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BY HAND

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Import Administration
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Rebuttal Comments of Gouvernement du Québec on the Proposed Modification of Agency Practice under Section 123 of the Uruguay Round Agreement Act

Dear Mr. May:

This letter provides the rebuttal comments of the Gouvernement du Québec ("GOQ") on the comments submitted to the Department regarding the proposed modification of the agency's methodology in reviewing the privatization of a formerly subsidized firm.

As the Department explains in the Federal Register, the methodology it proposes is structured as a sequence of rebuttable presumptions. The baseline presumption "is that non-recurring subsidies can benefit the recipient over a period of time normally corresponding to the average useful life of the recipient's assets." That presumption may be rebutted if an interested party can demonstrate that a privatization occurred during the allocation period "in which 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."[1]

Certain of the commentators, including The Specialty Steel Industry of North America (SSINA), propose that the Department introduce far-reaching loopholes into the fair market value analysis, in order to minimize the circumstances in which extinguishment of the pre-privatization subsidy will be found. The Department should reject those proposals for change in the methodology, as proposed in the Federal Register notice.

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[1] 68 Fed. Reg. 13897, 13899 (March 21, 2003).

In particular, the Department should reject the change proposed by SSINA to the language relating to "committed investment." *See* SSINA comments (submitted by Collier Shannon) at 8.

The Department's proposed methodology would consider whether committed investments were a requirement of the sale and whether the seller offered price discounts or other inducements in exchange for promises of additional future investment that private commercial sellers would not normally seek. SSINA calls on the Department to amend its methodology to delete reference to price discounts or other inducements, asserting that *any* condition upon the terms of a sale is a sufficient indicator on its own that the government "is not acting as a normal commercial actor, even absent an explicit price discount." *Id.* In so suggesting, SSINA appears to advocate a rule that the addition of any type of condition to the terms of a sale presumptively eliminates any claim of fair market value.

The GOQ respectfully disagrees and urges the Department, to the extent that it looks at the issue of committed investments, to retain its emphasis, as currently proposed, on whether a benefit is *actually* conferred. Unless there is *both* (i) a "committed investment" that was *required* by the selling government (rather than offered by the bidder on its own initiative or as part of its own business plan for the post-privatized business) *and* (ii) a clearly demonstrable effect of that requirement on the price of the sale (that is, a clear showing that the bidder offered less because of the requirement), the transaction will remain at fair market value whether or not a "committed investment" term is included.

First, the Department's methodology must recognize that bidders may, of their own initiative, include terms in their bids that would fit under the rubric of "committed investment" as the Department defines that term. A bidder for a privatizing business usually will intend to keep the business active and competitive – otherwise it would not be bidding. Its business plan for the acquired company therefore will, in normal situations, include plans to keep plants in production, to keep workers employed, and to make capital investments that will upgrade or modernize. In many cases, the bidder may include those elements in its proposal to the selling government. The fact that it does so in no way undermines the market value nature of the proposal. The bidder is simply stating its intent to do what is commercially routine after it acquires the business.

As the Department's notice states, the "basic question … 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 fair market value.[2] No question is raised where the "committed investment" term was not sought or required by the government. Accordingly, unless the solicitation for bids mandates the inclusion of terms related to employment levels, continuity of production, or future capital investment, the Department need not and should not pause over the "committed investment" issue.

Second, contrary to the SSINA proposed change, it is an essential element of any fair market value analysis of "committed investment" terms that those conditions actually and demonstrably result

[2] 68 Fed. Reg. 13897, 13900 (March 21, 2003).

in payment of a lower price by the bidder. As the Department's notice states, the record must establish that there were "price discounts or other inducements" given by the selling government in order to obtain the "committed investment" terms. Absent such a showing, those terms by definition have no effect on the fair market value question.

Third, the GOQ notes that the SSINA comments do not address the central point that, even if a "committed investment" term is present, that fact has no logical connection to the issue of whether pre-privatization subsidies pass through and benefit the new owner.

To begin with, the Department cannot automatically assume that "committed investment" conditions lead to a failure of the selling government to "maximiz[e] its return" or to the conclusion that such maximization was "not the government's primary consideration" in agreeing to the sale with those conditions included.[3] Adding a condition to the sale of an asset may produce substantial net benefits to the government that would *necessarily* maximize the government's return. A bidder who proposes to retain employees, or to maintain production, or to invest in new equipment or expansion, offers additional value to the selling government in the form of likely additional tax revenues and other financial benefits from those conditions that otherwise might not be present after the privatization.

Even assuming *arguendo* that, in this situation, the buyer has received a benefit in the form of a price discount, that is a *different* benefit from the pre-privatization subsidy. There is no link between that possible benefit and the prior subsidy, and no analytical basis for the Department to conclude that the prior subsidy passes through to the new owner in these circumstances, whether or not the Department finds that the sale price was not fair market value because of the additional conditions.

The GOQ thanks the Department for the opportunity to comment and looks forward to the final modification notice.

Very truly yours,

Hamilton Loeb
A. Jeff Ifrah
Lamia Matta

Counsel for the Gouvernement du Québec

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[3] 68 Fed. Reg. 13897, 13900 (March 21, 2003) (describing "committed investment" factor).