

our benefit-to-recipient determination for equity infusions essentially is made by determining whether a private actor, when faced with the same investment circumstances and choices as those faced by the government, would have made the same decisions and taken the same actions as those of the government. Accordingly, the "private, commercial seller" standard that we have adopted for this final modification is consistent with our longstanding equity infusion practice.

Finally, the relevance of the government's actions to whether subsidies are extinguished during a privatization was recognized by the *Delverde III* Court where it stated, for example, that "[t]he government has different concerns from those of a private seller. Unlike a private seller who seeks the highest market price for its assets, the government may have other goals, such as employment, national defense, and political concerns, which may affect the terms of a privatization transaction." *Delverde III*, at 1369. Likewise, the relevance has been clearly acknowledged by the WTO and, in fact, is central to the Appellate Body's reasoning with regard to broader market distortions, as detailed elsewhere in this notice.¹² Accordingly, the approach that we have adopted here is fully consistent with U.S. law and practice, as well as the WTO findings.

4. Arms-Length Analysis

At least one commenter expresses a view that an arm's-length transaction is not, in and of itself, a criterion for determining that subsidy benefits are extinguished. Rather, the commenter suggests that the existence of an arm's-length privatization is strong evidence of—and should create a presumption of—the payment of market value. The commenter notes that there are circumstances where the Department may find a transaction price to be fair market value even though the sale was not at arm's length. The commenter also suggests that where a private-to-private transaction is found to have occurred at arm's length, the sale was, by definition, for fair market value.

Another commenter states that the Department should not apply an arm's-length sale analysis unless the parties to the transaction are truly unrelated. In particular, the commenter believes that reorganizations of the structure of joint

ventures or similar business entities are not transactions to which this proposed modification should be applied.

Department's Position: The Department's new methodology requires a finding of both an arm's-length transaction and a transaction price reflective of fair market value as the basis for overriding the baseline presumption. We note that this is entirely consistent with both the Panel's and Appellate Body's findings. Moreover, an arm's length sale is a necessary precondition for an accurate determination regarding the transaction price under the fair-market-value analysis we have adopted. Our private, commercial seller standard only makes sense where we first establish that the buyer's and seller's interests are independent of each other.

5. Fair-Market-Value Analysis

In General: At least one commenter urges the Department first to consider more broadly and develop a rationale as to why a privatization may extinguish prior subsidies, stating that this rationale should then underpin every aspect of the privatization methodology. Specifically, the correct rationale, this commenter suggests, is that where fair market value has been paid, the company no longer has inputs acquired at a cost artificially reduced by a government financial contribution. Many other commenters recognize that fair market value can be difficult to assess in the circumstances of particular cases. However, in looking at the Department's proposed approach to evaluating fair market value, some commenters argue that the Department should not establish a rigid "hierarchy" of factors to be examined in its analysis of fair market value, but rather remain flexible to address the diverse factual scenarios that may be encountered by the agency in the future.

Others disagree, emphasizing that a sales price consistent with the recommendations of an independent or objective analysis should be the primary consideration in analyzing the sale. Some commenters propose further criteria that could be included in the evaluation process, e.g., industrial policies of a country and stock price trends following the offering. Other commenters find the Department's proposed factors to be too vague.

Barriers to Entry: Specifically with regard to artificial barriers to entry, some commenters argue that significant restrictions on stock purchased by the general public are inconsistent with seeking maximum return on the sale. Accordingly, the Department should carefully scrutinize any restrictions on

the holding period or minimum purchase quantity, and examine whether different classes of stock have been created or whether there are any other advantages bestowed on those buying such stock. Additionally, some commenters urge the Department to scrutinize particularly closely situations where a government seeks "strategic" investors or where the parties to the transaction were already involved in a contract (e.g., a lease), and to find any process that has only one or two bidders as not being truly open.

Other commenters state that, although entry barriers may be one relevant factor, they cautioned that a transaction should not be ruled to be not at fair market value solely because there were restrictions on the bidders. One commenter suggests that "overly burdensome" and "unreasonable" bidder qualifications are too ambiguous and could result in unpredictable determinations. Another emphasizes that limitations on eligibility matters only if the pool of eligible participants is insufficient to create a market driven transaction and if the limitations are not based on economic considerations. Finally, an additional commenter urges the Department to abandon this factor altogether because it would be too difficult to quantify the effect of such barriers on bid prices.

Objective Analysis: Regarding objective analyses, several commenters agree that a sale based on an objective analysis and which sets a minimum price based on that analysis should be presumed to be at fair market value if the sale is consummated near or above the minimum price. Thus, the combination of an independent valuation, a sale near or above the amount of the independent valuation, and the fact that the sale occurred in an economy not designated by the Department as a non-market economy should create a presumption that the sale was at fair market value. Other commenters caution against such objective analyses, urging that any such analysis must be compared with comments by the financial press as well as the stock price following privatization. One commenter argues that the independence of the analysis should be closely scrutinized, and that the absence of an independent analysis should be a dispositive indicator that the sale was not for fair market value.

Highest Bid: Regarding the selection of the highest bid, several commenters contend that the fact that a government seller does not accept the highest price bid does not, in and of itself, warrant the conclusion that fair market value was not paid. In such a case, the

¹² See, e.g., AB Report at para. 124, where the Appellate Body noted that, "[i]n 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."