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(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 2164/98

of 5 October 1998

imposing a definitive countervailing duty on imports of certain broad spectrum antibiotics originating in India and collecting definitively the provisional duty imposed

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community [1] (hereinafter referred to as 'the Basic Regulation'), and in particular Article 15 thereof,

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

Whereas:

A. PROCEDURE

(1) By Commission Regulation (EC) No 1204/98 [2] (hereinafter referred to as 'the Provisional Duty Regulation'), a provisional countervailing duty was imposed on imports into the Community of certain broad spectrum antibiotics originating in India, namely amoxicillin trihydrate, ampicillin trihydrate and cefalexin presented in bulk falling within CN codes ex 2941 10 10, ex 2941 10 20 and ex 2941 90 00.

(2) Subsequent to the imposition of the provisional countervailing duties, the Indian cooperating exporting producers Kopran Ltd, Orchid Chemicals and Pharmaceuticals Ltd, Ranbaxy Laboratories Ltd, and Vitara Chemicals Ltd (hereinafter referred to as 'the Indian exporting producers'), the Government of India (hereinafter referred to as 'GOI') and the complainant Community producers (hereinafter referred to as 'the Community industry') submitted comments in writing.

(3) In accordance with the provisions of Article 11(5) of the Basic Regulation, all above parties requested and were granted hearings.

The Indian exporting producers and the Community industry also presented their opposing views in a meeting organised by the Commission upon request of the Community industry in accordance with Article 11(6) of the Basic Regulation.

(4) Certain importers and traders, some of which did not make themselves known at an earlier stage, reacted further to the imposition of the provisional measures.

(5) The Commission continued to seek and verify all information it deemed necessary for the definitive findings.

(6) Parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of definitive countervailing duties and the definitive collection of amounts secured by way of provisional duties. They were also granted a period within which to make representations subsequent to the disclosures.

(7) The oral and written comments submitted after the imposition of provisional measures and after the above disclosures were considered and, where deemed appropriate, taken into account in the definitive findings.

B. PRODUCT UNDER CONSIDERATION AND LIKE PRODUCT

(8) No comments or new facts were submitted by any interested party in relation to the provisional findings as regards the definition of the product under consideration and the like product as set out in recitals 8 to 10 of the Provisional Duty Regulation.

(9) The Commission, however, was informed of certain problems of interpretation in respect of the definition of the term 'presented in bulk'. It appeared that the antibiotics subject to the provisional duty are classified under CN heading 2941 because they are not put up in measured doses or in forms or packings for retail sale. Otherwise, they would be classified under CN heading 3004. It was therefore decided to replace this definition. This proceeding

[1] OJ L 288, 21. 10. 1997, p. 1.
[2] OJ L 166, 11. 6. 1998, p. 17.

consequently covers certain broad-spectrum antibiotics, namely amoxicillin trihydrate, ampicillin trihydrate and cefalexin, not put up in measured doses or in forms or packings for retail sale, which fall within CN codes ex 2941 10 10, ex 2941 10 20 and ex 2941 90 00 respectively.

C. **SUBSIDIES**

1. **Passbook scheme (PBS)**

(a) *Nature of the scheme*

(10) The Governments of India (GOI) stated that this scheme, which is described in recitals 15 to 23 of the Provisional Duty Regulation, was a permitted drawback system within the meaning of Annex I(i) and Annexes II and III of the Basic Regulation. Furthermore, there was no requirement under Annex I(i) that imported inputs are used for export production.

However, Annex I(i) clearly states that imported inputs must either be consumed in the production of the exported product (i.e. a drawback scheme as provided for within the meaning of Annex II) or the imported inputs must have the same quantity and the same quality and characteristics as home market inputs (i.e. a substitution drawback scheme as foreseen within the meaning of Annex III). The PBS in fact allows the importation of goods free of duty which are not inputs used in producing goods for export or inputs having the same quantity and the same quality and characteristics as home market inputs actually incorporated in the exported product. It is therefore considered that the PBS is not a permitted drawback or substitution drawback scheme under the provisions of the Basic Regulation.

(11) The GOI further referred to the existence of a verification procedure based on 'Standard input/output norms' as described in recital 18 of the Provisional Duty Regulation. These norms were issued for exported products and set out quantities of normally imported raw materials required to produce one unit of the finished product. The GOI argued that the system was in place to ensure that there was no excess drawback of import duties as required by Annex I(i) and Annexes II and III of the Basic Regulation and that, furthermore, the Commission had the opportunity to verify all actual transactions to determine whether there was an excess drawback.

This argument cannot be accepted as the issue of excess remission only arises in the context of assessing properly constituted drawback/substitution drawback schemes and it has been established that the PBS is not a drawback or substitution drawback scheme in the meaning of Annex I(i) and Annexes II and III of the Basic Regulation.

(12) One Indian exporting producer also referred to the fact that there was a verification system in place through the very existence of standard input/output norms and also through the requirement to provide documentation of input content for each export transaction, in order to obtain credit. Additionally, documentation regarding the production process had to be provided to obtain a certain rate of credit and an export declaration for the international prices of inputs had to be provided. The system was enforced through sanctions in the case of non-compliance. The denial of some credit claims showed that the system was operated restrictively.

However, as stated above, the question of whether the rules governing the working of the PBS in their totality are such as to qualify as a verification system within the meaning of Annexes II and III of the Basic Regulation is irrelevant, since overall the system allows for transactions which make clear that it falls outside the definition of an allowable drawback system.

In any event, it is considered that the standard input/output norms only allow the setting of a notional duty amount. A verification system has to be based on actual transactions. This is not the case in the PBS procedure which does not contain a verification of the quantities of inputs actually contained in the exported product but only the actual international price for a notional input amount, resulting in a notional duty amount for which credit is given.

