Customs Tariff (Identification, Assessment And Collection Of Countervailing Duty On Subsidized Articles And For Determination Of Injury) Rules, 1995

1. Short title and commencement.-

(1) The Rule may be called Customs Tariff (Identification, assessment and collection of countervailing duty on subsidies articles and for determination injury) Amendment) Rules 2006.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. Definitions.-

In these rules, unless the context otherwise requires, -

(a) "Act" means the Customs Tariff Act,1975 (51 of 1975);

(b) "domestic industry" means the domestic producers as a whole of the like article or domestic producers whose collective output of the said article constitutes a major proportion of the total domestic production of that article, except when such producers are related to the exporters or importers of the alleged subsidised article, or are themselves importers thereof, in which case such producers shall be deemed not to form part of domestic industry:

Provided that in exceptional circumstances referred to in sub-rule (3) of rule 13, the domestic industry in relation to the article in question shall be deemed to comprise two or more competitive markets and the producers within each of such market be deemed as a separate industry if -

(i) the producers within such market sell all or almost all of their production of the article in question in that market, and

(ii) the demand in the market is not in any substantial degree supplied by producers of the said article located elsewhere in the territory;

(c) "interested party" includes -

(i) an exporter or foreign producer or the importer of an article subject to investigation for being subsidised or a trade or business association a majority of the members of which are producers, exporters or importers of such an article; and

(ii) a producer of the like article in India or a trade and business association a majority of the members of which produce the like article in India;

(d) "provisional duty" means a countervailing duty imposed under sub-section (2) of section 9A of the Act;

(e) "specified country" means a country or territory which includes the country or terriotry with which the Government of India has an agreement for giving it the most favoured nation treatment;

(f) all words and expressions used in these rules, but not defined, shall have the meaning respectively assigned to them in the Act.

3. Appointment of designated authority.-

(1) The Central Government may, by notification in the Official Gazette , appoint a person not below the rank of a Joint Secretary to the Government of India or such other person as that Government may think fit as the designated authority for purposes of these rules.

(2) The Central Government may provide to the designated authority the services of such other persons and such other facilities as it deems fit.

4. Duties of the designated authority.-

It shall be the duty of the designated authority in accordance with these rules - (a) to investigate the existence, degree and effect of any subsidy in relation to the import of an article;

(b) to identify the article liable for countervailing duty;

(c) to submit its findings, provisional or otherwise to the Central Government as to -

(i) the nature and amount of subsidy in relation to an article under investigation.

(ii) the injury or threat of injury to an industry established in India or material retardation to the establishment of an industry in India consequent upon the import of such articles from the specified countries.

(d) to recommend the amount of countervailing duty, which if levied would be adequate to remove the injury to the domestic industry and the date of commencement of such duty; and

(e) to review the need for continuance of countervailing duty.

5. Decision as to country of origin.-

In cases where articles are not imported directly from the country of origin but are imported from an intermediate country, the provisions of these rules shall be fully applicable and any such transaction shall, for the purpose of these rules be regarded as having taken place between the country of origin and the country of importation.

6. Initiation of investigation.-

(1) Except as provided in sub-rule (4) the designated authority shall initiate an investigation to determine the existence, degree and effect of alleged subsidy only upon receipt of a written application by or on behalf of the domestic industry.

(2) An application under sub-rule (1) shall be in the form as may be specified by the designated authority in this behalf and the application shall be supported by evidence of -

(a) subsidy and, if possible, its amount,

(b) injury where applicable, and

(c) where applicable, a casual link between such subsidized imports and alleged injury.

(3) The designated authority shall not initiate an investigation pursuant to an application made under sub-rule (1) unless -

(a) it determines, on the basis of an examination of the degree of support for, or opposition to the application expressed by domestic producers of the like article, that the application has been made by or on behalf of the domestic industry:

Provided that no investigation shall be initiated if domestic producers expressly supporting the application account for less than twenty five per cent of the total production of the like product by the domestic industry, and

(b) it examines the accuracy and adequacy of the evidence provided in the application and satisfies itself that there is sufficient evidence regarding -

(i) subsidy,

(ii) injury, where applicable; and

(iii) where applicable, a casual link between such subsidized imports and the alleged injury, to justify the initiation of an investigation.

Explanation. - For the purpose of this rule, the application shall be considered to have been made "by or on behalf of domestic industry" if it is supported by those domestic producers whose collective output constitutes more than fifty per cent of the total production of the like article produced by that portion of the domestic industry expressing either support for or opposition as the case may be, to the application.

(4) Notwithstanding anything contained in sub-rule (1), the designated authority may initiate an investigation suo motu, if it is satisfied from the information received from the Commissioner of Customs appointed under the Customs Act, 1962 (52 of 1962) or any other source that sufficient evidence exists as to the existence of the circumstances referred to in sub-clause (b) of sub-rule (3).

(5) The designated authority shall notify the government of the exporting country before proceeding to initiate an investigation.

7. Principles governing investigations.-

(1) The designated authority shall, after it has decided to initiate investigation to determine the existence, degree and effect of any alleged subsidization of any article, issue a public notice notifying its decision. Public notice regarding initiation of investigation shall, inter alia, contain adequate information on the following:

(i) the name of the exporting countries and the article involved;

(ii) the date of initiation of the investigation;

(iii) a description of the subsidy practice or practices to be investigated;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested countries and interested parties should be directed; and

(vi) the time-limits allowed to interested countries and interested parties for making their views known.

(2) A copy of the public notice shall be forwarded by the designated authority to the known exporters of the article alleged to have been subsidized, the government of the exporting country concerned and other interested parties.

(3) The designated authority shall also provide a copy of the application referred to in sub-rule (1) of rule 6 to -

(i) the known exporters or the concerned trade association where the number of exporters is large, and

(ii) the government of the exporting country :

Provided that the designated authority shall also make available a copy of the application, upon request in writing, to any other interested party.

(4) The designated authority may issue a notice calling for any information in such form as may be specified by it from the exporters, foreign producers and governments of interested countries and such information shall be furnished by such persons in writing within thirty days from the date of receipt of the notice or within such extended period as the designated authority may allow on sufficient cause being shown.

