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Joseph A. Spetrini
Acting Assistant Secretary for Import Administration
Central Records Unit, Room 1870
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Comments on Status of Ukraine as a Nonmarket-Economy Country

Dear Mr. Spetrini:

On behalf of Eramet Marietta Inc., petitioner in the antidumping proceeding with respect to silicomanganese from Ukraine, we hereby submit comments (and supporting documentation) in opposition to the granting of market-economy status to Ukraine.

These comments are submitted in response to the Department of Commerce's ("Department") request for comments in this proceeding[1] on whether the Department should revoke Ukraine's nonmarket-economy status.

[1] *See Initiation of a Changed Circumstances Review of the Antidumping Duty Order on Carbon and Certain Alloy Steel Wire Rod from Ukraine*, 70 Fed. Reg. 21,396 (April 26, 2005); *Changed Circumstances Review of the Antidumping Duty Order on Carbon and Certain Alloy Steel Wire Rod from Ukraine*, 70 Fed. Reg. 34,744 (June 15, 2005).

Thank you for your consideration of these comments.

Very truly yours,

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Counsel for Eramet Marietta Inc.

cc: Lawrence Norton
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COMMENT I: PROPER LEGAL STANDARD

A. Statement of the Issue Addressed in the Comment

What is the proper legal standard to apply in determining whether Ukraine qualifies as a market-economy country under section 771(18) of the Tariff Act of 1930?

B. Summary of Comment

The question under the statute is not whether Ukraine is making progress toward creating a market economy, but rather whether the record shows that Ukraine now operates on market principles of cost and pricing structures and that functioning markets have replaced the old state controls, so that the Department can validly apply its market-economy antidumping and countervailing duty methodologies.

C. Comment

In addition to identifying specific factors the Department is to take into account in making nonmarket-economy ("NME") determinations,[1] the statute also defines what constitutes an NME country. Under the statute, an NME country is "any foreign country that the {Department} determines *does not operate on market principles of cost or pricing structures*, so that sales of merchandise in such country do not reflect the fair value of the merchandise."[2] In examining the facts with respect to the statutory factors, the Department should focus on the bottom-line question under the statute – whether the economy in Ukraine operates on market principles of cost and pricing structures.

Consistent with the statute, the Department previously declined to revoke the NME status of Ukraine precisely because functioning markets were not in place, despite the market reforms that had occurred by that time. The Department found that

> While significant progress has been made in Ukraine's transformation to a market economy, under the analysis required by section 771(18)(B) of the Act, we cannot conclude that Ukraine should be treated as a market economy for purposes of the antidumping duty law. While many of the state controls have been abandoned, *functioning markets have not completely replaced government controls*.[3]

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[1] Section 771(18)(A) of the Tariff Act of 1930, as amended (the "Act"); 19 U.S.C. § 1677(18)(A).

[2] *Id.* (emphasis added).

[3] *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From Ukraine,* 62 Fed. Reg. 61,754, 61,756 (November 19, 1997) (emphasis added).

Thus, the Department has recognized that the issue under the statute is not whether substantial reform has occurred (or is occurring), but rather whether functioning markets are in place and prices and costs adequately reflect market considerations.[4]

Similarly, the Department declined to revoke the NME status of Russia in 1995 because functioning markets were not in place at that time. The Department noted that Russia was "in the process of implementing extensive reforms to achieve its goal of becoming a market economy," including the "freeing of most prices in December 1991 and the privatization of most enterprises formerly within the state-planning system."[5] However, the Department found that:

> The Russian economy, having emerged from a centrally-planned system, is in a state of transition. Many of the state controls have been abandoned, but that does not mean that functioning markets have replaced controls. Because the evidence does not demonstrate that prices and costs in Russia adequately reflect market considerations, we cannot at this time alter Russia's designation as a nonmarket economy.[6]

Likewise, the Department declined to revoke Vietnam's NME status because functioning markets had not yet replaced state controls. The Department stated that:

> {i}n conducting its analysis, the Department is required to consider the totality of Vietnam's economic reforms in determining whether its economy is sufficiently operating under market principles. While many {state} controls have been abandoned in Vietnam,

