COMMISSION REGULATION (EC) No 1204/98

of 9 June 1998

imposing a provisional countervailing duty on imports of certain broad spectrum antibiotics originating in India

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 subsidized imports from countries not members of the European Community [1] and in particular Article 12 thereof,

After consulting the Advisory Committee,

Whereas:

A. PROCEDURE

1. Initiation

(1) On 12 September 1997, the Commission announced by a notice published in the *Official Journal of the European Communities* [2] the initiation of an anti-subsidy proceeding with regard to imports into the Community of certain broad spectrum antibiotics (amoxicillin trihydrate, ampicillin trihydrate and cefalexin) originating in India, and commenced an investigation.

(2) The proceeding was initiated as a result of a complaint lodged in July 1997 by six Community producers, i.e. Antibioticos SA, Spain, Antibioticos SpA, Italy, Biochemie GmbH, Austria, Biochemie SA, Spain, Biochemie SpA, Italy, and ACS Dobfar SpA, Italy, whose collective output of the said product represented a major proportion of Community production of these broad spectrum antibiotics.

The complaint contained evidence of subsidisation of the said product, and of material injury resulting therefrom, which was considered sufficient to justify the initiation of a proceeding.

2. Investigation

(3) The Commission officially advised the exporting producers and importers known to be concerned, the representatives of the exporting country and the complainants of the initiation of the proceeding and gave the parties concerned the opportunity to make their views known in writing and to request a hearing within the time limits set in the notice of initiation.

(4) The Government of India and the exporting producers made their views known in writing and requested hearings, which were granted.

(5) The Commission sent questionnaires to all parties known to be concerned and received replies from the complainant Community producers, the Government of India, nine Indian exporting producers and one related and one unrelated importer in the Community.

(6) The Commission sought and verified all the information it deemed necessary for the purpose of a provisional determination of subsidisation and injury, and carried out verification visits at the premises of the following interested parties:

(a) *Complainant Community producers:*

— Antibiotics SA, Madrid (Spain) which also replied to the Commission's questionnaire on behalf of Antibioticos SpA (Italy),

— Biochemie GmbH, Kundl (Austria), which also replied to the Commission's questionnaire on behalf of Biochemie SA (Spain) and Biochemie SpA (Italy),

— ACS Dobfar SpA, Tribiano (Italy).

(b) *Government of India:*

— Ministry of Commerce, New Delhi,

— Undersecretariat for Customs, New Delhi,

— Ministry of Finance, New Delhi.

(c) *Producing exporters in India:*

— Ranbaxy Laboratories Ltd, New Delhi,

— Vitara Chemicals Ltd, Mumbai,

— Kopran Ltd, Mumbai,

— Lupin Laboratories Ltd, Mumbai,

— Gujarat Lyka Organics Ltd, Mumbai,

— Torrent Pharmaceuticals Ltd, Ahmedabad,

— Biochem Synergy Ltd, Indore,

— Orchid Chemicals & Pharmaceuticals Ltd, Chennai,

— Harshita Ltd, New Delhi.

(d) *Related importer in the Community:*

— Ranbaxy (Netherlands) BV, Netherlands (a related importer of Ranbaxy Laboratories Ltd).

[1] OJ L 288, 21. 10. 1997, p. 1.
[2] OJ C 277, 12. 9. 1997, p. 2.

(7) The investigation period for the determination of subsidization was 1 July 1996 to 30 June 1997 (hereinafter referred to as the 'investigation period'). The examination of injury covered the period 1 January 1993 up to the end of the investigation period (hereinafter referred to as the 'period examined').

B. PRODUCT UNDER CONSIDERATION AND LIKE PRODUCT

1. Product under consideration

(8) This proceeding covers certain broad-spectrum antibiotics, namely amoxicillin trihydrate, ampicillin trihydrate and cefalexin, presented in bulk, which fall within CN codes ex 2941 10 10, ex 2941 10 20, and ex 2941 90 00 respectively.

(9) The abovementioned antibiotics are betalactam antibiotic bulk pharmaceutical substance which are used to manufacture finished dosage forms, the purpose of which is the treatment of a variety of infectious diseases. They are produced from the same raw materials, penicillin G or penicillin V, which are obtained through fermentation. The resulting penicillin is then converted by chemical or biochemical syntheses into downstream intermediaries (called '6-APA' or '7-ADCA'), which are themselves converted into the three bulk active substances mentioned above. In spite of certain technical differences between these three antibiotics, they all belong to the same category of product, i.e. bulk semisynthetic broad spectrum antibiotics and have the same use, that of being incorporated into finished dosage forms which are effective in treating a variety of infectious diseases. Even though a given antibiotic may sometimes be preferred to another for the treatment of a specific disease, all three antibiotics are interchangeable to a large extent and are therefore considered, for the purpose of the present proceeding, as forming one single category of product.

2. Like product

(10) The investigation established that the broad spectrum antibiotics produced in India and sold domestically or exported to the Community and the broad spectrum antibiotics produced and sold in the Community by the complainant Community producers had effectively identical physical characteristics and uses and where thus like products within the meaning of Article 1(5) of Regulation (EC) No 2026/97 (hereinafter referred to as the 'Basic Regulation').

C. SUBSIDIES

1. Introduction

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

— Passbook Scheme,

— Duty Entitlement Passbook Scheme,

— Export Promotion Capital Goods Scheme,

— Export Processing Zones Export Oriented Units,

— Income Tax Exemption Scheme.

Further details of these schemes are set out below.

(12) The first four schemes are based on the Foreign Trade (Development and Regulation) Act 1992 (effective from 7 August 1992) which repealed the Imports and Exports Control Act of 1947. The Foreign Trade Act authorises the Government of India (hereinafter referred to as the 'GOI') to issue notifications regarding export and import policy. These are summarised in 'Export and Import Policy' documents which are issued every five years and updated every year. Two Export and Import Policy documents are relevant to the investigation period of this case i.e. the five-year plans relating to the years 1992 to 1997 and 1997 to 2002.

The last scheme, the Income Tax Scheme, is based on the Income Tax Act of 1961 which is amended yearly the Finance Act.

(13) The declared objectives of India's current Export and Import Policy are:

— to accelerate the country's transition to a globally-oriented vibrant economy with a view to deriving maximum benefits from expanding global market opportunities,

— to stimulate sustained economic growth by providing access to essential raw materials, intermediates, consumables and capital goods required for augmenting production,

— to enhance the technological strength and efficiency of Indian agriculture, industry and services, thereby improving their competitive strength while generating new employment opportunities, and to encourage the attainment of internationally accepted standards of quality,

— to provide consumers with good quality products at reasonable prices.

(14) The Commission examined these five schemes in the light of the policies set out in the relevant 'Export and Import Policy' plans and in the Income Tax Act of 1961 as amended.

2. **Passbook Scheme**

(15) One instrument under the Export and Import Policy involving export related assistance is the PBS which entered into force on 30 May 1995.