Explanation.- For the purpose of this sub-rule the public notice and other documents shall be deemed to have been received one week from the date on which these documents were sent by the designated authority or transmitted to the appropriate diplomatic representative of the exporting country.

(5) The designated authority shall also provide opportunity to the industrial users of the article under investigation, and to representative consumer organisations in cases where the article is commonly sold at retail level, to furnish information which is relevant to the investigation regarding subsidization and where applicable injury and casuality.

(6) The designated authority may allow an interested country or an interested party or its representative to present information relevant to the investigation orally also, but such oral information shall be taken into consideration only when it is subsequently reproduced in writing.

(7) The designated authority shall make available the evidence presented by one party to other interested parties participating in the investigation.

(8) In a case where an interested party refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes the investigation, the designated authority may record its findings on the basis of facts available to it and make such recommendations to the Central Government as it deems fit under such circumstances.

8. Confidential informations.-

(1) Notwithstanding anything contained in sub-rule (1), (2), (3) and (7) of rule 7, sub-rule (2) of rule 14, sub-rule (4) of rule 17 and sub-rule (3) of rule 19 copies of applications received under sub-rule (1) of rule 6 or any other information provided to the designated authority on a confidential basis by any party in the course of investigation, shall, upon the designated authority being satisfied as to its confidentiality, be treated as such by it and no such information shall be disclosed to any other party without specific authorisation of the party providing such information.

(2) The designated authority may require the parties providing information on confidential basis to furnish non-confidential summary thereof in sufficient details to permit a reasonable understanding of the substance of the confidential information and if, in the opinion of a party providing such information, such information is not susceptible of summary, such party may submit to the designated authority a statement of reasons why summarisation is not possible.

(3) Notwithstanding anything contained in sub-rule (2), if the designated authority, is satisfied that the request for confidentiality is not warranted or the supplier of the information is either unwilling to make the information public or to authorise its disclosure in generalised or summary form, it may disregard such information.

9. Accuracy of the information.-

Except in cases referred to in sub-rule (8) of rule 7 the designated authority shall during the course of investigation satisfy itself as to the accuracy of the information supplied by the interested parties upon which its findings are based.

10. Investigation in the territory of other specified countries.-

(1) The designated authority may carry out investigations in the territories of other countries, in order to verify the information provided or to obtain further details :

Provided that the designated authority notifies to such country in advance and such country does not object to such investigation.

(2) The designated authority may also carry out investigations at the premises of any commercial organisation and may examine its records if such organisation agrees and if the country in whose territory the said commercial organisation is situated, is notified and has not raised any objection for the conduct of such investigation.

11. Nature of subsidy.-

(1) The designated authority while determining the subsidy shall ascertain as to whether the subsidy under investigation -

(a) relates to export performance including those illustrated in Annexure III to these rules, or;

(b) relates to the use of domestic goods over imported goods in the export article, or

(c) it has been conferred on a limited number of persons, engaged in manufacturing, producing or exporting the article unless such a subsidy is for -

(i) research activities conducted by or on behalf of persons engaged in the manufacture, production or export; or

(ii) assistance to disadvantaged regions within the territory of the exporting country; or

(iii) assistance to promote adaptation of existing facilities to new environmental requirements:

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Explanation.- (1) For the purposes of sub-clause (i) of clause (c) the term "subsidy for research activity" means assistance for research activities conducted by commercial organisations or by higher education or research establishments on a contract basis with the commercial organisations if the assistance covers not more than seventy five per cent of the costs of industrial research or fifty per cent of the costs of pre-competitive development activity and provided that such assistance is limited exclusively to -

(i) costs of personnel (researchers, technicians and other supporting staff employed exclusively in the research activity);

(ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;

(iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought in research, technical knowledge, patents, etc.;

(iv) additional overhead costs incurred directly as a result of the research activity; and

(v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.

(2) For the purposes of sub-clause (ii) of clause (c), the term "subsidy for assistance to disadvantaged regions" means assistance to disadvantaged regions within the territory of the exporting country given pursuant to a general framework of regional development and such subsidy has not been conferred on limited number of enterprises within the eligible region:

Provided that –

(a) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;

(b) the region is considered as disadvantaged on the basis of neutral and objective criteria, indicating that the region"s difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;

(c) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors

(i) one of either income per capita or household income per capita, or Gross Domestic Product per capita, which must not be above eighty five per cent of the average for the territory concerned;

(ii) unemployment rate, which must be at least one hundred and ten per cent of the average for the territory concerned, as measured over a three-year period; such measurement, however, may be a composite one and may include other factors.

(3) For the purposes of sub-clause (iii) of clause (c), "subsidy for assistance to promote adaptation of existing facilities to new environmental requirements" means assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on commercial organizations :

Provided that the assistance –

(i) is a one-time non-recurring measure; and

(ii) is limited to twenty per cent of the cost of adaptation; and

(iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by commercial organizations; and (iv) is directly linked to and proportionate to a commercial organisation"s planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and

(v) is available to all firms which can adopt the new equipment and/or production processes

(3) The designated authority while determining the subsidy of a kind as referred to in sub-clause (c) to sub-rule (1) shall take into account, inter alia the principles laid down in Annexure II to these rules.

12. Calculation of the amount of the countervailable subsidy

(1) For the purposes of these rules, the amount of countervailable subsidies, shall be calculated in terms of the benefit conferred on the recipient which is found to exist during the investigation period for subsidization

(2) As regards the calculation of benefit to the recipient, the following factors shall apply, namely:-

(a) government provision of equity capital shall not be considered to confer a benefit, unless the investment can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of the country of origin or export;

(b) a loan by a government shall not be considered to confer a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount that the firm would pay for a comparable commercial loan which the firm could actually obtain from the market and in that event the benefit shall be the difference between these two amounts;

(c) a loan guarantee by a government shall not be considered to confer a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay for a comparable commercial loan in the absence of the government guarantee and in such case the benefit shall be the difference between these two amounts, adjusted for any differences in fees;

(d) the provision of goods or services or purchase of goods by a government shall not be considered to confer a benefit, unless the provision is made for less than adequate remuneration or the purchase is made for more than adequate remuneration; whereas, the adequacy of remuneration shall be determined in relation to prevailing market conditions for the product or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

(3) The amount of the countervailable subsidies shall be determined per unit of the subsidised product exported to India and while establishing this amount the following elements may be deducted from the total subsidy:

(a) any application fee, or other costs necessarily incurred in order to qualify for, or to obtain, the subsidy;

(b) export taxes, duties or other charges levied on the export of the product to India specifically intended to offset the subsidy and in cases where an interested party claims a deduction, he must prove that the claim is justified.

