Comment 31: Duty Drawback on Non-Physically Incorporated Items and Excessive Loss Rates, and on Domestic Sales of Finished Products Manufactured from Imported Raw Materials
Comment 32: Import Duty Reduction for Cutting Edge Products
Comment 33: Permission for Hynix and SEC to Build in Restricted Area
Comment 34: Exemption of Value-Added Tax (''VAT'') on Imports Used for Bonded FactoriesUnder Construction

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DEPARTMENT OF COMMERCE

International Trade Administration

Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Modification of agency practice regarding privatizations.

SUMMARY: On January 8, 2003, the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) adopted the report of the WTO Appellate Body in *United States-Countervailing Measures Concerning Certain Products from the European Communities,* WT/DS212/AB/R (December 9, 2002) (*Certain Products*), that recommends that the United States bring its administrative practice regarding privatization, both as such and as applied in twelve challenged administrative determinations, into conformity with its obligations under the WTO Subsidies and Countervailing Measures Agreement (Subsidies Agreement). Section 123 of the Uruguay Round Agreements Act (URAA) governs changes in the Department of Commerce's (Department's) practice when a dispute settlement panel or the Appellate Body of the World Trade Organization finds such practice to be inconsistent with any of the Uruguay Round agreements. Consistent with section 123(1)(g)(C), we published a proposed modification of the Department's privatization methodology, together with an explanation thereof, and provided opportunity for public comment. *Notice of Proposed Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act and Request for Public Comment,* 68 FR 13897 (March 21, 2003). We received numerous affirmative and rebuttal comments submitted pursuant to this notice, as discussed below.

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SUPPLEMENTARY INFORMATION:

Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the Tariff Act of 1930, as amended (the Act). Citation to ''section 123'' refers to section 123 of the URAA.

Background

On February 2, 2000, the U.S. Court of Appeals for the Federal Circuit in *Delverde Srl* v. *United States,* 202 F.3d 1360, 1365 (Fed. Cir. 2000), *reh'g granted in part* (June 20, 2000) (Delverde III), rejected the Department's application of its change-in-ownership methodology, as explained in the *General Issues Appendix,* to the facts before it in that case.[1] The Federal Circuit held that the Act, as amended, did not allow the Department to presume conclusively that the subsidies granted to the former owner of Delverde's corporate assets automatically ''passed through'' to Delverde following the sale. Rather, where a subsidized company has sold assets to another company, the Court held that the Act requires the Department to examine the particular facts and circumstances of the sale and determine whether the purchasing company directly or indirectly received both a financial contribution and benefit from the government. Delverde III, 202 F.3d at 1364–1368.

Pursuant to the Federal Circuit's finding, the Department developed a new change-in-ownership methodology, first announced in a remand determination on December 4, 2000, following the Federal Circuit's decision in *Delverde III,* and also applied in *Grain-Oriented Electrical Steel from Italy; Final Results of Countervailing Duty Administrative Review,* 66 FR 2885 (January 12, 2001). The first step under this methodology was to determine whether the legal person to which the subsidies were given was, in fact, distinct from the legal person that produced the subject merchandise exported to the United States. If we determined that the two persons were distinct, we then analyzed whether a subsidy was provided to the purchasing entity as a result of the change-in-ownership transaction. If we found, however, that the original subsidy recipient and the current producer/exporter were the same person, then that person continued to benefit from the original subsidies, and its exports were subject to countervailing duties to offset those subsidies.

This ''same-person'' privatization methodology is currently the subject of appeals to the Federal Circuit in three cases: *Acciai Speciali Terni S.p.A.* v. *United States,* Ct. No. 01–00051; *Allegheny Ludlum Corp.* v. *United States,* Ct. Nos. 03–1189 and 03–1248; and *GTS Industries, S.A.* v. *United States,* Ct. Nos. 03–1175 and 03–1191.

On August 8, 2001, the European Communities requested that the DSB establish a dispute settlement panel to examine the practice of the United States of imposing countervailing duties on certain products exported from the European Communities by privatized companies. A panel was established, the case was briefed and argued, and the Panel circulated its final report on July 31, 2002. *United States-Countervailing Measures Concerning Certain Products from the European Communities,* WT/DS212/R (July 31, 2002) (Panel Report). The United States appealed certain findings and conclusions in the Panel Report, and the Appellate Body circulated its report on December 9, 2002. *United States-Countervailing Measures Concerning Certain Products from the European Communities,* WT/DS212/AB/R (December 9, 2002) (AB Report). The AB Report, and the Panel Report as modified by the AB Report, were adopted by the DSB on January 8, 2003. On January 27, 2003, the United States informed the DSB that it would implement the recommendations and rulings of the DSB in a manner consistent with its WTO obligations.

Section 123 of the URAA is the applicable provision governing the actions of the Department when a WTO dispute settlement panel or the Appellate Body finds that a regulation or practice of the Department is inconsistent with any of the Uruguay Round agreements. Specifically, section 123(g)(1) provides that, ''[i]n any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until * * * (C) the head of the relevant department or agency has provided an opportunity for public

[1] Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, 58 FR 37217, 37225 (July 9, 1993).

comment by publishing in the **Federal Register** the proposed modification and the explanation for the modification; * * *.'' Accordingly, consistent with section 123(1)(g)(C), we published a proposed modification of the Department's privatization methodology, together with an explanation thereof, and provided opportunity for public comment. *Notice of Proposed Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act and Request for Public Comment,* 68 FR 13897 (March 21, 2003) (*Proposed Modification*). We received numerous affirmative and rebuttal comments submitted pursuant to this notice, as discussed below.

Legal Context

To provide a context for the discussion of changes to our new privatization methodology, we first review the statutory provisions governing the Department's analysis of changes in ownership in the countervailing duty context, as explained in the Statement of Administrative Action (SAA) and interpreted by the Court. The statute provides, at section 771(5)(F), that ''[a] change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction.'' The SAA explains that ''the term 'arm's-length transaction' means a transaction negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties.'' SAA, at 258. The SAA further explains that

> [s]ection 771(5)(F) is being added to clarify that the sale of a firm at arm's length does not automatically, and in all cases, extinguish any prior subsidies conferred. * * * The issue of the privatization of a state-owned firm can be extremely complex and multifaceted. While it is the Administration's intent that Commerce retain the discretion to determine whether, and to what extent, the privatization of a government-owned firm eliminates any previously conferred countervailable subsidies, Commerce must exercise this discretion carefully through its consideration of the facts of each case and its determination of the appropriate methodology to be applied.

