RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

Acciai Speciali Terni S.p.A. and Acciai Speciali Terni USA v. United States

Court No. 99-06-00364, Remand Order (CIT Nov. 12, 2004)

I. Introduction

The Department of Commerce ("Department") has prepared these results of redetermination pursuant to an order from the U.S. Court of International Trade ("CIT") in Acciai Speciali Terni S.p.A. and Acciai Speciali Terni USA v. United States, slip op. 04-140 (CIT Nov. 12, 2004) ("AST III").

II. Background

In the Final Affirmative Countervailing Duty Determination: Stainless Steel Plate in Coils from Italy, 64 FR 15508 (March 31, 1999) ("SSPC from Italy"), the Department determined that countervailable subsidies were being provided to producers and exporters of stainless steel plate in coils from Italy. Acciai Speciali Terni ("AST") challenged this determination before the CIT.

On February 2, 2000, in a case involving the Final Affirmative Countervailing Duty Determination: Certain Pasta From Italy, 61 FR 30288 (June 14, 1996) ("Pasta from Italy"), the Court of Appeals for the Federal Circuit ("Federal Circuit") ruled in Delverde SrL v. United States, 202 F.3d 1360 (Fed. Cir. 2000), reh'g granted in part, (June 20, 2000) ("Delverde III"), that the Department could no longer rely upon the change-in-ownership methodology it employed in Pasta from Italy due to the use of a prohibited *per se* rule in its financial contribution and benefit analysis. Since the methodology struck down by the Federal Circuit in Delverde III was similar to that employed in SSPC from Italy, the Department, with the consent of the parties, asked the CIT to remand the case for reconsideration in light of Delverde III. On August 14, 2000, the CIT remanded the case to the Department with instructions to: "issue a determination consistent with United States law, interpreted pursuant to all relevant authority, including the decision of the Court of Appeals for the Federal Circuit in (Delverde III)."

On December 19, 2000, the Department issued the Final Results of Redetermination Pursuant to Court Remand in Acciai Speciali Terni S.p.A v. United States, (Court No. 99-06-00364) ("Remand Redetermination I"). In that determination, the Department employed a revised change-in-ownership methodology, known as the "same person" test, and determined that AST, after it was transferred to private ownership, remained essentially the same person as before, and consequently, subsidies given prior to privatization remained attributable to AST. Remand Redetermination I at 22.

After briefing and a hearing, the CIT, on February 1, 2002, again remanded the case to the Department. Acciai Speciali Terni S.p.A. and Acciai Speciali Terni USA v. United States, slip op. 2002-10 (CIT Feb. 1, 2002) ("AST II"). Even though the Court ruled that the Department properly applied the same person test in Remand Redetermination I, it concluded that the Department's same person test "effectively" was another prohibited *per se* rule. On remand, the Court directed the Department to "examine and consider certain material facts as part of its analysis, including but not limited to the impact the purchase price paid by KAI Italia S.r.l. ("KAI") for AST's assets has upon whatever benefit KAI-AST may have enjoyed." AST II, slip op. at 34. In response to the remand order, on June 3, 2002, the Department issued Final Results of Redetermination Pursuant to Court Remand in Acciai Speciali Terni S.p.A v. United States, (Court No. 99-06-00364) ("Remand Redetermination II") with a revised change-in-ownership methodology, known as the "full value" test, that concluded that KAI paid full value for AST which extinguished the original subsidies.

On November 12, 2004, the CIT affirmed that the Department's determination in Remand Redetermination II that the sale of AST was a fair market value ("FMV") transaction was supported by substantial evidence and was in accordance with law. However, the Court remanded several issues to the Department and directed the Department to "reexamine its {Remand Redetermination II} and determine whether the privatization sale at issue resulted in the extinguishment of the countervailable subsidy in accordance with {Delverde III} and Allegheny Ludlum Corp. v. United States, 367 F. 3d 1339 (Fed. Cir. 2004) {("Allegheny II")}." Specifically, the Court identified three issues for the Department to address:

Issue 1: The Per Se Full Value Test for Determining Whether a Subsidy Has Been Extinguished Is Not in Accordance with Delverde III or Allegheny II

In remanding this issue to the Department, the Court noted that the Department's full value test deemed an FMV transaction as *per se* extinguishing the original subsidy granted to AST by the Government of Italy ("GOI"). The Court ruled that the Department's full value test failed to comply with the law because "it misses the mark and 'the fundamental issue whether any such alleged 'successor' actually received a market benefit during the period of review with regard to the products under investigation.'" AST III, slip op. at 12, citing AST II, slip op. at 42. The Court stated that the Department's conclusion that payment of FMV *per se* indicates the extinguishment of a subsidy and a benefit shows that the Department "appears to have substituted one inadequate methodology for a second inadequate methodology not taking into account the full and complete analysis under Delverde III requiring an evaluation of whether the post-privatized entity continues to enjoy the pre-privatization subsidies." AST III, slip op. at 12, citing Allegheny II, 367 F.3d at 1350.

The Court indicated that, under 19 U.S.C. § 1677(5), the Department does not need to use any particular methodology to find whether a countervailable subsidy exists where there is a change in ownership. According to the Court, the Department's determination that the sale of AST was an FMV transaction was supported by substantial evidence since the Department adequately considered the facts and circumstances of the privatization sale. The Court further explained that "{i}t may be that the existence of an FMV sale translates into the extinguishment of a subsidy - as the term 'FMV' itself assumes that the sale price would include and take into account subsidies given and benefit conferred. This determination, however, cannot be put forward by Commerce as a per se test." AST III, slip op. at 13. Instead, the Court directed the Department to employ a change-in-ownership methodology which explains whether the FMV transaction extinguished the subsidy and the benefit conferred and to articulate the conditions in which an FMV sale clearly extinguishes the subsidy and benefit.

Issue 2: The Department's Change-in-Ownership Analysis Needs to Be in Compliance with U.S. Statute and Case Law and Requires a Benefit Analysis

The Court ruled that both the Department's same person and full value tests contravened U.S. statute and case law, and instructed the Department to conduct its change-in-ownership analysis based on the methodology it develops in accordance with 19 U.S.C. § 1677(5), Delverde III, and Allegheny II. With regard to whether and how pre-privatization subsidy benefits survive a privatization, the Court stated that "{i}t is insufficient for Commerce to point to facts supporting its discredited 'same person' methodology and to incorporate them by reference to justify its position in its {r}edetermination." AST III, slip op. at 16. The Court further held that because the Department employed the full value test, the Department had equated AST's full value sale with the benefit received. Consequently, the Court directed the Department to examine and explain how, despite the change of ownership, the benefit of prior subsidies to KAI continues to exist.

