BEFORE THE BUREAU OF INDUSTRY

AND SECURITY

U.S. DEPARTMENT OF COMMERCE

RESPONSE TO WRITTEN COMMENTS AND ORAL TESTIMONY ON BEHALF OF THE CO-PETITIONERS IN THE PETITION FOR THE IMPOSITION OF MONITORING AND SHORT SUPPLY CONTROLS WITH RESPECT TO EXPORTS FROM THE UNITED STATES OF COPPER SCRAP AND COPPER-ALLOY SCRAP

DOCKET NO. 040419121-4121-01

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June 7, 2004

I. GENERAL COMMENTS

A. The Applicable Law

When Congress enacted the Export Administration Act of 1979 (50 U.S.C. 2401 *et seq*) ("the EAA") it found, amongst other things, that:

- The ability of United States citizens to engage in international commerce is a fundamental concern of United States policy;
- The restriction of exports from the United States can have serious adverse effects on the balance of payments and on domestic employment, particularly when restrictions applied by the United States are more extensive than those imposed by other countries;
- Uncertainty of export control policy can inhibit the efforts of United States business and work to the detriment of the overall attempt to improve the trade balance of the United States; and
- Unreasonable restrictions on access to world supplies can cause worldwide political and economic instability, interfere with free international trade, and retard the growth and development of nations.[1]

Congress went on to say that "[i]t is the policy of the United States to use export controls *only after full consideration of the impact on the economy of the United States and only to the extent necessary*…to restrict the export of goods where necessary *to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand*."[2] This statement is critical to the Secretary's determination of whether export controls should be imposed because section 7(c) of the

[1] 50 App. USCA § 2401 (2), (6) & (7).
[2] 50 App. USCA § 2402 (2).

EAA[3] ("§7(c)") clearly states that "[*t*]***he Secretary may impose monitoring or controls***, on a temporary basis, on the export of a metallic material after a petition is filed under paragraph (1)(A) with respect to that material but before the Secretary makes a determination under paragraph (3) with respect to that material ***only if***… the failure to take such temporary action would result in ***irreparable harm*** to the entity filing the petition, or to the national economy or segment thereof, including a domestic industry, ***and the Secretary considers such action to be necessary to carry out the policy set forth in section 3(2)(C) of this Act***."[4] ISRI believes that Congress' intent was that in taking action under §7(c) the Secretary should take into account the effect of any action he might take on the national economy as a whole. Petitioners have failed to make their case as required by §7(c). They have provided no proof whatsoever that there is an excessive drain of scarce materials or that the domestic economy is suffering from a serious inflationary impact. Petitioners have provided a great deal of rhetoric but no hard data or other proof to support their request for export controls. Instead, they have looked to the recycling industry to prove the negative—that there is no shortage of copper-based scrap in the United States. Petitioners seem to believe that all that is required under §7(c) is for them to file a petition and for the recycling industry to refute their claims. However, as outlined above, it is incumbent upon the Petitioners to make a compelling case that meets the criteria of the entire statute, not simply one paragraph of that statute.

[3] 50 App. USCA § 2406 (c).
[4] 50 App. USCA § 2406 (c)(8).

B. Statutory Criteria

Section 7(c) of the Export Administration Act requires that BIS consider a set of statutory criteria in connection with any Petition seeking the imposition of short supply controls on recyclable metals. ISRI addresses each of these criteria below.

1. Has there been a significant increase, in relation to a specific period of time, in exports of copper scrap in relation to domestic supply and demand?

Clearly, exports of copper scrap have increased significantly in recent years. At the same time, domestic demand for copper scrap has declined. Thus, there has been a significant increase in exports in relation to domestic demand. The question that ISRI would pose is what does this mean or what has been the cause? ISRI submits that exports have increased in large measure precisely because domestic demand has dropped. As shown at Exhibit 2 to Petitioners' Initial Comments, between 1996 and 2003, total U.S. consumption of copper scrap dropped by a total of 475,400 metric tons. Of this, 431,000 metric tons was attributable to reduced demand by smelters and refiners. During the same period (1996-2003), U.S. scrap exports increased by only 356,134 metric tons. Thus, the increase in exports is <u>less than</u> the drop in U.S. consumption. Over the same period of time, total U.S. scrap supply has remained relatively constant, dropping less than 6 percent. This strongly suggests that scrap copper is being exported in increasing quantities because of a drop off in U.S. demand.

2. Has there been a significant increase in the domestic price of copper scrap or a domestic shortage of copper scrap relative to demand?

