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VIA HAND DELIVERY

Mr. Jeffrey May
Director of Policy
Central Records Unit
Room B-099
Import Administration
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Attn: Privatization Methodology

Re: Rebuttal Comments on Proposed Modification of Agency Practice (CVD - Privatization) - Brazilian Steel Producers

Dear Mr. May:

This submission is in response to comments filed by certain parties on April 11, 2003, concerning the Department's proposed modification to its privatization methodology in countervailing duty proceedings. It is filed on behalf of the Instituto Brasileiro de Siderurgia (the Brazilian Steel Institute), and certain of its member companies Aços de Minas Gerais, Companhia Siderúrgica Nacional, Companhia Siderúrgica Paulista, Companhia Siderúrgica de Tubarao, and Usinas Siderúrgicas de Minas Gerais (hereinafter the "Brazilian steel producers").

At the outset, we agree with the many comments filed by several respondent interests pointing out that the Department's proposed methodology is incurably flawed in those aspects

that rest on a cost-to-government approach, as opposed to a benefit-to-recipient approach. As reflected in the Brazilian steel producers' initial comments, the benefit-to-recipient approach correctly underlies the proposed rebuttal of the Department's "baseline presumption" of continuing subsidization if "the government sold its ownership of all or substantially all of a company or its assets, retaining no controlling interest in the company or its assets, and the sale was an arm's length transaction for fair market value." The major flaw in the proposal is not necessarily the Department's literal formulation of the rebuttal to the baseline presumption, but rather with the cost-to-government approach proposed by the Department to assess whether a transaction is arm's length.[1]

The inappropriate cost-to-government approach opens the door to other inappropriate considerations, as is plainly evident in the comments from petitioners' interests. For example, Nucor[2] would have the Department 1) focus on a government's alleged and implicitly nefarious other "agendas," 2) forbid any finding of an arm's length transaction if a successful privatization was followed by an increase in the company's stock price, and 3) ignore the opinions of independent financial consultants because, according to Nucor, 'everyone knows' that they cannot be trusted. The litany of opprobrium in Nucor's comments is exactly what is to be expected in response to a departmental proposal that, by way of example, invites every wild

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[1] The Brazilian steel producers take no position with some respondents' major objections to this formulation concerning partial and private-to-private privatizations since these have not been the experience of the Brazilian steel producers.

[2] Comments Filed by Wiley Rein & Fielding LLP, on behalf of Nucor Corporation and Nucor Yamato Steel Co. (April 11, 2003).

allegation to support continued countervailability and proposes a meaninglessly low threshold for such allegations to prevent a finding of no continuing subsidies.

Turning to a few other comments by petitioners' interests[3] on the Department's proposal, some specific discussion is necessary to demonstrate why the proposal must be substantially revamped.

Commerce's Authority to Reform Its Illegal Privatization Methodology

The Specialty Steel Industry of North America ("SSINA")[4] is in error in arguing that, in effect, the statute and the SSA direct that the Department cannot change its privatization methodology in any manner that would enunciate circumstances for finding extinguishment of subsidies through privatization because this would be an "extreme interpretation" of the statute. It would also constitute a "per se" rule which, according to SSINA, would contradict the court's holding in Delverde[5]. Of course, however, the statute says only that a change in ownership alone through an arm's length transaction does not require the Department to find that past subsidies are no longer countervailable.[6] Nor does the SSA contain the directive that SSINA ascribes to it, only that an "arm's length {sale} does not automatically, and in all cases, extinguish any prior

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3 To the extent that other petitioners' interests may be seeking to work their will on the Department's proposal through means other than the public comment process, their efforts must be ignored by the Department for their refusal to subject their views to public scrutiny and, thereby, subvert fundamental notions of notice and due process.

4 Comments Filed by Collier Shannon Scott, on behalf of Specialty Steel Industry of North America (April 11, 2003).

5 Delverde Srl v. United States, 202 F.3d 1360 (Fed. Cir. 2000), reh'g granted in part (June 20, 2000).

6 19 U.S.C. §1677(5)(F).

subsidies incurred."[7] The plain language of the statute and the SAA leave ample leeway without statutory changes for the innumerable vague bases to countervail despite arm's length privatization that the Department proposes (but the courts and the WTO do not) and, in the correct benefit-to-recipient approach that should instead be adopted, as required by the courts and the WTO. Any ambiguity about the Department's ability to act correctly in this regard is settled by the SSA in a passage SSINA neglected to mention:

> The issue of privatization of a state-owned firm can be extremely complex and multifaceted. While it is the Administration's intent that Commerce retain the discretion to determine whether, and to what extent, the privatization of a government-owned firm eliminates any previously conferred subsidies, Commerce must exercise this discretion carefully through its consideration of the facts of each case and its determination of the appropriate methodology to be applied.[8]

Petitioners' Inappropriate Heaping on of More Vague Factors

A major flaw in the Department's proposal is found in the many vague factors that would prevent a finding of subsidy extinguishment. SSINA's and Nucor's comments seek to compound these errors by heaping on more vagaries and per se rules to be used as excuses to continue to countervail. These include SSINA's call for dispositive factors such as the number of bidders, apparently indicating that SSINA considers USG's acquisition of LTV and Bethlehem, U.S. Steel's impending acquisition of National, and Nucor's acquisition of Trico, to be "pre-ordained" based on the small number of bidders and, therefore, somehow assumed to be illegitimate. And SSINA would establish a per se requirement of an advance independent

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[7] SAA at 928 (emphasis added).

