

Slip Op. 02-02

UNITED STATES COURT OF INTERNATIONAL TRADE

Before: Judge Judith M. Barzilay

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GTS INDUSTRIES S.A.,	:	
	:	
Plaintiff,	:	Consolidated
	:	Court No. 00-03-00118
v.	:	
	:	
UNITED STATES,	:	
	:	
Defendant	:	
	:	
and	:	
	:	
U.S. STEEL GROUP, A UNIT OF USX	:	
CORPORATION, <i>ET AL.</i> ,	:	
	:	
Defendant-Intervenors.	:	
_____	x	

[Plaintiff's Motion for Judgment Upon an Agency Record granted in part and remanded.]

Decided: January 4, 2002

deKieffer & Horgan, (*Donald E. deKieffer, J Kevin Horgan, Marc E. Montalbine*), for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, United States Department of Justice;
David M. Cohen, Director, Commercial Litigation Branch, Civil Division United States
Department of Justice, (*David D'Allessandris*); *Terrence J. McCartin, Boguslaw B. Thoemmes*,
Office of the Chief Counsel for Import Administration, United States Department of Commerce,
of Counsel, for Defendant.

Dewey Ballantine LLP, (*John A. Ragosta, John R. Magnus, Hui Yu*), for Defendant-Intervenors.

MEMORANDUM OPINION AND ORDER**BARZILAY, JUDGE:****I. INTRODUCTION**

In this case, the court is asked, yet again, to review the subsidy calculation methodology employed by the Department of Commerce (“Commerce”) during countervailing duty investigations and reviews to determine under what circumstances a privatized company is the recipient of a benefit pursuant to United States law. This case comes before the court pursuant to Plaintiff’s and Defendant Intervenors’ USCIT R. 56.2 Motions for Judgment Upon an Agency Record. Plaintiff and Defendant-Intervenors challenged certain aspects of the final determination of the Department of Commerce International Trade Administration’s countervailing duty investigation of carbon-quality steel plate from France. *See Final Affirmative Countervailing Duty Determination: Certain Cut-to-length Carbon-Quality Steel Plate from France*, 64 Fed. Reg. 73,277 (Dec 29, 1999) (“*Final Determination*”). While this case was pending before the court, the Federal Circuit issued its opinion in *Delverde SrL v. United States*, 202 F.3d 1360 (Fed. Cir. 2000) *reh’g denied* Ct. No. 99-1186 (June 20, 2000) (“*Delverde III*”). On July 31, 2000, defendant United States requested a remand to Commerce to consider the impact of the Federal Circuit’s holding in *Delverde III* to the facts of this case. The subsequent remand order instructed Commerce “(1) to determine the applicability, if any, of the decision by the Court of Appeals for the Federal Circuit in *Delverde SrL v. United States* 202 F.3d 1360 (Fed. Cir. 2000) *reh’g denied* (June 20, 2000) to this proceeding, and (2) embark upon further fact finding if

appropriate” *Remand Order* (August 9, 2000). The court now reviews Commerce’s *Final Results of Redetermination Pursuant to Court Remand in GTS Industries S.A. v. United States*, Court No. 00-03-00118 (December 22, 2000) (“*Remand Determination*”).¹ The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994) which provides for judicial review of a final determination by the Department of Commerce in accordance with the provisions of 19 U.S.C. § 1516a(a)(2)(B)(I) (1994).

II. BACKGROUND

On March 16, 1999, Commerce sought to investigate whether subsidies were given by the French Government to certain elements of the French steel industry. *See Initiation of Countervailing Duty Investigations: Certain Cut-to-Length Carbon-Quality Steel Plate From France, Indonesia, Italy, and the Republic of Korea*, 64 Fed. Reg. 12,996 (March 16, 1999). The period of investigation was calendar year 1998. In its final affirmative determination, Commerce determined that GTS’ total estimated CVD rate was 6.86%. *Final Determination*, 64 Fed. Reg. at 73,298.

