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(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)

REGULATIONS

COUNCIL REGULATION (EC) No 906/2008

of 15 September 2008

terminating the new exporter review of Regulation (EC) No 1659/2005 imposing a definitive anti-dumping duty on imports of certain magnesia bricks originating in the People's Republic of China

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community [1] (the basic Regulation), and in particular Article 9(4) and Article 11(4) thereof,

Having regard to the proposal submitted by the Commission after consulting the Advisory Committee,

Whereas:

1. PROCEDURE

1.1. Existing measures

(1) The Council, by Regulation (EC) No 1659/2005 [2] (the original Regulation), imposed a definitive anti-dumping duty on imports of certain magnesia bricks originating in the People's Republic of China (the PRC). The measures consist of an *ad valorem* duty rate of 39,9 %, with the exception of six companies expressly mentioned in the original Regulation which are subject to individual duty rates.

1.2. Request for a review

(2) Subsequent to the imposition of definitive measures, the Commission received an application to initiate a new exporter review of Regulation (EC) No 1659/2005, pursuant to Article 11(4) of the basic Regulation, from a Chinese exporting producer, Yingkou Dalmond Refractories Co. Ltd (the applicant). The applicant claimed that it was not related to any of the exporting producers in the PRC subject to the anti-dumping measures in force with regard to magnesia bricks. Furthermore, it claimed that it had not exported magnesia bricks during the original period of investigation (from 1 April 2003 to 31 March 2004), but had exported them to the Community after that period.

1.3. Initiation of a new exporter review

(3) The Commission examined the *prima facie* evidence submitted by the applicant and considered it sufficient to justify the initiation of a review in accordance with Article 11(4) of the basic Regulation. After consultation of the Advisory Committee and after the Community industry concerned had been given the opportunity to comment, the Commission initiated, by Regulation (EC) No 1536/2007 [3], a review of Regulation (EC) No 1659/2005 with regard to the applicant.

(4) Pursuant to Commission Regulation (EC) No 1536/2007, the anti-dumping duty of 39,9 % imposed by Regulation (EC) No 1659/2005 was repealed with regard to imports of magnesia bricks produced and sold for exports to the Community by the applicant. Simultaneously, pursuant to Article 14(5) of the basic Regulation, customs authorities were directed to take appropriate steps to register such imports.

1.4. Product concerned and like product

(5) The product concerned is the same as that described in the original Regulation, i.e. chemically bonded, unfired magnesia bricks, whose magnesia component contains at least 80 % MgO, whether or not containing magnesite, originating in the PRC, currently classifiable within CN codes ex 6815 91 00, ex 6815 99 10 and ex 6815 99 90 (TARIC codes 6815 91 00 10, 6815 99 10 20 and 6815 99 90 20).

(6) The like product is also the same as that defined in the original Regulation.

[1] OJ L 56, 6.3.1996, p. 1.
[2] OJ L 267, 12.10.2005, p. 1.
[3] OJ L 337, 21.12.2007, p. 42.

1.5. **Parties concerned**

(7) The Commission officially advised the Community industry, the applicant and the representatives of the exporting country of the initiation of the review. Interested parties were given the opportunity to make their views known in writing and to be heard.

(8) The Commission sent a market economy treatment (MET) claim form and a questionnaire to the applicant and received a reply within the deadline set for that purpose. The Commission sought to verify all the information it deemed necessary for the determination of dumping, and verification visits were carried out at the premises of the applicant and the following cooperating related companies in the PRC:

— Yingkou Dalmond Refractories Co. Ltd (the applicant),

— Liaoning Qunyi Group Refractories Co. Ltd (the mother company),

— Yingkou Guangshan Refractories Co. Ltd (related producer),

— Dalian Dalmond Trading Co. Ltd (related exporter).

1.6. **Investigation period**

(9) The investigation of dumping covered the period from 1 April 2006 to 30 September 2007 ('investigation period' or 'IP').

2. **RESULTS OF THE INVESTIGATION**

2.1. **New exporter qualification**

(10) The Community industry argued that the applicant was exporting the product concerned to the Community as early as 2004 and backed this assertion by various website pages and catalogues of the applicant mentioning sales in the Community. However, these documents did not mention specifically the product concerned or the date of the export, and the examination of the sales ledger of the applicant and its related companies showed no evidence of such exports. The investigation confirmed that the applicant had not exported the product concerned during the original investigation period and that it had begun exporting to the Community after that period.

(11) Furthermore, the applicant was able to satisfactorily demonstrate that it did not have any links, direct or indirect, with any of the Chinese exporting producers subject to the anti-dumping measures in force with regard to the product concerned.

(12) Accordingly, it was confirmed that the company should be considered a 'new exporter' in accordance with Article 11(4) of the basic Regulation.