Id.

The Federal Circuit reviewed the statute's change-in-ownership provisions in *Delverde III.* In that decision, in striking down the Department's previous ''gamma'' privatization methodology on the basis that, *inter alia,* it was a *per se* rule, the Federal Circuit opined

> Had Commerce fully examined the facts, it might have found that [the respondent] paid full value for the assets and thus received no benefit from the prior owner's subsidies, or Commerce might have found that [the respondent] did not pay full value and thus did indirectly receive a 'financial contribution' and a 'benefit' from the government by purchasing its assets from a subsidized company 'for less than adequate remuneration.' * * * Commerce might have reached the conclusion that [the respondent] indirectly received a subsidy by other means.

Delverde III, 202 F.3d at 1368.

In light of the SAA and the Federal Circuit's findings, we believe the statute grants the Department flexibility and discretion in the countervailing duty context for analyzing changes in ownership, including privatizations.

WTO Findings and Recommendations

We now turn to the findings of the Panel and Appellate Body. At the outset, the Panel clarified that its findings apply only to changes in ownership that involve privatizations in which the government retains no controlling interest in the privatized producer and transfers all or substantially all the property. *Panel Report* at para. 7.62; noted in *AB Report* at paras. 85 and 117, footnote 177. The Panel then stated that, ''[w]hile Members may maintain a rebuttable presumption that the benefit from prior financial contributions (or subsidization) continues to accrue to the privatized producer, privatization at arm's length and for fair market value is sufficient to rebut such a presumption. *Panel Report* at para. 7.82, upheld at *AB Report* at para 126. This finding led the Panel to hold, *inter alia,* that the Department's same-person methodology is contrary to the requirements of the Subsidies Agreement.

While the Appellate Body agreed with the Panel that the same-person methodology is contrary to the requirements of the Subsidies Agreement, it clarified that

> [p]rivatization at arm's length and for fair market value may result in extinguishing the benefit. Indeed, we find that there is a rebuttable presumption that a benefit ceases to exist after such a privatization. Nevertheless, it does not necessarily do so. There is no inflexible rule requiring that investigating authorities, in future cases, automatically determine that a 'benefit' derived from pre-privatization financial contributions expires following privatization at arm's length and for fair market value. (Emphasis in original)

AB Report at para. 127.

The Appellate Body identified examples of circumstances where the conditions necessary for ''market prices'' to fairly and accurately reflect subsidy benefits are not present, or are ''severely affected'' by the government's economic and other policies

> Markets are mechanisms for exchange. Under certain conditions (*e.g.*, unfettered interplay of supply and demand, broad-based access to information on equal terms, decentralization of economic power, an effective legal system guaranteeing the existence of private property and the enforcement of contracts), prices will reflect the relative scarcity of goods and services in the market. Hence, the actual exchange value of the continuing benefit of past non-recurring financial contributions bestowed on the state-owned enterprise will be fairly reflected in the market price. However, such market conditions are not necessarily always present and they are often dependent on government action.
>
> Of course, every process of privatizing public-owned productive assets takes place within the concrete circumstances prevailing in the market in which the sale occurs. Consequently, the outcome of such a privatization process, namely the price that the market establishes for the state-owned enterprise, will reflect those circumstances. However, governments may choose to impose economic or other policies that, albeit respectful of the market's inherent functioning, are intended to induce certain results from the market. In such circumstances, the market's valuation of the state-owned property may ultimately be severely affected by those government policies, as well as by the conditions in which buyers will subsequently be allowed to enjoy property.
>
> The Panel's absolute rule of ''no benefit'' may be defensible in the context of transactions between two private parties taking place in reasonably competitive markets; however, it overlooks the ability of governments to obtain certain results from markets by shaping the circumstances and conditions in which markets operate. Privatizations involve complex and long-term investments in which the seller—namely the government—is not necessarily always a passive price taker and, consequently, the ''fair market price'' of a state-owned enterprise is not necessarily always unrelated to government action. In 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.

AB Report at paras. 122–124.

Accordingly, the Appellate Body reversed the Panel's conclusion that once an importing Member has determined that a privatization has taken place at arm's length and for fair

market value, it must reach a conclusion that no benefit resulting from the prior financial contribution continues to accrue to the privatized producer. *AB Report* at para. 161(b). However, the Appellate Body nevertheless found the Department's same-person privatization methodology to be inconsistent with the WTO obligations of the United States because, under that methodology, where the entity that produced the subject merchandise was the very same entity that received the subsidy, the Department is precluded from finding that an arm's-length, fair market value privatization transaction extinguished the pre-privatization subsidy benefit. Accordingly, the Appellate Body recommended that the DSB request the United States to bring its measures and administrative practice (*i.e.*, the same-person methodology) into conformity with its obligations under the Subsidies Agreement. *AB Report* at para. 162.

Final Modification

The Department's final modification of its practice regarding privatizations of state-owned enterprises in the countervailing duty context is basically the same as the proposed modification, but with some revisions that are discussed below in the Department's response to the comments. This new practice is fully consistent with the statute, which gives the Department broad discretion in analyzing changes in ownership.

The methodology is based on certain rebuttable presumptions, reflecting the conclusions of the Panel and Appellate Body. The ''baseline presumption'' is that non-recurring subsidies can benefit the recipient over a period of time (*i.e.*, allocation period) normally corresponding to the average useful life of the recipient's assets. However, an interested party may rebut this baseline presumption by demonstrating that, during the allocation period, a privatization occurred in which the government sold its ownership of all or substantially all of a company or its assets, retaining no control of the company or its assets, and that the sale was an arm's-length transaction for fair market value.