(4) Where the subsidy is not granted by reference to the quantities manufactured, produced, exported or transported, the amount of countervailable subsidy shall be determined by allocating the value of the total subsidy, as appropriate, over the level of production, sales or exports of the products concerned during the investigation period for subsidisation.

(5) Where the subsidy can be linked to the acquisition or future acquisition of fixed assets, the amount of the countervailable subsidy shall be calculated by spreading the subsidy across a period which reflects the normal depreciation of such assets in the industry concerned and the amount so calculated which is attributable to the investigation period, including that which derives from fixed assets acquired before this period, shall be allocated as described in sub-rule (4) and, where the assets are non-depreciating, the subsidy shall be valued as an interest-free loan, and be treated in accordance with clause (b) of sub-rule 2 (b) above.

(6) Where a subsidy cannot be linked to the acquisition of fixed assets, the amount of the benefit received during the investigation period shall in principle be attributed to this period, and allocated as described in sub-rule (4), unless special circumstances justify its attribution over a different period.

(7) The designated authority while calculating the amount of subsidy in countervailing duty investigation shall take into account, inter-alia, the guidelines laid down in Annexure IV to these rules.

13. Determination of injury.-

(1) In the case of imports from specified countries, the designated authority shall give a further finding that the import of such article into India causes or threatens material injury to any industry established in India, or materially retards the establishment of an industry in India.

(2) Except when a finding of injury is made under sub-rule (3), the designated authority shall determine the injury, threat of injury, material retardation to the establishment of an industry and the casual link between the subsidised import and the injury, taking into account inter alia, the principle laid down in Annexure I to the rule.

(3) The designated authority may, in exceptional cases, give a finding as to the existence of injury even where a substantial portion of the domestic industry is not injured if –

(i) there is a concentration of subsidised imports into an isolated market, and

(ii) the subsidised imports are causing injury to the producers of almost all of the production within such market.

14. Preliminary findings.-

(1) The designated authority shall proceed expeditiously with the conduct of the investigation and shall, in appropriate cases, record a preliminary finding regarding existence of a subsidy and its nature and in respect of imports from specified countries, it shall also record its preliminary finding regarding injury to the domestic industry and such finding shall contain sufficiently detailed explanation for the preliminary determination on the existence of a subsidy and injury and shall refer to the matter of fact and law which have led to arguments being accepted or rejected. Such finding shall contain –

(i) the names of the suppliers or, when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined;

(iv) considerations relevant to the injury determination; and

(v) the main reasons leading to the determination.

(2) The designated authority shall issue a public notice recording its preliminary findings.

15.Levy of provisional duty.-

The Central Government may, in accordance with the provisions of sub-section (2) of section 9 of the Act, impose a provisional duty on the basis of the preliminary findings recorded by the designated authority:

Provided that no such duty shall be imposed before the expiry of sixty days from the date of issue of the public notice by the designated authority regarding its decision to initiate investigations :

Provided further that such duty shall remain in force for a period not exceeding four months.

16. Termination of investigation.-

(1) The designated authority shall, by issue of a public notice terminate an investigation immediately if –

(a) it receives a request in writing for doing so from or on behalf of the domestic industry affected, at whose instance the investigation was initiated;

(b) it is satisfied in the course of an investigation, that there is no sufficient evidence either for subsidisation or, where applicable, injury to justify continuation of the investigation;

(c) it determines that the amount of subsidy is less than one per cent ad valorem or in the case of a product originating from a developing country the amount of subsidy is less than two per cent.

(d) it determines that the volume of the subsidized imports, actual or potential or injury where applicable, is negligible or in the case of a product originating in a developing country the volume of the subsidized imports represents less than four per cent of the total imports of the like product into India, unless imports from developing countries whose individual shares of total imports represent less than four per cent collectively account for more than nine per cent of the total imports of the like product into India.

17. Suspension or termination of investigation on acceptance of price undertaking.-

(1) The designated authority may suspend or terminate an investigation, if –

(a) the government of the exporting country –

(i) furnishes an undertaking that it would withdraw the subsidy.

(ii) in case of specified countries, undertakes to limit the quantum of subsidy within reasonable limit, or to take other suitable measures to neutralise the effect of such subsidy, provided that the designated authority is satisfied that the injurious effect of the subsidy is eliminated, or

(b) in case of specified countries the exporters concerned agree to revise their prices so that injurious effect of subsidy is eliminated and the designated authority is satisfied that the injurious effect of the subsidy is eliminated:

Provided that increase in price as a result of this clause is not higher than what is necessary to eliminate the amount of subsidy :

Provided further that the designated authority shall complete the investigation and record its finding, if the Central Government so desires or the government of the exporting country so decides.

(2) No undertaking as regards price increase under sub-rule (1) shall be accepted unless the designated authority had made preliminary determination of subsidization and the injury:

Provided that an undertaking from an exporter shall be accepted only when the designated authority has also obtained the consent of the exporting country.

(3) The designated authority, may also not accept undertakings offered by any country or any exporter, if it considers the acceptance of such undertaking as impracticable or as unacceptable for any other reason.

(4) The designated authority shall intimate the acceptance of an undertaking and suspension or termination of investigation to the Central Government and also issue a public notice in this regard. The public notice shall, contain inter alia, the non-confidential part of the undertaking.

(5) In cases where an undertaking has been accepted by the designated authority the Central Government may not impose a duty under sub-section (2) of section 9 of the Act for such a period the undertaking acceptable to the designated authority remains valid.

