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COUNCIL REGULATION (EC) No 713/2005

of 10 May 2005

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

(OJ L 121, 13.5.2005, p. 1)

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COUNCIL REGULATION (EC) No 713/2005

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

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] (the basic Regulation), and in particular Articles 18 and 19 thereof,

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

Whereas:

A. PROCEDURE

I. Previous investigation and existing measures

(1) The Council, by Regulation (EC) No 2164/98 [2], imposed a definitive countervailing duty on imports of 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 (the product concerned) falling within CN codes ex 2941 10 10, ex 2941 10 20 and ex 2941 90 00 originating in India. The measures took the form of an ad valorem duty ranging between 0 and 12 % imposed on imports from individually named exporters with a residual duty rate of 14,6 % imposed on imports from other exporters.

II. Request for a combined expiry and interim review

(2) Following the publication of a notice of impending expiry [3] of the definitive measures in force, the Commission received a request for the initiation of a combined expiry and interim review of Regulation (EC) No 2164/98 pursuant to Articles 18(2) and 19(2) of the basic Regulation, from related Community producers of the like product, Sandoz GmbH, Austria, and Sandoz Industrial Products SA, Spain, (the applicants). The applicants represent a major proportion, in this case over 40 %, of the total Community production of certain broad spectrum antibiotics.

(3) The request was based on the grounds that the expiry of the measures would be likely to result in the continuation or recurrence of subsidisation and injury to the Community industry and that the level of the measures in force was allegedly inappropriate to counteract the subsidisation which was causing the injury.

(4) Prior to the initiation of the combined expiry and interim review, and in accordance with Articles 22(1) and 10(9) of the basic Regulation, the Commission notified the Government of India (the GOI) that it had received a properly documented review request. The GOI was invited for consultations with the aim of clarifying the situation as regards the contents of the request and

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[1] OJ L 288, 21.10.97, p. 1. Regulation as last amended by Regulation (EC) No 461/2004 (OJ L 77, 13.3.2004, p. 12).
[2] OJ L 273, 9.10.1998, p. 1.
[3] OJ C 8, 14.1.2003, p. 2.

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arriving at a mutually agreed solution. The GOI declined the Commission's invitation to have consultations.

III. **Initiation of a combined expiry and interim review**

(5) The Commission examined the evidence submitted by the applicants and considered it sufficient to justify the initiation of a review in accordance with the provisions of Articles 18(2) and 19(2) of the basic Regulation. After consultation of the Advisory Committee, the Commission initiated, by a notice published in the *Official Journal of the European Union* [1], a combined expiry and interim review of Council Regulation (EC) No 2164/98.

IV. **Investigation period**

(6) The investigation covered the period from 1 April 2002 to 31 March 2003 (the review investigation period or IP). The examination of trends in the context of injury covered the period from 1 January 1999 up to the end of the review investigation period (the period considered).

V. **Parties concerned by the investigation**

(7) The Commission officially informed the applicants, other known Community producers, exporting producers, importers, upstream suppliers, users and the GOI of the initiation of the investigation. Interested parties had the opportunity to make their views known in writing and to request a hearing. The written and oral comments submitted by the parties were considered and, where appropriate, taken into account.

(8) In view of the apparently large number of exporting producers of the product concerned in India which were named in the request, the use of sampling techniques for the investigation of subsidisation was envisaged in accordance with Article 27 of the basic Regulation.

(9) However, only a limited number of exporting producers made themselves known and provided the information requested for sampling. Therefore, the use of sampling techniques was not considered necessary.

(10) The Commission sent questionnaires to all parties known to be concerned who made themselves known within the deadlines set in the notice of initiation. Replies were received from five Community producers, seven exporting producers, one importer, two up-stream suppliers and the GOI.

(11) The Commission sought and verified all information it deemed necessary for the determination of subsidisation and injury as well as to determine whether there is a likelihood of continuation or recurrence of subsidisation and injury and whether maintaining or amending the measures would not be against the Community interest. Verification visits were carried out at the premises of the following interested parties:

1. Community producers

DSM Anti-Infectives BV, Delft (The Netherlands), which also replied to the Commission’s questionnaire on behalf of DSM Anti-Infectives Deretil SA, Almeria, (Spain) and DSM Anti-Infectives Chemferm SA, Santa Perpetua de Mogoda, (Spain). These three companies are hereafter jointly referred to as ‘DSM’.

Sandoz GmbH (formerly Biochemie GmbH), Kundl (Austria), which also replied to the Commission's questionnaire on behalf of Sandoz Industrial Products SA (formerly

[1] OJ C 241, 8.10.2003, p. 7.

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Biochemie SA), Barcelona (Spain). Both companies are hereafter jointly referred to as 'Sandoz'.

2. Government of India

Ministry of Commerce, New Delhi.

3. Exporting producers in India

KDL Biotech Ltd (formerly Kopran Ltd), Mumbai,

Orchid Pharmaceuticals and Chemicals Ltd, Chennai,

Nectar Lifesciences Ltd, Chandigarh,

Nestor Pharmaceuticals Ltd, New Delhi,

Ranbaxy Laboratories Ltd, New Delhi,

Torrent Gujarat Biotech Ltd, Ahmedabad,

Surya Pharmaceutical Ltd, Chandigarh.

VI. **Disclosure and comments on procedure**

(12) The GOI and the other interested parties were informed of the essential facts and considerations upon which it was intended to propose the continuation of measures. They were also given a reasonable time to comment. Certain parties presented their comments in writing. In addition, the GOI and three exporting producers presented their positions in post-disclosure hearings followed up by post-hearing submissions summarizing their positions. All submissions and comments were taken duly into consideration as set out below.

(13) The GOI and one exporting producer pointed out during a post-disclosure hearing that the applicants did not produce one type of the like product, i.e. cefalexin, and claim that therefore in respect of this type the initiation of the investigation should be made void.

(14) In response to this submission, it should be recalled that already in the original investigation it was established that all types of the product under investigation (see below under Section B) constitute one single category of product ([1]). All types belong to the same category, 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. Thus, since all types form one product for the purpose of this proceeding, which is produced by the applicants, this argument has to be refuted.

(15) The GOI and one exporting producer contended that the non-confidential questionnaire replies of the Community producers were not sufficiently detailed and not filed in accordance with Article 29 of the basic Regulation. It was alleged, that a lack of information in the non-confidential questionnaire replies denied cooperating exporters an effective opportunity to defend their interests in relation to the injury and causal link analysis.

(16) In this context, it should be noted that, as set out in section E, the Community industry in the present investigation consists of only two parties, i.e. Sandoz and DSM. In addition, one party produced only amoxicillin trihydrate and ampicillin trihydrate, whereas the other produced cefalexin as well. These particular circumstances with regard to the Community industry increased the confidential nature of certain data provided during the investigation. In any event, the file available for inspection by interested parties contains the non-confidential replies to the questionnaire of both cooperating Community producers, where confi-

([1]) OJ L 166, 11.6.1998, p. 17, recital 9.

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dential data have been provided in index form in order to permit a reasonable understanding of the substance of the information submitted in confidence. Therefore, the non-confidential questionnaire replies of the Community producers are still considered in line with the provisions of Article 29 of the basic Regulation. In addition, it is pertinent to note, that the indexed injury data as disclosed and set out in section F of this Regulation provided all interested parties with a sufficiently precise picture on the injury and causality situation, so as to be able to assess the analysis and defend their interests.

B. PRODUCT CONCERNED AND LIKE PRODUCT

I. Product concerned

(17) The product covered by this review is the same product as the one concerned by Council Regulation (EC) No 2164/98, namely 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, ex 2941 10 20 and ex 2941 90 00 originating in India (the product concerned).

II. Like product

(18) During the post-disclosure hearing the GOI and one exporting producer have drawn attention to the fact that one Community producer mentioned certain differences in 'stability, purity, assay, galenical properties etc.' when comparing the product concerned and the like product. In addition, the only cooperating importer mentioned differences with regard to water solubility.

(19) However, both the product concerned and the like product have to correspond to the same international pharmacopoeias with certain specifications. Thus, though not alike in all respects, they closely resemble each other as required by Article 1(5) of the basic Regulation.

(20) Consequently, the investigation confirmed that the amoxicillin trihydrate, ampicillin trihydrate and cefalexin produced and sold in the Community by the Community producers had identical or closely resembling physical characteristics and uses to the product concerned and were thus a like product within the meaning of Article 1(5) of the basic Regulation.

C. SUBSIDIES

I. Introduction

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

1. Nationwide schemes

(a) Advance licence scheme,

(b) Duty entitlement passbook scheme,

(c) Special economic zones/Export oriented units scheme,

(d) Export promotion capital goods scheme,

(e) Income tax schemes,

— Export income tax exemption scheme,

— Income tax incentive for research and development,

(f) Export credit scheme.

(22) The schemes (a) to (d) specified above are based on the Foreign Trade (Development and Regulation) Act 1992 (No 22 of 1992) which entered into force on 7 August 1992 (Foreign Trade Act).

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The Foreign Trade Act authorises the GOI to issue notifications regarding the export and import policy. These are summarised in 'Export and Import Policy' documents, which are issued by the Ministry of Commerce every five years and updated regularly. One Export and Import Policy document is relevant to the review investigation period of this case; i.e. the five-year plan relating to the period 1 April 2002 to 31 March 2007 (EXIM-policy 02-07). In addition, the GOI also sets out the procedures governing the EXIM-policy 02-07 in a 'Handbook of Procedures – 1 April 2002 to 31 March 2007, Volume I' (HOP I 02-07) ([1]). The Handbook of Procedures is also updated on a regular basis.

(23) The income tax schemes specified above under (e) are based on the Income Tax Act of 1961, which is amended yearly by the Finance Act.

(24) The Export credit scheme specified above under (f) is based on sections 21 and 35A of the Banking Regulation Act 1949, which allow the Reserve Bank of India (RBI) to direct commercial banks in the field of export credits.

2. Regional Schemes

(25) On the basis of the information contained in the review request and the replies to the Commission's questionnaire, the Commission also investigated a number of schemes which allegedly are granted by regional governments or authorities in certain Indian states.

(a) State of Punjab,

— Punjab industrial incentive scheme.

— This scheme is based on the industrial policy and incentives code of the Government of Punjab.

(b) State of Gujarat,

— Gujarat industrial incentive scheme,

— Refund of electricity duty.

— The first scheme is based on Gujarat's industrial incentive policy whereas the second scheme is based on the Bombay Electricity Duty Act of 1958.

(c) State of Maharashtra,

— Package scheme of incentives of the Government of Maharashtra (the GOM). This scheme is based on resolutions of the GOM Industries, Energy and Labour Department.

(26) One income tax scheme (income tax incentive for research and development) and three regional schemes (Punjab industrial incentives, Gujarat industrial incentives and Gujarat refund of electricity duty) were not mentioned in the review request. Therefore, in accordance with Articles 22(1) and 11(10) of the basic Regulation, the Commission notified the GOI about a possible extension of the scope of the investigation in order to include these schemes. The GOI was invited for consultations with the aim of clarifying the factual situation as regards the alleged schemes and arriving at a mutually agreed solution. Following these consultations, and in the absence of a mutually agreed solution in relation to these four schemes, the Commission included these schemes in the investigation of subsidisation.

([1]) Notification No 1/2002-07 of 31.3.2002 of the Ministry of Commerce and Industry of the GOI.

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3. General disclosure comments on subsidisation

(27) Two exporting producers contended that the Advance licence scheme, the Income tax incentive scheme for research and development and the Export credit scheme should be excluded from the scope of the present investigation, because a review should only cover schemes originally investigated. In this case, these three schemes and the regional schemes investigated were not investigated during the original investigation.

(28) However, the relevant provisions of the basic Regulation concerning interim and expiry reviews do not stipulate such a narrow approach in reviews. For example, an interim review could lead to an increase of measures, in line with Article 19(2) of the basic Regulation, if the existing ones were insufficient to counteract a countervailable subsidy. Article 19(4) of the basic Regulation further requires an examination to 'consider whether the circumstances with regard to subsidisation (…) have changed significantly'. Thus, an interim review concerning subsidisation can lead per se to a complete re-evaluation of the subsidisation framework, not just the subsidy schemes originally investigated, which possibly could benefit the product concerned. In addition, an expiry review need not solely focus on schemes originally investigated. Article 18(2) of the basic Regulation refers to 'continuation or recurrence of subsidisation', that is to say, in general, and not to subsidy schemes originally investigated. Consequently, reviews are not limited to schemes originally investigated, but necessitate a determination of present and future subsidisation, including programs not originally investigated. In fact, it is only such an approach which leads to an adequate analysis of the factual situation concerning subsidisation during a given review investigation period. Otherwise, governments could effectively shield themselves from subsidy disciplines by simply renaming a scheme or making slight structural changes in it. This would frustrate the object and purpose of countervailing measures, which is to offset injurious subsidisation.

II. **Nationwide schemes**

1. *Advance licence scheme (ALS)*

(a) Legal basis

(29) The detailed description of the scheme is contained in paragraphs 4.1.1 to 4.1.14 of the EXIM-policy 02-07 and chapters 4.1 to 4.30 of the HOP I 02-07.

(b) Eligibility

(30) The ALS consists of six subschemes, as described in more detail in recital 31. Those subschemes, *inter alia*, differ in the scope of eligibility. Manufacturer-exporters and merchant-exporters 'tied to' supporting manufacturers are eligible for the ALS physical exports and for the ALS for annual requirement. Manufacturer–exporters supplying the ultimate exporter are eligible for ALS for intermediate supplies. Main contractors which supply to the 'deemed export' categories mentioned in paragraph 8.2 of the EXIM-policy 02-07, such as suppliers of an export oriented unit (EOU), are eligible for ALS deemed export. Eventually, intermediate suppliers to manufacturer-exporters are eligible for 'deemed export' benefits under the subschemes advance release order (ARO) and back to back inland letter of credit.

(c) Practical implementation

(31) Advance licences can be issued for:

(i) *Physical exports:* this is the main subscheme. It allows for duty free import of input materials for the production of a

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specific resultant export product. 'Physical' in this context means that the export product has to leave Indian territory. Import allowance and export obligation including the type of export product are specified in the licence.

(ii) *Annual requirement:* such a licence is not linked to a specific export product, but to a wider product group (e.g. chemical and allied products). The licence holder can, up to a certain value threshold set by its past export performance, import duty free any input to be used in manufacturing any of the items falling under such a product group. It can choose to export any resultant product falling under the product group using such duty-exempt material.

(iii) *Intermediate supplies:* this subscheme covers cases where two manufacturers intend to produce a single export product and divide the production process. The manufacturer-exporter produces the intermediate product. It can import duty free input materials and can obtain for this purpose an ALS for intermediate supplies. The ultimate exporter finalizes the production and is obliged to export the finished product.