In considering whether the evidence presented demonstrates that the transaction was conducted at arm's length, we will be guided by the SAA's definition of an arm's-length transaction, noted above, as a transaction negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties.

In analyzing whether the transaction was for fair market value, the basic question is whether the full amount that the company or its assets (including the value of any subsidy benefits) were actually worth under the prevailing market conditions was paid, and paid through monetary or equivalent compensation.[2] In making this determination, the Department will normally examine whether the government, in its capacity as seller, acted in a manner consistent with the normal sales practices of private, commercial sellers in that country. A primary consideration in this regard normally will be whether the government failed to maximize its return on what it sold, indicating that the purchaser paid less for the company or assets than it otherwise would have had the government acted in a manner consistent with the normal sales practices of private, commercial sellers in that country.[3] Accordingly, in determining whether the evidence presented, including, *inter alia,* information on any comparable benchmark prices as well as information on the process through which the sale was made, demonstrates that the transaction price was fair market value, the following non-exhaustive list of factors might be considered.

(1) Objective analysis: Did the government perform or obtain an objective analysis in determining the appropriate sales price? Did it implement the recommendations of such objective analysis for maximizing its return on the sale, including in regard to the sales price recommended in the analysis?

(2) Artificial barriers to entry: For example, did the government impose restrictions on foreign purchasers or purchasers from other industries, or overly burdensome or unreasonable bidder qualification requirements, or any other restrictions that artificially suppressed the demand for, or the purchase price of, the company?

(3) Highest bid: For example, was the highest bid accepted and was the price paid in cash or close equivalent? Why or why not?

(4) Committed investment: For example, were there price discounts or other inducements in exchange for promises of additional future investment that private, commercial sellers would not normally seek (*e.g.*, retaining redundant workers or unwanted capacity)? Did the committed investment requirements serve as a barrier to entry, or in any way distort the value that bidders were willing to pay for what was being sold?

If we determine that the evidence presented does not demonstrate that the privatization was at arm's length for fair market value, the baseline presumption will not be rebutted and we will find that the unamortized amount of any pre-sale subsidy benefit continues to be countervailable. Otherwise, if it is demonstrated that the privatization was at arm's length for fair market value, any pre-sale subsidies will be presumed to be extinguished in their entirety and, therefore, non-countervailable.

A party can, however, obviate this presumption of extinguishment by demonstrating that, at the time of the privatization, the broader market conditions[4] necessary for the transaction price to reflect fairly and accurately the subsidy benefit were not present, or were severely distorted by government action (or, where appropriate, inaction).[5] In other words, even if we find that the sales price was at ''market value,'' parties can demonstrate that the broader market conditions were severely distorted by the government and that the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action.

Some factors, *inter alia,* that might be considered in determining whether these broader market distortions exist include:

1. Basic Conditions: For example, are the basic requirements for a properly functioning market sufficiently present in the economy in general as well as in the particular industry or sector, including free interplay of supply and demand, broad-based and equal access to information, sufficient safeguards against collusive behavior, effective operation of the rule of law, and adequate enforcement of contracts and property rights?

2. Legal and Fiscal Incentives: Has the government used the prerogatives of government in a special or targeted way that makes possible, or otherwise significantly distorts the terms of, a sale in a way that a private seller could not, *e.g.*, through special tax or duty rates that make the sale more attractive to potential purchasers generally or to particular (*e.g.*, domestic) purchasers, through regulatory exemptions particular to the privatization (or privatizations generally) affecting worker retention or environmental remediation, or through subsidization or support of other companies to an extent that severely distorts the normal market signals regarding company and asset values in the industry in question?

[2] With regard to an analysis of the transaction price, we note that there is no statutory definition of fair market value, nor does the SAA give any guidance in this area.

[3] Under normal market conditions, the purchaser would have otherwise had to pay fair market value for the company or assets.

[4] The term ''market conditions'' is used here in a broad sense, not only incorporating economic and financial considerations, but also the legal and regulatory regime in which the market operates.

[5] We would generally be concerned here only with the actions of government in its role ''as government,'' and not the actions of the government in its role as the seller. In other words, we would examine here only those actions which private sellers could not take even if they wished to do so.

Where a party demonstrates that these broader market conditions were severely distorted by government action and that the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action, the baseline presumption will not be rebutted and the unamortized amount of any pre-sale subsidy benefit will continue to be countervailable. Where a party does not make such a demonstration with regard to an arm's-length sale for fair market value, we will find all pre-sale subsidies to be extinguished by the sale and, therefore, to be non-countervailable.

Analysis of Public Comments

Numerous comments and rebuttal comments were submitted in response to the proposed modification. We have carefully considered each of the comments submitted. While we have not adopted or made revisions reflecting all of the comments, the comments were nevertheless useful in helping to clarify the concepts underlying our privatization analysis and in refining the proposed modification. As such, we are grateful to those who took the time to comment on this aspect of the Department's countervailing duty methodology. Specific comments are summarized below, along with the Department's position on each. For more detail on the comments submitted, *see* the Department's Web site at *http://ia.ita.doc.gov,* where all public comments received have been posted in their entirety.

1. Legality of New Methodology

Some commenters argue that the Department's methodology is inconsistent with the statute, the SAA, and *Delverde III* because it would find the extinguishment of subsidies solely by virtue of an arm's-length sale for fair market value. Specifically, the commenters suggest that the methodology represents a *per se* rule that is in conflict with Section 771(5)(F) of the URAA, which states that ''a change in ownership * * * does not by itself require [extinguishment of previously countervailable subsidy benefits] * * * even if the change in ownership is accomplished through an arm's length transaction.''

Other commenters counter that this argument was based on a misunderstanding of the statutory provision and of the methodology. Specifically, they state that the statute in no way questions the fundamental criterion of fair market value; the point of Section 771(5)(F) is that a sale by a governmental seller, even if at arm's length, is not necessarily a sale for fair market value. Accordingly, examination of a privatization must consider evidence that the governmental seller did not seek, and in turn the purchaser did not pay, fair market value.

