

Official Journal

of the European Union

L 179



English edition

Legislation

Volume 52

10 July 2009

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I

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

REGULATIONS

COUNCIL REGULATION (EC) No 598/2009

of 7 July 2009

**imposing a definitive countervailing duty and collecting definitively the provisional duty imposed
on imports of biodiesel originating in the United States of America**

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 subsidized imports from countries not members of the European Community⁽¹⁾ (the 'basic Regulation'), and in particular Article 15 thereof,

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

Whereas:

impose provisional countervailing measures ('provisional disclosure'), several interested parties made written submissions making their views known on the provisional findings. The parties who so requested were granted an opportunity to be heard. The Commission continued to seek and verify all information it deemed necessary for its definitive findings. The oral and written comments submitted by the interested parties were considered and, where appropriate, the provisional findings were modified accordingly.

(4) All parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of definitive countervailing measures on imports of biodiesel originating in the USA and the definitive collection of the amounts secured by way of the provisional duty ('final disclosure'). They were also granted a period within which they could make representations subsequent to this disclosure.

1. PROCEDURE

1.1. Provisional measures

- (1) The Commission, by Regulation (EC) No 194/2009⁽²⁾ (the 'provisional Regulation') imposed a provisional countervailing duty on imports of biodiesel originating in the United States of America ('USA' or 'country concerned').
- (2) In the parallel anti-dumping proceeding, the Commission by Regulation (EC) No 193/2009⁽³⁾ imposed a provisional anti-dumping duty on imports of biodiesel originating in the United States of America.

1.2. Subsequent procedure

- (3) Subsequent to the disclosure of the essential facts and considerations on the basis of which it was decided to

(5) The US Government (USG) and other interested parties expressed their disappointment with the decision to grant only sixteen days to provide comments on the provisional disclosure and also with the decision to decline the requests of certain parties for a meaningful extension of time to file those comments.

(6) Article 30(1) of the basic Regulation provides that interested parties may be provided with the details underlying the essential facts and considerations on the basis of which provisional measures have been imposed. In this regard, it is the Commission's practice to provide disclosure to all interested parties to a proceeding upon publication in the *Official Journal of the European Union* of a regulation imposing provisional measures and to provide a period of time within which parties may provide comments thereon. This practice was followed

⁽¹⁾ OJ L 288, 21.10.1997, p. 1.

⁽²⁾ OJ L 67, 12.3.2009, p. 50.

⁽³⁾ OJ L 67, 12.3.2009, p. 22.

in this proceeding. In regard to the time period within which parties were required to provide comments, the basic Regulation does not specify what period should be allowed. In this proceeding, it was considered that a period of sixteen days (subsequently extended to seventeen days) be granted given the complexity of the proceeding and the need to respect the requirement in Article 11(9) of the basic Regulation that the investigation be concluded within thirteen months of initiation.

- (7) In regard to the rate of duty established for US companies that did not make themselves known and cooperate in the investigation, the provisional duty rate was set at the level of the lower of the highest subsidisation margin or highest injury margin found for the sampled cooperating exporting producers. The rate so established was as set out ('all other companies' rate of EUR 237,0 per tonne) in Article 1(2) of the provisional Regulation. The USG considers that this rate of duty is a punitive rate improperly calculated on the basis of the facts available. The USG considers that, in order to rely on facts available under Article 28 of the basic Regulation, it must first be determined that an interested party has refused or failed to provide the 'necessary information' ⁽¹⁾. The USG rather considers that the weighted average rate calculated for the non-sampled cooperating companies should be applied instead.
- (8) In reply to this it should be noted that, at initiation stage, the Commission sent the sampling form, complaint and the Notice of initiation to the companies listed in the complaint (more than 150 companies). A copy of the sampling form was also attached to the Note Verbale sent to the Mission of the United States of America to the European Communities at initiation and they were invited to send it to exporters/producers in the United States of America. Moreover, the National Biodiesel Board, which has been an interested party from the outset of this proceeding, represents a great number of companies in the biodiesel industry in the United States of America.
- (9) The Notice of Initiation as well as the cover letter attached to the sampling form drew the attention of the consequences of non-cooperation. As mentioned in recital (8) of the provisional Regulation, more than 50 companies identified themselves in the context of the sampling exercise and provided the requested information within the 15 day period. These companies accounted for more than 80 % of the total imports of biodiesel from the United States of America to the Community.

⁽¹⁾ Article 28(1) of the basic Regulation states: 'In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within the time limits provided in this Regulation, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available. [...]'.
⁽²⁾ Unlike those companies which received a sampling form but did not return it.

- (10) Subsequent to the imposition of provisional measures, the authorities of the United States of America were asked to provide additional information. In particular, the authorities were asked to invite any additional exporters/producers of biodiesel in the United States of America beyond those listed in Article 1 and the Annex to the provisional Regulation, who were not known at the time of the initiation and did not previously refuse to cooperate ⁽²⁾, to make themselves known.
- (11) The authorities of the United States of America provided a list containing the names of more than 100 additional companies (producers/exporters) in the United States of America. It was examined whether any of the companies had been invited to cooperate at the stage of initiation of the proceeding. The investigation revealed that a significant number of the companies on the list had already been invited to cooperate during the sampling exercise but had chosen not to do so at that time. In other words, these companies were aware of the consequences of non-cooperation in accordance with Article 28 of the basic Regulation.
- (12) However, as regards those companies (more than 40) on the list who were unknown to the Commission at the time of the initiation of this proceeding, it was noted that the request to the US authorities to provide details of these companies was made after the imposition of provisional measures. It was therefore decided to add these companies to the Annex of this Regulation and apply the same duty rate to these companies as to those who expressly cooperated but were not chosen in the sample. These companies received disclosure of the essential facts and considerations on the basis of which it was intended to impose definitive measures and were invited to comment on the fact that it was proposed to add their names to the Annex of this Regulation.
- (13) Following final disclosure, the USG welcomed the proposal to apply the weighted average duty to additional companies. However, the USG considered that no explanation had been provided as to why other companies are made subject to the 'all other companies' rate. In this regard it is noted that for the companies that were invited to co-operate during the sampling exercise, explanations have already been given above. Regarding possible US exporters/producers that were not individually notified of the investigation nor mentioned in the list referred to in recital (11), it is noted first of all that extensive efforts were made upon initiation of the proceeding to contact companies in the USA that might be concerned by this proceeding (see recitals (8) and (10)).

above). Furthermore, additional efforts were made subsequent to the imposition of provisional measures as mentioned in recital (10) above to identify other companies which resulted in the addition of more than 40 companies to the list of those to whom the weighted average duty would apply. It is considered that these extensive efforts have given every opportunity to biodiesel companies in the USA to make themselves known. In this regard, it is noted that the relevant industry association has been involved in the proceeding since its initiation. Consequently, it is considered that the 'all other companies' rate of duty should be applied to companies that did not make themselves known.

- (14) One company that submitted a reply to the sampling form and was consequently listed in the Annex to the Provisional Regulation requested that its parent company be added to the list of companies in the Annex. This company also requested that the city location of the two companies be changed in the Annex to correctly reflect the address on the invoices of the companies.
- (15) Having examined this company's request, it was considered that the parent company should also be listed in the Annex to the current Regulation as it was mentioned in the company's reply to the sampling form as the only related company involved in the biodiesel business. The city location for both companies is also being revised.
- (16) Two cooperating companies requested that their names be removed from the Annex as they claimed not to be exporting producers. The companies' names have been removed accordingly.
- (17) It is recalled that the investigation of subsidisation and injury covered the period from 1 April 2007 to 31 March 2008 ('investigation period' or 'IP'). With respect to the trends relevant for the injury assessment, the Commission analysed data covering the period from January 2004 to the end of the IP ('period considered').

1.3. Sampling of Community producers and exporting producers in the USA

- (18) In the absence of any comments concerning the sampling of exporting producers in the USA the provisional findings in recitals (6) to (10) of the provisional Regulation are hereby confirmed.
- (19) Certain parties commented on the representativity of the sample of Community producers. These comments are addressed in recitals (77) to (81) below.

2. PRODUCT CONCERNED AND LIKE PRODUCT

2.1. Product concerned

- (20) It is recalled that in the notice of initiation, the product allegedly being subsidised was defined as fatty-acid monoalkyl esters and/or paraffinic gasoils from synthesis and/or hydro-treatment, of non-fossil origin (commonly known as 'biodiesel'), whether in pure form or in a blend.
- (21) The complaint contained *prima facie* evidence that biodiesel and all blends, of biodiesel with mineral diesel, produced and subsidized in the USA and exported to the Community had affected the economic situation of the biodiesel producers in the Community. Consistent with the characteristics of the relevant US biodiesel producers and domestic market, the definition of the product concerned intended to cover biodiesel also when incorporated into the biodiesel blends. It was however considered that the definition of the product concerned as mentioned in the notice of initiation and in recital (20) above, could give rise to concerns as to what producers and what product types were intended to be covered by the investigation and those that were not.
- (22) Similarly, for the investigation of subsidization and injury, in particular for establishing the subsidy margins and injury elimination levels it was necessary to clearly identify the products concerned by the investigation.
- (23) In line with the characteristics of the US market, the product concerned was provisionally defined as fatty acid monoalkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, commonly known as 'biodiesel', whether in pure form or in blends, which are above B20. Hence the product concerned covered pure biodiesel (B100) and all blends which contain more than 20 % biodiesel ('the product concerned'). This threshold was considered to be appropriate to allow a clear distinction between the various types of blends which are intended to be further blended and those intended for direct consumption on the US market.
- (24) The investigation showed that all types of biodiesel and the biodiesel in the blends covered by this investigation, despite possible differences in terms of raw material used for the production, or variances in the production process, have the same or very similar basic physical, chemical and technical characteristics and are used for the same purposes. The possible variations in the product concerned do not alter its basic definition, its characteristics or the perception of that various parties have of it.

- (25) Claims were received from interested parties on the definition of the product concerned and the like product whereby they contested both the definition of the product concerned and the like product simultaneously with the same arguments without making any distinction between the concept of product concerned and like product in the context of the proceeding.
- (26) It is recalled that whilst the concept of the product concerned is governed by the provisions of Article 1(1) to 1(4) of the basic Regulation, the interpretation of the term 'like product' is mentioned in Article 1(5) of the basic Regulation. Hence, the claims will be addressed separately below.
- (27) One party questioned to what extent blends with low proportion of biodiesel (e.g. B21) should still deem to qualify as biodiesel on par with pure biodiesel (B100) or on similar blends that consist primarily of biodiesel with lower amount of mineral diesel (e.g. B99). They claimed that B100 and B99 basically underwent the investigation and that all the calculations of dumping and injury were made on the basis of these two product types. In their view establishing a threshold just above B20, namely the low-level blend sold directly to consumers in the US leads to an artificial definition of the product concerned.
- (28) The same party also questioned whether a blend with 20 % biodiesel still qualifies to be a biodiesel fuel rather than mineral diesel which is not included in the definition of the product concerned. This party understands that the EU supports the view that a new customs heading should be created ⁽¹⁾ for biodiesel in the customs Harmonised System (HS). In its view the Commission broadened the definition of the product in the present proceeding and expanded the product types affected by the imposition of the measures.
- (29) In addition, the party considers that at the time of the investigation no specific threshold existed to determine what is biodiesel for the classification in CN code 3824 90 91, the specific code created since 1 January 2008 for biodiesel by the EU. They questioned whether under the rule 3(b) of the general rules for the interpretation of the combined nomenclature ⁽²⁾ a blend containing less than 50 % biodiesel could still qualify as biodiesel. They further mentioned that the examples of blends mentioned in the Commission questionnaire were of high biodiesel contents and thus implied that the product concerned is only biodiesel and blends containing very high levels of biodiesel.
- (30) The party also claimed that the EU cannot change the definition of the product concerned whilst maintaining a different like product. It referred to Article 15.1 of the WTO ASCM (Agreement on Subsidies and Countervailing Measures). According to them the subsidy and the injury findings are made based on B100 and B99 and the US Harmonised Tariff System (HTS) codes ⁽³⁾ which were used in the investigation do not appear to include products with biodiesel volume as low as 20 %. They also referred to the provisional disclosure to the sampled US biodiesel producers that demonstrates that the sampled US producers sold blends exclusively made of various types of biodiesel. Hence the product concerned should be limited to the products that contain 100 % of biodiesel (B100), even if composed of biodiesel made of different feedstock, or to blends containing 99 % of biodiesel (B99).
- (31) The party referred to a recent Court Judgement ⁽⁴⁾ concerning imports of ammonium nitrate and concluded that the rationale of that judgment also applies to the current proceeding and that biodiesel that is not part of blends in very high content cannot be subject to the investigation and to measures as it is not the like product for which dumping and injury findings were drawn, namely products that contain only biodiesel (B100) or blends with 99 % of biodiesel (B99).
- (32) The parties did not bring any evidence or a legal reference which would show that the product concerned was not correctly defined in the present investigation. The provisions in Article 1(1) to 1(4) of the basic Regulation which provide guidance as to the definition of the product concerned. Article 1(1) states that: 'A countervailing duty may be imposed for the purpose of offsetting any subsidy granted, directly or indirectly, for the manufacture, production, export or transport of any product whose release for free circulation in the Community causes injury.'
- (33) As mentioned in recital (21) above, the complaint contained *prima facie* evidence that biodiesel and all blends, of biodiesel with mineral diesel, produced in the USA and exported at subsidised price to the Community had affected the economic situation of the biodiesel producers in the Community.
- (34) The parties did not bring any evidence showing that the threshold fixed in the provisional Regulation to set the dividing line between product concerned and product non concerned was artificial. As mentioned in recitals (26) and (28) of the provisional Regulation, the investigation showed that B20, and potentially lower level blends, were actually sold directly to consumers in the US. The investigation also showed that the market for blending and the market for consumer products

⁽¹⁾ Heading number 3826 00 to cover 'biodiesel and mixtures thereof, not containing or containing less than 70 % by weight of petroleum oils or oils obtained from bituminous minerals'.

⁽²⁾ Mixtures composite goods consisting of different materials or made of different components and goods put in sets for retail sales, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character in so far as this criterion is applicable.'

⁽³⁾ HTS codes 38 24 90 40 00 and 38 24 90 40 20.

⁽⁴⁾ Case T-348/05: JSC Kirovo-Chepetsky Khimichesky Kombinat v Council, 10 September 2008, paras 61-63.

were different markets with different customers: one market where biodiesel and biodiesel blends are destined to further blending by traders and blenders and one market where the blends are destined to the distribution network and thus to consumers. Defining the threshold for the product concerned above B20 allowed to draw a clear dividing line and avoided confusion between the products, the markets and the various parties in the USA. The claim was thus rejected.

- (35) In all anti-subsidy investigations it is common that individual companies investigated do not produce and sell all the product types included in the definition of the product concerned. Some companies may produce a very limited range of product types while other may produce a larger range. This, however, does not affect the definition of the product concerned. It is therefore considered that the claim that the product concerned should only cover the product types that were exported by the US producers and used for the subsidisation and the injury calculations is unfounded.
- (36) As mentioned in the provisional Regulation and in recital (20) above, the investigation primarily focused on biodiesel, whether in pure form or when incorporated in blends. The countervailing measures will apply to the relevant blends exported to the Community market. Hence, it is considered that the question whether a blend with 20 % biodiesel still qualifies for a biodiesel fuel rather than mineral diesel which is not included in the definition of the product concerned is not relevant.
- (37) It should be clarified that the subsidy and the injury findings of each company investigated were exclusively based on the relevant product types which were produced and sold by the relevant company during the IP. Claiming that the definition of the product concerned including blends above B20 would affect unduly US producers is not founded and cannot lead to the conclusion that the product concerned should be limited to the products that contain 100 % of biodiesel (B100) even if composed of biodiesel of different feedstock or a blend composed of 99 % of biodiesel (B99). Including blends above B20 in the definition of the product concerned had no impact whatsoever on the findings made for companies investigated which are not producing and exporting this product type.
- (38) The allegation of the party according to which the rationale of a Court Judgment⁽¹⁾ also applies to the current proceeding and that biodiesel that is not part of blends in very high content cannot be subject to the scope of the investigation is also not founded. In fact, for each company investigated, any injury and subsidy margins will exactly match the product concerned and the like product for which subsidy and injury findings were established, namely the relevant products types that contain biodiesel that were sold domestically and

exported to the Community by that company. Also, the judgment which is invoked by the operator concerned a review of existing anti-dumping measures resulting in their extension to other products than the product concerned, which is not the case in the current investigation.

- (39) Although it is considered that the examples provided in a questionnaire intended to collect data for the purpose of an investigation cannot be used to make assumptions as to the conclusion of the investigation, it is noteworthy that the Commission cannot know in advance, namely before its on-spot investigation takes place, which types of products will be produced and sold in the domestic market and for export by the companies concerned at the moment of the drafting of the questionnaire. According to Article 1 of the basic Regulation, the relevant product types to include in the scope of an anti-subsidy investigation are those considered to be subsidized from a countervailable subsidy. In such case a countervailing duty may be imposed for the purpose of offsetting any subsidy granted directly and indirectly for the manufacture, production, export or transport of any product.
- (40) It is also considered that B100 should not be excluded from the product definition. Firstly, because B100 or pure biodiesel is the core product for which the US subsidies were established. This is clear from the US Internal Revenue Code (US. CODE), in particular Title 26, §40A, point (d), which clearly defines the term biodiesel, that the whole subsidy scheme was implemented to support the biodiesel industry in the USA. Secondly, because during the verification visit at the premises of the USG, it appeared that biodiesel even when blended outside the USA by a company having a subsidiary in the USA could benefit from the Federal biodiesel Tax credit of USD 1 per gallon in the USA.
- (41) The investigation has also showed that the production of pure biodiesel by any producer in the USA triggers the issuance of producer certificate mentioned in recital (51) of the provisional Regulation. This certificate is transferable and must be presented to the US Government when the claim for subsidy is introduced.
- (42) Based on the above facts and considerations, it is confirmed that all types of biodiesel and the biodiesel in the blends covered by this investigation, namely pure biodiesel (B100) and blends above B20, despite possible differences in terms of raw material used for the production, or variances in the production process, have the same or very similar basic physical, chemical and technical characteristics and are used for the same purposes. The possible variations in the product concerned do not alter its basic definition, its characteristics or the perception that various parties have of it.

⁽¹⁾ Case T-348/05: JSC Kirovo-Chepetsky Khimichesky Kombinat v Council, 10 September 2008, paras 61-63.

2.2. Like product

- (43) It was provisionally found that the products produced and sold on the domestic market of the USA, which are covered by this investigation, have similar basic physical, chemical and technical characteristics and uses as those exported from this country to the Community market. Similarly, the products manufactured by the Community industry and sold on the Community market have similar basic physical, chemical and technical characteristics and uses when compared to those exported to the Community from the country concerned.
- (44) Therefore no differences were found between the various types of the product concerned and the Community product types sold on the Community market which would lead to the conclusion that the product types produced and sold on the Community market are not like products, sharing the same or very similar basic physical, chemical and technical characteristics as to the types of the product concerned produced in the USA and exported to the Community. It was therefore concluded that all types of biodiesel covered by this investigation are considered to be alike within the meaning of Article 1(5) of the basic Regulation.
- (45) One party claimed that the definition of the like product is intricately linked to the identification of the product concerned and must be established in term of physical characteristics and end-use of the product. They basically said that B20 is not used for consumption in the EU but rather an even lower blend which is B5. Hence the like product was wrongly defined. They also claimed that the definition of the product concerned cannot be changed whilst maintaining a different like product.
- (46) As it clearly appears in recital (31) to (37) of the provisional Regulation, the definition of the like product is linked to the identification of the product concerned and was mainly established in term of physical characteristics of the product. The actual end-use of the products was also taken into account and it was considered that the threshold of B20 should also be maintained for the definition of the like product. In this case, the number of product types covered by the definition of the like product has also been reduced to match with the definition of the product concerned.
- (47) Hence, the claims of the parties that the definition of the like product was incorrect have to be rejected and the provisional definition of the like product can be confirmed.
- inally chose the sample. On this basis, the company should not have been excluded from the sample.
- (49) In regard to this claim, it is noted that, whether or not the company is included in the sample has no material impact on the company in terms of the outcome of the investigation. If it were to be included in the sample, the company would have its own individual countervailing duty rate established as was done at provisional stage even though the company was excluded from the sample. The current Regulation also establishes an individual countervailing duty rate for the company. Following final disclosure of these findings, the company claimed that its 'de-facto exclusion' from the sampled exporters prevented it from some substantive rights, including rights resulting from specific calculations as applied to data provided by the sampled exporters. In reply to this, it is noted that a specific calculation was made of the level of subsidisation of this company. In regard to the injury margin for this company, this was established as set out in recitals (173) to (175) below, i.e. on the basis of facts available under Article 28 of the basic Regulation given that the company did not provide the requested information in regard to its export sales and resales in the Community. In these circumstances, the company's claim is rejected.
- (50) One company claimed that the countervailing duty rate appeared to have been calculated on the basis of domestic sales in addition to export sales. The company asked that the calculations be corrected accordingly.
- (51) In regard to this claim, it is noted that all of the subsidy schemes that are being countervailed have been found to be domestic subsidies, i.e. they equally benefit domestic as well as export sales. In line with standard practice the amount of benefit from each scheme in the IP has been allocated over total sales of the product concerned (i.e. domestic plus export sales). The company's claim is therefore rejected.
- (52) This company as well as another company also pointed out that the CIF values used for calculating the countervailing duty rate are not the same as the ones used for the injury and dumping calculations. The companies consider that, in order to ensure consistency, the correct CIF values which have been used for the dumping and injury calculations should also be used for the countervailing duty rate calculations.
- (53) In regard, to this claim, it must again be pointed out that, as mentioned in recital (51) above, all of the subsidy schemes that are being countervailed have been found to be domestic subsidies. In these circumstances, the denominator used in establishing the benefit in the IP is total sales unlike in anti-dumping proceedings where the denominator is export sales to the EU only. In these circumstances, this claim is rejected.

3. SUBSIDISATION

3.1. General

- (48) One company claimed that the reasons set out in recital 9 of the Provisional Regulation for its exclusion from the sample were known to the Commission when it orig-

(54) A number of companies and the National Biodiesel Board (NBB) argued that a countervailing duty should not be levied on imports of B100 on the grounds that the subsidy and injury margins have been calculated without including sales of B100. In regard to this claim, it is noted that sales of B100 produced by the sampled companies have been taken into account in calculating the amount of countervailable subsidies as well as in the calculation of the injury margin. In these circumstances, this claim is rejected.