Clearly, there has been a significant increase in the domestic price of copper scrap. As explained below, however, this increase mirrors the parallel increase in the price of copper cathode. The increase in price of copper scrap thus does not connote a domestic shortage relative to demand for scrap. Rather, it reflects a worldwide shortage of copper metal, a shortage that export controls on copper scrap would do nothing to address.

3. Are exports of copper scrap as important as any other cause of a domestic price increase or shortage relative to demand?

In their Initial Comments, Petitioners baldly state, "there are no factors other than exports that serve to explain domestic shortages and increased prices for copper based scrap in the United States." Yet the immediately following sentence recognizes that "prices for copper based scrap clearly are related to prices for copper cathode as reflected in the COMEX and LME exchange prices." The one statement simply cannot be reconciled with the other. Again, as explained below, U.S. prices for copper scrap are driven by worldwide prices for copper cathode. The doubling of copper scrap prices between September 2002 and March 2004 is explained by, and caused by, the corresponding doubling of the price of copper cathode. Any impact that the increase in exports might have had on scrap prices is marginal at best and impossible to quantify.

Petitioners allege that shrinking discounts paid for copper scrap as compared to COMEX prices prove that increasing exports are driving the price of scrap higher. Data provided by the Petitioners demonstrate that, on the contrary, differentials as contrasted to COMEX prices remain within historical ranges. Moreover, the comparison of scrap prices to COMEX prices is inherently misleading since cathode consumers typically pay a premium to COMEX prices for cathode delivered to their facilities. In short, exports of copper scrap are not "as important as any other cause" of recent price increases. Copper scrap prices are driven by the worldwide price of copper cathode. The impact on U.S. prices of increasing exports of copper scrap is incremental at best.

ISRI firmly believes that there is an adequate supply of copper scrap in the United States to meet the needs of the domestic brass mill and ingot making industries for decades to come. We call your attention to The National Inventory of Copper Scrap: Accumulation and Availability 1982-2003, which ISRI commissioned Nathan and Associates to perform in response to the allegations to the Petition. Robert Damuth, a Vice President of Nathan & Associates who has extensive experience in these issues, conducted this study. Clearly, the study points out that the inventory of copper scrap in the United States is adequate to support the needs of the country.

4. Has a domestic price increase or shortage relative to demand significantly adversely effected (or may it significantly adversely effect) the national economy or any sector thereof, including a domestic industry?

ISRI submits that there is no shortage within the United States of copper scrap. ISRI recognizes, however, that there has been a significant increase in the price of copper metal in world markets since 2002 and that the price of copper scrap has followed these world copper prices. ISRI sees no evidence that these recent price increases have significantly adversely affected the national economy, however. On the contrary, the United States economy is expanding while interest rates and inflation remain low.

Prices of many commodities are trending higher as the United States and the global economy is gaining steam. Recent headlines have focused on gasoline and crude oil prices, which have reached record highs in nominal dollars. These price rises are a normal part of the business cycle and, if history is to be any guide, are likely temporary. As demonstrated in ISRI's previous submissions, copper prices tend to be volatile. ISRI submits that the leadership enjoyed by the United States, as a champion of free and fair trade would suffer if the United States were to adopt trade-distorting and market-distorting interventionist measures in response to every price swing in basic commodities.

ISRI does not doubt that these increases in the price of copper metal and copper scrap have lead to increased material costs for Petitioners. The U.S. industry is hardly alone, however, in confronting the challenges created by rising copper prices. Copper is globally traded and globally priced. Thus, those United States industries that consume copper metal and copper scrap are no more adversely affected by copper price increases than their foreign counterparts.

Several witnesses who testified in support of the Petition suggested that Chinese consumers of copper and copper scrap might enjoy lower prices for their raw material inputs than their international competitors due to ill-defined Chinese subsidies, VAT rebates or other market-distorting schemes.[5] If these allegations are true, Chinese trade practices would accurately be characterized as unfair under United States and international trade law. United States law offers a variety of means to seek redress of unfair trade practices. "Section 301," for example, enables Petitioners to identify, document and substantiate the unfair trade practices they have alleged and to ask that the United States Trade Representative undertake negotiations with the Chinese government, under threat of sanctions, to address them. The Commerce Department has also recently formed a group to look at unfair trade practices. The provision of the EAA that authorizes this proceeding, §7(c), is not intended or designed to address unfair foreign

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[5] In his testimony, Jim Rourke of Mueller Industries, Inc. appeared to take umbrage at the fact that Chinese scrap buyers were willing to pay cash for scrap or pay higher prices. ISRI is not aware of a U.S. policy or of U.S. agency or judicial decisions that would characterize a willingness to pay cash on delivery or to offer higher prices as unfair trade practices. Rather, these are the hallmarks of a vibrant and competitive economy.

trade practices. It is intended and designed to address shortages in the United States of recyclable metals when necessary to protect the national economy. There are no such shortages, and Petitioners should not be allowed to utilize the short supply controls provision of the EAA if their real concerns relate to unfair trade practices.