(6) Where the designated authority has accepted any undertaking under sub-rule (1), it may require the government of the exporting country, or the exporter from whom such undertaking has been accepted to provide from time to time information relevant to the fulfilment of the undertaking and to permit verification of relevant data:

Provided that in case of any violation of any undertaking, the designated authority will intimate the Central Government and complete the investigation expeditiously.

(7) The designated authority shall suo motu or on the basis of any request received from exporters or importers of the article in question or any other interested person review from time to time the need for the continuance of any undertaking given earlier.

18. Disclosure of information.-

The designated authority, shall, before giving its final findings, inform all interested parties and interested countries of the essential facts under consideration which form the basis of its decision and permit the interested parties to defend their interest.

19. Final findings.-

(1) The designated authority shall, within one year from the date of initiation of an investigation determine as to whether or not the article under investigation is being subsidized and submit to the Central Government its final finding, as to –

(a) (i) the nature of subsidy being granted in respect of the article under investigation and the quantum of such subsidy;

(ii) whether imports of such articles into India in the case of imports from specified countries, cause or threaten material injury to an industry established in India or materially retards the establishment of any industry in India and a casual link between the subsidized imports and such injury; and

(iii) Whether a retrospective levy is called for and if so, the reasons therefor and the date of commencement of such levy.

;(b) its reommendation as to the amount of duty which if levied, would be adequate to remove the injury to the domestic industry:

Provided that the Central Government may in circumstances of exceptional nature extend further the aforesaid period of one year by six months:

Provided further that in those cases where the designated authority has suspended the investigation on the acceptance of a price undertaking as provided in rule 17 and subsequently resumes the same on violation of the terms of the said undertaking, the period for which investigation was kept under suspension shall not be taken into account while calculating the said period of one year.

(2) The final finding if affirmative, shall contain all information on the matter of facts and law and reasons which have led to the conclusion and shall also contain information regarding –

(i) the names of the suppliers, or, when this is impractical, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined;

(iv) considerations relevant to the injury determination; and

(v) the main reasons leading to the determination

(3) The designated authority shall issue a public notice regarding its final findings.

20. Levy of duty.-

(1) The Central Government may, within three months of the date of publication of the final findings by the designated authority under rule 19, impose, by notification in the Official Gazette, upon importation into India of the article covered under the final finding, a countervailing duty not exceeding the amount of subsidy as determined by the designated authority under rule 19 :

Provided that in case of imports from specified countries the amount of duty shall not exceed the amount which has been found adequate to remove the injury to the domestic industry.

(2) Notwithstanding anything contained in sub-rule (1) where a domestic industry has been interpreted according to the proviso to clause (b) of rule 2, a countervailing duty shall be levied only after the exporters have been given opportunity to cease exporting at subsidized prices to the area concerned or otherwise give an undertaking pursuant to rule 17 and such undertaking has not been promptly given and in such cases duty cannot be levied only on the product of specified producers which supply the area in question.

(3) If the final finding of the designated authority is negative, that is contrary to the prima facie evidence on whose basis the investigation was initiated, the Central Govemment shall within forty five days of the publication of final findings by the designated authority under rule 19, withdraw the provisional duty, imposed if any.

21. Imposition of duty on non-discriminatory basis.-

Any countervailing duty imposed under rule 15 or 20 shall be on a non-discriminatory basis and applicable to all imports of such article, if found to be subsidised and where applicable, causing injury except in the case of imports from those sources from which undertakings in terms of rule 17 have been accepted.

22. Date of commencement of duty.-

(1) The countervailing duty levied under rules 15 and 20 shall take effect from the date of publication of the notification in the Official Gazette.

(2) Notwithstanding anything contained in sub-rule (1) –

(a) where a provisional duty has been levied and where the designated authority has recorded a finding of injury or where the designated authority recorded a finding of threat of injury and a further finding that the subsidised imports, in the absence of provisional duty would have led to injury, the countervailing duty may be imposed from the date of imposition of provisional duty:

(b) in the circumstances referred to in sub-section (4) of section 9 of the Act, the countervailing duty may be levied retrospectively from the date commencing ninety days prior to the imposition of provisional duty:

Provided that in case of violation of an undertaking referred to in sub-rule (6) of rule 17, no duty shall be levied retrospectively on imports which have entered for home consumption before violation of such terms of the undertaking.

23. Refund of duty.-

(1) If the countervailing duty imposed by the Central Government on the basis of the final findings of the investigation conducted by the designated authority is higher than the provisional duty already imposed and collected the differential shall not be collected from importer.

(2) If the countervailing duty fixed after the conclusions of the investigation is lower than the provisional duty already imposed and collected, the differential shall be refunded to the importer.

(3) If the provisional duty imposed by the Central Government is withdrawn in accordance with the provisions of sub-rule (3) of rule 20, the provisional duty already imposed and collected, if any shall be refunded to the importer.

24. Review.-

(1) The designated authority shall, from time to time, review the need for continued imposition of the countervailing duty and shall, if it is satisfied on the basis of information received by it that there is no justification for the continued imposition of such duty or additional duty, recommend to the Central Government for its withdrawal.

(2) Any review initiated under sub-rule (1) shall be concluded within a period not exceeding 12 months from the date of initiation of such review.

(3) The provisions of rules 6, 7,8, 9,10,11,12,13,16,17,18,19,20,22 and 23 shall mutatis mutandis apply in the case of review.

ANNEXURE I

Principles governing the determination of injury

The designated authority shall take into account inter alia, the following principles while determining injury :-

1. (1) A determination of injury for purposes of rule 13 shall be based on positive evidence and involve an objective examination of both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products.

(2) With regard to the volume of the subsidized imports, the designated authority shall inter alia consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in India.

(3) With regard to the effect of the subsidized import on prices, the designated authority shall, consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like article in India, or whether the affect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree.

(4) Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the designated authority may cumulatively assess the effect of such imports only if it determines that (a) the amount of subsidization established in relation to the imports from each country is more than one per cent ad valorem and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the like domestic product.

