

## 6. Safe Harbor

Some commenters argue for the Department to consider identifying a "safe harbor" with explicit guidelines for when a privatization will be deemed to eliminate the continuing benefit of past nonrecurring subsidies. Such a safe harbor, these commenters continue, would be desirable not only to simplify proceedings before the Department, but also to advance the U.S. policy of encouraging privatization, especially in developing countries. One approach, for example, would be to develop a clear rule that a privatization carried out under independent private advisors through commercial auction procedures, and/or that used post-privatization audits, would normally be deemed to be for fair market value. Other commenters suggest additional "safe harbor" rules, including a simple safe harbor for private-to-private sales.

In response to these suggestions, other commenters state that it is important that the Department maintain flexibility in its privatization methodology to consider the facts and circumstances of each case before it determines whether subsidies have been extinguished following a privatization. They find, therefore, that it would be premature for the Department to attempt to define "safe harbors" at this point without reviewing the various factual scenarios that accompany privatization. At least one commenter objects strongly, arguing that a safe harbor would merely become a "roadmap" for subsidization.

*Department's Response:* We disagree that any explicit "safe harbor" *per se*, as envisioned by certain commenters, is warranted. The new methodology described in this notice is sufficiently detailed and articulated to provide parties with a good understanding of how the Department will approach analyzing privatizations, and with a reasonable basis for forming expectations about how the Department will rule when examining a particular fact pattern. As discussed elsewhere in this notice, where we have refrained from detailing specific rules regarding various aspects of this methodology, we have done so either because such issues did not lend themselves to defined rules, or because we wanted to gain further experience in a particular facet of the methodology before establishing a defined rule.

## 7. Broader-Market-Distortions Analysis

*In General:* Several commenters state that the Department should not attempt analyzing broader market or economic conditions, but should instead focus its analysis solely on the benefit to the

purchaser. Specifically, these commenters believe that the proposed analysis of broader market distortions would effectively allow the Department to ignore the fundamental importance of an arm's-length, fair-market-value privatization and impose countervailing duties against a company's products without determining the existence or amount of any countervailable benefit currently enjoyed by the company. A related comment is that this analysis of broader market distortions should not be a separate analysis, but should be included as part of the fair-market-value analysis because the issues are fundamentally the same.

Moreover, several commenters find the Department's proposed market distortion criteria in general to be too vague and sweeping, and therefore, unpredictable and impractical. Other commenters suggest that the macroeconomic distortions contemplated under this analysis would be too general to meet the specificity requirements of a countervailable subsidy, and that only those actions that specifically affect the value of the privatized entity may be relevant.

Some commenters also view the Department's "reasonable basis for believing" in regard to proof of severe market distortion as too low a standard. Instead, one commenter proposes that the Department restate the standard so that the presumption of extinguishment could only be rebutted with clear and convincing evidence that severe market distortion exists; in the absence of such evidence, the Department should not overturn the presumption of extinguishment that follows an arm's length sale at fair market value. Some commenters further argue that such distortions must be quantified in order to prove that such distortions are material.

Some commenters supported the Department's proposed approach to market distortions, but urged the Department to leave itself discretion to adapt its analysis to the circumstances of each case. Another commenter suggested that the distortion factors be preceded by a preamble allowing for general consideration of market distortion issues that may not be covered by the specific factors listed. One commenter also suggests that post-sale conditions be added to the proposed list of factors in evaluating market distortions.

*Basic Conditions:* With regard to the "basic conditions" criterion, although this proposed criterion was lifted from language in the WTO Appellate Body opinion, several commenters found it too vague and sweeping to provide any

meaningful guide to parties. Several commenters suggested that the Department should determine that the "basic conditions" necessary for an undistorted market are present if the economy is a market economy, and that those conditions are not present if the economy is a non-market economy. Accordingly, the proposed analysis of these basic market conditions is not necessary where the Department has already deemed the country to be a market economy for countervailing duty purposes.

*Related Incentives:* Because they find this factor to be overly broad, several commenters think that the Department should amend the "related incentives" criterion to reflect the economic reality that all governments engage in activities that affect market transactions. Instead, they believe that the Department should focus on the question of whether the government action was intended to facilitate the sale for less than fair market value with a view to later reversing the action so as to effectively provide the buyer the asset or entity at less than fair market value. Other commenters, however, support consideration of this factor as it provides further insight into whether the government acted like a private, commercial seller.

*Legal Requirements:* Some commenters suggest that while legal requirements imposed by governments do affect the market price, they would have to be extremely restrictive (such as requiring a level of employment far in excess of what is economically justifiable) in order to vitiate the fair market value of the sale. Because of this, these commenters believe that this criterion is overly broad and should not be considered in the Department's analysis. Several other commenters argue that any such legal requirements would be fully reflected in the purchase price of the company so long as that price was a fair market value.

*Creation/Maintenance:* With specific reference to the effect on the market of subsidization of other companies, several commenters argue that the fact that other companies are subsidized is not evidence that the privatization in question does not "fairly and accurately reflect" the market value for the privatized asset but, rather, that such creation/maintenance effects are fully reflected in the fair market value. One commenter notes that the countervailing duty law is meant to offset the benefits to specific recipients, not to remove market distortions to an industry generally. Several commenters also query whether this analysis would include subsidization outside of the