

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 para. 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 is precluded from finding 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.

Final Modification

The Department's final modification of its practice regarding privatizations of state-owned enterprises in the countervailing duty context is basically the same as the proposed modification, but with some revisions that are discussed below in the Department's response to the comments. This new practice is fully consistent with the statute, which gives the Department broad discretion in analyzing changes in ownership.

The methodology is based on certain 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 control of the company or its assets, and that the sale was an arm's-length transaction for fair market value.

In considering whether the evidence presented demonstrates that the transaction was conducted at arm's length, we will be guided by the SAA's definition of an arm's-length transaction, noted above, as 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.

In analyzing whether the transaction was for fair market value, the basic question is whether the full amount that the company or its assets (including the value of any subsidy benefits) were actually worth under the prevailing market conditions was paid, and paid through monetary or equivalent compensation.² In making this determination, the Department will normally examine whether the government, in its capacity as seller, acted in a manner consistent with the normal sales practices of private, commercial sellers in that country. A primary consideration in this regard normally will be whether the government failed to maximize its return on what it sold, indicating that the purchaser paid less for the company or assets than it otherwise would have had the government acted in a manner consistent with the normal sales practices of private, commercial sellers in that country.³ Accordingly, in determining whether the evidence presented, including, *inter alia*, information on any comparable benchmark prices as well as information on the process through which the sale was made, demonstrates that the transaction price was fair market value, the following non-exhaustive list of factors might be considered.

(1) Objective analysis: Did the government perform or obtain an objective analysis in determining the appropriate sales price? Did it implement the recommendations of such objective analysis for maximizing its return on the sale, including in regard to the sales price recommended in the analysis?

(2) Artificial barriers to entry: For example, did the government impose restrictions on foreign purchasers or purchasers from other industries, or overly burdensome or unreasonable bidder qualification requirements, or any other restrictions that artificially suppressed the demand for, or the purchase price of, the company?

(3) Highest bid: For example, was the highest bid accepted and was the price paid in cash or close equivalent? Why or why not?

(4) Committed investment: For example, were there price discounts or other inducements in exchange for promises of additional future investment that private, commercial sellers would not normally seek (*e.g.*, retaining redundant workers or unwanted capacity)? Did the committed investment requirements serve as a barrier to entry, or in any way distort the value that bidders were willing to pay for what was being sold?

² With regard to an analysis of the transaction price, we note that there is no statutory definition of fair market value, nor does the SAA give any guidance in this area.

³ Under normal market conditions, the purchaser would have otherwise had to pay fair market value for the company or assets.

If we determine that the evidence presented does not demonstrate that the privatization was at arm's length for fair market value, the baseline presumption will not be rebutted and we will find that the unamortized amount of any pre-sale subsidy benefit continues to be countervailable. Otherwise, if it is demonstrated that the privatization was at arm's length for fair market value, any pre-sale subsidies will be presumed to be extinguished in their entirety and, therefore, non-countervailable.

A party can, however, obviate this presumption of extinguishment by demonstrating that, at the time of the privatization, the broader market conditions⁴ necessary for the transaction price to reflect fairly and accurately the subsidy benefit were not present, or were severely distorted by government action (or, where appropriate, inaction).⁵ In other words, even if we find that the sales price was at "market value," parties can demonstrate that the broader market conditions were severely distorted by the government and that the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action.

Some factors, *inter alia*, that might be considered in determining whether these broader market distortions exist include:

1. Basic Conditions: For example, are the basic requirements for a properly functioning market sufficiently present in the economy in general as well as in the particular industry or sector, including free interplay of supply and demand, broad-based and equal access to information, sufficient safeguards against collusive behavior, effective operation of the rule of law, and adequate enforcement of contracts and property rights?

2. Legal and Fiscal Incentives: Has the government used the prerogatives of government in a special or targeted way that makes possible, or otherwise significantly distorts the terms of, a sale in a way that a private seller could not, *e.g.*, through special tax or duty rates that make the sale more attractive to potential purchasers generally or to particular (*e.g.*, domestic) purchasers, through regulatory exemptions particular to the privatization (or privatizations generally) affecting worker retention or environmental remediation, or through subsidization or support of other companies to an extent that severely distorts the normal market signals regarding company and asset values in the industry in question?

⁴ The term "market conditions" is used here in a broad sense, not only incorporating economic and financial considerations, but also the legal and regulatory regime in which the market operates.

⁵ We would generally be concerned here only with the actions of government in its role "as government," and not the actions of the government in its role as the seller. In other words, we would examine here only those actions which private sellers could not take even if they wished to do so.