(iv) *Deemed exports:* this subscheme allows a main contractor to import inputs free of duty which are required in manufacturing goods to be sold as 'deemed exports' to the categories of customers mentioned in paragraph 8.2(b) to (f), (g), (i) and (j) of the EXIM policy 02-07. According to the GOI, deemed exports refer to those transactions in which the goods supplied do not leave the country. A number of categories of supply is regarded as deemed exports provided the goods are manufactured in India, e.g. supply of goods to an EOU or to a company situated in a special economic zone (SEZ).

(v) *ARO:* The ALS holder intending to source the inputs from indigenous sources, in lieu of direct import, has the option to source them against AROs. In such cases the Advance Licences are validated as AROs and are endorsed to the indigenous supplier upon delivery of the items specified therein. The endorsement of the ARO entitles the indigenous supplier to the benefits of deemed exports as set out in paragraph 8.3 of the EXIM-policy 02-07 (i.e. ALS for intermediate supplies/deemed export, deemed export drawback and refund of terminal excise duty). The ARO mechanism refunds taxes and duties to the supplier instead of refunding the same to the ultimate exporter in the form of drawback/refund of duties. The refund of taxes/-duties is available both for indigenous inputs as well as imported inputs.

(vi) *Back to back inland letter of credit:* this subscheme again covers indigenous supplies to an ALS holder. The holder of an ALS can approach a bank for opening an inland letter of credit in favour of an indigenous supplier. The licence will be invalidated by the bank for direct import, only in respect of the value and volume of items being sourced indigenously instead of importation. The indigenous supplier will be entitled to deemed export benefits as set out in paragraph 8.3 of the EXIM-policy 02-07 (i.e. ALS for intermediate supplies/deemed export, deemed export drawback and refund of terminal excise duty).

It was established that during the review investigation period, the cooperating exporters only obtained concessions under four subschemes linked to the product concerned, i.e. (i) ALS physical exports, (ii) ALS for annual requirement, (iii) ALS for intermediate supplies as furnisher to an ultimate exporter and (iv) ALS deemed export as supplier to EOUs/units in SEZs. It is therefore not necessary to establish the countervailability of (v) the ARO scheme and (vi) the back to back inland letter of credit scheme.

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(32) For verification purposes by the Indian authorities, a licence holder is legally obliged to maintain 'a true and proper account of licence-wise consumption and utilisation of imported goods' in a specified format (chapter 4.30 and appendix 18 HOP I 02-07), i.e. an actual consumption register (appendix 18 register).

(33) With regard to the subschemes (i), (iii) and (iv) listed above under recital 31, both the import allowance and the export (including deemed export) obligation are fixed in volume and value by the GOI and are documented on the licence. In addition, at the time of import and of export, the corresponding transactions are to be documented by government officials on the licence. The volume of imports allowed under this scheme is determined by the GOI on the basis of standard input-output norms (SIONs). SIONs exist for most products including the product concerned and are published in the HOP II 02-07.

(34) In the case of the subscheme (ii) listed above under recital 31 (ALS for annual requirement), only the import allowance in value is documented on the licence. The licence holder is obliged to 'maintain the nexus between imported inputs and the resultant product' (paragraph 4.24A(c) HOP I 02-07).

(35) Imported input materials are not transferable and have to be used to produce the resultant export product. The export obligation must be fulfilled within a prescribed time frame after issuance of the licence (18 months with two possible extensions of six months each). In case of an ALS for annual requirement, no extension of the time frame is allowed.

(36) In the course of the review investigation it was established that the input materials imported according to the SIONs import allowance duty free under the various subschemes by the cooperating exporters exceeded the material they needed to produce the reference quantity of the resultant export product. Thus, the SIONs for the product concerned were not accurate. Furthermore, during the review investigation period, none of the cooperating exporters kept a correct actual consumption register based on real consumption. In four cases, such register was not kept at all despite a legal obligation to do so (see recital 32 above). In two cases, no actual consumption was registered by the companies. Neither the investigated exporters nor the GOI were able to demonstrate that the import duty exemption did not lead to an excess remission.

(d) Disclosure comments

(37) The GOI and five cooperating exporters submitted comments on the ALS. They claimed that the ALS operates as a permitted drawback or substitution drawback system, which allegedly resembles the EC inward processing system, with a verification system in conformity with the provisions of Annexes I, II and III of the basic Regulation in place to monitor the nexus between duty free imported inputs and the resultant export products. The GOI and two exporters further contended that only an excess remission of duties could be countervailed. With regard to a verification system, they insisted that an adequate verification system was in place. In this context they referred to a number of verification elements which were available to the GOI for such verification, including: SIONs, quantity information on import and export documents, a customs bond register of imports and exports under the ALS, a consumption register, a duty entitlement export certification book (DEEC book), redemption verification after fulfilment of importation and exportation, additional checks in the context of the Indian excise and customs duty administration, periodical audits and legal prosecutions in case of 'diversion'. However, the GOI and one exporter admitted the SIONs 'can lower that what is actually consumed'. In addition,

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no exporter provided sufficient evidence that it fulfilled its obligation to properly keep the actual consumption register mandated by the EXIM-policy. Further, two exporters claimed that the investigating authority should have calculated an excess remission itself. Finally, it has been claimed that the EC is bound by past precedents not to countervail the ALS. One exporter provided, after the post-disclosure hearing, a calculation of duties remitted in excess.

(e) Conclusion

(38) The exemption from import duties is a subsidy within the meaning of Article 2(1)(a)(ii) and Article 2(2) of the basic Regulation, i.e. a financial contribution of the GOI which conferred a benefit upon the investigated exporters.

(39) In addition, ALS physical exports, ALS for annual requirement and ALS for intermediate supply are clearly contingent in law upon export performance, and therefore deemed to be specific and countervailable under Article 3(4)(a) of the basic Regulation. Without an export commitment a company cannot obtain benefits under these schemes.

(40) ALS deemed export under the modalities of the present case is de facto contingent upon export performance. It was only used by one company to a minor extent and only when supplying EOUs or units in a SEZ, both categories mentioned in paragraph 8.2(b) of the EXIM-policy 02-07. This company stated that its customers eventually exported the product concerned. The objective of an EOU/SEZ is exportation as set out in paragraph 6.1 of the EXIM-policy 02-07. Thus, a domestic supplier obtains benefits under the ALS deemed export, because the GOI anticipates export earnings subsequently received by an exporter located in an EOU/SEZ. According to Article 3(4)(a) of the basic Regulation, a subsidy shall be considered as export contingent when the facts demonstrate that the granting of a subsidy, though not legally contingent upon export performance, is in fact tied to actual or anticipated export earnings.

(41) None of the four subschemes used in the present case can be considered as permissible duty drawback systems or substitution drawback systems within the meaning of Article 2(1)(a)(ii) of the basic Regulation. This finding is confirmed after careful consideration of the disclosure submissions. They do not conform to the strict rules laid down in Annex I item (i), Annex II (definition and rules for drawback) and Annex III (definition and rules for substitution drawback) of the basic Regulation. The GOI did not effectively apply its verification system or procedure to confirm whether and in what amounts inputs were consumed in the production of the exported product (Annex II(II)(4) of the basic Regulation and, in the case of substitution drawback schemes, Annex III(II)(2) of the basic Regulation). The SIONs for the product concerned were not sufficiently precise. No disclosure comment has changed this finding. To the contrary, the GOI even admitted the SIONs were inaccurate. Thus, it is confirmed that the SIONs themselves cannot be considered a verification system of actual consumption, because the design of those overly generous standard norms does not enable the GOI to verify with sufficient precision what amount of inputs were consumed in the export production. Furthermore, an effective control done by the GOI based on a correctly kept actual consumption register (appendix 18 register), did not take place. In addition, the GOI did not carry out a further examination based on actual inputs involved, although this would normally need to be carried out in the absence of an effectively applied verification system (Annex II(II)(5) and Annex III(II)(3) to the basic Regulation), nor did it prove, that no excess remission took place. The alleged comparability of the ALS with the EC inward

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processing system is irrelevant since the EC system is not subject to the present investigation.

(42) The other verification elements claimed upon disclosure either no longer exist (i.e. the DEEC-book was abolished by the EXIM policy 02-07) or are apparently, in the absence of an effective control of actual consumption registers, based on the overly generous SIONs, which is not sufficient (i.e. information on import export documents, customs bond register, redemption control of ALS). Auditing reports of the Indian authorities with regard to the exporting producers under investigation have not been provided.

(43) Finally, since the ALS was never previously analysed on a basis of facts comparable with those established during the present investigation, in particular in view of the imprecision of the SIONs for the product concerned, no binding precedent not to countervail the scheme exists.

(44) These four subschemes are therefore countervailable.

(f) Calculation of the subsidy amount

(45) In the absence of permitted duty drawback systems or substitution drawback systems, the countervailable benefit is the remission of total import duties normally due upon importation of inputs. Contrary to the disclosure submissions made by the GOI and two exporters, the basic Regulation does not only provide for the countervailing of an 'excess' remission of duties. According to Article 2(1)(a)(ii) and Annex I(i) of the basic Regulation only an excess remission of duties can be countervailed, provided the conditions of Annexes II and III of the basic Regulation are met. However, these conditions were not fulfilled in the present case. Thus, if an absence of an adequate monitoring process is established, the above exception for drawback schemes is not applicable and the normal rule of the countervailing of the amount of (revenue foregone) unpaid duties, rather than any purported excess remission, applies. As set out in Annexes II(II) and III(II) of the basic Regulation the burden is not upon the investigating authority to calculate such excess remission. To the contrary, according to Article 2(1)(a)(ii) of the basic Regulation it only has to establish sufficient evidence to refute the appropriateness of an alleged verification system. It should further be noted, that an additional examination by the Indian authorities in the absence of an effectively applied verification system needs to be done in a timely manner, i.e. normally before the on the spot verification in a countervailing duty investigation. The calculation of a duty remission in excess provided by one exporter after disclosure is neither timely nor done by the GOI. Therefore, it has to be disregarded.

(46) The subsidy amounts for the exporters which used the ALS were calculated on the basis of import duties forgone (basic customs duty and special additional customs duty) on the material imported under the four subschemes used for the product concerned during the review investigation period as set out under recital 31 (numerator). In accordance with Article 7(1)(a) of the basic Regulation, fees necessarily incurred to obtain the subsidy were deducted from the subsidy amounts where justified claims were made. In accordance with Article 7(2) of the basic Regulation, these subsidy amounts have been allocated over the export turnover generated by the product concerned during the review investigation period as appropriate denumerator, because the subsidy is contingent upon export performance and was not granted by reference to the quantities manufactured, produced, exported or transported.

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(47) Six companies benefited from this scheme during the review investigation period and obtained subsidies of between 22,0 and 25,8 % (see table in recital 154).

2. *Duty Entitlement Passbook Scheme (DEPBS)*

(a) Legal Basis

(48) The detailed description of the DEPBS is contained in paragraph 4.3 of the EXIM-policy 02-07 and in chapter 4 of the HOP I 02-07.

(b) Eligibility

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

(c) Practical implementation of the DEPBS

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

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

(52) It was also found that in accordance with Indian accounting standards, DEPBS credits can be booked on an accrual basis as income in the commercial accounts, upon fulfilment of the export obligation.

(53) Such credits can be used for payment of customs duties on subsequent imports of any goods unrestrictedly importable, except capital goods. Goods imported against such credits can be sold on the domestic market (subject to sales tax) or used otherwise.

(54) DEPBS credits are freely transferable and valid for a period of 12 months from the date of issue.

(55) An application for DEPBS credits can cover up to 25 export transactions and, if electronically filed, an unlimited amount of export transactions. De facto, no strict deadlines to apply for DEPBS credits exist, because the time periods mentioned in chapter 4.47 HOP I 02-07 are always counted from the most recent export transaction included in a given DEPBS application.

(d) Disclosure comments

(56) Upon disclosure three exporters, which received benefits under this scheme, commented on the DEPBS analysis as set out above. They submitted that (i) contrary to the findings in recitals 53 and 59 materials imported under the DEPBS allegedly have to be

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used for export production and DEPBS credit can allegedly only be obtained if goods are exported which bear import duties on its input materials, (ii) the new calculation methodology for countervailable amounts (focus on the export transaction, see recitals 61 and 62) should not be used, because a benefit is allegedly only conferred upon usage of the credit and for the reason that the new approach discriminatorily departs from earlier EC precedence, (iii) DEBPS should only be countervailed to the extent that such credits were obtained for the product concerned and (iv) a DEPBS-rate reduction which took place in February 2004 should be taken into consideration.

(e) Conclusions on the DEPBS

(57) The DEPBS provides subsidies within the meaning of Article 2(1)(a)(ii) and Article 2(2) of the basic Regulation. A DEPBS credit is a financial contribution by the GOI, since the credit will eventually be used to offset import duties, thus decreasing the GOI's duty revenue which would be otherwise due. In addition, the DEPBS credit confers a benefit upon the exporter, because it improves its liquidity.

(58) Furthermore, the DEPBS is contingent in law upon export performance, and therefore deemed to be specific and countervailable under Article 3(4)(a) of the basic Regulation.

(59) This scheme cannot be considered a permissible duty drawback system or substitution drawback system within the meaning of Article 2(1)(a)(ii) of the basic Regulation. It does not conform to the strict rules laid down in Annex I item (i), Annex II (definition and rules for drawback) and Annex III (definition and rules for substitution drawback) of the basic Regulation. An exporter is under no obligation to actually consume the goods imported free of duty in the production process and the amount of credit is not calculated in relation to actual inputs used. Moreover, there is no system or procedure in place to confirm which inputs are consumed in the production process of the exported product or whether an excess payment of import duties occurred within the meaning of item (i) of Annex I and Annexes II and III of the basic Regulation. Lastly, an exporter is eligible for the DEPBS benefits regardless of whether it imports any inputs at all. In order to obtain the benefit, it is sufficient for an exporter to simply export goods without demonstrating that any input material was imported. Thus, even exporters which procure all of their inputs locally and do not import any goods which can be used as inputs are still entitled to benefit from the DEPBS.

(60) Neither the claim made by one exporter that materials imported under this scheme have to be used for export production nor the allegation that DEPBS credits can only be obtained under the condition that input material used bears an import duty burden, have been substantiated. In this context it should also be noted, that the GOI did at no point in time contest the factual description of the DEPBS as set out above. Therefore, those claims have to be rejected.