(13) The GOI furthermore argued that the fixing of standard input/output norms precisely corresponds with the requirements of Annexes I to III of the Basic Regulation. First, these norms were adjusted to allow for the drawback of basic but not special or additional duty, and because the use of the lowest international price for the standard inputs provided the most conservative calculation which does not allow for an excess drawback of import duty. Similarly, one Indian exporting producer argued that the criteria for derogation provided by Article 2(1)(a)(ii) of the Basic Regulation as set out in Annex III are met and that the Commission did not address the issue of 'over-rebate', in particular by assessing the relevance of standard input/output norms for this issue.

(14) In response to the first point, it is considered that the nature of the scheme, which allows for the import, free of duty, of goods other than inputs, involves in itself 'excess' remission and/or 'over-rebate'. The excess payment is due to the fact that the PBS allows imports, free of duty, which would not be allowed under permitted drawback or substitution drawback systems since the loss of duty represents a revenue foregone by the Government on all imports under the scheme. This fact alone renders the scheme countervailable.

(15) The GOI also states that the requirement for inputs to be 'consumed' in the production process of the exported product (footnote 1 to Annex II of the Basic Regulation) is also satisfied where the calculation of the amount of import charges for remission is based on statistical information regarding inputs normally required for the production of the products concerned, i.e. the standard input/output norms and is not limited to those situations where only the imported inputs necessary for the production of exported products are imported duty-free under the scheme.

(16) In reply to this second argument, it is considered that the requirements of Annexes II and III of physical incorporation of imported inputs under drawback systems, or the use of inputs having the same quantity and the same quality and characteristics as the imported inputs in the case of a substitution drawback system, cannot be achieved through a notional concept based on statistical information since it has no bearing on the actual transactions for the particular companies involved. It is also in contrast to the clear wording of the Basic Regulation, which requires 'physical incorporation' of imports under the drawback scheme and the import of inputs having the same quantity and the same quality and characteristics as the home market inputs incorporated in the exported product.

(17) Finally, the GOI argued that the element of minimum value addition (MVA) in the standard input/output norms does not render the PBS an import substitution subsidy since there was no minimum prescribed domestic input and the MVA could also be achieved by the use of, for example, imported inputs.

This argument is certainly in contradiction with the statements made by the GOI that the standard input/output norms are calculated on the basis of all inputs which are normally imported but, as this scheme is already considered countervailable on the basis that it is contingent upon export performance within the meaning of Article 3(4)(a) of the Basic Regulation, it is not necessary to make a further finding on the issue of an import substitution subsidy.

(18) The GOI claimed that the benefits under the PBS should not be countervailed since the PBS had been abolished as from 31 March 1997 and only a limited number of companies could continue to avail themselves of credits previously granted. The GOI made reference to Article 17 of the Basic Regulation, which provides that a countervailing measure remains in force only as long as, and to the extent that, it is necessary to counteract the countervailable subsidies which are causing injury, and also referred to previous Community practice. One Indian exporting producer claimed, using similar arguments, that benefits under this scheme should not be countervailed after 17 months from the entry into force of definitive duties because at that point no credits under the PBS could be used.

In response to these points, it should be noted that even though the PBS has been abolished, companies can still claim credits under this scheme for export transactions made up to 31 March 1997, and may use these credits up to 31 March 2001. Substantial benefits under this scheme will, therefore, continue to be granted until that date and they constitute countervailable subsidies. With regard to countervailability of benefits after that date, it is considered that the principle stated in Article 5 of the Basic Regulation applies, i.e. that the amount of countervailable subsidies shall be calculated in terms of the benefit conferred on the recipient in the investigation period. During the investigation period, the PBS was, as stated by the GOI, abolished and replaced by its successor, the duty entitlement passbook scheme (DEPBS), which is also considered countervailable. Since benefits will continue to be granted in the future under the DEPBS it is considered necessary to impose measures based on the benefits received during the investigation period under both the PBS and the DEPBS because, as prescribed by Article 17 of the Basic Regulation, it will still be necessary to counteract the countervailable subsidies which are causing injury.

(19) The GOI provided information that, following an instruction in July 1998 from the Ministry of Commerce, the relevant Indian authorities have only until 30 September 1998 at the latest to grant passbook credits, and not 31 March 2001 as previously provided for (see recital 18). The GOI asked, therefore, that this development be taken into consideration in making a final determination.

It is considered that, as the PBS has been replaced by a successor scheme, the DEPBS (which is also considered to be a countervailable subsidy) and benefits will continue to be granted in future under the DEPBS, it is not appropriate to disregard benefits which accrued to exporters under the PBS during the investigation period. Therefore, measures should be imposed on benefits received during the investigation period under both the PBS and the DEPBS.

(b) *Calculation of the subsidy amount*

(20) One Indian exporting producer claimed that the Commission should have, in any case, only used the debits for the products concerned for calculating the subsidy as set forth in Article 7(2) of the Basic Regulation. In the alternative, the Commission should have calculated the subsidy by adding the credits utilised for imports of raw materials used in producing the products concerned minus duty paid for imports of raw materials used in producing the products concerned.

In response to this, it is considered that the full benefit under the scheme to the recipient had to be the basis for the calculation of the subsidy as set forth in Article 5 of the Basic Regulation. The benefit is the amount of duty unpaid which would have been payable on all imports in the investigation period if they had not been imported under the scheme. This benefit must be allocated over total exports during the same period since it is contingent upon total export performance. Furthermore, it is considered inappropriate, for the purpose of calculation, to identify and deduct the inputs imported under the scheme for the production of the products concerned, since, once the scheme is determined to be countervailable, the calculation of the benefit under the scheme is determined by the amount of revenue foregone on all imports.

2. **Duty entitlement passbook scheme (DEPBS) — pre-export basis**

(21) Arguments raised by the GOI regarding this scheme, which is described in recitals 28 to 34 of the Provisional Duty Regulation, need not be addressed, given that this scheme provided only a negligible amount of subsidy during the investigation period. Consequently, no measures will be imposed on benefits under this scheme and, therefore, no definitive finding is required.

3. **Duty entitlement passbook scheme (DEPBS) — post-export basis**

(22) The GOI claimed that to countervail benefits under the DEPBS as described in recitals 28 and 38 to 40 of the Provisional Duty Regulation, was in violation of Article 5 of the Basic Regulation since the proceeding was initiated in September 1997 i.e. within six months of the start of the scheme which was introduced in April 1997. The GOI claimed that this Article required that the investigation period chosen should end six months prior to the initiation date.