Issue 3: The Purchase Price Does Not Have to Specifically Itemize the Repayment of Subsidies, But the Repayment of Subsidies Should Be Addressed in the Change-in-Ownership Analysis

The Court stated that, in conducting its change-in-ownership analysis under 19 U.S.C. § 1677(5) to determine whether prior subsidies have been extinguished, the Department needs to consider whether the subsidies have been repaid, although the Department is not required to show itemization or explicit repayment of pre-privatization subsidies. Moreover, such an analysis must be based on a consideration of the totality of economic circumstances that surrounded the privatization of AST. The Court further instructed the Department to show that the circumstances of sale demonstrate the extinguishment of the subsidy. Finally, the Court suggested that to comply with the statute and the case law in its benefit analysis, the Department "may analyze the value of the subsidy to the purchaser and in turn if it was repaid." AST III, slip op. at 22.

III. Analysis

Subsequent to Remand Redetermination II and pursuant to an adverse finding by the WTO Appellate Body in *United States Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R (December 9, 2002), the Department modified its methodology for analyzing privatizations in the context of the countervailing duty law. See Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 FR 37125 (June 23, 2003) ("Modification Notice"). In accordance with section 129 of the Uruguay Round Agreements Act ("URAA"), the Department then applied the modified methodology to the privatization at issue in SSPC from Italy. See Memorandum to James J. Jochum; Re: Issues and Decision Memorandum for the Determination Under Section 129 of the Uruguay Round Agreements Act: Final Affirmative Countervailing Duty Determination: Stainless Steel Plate in Coils from Italy, dated October 24, 2003 ("Section 129 Determination"). To ensure that the Department has as complete a record as possible concerning the sale of AST for purposes of addressing the privatization issues remanded by the Court in this segment of the proceeding, we have placed on the record of this remand redetermination, pursuant to 19 CFR 351.306(b), the Section 129 Determination and its accompanying privatization analysis memorandum and other supporting documentation from the Section 129 segment of the proceeding. Memorandum to File; Re: Information on the Record; Third Remand of the Countervailing Duty Investigation: Stainless Steel Plate in Coils from Italy, dated December 7, 2004 and January 4, 2005.

For the purposes of this remand redetermination, we are adopting the findings and reasoning of the Section 129 Determination. We believe the Department's modified privatization methodology fully addresses the Court's concerns and complies with the Court's opinion and order of remand. The Department's modified methodology is designed to analyze all aspects of a privatization pursuant to the change-in-ownership provision of the countervailing duty statute and with respect to court decisions which have considered the Department's previous privatization methodologies. Moreover, in applying its modified methodology in the Section 129 Determination to the privatization of AST, the Department reasonably determined that an arm's-length, FMV sale extinguished certain subsidies attributable to AST. This determination was based upon a reasonable application of both the statute and relevant court decisions to evidence upon the record. Below, we first provide a brief overview of the modified methodology and its application to the privatization in SSPC from Italy, and then address each of the Court's areas of concern in turn.

Modified Methodology as Applied to AST

The Department's modified methodology includes certain rebuttable presumptions. The "baseline presumption" is that non-recurring subsidies may benefit the recipient over a period of time (the "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 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 FMV. Modification Notice, 68 FR at 37127.

In considering whether the evidence presented demonstrates that the transaction was conducted at arm's length, the Department is guided by the Statement of Administrative Action ("SAA") accompanying the URAA, H.R. Doc. No. 103-36. Vol. 1, 103d Cong., 2d Sess. (1994), which defines an arm's-length transaction as one 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. Modification Notice, 68 FR at 37127, citing SAA at 928.

In analyzing whether the transaction was for FMV, 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.[1] In making this determination, the Department normally examines 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 is 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.[2] Modification Notice, 68 FR at 37127.

If the Department determines that the evidence presented does not demonstrate that the privatization was at arm's length for FMV, the baseline presumption is not rebutted and we find

[1] There is no statutory definition of FMV, nor does the SAA give any guidance in this area.

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

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 FMV, any pre-sale subsidies are presumed to be extinguished in their entirety and, therefore, non-countervailable. Id.

A party can, however, 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 by government action (or, where appropriate, inaction). In other words, even if the Department finds 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. Id.

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 is not rebutted and the unamortized amount of any pre-sale subsidy benefit continues to be countervailable. Where a party does not make such a demonstration with regard to an arm's-length sale for FMV, the Department finds all pre-sale subsidies to be extinguished by the sale and, therefore, non-countervailable. Id., 68 FR at 37128.

With regard to AST's privatization, in determining whether allocable, non-recurring subsidies received by AST prior to its privatization continued to benefit post-privatization AST, the Department first considered whether the privatization of AST was conducted through an arm's-length transaction. The Department determined that, because the purchasers in this transaction were not related to the seller or AST, the sale was conducted at arm's length. Section 129 Determination at 5.

Next, in determining whether the sale of AST was for FMV, the Department applied a "process-oriented analysis" based on the illustrative list of factors in the Modification Notice (68 FR at 37127), and determined that, although the privatization of AST presents a somewhat mixed picture, a weighing of all the relevant facts indicated that FMV was paid for AST. Id.

Finally, with regard to any broader market distortions, we determined that the petitioners had not sufficiently demonstrated that the broader market conditions necessary for the transaction price to reflect fairly and accurately the subsidy benefits 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. Id. at 9.

Court's Concerns

Issue 1: The Per Se Full Value Test for Determining Whether a Subsidy Has Been Extinguished Is Not in Accordance with Delverde III or Allegheny II

The Department's modified methodology addresses the concerns expressed by the Federal Circuit in Delverde III and Allegheny II, which were reiterated by this Court. In particular, the Delverde III court emphasized that the change-in-ownership provision of the statute "simply prohibits a per se rule either way." 202 F.3d at 1366; accord Allegheny II, 367 F.3d at 1347. In other words, the Department's privatization methodology cannot operate in a manner that, in effect, requires that subsidies be automatically extinguished or, conversely, that they continue to be countervailable – even where the sale is conducted at arm's length. In addition, the Department must fully examine the facts and circumstances, including the terms of the transaction. Delverde III, 202 F.3d at 1369-1370; Allegheny II, 367 F.3d at 1347. Moreover, the Department must articulate the conditions under which an FMV sale definitively demonstrates that a benefit has been extinguished. AST III, slip op. at 13.

The Department's modified methodology fully complies with the Court's instructions regarding these matters. Most importantly, the modified privatization methodology, as applied to the AST privatization in the Section 129 Determination, is not a *per se* test based on a single consideration.[3] Rather, as described in the summary above, the Department's modified methodology includes a range of factors to be considered in determining whether the conditions necessary to find extinguishment of prior subsidy benefits are present. First, the Department determines whether the privatization was conducted at arm's length which, under the modified methodology, is a necessary though not sufficient condition for subsidy extinguishment. This is fully consistent with the statute, which makes clear that the Department is not required to find that subsidies are extinguished solely upon the basis that a change in ownership occurred in an arm's-length transaction. 19 U.S.C. § 1677(5)(F); see also SAA at 928.