(5) The designated authority while examining the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital investments and, in the case of agriculture, whether there has been an increased burden on government support programmes

2. (1) It must be demonstrated that the subsidized imports are, through the effects of subsidies, causing injury. The demonstration of a casual relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the designated authority. The designated authority shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, inter alia, the volumes and prices on non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

(2) The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers sales and profits. If such separate identification of that production is not possible, the effects of the subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

3. A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the designated authority shall consider, inter alia, such factors as :

(i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;

(ii) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;

(iii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to Indian market, taking into account the availability of other export markets to absorb any additional exports;

(iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(v) inventories of the product being investigated.

ANNEXURE II

Principles for determination of subsidy which has been conferred on a limited number of persons as referred to in Rule 11

1. The designated authority in order to determine as to whether a subsidy has been conferred on a limited number of persons engaged in the manufacture or production of an article, shall take the following principles into consideration :-

(a) whether the granting authority or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises. However, where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, such subsidy shall not be considered to have been conferred on a limited number of persons engaged in the manufacture or production of an article, provided that the eligibility is automatic and such criteria or conditions are strictly adhered to and such criteria and conditions have been clearly spelt out in the law, regulation or other official document of the granting country or territory and are capable of verification.

Explanation : For the purposes of the above para objective criteria or conditions mean criteria or condition 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 enterprises.

(b) Notwithstanding the determination that a subsidy is not being granted to a limited number of enterprises in terms of the provisions contained in para (a) above, if the designated authority has reason to believe that the subsidy has in fact been conferred to a limited number of enterprises, it may consider other factors like (1) use of a subsidy programme by a limited number of certain enterprises or predominant use by certain enterprises (2) granting of disproportionately large amounts of subsidy to certain enterprises and (3) manner in which discretion has been exercised by the granting authority in decision to grant a subsidy, for determination of subsidy. The designated authority, in applying this clause, shall take into account, the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as the length of the time during which the subsidy programme has been in operation.

(c) A subsidy which is limited to certain persons engaged in the manufacture or production of an article located within a designated geographical region within the jurisdiction of the granting authority shall be considered to have been granting to a limited number of persons engaged in the manufacture or production.

ANNEXURE III

PART- 1

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(b) Currency retention schemes or any similar practices which involve a bonus on exports.

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.

Explanation: The term "commercially available" means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

(e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises.

Explanation: For the purpose of this paragraph:

(i) the term "direct taxes" shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property;

(ii) the term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;

(iii) the term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;

(iv) "Prior-stage" indirect taxes are those levied on goods or services used directly or indirectly in making the product;

(v) "Cumulative" indirect taxes are multi-stage taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production;

(vi) "Remission" of taxes includes the refund or rebate of taxes;

(vii) "Remission or drawback" includes the full or partial exemption or deferral of import charges.

(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

(g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h) The exemption, remission or deferral of prior-stage cumulative indirect taxes on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste) and the item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Part -2 of this Annexure. This paragraph does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).

(i) The remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years and the item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Part -2 of this Annexure and the guidelines in the determination of substitution drawback systems as export subsidies contained in Part -3 of this Annexure.

(j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments (or special institutions controlled by or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, that if a country is a party to an international undertaking on official export credits to which at least twelve original World Trade organisation Members are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a country applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by these rules.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.

PART-2
GUIDELINES ON CONSUMPTION OF INPUTS IN THE PRODUCTION PROCESS

I

1. Indirect tax rebate schemes can allow for exemption, remission or deferral of prior-stage cumulative indirect taxes levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). Similarly, drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).

2. The Illustrative List of Export Subsidies in Part 1 of Annexure III of these rules makes reference to the term "inputs that are consumed in the production of the exported product" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior-stage cumulative indirect taxes in excess of the amount of such taxes

actually levied on inputs that are consumed in the production of the exported product. Pursuant to paragraph (i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. Both paragraphs stipulate that normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product.

II

1. Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product. In examining whether inputs are consumed in the production of the exported product, as part of a countervailing duty investigation pursuant to these rules, the designated authority should proceed on the following basis, namely:-

(1) Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the designated authority should first determine whether the government of the exporting country has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the designated authority should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The designated authority may it necessary if he considers carry out certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.

(2) Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting country based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the designated authority considers it necessary, a further examination would be carried out in accordance with sub-paragraph 1 above.

2. The designated authority should treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported. An input need not be present in the final product in the same form in which it entered the production process.

3. In determining the amount of a particular input that is consumed in the production of the exported product, a "normal allowance for waste" should be taken into account, and such waste should be treated as consumed in the production of the exported product. The term "waste" refers to that portion of a given input which does not serve an independent function in the production process, is not consumed in the production of the exported product (for reasons such as inefficiencies) and is not recovered, used or sold by the same manufacturer.

4. The designated authority's determination of whether the claimed allowance for waste is "normal" should take into account the production process, the average experience of the industry in the country of export, and other technical factors, as appropriate. The designated authority should bear in mind that an important question is whether the authorities in the exporting country have reasonably calculated the amount of waste, when such an amount is intended to be included in the tax or duty rebate or remission.

PART-3
GUIDELINES IN THE DETERMINATION OF SUBSTITUTION DRAWBACK SYSTEMS AS EXPORT SUBSIDIES

I

Drawback systems can allow for the refund or drawback of import charges on inputs which are consumed in the production process of another product and where the export of this latter product contains domestic inputs having the same quality and characteristics as those substituted for the imported inputs. Pursuant to paragraph (i) of the Illustrative List of Export Subsidies in Part-1 of Annexure III substitution drawback systems can constitute an export subsidy to the extent that they result in an excess drawback of the import charges levied initially on the imported inputs for which drawback is being claimed.

II

1. In examining any substitution drawback system as part of a countervailing duty investigation pursuant to these rules, the designated authority should proceed on the following basis, namely:-

(i) Paragraph (i) of the Illustrative List of Export Subsidies of Part -1 of Annexure III stipulates that home market inputs may be substituted for imported inputs in the production of a product for export provided such inputs are equal in quantity to, and have the same quality and characteristics as, the imported inputs being substituted. The existence of a verification system or procedure is important because it enables the government of the exporting country to ensure and demonstrate that the quantity of inputs for which drawback is claimed does not exceed the

quantity of similar products exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported inputs in question.