3.2. Excise tax/Income tax credit

(55) One company claimed that the amount of benefit that it received under the federal excise tax/income tax credit in the investigation period (IP), would be less than USD 1 per gallon if the benefit were to be calculated by spreading it over the total sales volume in the IP.

(56) In regard to the benefit received under the excise tax/income tax credit scheme, this was calculated, as stated in recital (59) of the provisional Regulation, on the basis of USD 1 per gallon of neat biodiesel sold in the IP, whether sold as pure biodiesel (B100) or in a blend. This benefit was reflected in the level of provisional countervailing duty imposed. The provisional duty, and indeed the definitive duty now to be imposed by this regulation, provides that the countervailing duty on blends shall be applicable in proportion in the blend of the total content of biodiesel. In these circumstances, it is considered that a duty based on USD 1 per gallon of neat biodiesel correctly reflects the benefit in the IP as a lesser duty is imposed on, for example, imports of B99 given that it contains less biodiesel. In these circumstances, the company's claim is rejected.

(57) A number of companies and the NBB claimed that, as no federal excise tax/income tax credit is available on sales of B100, there is no basis to consider that such sales have benefited from this tax credit. One of these companies argued in particular that, for their sales of B100 in the IP, it had not been demonstrated that they had been the indirect recipient of the USD 1 per gallon tax credit.

(58) In addressing these claims, it should be recalled that the US Code provides that the biodiesel mixture credit will not be granted unless the company (blender) that makes the mixture of biodiesel and mineral diesel obtains a certificate ('Certificate for Biodiesel') from the producer of the biodiesel in which the producer certifies the quantity of biodiesel to which the certificate relates. The biodiesel certificate is transferable, entitling the holder to a USD 1 per gallon tax credit for the number of gallons of biodiesel used by the claimant in producing any biodiesel mixture. In regard to sales of B100 by the investigated companies in the IP, there is a benefit to the companies as the biodiesel certificate confers a right to a USD 1 per gallon tax credit.

(59) Following final disclosure, some parties argued that the benefit from the blender's tax credit is obtained by the blender of the biodiesel and that there has been no determination that for sales of pure biodiesel (B100), the benefit would be received by the producer/seller of the B100. In reply to this, it should be noted that, as explained above, the biodiesel certificate is transferable. In effect, therefore, the holder of the certificate knows that the certificate has a value of USD 1 per gallon.

(60) The USG considered that, as it was stated in recital 44 of the Provisional Regulation that in order to be eligible for the biodiesel mixture credit a company must create a mixture of biodiesel and diesel fuel, the amount of benefit should not be established on the basis of pure biodiesel or in a blend as stated in recital (59) of the Provisional Regulation. In this regard, it is pointed out that, for the reasons mentioned in recital (58) above and as addressed in recitals (54) to (55) of the Provisional Regulation, it is considered that all biodiesel is subsidised.

(61) In these circumstances, it is considered that sales of B100 have been found to confer a benefit to the producers of this product and the claims in recitals (57) to (60) are therefore rejected.

(62) Some companies and the NBB argued that a countervailing duty should not be levied on imports of B100, since such sales to the EU cannot benefit from the biodiesel tax credit. As stated in recital (60) above, it was found that all biodiesel is subsidised through the tax credit scheme. In these circumstances, it is considered that a countervailing duty can be levied on imports of pure biodiesel and biodiesel in a blend. It should furthermore be noted that sales of B100 to the Community are also eligible for benefits under the Small Agribiodiesel Producer Income tax credit.

(63) During the IP, some of the companies in the sample had exported small quantities of B100 to the Community. However, there appeared to be no economic justification to export B100 in lieu of B99 to the Community, as only the latter directly or indirectly would have benefitted from the biodiesel mixture credit unless the exporter or the purchaser qualified for the above-mentioned income tax credit. If that is the case, there would be a benefit for the US producer in the same way as for sales of B100 on the domestic market. Following final disclosure, the USG stated that no evidence had been cited to substantiate the statement that there is no economic justification to export B100 in lieu of B99 to the Community. In this regard, it must be pointed out that the finding above states that there 'appears' to be no economic justification to export B100 in lieu of B99 to the Community. The reasons for this conclusion are as set out above.

(64) Therefore, in view of the fact that it is perfectly possible that export of B100 could be subsidised and that there appears to be no economic justification to export to the Community without a subsidy, the above claims are rejected.

(65) In the light of the above, the findings in relation to this scheme as set out in recitals (41) to (63) of the provisional Regulation are hereby confirmed.

3.3. Small Agribiodiesel Producer Income tax credit

(66) In the absence of any comments concerning this scheme, recitals (64) to (72) of the provisional Regulation are hereby confirmed.

3.4. The US Department of Agriculture Bioenergy Program

(67) In the absence of any comments concerning this scheme, recitals (73) to (86) of the provisional Regulation are hereby confirmed.

STATE SCHEMES

(68) In the absence of any comments concerning the schemes mentioned below, recitals (87) to (157) of the provisional Regulation are hereby confirmed.

— Illinois biodiesel tax exemption

— Missouri qualified biodiesel producer incentive fund

— North Dakota biofuels partnership in assisting community expansion (PACE) loan Program

— North Dakota biodiesel production equipment tax credit

— North Dakota biodiesel income tax credit

— Texas ethanol and biodiesel blend tax exemption

— Texas fuel ethanol and biodiesel production incentive program

— Washington State biofuels production tax exemption

3.5. Amount of countervailable subsidies

(69) The amount of countervailable subsidies in accordance with the provisions of the basic Regulation, expressed *ad valorem*, for the investigated companies ranges between 29,1 % and 41,1 %. As these are at the same level as set out in recital (158) of the provisional Regulation, that recital is therefore confirmed.

SCHEME → COMPANY ↓	Biodiesel Mixture Credit	Small Agri- biodiesel Producer Income tax credit	Missouri qualified biodiesel producer incentive fund	Texas fuel ethanol and biodiesel production incentive program	Washington State biofuels production tax exemption	Total
	%	%	%	%	%	%
Archer Daniels Midland Company	31,3		3,8			35,1
Cargill Inc.	34,1	0,4				34,5
Green Earth Fuels of Houston LLC	38,7			0,3		39,0
Imperium Renewables Inc.	28,4				0,7	29,1
Peter Cremer North America LP	41,0					41,0
Vinmar Overseas Limited	41,1					41,1
World Energy Alternatives LLC	37,6					37,6

- (70) The methodology for establishing the subsidy margin for the cooperating companies not included in the sample was set out in recital (159) of the provisional Regulation. In accordance with Article 15(3) of the basic Regulation, the subsidy margin for the cooperating companies not included in the sample, calculated on the basis of the weighted average subsidy margin established for the cooperating companies in the sample, is 36,0 %. Hence, recital (159) of the provisional Regulation is confirmed.
- (71) The basis for establishing the country-wide subsidy margin was set out in recital (160) of the provisional Regulation. In the absence of any comments in this regard, recital (160) of the provisional Regulation is confirmed.

4. COMMUNITY INDUSTRY

4.1. Community production and standing

- (72) One interested party contested the exclusion from the assessment of total Community production of the group of producers related to an exporting producer in the USA mentioned in recital (162) of the provisional Regulation on the basis of Article 9(1) of the basic Regulation. It argued that the correct denominator to establish support to the complaint should be kept at around 5 400 thousand tonnes and not decreased to between 4 200 to 4 600 thousand tonnes as was done at provisional stage.
- (73) The relevant provisions of the basic Regulation to assess standing or the support for the investigation are Article 9(1) and Article 10(8) of the basic Regulation. For information, the relevant provisions of the Agreement on Subsidies and Countervailing Measures concerning the definition of the domestic industry are contained in the EU's legislation in Article 9(1) of the basic Regulation. From these provisions, it is clear that the definition of the domestic production to establish standing should be made in conjunction and is subject to the same requirements as those for the definition of the domestic industry. In any case this claim is not such as to alter the conclusion that the investigation was supported by a major proportion of Community production. Even if the denominator was kept at 5 400 thousand tonnes, the support for the investigation would be above 50 %, namely largely above the requirements of the basic Regulation.
- (74) The same interested party argued that in the light of the definition of the product concerned and the like product which is biodiesel whether in pure form or in blends containing more than 20 % biodiesel (B20), the Community industry and Community production must be composed of all Community companies producing biodiesel and blends above B20. It claimed that there is no evidence that the complainant or the Commission has

sought to include these companies into the total production or determined that these producers supported the complaint.

- (75) In this regard it is noted that the total Community production figure indicated in recital (162) of the provisional Regulation does indeed take into account the production volume of biodiesel in blends above B20. It can further be clarified that according to available information, the production in the Community of blends containing between 21 % (B21) and 99 % (B99) of biodiesel has been very limited during the IP. The only production of blends in this range was concentrated on blends of B30 and did not exceed 60 000 tonnes in terms of biodiesel content. Moreover, the Commission has contacted known producers of B30 after the imposition of provisional measures and the responses received from two of the producer indicate that they support the complaint.

- (76) In the absence of any other comments recitals (161) to (163) of the provisional Regulation concerning the definition of Community production, Community industry and standing are hereby confirmed.

4.2. Sampling

- (77) One party argued that the performance of one sampled Community producer that failed to cooperate in the investigation was very good and it should have been taken into account in the assessment of injury to the Community industry. It was claimed that this producer was not injured during the IP and that best facts available should be used in accordance with Article 28 of the basic Regulation. In this regard the party suggested using the publicly available financial data of this producer for 2007 and 2008 for the examination of injury to the Community industry.
- (78) It is common practice in anti-subsidy investigations that the Commission exclude producers that failed to cooperate for the purpose of the assessment of injury and not to use facts available in line with Article 28 of the basic Regulation. The data concerning injury cover an extended period of 4 years and it is not possible to obtain based on public sources all the necessary information to establish all injury indicators for the whole period. In this particular case, the said Community producer was excluded from the investigation because it had failed to provide complete meaningful information for the years 2004 to 2006 and it only provided partial information for 2007 and the IP. Using the public information for this producer's biodiesel activity for 2007 and 2008, would not have allowed to obtain data for all injury factors and for all the years of the period considered. This would have distorted the trends which are relevant for the assessment of injury.

(79) Moreover, maintaining the said producer in the sample would have not allowed the assessment of undercutting to be made for the totality of the sales of the sampled producers as the said company did not provide a listing with its detailed sales by product type for the IP. Finally, it is noteworthy that contrary to the claim made by the interested party, the financial performance of the said producer, in terms of profitability as shown in its publicly available data, was well below the average profitability established for the co-operating sampled Community producers as shown in Table 7 of the provisional Regulation. On the basis of the above the request made by this party had to be rejected.

(80) The same party claimed that the sample of Community producers was not representative of the Community industry as it was based only on producers of pure biodiesel (B100) and therefore failed to include producers of blends from B99 down to B20 as well as blenders of B100.

(81) In this regard it is recalled that as mentioned in recital (75) above, the Community production of biodiesel blends between B20 and B99 has been very limited during the IP. In view of this limited quantity, which represents less than 2 % of total Community production

of the like product in the IP, it can be concluded that the selection of the sample which was mainly based on the largest volume of production and sales within the Community was representative. As far as the blenders of B100 is concerned these companies could not be considered as producers of the like product as they are processing by a simple blending operation an existing like product. The claim was therefore rejected.

(82) In the absence of any other comments recitals (164) to (166) of the provisional Regulation are hereby confirmed.

5. INJURY

(83) As mentioned in recital (17) above, the examination of the trends concerning the assessment of injury covered the period from January 2004 to the end of the IP. However the investigation showed that the Community industry was practically starting up in 2004. It was, thus, considered more appropriate to make an analysis on the possible injury and the economic situation of the Community industry based on trends for the period 2005 to the IP ('period analysed'). As no party commented on this approach recital (167) of the provisional Regulation is confirmed.

5.1. Community consumption

Table 1

Community Consumption	2004	2005	2006	2007	IP
Tonnes	1 936 034	3 204 504	4 968 838	6 644 042	6 608 659
<i>Index 2005=100</i>	60	100	155	207	206

(84) In the absence of any comments that could justify a change concerning the Community consumption as shown in the above table, recitals (168) to (173) of the provisional Regulation are hereby confirmed.

5.2. Volume of imports from the country concerned and market share

(85) The table below shows the total imports into the Community market made by US exporting producers during the period considered.

Table 2

All imports from USA	2004	2005	2006	2007	IP
Tonnes	2 634	11 504	50 838	730 922	1 137 152
<i>Index 2005=100</i>	23	100	442	6 354	9 885
Market share	0,1 %	0,4 %	1,0 %	11,0 %	17,2 %
<i>Index 2005=100</i>	25	100	250	2 750	4 300

Source: USA export statistics.

- (86) One interested party claimed that the injury and causation analysis of the anti-subsidy proceeding should be made on different data than that made in the parallel anti-dumping proceeding. It was argued that the subsidy findings are based on i) own produced, ii) produced and blended and iii) purchased and blended biodiesel exported to the Community whereas the dumping findings, in particular the export sales to the Community, are based only on the own produced biodiesel of the sampled producers.
- (87) This claim would appear to suggest that the anti-dumping proceeding should always be based on a narrower data in relation to the anti-subsidy proceeding. However, at provisional stage it was found in the parallel anti-dumping proceeding that all the exports of the own production of the companies included in the sample of US producers were made at dumped prices in the Community market. A similar finding was made in the present anti-subsidy investigation. Thus in both investigations all exports made from the USA were deemed to be dumped and subsidized and were thus all included in the injury and causation analysis.
- (88) It should, however, be pointed out that, at definitive stage, one sampled US company was found not to be dumping and this has led to a difference between the volume of dumped imports and the volume of subsidized imports to be considered in the injury and causation analysis of the proceedings. In the anti-dumping proceeding, the overall volume of dumped imports from the USA has been adjusted to take into account the fact that the imports of one sampled exporting producer were found not to be dumped. This has no bearing, however, on the anti-subsidy proceeding.
- (89) In view of the above the claim had to be rejected.
- (90) One interested party claimed that the HTS heading 3824 90 of the USA export statistics which was used in the provisional Regulation to establish the imports from the country concerned would also cover, in addition to biodiesel, other products such as 'fatty substances of animal or vegetable origin and mixtures thereof'. The analysis of the import volume from the USA was therefore deficient. The same interested party proposed that the trends established for the investigated US producers be used instead.
- (91) In this regard, it is firstly noted that the US HTS code 3824 90 4000 was used in order to compute the import volumes originating in the USA and not the six-digit tariff heading claimed by this party.
- (92) Moreover, it is recalled that as mentioned in recital (170) of the provisional Regulation, Eurostat data could not be used for the purpose of assessing the imports of biodiesel from the USA because until the end of 2007 there was no distinct CN code available for the customs classification of that product. Biodiesel could indeed have been classified under various CN codes which also contained import data for other products. The reason why the USA export statistics were used was that they appeared to capture the exports of the product concerned under one tariff code and that the volume of other products captured under the same code would be of insignificant importance as far as exports to the Community are concerned.
- (93) In view of the limitations to use Eurostat data, another alternative to the US export statistics would have been to use the import data reported in the complaint. This data was obtained by the complainants from confidential market intelligence sources and therefore recourse to such information would have been subject to this limitation. However, for the sake of completeness the trends of import volumes would have shown the following picture in an indexed form:

Table 3

Imports from USA	2004	2005	2006	2007	IP
<i>Indexed 2005=100</i>	0	100	1 359	15 059	15 394

- (94) The comparison of the Table 3 with Table 2 above would demonstrate that the Commission's assessment of the import volumes of the product concerned over the analysis period was more conservative than the one that could have been alternatively used. Moreover, this overall picture of the import volumes of Table 3 is compiled from confidential data not susceptible to disclosure whereas the USA statistics is publicly available information.
- (95) The proposed method by the interested party would have shown the following picture regarding the trends of the export volumes on the basis of the information collected from the investigated exporting producers:

Table 4

Imports from USA	2004	2005	2006	2007	IP
<i>Indexed 2005=100</i>	16	100	461	6 180	9 005

- (96) The comparison of Table 4 with Table 2 above would demonstrate very similar trends between the method used by the Commission and the one proposed by this party.
- (97) The same interested party also claimed that because the product concerned is biodiesel and blends of biodiesel with a biodiesel content above 20 % the volume of imports shown in Table 2 above could not correlate with the correct import volume for the product concerned.
- (98) In this regard it is noted that the investigation has not identified any imports of the product concerned with a biodiesel content above B20 and below B99 during the IP. In other words the investigation has not identified any imports of the product concerned that because of their low biodiesel content would be classified under a different US HTS code.
- (99) On the basis of the above it is concluded that the import volume presented in the Table 2 of the provisional Regulation represents a reliable, objective and conservative estimation of the imports into the Community of the product concerned.
- (100) One interested party claimed that the splash and dash quantities exported from the USA should have been distinguished from the imports of the product concerned originating in the USA as the former cannot be treated as imports of US origin.
- (101) In addition the same party and the USG claimed that contrary to what was stated in recitals (179) and (182) of the provisional Regulation all exports from the USA are not deemed to be originating in the USA. There is no authority in the USA that makes an assessment or a determination with respect to the country of origin of a particular product for export and it cannot be assumed that all biodiesel leaving the territory of the USA is of US origin.
- (102) The same party also stated that the origin regulations established by the US Census Bureau regarding the determination of the origin of the exported goods are not widely known to the biodiesel industry and therefore the exporters of biodiesel when filling out the 'Shippers Export Declaration' (SED) normally indicate that the goods exported are of domestic origin.
- (103) It further reiterated its claim made at provisional stage that volumes imported in the Community under the *splash and dash* pattern would represent more than 40 % of the product concerned exported from the USA. In support of its claim it used the US import and export data of the HTS codes 3824 90 4020 and 3824 90 4000, and practically claimed that all imports of biodiesel in the USA were re-exported under the *splash and dash* pattern to the Community.
- (104) On the above it is noted that the clarification requested by the US authorities regarding the fact that no US authority makes an assessment or determination of the origin of a particular product for export can be accepted.
- (105) The claim that *splash and dash* would represent at least 40 % of the US exports to the Community was based on the assumption that all biodiesel imported in the USA would ultimately be re-exported to the Community under the *splash and dash* pattern without any volume being consumed in the USA or further being blended in the USA before exportation.
- (106) However, the data presented by this party showed that in the years 2004 to 2006 the imports exceeded by far the exports which would suggest that there is a domestic demand for biodiesel in the USA from other countries. Moreover, this assumption is rather simplistic as it does not take into account the quantities of biodiesel blended in the USA and exported to the Community in which i) the characteristics of the blends are different from those of the input materials which would confer US origin to the whole blended product or ii) blends in which the proportion of US origin biodiesel being the dominant one would confer US origin to the whole blended product. It is recalled in this respect that, as mentioned in recital (180) of the provisional Regulation, the US companies investigated declared that it was not possible to differentiate in the quantities exported to the Community or sold on the domestic market between the quantities own produced or sourced in the USA or imported. It is also noted that the origin would appear to have correctly been declared by the US companies concerned as in all of the cases further blending of non-US origin biodiesel was taking place in the USA. Indeed, in most of the cases the investigated exporting producers are very large companies or groups of companies with related companies in the Community for which it is difficult to accept that they were not aware of the existing US and Community rules regarding the origin determination.

- (107) On the basis of all the above it is concluded that there are no grounds to clearly identify the imports made in the Community under the *splash and dash* pattern for the period considered. It is also considered that there are no grounds to treat these exports, if any, as non-US origin imports.

5.3. Prices of the subsidised imports and price undercutting

5.3.1. Unit selling price

- (108) The table below shows the unit selling price of all imports into the Community market originating in the USA during the period considered as ascertained in recitals (183) and (184) of the provisional Regulation.

Table 5

All imports from USA	2004	2005	2006	2007	IP
Prices in EUR/tonne	463	575	600	596	616
Index2005=100	81	100	104	104	107

Source: US export statistics and questionnaire replies of the sampled US exporters.

5.3.2. Price undercutting

- (109) For the purpose of analysing price undercutting, the weighted average sales prices of the sampled Community producers charged to unrelated customers on the Community market, adjusted to an ex-works level, were compared to the corresponding weighted average prices of the dumped imports from the USA, established on a CIF basis for the sampled exporting producers in the USA which were found to be dumping into the Community market. An adjustment for the customs duties, post-importation costs and for the differences in feedstock used for the production of biodiesel was applied where appropriate as described in recital (186) of the provisional Regulation.
- (110) Certain exporting producers claimed that the adjustment for the differences in feedstock was understated as it did not reflect correctly the market value of the differences. They further claimed that the differences should be obtained on the basis of the prices for the different types of biodiesel in the Community market and quantified this claim by reference to the price quotations, customs cleared Antwerp based, published by a market analyst.
- (111) In this regard it is noted that the adjustment was based on the overall, verified data collected from the sampled exporting producers for their operations in the USA and was, therefore, based on the findings of the investigation which is the most reliable source of information. Moreover, the price quotations at Community level would have been an inappropriate basis for this adjustment as these price levels would have been influenced by the price levels of the subsidised imports originating in the USA. On this basis the claim was rejected.
- (112) The same exporting producers claimed that the adjustment for feedstock differences should only be applied to the sales of the sampled exporting producers and not to the sales of the sampled Community producers as the sales of the latter consist of blends compatible with the Community standards.
- (113) This claim was found to be irrelevant as the purpose of the adjustment was to address the differences in feedstock and not any differences in meeting the different standards applicable at Community level. The claim was, therefore rejected.
- (114) The complainant contested the appropriateness of this adjustment by claiming that both Community producers and US exporters use a variety of feedstock and both produce a variety of blends which are provided on both markets and are, therefore, operating with the same range possibilities when it comes to the raw material choice.
- (115) In this regard it is noted that, whilst it is true that both Community producers and US exporting producers use a variety of blends based on different feedstock, the repartition of feedstock in the blends may differ significantly from producer to producer and even from customer to customer of the same producer. Indeed, the investigation has shown that a precise matching in the blends sold by the sampled Community producers and those sold by sampled exporting producers on the Community market was met in very few occasions. Therefore, in order to allow for undercutting calculations to take into account the different product types of biodiesel, it was considered indeed necessary to make the adjustment for differences in feedstock. Therefore, this claim had to be rejected.

- (116) Certain exporting producers claimed that the prices used for the injury margin calculations were the CIF Community frontier prices rather than the resale prices to the first unrelated customer. They claimed that these calculations have to be corrected in order to take into account the value and quantities of sales to the first unrelated customer.
- (117) This claim was found to be relevant for two exporting producers and the injury calculations were corrected accordingly.
- (118) On the basis of the above, the average price undercutting margin in the IP, expressed as a percentage of the Community industry's weighted average ex-work prices, was found to range from 18,9 % to 31,9 %, instead of a range from 18,9 % to 33,0 % at provisional stage.