Although the Department found that AST was sold in an arm's-length transaction, the inquiry did not stop there. Rather, the Department sought additional evidence to determine whether the privatized AST continued to benefit from pre-privatization subsidies and, in

[3] The points below are more generally articulated in the Modification Notice, 68 FR at 37128.

particular, whether AST was sold for FMV.[4] Although the Department was not able to find a contemporary, market benchmark price for a comparable steel producer for sale, evidence on the record demonstrated that the process leading to the sale of AST indicated that FMV was paid for the company.

However, under the modified methodology, even a finding that the sale was at arm's length *and* for FMV is not *necessarily* determinative in finding subsidy extinguishment. The Department, accordingly, pressed its examination further to consider whether the record information indicated that the GOI might have distorted the broader market conditions in the Italian steel industry such that AST's sale price was "meaningfully different from what it would otherwise have been" under normal market conditions. However, the record shows that no party, including petitioners, made any such showing.

After considering voluminous record evidence, as well as comments by the interested parties, for the reasons stated in the Section 129 Determination at 8, the Department has determined that AST had been privatized in an arm's-length transaction for FMV, and that the transaction was not otherwise affected by severely distorted broader market conditions. As the Modification Notice makes clear, under such circumstances, the Department finds that the baseline presumption – that allocable, non-recurring pre-privatization subsidies continue to be countervailable – has been rebutted and that the subsidy benefits in question are extinguished and no longer countervailable.

[4] We note that the Federal Circuit very clearly distinguished the concepts of "arm's length" and "fair market value." Allegheny II, 367 F.3d at 1348.

Issue 2: The Department's Change-in-Ownership Analysis Needs to Be in Compliance with U.S. Statute and Case Law and Requires a Benefit Analysis

Here, the Court instructed the Department to examine and explain how, despite the change in ownership, the benefit of prior subsidies to KAI continues to exist. The short answer is that, under the Department's modified methodology, where a privatization is transacted at arm's length and for FMV, and where the broader market conditions necessary for the transaction to reflect fairly and accurately the subsidy benefit are present and not severely distorted by government action, the benefit of prior subsidies does *not* continue to exist. Accordingly, for the reasons stated in the Section 129 Determination at 9, we have determined that the allocable, pre-privatization subsidies to AST were extinguished in their entirety by the privatization and, therefore, are non-countervailable.

The fact that subsidy benefits may be extinguished by an arm's-length, FMV privatization is implicit in the nature of the modified FMV analysis which emphasizes a "benefit-to-recipient" standard, consistent with the statute (section 771(5)(E)).[5] A key question in this analysis is whether, in purchasing the company, the buyer/privatized company got/retained something of value for which it did not pay. Modification Notice, 68 FR at 37133.[6] In making this FMV determination, the Department examines whether the full amount that the company (including the

[5] As the Court itself observed, "It may be that the existence of an FMV sale translates into the extinguishment of a subsidy–as the term 'FMV' itself assumes that the sale price would include and take into account subsidies given and benefit conferred. This determination, however, cannot be put forward by Commerce as a per se test." AST III at 13. As noted above, we have modified our methodology to ensure that it is not a *per se* test.

[6] Note that, under its modified methodology, the Department does not distinguish between a company and its owners for purposes of determining the impact of a privatization on any pre-privatization subsidy benefits. Modification Notice, 68 FR at 37137.

value of any subsidy benefits) was actually worth under the prevailing market conditions was paid. Modification Notice, 68 FR at 37127. If the company was sold in an arm's-length sale for an FMV price that, necessarily, fully reflects the market value of any residual subsidy benefits, then the privatized company no longer benefits from any "free value" that it had previously received. In other words, the pre-privatization subsidy benefits are extinguished.[7]

Issue 3: The Purchase Price Does Not Have to Specifically Itemize the Repayment of Subsidies, But the Repayment of Subsidies Should Be Addressed in the Change-in-Ownership Analysis

The Court instructed the Department on remand to consider whether there has been repayment of subsidies when it considers the totality of economic circumstances that surrounded the privatization of AST. The Court further stated that though the Department was not required to show itemization or explicit repayment of pre-privatization subsidies, it must show that the circumstances of the sale demonstrate the extinguishment of the subsidy. In doing so, the Department may analyze the value of the subsidy to the purchaser and, in turn, if it was repaid. It is, however, within the Department's discretion to derive the most accurate methodology to analyze privatizations. AST III, slip op. at 22.

Our response to the Court's direction builds on the discussion above of the analysis of FMV under the modified methodology. We first note that the concept of subsidy "repayment" is not explicit in the modified methodology. This is because the modified FMV analysis is based

[7] We believe this is fully consistent with the Federal Circuit's statements in Delverde III: "Had Commerce fully examined the facts, it might have found that Delverde paid full value for the assets and thus received no benefit from the prior owner's subsidies, or Commerce might have found that Delverde 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.'" Delverde III, 202 F.3d at 1368.

on a "benefit to recipient" standard that seeks to determine whether the actual price paid for the company is consistent with what the privatized company was worth in the marketplace at the time of the sale. This can be contrasted to an approach which compares the privatization transaction price to the face value of the prior subsidies. A key, distinguishing feature between the two approaches is whether the subsidy "repayment" amount reflects the market value of residual subsidy benefits at the time of the privatization or, rather reflects the unallocated balance of the original subsidy amount. Although the latter approach may be appropriate in determining whether a subsidy continues to exist when no change in ownership occurs, 19 U.S.C. 1677(5) indicates that a different analysis is warranted where there is a change in ownership.

The modified methodology developed by the Department to implement 19 U.S.C. 1677(5) takes into account the totality of economic circumstances of the privatization in determining whether the full value of the company and its subsidies, as determined in the marketplace at the time of the sale, was paid. The mechanics of how this is achieved in the analysis of concurrent subsidies, for example, are illustrated in the following discussion, excerpted from the Modification Notice:

> 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 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.

Modification Notice, 68 FR at 37137. In sum, in examining whether the sales price fully reflected the market value of any existing subsidies, a finding that FMV was paid normally ensures that all subsidy benefits were fully "paid for" and, therefore, extinguished.[8]

Consistent with this modified methodology, in analyzing the privatization of AST, the Department undertook an exhaustive analysis of the process which led to the sale of AST and, for the reasons specified in the Section 129 Determination at 8, reasonably concluded that the transaction was conducted at arm's length and for FMV, and that the broader market conditions necessary for the transaction price to reflect fairly and accurately the subsidy benefit were not severely distorted by government action. Accordingly, we believe that our analysis comports with the Court's directions on this issue.

IV. Conclusion

The Department developed a modified privatization methodology that is consistent with the statute and case law. Further, this modified methodology fully addresses this Court's concerns and complies with its opinion and order of remand. Based on this modified

[8] This is consistent with Allegheny II, where, in faulting the Department's prior privatization methodology, the Federal Circuit noted, "{f}or instance, the same-person methodology would never consider whether the purchasers adequately compensated the seller (*i.e.*, the foreign government) for the entirety of the acquired business and *thus repaid any past subsidies.*" Allegheny II, 367 F.3d at 1347. (Emphasis added.)

methodology, the total countervailable subsidy bestowed on the subject merchandise was recalculated by eliminating the benefits of pre-privatization subsidies to AST. As indicated in the Section 129 Determination at 9 (which analyzed the same privatization as is at stake here), the resulting countervailing duty rate for AST is 1.62 percent ad valorem.