(a) *Eligibility*

(16) The PBS is available to certain categories of exporters, i.e. those which manufacture in India and subsequently export ('manufacturer-exporters') and exporters, whether manufacturer or only trader, granted an 'Export House/Trading House/Star Trading House/SuperStar Trading House certificate'. The latter category of exporters, which is defined in the Export and Import Policy document, has to provide in particular proof of prior export performance.

(b) *Practical implementation*

(17) Any eligible exporter can apply for a Passbook. This takes the form of a book in which credit and debit amounts of duty are entered. It is issued automatically if the company is a recognised manufacturer/exporter or an approved Export/Trading House.

(18) Upon the export of finished goods, the exporter is eligible to claim credit which can be be used to pay customs duties on subsequent imports. Various elements are taken into consideration in calculating the amount of credit to be granted in accordance with 'Standard Input/Output norms' which are issued by the GOI for exported products. Standard Input/Output norms set out quantities of normally imported raw materials required to produce one unit of the finished product. The norms are established by the special Advance Licensing Committee on the basis of a technical analysis of the production process and global statistical information. By applying the Standard Input/Output norms, the credit is granted up to an amount corresponding to the basic customs duty payable on the normally imported inputs used by the Indian antibiotics industry in producing the exported product. One other element is the 'minimum value addition' (MVA). The MVA is the minimum value which the Indian producer must add (i.e. through indigenously sourced inputs/labour costs) to the value of imported inputs in producing the finished goods. The MVA for exports of the products concerned is fixed at 33 % by the Indian authorities.

(19) The credit granted is entered in the Passbook and is available to be offset against customs duties due on future imports of any goods (e.g. raw materials, capital goods, etc.) except those contained in the 'Negative List of Imports' as laid out in the Export and Import Policy. This list sets out goods which either may not be imported or which may only be imported after the GOI has issued a special licence to the importer. The imported goods need not have any relation to the actual production of the exporter and may be sold on the Indian market.

(20) Passbook credits are not transferable. The passbook is valid for a period of 2 years from the date of issue. Any credit at the end of the two-year period is allowed to be utilised within a period of 12 months thereafter. At the end of the third year, any unutilised credit lapses. Within this general timetable there is no time limit for claims for credit to be made for a particular export transaction.

(21) When all credits in the Passbook have been used, the passbook is closed and the Passbook holder has to pay a fee to the relevant authority.

(22) The GOI has stated in its reply to the quationnaire in relation to the PBS that:

'Under this scheme, the exporter retrieves import charges on the exported product, whereas there is no remission of import charges on the like product destined for consumption within the exporting country. In this respect the Scheme is in accordance with Council Regulation (EC) No 3284/94 (the anti-subsidy Regulation)'.

(23) In response to this point, it should be noted that there is no difference on this point between this latter Regulation, which has since been repealed, and its replacement, the Basic Regulation. Article 2(1)(ii) of the Basic Regulation provides that the exemption of an exported product form duties/

charges shall not be deemed to be a subsidy provided that it is granted in accordance with the provisions of Annexes I to III of the Basic Regulation. Item (i) of Annex I (the Illustrative List of Export Subsidies) specifies that the remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product constitutes an export subsidy. Furthermore, Annex II to the Basic Regulation requires investigating authorities, in determining whether inputs are consumed in the production process, to establish whether the government of the exporting country has in place a system or procedure to confirm which inputs are consumed in the production process of the exported product. In this case, no such system exists. In fact, the benefit granted in India to exporters of the products concerned in the form of Passbook credits is automatically calculated on the basis of the Standard Input/Output norms independently of whether inputs have been imported, duty has been paid on them or whether the inputs were actually used for export production.

Furthermore, the export is under no obligation to either import actual inputs or consume the imported goods in the production process under the PBS. What happens in the PBS, is that upon export of a finished product, an exporter is granted an amount of credit based on the amount of customs duty which is deemed to have been paid on normally imported inputs used in producing the finished product. This credit amount can be used to offset customs duty due on future imports of any product. A benefit accrues to the exporter in the form of unpaid customs duty on imports of any product (whether raw materials or capital goods). This scheme therefore allows an exporter to import goods without paying customs duty once it has previously exported some goods. Hence, the PBS is not a remission/drawback scheme within the meaning of item (i) of Annex I or Annex II to the Basic Regulation.

(c) *Conclusions on PBS*

(24) The PBS is not a permitted remission/drawback or substitution drawback scheme within the provisions of the Basic Regulation since the Passbook credit is not calculated in relation to inputs actually to be consumed in the production process. Furthermore, the exporter is under no obligation to import goods free of duty which must be consumed in the production process.

In any case, even if it were assumed that the scheme in question constituted a remission/drawback or substitution drawback scheme, there is no system or procedure in place to confirm which inputs are consumed in the production process of the exported product within the meaning of item (i) of Annex I and Annexes II and III to the Basic Regulation. Annex II(II)(5) and Annex III(II)(3) of that Regulation provide that where it is determined that the government of the exporting country does not have such a 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. The GOI did not carry out such an examination. Hence, 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.

(25) The schemes constitutes a subsidy as the financial contribution by the GOI in the form of duties forgone on imports confers a benefit upon the Passbook holder who can import goods duty free using credits earned on exports. It is a subsidy contingent in law upon export performance and is therefore deemed to be specific under Article 3(4)(a) of the Basic Regulation. In addition, the MVA requirement (see recital 18) is considered to require the use of domestic over imported goods. In this regard, the PBS is a specific subsidy within the meaning of Article 3(4)(b) of the Basic Regulation.

(26) In early 1997, the GOI announced that the PBS was effectively terminated and credit claims could no longer be made for export transactions taking place after 31 March 1997. An exporter may, however, continue to use a Passbook which has already been issued, for a period of three years after the date of issue. Additionally, there is no time limit within which claims for credit must be made for export transactions made before 31 March 1997. While the scheme in that form has techincally been terminated, exporters can continue to benefit from this scheme by importing goods, free of customs duties, until all credits have been exhausted or until 31 March 2000 at the latest. In these circumstances, it is considered that the scheme can be countervailed.

(d) *Calculation of the subsidy amount*

(27) The benefit to the exporters has been calculated on the basis of the amount of customs duty normally due on imports made during the investigation

period but which remained unpaid under the PBS. In order to establish the full benefit to the recipient under this scheme, this amount has been adjusted by adding interest during the investigation period. Since the benefits from import duty exemptions are obtained regularly during the investigation period, they are equivalent to a series of grants. It is normal practice to reflect the benefit to the recipient of one-time grants by adding the annual commercial interest to the nominal amount of the grant, on the assumption that the grant is considered to have been made on the first day of the investigation period. However, in the present case, it is clear that individual grants can be made at any time between the first and the last day of the investigation period. Consequently, instead of adding annual interest to the whole amount, it is considered appropriate to assume that an average grant would have been received at the mid-point of the investigation period, and therefore the interest should cover a period of six months, equivalent to half of the annual commercial rate during the investigation period in India, i.e. 7,575 %. This amount (i.e. unpaid customs duty plus interest) has been allocated over total exports during the investigation priod.

