

of the appropriate methodology to be applied.
Id.

The Federal Circuit reviewed the statute's change-in-ownership provisions in *Delverde III*. In that decision, in striking down the Department's previous "gamma" privatization methodology on the basis that, *inter alia*, it was a *per se* rule, the Federal Circuit opined

Had Commerce fully examined the facts, it might have found that [the respondent] paid full value for the assets and thus received no benefit from the prior owner's subsidies, or Commerce might have found that [the respondent] did not pay full value and thus did indirectly receive a 'financial contribution' and a 'benefit' from the government by purchasing its assets from a subsidized company 'for less than adequate remuneration.' * * * Commerce might have reached the conclusion that [the respondent] indirectly received a subsidy by other means. *Delverde III*, 202 F.3d at 1368.

In light of the SAA and the Court's findings, we believe the statute grants the Department flexibility and discretion in the countervailing duty context for analyzing changes in ownership, including privatizations.

WTO Findings and Recommendations

We now turn to the findings of the Panel and Appellate Body. At the outset, the Panel clarified that its findings apply only to changes in ownership that involve privatizations in which the government retains no controlling interest in the privatized producer and transfers all or substantially all the property. Panel Report at para. 7.62; noted in AB Report at paras. 85 and 117, footnote 177. The Panel then stated that, "[w]hile Members may maintain a rebuttable presumption that the benefit from prior financial contributions (or subsidization) continues to accrue to the privatized producer, privatization at arm's length and for fair market value is sufficient to rebut such a presumption. Panel Report at para. 7.82, upheld at AB Report at para 126. This finding led the Panel to hold, *inter alia*, that the Department's same-person methodology is contrary to the requirements of the Subsidies Agreement.

While the Appellate Body agreed with the Panel that the same-person methodology is contrary to the requirements of the Subsidies Agreement, it clarified that

[p]rivatization at arm's length and for fair market value may

result in extinguishing the benefit. Indeed, we find that there is a rebuttable presumption that a benefit ceases to exist after such a privatization. Nevertheless, it does not necessarily do so. There is no inflexible rule requiring that investigating authorities, in future cases, automatically determine that a 'benefit' derived from pre-privatization financial contributions expires following privatization at arm's length and for fair market value. (Emphasis in original) AB Report at para. 127.

The Appellate Body identified examples of circumstances where the conditions necessary for "market prices" to fairly and accurately reflect subsidy benefits are not present, or are "severely affected" by the government's economic and other policies:

Markets are mechanisms for exchange. Under certain conditions (e.g., unfettered interplay of supply and demand, broad-based access to information on equal terms, decentralization of economic power, an effective legal system guaranteeing the existence of private property and the enforcement of contracts), prices will reflect the relative scarcity of goods and services in the market. Hence, the actual exchange value of the continuing benefit of past non-recurring financial contributions bestowed on the state-owned enterprise will be fairly reflected in the market price. However, such market conditions are not necessarily always present and they are often dependent on government action.

Of course, every process of privatizing public-owned productive assets takes place within the concrete circumstances prevailing in the market in which the sale occurs. Consequently, the outcome of such a privatization process, namely the price that the market establishes for the state-owned enterprise, will reflect those circumstances. However, governments may choose to impose economic or other policies that, albeit respectful of the market's inherent functioning, are intended to induce certain results from the market. In such circumstances, the market's valuation of the state-owned property may ultimately be severely affected by those government policies, as well as by the conditions in which buyers will subsequently be allowed to enjoy property.

The Panel's absolute rule of "no benefit" may be defensible in the context of transactions between two private parties taking place in reasonably competitive markets; however, it overlooks the ability of governments to obtain certain results from markets by shaping the circumstances and conditions in which markets operate. Privatizations involve complex and long-term investments in which the seller—namely the government—is not necessarily always a passive price taker and, consequently, the "fair market price" of a state-owned enterprise is not necessarily always unrelated to government action. In privatizations, governments have the ability, by designing economic and other policies, to influence the circumstances and the conditions of the sale so as to obtain a certain market valuation of the enterprise.

AB Report at paras. 122–124.

Accordingly, the Appellate Body reversed the Panel's conclusion that once an importing Member has determined that a privatization has taken place at arm's length and for fair market value, it *must* reach a conclusion that no benefit resulting from the prior financial contribution continues to accrue to the privatized producer. AB Report at paras. 161(b). However, the Appellate Body nevertheless found the Department's same-person privatization methodology to be inconsistent with the WTO obligations of the United States because, under that methodology, where the entity that produced the subject merchandise was the very same entity that received the subsidy, the Department could not find that an arm's-length, fair market value privatization transaction extinguished the pre-privatization subsidy benefit. Accordingly, the Appellate Body recommended that the DSB request the United States to bring its measures and administrative practice (*i.e.*, the same-person methodology) into conformity with its obligations under the Subsidies Agreement. AB Report at para. 162.

Proposed Methodology

Pursuant to the statement of the United States to the DSB that we would implement the recommendations and ruling of the DSB in this matter, and in light of the Department's flexibility and discretion under the statute in analyzing changes in ownership, we propose the following new privatization methodology that is fully consistent with the statute.

This proposed methodology is structured as a sequence of rebuttable presumptions, reflecting the conclusions of the Panel and Appellate Body. The "baseline presumption" is that non-recurring subsidies can benefit the recipient over a period of time (*i.e.*, allocation period) normally corresponding to the average useful life of the recipient's assets. However, an interested party may rebut this baseline presumption by demonstrating that, during the allocation period, a privatization occurred in which the government sold its ownership of all or substantially all of a company or its assets, retaining no controlling interest in the company or its assets, and the sale was an arm's-length transaction for fair market value.

Our first point of inquiry under this proposed methodology, therefore, is whether the change in ownership in fact involves a government's sale to a private party of all or substantially all of a subsidized company or its assets, with