



Australian Government
Australian Customs Service

M A N U A L

CUSTOMS SUBSIDY MANUAL

EXPOSURE DRAFT FOR COMMENT

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1 IDENTIFYING A SUBSIDY – WHETHER A FINANCIAL CONTRIBUTION EXISTS

1.1 CONTEXT

1 Article 1 of the SCM Agreement provides that a subsidy exists where two distinct elements are
2 present: there must be a financial contribution by a government, or income or price support; and
3 this must confer a benefit.

4 A financial contribution is a transaction through which something of economic value is
5 transferred by the government – this may be money or goods or services. The government's
6 actions are the focus when examining whether there has been a financial contribution.

7 In defining a subsidy, section 269T of the Act seeks to incorporate the above provision. The
8 requirement of a financial contribution is intended to ensure that not all government measures
9 that confer benefits could be deemed to be subsidies.

10 1.2 POLICY

11 The definition of a subsidy in the Act refers to a 'government' and to a 'public body'. It also refers
12 to a 'private body' which the government or a public body entrust or directs to carry out a
13 governmental function. The term 'government' is taken to include government at all different
14 levels – national, state or provincial governments.

15 1.3 PRACTICE

16 In establishing whether a financial contribution by a government exists, an important question is
17 how broad is the concept of 'government'? It includes not only the 'government' per se, but also:

- 18 • any 'public body' within the country of export or origin of the goods; and
- 19 • any 'private body' entrusted or directed by the government to carry out a financial
20 contribution as defined.

21 In examining whether there is a public body or there has been direction/entrustment provided to
22 a private body the burden of proof is placed on Customs. Customs will seek to determine if
23 positive evidence exists. The failure of a party to cooperate by providing the information required
24 will be weighed up by Customs and examination may proceed on the basis of all relevant
25 information available to Customs.

26 Public Body

27 As the term 'public body' is not defined in the Customs Act, Customs has regard to the dictionary
28 definition which refers to an institution or organisation acting on behalf of the community. The
29 determination of whether an entity or company is a 'public body' will be made by Customs
30 following a careful examination of:

- 31 • the body's ownership and management structures, and
- 32 • the objectives and functions performed by the body – whether the entity in question is
33 pursuing public policy objectives.

34 *Ownership / Management*

35 In some cases deciding on ownership and management will be relatively straightforward - for
36 example if the body is wholly owned by a government, or if the government has a majority
37 ownership and appoints the management. The greater the ownership by government, the more
38 likely Customs will make a finding of a 'public body'.

39 Where the government is not a majority shareholder the evidentiary requirements placed on
40 Customs to determine that it is a public body is significantly increased. In this situation, a
41 decision whether a body is a public body can only be made after carefully examining all relevant
42 facts concerning the management structure, and the way in which it was appointed. A finding of
43 a 'public body' may be seen through the government's ability to make appointments; the right of
44 government to review results, determining the body's objectives and involvement in individual
45 investment or business decisions.

46 *Objectives / Functions*

47 Additional to ownership, Customs will consider whether the public body is authorised to act on
48 behalf of the government (and not in the manner of a private entity that acts in the interests of its
49 owners). Customs will examine whether the body in question carries out public policy objectives,
50 taking into account national or regional economic interests and the promotion of social
51 objectives.

52 Private body

53 Where an entity is neither a government nor a public body Customs would treat it as a private
54 body. In this case, government direction to provide a financial contribution must be established
55 by Customs.

56 The level of government ownership may still be important in deciding whether the government
57 has directed the private body.

58 Regarding the issue of government entrusting and directing a private body, Customs will
59 conduct its examinations in conformity with the WTO appellate body which found that
60 interpreting 'entrusts' as being limited to acts of 'delegation'; and 'directs' as being limited to
61 acts of 'command'; were too narrow. Customs will look to determine if there is a demonstrable
62 link between the government and the conduct of the private body; and 'entrustment and
63 direction' will be seen as requiring a more active role by the government than mere acts of
64 encouragement'. Inadvertent direction or mere policy announcements alone would therefore be
65 insufficient.

66 Therefore, Customs will determine entrustment as occurring when a government gives
67 responsibility to a private body; and direction as referring to those situations where a
68 government exercises its authority over a private body. The common element is that the
69 government will have to be found as using a private body as proxy to give effect to types of
70 financial contributions, and this also may involve some form of threat or inducement, which could
71 serve as evidence of entrustment or direction.

72 Customs will not interpret the term "private body" as being limited to a single entity only – it may
73 also include a group of entities or persons.

74 Direct transfer of funds

75 The direct transfer of funds includes grants (such as investment allowances, equity infusion not
76 reflecting usual investment practices); and loans (such as preferential export credits, and tax
77 deferrals) will be treated by Customs as a financial contribution. Also included are potential
78 direct transfers of funds or liabilities such as loan guarantees. The provision of grants, loans or
79 loan guarantees by State banks will also be taken by Customs to be a form of financial
80 contribution.

81 If a budgetary amount has been set aside, for example in a budgetary allocation, or where a
82 letter of commitment or some other assurance has been given, but no actual payment made,

83 Customs approach would be that this is insufficient evidence that there has been a direct
84 transfer of funds.

85 Foregoing or non collection of revenue

86 Foregoing or not collecting revenue that is otherwise due such as granting tax credits or
87 deductions from taxable income, or exemption from corporate income tax will be treated by
88 Customs as a financial contribution.

89 Included are refunds of customs duties paid on imports of raw materials when it exports finished
90 products incorporating those materials and the remission is in excess of those duties actually
91 levied on the inputs.

92 This does not arise wherever an observation is made that a government has not raised revenue
93 which it otherwise could have raised. Rather, Customs will examine the taxation rules of the
94 country and determine whether the contested measures involve the foregoing of revenue that
95 would otherwise be due. In making comparisons between taxation rules to see if a particular
96 industry has received a financial contribution Customs will ensure that comparisons are fair ie,
97 the tax systems being compared have the same basis.

98 Providing goods or services other than general infrastructure, or purchasing goods

99 Customs will examine whether a financial contribution may arise when a government provides
100 goods or services or purchases goods. An example would be the supply by a government of
101 energy at preferential prices to specific sectors. A private body may be entrusted with these
102 functions.

2 IDENTIFYING A SUBSIDY - WHETHER A BENEFIT IS CONFERRED

2.1 CONTEXT

Article 1 of the SCM Agreement provides that a subsidy exists where a financial contribution by a government or any public body confers a benefit. This provision is reflected in s.269T of the Act.

Article 14 of the SCM Agreement requires that the method used to calculate the "benefit to the recipient" be provided for in national legislation / regulations and that the methods be consistent with guidelines set out in that article. This part of Customs manual meets that requirement.

Article VI:3 of the GATT 1994 provides that: "No countervailing duty shall be levied on any product of the territory of a Member imported into the territory of another Member in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation..."

As reflected in footnote 36 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), the term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export or any merchandise".

2.2 POLICY

Customs considers that the words "... any method used by the investigating authority ..." in SCM Article 14 show that there may be more than one method for calculating the benefit to the recipient. In calculating the benefit to the recipient Customs will have regard to the relevant case circumstances and ensure that the details of the benefit calculations are fully outlined in its reports.

The consideration of 'benefit' has been used in slightly different terms between WTO provisions and the Customs Act:

- Article 14 of the SCM Agreement uses the term "benefit to the recipient";
- Article VI of the GATT 1994 uses the term "subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation"; and
- the Customs Act uses the term "subsidy, in relation to goods exported to Australia".

Customs does not draw any practical distinctions between the meaning of these terms and will assess the benefit received by the producers of the processed product the subject of the investigation.

Distinction between "benefit" and "competitive effect"

Imposition of the countervailing duty on goods exported by an enterprise that has received the benefit of a subsidy is independent of the "effect", if any, that the subsidy may have had on the selling price of the goods into the export market.

Customs does not calculate any "competitive effect" that may arise as a consequence of the benefit being received by the producer of the final processed product the subject of the investigation. An exporter may use a subsidy in any number of ways.

144 Even in the case of an export subsidy, where it may be expected that any effect on an export
145 price may be most demonstrable, determination of the amount of the benefit conferred by an
146 export subsidy is independent of any such 'competitive effect'. What Customs seeks to
147 determine is the amount of the benefit from the export subsidy received by the producer of the
148 final processed product the subject to the investigation. Similarly, for domestic subsidies¹ the
149 benefit is quantified independently of any competitive effect.

150 **2.3 PRACTICE**

151 The amount of a subsidy is worked out by calculating a 'grant equivalent' – that is, the scheme
152 has transferred something of economic value from a government to the advantage of a recipient
153 and in so doing has reduced the costs of the recipient, whether considered in terms of money,
154 goods or services². Or, a benefit arises to the extent that the producer of certain goods would
155 have to pay more for the 'inputs' if there had been no government assistance. In other words,
156 without that subsidy the enterprise would have had to pay more. 'Benefit' does not necessarily
157 equate with the cost to the government.

158 Customs sends out questionnaires to foreign governments and to exporters. The questionnaires
159 will contain the details of the alleged schemes and include requests for data that will allow the
160 quantification of any benefit.

161 Not all cases where financial resources have been committed give rise to a countervailable
162 subsidy. For example, a financial contribution such as a grant, or a tax incentive, always confers
163 as benefit as they are like a gift. But, loans and loan guarantees, for example, only confer a
164 benefit if they are granted on terms that are more favourable terms than commercially available
165 loans or loan guarantees.

166 **Objective of the calculation**

167 The purpose is to determine the amount of subsidy per unit for each subsidy received by the
168 exporter. The unit selected will vary according to the case circumstances. It may be the number
169 of items in the case of consumer goods or per tonne, for example, in the case of goods like bulk
170 chemicals.

171 The calculation will be made during an investigation period which will usually be the most recent
172 financial year of the beneficiary companies in the country concerned in order to allow verification
173 to audited accounts.

174 In the case of a joint dumping and subsidy application Customs will set a common investigation
175 period for both investigations. The investigation period will be worked out having regard to the
176 requirements of the subsidy investigation and the desirability of avoiding a part period which
177 overlaps another financial period (which may have been possible were there a dumping
178 investigation only).