Three companies benefited from this scheme during the investigation period and obtained subsidies of between 0,01 and 5,89 %. None of the companies claimed a deduction for the application fee or other costs necessarily incurred in order to qualify for, or to obtain, the subsidy. Biochem Synergy did not provide any verifiable information relating to this scheme. In accordance with the provisions of Article 28(1) of the Basic Regulation, provisional findings relating to subsidies received by this company under the PBS have been made on the basis of the facts available. In view of the absence of other reliable information from independent sources and in order to avoid rewarding non-cooperation, it was considered appropriate to apply the highest rate of benefit under the PBS established for other cooperating exporters to this company, i.e. 5,89 %.

3. **Duty Entitlement Passbook Scheme (DEPB)**

(28) Another instrument under the Export Import Policy involving export related assistance is the DEPB which became effective on 7 April 1997. The DEPB constitutes the successor to the PBS which was terminated on 31 March 1997. The DEPB is of two types:

— DEPB on pre-export basis,

— DEPB on post-export basis.

(a) *Eligibility for DEPB on pre-export basis*

(29) The DEPB on pre-export basis is available to manufacturer-exporters (i.e. every manufacturer in India who exports) or merchant-exporters (i.e. traders) linked with manufacturers. To be eligible under this scheme, the company must have exported during a three-year prior to submitting a claim for credit.

(b) *Practical implementation of DEPB pre-export basis*

(30) Any eligible exporter can apply for a licence which grants a credit amount to be used to offset customs duties due on future imports of goods. The licence granting the credit, which is calculated on the basis of 5 % of the average yearly value of all exports during the previous three years, is issued automatically. The granting of the licence carries with it an export obligation. When the DEPB holder has made exports of such a value which will entitle him to credit equivalent to the credit already given under DEPB on pre-export basis, his obligation against such DEPB is offset.

(31) Unlike the PBS, the DEPB on pre-export basis allows for the use of such credits only for customs duties payable for subsequent imports of inputs (which are not on the 'Negative List of Imports') required for use in the production of goods in the factory of the company concerned ('Actual User condition'). Such imported inputs may not be transferred, loaned, sold, parted with, or disposed of in any manner.

(32) DEPB credits are not transfereable. The DEPB licence is valid for a period of 12 months from the date of granting of the licence. Upon importation, the exporter undertakes to use the inputs for the export of the finished product. When a company uses all of the credits granted, the company may apply for a further credit amount calculated on the basis of 5 % of the average value of exports during the previous three years.

(33) When a company is granted a credit amount, it is then allowed to import inputs free of customs duties. The GOI states that the Indian Customs Authorities are usually aware of the general import requirements of the importer with regard to the Actual User condition. However, there is no verification procedure in place to ensure that the Actual User condition is respected.

(34) When all credits have been used, the company has to pay a fee to the relevant authority

(c) *Conclusion on DEPB pre-export basis*

(35) The DEPB is not a permitted remission/drawback or substitution drawback scheme within the provisions of the Basic Regulation since, despite the existence of the 'Actual User condition', the DEPB credit is not calculated in relation to inputs actually to be consumed in the production process. Furthermore there is no system or procedure in place to confirm which inputs are consumed in the production process of the imported product and in what amounts. Annex II(II)(5) and Annex III(II)(3) to the Basic Regulation provide that where it is determined that the government of the exporting country does not have such a 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 there an excees payment occurred. The GOI did not carry out such an examination. Hence, 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.

(36) This scheme constitutes a subsidy as the financial contribution by the GOI in the form of duties forgone on imports confers a benefit upon a company which can import goods free of customs duty. It is a subsidy contingent in law upon export performance and is therefore deemed to be specific under Article 3(4)(a) of the Basic Regulation.

(d) *Calculation of the subsidy amount for DEPB pre-export basis*

(37) The benefit to the exporters has been calculated on the basis of the amount of customs duty normally due on imports made during the investigation period but which remained unpaid under the DEPB. In order to establish the full benefit to the recipient under this scheme, this amount has been adjusted by adding interest during the investigation period. Given the nature of this subsidy, which is equivalent to a series of grants, a rate of 7,575 %, i.e. half the commercial interest rate during the investiation period in India, was considered appropriate for the same reasons as stated above in recital 27. The amount of benefit has been allocated over total exports during the investigation period.

One company availed of this scheme during the investigation period and obtained a benefit of 0,05 %. In calculating the benefit, the fee necessarily incurred to obtain the subsidy has been deducted as claimed by the company. Another company, Biochem Synery did not provide any verified information relating to this scheme. In accordance with the provisions of Article 28(1) of the Basic Regulation, provisional findings relating to subsidies received by this company under the DEPB on pre-export basis have been made on the basis of the facts available. In view of the absence of other reliable information from independent sources and in order to avoid rewarding non-coorperation, it was considered appropriate to apply the highest rate of benefit established for other cooperating exporters to this company, i.e. 0,05 %.

(e) *Eligibility for DEPB on post-export basis*

(38) The DEPB on post-export basis is virtually identical to the PBS described above. It is available to manufacturer/exporters (i.e. very manufacturer in India who exports) or merchant/exporters (i.e. traders).

(f) *Pratical implemention of DEPB post-export basis*

(39) Under this scheme, any eligible exporter can apply for credits which are calculated as a percentage of the value of exported finished products. Such DEPB rates have been established by the Indian authorities for most products, including the products concerned, on the basis of the Standard Input/Output norms. A licence stating the amount of credit granted is issued automatically.

DEPB on post-export basis allows for the use of such credits for any subsequent imports (e.g. raw materials or capital goods) not on the Negative List of Imports. Such imported goods can be sold on the domestic market (subject to sales tax) or used otherwise.

DEPB credits are freely transferable. The DEPB licence is valid for a period of 12 months from the date of granting of the licence.

(40) When all credits have been used, the company has to pay a fee to the relevant authority.

(g) *Conclusion on DEPB on post-export basis*

(41) This scheme is clearly contingent upon export performance. When a company exports goods, it is granted a credit which can be used to offset

amounts of customs duties due on future imports of any goods (whether raw materials or capital goods). Like the PBS, it is not a permitted drawback or substitution drawback scheme for the same reasons as stated above in recital 24. The scheme constitutes a subsidy as the financial contribution by the GOI in the form of duties forgone on imports confers a benefit upon a company which can import goods free of customs duty. It is a subsidy contingent in law upon export performance and is therefore deemed to be specified under Article 3(4)(a) of the Basic Regulation.

(h) *Calculation of the subsidy amount for DEPB post-export basis*

(42) No evidence was found that the companies benefited from the DEPB on post-export basis during the investigation period. However, Biochem Synergy did not provide any verifiable information relating to this scheme. In accordance with the provisions of Article 28(1) of the Basic Regulation, provisional findings relating to subsidies received by this company under the DEPB on post-export basis have been made on the basis of the facts available. In view of the absence of other reliable information from independent sources and in order to avoid rewarding non-cooperation, a rate of 3,75 % has been applied. This rate was calculated on the basis of the actual DEPB rate applicable for exports of cefalexin (the only product exported by the company) of 15 % and acknowledging the fact that the scheme was only in force the last quarter of the investigation period.