It is however considered that Article 5 does not create the obligation to choose an investigation period which must end six months prior to the initiation of the proceeding but rather sets the minimum duration of the whole investigation period (i.e. six months); consequently, there is no violation of Article 5.

(23) The GOI also argued that the Indian exporting producers could have used cash remission for their imported inputs instead of using the DEPBS. Such cash remission could have subsequently been used for payment of import duties on any goods without any restrictions whatsoever. The mode or method of remission, it is therefore claimed, should not be considered a factor in determining whether or not such remission was a countervailable subsidy.

This argument has to be rejected. The existence of a permitted cash remission system had neither been alleged nor been found during the course of the investigation and could not be considered more fully at such a late stage of the procedure. In any event, since the Indian exporting producers have chosen to avail themselves of a countervailable scheme the benefits thereunder are countervailable.

(24) The GOI stated that since no company availed itself of this scheme during the investigation period, it could not be countervailed.

It is considered that, since the finding of subsidisation for the one non-cooperating company had to be made on the basis of the best facts available, benefits under this scheme, which was available to the company during the investigation period, could have accrued. Therefore, since it was verified that the scheme itself is countervailable, the benefits under the scheme were considered to have been received by that company and the amount was established on the basis of best facts available.

(25) The GOI argued that since Annex II of the Basic Regulation does not cover situations where exports are made before imports, as was the case with the DEPBS, this scheme was not countervailable.

It is considered, however, that this situation is covered by Annex III of the Basic Regulation. Since the DEPBS does not conform with the requirements of either Annex II or Annex III as an exporter is under no obligation to import goods free of duty which must be consumed in the production process or inputs having the same quantity and the same quality and characteristics as home market inputs, the scheme is countervailable.

(26) The GOI also claimed that there was an obligation for the exporter to incorporate the goods imported under the DEPBS in the exported products as stated in the Indian Customs Notice No 34/97 dated 7 April 1997 at paragraph (v).

However, this provision refers to the DEPBS on pre-export basis but not to the DEPBS on post-export basis for which it was verified that such an 'actual user condition' does not exist.

4. **Export promotion capital goods scheme (EPCGS)**

(27) The GOI has made a number of claims regarding the export promotion capital goods scheme (EPCGS), which is described in recitals 43 to 47 of the Provisional Duty Regulation. These concern the qualification of the scheme as a subsidy and the calculation of the subsidy amount.

(a) *Nature of the scheme*

(28) It was argued that there is no requirement under the law that capital goods purchased under this scheme should be exclusively used for the manufacture of export goods and that, consequently, the exemption from import charges of goods imported under this scheme cannot be considered as a subsidy.

In regard to this claim, the investigation has shown that to avail itself of the EPCGS, a company must make a commitment to export a certain value of goods within a certain time period. As this scheme is therefore contingent in law upon export performance, i.e. it cannot be obtained without committing to export goods, it is deemed to be specific under the provisions of Article 3(4)(a) of the Basic Regulation and, therefore, countervailable. In the light of these facts, the question of whether capital goods are used exclusively or not for the manufacture of goods for export is of no relevance.

(29) It is further argued that the scope of the term 'input' under paragraph (i) of Annex I (Illustrative list of export subsidies) of the Basic Regulation also covers capital goods and that, under this paragraph, the remission of any duty cannot *per se* be considered as a subsidy unless there is an excess remission.

However, capital goods do not constitute 'inputs' within the meaning of the Basic Regulation because they are not physically incorporated into the exported products.

(30) According to the GOI, upon importation of capital goods under this scheme, the collection of duties is merely postponed pending the fulfilment by the exporter of the export commitment. In these circumstances, the question of government revenue foregone and benefit to the recipient would not arise until the end of the period for which the exporter has given a commitment.

In regard to this claim, it is considered that when a company requests permission to use this scheme and thereby gives a commitment to export goods, it must be presumed that the export obligation will be met and final exemption from the payment of import duties will be granted. Indeed, there must be an expectation on the part of the companies that they will not have to pay duties which will be reflected in their prices. To assume otherwise would render the scheme meaningless. It is considered, therefore, that at the time of importation of capital goods, government revenue is foregone and the importing company receives a benefit in the form of unpaid duties.

(b) *Calculation of the subsidy*

(31) The GOI submitted that the depreciation period used by the Commission in making its provisional findings (i.e. 10 years as mentioned in recital 50 of

the Provisional Regulation) is incorrect. If the Commission had taken into account the useful life of capital goods as provided under the laws in India and of the cost of the bank guarantee which the exporter must provide to the authorities when importing goods under this scheme, the benefit, if any, from the scheme would have been *de minimis*.

In reply to this claim, the Commission, in establishing its provisional findings, determined the normal depreciation period of capital goods in the antibiotics industry, i.e. 10 years on the basis of information provided by the cooperating Indian exporting producers. This is in accordance with the requirements of Article 7(3) of the Basic Regulation which states that where a subsidy can be linked to the acquisition of fixed assets, the amount of the countervailable subsidy shall be calculated by spreading the subsidy across a period which reflects the normal depreciation of such assets in the industry concerned. It is noted that no evidence has been provided in support of a different period for depreciation of capital goods in the pharmaceutical sector from the 10 years period used by the Commission in making its provisional findings. Concerning the issue of the cost of the bank guarantee which the exporter bears when importing goods under this scheme, this claim is rejected as no claims for such costs to be taken account of have been made by the cooperating exporters concerned as required by Article 7(1) of the Basic Regulation. The claim is therefore rejected.

(32) The GOI contested the fact that, for calculating the subsidy amount per unit, the Commission in its provisional findings spread the benefits from the scheme only over export turnover. It claimed that as capital goods imported under the EPCGS are used for producing goods for both the export and domestic markets, benefits under the scheme should be spread over total turnover.

