Truth finding: Do Subsidies Continue After Privatization?*

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Abstract: the theme of this article is to discuss whether a pre-privatization subsidy would be extinguished after privatization of entities. Since WTO AB held that privatization at arm's length and for fair market value may, not must result in extinguishing the benefit, it provides possibilities for the investigating authorities to develop more methodologies to examine the issue. Actually, how to define a fair market value directly influences standards employed by the investigating authorities to assess the problem. After reviewing the changes of U.S. methodologies of assessment, this article intends to clarify the crucial meaning of fair market value, claiming a fair way in which the transaction of privatization is conducted more effectively ensures realization of a fair market value.

Keywords: subsidy, privatization, fair market value, ASCM

1. Introduction

A subsidy in ASCM[1] means a financial contribution or benefit thereby conferred by governments or any public body within the territory of a member country.

Subsidies exist in various forms. This article makes an attempt to address the continuity of subsidies especially after privatization. For example, a steel producer obtained a subsidy from the government while it was a state-owned enterprise. Aided by the provision of subsidies, the steel producer was encouraged to export and therefore made a great improvement in its produce. In the recent reform of this country, privatizing the steel producer was necessary, and then transferred to a new producer. A question arises here whether the privatized steel producer still enjoyed the benefit of subsidies, and accordingly would be subjected to countervailing duties [2] from other countries upon its steel exports, only because the prior steel producer did receive the subsidy before privatization. Will a non-recurring financial contribution to the previous owners still confers a benefit to the new owners and therefore qualifies as a countervailable subsidy? [3]

The WTO Panel, in many of its cases, ruled that "while 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".[4] The Appellate body clarified that privatization at arm's length and for fair market value may not result in extinguishing the benefit. However, how to define a fair market value varies and is not fixed because of the different places, time, and the methods of privatization.

In fact, the problem would become more complicated when the subsidy is offered during the process of privatization. The interplay between privatization and countervailing duties laws occurs at two main points: the treatment of past subsidies to enterprises (whether they are extinguished by the transfer of ownership), and the treatment of subsidies given in connection with the privatization process as incentives to private purchasers.[5] The second treatment is directly concerned with privatization itself.

Privatization is the transfer of property or responsibility from the public sector (government) to the private sector (business). The term can refer to partial or complete transfer of any property or responsibility held by government. There are three main methods of privatization: (1) share issue privatization – selling shares on the stock market. Share issue requires a mature and sufficiently developed capital market, otherwise it is difficult to find enough buyers, and transaction cost would be high; (2) Asset sale privatization – selling the entire firms or part of it to a strategic investor, usually by auction. As a result of higher political and currency risk deterring foreign investors, asset sales are more common in developing countries; (3) Voucher privatization – shares of ownership are distributed to all citizens, usually for free or at a very low price. It has been mainly used in the transition economies of Central and Eastern Europe, such as Russia, Poland, the Czech Republic, and Slovakia. To judge whether a subsidy is transferred to the new owner after privatization, the choice of methods of privatization closely relates to the answer, because the standard to test the "transfer of subsidies" in privatization by an auction may no longer apply to the voucher privatization. Therefore, while the U.S. intends to lists the factors to proceed

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to a consideration of whether the sale of privatization was at arm's length for fair market value, it needs to consider the method of privatization, but it appears not.

This article intends to analyze the basic standard set up by WTO Appellate body firstly. Pertinent to the proposed methodology and the factors that might be considered by U.S. government in the test of subsidies continuity, a clarification is made that some considered factors are not appropriate for judging whether subsidies are transferred to a new privatized entity. The article is divided into three parts: firstly, reviewing the WTO rules and cases, especially looking through the development of methodology to test the "transfer of subsidies" by U.S. government. Secondly, introducing and analyzing the new factors and possible standards of U.S. to test fair market value, in order to point out irrationality of some factors. Thirdly, identifying some unresolved problems during the process of test, and attempting to find the solutions for them.

2. The concerned WTO rules and findings

With respect to assessing the transfer of subsidies after privatization, the only rule in Uruguay Round Agreement on Subsidies and Countervailing Measures (ASCM) concerning this problem is Article 27.13

> "The provisions of Part III shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned."