GTS’ *ad valorem* rate is based entirely upon subsidies granted to Usinor prior to Usinor’s 1995 privatization, and attributed to GTS in part when GTS was still a consolidated, majority-owned subsidiary of Usinor. Therefore, the main change in ownership transaction in this investigation is Usinor’s 1995 privatization and, accordingly, we have analyzed this transaction. . . .

Remand Determination at 15.

The French Government was the majority owner of Usinor and Sacilor, another steel

¹ This case is a companion case to *Allegheny Ludlum Corp., et al., v. United States*, 26 CIT __ (2002). *Allegheny* involved imports from GTS’ parent company Usinor and the same privatization transaction is at issue.

producer, until the mid-1980s. *See Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils from France*, 64 Fed. Reg. 30,774, 30,776 (1999) (“*Usinor Final Determination*”). After a capital restructuring in 1986, France was the sole owner of both companies. *Id.* In 1987, France placed Usinor and Sacilor under the ownership of a holding company, with the holding company retaining the Usinor name. *Id.* In 1991, Credit Lyonnais, a government-owned bank, purchased 20% of Usinor. *Id.* Beginning in the summer of 1995 and continuing through 1996 and 1997, the French Government privatized Usinor through a public stock offering. *Id.* By the end of 1997, the vast majority of Usinor’s shares were owned by private shareholders, with the remaining shares owned by employees and “stable shareholders.”² *Id.*

Prior to 1992, Usinor owned approximately 90% of GTS. *Final Determination*, 64 Fed. Reg. at 73,278. From 1992 to 1995, Usinor reduced its holding in GTS. *Id.* Through two separate transactions, one occurring in 1992 and the other in 1996, Usinor transferred a majority of interest in GTS to AG der Dillinger Huttenwerks (“Dillinger”). *Id.* However, Usinor retained a 48.75% interest in the holding company Dillinger which in turn, owed 99% of GTS. *Id.* Despite the public stock offering that privatized Usinor, Commerce concluded in the *Remand Determination* that Usinor was the “same person” after the privatization and, since it had already determined that Usinor had previously received subsidies, it did not have to analyze whether the past subsidies were extinguished by the change in ownership transaction. *Remand Determination*

² The French privatization law establishes procedures for designating “Stable Shareholders.” *GTS Questionnaire Response* at 15 (Sept. 19, 2000). The purpose seems to be to provide a core group of investors who are restricted from selling during the privatization process, in order to promote stability and project confidence in the sale.

at 14. Therefore, Commerce used a 14-year average useful life (“AUL”) to allocate the benefits bestowed by the nonrecurring subsidies.³ Similarly, Commerce determined that GTS, since it had been a majority-owned subsidiary of Usinor, had also received countervailable subsidies that had not been extinguished by the privatization transaction. *Id.* at 16. Based upon its findings, Commerce recalculated GTS’ CVD rate to be 6.10% *ad valorem*. *Id.* at 43. GTS disputes this finding on several grounds but the issue of subsidy pass through is central.⁴

III. STANDARD OF REVIEW

The court must evaluate whether the remand findings are supported by substantial evidence on the record or otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B). “Substantial evidence is more than a mere scintilla;” it is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consolidated Edison Co. of New York*

³ “Commerce assumes that when a company sells ‘productive assets’ during ‘the average useful life,’ a pro rata portion of that subsidy ‘passes through’ to the purchaser at the time of sale. Commerce then quantifies the assumed ‘pass through’ amount, makes adjustments based on the purchase price, allocates an amount to the year of investigation, and calculates the *ad valorem* subsidy rate.” *Delverde III*, 202 F.3d at 1363 (citing *Affirmative Countervailing Duty Determination: Certain Steel From Prod. From Aus.*, 58 Fed. Reg. 37,217, 37,268-69 (1993)) (citation omitted).