(ii) Where it is alleged that a substitution drawback system conveys a subsidy, the designated authority should first proceed to determine whether the government of the exporting country has in place and applies a verification system or procedure. Where such a system or procedure is determined to be applied, the designated authority should then examine the verification procedures to see whether they are reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. To the extent that the procedures are determined to meet this test and are effectively applied, no subsidy should be presumed to exist. The designated authority may, if he considers necessary, carry out certain practical tests in order to verify information or to satisfy themselves that the verification procedures are being effectively applied.

(iii) Where there are no verification procedures, where they are not reasonable, or where such procedures are instituted and considered reasonable but are found not to be actually applied or not applied effectively, there may be a subsidy. In such cases a further examination by the exporting country based on the actual transactions involved would need to be carried out to determine whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with sub-paragraph (ii) of Part 3 of this Annexure.

(iv) The existence of a substitution drawback provision under which exporters are allowed to select particular import shipments on which drawback is claimed should not of itself be considered to convey a subsidy.

(v) An excess drawback of import charges in the sense of paragraph (i) would be deemed to exist where governments paid interest on any monies refunded under their drawback schemes, to the extent of the interest actually paid or payable.

ANNEXURE IV
GUIDELINES FOR THE CALCULATION OF THE AMOUNT OF SUBSIDY IN COUNTERVAILING DUTY INVESTIGATIONS

A. CALCULATION OF SUBSIDY PER UNIT/AD VALOREM

The calculation of the benefit shall reflect the amount of subsidy found to exist during the investigation period and not simply the face value of the amount at the time it is transferred to the recipient or foregone by the government. Thus, the face value of the amount of the subsidy should be transformed into the value prevailing during the investigation period through the application of the normal commercial interest rate.

The objective of the calculation should be to arrive at the amount of subsidy per unit of production during the investigation period. In the case of consumer products, such as television sets, the appropriate unit would be each individual item. If bulk products, such as fertilizers or chemicals, are involved, it would be appropriate to calculate the subsidy, that is to say, per tonne, or other appropriate unit of measurement. The per unit subsidy can be converted into an ad valorem rate by expressing the per unit subsidy as a percentage of export price. This may be used to establish whether the subsidy amount is de minimis, since this is expressed ad valorem (1 % for imports from developed countries; 2 % for developing countries). In certain circumstances, it may also be considered to be appropriate to express the countervailing duty on an ad valorem basis.

B. CALCULATION OF CERTAIN TYPES OF SUBSIDY

(a) Grants

In the case of a grant (or equivalent) where none of the money is repaid, the value of the subsidy should be the amount of the grant corrected for any differences between the point in time of its receipt and the investigation period, i.e. the period in which the production or sales are allocated. Therefore, if the grant is expensed during the investigation period, (that is, its amount is entirely allocated to production or sales during this period), the interest that would have accrued during that period should normally be added. If however, the grant is allocated over a longer period than the investigation period, the interest may be added as described in section C (a)(ii).

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

(i) Direct transfer of funds

The amount of subsidy should be the amount received by the company concerned (a subsidy to cover operating losses would fall into this category).

(ii) Tax exemptions

The amount of subsidy should be the amount of tax that would have been payable by the recipient company at the standard applicable tax rate during the investigation period.

(iii) Tax reductions

The amount of subsidy should be the difference between the amount of tax actually paid by the recipient company during the investigation period and the amount that would have been paid at the normal rate of tax.

(The same method should be applied to all other exemptions and reduction of obligation, e.g. import duties, social security contributions, redundancy payments)

(iv) Accelerated depreciation

Accelerated depreciation of assets under a government agreed programme should be considered as a tax reduction. The amount of subsidy should be the difference between the amount of tax that would have been paid during the investigation period under the normal depreciation schedule for the assets concerned, and the amount actually paid under accelerated depreciation. To the extent that the accelerated depreciation results in a tax saving for the company concerned during the investigation period, there is a benefit.

(v) Interest rate subsidies

In the case of an interest rate subsidy, the amount of subsidy should be the amount of interest saved by the recipient company during the investigation period.

(b) Loans

(1) Basic methodology

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

(ii) A comparable commercial loan would normally be a loan of a similar amount with a similar repayment period obtainable by the recipient from a representative bank operating on the domestic market.

(iii) In this regard, the commercial interest rate should preferably be established on the basis of the rate actually paid by the company concerned on comparable loans from banks. If this is not possible, the investigation should consider the interest paid on comparable loans to companies in a similar financial situation in the same sector of the economy, or, if information on such loans is not available, to any comparable loan made to companies in a similar financial situation in any sector of the economy.

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

(v) If all or part of a loan is forgiven or defaulted on, the amount not re-paid should be treated as a grant depending on whether there was a guarantee.

(2) Specific cases

(i) It should be noted that tax deferrals, or the deferral of any other financial obligation, should be considered as interest-free loans and the amount of subsidy calculated as above.

(ii) In the case of reimbursable grants, these should also be considered as interest free loans until they are reimbursed. If they are not reimbursed, in whole or in part, they should be considered as grants rather than interest-free loans from the date on which non-reimbursement is established. From this date, the normal grant methodology should apply. In particular, if the grant is to be allocated over time, such allocation would start on the established date of non-reimbursement. The amount of subsidy should be the amount of the grant, minus any repayments.

(iii) The same approach would apply to contingent-liability loans. To the extent that such loans are given at a preferential rate of interest, the subsidy should be calculated as in paragraph (i). However, if it were to be determined that the loan would not be repaid, it should be treated as a grant from the date on which non-repayment was established. The amount of subsidy should be the amount of the loan, less any repayments.

(c) Loan guarantees

(i) In general, a loan guarantee, by eliminating to some extent the risk of default by the borrower to the lender, will normally enable a firm to borrow more cheaply than would otherwise be the case. If the government provides the guarantee, the fact that loans are obtained at a lower interest rate than would otherwise be the case does not mean there is a subsidy, provided that the guarantee is financed on a commercial basis, since the financing of such a viable guarantee by the company would be assumed to offset any benefit of a preferential interest rate.