¹ This is so whether it is a direct, or indirect, subsidy. For indirect, or 'upstream', subsidies the amount of any countervailable duty is worked out after determining the amount of the benefit received by the exporter of the final finished goods. Again, no "competitive effect" is required to establish whether the selling price received by the producer of the final processed product the subject to the investigation reflected any part of that 'upstream' subsidy. This is a different matter to the quantification of the input price itself in the case of an upstream subsidy - here the competitive benefit does have to be made when examining any pass through of a benefit arising from that indirect subsidy.

² Use of the present tense regarding the 'financial contribution' and the 'benefit' in the WTO provisions is taken to mean both must exist during the period of the investigation or review.

179 The simplest form is a subsidy granted per unit. Here the calculation would generally be a
180 weighted average of the per unit amounts over the investigation period.

181 But most subsidies are not paid in such simple per unit terms and attribution, and allocations,
182 must be worked out in order to determine an amount per unit.

183 Customs will calculate the amount of the subsidy by:

- 184 • Attributing the amount of subsidy to the investigation period (and in that process take
185 account of the time value of money);
- 186 • Calculating the amount of subsidy per unit sold during the investigation period;
- 187 • Converting the per unit subsidy into an ad valorem rate by expressing the per unit subsidy
188 amount as a percentage of the average fob per unit export price;

189 Attribution of a subsidy to the goods

190 Payment of a subsidy can occur at a point in time. However, it will not always be appropriate to
191 attribute every subsidy to a single year. It is recognised that some subsidies have the capacity
192 to have an impact in more than the one year in which a one of payment may have been made.
193 The manner in which a subsidy will be attributed to a particular year will vary according to the
194 type of subsidy. For subsidies having an effect over a number of years the amount will be
195 amortized in order to calculate the portion of the subsidy to be attributed to the investigation
196 period.

197 Customs will investigate such subsidies over a prior period in order to determine the portion of
198 such subsidy to be attributed to the investigation period.

199 On the other hand, some other types of subsidies may be attributed to the investigation period
200 by expensing them within that period. For subsidies that cannot be linked to the acquisition of
201 fixed assets the amount of the benefit received during the investigation period will be normally
202 be attributed to that period.

203 Allocation

204 The amount of the subsidy that has been attributed to the investigation period will be allocated to
205 the goods under consideration. For example, an enterprise may have multiple products and the
206 total subsidy benefits within the investigation period, in relation to the enterprise's whole
207 operations, must be allocated in order to estimate the amount of the subsidy on the goods.

208 Allocation to the goods may be made according to the most appropriate factor and depending on
209 case circumstances:

- 210 • as a proportion of total production costs, or
- 211 • as a proportion of production or sales quantity.

212 Amortization period

213 Where the subsidies can be linked to the acquisition of fixed assets/long term debt structure of
214 the enterprise the total value of the subsidy will be spread over a period which reflects the
215 normal depreciation of the assets in the industry concerned. Therefore, a one of grant used in
216 this manner, for example, can be spread over the normal period used for the depreciation of
217 assets. Such approach means that one-off subsidies paid in the past can remain
218 countervailable provided that an effect had carried into the investigation period.

219 Allocating a subsidy in this fashion is treating the allocation as being the equivalent of a series of
220 annual grants, hence the term 'grant equivalent principle' in the previous section.

221 *Normal period for depreciation of assets*

222 At the outset of the investigation Customs will invite exporters and the government to provide
223 information about the normal average useful life of assets (AUL) for the industry under
224 investigation. Customs will prefer to use exporter/producer data concerning AULs³, but absent
225 that will consider any other reliable information. For example, the government may be able to
226 demonstrate that it has procedures in place which recognise the AUL of industries and which
227 have been based upon reliable industry surveys. Customs will not assume that depreciation
228 periods relating used for taxation purposes equate with the actual AUL of the industry.

229 Where the use of a subsidy is unknown for any reason, or is not linked to the acquisition of
230 capital assets, estimates may have to be made of the AUL. In this instance Customs will use
231 the weighted average of useful life of assets employed for other companies, or if such
232 information does not exist it may use the AUL based upon the Australian industry.

233 *Exception*

234 In the case of long term loans at preferential rates Customs will not use the AUL of assets.
235 Instead, the actual term of the loan will be used to attribute the benefits over time.

236 Addition of interest

237 Interest is added whether the subsidy has been expensed or amortized. When expensed in the
238 investigation period, the expensed amount determined by Customs will generally be increased
239 by the annual commercial interest rate (to reflect the full estimate of benefit on the assumption
240 that the beneficiary company would have had to borrow the money at the beginning of the period
241 and repay at the end)⁴.

242 Addition of interest can become a significant addition to the benefit calculation where the rates
243 are high. The rationale behind the addition of interest is that benefit to the recipient includes not
244 only the amount conferred but also the interest related benefit of not having to borrow an
245 equivalent amount of money. Adding interest in this manner means a distinction is being made
246 between the face value of a subsidy at the time it is transferred to the recipient or foregone by
247 the government and the amount found to exist in the investigation period.

248 Customs may make the determination of the benefit on a company-specific basis where the
249 facts reveal the existence of different categories of producers who received different amounts of
250 subsidization. Or it may make determinations at a more general level that is not company
251 specific, again depending on the facts.

252 The appropriate denominator for allocation of a subsidy amount per unit

253 Once the subsidy amount attributed to the investigation period, and then allocated to the goods
254 themselves, the resulting amount is used to determine the per unit subsidy, using the
255 appropriate denominator.

³ If generally recognised AUL's do not exist a company specific AUL may be estimated. One method of doing so is to cumulate the annual average book value of the depreciable fixed assets over an appropriate period divided by the sum of annual depreciation charges for that same period. (Excluded would be any fixed assets that are not depreciable and assets that have been already fully depreciated that are no longer in service. Assets fully depreciated and still in service may still be included). This method normally involves the collection of a longer period of historical data in order to make the calculation a reasonable one – generally Customs will require 10 years of historical data.

⁴ Expressed as a face value all subsidies may conceptually be seen as being the equivalent of a grant. Non repayable grants are not available commercially, and in the absence of such a 'grant' the recipient would have to raise an equivalent sum from commercial sources and repay it with interest over a period of time. On this basis the amount of the benefit determined can be treated as having to include an amount for interest.

256 For export subsidies, the appropriate denominator to be used when allocating to an amount per
257 unit is the export volume during the investigation period. This is because the subsidy benefits
258 only the exports.

259 For non-export subsidies, for example a production subsidy, the total sales (domestic plus
260 export) in the investigation period should normally be used as the denominator since such
261 subsidies benefit both domestic and export sales.

262 If the benefit of a subsidy is limited to a particular product the denominator should reflect only
263 sales of that product. If this is not the case, the denominator should be the recipient's total
264 sales.

265 Production quantities may be relevant if the subsidy is linked to production.

266 Ad valorem

267 Having calculated the per unit subsidy as above, Customs will then calculate the ad valorem rate
268 of that subsidy, meaning it is expressed as a percentage of the export price. Generally, this
269 calculation will be made in the manner illustrated by the following example:

- 270 • a subsidy of \$20m is given to purchase capital equipment and this has been attributed to
271 the investigation period to an amount of \$2m;
- 272 • this amount is allocated to the goods under consideration based upon the ratio production
273 costs of the goods bear to total production costs and equals, for example, \$0.5m;
- 274 • the total sales of the exporter in the investigation period was 10m units therefore subsidy
275 per unit is \$0.05/unit;
- 276 • the FOB unit price for exports to Australia (a an average over the investigation period) is
277 worked out to be \$0.30/unit;
- 278 • The ad valorem equivalent of the subsidy is 16.6%

279 The ad valorem equivalent of the subsidy is required under the terms of section 269TDA(16) of
280 the Act in order to make determinations whether the subsidy is negligible.

281 Related Parties

282 If a subsidiary company is under investigation and certain subsidies have also been received by
283 related parties for example the holding or parent company, Customs may allocate some of that
284 subsidy to the subsidiary company where it relates to the goods.

285 Attribution – Expensed or Amortized

286 Subsidies used for operational expenses are usually expensed. Subsidies used for acquisition
287 of capital assets are amortized over the expected useful life of the assets. Subsidies for other
288 uses, or if the use of a subsidy is unknown, are generally amortized over the weighted average
289 useful life of assets employed in the industry.

290 Some subsidies are expensed and in this case are attributed entirely to a single year. These
291 types of subsidies are normally related to the on-going production and sales activities of the
292 company. In the case of subsidies that are expensed in this manner, or those subsidies
293 expensed under the 1% exception procedure described below, no subsidies provided before the
294 investigation period should be taken into account.

295 Other types of subsidies, for example those that are infrequent/exceptional in nature and linked
296 to the long term financial structure of the company or to fixed assets, have a continuing benefit
297 to the enterprise beyond the year of receipt – these are generally amortized over a longer period
298 and a portion attributed to the investigation period.

299 Included in this are some subsidies which, although given on a recurring basis, are linked to
 300 fixed assets - the benefits accruing from previous years within the depreciation period are taken
 301 into account when working out the appropriate amount to attribute to the investigation period.
 302 An example is import duty exemptions on imported machinery.

303 *Exception*

304 Some subsidies which would ordinarily have been amortized over a determined period, for
 305 example because they are linked to purchase of assets, will be expensed by Customs to the
 306 year of receipt if the total amount of the benefits is less than 1% ad valorem of the export sales
 307 value. This exception simplifies investigations because expensing small benefits in the year of
 308 receipt avoids the need to examine data needed to calculate those benefits over time. A
 309 considerable burden can be involved in that task. Ad valorem rates for all subsidies received by
 310 a company under all programs may be added to determine if the total rate is below 1% ad
 311 valorem of the export sales value.

312 *Subsidies that are generally expensed*

313 Short term loans (operational); grants for operational expenses; tax credits, refunds, and
 314 exemptions; tax deferrals; excess relief of indirect taxes and import duties; provision by
 315 government of goods or services used for operations (and discounts on electricity, water and
 316 other utilities); purchase of goods by government; price support; freight subsidies; export
 317 promotion assistance; wage subsidies; and upstream subsidies.