⁴ GTS also challenges Commerce’s use of (1) a 14-year AUL to allocate the benefits bestowed by nonrecurring subsidies, (2) sales values instead of total asset values to calculate the amount of subsidies allocable to GTS which increased the margin significantly from the preliminary to the final determination, (3) an allocation method that failed to allocate subsidies based upon Usinor’s retained ownership interest in GTS, and (4) the use of “facts available” in analyzing the change in ownership transactions in 1992 and 1996. Defendant-Intervenors challenge the methodology used by Commerce to allocate non-recurring subsidies. In the interest of judicial economy the court reaches a decision in this phase of the case solely on the issue of the effect of Usinor’s privatization. Once Commerce properly analyzes the privatization transaction, it may not be necessary to reach the other issues.

v. NLRB, 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). To determine if the agency's interpretation of the statute is in accordance with law "we must first carefully investigate the matter to determine whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex V.I. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998). The expressed will or intent of Congress on a specific issue is dispositive. See *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 233-237 (1986). If the court determines that the statute is silent or ambiguous, the question to be asked is whether the agency's construction of the statute is permissible. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). This deference is due when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. *United States v. Mead Corp.* 121 S.Ct. 2164, 1271 (2001). This is not limited to notice and comment rulemaking but are given to those "statutory determinations that are articulated in any 'relatively formal administrative procedure'" *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1380 (Fed. Cir. 2001). Therefore, statutory interpretations articulated by Commerce during antidumping proceedings are entitled to judicial deference under *Chevron*. *Id.* at 1382. Essentially, this is an inquiry into the reasonableness of Commerce's interpretation. See *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996).

IV. DISCUSSION

A. *History of the Issue*

A brief history of the privatization subsidy issue is appropriate. The applicable law attempts to level the playing field by imposing a countervailing duty on subsidized imported goods sold in the United States which materially injure a domestic industry. A subsidy is a financial benefit conferred on a natural or legal person (usually the producing company) by a government entity or agent. *See* 19 U.S.C. § 1677(B).

In the past twenty years many countries have moved to privatize state-owned enterprises and thereby shift major manufacturing activity from public to private entities. Thus many plants formerly run entirely or mostly under government finance and control are now under the control of private shareholders. The question then becomes: if the plant received non-recurring financial benefits when it was government owned and operated, do those benefits survive the privatization and are the new owners, therefore, subject to countervailing duties on products they export to the United States?

Commerce first confronted this issue in 1989 when it decided that no benefits had passed to the recently privatized firm under review because the sale was for full market value and at arm's length. *See Lime from Mexico; Preliminary Results of Changed Circumstances Countervailing Duty Administrative Review*, 54 Fed. Reg. 1,753, 1,754-55 (Jan. 17, 1989). By 1993, however, Commerce had changed its views in the context of steel countervailing duty investigations. Commerce ignored the change of ownership at fair market value, which it had found significant in *Lime from Mexico*, and held that the previously bestowed subsidies survived such a sale and thus it assumed a continuing benefit to the new owners. *See Certain Hot Rolled*

Lead and Bismuth Carbon Steel Products from the U.K., 58 Fed. Reg. 6,237 (Jan. 27, 1993).⁵

Commerce then issued a fuller explanation of its position on subsidies in the privatization context when it published the General Issue Appendix covering several different CVD investigations. See *Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, General Issues Appendix*, 58 Fed. Reg. 37,217, 37,225 (July 9, 1993). In this new privatization methodology Commerce essentially assumed that a portion of the previously bestowed subsidy passed through to the new owners from the state owned entity depending on when it had been initially granted. In this methodology the life of the subsidy in years (calculated by a formula based on amortization of assets) was the critical component and whether the sale was for full market value had no significance.

Commerce's methodology of ignoring a sale at full market value was rejected by this court but reinstated by the Court of Appeals for the Federal Circuit. In *Saarstahl, AG v. United States*, 18 CIT 525, 858 F. Supp.187 (1994) this court applied pre-URAA law⁶ and held that

⁵ The historical and political context of this decision is discussed in Julie Dunne, Note, *Delverde and the WTO's British Steel Decision Foreshadow More Conflict Where the WTO Subsidies Agreement, Privatization and the United States Countervailing Duty Law Intersect*, 17 Am. U. Int'l L. Rev. 79, 89 n.38 (2001).

