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

REGULATIONS

COUNCIL REGULATION (EC) No 1176/2008

of 27 November 2008

amending Council Regulation (EC) No 713/2005 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 15 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 713/2005 [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 rate of the duty ranges between 17,3 % and 30,3 % for individually named exporters with a residual duty rate of 32 % imposed on imports from other exporters.

II. Initiation of a partial interim review

(2) Following the imposition of the definitive countervailing duty, the Government of India (GOI) made submissions that the circumstances with regard to two subsidy schemes (the Duty Entitlement Passbook Scheme and the Income Tax Exemption under Section 80 HHC of the Income Tax Act) have changed and that these changes are of a lasting nature. Consequently, it was argued that the level of subsidisation was likely to have decreased and thus measures that had been established partly on these schemes should be revised.

(3) The Commission examined the evidence submitted by the GOI and considered it sufficient to justify the initiation of a review in accordance with the provisions of Article 19 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* [3], an *ex-officio* partial interim review of Regulation (EC) No 713/2005.

(4) The purpose of the partial interim review investigation is to assess the need for the continuation, removal or amendment of the existing measures in respect of those companies which benefited from one or both the changed subsidy schemes where sufficient evidence was provided in line with the relevant provisions of the notice of initiation. The partial interim review investigation would also assess the need, depending on the review findings, to revise the measures applicable to other companies that cooperated in the investigation that set the level of the existing measures and/or the residual measure applicable for all other companies.

III. Investigation period

(5) The investigation covered the period from 1 April 2006 to 31 March 2007 ('the review investigation period' or 'RIP').

[1] OJ L 288, 21.10.1997, p. 1.
[2] OJ L 121, 13.5.2005, p. 1.
[3] OJ C 212, 11.9.2007, p. 10.

IV. **Parties concerned by the investigation**

(6) The Commission officially informed the GOI and those Indian exporting producers who cooperated in the previous investigation, were mentioned under Regulation (EC) No 713/2005 and were listed in the notice of initiation of the partial interim review, that were found to benefit from any of the two allegedly changed subsidy schemes, as well as the Community producers of the initiation of the partial interim review 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.

(7) In view of the apparent number of parties involved in this review, the use of sampling techniques for the investigation of subsidisation was envisaged in accordance with Article 27 of the basic Regulation.

(8) Only two exporting producers made themselves known and provided the information requested for sampling. Therefore, the use of sampling techniques was not considered necessary.

(9) However, one of the aforesaid exporting producers stated in its sampling reply that it did not receive benefits under the two allegedly changed subsidy schemes (i.e. the Duty Entitlement Passbook Scheme and the Income Tax Exemption under Section 80 HHC of the Income Tax Act) during either the investigation period that led to the measures in force or the RIP. Moreover, this company did not cooperate in the original investigation, and no particular need was identified to adapt the residual measure applicable to all other companies, including this one. Thus, the company did not fulfil the eligibility provisions of the scope of the partial interim review investigation as set out in point 4 of the notice of initiation and could not therefore participate in this review investigation. The company in question was informed accordingly.

(10) The Commission sent questionnaires to the sole cooperating exporting producer which was eligible for this review (Ranbaxy Laboratories Ltd) and to the GOI. Replies were received from both that producer and the GOI.

(11) The Commission sought and verified all information it deemed necessary for the determination of subsidisation. Verification visits were carried out at the premises of the following interested parties:

1. Government of India

Ministry of Commerce, New Delhi;

2. exporting producers in India

Ranbaxy Laboratories Ltd, New Delhi.

V. **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 to amend the duty rate applicable to the sole cooperating Indian producer and prolong existing measures for all other companies which did not cooperate with this partial interim review. They were also given a reasonable time to comment. All submissions and comments were taken duly into consideration as set out below.

B. **PRODUCT CONCERNED**

(13) The product covered by this review is the same product as the one concerned by Regulation (EC) No 713/2005, 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.

C. **SUBSIDIES**

I. **Introduction**

(14) On the basis of the information submitted by the GOI and the sole cooperating exporting producer and the replies to the Commission's questionnaire, the following schemes, which allegedly involve the granting of subsidies, were investigated:

(a) Advance Authorisation Scheme (formerly known as Advance Licence Scheme);

(b) Duty Entitlement Passbook Scheme;

(c) Export Promotion Capital Goods Scheme;

(d) Focus Market Scheme;

(e) Income Tax Schemes:

— Export Income Tax Exemption Scheme,

— Income Tax Incentive for Research and Development;

(f) Export Credit Scheme.

