

countervailability. The Eurodif court decision, as discussed above, interpreted Section 771(5)(D) of the Tariff Act, but has only affected DOC's behaviour in the specific case to which it applied; the proposition that purchasing services is not a financial contribution was already well-ensconced in DOC policy and practice. In general, DOC has continued to take a fairly aggressive approach to "indirect subsidy" cases. On the other hand, it has declined, in a recent series of countervails involving Chinese products, to investigate claimed "currency subsidies" arising from allegedly misvalued foreign exchange transactions between Chinese exporters and their government. DOC has ruled that the subsidy claims made in several petitions on this point did not merit investigation. Indications are that DOC believes that there are no sufficient allegations of a financial contribution in such cases.

(b) Benefit. DOC's application of the "benefit" element of the subsidy definition has evolved since 2000 in three specific contexts:

- the treatment of amortized subsidy benefits, when a change in ownership occurs during the amortization period;
- the use of cross-border benchmarks; and
- the analysis of benefit "pass through."

i) Change in ownership/privatization. DOC's practice for many years has been to allocate amortizable subsidies over a period of years based on facts existing at the time of bestowal, and to decline to tamper with established benefit streams in reaction to subsequent events occurring during the amortization period. This approach is now subject to a significant exception applicable where the post-bestowal event is a fair-market-value sale of the subsidy-receiving company's stock or assets.

This change resulted from a series of court decisions as well as the decision adopted by the DSB in United States–Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/AB/R (December 9, 2002). The new methodology as announced by DOC in reaction to the WTO decision in 2003 applies only where the change in ownership is a privatization. In that context, it affects all pre-sale subsidies that would otherwise yield an allocated benefit in the time period being examined. While not expressed in absolute terms, the view that privatization extinguishes previously bestowed subsidies is now a very strongly held default rule. As explained by DOC:

"...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 ... obviate this presumption of extinguishment by demonstrating that, at the time of the privatization, the broader market conditions necessary for the transaction price to reflect fairly and accurately the subsidy benefit were not present, or were severely distorted Where a party demonstrates that these broader market conditions were severely distorted by government action and that the transaction price was meaningfully