⁶ In 19 U.S.C. § 1677(5)(A)(2) (1988) a subsidy was defined as "provided or required by government action to a specific enterprise or industry. . . whether paid or bestowed directly or indirectly on the manufacture, production or export of any class or kind of merchandise." This provision was amended in 1994 as part of the Uruguay Round Agreement Act to read as follows:

(B) Subsidy described

A subsidy is described in this paragraph in the case in which an authority

(I) provides a financial contribution,

subsidies are extinguished in a true arms-length sale for full market value because the value of the company includes the benefit of any previous subsidies which the buyer pays for at time of purchase, leaving no remaining competitive advantage.

The Federal Circuit disagreed, holding that Commerce's decision to countervail previously bestowed subsidies was reasonable absent an explicit mandate from Congress to the contrary and that the CIT should have deferred to Commerce's interpretation. *See Saarstahl AG v. United States*, 78 F.3d 1539, 1544 (Fed. Cir. 1996). The appeals court reasoned that the statute at issue did not require countervailable subsidies to confer a benefit and that once Commerce finds a governmental subsidy it can assess countervailing duties on the new entity if the private purchaser repaid none or only some of the subsidy received prior to privatization.

In December 1999, the World Trade Organization first addressed the issue in a case also originating in the steel industry. *See WTO Dispute Panel Report on United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products*

* * * *

to a person and *a benefit is thereby conferred*.

(Emphasis added).

The URAA also included 19 U.S.C. §1677(5)(F) which stated:

A change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction.

This provision was widely thought to have been added in reaction to this court's opinion in *Saarstahl* which at the time of URAA enactment had not been reversed by the Federal Circuit. *See Delverde III*, 202 F.3d at 1367 n.3.

Originating in the United Kingdom, No. WT/DS138/R (Dec. 23, 1999). The Panel examined Commerce's assessment of countervailing duties on steel after a complaint by the European Communities. Commerce had specifically determined that the privatization at issue was at arm's-length for fair market value and consistent with commercial considerations. *Panel Report*, ¶ 6.23. The Panel held that Commerce's decision to countervail was contrary to the definition of a subsidy contained in the *Agreement on Subsidies and Countervailing Measures*, Pt. I, Art. 1 (1994). Specifically the Panel stated, *inter alia*, that the existence of a benefit could only be found by comparing whether the recipient was better off than it would be without the contribution and that "the marketplace provides an appropriate basis for comparison . . . whether the recipient has received a 'financial contribution' on terms more favorable than those available to the recipient in the market." *Panel Report*, ¶ 6.65. The Panel found that the privatization of a government owned company in an arm's length, fair market value transaction eliminates any benefit from prior subsidization. The United States appealed to the WTO's Appellate Body which upheld the Panel's Report and recommended "the United States [to] bring its measures found in the Panel Report, as upheld by this Report, to be inconsistent with its obligations under the SCM agreement into conformity with its obligations under that agreement." *WTO Dispute Appellate Body Report on United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, No. WT/DS138/R at ¶ 76 (May 10, 2000).

The Federal Circuit noted the Panel decision in *Delverde III* when it reviewed a decision by this court in a CVD case involving pasta from Italy.⁷ *See Delverde SrL v. United States*, 22

⁷ The *Delverde* case will be discussed at length *infra* in this opinion.

CIT 947, 24 F. Supp. 2d 314 (1998) (“*Delverde II*”). *Delverde*, the foreign producer, had asked this court to review the imposition of CVD by Commerce when the department, using its General Issues Appendix methodology, held *Delverde* responsible for a pro-rata portion of nonrecurring subsidies that had been granted to the former owner. Initially, this court had agreed with *Delverde*’s argument that Commerce could not assume the pro-rata portion survived the sale and remanded to Commerce to examine the sale itself to determine whether *Delverde* received a subsidy through its purchase of plant assets from an owner that had previously received subsidies. *Delverde Sr.L v. United States*, 21 CIT 1294, 989 F. Supp. 218 (1997)⁸ (“*Delverde I*”).