In other words, in consistent with necessary conditions such as notification to the Committee, some partial subsidies can be not actionable if the subsidies encourage the privatization. As for this Article 27.13, there are three points needed to be clarified: firstly, this article only applies to developing countries, rather than the disputes between U.S. and E.C., since this article is part of Article 27 entitled with Special and differential treatment of developing countries members. However, the definition of "developing countries" is not clearly given in ASCM. Secondly, the subsidies that are only granted within or directly linked to a privatization might not be considered for countervailing duties by import countries. Virtually, the purpose of most subsidies offered during the process of privatization is to encourage privatization of entities rather than encourage exports or use of domestic over imported goods, thus such subsidies are not prohibitive subsidies. It also provides an answer to whether a concurrent subsidy with privatization, e.g. debt forgiveness, relinquishment of government revenue and transfer of liabilities, can be extinguished during the privatization, or a new subsidy to the new owners, provided the subsidies can just cover social costs. However, it only happens in privatization of developing countries instead of developed countries. Thirdly, due to the purpose of such subsidies offered to encourage privatization, they are not categorized to prohibitive subsidies, but actionable subsidies. If such subsidies are cover social costs or contingent upon export or use of domestic over imported goods, or happening before privatization, they should be actionable or even prohibitive.

Obviously, it does not answer the question of whether the subsidies offered before privatization would be extinguished in privatized entities. Nonetheless, the WTO Appellate Body in United States- countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/AB/R (December 9.2002) recommended an option to assess the problem.

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 transfer all or substantially all the property.[6] The Panel then stated that "while 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[7] is sufficient to rebut such a presumption" [8]

While the Appellate Body clarified that privatization 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[9].Privatization may, not must, result in extinguishing the benefit. The Appellate Body changes an irrebuttable presumption into a rebuttable presumption.

As for this case, the first question arising is why subsidies could be extinguished if the transaction of privatization is made at arm's length and for fair market value. Since a government grants a financial contribution to a pre-privatization entity, it is possible for the pro-privatization entity to get the benefit of the subsidy. The purpose of the countervailing duty law is to offset the competitive benefit enjoyed by subsidized firms. The mere

change of ownership of the shares from the government to the private company does not reduce the competitive benefit and therefore it is difficult to say the prior subsidies do not pass through to new entities. Before assessing whether the finding is reasonable, the following is an example:

Consider a person ("A") who is given £100 through a government financial contribution. This £100 confers a "benefit" on A, as the recipient of the money. A then purchases a chair with the £100. He sells the chair to an unrelated purchaser, B, for its fair market value, £100. This example shows that the "benefit" of the £100 has not "passed through" to B. The government is £100 poorer and A is £100 richer; both before and after the sale of the chair. B has not benefited at all. He has exchanged £100 for a chair which is worth that amount. If the price increases in value to £ 125, A received a benefit of £100 from the government, and made a profit of £ 25 due to the increased value of his purchased asset, no benefit conferred to B. If there are too many chairs providers in the market and at the price declined by £25, B buys the chair for £75. In this case, B does not benefit from the government contribution, and the government has spent £100.

Therefore, after Firm A is owned by the state and has received financial contributions for some years, the company is valued at £100 million. Firm B, in the same industry, has the identical type of plant and equipment, but has never received any government assistance. The two companies are put up for sale in a competitive bidding process. The companies will have the same value to prospective purchasers, and they should sell for the same price. This is because a rational purchaser is indifferent between the two firms. The rational purchaser would not offer a higher price for Firm A than for Firm B simply because the former had received a subsidy. Nor would a purchaser value Firm B at a higher amount because it had never received any government assistance."[10]

If the privatization involves debt forgiven by the government, or tax relinquishment as negotiated, some could argue that the change in ownership did not affect the pass-through of benefits and therefore, the repayment of any remaining value of prior subsidies apart from the market value will result in their extinguishment. However, "since a given transaction is at arm's length, one must conclude that the buyer and the seller have negotiated in their respective self-interests, the buyer has taken into consideration all relevant facts, and has paid an amount which represents the market value of all it is to receive. Because the countervailable benefit does not survive the arm's length transaction, there is no benefit conferred to the purchaser and, therefore, no countervailable subsidy within the meaning of the US CVD[11] statute. The purchaser, thus, will not realize any competitive countervailable benefit and any countervailable duty assigned to it amounts to a penalty"[12]. Accordingly, "at arm's length", to some extent, can ensure the transaction of privatization is made at market value, and the proper economic inquiry in consideration of whether benefit or advantage has pass through to a buyer should be the degree to which the authorities consider that "market value" was paid. Such consideration includes the fairness and transparency of the negotiation and sales process and adequacy of value received for the company based on commercially meaningful criteria. [13]

