April 11, 2003

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

Re: Comments on Proposed Modification of Agency Practice -- ThyssenKrupp Acciai Speciali Terni S.p.A. and ThyssenKrupp Acciai Speciali Terni USA, Inc.

Dear Mr. May:

The following comments are submitted on behalf of ThyssenKrupp Acciai Speciali Terni S.p.A. and ThyssenKrupp AST USA, Inc., pursuant to the Department's Federal Register notice of March 21, 2003 (68 Fed. Reg. 13897).

The Department commendably acknowledges the need to implement the recommendations and rulings of the WTO Appellate Body Determination in United States – Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/AB/R (Dec. 9,2002) (*AB Report*). 1/ However, the Department's proposal violates both the letter and spirit of the *AB Report*, as well as the Court of Appeals determination in *Delverde* S*rL v. United States*

1/ It also rightly refrains from distinguishing between stock and asset purchases.

(Delverde) 2/, in a number of significant ways. We are particularly concerned about the ease in which the presumption that an arm's length fair market value sale extinguishes subsidies can be rebutted. These comments indicate the violations and suggest preferred solutions.

I. ARM'S LENGTH/FAIR MARKET VALUE TEST

We agree with the Department's general approach that, if a privatization sale was at arm's length for fair market value, any pre-privatization subsidies will be presumed to be extinguished and therefore to be noncountervailable. In determining whether a privatization sale occurred at "fair market value," the Department should continue to follow the "process-oriented" approach that it has applied in recent remand redeterminations in the Court of International Trade. 3/

The Department's proposed methodology as set forth in the Federal Register Notice, however, contains a number of troubling items. In several of the enumerated factors, the Department has incorporated the concept of "profit

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2/ 202 F. 3d 1360 (Fed. Cir. 2000), *reh'g and reh'g en banc denied*, June 20, 2000.

3/ *See, e.g., Results of Redetermination Pursuant to Court Remand, Acciai Speciali Terni S.p.A. and Acciai Speciali Terni USA v. United States*, CIT No. 99-06-00364 (Feb. 1, 2002) (AST Remand Redetermination); *Results of Redetermination Pursuant to Remand, Allegheny Ludlum Corp. v. United States*, CIT No. 99-09-00566 (January 4, 2002); *Results of Redetermination Pursuant to Remand, GTS Industries, S.A. v. United States*, CIT No. 99-03-00118 (January 4, 2002).

maximization," and implied that if a selling Government could have received more cash for a company by packaging it differently, this could be a basis for determining that the privatization did not occur at "fair market value." This focus on "profit maximization" is contrary to U.S. WTO obligations, United States law and sound policy.

Both the *Delverde* decision and the *AB Report* recognize that a determination as to whether "fair market value" was paid must be made by reference to the *purchaser*. The issue is whether the *purchaser* paid "fair market value" for what it received, not whether the Government could have received more money if the government included more assets or fewer conditions in the business unit sold. In particular, *Delverde* states:

> Had Commerce fully examined the facts, it might have found that Delverde paid full value for the assets and thus received no benefit from the prior owner's subsidies, or Commerce might have found that Delverde did not pay full value and thus did indirectly receive a "financial contribution" and a "benefit" from the government by purchasing its assets from a subsidized company "for less than adequate remuneration." 4/

Thus, the *Delverde* court equated "fair market value" with "adequate remuneration" paid by the purchaser – not "maximum remuneration" to the selling government.

4/ *Delverde* at 1368, citing to 19 U.S.C. § § 1677(5)(D)(iii)(E)(iv).

The Commerce Department recognized and accepted this approach in the remand redetermination in *Acciai Speciali Terni S.p.A. and Acciai Speciali Terni USA v. United States*. The Department stated:

> [T]he petitioners have argued that GOI-imposed conditions on AST and its subsidiaries for several years after the sale affected the terms of sale and would not be part of a fair market value sale. The Department's analysis has focused on the "package" that was offered by the IRI in the privatization of AST. While we agree with the petitioners that what comprises the package will affect the price received, we are not in a position to speculate about what the value would have been had the government offered a different package. Instead, we have analyzed the sale as it was fashioned by IRI, looking at whether the sales process was open and competitive, and whether the price received by IRI was consistent with the valuations made by outside parties. Based on this analysis, as stated in the redetermination on remand, we determine that full value was paid for AST. 5/

This focus on the purchaser is consistent with the Department's overall approach to benefit determinations, which is that the focus should be on whether there is a benefit to the recipient, as opposed to the cost to the government. This is the approach mandated by both U.S. law 6/ and the Subsidies Agreement. 7/ Any

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5/ AST Remand Redetermination at p. 26.