On remand, however, after Commerce had further explained its position, the result was different. This court found permissible Commerce’s presumption of pass through of subsidies when it assessed benefit only at the time the subsidization occurred. *Delverde II*, 24 F. Supp. 2d at 317. The Federal Circuit disagreed, holding that the statutory language required Commerce to determine whether the purchaser received both a financial contribution and a benefit from a government before concluding that the purchaser was subsidized. 202 F.3d at 1367. The court went on to instruct that Commerce examine the issue “based on the facts and circumstances, including the terms of the transaction . . .” *Id.* at 1369-70. It specifically stated that its decision was not inconsistent with that of the WTO Dispute Panel. *Id.* at 1369.

B. What does Delverde require?

The court views the *Delverde* decision as central to the resolution of this case. The parties have sharply divergent views on the meaning of that decision and its application to the

⁸ Both this court and the Federal Circuit assumed the sale in *Delverde* was between private entities. *Delverde III*, at 202 F.3d 1362.

administrative action now before the court. Commerce asserts that, in accordance with the Federal Circuit's holding in *Delverde III*, it formulated a new two-step inquiry to determine if prior subsidies passed through to the new privatized entity.

Consistent with the Federal Circuit's analysis in *Delverde III*, Commerce announced a two-step inquiry. Commerce first analyzes whether the pre-sale and post-sale entities are for all intents and purposes the same person. If they are, Commerce's analysis stops, as all of the elements of a subsidy will have been established with regard to the producer under investigation, *i.e.*, the post-sale entity. However, if the two entities are not the same person, Commerce will proceed to the second step in its inquiry and will examine whether a subsidy has been provided to the post-sale entity through the change-in-ownership transaction itself.

Def.'s Mem. In Opp'n to Pl.'s and Def.-Intervenors' Mot. for J. Upon Agency R. at 15. (“*Def.'s Br.*”). After applying the two-step analysis to Usinor, Commerce concluded it did not have a duty to analyze whether the subsidies passed to Usinor because Usinor was the same “person” before and after the privatization. *Id.* at 16.

After a lengthy review and analysis of the remand record, Commerce determined that government-owned Usinor and privatized Usinor were for all intents and purposes the same person. As a result, the prior subsidies remained attributable to privatized Usinor, as all of the elements of a subsidy were established with regard to privatized Usinor. Thus, it was unnecessary for Commerce to proceed to the second step in its privatization analysis, which would have involved an inquiry into whether a subsidy had nevertheless been provided to the privatized entity through the privatization transaction itself.

Id. Therefore, since Commerce had previously determined that Usinor was the recipient of subsidies, it imputed the subsidies to Usinor and, therefore, GTS after the privatization.

GTS asserts the *Remand Determination* is contrary to *Delverde III* because Commerce “simply applied an irrebuttable presumption that, because post-privatized Usinor ‘continued to operate, for all intents and purposes, as the same ‘person’ that existed prior to the privatization,’

the pre-privatization subsidies are presumed to provide a continuing benefit to GTS.” *Pl.’s Mem. in Supp. of Mot. for J. Upon the Agency Record* at 14 (“*Pl.’s Br.*”) (quoting *Remand Determination* at 19). GTS claims “[b]ecause the owners of the newly privatized Usinor paid full market value for the company in an arm’s length transaction based upon commercial considerations, the newly privatized company received no benefit from the subsidies bestowed before privatization.” *Pl.’s Br.* at 21. Additionally, GTS claims that the *Remand Determination* is contrary to the Agreement on Subsidies and Countervailing Measures and inconsistent with the WTO decision in *Appellate Body Report on United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, No. WT/DS138/R at ¶ 76 (May 10, 2000). *See Pl.’s Br.* at 11-13.