However, it has been determined that this scheme is contingent solely upon export performance (see recital 28 above). In conformity with Article 7(2) of the Basic Regulation, it is considered appropriate that the benefit for this scheme should be spread over export turnover only since the subsidy is granted by reference to a certain value of exports of goods within a certain time period. The claim, therefore, that benefits under the scheme should be spread over total turnover is rejected.

(33) Finally, the GOI claimed that the inclusion of an amount for interest which the Commission took account of in arriving at the total benefit to companies which availed themselves of this scheme is not contemplated under the Agreement on subsidies and countervailing measures (ASCM) of the World Trade Organisation (WTO). Neither is it the Community's practice to include such an amount in calculating the amount of benefit to companies availing themselves of such subsidy schemes.

In regard to this claim, the interest element is added in order to reflect the benefit to the recipient obtained by not having to raise an equivalent amount of money from commercial sources. Indeed, Article 6 of the Basic Regulation makes it clear that the benchmark for the calculation of the subsidy is the equivalent cost of funds on the commercial market. Thus, the Community's practice in this area is to add an amount for interest in calculating the total benefit in such cases. This claim is therefore rejected.

(34) One Indian exporting producer claimed that the information which it had provided to the Commission concerning imports of capital goods, which was subsequently verified by the Commission services and formed the basis on which the amount of benefit from the EPCGS was calculated, contained certain errors. After imposition of provisional measures, this Indian exporting producer provided new information relating to certain imports of capital goods and claimed that this new information should be taken into account in making a final determination.

However, in accordance with Article 28(3) of the Basic Regulation, as this new information had not been submitted in due time and was not verifiable, it must be disregarded.

5. **Export processing zones (EPZ)/Export-oriented units (EOU)**

(a) *Capital goods*

(35) Regarding the importation of capital goods under the EPZ/EOU scheme, the GOI has made the same claims as those outlined in recitals 29 to 34 concerning the EPCGS. These claims are rejected for the same reasons outlined in the same recitals.

(36) The GOI has also claimed that capital goods imported under this scheme, which is described in recitals 51 to 53 of the Provisional Duty Regulation, are not exempt from import duties, given that they enter a customs-bonded area. The duties were merely deferred until the goods leave bond and it would not be appropriate to consider that govern-

ment revenue has been foregone. It is claimed that no subsidy exists given the definition of a subsidy contained in Article 2 of the Basic Regulation which requires that a subsidy shall be deemed to exist if, *inter alia,* government revenue is foregone.

In regard to this claim, it is considered that, as in the case of the EPCGS, when a company imports capital goods without the payment of import charges, the company expects that it will meet its export obligations and consequently will not anticipate having to pay import charges. The company is then in a position to reflect these lower costs (i.e. unpaid duties) in its prices. In these circumstances, a benefit is conferred on the company through the government's willingness to forego revenue at the time of importation as the company has committed itself to meet certain export obligations. It is considered, therefore, that at the time of importation of capital goods when the collection of import duties is postponed, government revenue is foregone and the importing company receives a benefit in the form of unpaid duties. This claim is therefore rejected.

(b) *Raw materials*

(37) The GOI and one Indian exporting producer have claimed that, as raw materials which are imported without payment of import charges are consumed and physically incorporated in goods produced for export, a situation which is allowed under Article 2(1)(a)(ii), the scheme is not a subsidy.

In reply to this argument, it should be first recalled that one recognised EOU, Orchid Chemicals and Pharmaceuticals Ltd, replied to the Commission's questionnaire in this proceeding but did not supply verifiable information during the investigation. In making its provisional findings, the Commission, in the absence of such information, had to use the best facts available in order to calculate the amount of benefit which this EOU exporter had received under the raw material duty exemption provisions of the EPZ/EOU scheme. These facts were considered to be the global company data contained in the audited accounts for all purchases of raw materials since it was not possible to assess on the basis of verifiable information whether the raw materials which were imported without payment of import charges by this company were consumed and physically incorporated in goods produced for export. In these circumstances, the definitive findings in relation to this scheme must also be based on the best facts available in accordance with Article 28(1) of the Basic Regulation. For the purposes of the definitive findings it is however considered reasonable to base these findings on the information which was provided by other cooperating Indian exporting producers for other schemes (outside the provisions of the EPZ/EOU scheme) which similarly provide for the importation of raw materials free of duty (i.e. the PBS and the DEPBS). An appropriate adjustment has accordingly been made to the amount of subsidy for the one recognised EOU.

(38) The GOI has also made reference to the fact that the existence of export processing zones is not unique to India. However, the principle of export processing zones is not at stake as such: it has to be stressed that Indian exporting zones investigated in the present case were found to have conferred countervailable subsidies on an Indian company exporting antibiotics.

6. **Income tax exemption scheme**

(39) The GOI and one Indian exporting producer have claimed that, as the rate of corporate tax which is described in recitals 57 to 61 of the Provisional Duty Regulation, has been reduced since the 1996/97 tax year (i.e. the period on which the Commission made its provisional finding for this scheme), account should now be taken of the reduced rate in calculating any benefit to the Indian exporting producers concerned.

In this regard, it is noted that Article 5 of the Basic Regulation provides that the amount of countervailable subsidies shall be calculated in terms of the benefit conferred on the recipient which is found to exist during the investigation period for subsidisation. As stated above, in the case of the provisional findings, the Commission calculated the benefit on the basis of the tax year 1996/97 (i.e. 1 April 1996 to 31 March 1997) which corresponded most closely to the investigation period. During this tax year, the rate of corporate tax applied was 43 %. For the subsequent tax year (i.e. from 1 April 1997 to 31 March 1998), the rate of tax to be applied was reduced to 35 %. It is considered that, as part of this latter tax year falls within the investigation period of this proceeding, it is appropriate

to make the calculation of the amount of countervailable subsides on the basis of a pro rata of the two tax rates which applied in the investigation period. Appropriate adjustments have accordingly been made to the amount of subsidy for the companies which availed themselves of this scheme.