5. Are monitoring or controls necessary to carry out the policy articulated in Section 3(C) of the Export Administration Act?

Section 3(C) (50 USC App. Section 2402(C)) states that it is the policy of the United States "to restrict the export of goods where necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand." ISRI submits that there has not been an excessive drain of scarce materials in connection with increased exports from the United States of copper scrap. There is no shortage of copper scrap in the United States. Therefore, copper scrap cannot properly be characterized as a "scarce material." Similarly, insofar as there remain adequate supplies of copper scrap for domestic consumers, ISRI submits that increased exports from the United States of copper scrap cannot accurately be characterized as an "excessive drain" of this material.

U.S. policy also considers the possible "serious inflationary impact of foreign demand." The increasing prices of copper cathode and the corresponding price increases of copper scrap result from global fundamentals relating to demand and supply. Thus, it is not "foreign demand" that is driving up the price of copper metal and copper scrap, rather it is global demand that is leading to price increases. In any event, there is no evidence that increasing prices of copper metal and copper scrap are having a serious inflationary impact. Both interest rates and inflation remain low within the United States. For all of these reasons, ISRI submits that the imposition of export restrictions on copper scrap cannot be justified as necessary to carry out the U.S. policy of restricting the export of goods when necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand.

II. RESPONSE TO THE ARGUMENTS IN CO-PETITIONERS RESPONSE COMMENTS FILED MAY 27, 2004

A. The Imposition of Export Controls Would be a Violation of International Trade Agreements of the World Trade Organization

Co-Petitioners argue that the imposition of export controls under §7(c) would not be a violation of international trade agreements. Ironically, co-petitioner Copper and Bass Fabricators Council took a position that was diametrically opposed to this argument when, in 1988, they called upon the United States government to take action against the European Union for having imposed export controls on copper scrap. The report of the panel[6] established to examine the United States' complaint against the European Economic Community ("EEC") notes that the terms of reference were:

> To examine, in light of the relevant GATT provisions, the matter referred to the Contracting Parties by the United States…and to make such findings as will assist the Contracting Parties in making the recommendations or in giving the rulings provided for in Article XXIII: 2.[7]

A case study published online by American University details the facts of the case.[8] In summary, the EEC was doing exactly what the Petitioners would ask the Secretary to do. It is somewhat disingenuous for Petitioners to argue that such an action undertaken by the United States would not be in violation of international trade agreements when

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[6] EEC-RESTRICITIONS ON EXPORTS OF COPPER SCRAP, Recourse to Aricle XXIII:2 by the United States, Report of the Panel adopeted on 20 February 1990 (*DS5/R – 37S/200*) (Attached hereto in Appendix I)

[7] *Id.* at ¶2.

[8] http://www.american.edu/TED/eucopper.htm

Petitioners asked the United States to advocate on their behalf that the same actions undertaken by the EEC were in fact in violation of the General Agreement on Tariffs and Trade.

ISRI notes that additional comments on this subject were filed on its behalf by on May 27, 2004 but the Patton Boggs law firm.

B. Price Increases for Copper-Based Scrap in the United States Simply Reflect World Copper Prices

Petitioners have either chosen to ignore common practice in the industry or have simply decided to torture ISRI's comments relative to the pricing of scrap. ISRI has maintained throughout this matter that 1) scrap copper is bought—it is not sold; and 2) the price of scrap copper is highly correlated to the prices quoted on the COMEX Division of the New York Commodities Exchange ("COMEX") and the London Metal Exchange ("LME"). The price of scrap trends with the COMEX and LME prices. Plainly stated, when COMEX and LME rise, scrap prices tend to rise. When COMEX and LME fall, scrap prices tend to fall. The only real variations are the "spreads" between COMEX and LME. These spreads widen and narrow depending on market conditions. The spreads apply to cathode as well as to scrap. The reality of the marketplace is that COMEX and LME are not necessarily true indicators of the absolute price of cathode. They can be better described as benchmarks. The reality is that, given supply and demand at any particular time, the price of cathode may carry a premium to the COMEX or LME price. Similarly, the various grades of copper scrap are priced "against" the COMEX or LME benchmarks. That is to say that, at any given time depending upon supply and demand, a particular grade of scrap may be selling at a discount or a premium to the COMEX or LME price. Petitioners argue that the narrowing of those spreads is a clear indication of a shortage of copper scrap. Petitioners take a very myopic view of the marketplace. All the spreads really indicate are changes in supply and demand. Supply and demand changes all the time. Just because supply tightens does not mean there is a shortage. Petitioners fail to acknowledge that their own data source indicates wide swings in the spread over the course of a couple of weeks.[9] On April 1, 2004, the differential between the COMEX Cathode price and No. 1 scrap was 1.10 cents per pound. On April 8, 2004, that differential was 2.25 cents per pound. And, on April 15, 2004, the differential was .45 cents per pound. A similar phenomenon occurred in 2003 when the average monthly differential was .64 cents per pound in June, 4.20 cents per pound in July and .52 cents per pound in August. Are these swings indicative of supply shortages? Should Petitioners be coming to the government every time the market changes? Clearly not! These changes are indicative of a commodity-based marketplace that adjusts regularly to a variety of factors.