(ii) In this situation, it is considered that there is no benefit to the recipient if the fee which it pays to the guarantee programme is sufficient to enable the programme to operate on a commercial basis, i.e. to cover all its costs and to earn a reasonable profit margin. In such a situation, it is presumed that the fee covers the risk element involved in obtaining a lower interest rate. If the guarantee programme is viable during the investigation period as

a whole and the recipient has paid the appropriate fee, there is no financial contribution from the government and therefore no subsidy, even if the recipient involved were to default on its loans during the period.

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

(iii) In the case of ad hoc guarantees (i.e. not part of a programme), it should first be ascertained whether the fees paid correspond to those charged to other companies in a similar position which benefit from viable loan guarantee programmes. If so, there would normally be no subsidy; if not, the method explained in (ii) above would apply.

(iv) If no fees are paid by the recipient, the amount of subsidy should be the difference between the amount the firm pays on the guaranteed loan and the amount that it would pay for a comparable commercial loan in the absence of the government guarantee.

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

(d) Provision of goods and services by the government

Principle

(i) The amount of subsidy as regards the provision of goods or services by the government should be the difference between the price paid by firms for the goods or service, and adequate remuneration for the product or service in relation to prevailing market conditions, if the price paid to the government is less than this amount.

Adequate remuneration should normally be determined in the light of prevailing market conditions on the domestic market of the exporting country, and the calculation of the subsidy amount must reflect only that part of the purchases of goods or services which are used directly in the production or sale of the like product during the investigation period.

Comparison with private suppliers

(ii) As a first step, it must be established whether the same goods or services involved are provided both by the government and by private operators. If this is the case, the price charged by the government body would normally constitute a benefit to the extent that it is below the lowest price available from one of the private operators to the company involved for a comparable purchase. The amount of subsidy should be the difference between these two prices. If the company involved has not made comparable purchases from private operators, details should be obtained of the price paid by comparable companies in the same sector of the economy or, if such data is not available, in the economy as a whole and the amount of subsidy should be calculated as above.

Government monopoly suppliers

(iii) If, however, the government is the monopoly supplier of the goods or services involved, they are considered to be provided for less than adequate remuneration if certain enterprises or sectors benefit from preferential prices. The amount of subsidy should be the difference between the preferential price and the normal price.

If the goods and services in question are widely used in the economy, a subsidy will only be specific or conferred on a limited number of persons if there is evidence of preferential pricing to a particular firm or sector. It may be that per unit prices charged vary according to neutral and objective criteria, for example large consumers pay less per unit than small ones, as sometimes happens in the provision of gas and electricity. In such situations, the fact that certain enterprises benefit from more favourable prices than others would not mean that the provision in this case was necessarily made for less than adequate remuneration, provided that the pricing structure in question was generally applied throughout the whole economy, without any preferential prices being given to specific sectors or firms. The amount of subsidy should in principle be the difference between the preferential price and the normal price charged to an equivalent company, according to the normal structure.

(iv) However, if the normal price is insufficient to cover the supplier"s average total costs plus a reasonable profit margin (based on sector averages), the amount of subsidy should be the difference between the preferential price and the price which would be required to cover the above costs and profit.

(v) If the government is the monopoly supplier of the goods or services with a specific use, e.g. television tubes, the question of preferential pricing does not arise, and the amount of subsidy should be the difference between the price paid by the firm involved and the price required to cover the supplier"s costs and profit margin.

(e) Purchase of goods by government

(i) In a situation where private operators purchase the kind of goods in question as well as the government body, the amount of subsidy should be the extent to which the price paid for the like product by the government exceeds the highest price offered for a comparable purchase of the same goods by the private sector.

(ii) If the company involved has not made comparable sales to private operators, details should be obtained of the price paid by private operators to comparable companies in the same sector of the economy, or, if such data is not available, in the economy as a whole. In such a case, the amount of subsidy should be calculated as above.

(iii) If the government has a monopoly for the purchase of the goods in question, the amount of subsidy as regards the purchase of goods by the government should be the extent to which the price paid for the goods exceeds adequate remuneration. Adequate remuneration in this situation is the average costs incurred by the firm selling the product during the investigation period, plus a reasonable amount of profit, which will have to be determined on a case-to-case basis.

The amount of subsidy should be the difference between the price paid by the government and adequate remuneration as defined above. **(f) Government provision of equity capital**

(i) Government provision of equity capital should not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the exporting country concerned.

(ii) Therefore, the provision of equity capital does not of itself confer a benefit. The criterion should be whether a private investor would have put money into the company in the same situation in which the government provided equity. On the basis of this principle, the matter has to be dealt with on a case-to-case basis.

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

(iv) As a general rule, in cases where there is no market in freely-traded shares, the government"s realistic expectation of a return on the price paid for equity should be considered. In this regard, the existence of an independent study demonstrating that the firm involved is a reasonable investment should be considered the best evidence; if this is not present, the onus should be on the government to demonstrate on what basis it can justify its expectation of a reasonable return on investment.

(v) If there is no market price and the equity injection is made as part of an ongoing programme of such investments by the government, close attention should be paid not just to the analysis of the firm in question, but to the overall record of the programme over the last few years. If the records show that the programme has earned a reasonable rate of return for the government, there should be a presumption that the government is acting according to the usual investment practice of private investors with regard to the case in question. If the programme has not generated a reasonable return, the onus should be put on the government to demonstrate on what basis it can justify its expectation of a reasonable return on investment.

(vi) The existence of a subsidy should be determined by the information available to the parties at the time the equity injection is made. Thus, if an investigation considers an equity injection that was made several years before, the fact that the company has performed less well than expected should not mean that a subsidy exists, provided that the expectation of a reasonable return was justified in the light of the facts know at the time of the provision of equity.

On the other hand, a subsidy might exists even if a reasonable return has been achieved, if at the equity injection the prospect of such a return was so uncertain that no private party would have made the investment.