(15) 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). 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 RIP of this case; i.e. the five-year plan relating to the period 1 September 2004 to 31 March 2009 (EXIM policy 04-09). In addition, the GOI also sets out the procedures governing the EXIM policy 04-09 in a 'Handbook of Procedures — 1 September 2004 to 31 March 2009, Volume I' (HOP I 04-09). The Handbook of Procedure is also updated on a regular basis.

(16) 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.

(17) 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.

(18) In accordance with Article 11(10) of the basic Regulation, the Commission invited the GOI for additional consultations with respect to both changed and unchanged schemes 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 schemes, the Commission included all these schemes in the investigation of subsidisation.

II. **Specific schemes**

1. *Advance Authorisation Scheme (AAS)*

(a) Legal basis

(19) The detailed description of the scheme is contained in paragraphs 4.1.1 to 4.1.14 of the EXIM policy 04-09 and chapters 4.1 to 4.30 of the HOP I 04-09. This scheme was called Advance Licence Scheme during the previous review investigation that led to the imposition by Regulation (EC) No 713/2005 of the definitive countervailing duty currently in force.

(b) Eligibility

(20) The AAS consists of six sub-schemes, as described in more detail in recital 21. Those sub-schemes differ, *inter alia*, in the scope of eligibility. Manufacturer-exporters and merchant-exporters 'tied to' supporting manufacturers are eligible for the AAS physical exports and for the AAS for annual requirement. Manufacturer-exporters supplying the ultimate exporter are eligible for AAS for intermediate supplies. Main contractors which supply to the 'deemed export' categories mentioned in paragraph 8.2 of the EXIM policy 04-09, such as suppliers of an export oriented unit (EOU), are eligible for AAS deemed export. Eventually, intermediate suppliers to manufacturer-exporters are eligible for 'deemed export' benefits under the sub-schemes Advance Release Order (ARO) and back-to-back inland letter of credit.

(c) Practical implementation

(21) Advance authorisations can be issued for:

(i) physical exports: this is the main sub-scheme. It allows for duty-free import of input materials for the production of a specific resultant export product. 'Physical' in this context means that the export product has to leave Indian territory. An import allowance and export obligation including the type of export product are specified in the authorisation;

(ii) annual requirement: such an authorisation is not linked to a specific export product, but to a wider product group (e.g. chemical and allied products). The authorisation 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 sub-scheme covers cases where two manufacturers intend to produce a single export product and divide the production process. The manufacturer-exporter who produces the intermediate product can import duty-free input materials and can obtain for this purpose an AAS for intermediate supplies. The ultimate exporter finalises the production and is obliged to export the finished product;

(iv) deemed exports: this sub-scheme 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 04-09. 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 AAS 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 Authorisations 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 04-09 (i.e. AAS 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 sub-scheme again covers indigenous supplies to an Advance Authorisation holder. The holder of an Advance Authorisation can approach a bank for opening an inland letter of credit in favour of an indigenous supplier. The authorisation 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 the forecast export benefits as set out in paragraph 8.3 of the EXIM policy 04-09 (i.e. AAS for intermediate supplies/deemed export, deemed export drawback and refund of terminal excise duty).

It was established that during the RIP the cooperating exporter only obtained concessions under two sub-schemes linked to the product concerned, i.e. (i) AAS physical exports and (ii) AAS for intermediate supplies. It is therefore not necessary to establish the countervailability of the remaining unused sub-schemes.

(22) Following the imposition by Regulation (EC) No 713/2005 of the definitive countervailing duty currently in force, the GOI has modified the verification system applicable to AAS. In concrete terms, for verification purposes by the Indian authorities, an Advance Authorisation holder is legally obliged to maintain 'a true and proper account of consumption and utilisation of duty-free imported/domestically procured goods' in a specified format (chapters 4.26, 4.30 and Appendix 23 HOP I 04-09), i.e. an actual consumption register. This register has to be verified by an external chartered accountant/cost and works accountant who issues a certificate stating that the prescribed registers and relevant records have been examined and the information furnished under Appendix 23 is true and correct in all respects. Nevertheless, the aforesaid provisions apply only to Advance Authorisations issued on or after 13 May 2005. For all Advance Authorisations or Advance Licences issued before that date, holders are requested to follow the previously applicable verification provisions, i.e. to keep a true and proper account of licence-wise consumption and utilisation of imported goods in the specified format of Appendix 18 (chapter 4.30 and Appendix 18 HOP I 02-07).