(f) Calculation of the subsidy amount

(61) In accordance with Articles 2(2) and 5 of the basic Regulation, the amount of countervailable subsidies was calculated in terms of the benefit conferred on the recipient, which is found to exist during the review investigation period. In this regard, it was considered that the benefit is conferred on the recipient at the point in time when an export transaction is made under this scheme. At this moment the GOI is liable to forego the customs duties, which constitutes a financial contribution within the meaning of Article 2(1)(a)(ii) of the basic Regulation. As stated in recital 51 above, once the customs authorities issue an export shipping bill which shows, *inter alia*, the amount of

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DEPBS credit which is to be granted for that export transaction, the GOI has no discretion as to whether or not to grant the subsidy and it has no discretion as to the amount of the subsidy. Also, as stated above in the same recital, any change of the DEPBS rates between the actual export and the issuance of a DEPBS licence has no retroactive effect on the level of the benefit granted. Furthermore, as stated in recital 52, companies can, in line with Indian accounting standards, book the DEPBS credits on an accrual basis as income at the stage of export transaction. Finally, by virtue of the fact that a company is aware that it will receive a subsidy under the DEPBS, and indeed benefits under other schemes, the company is already in a more advantageous competitive position, because it can reflect the subsidies through offering lower prices.

(62) The rationale for imposing a countervailing duty, though, is to redress unfair trading practices based on illicit competitive advantage. In light of the above, it is considered appropriate to assess the benefit under the DEPBS as being the sum of the credits earned on all export transactions made under this scheme during the investigation period.

(63) The comments on the disclosure have not led to a revision of this calculation approach. The new methodology has already been used in the recent past by the European Communities for example in the context of the graphite electrode system case ([1]). In addition, the principles of legal certainty and legitimate expectations do not prevent such change of methodology. Firstly, the new approach does not result in a complete re-evaluation of the scheme, which, indeed, has always been countervailable. It only concerns the calculation of the subsidy amount in order to link it more closely to the factual situation during a given investigation period. Secondly, this approach is, *inter alia*, the consequence of facts established by the Commission in the course of recent investigations, e.g. the booking of DEPBS credits on an accrual basis according to Indian accounting standards and the de facto non-existence of application deadlines for such credits under the EXIM policy. Furthermore, the disclosure comments have confirmed that at the moment of the export transaction made under this scheme, an exporter has obtained an irrevocable entitlement for DEPBS credits. However, such moment is decisive in order to establish conferral of a benefit as set out under recital 61, not the subsequent usage, because an exporter already with such vested right is 'better off' in financial terms.

(64) Contrary to the submission of some exporting producers, even DEPBS credit generated by exporting non-product concerned had to be considered when establishing the amount of countervailable DEPBS credit. Under the DEPBS no obligation exists which limits the use of the credits to import duty-free input material linked to a specific product. On the contrary, DEPBS credits are freely transferable, can even be sold and be used for imports of any unrestrictedly importable goods (the input materials of the product concerned belong to this category), except capital goods. Consequently, the product concerned can benefit from all DEPBS credits generated.

(65) Furthermore, DEPBS rate reductions subsequent to the review investigation period cannot be considered, since Article 11(1) of the basic Regulation provides that information relating to a period subsequent to the IP shall not, normally, be taken into account. Besides, no guarantee exists that the GOI will not increase DEPBS rates in the future.

([1]) Council Regulation (EC) No 1628/2004 (OJ L 295, 18.9.2004, p. 4 (recital 13)).

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(66) Where justified claims were made, fees necessarily incurred to obtain the subsidy were deducted from the credits so established to arrive at the subsidy amounts as numerator, Article 7(1)(a) of the basic Regulation. In accordance with Article 7(2) of the basic Regulation these subsidy amounts have been allocated over the total export turnover during the review investigation period as appropriate denumerator, because the subsidy is contingent upon export performance and it was not granted by reference to the quantities manufactured, produced, exported or transported. Five companies benefited from this scheme during the review investigation period and obtained subsidies of between 3,2 and 8,0 % (see table in recital 154).

3. *Export Oriented Units Scheme ('EOUS')/Special Economic Zones Scheme (SEZS)*

(a) Legal basis

(67) The details of these schemes are contained in chapters 6 (EOUS) and 7 (SEZS) respectively of the EXIM-policy 02-07 and of the HOP I 02-07.

(b) Eligibility

(68) With the exception of pure trading companies, all enterprises which, in principle, undertake to export their entire production of goods or services may be set up under the SEZS or the EOUS. However, unlike services and agriculture, undertakings in the industrial sectors have to fulfil a minimum investment threshold in fixed assets (Indian rupees 10 million) to be eligible for the EOUS.

(c) Practical implementation

(69) The SEZS is the successor scheme of the former Export processing zones scheme (EPZS). SEZs are specifically delineated duty free enclaves and considered by the EXIM-policy 02-07 as foreign territory for the purpose of trade operations, duties and taxes. 14 SEZs already operate and another 13 SEZs have been approved by the Indian authorities for establishment.

(70) EOUs on the other side, are geographically more flexible and can be established anywhere in India. This scheme is complementary to the SEZS.

(71) An application for EOU or SEZ status must include details for a period of the next five years on, *inter alia*, planned production quantities, projected value of exports, import 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. The agreement to be recognised as a company under SEZ/EOU is valid for a five-year period. The agreement may be renewed for further periods.

(72) A crucial obligation of an EOU or an SEZ as set out in the EXIM-policy 02-07 is to achieve net foreign exchange (NFE) earnings, i.e. in a reference period (five years) the total value of exports has to be higher than the total value of imported goods.

(73) EOU/SEZ units are entitled to the following concessions:

(i) exemption from import duties on all types of goods (including capital goods, raw materials and consumables) required for the manufacture, production, processing, or in connection therewith;

(ii) exemption from excise duty on goods procured from indigenous sources;

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(iii) reimbursement of central sales tax paid on goods procured locally;

(iv) facility to sell a part of production on the domestic market on payment of applicable duties on the finished product as an exception to the general requirement to export the entire production;

(v) exemption from income tax normally due on profits realised on export sales in accordance with Section 10A or Section 10B of the Income Tax Act, for a 10-year period after starting its operations, but no longer than up to 2010;

(vi) possibility of 100 % foreign equity ownership.

(74) Although the concessions under both schemes are largely comparable, some differences exist. For instance, only an EOU can obtain a 50 % reduction of duties payable upon domestic sales (DTA sales), whereas in an SEZ 100 % of the duties are payable on such sales. An EOU unit can sell up to 50 % of its turnover domestically at such reduced rate.

(75) Units operating under these schemes are bonded under the surveillance of customs officials in accordance with Section 65 of the Customs Act.

(76) They are legally obliged to maintain, in a specified format, a proper account of all imports, of the consumption and utilisation of all imported materials and of the exports made. These documents should be submitted periodically, as may be required, to the competent authorities (quarterly and annual progress reports).

(77) However, 'at no point in time (an EOU or a SEZ unit) shall be required to co-relate every import consignment with its exports, transfers to other units, sales in DTA or stocks', paragraph 10.2 of appendix 14-I and paragraph 13.2 of appendix 14-II of the HOP I 02-07.

(78) Domestic sales are dispatched and recorded on a self-certification basis. The dispatch process of export consignments of an EOU is supervised by a customs/excise official, who is permanently posted in the EOU. The company is obliged to reimburse the GOI for the salary of such permanent bond officer.

(79) 'All activities of SEZ units within the zone, unless otherwise specified, including export and re-import of goods shall be through self certification procedure', as paragraph 29 of appendix 14-II of the HOP I 02-07 states. Thus, no routine examinations of the export consignments of an SEZ unit by customs authorities take place.

(80) In the present case, the EOUS was used by one of the cooperating exporters. As the SEZS was not used, it is therefore not necessary to analyse the countervailability of this scheme. The cooperating exporter that used the EOUS utilised the scheme to import raw materials and capital goods free of import duties, to procure goods domestically free of excise duty plus obtain sales tax reimbursement and to sell part of its production on the domestic market. Thus, it availed of all benefits as described in recital 73 (i) to (iv). The exporter concerned also availed of benefits under the income tax exemption provisions of the EOUS. However, as the said income tax exemption falls under the more generally available income tax exemption scheme, the analysis thereof is set out in recitals 117 and 118.

(d) Disclosure comments

(81) Upon disclosure, one exporting producer submitted that the EOUS should, if at all, only be countervailed insofar as duties paid for domestic sales do not fully cover the amount of import

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duties exempted on input materials used for domestically sold production (excess remission). The exporter is of the opinion that with regard to the EOUS, which allegedly resembles the EC inward processing system, a verification system in conformity with the provisions of Annexes I, II and III of the basic Regulation is in place. To this end, it argued that a consignment-wise correlation of input materials and resultant export production is indeed not required by the Indian authorities (see recital 77), as it is not mandatory according to the basic Regulation or the WTO Agreement on Subsidies and Countervailing Measures (ASCM) for a proper verification system. In addition, the exporter referred to its company internal batch sheet system as providing nexus information between inputs and outputs. The exporter further pointed out that its domestic sales constituted less the 5 % of its sales during the IP. It also claimed that the periodical assessment of the monthly sales tax returns by the GOI is sufficient to meet the verification standards set by the basic Regulation.

(82) Furthermore it contended, that (i) for calculation purposes not the amount of raw materials imported during the review investigation period as set out in recital 19 of the annual progress report of this EOU should be taken, but the amount of raw materials consumed during this period as set out in recital 20 of this report and (ii) the allocation period concerning duties saved upon importation of capital goods should be based on the company specific depreciation period and not on the basis of an average depreciation period for all cooperating exporting producers. In addition, it claimed that the interest added (commercial rate prevailing in India during the IP) should be reduced to the weighted average rate of founding of this EOU during the review investigation period.

(e) Conclusions on the EOUS

(83) The exemptions of an EOU from two types of import duties (basic customs duty and special additional customs duty) and the reimbursement of sales tax are financial contributions of the GOI within the meaning of Article 2(1)(a)(ii) of the basic Regulation. Government revenue which would be due in the absence of this scheme is forgone, thus, in addition, conferring a benefit upon the EOU in the meaning of Article 2(2) of the basic Regulation, because it saved liquidity by not having to pay duties normally due and by obtaining a sales tax reimbursement.

(84) The exemption from excise duty and its import duty equivalent (additional customs duty), however, do not lead to revenue forgone which is otherwise due. Excise and additional customs duty, if paid, could be used as a credit for own future duty liabilities (the so-called Cenvat mechanism). Therefore, these duties are not definitive. By the means of 'Cenvat'-credit only an added value bears a definitive duty, not the input materials.

(85) Thus, only the exemption from basic customs duty, special additional customs duty and the sales tax reimbursement constitute subsidies in the meaning of Article 2 of the basic Regulation. They are contingent in law upon export performance, and therefore deemed to be specific and countervailable under Article 3(4)(a) of the basic Regulation. The export objective of an EOU as set out in paragraph 6.1 of the EXIM-policy 02-07 is a *conditio sine qua non* to obtain the incentives.

(86) Furthermore, these subsidies cannot, contrary to the submission made by one exporter, be considered as permissible duty drawback systems or substitution drawback systems within the meaning of Article 2(1)(a)(ii) of the basic Regulation. They do not conform to the strict rules laid down in Annex I (items (h) and (i)), Annex II (definition and rules for drawback) and Annex

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III (definition and rules for substitution drawback) of the basic Regulation. The alleged comparability of the EOUS with the EC inward processing system is in this context irrelevant since the EC system is not subject to the present investigation.

(87) In so far as the sales tax reimbursement and import duty exemption provisions are used for purchasing capital goods, they are already not in conformity with the rules for permitted drawback systems, because those goods are not consumed in the production process, as required by Annex I item (h) (sales tax reimbursement) and (i) (import duties remission). The exporter objected to this analysis and argued that since capital goods are necessary for production, they cannot be per se excluded from any permitted duty drawback. However, this reasoning is not reflected in the clear wording of Annex I item (h) and (i), capital goods are used for production not consumed in it. The argument is therefore rejected.

(88) In addition, and also concerning the other benefits which are available under this scheme, despite careful consideration of the submissions made by the exporter, it was confirmed that the GOI has no effective verification system or procedure in place to confirm whether and in what amounts duty and or sales tax free procured inputs were consumed in the production of the exported product (Annex II(II)(4) of the basic Regulation and, in the case of substitution drawback schemes, Annex III(II)(2) of the basic Regulation).

(89) An EOU is allowed to sell a significant amount of its production, up to 50 % of its annual turnover, on the domestic market. Therefore, no obligation in law exists to export the total amount of manufactured resultant products. Moreover, due to the self-certification procedure these domestic transactions take place without the supervision and control of a government official. Consequently, the bonded premises of an EOU are at least in part not subject to a physical control by the Indian authorities. This, however, increases the importance of further verification elements, notably control of the nexus between duty free inputs and resultant export products in order to qualify as a duty drawback verification system. It was considered that the EOU subject to the present investigation did not sell 50 % domestically but only around 5 % of its annual turnover during the IP. However, this has no impact on the more general assessment of the adequacy of the verification system in place.

(90) Concerning further verification steps installed it should be recalled, as mentioned under recital 77 and confirmed by the submissions of the exporter, that an EOU is already *de jure* and at no point in time required to co-relate every import consignment with the destination of the corresponding resultant product. Only such consignment controls, however, would provide the Indian authorities with sufficient information about the final destination of inputs to check that the duty/sales tax exemptions do not exceed inputs for export production. Monthly tax returns for domestic sales on a self assessment basis, which are periodically assessed by the Indian authorities, do not suffice. Company internal systems, which are kept without a legal obligation under the EXIM policy, e.g. a batch sheets system, do not suffice to replace such key requirement for a duty drawback verification system either. In addition, a duty drawback verification system needs to be designed and enforced by a government and should not be left to the discretion of the management of each individual company concerned to set up an information system. Audit reports of the Indian authorities were requested both from the company and the GOI, but never made available, thus not substantiated. Consequently it is confirmed that, since an EOU is explicitly not required by the Indian EXIM policy to record the nexus between input materials

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and the resultant product, no effective control mechanism was set up by the GOI to determine which inputs were consumed in export production and in what amounts.

(91) Also, the GOI neither carried out a further examination based on actual inputs involved, although this would normally need to be carried out in the absence of an effective verification system (Annex II(II)(5) and Annex III(II)(3) to the basic Regulation), nor did it prove that no excess remission took place. It should be recalled that such further examination in principle needs to be completed before the verification visit in such investigation is carried out, so that a verification, if considered appropriate, can take place to base findings on such further examination, Articles 11(8) and 26(1) of the basic Regulation.

(f) Calculation of the subsidy amount

(92) Accordingly, in the absence of a permitted duty drawback system or substitution drawback system, the countervailable benefit is the remission of total import duties (basic customs duty and special additional customs duty) normally due upon importation, as well as the sales tax reimbursement, both during the review investigation period.