V. Comments

The respondents support the draft redetermination pursuant to remand. They claim that it is consistent with the statute, Delverde III and Allegheny II; that it fully addresses this Court's concerns, and complies with the Court's opinion and order of remand; and that the Department has appropriately adopted the findings and reasoning of the Section 129 Determination.

Comment 1: *Per Se* Test and the Valuation Studies

Petitioners contend that this redetermination on remand is not responsive to the Court's concerns about application of a *per se* rule because the Department effectively implemented a *per se* rule in applying its Section 129 privatization methodology incorrectly. According to petitioners, the Department relied upon the fact that the amount paid for AST was greater than the amounts reflected in the valuation studies as the "entire analysis" of whether the company was sold for fair market value. However, petitioners claim that such an approach is specifically rejected in the Modification Notice.

Petitioners further contend that the Modification Notice requires the Department to conduct a close evaluation of the valuation studies on the record. According to petitioners, the Department did not do so. Consequently, in their view, the Department incorrectly relied on flawed valuation studies and incorrectly concluded that those studies outweighed other aspects of the sales process that indicated the sale of AST was not a fair market value transaction.

The Department's Position: We disagree that the Department relied exclusively on the fact that the price paid for AST exceeded the valuations of the company to find that the company was sold for fair market value. Under the methodology described in the Modification Notice, the Department may consider a variety of relevant factors in determining whether a privatization process results in the government receiving fair market value, including: (1) objective analyses; (2) artificial barriers to entry; (3) highest bid; and (4) committed investment. Modification Notice, 68 FR at 32127. The analysis of each of these factors and other relevant considerations was detailed on pages 5 through 8 of the Section 129 Determination and was summarized in the Department's conclusion:

> Based on our review of the factors relevant to fair market value, the privatization of AST presents a somewhat mixed picture. On the one hand, there were some real and perceived barriers in the bidding process that might have limited the number of potential purchasers. On the other hand, there is substantial record evidence that the privatization of AST was accomplished through a fair-market-value transaction. First, the GOI commissioned and followed the recommendations of objective analyses of the value of AST. Second, the value/cost of any committed investments and concurrent subsidies were known to bidders and reflected in the prices offered. Third, the GOI received the best available price for AST. After weighing these various factors, we determine that fair market value was paid for AST.

Section 129 Determination at 8.

Contrary to petitioners' assertion, the relationship of the purchase price to the estimated values in the studies was but one of the many facts and circumstances that the Department considered. Moreover, there is no indication whatsoever in the Section 129 Determination that the Department considered this one fact to be paramount.

Although the Department has adopted the findings and reasoning of the Section 129 Determination for purposes of the redetermination on remand, we note that the Department also analyzed the privatization of AST in Remand Redetermination II and this Court affirmed the Department's determination that the sale was a fair market value transaction. AST III at 13 and 23.

Petitioners' comments regarding the Department's analysis of the valuation studies are addressed in comment 5.

Comment 2: The Sale of AST was Not at Arm's Length

In finding that the sale of AST was an arm's length transaction, petitioners argue that the Department failed to examine the second part of the arm's length test, *i.e.*, whether the GOI and KAI were both acting solely in their own "self-interest." They contend that given the committed investments, debt relief, concurrent subsidies, the overly short-time frame for due diligence and bid preparation, the exclusion of Ugine, and the requirement for Italian investors in purchasing AST, the GOI was not acting solely in its own self interest. Because of this, petitioners assert that the sale of AST cannot be deemed an arm's-length transaction.

The Department's Position: Petitioners have correctly pointed out that the Section 129 Determination does not explicitly or separately address, as part of the arm's length analysis, the issue of whether the GOI was acting solely in its own self interest. Petitioners are incorrect, however, in their assertion that the Department's arm's-length test *requires* a distinct, explicit finding in this regard.

We start by reiterating the discussion in the Modification Notice regarding the Department's analysis of arm's length:

> In considering whether the evidence presented demonstrates that the transaction was conducted at arm's length, we will *be guided by* the SAA's {Statement of Administrative Action's} definition of an arm's-length transaction . . . 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.

Modification Notice, 68 FR at 37127 (emphasis added). The Modification Notice, 68 FR at 37130, further explains the nature and purpose of the analysis, noting that "{o}ur private, commercial seller standard only makes sense where we first establish that the buyer's and seller's interests *are independent of each other*." (Emphasis added.) There is no indication that either the SAA or the Modification Notice contemplates a mandatory, explicit and distinct analysis of whether each party is "acting in its own interest." There is certainly no basis for petitioners' further assertion that parties to an arm's-length transaction must act "solely" in their own interest. Rather, it is the Department's view that, although the fact of whether parties have acted in their own interest may be an important consideration in a particular case, the relevance of that consideration is in further elucidating whether the parties are related.

Moreover, petitioners' factual arguments as to why the GOI was not acting solely in its own interest and, therefore, why the transaction was not arm's length, are essentially the same as those they make in arguing that the sale was not for fair market value.[9] Petitioners appear to be arguing that because the sale was allegedly not for fair market value, its was therefore not conducted at arm's length. However, as is made very clear in the Modification Notice, the arm's length test and the fair market value analysis are distinct elements of the privatization analysis, and the Department rejects any attempt by the petitioners to collapse the two here. As noted previously, the Federal Circuit distinguished "arm's length" from "fair market value" and rejected attempts to conflate "the two very separate and distinct concepts." Allegheny II, 367 F.3d at 1348.

Finally, even if such an additional analysis were necessary in this instance, the evidence to which petitioners cite does not conclusively establish that the GOI was not acting in its own interest.[10] In fact, the Department's review of the record indicates the contrary. For example, in its October 5, 2000 QR, AST states:

> The privatization program included the following main objectives: (1) to maximize the proceeds of the sale and to thereby reduce debts; and (2) fundamentally to restructure the state-owned steel sector without public support and in compliance with EC legislation. By selling AST as an operating entity, rather than merely auctioning its individual assets, IRI (a government agency) expected to obtain a higher sale price and thereby to maximize the revenue from the sale to IRI. Revenue maximization was IRI's principal objective because it was responsible as the sole shareholder for the payment of any remaining debt of old ILVA upon completion of the liquidation process.

AST Questionnaire Response dated October 5, 2000 at 6.

---

[9] Indeed, as is clear on page 4 of their comments, petitioners merely "incorporate by reference" their subsequent arguments regarding fair market value.

[10] As noted in Allegheny II, 367 F.3d at 1347, in Delverde III the Federal Circuit stated that, "{u}nlike 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." Delverde III, 202 F.3d at 1369.