(23) With regard to the sub-schemes used during the RIP by the sole cooperating exporting producer, i.e. physical exports and intermediate supplies, both the import allowance and the export obligation are fixed in volume and value by the GOI and are documented on the authorisation. In addition, at the time of import and of export, the corresponding transactions are to be documented by government officials on the authorisation. 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 04-09. Following the imposition by Council Regulation (EC) No 713/2005 of the definitive countervailing duty currently in force, SION norms for the product concerned were only applicable up to September 2005. New norms were issued in September 2006 (for amoxicillin trihydrate) and April 2007 (for ampicillin trihydrate and cefalexin). In the meantime, ad-hoc norms applied.

(24) Imported input materials are not transferable and have to be used to produce the resulting export product. The export obligation must be fulfilled within a prescribed time-frame after issuance of the authorisation (24 months with two possible extensions of six months each).

(25) The review investigation established that raw materials were imported under different authorisations/licences and different SION norms and then were mixed and physically incorporated in the production process of the same exported good. Account taken of the above, it was not possible to establish whether SION norm requirements, stipulated under specific authorisations/licences, with respect to duty-free input materials exceed the material needed to produce the reference quantity of the resulting export product.

(26) The review investigation also established that the verification requirements stipulated by the Indian authorities were either not honoured or not yet tested in practice. For Advance Licences issued before 13 May 2005 the necessary actual consumption and stock registers (i.e. Appendix 18) did not exist. For Advance Authorisations issued after 13 May 2005 the necessary actual consumption and stock registers were used but GOI had not yet verified the compliance of these registers with EXIM policy requirements. In the latter case, the registers were only verified by an external chartered accountant as required by the relevant Indian legislation

mentioned under recital 22. Nevertheless, there were no records kept either by the company or by the chartered accountant on how this certification process took place. There was no audit plan or any other supporting material of the audit performed, no recorded information on the methodology used and the specific requirements needed for such scrupulous work that requires detailed technical knowledge on production processes, EXIM policy requirements and accounting procedures. Account taken of this situation, it is considered that the investigated exporter was not able to demonstrate that the relevant EXIM provisions were met.

(d) Disclosure comments

(27) The sole cooperating producer submitted comments on the AAS. The company claimed that despite the situation described under recital 24 it was possible to establish whether SION norm requirements stipulated under specific authorisations exceed the materials needed to produce the reference quantity of the resulting export product and that the company maintained actual consumption records in highly meticulous manner. In this respect it is noted that the actual production records confirmed that it was not possible to establish a reliable benchmark per given authorisation (i.e. materials needed to produce the reference quantity) account taken of the various applicable SION norms and the incoherent mixture of raw materials used for production. Furthermore, raw materials covered by the scheme were found to be used for products other than the product concerned. Thus, making virtually impossible any attempt to calculate yield results for the product under investigation. Moreover, the company did not keep, in breach of the relevant GOI provisions, the per EXIM policy requested consumption record (i.e. Appendix 18) which purpose is to provide a comprehensible way of monitoring and verifying actual consumption. The company also claimed that Article 26(1) of the basic Regulation does not empower the Commission to examine the records of the independent chartered accountant. According to the company, the certificate has to be accepted unless there are grounds to believe that the chartered accountant has made a false certification. In this respect it is recalled that the verification process performed by the chartered accountant and the issuing of the relevant certificate form part of the verification system introduced by the GOI in its EXIM policy, as described under recital 22. The Commission was therefore obliged to examine whether the aforesaid verification system was effectively applied. Furthermore, in line with the provisions of Article 11(8) of the basic Regulation, the Commission had to examine the information supplied during the course of the investigation upon which findings are based.