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[4] *See also Antidumping Duty Administrative Review of Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Romania – Non-Market Economy Status Review* at 5 (March 10, 2003) ("the Department must determine that the {statutory} factors, taken together, indicate that reforms have reached a threshold level such that the country can be considered to have a functioning market economy."); *Decision Memorandum Regarding Estonia's Status as a Non-Market Economy Country for Purposes of the Antidumping and Countervailing Duty Law under a Changed Circumstances Review of the Solid Urea Order Against Estonia* at 4 (February 28, 2003) (same); *Decision Memorandum Regarding Lithuania's Status as a Non-Market Economy Country for Purposes of the Antidumping and Countervailing Duty Law under a Changed Circumstances Review of the Solid Urea Order Against Lithuania* at 5 (February 28, 2003) (same); *Inquiry into the Status of the Russian Federation as a Non-Market Economy Country Under the U.S. Antidumping Law* (June 6, 2002) (same); *Antidumping Duty Investigation of Silicomanganese from Kazakhstan - Request for Market Economy Status* (March 25, 2002) (in granting market-economy status to Kazakhstan, stating that "{o}verall, functioning markets have replaced controls in the economy.").

[5] *Notice of Final Determinations of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium from the Russian Federation,* 60 Fed. Reg. 16,440, 16,443 (March 30, 1995).

[6] *Id.*

> functioning markets have not yet sufficiently replaced government controls over much of the economy.[7]

Furthermore, in order for the Department to apply its market-economy antidumping and countervailing duty methodologies, prices and costs in the economy in question must be market-determined. The economic environment must be one of functioning markets, in which any isolated distortions caused by government interference can be reliably and practicably quantified through a countervailing duty analysis. If functioning markets have not replaced state controls, the Department can neither apply market-economy dumping margin calculation methodologies nor perform a countervailing duty analysis without encountering distortions at multiple levels of the economy, which would render such analyses invalid.

As explained below in Comment II, an analysis of the statutory factors that the Department is to take into account in making NME determinations shows that functioning markets have not replaced state controls in Ukraine and that prices and costs do not adequately reflect market considerations. Accordingly, the Department should maintain Ukraine's NME status for purposes of the antidumping and countervailing duty laws.

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[7] *Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status* at 43 (November 8, 2002).

COMMENT II: UKRAINE DOES NOT OPERATE ON MARKET PRINCIPLES AND FUNCTIONING MARKETS ARE NOT IN PLACE

A. Statement of the Issue Addressed in the Comment

Does Ukraine operate on market principles of cost and pricing structures and have functioning markets replaced state controls in Ukraine?

B. Summary of Comment

The facts with respect to the statutory factors show that Ukraine does not operate on market principles of cost and pricing structures and that functioning markets have not replaced state controls. As discussed below: (1) the Ukrainian currency is not fully convertible; (2) wage rates in state and non-state enterprises appear to remain subject to a government "Tariff Rate System"; (3) foreign investment is restricted and extremely low as compared to other transition economies; (4) the state retains significant ownership and control of the means of production and there is a lack of consensus in the newly elected government regarding privatization; (5) the state exercises significant control over the allocation of resources and price and output decisions and has recently moved to increase its control over the prices of energy and other commodities; and (6) over-regulation, corruption and the lack of an adequate legal system continue to impede the development of functioning markets.

C. Comment

As explained in Comment I, the question under the statute is not whether Ukraine is making progress toward creating a market economy, but rather whether the facts show that Ukraine currently operates on market principles of cost and pricing structures and that functioning markets have replaced state controls. The statute provides that, in making this determination, the Department shall take into account:

> (1) the extent to which the currency of the foreign country is convertible into the currency of other countries;
>
> (2) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management;
>
> (3) the extent to which joint ventures or other investments by firms of other countries are permitted in the foreign country;
>
> (4) the extent of government ownership or control of the means of production;
>
> (5) the extent of government control over the allocation of resources and over the price and output decisions of enterprises; and

(6) such other factors as the Department considers appropriate.[1]

As explained below, the facts with respect to these factors show that Ukraine does not operate on market principles of cost and pricing structures and that functioning markets have not replaced state controls.