5.4. Economic situation of the Community industry

- (119) As mentioned in recitals (209) to (212) of the provisional Regulation, it was found that the Community industry suffered material injury within the meaning of Article 8(5) of the basic Regulation.
- (120) Indeed, the provisional analysis showed that the performance of the Community industry improved as regards some volume indicators, but that most of the indicators related to the financial situation of the Community industry significantly deteriorated during the period considered. Notwithstanding the Community industry's ability to raise capital for investments, return on investments declined dramatically during the IP and profitability declined significantly over the period considered.
- (121) One interested party claimed that the analysis made in recital (195) of the provisional Regulation regarding the growth of the Community industry was incorrect. In particular, this party argued that the provisional Regulation suggested that the strong increase in demand for biodiesel in the Community market was supposed to lead to a comparable increase in the market shares of the Community industry, while there is no direct correlation between the increase in demand and market share.
- (122) The same party further argued that the injury factors mentioned in the same recital (195) of the provisional Regulation, namely production, utilisation of production capacity, productivity, sales, investment policy, return on investments, cannot be considered as severely affected.
- (123) The argument regarding the de-correlation between demand and market share is accepted. However, it remains that between 2006 and the IP, the market share of the sampled Community producers was multiplied by 1,2 while during the same time, the market share of subsidised imports was multiplied by around 17. This comparatively strong increase in market share for US imports is the result of much lower sales prices for these US imports as shown in table 5 and recital (118) above.
- (124) Regarding the claim about the global assessment of all injury factors, it is acknowledged that not all these factors were deteriorating during the period considered. However, it is stated that factors relating to financial situation of the Community industry were indeed severely affected, namely the profitability and the return on investment and to a lesser extent productivity was affected. This stems from the fact that the Community industry had to adapt to the competition of price-setting subsidised US imports, and chose to maintain their presence on the market to the detriment of their profitability, rather than preserving their profitability but losing market shares.
- (125) Certain interested parties and the USG claimed that the levels of profitability and return on investment for the sampled EU producers are still good in 2007 and during the IP, in absolute value, in spite of the strong decrease compared to the previous years. They argue that the levels of profitability and return on investment achieved from 2004 to 2006 were not sustainable and that the EU biodiesel industry, as all nascent industries, experienced a normal 'boom and bust' phenomenon during the period considered.
- (126) In this regard, it is recalled that some US sampled companies achieved much higher profitability, exceeding 30 %, in the similar context of a developing market during the period considered. It is also stated that the decrease of profitability and return on investment experienced by the Community industry was very brutal since it occurred from 2006 to 2007, and coincides exactly with the surge of U.S. imports of biodiesel.
- (127) Several Community producers claimed that the situation of non-sampled Community companies should be fully taken into account in the injury assessment, in particular in the light of the numerous cases of downsizing, closures or postponement of new projects that were identified among these companies during the period considered.
- (128) On the other hand, one interested party claimed that the reference made in the provisional Regulation to producers in the Community not included in the sample is irrelevant, as the unverified data from non-sampled producers cannot be used for the demonstration of injury. This party further insists on public data showing that some of these non-sampled producers are profitable.

(129) Regarding the two claims above, it is recalled that the provisional Regulation in its recitals (205) to (208) refers to the situation of the non-sampled producers in the Community as a supplementary indication of injury, without impacting the calculations of the injury indicators and injury margin for which verified information was actually used. Therefore the claim of this party was rejected. On the other hand, in the absence of available verified statistics or individual information regarding the situation of all non-sampled EU producers, it is not possible to make any accurate determination for the Community producers as a whole as suggested by the Community producers. This claim was therefore also rejected.

(130) In the absence of any other comments on the provisional findings concerning the economic situation of the Community industry, recitals (188) to (194) and (196) to (208) of the provisional Regulation are hereby confirmed.

(131) The conclusion that the Community industry suffered material injury, as set out in recitals (209) to (212) of the provisional Regulation, is also confirmed.

6. CAUSATION

6.1. Effect of the subsidised imports

(132) It is recalled that the subsidised import volumes from the USA increased significantly during the period analysed. There was also a clear coincidence in time between the surge of subsidised imports and the deterioration of the economic situation of the Community industry. That industry was not able to set its prices in line with market conditions and the cost increases, as its prices were undercut during the IP by the subsidised imports.

(133) It is therefore confirmed that the surge of low-priced subsidised imports from the USA had a considerable negative impact on the economic situation of the Community industry during the IP.

6.2. Effect of other factors

6.2.1. Imports from other third countries

(134) In the absence of any comments that would justify a change in the provisional findings it is confirmed that imports from other third countries cannot have made more than negligible contribution to the injury suffered by the Community industry.

6.2.2. Development of demand

(135) One interested party claimed that the contraction in demand between 2007 and the IP even being negligible (0,5 %) would nevertheless have caused injury to the Community industry by alleging that an hypothetical

increase of 10 % in demand would have yielded an additional volume of sales of 205 733 tonnes if the Community industry would have maintained the same market share of 29,8 % that was recorded during the IP.

(136) In this respect it is noted that the claims made by this party were based on broad and unsubstantiated assumptions. Moreover, in view of the fact that between 2007 and the IP the market share of the Community industry increased by 2,8 percentage points, would indeed support the conclusion reached in recital (223) of the provisional Regulation that injury suffered by the Community industry cannot be attributed to this slight contraction in demand between 2007 and the IP. Therefore, in the absence of any other comments concerning the development of demand on the Community market recital (223) of the provisional Regulation is confirmed.

6.2.3. Public Policy Decisions

(137) One interested party reiterated its claim that the reintroduction of energy tax in Germany would have negatively influenced the economic situation of Community producers supplying that market as because of these measures the biodiesel demand for B100 representing at least 1,5 million tonnes would have collapsed. It further claimed, in response to the findings of the investigation set in recital (225) of the provisional Regulation, that even if the introduction of a blending requirement of 4,4 % for the diesel placed in the German market for transport purposes (B5) would have compensated the alleged sales losses of B100, the prices levels of B100 would be different from those of biodiesel intended for the B5 blends. It alleged that B100 was produced only from the more expensive rapeseed feedstock, whereas biodiesel B5 from a variety of feedstock, thus having a negative influence on the average price of the Community producers.

(138) In this respect it is recalled that, contrary to the allegations made by this party, the investigation has shown that the sales volumes of the sampled Community producers supplying the German market rose by 68 % between 2006 and the IP, which would indeed confirm the provisional finding that any losses on B100 sales were compensated by the mandatory blending requirement. It is further noted that the introduction of the Euro 0,09 per litre of biodiesel as of 1 August 2006 did not lead to the collapse of the market as alleged by this party, but indeed B100 sales were reduced significantly in the last quarter of the IP when this tax was further increased to Euro 0,15 per litre as of 1 January 2008. Regarding the effect on prices, the allegations made by this party were unfounded as the biodiesel used for both types of products had to conform with the same standards which means that in both biodiesel fuels the same mix of feedstock could be used which means that there is no proven price differentiation between the two types of biodiesel. On the basis of the above the claim was rejected.

(139) In the absence of any other comments concerning the public policy decisions recital (226) of the provisional Regulation is confirmed.

6.2.4. Idle production capacity of Community producers

(140) One interested party, whilst accepting that capacity utilisation rates remained fairly high for the sampled Community producers, claimed that the overcapacity of the sampled Community producers would still be a cause of injury in view of the fact that it would result in higher fixed costs that would have a negative effect on profitability. It further claimed that the increase in the net asset value of the said producers would have resulted in fixed cost increases as depreciation and financial costs would have been higher.

(141) In this regard it is recalled that from detailed analysis of the repartition of variable and fixed costs in the cost structure of the Community industry it was established that the share of fixed costs represented only 6 % of overall costs (recital 228 of the provisional Regulation). In addition, it should be noted that this analysis showed insignificant fluctuations of this percentage over the period analysed. With regard to the claim concerning the effect on profitability caused by the increase in the net asset value, it should be noted that the increase in costs in absolute terms, does not automatically lead to an increase in the unit production cost as the latter depends on the volume of output which as shown in Table 4 of the provisional Regulation increased steadily over the period analysed. Therefore higher fixed costs in absolute terms were attributed to higher output volume resulting in the above mentioned repartition of fixed costs in relation to overall costs. On this basis the claims made by this interested party had to be rejected.

(142) The same party alleged that overall overcapacity of the Community producers has a direct impact on prices as there would be a fierce battle among producers to gain contracts up to marginal costs and therefore, producers with high utilisation rates must have been the most aggressive on their sales to undercut the price of their competitors. In support of its claim it submitted an announcement of one sampled company to its financial statements of year 2007.

(143) The allegations, however, of this party were not supported by any evidence as no reference to the alleged battle of prices due to overcapacity was indicated in this statement. The statement rather referred to the increase by the German government of the energy tax on B100 biodiesel as of 1 January 2008 which stimulated competition in the B5 market of biodiesel. On the basis of the above the claim had to be rejected.

(144) In the absence of any other comments concerning the idle capacity of Community producers, recitals (227) to (230) of the provisional Regulation are confirmed.

6.2.5. Increased demand for feedstock and increasing prices

(145) One interested party and the US government claimed that none of the arguments in recitals (231) to (235) of the provisional Regulation addresses the issue that the prices of soybean oil, palm oil and canola oil in the USA at all times since 2004 remained significantly below the prices for rapeseed in the Community which yields a significant competitive advantage to the biodiesel imported from the USA.

(146) It is recalled that the investigation has to establish whether the subsidised imports (in terms of prices and volume) have caused material injury to the Community industry or whether such material injury was due to other factors. In this respect, Article 8(6) of the basic Regulation states that it is necessary to show that the price level of the subsidised imports cause injury. It therefore merely refers to a difference between price levels, and there is thus no requirement to analyse the factors affecting the level of those prices.

(147) In practice, the effect of the subsidised imports on the Community industry's prices is essentially examined by establishing price undercutting, price depression and price suppression. For this purpose, the subsidised export prices and the Community industry's sales prices are compared, and export prices used for the injury calculations may need in certain cases to be adjusted in order to have a comparable basis. Consequently, the use of adjustments in this context only ensures that the price difference is established on a comparable basis. From this, it becomes obvious that the prices of raw materials in the exporting country cannot in principle be another factor of injury.

(148) The above is also confirmed by the wording of Article 8(7) of the basic Regulation, which refers to known factors other than subsidised imports. The list of the other known factors in this Article does not make reference to any factor affecting the price level of the subsidised imports. To summarise, if the imports are subsidised, and even if they benefited from a favourable development of raw material prices, it is not considered that such development could be another factor causing injury.

(149) Thus, the analysis of the factors affecting the level of the prices of the subsidised imports, such as the alleged competitive advantage due to lower raw material prices, cannot be conclusive and such analysis would go beyond the requirements of the basic Regulation.

(150) In any event, and without prejudice to the above, it has to be recalled that a general increase in prices of agricultural products worldwide took place during the IP and that the increase in soybean oil (the main feedstock used by the producers in the country concerned) was more pronounced than the increase of rapeseed oil over the same period. However, these increases in costs in the USA were not reflected in the prices of the subsidised imports in the Community market which significantly undercut the prices of the Community industry.

(151) In light of the above, the claim made by these parties had to be rejected.

(152) In the absence of any other comments concerning the increased demand for feedstock and increasing prices recitals (231) to (238) of the provisional Regulation are confirmed.

6.2.6. Price development of mineral diesel

(153) One interested party reiterated its claim (see recital 236 of the provisional Regulation) and further argued that the prices of mineral diesel would set a cap beyond which the producers of biodiesel would not be able to increase their prices in line with the increases in feedstock.

(154) In this regard it is noted that all of the Community producers were supplying markets where mandatory blending targets exist. In addition, biodiesel was subject to detaxation in most of the Member States which means that its price is comparable with the price of mineral diesel increased with a factor to take into account the energy tax that the latter is subject to. This means that while one can accept a certain correlation with the oil prices, the investigation has established that for the above reasons biodiesel can be indeed sold at higher prices than mineral diesel. Moreover, this party did not submit any convincing evidence showing that the prices of mineral diesel which were at very high levels in the second half of the IP exerted price pressure on the prices of biodiesel of the Community producers during the IP.

(155) In the absence of any other comments concerning the price development of mineral diesel it is concluded that this factor has not caused injury to the Community industry.

6.2.7. Importance of the location of the biodiesel plants in the Community

(156) In the absence of any other comments concerning the location of biodiesel plants in the Community recitals (239) to (241) of the provisional Regulation are confirmed.

6.2.8. Producers related to the US exporters

(157) In the absence of any other comments concerning the impact of imports from the USA by the producers related

to the US exporters, recital (242) of the provisional Regulation is confirmed.

6.2.9. Conclusion on causation

(158) In the light of the foregoing and in the absence of any other comments recitals (243) to (245) of the provisional Regulation are confirmed.

7. COMMUNITY INTEREST

7.1. Community industry

(159) Subsequent to the provisional disclosure the Community industry producers endorsed the findings of the Commission and confirmed that the measures would be in their interest.

(160) One interested party claimed that the measures would not be in the interest of the Community industry as the measures would result in a shift of trade flows, i.e. a switch to imports from countries not covered by measures, because i) the Community market operators would continue to require cheaper biodiesel based on soybean oil and palm oil in order to complement it with the more expensive rapeseed biodiesel which is produced by the Community industry and ii) because the rapeseed oil biodiesel will not be sufficient to cover the demand.

(161) In this regard it is noted that whilst the main feedstock used by the Community industry producers is rapeseed, the same producers did not rely only on this feedstock for their biodiesel production but used also other feedstock such as soybean oil and palm oil. However, in view of the fact that very often the price of other feedstock was higher than the price of the subsidised imports of biodiesel based on such feedstock, the Community industry producers were deprived from the possibility of using soybean oil and palm oil on a larger scale. It is therefore expected that the imposition of measures would also restore normal market conditions in this regard allowing the Community industry producers to adapt more efficiently their production to the different types of biodiesel needed on the Community market. On this basis the claim was rejected.

(162) In the absence of any other comments concerning the interest of the Community industry, recitals (247) to (249) of the provisional Regulation are confirmed.

7.2. Unrelated importers/traders in the Community

(163) In the absence of any reaction from importers after the imposition of provisional measures it is concluded that the effect of the measures will most likely not have a material impact on importers/traders.

7.3. Users in the Community

- (164) In the absence of any reaction from users after the imposition of provisional measures, it is concluded that the countervailing duties will most likely not have a material impact on users.

7.4. Suppliers of raw materials in the Community

- (165) In the absence of any reaction from suppliers after the imposition of provisional measures, recitals (256) to (258) of the provisional Regulation are confirmed.

7.5. Other interests

- (166) Subsequent to the provisional disclosure one interested party claimed that the automobile manufacturers which have invested in producing vehicles adjusted for use with biodiesel may be unable to bring their investments to fruition by selling such vehicles should the prices of biodiesel in the Community because of the measures rise to levels which are not competitive with those of mineral diesel.
- (167) In this regard it is noted that the possibility alleged by this party could have happened even in the absence of measures, i.e. prices of mineral diesel (which depend on the crude oil prices) to drop at levels making them more competitive than biodiesel. Therefore, it would appear unreasonable to suggest that the automobile industry has made investments without taking this parameter into account. Therefore, this claim was rejected.
- (168) Subsequent to the provisional disclosure, one association of EU farmers expressed its support and indicated that the imports of US biodiesel have deprived EU oilseed producers of an outlet of around 6 millions tonnes of oilseeds, or approximately 11 % of EU oilseed production in 2007 and 2008, and led to a 90 Euro per tonne drop in the potential value of rape seed used for non-food purposes. These late comments, however, could not be verified.

7.6. Competition and trade distorting effects

- (169) One interested party reiterated its comments regarding the incoherence of the countervailing measures with the European Union policy to promote the use of biofuels. It added that the European Union cannot depend only on rapeseed-based biodiesel produced in the Community to develop its biodiesel market.
- (170) While this comment has been addressed in section 7.6 of the provisional Regulation, for the issue of rapeseed biodiesel brought up by this party reference is also made to recital (161) above.
- (171) In the absence of any other comments concerning competition and trade distorting effects, recitals (259) to (261) of the provisional Regulation are confirmed.

7.7. Conclusion on Community interest

- (172) Based on the above, it is concluded that there are no compelling reasons against the imposition of countervailing duties in the present case.

8. DEFINITIVE COUNTERVAILING MEASURES

8.1. Injury elimination level

- (173) One company claimed that, in regard to setting its injury margin at the level of the highest injury margin found for the sampled companies (see recitals (268) to (270) of the provisional Regulation), it offered to supply the information necessary to allow for its own margin to be calculated. The company furthermore was prepared to allow a visit to the premises of the company's subsidiary. The company submitted that this invitation is still open.
- (174) Having received this company's reply to the questionnaire response following the initiation of the proceeding, it was noted that there were certain deficiencies in information regarding its export sales to the Community and the resales of its related importer in the Community. The company was asked to provide the information concerned within a specified deadline but the company did not reply to the request. The company was then informed, as stated in recital (268) of the provisional Regulation, that if the requested information was not provided, in accordance with Article 28 of the basic Regulation, the deficient information provided in its questionnaire response may be disregarded. The company was informed about the consequences of its partial co-operation and given an opportunity to comment. The company replied almost two weeks after the prescribed deadline by stating, *inter alia*, that the company 'will submit as a matter of urgency the information requested'. However, the requested information was never provided by the company.
- (175) In light of the above, it is confirmed that the injury elimination level for this company be set at the level of the highest injury margin found for the sampled companies.
- (176) Several interested parties and the USG contested the provisional determination that a profit of 15 % would be the profit margin that could be reasonably be achieved by an industry of this type under normal conditions of competition.
- (177) One interested party claimed that the profit margin for the Community industry used for the determination of the injury elimination level should be set at the level of the profit realised by the Community industry during the IP, namely 5,7 %, because this profit margin would be in the range of profits realised for commodities such as biodiesel. In support of this claim it made reference to profits realised by US producers of ethanol and vegetable oils and by petroleum refineries.

(178) It is noted that the injury elimination level has to be based on an evaluation of the profit that the industry can reasonably expect to achieve in the absence of subsidised imports on the sales of the like product on the Community market. For a given investigation, the profit realised in the beginning of the period considered may be reasonably considered as the profit realised in the absence of subsidised imports. Indeed, in this specific case in the early years of the period considered (2004 to 2006) the imports from the USA never exceeded a market share of 1 % and it can therefore reasonably be concluded that these periods were characterised by the absence of subsidised imports. Therefore, the average profit achieved in these periods by the Community industry was considered as a reasonable basis for determination of the injury elimination level also taking into account the needs to guarantee the production investment of this newly established industry. Moreover, and in relation to the claim made by the interested party, the investigation has shown that the profits realised by the major USA exporting producers for their domestic biodiesel operations were well above the profit used for the determination of the injury elimination level. On the basis of the above the claim had to be rejected.

(179) Certain claims from US companies regarding the conversion of the *ad-valorem* duties into fixed amount duties, described in recital (185) below, revealed that the *ad-valorem* underselling amount was calculated as the ratio between the total underselling and the adjusted CIF price (see adjustment mentioned in recital (109)), whereas the non-adjusted CIF price should have

been used as it was done to calculate the *ad-valorem* dumping margin. Therefore all *ad-valorem* injury elimination levels were recalculated for all the sampled US companies.

(180) In the absence of other comments following the provisional disclosure, the same methodology as mentioned in recitals (266) and (267) of the provisional Regulation has been used to obtain the non-injurious prices. The injury elimination level was calculated as a percentage to the total non adjusted CIF import value.

8.2. Form and level of the duties

(181) In the light of the foregoing and in accordance with Article 15(1) of the basic Regulation, a definitive countervailing duty should be imposed at a level sufficient to eliminate the injury caused by the subsidised imports without exceeding the subsidy margin found.

(182) In view of the comments received by certain interested parties following the provisional disclosure and in view of the revisions described in this Regulation, certain margins have been amended.

(183) On the basis of the above, countervailing duty rates have been established by comparing the injury elimination margins and the subsidy margins. Consequently, the proposed countervailing duties are as follows:

Company	Injury margin	Subsidy margin	Countervailing duty rate
Archer Daniels Midland Company	54,5 %	35,1 %	35,1 %
Cargill Inc.	64,4 %	34,5 %	34,5 %
Green Earth Fuels of Houston LLC	51,3 %	39,0 %	39,0 %
Imperium Renewables Inc.	41,6 %	29,1 %	29,1 %
Peter Cremer North America LP	77,2 %	41,0 %	41,0 %
Vinmar Overseas Limited	76,4 %	41,1 %	41,1 %
World Energy Alternatives LLC	46,1 %	37,6 %	37,6 %
Co-operating non sampled companies	56,2 %	36,0 %	36,0 %

(184) In view of the fact that the countervailing duty will apply to blends containing by weight more than 20 % of biodiesel, in proportion to their biodiesel content, it is considered appropriate for the effective implementation of the measures by the customs authorities of the Member States to determine the duties as fixed amounts on the basis of biodiesel content.

(185) Certain parties contested the methodology used to convert the *ad valorem* duty rates into duties in the form of fixed amounts. They claimed that the CIF values that should have been used for the conversion of an *ad valorem* duty into a fixed amount should have been the actual CIF values and not the ones adjusted to take into account the feedstock differences described in recitals (185) and (186) of the provisional Regulation.

(186) This claim was examined and it was indeed found that the adjusted CIF values were used for the conversion of the *ad valorem* duties into fixed amount duties. However, it was also found that the same values were used as the basis for expressing the underselling amount as an *ad valorem* duty. Therefore, a first correction had to be made in expressing the underselling amount as a percentage of the total actual CIF import value. On this basis the injury margins have been revised accordingly. The subsequent calculation of the fixed amount duty rates, however, showed no difference from the duty rates appearing in Article 1(2) of the provisional Regulation since the higher *ad valorem* duty was exactly offset by the decrease of the CIF prices (from adjusted to actual) used for converting expressing the former into fixed duties.

(187) The individual company countervailing duty rates specified in this Regulation were established on the basis of the findings of the present investigation. Therefore, they reflect the situation found during that investigation with respect to these companies. These duty rates (as opposed to the country-wide duty applicable to 'all other companies') are thus exclusively applicable to imports of products originating in the country concerned and produced by the companies and thus by the specific legal entities mentioned. Imported products produced by any other company not specifically mentioned in the operative part of this Regulation with its name and address, 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'.