318 *Subsidies that are generally amortized*

319 Long term loans (non operational); loan guarantees (non operational); equity infusions and debt
 320 to equity swaps; grants for capital assets (non operational); provision of goods (capital assets)
 321 and infrastructure (non general); debt forgiveness; plant closure assistance.

322 These examples are illustrative only. In an investigation Customs will invite submission from
 323 interested parties in order to make determinations whether a particular subsidy should be
 324 expensed or amortized. Issues to be considered are whether the subsidy was paid as part of
 325 any ongoing scheme; and if it was linked to long term debt structure or the capital assets of the
 326 enterprise. In summary, affirmative answers to one or more of the following may suggest that a
 327 subsidy has to be amortized:

- 328 • whether the purpose of the subsidy was for the purchase of fixed assets
- 329 • whether non-recurring and/or large
- 330 • whether orientated toward future production
- 331 • whether consisting of equity
- 332 • whether carried forward in recipient's accounting records.

333 Attributing amortized benefits to each year including the investigation period

334 Where benefits have to be amortized over the AUL of assets Customs will use a formula:

$$335 A_k = \frac{y/n + [y - (y/n)(k-1)]d}{1 + d}$$

338 Where:

- 339 A_k = the amount of the benefit allocated
 340 to year k ,
 341 y = the face value of the subsidy,
 342 n = the AUL of assets in the industry being investigated,
 343 d = the discount rate, and
 344 k = the year of allocation where the
 345 year of receipt = 1 and $1 \leq k \leq n$.

346 The formula calculates the annual benefit amount for each year using the variables: face value
347 of the subsidy; AUL; and interest rate⁵. The numerator is can be seen to be like principal
348 (subsidy) plus an interest component. The denominator brings the benefit back to day 1 dollars.

349 Year 1: in year 1 the formula becomes $y/n + (y)(d)$ (as $k-1=0$), and y/n is the 'principal' added to
350 $y(d)$ which is the 'interest' on that years allocated subsidy. On day one of the first year the
351 subsidy part of the benefit is y/n and on day 364 of the first year the benefit is $y/n + (y)(d)$. The
352 denominator brings the benefit back to day 1 dollars. i.e., discounts the benefit at the end of the
353 year 1 to day 1 of that year.

354 Year 2: in year 2 k equals 2 and $(k-1)$ equals 1, and the numerator becomes formula becomes
355 $y/n + [y - (y/n)]d$; the numerator still consists of the interest component where y/n is the face
356 value of the benefit allocated in year 2 added to the interest on the outstanding 'principal' in year
357 2. Because some of the subsidy (principal) has been attributed to year 1, there can be no
358 interest component on that portion 1 year 2. Therefore the formula subtracts y/n from the face
359 value of the grant before deriving the interest in year 2. On day 1 of year 2 the benefit is still y/n
360 and at the end of year 2 the total benefit is $y/n + [y - (y/n)]$. As in year one the denominator
361 brings the total benefit back to year 2, day 1 dollars. i.e., discounts the benefit at the end of the
362 year 2 to day 1 of that year.

363 In following years while y/n stays the same, the interest component declines. The result is that
364 benefit line slopes down over time because of the fact that the interest component decreases
365 each year.

366 The interest, or discount, rate is based upon information relating to the year in which the subsidy
367 was originally provided. The rate used will be in order of preference: the cost of long term fixed
368 rate loans paid by the company under examination; or the average of long term fixed rate loans
369 in the country. This interest, or discount, rate is used to take into account in the benefit
370 calculation the time value of money. Because the benefit from the subsidy is being allocated
371 over a number of years the formula incorporates the interest rate in order to account for the time
372 value of money. (\$1000 received today is worth more than \$1000 received one year later. This
373 basic principle is incorporated in the calculations as it is considered to result in a more
374 meaningful measurement of the benefit stream that is received by the recipient accruing from
375 the face value of the subsidy).

376 **Grants**

377 In the case of a grant, where none of the money is repaid, the benefit from this most basic type
378 of subsidy is the amount of the grant. The benefit will normally have been regarded as having
379 been received on the date the company first received the grant.

380 If the grant is expensed within the investigation period (i.e., it has been entirely allocated to
381 production or sales during this period) the interest that would have accrued during the
382 investigation period will generally be added.

383 However, if the grant has to be allocated over a longer period, the method of working out the
384 amount that falls within the investigation period will be made in accordance with the procedures
385 described above.

⁵ y/n is the nominal annual benefit; $[y - (y/n)(k-1)]d$ is the interest on the declining balance of the face value of the subsidy; $1 + d$ is the factor that discounts the cash flow back to day one of the year of allocation; k is the year of allocation where year of receipt = 1. (If the subsidy was given in 2000, and the AUL (n) was 5, the benefit would be attributed for the years from 2000 through to 2004).

386 Any lump sum of revenue transferred or foregone (e.g. income tax or duty exemption, rebates,
387 money saved from preferential provision of goods and services, or gained from excessive prices
388 for the purchase of goods) will normally be treated as being equivalent to a grant.

389 Examples of grants (or equivalents to a grant)

390 To work out the full amount of subsidy all of the amounts in the examples are increased by an
391 amount for interest as described above. The total amount of subsidy also depends on whether
392 the subsidy is apportioned over time or expensed.

393 *Direct transfer of funds*

394 This is the simplest case of a grant. The amount of subsidy is the amount received by the
395 company concerned (a subsidy to cover operating losses would fall into this category).

396 *Tax exemption, tax reductions, and tax credits*

397 A common form of relief from direct taxes is special income tax exemptions, deductions, or
398 credits. A benefit would be the extent to which the taxes paid by the enterprise are less than the
399 taxes the enterprise would have paid had the program not existed. The benefit will generally be
400 expensed to the year in which the benefit is received (benefit is normally received on the date
401 on which the enterprise would otherwise have had to pay the taxes associated with the
402 exemption etc – normally this will be the date it lodged the tax return. By this means the benefit
403 can be expensed to the investigation period.

404 *Accelerated depreciation*

405 Accelerated depreciation of assets under a government agreed program would be considered
406 the equivalent of a tax reduction. The amount of subsidy is the difference between the amount of
407 tax that would have been paid during the investigation period under the normal depreciation
408 schedule for the assets concerned and the amount actually paid under accelerated depreciation.
409 There is a benefit to the extent that the accelerated depreciation results in a tax saving for the
410 company concerned during the investigation period.

411 *Interest rate subsidies*

412 In the case of an interest rate subsidy, the amount of subsidy is the amount of interest saved by
413 the recipient company during the investigation period.

414 *Debt forgiveness*

415 For government provided debt assumptions or forgiveness, where a government may relieve a
416 company of its repayment obligations, are treated as a grant. i.e., as a subsidy expenses within
417 the investigation period. (There may be fewer circumstances where an interest assumption is
418 tied to a known loan and the interest assumption may be treated by Customs as a reduced
419 interest loan and allocated according to the procedures set out for loans).

420 All other exemptions or reductions of obligations, such as import duties, social security
421 contributions, and redundancy payments, will also generally be treated as grant equivalents.

422 Loans

423 In the case of a loan from the government (where repayment does take place) the subsidy is the
424 difference between the amount of interest paid on the government loan and the interest normally
425 payable on a comparable commercial loan during the investigation period.

426 A comparable commercial loan would normally be a loan of a similar amount with a similar
427 repayment period obtainable by the recipient from a representative private bank operating on the
428 domestic market. Customs will generally place an emphasis on similarities in the structure of

429 the loans, for example fixed interest rate v variable interest rate; short v long term maturity; and
430 the currency in which the loans are denominated. (As part of seeking the most comparable
431 commercial loan, Customs may also consider information that is available about 'effective'
432 interest rates in preference to nominal rates – 'effective' interest rates being those which take
433 into account the actual cost of the loan having regard to any fees, commissions, and other
434 charges that may exist in addition to the nominal interest).

435 The commercial interest rate should preferably be established on the basis of the rate actually
436 paid by the company concerned on comparable loans from private banks. If this is not available,
437 the interest paid on comparable private loans to companies in a similar financial situation in the
438 same sector of the economy will be considered, or if such information is not available, to any
439 comparable private loan made to companies in a similar financial situation in any sector of the
440 economy.

441 Customs may treat a loan from a government owned bank as a commercial loan. Customs will
442 examine the evidence when deciding whether the loan from that institution has been provided on
443 non-commercial terms or has been made under any government direction.

444 If there are no comparable commercial lending practices on the domestic market of the
445 exporting country, the interest rate on a commercial loan may be estimated with reference to
446 indicators of the economic situation prevailing at the time, notably the inflation rate, and the
447 situation of the company concerned.

448 If all, or part of, a loan is forgiven or defaulted on the amount not repaid is treated as a grant
449 depending on whether there was a guarantee.

450 In the case of loans the benefit will normally be taken as having been received in the year in
451 which the enterprise would otherwise have had to make a payment on a comparable
452 commercial loan.

453 Attribution of the loan to a particular time period

454 *Short term loans*

455 For short term loans Customs will expense the benefit from that loan to the year in which the
456 company is due to make the interest payments on the loan.

457 *Long term loans*

458 For long term loans having a concessionary fixed rate of interest the calculation involves
459 determining a present value of the benefit that has occurred over time. The total interest
460 differential over the life of the loan will be calculated and the present value of that total benefit
461 stream will be calculated and treated like value y in the formula – this amount to be allocated
462 over the life of the loan in line with the calculation methodology set out above under 'Attributing
463 amortized benefits to each year including the investigation period'.

464 Customs will use this formula in the case of:

- 465 • government provided loans and the loan to which it is compared – the benchmark loan –
466 have different maturity periods or repayment schedules; or
- 467 • government provided loans where the only difference to the benchmark loan is the
468 difference in repayment terms.

469 Examples of loans

470 *Tax deferrals*

471 Customs will treat these as government provided loans. Deferrals of one year or less may be
472 treated by Customs as short term loans and in this case a short term interest rate is used as the

473 benchmark. For tax deferrals longer than one year the benefit will be calculated using a long
474 term interest rate as the benchmark. For example, if the enterprise knows at the time the taxes
475 are normally due that it would not be liable for taxes until 5 years later, the deferral can be
476 treated like a 5 year loan and the benchmark would in that case be a 5 year loan.