1. Ukraine's Currency Is Not Fully Convertible

In its 1997 determination to deny market-economy status to Ukraine, the Department found that there were significant restrictions on the convertibility of Ukraine's currency, the hryvnia. Specifically, the Department found that the hryvnia was not convertible outside the newly independent nations of the former Soviet Union, and that the government of Ukraine ("GOU") required 50 percent of foreign export earnings to be converted to hryvnia through an interbank currency exchange created by the GOU.[2]

Despite the passage of nearly eight years since the Department's determination to deny market-economy status to Ukraine, the convertibility of the hryvnia remains nearly as limited today as it was in 1997. The GOU claims that it abolished the 50 percent surrender requirement for foreign export earnings in March 2005.[3] However, the hryvnia is still not convertible outside Ukraine.[4]

Moreover, Ukraine's central bank, the National Bank of Ukraine ("NBU"), continues to impose restrictions on foreign currency transactions. Payments under foreign trade contracts between Ukrainian and non-Ukrainian entities can only be made in foreign currency, and foreign loans must be registered with the NBU prior to receiving the funds.[5] In addition, Ukrainian companies must obtain licenses for certain foreign currency transactions, such as making in-cash investments in assets outside of Ukraine, transferring property to a foreign branch, purchasing foreign securities and opening accounts with foreign banks.[6] Recently, the NBU imposed further restrictions on foreign currency transactions by passing a resolution that

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[1] 19 U.S.C. § 1677(18)(B).

[2] *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From Ukraine*, 62 Fed. Reg. 61,754, 61,755 (November 19, 1997) ("1997 Determination").

[3] Letter from Yevgen V. Burkat, Chief of the Trade and Economic Mission, Embassy of Ukraine to the United States of America, to Joseph A. Spetrini, Acting Assistant Secretary for Import Administration, at 3 (May 10, 2005) ("Ukraine Letter").

[4] "Doing Business In Ukraine," Ernst & Young (April 2004) at 11, attached as Exhibit 1.

[5] "Doing Business and Investing in Ukraine," PriceWaterhouseCoopers (April 2005) at 42 ("Investing in Ukraine"), attached as Exhibit 2.

[6] *Id.* at 43.

foreign investment funds can only be brought into or repatriated from Ukraine via special bank accounts in which the necessary currency exchanges are performed.[7]

These currency controls have caused some observers to question the GOU's commitment to free market principles. In the words of one commentator, "{i}n a free market economy, as opposed to a socialist one, it's no business of the government's what a person does with his legally-earned money, including take it out of the country. If a Ukrainian businessman wants to invest his money abroad, no democratic government committed to free market principles has the right to stop him."[8]

2. Wages In Ukraine Are Not Determined by Free Bargaining Between Labor and Management

In its 1997 determination to deny market-economy status to Ukraine, the Department found that the GOU was "heavily involved" in establishing wage rates.[9] Specifically, the Department found that under the March 1995 "Law on Remuneration of Labor," the GOU established a "Tariff Rate System" that sets salaries based on the level of job complexity and worker qualifications.[10] The Department found that the law required state-owned enterprises to base their employees' wages on this system and non-state-owned enterprises to "compile their own job classification and wage rates to reflect the government's system."[11]

In its request for market economy status, the GOU appears to acknowledge that this system still exists and that it governs wage rates for enterprises. According to the GOU, negotiations are conducted at the national and regional levels to establish a "tariff system which lies in the basis of labor remuneration."[12] The negotiations at the national level result in the establishment of a "general agreement," which establishes the "tariffs and wages to be used by enterprises."[13] Under Article 15 of the Law on Remuneration of Labor, enterprises can enter into "collective agreements" that establish, inter alia, "tariffs, job rates, scale of position wages, terms

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7 "Doing Business In Ukraine: A Country Commercial Guide for U.S. Companies," U.S. & Foreign Commercial Service (February 2005) at 68 ("Ukraine Commercial Guide"), attached as Exhibit 3.

8 "Has the Orange Revolution Gone Red?," Kyiv Post (May 17, 2005) ("Has the Orange Revolution Gone Red?"), attached as Exhibit 4.

9 1997 Determination at 61,755.

10 *Id.*

11 *Id.*

12 Ukraine Letter at 8.

13 *Id.*

of payment and amounts of extra pay, bonuses and other compensations and guarantee payments *in compliance with the Ukrainian legislation, general and branch (regional) agreements*."[14] Thus, as was true when the Department examined this issue in 1997, state and non-state enterprises in Ukraine are still required to base their wage rates on the government's tariff rate system.