(188) Any claim requesting the application of an individual company countervailing duty rate (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 example, that name change or that change in the production and sales entities. If appropriate, the Regulation will then be amended accordingly by updating the list of companies benefiting from individual duty rates.

(189) All parties were informed of the essential facts and considerations on the basis of which it was intended to

recommend the imposition of definitive countervailing duties. They were also granted a period within which they could make representations subsequent to this disclosure. The comments submitted by the parties were duly considered, and, where appropriate, the findings have been modified accordingly.

8.3. Undertakings

(190) Certain US cooperating exporting producers offered price undertakings in accordance with Article 13(1) of the basic Regulation. It is noted that in view of significant price variations of the raw material, the product is not considered suitable for a fixed price undertaking. In this context, the companies proposed that the minimum import prices (MIPs) are indexed regularly in relation to the fluctuations of the prices of rapeseed oil. Moreover, they offered MIPs for three types to take account of the product variety upon importation (biodiesel obtained from soybean, palm or canola oil) on the basis of the feedstock coefficients established during the IP.

(191) In relation to the offers of the co-operating exporting producers it is noted that the basis to establish an indexed MIP was on average between 7-8 % lower than the non injurious price established during the IP. Moreover, the proposed coefficients to arrive at adjusted MIPs for the types mentioned above were inappropriate as they related to the IP. Indeed, in view of the fact that these coefficients, which depend on the difference in price between the feedstock, continuously fluctuate, these coefficients may have considerably changed in relation to the situation observed during the IP. Therefore, the proposed indexation of MIPs for soybean biodiesel or palm oil biodiesel on the basis of price fluctuations of the rapeseed oil was considered inappropriate as it would be based on the evolution of prices of raw material different to the ones used for the production of the exported product concerned.

(192) On the basis of the above, and without referring to any further company specific practical issues regarding their acceptance, it was considered that the undertakings had to be rejected as the method to determine the MIPs was inappropriate and that the offered MIPs were not at levels that would eliminate the injurious subsidisation.

8.4. Definitive collection of provisional duties and special monitoring

(193) Subsequent to the disclosure of final findings, the complainant requested special measures to prevent possible circumvention of the measures in view of the fact that the market concerned is a global commodity market with a fungible product commercialised through various sales channels.

⁽¹⁾ European Commission, Directorate-General for Trade, Directorate H, Office N105 04/092, 1049 Brussels, Belgium.

(194) In consideration of the above, it is indeed considered appropriate to monitor closely the imports of biodiesel from all destinations, with a view of facilitating swift appropriate action should the situation so require.

(195) In view of the magnitude of the subsidy margins found and in the light of the level of the injury caused to the Community industry, it is considered necessary that the amounts secured by way of the provisional countervailing duty, imposed by the provisional Regulation should be definitively collected to the extent of the amount of the definitive duties imposed. Where the definitive duties are lower than the provisional duties, amounts provisionally secured in excess of the definitive rate of countervailing duties shall be released. Where the definitive duties are higher than the provisional duties, only the amounts secured at the level of the provisional duties shall be definitively collected,

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive countervailing duty is hereby imposed on imports of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, commonly known as 'biodiesel', in pure form or in a blend containing by weight more than 20 % of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, currently falling within CN codes ex 1516 20 98 (TARIC code 1516 20 98 20), ex 1518 00 91 (TARIC code 1518 00 91 20), ex 1518 00 99 (TARIC code 1518 00 99 20), ex 2710 19 41 (TARIC code 2710 19 41 20), 3824 90 91, ex 3824 90 97 (TARIC code 3824 90 97 87), and originating in the United States of America.

2. The rate of the definitive countervailing duty applicable to the products described in paragraph 1 and manufactured by the companies below shall be:

Company	Countervailing duty rate Euro per tonne net	TARIC additional code
Archer Daniels Midland Company, Decatur	237,0	A933
Cargill Inc., Wayzata	213,8	A934
Green Earth Fuels of Houston LLC, Houston	213,4	A935
Imperium Renewables Inc., Seattle	216,8	A936
Peter Cremer North America LP, Cincinnati	211,2	A937
Vinmar Overseas Limited, Houston	211,2	A938
World Energy Alternatives LLC, Boston	211,2	A939
Companies listed in the Annex	219,4	see Annex
All other companies	237,0	A999

The countervailing duty on blends shall be applicable in proportion in the blend, by weight, of the total content of fatty-acid mono-alkyl esters and of paraffinic gasoils obtained from synthesis and/or hydro-treatment, of non-fossil origin (biodiesel content).

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

Article 2

Amounts secured by way of provisional countervailing duties pursuant to Commission Regulation (EC) No 194/2009 on imports of biodiesel falling within CN codes ex 1516 20 98 (TARIC code 1516 20 98 20), ex 1518 00 91 (TARIC code 1518 00 91 20), ex 1518 00 99 (TARIC code 1518 00 99 20), ex 2710 19 41 (TARIC code 2710 19 41 20), 3824 90 91, ex 3824 90 97 (TARIC code 3824 90 97 87), and originating in the United States of America shall be definitively collected. The amounts secured in excess of the amount of the definitive countervailing duties shall be released. Where the definitive duties are higher than the provisional duties, only the amounts secured at the level of the provisional duties shall be definitively collected.

Article 3

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.

Done at Brussels, 7 July 2009.

For the Council
The President
A. BORG

ANNEX

US co-operating exporting producers not sampled

Company Name	City	TARIC additional code
AC & S Inc.	Nitro	A941
Alabama Clean Fuels Coalition Inc.	Birmingham	A940
American Made Fuels, Inc.	Canton	A940
Arkansas SoyEnergy Group	DeWitt	A940
Arlington Energy, LLC	Mansfield	A940
Athens Biodiesel, LLC	Athens	A940
Beacon Energy	Cleburne	A940
Biodiesel of Texas, Inc.	Denton	A940
BioDiesel One Ltd	Southington	A940
BioPur Inc.	Bethlehem	A941
Buffalo Biodiesel, Inc	Tonawanda	A940
BullDog BioDiesel	Ellenwood	A940
Carbon Neutral Solutions, LLC	Mauldin	A940
Central Iowa Energy LLC	Newton	A940
Chesapeake Custom Chemical Corp.	Ridgeway	A940
Community Fuels	Stockton	A940
Delta BioFuels Inc.	Natchez	A940
Diamond Biofuels	Mazon	A940
Direct Fuels	Euless	A940
Eagle Creek Fuel Services, LLC	Baltimore	A940
Earl Fisher Bio Fuels	Chester	A940
East Fork Biodiesel LLC	Algona	A940
ECO Solutions, LLC	Chatsworth	A940
Ecogy Biofuels LLC	Tulsa	A940
ED&F Man Biofuels Inc.	New Orleans	A940
Freedom Biofuels Inc.	Madison	A940
Freedom Fuels LLC	Mason City	A941
Fuel & Lube, LLC	Richmond	A940
Fuel Bio	Elizabeth	A940
FUMPA Bio Fuels	Redwood Falls	A940
Galveston Bay Biodiesel LP (BioSelect Fuels)	Houston	A940
GeoGreen Fuels LLC	Houston	A940
Georgia Biofuels Corp.	Loganville	A940
Green River Biodiesel, Inc.	Moundville	A940
Griffin Industries Inc.	Cold Spring	A940
High Plains Bioenergy	Guymon	A940
Huish Detergents Inc.	Salt Lake City	A940

Company Name	City	TARIC additional code
Incobrasa Industries Ltd.	Gilman	A940
Independence Renewable Energy Corp.	Perdue Hill	A940
Indiana Flex Fuels	LaPorte	A940
Innovation Fuels Inc.	Newark	A940
Integrity Biofuels	Morristown	A941
Iowa Renewable Energy LLC	Washington	A940
Johann Haltermann Ltd.	Houston	A940
Lake Erie Biofuels LLC	Erie	A940
Leland Organic Corporation	Leland	A940
Louis Dreyfus Agricultural Industries LLC	Claypool	A940
Louis Dreyfus Claypool Holdings LLC	Claypool	A940
Middle Georgia Biofuels	East Dublin	A940
Middletown Biofuels LLC	Blairsville	A940
Musket Corporation	Oklahoma City	A940
Natural Biodiesel Plant LLC	Hayti	A941
New Fuel Company	Dallas	A940
North Mississippi Biodiesel	New Albany	A940
Northern Biodiesel, Inc.	Ontario	A940
Northwest Missouri Biofuels, LLC	St. Joseph	A940
Nova Biofuels Clinton County LLC	Clinton	A940
Nova Biosource	Senaca	A940
Organic Fuels Ltd.	Houston	A940
Owensboro Grain Company LLC	Owensboro	A940
Paseo Cargill Energy, LLC	Kansas City	A940
Peach State Labs Inc.	Rome	A940
Perihelion Global, Inc.	Opp	A940
Philadelphia Fry-O-Diesel Inc.	Philadelphia	A940
Piedmont Biofuels Industrial LLC	Pittsboro	A941
Pinnacle Biofuels, Inc.	Crossett	A940
PK Biodiesel	Woodstock	A940
Pleasant Valley Biofuels, LLC	American Falls	A940
Prairie Pride	Deerfield	A941
RBF Port Neches LLC	Houston	A940
Red Birch Energy, Inc.	Bassett	A940
Red River Biodiesel Ltd.	New Boston	A940
REG Ralston LLC	Ralston	A940
Renewable Energy Products, LLC	Santa Fe Springs	A940
Riksch BioFuels LLC	Crawfordsville	A940
Safe Renewable Corp.	Conroe	A940
Sanimax Energy Inc.	DeForest	A940
Seminole Biodiesel	Bainbridge	A940

Company Name	City	TARIC additional code
Southeast BioDiesel LLC	Charlotte	A941
Soy Solutions	Milford	A940
SoyMor Biodiesel LLC	Albert Lea	A940
Stepan Company	Northfield	A941
Sunshine BioFuels, LLC	Camilla	A940
TPA Inc.	Warren	A940
Trafigura AG	Stamford	A940
U.S. Biofuels Inc.	Rome	A940
United Oil Company	Pittsburgh	A940
Valco Bioenergy	Harlingen	A940
Vanguard Synfuels, LLC	Pollock	A940
Vitol Inc.	Houston	A940
Walsh Bio Diesel, LLC	Mauston	A940
Western Dubque Biodiesel LLC	Farley	A940
Western Iowa Energy LLC	Wall Lake	A940
Western Petroleum Company	Eden Prairie	A940
Yokaya Biofuels Inc.	Ukiah	A941

COUNCIL REGULATION (EC) No 599/2009**of 7 July 2009****imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in the United States of America**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

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

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

Whereas:

1. PROCEDURE**1.1. Provisional measures**

- (1) The Commission, by Regulation (EC) No 193/2009 ⁽²⁾ (the 'provisional Regulation') imposed a provisional anti-dumping duty on imports of biodiesel originating in the United States of America ('USA' or 'country concerned').
- (2) In the parallel anti-subsidy proceeding, the Commission, by Regulation (EC) No 194/2009 ⁽³⁾ imposed a provisional countervailing duty on imports of biodiesel originating in the United States of America.

1.2. Subsequent procedure

- (3) Subsequent to the disclosure of the essential facts and considerations on the basis of which it was decided to impose provisional anti-dumping measures ('provisional disclosure'), several interested parties made written submissions making their views known on the provisional findings. The parties who so requested were granted an opportunity to be heard. The Commission continued to seek and verify all information it deemed necessary for its definitive findings. The oral and written comments submitted by the interested parties were considered and, where appropriate, the provisional findings were modified accordingly.

- (4) All parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of definitive anti-dumping measures on imports of biodiesel originating in the USA and the definitive collection of the amounts secured by way of the provisional duty ('final disclosure'). They were also granted a period within which they could make representations subsequent to this disclosure.

- (5) The US Government (USG) and other interested parties expressed their disappointment with the decision to grant only sixteen days to provide comments on the provisional disclosure and also with the decision to decline the requests of certain parties for a meaningful extension of time to file those comments.

- (6) Article 20(1) of the basic Regulation provides that interested parties may be provided with the details underlying the essential facts and considerations on the basis of which provisional measures have been imposed. In this regard, it is the Commission's practice to provide disclosure to all interested parties to a proceeding upon publication in the *Official Journal of the European Union* of a regulation imposing provisional measures and to provide a period of time within which parties may provide comments thereon. This practice was followed in this proceeding. In regard to the time period within which parties were required to provide comments, the basic Regulation does not specify what period should be allowed. In this proceeding, it was considered that a period of sixteen days (subsequently extended to seventeen days) be granted given the complexity of the proceeding and the need to respect the requirement in Article 11(9) of the basic anti-subsidy Regulation that the investigation be concluded within thirteen months of initiation.

- (7) Further to the disclosure of the provisional findings in the parallel anti-subsidy proceeding, the USG commented on the duty rate established for 'all other companies'. In regard to the rate of duty established for US companies that did not make themselves known and cooperate in the investigation, the provisional duty rate was set at the level of the lower of the highest subsidisation margin or highest injury margin found for the sampled cooperating exporting producers. The same method was also applied in the anti-dumping proceeding. The rate of the anti-dumping duty so established was as set out in Article 1(2) of the provisional Regulation ('all other companies' rate of EUR 182,4 per tonne). The USG considers that this rate of duty is a rate improperly calculated on the basis of the facts available. The USG considers that, in order to rely on facts available under Article 18 of the basic Regulation, it must first be

⁽¹⁾ OJ L 56, 6.3.1996, p. 1.

⁽²⁾ OJ L 67, 12.3.2009, p. 22.

⁽³⁾ OJ L 67, 12.3.2009, p. 50.

determined that an interested party has refused or failed to provide the 'necessary information' ⁽¹⁾. The USG rather considers that the weighted average rate calculated for the non-sampled cooperating companies should be applied instead.

- (8) In reply to this it should be noted that, at initiation stage, the Commission sent the sampling form, complaint and the Notice of Initiation to the companies listed in the complaint (more than 150 companies). A copy of the sampling form was also attached to the Note Verbale sent to the Mission of the United States of America to the European Communities at initiation and they were invited to send it to US exporters/producers USA. Moreover, the National Biodiesel Board ('NBB'), which has been an interested party from the outset of this proceeding, represents a great number of companies in the biodiesel industry in the USA.
- (9) The Notice of Initiation as well as the cover letter attached to the sampling form drew the attention of the consequences of non-cooperation. As mentioned in recital (8) of the provisional Regulation, more than 50 companies identified themselves in the context of the sampling exercise and provided the requested information within the 15 day period. These companies accounted for more than 80 % of the total imports of biodiesel from the USA to the Community.
- (10) Subsequent to the imposition of provisional measures, the US authorities were asked to provide additional information. In particular, the authorities were asked to invite any additional exporters/producers of biodiesel in the USA beyond those listed in Article 1 and the Annex to the provisional Regulation, who were not known at the time of the initiation and did not previously refuse to cooperate ⁽²⁾, to make themselves known.
- (11) The US authorities provided a list containing the names of more than 100 additional companies (producers/exporters) in the USA. It was examined whether any of the companies had been invited to cooperate at the stage of initiation of the proceeding. The investigation revealed that a significant number of the companies on the list had already been invited to cooperate during the sampling exercise but had chosen not to do so at that time. In other words, these companies were aware of the consequences of non-cooperation in accordance with Article 18 of the basic Regulation.
- (12) However, as regards those companies (more than 40) on the list who were unknown to the Commission at the time of the initiation of this proceeding, it was noted that the request to the US authorities to provide details of these companies was made after the imposition of provisional measures. It was therefore decided to add these companies to the Annex of this Regulation and apply the same duty rate to these companies as to those who expressly cooperated but were not chosen in the sample. These companies received disclosure of the essential facts and considerations on the basis of which it was intended to impose definitive measures and were invited to comment on the fact that it was proposed to add their names to the Annex of this Regulation.
- (13) Following final disclosure, the USG welcomed the proposal to apply the weighted average duty to additional companies. However, the USG considered that no explanation had been provided as to why other companies are made subject to the 'all other companies' rate. In this regard it is noted that for the companies that were invited to cooperate during the sampling exercise, explanations have already been given above. Regarding possible US exporters/producers that were not individually notified of the investigation nor mentioned in the list referred to in recital (11), it is noted first of all that extensive efforts were made upon initiation of the proceeding to contact companies in the USA that might be concerned by this proceeding (see recitals (8) and (10) above). Furthermore, additional efforts were made subsequent to the imposition of provisional measures as mentioned in recital (10) above to identify other companies which resulted in the addition of more than 40 companies to the list of those to whom the weighted average duty would apply. It is considered that these extensive efforts have given every opportunity to biodiesel companies in the USA to make themselves known. In this regard, it is noted that the relevant industry association has been involved in the proceeding since its initiation. Consequently, it is considered that the 'all other companies' rate of duty should be applied to companies that did not make themselves known.
- (14) One company that submitted a reply to the sampling form and was consequently listed in the Annex to the Provisional Regulation requested that its parent company be added to the list of companies in the Annex to this Regulation. This company also requested that the city location of the two companies be changed in the Annex to correctly reflect the address on the invoices of the companies.
- (15) Having examined this company's request, it was considered that the parent company should also be listed in the Annex to this Regulation as it was mentioned in the company's reply to the sampling form as the only related company involved in the biodiesel business. The city location for both companies is also being revised.
- ⁽¹⁾ Article 18(1) of the basic Regulation states: 'In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within the time limits provided in this Regulation, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available. [...]'.
⁽²⁾ Unlike those companies which received a sampling form but did not return it.

- (16) It is recalled that the investigation of dumping and injury covered the period from 1 April 2007 to 31 March 2008 ('investigation period' or 'IP'). With respect to the trends relevant for the injury assessment, the Commission analysed data covering the period from January 2004 to the end of the IP ('period considered').

1.3. Sampling of Community producers and exporting producers in the USA

- (17) In the absence of any comments concerning the sampling of exporting producers in the USA the provisional findings in recitals (5) to (10) of the provisional Regulation are hereby confirmed.
- (18) Certain parties commented on the representativity of the sample of Community producers. These comments are addressed in recitals (74) to (78) below.

2. PRODUCT CONCERNED AND LIKE PRODUCT

2.1. Product concerned

- (19) It is recalled that in the notice of initiation, the product allegedly being dumped was defined as fatty-acid monoalkyl esters and/or paraffinic gasoils from synthesis and/or hydro-treatment, of non-fossil origin (commonly known as 'biodiesel'), whether in pure form or in a blend.
- (20) The complaint contained *prima facie* evidence that biodiesel and all blends, of biodiesel with mineral diesel, produced in the USA and exported at dumped price to the Community had affected the economic situation of the biodiesel producers in the Community. Consistent with the characteristics of the relevant US biodiesel producers and domestic market, the definition of the product concerned intended to cover biodiesel also when incorporated into the biodiesel blends. It was however considered that the definition of the product concerned as mentioned in the Notice of Initiation and in recital (19) above, could give rise to concerns as to what producers and what product types were intended to be covered by the investigation and those that were not.
- (21) Similarly, for the investigation of dumping and injury, in particular for establishing the dumping margins and injury elimination levels it was necessary to clearly identify the product types that were concerned by the investigation.
- (22) In line with the characteristics of the US market, the product concerned was provisionally defined as fatty acid monoalkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, commonly known as 'biodiesel', whether in pure form or in blends, which are above B20. Hence the

product concerned covered pure biodiesel (B100) and all blends which contain more than 20 % biodiesel ('the product concerned'). This threshold was considered to be appropriate to allow a clear distinction between the various types of blends which are intended to be further blended and those intended for direct consumption on the US market.

- (23) The investigation showed that all types of biodiesel and the biodiesel in the blends covered by this investigation, despite possible differences in terms of raw material used for the production, or variances in the production process, have the same or very similar basic physical, chemical and technical characteristics and are used for the same purposes. The possible variations in the product concerned do not alter its basic definition, its characteristics or the perception of that various parties have of it.
- (24) Claims were received from interested parties on the definition of the product concerned and the like product whereby they contested both the definition of the product concerned and the like product simultaneously with the same arguments without making any distinction between the concept of product concerned and like product in the context of the proceeding.
- (25) It is recalled that the concept of the product concerned is governed by the provisions of Article 1(1) to 1(3) of the basic Regulation, the interpretation of the term 'like product' is mentioned in Article 1(4) of the basic Regulation. Hence, the claims will be addressed separately below.
- (26) One party questioned to what extent blends with low proportion of biodiesel (e.g. B21) should still deem to qualify as biodiesel on par with pure biodiesel (B100) or on similar blends that consist primarily of biodiesel with lower amount of mineral diesel (e.g. B99). They claimed that B100 and B99 basically underwent the investigation and that all the calculations of dumping and injury were made on the basis of these two product types. In their view establishing a threshold just above B20, namely the low-level blend sold directly to consumers in the USA leads to an artificial definition of the product concerned.
- (27) The same party also questioned whether a blend with 20 % biodiesel still qualifies to be a biodiesel fuel rather than mineral diesel which is not included in the definition of the product concerned. This party understood that the EU supports the view that a new customs heading should be created⁽¹⁾ for biodiesel in the customs Harmonised System (HS). In its view the Commission broadened the definition of the product in the present proceeding and expanded the product types affected by the imposition of the measures.

⁽¹⁾ Heading number 3826 00 to cover 'biodiesel and mixtures thereof, not containing or containing less than 70 % by weight of petroleum oils or oils obtained from bituminous minerals'.