The central question is whether Commerce’s application of its method complies with congressional intent embodied in the statutory language of 19 U.S.C. § 1677(5)(F), as interpreted by the Federal Circuit in *Delverde*. Consistent with the court of appeals’ decision in *Delverde*, this court finds the statute’s meaning to be clear, and, therefore, does not reach the issue of deference to Commerce’s interpretation under the *Chevron* doctrine. *See Delverde III*, 202 F.3d at 1367. “We need only determine whether Commerce’s methodology is in accordance with the statute.” *Id.* As noted above, the *Delverde* decision assumed the sale of assets from one private company to another. The question directly before the court was whether Commerce’s methodology for determining a subsidy was permitted under the new statutory direction by Congress. Commerce assumed that when a company sells “productive assets” previously subsidized during their “average usual life” a pro rata portion of the subsidy “passes through.” *Id.* at 1363.

The Federal Circuit struck down this methodology as not in accordance with 19 U.S.C. § 1677(5). The court characterized the method used in *Delverde* as a *per se* rule which avoided looking at the “facts and circumstances of the sale.” *Delverde III*, 202 F.3d at 1364. The Federal Circuit stated:

[W]e have come to the conclusion that the Tariff Act as amended does not allow Commerce to presume conclusively that the subsidies granted to the former owner of Delverde’s corporate assets automatically “passed through” to Delverde following the sale. Rather, the Tariff Act requires that Commerce make such a determination by examining the particular facts and circumstances of the sale and determining whether Delverde directly or indirectly received both a financial contribution and benefit from a government.

Id. at 1364. The court of appeals, therefore, interpreted section 1677(5) to prohibit Commerce from adopted any *per se* rule that a subsidy passes through, or is eliminated, with a change of ownership. *Id.* at 1366.

Commerce, the court granted, did have some flexibility to establish a methodology for calculating the financial contribution and benefit conferred on a person. *Id.* However, contrary to Commerce’s assertion in the case now before the court, the *Delverde* court expressed no doubt that the new statute required two actions from Commerce: one, that the terms of the sale must be examined, and must include analysis of the entire transaction to determine if the subsidy (not the corporate identity) passed through to a person now under investigation. *Id.* at 1365-66. In addition, such examination must focus on the new owner. According to the *Delverde* decision, the term “person” is not open to interpretation. The court said that “person” means the purchaser of the asset.

[W]e conclude that the statute does not contemplate any exception to the requirement that Commerce determine that a government provided both a financial contribution and benefit to a person, either directly or indirectly, by one

of the acts enumerated, before charging it with receipt of a subsidy, *even when that person bought corporate assets from another person* who was previously subsidized.

Id. at 1366 (emphasis added). In *Delverde* the purchaser was a private company, buying some portion of a subsidized company's assets. In the instant case, the purchasers are the shareholders of the newly privatized company buying all the assets of the company in an initial public offering from the Government of France. In either case, the Federal Circuit's teachings are clear that in order to countervail the imported product, "Commerce must find that the purchaser *indirectly* received subsidies from a government." *Id.* at 1367 (emphasis in original).

The Federal Circuit emphasizes that the legislative history supports a reading of the statute, "as plainly requiring Commerce to make a determination that a purchaser of corporate assets received both a financial contribution and a benefit from a government. . . ." *Id.* The court was even more specific and found the methodology contrary to law because,

[i]t did not consider *any* of the facts or circumstances of the sale relevant. Commerce produced no evidence that *Delverde* received goods for less than "adequate remuneration."

Id. (emphasis in original).

The court in *Delverde* did not have Commerce's novel "personhood" methodology before it, but was explicit enough in its description of when a rule can be considered *per se* that the decision provides clear guidance. A methodology is *per se*, and therefore contrary to the statute, when it determines that a subsidy continues to be countervailable to a new owner following a change in ownership without looking at the transaction itself. *Id.* The Federal Circuit directed that any methodology must examine the facts of the sale to determine if the new owner, "paid full value for the asset and thus received no benefit from the prior owner's subsidies. . . ." *Id.* at

1368. Such an analysis must focus on the new owner, since that entity is the producer of the goods at issue during the period of investigation under review.

