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Mr. Jeffrey May
Director of Policy
U.S. Department of Commerce
Import Administration
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Washington, DC 20230

Attn: Privatization Methodology

Re: Notice of Proposed Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act and Request for Public Comment -- Rebuttal

Dear Mr. May:

These rebuttal comments are submitted by the Specialty Steel Industry of North America (SSINA) pursuant to the comment opportunity provided by the Department of Commerce with respect to its proposed modification to its privatization methodology. 68 Fed. Reg. 13,897 (Mar. 21, 2003). A number of foreign producers that have been found to have benefited from subsidies despite privatizations of the companies have submitted comments urging the Department to modify its proposed methodology in various respects to ensure that the subsidies they have received will not be countervailed. Towards this end, the foreign producers have

variously urged the Department to: (1) ignore the exception for "market distortions" recognized by the World Trade Organization; (2) treat only nonmarket economy countries as satisfying the market distortion aspect of the agency's test; (3) identify a "safe harbor" as a roadmap for foreign producers on how to obtain subsidies without recourse; (4) ignore all concurrent subsidies that accompany privatizations; (5) adopt court decisions or agency positions taken on remand in response to certain (but not all) lower court orders that neither reflect agency practice nor law; and (6) modify the methodology due to alleged errors in a "cost to government" viewpoint of the methodology. SSINA's rebuttal to each of these comments is set forth below.

I. THE DEPARTMENT SHOULD MAINTAIN ITS EXCEPTION FOR MARKET DISTORTIONS

An argument advanced by several commenters, including Corus Group plc and Arcelor S.A., is that the agency has improperly included consideration of market distortions as part of its proposed privatization methodology. It is the position of these companies that a sale of a company at arm's length and for fair market value in and of itself extinguishes all subsidies, irrespective of the broader market or economic environment in which such a transaction occurs. As Corus states, the concept that "the broader market was severely distorted by government action" should have "no place in ITA's privatization analysis." See Corus Group Comments at 11.

These arguments fail to recognize the holding of the Appellate Body of the World Trade Organization in the dispute at issue that led to the Department's proposed methodology change. In that case, the Panel had held that an arm's length sale for fair market value extinguished past subsidies in all cases. The Appellate Body, however, disagreed, stating that such a broad rule "overlooks the ability of governments to obtain certain results from markets by shaping the

circumstances and conditions in which the markets operate." See Appellate Body Report at para. 124, WT/DS212/AB/R (Dec. 9, 2002). Given that the Department is modifying its privatization methodology in order to be consistent with the holding of the Appellate Body, it should reject foreign producer arguments that urge it to adopt a position inconsistent with the Appellate Body decision and should retain its exception for market distortions.

II. THE MARKET DISTORTION EXCEPTION CANNOT BE EQUATED TO NONMARKET ECONOMIES

Several of the commenters argue that to the extent the Department recognizes that market distortions can lead to a finding that subsidies continued to benefit a company despite an arm's length sale of that company at fair market value, the Department should consider that such market distortions exist only in a nonmarket economy country ("NME"). The Gouvernement du Quebec, for example, states:

> When the government in question operates in a market economy, the inquiry should end there. The Department should reserve any further market distortion analysis for subsidy allegations involving non-market economies (to the extent subsidy claims are cognizable against NMEs) or transitional economies in the early stages of transformation from centrally-controlled to market-based structures.

See Gouvernement du Quebec Comments at 8. Similarly, Cogne Accaia Speciali and ILVA assert that the Department should define market distortions based on the same factors it considers to classify a country as a nonmarket economy country in a dumping proceeding. See Cogne Acciai Speciali Comments at 11; ILVA Comments at 10-11. See also Brazilian Steel Institute Comments at 3 (arguing that countries that are not NMEs should be presumed to have sales at market value if the price is near or above a minimum, independently-valued price).

These comments should be rejected as untenable by the agency. As the Gouvernment du Quebec implicitly acknowledges, subsidy claims are not cognizable against NMEs. Equating market distortion situations to those that exist in an NME country, therefore, would be meaningless, as countervailing duties are not imposed against NMEs in any case.

Moreover, a review of the discussion of the Appellate Body in creating an exception for situations in which a market distortion has occurred does not suggest that an NME or even a transitional economy are the exceptions the Appellate Body had in mind. Rather, the Appellate Body recognized that governments may "influence the circumstances and the conditions of the sale so as to obtain a certain market valuation of the enterprise." AB Report at para. 124. This type of market distorting behavior can and does occur in market economies. Accordingly, the agency should reject arguments that the market distortion exception be equated to NME situations.