- (28) In addition, the party considered that at the time of the investigation no specific threshold existed to determine what is biodiesel for the classification in the combined nomenclature (CN) code 3824 90 91, the specific code created since 1 January 2008 for biodiesel by the EU. The party questioned whether under the rule 3(b) of the general rules for the interpretation of the CN⁽¹⁾ a blend containing less than 50 % biodiesel could still qualify as biodiesel. They further mentioned that the examples of blends mentioned in the Commission questionnaire were of high biodiesel contents and thus implied that the product concerned is only biodiesel and blends containing very high levels of biodiesel.
- (29) The party also claimed that the EU cannot change the definition of the product concerned whilst maintaining a different like product. They referred to the provisional disclosure to the sampled US biodiesel producers that demonstrates that the sampled US producers sold blends exclusively made of various types of biodiesel. Hence the product concerned should be limited to the products containing 100 % of biodiesel (B100), even if composed of biodiesel made of different feedstock, or to blends containing 99 % of biodiesel (B99).
- (30) The party referred to a recent Court Judgement⁽²⁾ concerning imports of ammonium nitrate and concluded that the rationale of that judgment also applies to the current proceeding and that biodiesel that is not part of blends in very high content cannot be subject to the investigation and to measures as it is not the like product for which dumping and injury findings were drawn, namely products that contain only biodiesel (B100) or 99 % of biodiesel (B99).
- (31) The parties did not bring any evidence or a legal reference which would show that the product concerned was not correctly defined in the present investigation. The provisions in Article 1(1) to 1(3) of the basic Regulation provide guidance as to the definition of the product concerned. Article 1(1) states that: 'An anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury.'
- (32) As mentioned in recital (20) above, the complaint contained *prima facie* evidence that biodiesel and all blends, of biodiesel with mineral diesel, produced in the USA and exported at dumped prices to the Community had affected the economic situation of the biodiesel producers in the Community. The dumping and the injury margins were determined for each individual sampled producer on the basis of the product types they sold to the Community market.
- (33) The parties did not bring any evidence showing that the threshold fixed in the provisional Regulation to set the dividing line between product concerned and product non concerned was artificial. As mentioned in recitals (24) and (26) of the provisional Regulation, the investigation showed that B20, and potentially lower level blends, were actually sold directly to consumers in the US. The investigation also showed that the market for blending and the market for consumer products were different markets with different customers: one market where biodiesel and biodiesel blends are destined to further blending by traders and blenders and one market where the blends are destined to the distribution network and thus to consumers. Defining the threshold for the product concerned above B20 allowed to draw a clear dividing line and avoided confusion between the products, the markets and the various parties in the USA.
- (34) In all anti-dumping investigations it is common that individual companies investigated do not produce and sell all the product types included in the definition of the product concerned. Some companies may produce a very limited range of product types while other may produce a larger range. This however does not affect the definition of the product concerned. It is therefore considered that the claim that the product concerned should only cover the product types that were exported by the US producers and used for the dumping and the injury calculations is unfounded.
- (35) As mentioned in the provisional Regulation and in recital (19) above, the investigation primarily focused on biodiesel, whether in pure form or incorporated in blends. The anti-dumping measures will apply to the relevant blends exported to the Community market. Hence, it is considered that the question whether a blend with 20 % biodiesel still qualifies for a biodiesel fuel rather than mineral diesel which is not included in the definition of the product concerned is not relevant.
- (36) It should be clarified that the dumping and the injury findings of each company investigated were exclusively based on the relevant product types which were produced and sold by the relevant company during the IP. Claiming that the definition of the product concerned including blends above B20 would affect unduly US producers is not founded and cannot lead to the conclusion that the product concerned should be limited to the products that contain 100 % of biodiesel (B100) even if composed of biodiesel of different feedstock or a blend composed of 99 % of biodiesel (B99). Including blends above B20 in the definition of the product concerned had no impact whatsoever on the findings made for companies investigated which are not producing this product type.
- ⁽¹⁾ 'Mixtures composite goods consisting of different materials or made of different components and goods put in sets for retail sales, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character in so far as this criterion is applicable.'
- ⁽²⁾ Case T-348/05: JSC Kirovo-Chepetsky Khimichesky Kombinat v. Council, 10 September 2008, paragraphs 61-63.

- (37) The allegation of the party according to which the rationale of a Court Judgement⁽¹⁾ also applies to the current proceeding and that biodiesel that is not part of blends in very high content cannot be subject to the scope of the investigation is also not founded. In fact, for each company investigated, any injury and dumping margins will exactly match the product concerned and the like product for which dumping and injury findings were established, namely the relevant products types that contain biodiesel that were sold domestically and exported to the Community by that company. Also, the judgment which is invoked by the operator concerned a review of existing anti-dumping measures resulting in their extension to other products than the product concerned, which is not the case in the current investigation.
- (38) Although it is considered that the examples provided in a questionnaire intended to collect data for the purpose of an investigation cannot be used to make assumptions as to the conclusion of the investigation, it is noteworthy that the Commission cannot know in advance, namely before its on-spot investigation takes place, which types of products will be produced and sold in the domestic market and for export by the companies concerned at the moment of the drafting of the questionnaire. The product concerned by anti-dumping investigations may cover a range of different product types and the fact that some of them may not be dumped does not lead to their exclusion from the definition of the product concerned.
- (39) Based on the above facts and considerations, it is confirmed that all types of biodiesel and the biodiesel in the blends covered by this investigation, despite possible differences in terms of raw material used for the production, or variances in the production process, have the same or very similar basic physical, chemical and technical characteristics and are used for the same purposes. The possible variations in the product concerned do not alter its basic definition, its characteristics or the perception that various parties have of it.
- (41) Therefore no differences were found between the various types of the product concerned and the Community like products sold on the Community market which would lead to the conclusion that the products produced and sold on the Community market is not a like product, sharing the same or very similar basic physical, chemical and technical characteristics as to the types of the product concerned produced in the USA and exported to the Community. It was therefore concluded that all types of biodiesel covered by this investigation are considered to be alike within the meaning of Article 1(4) of the basic Regulation.
- (42) One party claimed that the definition of the like product is intricately linked to the identification of the product concerned and must be established in term of physical characteristics and end-use of the product. They basically said that B20 is not used for consumption in the EU but rather an even lower blend which is B5. Hence the like product was wrongly defined. They also claimed that the definition of the product concerned cannot be changed whilst maintaining a different like product.
- (43) As it clearly appears in recital (29) to (35) of the provisional Regulation, the definition of the like product is linked to the identification of the product concerned and was mainly established in term of physical characteristics of the product. The actual end-use was also considered and it was considered that the threshold of B20 should also be maintained for the definition of the like product. In this case, the number of product types covered by the like product has also been reduced to match with the definition of the product concerned.
- (44) Hence, the claims of the parties that the definition of the like product was incorrect have to be rejected and the provisional definition of the like product can be confirmed.

3. DUMPING

3.1. Preliminary remark

- 2.2. Like product**
- (40) It was provisionally found that the products produced and sold on the domestic market of the USA, which are covered by this investigation, have similar basic physical, chemical and technical characteristics and uses as those exported from this country to the Community market. Similarly, the products manufactured by the Community industry and sold on the Community market have similar basic physical, chemical and technical characteristics and uses when compared to those exported to the Community from the country concerned.
- (45) Following the disclosure of the provisional findings, several exporting producers as well as NBB claimed that an adjustment should have been made in the dumping calculations to eliminate the impact of subsidisation. According to them, disregarding the effect of the subsidy granted both on domestic and export sales resulted in the understatement of revenues, affecting both the normal value for the like product and the export price determination for the product concerned. Consequently, the normal value was affected since the ordinary course of trade test was determined based on sales prices that did not take into account the revenue generated by sales of the product benefiting from the subsidy whilst the export price was equally understated for the same reason. These parties further alleged that the non-adjustment of the subsidy constituted a manifest

⁽¹⁾ Case T-348/05: JSC Kirovo-Chepetsky Khimichesky Kombinat v. Council, 10 September 2008, paragraphs 61-63.

error in the application of Articles 2(4) and 2(10) of the basic Regulation because it contributed to the use of constructed normal values whilst the production and sales of the product concerned were in reality profitable if account was taken of the subsidies. It is recalled that according to the findings of the investigation, the US authorities granted a so-called blender's credit of 1 USD per gallon of pure biodiesel present in the blend of biodiesel with mineral diesel.

- (46) Accordingly NBB claimed that in order to ensure a fair comparison and functional symmetry between normal value and export price under Article 2(10) of the basic Regulation, the blender's credit should be added not only to the normal value but also to the export price.
- (47) As explained in recital (38) of the provisional Regulation, the circumstances in which a subsidy could lead to an adjustment as claimed by NBB to avoid a double remedy in the case of parallel anti-subsidy and anti-dumping investigations for the same product are expressly provided in Article 24(1) of the anti-subsidy basic Regulation which states that no product shall be subject to both anti-dumping and countervailing duties for the purpose of dealing with one and the same situation arising from dumping or from export subsidisation. Such circumstances do not arise in the current case. Indeed, the blender's credit is a subsidy available for both domestic and export sales exactly in the same way and for the same amount and does not therefore constitute export subsidisation within the meaning of Article 24(1). This was not challenged by NBB. Therefore, the claim that the blender's credit should be 'adjusted' in the dumping calculations was considered unwarranted and was therefore rejected.
- (48) In the absence of any other comments which would alter the provisional findings in this respect, recitals (36) to (38) of the provisional Regulation are hereby confirmed.

3.2. Normal value

- (49) Following the disclosure of the provisional findings, one exporting producer pointed to a clerical error in the calculation of the normal value of a certain product type based on the domestic sales price. This clerical error was corrected.
- (50) Another exporting producer, which had no representative domestic sales, disputed the use of the weighted average profit margin of other exporting producers subject to the investigation in respect of their production and sales of the like product on the domestic market, when constructing the normal value. It claimed that instead of using the average profit margin of the two integrated producers which were profitable on their domestic sales in the IP, the average profit used should have been that of the non-integrated producers. Given that the company acquired its feedstock in the open market, it claimed that it could not be compared with the two fully integrated producers, which it claimed were not representative of the market conditions of all other sampled exporting producers.
- (51) The above claim was considered warranted, since indeed it can be argued that the situation of the two integrated producers may not be directly comparable to that of the other sampled producers in that they are fully integrated and have access to their own feedstock. However, the suggestion to use the average profit margins of the non-integrated producers was not possible since none of these producers were profitable on their domestic sales in the IP. It was therefore considered reasonable, in accordance with Article 2(6)(c) of the basic Regulation, to base the profit on the profitable domestic sales transactions of all sampled exporting producers with domestic sales instead. This profit was then used for constructing the normal value of the said exporting producer.
- (52) Following final disclosure, one exporting producer group claimed that the profit margin used for constructing the normal value of the product types which were not sold on the domestic market in the IP was not reasonable. It argued that the normal value should have been established based on the product types for which the normal value was not constructed, applying an adjustment for physical differences, in accordance with Article 2(10)(a) of the basic Regulation. It further claimed that the adjustments made in the context of calculating the injury margins should have been applied also for the calculation of the normal value.
- (53) In this respect it is noted that the purpose of the adjustments mentioned in Article 2(10) of the basic Regulation is to allow a fair comparison between the normal value and the export price and not to establish normal value. The purpose of the adjustment made in the injury calculations was to make the imports of US biodiesel comparable with the biodiesel produced and sold by the Community industry on the Community market. As described in recital 46 of the provisional Regulation, the profit used for the constructed normal value is determined in accordance with Article 2(6) of the basic Regulation. Therefore, this claim was not considered warranted and had to be rejected.
- (54) In the absence of any other comments concerning the normal value, which would alter the provisional findings, recitals (39) to (48) of the provisional Regulation are hereby confirmed.

3.3. Export price

- (55) One exporting producer contested the determination of the profit margin for its related importer in the Community, claiming that certain costs, such as ocean freight and insurance costs were not included in the cost of goods sold.
- (56) This claim was found to be warranted and the cost of goods sold of the related importer was revised based on the FOB purchase price to which all costs in obtaining the product concerned were added, such as commissions, transport, insurance and handling costs, and customs duties paid.
- (57) The same exporting producer claimed that the results of certain settled hedging operations at the level of the same related importer were unjustly apportioned to the operational result of the product concerned, whereas they were strictly related to operations on the acquisition and sale of another product.
- (58) The company provided evidence showing that the results of the settled hedging operations referred exclusively to individual sales contracts regarding a product that was not the product concerned and consequently did not influence the SG&A expenses related to the product concerned.
- (59) In view of the above, since these operations were found not to relate to the product concerned it was decided not to incorporate these results in the determination of the SG&A expenses of the related importer.
- (60) Following final disclosure, one exporting producer group disputed the exclusion from the calculations of the part of its biodiesel exports to the Community that had been further blended with other non-US biodiesel and resold in the Community as a blend of both origins. The group claimed that there was no discretion in the basic Regulation or in the WTO Anti-dumping Agreement to allow for this exclusion. In this respect the USG stated that the Commission did not sufficiently document and justify the changes between the provisional and definitive determination.
- (61) In the light of the comments received and the alternative method proposed by the exporting producer group in question to establish a reliable export price from the blends resold in the Community, the Commission reassessed the determination of the export price. The method put forward by the group could not be followed as it failed to individually identify the relevant export price for the imported biodiesel components of the blend that was subsequently resold on the

Community market. However, in line with the methodology applied in the injury calculations, the resale price of the blend sold on the Community market was brought to rapeseed feedstock equivalent and the ex-works export price was constructed on that basis, by deducting all costs incurred between importation and resale, in accordance with Article 2(9) of the basic Regulation.

- (62) In the absence of any other comments concerning the export price, which would alter the provisional findings, recitals (49) to (50) of the provisional Regulation are hereby confirmed.

3.4. Comparison

- (63) Two exporting producers contested the adjustments in accordance with Article 2(10) of the basic Regulation in respect of freight, handling and warehousing costs that occurred between the location of the production facilities and the terminal from which the product concerned was shipped for sale. Furthermore, one of the exporting producers claimed that in the terminal the product loses its individual identity since it is blended with other material and that as a consequence the abovementioned expenses should not be considered to be directly related to the sale.
- (64) It should be stressed that for the calculation of the dumping margins only biodiesel produced by the exporting producers investigated was taken into account, whether in a pure form or blended. Therefore disregarding certain costs that occurred after the production of the B100 base product is not considered warranted. Consequently these costs should be deducted to bring the export price to unrelated parties of all own-produced biodiesel, whether in pure form or blended, back to the ex-works level. The fact that the transport of biodiesel takes place from the factory to a terminal outside the factory does not mean that the own-produced part of the final blend would not have been subject to transport, handling and warehousing costs.
- (65) In the absence of any other comments concerning the comparison, which would alter the provisional findings, recitals (51) to (53) of the provisional Regulation are hereby confirmed.

3.5. Dumping margins

- (66) The definitive dumping margins, expressed as a percentage of the CIF Community frontier price, duty unpaid, are the following:

Company	Definitive dumping margin
Archer Daniels Midland Company (ADM)	10,1 %
Cargill Inc.	<i>de minimis</i>
Green Earth Fuels of Houston LLC	88,4 %
Imperium Renewables Inc.	29,5 %
Peter Cremer North America LP	39,2 %
World Energy Alternatives LLC	52,3 %
Co-operating non-sampled	33,5 %

(67) In view of the changes in the dumping margins of the sampled companies, the weighted average dumping margin of the cooperating exporting producers not included in the sample was recalculated in accordance with the methodology described in recital (56) of the provisional Regulation. As indicated above, it was set at 33,5 % of the CIF Community frontier price, duty unpaid.

(68) The basis for establishing the country-wide dumping margin was set out in recital (57) of the provisional Regulation. On the same basis, the country-wide dumping margin was definitely set at 39,2 %.

4. COMMUNITY INDUSTRY

4.1. Community production and standing

(69) One interested party contested the exclusion from the assessment of total Community production of the group of producers related to an exporting producer in the USA mentioned in recital (60) of the provisional Regulation on the basis of Article 4(1) of the basic Regulation. It argued that the correct denominator to establish support to the complaint should be kept at around 5 400 thousand tonnes and not decreased to between 4 200 to 4 600 thousand tonnes as was done at provisional stage.

(70) The relevant provisions of the basic Regulation to assess standing or the support for the investigation are Article 4(1) and Article 5(4) of the basic Regulation. For information, the relevant provisions of the Anti-Dumping Agreement (ADA) concerning the definition of the domestic industry are contained in Article 4(1) of the basic Regulation. From these provisions, it is clear that the definition of the domestic production to establish standing should be made in conjunction and is

subject to the same requirements as those for the definition of the domestic industry. In any case this claim is not such as to alter the conclusion that the investigation was supported by a major proportion of Community production. Even if the denominator was kept at 5 400 thousand tonnes, the support for the investigation would be above 50 %, namely largely above the requirements of the basic Regulation.

(71) The same interested party argued that in the light of the definition of the product concerned and the like product which is biodiesel whether in pure form or in blends containing more than 20 % biodiesel (B20), the Community industry and Community production must be composed of all Community companies producing biodiesel and blends above B20. It claimed that there is no evidence that the complainant or the Commission has sought to include these companies into the total production or determined that these producers supported the complaint.

(72) In this regard it is noted that the total Community production figure indicated in recital (60) of the provisional Regulation does indeed take into account the production volume of biodiesel in blends above B20. It can further be clarified that according to available information, the production in the Community of blends containing between 21 % (B21) and 99 % (B99) of biodiesel has been very limited during the IP. The only production of blends in this range was concentrated on blends of B30 and did not exceed 60 000 tonnes in terms of biodiesel content. Moreover, the Commission has contacted known producers of B30 after the imposition of provisional measures and the responses received from two of the producers indicate that they support the complaint.

(73) In the absence of any other comments recitals (59) to (61) of the provisional Regulation concerning the definition of Community production, Community industry and standing are hereby confirmed.

4.2. Sampling

(74) One party argued that the performance of one sampled Community producer that failed to cooperate in the investigation was very good and it should have been taken into account in the assessment of injury to the Community industry. It was claimed that this producer was not injured during the IP and that best facts available should be used in accordance with Article 18 of the basic Regulation. In this regard, the party suggested, using the publicly available financial data of this producer for 2007 and 2008, for the examination of injury to the Community industry.

- (75) It is common practice in anti-dumping investigations that the Commission excludes producers that failed to cooperate for the purpose of the assessment of injury and not to use facts available in line with Article 18 of the basic Regulation. The data concerning injury cover an extended period of four years and it is not possible to obtain based on public sources all the necessary information to establish all injury indicators for the whole period. In this particular case, the said Community producer was excluded from the investigation because it had failed to provide complete meaningful information for the years 2004 to 2006 and it only provided partial information for 2007 and the IP. Using the public information for this producer's biodiesel activity for 2007 and 2008, would not have allowed to obtain data for all injury factors and for all the years of the period considered. This would have distorted the trends which are relevant for the assessment of injury.
- (76) Moreover, maintaining the said producer in the sample would have not allowed the assessment of undercutting to be made for the totality of the sales of the sampled producers as the said company did not provide a listing with its detailed sales by product type for the IP. Finally, it is noteworthy that contrary to the claim made by the interested party, the financial performance of the said producer, in terms of profitability as shown in its publicly available data, was well below the average profitability established for the cooperating sampled Community producers as shown in Table 7 of the provisional Regulation. On the basis of the above the request made by this party had to be rejected.
- (77) The same party claimed that the sample of Community producers was not representative of the Community industry as it was based only on producers of pure biodiesel (B100) and therefore failed to include producers of blends from B99 down to B20 as well as blenders of B100.
- (78) In this regard it is recalled that, as mentioned in recital (72) above, the Community production of biodiesel blends between B20 and B99 has been very limited during the IP. In view of this limited quantity, which represents less than 2 % of total Community production of the like product in the IP, it can be concluded that the selection of the sample which was mainly based on the largest volume of production and sales within the Community was representative. As far as the blenders of B100 is concerned these companies could not be considered as producers of the like product as they are processing by a simple blending operation an existing like product. The claim was therefore rejected.
- (79) In the absence of any other comments recitals (62) to (64) of the provisional Regulation are hereby confirmed.

5. INJURY

- (80) As mentioned in recital (16) above, the examination of the trends concerning the assessment of injury covered the period from January 2004 to the end of the IP. However the investigation showed that the Community industry was practically starting up in 2004. It was, thus, considered more appropriate to make an analysis on the possible injury and the economic situation of the Community industry based on trends for the period 2005 to the IP ('period analysed'). As no party commented on this approach, recital (65) of the provisional Regulation is confirmed.

5.1. Community consumption

Table 1

Community Consumption	2004	2005	2006	2007	IP
Tonnes	1 936 034	3 204 504	4 968 838	6 644 042	6 608 659
<i>Index 2005=100</i>	60	100	155	207	206

- (81) In the absence of any comments that could justify a change concerning the Community consumption as shown in the above table, recitals (66) to (71) of the provisional Regulation are hereby confirmed.

5.2. Volume of imports from the country concerned and market share

- (82) The table below shows the total imports into the Community market made by US exporting producers during the period considered.

Table 2

All imports from USA	2004	2005	2006	2007	IP
Tonnes	2 634	11 504	50 838	730 922	1 137 152
<i>Index 2005=100</i>	23	100	442	6 354	9 885
Market share	0,1 %	0,4 %	1,0 %	11,0 %	17,2 %
<i>Index 2005=100</i>	25	100	250	2 750	4 300

Source: US export statistics.

- (83) For the purpose of the definitive findings it was found that one US exporting producer was found not to be dumping its products on the Community market, hence the total volume and price of dumped imports had to be reassessed. In this case, when using sampling to establish dumping it is the Commission practice to then examine whether there is positive evidence showing whether or not all the companies which were not sampled were effectively dumping their products on the Community market during the IP.
- (84) To this end, the export prices charged by the cooperating exporting producers not included in the sample and the export prices of the non-cooperating exporters were investigated on the basis of US export statistics, the questionnaire responses of the sampled exporting producers in the USA and the replies to the sampling forms provided by all the cooperating companies in the USA. It was considered that by adding the average dumping margin found on the basis of the sampled exporting producers to the average export prices established for the sampled exporting producers found to be dumping, the level of non-dumped export prices for the product concerned would be set.
- (85) The export price was established for the non-sampled exporting producers on the basis of the US export statistics after deducting the exports data concerning the sampled exporting producers. The resulting price was then compared with the non-dumped export price.
- (86) This price comparison showed that both i) the cooperating exporting producers which were not included in the sample and ii) the exporting producers which did not cooperate in the investigation had average export prices which were in all cases below the average non-dumped prices established for the sampled exporting producers. This was sufficient indication that the imports from all companies that were not sampled, namely the cooperating and non-cooperating ones, could be considered as being dumped.
- (87) Concerning the non-sampled companies, the information available and the data submitted concerning their export price did not show that their prices were above the non-dumped price established as explained in recital (84) above.
- (88) As mentioned in recital (83) above, it was found at the definitive stage that one exporting producer in the USA included in the sample was not dumping its products on the Community market. Accordingly, its exports were excluded from the analysis concerning the development of dumped imports on the Community market.
- (89) However, in order to avoid any possibility of disclosing sensitive business data pertaining to the said producer, it was considered appropriate for confidentiality reasons not to present publicly available data, such as the US export statistics, excluding the data of the exporter not found to be dumping on the Community market.

- (90) Therefore, the table below comprises all imports of biodiesel originating in the USA which were found or considered to be dumped on the Community market during the period considered in an indexed form.

