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April 18, 2003

FILE NO: 59296.000002

**By Hand**

**PUBLIC DOCUMENT**
Total Pages: 10

Mr. Jeffrey May
Director of Policy
Central Records Unit, B-099
Import Administration
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, DC 20230
Attention: Privatization Methodology

Re: Notice of Proposed Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act: Rebuttal Comments of ILVA S.p.A.

Dear Mr. May:

On behalf of ILVA S.p.A. ("ILVA"), we submit these rebuttal comments in response to the Federal Register notice of March 21, 2003[1] concerning the Department's proposed change to its privatization methodology to conform with the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

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[1] Notice of Proposed Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act and Request for Public Comment, 68 Fed. Reg. 13897 (Mar. 21, 2003).

**The Department Should Focus on Benefits to the Purchaser, Not Motives of the Seller**

In its comments to the Department, the Specialty Steel Industry of North America ("SSINA"), made suggestions that the Department should reject as misguided attempts to transform the inquiry from analysis of the benefit to the purchasers to an inquest of the motives of the government.

The World Trade Organization ("WTO") Agreement on Subsidies and Countervailing Measures ("SCM Agreement") defines a "subsidy" as "a financial contribution by a government … [in which] a benefit is thereby conferred."[2] Likewise, the definition of "subsidy" in U.S. law includes the elements of a "financial contribution" and "benefit".[3] The Court of Appeals for the Federal Circuit has explained that the statute requires the Department "to make a determination that a purchaser of corporate assets received both a financial contribution and benefit from a government, albeit indirectly through the seller, before concluding that the purchaser was subsidized."[4] These authorities confirm that the Department must focus on whether the privatization transaction resulted in a benefit to the purchaser.

[2] SCM Agreement, Art. 1.1, reprinted in Uruguay Round Trade Agreements, Text of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements, H. Doc. 103-316, v. 1, at 1533.

[3] 19 U.S.C. § 1677(5)(B).

[4] Delverde S.r.l. v. United States, 202 F.3d 1360, 1367 (Fed. Cir. 2000), reh'g granted in part on other grounds (June 20, 2000).

Nowhere does the SCM Agreement or any U.S. statute call for the Department to examine the motives of the government in determining whether a subsidy has occurred.[5] The Department itself has refused to examine motives in determining whether an investment was consistent with commercial considerations, choosing instead to focus on objective characteristics.[6]

Given the absence of any mandate in the SCM Agreement or U.S. law to examine motives in making a determination of countervailability, it is puzzling that SSINA makes recommendations that amount to a query of motives. SSINA asserts that the Department should determine whether a sale is at fair market value based on the "behavior" of the government, specifically that "a fair market value sale must reflect not only a price but also a behavior that is consistent with that of a non-governmental seller."[7] In support of its position, SSINA quotes a footnote from the Department's proposal, suggesting that "one possible

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[5] See Allegheny Ludlum Corp. v. United States, 182 F. Supp.2d 1357, 1366 (Ct. Int'l Trade 2002) ("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.'"), appeal docketed, No. 03-1248 (Fed. Cir. Feb. 11, 2003).

[6] See Carbon Steel Structural Shapes, Hot Rolled Carbon Steel Plate, Hot Rolled Carbon Steel Bar, and Cold-Formed Carbon Steel Bar from the United Kingdom, 47 Fed. Reg. 39384, 39391 (1982) (final CVD determ.) ("In determining whether an investment was consistent with commercial considerations, we do not investigate the motives underlying the government's action, but rather examine objective financial characteristics of the firm at the time of the investment".).