4. **Export Promotion Capital Goods Scheme (EPCGS)**

(43) Another instrument under the Export Import Policy involving export related assistance is the EPCGS introduced on 1 April 1990 and amended on 5 June 1995.

(a) *Eligibility*

(44) The EPCGS is available to manufacturer/exporters (i.e. every manufacturer in India who exports) or merchant/exporters (i.e. traders). Since 1 April 1997, manufacturers linked with merchant/exporters can also benefit from the scheme.

(b) *Pratical implementation*

(45) To benefit from the scheme, a company must provide to the relevant authorities, details of the type and value of capital goods which are to be imported. Depending on the level of export commitment which the company is prepared to undertake, the company will be allowed to import capital goods at either a zero rate of duty or a reduced rate. A license authorising the import at preferential rates is issued automatically.

(46) In order to meet the export obligation, goods exported must have been produced using the imported capital goods.

(47) An application fee is payable to obtain a licence.

(c) *Conclusions on EPCGS*

(48) The EPCGS is a countervailable subsidy as the payment by an exporter of a reduced or zero rate of duty constitutes a financial contribution by the GOI, revenue otherwise due is forgone and a benefit is conferred on the recipient by lowering the duties payable or fully exempting him from paying the import duties.

(49) The 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 committing to export goods, and is therefore deemed to be specific.

(d) *Calculation of the subsidy amount*

(50) The benefit to the exporters has been calculated on the basis of the amount of unpaid customs duty due on imported capital goods by spreading this amount across a period which reflects the normal depreciation of such capital goods in the antibiotics industry. This period has been established by using the weighted average (on the basis of production volume of the products concerned) of depreciation periods for capital goods actually imported under the EPCGS by each company, resulting into a normal depreciation period of 10 years. The amount so calculated which is attributable to the investigation period has been adjusted by adding interest during the investigation period in order to establish the full benefit to the recipient under this scheme. Given the nature of this subsidy, which is equivalent to a one-time grant, the commercial interest rate during the investigation period in India, i.e. 15,15 % was considered appropriate. This amount has then been allocated over total exports during the investigation period.

Three companies benefited from this scheme during the investigation period and obtained subsidies of between 0,03 % to 1,17 %. None of the companies claimed a deduction for the application fee or other costs necessarily incurred in order to qualify for, or to obtain, the subsidy.

5. **Export Processing Zones (EPZ)/Export Oriented Units (EOU)**

(51) Another instrument under the Export Import Policy involving export related assistance is the EPZ/EOU scheme which was introduced on 22 June 1994.

(a) *Eligibility*

(52) Companies located in any of the seven identified EPZs which undertake to export at least 75 % of their production can avail themselves of certain benefits. The same benefits are available to EOUs which can be located anywhere in India (also referred to as 'stand-alone EPZs'). EOUs are bonded units under the surveillance of customs officials. With effect from 1 April 1997, companies located in electronic hardware technology parks and software technology parks are also eligible for benefits similar to those available to companies in EPZs and EOUs.

(b) *Practical implementation*

(53) Companies located in EPZs and EOUs can obtain the following benefits:

— suspension of collection of duties due on purchases of capital goods during the period of bonding,

— exemption from customs duties due on purchases of raw materials and consumables,

— exemption from excise duty on goods procured from indigenous sources,

— reimbursement of central sales tax paid on goods procured locally.

Companies located in EPZs and companies requesting treatment as EOUs, must apply to the relevant authorities. Such application must include details for a period of the next five years, on, *inter alia*, planned production quantities, projected value of exports, imports requirements and indigenous requirements. If the authorities accept the company's application, the terms and conditions attached to the acceptance will be communicated to the company. Companies in EPZs and EOUs can be involved in the production of any product. The agreement to be recognised as a company in an EPZ/EOU is valid for a five-year period. The agreement may be renewed for further periods.

(c) *Conclusion on EPZ/EOU*

(54) The EOU/EPZ scheme involves the granting of countervailable subsidies as the concessions granted under the scheme constitute financial contributions by the GOI, since revenues otherwise due are forgone and a benefit is conferred on the recipient. The concessions granted relate to the suspension of collection of duties due on capital goods during the period of bonding, the exemption from customs duty on raw materials and consumables, the exemption from excise duty on goods procured from indigenous sources, and the reimbursement of central sales tax paid on goods procured locally. In the case of the suspension of the collection of duties on capital goods, this suspension is considered to have the same effect as an exemption since, as long as the export requirements are fulfilled, it is solely within the discretion of the company if and when to de-bond the capital goods.

(55) All the above subsidies are contingent in law upon export performance within the meaning of Article 3(4)(a) of the Basic Regulation, since they cannot be obtained without the company accepting an export obligation, and are therefore deemed to be specific.

(d) *Calculation of the subsidy amount*

(56) The benefit to the exporters has been calculated on the basis of the amount of duty or taxes normally due on imported or indigenously sourced goods (i.e. raw materials and capital goods) during the investigation period. In order to establish the full benefit to the recipient under this scheme, this amount has been adjusted by adding interest during the investigation period. Given the nature of this subsidy, which is equivalent to a series of grants, a rate of 7,575 %, i.e. half the commercial interest rate during the investigation period in India, was considered appropriate, in so far as raw materials were concerned, for the same reasons as stated above in recital 27. In the case of capital goods, the commercial interest rate during the investigation period in India, i.e. 15,15 % was considered appropriate since the subsidy is equivalent to a one-time grant, and this amount has been spread across a period which reflects the normal depreciation of such capital goods in the antibiotics industry (i.e. 10 years), as explained in recital 50. The amount of benefit so determined which is attributable to the investigation period has been allocated over total exports during the investigation period.

One company, Orchid Chemicals & Pharmaceuticals Ltd., is a recognised EOU. This company received all available benefits under this scheme at a rate of 34,38 %.

6. **Income Tax Exemption Scheme (ITES)**

(57) The Income Tax Act 1961 is the legal basis under which the ITES operates. The Act, which is amended yearly by the Finance Act, sets out the basis for the collection of taxes as well as various exemptions/deductions which can be claimed. Among the exemptions which can be claimed by firms are those covered by Sections 10A, 10B and 80HHC of the Act.

(a) *Eligibility*

(58) Exemption under Section 10A can be claimed by firms located in free trade zones. Exemption under Section 10B can be claimed by Export Oriented Units. Exemption under Section 80HHC can be claimed by any firm which exports goods.

(b) *Practical implementation*

(59) To benefit from the abovementioned deductions/exemptions from paying tax, a company will make the relevant claim when submitting its tax return to the Tax Authorities at the end of the tax year. The tax year runs from 1 April to 31 March. The tax return must be submitted to the authorities by the following 30 November. The final assessment by the authorities can take up to three years after submitting the tax return. A company can only claim one of the deductions available under the three sections mentioned above.

Under Sections 10A, 10B and 80HHC companies can claim exemption from taxable income for profits realised on export sales. Under Sections 10A and 10B only, for companies established after 1 April 1994, 25 % of sales may be made in India but the company can still receive 100 % exemption from taxable income for profits realised on all sales (i.e. sales for export and sales in India); companies established before 1 April 1994 may claim pro rata deduction from taxable income based on the ratio of domestic sales to export sales.

