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April 18, 2003

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

**PUBLIC DOCUMENT**

ATTN: Privatization Methodology

**Re: Rebuttal Comments on Proposed Modification of Agency Practice –Submitted by ThyssenKrupp Acciai Speciali Terni S.p.A. and ThyssenKrupp Acciai Speciali Terni USA, Inc.**

Dear Mr. May:

The following rebuttal comments are submitted on behalf of ThyssenKrupp Acciai Speciali Terni S.p.A. and ThyssenKrupp AST USA, Inc., pursuant to the U.S. Department of Commerce's Federal Register notice of March 21, 2003 (68 Fed. Reg. 13897). The comments address issues that were raised in submissions addressing the modified methodology proposed by the U.S. Department of Commerce ("the Department") for determining whether government

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subsidies have been extinguished by privatization, and supplement our previous submission. 1/

In our rebuttal comments, we focus on comments filed by two domestic petitioner interests: Nucor Corporation and Nucor Yamato Steel Co. (“Nucor”) 2/ and the Specialty Steel Industry of North America (“SSINA”). 3/ Our rebuttal comments address the following issues: (1) whether the Department’s presumption in favor of a fair market value privatization extinguishing pre-privatization subsidies is consistent with U.S. law; (2) the significance of “independent analysis” in establishing fair market value; (3) the significance of “market distortion” factors and (4) the appropriate treatment of contributions made at or near the time of privatization (“concurrent subsidies”).

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1/ *Comments on Proposed Modification of Agency Practice -- ThyssenKrupp Acciai Speciali Terni S.p.A. and ThyssenKrupp Acciai Speciali Terni USA, Inc. of April 11, 2003* (“April 11, 2003 Comments on Behalf of AST”).

2/ *Comments submitted by Wiley Rein & Fielding on behalf of Nucor Corporation and Nucor Yamato Steel Co. on April 11, 2003* (“Comments on Behalf of Nucor”).

3/ *Comments submitted by Collier Shannon Scott on behalf of the Specialty Steel Industry of North America on April 11, 2003* (“Comments on Behalf of SSINA”).

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**I. THE DEPARTMENT'S PRESUMPTION THAT A FAIR MARKET VALUE PRIVATIZATION EXTINGUISHES PRE-PRIVATIZATION SUBSIDIES IS CONSISTENT WITH U.S. LAW**

SSINA argues that the Department's proposed presumption that a fair market value privatization extinguishes past subsidies is inconsistent with Section 771(5)(F) of the Tariff Act of 1930, as amended, the Statement of Administrative Action (SAA), and the holding of the Court of Appeals in *Delverde SrL v. United States (Delverde)*. <sup>4/</sup> SSINA has grossly misinterpreted the statute and other sources to arrive at such an erroneous conclusion. The wording of Section 771(5)(F) and as interpreted in the SAA and the *Delverde* decision sustains a presumption, so long as it is not a *per se* rule. The Department's proposed methodology does not create a *per se* rule and therefore is plainly consistent with the statute. Section 771(5)(F) states that "{a} change in ownership of all or part of a foreign enterprise does not *by itself* require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction". <sup>5/</sup> This is very different from a requirement that evidence in

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<sup>4/</sup> 202 F. 3d 1360 (Fed. Cir. 2000), *reh'g and reh'g en banc denied*, June 20, 2000. See Comments on Behalf of SSINA at page 2.

<sup>5/</sup> 19 U.S.C. § 1677(5)(F) (emphasis added).

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addition to a fair market value sale would be required to establish that a previous subsidy is no longer countervailable. Yet, without logic or substance, SSINA tries to equate the two concepts.

The Department's proposed methodology establishes a *rebuttable presumption* that any pre-privatization subsidies were extinguished if a privatization sale was at arm's length for fair market value. This methodology is therefore plainly consistent with U.S. law.

## II. THE PROPER ROLE OF INDEPENDENT ANALYSIS OF VALUATION

Both SSINA and Nucor address the issue of independent analysis, questioning that an "independent analysis" would be truly independent. SSINA recommends that the Department "must scrutinize the analysis to prove complete independence in the evaluation <sup>6/</sup> and Nucor suggests that the Department's methodology note that "any views of the paid consultant will be compared with comments by the financial press [...] and will be compared with the stock price once the privatized shares are available to be traded on exchanges". <sup>7/</sup> We believe that these recommendations are made for the principal purpose of delaying the

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<sup>6/</sup> See Comments on Behalf of SSINA at page 7.

<sup>7/</sup> See Comments on Behalf of Nucor at page 10.

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resolution of proceedings making them more burdensome for the Department and responding parties. This is not an acceptable approach.

As we stated in our initial comments, we believe that the existence of an independent analysis of valuation provides the most reliable benchmark for determining if the selling price was at fair market value. Any party challenging the validity or independence of an outside appraisal would (and should) have a heavy burden to meet. Certainly there is no basis to challenge the appraisals that were conducted in the context of the AST privatization transaction. 8/

### III. "MARKET DISTORTION" FACTORS

Both Nucor and SSINA submitted recommendations regarding the Department's proposed "market distortion" analysis that would be contrary to WTO requirements and U.S. law.

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8/ We emphasize in our initial comment (at page 6) that, while an independent analysis is the most reliable benchmark of a fair market value sale, the Department's formulation incorrectly focuses on the concept of maximizing the government's return. The ultimate question is whether the purchaser of the company or asset has received a benefit, which requires a focus on what the purchaser bought and the price the purchaser paid. The concept of maximizing total revenue to the government is inconsistent with *Delverde*, the Subsidies Agreement and 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).