Table 3

Dumped imports from USA	2004	2005	2006	2007	IP
<i>Indexed volumes 2005=100</i>	—	100	411	5 825	9 261
<i>Index market share 2005=100</i>	—	100	265	2 810	4 490

Source: US export statistics and replies to sampling forms of non-dumping US companies.

- (91) The new figures show that the import volumes from the USA increased significantly from more than 10 000 tonnes in 2005 to more than 1 000 000 tonnes in the IP. During the period analysed, the dumped imports from the USA continuously increased their share of the Community market from around 0,3 % in 2005 to more than 15 % in the IP. Therefore it remains that there has been a significant increase in dumped imports both in absolute terms and in relative terms compared to the Community consumption over that period.
- (92) One interested party claimed that the injury and causation analysis of the anti-dumping proceeding should be made on different data than that made in the parallel anti-subsidy proceeding. It was argued that the dumping findings, in particular the export sales to the Community, are based only on the own produced biodiesel of the sampled producers whereas the subsidy findings are based on i) own produced, ii) produced and blended and iii) purchased and blended biodiesel exported to the Community.
- (93) This claim would appear to suggest that the anti-dumping proceeding should always be based on a narrower data in relation to the anti-subsidy proceeding. However, at provisional stage it was found that all the exports of the companies included in the sample of US producers were made at dumped prices in the Community market. A similar finding was made in the anti-subsidy investigation. Thus in both investigations all exports made from the USA were deemed to be dumped and subsidized and were thus all included in the injury and causation analysis.
- (94) The fact that, as explained in recital (83) above, at definitive stage, one sampled US company was found not to be dumping has now led to a discrepancy between the volume of dumped imports and the volume of subsidized imports to be considered in the injury and causation analysis of the proceedings. The overall volume of dumped imports from the USA was adjusted to take into account the fact that the imports of one sampled exporting producer were found not to be dumped.
- (95) In view of the above the claim had to be rejected.
- (96) One interested party claimed that the HTS heading 3824 90 of the US export statistics which was used in the provisional Regulation to establish the imports from the country concerned would also cover, in addition to biodiesel, other products such as 'fatty substances of animal or vegetable origin and mixtures thereof'. The analysis of the import volume from the USA was therefore deficient. The same interested party proposed that the trends established for the investigated US producers be used instead.
- (97) In this regard, it is firstly noted that the US HTS code 3824 90 4000 was used in order to compute the import volumes originating in the USA and not the six-digit HTS heading claimed by this party.

- (98) Moreover, it is recalled that as mentioned in recital (68) of the provisional Regulation, Eurostat data could not be used for the purpose of assessing the imports of biodiesel from the USA because until the end of 2007 there was no distinct CN code available for the customs classification of that product. Biodiesel could indeed have been classified under various CN codes which also contained import data for other products. The reason why the USA export statistics were used was that they appeared to capture the exports of the product concerned under one tariff code and that the volume of other products captured under the same code would be of insignificant importance as far as exports to the Community are concerned.
- (99) In view of the limitations to use Eurostat data, another alternative to the US export statistics would have been to use the import data reported in the complaint. This data was obtained by the complainants from confidential market intelligence sources and therefore recourse to such information would have been subject to this limitation. However, for the sake of completeness the trends of import volumes would have shown the following picture in an indexed form:

Table 4

Imports from USA	2004	2005	2006	2007	IP
<i>Indexed 2005=100</i>	0	100	1 359	15 059	15 394

- (100) The comparison of the Table 4 above with Table 2 would demonstrate that the Commission's assessment of the import volumes of the product concerned over the analysis period was more conservative than the one that could have been alternatively used. Moreover, this overall picture of the import volumes of Table 4 is compiled from confidential data not susceptible to disclosure whereas the USA statistics is publicly available information.
- (101) The proposed method by the interested party would have shown the following picture regarding the trends of the export volumes on the basis of the information collected from the investigated exporting producers:

Table 5

Imports from USA	2004	2005	2006	2007	IP
<i>Indexed 2005=100</i>	16	100	461	6 180	9 005

- (102) The comparison of Table 5 with Table 2 above would demonstrate very similar trends between the method used by the Commission and the one proposed by this party.
- (103) The same interested party also claimed that, because the product concerned is biodiesel and blends of biodiesel with a biodiesel content above 20 %, the volume of imports shown in Table 2 above could not correlate with the correct import volume for the product concerned.
- (104) In this regard it is noted that the investigation has not identified any imports of the product concerned with a biodiesel content above B20 but below B99 during the IP. In other words the investigation has not identified any imports of the product concerned that because of their low biodiesel content would be classified under a different US HTS code.
- (105) On the basis of the above it is concluded that the import volume presented in the Table 2 of the provisional Regulation represents a reliable, objective and conservative estimation of the imports into the Community of the product concerned.
- (106) One interested party claimed that the *splash and dash* quantities exported from the USA should have been distinguished from the imports of the product concerned originating in the USA as the former cannot be treated as imports of US origin.

- (107) In addition the same party and the USG claimed that contrary to what was stated in recitals (77) and (80) of the provisional Regulation all exports from the USA are not deemed to be originating in the USA. There is no authority in the USA that makes an assessment or a determination with respect to the country of origin of a particular product for export and it cannot be assumed that all biodiesel leaving the territory of the USA is of US origin.
- (108) The same party also stated that the origin regulations established by the US Census Bureau regarding the determination of the origin of the exported goods are not widely known to the biodiesel industry and therefore the exporters of biodiesel when filling out the 'Shipper's Export Declaration' (SED) normally indicate that the goods exported are of domestic origin.
- (109) It further reiterated its claim made at provisional stage that volumes imported in the Community under the *splash and dash* pattern would represent more than 40 % of the product concerned exported from the USA. In support of its claim it used the US import and export data of the HTS codes 3824 90 4020 and 3824 90 4000, and practically claimed that all imports of biodiesel in the USA were re-exported under the *splash and dash* pattern to the Community.
- (110) On the above it is noted that the clarification requested by the US authorities regarding the fact that no US authority makes an assessment or determination of the origin of a particular product for export can be accepted.
- (111) The claim that *splash and dash* would represent at least 40 % of the US exports to the Community was based on the assumption that all biodiesel imported in the USA would ultimately be re-exported to the Community under the *splash and dash* pattern without any volume being consumed in the USA or further being blended in the USA before exportation.
- (112) However, the data presented by this party showed that in the years 2004 to 2006 the imports exceeded by far the exports which would suggest that there is a domestic demand for biodiesel in the USA from other countries. Moreover, this assumption is rather simplistic as it does not take into account the quantities of biodiesel blended in the USA and exported to the Community in which i) the characteristics of the blends are different from those of the input materials which would confer US origin to the blended product or ii) blends in which the proportion of US origin biodiesel being the dominant one would confer US origin to the whole blended product. It is recalled in this respect that, as mentioned in recital (78) of the provisional Regulation, the US companies investigated declared that it was not possible to differentiate in the quantities exported to the Community or sold on the domestic market the quantities own produced or sourced in the USA or those imported. It is also noted that the origin would appear to have correctly been declared by the US companies concerned as in all of the cases further blending of non-US origin biodiesel was taking place in the USA. Indeed, in most of the cases the investigated exporting producers are very large companies or groups of companies with related companies in the Community for which it is difficult to accept that they were not aware of the existing US and Community rules regarding the origin determination.
- (113) On the basis of all the above it is concluded that there are no grounds to clearly identify the imports made in the Community under the *splash and dash* pattern for the period considered. It is also considered that there are no grounds to treat these exports, if any, as non-US origin imports.

5.3. Prices of the dumped imports and price undercutting

5.3.1. Unit selling price

- (114) The table below shows the unit selling price of all imports into the Community market originating in the USA during the period considered as ascertained in recitals (81) and (82) of the provisional Regulation.

Table 6

All imports from USA	2004	2005	2006	2007	IP
Prices in EUR/tonne	463	575	600	596	616
Index 2005=100	81	100	104	104	107

Source: US export statistics and questionnaire replies of the sampled US exporters.

- (115) In view of the definitive findings concerning dumping, and the fact that one company was found not to be dumping its products on the Community market, the unit selling prices of dumped imports into the Community market were calculated separately and are presented in the following table.

Table 7

Dumped imports from USA	2004	2005	2006	2007	IP
Prices in EUR/tonne	463	575	608	603	615
Index 2005=100	81	100	106	105	107

Source: US export statistics and questionnaire replies of the sampled dumping US exporters.

- (116) Average prices for imports from the USA fluctuated during the period considered and overall showed an increase of 6 % between 2005 and the IP.

5.3.2. Price undercutting

- (117) For the purpose of analysing price undercutting, the weighted average sales prices of the sampled Community producers charged to unrelated customers on the Community market, adjusted to an ex-works level, were compared to the corresponding weighted average prices of the dumped imports from the USA, established on a CIF basis for the sampled exporting producers in the USA which were found to be dumping into the Community market. An adjustment for the customs duties, post-importation costs and for the differences in feedstock used for the production of biodiesel was applied where appropriate as described in recital (84) of the provisional Regulation.

- (118) Certain exporting producers claimed that the adjustment for the differences in feedstock was understated as it did not reflect correctly the market value of the differences. They further claimed that the differences should be obtained on the basis of the prices for the different types of biodiesel in the Community market and quantified this claim by reference to the price quotations, customs cleared Antwerp based, published by a market analyst.

- (119) In this regard it is noted that the adjustment was based on the overall, verified data collected from the sampled

exporting producers for their operations in the USA and was, therefore, based on the findings of the investigation which is the most reliable source of information. Moreover, the price quotations at Community level would have been an inappropriate basis for this adjustment as these price levels would have been influenced by the price levels of the dumped imports originating in the USA. On this basis the claim was rejected.

- (120) The same exporting producers claimed that the adjustment for feedstock differences should only be applied to the sales of the sampled exporting producers and not to the sales of the sampled Community producers as the sales of the latter consist of blends compatible with the Community standards.

- (121) This claim was found to be irrelevant as the purpose of the adjustment was to address the differences in feedstock and not any differences in meeting the different standards applicable at Community level. The claim was, therefore rejected.

- (122) The complainant contested the appropriateness of this adjustment by claiming that both Community producers and US exporters use a variety of feedstock and both produce a variety of blends which are provided on both markets and are, therefore, operating with the same range possibilities when it comes to the raw material choice.

(123) In this regard it is noted that, whilst it is true that both Community producers and US exporting producers use a variety of blends based on different feedstock, the repartition of feedstock in the blends may differ significantly from producer to producer and even from customer to customer of the same producer. Indeed, the investigation has shown that a precise matching in the blends sold by the sampled Community producers and those sold by sampled exporting producers on the Community market was met in very few occasions. Therefore, in order to allow for undercutting calculations to take into account the different product types of biodiesel, it was considered indeed necessary to make the adjustment for differences in feedstock. Therefore, this claim had to be rejected.

(124) Certain exporting producers claimed that the prices used for the injury margin calculations were the CIF Community frontier prices rather than the resale prices to the first unrelated customer. They claimed that these calculations have to be corrected in order to take into account the value and quantities of sales to the first unrelated customer.

(125) This claim was found to be relevant for two exporting producers and the injury calculations were corrected accordingly.

(126) On the basis of the above, the average price undercutting margin in the IP, expressed as a percentage of the Community industry's weighted average ex-work prices, was found to range from 18,9 % to 31,9 %, instead of a range from 18,9 % to 33,0 % at provisional stage.

5.4. Economic situation of the Community industry

(127) As mentioned in recitals (107) to (110) of the provisional Regulation, it was found that the Community industry suffered material injury within the meaning of Article 3(5) of the basic Regulation.

(128) Indeed, the provisional analysis showed that the performance of the Community industry improved as regards some volume indicators, but that most of the indicators related to the financial situation of the Community industry significantly deteriorated during the period considered. Notwithstanding the Community industry's ability to raise capital for investments, return on investments declined dramatically during the IP and profitability declined significantly over the period considered.

(129) One interested party claimed that the analysis made in recital (93) of the provisional Regulation regarding the growth of the Community industry was incorrect. In particular, this party argued that the provisional Regulation suggested that the strong increase in demand for

biodiesel in the Community market was supposed to lead to a comparable increase in the market shares of the Community industry, while there is no direct correlation between the increase in demand and market share.

(130) The same party further argued that the injury factors mentioned in the same recital (93) of the provisional Regulation, namely production, utilisation of production capacity, productivity, sales, investment policy, return on investments, cannot be considered as severely affected.

(131) The argument regarding the de-correlation between demand and market share is accepted. However, it remains that between 2006 and the IP, the market share of the sampled Community producers was multiplied by 1,2 while during the same time, the market share of dumped imports was multiplied by around 17. This comparatively strong increase in market share for US imports is the result of much lower sales prices for these US imports as shown in table 7 and recital (126) above.

(132) Regarding the claim about the global assessment of all injury factors, it is acknowledged that not all these factors were deteriorating during the period considered. However, it is stated that factors relating to financial situation of the Community industry were indeed severely affected, namely the profitability and the return on investment and to a lesser extent productivity was affected. This stems from the fact that the Community industry had to adapt to the competition of price-setting dumped US imports, and chose to maintain their presence on the market to the detriment of their profitability, rather than preserving their profitability but losing market shares.

(133) Certain interested parties and the USG claimed that the levels of profitability and return on investment for the sampled EU producers are still good in 2007 and during the IP, in absolute value, in spite of the strong decrease compared to the previous years. They argue that the levels of profitability and return on investment achieved from 2004 to 2006 were not sustainable and that the EU biodiesel industry, as all nascent industries, experienced a normal 'boom and bust' phenomenon during the period considered.

(134) In this regard, it is recalled that some US sampled companies achieved much higher profitability, exceeding 30 %, in the similar context of a developing market during the period considered. It is also stated that the decrease of profitability and return on investment experienced by the Community industry was very brutal since it occurred from 2006 to 2007, and coincides exactly with the surge of US imports of biodiesel.

(135) Several Community producers claimed that the situation of non-sampled Community companies should be fully taken into account in the injury assessment, in particular in the light of the numerous cases of downsizing, closures or postponement of new projects that were identified among these companies during the period considered.

(136) On the other hand, one interested party claimed that the reference made in the provisional Regulation to producers in the Community not included in the sample is irrelevant, as the unverified data from non-sampled producers cannot be used for the demonstration of injury. This party further insists on public data showing that some of these non-sampled producers are profitable.

(137) Regarding the two claims above, it is recalled that the provisional Regulation in its recitals (103) to (106) refers to the situation of the non-sampled producers in the Community as a supplementary indication of injury, without impacting the calculations of the injury indicators and injury margin for which verified information was actually used. Therefore the claim of this party was rejected. On the other hand, in the absence of available verified statistics or individual information regarding the situation of all non-sampled EU producers, it is not possible to make any accurate determination for the Community producers as a whole as suggested by the Community producers. This claim was therefore also rejected.

(138) In the absence of any other comments on the provisional findings concerning the economic situation of the Community industry, recitals (86) to (92) and (94) to (106) of the provisional Regulation are hereby confirmed.

(139) The conclusion that the Community industry suffered material injury, as set out in recitals (107) to (110) of the provisional Regulation, is also confirmed.

6. CAUSATION

6.1. Effect of the dumped imports

(140) It is recalled that the dumped import volumes from the USA increased significantly during the period analysed. There was also a clear coincidence in time between the surge of dumped imports and the deterioration of the economic situation of the Community industry. That industry was not able to set its prices in line with market conditions and the cost increases, as its prices were undercut during the IP by the dumped imports.

(141) It is therefore confirmed that the surge of low-priced dumped imports from the USA had a considerable negative impact on the economic situation of the Community industry during the IP.

6.2. Effect of other factors

6.2.1. Imports from other third countries

(142) In the absence of any comments that would justify a change in the provisional findings it is confirmed that imports from other third countries cannot have made more than negligible contribution to the injury suffered by the Community industry.

6.2.2. Development of demand

(143) One interested party claimed that the contraction in demand between 2007 and the IP even being negligible (0,5 %) would nevertheless have caused injury to the Community industry by alleging that an hypothetical increase of 10 % in demand would have yielded an additional volume of sales of 205 733 tonnes if the Community industry would have maintained the same market share of 29,8 % that was recorded during the IP.

(144) In this respect it is noted that the claims made by this party were based on broad and unsubstantiated assumptions. Moreover, in view of the fact that between 2007 and the IP the market share of the Community industry increased by 2,8 percentage points, would indeed support the conclusion reached in recital (121) of the provisional Regulation that injury suffered by the Community industry cannot be attributed to this slight contraction in demand between 2007 and the IP. Therefore, in the absence of any other comments concerning the development of demand on the Community market recital (121) of the provisional Regulation is confirmed.

6.2.3. Public Policy Decisions

(145) One interested party reiterated its claim that the reintroduction of energy tax in Germany would have negatively influenced the economic situation of Community producers supplying that market as because of these measures the biodiesel demand for B100 representing at least 1,5 million tonnes would have collapsed. It further claimed, in response to the findings of the investigation set in recital (123) of the provisional Regulation, that even if the introduction of a blending requirement of 4,4 % for the diesel placed in the German market for transport purposes (B5) would have compensated the alleged sales losses of B100, the prices levels of B100 would be different from those of biodiesel intended for the B5 blends. It alleged that B100 was produced only from the more expensive rapeseed feedstock, whereas biodiesel B5 from a variety of feedstock, thus having a negative influence on the average price of the Community producers.

(146) In this respect it is recalled that, contrary to the allegations made by this party, the investigation has shown that the sales volumes of the sampled Community producers supplying the German market rose by 68 % between 2006 and the IP, which would indeed confirm

the provisional finding that any losses on B100 sales were compensated by the mandatory blending requirement. It is further noted that the introduction of the EUR 0,09 per litre of biodiesel as of 1 August 2006 did not lead to the collapse of the market as alleged by this party, but indeed B100 sales were reduced significantly in the last quarter of the IP when this tax was further increased to EUR 0,15 per litre as of 1 January 2008. Regarding the effect on prices, the allegations made by this party were unfounded as the biodiesel used for both types of products had to conform with the same standards which means that in both biodiesel fuels the same mix of feedstock could be used which means that there is no proven price differentiation between the two types of biodiesel. On the basis of the above the claim was rejected.

- (147) In the absence of any other comments concerning the public policy decisions recital (124) of the provisional Regulation is confirmed.

6.2.4. Idle production capacity of Community producers

- (148) One interested party, whilst accepting that capacity utilisation rates remained fairly high for the sampled Community producers, claimed that the overcapacity of the sampled Community producers would still be a cause of injury in view of the fact that it would result in higher fixed costs that would have a negative effect on profitability. It further claimed that the increase in the net asset value of the said producers would have resulted in fixed cost increases as depreciation and financial costs would have been higher.

- (149) In this regard it is recalled that from detailed analysis of the repartition of variable and fixed costs in the cost structure of the Community industry it was established that the share of fixed costs represented only 6 % of overall costs (recital 126 of the provisional Regulation). In addition, it should be noted that this analysis showed insignificant fluctuations of this percentage over the period analysed. With regard to the claim concerning the effect on profitability caused by the increase in the net asset value, it should be noted that the increase in costs in absolute terms, does not automatically lead to an increase in the unit production cost as the latter depends on the volume of output which as shown in Table 4 of the provisional Regulation increased steadily over the period analysed. Therefore higher fixed costs in absolute terms were attributed to higher output volume resulting in the above mentioned repartition of fixed costs in relation to overall costs. On this basis the claims made by this interested party had to be rejected.

- (150) The same party alleged that overall overcapacity of the Community producers has a direct impact on prices as there would be a fierce battle among producers to gain

contracts up to marginal costs and therefore, producers with high utilisation rates must have been the most aggressive on their sales to undercut the price of their competitors. In support of its claim it submitted an announcement of one sampled company to its financial statements of year 2007.

- (151) The allegations, however, of this party were not supported by any evidence as no reference to the alleged battle of prices due to overcapacity was indicated in this statement. The statement rather referred to the increase by the German government of the energy tax on B100 biodiesel as of 1 January 2008 which stimulated competition in the B5 market of biodiesel. On the basis of the above the claim had to be rejected.

- (152) In the absence of any other comments concerning the idle capacity of Community producers, recitals (125) to (128) of the provisional Regulation are confirmed.

6.2.5. Increased demand for feedstock and increasing prices

- (153) One interested party and the US government claimed that none of the arguments in recitals (129) to (133) of the provisional Regulation addresses the issue that the prices of soybean oil, palm oil and canola oil in the USA at all times since 2004 remained significantly below the prices for rapeseed in the Community which yields a significant competitive advantage to the biodiesel imported from the USA.

- (154) It is recalled that the investigation has to establish whether the dumped imports (in terms of prices and volume) have caused material injury to the Community industry or whether such material injury was due to other factors. In this respect, Article 3(6) of the basic Regulation states that it is necessary to show that the price level of the dumped imports cause injury. It therefore merely refers to a difference between price levels, and there is thus no requirement to analyse the factors affecting the level of those prices.

- (155) In practice, the effect of the dumped imports on the Community industry's prices is essentially examined by establishing price undercutting, price depression and price suppression. For this purpose, the dumped export prices and the Community industry's sales prices are compared, and export prices used for the injury calculations may need in certain cases to be adjusted in order to have a comparable basis. Consequently, the use of adjustments in this context only ensures that the price difference is established on a comparable basis. From this, it becomes obvious that the prices of raw materials in the exporting country cannot in principle be another factor of injury.

(156) The above is also confirmed by the wording of Article 3(7) of the basic Regulation, which refers to known factors other than dumped imports. The list of the other known factors in this Article does not make reference to any factor affecting the price level of the dumped imports. To summarise, if the imports are dumped, and even if they benefited from a favourable development of raw material prices, it is not considered that such development could be another factor causing injury.

(157) Thus, the analysis of the factors affecting the level of the prices of the dumped imports, such as the alleged competitive advantage due to lower raw material prices, cannot be conclusive and such analysis would go beyond the requirements of the basic Regulation.

(158) In any event, and without prejudice to the above, it has to be recalled that a general increase in prices of agricultural products worldwide took place during the IP and that the increase in soybean oil (the main feedstock used by the producers in the country concerned) was more pronounced than the increase of rapeseed oil over the same period. However, these increases in costs in the USA were not reflected in the prices of the dumped imports in the Community market which significantly undercut the prices of the Community industry.

(159) In light of the above, the claim made by these parties had to be rejected.

(160) In the absence of any other comments concerning the increased demand for feedstock and increasing prices recitals (129) to (136) of the provisional Regulation are confirmed.

6.2.6. Price development of mineral diesel

(161) One interested party reiterated its claim (see recital 134 of the provisional Regulation) and further argued that the prices of mineral diesel would set a cap beyond which the producers of biodiesel would not be able to increase their prices in line with the increases in feedstock.