(40) The GOI has also claimed that, in arriving at its provisional findings, the Commission was in violation of previous Community practice as well as both the ASCM and the Basic Regulation by adding an amount for interest in arriving at the total benefit to companies which availed of this scheme. In assessing this scheme, it was considered that the amount of tax which remained unpaid by a company in the tax year corresponding most closely to the investigation period was the most reasonable indicator of benefit to a company under this scheme. This amount is considered to equate to a one-time grant which is available to a company during the investigation period. An amount is added to this grant for interest for the reasons set out in recital 34 and this claim has accordingly to be rejected.

(41) One Indian exporting producer claimed that the information which it had provided to the Commission concerning its claim for income tax exemption under Section 80HHC of the Income Tax Act contained certain errors. This information was verified by the Commission services and subsequently formed the basis on which the amount of benefit from this scheme was calculated. This Indian exporting producer has now provided new information relating to its income tax exemption claim and has asked that this new information be taken account of in making a final determination.

Another Indian exporting producer provided new information relating to its claim for exemption from tax on export profits under Section 80HHC of the Indian Income Tax Act.

In accordance with Article 28(3) of the Basic Regulation, as this new information has not been submitted in due time and is not verifiable, it must be disregarded and both claims have to be rejected.

(42) One Indian exporting producer also claimed that, as the Indian Income Tax Act provides for the payment of tax in quarterly instalments, account should be taken of this when adding interest to calculate the total amount of benefit.

On this point, it is considered that, when a company submits its tax assessment to the tax authorities, presumably in accordance with the law in force at that time, the company has a legitimate expectation that it will be accepted by the tax authorities, even though the assessment will first be subject to scrutiny by them. In this sense, a benefit accrues immediately to a company in the form of the total amount of tax which will remain unpaid as a result of its claim under the relevant section of the Income Tax Act. It is appropriate, therefore, to apply interest to the full amount of benefit which accrues to the company for the relevant tax year.

7. **Amount of countervailable subsidies**

(43) Taking account of the definitive findings relating to the various schemes as set out above, the amount of countervailable subsidies for each of the investigated exporting producers is as follows.

(%)

	Passbook	DEPB		EPCGS	EPZ/EOU	Income tax	Total
		Pre-export	Post-export				
Ranbaxy Laboratories Ltd	0,01	negligible	0	0,15	0	6,16	6,32
Vitara Chemicals Ltd	0	0	0	0	0	0,46	0,46
Kopran Ltd	5,43	0	0	1,17	0	2,12	8,72
Lupin Laboratories Ltd	5,89	0	0	0,03	0	5,09	11,01

(%)

	Passbook	DEPB		EPCGS	EPZ/EOU	Income tax	Total
		Pre-export	Post-export				
Gujarat Lyka Organics Ltd	0	0	0	0	0	0	0
Torrent Pharmaceuticals Ltd	0	0	0	0	0	0,78	0,78
Biochem Synergy Ltd	5,89	negligible	3,75	0	0	0	9,64
Orchid Chemicals & Pharmaceuticals Ltd	0	0	0	0	12,58	2,74	15,32
Harshita Ltd	0	0	0	0	0	9,16	9,16

D. COMMUNITY INDUSTRY

(44) As no comments or new facts were submitted by any interested party with regard to the definition of the Community industry, the findings made as set out in recitals 64 and 65 of the Provisional Duty Regulation are hereby confirmed.

E. INJURY

1. Consumption, import volumes and market share

(45) The Indian exporting producers claimed that the Commission's analysis of imports of the product concerned into the Community from India was incorrect, it being claimed that Eurostat data was unreliable, mainly because the CN-codes referred to comprise a larger number of antibiotics or presentations thereof than the ones actually covered by this proceeding.

A complete set of computations based on Indian export statistics as well as information from Indian exporting producers was submitted, and it was claimed that these data represented the most accurate data concerning actual imports of the product concerned originating in India.

The CN codes referred to can indeed comprise antibiotics or presentations thereof different from the specific product subject to the proceeding. However, these antibiotics or presentations thereof were either not produced in India in the case of metampicillin and pivampicillin, or insignificant in terms of Community market share in the case of amoxicillin and ampicillin sodium sterile and ampicillin anhydrous. Concerning cefalexin, other antibiotics and presentations thereof may have a larger impact. However, all products covered by the relevant CN code represented only a small proportion of the total Indian exports of the product concerned. In view of the above, it was concluded that the Indian export statistics did not reveal a significant difference with the provisional findings of the Commission concerning consumption in the Community of the product concerned, volume of imports and market shares for this product. This was also confirmed by a tentative determination of the relevant indicators on the basis of the data submitted by the Indian exporting producers. This calculation showed an almost 200 % increase of total Indian exports of the product concerned between 1993 and the investigation period where Eurostat figures showed an almost 300 % increase. During the same period, the share of the Community market held by these imports practically doubled while Eurostat figures were showing a 157 % increase in market share.

(46) It is therefore concluded that regardless of the source of the data used, the conclusions reached by the Commission at the provisional stage, notably the existence of very large increases of total Indian exports of the product concerned, and a very substantial increase of their share of the Community market, are confirmed.

(47) The Indian exporters also claimed that practically all imports are, as such or after further processing, re-exported out of the Community.

While it is admitted that the fact that the products concerned are not liable to customs duty on importation (0 % duty rate) does not encourage traders or processors to resort to customs regimes covering temporary importation (e.g. inward processing), this fact can nevertheless not be construed as supporting the allegation made by the Indian exporting producers in respect of re-exportations. Since no sufficient evidence has been submitted in this regard, the Commission had to disregard these allegations. Consequently, the findings as set out in recitals 66 to 69 of the Provisional Duty Regulation and which are based on statistical Eurostat data which reflect the actual import volumes of products released into free circulation in the Community are confirmed.

2. **Prices of the subsidised imports**

(48) The Indian exporting producers claimed that the price comparison made in the Provisional Duty Regulation based on Eurostat data was not reliable, mainly because the price for dosage forms or formulations would differ significantly from the price of bulk products.

(49) However since, as explained in recital 9, finished dosage forms, or formulations, are not covered in the CN codes referred to in this proceeding, it can be concluded that no comparisons were made between bulk and finished products.