2.2. **Market economy treatment (MET)**

(13) Pursuant to Article 2(7)(b) of the basic Regulation, in anti-dumping investigations concerning imports from the PRC, normal value shall be determined in accordance with paragraphs 1 to 6 of Article 2 of the basic Regulation for those producers which were found to meet the criteria laid down in Article 2(7)(c) of the basic Regulation, i.e. where it is shown that market economy conditions prevail in respect of the manufacture and sale of the like product. These criteria are set out in a summarised form below:

— business decisions are made in response to market signals, without significant State interference, and costs reflect market values,

— firms have one clear set of basic accounting records which are independently audited in line with international accounting standards (IAS) and applied for all purposes,

— there are no significant distortions carried over from the former non-market economy system,

— bankruptcy and property laws guarantee stability and legal certainty,

— currency exchanges are carried out at market rates.

(14) The applicant requested MET pursuant to Article 2(7)(b) of the basic Regulation and was invited to complete a MET claim form.

(15) In the course of the investigation the applicant submitted a number of MET claims for its related companies. After analysis of the claims, the Commission identified four MET claims for verification of companies involved in the production and sale of the product concerned. These companies are listed in recital 8 of this Regulation. However, at a late stage of the investigation, it was found that the applicant was related to another producer and another exporter of the product concerned located in the PRC. These companies did not fill a separate MET claim form and thus it was not possible to assess the situation of the whole group within which the applicant is operating.

(16) It is the Commission's consistent practice to examine whether a group of related companies, as a whole, fulfils the conditions for MET. This is deemed to be necessary to avoid sales of a group of companies being channelled via one of the related companies in the group, should a preferential individual duty rate be granted to that company. Therefore, in cases where a subsidiary or any other related company is a producer and/or a seller of the product concerned, all such related companies have to provide a MET claim form to enable an examination of whether the criteria in Article 2(7)(c) of the basic Regulation are met. The failure of the applicant to disclose the existence of these companies alone is sufficient to conclude that it cannot be established whether the group as a whole fulfils all the conditions for MET.

(17) Nevertheless, it should be noted that the investigation revealed that out of the four companies of the group that submitted MET claim forms, only one company fulfilled all the conditions for granting MET. The remaining three companies did not fulfil the first three criteria mentioned in recital 13 above.

(18) As regards the mother company, this company did not demonstrate that it was free from State interference. Firstly, the source of the capital of the company incorporated in 2001 could not be established and the accounts demonstrating the capital import could not be reconciled (criterion one). Secondly, this company did not substantiate that it had one clear set of basic accounting records prepared and audited in compliance with IAS. In particular, the company did not have individual audited accounts. It only had audited consolidated financial statements, specifically prepared upon request of a creditor. Furthermore, the unaudited individual accounts also showed several breaches of the IAS, concerning fixed assets and depreciation, booking of certain assets and the revaluation of assets (criterion two).

(19) As regards the applicant, it did not demonstrate that it was free from State interference. In particular, its articles of association (AoA), which were communicated to the State authorities in order to obtain a business licence, contained restrictions for sales on the domestic market. In addition, the company was unable to provide a contract for the supply of energy (criterion one). Secondly, the company did not substantiate that it had one clear set of basic accounting records, which were prepared and audited in compliance with IAS (criterion two). Finally, the applicant did not demonstrate that it was free from significant distortions carried over from the former non-market economy system, in particular because not all its initial assets were independently evaluated, and because it benefited from significant tax rebates (criterion three).

(20) As regards the third company, it did not demonstrate that business decisions were made in response to market signals, without significant State interference, and that its costs reflect market values (criterion one). Secondly, this company did not demonstrate that it had one clear set of basic accounting records, which were prepared and audited in compliance with IAS: several breaches of IAS were noted such as the late booking of revenues, or incorrect depreciation of fixed assets (criterion two). Finally, the company did not demonstrate that it was free from significant distortions carried over from the former non-market economy system, in particular because the initial assets of the company could not be considered as independently evaluated (criterion three).

(21) Based on the above facts and considerations, the applicant and the group as a whole, in which it operates, could not be granted MET.

(22) The Community industry, the applicant and the authorities of the exporting country were given an opportunity to comment on the findings concerning MET. Only the applicant submitted such comments.

(23) The applicant first argued that the two companies discovered at a late stage of the investigation as mentioned in recital 15 above did not have to submit MET claims. According to the applicant, MET claims should be submitted by producers and traders of the product concerned during the IP. The two companies in question were not involved in the production or sale of the product concerned during the IP and beyond because the related exporter was liquidated at the beginning of 2008, and the related producer was not fully operational during the IP since it has not obtained a production licence.