(162) In this regard it is noted that all of the Community producers were supplying markets where mandatory blending targets exist. In addition, biodiesel was subject to detaxation in most of the Member States which means that its price is comparable with the price of mineral diesel increased with a factor to take into account the energy tax that the latter is subject to. This means that while one can accept a certain correlation with the oil prices, the investigation has established that for the above

reasons biodiesel can be indeed sold at higher prices than mineral diesel. Moreover, this party did not submit any convincing evidence showing that the prices of mineral diesel which were at very high levels in the second half of the IP exerted price pressure on the prices of biodiesel of the Community producers during the IP.

(163) In the absence of any other comments concerning the price development of mineral diesel it is concluded that this factor has not caused injury to the Community industry.

6.2.7. Importance of the location of the biodiesel plants in the Community

(164) In the absence of any other comments concerning the location of biodiesel plants in the Community recitals (137) to (139) of the provisional Regulation are confirmed.

6.2.8. Producers related to the US exporters

(165) In the absence of any other comments concerning the impact of imports from the USA by the Community producers related to the US exporting producers, recital (140) of the provisional Regulation is confirmed.

6.2.9. Conclusion on causation

(166) In the light of the foregoing and in the absence of any other comments recitals (141) to (143) of the provisional Regulation are confirmed.

7. COMMUNITY INTEREST

7.1. Community industry

(167) Subsequent to the provisional disclosure the Community industry producers endorsed the findings of the Commission and confirmed that the measures would be in their interest.

(168) One interested party claimed that the measures would not be in the interest of the Community industry as the measures would result in a shift of trade flows, i.e. a switch to imports from countries not covered by measures, because i) the Community market operators would continue to require cheaper biodiesel based on soybean oil and palm oil in order to complement it with the more expensive rapeseed biodiesel which is produced by the Community industry and ii) because the rapeseed oil biodiesel will not be sufficient to cover the demand.

(169) In this regard it is noted that whilst the main feedstock used by the Community industry producers is rapeseed, the same producers did not rely only on this feedstock for their biodiesel production but used also other feedstock such as soybean oil and palm oil. However, in view of the fact that very often the price of other feedstock was higher than the price of the dumped imports of biodiesel based on such feedstock, the Community industry producers were deprived from the possibility of using soybean oil and palm oil on a larger scale. It is therefore expected that the imposition of measures would also restore normal market conditions in this regard allowing the Community industry producers to adapt more efficiently their production to the different types of biodiesel needed on the Community market. On this basis the claim was rejected.

(170) In the absence of any other comments concerning the interest of the Community industry, recitals (145) to (147) of the provisional Regulation are confirmed.

7.2. Unrelated importers/traders in the Community

(171) In the absence of any reaction from importers after the imposition of provisional measures it is concluded that the effect of the measures will most likely not have a material impact on importers/traders.

7.3. Users in the Community

(172) In the absence of any reaction from users after the imposition of provisional measures, it is concluded that the anti-dumping duties will most likely not have a material impact on users.

7.4. Suppliers of raw materials in the Community

(173) In the absence of any reaction from suppliers after the imposition of provisional measures, recitals (154) to (156) of the provisional Regulation are confirmed.

7.5. Other interests

(174) Subsequent to the provisional disclosure one interested party claimed that the automobile manufacturers which have invested in producing vehicles adjusted for use with biodiesel may be unable to bring their investments to fruition by selling such vehicles should, the prices of biodiesel in the Community rise because of the measures to levels which are not competitive with those of mineral diesel.

(175) In this regard it is noted that the possibility alleged by this party could have happened even in the absence of measures, i.e. prices of mineral diesel (which depend on the crude oil prices) to drop at levels making them more competitive than biodiesel. Therefore, it would appear unreasonable to suggest that the automobile industry

has made investments without taking this parameter into account. Therefore, this claim was rejected.

(176) Subsequent to the provisional disclosure, one association of Community farmers expressed its support and indicated that the imports of US biodiesel have deprived Community oilseed producers of an outlet of around 6 millions tonnes of oilseeds, or approximately 11 % of Community oilseed production in 2007 and 2008, and led to a EUR 90 per tonne drop in the potential value of rape seed used for non-food purposes. These late comments, however, could not be verified.

7.6. Competition and trade distorting effects

(177) One interested party reiterated its comments regarding the incoherence of the anti-dumping measures with the European Union policy to promote the use of biofuels. It added that the European Union cannot depend only on rapeseed-based biodiesel produced in the Community to develop its biodiesel market.

(178) While this comment has been addressed in section 7.6 of the provisional Regulation, for the issue of rapeseed biodiesel brought up by this party reference is also made to recital (169) above.

(179) In the absence of any other comments concerning competition and trade distorting effects, recitals (157) to (159) of the provisional Regulation are confirmed.

7.7. Conclusion on Community interest

(180) Based on the above, it is concluded that there are no compelling reasons against the imposition of anti-dumping duties in the present case.

8. DEFINITIVE ANTI-DUMPING MEASURES

8.1. Injury elimination level

(181) Several interested parties and the USG contested the provisional determination that a profit of 15 % would be the profit margin that could be reasonably achieved by an industry of this type under normal conditions of competition.

(182) One interested party claimed that the profit margin for the Community industry used for the determination of the injury elimination level should be set at the level of the profit realised by the Community industry during the IP, namely 5,7 %, because this profit margin would be in the range of profits realised for commodities such as biodiesel. In support of this claim it made reference to profits realised by US producers of ethanol and vegetable oils and by petroleum refineries.

- (183) It is noted that the injury elimination level has to be based on an evaluation of the profit that the industry can reasonably expect to achieve in the absence of dumped imports on the sales of the like product on the Community market. For a given investigation, the profit realised in the beginning of the period considered may be reasonably considered as the profit realised in the absence of dumped imports. Indeed, in this specific case in the early years of the period considered (2004 to 2006) the imports from the USA never exceeded a market share of 1 % and it can therefore reasonably be concluded that these periods were characterised by the absence of dumped imports. Therefore, the average profit achieved in these periods by the Community industry was considered as a reasonable basis for determination of the injury elimination level also taking into account the needs to guarantee the production investment of this newly established industry. Moreover, and in relation to the claim made by the interested party, the investigation has shown that the profits realised by the major USA exporting producers for their domestic biodiesel operations were well above the profit used for the determination of the injury elimination level. On the basis of the above the claim had to be rejected.
- (184) Certain claims from US companies regarding the conversion of the *ad valorem* duties into fixed amount duties, described in recital (193) below, revealed that the *ad valorem* underselling amount was calculated as the ratio between the total underselling and the adjusted CIF price (see adjustment mentioned in recital (117)), whereas the non-adjusted CIF price should have been used as it was done to calculate the *ad-valorem* dumping margin. Therefore all *ad valorem* injury elimination levels were recalculated for all the sampled US companies.
- (185) In the absence of other comments following the provisional disclosure, the same methodology as mentioned in recitals (164) and (165) of the provisional Regulation has been used to obtain the non-injurious prices. The injury elimination level was calculated as a percentage to the total non adjusted CIF import value.
- 8.2. Form and level of the duties**
- (186) In the light of the foregoing and in accordance with Article 9(4) of the basic Regulation, a definitive anti-dumping duty should be imposed at a level sufficient to eliminate the injury caused by the dumped imports without exceeding the dumping margin found.
- (187) In view of the comments received by certain interested parties following the provisional disclosure and in view of the revisions described in this Regulation, certain margins have been amended.
- (188) However, in the parallel AS proceeding, countervailing duties on imports of biodiesel originating in the USA are also imposed. The subsidies found in this parallel proceeding are not export subsidies and are therefore considered not to have affected the export price and the corresponding dumping margin. Therefore, in view of the fact that the overall imports examined are common to both proceedings, the anti-dumping duties can be imposed together with the countervailing duties to the extent that both duties taken together do not exceed the injury elimination margin (lesser duty rule).
- (189) One party claimed that the Institutions should use their discretion not to apply the lesser duty rule in this case as this is not justified for the following reasons:
- (a) there is a wide variety of critical situations faced by Community biodiesel producers, not included in the sample, which cannot be reflected to the injury margin calculations;
 - (b) it is necessary to reflect in the determination of the most appropriate measures to be imposed, the interests of the Community industry as a whole including the interests of the most vulnerable producers which were fully exposed to the unfair competition and were prevented from reaching the critical size of operations which would have justified their inclusion in the sample;
 - (c) the investigation established the high magnitude of dumping and subsidisation practices which are the primary cause of the critical situation of the biodiesel producers, including those which could not be included in the sample.
- (190) In this regard it is noted that the injury margin established in this investigation is considered adequate to remove the injury to the investigated Community industry producers. As the investigation focused on the situation of these producers it is not possible to make any accurate determination for the Community producers as a whole as suggested by this party. Therefore, these wider considerations do not allow the Institutions to deviate from the legal requirement to apply the lesser duty rule.
- (191) On the basis of the above, anti-dumping duty rates have been established by comparing the injury elimination margins, dumping margins and the countervailing duty rates. Consequently, the proposed anti-dumping duties are as follows:

Company	Injury margin	Dumping margin	Countervailing duty rate	Anti-dumping duty rate
Archer Daniels Midland Company	54,5 %	10,1 %	35,1 %	10,1 %
Cargill Inc.	—	<i>de minimis</i>	34,5 %	0 %
Green Earth Fuels of Houston LLC	51,3 %	88,4 %	39,0 %	12,3 %
Imperium Renewables Inc.	41,6 %	29,5 %	29,1 %	12,5 %
Peter Cremer North America LP	77,2 %	39,2 %	41,0 %	36,2 %
World Energy Alternatives LLC	46,1 %	52,3 %	37,6 %	8,5 %
Co-operating non sampled companies	55,3 %	33,5 %	36,0 %	19,3 %

(192) In view of the fact that the anti-dumping duty will apply to blends containing by weight more than 20 % of biodiesel, in proportion to their biodiesel content, it is considered appropriate for the effective implementation of the measures by the customs authorities of the Member States to determine the duties as fixed amounts on the basis of biodiesel content.

(193) Certain parties contested the methodology used to convert the *ad valorem* duty rates into duties in the form of fixed amounts. They claimed that the CIF values that should have been used for the conversion of an *ad valorem* duty into a fixed amount should have been the actual CIF values and not the ones adjusted to take into account the feedstock differences described in recitals (83) and (84) of the provisional Regulation.

(194) This claim was examined and it was indeed found that the adjusted CIF values were used for the conversion of the *ad valorem* duties into fixed amount duties. However, it was also found that the same values were used as the basis for expressing the underselling amount as an *ad valorem* duty. Therefore, a first correction had to be made in expressing the underselling amount as a percentage of the total actual CIF import value. On this basis the injury margins have been revised accordingly. The subsequent calculation of the fixed amount duty rates, however, showed no difference from the duty rates appearing in Article 1(2) of the provisional Regulation since the higher *ad valorem* duty was exactly offset by the decrease of the CIF prices (from adjusted to actual) used for converting the *ad valorem* duties into fixed duties.

(195) The individual company anti-dumping duty rates specified in this Regulation were established on the basis of the findings of the present investigation. Therefore, they reflect the situation found during that investigation with respect to these companies. These duty rates (as opposed to the country-wide duty applicable to 'all other companies') are thus exclusively

applicable to imports of products originating in the country concerned and produced by the companies and thus by the specific legal entities mentioned. Imported products produced by any other company not specifically mentioned in the operative part of this Regulation with its name and address, 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'.

(196) Any claim requesting the application of an individual company anti-dumping duty rate (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 example, that name change or that change in the production and sales entities. If appropriate, the Regulation will then be amended accordingly by updating the list of companies benefiting from individual duty rates.

(197) All parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of definitive anti-dumping duties. They were also granted a period within which they could make representations subsequent to this disclosure. The comments submitted by the parties were duly considered, and, where appropriate, the findings have been modified accordingly.

(198) In order to ensure equal treatment between any new exporting producers and the cooperating companies not included in the sample, mentioned in Annex I of this Regulation, provision should be made for the weighted average duty imposed on the latter companies to be applied to any new exporters which would otherwise not be entitled to a review pursuant to Article 11(4) of the basic Regulation, as Article 11(4) does not apply where sampling has been used.

⁽¹⁾ European Commission, Directorate-General for Trade, Directorate H, Office N105 04/092, 1049 Brussels, Belgium.

8.3. Undertakings

- (199) Certain US cooperating exporting producers offered price undertakings in accordance with Article 8(1) of the basic Regulation. It is noted that in view of significant price variations of the raw material, the product is not considered suitable for a fixed price undertaking. In this context, the companies proposed that the minimum import prices (MIPs) are indexed regularly in relation to the fluctuations of the prices of rapeseed oil. Moreover, they offered MIPs for three types to take account of the product variety upon importation (biodiesel obtained from soybean, palm or canola oil) on the basis of the feedstock coefficients established during the IP.
- (200) In relation to the offers of the co-operating exporting producers it is noted that the basis to establish an indexed MIP was on average between 7-8 % lower than the non injurious price established during the IP. Moreover, the proposed coefficients to arrive at adjusted MIPs for the types mentioned above were inappropriate as they related to the IP. Indeed, in view of the fact that these coefficients, which depend on the difference in price between the feedstock, continuously fluctuate, these coefficients may have considerably changed in relation to the situation observed during the IP. Therefore, the proposed indexation of MIPs for soybean biodiesel or palm oil biodiesel on the basis of price fluctuations of the rapeseed oil was considered inappropriate as it would be based on the evolution of prices of raw material different to the ones used for the production of the exported product concerned.
- (201) On the basis of the above, and without referring to any further company specific practical issues regarding their acceptance, it was considered that the undertakings, had to be rejected as the method to determine the MIPs was inappropriate and that the offered MIPs were not at levels that would eliminate the injurious dumping.

8.4. Definitive collection of provisional duties and special monitoring

- (202) Subsequent to the disclosure of final findings, the complainant requested special measures to prevent possible circumvention of the measures in view of the

fact that the market concerned is a global commodity market with a fungible product commercialised through various sales channels.

- (203) In consideration of the above, it is indeed considered appropriate to monitor closely the imports of biodiesel from all destinations, with a view of facilitating swift appropriate action should the situation so require.
- (204) In view of the magnitude of the dumping margins found and in the light of the level of the injury caused to the Community industry, it is considered necessary that the amounts secured by way of the provisional anti-dumping duty, imposed by the provisional Regulation should be definitively collected to the extent of the amount of the definitive duties imposed. Where the definitive duties are lower than the provisional duties, amounts provisionally secured in excess of the definitive rate of anti-dumping duties shall be released. Where the definitive duties are higher than the provisional duties, only the amounts secured at the level of the provisional duties shall be definitively collected,

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive anti-dumping duty is hereby imposed on imports of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, commonly known as 'biodiesel', in pure form or in a blend containing by weight more than 20 % of fatty-acid mono-alkyl esters and/or paraffinic gasoil obtained from synthesis and/or hydro-treatment, of non-fossil origin, currently falling within CN codes ex 1516 20 98 (TARIC code 1516 20 98 20), ex 1518 00 91 (TARIC code 1518 00 91 20), ex 1518 00 99 (TARIC code 1518 00 99 20), ex 2710 19 41 (TARIC code 2710 19 41 20), 3824 90 91, ex 3824 90 97 (TARIC code 3824 90 97 87), and originating in the USA.

2. The rate of the definitive anti-dumping duty applicable to the products described in paragraph 1 and manufactured by the companies below shall be:

Company	AD duty rate EUR per tonne net	TARIC additional code
Archer Daniels Midland Company, Decatur	68,6	A933
Cargill Inc., Wayzata	0	A934
Green Earth Fuels of Houston LLC, Houston	70,6	A935
Imperium Renewables Inc., Seattle	76,5	A936
Peter Cremer North America LP, Cincinnati	198,0	A937
World Energy Alternatives LLC, Boston	82,7	A939
Companies listed in the Annex	115,6	see Annex
All other companies	172,2	A999

The anti-dumping duty on blends shall be applicable in proportion in the blend, by weight, of the total content of fatty-acid mono-alkyl esters and of paraffinic gasoils obtained from synthesis and/or hydro-treatment, of non-fossil origin (biodiesel content).

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

Article 2

Amounts secured by way of provisional anti-dumping duties pursuant to Regulation (EC) No 193/2009 falling within CN codes ex 1516 20 98 (TARIC code 1516 20 98 20), ex 1518 00 91 (TARIC code 1518 00 91 20), ex 1518 00 99 (TARIC code 1518 00 99 20), ex 2710 19 41 (TARIC code 2710 19 41 20), 3824 90 91, ex 3824 90 97 (TARIC code 3824 90 97 87), and originating in the USA shall be definitively collected. The amounts secured in excess of the amount of the definitive anti-dumping duties shall be released. Where the definitive duties are higher than the provisional duties, only the amounts secured at the level of the provisional duties shall be definitively collected.

Article 3

Where any party from the USA provides sufficient evidence to the Commission that it did not export the goods described in Article 1(1) originating in the USA during the period of investigation (1 April 2007-31 March 2008) that it is not related to an exporter or producer subject to the measures imposed by this Regulation; and that it has either actually exported the goods concerned or has entered into an irrevocable contractual obligation to export a significant quantity to the Community after the end of the period of investigation, the Council, acting by simple majority on a proposal by the Commission, after consulting the Advisory Committee, may amend Article 1(2) in order to attribute to that party the duty applicable to cooperating producers not in the sample, i.e. EUR 115,6 per tonne.

Article 4

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.

Done at Brussels, 7 July 2009.

For the Council
The President
A. BORG

ANNEX

US cooperating exporting producers not sampled

Company Name	City	TARIC additional code
American Made Fuels, Inc.	Canton	A940
AG Processing Inc.	Omaha	A942
Alabama Clean Fuels Coalition Inc.	Birmingham	A940
Arkansas SoyEnergy Group	DeWitt	A940
Arlington Energy, LLC	Mansfield	A940
Athens Biodiesel, LLC	Athens	A940
Beacon Energy	Cleburne	A940
Biodiesel of Texas, Inc.	Denton	A940
BioDiesel One Ltd	Southington	A940
Buffalo Biodiesel, Inc	Tonawanda	A940
BullDog BioDiesel	Ellenwood	A940
Carbon Neutral Solutions, LLC	Mauldin	A940
Central Iowa Energy, LLC	Newton	A940
Chesapeake Custom Chemical Corp.	Ridgeway	A940
Community Fuels	Stockton	A940
Delta BioFuels, Inc.	Natchez	A940
Diamond Biofuels	Mazon	A940
Direct Fuels	Euless	A940
Eagle Creek Fuel Services, LLC	Baltimore	A940
Earl Fisher Bio Fuels	Chester	A940
East Fork Biodiesel, LLC	Algona	A940
ECO Solutions, LLC	Chatsworth	A940
Ecogy Biofuels, LLC	Tulsa	A940
ED & F Man Biofuels Inc.	New Orleans	A940
Freedom Biofuels, Inc.	Madison	A940
Fuel & Lube, LLC	Richmond	A940
Fuel Bio	Elizabeth	A940
FUMPA Bio Fuels	Redwood Falls	A940
Galveston Bay Biodiesel, LP (BioSelect Fuels)	Houston	A940
Geo Green Fuels, LLC	Houston	A940
Georgia Biofuels Corp.	Loganville	A940
Green River Biodiesel, Inc.	Moundville	A940
Griffin Industries, Inc.	Cold Spring	A940
High Plains Bioenergy	Guymon	A940
Huish Detergents, Inc.	Salt Lake City	A940
Incobrasa Industries, Ltd.	Gilman	A940
Independence Renewable Energy Corp.	Perdue Hill	A940

Company Name	City	TARIC additional code
Indiana Flex Fuels	LaPorte	A940
Innovation Fuels, Inc.	Newark	A940
Iowa Renewable Energy, LLC	Washington	A940
Johann Haltermann Ltd.	Houston	A940
Lake Erie Biofuels, LLC	Erie	A940
Leland Organic Corporation	Leland	A940
Louis Dreyfus Agricultural Industries, LLC	Wilton	A940
Louis Dreyfus Claypool Holdings LLC	Claypool	A940
Memphis Biofuels, LLC	Memphis	A942
Middle Georgia Biofuels	East Dublin	A940
Middletown Biofuels, LLC	Blairsville	A940
Musket Corporation	Oklahoma City	A940
New Fuel Company	Dallas	A940
North Mississippi Biodiesel	New Albany	A940
Northern Biodiesel, Inc.	Ontario	A940
Northwest Missouri Biofuels, LLC	St. Joseph	A940
Nova Biofuels Clinton County, LLC	Clinton	A940
Nova Biosource	Senaca	A940
Organic Fuels, Ltd	Houston	A940
Owensboro Grain Company LLC	Owensboro	A940
Paseo Cargill Energy, LLC	Kansas City	A940
Peach State Labs, Inc.	Rome	A940
Perihelion Global, Inc.	Opp	A940
Philadelphia Fry-O-Diesel Inc.	Philadelphia	A940
Pinnacle Biofuels, Inc.	Crossett	A940
PK Biodiesel	Woodstock	A940
Pleasant Valley Biofuels, LLC	American Falls	A940
RBF Port Neches LLC	Houston	A940
Red Birch Energy, Inc.	Bassett	A940
Red River Biodiesel Ltd.	New Boston	A940
REG Ralston, LLC	Ralston	A940
Renewable Energy Products, LLC	Santa Fe Springs	A940
Riksch BioFuels LLC	Crawfordsville	A940
Safe Renewable Corp.	Conroe	A940
Sanimax Energy Inc.	DeForest	A940
Scott Petroleum	Itta Bena	A942
Seminole Biodiesel	Bainbridge	A940
Soy Solutions	Milford	A940
SoyMor Biodiesel, LLC	Albert Lea	A940
Sunshine BioFuels, LLC	Camilla	A940
TPA Inc.	Warren	A940

Company Name	City	TARIC additional code
Trafigura AG	Stamford	A940
U.S. Biofuels, Inc.	Rome	A940
United Oil Company	Pittsburgh	A940
Valco Bioenergy	Harlingen	A940
Vanguard Synfuels, LLC	Pollock	A940
Vinmar Overseas, Ltd	Houston	A938
Vitol Inc.	Houston	A940
Walsh Bio Diesel, LLC	Mauston	A940
Western Dubque Biodiesel, LLC	Farley	A940
Western Iowa Energy, LLC	Wall Lake	A940
Western Petroleum Company	Eden Prairie	A940

COMMISSION REGULATION (EC) No 600/2009**of 9 July 2009****establishing the standard import values for determining the entry price of certain fruit and vegetables**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) ⁽¹⁾,

Having regard to Commission Regulation (EC) No 1580/2007 of 21 December 2007 laying down implementing rules for Council Regulations (EC) No 2200/96, (EC) No 2201/96 and (EC) No 1182/2007 in the fruit and vegetable sector ⁽²⁾, and in particular Article 138(1) thereof,

Whereas:

Regulation (EC) No 1580/2007 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in Annex XV, Part A thereto,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 138 of Regulation (EC) No 1580/2007 are fixed in the Annex hereto.