3. The Government of Ukraine Imposes Limits on Foreign Investment

In its 1997 determination, the Department found that although Ukraine was generally open to foreign investment, "areas of concern" remained for foreign investors, "in particular the reportedly burdensome and unpredictable arbitration and enforcement system."[15]

These concerns still exist. According to the U.S. Foreign and Commercial Service, "Ukraine has not yet attracted the levels of foreign investment enjoyed by neighboring Central European countries" because "issues of corruption, transparency and rule of law have discouraged foreign investment."[16] Thus, foreign direct investment ("FDI") in Ukraine is among the lowest in the region. As of December 2004, per capita FDI in Ukraine was only $160. In contrast, FDI in neighboring Poland was nearly 10 times as high.[17]

Foreign investment in Ukraine is not only deterred by the unpredictable business climate, but in some instances also is actively discouraged by the GOU. Specifically, foreign ownership of enterprises in such "strategic" sectors as radio, television, energy and insurance is limited by law. Foreign companies cannot carry out any insurance activities in Ukraine, and foreign ownership is limited to 30 percent of radio and television companies and 35 percent of information agencies.[18]

In addition, the GOU discriminates against foreign companies attempting to participate in the privatization of Ukrainian companies. For example, during the June 2004 privatization of Krivorizhstal, Ukraine's largest steelmaker, the GOU rejected bids by such foreign firms in favor of significantly lower bids by Ukrainian firms with ties to the government.[19]

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[14] *Id.* (emphasis added)

[15] 1997 Determination at 61,756.

[16] Ukraine Commercial Guide at 66.

[17] *Id.* at 80.

[18] Doing Business in Ukraine at 8.

[19] "Tempers Ran High," Kommersant (June 30, 2005) ("Tempers Ran High"), attached as Exhibit 5.

4. The Government of Ukraine Continues to Maintain Significant Ownership and Control Over the Means of Production

In its 1997 determination, the Department found that the GOU maintained a significant level of ownership and control of the means of production. In particular, the Department noted that "Ukraine has designated thousands of companies in sectors such as energy, communications, metallurgy, defense industries and chemicals as 'strategic' enterprises and therefore not eligible for privatization."[20] The Department also questioned whether privatization of enterprises meant "100 percent privatization . . . or some continued level of government ownership."[21]

Several years after the Department's determination to deny market-economy status to Ukraine, one study found that on average the GOU retained a 44 percent ownership stake in "privatized" small and medium enterprises and a 65 percent ownership stake in "privatized" energy, metals, chemical and oil companies.[22] Today, the GOU continues to hold significant shares of "privatized" enterprises. According to an April 2005 report by PriceWaterhouseCoopers, although the GOU "has given up majority ownership" of most of the industrial enterprises it owned in 1991, "the authorities continue to exert informal influence over roughly 10,000 medium and large scale enterprises privatised since 1992."[23]

In addition, recent developments in Ukraine have raised concerns that the government may reassert control over numerous privatized enterprises. In many instances, the GOU privatized state-owned firms through a non-transparent process that favored bidders with ties to the government and resulted in enterprises being sold for well below their actual value. In 2003, the GOU sold the Nikopol Ferroalloy Plant – one of the largest ferroalloy plants in the world and a very large producer of silicomanganese[24] – for approximately half its estimated value.[25] Similarly, in 2004, the GOU sold steelmaker Krivorizhstal for $804 million even though investors had bid up to $2 billion for the company.[26]

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[20] 1997 Determination at 61,756.

[21] *Id.*

[22] "International Market Insight: The Overview of Privatization in Ukraine," Andriy Ignatov (June 2000) (Exhibit 6).

[23] Investing in Ukraine at 12.

[24] The plant produces nearly one quarter of total world output of silicomanganese. *See* Exhibit 7.

[25] "Privatbank to Dispute Nikopol Ferroalloys Sale," Mining & Metals Report (June 5, 2003), attached as Exhibit 8.

[26] Tempers Ran High.