(24) In this regard it is recalled that the applicant was given an opportunity to and provided MET claims for most of its related companies. However, it failed to disclose the existence of these two companies within the deadlines set for this purpose, as explained in the following recitals 25 and 26.

(25) The existence of the alleged liquidated exporter was discovered by the Commission and confirmed by the applicant just before the verification visit in the PRC. The company did not file an MET claim and, in addition, the applicant, despite a request from the Commission, did not provide any accounting records and other relevant information to clarify the exact activities of this company during the IP. Therefore, the Commission was unable to establish that this company was not involved in the sale of the product concerned during the IP.

(26) As regards the related producer, its existence was communicated to the Commission during the verification visit in the PRC and thus, since this producer was located in another province, the Commission was unable to verify on the spot the exact nature of its operations and whether in fact the company had not started production of the product concerned. It was found that although the company has not yet obtained a production licence, its business licence granted in 2007, namely during the IP, covers the manufacturing of the product concerned. This related producer should therefore have submitted an MET claim.

(27) The failure to disclose the existence of these two companies and submit MET claims deprived the Commission of the possibility to verify the subsequently submitted information on their activities and to assess whether the group of companies satisfied the conditions for granting MET.

(28) The applicant also claimed that the parent company should not have been included in the scope of the MET investigation given that it is neither a producer nor an exporter of the product concerned.

(29) The parent company exercises control over its related companies, including their activities with regard to the product concerned. Thus any finding showing that the parent company is not following market economy principles has a direct impact on the whole group. The investigation demonstrated that strong links existed between the mother company and its subsidiaries, in particular with the applicant and another cooperating company of the group involved in the product concerned. There were many transactions between the said companies. In addition, the assets and overhead expenses were not clearly separated. Moreover, the parent company indicated during the verification visit its intention to produce magnesia bricks in the future, and there was nothing in its business licence to prevent this company from doing so. On this basis this claim had also to be rejected.

(30) The applicant acknowledged that the company mentioned in recital 20 above does not fulfil all MET criteria, but claimed that it should no longer be considered as a producer since it was currently renting its production facilities to a related producer.

(31) In this respect it was found that this company has the capability to resume production on its own right at any time in the future. Therefore, this claim had to be rejected.

(32) The applicant made further claims and brought new elements allegedly demonstrating that the company mentioned in recital 19 above meets all the MET criteria. These claims are described and discussed below.

(33) As regards criterion one, the applicant further argued that any restriction in the AoA is purely a private agreement between shareholders in which the State did not interfere. The applicant also claimed that the Chinese Contract Law did not impose any obligation to sign a written contract for energy supply.

(34) In this regard, it is noted that the Chinese Company Law provides that the AoA of companies are binding on the company, shareholders, directors, supervisors and senior management. Moreover, the AoA and any changes thereof are required to be registered with the State authorities. Contrary to the claim of the applicant, it was also found that the Chinese Contract Law makes clear reference to contracts for supply and use of energy and contains clear provisions on the content of such contracts. On this basis, the claims concerning criterion one were rejected.

(35) As regards criterion two, the applicant provided documents alleging that shortcomings found in the accounts, in particular for a transaction between related companies, were corrected later in April 2008, and argued that criterion two was thus fulfilled.

(36) In this respect, it is noted that any alleged remedy applied in 2008 cannot remedy the fact that the accounts of the applicant which were provided in the claim form were not reliable as indicated in recital 19 above. On this basis, this claim had to be rejected.

(37) As regards criterion three, the applicant claimed that the capital verification report provided in its MET claim should be sufficient in itself to certify the evaluation of its assets. The applicant also claimed that the tax rebates should not have been taken into account in the framework of the present anti-dumping investigation as this issue is relevant only for anti-subsidy investigations.

(38) It is noted that the investigation found that the capital verification report was found to be erroneous and thus cannot be considered as a reliable independent basis for the evaluation of the assets. Concerning the tax rebates obtained by the applicant, it is considered that it distorts significantly the financial situation of the company and indeed has an impact on the third MET criterion. Therefore, these claims concerning criterion three had to be rejected.

(39) On the basis of the above, the Commission maintained its findings and conclusions concerning the criteria one to three. It is thus confirmed that the applicant and the group in which it operates cannot be granted MET.

2.3. **Individual treatment (IT)**

(40) Further to Article 2(7) of the basic Regulation, a country-wide duty, if any, is established for countries falling under that Article, except in those cases where companies are able to demonstrate that they meet all criteria for individual treatment (IT) set out in Article 9(5) of the basic Regulation. These criteria are set out in a summarised form below:

— in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits,

— export prices and quantities, and conditions and terms of sale are freely determined,

— the majority of the shares belong to private persons, and it must be demonstrated that the company is sufficiently independent from State interference,

— exchange rate conversions are carried out at the market rate,

— State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.