We submit that the most informative document contained in the record to date is Exhibit 6 to the Initial Comments of Petitioners.[10] This one page provides Number 1 scrap prices, Number 2 scrap prices and COMEX cathode prices from 1998 through April 2004, and lists the differential or "discount" from the COMEX price that was paid for Number 1 or Number 2 scrap. The document is revealing in several respects. First, it demonstrates conclusively that Number 1and Number 2 scrap prices track closely the COMEX price for copper cathode. Second, given the broad price swings seen for copper

[9] Co-Petitioners' Response to Initial Comments Regarding the Receipt by the Department of Commerce of a Written Petition Requesting the Imposition of Short-Supply Export Controls and Monitoring on Recyclable Metallic Materials Containing Copper, May 27, 2004, ("Petitioners' Response") Exhibit 1

[10] This same document was attached as Exhibit 10 to the Petition.

cathode, the changes in the discount from COMEX prices paid for scrap appear minimal. For Number 1 scrap, the price differential with respect to the COMEX price per cathode ranged from a high of 3.3 cents per pound in 2000 to a low of 0.35 cents per pound on May 6, 2004.[11] For Number 2 scrap, the discount has ranged from a high of 22.2 cents per pound on April 29, 2004, to a low of 4.95 cents per pound in June of 2002. During the same period, the price of cathode was as low as 67.71 cents per pound in September 2002 and as high as 136.95 cents per pound on March 18, 2004. Thus, the price of cathode more than doubled in the period September 2002 – March 2004, and the price of Number 1 and Number 2 copper scrap doubled along with it. During this entire period, however, the discount to COMEX prices paid for copper scrap never changed more than a few cents per pound.

Given the consistent and close correlation in prices between copper scrap and COMEX cathode prices, it is clear that scrap prices follow or track the COMEX price. The imposition of export controls on copper scrap would do nothing to break this relationship. The rising price of copper cathode has dictated the rising price of copper scrap. Limiting exports of copper scrap would do nothing to lower copper cathode prices. There is thus little reason to believe that limiting exports of copper scrap would lead to a reduction in copper scrap prices.

C. There Is An Indication That Currently High Prices Will Soon Be Followed By a Price Trough

Anyone who has taken Economics 101 knows that history is a good indicator of what a market economy will do. Were it not so there would be no predictability

[11] We note that the discount for Number 1 scrap has increased since May 6.

whatsoever and we would have to conduct business completely different from the current method. The phenomenon we are encountering currently is comparable to what we experienced in the 1980's as the Japanese economy was developing. Over the past thirty years, price rises, and declines, have never been sustained over a period of more than a few years. Petitioners' self-congratulatory statement that "the trends of a few weeks, apparently in response to the pendency of this action, should not be read as a permanent pull-back from the U.S. market by buyers working on behalf of foreign producers"[12] is far from accurate. Foreign buyers are adjusting their buying patterns based upon supply and demand. As the Chinese government makes a conscious effort to slow down that country's overheated economy it is only natural that the buying patterns of their basic industries will change. Additionally, Petitioners have likely not calculated the impact of a new licensing regime in China scheduled to take effect on July 1, 2004. After that date, any exporter of scrap material to China must be registered with the General Administration of Quality Supervision, Inspection and Quarantine of China (AQSIQ) in order to ship scrap materials to China. Given the current level of registration, it is not inconceivable that the vast majority of the scrap trade with China will come to a screeching halt. Thus, Petitioners hypotheses and prognostications are nothing more than that—an attempt to look into the future and guess what will be. Unfortunately, they have elected to do so without the benefit of technical analysis of the current and short-term future dynamics of the marketplace. Whose guess about the future will be correct is just another guess. ISRI strongly believes that Congress did not intend for the Secretary to take such extraordinary action as imposing export controls in the absence of rock solid data and analysis indicating that the there will be an excessive drain of scarce materials.

[12] Petitioners' Response at p. 4.