Department's Position: We disagree that the Department's final modification is contrary to the statute. The statutory provision regarding changes in ownership makes clear that the Department is not *required* to find extinguishment of previously bestowed subsidies on the sole basis that a change in ownership occurred, or that it occurred in an arm's-length transaction. According to the SAA, this provision is meant to clarify that ''the sale of a firm at arm's-length does not *automatically, and in all cases,* extinguish any prior subsidies conferred. Absent this clarification, some might argue that all that would be required to eliminate any countervailing duty liability would be to sell subsidized productive assets *to an unrelated party.*'' (Emphasis added.) *SAA, at 258.* Under our new methodology, we will not treat an arm's-length privatization as an exclusively dispositive indicator of subsidy extinguishment, but will require other evidence indicating that the post-sale company no longer benefits from such subsidies. Specifically, in addition to analyzing whether the sale was between unrelated parties, we will examine any evidence presented on whether the sale was for fair market value and/or whether there were broader market distortions that would be relevant to a finding of subsidy extinguishment.

2. Burden of Proof

Several commenters state that the burden of proof on the respondent under the new methodology is inconsistent with the requirements under U.S. law, and corresponding international agreements, permitting the imposition of countervailing duties. Specifically, they believe that this methodology unfairly and illegally shifts the burden of proof onto the respondent to demonstrate that there was a privatization at arm's length and for fair market value in order to rebut the presumption of a continuing benefit. Some commenters argue that the only burden that can properly be placed on the respondents is the burden of showing that there has been a privatization. Once this burden has been met, it is the petitioners' or the Department's responsibility to affirmatively demonstrate that the conditions exist to allow the subsidy benefit to continue after the privatization. One commenter suggests that once the petitioners have come forward with evidence to raise a genuine issue of current subsidization, the Department may then shift the burden to the respondent to counter with opposing evidence that the subsidy it received was extinguished.

Department's Position: We disagree that the new methodology unfairly or illegally shifts the burden of proof onto any particular party. Our baseline presumption that subsidies may benefit the recipient over a number of years is entirely consistent with U.S. law. The Delverde III Court found the presumption to be contrary to U.S. law only to the extent that it was applied as a *per se* rule, *i.e.*, a rule that precluded consideration of all of the facts and circumstances of the sale. Moreover, regardless of how one interprets the international agreements on this point, it is important to recognize that they are not automatically incorporated into U.S. law.[6] WTO findings are also not automatically incorporated into U.S. law.[7] In any event, the WTO findings here do, in fact, uphold the baseline presumption.[8] The Panel and Appellate Body made it clear that it is not the mere fact of privatization that is sufficient to disturb the baseline presumption. Rather, it is the payment of fair market value in an arm's-length privatization that can extinguish the prior subsidies.[9]

The implication at the heart of these commenters' arguments is that the occurrence of a privatization itself creates a presumption of subsidy extinguishment. This contention is without any support under U.S. law or even under the relevant WTO decisions. Neither the Federal Circuit nor the WTO has indicated that the baseline presumption ceases to apply simply because a privatization has occurred, regardless of its nature and terms, and that somehow it becomes the petitioners' or the Department's responsibility to demonstrate that such a privatization was not at arm's length for fair market value.[10]

As a practical matter, we anticipate that, in most if not all of the privatizations we examine, one party or

[6] 19 U.S.C. § 3512(a)(1).

[7] *See* SAA at 363 (1032).

[8] *See, e.g.*, AB Report at para. 84.

[9] As noted elsewhere, the starting point of the AB Report was the assumption that the privatizations in all 12 of the subject cases were arm's-length transactions for fair market value.

[10] For instance, the AB Report touches on the issue of burden in an administrative review when it states that '' * * * an investigating authority, in an administrative review, when presented with information directed at proving that a ''benefit'' no longer exists following a privatization, must determine whether the continued imposition of countervailing duties is warranted in the light of that information.'' (Emphasis added.) AB Report at para. 144.

another will raise the question of whether the sale was at arm's length and for fair market value. Also, in the normal course of an investigation or review, the Department will usually issue a questionnaire that solicits basic information about the privatization as well as the broader market conditions. As much of the necessary information to analyze such an issue will be in the possession of the respondent company and/or government, that company or government will necessarily bear the ''burden'' of providing the necessary information, as would be the case with most factual questions the Department must consider in the course of a countervailing duty investigation. To some extent, therefore, the question of who must raise the issue for it to be considered is of only limited practical importance.

3. Process Analysis and the Cost to Government

Several commenters agree that an analysis of the privatization process is pertinent, if not central, to determining whether the sale was for fair market value. One commenter suggests that a price determined through a fair and open sales process is, by definition, the fair market value. Some commenters caution that merely because a fair and open process can result in fair market value, it does not necessarily follow that a process that is less than ideal cannot result in fair market value. In such less-than-ideal sales, all circumstances of the sale, including the objective analysis, must be considered.

Other commenters argue that an emphasis on the process through which the government sold the company would represent an illegal cost-to-government approach. The government's actions or motives in selling the company, they argue, are irrelevant to whether the purchaser received a benefit by paying less than fair market value (*i.e.*, on terms more favorable than those in the market). They continue that any such examination of government motives is illegal—neither the statute nor the Subsidies Agreement instructs the Department to examine a government's motives in determining a subsidy. Moreover, some commenters argue, discerning the government's motives would be prohibitively difficult in practice.

Likewise, the proposed ''private seller'' standard, several commenters contend, is illegal and impractical. One commenter argues that such a standard effectively and improperly collapses the financial contribution finding (*i.e.*, what the government provides) with the benefit finding (*i.e.*, what the recipient receives). Other commenters, however, strongly support such a process-oriented approach, noting that the government, as seller, makes all of the critical decisions regarding the sale and, therefore, the Department's analysis must remain focused upon the government.

Department's Position: We disagree that our new methodology encompasses a cost-to-government standard, though we have revised the text to clarify any potential misunderstanding in this regard.