The fact that neither the company nor the assigned chartered account hold any record on the checks performed in order to issue the EXIM policy stipulated certificate demonstrates that the company was not in a position to prove that the relevant EXIM policy provisions were met. The company disputed the fact that GOI has not yet verified the compliance of its registers with EXIM policy requirements but did not provide any concrete evidence on its claim. It was also argued that the actual consumption of the sole cooperating producer had been higher than the SION norms for every input and that there was no excess remission of duties. Nevertheless, account taken of the actual situation found on the spot (i.e. mixture of inputs and produced products, use of different SION norms, lack of the by EXIM policy stipulated actual consumption registers) and pending the fulfilment of the necessary final verification steps by the GOI, any calculation with respect to actual consumption and consequent excess remission of duties per authorisation/license and SION norm was not feasible. Therefore, all the aforesaid claims had to be rejected. Finally, the company provided comments on a computation error which was considered warrant and was acknowledged in the calculation of the subsidy amount.

(e) Conclusion

(28) 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 exporter.

(29) In addition, AAS physical exports and AAS 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.

(30) None of the two sub-schemes 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. They do not conform to the rules laid down in Annex I point (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 themselves cannot be considered a verification system of actual consumption, since duty-free input materials imported under authorisations/licences with different SION yields are mixed in the same production process for an exporting good. This type of process does not enable the GOI to verify with sufficient precision what amounts of inputs were consumed in the export production and under which SION benchmark they should be compared. Furthermore, an effective control done by the GOI based on a correctly kept actual consumption register either did not take place or has not yet been completed. 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). Finally, the involvement of chartered accountants in the verification process has not led to the improvement of the verification system as no detailed rules exist on how chartered accountants should perform the entrusted tasks and the information presented during the investigation could not warrant the fulfilment of the aforesaid rules laid down under the basic Regulation.

(31) These two sub-schemes are therefore countervailable.

(f) Calculation of the subsidy amount

(32) 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. In this respect, it is noted that 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 forgone) 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.

(33) The subsidy amount for the exporter which used the AAS was calculated on the basis of import duties forgone (basic customs duty and special additional customs duty) on the material imported under the two sub-schemes used for the product concerned during the RIP (nominator). In accordance with Article 7(1)(a) of the basic Regulation, fees necessarily incurred to obtain the subsidy were deducted from the subsidy amount where justified claims were made. In accordance with Article 7(2) of the basic Regulation, this subsidy amount has been allocated over the export turnover generated by the product concerned during the RIP as appropriate denominator, because the subsidy is contingent upon export performance and was not granted by reference to the quantities manufactured, produced, exported or transported.

(34) The subsidy rate established in respect of this scheme during the RIP for the sole cooperating producer amounts to 8,2 %.

2. *Duty Entitlement Passbook Scheme (DEPBS)*

(a) Legal Basis

(35) The detailed description of the DEPBS is contained in paragraph 4.3 of the EXIM policy 04-09 and in chapter 4 of the HOP I 04-09.

(b) Eligibility

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

(c) Practical implementation of the DEPBS

(37) 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.

(38) 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.

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

(40) Applications for DEPBS credits are electronically filed and can cover an unlimited amount of export transactions. De facto, no strict deadlines exist to apply for DEPBS credits. The electronic system used to manage DEPBS does not automatically exclude export transactions outside the deadline submission periods mentioned in chapter 4.47 HOP I 04-09. Furthermore, as clearly provided in chapter 9.3 HOP I 04-09 applications received after the expiry of submission deadlines can always be considered with the imposition of a minor penalty fee (i.e. 10 % on the entitlement).

(d) Disclosure comments

(41) Upon disclosure the sole cooperating exporting producer submitted comments on DEPBS. The company claimed that DEPBS benefit should not be countervailed because it was not availed for the product concerned. However, the company did not provide any argument that could dispute the practical implementations of the scheme as expressed under recitals 37 to 40. The company also claimed that only the credit amount of the exports made during the RIP should be used for the calculation of the duty benefit granted but failed to substantiate why the calculation methodology used both in the present and previous investigation that led to the imposition of the existing measures are not in line with the provisions of the basic Regulation. Therefore, those claims had to be rejected. Finally, the company provided comments on a computation error which was considered warrant and was acknowledged in the calculation of the subsidy amount.

(e) Conclusions on the DEPBS

(42) 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.

(43) 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.

(44) 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 point (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 point (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.

(f) Calculation of the subsidy amount

(45) In accordance with Articles 2(2) and 5 of the basic Regulation and the calculation methodology used for this scheme in Regulation (EC) No 713/2005, the amount of countervailable subsidies was calculated in terms of the benefit conferred on the recipient, which is found to exist during the RIP. 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. Once the customs authorities issue an export shipping bill which shows, *inter alia*, the amount of 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. 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, the sole cooperating exporting producer booked the DEPBS credits on an accrual basis as income at the stage of export transaction.