477 *Reimbursable grants*

478 Reimbursable grants are treated like interest free loans until they are reimbursed. If not
479 reimbursed, in whole or in part, they will be considered as grants rather than interest free loans
480 from the date on which non-reimbursement is established. From this date, the normal grant
481 methodology will apply. In particular, if the grant is to be allocated over time, this will commence
482 from the establishment date of non-reimbursement. The amount of subsidy is the amount of the
483 grant minus any repayments.

484 *Contingent liability loans*

485 Customs follows the same approach as reimbursable grants. To the extent that such loans are
486 given at a preferential rate of interest the subsidy would be calculated as the difference between
487 the amounts of interest paid on the government loan and the interest normally payable on a
488 comparable commercial loan during the investigation period. However, if it were to be
489 determined that the loan would not be repaid, it is treated as a grant from the date on which non-
490 repayment was established. The amount of subsidy is the amount of the loan, less any
491 repayments.

492 *Uncreditworthy loans*

493 Where a government makes loans to borrowers who are uncreditworthy - meaning that its
494 financial position is so weak that it can be demonstrated from the evidence that it would have
495 obtained a commercial loan – Customs in these cases will consider whether the entire loan
496 should be treated as being equivalent to a grant. Claims by Australian industry whether a
497 company is uncreditworthy will need to be supported by information about the financial health of
498 the company as shown by various financial indicators; its ability to meet its costs and financial
499 obligations from cash flow; and evidence concerning the enterprise's future financial position
500 using market studies, and project and loan appraisals. The presence of long term loans with out
501 any government guarantee may be indicative that an enterprise is not uncreditworthy.

502 **Loan guarantees**

503 In general, a benefit exists from a loan guarantee to the extent that the total amount the form
504 pays for a loan with the government guarantee is less than what the enterprise would pay for a
505 comparable commercial loan that the enterprise would actually obtain absent the guarantee.

506 If the government provides the guarantee, the fact that loans are obtained at a lower interest
507 rate than would otherwise be the case does not mean, of itself, that there is a subsidy provided
508 that the guarantee is financed on a commercial basis - the financing of a viable guarantee on a
509 commercial basis by the company may offset any benefit of a preferential interest rate.

510 In this situation, there is generally no benefit to the recipient if the fee it pays to the guarantee
511 program is sufficient to enable the program to operate on a commercial basis i.e. to cover all its
512 costs and to earn a reasonable profit margin. In such a situation, it is presumed that the fee
513 covers the risk element involved in obtaining a lower interest rate. If the guarantee program is
514 viable during the investigation period as a whole and the recipient has paid the appropriate fee,
515 there is no financial contribution from the government and therefore no subsidy, even if the
516 recipient involved were to default on its loans during the period.

517 If the scheme is not viable, the benefit to the recipient is the difference between the fees actually
518 paid and the fees which should have been paid to make the program viable or the difference
519 between the amount the enterprise pays on the guaranteed loan and the amount that it would
520 pay for a comparable commercial loan in the absence of the government guarantee, whichever
521 is the lower.

522 Customs will examine whether the guarantee affects other terms of the loan such as the interest
523 rate.

524 Where the government is the owner, and as owner provides a guarantee to the enterprise, that
525 will not provide a benefit if evidence shows that it is normal commercial practice for shareholders
526 to provide guarantees to their enterprises under similar circumstances.

527 For loan guarantees the benefit will normally be taken as having been received in the year in
528 which the enterprise otherwise would have had to make a payment on the comparable
529 commercial loan.

530 In attributing the benefit from a government provided guarantee to a particular time period
531 Customs will the generally use the method set out for loans.

532 The same calculation principles would apply to credit guarantees, i.e. where the recipient is
533 guaranteed against credit defaults by its customers.

534 **Government provision of equity capital**

535 Government provision of equity capital is not considered to confer a benefit unless the
536 investment decision can be regarded as being inconsistent with the usual investment practice
537 (including the provision of risk capital) of private investors in the exporting country concerned.

538 Therefore, the provision of equity capital does not, of itself, confer a benefit. The criterion is
539 whether a private investor would have put money into the company in the same situation in
540 which the government provided equity.

541 If a government buys shares in a company and pays above the normal market price for these
542 shares (taking into account of any other factors which may have influenced a private investor),
543 the amount of subsidy is the difference between the two prices.

544 As a general rule, in cases where there is no market in freely traded shares, the government's
545 realistic expectation of a return on the price paid for equity will be examined. The existence of
546 an independent study demonstrating that it is a reasonable investment is the best evidence. If
547 this evidence is not available, the exporting government should demonstrate the basis justifying
548 its expectation of a reasonable return on investment.

549 If there is no market price and the equity injection is made as part of an ongoing program of
550 such investments by the government, the analysis will take account of the enterprise in question
551 as well as the overall record of the program over recent years. If the records show that the
552 program has earned a reasonable rate of return for the government, there is a presumption that
553 the government is acting according to the usual investment practice of private investors with
554 regard to the case in question. If the program has not generated a reasonable return, the
555 exporting government should demonstrate the grounds for its expectation of receiving a
556 reasonable return on investment.

557 The existence of a subsidy is determined by the information available to the parties at the time
558 the equity injection is made. Thus, if an investigation considers an equity injection that was
559 made several years ago, the fact that the company has performed less well than expected does
560 not mean that a subsidy exists, provided that the expectation of a reasonable return was justified
561 in the light of the facts known at the time of the provision of the equity.

562 On the other hand, a subsidy might exist even if a reasonable return has been achieved; this is if
563 at the time of the equity injection, the prospect of such a return was so uncertain that no private
564 party would have made the investment.

565 In cases where there is no market price for the equity and there is a subsidy and a benefit (i.e.
566 the government has not acted according to the usual investment practice of private investors) all
567 or part of the equity provided can be treated as a grant.

568 *Where an enterprise is unequityworthy*

569 If a project or enterprise is shown to be unequityworthy a benefit may exist to the amount of the
570 equity. The comments above concerning uncreditworthiness provide information about the type
571 of information requirements the Australian industry would have to produce to support a request
572 for an investigation into the matter.

573 **Exemption or remission upon export of indirect taxes**

574 These are based on paragraph (g) of the Illustrative List of Export Subsidies (Annex I of the
575 SCM Agreement). This deals with indirect taxes on the production or distribution of the
576 exported goods, such as value added tax, and provides that the remission or rebate of such
577 taxes is an export subsidy if the amount of the remittance or rebate is excessive i.e., it exceeds
578 the amount of indirect taxes levied on like products sold for domestic consumption

579 For programs that provide for a full or partial exemption of an indirect tax or an import charge, a
580 benefit can exist to the extent that the taxes or import charges paid by the enterprise as a result
581 of the program are less than the taxes the enterprise would have paid in the absence of the
582 program.

583 The benefit is generally treated as having been received on the date the enterprise would
584 otherwise have had to pay the taxes associated with the exemption or the remission – normally
585 this will be the date the tax return was due to be lodged.

586 The benefit will normally be expensed to the year in which it is considered to have been
587 received.

588 **Provision of goods and services by the government**

589 The amount of subsidy where there has been a provision of goods or services by the
590 government is the difference between the price paid by enterprises for the goods or service, and
591 adequate remuneration for the product or service in relation to prevailing market conditions, if
592 the price paid to the government is less than this amount.

593 Normally, adequate remuneration has to be determined in the light of prevailing market
594 conditions on the domestic market of the exporting country, and the calculation of the subsidy
595 amount must reflect only that part of the purchase of goods or services which are used directly
596 in the production or sale of the like goods during the investigation period.

597 *Comparison with private suppliers*

598 As a first step where there has been a provision of goods/services by a government, it must be
599 established whether the same goods or services involved are provided both by the government
600 and by private operators. If so, the price charged by the government body would normally
601 constitute a benefit to the extent that it is below the lowest price available from one of the private
602 operators to the company involved for a comparable purchase. The amount of subsidy is the
603 difference between these two prices.

604 If the company involved has not made comparable purchases from private operators, details are
605 required of the price paid by comparable companies in the same sector of the economy. If such

606 price is not available, a price will be obtained for comparable companies in the economy as a
607 whole.

608 *Government monopoly suppliers*

609 If the government is a monopoly supplier of the goods or services involved, the goods or
610 services are considered to be provided for less than adequate remuneration if certain
611 enterprises or sectors benefit from preferential prices. The amount of subsidy is the difference
612 between the preferential price and the normal price.

613 If the goods and services in question are widely used in the economy, a subsidy will only be
614 specific if there is evidence of preferential pricing to a particular enterprise or sector.

615 The unit prices charged may vary according to neutral and objective criteria, for example large
616 consumers pay less per unit than small ones in the provision of gas and electricity. In this
617 situation, the fact that certain enterprises benefit from more favourable prices than others would
618 not mean that the provision in this case was necessary made for less than adequate
619 remuneration, provided that the pricing structure in question was generally applied throughout
620 the whole economy, without any preferential prices being given to specific sectors or
621 enterprises. The amount of subsidy is in principle the difference between the preferential price
622 and the normal price charged to an equivalent company, according to the normal structure.

623 However, if the normal price is insufficient to cover the supplier's average total costs plus a
624 reasonable profit margin (based on sector averages), the amount of subsidy is the difference
625 between the preferential price and the price which would be required to cover these costs and
626 profit.

627 If the government is the monopoly supplier of a good or service with a specific use the question
628 of preferential pricing does not arise. The amount of subsidy is the difference between the price
629 paid by the enterprise involved and the price required to cover the supplier's costs and profit
630 margin.

631 **Purchase of goods by government**

632 In a situation where private operators purchase the kind of goods in question as well as the
633 government body, the amount of subsidy is the extent to which the price paid for the like goods
634 by the government exceeds the highest price offered for a comparable purchase of the same
635 goods by the private sector.

636 If the company has not made comparable sales to private operators, details are required of the
637 price paid by private operators to comparable companies in the same sector of the economy, or,
638 if such data is not available, in the economy as a whole.