Comment 3: The Department's Market Distortion Analysis is Insufficient to Remove Its Faulty Section 129 Analysis from Classification as a *Per Se* Test

Petitioners contend that the mere addition of the market distortion analysis to the Department's FMV analysis does not change the *per se* nature of the FMV test, given the manner in which the test has been applied in this case. Moreover, petitioners argue, a test that is based on more than one consideration nevertheless can be *a per se* test.

Moreover, although the Section 123 Methodology states that the Department will examine whether the government distorted the terms of sale in a way a private seller could not, petitioners claim that the Department effectively ignored the evidence put forth on this point. Specifically, the Department ignored petitioners' arguments that the GOI distorted the terms of AST's sale based on GOI's long history of ownership of, restructuring in, and market-distorting subsidies to the entire Italian steel sector.

<u>The Department's Position</u>: As noted in the "Analysis" section above, the Department's privatization analysis, as articulated in the <u>Modification Notice</u> and applied in this case, is not a *per se* test. Combined, the Department's arm's length, fair market value, and market distortions analysis address all relevant facts and circumstances of a privatization and together ensure that the methodology as applied does not operate as a *per se* rule.[11] With regard to the methodology

[11] We observe that, in overturning the Department's previous "same-person" methodology on the grounds that, *inter alia*, it constituted a *per se* rule, the Federal Circuit appeared to be particularly concerned about the lack of a fair market value analysis under that earlier methodology, as evidenced in the following citations: "Instead, this statute requires a fact-intensive inquiry into the circumstances surrounding the transfer of ownership, beyond the simple inquiry into whether the transaction occurred at arm's length." <u>Allegheny II</u>, 367 F.3d at 1344. "Because Commerce did not consider all facts and circumstances, including whether adequate remuneration had changed hands during the transaction, this court held that Commerce's methodology violated the statutory scheme." <u>Id</u>. "This court has repeatedly approved consideration of fair market value in assessing countervailing duties in privatization

generally, we note that we addressed comments similar to petitioners' in the Modification Notice, where we stated:

> 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.

Modification Notice, 68 FR at 37128.

Petitioners' comments regarding the Department's analysis of the alleged market distortions are addressed in comment 6.

Comment 4: Sale of AST was Not at Fair Market Value

In an appendix to their comments, petitioners provide additional facts and arguments in support of their positions that: (i) the sale of AST was not at FMV; (ii) market distortions existed in the Italian steel industry; and (iii) concurrent subsidies should be countervailed.

---

transactions, albeit under an earlier version of this particular statute." Id. at 1345. "Commerce would then have had to examine the entirety of the transaction, including whether the private company paid fair market value for those assets." Id. at 1347. "For instance, the same-person methodology would never consider whether the purchasers adequately compensated the seller (i.e., the foreign government) for the entirety of the acquired business and thus repaid any past subsidies." Id.

The Department's Position: The Department's fair market value analysis is explained fully in the Section 129 Determination. Moreover, in this proceeding, the Court has already ruled that the sale of AST was for fair market value. AST III at 13 and 23. Therefore, unless the Court so desires, we are not planning to address petitioners' arguments on those aspects of the fair market analysis which were discussed at length in Remand Redetermination II (aspects of the sales process that potentially limited the number of bidders and validity of the price paid for AST).

Petitioners' comments regarding the Department's analysis of concurrent subsidies are addressed in comments 7 and 8.

Comment 5: The "Objective Analyses" of AST

[ ]

Petitioners point out that three valuation studies of AST were submitted: the August 1993 IMI Report and two studies prepared by Pasfin and Morgan Grenfell in May 1994. According to petitioners, the IMI valuation study is of primary importance because "it was the first report prepared and

[

] Thus, petitioners claim,

[

]

Petitioners contend that

[

] (emphasis in original).

The Department erred, in petitioners' view, by assuming that

[

]

In support of their position, petitioners point to

[

] Regarding the [ ], petitioners allege that

these

[

] Petitioners also allege that the

[

]

The Department's Position: At the request of IRI and ILVA, the IMI undertook to evaluate the

restructuring proposal made by ILVA., *i.e.*,

[

]

[ ] IMI Study at 3.

[

] IMI Study at 16-17.

[

] IMI Study at 16-17.

[

] IMI Study at 18.

As part of its study,

[

] Based on these calculations, IMI set the value of AST at

[ ]. IMI Study at 19-21.

Petitioners characterize IMI's recommendations as being

[

] We acknowledge that

[

] As noted above,

[

] We also acknowledge that IMI formulated its recommendations so that private investors would be interested in AST. The goal was, after all, to sell the company to private parties.

Petitioners speak of IMI recommendations as if

[

] Again,

[

] Instead,

[

]

Petitioners then attempt to impugn the credibility of the Pasfin and Morgan Grenfell valuations, claiming they relied on the IMI Study and consequently were tainted by alleged errors in the IMI Study. However, neither of these valuations was grounded upon the results of the IMI study.

The Pasfin valuation states that its analysis

[ ] Pasfin Study at 1-2. As is readily evident, [ ] considered in the Pasfin valuation of AST. Other than [ ], there is no indication (and petitioners point to none) that the Pasfin valuation "relied on" the IMI study for its results.

Similarly, in a section captioned "Terms of reference and limitations of scope," the Morgan Grenfell Study [ ] used to value AST. Morgan Grenfell Study at 2-3. But, contrary to petitioners' assertions, there is no mention of the IMI Study, let alone that it was "relied on."

In the Modification Notice, 68 FR at 37132, the Department clearly articulated the standard it will apply to a valuation study when determining whether the study will be considered as relevant evidence: "Such analysis must be objective, timely (*i.e.*, complete 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)." In the AST (BPI) Privatization Analysis at 4-5, the Department made a factual finding that the three valuation studies in this case met the criteria, including that the studies contained "information typically considered by sellers contemplating such a sale."

With regard to the Morgan Grenfell study, in particular, as this study was commissioned by KAI itself and was relied upon by KAI in formulating its bid, there is no basis for believing that this study did not contain the information typically considered by private commercial investors. It by definition meets a commercial investor standard - there is no record evidence to suggest that KAI expected anything less out if its study than any other commercial investor would have demanded. Clearly KAI did not consider its study to be deficient and it had no reason to underestimate the value of AST. The Department has no basis to second-guess a commercial investor's own assessment in this matter.

Comment 6: The Italian Steel Market was Distorted and the Department Failed to Apply its Methodology Correctly

Petitioners contend that the Italian market for steel and steel companies was highly distorted by the GOI through repeated, substantial subsidization, particularly of ILVA and AST. Petitioners claim that without this subsidization, ILVA and AST would not have existed. Thus, according to petitioners, the GOI artificially affected supply and demand in the Italian steel sector, distorted terms of sale and made possible sales of companies that otherwise would never have taken place.