(93) The claim of the exporter to take only into consideration the amount of duties and sales taxes saved, which were linked to inputs consumed during the review investigation period, was rejected. Conferral of the benefit in the meaning of Article 2(2) of the basic Regulation takes already place upon duty or sales tax free procurement of the input materials, since at that stage the duties would normally be due.

(i) *Exemption from import duties (basic customs duty and special additional customs duty) and sales tax reimbursement on raw materials*

(94) The subsidy amount for the exporter which used the EOUS was calculated on the basis of import duties forgone (basic customs duty and special additional customs duty) on the materials imported for the production sector, i.e. bulk drugs and intermediates, and the sales tax reimbursed for this sector, both during the review investigation period. Fees necessarily incurred to obtain the subsidy were deducted in accordance with Article 7(1)(a) of the basic Regulation from this sum to arrive at the subsidy amount as numerator. In accordance with Article 7(2) of the basic Regulation this subsidy amount has been allocated over the export turnover generated by the bulk pharmaceutical sector (sector) during the review investigation period as appropriate denumerator, because the subsidy is contingent upon export performance and it was not granted by reference to the quantities manufactured, produced, exported or transported. The subsidy margin thus obtained was 29,6 %.

(ii) *Exemption from import duties (basic customs duty and special additional customs duty) on capital goods*

(95) Unlike raw materials, capital goods are not physically incorporated into the finished goods. In accordance with Article 7(3) of the basic Regulation, the benefit to the investigated company has been calculated on the basis of the amount of unpaid customs duty on imported capital goods spread across a period which reflects the normal depreciation period of such capital goods in the industry of the product concerned. In order to determine such normal depreciation period a weighted average of the depreciation periods used by all cooperating exporters has been calculated. The claim of the EOU under investigation to use the company-specific depreciation period had to be rejected, because ‘normal’ is not synonymous for ‘individual’ but for a ‘representative average’. The amount so calculated which is then attributable to the review investigation period has been adjusted

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by adding interest during this period in order to reflect the value of the benefit over time and thereby establishing the full benefit of this scheme to the recipient. The amount of interest added was based on the commercial interest rate during the review investigation period in India. The claim of the exporter to use its lower average rate did not lead to a difference in outcome, i.e. the subsidy margin remained the same. Fees necessarily incurred to obtain the subsidy were deducted in accordance with Article 7(1)(a) of the basic Regulation from this sum to arrive at the subsidy amount as numerator. In accordance with Article 7(2) and (3) of the basic Regulation this subsidy amount has been allocated over the export turnover generated by the sector during the review investigation period as appropriate denumerator, because the subsidy is contingent upon export performance and it was not granted by reference to the quantities manufactured, produced, exported or transported. The subsidy margin thus obtained was 1,3 %.

(96) Thus, the total subsidy margin under the EOUS for the company concerned amounts to 30,9 %.

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

(a) Legal basis

(97) The detailed description of the EPCGS is contained in chapter 5 of the EXIM-policy 02-07 and in chapter 5 of the HOP I 02-07.

(b) Eligibility

(98) Manufacturer-exporters, merchant-exporters 'tied to' supporting manufacturers and service providers are eligible for this scheme.

(c) Practical implementation

(99) Under the condition of an export obligation, a company is allowed to import capital goods (new and, since April 2003, second-hand capital goods up to 10 years old) at a reduced rate of duty. To this end the GOI issues upon application and payment of a fee an EPCGS licence. Since April 2000 the scheme provides for a reduced import duty rate of 5 % applicable to all capital goods imported under the scheme. Until 31 March 2000, an effective duty rate of 11 % (including a 10 % surcharge) and, in case of high value imports, a zero duty rate were applicable. In order to meet the export obligation, the imported capital goods must be used to produce a certain amount of export goods during a certain period.

(100) The EPCGS licence holder can also source the capital goods indigenously. In such case, the indigenous manufacturer of capital goods may avail of the benefit for duty free import of components required to manufacture such capital goods. Alternatively, the indigenous manufacturer can claim the benefit of deemed export in respect of supply of capital goods to an EPCGS licence holder.

(d) Disclosure comments

(101) Upon disclosure the GOI and one exporting producer submitted that, (i) the depreciation period used for capital goods has allegedly not been adequately disclosed to interested parties and (ii) that it was not sufficiently set out why and to which extent interest has been added to arrive at the countervailable subsidy amount.

(e) Conclusion on EPCG Scheme

(102) The EPCGS provides subsidies within the meaning of Article 2(1)(a)(ii) and Article 2(2) of the basic Regulation. The duty reduction constitutes a financial contribution by the GOI, since this concession decreases the GOI's duty revenue which

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would be otherwise due. In addition, the duty reduction confers a benefit upon the exporter, because the duties saved upon importation improve its liquidity.

(103) Furthermore, the EPCGS is contingent in law upon export performance, since such licences can not be obtained without a commitment to export. Therefore it is deemed to be specific and countervailable under Article 3(4)(a) of the basic Regulation.

(104) Eventually, this scheme can not be considered a permissible duty drawback system or substitution drawback system within the meaning of Article 2(1)(a)(ii) of the basic Regulation. Capital goods are not covered by the scope of such permissible systems, as set out in Annex I, item (i), of the basic Regulation, because they are not consumed in the production of the exported products.

(f) Calculation of the subsidy amount

(105) The subsidy amount was calculated, in accordance with Article 7(3) of the basic Regulation, on the basis of the unpaid customs duty on imported capital goods spread across a period which reflects the normal depreciation period of such capital goods in the antibiotics industry. In accordance with the established practice, the amount so calculated which is attributable to the review investigation period has been adjusted by adding interest during this period in order to reflect the full value of the benefit over time. The commercial interest rate during the review investigation period in India was considered appropriate for this purpose. Fees necessarily incurred to obtain the subsidy were deducted in accordance with Article 7(1)(a) of the basic Regulation from this sum to arrive at the subsidy amount as numerator. In accordance with Article 7(2) and 7(3) of the basic Regulation this subsidy amount has been allocated over the export turnover during the review investigation period as appropriate denumerator, because the subsidy is contingent upon export performance and it was not granted by reference to the quantities manufactured, produced, exported or transported. Four companies benefited from this scheme during the review investigation period. The subsidies obtained were negligible.

(106) Since the EPCGS will not be countervailed in the case at hand, it is not necessary to respond to the corresponding disclosure comments.

5. *Export Credit Scheme (ECS)*

(a) Legal basis

(107) The details of the scheme are set by in Master Circular IECD No 5/04.02.02/2002-03 (Export Credit in Foreign Currency) and Master Circular IECD No 4/04.02.02/2002-03 (Rupee Export Credit) of the Reserve Bank of India (RBI), which is addressed to all commercial banks in India.

(b) Eligibility

(108) Manufacturing exporters and merchant exporters are eligible for this scheme.

(c) Practical implementation

(109) Under this scheme, the RBI mandatorily sets maximum ceiling interest rates applicable to export credits, both in Indian rupees or in foreign currency, which commercial banks can charge an exporter 'with a view to making credit available to exporters at internationally competitive rates'. The ECS consists of two subschemes, the Pre-shipment export credit scheme (packing credit), which covers credits provided to an exporter for financing the purchase, processing, manufacturing, packing and/or shipping of goods prior to export, and the Post-shipment

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export credit scheme, which provides for working capital loans with the purpose of financing export receivables. The RBI also directs the banks to provide a certain amount of their net bank credit towards export finance.

(110) As a result of these RBI Master Circulars exporters can obtain export credits at preferential interest rates compared with the interest rates for ordinary commercial credits (cash credits), which are purely set under market conditions. In this respect the Master Circular on Rupee Export Credit notes that 'ceiling rates of interest on credit extended to exporters as prescribed in this Circular are lower than the maximum lending rates normally charged to other borrowers and are, therefore, indicated as concessive in this sense.' The difference in rates might decrease for companies with good credit ratings. In fact, high rating companies might be in a position to obtain export credits and cash credits at the same conditions.

(d) Disclosure comments

(111) Upon disclosure two exporters, which received benefits under this scheme, argued that the ECS is not a countervailable subsidy. To this end, they submitted that (i) a countervailable subsidy requires the transfer of public funds, (ii) the rates for ECS credits are set under market conditions, because different commercial banks offer significantly different interest rates and (iii) interest rates for cash credits are higher as compared with those for export credits, because export financing is less risky (self executing) and, in case of foreign currency export credits, due to allegedly lower inflation of freely convertible foreign currencies as compared with the Indian rupee currency, which it was claimed to have an impact of the interest rates.

(112) Furthermore, one exporter claimed, and without providing any new calculation of the subsidy margin, that for calculation purposes rates of other banks, and not those banks identified during the verification visit as lending banks, should be used and in any event only the lowest rates both for export and cash credits taken for the comparison. Another exporter argued without providing any evidence that the loan amount should be reduced by 25 %, which allegedly represents own capital, although in the accounts identified as foreign capital.

(e) Conclusion on the ECS

(113) Firstly, the preferential interest rates of an ECS credit set by the RBI Master Circulars mentioned in recital 107 can decrease interest costs of an exporter as compared with credit costs purely set by market conditions and confer in this case a benefit in the meaning of Article 2(2) of the basic Regulation on such exporter. Only in the case of those cooperating exporters, where such rate differences were found to exist, was it concluded that a benefit was conferred. Contrary to the submissions set out above, those rate differences cannot be explained by pure market behaviour of the commercial banks. Export financing is not per se more secure than domestic financing. In fact, it is usually perceived as being more risky and the extent of security required for a certain credit, regardless of the finance object, is a purely commercial decision of a given commercial bank. Rate differences with regard to different banks are the result of the methodology of the RBI to set maximum lending rates for each commercial bank individually. In addition, but for the RBI Master Circulars, commercial banks would not be obliged to pass through to borrowers of export financing any perhaps more advantageous interest rates for export credits in foreign currency. Summarizing the response to those submissions, it should be recalled that the objective of the RBI Master Circulars is to provide export financing at 'internationally compe-

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titive rates' and the RBI itself considers export credit rates as 'concessive'. Secondly, and despite the fact that the preferential credits under the ECS are granted by commercial banks, this benefit is a financial contribution by a government in the meaning of Article 2(1)(iv) of the basic Regulation. In this context, it should be noted that neither Article 2(1)(iv) of the basic Regulation nor the ASCM require a charge on the public accounts, e.g. reimbursement of the commercial banks by the GOI, to establish a subsidy, but only government direction to carry out functions illustrated in points (i), (ii) or (iii) of Article 2(1) of the basic Regulation. The RBI is a public body and falls therefore under the definition of a 'government' as set out in Article 1(3) of the basic Regulation. It is 100 % government-owned, pursues public policy objectives, e.g. monetary policy, and its management is appointed by the GOI. The RBI directs private bodies, since the commercial banks are bound by the conditions, *inter alia*, the maximum ceilings for interest rates on export credits mandated in the RBI Master Circulars and the RBI provisions that commercial banks have to provide a certain amount of their net bank credit towards export finance. This direction obliges commercial banks to carry out functions mentioned in Article 2(1)(a)(i) of the basic Regulation, in this case loans in the form of preferential export financing. Such direct transfer of funds in the form of loans under certain conditions would normally be vested in the government, and the practice, in no real sense, differs from practices normally followed by governments, Article 2(1)(a)(iv) of the basic Regulation. This subsidy is deemed to be specific and countervailable since the preferential interest rates are only available in relation to the financing of export transactions and are therefore contingent upon export performance, Article 3(4)(a) of the basic Regulation.

(f) Calculation of the subsidy amount

(114) The subsidy amount has been calculated on the basis of the difference between the interest paid for export credits used during the review investigation period and the amount that would have been payable if the same interest rates were applicable as for ordinary commercial credits used by the particular company. This subsidy amount (numerator) has been allocated over the total export turnover during the review investigation period as appropriate denumerator in accordance with Article 7(2) of the basic Regulation, because the subsidy is contingent upon export performance and it was not granted by reference to the quantities manufactured, produced, exported or transported. The late claim made by one exporter that the credit amount as verified during the on the spot visit should be reduced by 25 % because it allegedly consisted to this extent of own founds, something not mentioned before or even during the verification visit, has not been substantiated and, therefore, cannot be accepted. As far as the claim is concerned to use with regard to the lending banks new information instead of the information provided during the verification visit this has also to be refuted, because such information was not made available in good time and not subject to verification. In any event, this exporter has not substantiated its claim that it only obtained export financing by the commercial banks with the most favourable conditions. Six companies availed of benefits under the ECS. They obtained subsidies of up to 2,3 %.

6. *Income Tax Schemes*

(a) Export Income Tax Exemption Scheme (EITES)

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(i) *Section 80HHC of the Income Tax Act 1961 (ITA)*

(115) It was established that four of the investigated exporters received the benefit of a partial income tax exemption on profits derived from export sales during the review investigation period. The legal basis for this exemption is set by Section 80HHC of the ITA.

(116) This provision of the ITA was abolished for the assessment year 2005 to 2006 (i.e. for the financial year from 1 April 2004 to 31 March 2005) onwards. Consequently, 80HHC of the ITA will not confer any benefits on the applicant after 31 March 2004. While four of the investigated exporters benefited from this scheme in the review investigation period, insofar as the scheme has since been withdrawn, it shall therefore not be countervailed, in accordance with Article 15(1) of the basic Regulation.

(ii) *Sections 10A and 10B of the ITA*

(117) The full income tax exemption on profits derived from export sales of a newly established undertaking in a SEZ, a free trade zone, an electronic hardware technology park or a software technology park (section 10A ITA) or a newly established EOU (section 10B ITA) during the first 10 years of production continues to be in force till 31 March 2010.

(118) One company availed during the past 10 years of benefits under section 10B ITA, starting in the financial year 1993 to 1994. For this reason, this company will no longer be eligible for benefits under section 10B ITA from the financial year 2003 to 2004 onwards. Therefore, in accordance with Article 15(1) of the basic Regulation, this scheme shall not be countervailed in the present case.

(b) Income Tax Incentive for Research and Development (ITIRAD)

(i) *Legal basis*

(119) The detailed description of the ITIRAD is set out in section 35(2AB) of the ITA.

(ii) *Eligibility*

(120) Companies engaged in the business of bio-technology or manufacturing of drugs, pharmaceuticals, chemicals, electronic equipment, computers and computer software, telecommunication equipments, helicopters, aircrafts or any other article or thing as may be notified are eligible for benefits under this scheme.