639 If the government has a monopoly for the purchase of the goods in question, the amount of
640 subsidy as regards the purchase of goods by the government is the extent to which the price
641 paid for the goods exceeds adequate remuneration. Adequate remuneration in this situation is
642 the average costs incurred by the enterprise selling the product during the investigation period,
643 plus a reasonable amount of profit, which will have to be determined on a case-by-case basis.
644 The amount of subsidy is the difference between the price paid by the government and
645 adequate remuneration as defined above.

646 **Export subsidies**

647 A subsidy will generally be considered to be an export subsidy where eligibility for, and approval
648 of the amount of the subsidy, is contingent upon export performance. A subsidy is generally tied
649 to export performance if the provision of the subsidy is in law or in fact tied to the actual or
650 anticipated exportation or export earnings.

651 **Price preference for inputs used in export production**

652 This reflects paragraph (d) of the Illustrative List of Export Subsidies (Annex I of the SCM
653 Agreement). In the case of a program involving the provision by governments or their agencies,
654 either directly or indirectly through government-mandated schemes, of imported or domestic
655 products or services for use in the production of exported goods, a benefit exists to the extent
656 that the terms or conditions on which the products or services are provided are more favourable
657 than the terms or conditions applicable to the provision of like or directly competitive products or
658 services for use in the production of goods for domestic consumption unless, in the case of
659 products, such terms or conditions are not more favourable than those commercially available
660 on world markets to exporters.

661 In the case of products provided under such schemes, the amount of the benefit may be
662 determined by comparing the price of products used in the production of exported goods to the
663 commercially available world market price of such products, inclusive of delivery charges. (In
664 determining whether the domestically sourced input is being provided on more favourable terms
665 than are commercially available on world markets, Customs will add to the world market price
666 the delivery charges to the country in question. The delivered prices are the better measure of
667 prices that are commercially available to exporters in that country).

668 Commercially available means that the choice between domestic and imported products is
669 unrestricted and depends only on commercial considerations. The benefit will normally be taken
670 to have been received as of the date on which the enterprise paid, or in the absence of payment
671 was due to pay, for the product.

672 Attribution of benefit to a particular time period – normally the benefits will be expensed to the
673 year in which the benefit is considered to have been received.

674 **Remission or drawback of import charges upon export**

675 These are provided for in paragraph (i) of the Guidelines on Consumption of Inputs in the
676 Production Process, and the Guidelines in the Determination of Substitution Drawback Systems
677 as Export Subsidies (Annex III to the SCM Agreement).

678 Governments may remit or drawback import charges paid on imported inputs consumed in
679 production when the finished product is exported.

680 However, a benefit exists to the extent that the amount of the remission or drawback exceeds
681 the amount of import charges on imported inputs that are consumed in the production of the
682 exported product, making normal allowances for waste.

683 In the case of an exemption of import charges upon export, a benefit exists to the extent that the
684 exemption extends to inputs that are not consumed in the production of the exported product,
685 making normal allowances for waste, or if the exemption covers charges other than import
686 charges that are imposed on the input.

687 In relation to "substitution drawback", under such a drawback system an enterprise may
688 substitute domestic inputs for imported inputs without losing its eligibility for drawback. That is, it
689 uses a quantity of home market inputs equal to, and having the same quality and characteristics
690 as, the imported inputs as a substitute for them. Substitution drawback does not necessarily
691 result in the conferral of a benefit. However, a benefit exists if it is determined that:

- 692 • the import and the corresponding export operations both did not occur within a
693 reasonable time period, not to exceed two years; or
- 694 • the amount drawn back exceeds the amount of the import charges levied initially on the
695 imported inputs for which drawback is claimed.

696 The amount of the benefit arising from the remission or drawback of import charges, including
697 substitution drawback, will generally be the difference between the amount of import charges
698 remitted or drawn back and the amount paid on imported inputs consumed in production for
699 which remission or drawback was claimed.

700 In the case of the exemption of import charges, the amount of the benefit will be the import
701 charges that otherwise would have been paid on the inputs not consumed in the production of
702 the exported product, making normal allowance for waste, and the amount of charges other than
703 import charges covered by the exemption.

704 In the case of a deferral of import charges, the deferral will normally be treated like a
705 government-provided loan equal to the amount of the import charges deferred on the inputs not
706 consumed in the production of the exported product, making normal allowance for waste. The
707 short-term interest rate may be used as the benchmark for deferrals of one year or less, and the
708 long-term interest rate as the benchmark for deferrals of more than one year.

709 Based on Annex II to the SCM, Customs may consider the entire amount of an exemption,
710 deferral, remission or drawback to be a benefit if the foreign government has not examined the
711 inputs in order to confirm which inputs are consumed in the production of the exported goods,
712 and in what amounts, and the taxes that are imposed on those inputs. If Customs finds that
713 there is a system in place that confirms which inputs are consumed in the production of the
714 exported goods, in what amounts, and the taxes that are imposed on the inputs consumed in
715 production, Customs will examine that system to see if it is reasonable. Where such a system is
716 not in operation, or where the one that exists is not reasonable or effective, the government in
717 question may be able to carry out an examination of the actual inputs involved and show that the
718 exemption, remission or deferral of indirect taxes reflects only those inputs which are consumed
719 in the production of the exported goods, their quantity after allowing for waste, and only those
720 indirect taxes imposed on the input product. If the linkages cannot be demonstrated by these
721 means Customs may take the entire amount of the exemption etc as the benefit. i.e., it is treated
722 like a grant.

723 The date of exportation will normally be taken to be the time of receipt of benefit in the case of
724 the exemption, remission or drawback, including substitution drawback, of import charges.

725 In the case of a deferral of one year or less, the benefit will be taken to have been received on
726 the date the import charges became due. In the case of longer deferral the benefit will be taken
727 to have been received on the anniversary date(s) of the deferral.

728 The benefit will normally be expensed to the year in which the benefit is considered to have
729 been received.

730 The table below provides further illustration of this issue. However, certain types of subsidy may
731 be subject to a case-by-case analysis when deciding whether to expense or allocate.

732 **Deduction from an amount of subsidy**

733 The following may be deducted from the amount of subsidy:

- 734 • any application fee or other costs necessarily incurred in order to qualify for, or to obtain,
735 the subsidy. It is up to the exporter in the country to provide the information to support
736 any deduction.
- 737 • The only fees or costs that may normally be deducted are those paid directly to the
738 government in the investigation period. It must be shown that such payment is
739 compulsory in order to receive the subsidy. Thus payments to private parties, e.g.
740 lawyers, accountants, incurred in applying for subsidies, are not deductible. Neither are
741 voluntary contributions to governments, for example donations.

- 742 • the tax consequences of a subsidy are not included by Customs in determining the
- 743 amount of any benefit. For example if in receiving a grant the enterprise pays more
- 744 income tax, Customs does not reduce the benefit by the amount of higher taxes paid.
- 745 • export taxes, duties or other charges levied on the export of a product to Australia
- 746 specifically intended to offset the subsidy.
- 747 • Such claims for deductions should only be accepted if the charges involved were levied
- 748 during the investigation period, and it is established that they continue to be levied at the
- 749 time when definitive measures are recommended.

750 **Illustrative table of subsidies to be expensed or allocated over time**

EXPENSED SUBSIDIES	SUBSIDIES ALLOCATED OVER TIME
Grants: - Purpose is for other than purchase of fixed assets - Recurring and/or small	Grants: - Purpose if for purchase of fixed assets - Non-recurring and/or large - Recurring but granted in large, concentrated amounts
Tax Benefits/Indirect Tax Rebates/Import Duty Exemptions: - For operating expense - Benefits related to direct taxes	Tax Benefits/Indirect Tax Rebates/Import Duty Exemptions: - For purchase of/related to fixed assets (e.g. import duty/indirect tax exemption on machinery)
Provision of Goods and Services: - Provision of services/consumable inputs	Provision of Goods and Services: - Provision of fixed assets and non-general infrastructure
Research & Development: ⁶ - Expense only if allocation not appropriate	Research & Development: ⁶ - Presumption to allocate
Loss Coverage: - Recurring and/or small	Operating Costs: - Non-recurring and/or large - Benefit goods not yet produced
Interest Rate Subsidies: ⁷ - Interest subsidy payments made as loan payments become due	Interest Rate Subsidies: ⁷ - Subsidy is lump sum to offset past, present or future interest due or paid
Short-Term Loan Benefits	Equity Infusions
Export Rebates	Long-term Loan Benefits (benefits exist over life on loan)
Export Insurance	Forgiveness/Assumption of Long-term Debt (including principal and interest)
Export Promotion Assistance	
Redundancy Payments/Early Retirement/Workers Assistance	
Worker Training	
Wage Subsidies	
Price Support Payments	
Subsidies Below Minimum Threshold Size (if the total amount of the benefits is less than 1% ad valorem of the export sales value)	

⁶ This is based on the presumption that the R&D subsidies frequently benefit future productions.

⁷ This is based on the presumption that the subsidy is non-recurring.

751 **3 SPECIFICITY**

752 **3.1 CONTEXT**

753 A subsidy as defined in Article 1 of the Agreement on Subsidies and Countervailing Measures
754 (SCM Agreement) shall be countervailable only if it is specific in accordance with the provisions
755 of Article 2 of the SCM Agreement. 'Specific' subsidies are those targeted at individual
756 companies or certain sectors of the economy.

757 Article 2 of the SCM Agreement outlines principles to be applied in determining whether a
758 subsidy is specific to 'certain enterprises'.

759 The aim of the specificity test is to avoid countervailing action being taken against broadly
760 available subsidies that are used throughout the entire economy⁸. It limits the range of
761 countervailing subsidies to subsidies which affect normal conditions of competition and generally
762 recognised as being trade distorting because they selectively benefit certain industrial sectors or
763 certain enterprises. On these grounds a subsidy has to be specific to 'certain enterprises', as
764 defined, in order to be countervailable.

765 Section 269TAAC of the Act seeks to implement the provisions of Article 2 of the SCM
766 Agreement dealing with specificity.