III. NO "SAFE HARBOR" SHOULD BE CREATED FOR SUBSIDIZED COMPANIES

Several commenters, including the Gouvernement du Quebec and the Corus Group, urge the Department to create "safe harbors" that clearly greenlight the manner in which subsidies can be extinguished as a result of a privatization. See Gouvernment du Quebec Comments at 6; Corus Group Comments at 13-15. Corus, for example, urges the Department to set forth "guidelines with respect to when a privatization (as opposed to private-to-private transactions) will be deemed to eliminate the continuing benefit of past nonrecurring subsidies." Corus Group Comments at 14. Corus identifies the need for such a safe harbor based on the "U.S. policy of encouraging privatization, especially in developing countries." Id. at 15.

In effect, what these commenters are urging is that the Department provide them with a roadmap for how they can continue to receive subsidies but ensure that those subsidies will not be subject to countervailing duties so long as they structure a company privatization in a particular manner. The response to a request for a "safe harbor" is simple: don't bestow or accept unlawful subsidies in the first place. If no subsidies are provided, a company is clearly "safe" from the imposition of remedial duties. There should be no roadmap as to how to receive subsidies but ensure that there is no remedy or recourse by an injured industry in a third country as a result of competition with subsidized imports.

Further, as the agency properly has recognized, it is important that the agency maintain flexibility in its privatization methodology to consider the facts and circumstances of each case before it determines whether subsidies continue or have been extinguished following a privatization. It would be premature for the agency to attempt to define "safe harbors" at this point without reviewing the various factual scenarios that accompany privatizations. No alleged U.S. policy of encouraging privatizations can override a U.S. law that provides domestic industries with the right to obtain relief from injurious, unfairly-subsidized imports.

IV. THE DEPARTMENT SHOULD CONSIDER AS PARTICULARLY EGREGIOUS ANY ACTIONABLE SUBSIDIES THAT ACCOMPANY A PRIVATIZATION

Several commenters, including Cogne and ILVA, strongly object to the Department's statement that "concurrent subsidies," or subsidies provided to encourage or otherwise concurrently with a privatization, should be considered separately from past subsidies and should remain potentially countervailable following a privatization. See Cogne Comments at 2; ILVA Comments at 14-15. Cogne and ILVA argue that as long as concurrent subsidies were known to all bidders, they are factored in to the price and are therefore not actionable. Id.

As set forth in our initial comments, SSINA believes that the issue of concurrent subsidies is of critical importance in the Department's analysis of whether a privatization extinguishes a subsidy and agrees with the Department that such subsidies must be considered separately from past subsidies. As even the Government of Canada acknowledges, "any subsidy that may have been provided to encourage or facilitate privatization should be assessed very carefully." See Government of Canada Comments at 5. Contrary to the arguments of Cogne and ILVA, a subsidy provided concurrently with or to encourage a privatization cannot be simply ignored as subsumed in the purchase price but must, as the Government of Canada states, "be assessed very carefully" and, SSINA believes, should be countervailed as a new subsidy to the privatized company.

V. DECISIONS BY THE COURT OF INTERNATIONAL TRADE OR REMAND DETERMINATIONS BY THE AGENCY ARE NOT DETERMINATIVE OF THE AGENCY'S NEW METHODOLOGY

ThyssenKrupp Acciai Speciali Terni and Arcelor cite selected decisions of the Court of International Trade, as well as the approach taken by the Department on remand of those court appeals at the direction of the Court, as reflecting a correct approach that should be employed in the agency's new privatization methodology. Arcelor argues that the agency's new privatization methodology must be consistent with the U.S. court decisions analyzing the privatization of Usinor. Arcelor Comments at 3. ThyssenKrupp asserts that the Department's actions on remand at the Court's order reflect an approach that has been "recognized and accepted" by the Department. ThyssenKrupp Comments at 4.

These foreign producers fail to recognize several fundamental facts in advancing these arguments. First, the court cases cited are not final but have been appealed to the Court of

Appeals for the Federal Circuit. Second, there has been a split among the judges of the Court of International Trade addressing aspects of the agency's prior privatization methodology, so it would be improper to rely on selected aspects of any one of those decisions. Third, the agency's statements on remand of a Court's order reflect its attempt to abide by the instructions of the Court and do not reflect an approach "recognized and accepted" by the Department. And finally, as a result of the Appellate Body's decision, the Department is now reexamining and revising its prior privatization methodology, so past decisions reached under a previous methodology are no longer binding on the Department as it implements this new methodology.