(iii) *Practical implementation*

(121) For any expenditure (other than cost of land or building) on in-house research and development facilities as approved by the Department of Scientific and Industrial Research of the GOI, a deduction of a sum equal to 150 % of the costs de facto incurred is permitted for income tax purposes. Thus, by means of a 50 % deduction of fictional expenses (i.e. expenses not actually incurred), the income tax base and subsequently the income tax burden decreases artificially.

(iv) *Disclosure comments*

(122) Upon disclosure one exporter, which received benefits under this scheme, made the following submissions. This scheme should not be countervailed, because (i) albeit ITIRAD being indeed limited to certain sectors it is claimed to be not specific in the meaning of Article 3(2) of the basic Regulation, since all enterprises in those sectors are eligible and (ii) expenditure which is incurred after 31 March 2005 will, according to section 35(2AB) subsection (5)ITA, not benefit from this scheme.

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(v) *Conclusion on ITIRAD*

(123) The ITIRAD provides subsidies within the meaning of Article 2(1)(a)(ii) and Article 2(2) of the basic Regulation. The artificial income tax base reduction under section 35(2AB) of the ITA constitutes a financial contribution by the GOI, since this decreases the GOI's income tax revenue which would be otherwise due. In addition, the income tax reduction confers a benefit upon the company, because it improves its liquidity.

(124) The GOI argued and reiterated upon disclosure without substantiating it, that eligibility for ITIRAD is based on objective criteria and thus the scheme is not specific. However, the clear wording of section 35(2AB) ITA proves that ITIRAD is *de jure* specific in the meaning of Article 3(2)(a) of the basic Regulation and therefore countervailable. Eligibility for this scheme is not governed by objective criteria, which are neutral in the meaning of Article 3(2)(b) of the basic Regulation. Benefits under this scheme are only available to certain industrial sectors listed under recital 120; the GOI has not made this scheme available to all sectors. Contrary to the submission made by one exporter, such limitation constitutes specificity, since the category 'group of industries' in Article 3(2) of the basic Regulation synonymously describes sector restrictions. This restriction is not economic in nature and horizontal in application such as number of employees or size of enterprise.

(125) In addition, the claim that expenditure incurred after 31 March 2005 is exempt from the scheme does not lead to its non-countervailability in the meaning of Article 15(1) of the basic Regulation. It has not been demonstrated that this scheme was already withdrawn at the moment of finalizing the findings of the review investigation, nor that the exporter will no longer obtain benefits from ITIRAD. To the contrary, ITIRAD is in force for the whole assessment year 2005/2006 (i.e. the financial year 2004/2005), can thus continue conferring further benefits. In addition, the exporter has not substantiated its claim, that no prolongation of this scheme is foreseen by the GOI. In fact, the scheme has already been prolonged in the past ([1]). There is no indication that such prolongation will not take place with a future Finance Act, in particular since the GOI neither in the consultation nor in its disclosure comments gave any indication that as of 31 March 2005 the scheme will (i) expire and (ii) not be substituted by a comparable income tax relief provision.

(vi) *Calculation of the subsidy amount*

(126) The subsidy amount has been calculated on the basis of the difference between the income tax due for the review investigation period with and without the application of the provision of section 35(2AB) of the ITA. This subsidy amount (numerator) has been allocated over the total turnover during the review investigation period as appropriate denumerator in accordance with Article 7(2) of the basic Regulation, because this subsidy relates to all sales, domestic and export, and it was not granted by reference to the quantities manufactured, produced, exported or transported. A subsidy margin of 1,5 % was so established for one company which received benefits under the ITIRAD.

III. **Regional Schemes**

1. *Industrial Incentive Schemes (IIS) of the Governments of Gujarat and Punjab*

(127) The States of Gujarat and Punjab grant to eligible industrial enterprises, incentives in the form of exemption and/or deferment of sales and purchase tax in order to encourage the

([1]) The Indian Finance Act 1999 prolonged the application from 2000 to 2005.

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industrial development of economically backward areas within these States. Since these schemes are virtually identical, they are assessed jointly.

(a) Legal basis

(128) The detailed description of these schemes as applied by the Government of Gujarat (GOG) and the Government of Punjab (GOP) is set out in GOG Resolution No INC-1090-1023-(2)-I(GR No 2) of 16 October 1990 and in GOP Resolution No 15/43/96-5IB/2238 of 20 March 1996 respectively.

(b) Eligibility

(129) Companies setting up a new industrial establishment or making a large-scale expansion of an existing industrial establishment in backward areas are eligible to avail of benefits under these schemes. Nevertheless, exhaustive lists of ineligible industries exist that prevent companies in certain fields of operations from benefiting from the incentives.

(c) Practical implementation

(130) Under these schemes, companies must invest in backward areas. These areas, which represent certain territorial units in the two States are classified according to their economic development into different categories while at the same time there are areas excluded or 'banned' from the application of the incentive schemes. The main criteria to establish the amount of the incentives are the size of the investment and the area in which the enterprise is or will be located.

(131) Incentives can be granted at any point in time since there are no time limits either in the filing of an application for the incentives or in the fulfilment of the quantitative criteria.

(d) Disclosure comments

(132) Upon disclosure two exporters, which received benefits under the IIS, made the submission (i) that the IIS is not an export subsidy, (ii) constitutes only a compensation for extra expenses incurred on account of non-availability of appropriate infrastructure in the designated backward areas and (iii) in the case of one exporter that it did no longer benefit from the scheme since 5 July 2003.

(e) Conclusion on IIS

(133) These schemes provide subsidies within the meaning of Articles 2(1)(a)(ii) and 2(2) of the basic Regulation. They constitute a financial contribution by the GOG and the GOP respectively, since the incentives granted, in the present case sales and purchase tax exemptions, decrease tax revenue which would be otherwise due. In addition, these incentives confer a benefit upon a company, because they improve its financial situation since taxes otherwise due are not paid.

(134) Furthermore, the schemes are regionally specific in the meaning of Articles 3(2)(a) and 3(3) of the basic Regulation since they are only available to certain companies having invested within certain designated geographical areas within the jurisdiction of the States concerned. They are not available to companies located outside these areas and, in addition, the level of benefit is differentiated according to the area concerned.

(135) The GOI does not share this assessment. Firstly, it argued that international trade is per se not subject to sales tax, as already stipulated by the Indian Constitution. As a result, the GOI continued, such schemes cause no revenue forgone otherwise due in respect of export transactions and should consequently not be countervailed. However, and contrary to the disclosure submissions by two exporters in this respect as well, the

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scheme was not assessed as an export subsidy, within the meaning of Article 3(4)(a) of the basic Regulation, with a direct focus on exports of the product concerned, but as otherwise specific (see recital 134). A direct link between the subsidy and the exported product is not required to render a subsidy scheme countervailable. In accordance with Article 1(1) of the basic Regulation, it is sufficient to establish a direct link between the subsidy and the manufacturing company. On the basis that 'money is fungible' every kind of such domestic subsidy will be, via lower prices, reflected in export transactions as well, because such subsidy improved the overall liquidity of a company. In addition, the GOI has provided no evidence that the general sales tax exemption for export sales covers purchase tax liabilities on input materials as well. In fact, in the present case, the companies have also used the IIS to offset purchase tax liabilities.

(136) The GOI further contended that the IIS, although admittedly limited to certain backward regions within the territories of Punjab and Gujarat, should not be considered as specific, because they allegedly do not favour certain enterprises within these specially designated regions. However, the GOI admitted that not all kinds of production within those designated territories are eligible for the IIS. In fact, a regional restriction of a state subsidy scheme to all enterprises in specially designated areas within its territory by itself constitutes specificity. This kind of scheme clearly favour certain enterprises over others, because a company in an eligible region can obtain aid while its competitor located in a non-eligible region can not. Such a differentiation is not objective within the meaning of Article 3(2)(b) of the basic Regulation and therefore specific, since the schemes are not horizontally applied all over the State territory.

(137) An alleged compensation via the IIS for extra costs incurred due to insufficient infrastructure does not, contrary to the submission made by one exporter, change the evaluation as a countervailable subsidy. Such alleged costs have not been substantiated.

(138) The exporter, which claimed no longer to be eligible for benefits under the IIS, has not substantiated this allegation, e.g. by providing a confirmation of the GOG. To the contrary, it stated in its management reports for 2002 to 2003 (i.e. the review investigation period) that it was seeking extension of the IIS benefits until 2012. It should be noted, that such extension is possible under the IIS of Gujarat. The company has not provided any evidence that the GOG refused this extension.

(139) The argumentation of the GOI and the disclosure submissions have therefore not changed the assessment of the schemes, sales and purchase tax exemption, being countervailable.

(f) Calculation of the subsidy amount

(140) The subsidy amount was calculated on the basis of the amount of the sales and purchase tax normally due during the review investigation period but which remained unpaid under these schemes. In accordance with Article 7(2) of the basic Regulation, these amounts of subsidy (numerator) have then been allocated over total sales during the review investigation period as appropriate denominator, because the subsidy is not export contingent and it was not granted by reference to the quantities manufactured, produced, exported or transported. During this period three companies benefited from these schemes. They obtained subsidies of 2,4 % (two companies) and 3,1 %.

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2. *Electricity Duty Exemption scheme (EDE) of the Government of Gujarat*

(141) The State of Gujarat grants to eligible industrial enterprises, incentives in the form of exemption from the payment of electricity duty in order to encourage the industrial development of economically backward areas within this State.

(a) Legal basis

(142) The detailed description of the electricity duty exemption scheme applied by the Government of Gujarat (GOG) is set out in the Bombay Electricity Duty Act of 1958 and in particular in sections 3(2)(vi) and 3(2)(vii)(a) and (b) of this Act, as adapted by the Gujarat Adaptation of Laws Order of 1960.

(b) Eligibility

(143) Companies investing in backward areas, either by setting up a new industrial establishment or by making a large-scale capital investment in expansion of an existing industrial establishment, are eligible.

(c) Practical implementation

(144) The scheme is only available to companies having invested within certain designated geographical areas within the jurisdiction of the State of Gujarat. It also empowers the GOG to exclude any areas and any new industrial undertaking from the obligation to pay electricity duty. Furthermore, new industrial undertakings established in specially designated areas are, for a period of five years from the date of commencement of manufacturing, either exempted from the energy duty or levied with the duty at half the normal rate.

(d) Disclosure comments

(145) Upon disclosure one exporter, which received benefits under this scheme, made the submission that as per 4 June 2004 it allegedly no longer benefited from this scheme. In addition, another exporter claimed not to have used the scheme. However, it should be noted that in respect to this latter exporter this scheme has in any event not been included whilst establishing its subsidy amount.

(e) Conclusion on EDE

(146) This scheme is a subsidy within the meaning of Articles 2(1)(a)(ii) and 2(2) of the basic Regulation. It constitutes a financial contribution by the GOG, since this incentive decreases the state revenues which would be otherwise due. In addition, it confers a benefit upon the recipient company. The scheme is also regionally specific in the meaning of Articles 3(2)(a) and 3(3) of the basic Regulation since it is only available to companies having invested within certain designated geographical areas within the jurisdiction of the State of Gujarat. Furthermore, criteria and conditions of eligibility governing this incentive are not clearly set out by law, regulation, or other official document. It was confirmed during the verification visits, that one company made use of the scheme for a period of nine years. Although requested to do so, the company did not provide any information other than the Bombay Electricity Duty Act itself, which could have changed this analysis.

(147) The GOI argued that since the scheme has not been countervailed in another case in 1999, because it was considered horizontal in application within a whole State, it should not be countervailed now. To this end, it has only provided a notification of the GOM Industries, Energy and Labour Department of the State of Maharashtra concerning the Bombay Electricity Duty Act of 1958. However, this information does not concern the State of

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Gujarat. In addition, it should be noted that according to this notification, the EDE-incentive is apparently not available in all districts/areas of Maharashtra, thus still to be considered regionally specific. It was established that one exporter under investigation, which is situated in Gujarat, used this scheme during the review investigation period. Consequently, it is concluded that this scheme is countervailable for this exporter for the reasons set out in the previous recital.

(148) The exporter which claimed no longer to be eligible for benefits under the EDE, has not substantiated this allegation, e.g. by providing a confirmation of the GOG. On the contrary, it stated in its management reports for 2002 to 2003 (i.e. the review investigation period) that it was seeking extension of the EDE benefits until 2012, which it already successfully had done in the past for a total of nine years, despite the fact that according to the relevant legislation the exemption period for the EDE should only be five years. The company has not provided any evidence that the GOG refused this extension.

(f) Calculation of the subsidy amount

(149) The benefit to the exporting producer has been calculated on the basis of the amount of electricity duty normally due during the review investigation period but which remained unpaid under this scheme. In accordance with Article 7(2) of the basic Regulation, the amount of subsidy (numerator) has then been allocated over total sales during the review investigation period (denominator), because it relates to all sales, domestic and export, and it was not granted by reference to the quantities manufactured, produced, exported or transported. A subsidy margin of 0,2 % was so established for one company which received benefits under the EDE.

3. *Package Scheme of Incentives ('PSI') of the Government of Maharashtra (GOM)*

(150) It was found that the exporting producers did not obtain any countervailable benefits under the PSI.

IV. **Amount of countervailable subsidies**

(151) It has been the consistent practice to consider related companies as one single entity for the determination of a subsidy rate. This is because calculating individual subsidy rates might encourage circumvention of countervailing measures, thus rendering them ineffective, by enabling related producers to channel their exports to the Community through the company with the lowest individual rate. In order to avoid such a situation, an individual subsidy amount per scheme for each related company is first calculated and then a weighted average of these subsidy amounts is established and attributed to each of the related companies.

(152) Two exporting producers were regarded as related companies and attributed one single subsidy rate, because each of them is operationally in a position to exercise restraint on the other company. According to their Annual Reports, the key management persons of the two companies are relatives and are able to exercise 'significant influence' in each other's company. Significant influence according to Indian accounting standards means the participation in the financial and/or operating decisions of an enterprise. Such influence leads to the qualification as related according to the Indian accounting standards. Furthermore,

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according to European Customs law parties are deemed to be related when they control each other or are members of the same family ([1]).

(153) Upon disclosure one of these exporting producers disagreed with the related parties' analysis as set out above. It alleged without providing further evidence that no business relation between the two companies concerned exists. However, the exporting producer did neither contest the factual description outlined in recital 152 nor substantiated, why, despite these facts, both companies should not be considered as related parties. Consequently, the claim has to be disregarded.

The amount of countervailable subsidies in accordance with the provisions of the basic Regulation, expressed *ad valorem*, for the investigated exporting producers ranges between 25,3 and 35,1 %.

(154) Given the high level of cooperation, the subsidy rate for all non-cooperating companies is set at the level for the company with the highest individual rate, i.e. 35,1 %.