767 **3.2 POLICY**

768 Customs will firstly examine whether the subsidy is a prohibited subsidy as defined. Customs
769 will next examine the legislation or regulation of the exporting country to determine whether the
770 subsidy is limited by legislation to certain enterprises - sometimes referred to as de jure
771 specificity.

772 When there is no explicit limitation in the legislation Customs may examine the factual
773 circumstances in which subsidies are granted as the practices of the granting authority may
774 show that, in fact, it primarily benefits certain enterprises - sometimes referred to as de facto
775 specificity.

776 Customs will make its specificity determinations only after careful examination of the facts.

777 Customs has regard to Article 2 of the SCM Agreement which shows that the term 'certain
778 enterprises' may include any of the following:

- 779 • a single firm
- 780 • an industry
- 781 • a group of firms
- 782 • a group of industries

783 **3.3 PRACTICE**

784 **Determination of specificity**

785 Determinations of specificity may examine four potential types:

- 786 • Prohibited subsidies
- 787 • Enterprise specificity
- 788 • Industry specificity
- 789 • Regional specificity

⁸ For example, provision of public roads and transportation systems, fire protection and public health programs, fiscal policy measures or broad economic policies are general governmental policy measures that are excluded by the specificity test

790 Prohibited subsidies

791 A prohibited subsidy is one where a government targets export goods or goods using domestic
792 inputs for subsidisation.

793 Customs first examines whether the subsidy is a prohibited subsidy before undertaking any
794 specificity analysis. This is because a prohibited subsidy, even one that is generally available is
795 'deemed to be specific' and no further specificity analysis is required.

796 Prohibited subsidies are defined at Article 2.3 of the SCM Agreement and are "deemed to be
797 specific". They are identified at Article 3.1 to be subsidies contingent on:

- 798 • export performance, and
- 799 • the use of domestic goods over imported goods

800 Whether a subsidy is contingent on export performance is a matter of fact to be determined in
801 each case⁹.

802 Enterprise specificity

803 Enterprise specificity is where a government targets a particular company or companies for
804 subsidisation (de jure or de facto specificity).

805 Concerning groups of industries, Customs does not require that the members of the group share
806 similar characteristics because the purpose of the specificity test is to ensure that subsidies that
807 are distributed very widely throughout an economy are not countervailed. Therefore, while a
808 particular enterprise may be the subject of the application it may not be the only commercial
809 entity to which the subsidy is specifically provided.

810 Customs does not have a policy that defines what constitutes a sufficiently small number of
811 enterprises or industries for it to properly be considered specific and such decisions can only be
812 made in each case on the facts.

813 Industry specificity

814 Industry specificity is where a government targets a particular sector or sectors for subsidisation
815 (de jure or de facto specificity).

816 While no rule establishes what is sufficiently small to remain specific, Customs practice will be to
817 have regard to the whole of one industry sector as being too broad a category. That is, Customs
818 will not treat generally available programs to the whole of the manufacturing sector (and not
819 agriculture, or services), or the whole of the agricultural sector (and not manufacturing, or
820 services), as being specific.

821 Regional specificity

822 Regional specificity is where a government targets producers in specified parts of its territory for
823 subsidisation (de jure specificity).

824 Such subsidies are treated as being de jure specific within the terms of Article 2.2 of the SCM
825 Agreement, which provides that subsidies 'limited to certain enterprises located within a
826 designated geographical region within the jurisdiction of the granting authority shall be specific'.

827 Section 269TAAC(2)(b) also refers providing a subsidy is specific if "...access is limited to
828 particular enterprises carrying on business within a designated geographical region that is within
829 the jurisdiction of the subsidising authority".

⁹ In this regard the Illustrative List at Annex I to the SCM is a guide only and practices not listed may also be found to be a subsidy contingent on export performance.

830 Customs may therefore find a subsidy to be regionally specific if:

- 831 • a central government grants a subsidy to a designated geographical region of that
- 832 country regardless of the general availability within that geographical region;
- 833 • the subsidy is not generally available across the jurisdiction of the granting authority e.g.
- 834 a central government makes subsidies generally available to all businesses in a state or
- 835 province, and not to other states or provinces, they are specific;
- 836 • at the sub national level such as a state government, a subsidy that is limited to particular
- 837 regions within that state shall be specific. Subsidies provided by the state or province
- 838 shall not be treated as being specific if they are granted on a generally available basis
- 839 (i.e. are not limited to certain enterprises) within that state or province.

840 That there may be more than one region, or that the one 'designated geographical region' may

841 not be contiguous in nature, are not conclusive as to whether there is regional specificity.

842 **De Jure Specificity**

843 If Customs has not found that a prohibited subsidy exists, Customs will next examine the

844 legislation or regulation of the exporting country in order to determine whether the subsidy is

845 explicitly limited, by legislation, to certain enterprises, sometimes known as de jure specificity.

846 De jure specificity is covered in Article 2.1 (a) and (b) of the SCM Agreement and in section

847 269TAAC of the Act. The conditions where a de jure specificity finding can be made occur

848 where the granting authority, or the legislation pursuant to which the granting authority operates,

849 explicitly limits access to a subsidy to certain enterprises (paragraph (a) of Article 2.1.

850 As a consequence of this definition, pursuant to paragraph (b) of Article 2.1 of the SCM

851 Agreement and section 269TAAC(3) of the Act, a subsidy will not be considered as de jure

852 specific even if availability is limited, if Customs is satisfied the following conditions apply:

- 853 • objective criteria¹⁰ or conditions govern the eligibility for and the amount of the subsidy;
- 854 • the objective criteria are or conditions are strictly adhered to;
- 855 • eligibility is automatic if the objective criteria are met;
- 856 • the criteria and conditions are clearly set out by law, regulation or other official document
- 857 so as to be capable of verification.

858 An example, of the effect of paragraph (b) of Article 2.1 of the SCM Agreement and of section

859 269TAAC(3), is a subsidy provided to all small businesses across the jurisdiction of the granting

860 authority. Even though restricted to these enterprises, provided it operated across the

861 jurisdiction of the granting authority, and met the objective criteria and the eligibility requirement,

862 it would not be treated as being specific.

863 Customs would consider it to be countervailable, on either de jure or de facto grounds, if the

864 subsidy is found to be limited to certain small businesses. Another simple example of a de jure

865 specific subsidy is where the industry assistance legislation provides grants to the textile

866 industry or the tax legislation may limit the tax deductibility of investments to those made by the

867 textile industry.

868 The de jure test will first be examined by Customs when assessing specificity because de jure

869 specificity is generally recognised as involving less complex analyses than the de facto tests.

870 Where a government expressly limits, in law or in regulations, access to a number of

871 enterprises, industries, or groups of enterprises, and Customs has established specificity exists

¹⁰ Footnote 2 of the SCM defines the term "objective criteria or conditions" to be: "...criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise".

872 on that basis, no further inquiry will be made about actual use under the de facto methods if
873 such factors are being investigated. The circumstances about how a de facto analysis
874 commences, and the sequential analysis followed in that situation, are discussed in more detail
875 below.

876 **De Facto specificity**

877 Secondly, Customs may examine the factual circumstances in which subsidies are granted,
878 sometimes known as de facto specificity¹¹.

879 De facto analysis is not automatically included by Customs in every subsidy investigation.
880 Customs gives due consideration to the provisions of Article 2.1(c) of the SCM Agreement which
881 requires that there be reasonably available evidence supporting a decision to conduct any such
882 analyses: "If, notwithstanding any appearance of non specificity resulting from the application
883 of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the
884 subsidy may in fact be specific, other factors may be considered....".

885 If supporting evidence was provided in an application for countervailing duties concerning de
886 facto specificity, the exporter, and government questionnaires, would contain questions
887 concerning the allegations that had been raised in the application. Customs would then seek
888 information in relation to all de facto factors.

889 Customs may itself find information in the course of an investigation which it decides warrant
890 examination of de facto specificity. In this situation Customs will issue a supplementary
891 questionnaire and seek information in relation to all de facto factors.

892 The factors Customs will consider when conducting a de facto analysis, and as provided for at
893 section 269TAAC(4) and (5) of the Act, are:

- 894 • use of a subsidy program by a limited number of certain enterprises¹²;
- 895 • predominant use by certain enterprises;
- 896 • the granting of disproportionately large amounts to certain enterprises; and
- 897 • the manner in which discretion has been exercised by the granting authority in the
898 decision to grant a subsidy.

899 In applying these tests Customs must consider:

- 900 • the extent of economic diversification of economic activities in the jurisdiction of the
901 granting authority, and
- 902 • the length of time the subsidy program has been in operation

903 If there are grounds to examine the de facto factors, Customs will examine each factor in the
904 order of its appearance in section 269TAAC(4). Customs will cease conducting its specificity
905 analysis as soon as it finds that a single factor is sufficient to show that there is specificity.

906 The starting point, therefore, when examining de facto specificity will be the number of users.
907 Once Customs finds that there are a limited number of users of the program it will cease
908 conducting further de facto analysis and the finding of specificity may be made on that single
909 observation.

¹¹ A simple example where there could be *de facto* subsidies is when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact found to be tied to actual or anticipated exportation or export earning. (The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy – there must be a relationship of conditionality or dependence).

¹² There may be circumstances where no law or regulation exists at all but a subsidy has in fact been limited to one enterprise.

910 For this reason it is likely that an analysis of the level of benefit provided i.e. whether recipients
911 were dominant or disproportionate users under factors (2) or (3) respectively, will generally not
912 be examined unless the subsidy was provided to numerous and diverse industries. If this
913 occurred Customs will analyse the enterprises or industries that received benefits and seek to
914 determine if one or a limited number of the recipient enterprises/industries were in fact dominant
915 users (factor 2), or disproportionate users (factor 3) of the program. In conducting this further
916 analysis Customs may issue supplementary questionnaires as part of seeking the required
917 information.

918 Again Customs will cease de facto analysis as soon as a determination is made that a single
919 factor supports a finding of specificity¹³. The analysis by Customs under either factor (2) or
920 factor (3) will focus on the level of benefits provided, not the number of subsidies provided to
921 different industries. Any analysis of whether the level of benefits received by a particular
922 enterprise or industry, or group of enterprises or industries, were disproportionate in relation to
923 the economy as a whole is likely to be an unusual situation.

