the basic Regulation, the Commission notified the Government of India ('GOI') that it had received a properly documented complaint alleging that subsidised imports of certain graphite electrode systems originating in India were causing material injury to the Community industry. The GOI was invited for consultation with the aim of clarifying the situation as regards the contents of the complaint and arriving at a mutually agreed solution. Whilst no request for consultations was made by the GOI, due note was taken of written comments made by the GOI with regard to the allegations contained in the complaint regarding subsidised imports and material injury being suffered by the Community industry.

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(4) The initiation of a parallel anti-dumping proceeding concerning imports into the Community of the same product originating in India was announced by a notice published in the *Official Journal of the European Union*[4] on the same date.

(5) The Commission officially advised the complainant and other known Community producers, exporting producers, importers, users and suppliers known to be concerned of the initiation of the proceeding. The parties directly concerned were given an opportunity to make their views known in writing and to request a hearing within the time limit set in the notice of initiation.

(6) The two exporting producers in India, the GOI, as well as Community producers, users and importers/traders made their views known in writing. All parties who so requested within the above time limit and indicated that there were particular reasons why they should be heard were granted an opportunity to be heard.

2. SAMPLING

(7) In view of the large number of unrelated importers in the Community, it was considered appropriate, in conformity 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 indeed be necessary and, if so, to select a sample, all known unrelated importers were requested, pursuant to Article 27(2) of the basic Regulation, to make themselves known within 15 days of the initiation of the proceeding and to provide the Commission with the information requested in the notice of initiation, for the period from 1 April 2002 to 31 March 2003. Only two unrelated importers agreed to be included in the sample and provided the requested basic information within the deadline. Accordingly, sampling was not considered necessary in this proceeding.

3. QUESTIONNAIRES

(8) The Commission sent questionnaires to all parties known to be concerned, to the two unrelated importers referred to above and to all other companies who made themselves known within the deadlines set in the notice of initiation, as well as to the GOI.

(9) Replies were received from two Indian exporting producers, from the two complainant Community producers, from eight user companies and from the two unrelated importers referred to above. In addition, one user company made a written submission containing some quantitative information and two users' associations provided the Commission with written submissions.

(10) The Commission sought and verified all the information it deemed necessary for the purpose of a provisional determination of subsidisation, resulting injury and Community interest. Verification visits were carried out at the premises of the following companies:

Community producers:

— SGL Carbon GmbH, Wiesbaden and Meitingen, Germany;

— SGL Carbon SA, La Coruña, Spain;

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— UCAR SNC, Notre Dame de Briançon, France (including its related company, UCAR SA, Etoy, Switzerland);

— UCAR Electrodos Ibérica SL, Pamplona, Spain;

— Graftech SpA, Caserta, Italy.

Unrelated importers in the Community:

— Promidesa SA, Madrid, Spain;

— AGC-Matov allied graphite & carbon GmbH, Berlin, Germany.

Users:

— ISPAT Hamburger Stahlwerke GmbH, Hamburg, Germany;

— ThyssenKrupp Nirosta GmbH, Krefeld, Germany;

— Lech-Stahlwerke, Meitingen, Germany;

— Ferriere Nord, Osoppo, Italy.

Exporting producers in India:

— Graphite India Limited (GIL), Kolkatta;

— Hindustan Electro Graphite (HEG) Limited, Bhopal.

(11) The investigation of subsidisation and injury covered the period from 1 April 2002 to 31 March 2003 ('the investigation period' or 'IP'). The examination of trends relevant for the assessment of injury covered the period from 1999 to the end of the IP ('the period considered').

B. PRODUCT CONCERNED AND LIKE PRODUCT

1. PRODUCT CONCERNED

(12) The product concerned is graphite electrodes and/or nipples used for such electrodes, whether imported together or separately. A graphite electrode is a ceramic-moulded or extruded column of graphite. At both ends of this cylinder, threaded tapered 'sockets' are machined so that two or more electrodes can be joined to build a column. A connecting part, also in graphite, is used to join two sockets. This part is called a 'nipple'. Both the graphite electrode and the nipple are usually supplied pre-set as a 'graphite electrode system'.

(13) Graphite electrodes and nipples used for such electrodes are produced using petroleum coke, a by-product of the oil industry; and coal tar pitch. The manufacturing process has six steps; namely forming, baking, impregnation, rebaking, graphitising and machining. During the graphitising phase the product is heated electrically to over 3 000 ^{o}C and is physically transformed into graphite, the crystalline form of carbon: a unique material with low electrical but high heat conductivity; and high strength and performance at high temperature; that makes it suitable for use in electric arc furnaces. The processing time for a graphite electrode system is approximately two months. There are no product substitutes for graphite electrode systems.