Petitioners have chosen to cite a number of news articles in trade journals that seemingly support their case. ISRI would point out that in those same journals, in fact on the same pages provided in Exhibit II of Petitioners' Response, those journals talk of:

> wider spreads, larger supplies and renewed interest from overseas buyers.…[Chinese buyers are] "definitely creeping back, but it isn't the feeding frenzy that it was a few months ago" an ingot maker said. "We're seeing established and reputable [Chinese] buyers consuming low-grade materials." The Chinese government has been attempting to cool down the country's overheated economy by limiting credit.[13]

Nonetheless, it is true that should worldwide copper cathode supplies remain tight then scrap prices may strengthen again. But that would be a function of the fact that copper scrap follows the trend of COMEX and LME, not necessarily because there is a shortage of scrap. ISRI reiterates that copper scrap is bought—it is not sold. Brass mills and ingot makers determine the price they are willing to pay for the material they purchase. The typical transaction is conducted in such a manner that the buyer tenders to the seller the price that the buyer is willing to pay for the material and the seller then decides whether he is willing to sell the material at that price—quite different than most business transactions where the seller makes the price determination and the buyer then decides whether to pay the offered price. Given this market dynamic, it is difficult to understand how Petitioners can contend that scrap is the sole cause of their economic difficulties.

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[13] Joseph McCann, "Copper scrap spreads widen as supply rises, prices slide," *American Metal Market,* May 17, 2004 p.6 in Petitioners' Response Exhibit II

D. Increasing Exports of Copper-Based Scrap from the United States Are a Reflection of Reduced Capacity at Secondary Smelters and Reduced Operations at Domestic Brass Mills and Ingot Makers

Petitioners seem to have a difficult time acknowledging that the reduction in secondary smelting capacity in this country resulted in a situation that created a glut on the market and extraordinarily low copper prices in early part of this decade. One has to wonder what the Petitioners think happened to the material that had previously gone to the secondary smelters, especially in light of the brass mills and ingot makers low operating rates in the early part of this decade. One answer is price elasticity resulted in some of that material remaining in the inventory (as described in the Nathan Report) while much of the material accumulated at scrap processors. It was only the improvement in world markets in 2002-2004 that started to absorb those materials that had previously been delivered on a regular basis to the secondary smelters. It seems that Petitioners and their economists can only envision a scenario where there is a continuous activity—one has to question whether they considered that the scrap industry might have temporary capacity idlings or closures, just as the brass mills and ingot makers may have had during the slow years earlier this decade. Scrap processors suffered significantly during the period 2000-2002 when copper scrap prices were at their lows. Petitioners do not acknowledge the fact that those scrap processors had no recourse like §7(c) to address their woes, other than to take advantage of export markets. Petitioners seem to view the scrap processing industry as a captive to their whims, dedicated to providing copper scrap at low prices and little profit.

The reality of the marketplace is that during the 1990's and early part of this decade, 453,000 tons of copper scrap no longer had a home. The realities of the marketplace, and business in general, demanded that this material find another home. The United States is just as dependent upon a strong, healthy scrap processing industry (which manufactures specification grade commodities) as part of the manufacturing base as it is on any other manufacturing industry.

Even more worrisome is Petitioners' decision to edit direct quotes and omit vital information.[14] Aside from taking liberties with a direct quote, Petitioners fail to include the following information that comes from the same paragraph in which the quote appears: "There are no longer any secondary copper smelters in the United States, and China has emerged as the major outlet for No. 2 scrap." Clearly, Janice Jolly recognized what Petitioners and their economist failed to see—that No. 2 scrap had to go somewhere when its domestic market disappeared. Ms. Jolly also helps to explain the price elasticity of copper scrap. She states "U.S. scrap imports and exports were down significantly in 1998 and 1999, as a result of the worldwide depressed prices for copper and the strong U.S. dollar. The lower scrap price and stronger dollar combined to make U.S. scrap scarce for domestic buyers and expensive for foreign buyers"[15] acknowledging that the supply of scrap increases and decreases with the price of scrap. Her statement also goes to the point that the timeframe of reference—1996-2000-- the Petitioners have chosen for determining the 'proper' level of exports is absurd. That timeframe includes a period during which there was a significantly depressed worldwide demand for copper scrap.