For this final modification, we have concluded that a useful and appropriate standard for determining whether a transaction was for fair market value is to assess its consistency with the normal sales practices of private, commercial sellers in that country. Preferably, in making a fair-market-value determination, we will compare the price paid for the company or its assets to a contemporaneous, benchmark price actually observed in the marketplace for a comparable company or assets. Where clear information on such a comparable, market-benchmark value is available, we will normally consider it to be highly probative in our fair-market-value analysis (though we may still consider other information regarding factors, where available and appropriate).[11] In our experience, however, such a clear market-benchmark price for a comparable sale rarely exists, and we will often have to resort to less conclusive benchmarks or alternative means for identifying a benefit.

One useful alternative approach is to examine the process through which the sale was made. As with the direct comparison with comparable market benchmarks, the purpose of examining the ''process-oriented'' factors is to determine whether the buyer ultimately paid less for the company or its assets than the buyer otherwise would have had to pay in the marketplace. In lieu of a more concrete and directly comparable benchmark price, we would have to evaluate what the buyer actually paid by examining whether the conditions and circumstances of the sale reflect those that the buyer would have faced if the buyer were purchasing the company or its assets from a private, commercial seller in the marketplace. If the conditions and circumstances of the sale reflect those the buyer would otherwise have faced in the market, and absent more concrete evidence to the contrary, it is reasonable to determine that the price paid is what the buyer would otherwise have had to pay.

While it is true that, under this approach, there is an emphasis on the government's actions, this does not necessarily make it a cost-to-government standard. Rather, this emphasis merely reflects the reality that the seller is usually the party that determines the process and circumstances through which a company will be sold. In a privatization, the government happens to be the seller and, therefore, the one making those decisions.

We have, however, revised the wording of our final modification to de-emphasize the importance of government motives or intent. We continue to believe that, in some cases, statements from the government about what it was attempting to achieve by structuring a sale in a particular way may provide useful insight into what actions the government actually took, and what impact those actions had on the purchase price. However, we are clarifying that any determination regarding fair market value will normally not be based primarily on the government's motives or intent, as those are generally difficult to establish precisely and, in any case, are not necessarily indicative of whether the transaction price was less than fair market value.

We note that the approach we are taking in this new methodology is, in fact, similar in many fundamental respects to the Department's established equity infusion methodology. Consistent with the statute, we determine whether a benefit to the recipient has been conferred as the result of a government equity infusion by examining whether ''the investment decision is inconsistent with the usual investment practice of private investors, including the practice regarding the provision of risk capital, in the country in which the equity infusion is made.'' Section 771(5)(E)(I). Under section 351.507(a) of the Department's regulations, we will generally determine whether an equity infusion confers a benefit by reference to market prices for comparable shares.

However, where such benchmark prices are not available, our equity benefit determination will depend on whether we find the infusion recipient to have been equityworthy. Equityworthiness will be determined with reference to ''the perspective of a reasonable private investor examining the firm at the time the government-provided equity infusion was made.'' Section 351.507(a)(4). In other words,

[11] We would not necessarily or automatically consider the predicted or hypothetical values cited in independent or objective analyses (referenced in our non-exhaustive list of factors) to constitute such a comparable market benchmark without further scrutiny of such analyses.

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.''

Department should not immediately determine that the price was not fair market value, but instead should inquire as to why the highest bid was rejected and whether those reasons were commercially sound. Several commenters contend that there are many situations where a private commercial seller may choose as the winning bid an offer with a lower cash component, but with a higher value of bonds or other securities. Another commenter suggests the use of the ''best-value'' approach, which looks not only at price but a the technical component of the transaction as well.

Other commenters, however, argue that whether the highest bid was selected is an appropriate consideration, and suggested additional scenarios (*e.g.*, where the government finances the transaction) in which the payment may not be considered ''cash equivalent.''

Similarly, several commenters object to ''profit maximization'' as a necessary condition for determining that the government's actions were consistent with that of a private, commercial seller. One commenter believes that a focus on profit maximization is contrary to WTO obligations and United States law. Many argue that merely because a government ''repackaged'' the company's assets differently, thus resulting in a lower cash price, this does not mean that the purchaser paid less than fair market value for what it received.

Committed Investment: As to committed investment, several commenters state that the fair market value of the privatized company should be determined in light of the overall bundle of property, rights and obligations involved in the privatization. So long as any limitations or conditions are known prior to the sale, they argue, those conditions become part of the bargained-for exchange between the parties and are factored into the fair market value of the privatization transaction. Accordingly, these commenters state, the presence of such conditions or promises of future investments are not *per se* evidence that the sale was not for fair market value.

Several commenters note that even private sellers of companies may place conditions on a sale that go beyond a mere listing of assets to be sold. For example, these conditions may govern the timing or form of payment, or may involve pre-existing obligations to workers. Moreover, some commenters explained that in many cases, the government-imposed conditions or required investments do not even necessarily affect the sales price, particularly if the requirements are actions the purchaser would have taken anyway. Furthermore, one commenter recalls, the purpose of the countervailing duty law is not to correct market distortions caused by previously bestowed subsidies but, simply, is to provide remedial relief to offset subsidies. Accordingly, these commenters urge the Department to eliminate this factor from the items to be examined in the determination of fair market value.

Another commenter urges the Department to retain the emphasis from its proposed modification on whether a benefit is actually conferred through committed investments. Specifically, unless there is both a required committed investment and a clearly demonstrable effect of that requirement on the price of the sale, the Department should find, *ceteris paribus,* the sale to be for fair market value.

In response, other commenters contend that where the agency is confronted with behavior such as the government's imposition of conditions on a sale, it should find such actions inconsistent with those of a commercial seller. Furthermore, they urge the Department to recognize that by seeking such commitments from the purchaser, the government is accepting less than full market value for the company. One commenter, although agreeing generally with the inclusion of this factor, suggests that it should not be necessary to identify explicit price discounts or other inducements in order to establish that the committed investment was not a normal commercial selling practice.

Additional Factors: Some commenters propose that the Department add to its fair-market-value analysis an examination, where appropriate, of the trends in stock prices of a company following its privatization. Specifically, the commenter suggests that a sudden run-up in post-sale prices due to ''flipping'' of the stock by the initial purchasers on or soon after the sales date strongly suggests that the sales price was less than fair market value. Other commenters disagree that such *post hoc* analysis of secondary prices is appropriate. Other commenters suggest additional criteria to consider, such as the original cost less depreciation of the assets, contemporaneous similar sales, and the presence of government industrial policies in that sector.