(14) Graphite electrode systems are used by steel producers in electric arc furnaces; also referred to as 'mini mills'; as current carrying conductors to produce steel from recycled scrap. Graphite electrodes and nipples used for such electrodes covered by

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this investigation are only those with an apparent density of 1,65 g/cm^3 or more and an electrical resistance of 6,0 μΩ.m or less. Graphite electrode systems which meet these technical parameters can carry a very high rate of power feed.

(15) One Indian exporter stated that, in some cases, he produced the product concerned without using 'premium needle coke', a top quality petroleum coke which, according to this company, was considered by the complainants to be indispensable for producing the product within the specifications as mentioned in recitals 12 to 14. This exporter therefore claimed that graphite electrodes, and nipples used for such electrodes, made without 'premium needle coke' should be excluded from the scope of the investigation. Indeed, different qualities of petroleum coke can be used for producing graphite electrode systems. However, it is the basic physical and technical characteristics of the end product and its end uses, irrespective of the raw materials used, which determine the product definition. If graphite electrodes and nipples used for such electrodes originating in India and imported into the Community meet the basic physical and technical characteristics as described in the product definition, they are considered product concerned. Therefore, the claim was rejected.

2. LIKE PRODUCT

(16) The product exported to the Community from India, the product produced and sold domestically in India as well as the one manufactured and sold in the Community by the Community producers were found to have the same basic physical and technical characteristics as well as the same uses and are therefore considered as like products within the meaning of Article 1(5) of the basic Regulation.

C. SUBSIDISATION

1. INTRODUCTION

(17) On the basis of the information contained in the complaint and the replies to the Commission's questionnaire, the following five schemes, which allegedly involve the granting of export subsidies by the GOI, were investigated:

(i) Duty Entitlement Passbook (DEPB) Scheme

(ii) Export Promotion Capital Goods (EPCG) Scheme

(iii) Advance Licence Scheme (ALS)

(iv) Export Processing Zones/Export Oriented Units (EPZ/EOU)

(v) Income Tax Exemption.

(18) Schemes (i), (ii), (iii), and (iv) specified 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, summarised in the 'Export and Import Policy' documents, which are issued by the Ministry of Commerce every five years and updated regularly. The Export and Import Policy document relevant to

the IP of this case is the five-year plan for the period 1 April 2002 to 31 March 2007. In addition, the GOI also sets out the procedures governing India's foreign trade policy in the 'Handbook of Procedures — 1 April 2002 to 31 March 2007' (Volume 1), and which is also updated on a regular basis.

(19) It is clear from the Export and Import Policy covering the period 1 April 2002 to 31 March 2007 that licences/certificates/permissions issued before the entry into force of this Policy shall continue to be valid for the purpose for which such licence/certificate/permission was issued, including during the IP, unless otherwise stipulated.

(20) Subsequent references in this text to the legal basis for the above-mentioned investigated schemes (i) to (iv) are hereinafter made in relation to the Export and Import Policy covering the period 1 April 2002 to 31 March 2007 and to the 'Handbook of Procedures — 1 April 2002 to 31 March 2007' (Volume 1).

(21) The Income Tax Exemption specified under (v) above is based on the Income Tax Act of 1961, which is amended annually by the Finance Act.

(22) Article 14(5)(b) of the basic Regulation provides that the 3 % de minimis subsidy threshold applying to imports from certain developing countries, i.e. developing countries which are members of the WTO and which are mentioned in Annex VII of the Agreement on Subsidies and Countervailing Measures ('ASCM') as well as for developing countries which are members of the WTO and which have completely eliminated export subsidies, shall expire eight years after the entry into force of the WTO Agreement. Given that the said Agreement entered into force on 1 January 1995, this subsidy threshold no longer applies. The de minimis threshold now applying to imports from all developing countries is 2 % as provided for in Article 14(5)(a) of the basic Regulation. In parallel with the application of the 3 % de minimis threshold which applied to countries mentioned in Annex VII of the ASCM, the EC practice had been to apply to said countries, a de minimis threshold of 0,3 % per individual subsidy scheme. As the specific de minimis threshold which had applied to countries mentioned in Annex VII of the ASCM is no longer applicable, it is considered that the threshold for individual schemes should no longer apply either.

2. DUTY ENTITLEMENT PASSBOOK SCHEME ('DEPB')

(a) Legal Basis

(23) The DEPB entered into force on 1 April 1997 by means of Customs Notification 34/97. Paragraphs 4.3.1 to 4.3.4 of the Export and Import Policy, and paragraphs 4.37 to 4.53 of the Handbook of Procedures contain a detailed description of the scheme. The DEPB is the successor to the Passbook Scheme which was terminated on 31 March 1997. From the outset, there were two types of the DEPB, DEPB on pre-export basis and DEPB on post-export basis.

(24) The GOI stressed that the DEPB on pre-export basis was abolished on 1 April 2000 and therefore the scheme is not relevant for the IP. It was established that none of the companies availed of any benefit under the DEPB on pre-export basis, and it is, therefore, not necessary to establish the countervailability of DEPB on pre-export