6/ 19 U.S.C. § 1677(5)(E).

7/ Article 14 of the SCM Agreement.

requirement that the government maximize its profit amounts to an unlawful focus on the government's costs.

A. Artificial Barriers to Entry

The proposed methodology first adopts (appropriately) a presumption that a privatization sale of controlling interest in a company at fair market value renders non-countervailable subsidies received before the sale. The first step in determining whether a sale occurred at fair market value is whether there were "artificial barriers" to purchasing the company. This test essentially adopts and codifies the process-oriented approach the Department took in the recent remand determinations cited above. As noted, this is a workable approach that is fundamentally consistent with *Delverde* and the *AB Report*.

We are, however, concerned about whether the ambiguous references to "overly burdensome" or "unreasonable bidder qualifications" could be implemented in a way that would frustrate a reasonable and predictable outcome. Certainly, in considering whether particular requirements such as guarantee requirements are "unreasonable," the Department must consider the context, such as the size of the business that is being sold and the ability of the purchaser to pay. Also, we think it important to emphasize, as the Department apparently recognizes, that the "fundamental consideration here is not necessarily the number of bidders

per se but, rather, whether the market is contestable." 8/ If the market is "contestable," the sale should normally be considered to be at fair market value, since all willing competitors would bid. This concept should be incorporated into any final statement of agency practice that is issued.

B. Independent Analysis

The best evidence that a privatized company was sold at "fair market value" is that the price paid for the company was equal or greater than the valuation(s) made by independent qualified appraisers. The Department should emphasize this concept in the articulation of this standard.

As currently formulated, the "independent analysis" criterion incorrectly focuses on the concept of "maximizing" the government's returns; as noted above, this focus is inconsistent with U.S. law, the Subsidies Agreement, the *AB Report* and the *Delverde* Court of Appeals decision.

C. Highest Bid

In situations where a company is sold to the highest bidder in an open-competitive market situation, there is clear evidence that the company was sold at "fair market value."

8/ 68 Fed. Reg. at 13900, fn. 6.

D. Committed Investment

The proposed methodology focuses too much on the existence of certain conditions associated with the sale of a company. The mere existence of conditions on the sale, whether they serve government policy considerations or financial considerations, does not mean that those conditions affect whether the sale took place at fair market value. For example, the condition that a purchaser keep the company operating for a limited period of time or retain employees for a specified period has no effect on fair market value, especially when the purchaser's plans are consistent with these conditions. Even if the purchaser would have preferred to buy the company without conditions, if the purchaser paid fair market value *for what he received*, the sale should be considered to have been at fair market value. Also, as noted above, the focus on profit maximizing for the seller (the government) is misplaced.

II. MARKET DISTORTION TEST

Under the Department's proposed methodology, the threshold standard to rebut the arm's length/no benefit presumption is far too low. The presumption apparently could be rebutted by unquantified, speculative data. This standard would violate the requirements of the *AB Report* and the Court of Appeals decision

in *Delverde*, which holds that the burden is on the Commerce Department to establish that the purchaser received a benefit despite a fair market value sale. 9/

In attempting to justify the creation of its "market distortion" test, the Department quotes extensively from the *AB Report*. Notably, the Department does not quote from the concluding section of that discussion in the *AB Report*, which is the critical passage for this purpose. The subsequent, concluding paragraph of the *AB Report* refutes the Department's proposed approach:

> the effect of [an arm's length/fair market value privatization] is to shift to the investigating authority the burden of identifying evidence which establishes that the benefit from the previous financial contribution does indeed continue beyond privatization. In the absence of such proof, the fact of the arm's length, fair market value privatization is sufficient to compel a conclusion that the "benefit" no longer exists for the privatized firm, and therefore, that countervailing duties should not be levied. This is an accurate characterization of a Member's obligations under the SCM Agreement.
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> *AB Report* at ¶ 126 (emphasis supplied).

The Department's proposed methodology is contrary to *AB Report* ¶ 126. Under the Department's proposed approach, a party can rebut the presumption of extinguishment by demonstrating that

> at the time of privatization, the broader conditions necessary for the transaction price to fairly and accurately

9/ *Delverde* at 1366.

> reflect the subsidy benefit were not present, or were severely distorted by government action (or, where appropriate, inaction). In other words, although in our analysis we may find that the sale price was at "market value," parties can demonstrate that the market itself was so distorted by the government that there is a reasonable basis for believing that the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action. 10/

There are critical differences between the approach laid out in the *AB Report*, and the approach that the Department proposes that render the Department's approach fundamentally flawed. While the *AB Report* clearly places the burden on the *investigating authority* to identify evidence which establishes that the benefit from the previous financial contribution continues beyond privatization, under the Department's approach, there is no such burden. Rather, the Department simply reverses the presumption that the arm's length/fair market value sale eliminates the benefit upon a showing that the market itself was so distorted by the government that "there is a reasonable basis for believing that the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action." 11/ This burden of proof is not clear. Consistent with the *AB Report*, the petitioners must have the burden of rebutting the

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10/ 68 Fed. Reg. at 13900.