The newly elected government has pledged to review, and potentially reverse, privatization deals such as these. Some reports indicate that the new government may seek to reverse as many as 3,000 privatizations.[27] The GOU already has gone to court to reverse the privatizations of Nikopol and Krivorizhstal, and has "drafted a broad law that could undo much of Ukraine's privatization."[28]

Significantly, the privatization review is being conducted by officials who are openly opposed to privatization of large enterprises. The newly appointed privatization minister has asked "What's wrong with re-nationalization?", and the prime minister has stated that the largest enterprises must not be privatized because "they can give the state as an owner wonderful profits."[29] Thus, the future of privatization in Ukraine is uncertain at best, and even under a government that came to power promising western-style economic reforms; "Ukrainian businessmen still have to live under a vague threat to property rights."[30]

Despite some privatization in the electricity sector and limited movement toward so-called "Wholesale Electricity Market" (WEM) reform, the GOU retains substantial control over electricity generation and distribution and has taken steps to consolidate that control. As noted in a January 2005 review of the Ukrainian energy sector,

> Power sector privatization has . . . been stalled since the sale of six power distribution companies (Oblenergos) in April 2001. Moreover, the government took a step back from the privatization path by creating the state holding company "Energy Company of Ukraine" (hereinafter "ECU") in June 2004 following a respective presidential decree.
>
> The government contributed state owned equity stakes (varying from 25% to 100%) in joint stock power distribution and generating companies, previously managed by the Ministry of Fuel and Energy (MFE), to the ECU's statutory fund which amounts to almost $1.8 billion. ECU has also received operational control over the assets of several CHP plants existing in the form of state

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27 "Betraying a Revolution," The Washington Post (May 18, 2005) at A17 ("Betraying a Revolution"), attached as Exhibit 9.

28 *Id.*

29 *Id.*

30 Has the Orange Revolution Gone Red?

> enterprises and Ukrinterenergo, the state enterprise dealing with exports to Moldova and Eastern Europe.[31]

While the formation of the state-owned ECU "does not necessarily mean the end of privatization plans," its creation "has added one more barrier as the management of the newly created holding company will naturally oppose any divestiture plans."[32] Further,

> {i}t is still not clear how the creation of ECU is going to affect operations of the WEM, but most likely the impact will be negative in terms of competitiveness and transparency as ECU currently unites four out of five large thermal power generating companies (working in the competitive segment of the market), all the country's hydro power plants and a majority of the oblenergos. Controlling 40% of the country's power generation output and 65% of power supply, ECU plays a dominant role in the WEM and equally as important has four out of ten seats on the WEM Board.[33]

In addition, the

> {c}oal and gas markets remain highly centralized as the government still controls the majority of assets in these sectors and a competitive market is practically absent there. Besides, the majority of coal mines are not competitive and very much dependent on state support.[34]

As summarized by the Economist Intelligence Unit, "restructuring in the country has been delayed by vested bureaucratic and economic interests eager to preserve elements of the centrally planned system, and by the lack of consensus among political and business leaders over the desirability of market reforms."[35]

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[31] "Analysis Ukraine," Energy in East Europe at 8 (January 2005) ("Analysis Ukraine"), attached as Exhibit 10.

[32] *Id.* at 8-9.

[33] *Id.* at 9.

[34] *Id.*

[35] Economic Intelligence Unit, Country Profile Ukraine 2005, Section on Economic Structure (2005) ("Country Profile Ukraine 2005"), attached as Exhibit 11.

5. The Government of Ukraine Continues to Exert Significant Control Over the Allocation of Resources and Price and Output Decisions

In its 1997 determination to deny market-economy status to Ukraine, the Department found that the GOU "continues to set prices in some areas of the economy."[36] Specifically, the Department found that the GOU had the authority "to set prices on products which affect the entire economy" and "to set domestic prices of monopolies," which Ukrainian law defined as any company whose product had a 35 percent share of the domestic market.[37]

The GOU retains these powers today. In its request for market-economy status, the GOU acknowledges that prices and tariffs for "economically and socially important goods and services and those produced or provided by natural and artificial monopolies" are subject to state regulation.[38] The Ukrainian law "On Restricting Monopoly and Preventing Unfair Competition in Business" not only continues to define a monopoly as any enterprise whose product has a 35 percent share of the market, but also grants the Antimonopoly Committee of Ukraine the authority to declare an enterprise having less than a 35 percent market share as a monopoly.[39]