Article 2

This Regulation shall enter into force on 10 July 2009.

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

Done at Brussels, 9 July 2009.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 350, 31.12.2007, p. 1.

ANNEX

Standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)

CN code	Third country code ⁽¹⁾	Standard import value
0702 00 00	MK	42,6
	TR	44,0
	ZZ	43,3
0707 00 05	TR	112,2
	ZZ	112,2
0709 90 70	TR	104,4
	ZZ	104,4
0805 50 10	AR	60,1
	MK	25,1
	TR	41,9
	ZA	62,6
	ZZ	47,4
0808 10 80	AR	84,1
	BR	74,3
	CL	83,8
	CN	91,1
	NZ	99,8
	US	105,0
	UY	116,5
	ZA	85,3
	ZZ	92,5
0808 20 50	AR	78,4
	CL	77,4
	NZ	161,4
	ZA	108,5
	ZZ	106,4
0809 10 00	TR	201,5
	XS	116,3
	ZZ	158,9
0809 20 95	TR	350,9
	ZZ	350,9
0809 30	TR	135,9
	ZZ	135,9

⁽¹⁾ Nomenclature of countries laid down by Commission Regulation (EC) No 1833/2006 (OJ L 354, 14.12.2006, p. 19). Code 'ZZ' stands for 'of other origin'.

COMMISSION REGULATION (EC) No 601/2009**of 9 July 2009****amending for the 109th time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan,⁽¹⁾ and in particular the first indent of Article 7(1) thereof,

Whereas:

- (1) Annex I to Regulation (EC) No 881/2002 lists the persons, groups and entities covered by the freezing of funds and economic resources under that Regulation.
- (2) On 29 June 2009, the Sanctions Committee of the United Nations Security Council decided to amend the list of natural and legal persons, groups and entities to whom the freezing of funds and economic resources should apply, adding three natural persons to the list given the information related to their association with Al-Qaida. The Sanctions Committee has provided the statements of reasons for these listing decisions.
- (3) Annex I should be amended accordingly.

(4) In order to ensure that the measures provided for in this Regulation are effective, this Regulation must enter into force immediately.

(5) Where the addresses of the natural persons concerned are included in the UN list, the Commission will communicate the grounds on which this Regulation is based to the persons concerned, provide them with the opportunity to comment on these grounds and review this Regulation in view of the comments and possible available additional information. Since the UN list does not in this case provide the current addresses for some of the natural persons concerned, a notice should be published in the Official Journal so that the persons concerned can contact the Commission and that the Commission can subsequently communicate the grounds on which this Regulation is based to the natural person concerned,

HAS ADOPTED THIS REGULATION:

Article 1

Annex I to Regulation (EC) No 881/2002 is hereby amended as set out in the Annex to this Regulation.

Article 2

This Regulation shall enter into force on the day 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.

Done at Brussels, 9 July 2009.

For the Commission

Eneko LANDÁBURU

Director-General for External Relations

⁽¹⁾ OJ L 139, 29.5.2002, p. 9.

ANNEX

Annex I to Regulation (EC) No 881/2002 is amended as follows:

The following entries shall be added under the heading 'Natural persons':

1. Arif **Qasmani** (*alias* (a) Muhammad Arif **Qasmani**, (b) Muhammad 'Arif **Qasmani**, (c) Mohammad Arif **Qasmani**, (d) Arif Umer, (e) Qasmani Baba, (f) Memon Baba, (g) Baba Ji). Address: House Number 136, KDA Scheme No. 1, Tipu Sultan Road, Karachi, Pakistan. Date of birth: Approximately 1944. Place of birth: Pakistan. Nationality: Pakistani. Other information: In detention as of June 2009. Date of designation referred to in Article 2a(4)(b): 29.6.2009.
 2. Mohammed Yahya **Mujahid** (*alias* Mohammad Yahya Aziz). Date of birth: 12 March 1961. Place of birth: Lahore, Punjab Province, Pakistan. Nationality: Pakistani. National identification No: 35404-1577309-9 (Pakistani national identification number). Other information: In detention as of June 2009. Date of designation referred to in Article 2a(4)(b): 29.6.2009.
 3. Fazeel-A-Tul Shaykh Abu Mohammed Ameen **Al-Peshawari** (*alias* (a) Shaykh Aminullah, (b) Sheik Aminullah, (c) Abu Mohammad Aminullah **Peshawari**, (d) Abu Mohammad Amin Bishawri, (e) Abu Mohammad Shaykh Aminullah **Al-Bishauri**, (f) Shaykh Abu Mohammed Ameen **al-Peshawari**, (g) Shaykh Aminullah **Al-Peshawari**). Address: Ganj District, Peshawar, Pakistan. Date of birth: (a) Approximately 1967, (b) Approximately 1961, (c) Approximately 1973. Place of birth: Konar province, Afghanistan. Other information: In detention as of June 2009. Date of designation referred to in Article 2a(4)(b): 29.6.2009.
-

COMMISSION REGULATION (EC) No 602/2009**of 9 July 2009****fixing the maximum buying-in price for butter for the 8th individual invitation to tender within the tendering procedure opened by Regulation (EC) No 186/2009**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) ⁽¹⁾, and in particular Article 43, in conjunction with Article 4 thereof,

Whereas:

(1) Commission Regulation (EC) No 186/2009 ⁽²⁾ has opened buying-in of butter by a tendering procedure for the period expiring on 31 August 2009, in accordance with the conditions provided for in Commission Regulation (EC) No 105/2008 of 5 February 2008 laying down detailed rules for the application of Council Regulation (EC) No 1255/1999 as regards intervention on the market in butter ⁽³⁾.

(2) In the light of the tenders received in response to individual invitations to tender, a maximum buying-in price is to be fixed or a decision to make no award is to be

taken, in accordance with Article 16(2) of Regulation (EC) No 105/2008.

(3) In the light of the tenders received for the 8th individual invitation to tender, a maximum buying-in price should be fixed.

(4) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for the Common Organisation of Agricultural Markets,

HAS ADOPTED THIS REGULATION:

Article 1

For the 8th individual invitation to tender for the buying-in of butter within the tendering procedure opened by Regulation (EC) No 186/2009, in respect of which the time limit for the submission of tenders expired on 7 July 2009, the maximum buying-in price shall be EUR 220,00/100 kg.

Article 2

This Regulation shall enter into force on 10 July 2009.

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

Done at Brussels, 9 July 2009.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 64, 10.3.2009, p. 3.

⁽³⁾ OJ L 32, 6.2.2008, p. 3.

COMMISSION REGULATION (EC) No 603/2009**of 9 July 2009****fixing the maximum buying-in price for skimmed milk powder for the 6th individual invitation to tender within the tendering procedure opened by Regulation (EC) No 310/2009**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) ⁽¹⁾, and in particular Article 43, in conjunction with Article 4 thereof,

Whereas:

- (1) Commission Regulation (EC) No 310/2009 ⁽²⁾ has opened buying-in of skimmed milk powder by a tendering procedure for the period expiring on 31 August 2009, in accordance with the conditions provided for in Commission Regulation (EC) No 214/2001 of 12 January 2001 laying down detailed rules for the application of Council Regulation (EC) No 1255/1999 as regards intervention on the market in skimmed milk powder ⁽³⁾.
- (2) In the light of the tenders received in response to individual invitations to tender, a maximum buying-in price is to be fixed or a decision to make no award is to be

taken, in accordance with Article 17 of Regulation (EC) No 214/2001.

- (3) In the light of the tenders received for the 6th individual invitation to tender, a maximum buying-in price should be fixed.
- (4) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for the Common Organisation of Agricultural Markets,

HAS ADOPTED THIS REGULATION:

Article 1

For the 6th individual invitation to tender for the buying-in of skimmed milk powder within the tendering procedure opened by Regulation (EC) No 310/2009, in respect of which the time limit for the submission of tenders expired on 7 July 2009, the maximum buying-in price shall be EUR 167,90/100 kg.

Article 2

This Regulation shall enter into force on 10 July 2009.

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

Done at Brussels, 9 July 2009.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 97, 16.4.2009, p. 13.

⁽³⁾ OJ L 37, 7.2.2001, p. 100.

COMMISSION REGULATION (EC) No 604/2009**of 9 July 2009****fixing the maximum export refund for butter in the framework of the standing invitation to tender provided for in Regulation (EC) No 619/2008**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) ⁽¹⁾, and in particular Article 164(2), in conjunction with Article 4, thereof,

Whereas:

- (1) Commission Regulation (EC) No 619/2008 of 27 June 2008 opening a standing invitation to tender for export refunds concerning certain milk products ⁽²⁾ provides for a standing invitation to tender procedure.
- (2) Pursuant to Article 6 of Commission Regulation (EC) No 1454/2007 of 10 December 2007 laying down common rules for establishing a tender procedure for fixing export refunds for certain agricultural products ⁽³⁾, and following an examination of the tenders submitted in response to

the invitation to tender, it is appropriate to fix a maximum export refund for the tendering period ending on 7 July 2009.

- (3) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for the Common Organisation of Agricultural Markets,

HAS ADOPTED THIS REGULATION:

Article 1

For the standing invitation to tender opened by Regulation (EC) No 619/2008, for the tendering period ending on 7 July 2009, the maximum amount of refund for the products and destinations referred to in Article 1(a) and (b) and in Article 2 respectively of that Regulation shall be as shown in the Annex to this Regulation.

Article 2

This Regulation shall enter into force on 10 July 2009.

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

Done at Brussels, 9 July 2009.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 168, 28.6.2008, p. 20.

⁽³⁾ OJ L 325, 11.12.2007, p. 69.

ANNEX

(EUR/100 kg)

Product	Export refund Code	Maximum amount of export refund for exports to the destinations referred to in Article 2 of Regulation (EC) No 619/2008
Butter	ex 0405 10 19 9700	70,00
Butteroil	ex 0405 90 10 9000	84,50

COMMISSION REGULATION (EC) No 605/2009**of 9 July 2009****fixing the maximum export refund for skimmed milk powder in the framework of the standing invitation to tender provided for in Regulation (EC) No 619/2008**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) ⁽¹⁾, and in particular Article 164(2), in conjunction with Article 4, thereof,

Whereas:

(1) Commission Regulation (EC) No 619/2008 of 27 June 2008 opening a standing invitation to tender for export refunds concerning certain milk products ⁽²⁾ provides for a standing invitation to tender procedure.

(2) Pursuant to Article 6 of Commission Regulation (EC) No 1454/2007 of 10 December 2007 laying down common rules for establishing a tender procedure for fixing export

refunds for certain agricultural products ⁽³⁾ and following an examination of the tenders submitted in response to the invitation to tender, it is appropriate to fix a maximum export refund for the tendering period ending on 7 July 2009.

(3) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for the Common Organisation of Agricultural Markets,

HAS ADOPTED THIS REGULATION:

Article 1

For the standing invitation to tender opened by Regulation (EC) No 619/2008, for the tendering period ending on 7 July 2009, the maximum amount of refund for the product and destinations referred to in Article 1(c) and in Article 2 of that Regulation shall be EUR 25,80/100 kg.

Article 2

This Regulation shall enter into force on 10 July 2009.

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

Done at Brussels, 9 July 2009.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 299, 16.11.2007, p. 1.

⁽²⁾ OJ L 168, 28.6.2008, p. 20.

⁽³⁾ OJ L 325, 11.12.2007, p. 69.

II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COUNCIL

COUNCIL DECISION, MEETING IN THE COMPOSITION OF HEADS OF STATE OR GOVERNMENT**of 9 July 2009****nominating the person it intends to appoint as President of the Commission for the period 2009-2014**

(2009/532/EC)

THE COUNCIL OF THE EUROPEAN UNION, MEETING IN THE COMPOSITION OF HEADS OF STATE OR GOVERNMENT,

Article 2

This Decision shall be forwarded to the European Parliament.

Having regard to the Treaty establishing the European Community, and in particular Article 213(1), second and third subparagraphs, and Article 214(2), first subparagraph thereof, as well as to the Protocol on the enlargement of the European Union, and in particular Article 4(3) thereof,

Article 3

This Decision shall be published in the *Official Journal of the European Union*.

HAS DECIDED AS FOLLOWS:

Done at Brussels, 9 July 2009.

Article 1

Mr José Manuel DURÃO BARROSO is hereby nominated as the person the Council intends to appoint as President of the Commission for the period from 1 November 2009 to 31 October 2014.

For the Council
The President
F. REINFELDT

COMMISSION

COMMISSION DECISION

of 9 July 2009

amending Decision 2008/22/EC laying down rules for the implementation of Decision No 573/2007/EC of the European Parliament and of the Council establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' as regards Member States' management and control systems, the rules for administrative and financial management and the eligibility of expenditure on projects co-financed by the Fund

(notified under document number C(2009) 5251)

(Only the Bulgarian, Czech, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish texts are authentic)

(2009/533/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Decision No 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' and repealing Council Decision 2004/904/EC ⁽¹⁾, and in particular Articles 23 and 35(4) thereof,

Whereas:

(1) In the light of the experiences following the launch of the Fund, it is appropriate to extend the eligibility period of the annual programmes in order to enable Member States to implement the Fund in an effective way and to adapt the time schedule for the submission of the final report on the implementation of the annual programme.

(2) It is also appropriate to adapt the procedure for the submission of the revised annual programmes by Member States.

(3) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom is bound by the basic act and, as a consequence, by this Decision.

(4) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland is bound by the basic act and, as a consequence, by this Decision.

(5) In accordance with Article 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not bound by this Decision nor subject to the application thereof.

(6) The measures provided for in this Decision are in accordance with the opinion of the common Committee 'Solidarity and Management of Migration Flows',

HAS ADOPTED THIS DECISION:

Article 1

Commission Decision 2008/22/EC ⁽²⁾ is amended as follows:

1. Article 23(1) is replaced by the following:

'1. In order to revise the annual programme approved by the Commission pursuant to Article 20(5) of the basic act, the Member State concerned shall submit a revised draft annual programme to the Commission at the latest three months before the end of the eligibility period. The Commission shall examine and, as soon as possible, approve the revised programme in accordance with the procedure laid down in Article 20(5) of the basic act.'

⁽¹⁾ OJ L 144, 6.6.2007, p. 1.

⁽²⁾ OJ L 7, 10.1.2008, p. 1.

2. in point 4.1 of Annex 5, Part A, the words 'List of all pending recoveries at 30 June of the year N + 2 (N = year of this annual programme)' are replaced by the words 'List of all pending recoveries six months after the eligibility deadline for expenditure';

3. in Annex 11, point I.4.1 is replaced by the following:

'1. Costs relating to a project must be incurred and the respective payments (except for depreciation) made after 1 January of the year referred to in the financing decision approving the annual programmes of the Member States. The eligibility period is until 30 June of the year N (*) + 2, meaning that the costs relating to a project must be incurred before this date.

(*) Where "N" is the year referred to in the financing decision approving the annual programmes of the Member States.';

4. in Annex 11, point V.3 is replaced by the following:

'3. Activities linked to technical assistance must be performed and the corresponding payments made after 1 January of the year referred to in the financing decision approving the annual programmes of the

Member States. The eligibility period lasts at the latest until the deadline for the submission of the final report on the implementation of the annual programme.'

Article 2

This Decision shall apply to all annual programmes for which the payment of the balance has not been made at the date of its adoption.

Article 3

This Decision is addressed to the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 9 July 2009.

For the Commission

Jacques BARROT

Vice-President

COMMISSION DECISION

of 9 July 2009

amending Decision 2008/457/EC laying down rules for the implementation of Council Decision 2007/435/EC establishing the European Fund for the Integration of third-country nationals for the period 2007 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' as regards Member States' management and control systems, the rules for administrative and financial management and the eligibility of expenditure on projects co-financed by the Fund

(notified under document number C(2009) 5257)

(Only the Bulgarian, Czech, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish texts are authentic)

(2009/534/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

establishing the European Community, Ireland is bound by the basic act and, as a consequence, by this Decision.

Having regard to the Treaty establishing the European Community,

(5) In accordance with Article 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not bound by this Decision or subject to the application thereof.

Having regard to Council Decision 2007/435/EC of 25 June 2007 establishing the European Fund for the Integration of third-country nationals for the period 2007 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' ⁽¹⁾, and in particular Articles 21 and 33(4) thereof,

(6) The measures provided for in this Decision are in accordance with the opinion of the common Committee 'Solidarity and management of Migration Flows',

Whereas:

HAS ADOPTED THIS DECISION:

(1) In the light of the experiences following the launch of the Fund, it is appropriate to extend the eligibility period of the annual programmes in order to enable Member States to implement the Fund in an effective way and to adapt the time schedule for the submission of the final report on the implementation of the annual programme.

Article 1

Commission Decision 2008/457/EC ⁽²⁾ is amended as follows:

(2) It is also appropriate to adapt the procedure for the submission of the revised annual programmes by Member States.

1. Article 23(1) is replaced by the following:

(3) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom is bound by the basic act and, as a consequence, by this Decision.

'1. In order to revise the annual programme approved by the Commission pursuant to Article 19(4) of the basic act, the Member State concerned shall submit a revised draft annual programme to the Commission at the latest three months before the end of the eligibility period. The Commission shall examine and, as soon as possible, approve the revised programme in accordance with the procedure laid down in Article 19(4) of the basic act.'

(4) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty

2. in point 4.1 of Annex V, Part A, the words 'List of all pending recoveries at 30 June of the year N + 2 (N = year of this annual programme)' are replaced by the words 'List of all pending recoveries six months after the eligibility deadline for expenditure';

⁽¹⁾ OJ L 168, 28.6.2007, p. 18.

⁽²⁾ OJ L 167, 27.6.2008, p. 69.

3. in Annex XI, point I.4.1 is replaced by the following:

- ‘1. Costs relating to a project must be incurred and the respective payments (except for depreciation) made after 1 January of the year referred to in the financing decision approving the annual programmes of the Member States. The eligibility period is until 30 June of the year N (*) + 2, meaning that the costs relating to a project must be incurred before this date.;

(*) Where “N” is the year referred to in the financing decision approving the annual programmes of the Member States.’;

4. in Annex XI, point V.3 is replaced by the following:

- ‘3. Activities linked to technical assistance must be performed and the corresponding payments made after 1 January of the year referred to in the financing decision approving the annual programmes of the Member States. The eligibility period lasts at the latest until the deadline for the submission of the final report on the implementation of the annual programme.’

Article 2

This Decision shall apply to all annual programmes for which the payment of the balance has not been made at the date of its adoption.

Article 3

This Decision is addressed to the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 9 July 2009.

For the Commission

Jacques BARROT

Vice-President

COMMISSION DECISION

of 9 July 2009

recognising in principle the completeness of the dossier submitted for detailed examination in view of the possible inclusion of BAS 650 F in Annex I to Council Directive 91/414/EEC

*(notified under document number C(2009) 5369)***(Text with EEA relevance)***(2009/535/EC)*

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

plant protection product containing the active substance concerned, the requirements set out in Annex III to Directive 91/414/EEC.

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant-protection products on the market ⁽¹⁾, and in particular Article 6(3) thereof,

(5) This Decision should not prejudice the right of the Commission to request the applicant to submit further data or information in order to clarify certain points in the dossier.

Whereas:

(6) The measures provided for in this Decision are in accordance with the opinion of the Standing Committee on the Food Chain and Animal Health,

(1) Directive 91/414/EEC provides for the development of a Community list of active substances authorised for incorporation in plant protection products.

HAS ADOPTED THIS DECISION:

(2) A dossier for the active substance BAS 650 F was submitted by BASF SE to the authorities of the Netherlands on 26 September 2008 with an application to obtain its inclusion in Annex I to Directive 91/414/EEC.

Article 1

Without prejudice to Article 6(4) of Directive 91/414/EEC, the dossier concerning the active substance identified in the Annex to this Decision, which was submitted to the Commission and the Member States with a view to obtaining the inclusion of that substance in Annex I to that Directive, satisfies in principle the data and information requirements set out in Annex II to that Directive.

(3) The Dutch authorities have indicated to the Commission that, on preliminary examination, the dossier for the active substance concerned appears to satisfy the data and information requirements set out in Annex II to Directive 91/414/EEC. The dossier submitted appears also to satisfy the data and information requirements set out in Annex III to Directive 91/414/EEC in respect of one plant protection product containing the active substance concerned. In accordance with Article 6(2) of Directive 91/414/EEC, the dossier was subsequently forwarded by the respective applicant to the Commission and other Member States, and was referred to the Standing Committee on the Food Chain and Animal Health.

The dossier also satisfies the data and information requirements set out in Annex III to that Directive in respect of one plant protection product containing the active substance, taking into account the uses proposed.

Article 2

(4) By this Decision it should be formally confirmed at Community level that the dossier is considered as satisfying in principle the data and information requirements set out in Annex II and, for at least one

The rapporteur Member State shall pursue the detailed examination for the dossier referred to in Article 1 and shall communicate to the Commission the conclusions of its examination accompanied by a recommendation on the inclusion or non-inclusion in Annex I to Directive 91/414/EEC of the active substance referred to in Article 1 and any conditions for that inclusion as soon as possible and at the latest within a period of one year from the date of publication of this Decision in the *Official Journal of the European Union*.

⁽¹⁾ OJ L 230, 19.8.1991, p. 1.

Article 3

This Decision is addressed to the Member States.

Done at Brussels, 9 July 2009.

For the Commission
Androulla VASSILIOU
Member of the Commission

ANNEX

ACTIVE SUBSTANCE CONCERNED BY THIS DECISION

Common Name, CIPAC Identification Number	Applicant	Date of application	Rapporteur Member State
Developmental code: BAS 650 F CIPAC-No: not attributed yet ISO-common name: not attributed yet	BASF SE	26 September 2008	NL

2009/535/EC:

★ **Commission Decision of 9 July 2009 recognising in principle the completeness of the dossier submitted for detailed examination in view of the possible inclusion of BAS 650 F in Annex I to Council Directive 91/414/EEC** (*notified under document number C(2009) 5369*) ⁽¹⁾ 66



⁽¹⁾ Text with EEA relevance

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