Petitioners challenge the Department's application of the market distortion test described in the Modification Notice. Specifically, they dispute the Department's conclusion that GOI's decisions of what assets and liabilities to place in AST were similar to decisions faced by private sellers on the grounds that private sellers "could not tap the public treasury" to relieve the debt of companies they wish to sell. Moreover, petitioners contend, use of public funds in this way constitutes "the use of a government prerogative in a special or targeted way that made the sale possible that could not be undertaken by a private seller."

Additionally, petitioners charge that the Department failed to consider other market distortion factors listed in the "Basic Conditions" and "Legal and Fiscal Incentive Categories." In particular, the petitioners allege that the Department failed to consider the severe distortions in the broader Italian steel market resulting from the repeated bailouts by the GOI.

The Department's Position: Under the modified privatization methodology, where a party makes such a demonstration, the Department will determine whether a government, acting in its capacity as a government rather than as a commercial seller has so distorted the market for the company being sold such that the sales price does not reflect fairly and accurately the subsidy benefit. In the Section 129 Determination, where petitioners made similar arguments, as well as in the instant proceeding, the Department has found that petitioners have not sufficiently demonstrated that the broader market conditions necessary for the transaction price to reflect fairly and accurately the subsidy benefits were severely distorted by the repeated bailouts of ILVA and the massive subsidies provided to AST for sale. Nor have petitioners demonstrated that the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action.

In its Modification Notice, the Department explained that, in examining whether broader market distortions exist, it would focus upon the action of a government in its role as a government, not in its role as a seller. 68 FR at 37127. Thus, the Department has assessed whether the GOI used its governmental prerogatives "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." Section 129 Determination at 13. In particular, the Department has looked to see whether the GOI had undertaken such actions as special tax or duty rates, or regulatory exemptions particular to the privatization of AST. Id.

Aside from pointing to the subsidies in question, petitioners have identified little else by way of government qua government actions taken by the GOI that distorted the Italian steel market. Instead, petitioners point to asset write downs and debt assumptions by the GOI as evidence of market distortion. Petitioners in particular note that one factor that the Department may consider in this analysis is "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." Although petitioners are correct that the Department may find subsidies to *other* companies (*i.e.,* not the respondent company) a relevant consideration in some cases (Modification Notice, 68 FR at 37126), much of petitioners' purported evidence in this case consists of general arguments regarding subsidies to the respondent company AST (and its parent company ILVA) and vague, unsubstantiated appeals to the "well accepted reasoning that without multiple bailouts of various Italian steel companies by the Italian government, AST and most other Italian government-owned steel companies would not even have been in business at the time AST was sold."

Ironically, it is petitioners' subsidy-market distortion argument that amounts to the type of *per se* rule the Federal Circuit prohibited in Delverde III and Allegheny II. In effect, petitioners' position would preclude a finding of subsidy extinguishment simply due to the fact that a government provided subsidies in the first instance. According to petitioners, government subsidies to AST distorted the Italian steel market. Therefore, because these subsidies distorted the Italian steel market, the sale price for AST, regardless how high, cannot reflect a fair market value. Consequently, in the absence of a sale at a fair market value, the subsidies in question can never be extinguished. The logical conclusion to petitioners' argument is that a fair market value could only be determined if the GOI had never provided subsidies in the first place. In short, petitioners' subsidy-market distortion argument condemns AST to a subsidies "blackhole" from which it can never escape. Although petitioners would no doubt prefer this outcome, it does not reflect reality. Subsidies are bestowed, subsidies can provide benefits, subsidies can be countervailed, but both the Act and court decisions recognize that subsidies can also be extinguished through privatization - as they were in this case.

Comment 7: Commerce's Concurrent Subsidy Test is Not in Accordance with the Law

Petitioners argue that the Department incorrectly applies the same treatment to prior subsidies and subsidies given concurrent with a privatization. They claim that the privatization provision in the statute, 19 U.S.C. §1677 (5)(F), and Federal Circuit decisions[12] distinguish between prior subsidies and concurrent subsidies. Specifically, according to petitioners, prior subsidies potentially confer an indirect benefit upon a newly privatized company and its owners whereas concurrent subsidies confer a direct benefit upon a newly privatized company. Petitioners assert that the privatization of AST involves both prior subsidies and separate concurrent subsidies and that the Department's failure to differentiate prior subsidies from concurrent subsidies in its concurrent subsidies analysis is unlawful.

In addition, petitioners argue that under the third prong of the Department's concurrent subsidies analysis, the Department inappropriately assigns the burden of production and proof to the domestic industry to show that the value of concurrent subsidies was not reflected in the privatized company's sales price. Petitioners maintain that the respondents have the information necessary to do this, not the domestic industry, and that respondents failed to provide the needed information in this case.

Finally, petitioners maintain that the Department's concurrent subsidies analysis is also inconsistent with Article 27:13 of the WTO Agreement on Subsidies and Countervailing Measures ("SCM"), which provides a limited exception from countervailability for certain developing country subsidies granted concurrently with privatization. According to petitioners,

[12] Delverde III and Allegheny II.

while not controlling, Article 27:13 provides no exception for concurrent debt relief subsidies of the kind granted to AST as part of its privatization in a developed country such as Italy.

The Department's Position: Under its modified privatization methodology, the Department defines a "concurrent" subsidy as one which is given to facilitate or encourage privatization, or one which is otherwise bestowed concurrently with a privatization. Section 129 Determination at Comment 4, citing Modification Notice, 68 FR at 37136. In other words, a "concurrent" subsidy is simply a subset of the broader "prior" (or "past") subsidy category. The main difference is timing, *i.e.*, a "concurrent" subsidy is bestowed proximately before the time a company is sold. Thus, whether a subsidy is labeled as "prior," "past," or "concurrent," it is nevertheless bestowed upon the company before the sales date.

In the instant proceeding, the concurrent subsidy was the debt assumed by ILVA Residua when AST was demerged to prepare it for privatization. At the time of the demerger, a portion of the debt that was attributable to AST remained in ILVA Residua. AST was demerged from ILVA on December 21, 1993, which was proximately before the purchase agreement was signed by IRI and KAI on July 14, 1994, and before the May 13, 1994 deadline for submission of bids . AST (BPI) Privatization Analysis at 1-3; TKAST/GOI Questionnaire Response dated July 25, 2003 ("TKAST Quest.") at 4. Hence, the Department characterized AST's debt relief as a concurrent subsidy.

The Department will normally determine that the value of a concurrent subsidy is fully reflected in the fair market value price of an arm's-length privatization and, therefore, is fully extinguished in such a transaction where 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 of record demonstrating that the concurrent subsidies were not fully reflected in the transaction price. Modification Notice, 68 FR at 37137.

