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VIA HAND DELIVERY

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

Attn: Privatization Methodology

Re: Rebuttal Comments of Corus Group plc

Dear Mr. May:

The comments below are submitted on behalf of Corus Group plc (Corus) in rebuttal to certain comments of various parties filed in response to the International Trade Administration's (ITA) Notice of Proposed Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act and Request for Public Comment (ITA Proposal).

General Comment

After more than a decade of debate over the issues of allocation of subsidies over time, privatization and change of ownership, it is incumbent upon ITA now to focus particular attention on developing a rational, principled practice on these issues. Put another way, the Department must be clear in its own mind as to the nature of the continuing benefit of

nonrecurring or capital subsidies and must reason logically from the nature of that continuing benefit to the events and circumstances that do or do not require a determination not to apply countervailing duties against imports form a company that operates facilities it acquired (whether by asset purchase or share purchase) from a company that previously enjoyed time-allocated subsidy benefits.

Much of the commentary submitted in response to ITA's notice make no pretense of following such a logical path. Rather, they simply rely on quotations from the Appellate Body, from U.S. court decisions or from past ITA determinations -- sometimes quoted out of context -- as support for propositions that bear no relation to, or are in direct conflict with, the logical analysis from nature of continuing subsidy benefit that must now control the decisionmaking on this issue. The time for such argumentation is past, and such non-logical commentary should be given no weight. Instead, ITA should keep clearly in mind the basic principles that must govern the creation of its new practice:

- The nature of a time-allocated continuing subsidy benefit is that a company operates with some portion of its inputs having been acquired at a cost lower than would have been the case absent a government financial contribution -- in other words, with inputs that were acquired at a cost below their fair market value.[1]

[1] To the extent ITA is prepared to entertain the notion of other forms of continuing subsidy benefit, it should define those forms of benefit, explain how they are quantified for purpose of being countervailed by additional duties, and address separately the analysis of how the continuation of such benefits is or is not affected by a change of ownership.

- Where all or substantially all of the ownership interest in a subsidized company, or in one or more business units of such a company, or in one or more assets of such a company is acquired by a new owner or owners, in a transaction in which the price paid equals or exceeds the fair market value of what is acquired, the future operation of that company, business unit or asset enjoys no benefit from pre-transaction subsidies. The reason is that such operation does not involve the use of any input for which fair market value was not paid.

- A transaction at arm's length will normally, but does not always, result in a sale for fair market value. An arm's length sale between independent private parties is, by definition, a sale at market value. However, while ITA should presume that a sale from a government to a private party is made at fair market value, it should be open to evidence that this is not the case. However, as discussed below, it must be clear in its understanding of how government action in connection with the transaction may or may not affect the "fair market value" issue. (See discussion below.)

- Process evidence is not the only evidence bearing on the fair market value. As discussed in Corus' initial submission and in those of other parties, payment of fair market value may also be established by, inter alia, independent appraisals, examination of post-transaction share price movements, selection of the highest-price bidder in an adequately-contested bidding contest, or comparison to the prices of other similar transactions.

No party has raised any serious, rational argument against the creation of a methodology aimed at determining whether fair market value was paid, or indeed against any of the basic elements of a rational methodology as set forth above. The discussion below will deal briefly with specific points made by certain of the commenting parties.

The Alleged "Illegality" of the ITA Proposal

The comments submitted on behalf of the Specialty Steel Institute of North America, at pages 2-4, argue that the proposed methodology is inconsistent with Section 771(5)(F) of the Uruguay Round Agreements Act (URAA). That argument relies on Section 771(5)(F)'s statement that "a change in ownership … does not by itself require [termination of countervailing duties] … even if the change in ownership is accomplished through an arm's length transaction."

This argument, which has been rejected by the U.S. courts as well as the WTO, is based on a misunderstanding of the statutory provision and of ITA Proposal. The statute in no way questions the fundamental criterion of the ITA Proposal, which is the payment of fair market value. The point of Section 771(5)(F), with which Corus agrees, is that a sale by a governmental seller, even if at arm's length, is not necessarily a sale for fair market value. Accordingly, as Corus has urged and as ITA contemplates, examination of a privatization must consider evidence that the governmental seller did not seek -- and therefore (which is the important point) the purchaser did not pay -- fair market value.