[14] Petitioners' Response at 12, quoting Janice L. Jolly on behalf of the Copper Development Association.
[15] Technical Report, The U.S. Copper-base Scrap Industry and Its By-products—2003, Janice L. Jolly, Copper Development Association, Inc., December 2003, (hereinafter "Jolly") at 9 (a copy was submitted with ISRI's original comments)

E. Users of Copper-Based Scrap Can Cover Their Exposure to Price Increases Through Hedging

Petitioners' arguments that they are unable to minimize their risk of copper scrap price increases through hedging are disingenuous. We have already established that there is a clear trending relationship between scrap prices and the COMEX or LME prices. Petitioners admit that many of them minimize their selling price risk by keying off of the COMEX cathode price but they claim they are unable to pass along the changes in the spreads. This raises the question of whether or not it is appropriate to invoke §7(c) to help an industry that is unable to adequately address its selling price issues. In essence, what they are trying to do is shift the risk of the market to the scrap industry, which has little if any control over its own destiny when it comes to selling price. ISRI suggests that structural deficiencies such as the inability to adjust their market prices are not a relevant criteria for the Secretary granting a remedy under §7(c).

F. The Supply of Copper-Based Scrap is Responsive to Price

Petitioners have decided to dismiss the concept of copper scrap price elasticity with the wave of a hand. Unfortunately, this demonstrates a lack of understanding of the supply chain. While we readily admit that individuals would likely not be driven to tear down their homes in order to sell their copper plumbing, the absolute reality of the marketplace recognizes that industrial demolition is price sensitive. An old industrial plant may sit idle for some time due to the cost of demolition. However, in times of higher scrap prices the economics can change sufficiently that the demolition project may become a breakeven or net revenue generator. A recent article in the American Metal Market noted:

So why aren't scrap prices back riding the up escalator again? Sometimes, as the old adage goes, be careful what you wish for. Higher prices paid for scrap have attracted material from a slew of demolition projects. Companies that might have been straddling a decision about tearing down an older building and replacing it with a new facility have been encouraged to move ahead in some case by the high prices for old beams and piping, among other factors. As a result, more than a few scrapyards are looking at rising mountains of plate, structural scrap and other obsolete grades.

"The high scrap prices have brought out supplies of demo scrap and No. 1 heavy melt and cars for the shredder," one Pittsburgh-based trader said.[16]

Despite Petitioners' out of hand dismissal of this concept, despite their lack of respect for Mr. Damuth's clear and concise explanation during oral testimony, a reliable trade journal source that they have quoted time and again, the *American Metal Market*, clearly acknowledges the price elasticity of scrap.

G. The Copper-Based Scrap Being Exported from the United States is By No Means Limited to Number 2 Copper Scrap

We agree! A significant amount of the copper and copper-alloy scrap exported from the United States is not #2 copper. It is low-grade copper bearing scrap; it is also comprised of grades of brass scrap not purchased by domestic brass mills or ingot makers. It does include some #1 copper and some bare bright copper. It also includes light copper and insulated copper.

While a small portion of that which is exported can be used by domestic brass mills and ingot makers, ISRI maintains that the ***vast majority*** of the material being exported is copper scrap that would otherwise not be consumed domestically. Notwithstanding the foregoing, there are some high-grades of copper scrap exported from the west coast simply because of the economics of the transaction. The cost of freight to

[16] Michael Marley, "What goes up…comes down with a vengeance," *American Metal Market*, May 28, 2004, Cover Story (Attached in Appendix II)

move those materials to domestic consumers is such that the transaction is not cost effective. Hence, those high-grade materials such as bare bright and #1 copper may, in fact, be exported. Regardless, the amount of high-grade material that is exported is not significant enough to create a real shortage of copper scrap in the U.S.

Another point that must be addressed is the issue of grading. In Sheldon Tauben's written comments submitted May 27, 2004, he clarified the various grades of scrap generated in the U.S. and used by domestic consumers. Unfortunately, it has become eminently clear that there is a definite difference of opinion when it comes to terminology. For instance, while #1 and #2 copper are terms of art defined in the ISRI Scrap Specifications Circular (a copy of which is attached as Appendix III), many brass mills refer to #1 copper other than bare bright as #2 copper. This confusion is significant because, in reality, brass mills do not use #2 copper as defined in the ISRI Scrap Specifications Circular. As Mr. Tauben indicated in his oral testimony and in his written comments, they can't use it. Furthermore, there is no technology that exists that can turn No. 2 Copper into No. 1 Copper. Notwithstanding the foregoing, he indicated that one mill, Mueller Brass, has in fact utilized a limited amount of #2 copper that had been "upgraded" by using existing chopping lines. This is a value added process but the resultant product is still not suitable for most brass mills. Additionally, there seems to be a false impression that there is a widespread amount of US scrap processing equipment sitting idle. This is not an accurate reflection of the current marketplace.

Petitioners' argument that materials should be further processed and upgraded fail to acknowledge the cost factor associated with such a process. As it is, Petitioners are complaining that the cost of copper scrap is too high; are Petitioners ready to pay more for scrap that has to be significantly processed, in many cases using expensive hand labor?