11/ 68 Fed. Reg. at 13900.

presumption that the subsidies are extinguished and the presumption should only be rebutted by clear and convincing evidence – not mere speculation.

The Department goes on to explain that "[n]either the parties nor the Department would be required to quantify by how much the actual transaction price differed from an 'undistorted market' value." 12/ This compounds the inconsistency – quantification of the difference is indispensable to determining that there is a material difference between market conditions with and without government-induced distortions. Any determination that the presumption is rebutted obviously requires an assessment of the degree of distortion and further requires that the Department establish this with record evidence. The "broader conditions" approach proposed by the Department would fail WTO scrutiny.

A. Basic Conditions

We have no comment on these factors as they clearly are not relevant to Italy.

B. Related Incentives

To the extent that a government uses the "prerogatives of government" to provide more favorable treatment to one purchaser over another, that could be a basis for finding that the transaction is not consistent with "fair market value."

12/ 68 Fed. Reg. at 13900 fn. 8.

However, any such factors would be more appropriately considered in the "fair market value" part of the Department's analysis. 13/

C. Legal Requirements

See comments under Section I (D) above.

D. Creation/Maintenance

It is unclear whether the "other heavily subsidized companies" refers to companies in the same country or worldwide. We point out that any reference to companies located in countries other than the country under consideration in a particular case would violate U.S. law and the requirements of the WTO Subsidies Agreement. The *AB Report* only referred to situations where the government acts intentionally to disrupt the functioning of the *national* market with regard to the sale in question. 14/ Reference to other markets is fundamentally inconsistent with the *AB Report's* analysis; moreover, U.S. law plainly restricts "cross border" comparisons for determining commercial benchmarks. Consideration of the effect of subsidization of other companies in the seller's market is equally inappropriate. The purpose of the countervailing duty law is to offset the benefits to the specific

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13/ We note that no such factors are present in the privatization of AST.

14/ See, e.g., *AB Report* at ¶ 123, referring to "circumstances prevailing in the market in which the sale occurs."

recipient – not to remove the general market distortion of subsidies. 15/ Furthermore, resort to such comparisons would create a procedural nightmare and endless opportunities for delay and obfuscation.

III. ADDITIONAL ISSUES

A. Continuing Benefit Amount

If the presumption that prior subsidies are extinguished in a privatization should be rebutted, the Department raises the key question of how to quantify the amount of any benefit the privatized company continues to enjoy. In such a situation, the correct calculation of the benefit would be the difference between what the purchaser actually paid and the "fair market value" of the company or assets purchased. This question, however, highlights the difficulty with the Department's statement that it is unnecessary for any parties to quantify the amount of any distortion in the market. Without assessing the amount of distortion, it is impossible to determine correctly the disparity between the price paid and the fair market value. 16/

15/ See, e.g., *AB Report* at ¶ 101, citing the U.S. Government's position that the countervailing duty 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."

16/ We also note the obvious point that the proper measure *cannot* be to countervail the pre-privatization subsidies in a pass-through.

B. Concurrent Subsidies

The Department's notice also raises the question of whether a "subsidy, e.g., debt forgiveness" given to a company to encourage or facilitate a privatization should be considered a "pre-privatization" subsidy that can be extinguished during the privatization, or a new subsidy to the new owner(s)." 17/ This is clearly a false issue. Subsides provided to facilitate a privatization, such as debt forgiveness, clearly are pre-privatization subsidies and should be subject to the same approach as any other pre-privatization subsidy.

C. Partial or Gradual Sales

Where privatizations involve only the partial sale of assets or shares to private owners, Commerce should find that a privatization was accomplished when the Government ceased to retain effective control over the company. The standard would be whether the transaction transferring effective control occurred at fair market value.

III. CONCLUSION

We appreciate the opportunity to comment on the Department's proposed methodology and the questions posed by the Department. We are encouraged that the Department has finally moved the privatization issue toward the circumstances

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17/ 68 Fed. Reg. at 3901.

for eliminating pre-privatization subsidies from countervailing duties following a fair market value sale. Unfortunately, procedural and evidentiary flaws that could permit unpredictable results, and endless litigation and further violations of U.S. law and WTO requirements diminish this necessary and laudable step. We urge the Department to conform its implementation in its entirety to the requirements of the *AB Report*.

Respectfully submitted,

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