3. History of testing relation of subsidies and privatization

Reviewing the history of American cases concerning subsidies "pass-through" after privatization, we could determine whether subsidies continue to exist after privatization from the debate of U.S. national decisions. The constant change of methodologies to examine this problem reflects U.S. trade policies are seriously influenced by different interests groups. In order to achieve the truth of this problem, it is necessary to research on different concerned phases. The Department of Commerce (DOC) intends to come up with standards to examine this issue all along. Four phases of policies and the treatment of countervailable subsidies after a privatization transaction are identified.

Phase 1. The full-extinguishment approach establishes the principle in Lime from Mexico [14] that if the privatization is at transaction at an arm's length, the subsidies before privatization do not lead to pass-through of any pre-privatization subsidies. The Mexican government sold one hundred percent of ownership in Sonocal to Bomintzha, a private company, at the price determined in the process of bidding, while considering various factors such as "the continued economic viability of the company and the preservation of employment".[15] Having determined that there was an actual sale, DOC came to the conclusion that the price paid for the privatized company reflected its market value and that "therefore no benefits to [the government owned company] passed through to [the privatized company]"[16].

Phase 2. The "Pass-Through" methodology is formulated in Certain Hot-Rolled Lead and Bismuth Carbon Steel Product (U.S. – Lead bars).[17] The DOC radically changes its policy position, assuming that all pre-privatization subsidies automatically pass through to the new owners. In this case, privatization involved debt by the government as part of the negotiated transfer of majority ownership and merger to create a new company. [18] The government did not only retain the control after privatization, but also had a negotiation with only one bidder. It resulted the petitioner argued that the change in ownership did not affect the pass-through of benefits. At last, the DOC determined that "a company's sale of a 'business' or 'productive unit' does nothing to alter the subsidies

enjoyed by that productive unit". [19] This methodology was challenged under the "Tokyo Round Subsidies Code". During the course of the panel preceding, the United States amended its change-in-ownership methodology and did not defend the "pass-through methodology" to the extent that this methodology did not take account of the transaction value. [20]

Phase 3. The "Gamma Methodology", or "Partial Pass-through Methodology". In response to criticism, DOC revised the "pass-through" methodology, claiming part of any pre-privatization subsidies automatically be pass through to the new owners. The "Gamma methodology" purports to allocate past subsidies or productive assets previously owned by the recipient between the recipient of those subsidies and the purchaser of the company. A portion of purchase price can reflect part of remaining value of prior subsidies. Virtually, it means it is impossible that the totality of pre-privatization subsidies could pass through after privatization.

The "Gamma Methodology" was introduced in July 1993, a six months after DOC had introduced its "Pass-through" methodology, so that the methodology is also challenged by European Union in WTO case United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom. The DOC classified such alleged subsidies as non-recurrent and thus spread them out over 18 years, deemed to be the useful life of productive assets in the steel industry. The DOC found that the alleged subsidies in question "passed through" from BSC to UES first, and then more recently to BSES.

The WTO Dispute Panel found that the privatization methodology used by Commerce in countervailing duty investigations inconsistent with the United States' obligations under the WTO Subsidies Agreement. Article 10 provides that a WTO member country is not authorized to impose countervailing duties unless there is a subsidy to offset. Article 19.1and 19.4 require the respondent to demonstrate whether a subsidy exists before countervailing duties are imposed, and criteria for finding whether a subsidy exists must include a benefit. The Appellate Body on 10 May 2000 reached the same conclusion as the panel. It held:

> The question whether a "financial contribution" confers a "benefit" depends, therefore, on whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market. In the present case, the panel made factual findings that UES and BSplc/BSES paid fair market value for all the productive assets, goodwill, etc., they acquired from BSC and subsequently used in the production of leaded bars imported into the United States in 1994, 1995 and 1996. We, therefore, see no error in the panel's conclusion that, in the specific circumstances of this case, the "financial contributions" bestowed on BSC between 1977 and 1986 could not be deemed to confer a "benefit" on UES and BSplc/BSES.[21]

In fact, the decisions in Delverde v. United States [22] by US Court of Appeals for the Federal Circuit of 2 February 2000 prompted a review of this methodology. The Federal Circuit held that it is inconsistent with § 1677 (5) (F).