924 **Predominant use**

925 In examining predominant use by certain enterprises, Customs generally compares the
926 beneficiaries to others within the program in order to determine where they rank. For example,
927 one of the beneficiaries may be found to have received 50% of the total subsidy amount.

928 **Disproportionate use**

929 In examining disproportionate use, Customs generally examines the relative proportions each
930 beneficiary receives. For example, whether one beneficiary has received, say, 5% of the total
931 subsidy amount whereas all others receive only 0.5% each. Or, if at industry level it may be the
932 relative importance of recipient industries in terms of production value. Specificity on grounds of
933 disproportionate use may be found even though the program may have an objective of being
934 open to all industries, again illustrating how the specificity findings are driven by the
935 circumstances of each case.

936 **Discretion of granting authority**

937 Customs exercises caution when applying this test because:

- 938 • administrative discretion will usually exist, in one form or the other, in most subsidy
939 programs - discretion is usually being exercised when evaluating the facts or merits of an
940 application for a subsidy, and
- 941 • without care it risks rendering other de facto factors rendered meaningless because every
942 subsidy program may become specific were discretion given too broad a meaning.

943 An assessment of any discretion of the granting authority that shows favour toward some
944 enterprise(s) or industry(ies) over others will inform the question of specificity. When examining
945 this factor Customs will request information from the authority regarding the reasons for
946 acceptance or rejection of the applications, so that it might examine the manner in which the
947 authority exercised its discretion to either reject or grant subsidies. Having obtained such

¹³ This means that where *de facto* specificity analysis has dropped down to Item 3 (receipt of *disproportionate* amounts), Customs will treat this as positive evidence of specificity even if there are numerous users of the program and even if little discretion exists in awarding benefits. There is no certainty that it will always prove practical, or possible, to make determinations about the relative level of benefits under factors (2) or (3). (Information on each *de facto* factor will not always be available and because analyses can be complex Customs follows this sequential approach).

948 information, Customs will analyse the reasons for the rejection or acceptance to determine
949 whether they disclose a systematic pattern of acceptance or rejection without valid reasons.

950 Random, or purposeless discretion, cannot indicate specificity. Importantly, where the exercise
951 of discretion has shown favouritism it would normally have manifested itself as one of the first
952 three de facto factors, for example if the selected industries constituted a limited number, or if
953 exercise of discretion lead to there being a predominant or disproportionate use.

954 Alternatively, if the selected industries (i.e. those selected by the granting authority) constituted
955 more than a limited number of industries, or if there were no dominant users or disproportionate
956 benefits to certain users, or if there were no other indication that one or a group of enterprises or
957 industries was favoured over others, the program would not be specific.

958 This factor is therefore treated as the least significant factor, and for that reason it would be rare
959 for Customs to make a specificity finding solely on the grounds that some measure of discretion
960 was exercised. For the same reasons, an application claiming specificity on grounds of
961 discretion alone would not generally be treated by Customs as establishing a prima facie case
962 for an investigation.

963 Customs may give the discretion factor a greater weight where there is a new subsidy program
964 and there have been few applicants and few recipients. In the case of a new program, the first
965 three factors - limited number of users, dominant user, or disproportionately large user - may not
966 provide useful information as to whether the program is de facto specific.

967 In this situation the manner in which authorities exercised discretion in the early days of a new
968 program (e.g., by excluding certain applicants and limiting the benefit to a particular industry)
969 can become a useful indicator of specificity. Or, the evidence relating to the first three factors
970 may be inconclusive, and consideration of the discretion factor may help to inform whether there
971 is specificity. In this situation, the factors to consider in analysing the relevance of discretion
972 include the number of applicants turned down, the reasons they were turned down, and the
973 reasons successful applicants were chosen.

974 **Other considerations**

975 As noted, in evaluating de facto specificity Customs will consider:

- 976 • the length of time the subsidy program has been in operation, and
- 977 • the extent of diversification of economic activities within the economy in question

978 These additional criteria are seen by Customs as serving to inform the application of, rather than
979 supersede or substitute for, the enumerated four specificity factors. That is, while they are not
980 additional indicators of whether specificity exists, they may provide a more informed view when
981 analysing the de facto factors. For example, with respect to economic diversification, in
982 determining whether the number of industries using a subsidy is small or large, account will be
983 taken of the number of industries in the economy in question.

984 **Evidentiary requirements**

985 Where grounds have been established for a de jure analysis Customs will undertake the
986 investigation seeking such information. Where grounds have been established for a de facto
987 analysis Customs will seek in the questionnaires all of the information necessary to apply the de
988 facto specificity tests. From the information provided in the questionnaire responses, and
989 verification, and any other information Customs may collect, a specificity determination will be
990 made.

991 Article 2.4 of the SCM Agreement requires that any determination of specificity be “clearly
992 substantiated on the basis of positive evidence”. This does not affect Customs’ right, however,

993 to make determinations on the basis of the facts available, or all relevant information, when the
994 exporter or the government refuses access to, or does not provide, the necessary information.
995 If a party refuses to provide information requested in the questionnaires so that Customs can
996 conduct its specificity analysis, Customs may make findings based upon the all relevant
997 information principle.

998 If Customs does seek information relevant to both de jure and the de facto tests (either at the
999 outset of an investigation, or otherwise) and if, in the course of its investigation, becomes
1000 satisfied on de jure grounds, the de facto examination will cease. Customs does not require
1001 evidence on both de jure and de facto grounds in order to make a finding of specificity.

1002 Time period for determining specificity

1003 The time period for determining specificity does not have to coincide with the period of
1004 investigation. It may be appropriate to make it longer in some cases in order to fully appreciate
1005 the usage of a program. Therefore Customs may in its questionnaires or correspondence
1006 request information on specificity over a longer period.

1007 Specificity of a subsidy may also have to be periodically reviewed as it may become non specific
1008 at some later point in time.

1009 However, a subsidy that has been found to be specific that is non-recurring (i.e. one that has a
1010 benefit that can be amortised over time) will be treated by Customs as remaining specific for
1011 purposes of the amortised benefit stream, regardless of there having been any later changes to
1012 the program or its usage.

4 UPSTREAM SUBSIDIES

4.1 CONTEXT

Articles 10 and 32 of the SCM Agreement refer to Article VI of the GATT 1994, which provides:

“ no countervailing duty shall be levied on any product of the territory of a Member imported into the territory of another Member in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation..... The term “countervailing duty” shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export or any merchandise.”

Subsidies bestowed indirectly as used in Article VI of the GATT 1994 implies that financial contributions by the government to the production of inputs used in manufacturing products subject to an investigation are not excluded from the amount of subsidies that may be offset through the imposition of countervailing duties on the processed products.

“Upstream” subsidy refers to a subsidy (non-export) paid to an input product such as raw material or a manufactured product used in the production of the goods in question, and countervailing action may be taken where the benefit received by the upstream recipient of the subsidy passed through, in whole or in part¹⁴, to the downstream purchaser.

Where it is established that the price of the input product reflects the benefit of the subsidy, in whole or in part, received by the upstream supplier, then the downstream purchaser is taken to have had received a subsidy.

4.2 POLICY

Normally, the demonstration of the "pass-through" is undertaken by examining the price of the input product between the vendor and purchaser.

To determine whether the input has been purchased on terms that are more favourable than those available in the market Customs will, in order of priority, compare the purchase price of the subsidised input to the following benchmark prices:

- if there is a comparable and unsubsidised input product (either sourced in the country of export or imported), that actual price (subject to that price being reached under normal market conditions);
- average price data for an unsubsidised input product;
- surrogate information - pricing information may be available for a comparable industry where subsidies have not been paid on inputs and this information may be used to assess the likelihood of a competitive benefit having been provided by the subsidised input in question;
- absent any information to enable a price to be established using the options above, the benchmark price shall be such amount having regard to all relevant information.

In comparing a benchmark price to a subsidised input price, Customs will make appropriate adjustments to the benchmark price to take account of differences that may affect its

¹⁴ As it *cannot be assumed* that the whole of the benefit of the subsidy received by the input supplier always equates with the benefit that is received by the purchaser, being the producer of the *final goods* that are *the subject of the countervailing application*. (The exception being related party dealings as explained in this guideline).

1052 comparison with the subsidised input price. Such difference may include prices occurring at
1053 different times, physical characteristics, delivery terms and taxes.

1054 Specificity must be considered. A determination must be made whether the upstream subsidy
1055 was specific as defined. Customs will determine specificity at the initial stage of disbursement of
1056 the subsidy by the government (or any private body that is entrusted or directed to carry out the
1057 functions on behalf of the government). For example, a subsidy that the government provides
1058 exclusively in law or in fact to steel producers will be considered as specific. This determination
1059 will not change even if the steel producers on-sell that subsidised steel to a wide range of
1060 downstream industries.

1061 Where the input producers and the downstream processors operate at arms length the question
1062 of any benefit arising from the financial contribution received by the input producers will be
1063 examined in line with the practices below to establish whether any part of that benefit has
1064 passed through to producers of the final product subject of the investigation. Where the inputs
1065 are purchased from a related upstream supplier and consistent with practices elsewhere,
1066 Customs will infer that the whole of the input subsidy has been passed through to the related
1067 downstream purchasers.

1068 **4.3 PRACTICE**

1069 In considering whether there is pass through Customs will examine the transactions that take
1070 place between the input product on which the subsidy is paid and the final exported product.

1071 This examination might require sampling of those parties that are engaged in each step in the
1072 input process. Where necessary, Customs will consult with any relevant industrial organisation
1073 or other representative body in the country of export to agree on an appropriate sampling
1074 method.

1075 Customs will dispatch countervailing questionnaires for completion by the government of the
1076 country of export concerning the input scheme, and by companies involved in the production
1077 and exportation of the goods. In order to determine the nature of the transaction between the
1078 company producing the exported goods and the input supplier, a further questionnaire will be
1079 sent to the input supplier.