(41) The applicant, as well as requesting MET, also claimed IT in the event of not being granted MET.

(42) As explained in recital 16 above, it is the Commission's consistent practice to examine whether a group of related companies, as a whole, fulfils the conditions for IT. As indicated in recital 15, there was one additional producer and one exporter related to the applicant during the IP which did not cooperate with the present investigation. Thus, no conclusion could be made on whether these two companies fulfilled the criteria for IT.

(43) It is therefore concluded that neither MET nor IT should be granted to the applicant.

(44) The applicant, the authorities of the exporting country and the interested parties were given an opportunity to comment on the above findings. Only the applicant submitted the comments below.

(45) The applicant first reiterated its claim that the investigation on both MET and IT should focus only on producers and traders of the product concerned during the IP, and alleged that the two companies which did not cooperate were not involved in the production or sale of the product concerned. Then it further argued that the Commission officials received all necessary information to assess IT for the two non-cooperating companies while they were on the spot.

(46) On the first claim, it is noted that the exact activity of these two companies during the IP could not be checked during the verification visit precisely because of non-cooperation, as mentioned in particular in recital 15 above. Therefore, the applicant did not demonstrate that the two non-cooperating companies had not produced or were not involved in the sale of the product concerned during the IP. It is also noted that, whatever the activity of the producer during the IP, it should be included in the assessment of the group for the reasons explained in particular in recital 16 above. It is thus maintained that these two companies should have cooperated in the investigation.

(47) As mentioned in recital 24 to 27 above, the information provided during the on-the-spot visit was insufficient to make an assessment concerning IT for the two non-cooperating companies. In addition, this information was not provided within the time limit set for the submission of the IT claim and was provided so late that it did not allow its verification by the Commission. Therefore this claim had to be rejected.

(48) The applicant further submitted that the Commission's current practice to examine IT criteria is an infringement of Article 2.3 of the WTO Anti Dumping Agreement, since this agreement should be considered as an integral part of the EC legal order.

(49) However, given the non-cooperation from two related companies, IT criteria were not further examined in the present investigation, and the issue of their compatibility with WTO rules was thus irrelevant in the present case. Therefore this claim could not be further considered.

(50) Based on the above facts and considerations, it is thus confirmed that the applicant and the group in which it operates cannot be granted IT.

3. CONCLUSION

(51) The purpose of the present review was to determine the individual margin of dumping of the applicant, which was allegedly different from the current residual margin applicable to imports of the product concerned from the PRC. The request was mainly based on the allegation that the applicant fulfilled the criteria for MET.

(52) As the investigation concluded in particular that, in the absence of cooperation from its related producer and exporter, the applicant was granted neither MET nor IT, the Commission could not establish that the applicant's individual dumping margin was indeed different from the residual dumping margin established in the original investigation. Therefore, the request made by the applicant should be rejected and the new exporter review terminated. The residual anti-dumping duty found during the original investigation, i.e. 39,9 %, should consequently be maintained as far as the applicant is concerned.

4. RETROACTIVE LEVYING OF THE ANTI-DUMPING DUTY

(53) As the review has resulted in a determination of dumping in respect of the company, the anti-dumping duty applicable to the company should be levied retroactively on imports of the product concerned which have been made subject to registration pursuant to Article 3 of Regulation (EC) No 1536/2007.

5. DISCLOSURE AND DURATION OF THE MEASURES

(54) The applicant was informed of the essential facts and considerations on the basis of which it was intended to impose a definitive anti-dumping duty on its imports into the Community and was given the opportunity to comment.

(55) This review does not affect the date on which Regulation (EC) No 1659/2005 will expire pursuant to Article 11(2) of the basic Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

1. The new exporter review initiated by Regulation (EC) No 1536/2007 is hereby terminated and the anti-dumping duty applicable according to Article 1 of Regulation (EC) No 1659/2005 to 'all other companies' in the People's Republic of China is hereby imposed on imports identified in Article 1 of Regulation (EC) No 1536/2007.

2. The anti-dumping duty applicable according to Article 1 of Regulation (EC) No 1659/2005 to 'all other companies' in the People's Republic of China is hereby levied with effect from 22 December 2007 on imports of certain magnesia bricks which have been registered pursuant to Article 3 of Regulation (EC) No 1536/2007.

3. The customs authorities are hereby directed to cease the registration of imports carried out pursuant to Article 3 of Regulation (EC) No 1536/2007.

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

Article 2

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

Article 1(2) shall apply with effect from 22 December 2007.

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

Done at Brussels, 15 September 2008.

For the Council
The President
B. KOUCHNER