In its analysis of AST's privatization, the Department determined that any concurrent subsidies were known to all potential bidders and bestowed prior to the privatization. Further, there was no evidence upon the record that the sale price did not otherwise reflect those subsidies. Accordingly, the Department reasonably concluded that any such subsidies did not provide a benefit to post-privatized AST. Section 129 Determination at 8. Petitioners complain that, even if the Court determines that AST was sold for fair market value and that the Italian steel market was not distorted, the Department's finding that AST's debt relief was reflected in the purchase price and, therefore, no longer countervailable is not supported by substantial evidence or in accordance with the law. Petitioners' Comments ("Pet. Com.") dated January 24, 2005, at Appendix at 28-36. We disagree.

As explained above, the labels "prior," "past," or "concurrent" all deal with subsidies that are bestowed upon the company before it is sold. The principal distinction is timing, *i.e.*, how long before the sale the subsidies were given. The Department distinguishes prior (*i.e.*, pre-privatization) subsidies from post-privatization subsidies because only subsidies bestowed prior to the privatization can be subsumed in the purchase price and, therefore, potentially extinguished by the privatization. The Department distinguishes concurrent subsidies–as a *subset of prior subsidies*–because, given the proximity of their bestowal to the privatization, it is important to ensure that they are transparent to all bidders and reflected in the sales price (and, therefore, extinguishable by the sale).

Petitioners argue that AST's debt relief was a post-privatization subsidy, which could not be extinguished regardless of whether AST was sold for fair market value. Pet. Com. at Appendix at 29-31. In support its position, petitioners argue that "past" or "prior" subsidies result in "indirect" benefits that may or may not be affected by a privatization, but that AST's debt relief was a "concurrent" subsidy that provided a "direct" benefit to post-privatization AST that was not extinguished by a fair market sale.[13] Id. Petitioners are mistaken.

In formulating its modified privatization methodology, the Department acknowledged the concern over concurrent subsidies expressed by those who argued that, without such subsidies, bidders may not be willing to purchase the company or its assets. Modification Notice, 68 FR at 37137. The Department recognized that most concurrent subsidies were given in an effort to increase the attractiveness of the company or assets as an investment. In other words, these subsidies would generally be expected to increase the value of the company and, therefore, in a normally functioning market, increase the price the purchaser pays over what he or she would otherwise pay. Id. Accordingly, there would normally be no reason to believe that a concurrent subsidy would result in a purchaser paying less than fair market value. Id. Thus, all other things being equal, in a normally functioning and transparent market, the Department 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

[13] Petitioners' arguments in this regard are not novel. The Department addressed very similar points made by parties in the context of issuing the new privatization methodology. Modification Notice, 68 FR at 37136.

the company or its assets. Such additional value would be considered "paid for" in the purchase price, barring clear evidence to the contrary. Id. The Department cautioned, however, that any actionable subsidy bestowed subsequent to the privatization would be countervailed in full. Id.

Petitioners do not dispute that the GOI provided a subsidy to AST in the form of debt relief at the time it was demerged from ILVA in December 1993. See AST (BPI) Privatization Analysis at 8. Likewise, petitioners do not dispute that the sale of AST was not consummated until July 1994 when IRI and KAI signed the purchase agreement. Agreement for the Sale and Purchase of Shares at 24. At that point in time, “pre-privatized AST” became “post-privatized AST.” Therefore, regardless of the “concurrent” label the Department has used to characterize AST’s debt relief, it was not a subsidy bestowed by the GOI after July 1994 on post-privatized AST.

Petitioners cite to Delverde III and Allegheny II, claiming these cases make a distinction between “prior” subsidies that confer “indirect” benefits upon a post-privatized company and its owners and “concurrent” subsidies that “directly” benefit a newly privatized company. Pet. Com. at Appendix at 29-31. Granted, these cases deal with subsidies bestowed before the sale of the company in question. But, that is exactly what a “concurrent” subsidy is - a subsidy bestowed before a privatization, not after. However, contrary to petitioners’ claim, neither of these cases addresses the specific issue of concurrent subsidies in the context of a privatization. Thus, they provide no support for petitioners’ argument.[14]

[14] Petitioners also acknowledge that Article 27.13 of the SCM Agreement is “not controlling,” yet they argue that the Department’s modified methodology is inconsistent with that Article. Pet. Com. at Appendix at 29 n.11. We agree that Article 27.13 is not controlling. In fact, neither the SCM Agreement nor WTO decisions govern U.S. law and practice. See, e.g.,

Petitioners also complain that the Department inappropriately shifted the burden, requiring it to produce evidence that the final transaction price does not reflect concurrent subsidies. Pet. Com. at Appendix at 31-32. According to petitioners, it is the obligation of AST and the GOI to produce information that the sale price does account for all the subsidies in question, which they refused to do. In support of its position, petitioners argue that Zenith Elecs. Corp. v. United States, 988 F.2d 1573, 1583 (Fed. Cir. 1993), for example, stands for the proposition that "the party in possession of information has the burden of producing that information in order to obtain a favorable adjustment or exclusion." Id. at 31. We do not disagree with what the court said in Zenith, but we do disagree with petitioners' burden complaint.

In the course of the underlying investigation, as well as in the subsequent redeterminations on remand and the section 129 proceeding, respondents have submitted a considerable volume of information onto this record in response to the Department's questionnaires and other requests for information. Based on this information, AST has demonstrated that the potential bidders were aware of AST's debt relief and that the subsidies were bestowed prior to the sales date. There was no additional information requested by the Department, in this regard, that AST has not provided and, in this respect, the Department is satisfied that AST has met its burden of production. Although petitioners suggest that there

---

Corus Staal BV v. United States, 259 F. Supp. 2d 1253, 1264 (CIT 2003) ("WTO decisions are not binding upon the Department or the court."); accord Allegheny II, 367 F.3d at 1348; SAA at 1032 ("Reports issued by panels or Appellate Bodies under the [ ] have no binding effect under the law of the United States."). We also note that U.S. law is fully consistent with WTO requirements. See SAA at 669.

maybe additional information pertinent to this issue that AST has not provided, petitioners cite to no specifics. Though petitioners would interpret information in the record differently, the Department has made a reasonable determination that nothing else in the record detracts from the positive information indicating that potential bidders were aware of AST's debt relief, that the relief was provided prior to the sales date and, therefore, that the subsidy was reflected in the winning bid price.

Comment 8: The Finding that Concurrent Subsidies are Not Countervailable is Not Supported by the Record

Petitioners contend that the Department erred in finding that concurrent subsidies were reflected in AST's sales price. First, petitioners assert that the Department erred in finding that the concurrent subsidies received by AST were fully transparent to all potential bidders. According to petitioners, KAI and the other bidders could not have been aware of the value of the concurrent debt forgiveness because, due to AST's non-responsiveness, the Department had to resort to complex calculations to determine the amount of ILVA's debt forgiveness to attribute to AST. Also, losses resulting from asset write-downs that were assumed by the GOI were not known to potential bidders because they did not have access to AST's financial statements for periods prior to 1994. Thus, according to petitioners, the submitted bids did not reflect the value of the concurrent subsidies.