(50) Moreover, it should be noted that in their submissions, the Indian exporting producers have admitted that their export prices had fallen, and have not questioned the magnitude of this price decrease as established in recital 70 of the Provisional Duty Regulation, i.e. around 40 %.

(51) In view of the above, the reference to finished dosage forms in recital 70 of the Provisional Duty Regulation is withdrawn and the remaining findings as set out in recitals 70 to 75 of the Provisional Duty Regulation are confirmed.

3. **Situation of the Community industry**

(52) The GOI claimed that most injury indicators analysed in the Provisional Duty Regulation showed positive trends for the Community industry, while there were few negative indicators. However, as appears from recitals 84 to 87 of the Provisional Duty Regulation, the investigation has shown that the overall trends for the Community industry are negative, notably in relation to market share and prices, giving a clear indication of material injury. In addition, it is important to note that the positive trend for some indicators simply reflects overall growth of the market and the performance of the Community industry oil export markets. It can therefore be concluded that the Community industry has suffered material injury.

4. **Conclusion on injury**

(53) Based on the above considerations, it is confirmed that the Community industry has suffered material injury within the meaning of Article 8(1) of the Basic Regulation.

F. **CAUSATION**

1. **Effect of the subsidised imports**

(54) The Indian exporting producers claimed that there was no obvious correlation between the Indian subsidised exports and any of the subsidy schemes found during the investigation. It was argued that this circumstance was such as to break the causal link between the subsidised imports and the injury suffered by the Community industry. The reasoning behind this argument was based on the following considerations.

First, Eurostat import statistics were unreliable and ought to be replaced by the Indian export statistics as reported in an Indian official publication, which show that the main increase in volume, as well as the peak of exports, occurred during the period April 1994 to March 1995.

Second, during that period, the main subsidy schemes were not in place. As it appears on the basis of Indian export statistics that a decline of Indian deliveries took place after the entry into force of the subsidy schemes concerned, it would be obvious that the implementation of the subsidy schemes failed to foster exports. In these circumstances, it is claimed that it was impossible to attribute any injury suffered by the Community industry to the subsidised Indian imports.

Finally, for the sake of a proper causation assessment, the above elements called for a shortening of the period considered for the injury assessment: instead of a four-year period it was claimed that a two and a half year period, starting in 1995, should be adopted, on the basis of which it was alleged that a finding of no injury would be made, due to the absence of any significant increase in imported volumes.

The above reasoning calls for the following remarks.

(55) First of all, as regards import trends, the Commission has already explained that there are no grounds for substituting Community import statistics by Indian export statistics. The reliability of Eurostat statistics being reasonably ascertained, while the source of Indian data could not be verified, it is considered that the trends established at the provisional stage must be confirmed. It is worth recalling that according to Eurostat, Indian imports reached a peak in 1996 and only slightly decreased during the investigation period.

(56) The second and third step of the reasoning made by the Indian exporting producers raises a question of principle, namely what should be considered as a reasonable period for the assessment of injury in the context of an anti-subsidy investigation. In this respect, it is stressed that any injury assessment entails a two-step examination: firstly, it should be established whether the domestic industry has been suffering injury during the investigation period. Secondly, such findings have to be put into perspective in the light of the development of the specific indicators over previous years. For that purpose, it is consistent practice to assess the situation of the Community industry during a period of at least three years prior to the investigation period. It is only by undertaking such an examination that the trend in injury indicators can be examined. It is therefore confirmed that in the context of the injury assessment, the period examined should not be tailored. In the present case it has been found that the imports reached their peak before the investigation period. Contrary to the claims put forward, this is not *per se* sufficient to weaken the causal link between the subsidised imports and the injury suffered by the Community industry; a continuous increase in imports is not a prerequisite to a finding that injury has been caused by those imports. Price undercutting by the imports concerned, depressed prices of the Community industry and depressed profitability were all observed during the investigation period during which also subsidisation has been determined. Moreover, even if the peak in volume had been reached before the main subsidy schemes entered into force, it may well be the case that such export performance, would have been achieved in the absence of undercutting and might thus not be injurious. In this respect, it is worth noting from a legal point of view that the Basic Regulation does not require that the injury caused by e.g. undercutting practices be traced so as to show that the exporting producers actually used the money earned from the government to lower their prices. The reason for this is obvious as subsidies may as well be used to compensate for existing or previous losses and may not, thus, imply a direct decrease in price. Conversely, even stable or decreasing imports, but traded at aggressive prices, can be injurious. This is precisely the case here, where the injury mostly relates to prices and took the form of price depression which does not necessarily require high volumes for taking place in a price-sensitive and price-transparent market. In other words, it is considered that subsidised imports of the product concerned, irrespective of their trend in volume, had a material negative impact on the Community industry during the investigation period.

(57) It is therefore concluded that the elements brought forward by the Indian exporting producers do not undermine the finding in the provisional Regulation of a causal link between the subsidised imports from India and the injury suffered by the Community industry.

2. **Effect of other factors**

2.1. *Imports from other third countries*

(58) The Indian exporting producers submitted that more expensive imports originating in the United States of America (USA) had increased in volume by 100 %, and that this would indicate that the market for the product concerned would not be price-sensitive as stated in the Provisional Duty Regulation as well as in recital 56.

(59) As regards imports originating in the USA, it should be noted that the explanation originally given (recital 96 of the Provisional Duty Regulation) in respect of its comparatively high prices per kilogram should be disregarded since products in finished dosage form cannot be declared under the heading concerned. However, it appears that most of these imports are taking place in the framework of an intra-group relationship between an EU company and its affiliate in the USA and that prices may be affected by this relationship. As regards imports originating in third countries other than the USA, no allegation was received and no finding was made that they could have had a significant impact on the situation of the Community industry.

It is therefore confirmed 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.