1080 The purpose of the questionnaire is to determine whether the transactions between the input
1081 supplier and the producer are arms length transactions and whether the price paid was of fair
1082 market value. The information requested may include, for example, the contracts entered into
1083 between the relevant parties, whether there were any restrictions, and whether the parties could
1084 be considered to be related. In considering whether the parties are related, Customs will have
1085 regard to s.269TAA(4) of the Act concerning "associates".

1086 Customs will assess the information obtained in order to establish a benchmark market price.
1087 The benchmark could be an average price or a company specific price.

1088 **How upstream is upstream?**

1089 In most cases, Customs will investigate upstream subsidies up to one level immediately
1090 preceding the point of producing the exported goods. This practice rests upon two
1091 considerations:

- 1092 • in moving up the chain beyond one level it becomes less likely that subsidies will have a
1093 significant effect on the cost of manufacturing the subject finished goods, and
- 1094 • the knowledge that going beyond this point becomes unduly complex as multiple pass
1095 through tests may be required if the parties are not related.

1096 However, there may be some few cases where it is appropriate to move up an additional stage.
1097 In the agricultural sector, subsidies are normally given to individual growers. These growers will
1098 then sell to distributors, wholesalers or co-operatives that consolidate the product and offer it for
1099 sale in both the domestic and export markets.

1100 For example, a producer of good X may source its main raw material input from a producers'
1101 cooperative which in turn purchased the raw material input from various growers who received
1102 production subsidies from the government. In this case, it would be appropriate to pursue two
1103 levels immediately preceding the production of good X to determine if the production subsidies
1104 has passed through from the growers of the raw material input to the producer of good X.

1105 Upstream subsidies can also be pursued throughout the production chain when all of the parties
1106 are related as in the case of a vertically integrated company. As mentioned above, input subsidy
1107 may be regarded as having passed through to the indirect downstream recipients when the
1108 parties are not operating at arms length (i.e. related parties). Hence, no pass through test would
1109 be required in such circumstances.

1110 In other cases where an applicant requests an investigation in to an upstream subsidy more
1111 than one level removed from the goods under consideration it will face an onus to demonstrate
1112 the significance of those subsidies.

1113 The following is an example of an upstream subsidy. A countervailing duty investigation is
1114 initiated in respect of wine exports from country X. The wine producers purchase grapes from
1115 grape growers. The grape growers receive production subsidies from the state and/or federal
1116 government - the wine producers do not receive any subsidies directly from any level of
1117 government.

1118 The subsidies received by the grape producers are "upstream subsidies" provided they are
1119 passed-through, in whole or in part, to the wine producers in the price of the grapes. In these
1120 circumstances, the amount of the benefit that has flowed through to the producer of the exported
1121 product has to be established.

5 IMPOSITION OF CONCURRENT DUMPING AND COUNTERVAILING MEASURES

5.1 CONTEXT

Article VI of GATT 1994 requires: 'No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping and export subsidisation'.

Article 10 of the SCM requires that members of the WTO ensure that their imposition of countervailing measures is consistent with Article VI of the GATT 1994.

Section 269TJA of the Customs Act provides for the imposition of a combined dumping duty and countervailing duty which would arise from a joint application covering both dumping and subsidy. Customs practice set out below is designed to ensure that it acts in accordance with Article 10 of the SCM when imposing any dumping and countervailing duty in a joint investigation.

Section 8(5B) of the Customs Tariff (Anti Dumping) Act 1975 requires that the sum of the export price of the particular and the amounts of interim dumping and countervailing duty to be imposed, does not exceed the non-injurious price of the particular goods.

5.2 POLICY

The basic 'rules' Customs will follow when working out the amount of the countervailing and dumping duty in a joint application are:

- countervailing duty will be firstly imposed before deciding how much dumping duty should be imposed;
- the amount of any export subsidy will be deemed to have contributed to the dumping margin by the full amount of the export subsidy. As the export subsidy has been included in the amount of countervailing duty the same amount of export subsidy has to be deducted from the amount of dumping duty to avoid the double counting;
- any domestic subsidy, on the other hand, is not relevant to double counting and a domestic subsidy will be countervailed to the full amount of that subsidy - it will not affect quantification of dumping duty; and
- regard will be given to the lesser duty rule.

5.3 PRACTICE

The principles followed to avoid the double counting of dumping duty and countervailing duty is outlined in the following scenarios.

Joint AD/CVD application	AD margin	Export subsidy margin	Domestic subsidy margin	Proposed CVD duty	Proposed AD duty
Scenario A	20%	10%	-	10%	10%
Scenario B	20%	-	10%	10%	20%
Scenario C	30%	15%	10%	25%	15%

In scenario A there is a dumping margin of 20%. The export subsidy of 10% is deemed to have contributed to the dumping margin by that same amount. To ensure that double counting is avoided, the full amount of the countervailing margin is firstly imposed (10%), followed by the remainder of the dumping margin (10%).

1158 In scenario B there is a dumping margin of 20%. There is no export subsidy but there is a
 1159 domestic subsidy of 10%. In this situation the domestic subsidy is countervailed (i.e. 10%) and
 1160 as there is no export subsidy the full amount of the dumping duty may be offset by a dumping
 1161 duty (i.e. 20%).

1162 In scenario C there is a dumping margin of 30%. The export subsidy of 15% is deemed to have
 1163 contributed to the dumping margin by that same amount. To avoid double counting, and as the
 1164 countervailing duty is taken first, a countervailing duty of 15% for the export subsidy and 10% for
 1165 the domestic subsidy (i.e. a total CVD of 25%) is imposed. As 15% of the dumping margin is
 1166 deemed to have been accounted for by the export subsidy the balance of 15% (i.e. 30%-15%) is
 1167 accounted for by the dumping duty.

1168 The scenarios illustrated above provide some useful principles when considering countervailing
 1169 duties and dumping duties. The example below illustrates possible outcomes with factors
 1170 shown in terms of unit values as used in Australia's duty system.

1171 Example

1172 The relevant factors are shown in unit value terms. There are three possible scenarios:

- 1173 • where the injury level is higher than the normal value
- 1174 • where the injury level is the same as the normal value
- 1175 • where the injury level is lower than the normal value

1176 Each of these scenarios is illustrated in the table below.

	Scenario 1	Scenario 2	Scenario 3
Export price	\$80	\$80	\$80
Normal value	\$110	\$115	\$110
Dumping margin	\$30	\$35	\$30
Non-injurious price	\$115	\$115	\$95
Export subsidy	\$15	\$15	\$15
Domestic subsidy	\$5	\$5	\$5
Potential CVD	\$15+\$5=\$20	\$15+\$5=\$20	\$15+\$5=\$20
Potential dumping duty	\$110-\$80-\$15=\$15	\$115-\$80-\$15=\$20	\$110-\$80-\$15=\$15
Is action taken against all of the potential CVD?	Yes	Yes	No. CVD will be \$15
Is action taken against all of the potential dumping margin?	Yes	No. Dumping duty will be \$15	No. Dumping duty will be zero

1177 *Scenario 1: Where the non-injurious price is greater than the normal value*

1178 There is no lesser duty consideration in this example as the non injurious price exceeds the
 1179 normal value. The dumping margin is \$30 (NV less export price). There is an export subsidy of
 1180 \$15 and this is deemed to have contributed to the dumping margin by the amount of the export
 1181 subsidy.

1182 Interim countervailing duty equals the sum of the export subsidy (\$15) and the domestic subsidy
 1183 (\$5) giving a total countervailing duty of \$20.

1184 The interim dumping duty is calculated by subtracting the export subsidy of \$15 from the
 1185 dumping margin of \$30, meaning that there is a 'potential interim dumping duty' of \$15.

1186 Section 8(5B) of the CTAD Act: this section requires that the total duty charged does not exceed
1187 the amount necessary to prevent injury, i.e. non-injurious price.

1188 In this scenario, as the NIP is higher than the normal value, the dumping margin is calculated
1189 with regard to the normal value and not the non-injurious price. The sum of the duties and the
1190 export price is $\$80+\$20+\$15=\115 which results in an amount at the same level as non-
1191 injurious price.

1192 Therefore, Customs will impose duty up to the non injurious price being made up of an interim
1193 countervailing duty of \$20 and an interim dumping duty of \$15.

1194 *Scenario 2: Where the non-injurious price is equal to normal value*

1195 In this scenario the normal value and the NIP are both \$115. The dumping margin is \$35. The
1196 export subsidy of \$15 is deemed to have contributed to the dumping margin by the amount of
1197 the export subsidy.

1198 Interim countervailing duty is the sum of the export subsidy (\$15) and the domestic subsidy (\$5)
1199 giving a total countervailing duty of \$20.

1200 The interim dumping duty is calculated by subtracting the export subsidy which has contributed
1201 \$15 to the dumping margin of \$35, giving a 'potential interim dumping duty' of \$20.

1202 As mentioned above, Customs is required to ensure that the total duty charged does not exceed
1203 the non-injurious price. Given that the total duty possible plus export price will come to \$120, this
1204 will exceed the NIP by \$5. Therefore, dumping duty has to reduce by \$5 to ensure that s.8(5) is
1205 not breached.

1206 Therefore, Customs will impose duty up to the normal value and the NIP i.e:

- 1207 • a countervailing duty of \$20
- 1208 • a dumping duty of \$15.

1209 *Scenario 3: Where the non-injurious price is lesser than the normal value*

1210 There is a lesser duty consideration in this example as the non-injurious price is lower than the
1211 normal value.

1212 The dumping margin is \$30. There is an export subsidy of \$15 and this is deemed to have
1213 contributed to the dumping margin by the amount of the export subsidy.

1214 The interim countervailing duty is the sum of the export subsidy (\$15) and the domestic subsidy
1215 (\$5), giving a total countervailing duty of \$20.

1216 The interim dumping duty is calculated by subtracting the export subsidy which contributed \$15
1217 to the dumping margin of \$30, resulting in a 'potential dumping duty' of \$15.

1218 In this example the NIP is lower than the normal value. The sum of the possible duties and the
1219 export price is $\$80+\$20+\$15=\115 which is higher than the non injurious price (by an amount of
1220 \$20).

1221 Therefore, Customs will impose interim duty up to the NIP, being countervailing duty of \$15 and
1222 no dumping duty.