SCHEME →	ALS	DEPBS	EOUS	EPCGS	ECS	ITIRA-D	PSI	GIIS	PIIS	EDE	Total
COMPANY ↓	%	%	%	%	%	%	%	%	%	%	%
KDL Biotech Ltd	22,8	4,6	nil	negl.	1,0	nil	nil	nil	nil	nil	28,4
Nectar Life-sciences Ltd	25,8	3,2	nil	negl.	2,3	nil	nil	nil	2,4	nil	33,7
Nestor Pharma-ceuticals Ltd	22,0	3,3	nil	nil	negl.	nil	nil	nil	nil	nil	25,3
Orchid Chemicals & Pharmaceuticals Ltd	nil	nil	30,9	nil	1,1	nil	nil	nil	nil	nil	32,0
Ranbaxy Labora-tories Ltd	25,6	8,0	nil	negl.	negl.	1,5	nil	nil	nil	nil	35,1
Surya Pharma-ceutical Ltd	25,8	3,2	nil	negl.	2,3	nil	nil	nil	2,4	nil	33,7
Torrent Gujarat Biotech Ltd	24,8	nil	nil	nil	nil	nil	nil	3,1	nil	0,2	28,1

D. **LIKELIHOOD OF CONTINUATION OR RECURRENCE OF SUBSIDISATION**

(155) In accordance with Article 18(2) of the basic Regulation, it was examined whether the expiry of the measures in force would be likely to lead to a continuation or recurrence of subsidisation.

(156) As set out under recitals 21 to 153, it was established that during the review investigation period Indian exporters of the product concerned continued to benefit from countervailable subsidisation by the Indian authorities. In fact, the subsidy margins found during the review are higher than those established during the original investigation, which ranged from 0 to 15,3 % (recital 43 of Council Regulation (EC) No 2164/98). Only the subsidy scheme mentioned under recitals 115 and 116 (80 HHC ITA) has been discontinued, while in some other cases, individual companies have ceased to become eligible for certain schemes.

([1]) Article 143(1)(e)(h) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ L 253, 11.10.1993, p. 1). Regulation as last amended by Regulation (EC) No 2286/2003 (OJ L 343, 31.12.2003, p. 1).

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This has already been reflected in the calculation of the subsidy rates. The remaining subsidy schemes concerned give recurring benefits and there is no indication that these programmes will be phased out or modified in the foreseeable future. In the absence of such action, the exporters of the product in question will continue to receive countervailable subsidies. Each exporter is eligible for several of the subsidy programmes. In these circumstances, it was considered reasonable to conclude that subsidisation would be likely to continue in the future.

(157) Since it has been demonstrated that subsidisation continued at the time of the review and will likely continue in the future, the issue of likelihood of recurrence of subsidisation is irrelevant.

E. COMMUNITY INDUSTRY

I. Community production

(158) During the review investigation period, the like product was manufactured in the Community by the following Community producers: Sandoz, DSM, ACS Dobfar SpA and Antibioticos S.A.. Sandoz requested a combined expiry and interim review of the anti-subsidy measures in force. DSM supported the request. Sandoz and DSM fully cooperated with the review investigation. The other Community producers neither cooperated nor opposed the initiation of this combined expiry and interim review.

(159) One cooperating Community producer imported two types of the product concerned from India during the period considered, as well as from other third countries. This activity does not change its qualification as a producer in the meaning of Article 9(1) of the basic Regulation. Compared to its Community production of the like product, the quantities imported from India during the review investigation period represented only a relatively minor proportion of less than 10 %. Furthermore, its imports of the product concerned from India are only of a temporary nature since it is restructuring its production in the Community and it has started producing types of the like product which it has been importing from, *inter alia*, India.

II. Definition of the Community industry

(160) The like product produced by the cooperating Community producers during the review investigation period represented 70,5 % of the total Community production of the like product. These companies, therefore, constitute the Community industry within the meaning of Article 9(1) of the basic Regulation. They are referred to as the 'Community industry' hereafter.

F. ANALYSIS OF THE SITUATION ON THE COMMUNITY MARKET

I. Introduction

(161) The relevant Eurostat statistics for TARIC codes 2941 10 10 10, 2941 10 20 10 and 2941 90 00 30 together with data obtained from the verified questionnaire responses of the Community industry were used in the evaluation of volume and price trends.

(162) Community industry data were obtained from the verified questionnaire responses of the cooperating Community producers.

(163) Where necessary for reasons of confidentiality, indices are used to show the evolution of trends.

(164) Following disclosure, one exporter claimed that the injury analysis should have taken place on the basis of information for the Community market after the enlargement as per 1 May 2004, i.e. including the 10 new Member States.

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(165) Given that Article 11(1) of the basic Regulation stipulates that information relating to a period subsequent to the IP shall not, normally, be taken into account, and as enlargement took place after the IP, this submission has to be rejected. In any event, the information available indicates that there is no production of the like product in the 10 new Member States, which could alter the situation of the Community industry.

(166) In addition, as a general comment, it was submitted by one exporter without further substantiation that the injury analysis as disclosed did not consider all factors stipulated in Article 8 of the basic Regulation and was not based on positive evidence.

(167) Concrete claims to specific aspects of the injury analysis will be addressed in the context of the respective part of the analysis below. However, in reply to the general comment it should be mentioned that, (i) the basis for the injury analysis were verified facts supported by evidence and (ii) as set out below all import related factors of Article 8(2) of the basic Regulation, all 17 indicators of Article 8(5) of the basic Regulation related to the situation of the Community industry and all known factors other than subsidised imports of Article 8(7) of the basic Regulation have been assessed.

II. **Determination of the relevant Community market**

(168) In order to establish whether or not the Community industry suffered injury and to determine consumption and the various economic indicators related to the situation of the Community industry, it was examined whether and to what extent the subsequent use of the Community industry's production of the like product had to be taken into account in the analysis.

(169) Indeed, the like product is sold by the Community industry to both (i) unrelated customers and (ii) for further downstream processing to formulations in the same group of companies (related entities). Sales to unrelated entities were considered to form the 'free market'. Sales to related entities for further downstream processing were considered as captive use, because of a lack to choose the supplier freely.

(170) For the following economic indicators relating to the Community industry, it was found that a meaningful analysis and evaluation had to focus on the situation prevailing on the free market: sales volume and sales prices on the Community market, market share, growth, profitability, export volume and prices. Where possible and justified, these findings were subsequently compared with the data for the captive market, in order to provide a full picture of the situation of the Community industry.

(171) As regards other economic indicators, however, it was found on the basis of the investigation, that they could reasonably be examined only by referring to the whole activity. Indeed, production (for both the captive and the free market), capacity, capacity utilisation, investments, stocks, employment, productivity, wages, ability to raise capital depend upon the whole activity, whether the production is captive or sold on the free market.

(172) Two exporters contested the analysis in regard to the free and captive markets. They argued that it was not objective within the meaning of Article 8(2) of the basic Regulation.

(173) However, it is considered that the present investigation established a clear separation between the free and the captive markets. In fact, the captive buyer had no choice but to buy from its captive supplier. Under such circumstances the analysis has to focus primarily on the free market, since sales on the captive market were not subject to competition with products sold on the free market and were therefore not affected by the

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subsidised imports. It is further noted that the injury analysis has despite this clear separation not ignored the captive market. To the contrary, the situation of both markets has been juxtaposed, as set out below, in order to reach an objective final determination on the state of the Community industry as a whole. Consequently, the claim has to be rejected.

III. **Community consumption**

(174) In calculating the apparent Community consumption of the product concerned and the like product, the Commission added:

— the volume of total imports of the product concerned and the like product into the Community as reported by Eurostat,

— the volume of sales of the like product in the Community produced by the Community industry,

— the volume of captive use of the like product by the Community industry,

— and, on the basis of the information contained in the review request, the estimated volume of sales of the like product in the Community by the other known Community producers.

As shown in the table below, Community consumption of the product concerned and the like product increased by 51 % over the period considered.

Consumption (in kg)	1999	2000	2001	2002	IP
Product concerned and like product	2 482 053	3 240 481	3 254 464	3 801 666	3 745 549
Index	100	131	131	153	151

(175) The GOI and one exporter submitted that the consumption details as set out above should have been disclosed in more detail, notably per Community producer and separating free and captive consumption. Further, it was argued that the credibility of the data with regard to Community producers other than the Community industry has not been checked.

(176) It is noted that the Community industry consists only of two parties of which only one operates on the captive market. Therefore, in view of Article 29 of the basic Regulation (confidentiality) it is not possible to disclose further details. Concerning data for Community producers other than the Community industry it should be recalled that these producers did not cooperate with the investigation. In the absence of any other information available concerning their contribution to the Community consumption, the data provided in the review request were used. Furthermore, no party provided conflicting information nor did the verification raise doubts as to their credibility.

IV. **Imports of the product concerned into the Community**

1. *Volume, price and market share of imports from India*

Imports (in kg)	1999	2000	2001	2002	IP
Product concerned	36 800	47 400	72 100	101 800	95 200
Index	100	129	196	*277*	259

(177) The volume of imports of the product concerned increased significantly throughout the period considered. Imports in the review investigation period were 159 % greater than in 1999. These imports rose much faster than the general growth in consumption of 51 %, the increase in imports from third countries other than

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India of 13 % and the sales increase of the Community industry of 80 % 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 review investigation period represented significantly more than 4 % of the total imports of the like product in the Community.

Average import price per kg in EUR	1999	2000	2001	2002	IP
Product concerned	34,66	33,94	35,51	36,57	35,34
Index	100	98	102	106	102

(178) The average import price of the product concerned increased slightly with a peak in 2002 and subsequently fell back to the level before 2001.

EC market share	1999	2000	2001	2002	IP
Product concerned	1,5 %	1,5 %	2,2 %	2,7 %	2,5 %
Index	100	99	149	181	171

(179) Indian imports' market share on the Community market grew by 71 % over the period considered. It was submitted that the indexed increase should only amount to 66 instead of 71 %. On the basis of the rounded down market share in percentage this submission is arithmetically valid. Nevertheless, the above index is correctly calculated. For the purpose of precisely indexing the market share percentage points have not been rounded. This can be seen when comparing indexed figures and percentage points for 1999 and 2000. Furthermore, this methodology has consistently been applied in all tables of this Regulation.

2. *Price undercutting*

(180) For the determination of price undercutting, price data referring to the review investigation period were analysed. To this end, sales prices of the Community industry to their first unrelated customers on an ex-works basis have been compared with sales prices of the Indian exporting producers to their first independent customers in the Community on a cif import basis, in both cases after deduction of discounts, rebates and commissions.

(181) Based on the questionnaire replies, different product sub-types of the product concerned and the like product could be defined for comparison purposes based on the product type (i.e. amoxicillin trihydrate, ampicillin trihydrate and cefalexin) and its variants (i.e. powder or compacted form).

(182) The Community industry's sales prices and the cif import prices of the exporting producers were compared at the same level of trade, namely traders/distributors within the Community market, on the basis of weighted average prices per product subtype. During the review investigation period, virtually all sales of the exporting producers in the Community were made via traders/-distributors.

(183) The results of the comparison, when expressed as a percentage of the Community industry's sales prices during the review investigation period, showed significant price undercutting margins. On an exporting producer basis these margins were found to range between 11,5 and 17,1 %. Consequently, these price undercutting margins indicate continuous price pressure exerted by the Indian imports on the Community market despite the existence of measures.

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V. **Economic situation of the Community industry**

1. *Production, capacity and capacity utilisation*

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	1999	2000	2001	2002	IP
Index production	100	121	127	154	160
Index capacity	100	117	123	148	157
Index capacity utilisation	100	103	103	104	102

(184) As a consequence of the steady increase in Community consumption, the Community industry's production of the like product increased continuously over the period considered. This positive trend became more pronounced during the review investigation period when one of the cooperating Community producers started the production in the Community of one type of the like product which it only had imported previously.

(185) The production capacity of the Community industry showed the same positive trend as its production. This is partly due to important investments in a new production plant which were made during the review investigation period by one of the cooperating Community producers.

(186) The capacity utilisation rate has been stable at a relatively high level over the period considered. Such a high rate of utilisation is common in this type of industry, because of the continuous batch process utilised for the manufacture of the like product and in the case of the Community industry in addition due to its captive use.

(187) Three exporters submitted upon disclosure that the development of these factors does not show any sign of injury. However, it is noted that the conclusion on injury has not been based on these factors.

2. *Sales volume, sales price, market share and growth*

(a) Free market sales

Free market sales in the Community	1999	2000	2001	2002	IP
Index volume	100	170	162	192	180
Index average sales price	100	94	94	94	95
Index market share	100	130	123	125	120

(188) Based on the favourable evolution of Community consumption, the volume of free market sales of the Community industry in the Community increased over the period considered. The Community industry's free market sales volume showed a higher growth than the growth of Community consumption during the period considered. However, between 2000 and the review investigation period, the increase of the Community industry's free market sales volume was less than the increase of the Community consumption. The large increase of the Community industry's free market sales volume between 1999 and 2000 is mainly attributable to the taking over of another Community producer by the Community industry. Nevertheless, the 80 % increase of the free market sales volume of the Community industry in the Community during the period considered was less pronounced than the 159 % increase of imports of the product concerned during the same period.

(189) The GOI and four exporters pointed to the overall increase in sales of the Community industry as a positive sign and contended that it does not support an injury finding. It was further submitted that a comparison of the Community industry's performance with the one of Indian exporters in relative terms would be misleading due to significant difference in the size of the competitors.

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(190) In reply to these submissions it should be noted that sales volume development has not been considered in the present case as a key factor indicating the extent of injury suffered. However, since the growth in sales for the Community industry can largely be attributed to a take over in 2000, i.e. the integration of the sales of a former competitor as opposed to new sales, it cannot be considered as an indicator for the absence of injury either. Furthermore, in 2001 and during the IP the sales volume of the Community industry on the free market decreased.

(191) Despite growing demand indicated by the increased Community consumption, average free market sales prices of the Community industry declined from 1999 to 2000. This indicates price pressure exercised by competitors. Prices remained practically stable at the lower level up to the end of the review investigation period although demand further grew.

(192) The GOI and three exporters claimed that the price development should be considered as positive for the Community industry.

(193) This claim cannot be accepted. In fact, during the period considered the Community industry was at no time in the position to achieve non-injurious price levels.

(194) The Community industry increased its market share by 30 % from 1999 to 2000 to the detriment of the market shares held by the other Community producers and exporters from third countries other than India. However, the Community industry's market share fell from 2000 to the review investigation period when it reached its lowest level since 1999. This period coincided with a strong acceleration in growth of the share of imports from India.

(195) One exporter argued that the decrease in market share of the Community industry in 2001 and the IP would be insignificant in light of the increase in 2000 and it further pointed to its overall increase in market share over the period considered.

