

comment by publishing in the **Federal Register** the proposed modification and the explanation for the modification; * * *.” Accordingly, consistent with section 123(1)(g)(C), we published a proposed modification of the Department’s privatization methodology, together with an explanation thereof, and provided opportunity for public comment. *Notice of Proposed Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act and Request for Public Comment*, 68 FR 13897 (March 21, 2003) (*Proposed Modification*). We received numerous affirmative and rebuttal comments submitted pursuant to this notice, as discussed below.

Legal Context

To provide a context for the discussion of changes to our new privatization methodology, we first review the statutory provisions governing the Department’s analysis of changes in ownership in the countervailing duty context, as explained in the Statement of Administrative Action (SAA) and interpreted by the Court. The statute provides, at section 771(5)(F), that “[a] change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm’s length transaction.” The SAA explains that “the term ‘arm’s-length transaction’ means a transaction negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties.” SAA, at 258. The SAA further explains that

[s]ection 771(5)(F) is being added to clarify that the sale of a firm at arm’s length does not automatically, and in all cases, extinguish any prior subsidies conferred. * * * The issue of the privatization of a state-owned firm can be extremely complex and multifaceted. While it is the Administration’s intent that Commerce retain the discretion to determine whether, and to what extent, the privatization of a government-owned firm eliminates any previously conferred countervailable subsidies, Commerce must exercise this discretion carefully through its consideration of the facts of each case and its determination 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 Federal Circuit’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