The *Delverde III* court did note that there are differences between the sale of a single asset and a wholesale privatization. A private seller will presumably always seek the highest price for its assets, while a government may have other goals. *Id.* at 1369. Similarly, there are differences between the elements of the transaction which must be evaluated when the sale is of a single asset or is a privatization of an entire company through the sale of stock. These differences, however, do not alter the statutory requirements for determining if a financial contribution and benefit was conferred on the new owner. Variations in the structure of a transaction and the motives of the parties involved do not relieve Commerce of its responsibility to look at the facts and circumstances of the sale to determine if the new owner received directly or indirectly a subsidy for which it did not pay “adequate remuneration.” *Id.* at 1368.

Finally, the Federal Circuit, to re-enforce its underlying reasoning and amplify the analysis required of Commerce, referred to the WTO decision in *British Steel*. There, as noted above, when looking at the facts of government privatization of a steel company, where the terms were at arms-length and for fair market value, the WTO determined no subsidy passed through to the new owners. The Federal Circuit emphasized that its reasoning in *Delverde* is not inconsistent with the WTO’s reasoning in *British Steel*. *Id.* at 1369. The court reads this portion of the *Delverde* opinion to mean that any methodology adopted Commerce must recognize the possibility that a subsidy can be extinguished by a privatization, even the privatization of an entire company, if a thorough analysis of the transaction supports that conclusion.

The Federal Circuit in *Delverde* laid out certain criteria that at a minimum any new

methodology must include. First, Commerce cannot rely on any *per se* rule. Second, it must look at the facts and circumstances of the TRANSACTION, to determine if the PURCHASER, received a subsidy, directly or indirectly, for which it did not PAY ADEQUATE COMPENSATION. In this instance, Commerce avoids examining the terms of the sale by arguing that under the four-part test it developed, if the pre- and post-corporation is the same person, it is not required to determine if the subsidy it found to exist pre-privatization continues post-privatization. This argument contravenes the Federal Circuit's holding in *Delverde III*.

From *Delverde III*, it is evident that the court interpreted section 1677(5)(F) as requiring Commerce to determine if the subsidy continued to benefit the post-privatized corporation. In this instance, Commerce has developed a methodology that circumvents its statutorily mandated duty to determine if a benefit was conferred on the privatized corporation. To determine if Usinor was the same "person" Commerce used a four-factor test based on general corporate law principles.

[W]here appropriate and applicable, we would analyze such factors as (1) continuity of general business operations, including whether the successor holds itself out as the continuation of the previous enterprise, as may be indicated, for example, by the use of the same name, (2) continuity of production, (3) continuity of assets and liabilities, and (4) retention of personnel. . . . [T]he Department will generally consider the post-sale entity to be the same person as the pre-sale entity if, based on the totality of the factors considered, we determine that the entity sold in the change-in-ownership transaction can be considered a continuous business entity because it operated in substantially the same manner before and after the change in ownership.

*Remand Determination at 13.*⁹ Commerce has erroneously read *Delverde III* as leaving the

⁹ Commerce does not cite to any precedents or other supporting sources for using this test, other than a Corporation Practice Guide. It appears to be similar to one used by courts to determine if successor corporations are still liable to third parties, who are not parties to the merger, for the actions of the original corporation. See e.g. *Fehr Bros., Inc. v. Scheinman*, 121

analysis of the privatization transaction to its discretion. It is clear the method used to analyze the privatization transaction is left to the discretion of Commerce. *See Delverde III* 202 F.3d at 1367, *citing* H.R. Rep. No. 103-826(I), at 110 (1994). However, Commerce is *required* to examine the transaction to determine if a financial contribution and benefit “passed through” to the privatized corporation. *See* 19 U.S.C. § 1677(5)(B).