(46) Where justified claims were made, fees necessarily incurred to obtain the subsidy were deducted from the credits so established to arrive at the subsidy amount as nominator, pursuant to Article 7(1)(a) of the basic Regulation. In accordance with Article 7(2) of the basic Regulation this subsidy amount has been allocated over the total export turnover during the review investigation period as appropriate denominator, because the subsidy is contingent upon export performance and it was not granted by reference to the quantities manufactured, produced, exported or transported.

(47) The subsidy rate established in respect of this scheme during the RIP for the sole cooperating exporting producer amounts to 2,1 %.

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

(a) Legal basis

(48) The detailed description of the EPCGS is contained in chapter 5 of the EXIM policy 04-09 and in chapter 5 of the HOP I 04-09.

(b) Eligibility

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

(c) Practical implementation

(50) Under the condition of an export obligation, a company is allowed to import capital goods (new and, since April 2003, secondhand 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 was 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.

(51) 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

(52) Upon disclosure the sole cooperating exporting producer submitted comments on EPCGS. The company claimed that on the basis of the generally accepted accounting principles capital goods are consumed in the production process. In this respect it is noted that the company failed to substantiate this claim by explicitly mentioning the so-called generally acceptable accounting principles and providing an analysis in relation with the relevant EPCGS provisions of the EXIM policy as well as the definition of inputs consumed in the production process, as set out in Annex II of the basic Regulation. It also argued that the company's depreciation period should have been used as the normal depreciation period. Nevertheless, such an approach is contrary to the relevant provision of Article 7(3) of the basic Regulation. Therefore, these claims had to be rejected. Finally, the company provided comments on a computation error which was considered warrant and was acknowledged in the calculation of the subsidy amount.

(e) Conclusion on EPCG Scheme

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

(54) Furthermore, the EPCGS is contingent in law upon export performance, since such licences cannot 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.

(55) 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 point (i) of the basic Regulation, because they are not consumed in the production of the exported products.

(f) Calculation of the subsidy amount

(56) 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 RIP, 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. Where justified claims were maid, 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 nominator. 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 RIP as appropriate denominator, because the subsidy is contingent upon export performance and it was not granted by reference to the quantities manufactured, produced, exported or transported.

(57) The subsidy rate established in respect of this scheme during the RIP for the sole cooperating exporting producer amounts to 0,1 %.

4. *Export Credit Scheme (ECS)*

(a) Legal basis

(58) The details of the scheme are set by in Master Circular DBOD No DIR.(Exp). BC 01/04.02.02/2007-08 of the Reserve Bank of India (RBI), which is addressed to all commercial banks in India.

(b) Eligibility

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

(c) Practical implementation

(60) 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. The ECS consists of two sub-schemes, 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 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.

(61) As a result of the RBI Master Circular, exporters can obtain export credits at preferential interest rates compared with the interest rates for ordinary commercial credits (cash credits), which are set purely under market conditions. 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

(62) Upon disclosure the sole cooperating exporting producer submitted comments on ECS. The company argued that (i) there is no public funding into the granting of export credit in foreign currency; (ii) its low rates in foreign currency export credit was due to the company's high credit rating; and (iii) the interest rate used as benchmark on foreign currency credit should not be the same with the one used on Indian rupee credit. In this respect it is noted that both Indian rupee and foreign currency export credit form part of the same RBI Master Circular, with the practical implementations described under recitals 60 and 61, whose detailed and restrictive provisions demonstrates that foreign currency export credit funding and interest rates levied are linked to clear government imposed directives. As regards to the benchmark rate, it is noted that this was reported by the company on its Indian rupee credit and, in line with the relevant policies of the RBI Master Circular, exporters have the ability to freely pass for the same export transaction from rupee credit to foreign currency credit. It is therefore considered appropriate to use as benchmark the only rate reported by the company as its normal Indian interest rate. Therefore, those claims had to be rejected. Finally, the company provided comments on a computation error which was considered warrant and was acknowledged in the calculation of the subsidy amount.

(e) Conclusion on the ECS

(63) The preferential interest rates of an ECS credit set by the RBI Master Circular mentioned in recital 58 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. 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, commercial banks would not be obliged to pass through to borrowers of export financing any more advantageous interest rates for export credits in foreign currency.