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

A decision to consider all of the equity a grant should be made only in extreme cases where it is determined that the government had no intention of receiving any return on its investment and was in effect giving a disguised grant to the firm in question.

A decision on what portion of the equity to treat as a grant would depend on how near the government has come to meeting the private investor standard. This determination should be made on a case-to-case basis.

(g) Forgiveness of government-held debt

Forgiveness of debt held by government or government-owned banks relieves a company of its repayment obligations and should therefore be treated as a grant. If the subsidy is to be allocated, the allocation period should begin at the time of the forgiveness of the debt. The amount of subsidy should be the outstanding amount of the debt forgiveness (including any interest accrued).

C. INVESTIGATION PERIOD FOR SUBSIDY - CALCULATION OF EXPENSE VERSUS ALLOCATION

The amount of subsidy should be established during an investigation period, which should normally be the most recent financial year of the beneficiary enterprise. Although any other period of six months prior to initiation may be used, it is preferable to use the most recent financial year, since this will enable all appropriate data to be verified on the basis of audited accounts.

As many subsidies have effects for a number of years, subsidies granted before the investigation period should also be investigated in order to determine what portion of such subsidy is attributable to the investigation period.

(i) If the subsidy is granted on a per unit basis, for example, an export rebate granted per unit of product, the per unit calculation normally consists of taking the weighted-average value of the rebate over the investigation period;

(ii) Other kinds of subsidy are not readily expressed on a per unit basis, but involve a global sum of money which has to be allocated to each unit of product as appropriate. Two exercises may have to be carried out, in this respect:

- Attribution to the investigation period of a portion of those subsidies granted before the investigation period but whose effects extend over a number of years.

- Allocation of the subsidy amount attributed to the investigation period per unit of the like product. In this case, the appropriate denominator for such allocation has to be selected.

(a) Attribution of a subsidy amount to the investigation period

(i) Many types of subsidy, e.g. tax incentives and preferential loans are recurring and the effect is felt immediately after granting. Thus, the amount granted to the beneficiary can be expensed in the investigation period. The expensed amount should normally be increased by the annual commercial interest rate, to reflect the full benefit to the recipient, on the assumption that the beneficiary would have had to borrow the money at the beginning of the period and repay it at the end.

(ii) For non-recurring subsidies, which can be linked to the acquisition of fixed assets, the total value of the subsidy should be spread over the normal life of the assets. Therefore the amount of subsidy from, for example, a grant (for which it is assumed that it is used by the beneficiary to improve its competitiveness in the long term, and thus to purchase product assets of one kind or another), can be spread over the normal period used in the industry involved for the depreciation of assets. This should normally be done using the straight-line-method. For example, if the normal depreciation period was five years, 20 % of the value of the grant should be allocated to the investigation period.

The approach of allocating over time means that non-recurring subsidies granted several years before the investigation period may still be countervailed provided that they still have an effect during the investigation period.

This kind of allocation is equivalent to a series of annual grants, each having en equal amount. In order to determine the benefit to the recipient, the appropriate annual commercial interest rate should be added to each grant, to reflect the benefit of not having to borrow the money on the open market. In addition, in order to reflect the full benefit to the recipient of having a lump sum of money at its disposal from the beginning of the allocation period, the amount of subsidy should be increased by the average amount of interest which the recipient would expect to earn on the non-depreciated amount of total grant over the whole period of allocation.

(iii) As an exception to (ii), non-recurring subsidies which amount to less than 1 % ad valorem may normally be considered to be expensed, even if they are linked to the purchase of fixed assets.

(iv) In the case of recurring subsidies linked to the acquisition of fixed assets, e.g. import duty exemptions on machinery, which date back to before the investigation period, the benefits accruing from previous years within the depreciation period should be taken into account and the appropriate amount attributed to the investigation period.

(v) In addition, recurring subsidies granted in large, concentrated amounts prior to the investigation period, may in certain circumstances be allocated over time if it is determined that they are likely to be linked to the purchase of fixed assets and still confer a benefit during the investigation period.

(vi) In the case of subsidies expensed as in paragraphs (i) and (iii) no subsidies granted before the investigation period should be taken into account. For subsidies allocated over time, as in (ii), (iv), and (v), subsidies granted prior to the investigation period must be considered.

(b) Appropriate denominator for allocation of subsidy amount

Once the subsidy amount to be attributed to the investigation period has been established, the per unit amount may be arrived at by allocating it over the appropriate denominator, consisting of the volume of sales or exports of a product concerned.

(i) As regards export subsidies the appropriate denominator for allocation should be the export volume during the investigation period, since such subsidies benefit only exports;

(ii) For non-export subsidies the total sales (domestic plus export) should normally be used as the denominator, since such subsidies benefit both domestic and export sales.

(iii) If the benefit of a subsidy is limited to a particular product, the denominator should reflect only sales of that product. If this is not the case, the denominator should be the recipient"s total sales.

D. DEDUCTION FROM AMOUNT OF SUBSIDY

1. Only the following may be deducted from the amount of subsidy:

(i) Any application fee, or other costs necessarily incurred in order to qualify for, or to obtain, the subsidy

It is up to the exporter in the country concerned to claim a deduction; in the absence of such a claim accompanied by verifiable proof, no deduction should be granted. The only fees or costs that may normally be deducted are those paid directly to the government in the investigation period. It must be shown that such payment is compulsory in order to receive the subsidy. Neither the payments made to private parties, e.g., lawyers, accountants, incurred in applying for subsidies, nor the voluntary contributions the governments, for example donations, are not deductible.

(ii) Export taxes, duties or other charges levied on the export of a product to India specifically intended to offset the subsidy

Such claims for deductions should only be accepted if the charges involved were levied during the investigation period, and it is established that they continue to be levied at the time when definitive measures are recommended.

2. No other deductions can normally be made from the amount of subsidy. No allowance can be made for any tax effects of subsidies or for any other economic or time value effect beyond that which is specified in this communication.

(Rule has been amended vide Notification No. 24/2006 - Customs (N.T.) Dated March 01, 2006)

http://www.cbec.gov.in/htdocs-cbec/customs/cs-act/formatted-htmls/cs-import-rule23