Corus agrees with SSINA's formulation (at page 4) as the starting point for analysis of whether a governmental sale is at arm's length:

> … whether the government, in it capacity as seller, acted in a manner consistent with the usual sales practices of private, commercial sellers in that country.

If the answer to that question is "yes," and if the sale is to a party independent of the government, that should end the inquiry. If the answer is "no," ITA should look to other evidence -- as discussed above -- to determine whether the sale was at fair market value.

<u>After-Offering Share Trading</u>

Corus is in accord with the analysis of the Nucor companies (at pp. 8-9 of their comments) concerning the significance of after-offering share trading in the determination of whether the privatization was for fair market value. A "gradual increase" in the share price would not indicate that the privatization was not priced at or above fair market value. Rather, ITA should look to whether there was a "sudden run-up," in which the share price "increase[d] substantially in high volume …."

<u>Committed Investment and Concurrent Subsidies</u>

Much of the commentary on these issues addresses the problem form the wrong perspective, asking whether the "motive" of the selling government was a fully commercial motive. The relevant issue, of course, is whether the price paid by the purchaser represented the fair market value of what was purchased. Thus, the significance of either a condition imposed on the transaction by the selling government or a benefit offered to the purchaser by a selling government is whether and to what extent that condition or benefit resulted in a sale price that equaled or exceeded the fair market value of what was purchased, not whether the government's

motive (Sigmund Freud, where are you now that we need you?) was a fully commercial motive. Considering these issues from that standpoint clarifies the analysis in which ITA should engage:

- Where conditions are placed on the sale by the government that reduce the value of the company (or business unit or asset) to the purchaser (maintaining employment, making new investments, increasing exports, etc.) and those conditions are considered by the bidders in their evaluation of the transaction, the bid prices will be lower, but will still represent the fair market value of what is purchased.

- Similarly, where benefits are provided (e.g., debt forgiveness) and where those benefits are considered by the various bidders in formulating their bid prices, those bids will be higher and will thus result in payment of fair market value for what is purchased.

- The prospect of a less than fair market value price may arise where the introduction by the government of additional benefits occurs after bids are submitted and a purchaser is selected. For example, labor unions may object that the privatization places the company under ownership that may not be as able as the government to fund the pensions of employees, with the result that the government assumes the ultimate pension liability. Similarly, creditors might object that their claims are less secure under private ownership of the company, with the result that the government might assume some or all of the debts of the privatized company. In such circumstances, ITA should inquire whether the price of the privatization is adjusted sufficiently to reflect the

> benefit to the company of the government's assumption of obligations -- an assumption which would not have been factored into the winning bid for the company.

In the latter situation because the government concession could not have been factored into the bids submitted to purchase the company, the providing of the benefit is the equivalent of a price discount unless an adjustment is made to the originally-bid price to take into account the higher value of the company attributable to the government's provision of such a benefit. This would not be the case if the benefit had been provided earlier, such that its effect on company value would have been taken into account in the various bids submitted to the government.

Corus urges in particular that ITA be wary of unsupported, conclusory statements made in some parties' comments concerning the effect of government benefits or conditions. For example, the comments of the Nucor companies, at page 14, state that the effect of government assumption of corporate debt prior to a privatization would be that

> Capacity that would otherwise cease to exist is allowed to continue to produce, adding to global overcapacity and distorting the market place.

This statement is worse than haruspical; it is just plain wrong. The production facilities of an over-indebted company do not cease to exist simply because the company might go bankrupt. Rather, they would be sold -- for whatever reduced market value they might bring -- to new owners and would, in all likelihood, resume production at cost reduced by the elimination of the prior debt overhang.

“Broader Market Conditions”

Several of the comments from U.S. companies have placed great emphasis on the proposition that ITA should determine whether government intervention in the economy writ large may create distortions that should prevent a determination that the price paid in a privatization represented the price paid in a privatization represented the “real” market value of the company. Corus’ initial comments argued strongly that such inquiry is entirely inappropriate and that ITA should confine its inquiry to government actions directly related to the privatization transaction. For the reasons stated in our initial comments, logic and economic reality compel that conclusion. Moreover, the opinion of the Appellate Body also makes it clear that inquiry as to the price-distorting impact of governmental measures should be limited to those that “influence the circumstances and conditions of the sale.” (AB decision at par. 124). Macroeconomic analyses that are not directly related to the specific transaction are a road to never-never land and not to meaningful privatization analyses.

Respectfully submitted,

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