(196) However, this submission cannot be accepted, because it is based on an isolated focus 1999 versus the IP, which moreover neglects the exceptional nature of the increase in the year 2000. No explanation has been provided by this exporter why this obviously digressive development of the Community industry's free market share after 2000 should not be considered as negative.

(197) In this context, two other exporters argued that, given the more positive development on the captive market, this would be the result of a deliberate choice of the Community industry to opt for the more profitable formulations market.

(198) This argument cannot be accepted as it ignores the increased stock which could have been sold to the free market.

(b) Captive sales

Captive sales in the Community	1999	2000	2001	2002	IP
Index volume	100	88	124	180	189
Index average sales price	100	102	104	102	99
Index market share	100	67	95	117	125

(199) While the Community industry's sales volume on the free market increased by 80 % over the period considered, sales on the captive market increased by 89 %. In particular since 2001 an expansion on the Community industry's captive market can be observed, whereas its situation on the free market remained practically unchanged. This coincides with a strong increase of imports from India on the free market, which implies that the

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Community industry used its option to switch markets at least to a certain extent in order to avoid direct competition with subsidised imports of the product concerned at low prices.

(200) A similar pattern can be observed by examining comparatively the trends in growth of the Community industry's market share both on the free and on the captive market. This again indicates an increasing strategic relevance of the captive market for the Community industry since 2001.

(201) Whereas prices on the free market started to decrease already in 2000, the transfer prices on the captive market continued to increase moderately until 2001. However, with a time lag, starting in 2002 prices on the captive market showed a downward trend as well. This could be explained by the fact that transfer prices are generally not adjusted that quickly, because they are not shaped by direct competition. It is noted that the overall movement in prices of free market and captive sales during the period considered are similar.

3. *Stocks*

Stocks	1999	2000	2001	2002	IP
Index	100	74	100	141	161

(202) The Community industry's year-end stock levels in relation to production dropped by 26 % from 1999 to 2000 but then sharply increased by more than 115 % towards the end of the review investigation period. This increase coincided in time with a doubling of the Indian imports over the same period.

(203) The GOI and four exporters contended that the increase in stocks was not abnormally high, thus not showing injury. Furthermore, the methodology of using year-end stock levels was contested. Instead, other approaches, like moving average stock levels or stocks in terms of number of days sales, were suggested as more appropriate indicators.

(204) In reply to this submission it should be noted that the standard methodology of the Community to quantify stock levels was applied. The approach is objective and in line with WTO obligations. The claim for the use of another methodology was not substantiated. Thus, the suggestion to choose an alternative methodology is refuted. Secondly, on the basis of verified facts it cannot be denied that stock levels increased sharply.

4. *Profitability*

(a) Free market sales

Profitability (Free market sales in the Community)	1999	2000	2001	2002	IP
Index	– 100	113	239	146	87

(205) The profitability of the Community industry expressed in terms of return on net sales on the free market improved significantly from a loss-making situation in 1999. Following the imposition of the existing measures in 1998, profitability increased up to 2001, but then deteriorated sharply towards the review investigation period. In addition, it is pertinent that the Community industry was at no time during the period considered in a position to reach even half of the profit margin, which, according to the findings in the original investigation, it could reasonably have obtained in the absence of subsidised imports, i.e. 15 %. The development of the profitability and in particular its decline since 2002 is considered

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very important as it affects the level of financial resources available to the Community industry for investments in research and development that are necessary for further improvements to the production processes of existing products and the development of new products.

(206) The GOI and four exporters submitted comments on the profitability analysis. It was submitted that, (i) the Community industry achieved reasonable profitability levels, (ii) a non-injurious profitability margin of 10 % (see recital 260), would be too high and instead 5 % is sufficient, (iii) the profitability decline could be essentially attributed to the investment policy of the Community industry, (iv) the start up activities of one party qualify for self inflicted injury and (v) the profitability development should have been disclosed for each Community producer.

(207) It is reiterated that the Community industry was at no time, during the period considered, in a position to achieve reasonable profit margins as set out above. Thus, the deterioration since 2002 only worsened an already unsatisfactory situation. Further, in view of the special circumstances of the pharmaceutical sector a profit margin of 5 % is considered not to be sufficient. The Community industry has provided evidence that it can achieve for comparable bulk drugs profit figures of above 10 %. Such profit levels are necessary to provide the pharmaceutical sector sustainably with the necessary financial resources to carry on pharmaceutical innovation with its high inherent economic risks. In addition, the lack of reasonable profit margins achieved by the Community industry cannot just be explained by its investment policy. Only one Community producer was in a start up phase during the period considered, but neither party achieved reasonable profit margins. Finally, in view of Article 29 of the basic Regulation ('confidentiality') it is not possible to disclose further details.

(b) Captive sales

Profitability (Captive sales in the Community)	1999	2000	2001	2002	IP
Index	100	482	564	431	325

(208) The profitability trends of captive sales follow the same line, although on a higher level, i.e. increasing until 2001 and consecutively diminishing. The differences in profitability levels can mainly be attributed to the facts that, (i) selling general and administrative costs (SG & A) for captive sales are lower, because they do not necessitate marketing costs, and (ii) to higher transfer prices as compared with prices on the free market. In the absence of the higher profit levels achieved on captive sales, the industry would be in a worse overall financial situation.

5. *Investments, return on investment, cash flow and the ability to raise capital*

	1999	2000	2001	2002	IP
Index investments	0	100	300	1 123	351
Index return on investment	– 100	160	286	161	91
Index cash flow	100	186	71	160	33

(209) After 1999, the Community industry continually made investments for the manufacture of the like product. In particular

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in 2002, it strongly invested in new production techniques in order to remain competitive, improve environmental and security standards and increase production capacities.

(210) From 1999 to 2001, i.e. after the imposition of measures, return on investment improved. Since then, however, it strongly declined. Although this can be partially attributed to the start-up phase of one new production plant, the unsatisfactory profitability situation, caused by competitors' price pressure, contributed to this situation.

(211) During the period considered, the fluctuations of the cash flow generated by the sales of the like product are to a certain extent the consequence of the Community industry's investment policy during this period. However, the drastic decline in cash flow between 2002 and the review investigation period cannot only be explained by this factor. Price pressure exercised by competitors contributed to the unsatisfactory cash flow development as well.

(212) The Community industry did not experience any significant difficulty to raise capital.

(213) Upon disclosure it was submitted by the GOI and exporters that, (i) the data above should have been disclosed separately for each Community producer separately, (ii) the ability to raise capital did not support an injury finding, (iii) the cash flow allegedly cannot follow this trends in view of the trends for return on investments and profitability and should therefore be re-evaluated and, (iv) without further substantiation the analysis would be insufficient.

(214) In reply to these submissions it should be recalled that in accordance with Article 29 of the basic Regulation (confidentiality) the data cannot be disclosed separately for each Community producer. In regard to the ability to raise capital, no negative conclusion on injury has been drawn. As far as the submission regarding cash flow is concerned, after careful re-examination the respective index as set out above is confirmed. In regard to the general submission of insufficient analysis in respect of above factors it should be considered that, (i) the injury finding is not essentially based on these indicators and (ii) that the submission has not substantiated why a further elaboration could still change the overall finding.

6. *Employment, productivity and wages*

	1999	2000	2001	2002	IP
Index employment	100	101	101	187	185
Index productivity	100	120	127	83	86
Index wages	100	103	106	185	178

(215) Employment for the like product remained stable until 2001 but increased considerably in 2002 due to the setting up of a new production plant in the Community by one of the cooperating Community producers. The total cost for wages followed the same trend. However, productivity per worker, although increasing until 2001, declined in 2002. This can be clearly attributed to the start-up phase of one new production plant. No evidence of a decrease of efficiency was found during the investigation.

(216) The GOI and four exporters submitted that the trends for employment, productivity and wages are not supportive for a finding of material injury in the present case.

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(217) However, it should be noted, that no such conclusion has been made for employment and productivity. With regard to wages, only the total amount of wages increased. On average per employee, wages even decreased slightly (see table below). This shows that, (i) no positive development per employee took place and (ii) the determination of the Community industry to be cost efficient.

	1999	2000	2001	2002	IP
Index wages per employee	100	103	105	*99*	96

7. *Magnitude of subsidy and recovery from past subsidisation*

(218) Given the volume and in particular the prices of the subsidised imports from India, the impact of the actual amount of subsidisation, which is significant, cannot be considered to be negligible.

(219) In this context the GOI and three exporters submitted that the subsidy margins have been overstated.

(220) However, as set out in recitals 153 and 154 above, the investigation has shown that the amount of countervailable subsidies expressed *ad valorem* for the investigated exporting producers ranges between 25,3 and 35,1 %. This is a clear finding of significant subsidisation.

(221) The situation of the Community industry improved in the period considered. However, it did not fully recover from past subsidisation and continues to be weak.

VI. **Conclusion on the economic situation of the Community industry**

(222) Between 1999 and the review investigation period the volume of the subsidised imports of the product concerned increased significantly by 159 % and their share of the Community market grew by 70 %. This development contrasts with the much less favourable development for exporters from other countries and the Community industry. Imports from other countries to the Community market grew only by 7 % during the period considered and their market share even decreased by 29 %. The sales volume of the Community industry grew by 80 % and its market share by 20 % during the period considered. However, this positive development can essentially be attributed to the take over of another Community producer by the Community industry in 2000. Since 2001, the trend in market share development for the Community industry is even digressive. In particular, it can be observed that as of 2000 the Community industry did not, in relative terms, keep pace with the increase of Community consumption and the strong evolution of its Indian competitors on the Community market.

(223) In this context, it is noted that the average prices of subsidised imports from India were consistently lower than those of the Community industry during the period considered. Moreover, during the review investigation period, the prices of the imports from the country concerned undercut those of the Community industry. On a weighted average basis, price undercutting was in the review investigation period between 11,5 and 17,1 %.

(224) As a consequence of this price pressure exercised by subsidised Indian imports, the Community industry was at no time during the period considered in a position to reach non-injurious price levels. Although profitability of the Community industry initially improved after the imposition of measures, it has deteriorated since 2001 and its actual level is well below what it could reasonably have achieved in the absence of subsidised imports,

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i.e. 10 % on turnover (see recital 260). However, only an acceptable level of profitability will allow the Community industry to remain viable in a sustainable way.

(225) This negative tendency for the Community industry is further reflected in the picture displayed by the trends in return on investment and cash flow.

(226) Regarding captive sales, the option for the Community industry to sell part of its production on the captive market provided it with the opportunity to maintain high levels of capacity utilisation. High capacity utilisation contributes to decrease cost of production because of economies of scale. Furthermore, as outlined above, the trends in sales volumes, prices and market share between the free and captive markets did not diverge significantly. In the absence of the higher profits achieved by the industry on captive sales, the industry would be in a worse financial situation. Thus, the captive use did not contribute to the injurious situation. To the contrary, without a captive market the injurious situation of the Community industry might even have been worse.

(227) Two exporters contended that it cannot be concluded that the captive market sales did not contribute to the injurious situation of the Community industry, because captive sales prices are allegedly unreliable, i.e. the profitability of captive sales would be artificially too high.

(228) However, higher profitability on the captive market was not mainly the result of higher transfer prices, but in particular attributable to lower SG & A (see recital 208). Furthermore, this submission neglects the effect of economies of scale. Thus, it cannot change the conclusion that the captive sales did not contribute to the injury.

(229) As a result, it was confirmed that, overall, the Community industry has suffered material injury within the meaning of Article 8(1) of the basic Regulation. It should be recalled that Article 8(5) of the basic Regulation does not mandate all economic indicators for the Community industry to be negative in order to establish material injury. Moreover, not all economic indicators have the same weight. Profitability, though, is one of the key economic indicators, since it constitutes the ultimate goal of every economic undertaking. In the present case, insufficient profitability levels were established. Another important injury indicator having a major impact on profitability is the price levels. The Community industry was never in a position to achieve non injurious price levels during the period considered on the free market due to external price pressure, mainly from heavily subsidised Indian imports.

VII. **Effect of the subsidised imports**

(230) In 2000, and most likely due to the imposition of measures, India lost its position as the second largest exporter to the Community market for an interim period, whereas notably Omani exporters gained market share. However, since then, Indian exporters not only have recovered their position, but in the review investigation period they even took over the lead as the largest exporter to the Community.

(231) This growth in volume of the subsidised imports from India, in particular since 2002, coincided with the fact that in 2002, the profitability for the Community industry decreased as compared with 2001, i.e. by around 36 %. It was found that, during this time, one Community producer set up a new plant and found itself in a start-up phase which may have had an effect on its profitability in that period. However, it was also found that the other Community producer, which was not in a start-up phase,

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found itself confronted with a significant decrease in profitability, i.e. by 17 % as compared with 2001 which further deteriorated during the review investigation period. Moreover, as stated under recital 207, at no point in time was the Community industry in a position to reach non-injurious price levels. To the contrary, again starting in 2002, the Community industry had to adjust prices downwards in order to defend its market share.

(232) Upon disclosure, three exporters submitted that the Indian imports share on the Community market, 2,5 % during the IP, and their volume in relation to total imports, 8,4 % during the IP, both of which slightly decreased as compared with 2002, would be too small and marginal to have any injurious impact in particular in view of a bigger market share hold by the Community industry. Furthermore, it was argued that an analysis expressed in relative terms would be misleading, because India started from a very low level, 1,5 % market share and 3,7 % import volume in 1999.

(233) In reply to this submission it should be considered that both, India's market share and its import volume during the IP, are well above the *de minimis* thresholds set in Articles 10(11) and 14(4) of the basic Regulation, thus can have a causal effect. According to Article 8(6) of the basic Regulation, a causal effect can be manifested alternatively either by the import volume or by the price levels of subsidised imports. Such price level impact can clearly be observed in the present case. As already established in the course of the original investigation, the product under investigation, a bulk commodity, is highly price sensitive and reacts swiftly to any downward pressure. In such cases small quantities can influence prices on the market. In fact, over the period considered the Indian prices set on average the price pressure benchmark in this case.