(64) Despite the fact that the preferential credits under the ECS are granted by commercial banks, this benefit is a financial contribution by a government within the meaning of Article 2(1)(a)(iv) of the basic Regulation. In this context, it should be noted that neither Article 2(1)(a)(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)(a) 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, within the meaning of the second indent of Article 2(1)(a)(iv) of the basic Regulation, since the commercial banks are bound by the conditions it imposes, *inter alia*, with regard to the maximum ceilings for interest rates on export credits mandated in the RBI Master Circular 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, within the meaning of 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, pursuant to Article 3(4)(a) of the basic Regulation.

(f) Calculation of the subsidy amount

(65) The subsidy amount has been calculated on the basis of the difference between the interest paid for export credits used during the RIP and the interest rate that would have been payable for ordinary commercial credits used by the sole cooperating exporting producer. This subsidy amount (nominator) has been allocated over the total export turnover during the RIP as appropriate denominator 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.

(66) The subsidy rate established with regard to this scheme for the RIP for the sole cooperating exporting producer amounts to 1,3 %.

5. *Income Tax Schemes*

(a) Income Tax Exemption Scheme (ITES)

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

(67) Under this scheme exporters could avail the benefit of a partial income tax exemption on profits derived from export sales. The legal basis for this exemption was set by Section 80HHC of the ITA.

(68) This provision was abolished for the assessment year 2005/06 (i.e. for the financial year from 1 April 2004 to 31 March 2005) onwards and thus 80HHC of the ITA does not confer any benefits after 31 March 2004. The sole cooperating exporting producer did not avail of any benefits under this scheme during the RIP. Consequently, since the scheme has been withdrawn, it shall therefore not be countervailed, in accordance with Article 15(1) of the basic Regulation.

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

(i) *Legal basis*

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

(ii) *Eligibility*

(70) Companies engaged in the business of biotechnology or manufacture or production of drugs, pharmaceuticals, chemicals, electronic equipments, computers, telecommunication equipments, chemicals or any other article or thing as may be notified are eligible for benefits under this scheme.

(iii) *Practical implementation*

(71) 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*

(72) No comments with respect to ITIRAD were submitted upon disclosure.

(v) *Conclusion on ITIRAD*

(73) 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.

(74) The 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 within the meaning of Article 3(2)(b) of the basic Regulation. Benefits under this scheme are only available to certain industries since the GOI has not made this scheme available to all sectors. 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 a restriction on the number of employees or size of enterprise.

(vi) *Calculation of the subsidy amount*

(75) 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 (nominator) has been allocated over the total turnover during the RIP as appropriate denominator 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.

(76) The subsidy rate established with regard to this scheme during the RIP for the sole cooperating exporting producer amounts to 0,1 %.

6. *Focus Market Scheme (FMS)*

(a) Legal basis

(77) The detailed description of the FMS is contained in chapter 3.9 of the EXIM policy 04-09 and in chapter 3.20 of the HOP I 04-09.

(b) Eligibility

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

(c) Practical implementation

(79) Under this scheme exports of all products to countries notified under Appendix 37(C) of HOP I 04-09 are entitled to duty credit equivalent to 2,5 % of the FOB value of products exported under this scheme. Certain type of export activities are excluded from the scheme, e.g. exports of imported goods or transhipped goods, deemed exports, service exports and export turnover of units operating under special economic zones/export operating units. Also excluded from the scheme are certain types of products, e.g. diamonds, precious metals, ores, cereals, sugar and petroleum products.

(80) The duty credits under FMS are freely transferable and valid for a period of 24 months from the date of issue of the relevant credit entitlement certificate. They can be used for payment of custom duties on subsequent imports of any inputs or goods including capital goods.

(81) The credit entitlement certificate is issued from the port from which the exports have been made and after realisation of exports or shipment of goods. As long as the applicant provides to the authorities copies of all relevant export documentation (e.g. export order, invoices, shipping bills, bank realisation certificates), the GOI has no discretion over the granting of the duty credits.

(d) Disclosure comments

(82) Upon disclosure the sole cooperating exporting producer submitted comments on FMS. The company argued that the scheme is geographically related to other countries and cannot be countervailed by EC. Nevertheless, it was not able to dispute neither the practical implementations of the scheme nor the way the FMS benefit is used, as stated under recitals 79 to 81. Therefore, this claim had to be rejected. Finally, the company provided comments on a computation error which was considered warrant and was acknowledged in the calculation of the subsidy amount.