VI. THE AGENCY'S NEW METHODOLOGY DOES NOT REFLECT AN INCORRECT COST TO GOVERNMENT APPROACH

Several commenters argued that the Department should adjust its proposed analysis of "fair market value" to focus exclusively on actions of the purchaser, not the government as seller in the privatization transaction. Specifically, according to Cogne, "the issue of what the government seller sought is irrelevant to the inquiry." Cogne Comments at 3 (emphasis in original). Similarly, according to these arguments, the government's imposition of conditions or provision of concurrent subsidies becomes "irrelevant" because the purchaser would have considered such considerations and adjusted its offer for the company accordingly. Id. at 2, 4. These commenters claim that Commerce's intended examination of whether the government acted to maximize profits in the privatization transaction is contrary to U.S. law as a "cost to government," not "benefit to recipient" approach. The agency must reject these arguments in the codification of its proposed methodology for the following reasons.

The motives and behavior of the government in the privatization transaction are crucial, not irrelevant, to the Department's analysis. The agency's proposed methodology seeks to

address whether the government received fair market value on the sale by acting as a normal, private commercial seller in the country in question. By focusing only on the purchaser, and whether the purchaser felt "fair market value" was paid for a company, Commerce would be missing the key portion of the equation. Importantly, the government as seller makes all of the critical decisions regarding the sale, including, but not limited to: the condition of the company (combination of assets and liabilities), the method by which the sale will be made, and the selection of the ultimate purchaser. The Department's analysis, therefore, must remain focused upon the government.

Several commentators noted that the imposition of conditions in a sale may occur in private-to-private transactions, and therefore suggested that the Department eliminate this factor from the items to be examined in the determination of fair market value. As a preliminary matter, the agency should recognize that governments frequently are in a position to impose conditions and provide incentives not available to private market actors. For instance, case precedent clearly establishes that governments are willing to assume substantial costs "cleaning up" companies prior to sale without consideration of the future sale price. Moreover, the issue before the agency is not government's imposition of a specific condition, such as retention of workers, in isolation. Rather, the proposed methodology establishes a variety of factors to determine if the government "acted in a manner consistent with the usual sales practices of private, commercial sellers in that country." 68 Fed. Reg. 13,900. The agency, therefore, should not limit the factors that it will examine in its determination of fair market value, but should

retain the broad approach of the proposed methodology.[1]

Attempts to characterize the Department's analysis as a "cost to government" approach are misguided. In assessing fair market value, the proposed methodology does not seek to measure a "benefit" from a "new" subsidy provided in the privatization, i.e., the difference between fair market value and the amount paid by the purchaser.[2] Rather, the analysis examines whether previously provided subsidies continue to benefit the privatized company, or are extinguished in the transaction. Accordingly, citations to the statute regarding the measurement of the "benefit" from a subsidy are misplaced.

More important, focus on "profit maximization" is not a "cost to government" analysis. As recognized in the Department's regulations and practice, in many instances the agency must determine whether the government was acting consistently with the typical investment practices of private actors in the market. See, e.g., 19 C.F.R. § 351.507 and 19 § C.F.R. 351.511(a)(2). Normal commercial actors in a market economy will seek to maximize profits on the sale of assets. The agency's assumption that the government, as seller, should act in accordance with this principle is logical, unless the government, in selling the company, is not acting as a normal

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[1] Similarly, Commerce should not establish a rigid "hierarchy" of the factors to be examined in its analysis of fair market value. Rather, the methodology should remain flexible to address the diverse factual scenarios that may be encountered by the agency in the future.

[2] In this regard, the agency also should reject suggestions that the continuing benefit amount on subsidies determined to pass through to the privatized company should be recalculated after privatization. Specifically, several parties submit that the Department should calculate the difference between "fair market value" and actual purchase price to determine the amount of subsidy remaining with the privatized company. As this approach mirrors many aspects of Commerce's previously rejected "gamma" methodology, the agency must not accept this proposition. Instead, the agency should continue to allocate the remaining nonrecurring benefits over the average useful life of the assets.

commercial actor, but is motivated by other political and social considerations.

In sum, Commerce should reject suggestions that the "correct" methodology focus predominately on the purchaser, and not the government. Instead, the Department should maintain its currently proposed analysis that seeks to examine the privatization transaction in the context of whether the government acted as a rational commercial actor interested in maximizing profits.

Respectfully submitted,

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