[7] Letter from Collier Shannon Scott on behalf of SSINA to the Department (April 11, 2003) (hereinafter "SSINA Comments"), at 4.

standard" that it could apply is "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."[8]

ILVA objects to that standard, because it unnecessarily requires the Department to examine the motives of the government, and then to compare them with the "practices" of private sellers, both of which are irrelevant to the issue of whether the transaction is something less than "fair market value" and therefore amounts to an impermissible "benefit" to the purchaser (i.e., a benefit that the purchaser would not have obtained in a private transaction). Aside from the fact that neither the SCM nor U.S. law require an examination of motives to determine whether a "benefit" exists, such an examination of motives would be impossible to administer. Would the Department be required to examine the privatization contract line by line, isolate any provisions other than the immediate transfer of assets and the dollar price, and then begin an analysis of why the government included those provisions? Private sellers of companies place conditions of sale all the time that involve considerations other than the bare listing of assets and the price. Sometimes there are conditions on the form or timing of payment, for example. As discussed further below, sometimes private sellers place conditions on a sale in order to meet pre-existing obligations to workers. To ask the Department to examine each provision of a privatization contract and look behind the motives of the

[8] 68 Fed. Reg. at 13900 n.4.

government, and then make a comparison to what a private investor would do, would hopelessly complicate the Department's investigation. Moreover, it would make it impossible for a government about to privatize a company to know what motives or contractual provisions would be permissible and what motives or provisions would taint the entire transaction.

The standard proposed by SSINA, and suggested by the Department as a "possible" standard sounds attractive, because it has a ring similar to the "consistent with usual investment practice of private investors" standard that the Department applies in evaluating whether an equity infusion by the government in a producer constitutes a "financial contribution".[9] However, the SCM Agreement and U.S. law require both a "financial contribution" and a "benefit". This two-pronged standard is based on the assumption that the two steps are analytically distinct, with the first prong focusing on what the government provides and the second prong focusing on what the recipient received. The approach favored by SSINA (and suggested as a possibility in Footnote 4 to the Department's proposal) would, in effect, collapse the test to one prong, the showing of a "financial contribution". This approach would collapse the test by making the definition of a "benefit" in effect be a restatement of the "financial contribution" test, because the test of whether a "fair market value sale" that potentially extinguishes pre-privatization subsidies will turn on the question of whether the government's sale proposal reflects a "behavior that is consistent with that of a non-governmental seller."

[9] 19 C.F.R. § 351.507(a).

**The Department Should Not Countervail Pre-Privatization Subsidies Just Because The Sale Includes a Labor Agreement**

As perhaps a logical consequence of its obsession with what the government is doing in the privatization transaction instead of what the purchaser is obtaining, twice in its comments SSINA appears to insist on countervailing any privatization agreement that includes a clause regarding worker retention. In its definition of "fair market value," SSINA asserts that "where the agency is confronted with behavior such as the government's imposition of conditions on a sale requiring that certain employment levels or production output be maintained, or furnishes a subsidy concurrent with the privatization to entice the sale, it should find such actions inconsistent with those of a commercial seller."[10] First, as discussed above, SSINA's argument is misguided because it flows from the fallacious premise that the motives of the government determine the issue of whether the transaction price is "fair market value," and thus the ultimate question of whether the transaction constitutes a countervailable "benefit" to the purchaser. If all of the bidders are aware of the worker retention provision, then their bid

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[10] SSINA Comments, at 4-5 (emphasis added); see also id. at 8 ("A government's imposition of conditions upon the purchaser, in terms of future investments, retention of workers, maintenance of excess capacity, etc., should serve as sufficient evidence that the government is not acting as a normal commercial actor, even absent an explicit price discount."). Nucor appears to make an abbreviated version of the same argument in its comments. See Letter from Wiley Rein & Fielding on behalf of Nucor Corp. and Nucor Yamato Steel Co. to the Department (April 11, 2003) (hereinafter "Nucor Comments"), at 12 ("Under normal commercial considerations, a seller would not be concerned with what the buyer did with the company after the sale.").

prices will reflect that provision, just as their bid prices would reflect any other condition in the contract, whether or not that condition would have been made by a commercial seller. If all of the bid prices reflect the same understanding regarding the package as a whole, the highest bid should represent the fair market value.