(e) Conclusion on FMS

(83) The FMS provides subsidies within the meaning of Article 2(1)(a)(ii) and Article 2(2) of the basic Regulation. A FMS duty 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 FMS duty credit confers a benefit upon the exporter, because it improves its liquidity.

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

(85) 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 point (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. 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 point (i) of Annex I and Annexes II and III of the basic Regulation. An exporter is eligible for the FMS 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 FMS. Moreover, an exporter can use the FMS duty credits in order to import capital goods although capital goods are not covered by the scope of permissible duty drawback systems, as set out in Annex I point (i) of the basic Regulation, because they are not consumed in the production of the exported products.

(f) Calculation of the subsidy amount

(86) The amount of countervailable subsidies was calculated in terms of the benefit conferred on the recipient, which is found to exist during the RIP as booked by the cooperating exporting producer on an accrual basis as income at the stage of export transaction. In accordance with Article 7(2) and 7(3) of the basic Regulation this subsidy amount (nominator) has been allocated over the export turnover during the RIP as appropriate denominator, because the subsidy is contingent upon export performance and it was not granted by reference to the quantities manufactured, produced, exported or transported.

(87) The subsidy rate established with regard to this scheme during the RIP for the sole cooperating exporting producer amounts to 0,1 %.

III. **Amount of countervailable subsidies**

(88) It is recalled that in Regulation (EC) No 713/2005 the amount of countervailable subsidies, expressed *ad valorem*, was found to be 35,1 % for the sole exporting producer cooperating with the present partial interim review.

(89) During the present partial interim review the amount of countervailing subsidies, expressed *ad valorem*, was fount to be 11,9 %, as listed hereunder:

SCHEME / COMPANY	AAS	DEPBS	EPCGS	ECS	ITIRAD	FMS	Total
	%	%	%	%	%	%	%
Ranbaxy Laboratories Ltd	8,2	2,1	0,1	1,3	0,1	0,1	11,9

(90) Account taken of the above it is concluded that the level of subsidisation with regard to the sole cooperating exporting producer has decreased.

IV. **Countervailing measures**

(91) In line with the provisions of Article 19 of the basic Regulation and the grounds of this partial interim review stated under point 3 of the notice of initiation, it is established that the level of subsidisation with regard to the sole cooperating producer has decreased from 35,1 % to 11,9 % and, therefore, the rate of countervailing duty, imposed to this exporting producer by Regulation (EC) No 713/2005 has to be amended accordingly.

(92) In this respect, it is recalled that under Regulation (EC) No 713/2005 the subsidy rate of Ranbaxy Laboratories Ltd was higher than the injury elimination level. In accordance with Article 15(1) of the basic Regulation, the lesser duty reflecting the injury elimination level was considered adequate to remove injury to the Community industry and thus the rate of countervailing duty applicable to imports from Ranbaxy Laboratories Ltd was set to 30,3 %.

(93) Account taken of the above and given that the subsidies rate is now lower than the injury elimination level, the individual company countervailing duty rate applicable to the sole cooperating exporting producer, Ranbaxy Laboratories Ltd, is set at 11,9 %.

(94) With regard to all other companies that did not cooperate with the present partial interim review, it is noted that the actual modalities of the investigated schemes and their countervailability have not changed with respect to the previous investigation. Thus there is no reason to re-calculate the subsidy and duty rates of the companies that did not cooperate with the present partial interim review. Consequently, the rates of the duty applicable to all other parties except Ranbaxy Laboratories Ltd mentioned under Article 1(2) of Regulation (EC) No 713/2005 remain unchanged.

(95) The individual company countervailing duty rates specified in this Regulation reflect the situation found during the partial interim review. 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'.

(96) 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 Commission is hereby empowered to amend the Regulation accordingly by updating the list of companies benefiting from individual duty rates,

HAS ADOPTED THIS REGULATION:

Article 1

Paragraph 2 of Article 1 of Regulation (EC) No 713/2005 shall be replaced by the following:

'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).'

Article 2

This Regulation shall enter into force on the day following 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.

Done at Brussels, 27 November 2008.

For the Council
The President
M. ALLIOT-MARIE

[1] European Commission — Directorate-General for Trade — Directorate B — J-79 4/23 — Rue de la Loi/Wetstraat 200 — B-1049 Brussels.