(c) *Conclusion on ITES*

(60) Item (e) of the illustrative list of export subsidies (Annex I to the Basic Regulation) refers to the 'full or partial exemption ... related to exports, of direct taxes' as constituting an export subsidy. Under the ITES, the GOI confers a financial contribution to the company by forgoing government revenue in the form of direct taxes which would otherwise be due if the income tax exemptions were not claimed by the company. This financial contribution confers a benefit on the recipient by reducing its income tax liability.

(61) The subsidy is contingent in law upon export performance in the meaning of Article 3(4)(a) of the Basic Regulation, since it exempts profits from export sales, and is therefore deemed to be specific.

(d) *Calculation of the subsidy amount*

(62) As stated in recital 59, claims for benefit under Sections 10A, 10B and 80HHC are made when submitting a tax return at the end of the tax year. As the tax year in India runs from 1 April to 31 March, it is considered appropriate to calculate the benefit under this scheme on the basis of the tax year 1996/97 (i.e. 1 April 1996 to 31 March 1997) which covers nine months of the investigation period. The benefit to the exporters has therefore been calculated on the basis of the difference between the amount of taxes normally due with and without the benefit of the exemption. Account has been taken of the fact that some companies are liable to the payment of minimum alternate tax which is an alternative method of calculating tax due under the Income Tax Act. The rate of corporate tax applicable during this tax year was 43 %. In order to establish the full benefit to the recipient, this amount has been adjusted by adding interest during the investigation period. Given the nature of this subsidy, which is equivalent to a one-time grant, the commercial interest rate during the investigation period in India, i.e. 15,15 % was considered appropriate. The amount to benefit has been allocated over total exports during the tax year 1996/97. In the case of exemptions under Articles 10A and 10B of the Act, while proportional tax savings related to domestic sales can be made under these sections, it is considered that as the scheme is contingent upon export performance, total tax savings should be allocated over export sales only.

During the tax year 1996/97 one company benefited from this scheme under Section 10B and obtained a benefit of 2,88 % and six companies benefited from this scheme under Section 80HHC and obtained subsidies of from 0,82 % to 6,46 %.

7. **Amount of countervailable subsidies**

(63) The amount of countervailable subsidies for each of the investigated exporters is as follows:

%	Passbook	DEPB		EPCGS	EPZ/EOU	Income tax	Total
		Pre-export	Post-export				
Entry into force	30.5.1995	7.4.1997		1.4.1990 (amended 5.6.1995)	22.6.1994	Annually	
Ranbaxy Laboratories Ltd	0,01	0,05	0	0,15	0	6,46	6,67
Vitara Chemicals Ltd	0	0	0	0	0	1,08	1,08
Kopran Ltd	5,43	0	0	1,17	0	2,23	8,83
Lupin Laboratories Ltd	5,89	0	0	0,03	0	5,34	11,26
Gujarat Lyka Organics Ltd	0	0	0	0	0	0	0
Torrent Pharmaceuticals Ltd	0	0	0	0	0	0,82	0,82
Biochem Synergy Ltd	5,89	0,05	3,75	0	0	0	9,69
Orchid Chemical & Pharmaceuticals Ltd	0	0	0	0	34,38	2,88	37,26
Harshita Ltd	0	0	0	0	0	9,61	9,61

D. COMMUNITY INDUSTRY

(64) On the basis of the information available to the Commission at the time of initiation, the complainant Community producers accounted for a major proportion of the total production of the product concerned in the Community. They were therefore deemed to constitute the Community industry in accordance with Article 10(8) of the Basic Regulation.

(65) Certain interested parties claimed that the complainant Community producers did not represent a major proportion of Community production of the like product with the meaning of the Basic Regulation because the company Gist-Brocades BV, Delft, The Netherlands, which is a leading producer of antibiotics, was not a party to the complaint. These parties contested the standing of the complainants and any subsequent injury findings in relation to the Community industry.

Upon further investigation of this claim by means of a questionnaire, it was established that the company Gist-Brocates BV had been steadily decreasing its production of the product concerned in the Community during the period examined and had instead concentrated on importing this product from subsidiaries and joint venture companies located outside the Community.

In addition, the Commission established, on the basis of available information, that, apart from the complainant producers and Gist-Brocades BV, there are no other major producers in the Community of the product under investigation since the only other such producers in the Community do not sell the product under investigation as such but rather produce it for captive use, i.e. they incorporate it into finished dosage forms.

It can therefore be concluded that the complainant Community producers (hereinafter 'Community industry') represent all or almost all the Community production of the product under investigation.

E. INJURY

1. Consumption in the Community

(66) In calculating the apparent Community consumption of the product concerned, the Commission added:

— the total sales volume in the Community of the complainant Community producers of the product concerned,

— the total imports into the Community of the product concerned from all third countries, including India.

(67) With a view to establishing, for the whole period examined, consistent figures covering the enlarged Community of 15, the total imports were based on

relevant Eurostat statistics, as declared under CN codes ex 2941 10 10, ex 2941 10 20, and ex 2941 90 00, combined with national statistics of Austria, Finland and Sweden before their accession to the Community. It should be noted that the confidentiality of import statistics of the product under investigation had been requested by one Member State and therefore these statistics were not readily available. However, this Member State agreed to provide these figures to the Commission, on a confidential basis and for the sole purpose of the present investigation. Therefore all figures concerning imports of the product under investigation into the Community which are mentioned below are given in an indexed form.

(68) On this basis, the apparent Community consumption of the product under investigation was found to have increased by 54,6 % between 1993 and the investigated period.

2. **Factors and considerations relating to the subsidised imports**

(a) *Volume and market share of the subsidised imports*

(69) The volume of subsidised imports of the product concerned originating in India increased by almost 300 % between 1993 and the investigation period. The share of the Community market held by these imports increased by 157 % during the same period. With regard to the developing country status of India and the provisions of Article 14(4) of the Basic Regulation, it was found that the volume of imports from India in the investigation period represented significantly more than 4 % of the total imports of the like product in the Community.

(b) *Prices of the subsidised imports*

(70) Aggregate data from Eurostat and the National Statistical Offices of Austria, Finland and Sweden show that the import price of the product under investigation originating in India fell by around 40 % between 1993 and the investigation period. It should be noted however that since the abovementioned CN codes may also cover the broad-spectrum antibiotics in question in finished dosage forms, a price comparison on the basis of Eurostat data is not really meaningful but should be seen as a mere indication of a downward trend of prices.

(71) For the investigation period, the Commission services compared the sales prices of the exporting producers' prices of the complainant Community producers. For the exporting producers, in the absence of any customs duty payable on importation, prices were based on export prices at cif level. For one related importer, the prices charged to the first independent customer in the Community were compared to the prices of the complainant Community producers.

(72) The prices of the complainant Community producers were adjusted, on the basis of available information, at a level known to be comparable to the level of the Indian exports, i.e. ex factory, by deducting transport and insurance costs. Any rebated, discounts or sales commissions which were granted or paid have been equally deducted.