[8] SAA at 928 (emphasis added).

financial analysis as a prerequisite for subsidy extinguishment, but one that would invalidate any arm's length finding if the analysis was available for "comment" by anyone before finalization, as is always the case. Additionally, SSINA would have the Department find National's likely acquisition by U.S. Steel to be invalid for privatization purposes, for the simplistic reason that AK Steel has made a higher bid. Here, and in its discussion of "Committed Investment" and "Concurrent Subsidies" SSINA is merely carrying the Department's proposal to its logical, if absurd, extremes. Basically, according to SSINA and Nucor, any condition on the sale would invalidate the privatization, as would any effort to improve the value of the company before its sale. These proposals are so extreme that they should not be taken seriously.

Every Foreign Market Economy is Distorted, According to Petitioners

As with the Department's proposal, both SSINA and Nucor seek to justify consideration of vague "market distortions" as reasons to countervail after privatization by grossly distorting the Appellate Body's holding. The Appellate Body discussed the potential impact of government actions on market mechanisms and recognized the obvious in stating that "every process of privatizing public-owned productive assets takes place within the concrete circumstances prevailing in the market in which the sale occurs." This does not detract from the rule that an arm's length sale eliminates the subsidy. The key consideration is not that there are general government policies with varying impacts on every sale of everything in every economy, but whether, "In privatizations, governments have the ability, by designing economic and other policies, to influence the circumstances and conditions of the sale so as to obtain a certain market

valuation of the enterprise."[9] In other words, in a market economy, for privatization not to extinguish a subsidy, according to the Appellate Body, the government must have undertaken significant specific actions specifically designed to and effective in, materially distorting market valuation of the specific enterprise that is sold. Only in these specific instances would an exception operate whereby some subsidies could be found post-privatization.[10] Necessarily, under a benefit-to-recipient approach, there should also be an analysis of whether the government acting affecting the valuation conferred a benefit-to-recipient. This requirement is totally ignored by the Department, Nucor and SSINA.

It is only by grossly mischaracterizing the Appellate Body's holding that the Department and petitioners' create an illegitimate basis for the many vague "market distortions" that would be used to prevent a finding of subsidy elimination in every case. This error is compounded by the Department effectively requiring only an allegation of a market distorting factor with no valuation of the distortion (i.e., materiality) required, thereby placing on respondents an impossible and outcome-determinative burden.

Petitioners' Comments are Telltale Indicators of the Wasteful Litigation the Department's Proposal will Engender if Not Substantially Changed

Perhaps when the Department formulated its proposal it did not realize that it was setting up so many vagaries to frustrate its ability to make objective findings of whether a privatization has eliminated subsidies, as required by the courts and the Appellate Body. If this comment

[9] Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/AB/R (Dec. 9, 2002) (emphasis added).

[10] That is, if such market distortions are found and impact the market value, the only subsidy would be the difference between market value of and the price paid for the company.

process has demonstrated anything, as exemplified by the comments of SSINA and Nucor, it is that the Department has proposed a methodology laden with so many opportunities for abuse that it is guaranteed to fail to accomplish compliance with U.S. law and WTO jurisprudence. The baseless accusations, dark innuendos, and absurdities that permeate the comments by petitioners' interests in this process are exactly the type of spurious efforts that will be seen in future countervailing duty litigation unless the Department's proposal is substantively changed. The Department's proposal, while starting off right, quickly falls into the trap of protectionist appeasement with so many conditions, factors, and low thresholds that, as presently constructed, it is little more than an open invitation for abuse

CONCLUSION

Interestingly, the primary commentators on the Department's proposed privatization methodology are steel interests. This is undoubtedly because the effects of the new methodology will be greatest on steel mills. What is extraordinary is the fact that at the same time that the United States is attempting to obtain an agreement on broader disciplines on subsidies to steel mills in the discussions at the OECD, the Department of Commerce has proposed a practice which indicates a total unwillingness to be disciplined in its application of countervailing measures by the WTO Agreement on Subsidies and Countervailing Measures, the WTO dispute settlement process or U.S. courts. If the Department persists in adopting methodologies which ignore existing rules and replace them with its own rules in the context of the WTO Agreement on Subsidies and Countervailing Measures, it is difficult to see how other countries can agree to meaningful disciplines on steel subsidies. Are the new disciplines on subsidies to be created by a steel subsidies agreement, those that are defined multilaterally and enforced through dispute

settlement, or are they the rules as the Department of Commerce defines them? The continued intention to flout the existing methodology would seem to indicate the latter. This certainly does not provide a basis for foreign governments to accept new disciplines on steel.

Respectfully submitted,

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