2.2. *Competitiveness of the Community industry and fluctuation in the price of raw materials*

(60) The Indian exporting producers reiterated their claim that the injury suffered by the Community industry had been caused by downward fluctuations, notably from 1996 onward, of the price of penicillin G, which is the main raw material used for the production of the product concerned. More precisely, they claimed that the decrease in export prices during the investigation period reflected no more than passing on to customers their productivity gains and the decrease in the price of penicillin G. In other words, the Indian exporting producers argued that the undercutting established during the investigation period occurred independently of any subsidies granted. It was equally reiterated that the Community industry was not competitive in the segment of the product under consideration.

The Community industry claimed that the Indian exporting producers had lowered prices for the product concerned to a considerably larger extent than the reduced cost for penicillin G would have allowed for.

A downward trend in prices of penicillin G could indeed be observed from 1996 onward. Since penicillin G represents a considerable proportion of total input cost of the finished product, a decrease in its price would be likely to be reflected at least to some degree in the price of the product concerned.

However, submissions concerning price levels of penicillin G were inconsistent and even contradictory. Most notably, following the imposition of provisional measures, the Indian exporting producers submitted a full set of quotations of weighted average purchase prices for penicillin G but subsequently claimed that they had been able to purchase penicillin G at prices considerably lower than those quoted in the submission.

Consequently, it has not been possible to establish a precise and quantifiable effect of the falling prices of penicillin G on the prices of the product concerned.

Furthermore, a reduction in the cost of penicillin G would be likely to have an effect only in those companies which are not vertically integrated, i.e. which source this material externally instead of producing it (see also recitals 64 to 66). The Indian exporting producers claimed that they were not integrated and could thus fully benefit from this advantage and reflect it in their prices, while the Community industry, being mostly integrated, could not.

However, an analysis of the situation of a non-integrated Community producer that has an equal benefit from lower world market prices of penicillin G revealed that this producer was equally suffering from strongly depressed profitability and was facing price undercutting by the Indian exports, most notably in the second half of the investigation period.

It should furthermore be noted that the aim of the investigation of the causal link between subsidised imports and the injury of the Community industry is not to assess any underlying reasons for the behaviour of exporting producers as it has been established in the course of the investigation that they benefited from countervailable subsidies.

(61) As far as the competitiveness of the Community industry is concerned, it is difficult to raise any doubt since this industry is amongst the world leaders for the product under consideration. This is evidenced by both its performance on export markets and the reduction of costs and consequent gains in productivity. The Community industry has increased its production volume by 30 % whilst maintaining employment at a stable level. Moreover, the investigation revealed no inefficiencies in terms of cost of production. As regards the integrated companies, there was also every indication that their production process for penicillin G was highly efficient on a worldwide level.

(62) In order to substantiate the renewed claim that the Community industry had not been able to improve its efficiency, it was submitted that even companies that were known to be very efficient producers such as the Dutch company Gist-Brocades BV were having problems as a result of the price drop of penicillin G. A statement of Gist-Brocades' latest annual report was cited, saying that 'the profit forecast issued in March 1997 had to be adjusted from a marked increase to a slight fall. This was caused by the fall of world penicillin prices to a historical low'.

(63) The comparison of the situation of the Community industry manufacturing the product under investigation with the situation of Gist-Brocades BV is misleading in this context. Gist-Brocades is selling very considerable amounts of penicillin G, and a fall in prices for this product is therefore likely to have a significant negative effect on its profitability for this business segment. The Community industry, however, is not selling any penicillin G, but producing it for captive use.

(64) The Indian exporting producers submitted that the negative impact of falling penicillin G prices would be greater on those producers that have vertically integrated production, i.e. are producing the raw material penicillin G themselves, since they would not have been able to benefit from the price drop and therefore were forced to improve their efficiency in their production processes. It was stated that the Community industry had not been able to do so.

(65) Admittedly, falling prices of raw materials may have a different impact on integrated producers compared to producers sourcing the materials externally. Non-integrated producers should almost immediately benefit from a drop of procurement costs, while integrated producers are somewhat insulated from the direct effect of price movements on those costs, although they may be affected by the impact of these on the selling prices that their non-integrated competitors can offer for the processed products.

(66) Furthermore, in the case of rising raw material prices, being integrated, which is the situation of most Community producers, clearly constitutes an advantage. The decision of investing in a fully integrated plant is therefore a legitimate business decision. It is worth noting in this respect that the Indian exporting producers did not openly suggest that the Community industry should shut down and re-open their high-investment plants and change their production techniques whenever short-term movements in the prices of raw materials occur.

(67) In view of the above, although it cannot be fully excluded that the drop of raw material prices may have had a negative impact on the profitability of some Community producers, it can be concluded that the price drop of the raw material penicillin G cannot be construed to be the reason for the injury in terms of depressed profitability and loss of market share of the Community industry. The fact remains that the Indian exports of the products concerned were subsidised, which explains that the competitive situation was distorted in favour of the Indian product.

(68) It is therefore concluded that, taken in isolation, the subsidised imports, in particular in view of their low prices, have caused material injury to the Community industry. This conclusion is reached although decreasing raw material costs may have had a negative impact. Any such impact, however, was not such as to break the causal link between the subsidised imports and the injury caused to the Community industry.

3. **Conclusion on causality**

(69) In view of the above, the conclusion of recitals 88 to 104 of the Provisional Duty Regulation are confirmed. The reference to finished dosage forms in recital 96 is however withdrawn.

G. **COMMUNITY INTEREST**

1. **Preliminary remark**

(70) No comments or new facts were submitted by any party with regard to the interests of the Community industry, of up-stream suppliers, of the users of the product concerned or of the other, non-complainant Community-based producer, Gist-Brocades BV.

The findings of the Provisional Duty Regulation are therefore confirmed, notably the conclusions that the impact of measures on those groups would either be beneficial, have no negative impact, but possibly a positive one, or would be negligible.

2. **Arguments made by importers/traders**

(71) Several importers or traders made submissions following the imposition of the provisional measures. In essence, the following claims were made.

