

Where a party demonstrates that these broader market conditions were severely distorted by government action and that the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action, the baseline presumption will not be rebutted and the unamortized amount of any pre-sale subsidy benefit will continue to be countervailable. Where a party does not make such a demonstration with regard to an arm's-length sale for fair market value, we will find all pre-sale subsidies to be extinguished by the sale and, therefore, to be non-countervailable.

### Analysis of Public Comments

Numerous comments and rebuttal comments were submitted in response to the proposed modification. We have carefully considered each of the comments submitted. While we have not adopted or made revisions reflecting all of the comments, the comments were nevertheless useful in helping to clarify the concepts underlying our privatization analysis and in refining the proposed modification. As such, we are grateful to those who took the time to comment on this aspect of the Department's countervailing duty methodology. Specific comments are summarized below, along with the Department's position on each. For more detail on the comments submitted, see the Department's Web site at <http://ia.ita.doc.gov>, where all public comments received have been posted in their entirety.

#### 1. Legality of New Methodology

Some commenters argue that the Department's methodology is inconsistent with the statute, the SAA, and *Delverde III* because it would find the extinguishment of subsidies solely by virtue of an arm's-length sale for fair market value. Specifically, the commenters suggest that the methodology represents a *per se* rule that is in conflict with Section 771(5)(F) of the URAA, which states that "a change in ownership \* \* \* does not by itself require [extinguishment of previously countervailable subsidy benefits] \* \* \* even if the change in ownership is accomplished through an arm's length transaction."

Other commenters counter that this argument was based on a misunderstanding of the statutory provision and of the methodology. Specifically, they state that the statute in no way questions the fundamental criterion of fair market value; the point of Section 771(5)(F) is that a sale by a governmental seller, even if at arm's length, is not necessarily a sale for fair

market value. Accordingly, examination of a privatization must consider evidence that the governmental seller did not seek, and in turn the purchaser did not pay, fair market value.

*Department's Position:* We disagree that the Department's final modification is contrary to the statute. The statutory provision regarding changes in ownership makes clear that the Department is not *required* to find extinguishment of previously bestowed subsidies on the sole basis that a change in ownership occurred, or that it occurred in an arm's-length transaction. According to the SAA, this provision is meant to clarify that "the sale of a firm at arm's-length does not *automatically, and in all cases*, extinguish any prior subsidies conferred. Absent this clarification, some might argue that all that would be required to eliminate any countervailing duty liability would be to sell subsidized productive assets *to an unrelated party*." (Emphasis added.) SAA, at 258. Under our new methodology, we will not treat an arm's-length privatization as an exclusively dispositive indicator of subsidy extinguishment, but will require other evidence indicating that the post-sale company no longer benefits from such subsidies. Specifically, in addition to analyzing whether the sale was between unrelated parties, we will examine any evidence presented on whether the sale was for fair market value and/or whether there were broader market distortions that would be relevant to a finding of subsidy extinguishment.

#### 2. Burden of Proof

Several commenters state that the burden of proof on the respondent under the new methodology is inconsistent with the requirements under U.S. law, and corresponding international agreements, permitting the imposition of countervailing duties. Specifically, they believe that this methodology unfairly and illegally shifts the burden of proof onto the respondent to demonstrate that there was a privatization at arm's length and for fair market value in order to rebut the presumption of a continuing benefit. Some commenters argue that the only burden that can properly be placed on the respondents is the burden of showing that there has been a privatization. Once this burden has been met, it is the petitioners' or the Department's responsibility to affirmatively demonstrate that the conditions exist to allow the subsidy benefit to continue after the privatization. One commenter suggests that once the petitioners have come forward with evidence to raise a

genuine issue of current subsidization, the Department may then shift the burden to the respondent to counter with opposing evidence that the subsidy it received was extinguished.

*Department's Position:* We disagree that the new methodology unfairly or illegally shifts the burden of proof onto any particular party. Our baseline presumption that subsidies may benefit the recipient over a number of years is entirely consistent with U.S. law. The *Delverde III* Court found the presumption to be contrary to U.S. law only to the extent that it was applied as a *per se* rule, *i.e.*, a rule that precluded consideration of all of the facts and circumstances of the sale. Moreover, regardless of how one interprets the international agreements on this point, it is important to recognize that they are not automatically incorporated into U.S. law.<sup>6</sup> WTO findings are also not automatically incorporated into U.S. law.<sup>7</sup> In any event, the WTO findings here do, in fact, uphold the baseline presumption.<sup>8</sup> The Panel and Appellate Body made it clear that it is not the mere fact of privatization that is sufficient to disturb the baseline presumption. Rather, it is the payment of fair market value in an arm's-length privatization that can extinguish the prior subsidies.<sup>9</sup>

The implication at the heart of these commenters' arguments is that the occurrence of a privatization itself creates a presumption of subsidy extinguishment. This contention is without any support under U.S. law or even under the relevant WTO decisions. Neither the Federal Circuit nor the WTO has indicated that the baseline presumption ceases to apply simply because a privatization has occurred, regardless of its nature and terms, and that somehow it becomes the petitioners' or the Department's responsibility to demonstrate that such a privatization was not at arm's length for fair market value.<sup>10</sup>

As a practical matter, we anticipate that, in most if not all of the privatizations we examine, one party or

<sup>6</sup> 19 U.S.C. § 3512(a)(1).

<sup>7</sup> See SAA at 363 (1032).

<sup>8</sup> See, e.g., AB Report at para. 84.

<sup>9</sup> As noted elsewhere, the starting point of the AB Report was the assumption that the privatizations in all 12 of the subject cases were arm's-length transactions for fair market value.

<sup>10</sup> For instance, the AB Report touches on the issue of burden in an administrative review when it states that " \* \* \* an investigating authority, in an administrative review, when presented with information directed at proving that a 'benefit' no longer exists following a privatization, must determine whether the continued imposition of countervailing duties is warranted in the light of that information." (Emphasis added.) AB Report at para. 144.