

country in question, suggesting that such a “cross border” analysis would be inappropriate. Some commenters further argue that this factor would fall particularly heavily on developing countries—precisely those countries where the United States is encouraging privatization—because they are more likely to have numerous companies and industries that are subsidized.

Department’s Position: For this final modification, we have kept the analysis of broader market distortions separate and distinct from the arm’s-length, fair-market-value analysis. We recognize that this distinction may appear somewhat formalistic, given that where there are broader market distortions, any conclusions regarding market value are necessarily implicated. Nevertheless, the overall emphases of the two inquiries are distinguishable.¹⁶ The former focuses on the government in its capacity as seller, and whether its actions are consistent with those of a private, commercial seller. The analysis of broader market distortions, on the other hand, focuses on the government in its capacity as regulator and policymaker.¹⁷ Such an analysis is appropriate because it takes into account the unique power of a government to institute a basic market regime, as well as to create particular laws, regulations, economic incentives and unique conditions that impact the purchasers’ decisions.¹⁸ The use of such governmental powers may be distortive where they make a particular sale possible that would not otherwise be possible, or at least not possible under the same terms as those of the transaction that actually took place, under normal market, legal, and regulatory conditions.¹⁹

With regard to the comment that the factors we have listed as potentially

relevant are too broad, we disagree. We believe that it is important to leave room for flexibility in this analysis and not to circumscribe artificially or prematurely the nature of the factors that could be found to distort a market. Such distortions can be specific to the unique circumstances of particular countries or markets, and it is especially difficult for the Department to foresee at this time all of the factors that may be relevant to this analysis, particularly without obtaining more experience in this area. Therefore, we intend that this analysis will be conducted on a case-by-case basis, and that we will be able to refine such analysis over time building on our accumulated experience.

That said, we recognize that perfect markets seldom exist outside of economics textbooks. We do not intend to “fail” a privatization merely because the broader environment in which it took place did not perfectly conform to some market paradigm. Rather, we will be balanced and realistic in our analysis, focusing on those severe distortions that would have a meaningful impact on the transaction in question.

We further disagree with the suggestion that our “basic conditions” analysis and our market distortions analysis should generally be limited to those countries that have non-market or transitional economies. First, to limit this analysis to non-market economies would reduce this aspect of our new methodology to redundancy and irrelevance given that the Department’s practice is not to countervail subsidies in countries it finds to have non-market economies. Moreover, we will not necessarily limit the basic-conditions analysis to economy-wide distortions, but may, where appropriate, examine distortions that primarily affect particular industries or sectors of the economy. Furthermore, there is no indication that the Appellate Body’s reasoning in this regard was limited solely to the circumstances of a non-market or transitional economy.

After consideration of the comments regarding the standard of proof in this analysis, we have removed the reference to “reasonable basis for believing” when demonstrating that the transaction price is meaningfully different from what it otherwise would have been. Such language unnecessarily complicated and confused the standard. It will take more than mere speculation to demonstrate that market distortions exist. That said, we are mindful of the fact that it may be very difficult to identify “hard data” that conclusively demonstrates the extent of such distortions or their impact on the transaction price. It is

inherently difficult to show and, more so, to quantify precisely what the price would otherwise have been had there been a properly functioning market and regulatory regime.²⁰ Therefore, we will guard against an interpretation of our evidentiary standard that is so high as to be unattainable in practice.

8. Privatization of Parent or Holding Companies

Several commenters state that this new privatization methodology should not be applied where the privatization at issue occurs at the level of a holding company or parent company several levels removed from the actual respondent in the case. Some commenters argue that such privatizations do not extinguish subsidies provided to the subsidiary company that is the respondent in the case. Another commenter argues that the Department should carefully analyze the facts of each transaction and determine whether a particular subsidiary is benefitting from assistance received at the parent company level.

Department’s Position: We are not adopting any specific rule at this time with regard to how we will examine privatizations that occur at levels several times removed from the particular company under investigation, but will make such a determination on a case-by-case basis. We have learned from past experience that such an analysis is highly case-specific, and should take into consideration the context and all the facts surrounding a particular privatization.

9. Other Changes in Ownership

In the proposed modification, the Department invited comment on what percentage of shares or assets sold should be the threshold for triggering application of the methodology and, similarly, how incremental sales should be treated. Some commenters state that the partial sale of shares or assets does not provide any basis for reexamining an allocated benefit stream, noting that nothing in the WTO’s decisions addresses partial sales and, therefore, the agency is not required to revise its methodology to address this situation.

Other commenters argue that restricting the circumstances in which the baseline presumption can be rebutted to full privatizations represents an arbitrary limitation that violates the fundamental principle that countervailing duties can only be imposed upon a company’s products if

¹⁶ This distinction is also clearly reflected in the *AB Report*, and was the basis for the finding that an arm’s-length, fair-market-value privatization does not necessarily extinguish prior subsidies.

¹⁷ A loose, but helpful analogy here may be that of a game. Our analysis of government “as seller” examines whether the government was playing, like a normal player, to win (*i.e.*, to maximize its winnings). Our analysis of government “as government” examines the rules of the game, to determine whether they were sufficient to ensure a meaningful game to begin with and whether they favor a particular outcome to the game.

¹⁸ In this final modification, we have combined the four originally proposed criteria into two, to clarify and emphasize these two basic thrusts of the market-distortion analysis.

¹⁹ The presence of severe market distortions can render inoperative the presumption that fair market value “is deemed to include (*de facto*) the value of the advantage or benefit already received” (*Panel Report*, at para. 7.72), or that “the privatized producer paid for what he got and thus did not get any benefit or advantage from the prior financial contribution bestowed upon the state-owned producer.” *Panel Report*, at para. 7.82.

²⁰ Accordingly, parties will not normally be required to quantify the difference between the actual transaction price and the “undistorted market value.”