According to the GOU, prices for electricity, fuel and energy, and transportation are subject to government regulation.[40] The GOU also regulates the prices for such commodities as grain and meat.[41] Recent events have demonstrated that the newly elected government, despite its statements of intent to implement market-based reforms, will not hesitate to use its powers to regulate prices. In response to rising gasoline prices, this past spring the GOU imposed price ceilings on gasoline and forced state-owned oil companies to supply gasoline at below-market prices, resulting in declining oil supplies and gasoline shortages.[42] As one commentator noted, "{i}t's shocking that a country that wants to be granted free-market status and join the World Trade Organization is using state pressure to tell oil companies at what price they're allowed to sell gasoline."[43] As a result of increasing energy costs, on May 13 the GOU

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[36] 1997 Determination at 61,756.

[37] *Id.*

[38] Ukraine Letter at 29.

[39] Law of Ukraine on Restricting Monopoly and Preventing Unfair Competition in Business at Chapter I, Article 1, attached as Exhibit 12.

[40] Ukraine Letter at 29.

[41] Doing Business in Ukraine at 7.

[42] Betraying a Revolution.

[43] Has the Orange Revolution Gone Red?

created a working group of government and industry officials to devise a special formula for calculating the prices of petroleum products, suggesting that "the authorities are in the price-fixing game for the long haul."[44]

As noted above, the government has consolidated its control over the electricity sector by creating the state-owned ECU, hindering the development of competitive energy markets. And while there have been initial steps toward WEM reform,

> {t}he process is moving forward slowly, mainly due to the fact that it is fully controlled by the state agencies or state owned energy companies which are not interested in a fast transition to a new liberalized market model.[45]

The price of coal for electricity generation and industrial uses, which is effectively set by the state-dominated coal sector, remains at below-market and below-cost levels.[46]

Thus, despite the appearance of price liberalization in Ukraine, the GOU's active involvement in key sectors of the Ukrainian economy and continued active price regulation means that "the role of the government in the economy continues to be felt in Ukraine."[47]

6. Excessive Regulation, Corruption and an Inadequate Legal System Continue to Impede the Development of Functioning Markets in Ukraine

The European Bank for Reconstruction and Development ("EBRD") has described the transition from a nonmarket to a market economy as a two-stage process. The first stage involves the "relatively straightforward tasks of price and trade liberalization and small scale privatization," while the second stage involves large scale privatization and the development of "market supporting institutions."[48] Ukraine's progress in creating the necessary

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[44] *Id.*

[45] Analysis Ukraine at 8.

[46] *See id.* (noting that the "majority of coal mines are not competitive and very much dependent on state support"); "Ukraine's Government Working on Long-Term Plan to Tackle Coal," Ukraine Business Report (May 7, 2005) (Ukrainian Premier notes that the price of coal "does not correspond to its real value"), attached as Exhibit 13; "Energy Ministry to Close Several Coal Companies, Says Topolov," Ukraine Business Report (May 4, 2005) (government energy ministry official acknowledges that coal prices are artificially low and notes that the price for power-generating coal fell in Ukraine last year when world market prices rose), attached as Exhibit 14.

[47] Doing Business in Ukraine at 7.

[48] "Transition Report 2004," European Bank for Reconstruction and Development (November 2004) at 8 ("Transition Report"), attached as Exhibit 15.

market-supporting institutions, including an adequate legal system that protects private property rights, has been limited and halting at best. Further, over-regulation and corruption remain significant impediments.

The EBRD notes that "{p}roperty rights protection has been uneven" because of conflicts between Ukraine's newly enacted Civil and Commercial Codes and the absence of a joint-stock company law that adequately protects minority shareholder interests.[49] Moreover, Ukrainian courts "tend to strike down or ignore contractual provisions for international arbitration or that assign legal responsibility for dispute resolution to a foreign court,"[50] and also frequently fail to enforce judgments in favor of foreign investors.[51]

According to the U.S. and Foreign Commercial Service, "Ukraine's economy is still shackled by corruption, poorly developed rule of law, over-regulation and excessive government interference in what should be private business decisions."[52] A survey of Ukrainian businesses indicated that "the cumbersome regulatory framework, unstable legislation, anti-competitive practices and widespread corruption" were serious barriers to doing business in Ukraine, as were high taxes, inspections and customs procedures.[53] As a result of these problems, many Ukrainian firms become part of the underground economy.[54] According to an estimate quoted by the newly appointed Ukrainian prime minister, the underground economy accounts for roughly 55 percent of Ukraine's total gross domestic product.[55]