(73) Certain interested parties claimed that in comparing the prices of the exporting producers to the prices of the Community industry, an adjustment for differences in the level of trade should be made since it was claimed that the majority of exporting producers' sales are made to traders whilst the majority of sales by the Community industry are made to end-users. However, insufficient justification was provided to substantiate such a claim and it could not, at this stage, be taken into consideration. Moreover, the information provided by the cooperating exporting producers themselves in their replies to the Commission's questionnaire indicates that the exporting producers sell to both wholesalers and end-users in the Community. In addition, on the basis of this information, it was not possible to distinguish consistently different price levels according to whether sales were made to traders or end-users.

(74) It should be noted that sales are carried out on a spot basis and therefore prices vary throughout the year according to pressure on the market. Some factors such as exchange rate fluctuations can have have an impact on market trends according to the moment when a contract is concluded. The price levels of the Indian imports were analysed, on a monthly basis, throughout the investigation period. This analysis showed the existence of price undercutting throughout the entire investigation period with a peak during the second quarter of 1997. Consequently, the margins of price undercutting are an indication of continuous price pressure exerted by the Indian imports on the Community market.

(75) The results of the comparison, when expressed as a percentage of the complainant Community producers' selling prices during the investigation period, showed significant price undercutting margins. On a company basis these margins were found to range between 0 and 11,8 %.

3. **Situation of the Community industry**

(a) *Production, production capacity and capacity utilisation*

(76) Overall, the production of the product concerned by the Community industry increased from 3 698

tonnes in 1993 to 4 795 tonnes in the investigation period, an increase of 30 %. Most of the increase in production is attributable to export markets with exports outside the Community increasing from 2 122 tonnes in 1993 to 3 215 tonnes in the investigation period, i.e. an increased of 52 % of exports of the product under investigation by the Community industry.

(77) The capacity utilisation rate has been stable at a relatively high level. Capacity utilisation stood at 92 % in 1993, in then fell to 87 % in 1994, was increased to 95 % in 1995 and 1996 and then slightly fell again to 92 % of the investigation period. Such a high rate of utilisation is common in this type of industry. The fact that the Community industry has succeeded in increasing output without significantly increasing its production capacity should be underlined, since it is due to an increased efficiency, mainly in the form of improved yields.

(b) *Sales and market share*

(78) The volume of sales by the Community industry on the Community market increased during the period under consideration from 1 040 tonnes in 1993 to 1 253 tonnes in the investigation period, representing an increase of only 21 %. These trends should be seen against the increase of the total apparent Community consumption which, for the same period, stood at 54,6 %.

The volume of sales in the Communitry compared to the apparent Community consumption shows that the market share held by the Community industry decreased from 25 % in 1993 to 18,1 % in 1996 and then slightly increased to 19,5 % in the investigation period, i.e. an overall decrease by 5,5 percentage points representing at 22 % decline.

(c) *Stocks*

(79) Even though it is not the policy of the Community industry to carry stocks of active substances such as broad spectrum antibiotics (indeed subject to 'expiry dates'), and the level of these was found to be marginal throughout the period of investigation, certain increases in stock levels were identified, which coincided with the periods of increased Indian imports.

(d) *Prices and profitability of the complainant Community producers*

(80) The selling prices of the Community industry fell by 4 % between 1993 and the investigation period.

(81) The overall profitability of the product concerned on the Community market increased from 16,8 % of turnover in 1993 to 21,1 % in 1994 and then steadily decreased to 5,6 % during the investigation period. This decline in profitability is considered as particularly serious in the present case in view of the need for the Community industry to be able to invest in research and development (hereinafter 'R&D') in order to improve the production process of existing products and, more importantly, to finance research in order to bring new products to the market.

(82) It should also be borne in mind that without the increased efficiency reached by the Community industry in the form of improved yields, it is considered that the Community industry would have made losses. It cannot be assumed, however, that the Community industry will be able to continue to achieve, in future, such productivity gains. This is particularly true in view of the declining levels of profits which will affect the level of resources available for R&D.

(e) *Employment*

(83) Employment has been stable throughout the period examined. The number of people employed by the Community industry in the production of the product under investigation was 1 166 in 1993 and 1 173 in the investigation period, i.e. an increase of 0,5 %.

4. **Conclusion**

(84) Despite increasing its production and thereby reducing its costs per unit, the Community industry has seen as steady erosion of its share of the Community market from 25 % in 1993 to 18,1 % in 1996, followed by an increase to 19,5 % in the investigation period.

(85) Under these circumstances, it is considered that the pressure exerted on the prices of the Community industry, which decreased by 4 % beween 1993 and the investigation period, led to the weak financial situation of the Community industry. It should be noted that the market for the semisynthetic antibiotics under investigation, which are a bulk commodity product, is highly price-sensitive and reacts swiftly to any downward pressure.

(86) This price pressure has lead to a decrease in the profitability of the Community industry, which has fallen by 66,5 % between 1993 and the investigation period. This last figure is a particular cause for concern since the minimum return on turnover required in the pharmaceutical industry is 15 %. A continued impediment of the Community industry to reach this target would have a snowball effect and will, ultimately, affect the ability of the Community industry to compete.

(87) In the light of the foregoing analysis, it was concluded that, overall, the Community industry has suffered material injury within the meaning of Article 8(1) of the Basic Regulation.

F. CAUSATION OF INJURY

1. Introduction

(88) In accordance with Article 8(7) of the Basic Regulation, the Commission examined whether the injury suffered by the Community industry had been caused by the subsidised Indian imports and whether other factors had caused or contributed to that injury.

(89) It should be recalled that the antibiotics produced in the Community and imported antibiotics are in direct competition with each other, essentially on the basis of price competition. Indeed, the product under investigation is a bulk product, with moreover no significant differences of quality or applications between the imported product and the Community produced product. In this context, price difference is the major factor determing sales. Even relatively small quantities offered at prices undercutting the prices offered by the complainant producers can have a significant downward effect on the market.

2. Effect of the subsidised imports

(90) The Community industry has been facing the adverse effects of the presence of subsidised imports on the Community market since the beginning of the period examined and more acutely since 1995.

It appeared indeed that over the period examined the Indian imports increased by almost 300 %. India has now become the second largest exporter of the product under investigation to the Community.

(91) With regard to price, it was also established, on the basis of verified export transactions, that the prices of Indian imports decreased over the period examined.

(92) It was moreover established that the impossibility for the Community industry to maintain its profitability coincided with the growth in volume of the subsidised imports from India. In a price-sensitive market, this low-price policy had the effect of depressing the prices of the Community industry.

(93) It was indeed found that, as a result of price undercutting by Indian imports, the Community industry had to adjust its prices downward. This defensive behaviour on the part of the Community industry is explained by the fact that for this high fixed cost production, the industry strongly needed to protect its production volume by maintaining market share and could not risk seeing its unit costs increase as a result of lost sales volumes.

(94) It was therefore concluded that the subsidised imports from India had a considerable negative impact on the situation of the Community industry during the period examined, in particular in terms of profitability.