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**1. “Market Distortion” Analysis is Vague and Overly Broad**

Nucor suggests that the Department’s methodology on market distortion factors be preceded by a preamble allowing for general considerations of the market distortion issue that may not be covered by the specific factors listed by the Department. Nucor also recommends that post sale conditions, such as the ones imposed on the buyer of AST by the Government of Italy should be viewed as a strong indication of market distortion. 9/

SSINA endorses an intensive analysis of government actions taken to make sales more attractive to potential buyers when such actions would or could not be taken by non-government sellers. 10/

These proposals are all totally inappropriate and should be rejected, as they are contrary to the basic principles that must govern any inquiry into government “market distortions.” As we explained in our previous submission, 11/ the transaction must be analyzed from the point of view of benefit to the purchaser. The fact that a government imposes post-sale conditions such as worker retention does not support a conclusion that the purchaser received a benefit from a

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9/ See Comments on Behalf of Nucor at pages 11 and 12.

10/ See Comments on Behalf of SSINA at page 14.

11/ See April 11, 2003 Comments on Behalf of AST at pages 7 and 11.

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government financial contribution. The inquiry must always be whether the purchaser paid fair market value for what the purchaser received. That determination must be guided by reference to what was purchased – including any conditions of purchase – not by reference to what might have been purchased if the Government had chosen to package the sale in a different way.

**2. "Market Distortion" Standard Is Far Too Low**

In addition, we have grave concerns about the threshold standard set by the Department in the proposed methodology's market distortion test. As explained in our April 11, 2003 comments, 12/ the threshold standard proposed by the Department would violate the requirements of the AB Report and the *Delverde* decision. The comments of Nucor and SSINA compound the problem by leaving the "market distortion" factors even more vague and subject to abuse. 13/

The Court of Appeals in *Delverde* held that the burden is on the *Department* to establish that the purchaser received a benefit despite a fair market value sale. 14/ Similarly, the AB Report places the burden on the *investigating*

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12/ See April 11, 2003 Comments on Behalf of AST at page 7.

13/ See Comments on Behalf of Nucor at pages 11 and 12; Comments on Behalf of SSINA at page 12.

14/ *Delverde* at 1366.

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*authority* to identify evidence which establishes that the benefit from the previous financial contribution continues beyond privatization. 15/

Thus, the evidence needed to establish “market distortion” under the Department’s proposal is inappropriately low. Furthermore, there is nothing in the Appellate Body’s discussion of “market distortion” considerations that refers in any way to the types of conditions of sale that were present in the AST privatization transaction, for instance. Thus, there is clearly no basis to determine that typical conditions of sale would constitute “market distortions” as defined by the Appellate Body.

**IV. SUBSIDIES GIVEN IN CLOSE PROXIMITY TO THE TIME OF SALE**

Both SSINA and Nucor comment on the issue of subsidies given near the time of sale. SSINA recommends that the Department add to its list of four factors that are indicative of whether a sale occurred at fair market value the factor of whether subsidies were provided in the course of privatizations. 16/ Nucor

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15/ *AB Report* at ¶ 126: “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.” (emphasis added).

16/ See Comments on Behalf of SSINA at page 9.



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suggests that the Department should consider subsidies provided within an arbitrary time frame of two years of a company's privatization as subsidies to the new owners. 17/

The AB Report provides no basis for distinguishing the treatment of contributions provided to facilitate a privatization from any other type of pre-privatization subsidy. 18/ SSINA's statement that "the provision of subsidies prior to or during privatization proves that the privatization did not occur at fair market value" is plainly wrong and misses the fundamental point. The pertinent question is whether the price paid by the purchaser reflects the fair market value of the company in its condition at the time of the sale. If the purchaser paid fair market value for the company, prior subsidies, regardless of why and when they were given, are presumptively extinguished.

The proposal by Nucor that "subsidies provided within two years of a company's privatization should be considered as subsidies to the new owners, since they were, or may be presumed to have been, provided to benefit the new owners at the time of sale" fails to focus on the essential question. Contrary to Nucor's

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17/ See Comments on Behalf of Nucor at page 14.

18/ See Comments on Behalf of AST at page 13.

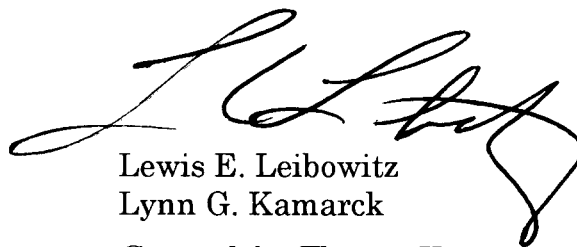
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assertion, pre-privatization subsidies will only benefit a purchaser of a company if the purchaser pays less than fair market value for the company or asset purchased. 19/

V. CONCLUSION

For the reasons stated herein, we urge the Department to provide a clear and workable standard for privatization, providing for a presumption that past subsidies are not countervailable after a sale at fair market value. The focus must be on whether the purchaser received a benefit from the purchase by paying less than fair market value for the property purchased.

Respectfully submitted,



Lewis E. Leibowitz  
Lynn G. Kamarck

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S.p.A. and ThyssenKrupp AST USA, Inc.*

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19/ If a company is worth \$2 million and is sold subject to debts of \$1 million, that same company could be sold for \$3 million subject to no debt. Both the \$2 million price for the company subject to debt, and the \$3 million price are at fair market value. The "debt forgiveness" (if it is fairly described as such) provides no benefit to the purchaser and is not countervailable.