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

VIII. **Impact of other factors**

1. *Imports from other third countries*

Third country imports	1999	2000	2001	2002	IP
Volume (kg)					
India	36 800	47 400	72 100	101 800	95 200
Index	100	129	196	277	259
Oman	77 400	119 700	85 100	88 400	93 500
Index	100	155	110	114	121
USA	11 100	2 800	16 600	106 300	70 000
Index	100	25	149	932	631
China	0	3 900	21 800	75 600	63 000
Index	0	100	559	1 938	1 615
South Korea	19 800	75 300	40 200	54 500	45 000
Index	100	380	203	275	227
Singapore	0	4 600	128 300	62 700	37 700
Index	0	100	2 789	1 363	820
Average import price per kg (EUR)					
India	34,66	33,94	35,51	36,57	35,34

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Third country imports	1999	2000	2001	2002	IP
Index	100	98	102	106	102
Oman	36,10	36,21	39,30	39,15	38,34
Index	100	100	109	108	106
USA	74,87	115,35	108,90	101,40	48,74
Index	100	154	145	135	65
China	0,00	188,97	116,06	68,22	58,59
Index	0	100	61	36	31
South Korea	34,84	37,52	37,66	45,59	48,06
Index	100	108	108	131	138
Singapore	0,00	76,88	57,47	57,47	51,28
Index	0	100	75	75	67

(235) Imports of the product under consideration from countries other than India increased by only 7 % between 1999 and the review investigation period, i.e. well below the rate of increase of the Community consumption. Amongst these countries, Oman, the United States of America (USA), China, South Korea and Singapore are the main suppliers to the Community market. However, their average import prices were considerably higher than the Indian import prices and, except for the import prices from Oman, also the Community industry prices. Import prices of Oman are at comparable levels to the Community industry's prices, but Oman's increase in market share over the period considered was much less pronounced than that for the other third countries.

(236) Following disclosure, it was submitted by the GOI and two exporters that the countervailing duty in place for Indian imports should have been taken into consideration when comparing average sales prices. This would allegedly lead to practically similar Indian and Omani price levels. In addition, it was noted that average prices from some third countries, notably the USA and China, decreased significantly over the period considered whereas, *inter alia*, Indian prices increased. Furthermore, it was submitted by another exporter that the volume decrease in Indian imports between 2002 and the review investigation period has not been properly taken into account in the analysis, that other third countries were the main suppliers and that average prices from South Korea and India were similar from 1999 to 2001.

(237) With regard to the original countervailing duty in place, it should be noted that the vast majority of imports from India were either subject to a zero duty rate or to a duty rate which still leads to lower average landing prices than the average Omani price levels. Thus, on average Omani imports did not exercise the same degree of price pressure. In addition, import prices from all other third countries as well were on average higher over the period considered than Indian price levels, again clearly identifying India as main source of price pressure. Volume wise, the observation is correct that India was not the only source of significant imports during all the time of the period considered. However, it is recalled that India is the only country subject to measures. This, of course, had an impact on the trade flow of the product concerned. Moreover, despite measures, Indian imports grew strongly since 2001 and India recovered its position as second largest exporter in 2002 to become during the IP even the biggest. Therefore, the small decrease in Indian imports between 2002 and the IP had no effect on the market, which

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eventually rewarded the Indian pricing policy. Consequently, these arguments cannot be accepted. It was therefore confirmed that imports from third countries could not have caused any injury to the Community industry which would break the causal link between the subsidised imports from India and the injury suffered by the Community industry.

2. *Development of consumption of the Community market*

(238) Consumption of the product under investigation on the Community market increased by 51 % during the period considered. Thus, the injury suffered by the Community industry cannot be attributed to a contraction of demand on the Community market.

3. *Export activity of the Community industry*

(239) The export performance of the Community industry grew by 16 % during the period considered. The Community industry's export prices were on average 10 to 15 % higher than the sales prices in the Community. Thus, the Community industry's export activity could not contribute to its injurious situation.

(240) In this context it was submitted by the GOI and one exporter that the Community industry in their questionnaire replies mentioned stiff competition due to Indian competitors on third country markets resulting for the Community industry in low prices and loss of market share in third countries, which prima facie would contradict above finding. Thus, on the basis of this assessment of the Community industry there would be no injury on the Community market or no causal link with Indian imports.

(241) In this respect, it is noted that given the worldwide growth of the market for such products, there is no contradiction between any decrease of export prices and loss of market share of the Community industry in third countries and the fact that the volume of such exports had actually increased and that their prices were higher than the Community industry's prices for sales in the Community. Therefore, although the export performance of the Community industry could have been better without a low priced subsidised Indian exports competition in third countries markets, there is no indication that, because of its export performance, the Community industry was not subject to injurious price competition on the Community market essentially caused by the low priced subsidised imports from India. Thus the argument should be rejected.

4. *Competitiveness of the Community industry*

(242) The Community industry is an important competitor for the product under consideration as demonstrated by its market share and has constantly invested to maintain the state-of-the-art in its production. The drop in productivity per worker on a per kg basis after 2001 can be exclusively attributed to the start-up phase of a new production plant of one Community producer. It is therefore only of a temporary nature. Consequently, no evidence was found that lack of competitiveness could have broken the causal link between imports from India and the injury suffered by the Community industry.

5. *Captive Use*

(243) As stated in recital 226 above, it is considered that the captive use did not contribute to the injurious situation. To the contrary, without a captive market the injurious situation of the Community industry might even have been worse.

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G. LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY

(244) In accordance with Article 18(2) of the basic Regulation, it was examined whether the expiry of the measures in force would be likely to lead to a continuation or recurrence of injury.

(245) As set out under recitals 161 to 243 above, it was established that during the review investigation period and despite the measures in force, the Community industry continued to sustain injury caused by the subsidised imports of the product concerned. The injury elimination level found during the present investigation ranged between 17,3 and 48,1 % and is higher than that established during the original investigation (between 12,6 and 28,9 %), despite the fact that in this review the reasonable profit margin for the Community industry was reduced by one third as compared with the original investigation (see recital 260 below). Furthermore, the investigation established that, despite domestic sales and exports to other countries, there is still significant spare capacity for the products under investigation in India, in particular with exporters which are subject to relatively high duty rates in the Community. It was, therefore, considered reasonable to conclude that subsidised low priced imports from India would further increase and, consequently, injury would be likely to continue in the future, should the measures lapse.

(246) Since the Community industry continues to suffer material injury due to the subsidised imports despite the existence of measures, it was not necessary to analyse further the likelihood of recurrence of injury.

H. COMMUNITY INTEREST

I. Introduction

(247) It was examined whether compelling reasons existed which would lead to the conclusion that it is not in the Community interest to continue applying measures in this particular case. For this purpose, and pursuant to Article 31(1) of the basic Regulation, the likely impact of measures for all parties concerned in the investigation was considered. In order to assess whether it is in the interest of the Community that measures be continued, questionnaires were sent to users and importers of the product concerned and to upstream suppliers of raw materials used in producing the like product.

II. Interest of the Community Industry

(248) As has been shown above, the Community industry producing the like product has been continuously increasing its production. This was possible thanks to the constant growth of investments made by the Community industry in order to keep its ability to compete, as it belongs to the main competitors for the product under investigation. It is recalled that during the review investigation period, the Community industry expanded its production facilities, set up one new factory within the Community and prepared plans for setting up of a further new facility in the Community. This process of continuing investments by the Community industry is being undermined in particular by the unsatisfactory development of its profitability, caused by the continuous price pressure exerted by the Indian imports of the product concerned on the Community market.

It is considered that without measures in place to correct the effects of the subsidised imports, the Community industry will continue to face price undercutting and thus price depression with its negative impact on profitability, return on investments and cash flow. Eventually, this could even put the viability of the Community industry at risk. Consequently, it was considered, that

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a lapse of the measures would not be in the interest of the Community industry.

III. **Interest of the importers/traders**

(249) Questionnaires were sent to all known importers/traders of the product concerned but only one out of nineteen replied. However, the cooperating importer did not comment on the likely impact of the continuation of measures on its business. On the basis of the information received, it appears that importers/traders in the Community purchase the product under investigation from a variety of sources. Since there are no fundamental quality differences between the product imported from India and the one obtained from any other sources, it is considered that the importers/traders in the Community would, if measures are to continue, have no difficulty obtaining the product from a variety of other sources. Furthermore, the cooperating importer is actively involved in trading a big variety of other products and is therefore not vitally depending on the product concerned. Although its sales of the product concerned over the period considered increased strongly (seven times in volume), these sales only represent a small part of its total turnover (ca. 1,4 % in the review investigation period). Finally, the importer did not indicate that the continuation of measures would have any impact on employment, since import activities are not labour intensive.

(250) Although importers/traders may not be in favour of measures, it can be concluded on the basis of the information available, that such possible interest in allowing measures to expire does not outweigh the actual interest of the Community industry to continue redressing unfair and injurious Indian trading practices as summarised in recital 248.

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

(251) In order to assess the likely effect that the continuation 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 two replies were received. These up-stream suppliers, which provide in particular glucose and dextrose to the Community industry, are in favour of the continuation of measures. Although the Community industry does not belong to the most important customers of these up-stream suppliers, this business still contributes to the employment and profitability of the up-stream suppliers. If the Community industry would curb or even stop production of the like product, such beneficial business-relation would be at risk.

(252) Therefore, and in the absence of any information to the contrary, it is concluded that the continuation of measures would comply with interests of up-stream suppliers.

V. **Interest of users**

(253) Questionnaires were also sent to five known Community users of the product concerned, i.e. pharmaceutical companies. The Commission requested, amongst other information, their comments on whether the maintenance of the measures in force would be in the interest of the Community and how these measures would continue to affect them. However, no questionnaire replies were received and thus no comments were made known. Taking into consideration that users could obtain the product under investigation not only from India but from other sources as well, and given the lack of any information on the economic impact of measures on the user's businesses (e.g. employment, profitability, investment policy), it was not possible to establish any user's interest of tantamount importance.

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(254) Although, despite their silence, users might not be in favour of measures, on the basis of the information available by cooperating interested parties, no substantiated user interest in discontinuing measures could overweight the actual interest of the Community industry to continue redressing unfair and injurious Indian trading practices as summarized in recital 248.

(255) One exporter claimed that Community consumers' interests have not been properly taken into account and that therefore the Community interests analysis would not be fully in accordance with Article 31 of the basic Regulation. It is argued that consumers' interests could be negatively affected, if producers of formulations passed through any alleged price increase due to increased costs in producing final dosage forms.

(256) In response to this submission it should be recalled that no consumer organisation has made any comments in the course of this investigation. In addition, Community consumers are in general medically insured. No substantiated evidence is at hand, if medical insurance fees could be adversely affected to any significant extent by an alleged increase in the costs of certain antibiotics formulations. Furthermore, it is unclear to which extend manufactures of certain antibiotics formulations, i.e. users, are in the position to pass through an increase of costs. Under such circumstances, it is not possible to establish any adverse Community consumers' interests of tantamount importance.

VI. **Conclusion**

(257) Having examined the various interests involved, it is considered that from an overall Community interest perspective, no interest overweighs the Community industry's interest to uphold measures. The effects of the continuation of the measures can be expected to afford the Community industry the opportunity to improve its profitability to a reasonable level and carry on its investment program within the Community with the resulting positive effects on employment and market competitiveness. On the other hand, on the basis of the information available, no opposing interests of other Community parties concerned (i.e. importers/traders, upstream suppliers, users and consumers) of tantamount importance were found.

I. COUNTERVAILING MEASURES

(258) In view of the conclusions reached with regard to continued subsidisation, injury and Community interest, it is considered appropriate to maintain countervailing measures on imports of the product concerned from India. For the purpose of determining the level of these measures, account was taken of the subsidy rates found during the review investigation period and of the amount of duty necessary to eliminate the injury sustained by the Community industry.

I. **Injury elimination level**

(259) The necessary price increase to eliminate injury was determined on a per-company basis by comparing the weighted average import price of the product concerned with the non-injurious price of the like product sold by the Community industry on the Community market. The price difference was expressed as a percentage of the CIF import value.

(260) The non-injurious price has been obtained by taking the weighted average cost of production of the Community industry together with a profit margin of 10 %. This profit margin, which is one-third less than that taken in the original investigation (see recital 205 above), reflects the achievable profit margin for similar product groups of the Community industry not subject to unfair competition. In view of increased competition, it was considered

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an appropriate and reasonable minimum instead of the 15 % profit margin established in the original investigation. This profit would allow the Community industry to further invest in research and development in order to remain competitive.

II. **Form and level of measures**

(261) In the absence of particular circumstances, the imposition of the standard duty type, i.e. *ad valorem*, was considered appropriate.

(262) With regard to the level of duty, in the case of four of the cooperating exporters the subsidy rate was higher than the injury elimination level. Thus in accordance with Article 15(1) of the basic Regulation, the lesser duty reflecting the injury elimination level was considered adequate to remove such injury to the Community industry insofar as imports from these four exporters are concerned. The rates of duty applicable to imports from these exporters should range from 17,3 to 30,3 %. As far as the other three exporters are concerned, the injury elimination levels were higher than the subsidy rates established, so that measures in respect of those companies should be based on the latter. The rates of duty applicable to imports from these exporters should range from 25,3 to 32 %. Given the fact that the level of cooperation of Indian exporters was high (over 80 %), the level of duty for all other companies should be set at the level of the company with the highest individual duty rate, i.e. 32 %.

(263) The individual company countervailing duty rates specified in this Regulation reflect the situation found during the review with respect to the cooperating exporters. Thus, they are solely applicable to imports of the product concerned produced by these companies. Imports of the product concerned manufactured by any other company not specifically mentioned in the operative part of this Regulation, including entities related to those specifically mentioned, cannot benefit from these rates and shall be subject to the duty rate applicable to 'all other companies'.

(264) Any claim requesting the application of these individual countervailing duty rates (e.g. following a change in the name of the entity or following the setting up of new production or sales entities) should be addressed to the Commission [1] forthwith with all relevant information, in particular any modification in the company's activities linked to production, domestic and export sales associated with, for instance, that name change or that change in the production and sales entities. If appropriate, and after consultation of the Advisory Committee, the Regulation will be amended accordingly by updating the list of companies benefiting from individual duty rates,

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.

[1] European Commission, Directorate-General for Trade, Directorate B J-79 5/17, Rue de la Loi/Wetstraat 200, B-1049 Brussels.

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2. The rate of duty applicable to the net free-at-Community-frontier price, before duty for imports produced in India by the companies listed below, shall be as follows:

— 17,3 % for KDL Biotech Ltd, Mumbai (TARIC additional code: A580),

— 28,1 % for Nectar Lifesciences Ltd, Chandigarh (TARIC additional code: A581),

— 25,3 % for Nestor Pharmaceuticals Ltd, New Delhi (TARIC additional code: A582),

— 11,9 % for Ranbaxy Laboratories Ltd, New Delhi (TARIC additional code: 8221),

— 28,1 % for Torrent Gujarat Biotech Ltd, Ahmedabad (TARIC additional code: A583),

— 28,1 % for Surya Pharmaceuticals Ltd, Chandigarh (TARIC additional code: A584),

— 32 % for all other companies (TARIC additional code: 8900).

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

Article 2

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

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