***Rebuttal Comments of AG der Dillinger Hüttenwerke and GTS Industries S.A. to Proposed Modification of Privatization Methodology***

Pursuant to the request for public comment published in the *Federal Register* on March 21, 2003 (68 Fed. Reg. 13897), we submit the following rebuttal comments on behalf of AG der Dillinger Hüttenwerke ("Dillinger") and GTS Industries S.A ("GTS") concerning the Department's proposed modification to its privatization methodology.

## I. Introduction

Of the eleven comments filed concerning the Department's proposed privatization methodology, only two were filed on behalf of domestic producers.[1] These two comments filed by domestic producers misinterpret the Appellate Body's decision in *United States - Countervailing Measures Concerning Certain Products from the European Communities* and completely ignore the two foundational principles of countervailing duty law that (1) countervailing duties can only be imposed upon a company's products if it is shown that the company is receiving a "benefit" from a "financial contribution" made by a government or public body and (2) countervailing duties may not exceed the amount of subsidy found to exist.[2] Because of these errors, the domestic producers would have the Department disregard the effect of privatizations in all but the most exceptional cases and routinely assess countervailing duties against a privatized company without any specific analysis as to whether the company actually

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[1] *See* Affirmative Comments of Nucor Corporation and Nucor Yamato Steel Co. (Apr. 11, 2003) [hereinafter Nucor Comments]; Affirmative Comments of Specialty Steel Industry of North America (Apr. 11, 2003) [hereinafter SSINA Comments].

[2] *See* Affirmative Comments of AG der Dillinger Hüttenwerke and GTS Industries S.A. to Proposed Modification of Privatization Methodology at 2-3 (Apr. 11, 2003) [hereinafter Dillinger/GTS Comments]. These two principles are referred to hereinafter as the "principles of benefit to the recipient ."

benefits from prior financial contributions bestowed on the prior state-owned enterprise. Such a result is clearly at odds with U.S. law and WTO obligations and must be rejected.

## II. Discussion

### A. Fair Market Value

In discussing the impact of a privatization at arm's-length and for fair market value, the domestic producers make no mention of the essential principles of benefit to the recipient. Instead, they concentrate solely on the cost to the government granting the financial contribution and its motives in structuring the privatization transaction. As explained in the affirmative comments of Dillinger and GTS, the WTO Appellate Body in *Canada-Aircraft* specifically rejected cost to the government as the basis for determining the existence or level of a benefit to the recipient.[3]

When a privatization transaction is properly analyzed from the point of view of benefit to the recipient, government conditions on a sale such as the retention of redundant workers or promises of future investments would not normally lead to the conclusion that the purchasers received a countervailable benefit from such conditions. Similarly, the granting of concurrent subsidies such as debt forgiveness would not necessarily provide a countervailable benefit to the privatized company. As long as the assistance is negotiated by the parties as part of the privatization transaction, any value of the assistance will be reflected in the purchase price paid by the new owners.

In this respect, it is important to keep in mind the purpose of the countervailing duty laws.

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[3] *Canada - Measures Affecting the Export of Civilian Aircraft*, AB-1999-2 at paras. 151-161 (Aug. 2, 1999) [hereinafter *Canada-Aircraft*].

The purpose of the countervailing duty laws is **not** to correct market distortions caused by previously bestowed subsidies as erroneously asserted by the domestic producers. Instead, as stated by the Department in *Certain Steel Products from Austria*:

> The CVD law is designed to provide remedial relief as a result of subsidies; it is not intended to recreate the *ex ante* conditions that existed prior to the bestowal of such subsidies. Indeed, the remedy provided by law, additional duties, does nothing to eliminate excess capacity caused by the subsidization. Thus, there is no reason to require the recipient of the subsidies to correct the distortion in order to avoid or lift the duties. . . . The fact that the productive capacity may have been created or continues to exist is an irrelevant inquiry and beyond the scope of the law.[4]

The court in *Delverde* also rejected the idea that the countervailing duty laws were intended to correct market distortions. In *Delverde*, the court stated that the issue was not whether the purchasing company was able to "produce and sell pasta products at lower prices, but whether it received a subsidy in the first place."[5]

Accordingly, the remedy under the countervailing duty laws is very narrow. It is meant solely to impose countervailing duties against a foreign producer in an amount not exceeding the countervailable benefit received by that producer.[6] The fact that a government takes actions before or during a privatization that makes a company more attractive for sale cannot lead to the assessment of countervailing duties against the purchaser unless it is shown that the purchaser received a specific benefit from the government actions that was not covered by the purchase

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[4] Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, 58 Fed. Reg. 37217, 37264 (1993) [hereinafter General Issues Appendix].

[5] Delverde, SrL v. United States, 202 F.3d 1368 (Fed. Cir. 2000).

[6] 19 U.S.C. § 1671(a).

price. In situations in which the purchaser did not receive a countervailable benefit, a domestic producer's proper avenue of redress is not the countervailing duty laws but other provisions of the WTO agreements such as Article 7 of the SCM Agreement or Article 2 of the WTO Agreement on Safeguards.[7]

Similarly, Nucor's contention that the fair market value of an initial public offering ("IPO") should be analyzed based on trends in the secondary market after the original offering should also be rejected.[8] As the Department found in its *Final Results of Redetermination Pursuant to Court Remand* in GTS Industries S.A. v. United States, Court No. 00-03-00118 (CIT Jan. 4, 2002), the fair market value of an IPO must be determined with respect to the actual terms and conditions of that offering.[9] The fact that prices for the company's stock in the secondary market rise after the IPO does not mean that the company received a countervailable benefit from a government-provided financial contribution.