Second, another premise of the argument is wrong, namely that there would be no labor retention agreement in a transaction between private parties. In the current bidding war between AK Steel and U.S. Steel to buy National Steel Corporation, the central point of contention is that U.S. Steel has reached a labor agreement with the United Steelworkers union as part of the deal, and AK Steel has not. Even though AK Steel has submitted a higher bid, the bankruptcy court that must approve any deal "had given AK Steel a deadline of April 9, 2003 to reach a new labor agreement with the union or run the risk of losing the 'stalking-horse' status the company had gained in a battle with Pittsburgh-based U.S. Steel Corp. to acquire National."[11] Thus, it would be incorrect for the Department to assume that simply because a privatization agreement contained a clause regarding retention of workers that this automatically would taint the agreement as something other than a transaction for "fair market value".

[11] "Gerard Tells AK Steel: 'No Contract, No Work,'" American Metal Market, April 14, 2003, at 2.

Finally, SSINA errs by neglecting to relate the contractual provision to the plans of the bidders. If a government were to include a provision in a privatization transaction requiring the winning bidder to employ at least 100 workers, and the highest bidder had valued and bid on the company based on a business plan where it had anticipated running the company using 200 workers, then how could the worker retention provision result in a transaction at less than "fair market value"? The winning bidder would have made the same bid, with or without the worker retention provision, because the worker retention provision did not decrease that bidder's valuation of the company, based on that bidder's plan for using the company's assets. Once again, SSINA errs by failing to examine the privatization transaction from the standpoint of the purchaser. For the reasons explained above, the Department need not examine labor-related provisions at all to conclude that the privatization occurred at fair market value. However, if the Department were to insist on examining the terms of the labor agreement at all, it would have to examine the business plans of the winning bidder to determine whether the absence of the supposedly non-commercial consideration would have resulted in a higher winning bid.

**The Department Should Not Countervail As "Concurrent Subsidies" Any Inducement That Was Disclosed And Available To All Bidders**

In its comments, SSINA asserts that the Department's proposed methodology "should recognize that the provision of subsidies prior to or during privatization proves that the

privatization did not occur at fair market value."[12] Nucor suggests that "[s]ubsidies provided within two years of a company's privatization should be considered as subsidies to the new owners, since they were, or may presumed to have been, provided to benefit the new owners at the time of sale."[13]

Both comments miss the point. First, as explained above, the point of the analysis of whether the privatization occurs at "fair market value" is to determine whether the purchaser got some unpaid "benefit", i.e., paid less than what the market dictated through open competition. If all bidders are aware of what the government has done to "clean up the books" and if these steps were non-discriminatory, i.e., in effect regardless of the ultimate purchaser, then the steps that the government took to make the privatized company more attractive will be reflected in the bid prices.

Second, although the motives of the government are irrelevant as explained above, in fact the act of taking steps to "clean up the books" of a marginal asset prior to sale is a typical practice in private-to-private transactions. SSINA asserts that "[a]lthough governments characterize this assistance as efforts to make the company more attractive to buyers, governments more regularly are catering to broader political and social goals."[14] This is a

[12] SSINA Comments, at 9.

[13] Nucor Comments, at 15.

[14] SSINA Comments, at 9.

totally speculative assertion, and it would be well nigh impossible for the Department to determine in any rational and consistent manner whether to credit the government with "good" motives (i.e., that the government "cleaned up the books" in order to make the company more attractive to buyers) or "bad" motives (i.e., that the government provided assistance pre-privatization in order to maintain the company as an ongoing concern regardless of cost). Even if the Department were to judge the government's motives, ultimately that judgment would be irrelevant to the determination of whether the transaction was for "fair market value" such that the purchaser received no illicit "benefit." That determination can only be made by asking whether there was sufficient buyer competition, a transparent process, and ultimately a sale to the highest bidder.

**Conclusion**

For the above reasons, the Department privatization methodology should avoid examination of the government's motives. The Department's methodology also should not dismiss a privatization as less than "fair market value" just because the sale involves a labor retention agreement. Finally, the Department's methodology should not countervail any privatization assistance that occurred prior to the submission of bids and was known to all bidders.

Respectfully submitted,

William Silverman
Richard P. Ferrin