Although Commerce’s “person” analysis is not an explicit *per se* rule, it still fails to meet the requirements of the statute because it concludes that a purchaser received a subsidy without making “specific findings of financial contribution and benefit. . . that are required by §§ 1677(5)(D) and (E).” *Delverde III*, 202 F.3d at 1367. An initial public offering of a formerly government controlled corporation will often involve the same entity pre- and post-sale using Commerce’s criteria. Indeed, in nearly every circumstance that a state-run enterprise is privatized as a whole entity, Commerce would be able to find that the same “person” exists. Commerce’s use of a methodology that eliminated the need to determine if the subsidies passed through to the privatized entity in this situation was specifically rejected by the Federal Circuit in *Delverde III*.

Commerce’s methodology conclusively presumed that Delverde received a subsidy from the Italian government— *i.e.*, a financial contribution and a benefit, simply because it bought assets from another person who earlier received subsidies. Commerce deemed the fact that Delverde bought the assets, as agreed to by both parties, at fair market value to be *irrelevant* to the determination whether it received a subsidy. It did not consider *any* of the facts and circumstances of the sale relevant. Commerce produced no evidence that Delverde received goods at less than “adequate remuneration.”

A.D.2d 13, 17, 509 N.Y.S.2d 304, 307 (N.Y. App. Div.1986). The court is not persuaded that this test applies here. In this case there is no reason for Commerce to default to a corporate law analysis because the facts of the sale will disclose whether the new owners compensated the government for previous subsidies.

Id. at 1367. (citations omitted). As the holding in *Delverde III* mandates, the change in ownership triggers Commerce's duty under 19 U.S.C. § 1677(5)(D) and (E) to determine if privatized Usinor received a financial contribution and benefit from the French Government. Therefore, the court finds that Commerce's failure to analyze the privatization transaction to determine if Usinor and, therefore, GTS received a subsidy after it was privatized is contrary to *Delverde III* and the statutory intent of section 1677(5)(F).

The court recognizes that the Usinor privatization is a complex transaction. This, however, only heightens the need for in-depth and focused analysis. A short review of the privatization reveals several facts ignored by Commerce in its *Remand Determination*, which may prove significant to the required inquiry. In 1995 the French Government moved to privatize Usinor. *Usinor Final Determination*, 64 Fed. Reg. at 30,776. The privatization of the controlling interest here involved two public offerings. *Id.* The French public offering was set at FF 86 per share. *GTS Questionnaire Response* at 9 (Sept. 19, 2000) The international public offering was set at FF 89. *Id.* In addition, there was an employee offering and a sale of certain stock at a 2% premium over the international offering was placed with so-called "Stable Shareholders." *Id.*

In 1997, France distributed most of its remaining stock, so that it held less than 1%. *Usinor Final Determination*, 64 Fed. Reg at 30,776. The Government of France turned over this stock, without compensation, to stable shareholders and employees who held their initial purchase of stock for a required time. *Id.* By 1998, the government had completely divested itself of Usinor. *Id.* Even this cursory examination of the record raises several questions. Some facts point to the probability that the stock offering represented a true arms-length transaction for

fair market value, which may include “adequate remuneration” to the government by the new owners for any previous subsidies bestowed. Other facts point to possible mechanisms, such as the use of “stable shareholders,” that could provide a vehicle for subsidy pass-through. On remand it is imperative, and required by 19 U.S.C. § 1677(5), as interpreted by the court in *Delverde III*, that Commerce examine the details of the Usinor privatization transaction to determine if goods imported by GTS during the POI of 1998 were subsidized.

V. CONCLUSION

For the foregoing reasons, the court holds that the Department's *Final Results of Redetermination Pursuant to Court Remand in GTS Industries S.A. v. United States*, Ct. No. 00-03-00118 (December 22, 2000) is not in accordance with law and therefore will be remanded to the agency for review and action consistent with this opinion.

SO ORDERED.

Dated: _____
New York, NY

Judith M. Barzilay
Judge