Department's Position: We have carefully considered the many comments we received on the proposed fair-market-value analysis, and have decided to retain the same basic approach articulated in our proposed modification. We agree with those commenters who argue that no hierarchy should be established among the factors, and that the list of factors should not be considered exhaustive. We will generally not consider any one factor in itself to be dispositive, but will consider all the relevant facts and circumstances of a privatization to determine whether the sales price was a fair market value.[13] For this reason, we disagree with other commenters' concern that the analysis is ''too vague.'' Our fair-market-value analysis must be sufficiently flexible to address the diverse factual scenarios that may be encountered in the future.

With regard to barriers to entry, as we noted in the proposed modification, the fundamental consideration here is not necessarily the number of bidders, but rather whether the market is contestable, *i.e.*, anyone who wants to buy the company or its assets has a fair and open opportunity to do so. We therefore do not believe that it would be useful to adopt a rigid rule with regard to how large the pool of bidders must be, or what would necessarily constitute ''overly burdensome'' or ''unreasonable'' bidder qualifications. Obviously, such considerations are case-specific, and we will judge them in the broader context of the overall privatization process and the relevant market. That said, we take note of the particular types of restrictions that some commenters argue are strongly indicative of a less-than-fair-market-value sales process, and agree that many of these would constitute sufficient cause for a more probing study. For example, we intend to scrutinize particularly closely any privatization where there is only one final bidder (or a few), particularly in those industries or economies where a relatively large pool of bidders for such a privatization would normally be expected.

With regard to an objective or independent analysis, we disagree that a sales price at or above the value cited in such an analysis is necessarily a dispositive indicator that the sale was for fair market value, other aspects of the sales process notwithstanding. We do not believe that private, commercial sellers normally follow or adopt such analyses blindly without a fuller understanding of, *inter alia,* the assumptions and scope of the analyses and the broader context of other market indicators and industry studies.

However, we do believe that the absence of such an analysis, in circumstances where private, commercial sellers would normally

[13] As explained below, we will normally consider the absence of an objective analysis to be highly probative in determining that the transaction was not a fair market value.

require such information, would be a very important consideration in our examination of the sales process. Accordingly, when examining fair market value, we will normally require from the respondents the information and analysis upon which the government relied in determining how, and for what price, to sell the company or its assets. Such analysis must be objective, timely (*i.e.*, completed prior to agreement on the final transaction price), and complete (*i.e.*,contain the information typically considered by private, commercial sellers contemplating such a sale). The absence of such information and analysis would normally be highly probative (though not necessarily dispositive) in determining that the transaction was not for fair market value.

We wish to clarify, however, that though such objective analysis can serve as one useful benchmark for the sales price and can provide useful information about whether the process the government pursued was consistent with that of a private, commercial seller, we must exercise caution in how we use such an analysis given that it is often speculative and subjective in nature. The Department has experience in considering similar types of independent studies and objective analyses in the related context of government equity infusions, and we intend to follow a similar approach here, to the extent appropriate. We discussed this issue at length in the preamble to our equity infusion regulations, wherein we stated,

> We will closely examine such studies. In order to be considered in our equityworthiness analysis, any study must have been prepared prior to the government's approval of the infusion and must be sufficiently objective and comprehensive. We intend to review such studies carefully to determine whether the government acted like a reasonable private investor, subjecting both the assumptions and the analysis to scrutiny. This will enable us to decide whether the decision to invest was commercially sound given the information at the disposal of the government.
>
> Some independent studies commissioned to analyze the merits of a given investment may present an assessment of the company's expected returns and risks that is predicated on certain future actions by the company in question. For instance, a study might conclude that the investment in a company planning to close one outmoded plant and construct a new one in a different location is commercially viable so long as the company also reduces its workforce by half. In this case, the Department would take into consideration whether the downsizing will actually occur. If the company has known for a long time that a reduction in its workforce was a necessary condition for improved financial performance, but has consistently shown itself unwilling or incapable of making that reduction, this may prove sufficient cause to believe that the projected return is unattainable.
>
> Some commenters cautioned the Department about relying too heavily on independent studies given their inherently speculative and subjective nature. We are well aware of the potential difficulties in using independent analyses, not least of which is the fact that independent experts often fundamentally disagree about the prospects of a given investment. In other instances, the objectivity of some studies is called into question. However, private investors are likewise usually faced with a similar variety of competing views and must exercise their own judgement with respect to the objectivity of information before them. When considering the suitability of a submitted study, we will seek to ensure the study is accurate and reliable, and exercise our own judgement with respect to a study's objectivity. Specifically, we will take into consideration the extent to which the study's premises and conclusions differ from those of other independent studies, accepted financial analysis principles, or market sentiment in general (*e.g.*, industry-specific business publications or general industry market studies).

Preamble to the CVD Regulations, 63 FR 65348, 65372 (November 25, 1998).

With regard to the acceptance of the highest bid, we disagree that this is not an important factor when considering whether the sale was for fair market value. This factor goes hand-in-hand with our ''primary consideration'' of whether the government maximized its return on what it sold, and is an important consideration in whether the government acted like a private, commercial seller. We recognize that there may be situations where a private, commercial seller will accept something other than cash or close equivalent as payment in a sale, but we believe those circumstances are exceptional and not the norm. We will, however, examine any information a party presents in demonstrating that the government's acceptance of non-cash or close-equivalent payment is consistent with private, commercial selling practice in the relevant market (*e.g.*, that country and/or industry).

We clarify that the phrase ''cash or close equivalent'' is intended to include normal types of payment that may take the form of a variety of financial instruments other than cash (*e.g.*, other shares or bonds). To the extent that these or similar forms of payment are used in transactions between private, commercial parties, there is generally no problem. What we would primarily be concerned with are forms of payment to which the government ascribes a value that is different from the monetary value that a private, commercial seller would ascribe to the payment. Examples of this might include illiquid forms of payment, or payments that have little or no tradeable value in the marketplace. As a general rule, we will carefully scrutinize any sale where the face or exchange value of a financial or other instrument given as payment differs from its market value.