3. Effect of other factors

(95) Factors other than the low-priced imports from India which might have led or contributed to the weak situation of the Community industry and in particular the impact of imports from countries other than India were also examined.

(a) *Imports from other third countries*

(96) Imports from countries not concerned by this proceeding increased by 56,4 % between 1993 and the investigation period, i.e. at a rate which is close to the increase of 54,6 % of Community consumption. Amongst these third countries the United States of America (USA) was the major supplier to the Community market and increased its market share by almost 100 %. Another important supplier to the Community market was the People's Republic of China which has seen its share of the Community market decline by 43 % between 1993 and the investigation period. As regards prices, the average price of imports other than those originating in India, as given by Eurostat, was considerably higher than the prices of the Indian imports even though this statement must be qualified since it is thought that imports from the USA include substantial quantities of higher-value products in finished-dosage forms.

(97) It is therefore considered that imports from sources other than India could not be considered to have caused the precarious situation of the Community industry. This led to the conclusion that the impact of imports from other third countries was not such as to have broken the causal link between the subsidised Indian imports and the injury suffered by the Community industry.

(b) *Development of consumption of the Community market*

(98) It should be recalled that consumption of the product under investigation on the Community market increased by 54,6 % between 1993 and the investigation period. Therefore, the injury suffered by the Community industry cannot be attributed to a contradiction of demand on the Community market.

(c) *Over-capacity of the Community industry*

(99) Certain interested parties claimed that the Community industry had developed an overcapacity for the product under investigation and that this was one of the main causes of the negative trend in prices. The investigation has shown

however, that the increase in production capacity by the complainant Community producers, far from being excessive has in fact been lower than the increase in Community consumption. It should also be borne in mind that the Community industry must increase its capacity at a rate which will enable it to meet the forecasted increase in demand on the Community and world markets. Indeed, it is very difficult to remedy capacity shortages in the short term because of the very important capital costs and long time periods necessary for the commissioning of new plants. If there is an over-capacity in the world market for the product under investigation, it has been caused by the building up of new production capacities in India and the People's Republic of China rather than in the Community.

(d) *Competitiveness of the Community industry*

(100) The competitiveness of the Community industry, which is amongst the world leaders for this product is not in doubt. This is evidenced by both its performance on export markets and also the reduction of costs and consequent gains in productivity which are at least in part due to its efforts in the field of R&D. It should also be noted that the Community industry has succeeded in increasing its production volume by 30 % whilst maintaining employment at a stable level.

Moreover, although the production processes are difficult to compare *per se,* it could be established that no inefficiency was to be found in terms of cost per tonne for the product concerned produced in the Community.

(e) *Fluctuation in the price of certain raw materials*

(101) Certain interested parties have argued that the injury suffered by the Community industry was mainly due to the fluctuations of the price of the raw materials penicillin G on the world market.

(102) Careful consideration has been given to this argument. It should be recalled, first of all, that whilst penicillin G is an essential raw material for the production of the product under investigation, it is not indispensable since alternative raw materials exist. In this respect the investigation established that one of the complainant Community producers which uses penicillin V rather than penicillin G for the production of amoxicillin and ampicillin was not in a situation which significantly differed from that of the two other complainant Community producers using penicillin G, as far as the injury findings are concerned. Moreover, the parties which raised this argument stressed that the rationale behind their reasoning was that in a period of decreasing prices for the raw material (penicillin G), integrated producers were suffering, while producers purchasing penicillin G from external sources were less affected. However the investigation showed that one of the complainant Community producers using the raw material penicillin G was not an integrated producer and purchased this raw material at market prices. Since the situation of this producer did not significantly differ from the average of the Community industry, it was not possible to attribute the injury suffered by the Community industry to the falling prices of penicillin G. Finally it should be recalled that the fall in prices of penicillin G is largerly attributable to the building up of new capacities in India.

(103) Therefore, and without prejudice to any further evidence on this point, it has been concluded that the effect of the fluctuations on the world market of the price of the raw material penicillin G, if any, could not have broken the causal link between the subsidised imports originating in India and the injury suffered by the Community industry.

4. **Conclusion**

(104) In view of the above, the Commission considers that, even though other factors may have contributed to depress the market for the product concerned, the subsidised imports from India, when taken in isolation, have nevertheless caused material injury to the Community industry. Indeed, it is considered that without the benefit of subsidies, undercutting of the Community industry's prices by Indian imports could not have taken place or at least reached its established magnitude and thus would not have been able to cause the Community industry to suffer injury. This conclusion is based on the various elements set out above, especially the quantities and prices concerned, which resulted in a strong downward price pressure on the Community market for the product concerned and in particular on the prices and profitability of the Community industry.

G. **COMMUNITY INTEREST**

1. **Preliminary remark**

(105) The Commission examined, on the basis of all evidence submitted, whether, despite the conclusions on the injurious effects of the subsidised imports, compelling reasons existed which would

lead to the conclusion that it would not be in the Community interest to impose measures in this particular case. For this purpose, and pursuant to Article 31(1) of the Basic Regulation, the Commission considered the impact of possible measures for all parties involved in the proceeding, and also the consequences of not taking measures. In order to assess whether it is in the interest of the Community that measures be imposed, questionnaires were sent to users and importers of the product concerned, to upstream suppliers of raw materials, as well as to Gist-Brocades BV.

2. **Interest of the Community industry**

(106) As has been shown above, the Community industry producing the product under investigation has been facing difficulties which are linked to the presence of subsidised Indian imports. The fact that the complainant Community producers are world leaders for the product under investigation and the good export performances of the Community industry should be recalled, as they are a clear indicator of their ability to compete.

(107) It is considered that without measures to correct the effects of the subsidised imports the Community industry will continue to face price undercutting and the consequent price depression which has lead to the deterioration of its profitability. In the event that such a situation were allowed to continue, the complainant Community producers would be left with no other alternative but to close down certain production lines or even entire plants which are devoted exclusively to the production of the antibiotics which are the subject of the present investigation.

Whilst the survival of the complainant Community producers would probably not be endangered by the absence of measures in view of the fact that in most cases the Community industry produces other products and is part of large groups, the above mentioned plants which could face imminent closure employ 1 173 people and are in most cases situated in areas of the Community with little or no alternative source of employment.

It goes without that such closures which, in any event, would not be the result of normal conditions of competition, would not be in the interest of the Community.

3. **Interest of other Community-based companies**

(108) As has been mentioned above, a questionnaire was addressed to the Community producer Gist-Brocades BV, which is a world leader in the field of semisynthetic antibiotics, in order to establish its volume of production in the Community and its volume of imports from third countries and also to assess the impact that the imposition of measures could have on this company. It should be recalled that the company Gist-Brocades BV was not a complainant and was therefore not (and moreover could not have been) included in the definition of the Community industry for the purpose of the injury investigation. In its reply this company, which has been reducing its production volume of the product under investigation in the Community in recent years, stated that it fully supported the imposition of countervailing measures, should the investigation conclude that such measures are warranted.

