

commenters argue, would merely encourage governments to heavily subsidize companies that they intend to privatize.

Other commenters disagree, stating that the Department should make clear that the fact that a government provides companies with subsidies to make them marketable should not prevent the extinguishment of the subsidy by an arm's-length sale at fair market value. As the WTO and U.S. courts have recognized, when a party pays fair market value for an asset (even if the asset is a whole company), all prior subsidies, regardless of when given, are extinguished. Several commenters maintain that as long as the assistance, such as debt forgiveness, is negotiated by the parties as part of the privatization transaction, any value of the assistance will be reflected in the purchase price paid by the new owners and there would therefore be no countervailable benefit accruing to the newly privatized company from the assistance. However, if the government provided the debt forgiveness after the bids were finalized, according to one commenter, the debt forgiveness would not necessarily have been reflected in the bid price, and therefore the debt forgiveness should be treated as a new subsidy.

Another commenter states that, where the government offers certain inducements (e.g., debt forgiveness) to encourage buyers, these inducements would be expected to increase the transaction price above market value. Although these may constitute new subsidies, the commenter maintains, such inducements generally cannot be considered evidence that the sale was for less than fair market value.

Department's Position: As we noted in the proposed modification, the Department has long wrestled with the issue of subsidies given to encourage, or that are otherwise concurrent with, a privatization.²⁴ However, based on our considerable experience to date with analyzing these subsidies and on the comments received, we are now prepared to provide more definitive

guidance on how we intend to analyze these types of subsidies.

For the purposes of this new methodology, the Department intends to scrutinize very carefully any instances of concurrent subsidies, and will normally determine that the value of a concurrent subsidy is fully reflected in the fair market value price of an arm's-length change privatization and, therefore, is fully extinguished in such a transaction, if the following criteria are met: (1) The nature and value of the concurrent subsidies were fully transparent to all potential bidders and, therefore, reflected in the final bid values of the potential bidders, (2) the concurrent subsidies were bestowed prior to the sale, and (3) there is no evidence otherwise on the record demonstrating that the concurrent subsidies were not fully reflected in the transaction price.

We believe that this approach is consistent with analyzing a privatization from the point of view of the purchaser. All other things being equal, in a normally functioning and transparent market, we would expect that potential investors would be willing to increase the value of their offer prices to reflect the additional value that such concurrent subsidies are expected to contribute to the overall value of the company or its assets. Such additional value is therefore properly considered to be "paid for" in the purchase price, barring clear evidence to the contrary.

We are sympathetic to the argument that concurrent subsidies may be special in the sense that, in certain cases, without such subsidies, bidders may not be willing to purchase the company or its assets, and that capacity which would otherwise cease to exist is thereby allowed to continue producing. This is a particularly important consideration for industries characterized by chronic overcapacity and excess production. It is for this reason, among others, that we intend to scrutinize very closely all instances where subsidies are given to facilitate or induce a privatization.²⁵

We recognize, however, that most concurrent subsidies are given in an effort to increase the attractiveness of the company or assets as an investment. In other words, normally these subsidies increase the value and, therefore, in a normally functioning market, increase the price the purchaser pays over what he or she would otherwise pay. Thus,

normally, there would be no reason to believe that a concurrent subsidy would lead to a purchaser paying less than fair market value.

With regard to the suggestion that concurrent subsidies be considered to be *new* subsidies to the new owners, we have not adopted that approach at this time because, for the purposes of this final modification, we are not distinguishing between a company and its owners.²⁶

We caution that our rationale for addressing concurrent subsidies should only be understood to apply to the circumstances of concurrent subsidies in the privatization context. If pushed to an extreme beyond these circumstances, such reasoning may lead to absurd conclusions that undermine the very effectiveness of the countervailing duty remedy. The Department would not consider the extreme argument, for example, that because the bid of a new owner reflected a recurring tax benefit that the company is expected to receive indefinitely into the future, that those future tax benefits are not countervailable. Any actionable subsidy bestowed subsequent to the privatization will be countervailed in full.

11. Continuing Benefit Amount

In instances in which the privatization was for less than fair market value and, therefore, did not result in the extinguishment of the benefits of pre-privatization subsidies, the Department sought comments on how it should quantify the amount of the benefit from those subsidies the company continues to enjoy. Some commenters state that, in such circumstances, the unallocated portion of the subsidy must continue to be countervailed at the same level as if no privatization had occurred. This is the only logical result where the baseline presumption of continuing benefit has not been rebutted. Other commenters propose formulas, e.g., the difference between what the purchaser actually paid and the "fair market value" of the company or assets purchased, while still others proposed that such calculations should be made on a case-by-case basis with no set formula. One commenter proposes that the quantification of the amount of continuing benefit should, at the very least, take into account both the normal allocation period for the original assets and the price paid for the assets.

Department's Position: Where the Department determines that the baseline presumption has not been rebutted

²⁴ The Department spoke to this issue in the Preamble to the CVD Regulations (63 FR 65348, 65355):

[w]hile we have not developed guidelines on how to treat this category of subsidies, we note a special concern because this class of subsidies can, in our experience, be considerable and can have a significant influence on the transaction value, particularly when a significant amount of debt is forgiven in order to make the company attractive to prospective buyers. As our thinking on changes in ownership continues to evolve we will give careful consideration to the issue of whether subsidies granted in conjunction with planned changes in ownership should be given special treatment.

²⁵ The special treatment for certain privatization-related subsidies in developing countries under Article 27.13 also suggests that these subsidies are distinguishable under the Subsidies Agreement.

²⁶ This approach is consistent with the WTO's findings. See, e.g., *AB Report* at para. 115.