SSINA's contention that the Department should "assume that sales that have only one or two bids that meet the terms and requirements for the sale do not involve a truly open bidding process" must also be rejected.[10] The legal requirements for the Department's countervailing duty analysis do not vary based upon the number of bidders involved in a privatization

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[7] In fact, as stated in Nucor's comments, they have resorted to 19 U.S.C. § 3571 to address certain actions by the Polish government, which are not actionable under the countervailing duty laws. Nucor Comments at 4-5.

[8] *See* Nucor Comments at 8-9.

[9] *Final Results of Redetermination Pursuant to Court Remand* (June 3, 2002) in GTS Industries S.A. v. United States, Court No. 00-03-00118 (CIT)

[10] *See* SSINA Comments at 5-6.

transaction. Rather, in all situations, the Department must thoroughly analysis the transaction and determine whether a privatized company actually benefits from prior financial contributions bestowed on the prior state-owned enterprise.

**B. Market Distortions**

In urging the Department to broadly consider alleged market distortions in disregarding the effect of fair market value privatizations, the domestic producers misconstrue the Appellate Body's decision in *United States - Countervailing Measures Concerning Certain Products from the European Communities*. As explained in the affirmative comments of Dillinger and GTS, the discussion at paragraphs 120-127 of the Appellate Body Report means only that an irrebuttable presumption of no benefit may not be imposed.[11] This discussion does not alter the fundamental requirements of benefit to the recipient or bring into countervailing duty investigations a new inquiry as to macroeconomic conditions. To the contrary, the Appellate Body emphasized that "privatization at arm's length and for fair market value . . . *presumptively* extinguishes any benefit received from the non-recurring financial contribution bestowed upon a state-owned firm" and that this presumption can only be rebutted if it is established that the "*benefit from the previous financial contribution* does indeed continue beyond privatization."[12] Thus, far from diminishing the requirements of benefit to the recipient, the Appellate Body

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[11] Dillinger/GTS Comments at 6-10.

[12] Appellate Body Report, para. 126 (emphasis added); *see also* id. at para 158 (stating that the *SCM Agreement "*permits an investigating authority to evaluate evidence directed at proving that, regardless of privatization at arm's length and for fair market value, the new private owner may nevertheless enjoy *a benefit from a prior financial contribution* bestowed on the state-owned enterprise." (emphasis added)).

reiterated that countervailing duties could be imposed on the production of a privatized company only if it was shown that the company received a benefit from the previous financial contributions paid to the prior state-owned enterprise.

Moreover, the Appellate Body's statements at paragraphs 120-127 must be read in the context of the entire report, especially the discussion at paragraphs 96-105. In rejecting the idea that countervailing duties were designed to counteract market distortions, the Appellate Body reiterated that, "for purposes of determining the continued existence of a 'benefit' under the *SCM Agreement*," the relevant value is the "*market value*" based upon the particular privatization transaction and not the "*utility value*" based upon broader economic considerations.[13] The Appellate Body also stressed that the situations in which privatization at arm's length and fair market value would not extinguish the benefit of a prior non-recurring subsidy would be rare.[14]

Accordingly, the Department should abandon any attempt at analyzing broader market or economic conditions and instead focus its inquiries upon specific benefit to the recipient as required by law.

**C. Issues Requiring Further Elaboration**

As discussed in the affirmative comments of Dillinger and GTS, each of the issues listed by the Department as requiring further elaboration must be analyzed in terms of the principles of

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[13] Id. at para 102.

[14] Id. at para 158 (stating that "privatization at arm's length and at fair market value price will *usually* extinguish the remaining part of a benefit bestowed by a prior, non-recurring financial contribution").

benefit to the recipient.[15] However, as they did in their comments concerning the other aspects of the Department's proposed methodology, the domestic producers continue to ignore these fundamental principles in their discussion of these additional issues. Due to this lack of regard for the principles of benefit to the recipient, domestic producers continually urge the Department to impose a methodology that would assess countervailing duties on a privatized company in an amount exceeding the actual amount of subsidy currently benefitting the recipient.

For example, SSINA urges the Department to ignore any privatization transaction in which the government retains an ownership interest of any amount.[16] This is tantamount to imposing an irrebuttable presumption for partial privatizations in violation of U.S. law and WTO obligations. The mere fact that a government retains some control in a privatized company cannot automatically justify the imposition of countervailing duties based upon the full amount of subsidies bestowed on the state-owned enterprise prior to privatization. Instead, the Department must make a careful analysis of the benefit actually received by the privatized company, and the amount of countervailing duties imposed may not exceed the amount of benefit determined.[17]

**III. Conclusion**

The Department should abandon its reliance upon presumptions of continuing benefit and instead base its revised methodology upon a direct and thorough analysis of whether a privatized

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[15] Dillinger/GTS Comments at 10-13.

[16] SSINA Comments at 17-18.

[17] Dillinger/GTS Comments at 3-4.

company actually benefits from prior financial contributions bestowed on the state-owned enterprise. Only in this way can the Department properly implement the Appellate Body's report in DS212.