"The Act did not allow the Department to presume conclusively that the subsidies granted to the former owner of Delverde's corporate assets automatically "pass-through" to Delverde following the sale. Rather, where a subsidized company has sold assets to another company, the Department need 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." [23]

Phase 4. "The same person" methodology. Pursuant to the Federal Circuit's finding, the DOC developed the new methodology and was applied to the Grain-Oriented Electrical Steel from Italy for the first time. The DOC posited two steps to analyze the existence of a countervailable subsidy after a change-in-ownership transaction. The first step under this methodology was to determine whether the legal person to whom the subsidies were given was, in fact, distinct from the legal person that produced the subject merchandise exported to the United States. If it is determined that the two persons were distinct, we then analyzed whether a subsidy was provided to the purchasing entity as a result of change-in-ownership transaction. If the original subsidy recipient and the current producer/exporter were the same person, then DOC determined that the person continued to benefit from the original subsidies, and its exports were subject to countervailing duties to offset those subsidies.[24]

This methodology, when applied in the Grain-Oriented Electrical Steel from Italy, had initially been developed in the draft. The final results of a red termination are pursuant to a court remand. In *Acciai Speciali Terni S.p.A. v. United States, Ct. No. 01-0005*1, [25] the DOC adopted a non-exhaustive list of factors which was used to analyze whether the subsidy recipient is the "same person" as the company under investigation: continuity of general business operation; continuity of production facilities; continuity of production facilities; continuity of assets and liabilities; and retention of personnel[26].

However, in the *United States – Countervailing Measures Concerning Certain Products from the EC*, the panel found that the same person method is inconsistent with the SCM Agreement because it `prohibits the examination of the conditions of the privatization-transaction when the privatized producer is not a distinct legal

person based on criteria relating mainly to the industrial activities of the producers concerned.[27]. Thus, if the U.S. authorities find that the privatized entity is the `same person, they do not inquire into the conditions of the privatization in order to determine whether the benefit of the subsidy continues to exist.

Although the Panel held 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 the conclusion that no "benefit" resulting from the prior financial contribution (or subsidization) continues to accrue to the privatized producer", [28] the Appellate Body reversed the Panel's finding and found that same person approach inconsistent with U.S. obligations under Articles 19.1, 21.2 and 21.3 of the SCM Agreement, relating to original investigations, administrative reviews, and sunset reviews, respectively. The AB held that the obligation of WTO Members, to limit CVD's countervailing duty laws to the amount and duration of the subsidy found by the investigating authority, applies to original determinations as well as to administrative and sunset reviews; but the same person methodology only applies to one administrative review conducted under Article 21.1 of ASCM. Secondly, Article 21.2 of ASCM requires that the investigating authorities in administrative procedures take into account 'positive information substantiating the need for a review'.

Lead bars affirmed 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 CVD's is warranted in the light of that information.' However, when the DOC has determined that no new legal person is created as a result of privatization, it reached its conclusion without having conducted further analysis of whether privatized entity continues to receive the benefit of subsidies. Therefore, the Appellate Body found that the same person method, as such, is inconsistent with the SCM Agreement. [29] As for the sunset review, the AB came to a similar conclusion that the investigating authorities in sunset reviews also have to determine whether a benefit continues to exist, even if no new legal person is created after privatization.

4. Recent development and Analysis of "fair market value"

Recently, the DOC proposed to list some factors to assess the "fair market value" and market conditions in response to the AB finding. The following non-exhaustive list of factors might be considered:

- Artificial barriers to entry: Did the government impose exclusions on foreign purchasers from other industries, or overly burdensome/unreasonable bidder qualification requirements that artificially suppressed demand for the company? The fundamental consideration is not necessarily the number of bidders; rather, whether the market is contestable, anyone who wants to buy the company or its assets has a fair and open opportunity to do so.
- Independent analysis: Did the government perform due diligence in determining the appropriate sales price, and did it follows the recommendations of any independent analysis, indicating that maximizing its return was the primary consideration? Was the highest bid accepted and was the price paid in cash or close equivalent (and not, e.g., with an imbalanced bond-for-equity swap)
- Committed investment: were there prices 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, building or maintaining unwanted capacity).