We believe that the criterion of profit maximization is an appropriate consideration in our fair-market-value analysis. It is a basic principle of corporate finance and management that the primary function of a commercial enterprise is to maximize the financial return on its owners' investment.[14] Moreover, such a ''profit maximization'' standard is supported by the Federal Circuit:

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

Delverde III, at 1369. Any of the government's actions in selling a company that do not maximize the financial return to the government on the sale are, therefore, legitimate and important areas of scrutiny under our fair-market-value analysis as they may indicate that the government has acted in a manner that is not consistent with the normal practices of private, commercial seller.

The profit-maximization standard is also fully consistent with the WTO findings. For example, the Panel noted that ''* * * in a market-based economy, the value of a company depends on its ability to generate returns for its shareholders.'' *Panel Report* at para. 7.51. The Panel further noted that, ''[f]ollowing privatization and consistent with commercial principles, the owners of the privatized company should be profit-maximizers, set on obtaining a market return on the entirety of their investment in the privatized company.'' *Panel Report* at para. 7.60. Although the Panel here was referring explicitly to the purchasers of the company (and not the seller), it is clear that in order for the sales price to be considered fair market value, both

[14] To the extent that a commercial firm may have goals other than profit maximization, those non-commercial pursuits are generally reflected in the company's market value to the extent they enhance or detract from the company's ability to generate a profit.

parties—the seller and the buyer—must be profit maximizers.

Regarding committed investment, we note that this appears to have been one of the most complicated and controversial parts of the proposed modification. In general, the numerous comments we received on this issue can be roughly divided into those that consider any committed investment to disqualify the sale automatically from being found to be at fair market value, and those arguing that any committed investment will be fully reflected in the purchase price. For this final modification, we have not adopted either argument as a *per se* rule, but find that our determination in a particular instance of committed investment must be based on the specific facts of that case, analyzed in their totality.

We would first like to clarify that by the term committed investment, we are referring to a range of possible restrictions or requirements that the government, as the seller, imposes on the future operation of, or investment in, the company or its assets. Some commenters noted that there are some practices which, on their surface, may appear to be committed investment, but are in fact actions which are sometimes taken by private, commercial sellers as well. As a threshold issue, therefore, we will first examine any evidence presented by parties that purports to demonstrate that a particular action is fully consistent with the normal sales practices of private, commercials sellers in the relevant market, even if that action would otherwise appear to fall within the scope of typical committed investment practices that the Department has encountered. Where such a demonstration is made, we normally will not regard such a practice as evidence that fair market value was not paid.

With regard to the impact a committed investment has on a sale, we disagree with the proposition that the presence of any committed investment necessarily means the sale is not for fair market value. As noted elsewhere in this notice, our analysis of fair market value under this new methodology is based on a benefit-to-recipient standard. The key question is whether, in purchasing the company or its assets, the buyer got something of value for which the buyer did not pay. In the relatively straightforward, hypothetical case of a requirement to maintain the workforce size at current levels for three years, we agree that, normally, a potential buyer will incorporate the cost (if any) of that restriction into the price the buyer offers to pay. Although this price may be lower than what the buyer would have been willing to pay absent the requirement, this does not necessarily mean that the buyer is receiving any net value that has not already been reflected in the transaction price.

In this hypothetical example, all other things being equal, our analysis and reasoning regarding this straightforward committed investment would resemble that of our analysis and approach to concurrent subsidies. Similar to concurrent subsidies, when making a finding that the value of the committed investment was fully reflected in the transaction price of an arm's-length privatization and, therefore, is fully extinguished in such a transaction, we will require the following criteria to be met: (1) The precise details of the committed investment were fully transparent to all potential bidders and, therefore, reflected in the final bid values of the potential bidders, (2) there is no implicit or explicit understanding or expectation that the buyer will be relieved of the requirement or commitment after the sale, and (3) there is no evidence otherwise on the record indicating that the committed investment was not fully reflected in the transaction price.

We also disagree, however, that a lowering of bid prices in the face of committed investments is necessarily a result of an increase in anticipated costs. In the hypothetical case above, our analysis and findings would likely be different if, for example, it were also shown that the government offers bidders an automatic discount [15] in the sales price for buyers who make certain promises regarding future operation of or investment in the plant. In this more complex scenario, the buyer is very possibly getting a discount for doing something the buyer might have otherwise done without the discount, *i.e.*, the commitment or requirement does not impose any additional cost—and in fact may be viewed as revenue-enhancing. Possibly, under this scenario, the buyer has paid less for the company or assets than it otherwise would have paid had the government acted in a manner consistent with the normal sales practices of private, commercial sellers.

This hypothetical case can be further expanded to reflect a situation where the bidding pool begins with relatively few potential bidders, *e.g.*, three bidders. A requirement to maintain the workforce at a certain level for a specified number of years may affect the three bidders' assessments of expected costs and revenues differently. For example, assume the first bidder would have maintained or even increased the workforce regardless of the stipulation; therefore, the requirement would likely have only a limited impact on that bidder's expected future profitability. The second bidder, however, has been very public in stating that the company has too many redundant employees, and that any minimum employment levels would negatively impact the future cost competitiveness of the plant. Likely, that bidder will lower his or her bid value accordingly. Assume the third bidder intended all along to purchase and then dismantle the plant, perhaps in order to shift the productive assets to another location or to eliminate competition from the marketplace. Very likely, such a minimum employment requirement would lead the third bidder to drastically reduce his or her bid amount, or even to drop out of the bidding process altogether. If the first bidder was generally aware of the business plans of the other two bidders, the first bidder could lower his or her bid amount, even though the requirement will impose no additional cost on him or her, and still win the bidding contest.