H. Petitioners’ Arbitrary Selection of a Base Time Frame for Determining a Quota

Petitioners have suggested that the Secretary impose export quotas based upon the period 1996-2000. ISRI assumes that they have selected this time period because it is the lowest five-year period they could find in recent history. It is for just this reason that ISRI objects to the selection of such a timeframe. As noted above, Janice Jolly pointed out that 1998-1999 was a very depressed worldwide market for copper. In fact, U.S. scrap processors were not even able to ship the excess materials that accumulated as a result of secondary smelter closures during that period. ISRI strongly opposes the imposition of any export controls or quotas. Even more so, the scrap industry is offended by the notion that export quotas should be based upon a time period that included some of the most depressed demand periods in recent history.

III. RESPONSE TO TESTIMONY AND COMMENTS OF MICHAEL KERWIN BEFORE THE BUREAU OF INDUSTRY AND SECURITY OF THE U.S. DEPARTMENT OF COMMERCE REGARDING COPPER-BASED SCRAP SHORT SUPPLY

If all the Petitioners' advocates were as refreshingly blunt as Mr. Kerwin, this matter could probably have been resolved much more quickly. Mr. Kerwin sums up his testimony by stating, "The plain fact is that ISRI opposes the petition because it fears that export controls will result in price reductions for copper-based scrap in the U.S. market, precisely the result that we are trying to achieve through this action.

First, Mr. Kerwin confirms what ISRI has said all along—this effort is nothing more than a smokescreen for exercising price control. It is unfortunate that the Petitioners would abuse the process by wasting the Department of Commerce's time and by forcing another industry to incur significant costs to try and prove a negative just to help Petitioners' collective bottom line.

Second, were it not for the *Noerr-Pennington* doctrine, ISRI would be visiting the antitrust division of the Justice Department seeking redress. This is clearly one instance where the protection afforded by *Noerr-Pennington* has been abused.

Finally, if Petitioners' dreams were to come true and prices went down, the scrap industry would deal with it just as it has for over a century. The scrap industry has weathered down markets time and again. Contrary to Mr. Kerwin's assertion, ISRI believes the price of copper scrap will go *up* rather than down. This is because withholding a globally traded commodity from the marketplace will increase the price of copper scrap due to global supply and demand—even in the United States. So why is ISRI opposed to this Petition, even though we believe the price of scrap will actually rise? What we really fear are the unintended and unanticipated consequences of artificially interfering with a market that is one of the purest examples of supply and demand economics. We are disappointed that Petitioners did not direct their economist to address this risk so that the Secretary could have reasonable information before him as he makes his decision.

Hopefully, Mr. Kerwin's comments will point out to the Congress that the time has come to once and for all remove this ridiculous, vestigial provision from the EAA. A review of the bills introduced over the past several years to reauthorize the EAA indicates that Congress sees no reason for this provision to exist any longer.

Throughout his testimony and comments, Mr. Kerwin talks in platitudes but fails to provide any hard evidence of a shortage of copper scrap in the United States. Despite having the advantage of months to prepare the case, Petitioners have not undertaken any new research to prove their point. ISRI however, at significant expense and with relatively little time, took the effort to hire a respected econometrics-consulting firm, Nathan and Associates, that has extensive experience in this area.[17]

Despite the platitudes, Mr. Kerwin makes some good points that we would like to elaborate upon. First, Mr. Kerwin points out that "[b]ecause U.S. consumption of copper-based scrap was declining during [the period 1999-2003], exports increased their share of the U.S. scrap supply."[18] What would Petitioners expect? If they are not going to use the scrap doesn't the domestic scrap processing industry have the right to sell it to others? Interestingly, Mr. Kerwin's statements contradict the Petition in which is it

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[17] Robert R. Nathan, the late president of Nathan and Associates, was retained by a predecessor association to ISRI in the 1970s and 1980s to study the inventory of ferrous scrap in the United States. Nathan and Assoicates performed several updates of that study and developed significant expertise in this area. In fact, the Nathan studies were a significant factor in the denial of export controls on ferrous scrap in 1979-1980. Their study was submitted under separate cover on May 27, 2004

[18] Testimony Of Michael Kerwin Before The Bureau Of Industry And Security Of The U.S. Department Of Commerce Regarding Copper-Based Scrap Short Supply, May 19, 2004 at 2. (hereinafter "Kerwin")

alleged that increases in exports actually caused the diminishment of capacity in the secondary smelting industry, when in fact exports were increasing because domestic consumption was declining.