As stated by the Economist Intelligence Unit this year:

> Ukraine's limited progress has reflected the lack of interest among ruling elites in relinquishing their tight control over economic and bureaucratic powers. This has slowed economic restructuring, and ensured a far higher degree of over-regulation and state interference than in the more advanced transition economies in the region. A regulatory apparatus designed to protect existing enterprises from domestic competition and from foreign ownership

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[49] *Id.* at 190.

[50] Ukraine Commercial Guide at 66.

[51] *Id.* at 70.

[52] Ukraine Commercial Guide at 66.

[53] Transition Report at 190.

[54] Betraying a Revolution.

[55] "Ukraine's Priority Is 'To Achieve European Standards,' According to Mrs Tymoshenko," Assembly of the West European Union Press Release (June 14, 2005), attached as Exhibit 16.

and tax reform remains in place. Punitively high taxes, organised crime and the government's inability to ensure the rule of law have imposed further costs on business. Studies by the IMF and the World Bank indicate far higher levels of corruption in Ukraine than in almost any other country in the region.[56]

7. Conclusion

For the foregoing reasons, the facts with respect to the statutory factors show that Ukraine does not operate on market principles of cost and pricing structures and that functioning markets have not replaced state controls in Ukraine. Accordingly, the Department should not grant market-economy status to Ukraine.

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[56] Country Profile Ukraine 2005.

COMMENT III: THE CONTINUED PROBLEMS WITH UKRAINE'S TRANSITION

A. Statement of the Issue Addressed in the Comment

If the Department decides to grant Ukraine market-economy status, should it state an intent to use prices and costs within Ukraine for the determination of normal value only when appropriate and to disregard such prices and costs when they are not in the ordinary course of trade, are not in accordance with generally accepted accounting principles, do not reasonably reflect the costs associated with the production and sale of the merchandise, or in other situations provided for in the statute or the Department's regulations?

B. Summary of Comment

When the Department granted market-economy status to Russia, it recognized that fundamental problems remained with Russia's transition to a market-economy and stated an intent to use prices and costs within Russia for the determination of normal value only when appropriate. The Department stated that it would disregard Russian prices and costs when they are not in the ordinary course of trade, are not in accordance with generally accepted accounting principles, do not reasonably reflect the costs associated with the production and sale of the merchandise, or in other situations provided for in the statute or the Department's regulations. As described in Comment II, fundamental problems also remain with Ukraine's transition to a market economy. Accordingly, if the Department decides to grant Ukraine market-economy status, it should make a similar statement in its decision memorandum.

C. Comment

For the reasons set forth in Comment II, under the legal standard described in Comment I, Ukraine does not qualify for market-economy status for purposes of the antidumping and countervailing duty law. If the Department nevertheless grants such status to Ukraine, notwithstanding the existence of the fundamental remaining problems with Ukraine's transition, the Department should state an intent to address these continuing problems in calculating normal value, as it stated in granting Russia market-economy status.

Specifically, in granting market-economy status to Russia, the Department acknowledged that "the pace of industrial restructuring has been slow recently, banking reforms have lagged, and regulated energy prices in Russia remain a significant concern in the economy."[1] In particular, with respect to energy prices, the Department stated that

> despite repeated double-digit annual percentage increases, most regulated prices, particularly those for gas and electricity (43 percent of the generation of which is gas-based), remain well below world-market levels and may not even cover the cost of production. Thus, as is the case in some market economy countries (*e.g.*, Venezuela in the late 1980s and early 1990s and

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[1] *Inquiry into the Status of the Russian Federation as a Non-Market Economy Country Under the U.S. Antidumping Law* (June 6, 2002).