We recognize that these scenarios just presented are complex and hypothetical (though they are not necessarily unusual). They are useful illustrations, however, of possible instances where, as a result of the government's imposition of requirements or restrictions that private, commercial sellers would not normally impose, a buyer might pay a lower price for a company or its assets than that buyer would otherwise pay even though such requirements or restrictions impose no additional cost on the buyer. This shows why any fixed rule one way or the other, as suggested by many of the commenters, would be inappropriate when analyzing committed investment. Accordingly, we will examine, on a case-by-case basis, whether the presence of committed investment resulted in the buyer paying less-than-fair-market-value for the company or its assets.

As to the additional factors some commenters suggested, we have not incorporated any of them explicitly into our non-exhaustive list at this time because we do not expect that they will have broad applicability across most of the privatizations we examine. However, we may consider these and any other relevant factors on a case-by-case basis where they are pertinent to the analysis of a particular privatization.

[15] For example, a credit towards the bid value keyed to the amount of the investment.

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

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.''

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. 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 Subsidies[23]

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 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

[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.

[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.

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.

because, *inter alia,* the transaction was not at arm's length and for fair market value or because there were severe market distortions, we will find that the company continues to benefit from the prior subsidies in the full amount of the remaining unallocated balance of the subsidy benefit. This is fully consistent with the logic of our baseline presumption, *i.e.*, that subsidy recipients can benefit from subsidies over a period of time unless the intervening event of an arm's-length, fair-market-value sale extinguishes such subsidies.

This approach is also fully consistent with the WTO findings.[27] As we have noted elsewhere in this notice, neither the Panel nor the Appellate Body elaborated on the issue of how to determine fair market value. Likewise, neither body opined or ruled on how payment of less-than-fair-market-value would bear on existing subsidy benefits; in fact, they explicitly refrained from making any decision on this issue. *AB Report* at footnote 177.

We also note that there are practical reasons for finding that subsidy benefits continue in their entirety under such circumstances. For example, some commenters suggested that we determine that the amount of continuing benefit is the difference between the actual transaction price and the (higher) fair market value. However, in circumstances where our analysis is focused on the *process* through which the company or its assets were privatized, such a ''shortfall'' approach could be impossible because there may not be any precise ''fair market value'' available for such a calculation.

Moreover, the shortfall approach resembles more an analysis of a new subsidy, with an identification of financial contribution (*e.g.*, government provision of a good or service), and a new identification and quantification of a new benefit (*e.g.*, in the amount of the shortfall). Though we do not preclude the possibility of the privatization transaction giving rise to a new subsidy, we address above whether the privatized company continues to benefit from prior subsidies, not from new subsidies starting at the beginning of their allocation stream.

12. Previous Remand Determinations

Several commenters note that the Department made arm's-length, fair-market-value findings in certain recent CIT remands involving some of the same privatizations currently before the WTO. Many commenters raise case-specific facts and analysis, arguing for a particular result in a specific case when this new methodology is applied to the case facts. Other commenters object to the argument that any earlier determinations by the Department are now binding on the Department's implementation of the new methodology.

Department's Position: In the proposed modification we noted that, in the context of several recent remand redeterminations in privatization cases before the CIT, the Department has applied a process-oriented approach to analyzing the facts and circumstances of particular privatizations and the resulting value paid.[28] Our approach and findings in those remand redeterminations, however, may or may not reflect the full extent of the analysis of the transaction appropriate under this new methodology. Moreover, our position with regard to those redeterminations is unaffected by this notice.

As to commenters' arguments regarding the application of this new methodology to the particular facts of specific cases, we do not believe that this notice is the appropriate context for considering and responding to particular claims regarding particular determinations. Rather, as noted elsewhere in this notice, we intend to apply this new methodology in separate ''section 129'' proceedings for each case before the WTO. In the context of those proceedings, we will provide all interested parties opportunity to present evidence and argument as to the appropriate determination in each case given the case-specific facts and the application of this methodology.

13. Timetable for Application

One commenter urged that the final modification clarify that, as a general matter, the new privatization methodology would apply immediately to any pending investigations and reviews, except to the extent that the privatization issues have already been resolved by court decisions interpreting the current U.S. statutory provisions. In addition, in order to ensure that countervailing measures are not improperly imposed on merchandise that is not benefitting from subsidies, this commenter urged the Department to consider self-initiation of changed circumstance reviews of any countervailing duty orders in which the alleged subsidy recipient had been privatized after the subsidies were received.

Department's Response: We intend to implement this final modification according to the timetable discussed below. Our approach to implementation here is consistent with the approach we took in implementing the WTO's findings in *U.S. Antidumping Measures on Certain Hot-Rolled Steel Products from Japan. See Antidumping Proceedings: Affiliated Part Sales in the Ordinary Course of Trade,* 67 FR 69186, 69197 (November 15, 2002) *(Japan Hot Rolled Implementation).* Our reasons for why this approach to implementation is fully consistent with the statute and our WTO obligations are fully explained in that notice.

Implementation Timetable

This methodology will be used in implementing the WTO's findings in *European Certain Steel Products* pursuant to section 129 of the URAA. The Department intends to make such ''section 129'' determinations in the relevant segments of each of the 12 proceedings before the WTO on or before November 8, 2003. To the extent that the relevant segment of such proceeding establishes a cash deposit rate going forward, in accordance with section 129(c)(1) of the URAA, these section 129 determinations will establish new cash deposit rates for all producers for whom the rates from the relevant segments of the proceedings are still applicable and will apply with respect to unliquidated entries of the subject merchandise which are entered, or withdrawn from warehouse, for consumption on or after the date on which the United States Trade Representative directs the Department to implement that determination. With respect to other proceedings, as well as other segments of the *Certain Products* proceedings that are not included in the dispute, the new methodology will be applied in all investigations and reviews initiated on or after June 30, 2003.

Dated: June 17, 2003.

Joseph Spetrini,

Acting Assistant Secretary for Import Administration.

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[27] The baseline presumption was upheld by the Appellate Body. *See, e.g., AB Report* at para. 84.

[28] *See, e.g., Results of Redetermination Pursuant to Remand, Allegheny Ludlum Corp.* v. *United States,* CIT No. 99–09–00566 (January 4, 2002); *Results of Redetermination Pursuant to Remand, GTS Industries, S.A.* v. *United States,* CIT No. 00–03–00118 (January 4, 2002).