

the government retaining no controlling interest in the company or its assets. If we determine that the government has not transferred, as a result of the sale, ownership and effective control over all or substantially all of the company or its assets, then our analysis of the transaction will stop and the baseline presumption of a continuing benefit will not be rebutted. Otherwise, we will proceed to a consideration of whether the sale was at arm's length for fair market value.

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

With regard to an analysis of the transaction price, there is no statutory definition of fair market value, nor does the SAA give any guidance in this area.<sup>2</sup> We note, however, that in the context of several recent remand redeterminations in privatization cases before the Court of International Trade (CIT), the Department has applied a process-oriented approach to analyzing the facts and circumstances of particular privatizations and the resulting value paid.<sup>3</sup> Given that certain of these redeterminations are now on appeal before the Federal Circuit, our approach and findings in these remand redeterminations may or may not reflect the full extent of the analysis of the transaction appropriate under this proposed new methodology. However, the CIT remand redeterminations may provide a useful initial framework for an approach to determining whether a transactions price was fair market value.

The basic question before us in analyzing fair market value is whether the government, in its capacity as seller, sought and received, in the form of monetary or equivalent compensation, the full amount that the company or its assets were actually worth under

existing market conditions.<sup>4</sup> Accordingly, in determining whether the evidence presented, including, *inter alia*, information on the process through which the sale was made, demonstrates that the transaction price was fair market value, we propose the following non-exhaustive list of factors that might be considered.<sup>5</sup>

(1) Artificial barriers to entry: Did the government impose exclusions on foreign purchasers or purchasers from other industries, or overly burdensome/unreasonable bidder qualification requirements that artificially suppressed demand for the company?<sup>6</sup>

(2) Independent analysis: Did the government perform due diligence in determining the appropriate sales price, and did it follow the recommendations of any independent analysis, indicating that maximizing its return was the primary consideration?

(3) Highest bid: Was the highest bid accepted and was the price paid in cash or close equivalent (and not, e.g., with an imbalanced bond-for-equity swap), again indicating that maximizing its return was the government's primary consideration?

(4) Committed investment: Were there price discounts or other inducements in exchange for promises of additional future investment that private, commercial sellers would not normally seek (e.g., retaining redundant workers, building or maintaining unwanted capacity), indicating that maximizing its return was not the government's primary consideration?

If we determine that the evidence presented does not demonstrate that the privatization was at arm's length for fair market value, then we will find that the company continues to benefit from subsidies. Otherwise, if it is demonstrated that the privatization was at arm's length for fair market value, any subsidies will be presumed to be extinguished and, therefore, to be non-countervailable.

However, a party can rebut this presumption of extinguishment by demonstrating that, at the time of the privatization, the broader conditions

necessary for the transaction price to fairly and accurately reflect the subsidy benefit were not present, or were severely distorted by government action (or, where appropriate, inaction).<sup>7</sup> In other words, although in our analysis we may find that the sale price was a "market value," parties can demonstrate that the market itself was so distorted by the government that there is a reasonable basis for believing that the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action.<sup>8</sup> A non-exhaustive list of factors that might be considered in determining whether these broader market distortions existed might include:

1. *Basic Conditions*: Are the basic requirements for a properly functioning market present in the economy in general as well as in the particular industry or sector, including unfettered interplay of supply and demand, broad-based and equal access to information, decentralization of economic power including effective safeguards against collusive behavior, effective legal guarantees and enforcement of contracts and private property?<sup>9</sup>

2. *Related Incentives*: Has the government used the prerogatives of government in other areas to facilitate, or affect the outcome of, a sale in a way that a private seller could not, e.g., by using its authority to tax or set duty rates to make the sale more attractive to potential purchasers generally, or to particular (e.g., domestic) purchasers?

3. *Legal requirements*: Where there special regulations pertaining to this privatization (or privatizations generally) affecting worker retention, etc., that distorted the market price of the company or its assets?

4. *Creation/Maintenance*: Did the presence of other heavily subsidized companies severely distort the market price of the company or its assets in that industry?

Where a party demonstrates that the broader market or economic environment was severely distorted by government action such that there is a reasonable basis for believing that the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action, the presumption of extinguishment will be rebutted. Where a party does not establish a reasonable

<sup>4</sup> One possible standard to apply here may be whether the government, in its capacity as seller, acted in a manner consistent with the usual sales practices of private, commercial sellers in that country.

<sup>5</sup> We propose below various factors that might be considered at each stage of inquiry under this new methodology. These are not meant to represent an exhaustive list of all factors that should be considered, and we invite comment on any additional factors that might be considered. Moreover, we encourage comment on any factors that might more appropriately be considered under a different stage of inquiry than the stage proposed here.

<sup>6</sup> The fundamental consideration here is not necessarily the number of bidders *per se* but, rather, whether the market is contestable, i.e., anyone who wants to buy the company or its assets has a fair and open opportunity to do so.

<sup>7</sup> We would generally be concerned here only with the actions of government in its role "as government," and not the actions of the government in its role as the seller to the extent its actions as seller are consistent with the normal commercial practices of a private seller.

<sup>8</sup> Neither the parties nor the Department would be required to quantify by how much the actual transaction price differed from an "undistorted market" value.

<sup>9</sup> We encourage comment on how this analysis might intersect with the Department's practices regarding nonmarket economies in the subsidies and countervailing duty context.

<sup>2</sup> We encourage parties to include in their comments specific suggestions on what, if any, explicit definition of fair market value the Department should adopt in the context of a countervailing duty proceeding.

<sup>3</sup> See, e.g., *Results of Redetermination Pursuant to Remand, Allegheny Ludlum Corp. v. United States*, CIT No. 99-09-00566 (January 4, 2002); *Results of Redetermination Pursuant to Remand, GTS Industries, S.A. v. United States*, CIT No. 00-03-00118 (January 4, 2002).