

it is shown that the company is receiving a benefit from a financial contribution. By ignoring other circumstances under which the presumption may be rebutted, such as a partial privatization, the Department would, contrary to the Subsidies Agreement, impose countervailing duties at a level exceeding the actual benefit to the recipient.

Turning to the issue of control, some commenters believe that the Department should apply its methodology when a government has relinquished effective control, even if the privatization has not been completed. Several commenters, however, argue that the mere fact that the government retains some control in a privatized company cannot automatically justify the imposition of countervailing duties based upon the full amount of subsidies bestowed on the state-owned enterprise prior to privatization.

Assuming that the release of control is relevant to when the Department should apply its methodology, several commenters suggested that the "use or direct" standard in the Department's cross-ownership regulations might be applicable. Another commenter suggested that the nature and relevance of control should be determined by the Department on a case-by-case basis, taking into account all of the various means by which parties may exercise control over the corporation—the inquiry may well require the Department to examine factors beyond the level of share ownership.

Other commenters disagreed, stating that the issue should not be whether the government has relinquished control of a company, but instead the Department should require that the government has no ownership whatsoever of the company and no right in any way to exert control over the company in order for the prior subsidies to be considered extinguished. Moreover, the "use or direct" standard of cross ownership is not necessarily appropriate because cross-ownership issues are very different from privatization issues.

Finally, some commenters argue that any final modification should not be applicable to private-to-private sales as well as government-to-private sales (*i.e.*, privatizations) because private-to-private sales were not addressed in the WTO decisions. Some commenters state that in the private-to-private context, an arm's-length transaction is necessarily one in which fair market value is paid and, as a result, the purchaser receives no benefit from past subsidies. Another commenter states that while a private-to-private sale can extinguish pre-sale subsidy benefits, an analysis to

determine whether the price paid for the private assets reflects the current market conditions would be appropriate.

Department's Position: We are not making a decision at this time as to whether or how we will apply this new methodology to types of changes in ownership and factual scenarios (*e.g.*, partial and gradual privatizations, private-to-private sales) other than the privatization of all or substantially all of a state-owned enterprise. Rather, we wish to provide the public with an additional opportunity for further comment on the applicability of the new methodology in those circumstances.²¹ Although we have received some comments to date on such issues, as summarized above, we believe that with the benefit of seeing our final modification, parties will be in a position to provide more informed and precise arguments as to how and why this final modification might be applied to these other types of sales.

In this regard, we encourage parties to address whether, if the government remains in a position of control over a privatized company, that company may continue to be operated in a manner that furthers the government's agenda. Further, at what point does a change away from government ownership cause the subsidy recipient to become a full profit maximizer? Is it where the government holds only a minority ownership in the company? Where the government retains only latent control (*e.g.*, a "golden share")? Or where it retains no control whatsoever? How should control even be defined in this regard?

Moreover, parties might wish to explain why becoming a profit maximizer is relevant to the extinguishment of prior subsidies in a sale. How does this logic apply, if at all, to a private-to-private sale where, presumably, the seller was already a profit maximizer? Would the application of this final modification to private-to-private sales be consistent with the *Delverde III* Court statement 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.

²¹ The Panel and Appellate Body explicitly refrained in their findings from addressing these alternative fact patterns. Therefore, deferring a decision on how this new methodology might apply to these other changes in ownerships in no way detracts from the United States' implementation of the Dispute Settlement Body's recommendations in this dispute.

Thus a case involving privatization does not necessarily govern a private-to-private situation.

Delverde III, at 1369.

We ask that any additional comments on these specific issues be submitted to the Department within 60 days of publication of this final modification.²² Parties should submit four written copies and an electronic copy (in WordPerfect, MS Word, or Adobe Acrobat format) of their comments to Room 1870, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230. Attention: Greg Campbell, Office of Policy. Re: Privatization Comments. Comments should be double-spaced and limited to 10 pages. All comments will be made available for public viewing in the Department's Central Records Unit, which is located in room B-099 of the main Department building. The Department also intends to post on Import Administration's Web site, shortly after the comment deadline, all public comments received pursuant to this request.

10. Concurrent Subsidies²³

Regarding subsidies that may have been provided to encourage or facilitate privatization, some commenters argue that an analysis should be undertaken to determine the role of that subsidization in the transaction in question. Specifically, they state that the new methodology should recognize that the provision of subsidies prior to or during privatization proves that the market was distorted and that the privatization did not occur at fair market value. At a minimum, subsidies provided in the context of privatization are new subsidies to the new company and are therefore countervailable. Another commenter proposes that any subsidies provided within two years of a company's privatization should be considered as subsidies to the new owners, since they were, or may be presumed to have been, provided to benefit the new owners at the time of sale. One commenter cited to Article 27.13 of the Subsidies Agreement to support its contention that concurrent subsidies are a unique type of subsidy that is not necessarily extinguished in a fair market value sale. Any failure to countervail concurrent subsidies, some

²² This additional comment period is separate and distinct from the current proceeding in which we are modifying our practice pursuant to section 123 of the URAA.

²³ For the purposes of this final modification, we consider "concurrent subsidies" to be subsidies given to facilitate, encourage, or that are otherwise bestowed concurrent with a privatization.