No matter how changeable are the methodologies that the DOC employed, it gradually concluded that the transaction of privatization at arm's length for fair market value may extinguish the pre-privatization subsidies although it does not necessarily do that. Nevertheless, i*n what conditions, the benefit of pre-subsidies continues to exist in privatized entities even though the transaction of privatization is at arm's length for fair market value?*

An examination of "fair market value" is needed. First of all, it is difficult to appraise according to the relativity of fair market value. It is important to remember that any vision about value is usually subjective to a number of circumstances, i.e. place (local habits), time (moment), the existence of comparable precedents and the evaluation principles of each person involved. Any value is valid if it is applied, and worthless if not applied. The opinion of 1000 people about their intention to buy a product has no meaning if nobody buys the product. On the other hand, if there is one single person interested in a product, it is a one-person market. In this case, any price would be a fair market price. Therefore, a fair market value is not invariable; it could change depending on the specific situation of market. For example, if a government assesses each tract before bidding to determine the minimum bid of "fair market value", but no bids are ultimately received due to the deficiencies of information, it is therefore difficult to say the minimum price set by the government is a fair market price. Similarly, it is possible to achieve the fair market value when a government negotiates with only one buyer, only if there is a single one buyer in the market.

In fact, the "fair" of "fair market value" refers not to the fairness of the amount received, but to the method by which it is determined. Accordingly, the most important feature of prices in a fair market is that they are

satisfactory to both parties to the transaction, given their knowledge and voluntary participation. Thus, to ensure to obtain the fair market value, it is reasonable to require governments to open the bidding to any purchasers who qualify the requirements of bidders, and provide sufficient opportunity for those who most highly value the item being sold to participate; and the transaction is free of collusion.

Secondly, *does the fair market value require governments to maximize revenue from the sale of public resources?* The definition of "fair market value" is found in the United States Supreme Court decision in the Cartwright case: the fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. [30] For knowledgeable sellers or buyers, they could be willing to conduct a transaction only when their own best interests can be realised. However, it is noted that there is difference between maximizing the interest of seller or buyer and maximizing the revenue of a government. A government as a special seller undertakes various responsibilities, so that it needs to take into account a "fair return to the public". It is evident that the appraisal or fair market value requirement is basically linked to the goals of increasing revenue or obtaining a fair return for state-owned properties, but is not employed where the government is attempting to develop some policy or encourage specific development goals. Therefore, when trying to encourage development, the government can accept a price below the actual value of properties or reduce the price in order to retain redundant workers, or maintain unwanted capacity when the knowledgeable and willing buyer is encumbered by undue pressure and realizes his own best interest in a fair market.

Thirdly, the reason why AB held that the pre-privatization subsidies may not be extinguished by privatization in the United States – Countervailing Measures Concerning Certain Products from the EC, is mainly because the market conditions were taken into account by AB.

1. Markets are mechanisms for exchange. Market conditions are not necessarily always present and they are often dependent on government action. 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.

2. Governments may choose to impose economic or other policies that 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. In privatization, governments have the ability, by designing economic and other policies, to influence the circumstance and the conditions of the sale so as to obtain a certain market valuation of the enterprise.

To analyze the market condition, it needs to examine the effect of the macro economic policies on privatization including the taxation system and legal rules pertain to privatization, regardless of a specific offer of a specific privatization, since it fails to affect the whole market. It is evident that the methodology of "fair market value" is not suitable with "market-transition economy" countries. This raises the questions of how subsidies must be treated after the company has been privatised and before the country assumes a market-economy status.

5. Conclusion

To examine whether a pre-privatization subsidy continues to benefit the privatized producer in a market-economy country, it is suggested that a process-oriented method be applied. Investigating authorities analyze different cases according to different transactions of privatization. The basic principle of the process-oriented method is the fair examination of whether the transaction of privatization is conducted by a fair way so that the producer can be privatized at arm's length and for fair market value. Therefore, the assessment of fair entry into bidding market, and fair opportunities to obtain object is necessary. However, since the transaction is at arm's length, the price discount or other inducements could be considered as part of the fair market value.