Second, petitioners contend that the Department was wrong in concluding that the concurrent subsidies were bestowed on AST prior to its sale. They assert that this conclusion is inconsistent with the Department's explicit finding that the debt forgiveness was a "concurrent" subsidy, and not a subsidy given prior to the privatization decision and sales process for AST.

Third, petitioners challenge the Department's finding that the concurrent subsidies were reflected in AST's sales price. Petitioners claim that the bidders did not know the nature or amount of the concurrent subsidies. Instead, as described in the Section 129 Determination, the bidders were perhaps aware of the value of AST as a whole as a result of the debt relief subsidy. However, according to petitioners, the Department has not explained how a bidder who is not aware of the types or amounts of concurrent subsidies can adequately compensate the government for those subsidies.

Finally, petitioners dispute the Department's conclusion that the result of the debt assumption could be valued by potential bidders. Even the result of the debt assumption was not apparent, in petitioners' view, because of the GOI's

[ ].

The Department's Position: During the course of the section 129 proceeding, the Department thoroughly examined the process leading to the sale of AST. In particular, the Department was concerned about the openness of the process, especially in respect to information that was available to potential bidders. In the course of the review, had the Department come across any information casting doubt upon the awareness of potential bidders regarding concurrent subsidies, it would have explicitly taken that information into account for purposes of the final section 129 determination. In fact, any party could have such information. However, as described above, and discussed further below, the Department found that potential bidders were fully aware of AST's financial status, including the subsidies, at the time the company was offered for sale. For example, the Department found that "all potential bidders were aware of the concurrent subsidy and [ ] it was bestowed prior to the privatization." AST (BPI) Privatization Analysis at 9.

Petitioners, however, assert that the record fails to demonstrate that potential bidders for AST were aware of the nature and value of the concurrent subsidies bestowed upon AST such that they were reflected in the sales price. Pet. Com. at Appendix at 32-36. We disagree.

Contrary to petitioners' assertions, the record does indicate that potential bidders were aware of "write-downs and resulting losses" regarding AST. For example, the Morgan Grenfell study commissioned by KAI notes that, for purposes of valuing AST, it undertook, among others, an

[ ]

Morgan Grenfell Study at 2. Thus, the record shows that KAI had current information regarding the financial status of AST, including its debt forgiveness. Accordingly, the Department reasonably concluded that such information was readily available to potential bidders because the result of the debt assumption by ILVA Residua was reflected in AST's balance sheet when it demerged from ILVA, before the company was put up for sale. Section 129 Determination at 17.

Nevertheless, petitioners contend that "concurrent subsidies were not known by KAI and other bidders because they did not have access to AST's audited financial statements for the periods prior to 1994." Pet. Com. at Appendix at 33. Indeed, it would be remarkable if such information were available given that AST did not come into existence until the end of 1993. Hence, no one should be surprised that such audits simply could not exist. In sum, the record shows the potential bidders were aware of the concurrent subsidies bestowed upon AST before it was sold.

Comment 9: The Department's Analysis Is Not in Compliance with the U.S. Change in Ownership Statute, Delverde III, or Allegheny II

Petitioners state that the Court directed the Department to examine and explain how the change in ownership affected subsidies received by AST. They allege that the Department, by assuming that any "free value" AST received from subsidies has been automatically extinguished by a FMV sale, is not in compliance with the Court's direction. Petitioners argue that the Court requires the Department to determine if the free value, *i.e.*, the millions in subsidy benefits that AST received, was or was not in fact extinguished, and that the Department has failed to conduct an examination of the facts and circumstances of the privatization to make such a determination.

<u>The Department's Position</u>: We disagree with petitioners that we have simply assumed that any "free value" AST received was automatically extinguished by its sale. The Department considered a range of factors to determine whether the conditions necessary to find extinguishment of prior subsidy benefits are present. Normally, when a company is sold at arm's length and for FMV, the sales price reflects the value of the company including the value (at the

time of the sale) of any previously bestowed subsidies. The Department carefully examined the terms of AST's privatization and concluded that the conditions were such that the market value of prior subsidies to AST were included in the price paid for AST.

The Department further examined whether the record indicated that the GOI might have distorted the broader market conditions in the Italian steel industry such that AST's sale price was "meaningfully different from what it would otherwise have been" under normal market conditions. However, the record shows that no party made any such showing.

Therefore, for the reasons stated in the Section 129 Determination at 8-9, the Department has determined that AST had been privatized in an arm's length transaction for FMV, and that the transaction was not otherwise affected by severely distorted broader market conditions. As the Modification Notice makes clear, under such circumstances, the Department finds that AST no longer benefits from any "free value" that it had previously received, *i.e.*, the pre-privatization subsidy benefits are extinguished.

Comment 10: The Department's Analysis Does Not Adequately Address the Repayment of Subsidies

Petitioners contend that the Department's modified privatization methodology did not in any way address the Court's concern that the price paid for AST ensure that subsidies have been repaid. They assert that the Department's latest methodology "fails to dig into the 'facts and circumstances' of the record to ensure that the fair market value of the company was paid, and that repayment of subsidies occurred." Petitioners claim that the Department has merely assumed that repayment of subsidies has occurred by comparing the price paid for AST to the faulty valuation studies. They argue that such an assumption is severely flawed because, according to the petitioners, the valuation studies do not set market prices or provide a benchmark price for a comparable company; they are flawed because of [ ]; and they provide no information on whether concurrent or past subsidies were factored into the valuations.

The Department's Position: We address the Court's concern regarding the repayment of subsidies under Court's Concerns: Issue 3 in the Analysis section above. There, we explained that the concept of subsidy "repayment" is not explicit in the modified methodology. Instead, when a company is purchased for FMV the purchaser has paid for the company, including any subsidies that have contributed to the value of the company.

An analogy can be drawn to a homeowner who spends $100,000 to make improvements on her home and then sells the house. There is no reason to expect that the value of the house, as reflected in the price she can expect to receive, will increase by precisely $100,000. It might increase more or less than $100,000, or not at all. The value of the homeowner's investment as part of the value of the house is determined by the market at the time of sale. An arm's length, fair market value transaction ensures that value is paid, but it does not ensure, and the Department's methodology does not seek to ensure, that the seller receives the exact amount originally invested in the home or the company.

It is important to note that the Department does not typically rely on market valuations of subsidies. To the contrary, the Department's regulations for valuing subsidies focus on the amount bestowed and not on the market-determined value of the subsidy. In the Department's view, 19 U.S.C. § 1677(5) creates a very narrow exception to our normal valuation rules. Because this provision allows for extinguishment of subsidies - even though such subsidies clearly continue under our normal methodology - the Department adopted in the Modification Notice an alternative valuation methodology, *i.e.*, a market valuation methodology. In this way, in narrowly drawn circumstances, we can carry out the statutory mandate, as interpreted by the Courts, and determine whether privatization of a company yields a payment to the seller reflecting the full value of the company including any value that has been contributed to the company through past subsidies.

____

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

____

(Date)