There was no injury to Community producers caused by Indian exports since the Indian prices went down due to lower prices of penicillin G, and, in addition, there was an excess production in the Community in which Indian companies were not involved. The quantity of Indian material sold in the Community was very small compared to the sales of producers based in the Community, which moreover made high profits. The imposition of countervailing duties may result in price increases to unreasonable levels by the producers based in the Community.

The Community producers missed opportunities for modernisation, and should have developed a product range of more sophisticated products instead of continuing to produce commodities available on the world market.

Also, the Community-based manufacturers of finished dosage forms would no longer have competitive options, since their possibility to source cheaper products of Indian origin would be diminished.

One trader, while confirming some of the above claims, also complained about the Indian ban on imports of penicillin G for local consumption.

Finally, the imposition of countervailing duties would have a negative effect on the profitability of the importers and traders and limit their choice of sourcing options. One importer pointed out that, being an exclusive agent for an Indian exporting producer, it had no possibility at all to import material from alternative sources.

(72) The claims relating to the decrease in price of penicillin G and the quantities of imports of the product concerned originating in India have been addressed in detail above. The low level of profitability of the Community industry has also been demonstrated and will be further addressed below. Furthermore, any price increase resulting from the imposition of countervailing measures is aimed at correcting the injurious effects of subsidised imports.

(73) The suggestion that the Community industry ought to abandon the production of commodities appears to allege that it would not be efficient and competitive in this field. The competitiveness of the Community industry, however, is not in doubt.

Moreover, the market for generic pharmaceutical products is an expanding one and there is no reason why Community-based industries would have to abandon this promising market segment.

(74) The allegations relating to the manufacturers of finished dosage forms cannot be sustained in their generalised form, since they imply that these companies generally use antibiotics from India in order to manufacture finished dosage forms, which is not the case. As appears from the replies to questionnaires from some of these companies, they are in fact not all opposed to the imposition of countervailing measures. One company even appeared to support the imposition of measures since it had encountered problems to sell its products because of the competition from products incorporating low-priced subsidised imports.

(75) The imposition of countervailing duties may have a negative impact on importers and traders. This impact will vary depending on the degree of their specialisation on products and originating countries. It appears that most importers and traders are not exclusively specialised in the product concerned originating in India, but rather cover a much larger range of bulk pharmaceutical products and source on a world-wide basis. In general, the impact of measures on importers and traders should therefore be limited.

In certain cases, however, the impact of countervailing duties may indeed be significant, notably for those importers or traders using exclusive agency or similar arrangements for the product concerned from India.

(76) This should, however, be put in balance with the interest of the Community industry which, without the remedial effects of measures to correct the negative effects of subsidised imports, is likely to continue to be confronted with continued price undercutting and the consequent price depression which has led to the deterioration of its profitability. In the event that this situation were allowed to continue, the Community industry may well be left with no alternative but to close down certain production lines or even entire plants. It should be recalled that production lines or plants devoted exclusively to the production of the product concerned employ almost 1 200 persons.

3. **Conclusion on Community interest**

(77) In conclusion, and having examined the various interests involved, it is considered 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. **DEFINITIVE MEASURES**

1. **Injury elimination level**

(78) As regards the profit margin used in establishing the non-injurious price level of the Community industry, the Indian exporting producers submitted that the Community industry had no need to invest in research and development (hereinafter 'R&D'), since the pharmaceutical industry would not and should not fund its research from the sale of off-patent commodities such as the product concerned, and that the suggested minimum profit level of 15 % of turnover would therefore be exaggerated.

(79) While it is admitted that profit levels can be expected to be significantly different depending on whether a drug is still under the protection of a patent or other form of intellectual property right or not, i.e. has become a 'generic' product, the statement that profits from the sale of non-protected products should not contribute in any way to R & D expenditure cannot be accepted.

(80) It should be recalled that almost all R & D expenditure is financed by the industry itself. It is therefore the long-term capacity to generate the resources needed to improve production processes of existing products and bring new products to the market that determines the ability to compete in the future, and this capacity depends on the possibility to achieve sufficient profit on those products that are already on the market.

(81) Without the increased efficiency achieved by the Community industry through R & D expenditure and resulting investments in process and yield improvements, it can be considered that the Community industry would already have made losses.

It is clear that the current depressed profit level would constitute a serious impediment for any such investment in the future, and thus, ultimately, affect the ability of the Community industry to compete.

It should moreover be kept in mind that the pharmaceutical industry represents an industrial sector with a very high level of investment. In order to maintain a reasonable return on investment, the return on turnover must be higher than the one typically achieved in sectors requiring lower levels of investment.

(82) In the light of the above, a profit level of 15 % on turnover is considered to be a reasonable minimum for an integrated pharmaceutical industry.

2. **Form and level of duty**

(83) No comments were submitted regarding the form of the measures. Changes from the provisional determination of the amount of countervailable subsidies have been made where appropriate. The rate of definitive countervailing duty is accordingly lower than the level of provisional duty for three of the cooperating Indian exporting producers.

Recitals 117 to 119 of the Provisional Duty Regulation are confirmed.

I. **COLLECTION OF THE PROVISIONAL DUTY**

(84) In view of the magnitude of the countervailable subsidies found for the exporting producers and in light of the seriousness of the injury caused to the Community industry, it is considered necessary that the amounts secured by way of provisional countervailing duty under Regulation (EC) No 1204/98 be definitively collected to the extent of the amount of definitive duties imposed,

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive countervailing duty is hereby imposed on imports of amoxicillin trihydrate, ampicillin trihydrate and cefalexin not put up in measured doses or in forms or packings for retail sale 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),

— 9,1 % for Harshita Ltd, New Delhi (TARIC additional code: 8788),

— 8,7 % for Kopran Ltd, Mumbai (TARIC additional code: 8220),

— 6,3 % 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 and 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.

Article 2

The amount secured by way of provisional countervailing duty pursuant to Regulation (EC) No 1204/98 shall be definitively collected at the duty rate definitively imposed.

Amounts secured in excess of the definitive rate of countervailing duty shall be released.

Article 3

This Regulation shall enter into force on the day following that of 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 Luxembourg, 5 October 1998.

For the Council
The President
W. SCHÜSSEL