4. **Interest of importers/traders**

(109) As has been mentioned above, questionnaires were sent to all known importers/traders of the product under investigation but only one meaningful reply was received. On the basis of the information obtained thus far it appears that importers/traders in the Community purchase the product under investigation from a variety of sources which include India and the Community industry.

Since there are no fundamental quality differences between the product imported from India or other origins and that produced in the Community, it is considered that the importers/traders in the Community would have no difficulty obtaining the product from other sources as well as from India, especially since there is no shortage of supply on the world market.

(110) In addition, when asked to comment on the effects that a likely imposition of countervailing measures could have on their business, no importer/trader alleged that the imposition of such measures was likely to affect it negatively.

On this basis, it should thus be provisionally concluded that the imposition of countervailing measures is not likely to significantly affect importers/traders in the Community.

5. **Interest of up-stream suppliers**

(111) In order to assess the likely effect that the imposition of countervailing measures could have on the up-stream suppliers of the Community industry, questionnaires were sent to all such known suppliers. In total six questionnaires were sent out and three replies were received. The three companies replying produce various raw materials which

are incorporated into the product under investigation such as sugar syrups, salts an numerous chemicals. These producers but they are also, in the case of one company, exported to India. When asked to comment on the expected impact of any countervailing measures on their business, the three companies which replied to the questionnaire stated that they expected such measures to have a positive impact in the form of increased orders from the Community industry.

It can thus be provisionally concluded that the imposition of countervailing measures would in any event have no negative impact but could be expected to have a positive impact on the Community producers of raw materials which are incorporated into the product under investigation.

6. **Interest of users of the product concerned**

(112) Questionnaires were also sent to five known Community users of the product under investigation. There of these users which are pharmaceutical companies manufacturing down-stream products incorporating the product under investigation provided meaningful replies. It appears from these replies that the down-stream users, even though they concede that the imposition of measures may increase the price of their raw materials, are not opposed to the imposition of countervailing measures on Indian imports. One of the users even seemed to welcome the imposition of countervailing measures since this company had problems selling its products because of the competition from products incorporating low-priced subsidised imports.

(113) In view of the above, the Commission considers that the impact of any possible measures on users of the product under investigation would be negligible.

7. **Conclusion**

(114) In examining the various interests involved and all the above aspects, the Commission provisionally considers that there are no compelling reasons not to take action against the imports in question by restoring a competitive market situation of fair pricing practices and preventing further injury to the Community industry.

H. **PROPOSED MEASURES**

(115) For the purpose of establishing the level of the provisional duty, account was taken of the level of subsidisation found and the amount of duty necessary to eliminate the injury suffered by the Community industry.

1. **Injury elimination level**

(116) Since the injury was mainly in the form of declining prices and profits, it was considered that the removal of such injury would be achieved through the establishment of a non-injurious price level, i.e. a price level which would prevail in the absence of subsidised imports from India. In the circumstances of this case, it can be assumed that such non-injurious price levels would allow the Community industry to cover its costs and achieve a reasonable profit.

In this respect, it was considered that a price level adequate to remove the injury should be based on the weighted cost of production of the complainant Community producers, together with a profit of 15 % on turnover. This profit rate was considered to be an appropriate minimum in order to allow the Community industry to invest in R&D and thus to remain competitive and, in the long term, viable. Such a rate of return could reasonably be expected by the Community in the absence of injurious subsidisation.

This injury elimination level was then compared with the weighted average cif import price reported by the exporters concerned.

2. **Form and level of the provisional measures**

(117) Since the injury elimination margins thus established are, in the case of four companies, higher than the subsidy margins, for these companies, duties corresponding to the subsidy margins are imposed. For two other companies, for which the injury elimination margins are lower than the subsidy margins, duties corresponding to the injury elimination margins in accordance with Article 12(1) of the Basic Regulation are imposed. For two other companies, the level of subsidisation was found to be *de minimis,* i.e. below 3 %, in accordance with Article 14(5)(b) of the Basic Regulation, and one other company did not receive any subsidies. For these latter three companies, the rate of duty is set at 0 %.

(118) As regards the form of the measures, particular consideration was given to the fact that the injury established consisted mainly of a depression of the complainant Community producers' prices, together with the negative impact of these low prices on their profitability. It was therefore provisionally considered that the appropriate way to remedy injury would be the imposition of an *ad valorem* duty.

(119) Since the cooperating exporters did not represent a majority of Indian exports to the Community and in order not to grant a bonus for non-cooperation, the residual duty should be set at the level of the average injury elimination margin established for the cooperating exporters, i.e. 14,6 % which is above the highest individual duty imposed on a cooperating.

I. **RIGHTS OF INTERESTED PARTIES**

(120) In the interests of sound administration, a period should be fixed within which the parties concerned may make their views known in writing and request a hearing. Furthermore, it should be stated that the findings made for the purposes of this Regulation are provisional and may have to be reconsidered for the purposes of any definitive duty which the Commission may propose,

HAS ADOPTED THIS REGULATION:

Article 1

1. A provisional countervailing duty is hereby imposed on imports of amoxicillin trihydrate, ampicillin trihydrate and cefalexin presented in bulk falling within CN codes ex 2941 10 10 (TARIC code 2941 10 10 *10) ex 2941 10 20 (TARIC code 2941 10 20*10) and ex 2941 90 00 (TARIC code 2941 90 00 30) originating in India.

2. The rate of duty applicable to the net free-at-Community-frontier price, before duty for imports manufactured by the companies mentioned, shall be:

— 9,6 % for Biochem Synergy Ltd., Indore (TARIC additional code: 8219),

— 9,6 % for Harshita Ltd, New Delhi (TARIC additional code: 8219)

— 8,8 % for Kopran Ltd, Mumbai (TARIC additional code: 8220),

— 6,6 % for Ranbaxy Laboratories Ltd, New Delhi (TARIC additional code: 8221),

— 4,6 % for Lupin Laboratories Ltd, Mumbai (TARIC additional code: 8222),

— 12 % for Orchid Chemicals & Pharmaceuticals Ltd, Chennai (TARIC additional code: 8224),

— 0 % for Torrent Pharmaceuticals Ltd, Ahmedabad (TARIC additional code: 8225),

— 0 % for Vitara Chemicals Ltd, Mumbai (TARIC additional code: 8225),

— 0 % for Gujarat Lyka Organics Ltd, Mumbai (TARIC additional code: 8225),

— 14,6 % for other companies (TARIC additional code: 8900).

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

4. The release for free circulation in the Community of the products referred to in paragraph 1 shall be subject to the provision of a security, equivalent to the amount of the provisional duty.

Article 2

Without prejudice to Article 30 of Regulation (EC) No 2026/97, the parties concerned may make known their views in writing and apply to be heard orally by the Commission within 15 days of the date of entry into force of this Regulation.

Pursuant to Article 31(4) of Regulation (EC) No 2026/97, the parties concerned may comment on the application of this Regulation within one month of the date of the date of its entry into force.

Article 3

This Regulation shall enter into force on the day following 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 Brussels, 9 June 1998.

For the Commission
Leon BRITTAN
Vice-President