> Hungary and Indonesia now), regulated energy prices in Russia remain a significant distortion in the economy . . . .[2]

Because of such continuing problems, in granting Russia market-economy status, the Department stated that it:

> will examine prices and costs within Russia, utilizing them for the determination of normal value when appropriate *or disregarding them when they are not*. In this regard, the Department retains its authority to disregard particular prices or costs when the prices are not in the ordinary course of trade, the costs are not in accordance with generally accepted accounting principles, the costs do not reasonably reflect the costs associated with the production and sale of the merchandise, or in other situations provided for in the Act or the Department's regulations.[3]

Subsequent to Russia's graduation to market-economy status, the Department renegotiated a suspension agreement concerning cut-to-length carbon steel plate from Russia. In the renegotiated suspension agreement, the Department reiterated its concerns with the reliability of Russian energy prices, stating that "{e}xamples of possible areas in which adjustments may be necessary include, but are not limited to, costs related to energy."[4]

Recently, in its final determination with respect to magnesium metal from Russia, the Department reaffirmed its authority to disregard Russian prices and costs in antidumping cases. The Department found that "the evidence on the record indicates that the Russian electricity sector is still, as a whole, in the early stages of reform, and is a sector where prices are based neither on market principles nor on long-term cost recovery."[5] The Department further stated that:

> because the record evidence of this investigation does not enable us to ascertain the manner and the extent to which the macroeconomic price distortions in the Russian electricity sector affect Respondents' reported electricity costs, the Department has determined not to adjust or disregard such costs for purposes of this final determination. *The Department reserves its discretion to do so in future proceedings when evidence of continuing significant distortions at the macroeconomic level is accompanied*

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[2] *Id.*

[3] *Id.* (emphasis added).

[4] *Suspension of Antidumping Duty Investigation of Certain Cut-to-Length Carbon Steel Plate from the Russian Federation*, 68 Fed. Reg. 3,859 (January 27, 2003).

[5] *Magnesium Metal from the Russian Federation: Notice of Final Determination of Sales at Less Than Fair Value*, 70 Fed. Reg. 9,041, 9,044 (February 24, 2005).

by sufficient evidence or analysis with respect to the impact of such distortions on energy prices paid by respondent firms.[6]

As explained in Comment II, the prices of energy and other goods and services in Ukraine continue to be distorted by significant government ownership and intervention, as in Russia. Other fundamental problems remain with Ukraine's transition. Accordingly, if the Department grants market-economy status to Ukraine, it should state an intent to use prices and costs within Ukraine for the determination of normal value only when appropriate and to disregard such prices and costs when they are not in the ordinary course of trade, are not in accordance with generally accepted accounting principles, do not reasonably reflect the costs associated with the production and sale of the merchandise, or in other situations provided for in the statute or the Department's regulations.

[6] *Id.* (emphasis added).

LIST OF EXHIBITS

Exhibit	Description
1	"Doing Business In Ukraine," Ernst & Young (April 2004).
2	"Doing Business and Investing in Ukraine," PriceWaterhouseCoopers (April 2005).
3	"Doing Business In Ukraine: A Country Commercial Guide for U.S. Companies," U.S. & Foreign Commercial Service (February 2005).
4	"Has the Orange Revolution Gone Red?," Kyiv Post (May 17, 2005).
5	"Tempers Ran High," Kommersant (June 30, 2005).
6	"International Market Insight: The Overview of Privatization in Ukraine," Andriy Ignatov (June 2000).
7	Nikopol Ferroalloy Plant Joint-Stock Company, Ukraine-European Union (printed July 8, 2005).
8	"Privatbank to Dispute Nikopol Ferroalloys Sale," Mining & Metals Report (June 5, 2003).
9	"Betraying a Revolution," The Washington Post (May 18, 2005).
10	"Analysis Ukraine," Energy in East Europe (January 2005).
11	Economic Intelligence Unit, Country Profile Ukraine 2005, Section on Economic Structure (2005).
12	Law of Ukraine On Restricting Monopoly and Preventing Unfair Competition in Business (printed June 28, 2005).
13	"Ukraine's Government Working on Long-Term Plan to Tackle Coal," Ukraine Business Report (May 7, 2005).
14	"Energy Ministry to Close Several Coal Companies, Says Topolov," Ukraine Business Report (May 4, 2005).
15	"Transition Report 2004," European Bank for Reconstruction and Development (November 2004)

16 Ukraine's Priority Is 'To Achieve European Standards,' According to Mrs. Tymoshenko," Assembly of the West European Union Press Release (June 14, 2005).