REFERENCE

1) Julie Dunne, Delverde and the WTO' British Steel Decision foreshadow more conflict where the WTO Subsidies Agreement, privatization, and United States Countervailing Law intersect, 17 Am. U. Int'l L. Rev.(2001-2002)
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3) Emanuel L. Gordon, What is fair market value?, N.Y.U Tax L. Rev. 35 1952-1953

4) WT/DS138/AB, R
5) WT/DS212/AB
6) Lime from Mexico, 54 Fed. Reg.1753 (Dep't Comm), supra note 3, (17. January. 1989) at 1754-1755.
7) Certain Hot-Rolled Lead and Bismuth Carbon Steel Products the United Kingdom, Preliminary Determination 57 Fed. Reg. 42974 (17. September. 1992)
8) United States – Leaded Bars: GATT Panel Report
9) United States v. Cartwright, 411 U.S. 546, 93 S. Ct. 1713, 1716-17, 36 L. Ed. 2d 528, 73-1 U.S. Tax Cas. (CCH) 12,926 (1973)

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[1] ASCM: the Agreement on Subsidies and Countervailing Measures
[2] Countervailing duties are a means to restrict international trade in case where imports are subsidized by foreign countries and hurt domestic producers. According to WTO rules, a country can launch its own investigation and decide to impose duties to counteract the subsidies.
[3] Julie Dunne, Delverde and the WTO' British Steel Decision foreshadow more conflict where the WTO Subsidies Agreement, privatization, and United States Countervailing Law intersect, 17 Am. U. Int'l L. Rev.(2001-2002) p.81
[4] WT/DS212/AB Report at Para 126; Panel Report at para.7.82
[5] David S. Da Silva Coenell, Maybe you can take it with you, after all: subsidies and privatization underdogs. countervailing duty law,25 law & Pol'y Int'l Bus.(1993-1994) p1309
[6] WT/DS212/AB/R, at paras.85 and 117, footnote177; Panel report at Para. 7.62
[7] The European Communities are using the terms "arm's length transaction" and "fair market value" in accordance with their accepted meanings:
Arm's length transaction. Said of a transaction negotiated by unrelated parties, each acting in his or her own self interest; the basis for a fair market value determination. A transaction in good faith in the ordinary course of business by parties with independent interests… The standard under which unrelated parties, each acting in his or her own best interest, would carry out a particular transaction.
Fair market value. The amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. BLACK' LAW DICTIONARY, West Publishing Co. (6th Ed.1990)
[8] WT/DS212/AB Report at Para 126; Panel Report at para.7.82
[9] WT/DS212/AB Report at para.127
[10] WT/DS138/R,p.60
[11] U.S. Countervailing Duties Statute
[12] Saarstahl AG v. U.S. 858 F. Supp. 187 (CIT.7. June. 1994), See also Inland Steel Bar Co. v. U.S., 858F, Supp. 179 (CIT.7. June. 1994)
[13] WT/DS138/R,p.62, para61
[14] Lime from Mexico, 54 Fed. Reg.1753 (Dep't Comm), supra note 3, (17. January. 1989) at 1754-1755
[15] Lime from Mexico, at1755
[16] Lime from Mexico, at1755
[17] Certain Hot-Rolled Lead and Bismuth Carbon Steel Products the United Kingdom, Preliminary Determination 57 Fed. Reg. 42974 (17. September. 1992)
[18] Certain Steel Products from Sweden, and Certain Hot-Rolled Lead and Bismuth Carbon Steel Products, supra note 33, at 6234
[19] Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Lead and Bismuth Carbon Steel Products the United Kingdom; 58 Fed. Reg. 6237 (27 January 1993)
[20] United States – Leaded Bars: GATT Panel Report; para.425
[21] United States – Leads Bars: Appellate Body Report, para.62
[22] Delverde Srl v. United States 202 F. 3rd 1360 (Fed Cir. Feb 2, 2000) reh'g denied (20 June 2000). Attached as Exhibit EC - 5
[23] Delverde III, 202 F.3rd at 1364-1368
[24] Acciai Speciali Terni S.p.A. v. United States, Ct. No. 01-00051, Final Remand Redetermination, page13
[25] This "same-person" privatization methodology is 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
[26]Ibid note 23
[27] United States – Countervailing Measures Concerning Certain Products from the EC, Panel Report, Para. 7.77
[28] United States – Countervailing Measures Concerning Certain Products from the EC, Panel Report, para.8.1 (d)

[29] United States – Countervailing Measures Concerning Certain Products from the EC, Appellate Body Report, Para 146-147

[30] United States v. Cartwright, 411 U.S. 546, 93 S. Ct. 1713, 1716-17, 36 L. Ed. 2d 528, 73-1 U.S. Tax Cas. (CCH) 12,926 (1973)