Mr. Kerwin goes on to talk about copper-based scrap exports reaching their highest levels in ***recent*** history. By implication, Mr. Kerwin acknowledges that there have been other times when we have been at the same level or higher. Why then are Petitioners seeking to have the Secretary impose export controls at this time? Could it be that, besides being a smokescreen for price controls, Petitioners are trying to address certain alleged unfair trade practices being carried out in China? Unfortunately, export controls will affect every country around the world—not just China. The more appropriate means for addressing these problems would be to bring an action alleging unfair trade practices. It has been suggested on a number of occasions that a §301 trade case would more appropriately address this issue. However, a §301 case does not move as expeditiously as a §7(c) petition. And a §301 action would require documented incidents. Perhaps Mr. Kerwin has alerted us to a further abuse of the process.

Mr. Kerwin says that "[b]ecause domestic brass mills have been unable to pass through ***all*** of their cost increases, these developments have had a severe impact on industry profitability."[19] ISRI fails to see how this point supports any of the criteria required by the statute.

Mr. Kerwin blames ISRI for glossing over the distinctions among various types of copper-based scrap exports and raises the issue of the classification under the various HTS codes as if ISRI should provide that information. Again, ISRI maintains that it is Petitioners' burden under the statute to prove its case and Petitioners have failed to

[19] *Id.* at 3.

provide this data. Hence, the Petition would affect all types of copper-based scrap currently being exported and not just those materials used by the domestic industry. Petitioners have failed to even attempt to identify specifically those materials used by the domestic industry, to estimate how much of exports are those materials and how much are materials they don't use, or to even provide a ballpark figure of how much of the proposed reduction of nearly 400,000 tons per year of exports can be absorbed by the domestic industry. The Petitioners have failed to account for what might happen to that material and for the adverse impacts that may be faced by the scrap industry.

IV. POTENTIAL HARM TO THE DOMESTIC SCRAP PROCESSING INDUSTRY

It is difficult to estimate precisely the adverse impacts upon the domestic scrap industry if export controls are imposed. ISRI knows that hundreds of its members are involved in the processing and trading of copper-based scrap. While not all of those members are directly involved in the export of copper-based scrap it is clear that market effects resulting from the imposition of export controls will have a direct impact on each and every player in that marketplace. If export controls are imposed, processors could be faced with high inventories, cash flow problems, and the need to layoff workers. Given the short time frame under which the petition process works, ISRI has been unable to calculate a dollar figure that would adequately reflect the impacts of export controls.

V. RESPONSE TO INQUIRIES FROM THE PANEL AT THE HEARING

In response to ISRI's allegations that shortages of copper-based scrap were fallacious, especially in light of brass mills and ingot makers extending shipping dates out as far as 6-8 weeks due to excess inventories, the panel requested that ISRI name names. We have polled some of our members to give you a sense of some of the copper consumers involved. The following represent brass mills or ingot makers who are extending delivery dates out as long as 6-8 weeks:

- Mueller Brass Wynne, AK
- Olin Brass East Alton, IL
- Howell Metal
- H. Kramer Chicago, IL
- Federal Metal Bedford, OH
- Hussey Copper
- Cambridge-Lee (Reading Tube) Reading, PA
- Wolverine Tube
- River Recycling
- SCM

We have also been advised that Extruded Metal Company was "out of the market" for nearly three weeks recently.

Additionally, the panelists inquired as to the various grades of copper and copper-alloy scrap shipped under the four Harmonized Tariff Sections identified by the Petitioners. ISRI has made inquiry of its members and believes the following to be an accurate reflection of the materials currently shipped under each code:

7404000020	copper scrap including #1 and #2
7404000045	Brass containing more than 0.3% lead –ISRI spec Honey
7404000062	other brass containing less than 0.3% lead
7404000080	other copper including material that is less than 94% and this category is also a catch all for copper bearing material

Finally, the panel requested information on how many scrap processors would be affected and what the financial impact would be if action was taken by the Secretary. It was not possible to accurately ascertain an exact number in the short time between the hearings and the submission of these comments. ISRI estimates that well over 500 companies would be affected and the dollar impact could be in the hundreds of millions of dollars.

VI. CONCLUSION

ISRI maintains that the Secretary should deny the Petition outright. To impose export controls on copper-based scrap will only be an artificial interference with a marketplace that is one of the purest examples of supply and demand economics. The Petitioners have provided plenty of anecdotal evidence but no data to support their claims. As outline above, there are statutory requirements that must be met and Petitioners have failed to make a case for the imposition of either export controls or monitoring. We strongly urge the Secretary not to placate petitioners by requiring monitoring. Such a decision would cause both the government and the scrap industry to incur additional, unnecessary costs and would in many instances be duplicative of activities that are currently conducted by the government.

We appreciate the opportunity to comment on this matter and stand ready to provide any further information that you may require.