

**The Ministry of Economy of Ukraine**

**Rebuttal Comments on Information Provided by  
Wiley Rein & Fielding LLP on behalf of Rebar Trade Association  
Coalition; Collier Shannon Scott, PLLC on behalf of Gerdau  
Ameristeel, Keystone Consolidated Industries, Inc., ISG  
Georgetown Inc.; The Ad Hoc Committee of Domestic Nitrogen  
Producers; DLA Piper Rudnick Gray Cary US LLP on behalf of  
Eramet Marrietta Inc.; American Iron and Steel Institute**

**Within the Framework of Recognition of Market  
Status of Ukraine's Economy in the Context of the  
U.S. Antidumping Law**

August 2005

## *Table of Contents*

<i>1. Convertibility Level of the National Currency</i>	<i>3</i>
<i>2. The Extent to which Wage Rates are Determined by Free Bargaining between Labor and Management</i>	<i>7</i>
<i>3. Status of Joint Ventures and Foreign Investors on the National Market</i>	<i>11</i>
<i>4. The Extent of Government Ownership or Control of the Means of Production</i>	<i>17</i>
<i>5. The Extent of Government Control over Resources and Influence on Pricing and Output</i>	<i>22</i>
<i>Addendum 1</i>	<i>26</i>

## ***1. Convertibility Level of the National Currency***

The currency regulation regime provides complete current account convertibility of the Ukrainian currency.

In addition to the Submission of May 10, 2005 we are submitting rebuttals and explanations regarding issues covered by comments in opposition to the granting of market economy status to Ukraine and which were not completely expounded in the Submission of May 10, 2005.

### ***Comments in opposition to the granting of market economy status to Ukraine:***

#### *Summary of Comment:*

*Effect of the Regulation of the National Bank of Ukraine (NBU) #482 of October 14, 2004 which introduced restrictions of free circulation of currency investments*

Wiley Rein & Fielding LLP on behalf of the Rebar Trade Association Coalition (page 11), The Ad Hoc Committee of Domestic Nitrogen Producers (pages 1,2), Collier Shannon Scott, PLLC on behalf of Gerdau Ameristeel, Keystone Consolidated Industries, Inc., ISG Georgetown Inc. (page 10), DLA Piper Rudnick Gray Cary US LLP on behalf of Eramet Marrietta Inc. (page 3)

#### Rebuttal:

The Regulation of the NBU #482 of October 14, 2004 was issued due to a political situation which took place in Ukraine during the Presidential election and that negatively affected Ukraine's financial market. The Regulation was aimed at prevention of "flight" of capital from Ukrainian Hryvnia into foreign currencies which finally would have led to significant reduction of gold and foreign currency reserves of the NBU.

After stabilization of the political situation, in April of 2005 the NBU issued Regulation # 154 "On Making Void the Regulation of the NBU #482 of October 14, 2004" in order to improve investment climate in Ukraine and expand opportunities of foreign investing.

#### *Summary of Comment:*

*There is a requirement for obligatory sale of 50 percent of currency receipts*

The Ad Hoc Committee of Domestic Nitrogen Producers (page 1)

#### Rebuttal, explanation:

The Regulation of the Cabinet of Ministers of Ukraine and the NBU #215 of March 30, 2005 "On Amending the Crisis-Proof Measures on Financial Stabilization" and the Regulation of the NBU #101 of March 31, 2005 "On Abrogation of Obligatory Currency

Sale in Favor of Residents” abolished obligatory sale of 50 percent of currency receipts in favor of residents.

*Summary of Comment:*

*The State Tax Administration has to approve foreign economic contracts amounts of which exceed 10 thousand dollars*

Wiley Rein & Fielding LLP on behalf of the Rebar Trade Association Coalition (page 11)

Rebuttal, explanation:

In March of 2005 the NBU issued the Regulation #100 “On Confirmation of the Amendments to the Rules of Transactions on Ukrainian Interbank Currency Market” that repealed the requirement in accordance with which purchases of foreign currency on interbank currency market of Ukraine for payments to non-residents within trade transactions had to be approved by the State Tax Administration of Ukraine if amounts of foreign trade agreements exceeded 10 thousand dollars.

*Summary of Comment:*

*The Government limits currency conversion by setting exchange rates and then only permitting a 2 percent deviation from the official rate on the Ukrainian Interbank Currency Exchange*

Wiley Rein & Fielding LLP on behalf of the Rebar Trade Association Coalition (page 11)

Rebuttal, explanation:

Requirement that foreign currency selling and buying rates not to exceed 2 percent deviation from the official rate set by the NBU was repealed by the NBU Regulation # 48 of February 16, 2005 “On Amending the Instruction on the Order of Organizing and Carrying out Currency Exchange Transactions in Ukraine”.

*Summary of Comment:*

*The Law of Ukraine “On the Procedure of Making Payments in Foreign Currency” (Article 3) requires that residents who purchase foreign currency in authorized banks for performing obligations in the name of non-residents to transfer this currency to local currency accounts within five working days of receiving the funds.*

Collier Shannon Scott, PLLC on behalf of Gerdau Ameristeel, Keystone Consolidated Industries, Inc., ISG Georgetown Inc. (page 9)

Rebuttal, explanation:

This norm does not contradict the GATT/WTO requirements since it does not limit residents' rights under performing foreign economic activities and does not affect terms of payments for goods imported by residents. Residents who make payments according to import agreements concluded with non-residents abide by terms of payments provided by those agreements, making payments with their own foreign currency or foreign currency which was bought before.

The norm requiring residents to transfer purchased foreign currency to non-residents within five working days is a tool aimed at promotion of financial discipline of business entities and prevention of non-target use of foreign currency and possible speculative transactions.

*Summary of Comment:*

*The NBU approves every currency transfer abroad amount of which exceeds 50 thousand dollars*

The Ad Hoc Committee of Domestic Nitrogen Producers (page 2), Collier Shannon Scott, PLLC on behalf of Gerdau Ameristeel, Keystone Consolidated Industries, Inc., ISG Georgetown Inc. (page 109)

Rebuttal, explanation:

There are no any restrictions on currency conversion under trade in goods and services in Ukraine except those related to combating corruption and money laundering.

The requirement that the NBU to consider every currency transfer abroad amount of which exceeds 50 thousand dollars is introduced in accordance with the FATF recommendations aimed at combating money laundering<sup>1</sup>.

*Summary of Comment:*

*All transfers of hard currency have to be licensed by the NBU*

Collier Shannon Scott, PLLC on behalf of Gerdau Ameristeel, Keystone Consolidated Industries, Inc., ISG Georgetown Inc. (page 10), DLA Piper Rudnick Gray Cary US LLP on behalf of Eramet Marietta Inc. (page 2)

Rebuttal, explanation:

According to Paragraph 2 of Article 5 of the Decree of the Cabinet of Ministers of Ukraine # 15-93 of February 19, 1993 "On the System of Currency Regulation and Control" commercial banks and other financial institutions of Ukraine are provided with general licenses for currency transactions.

---

<sup>1</sup> FATF Forty Recommendations.

*Summary of Comment:*

*The NBU undertakes interventions in the foreign exchange market*

Collier Shannon Scott, PLLC on behalf of Gerdau Ameristeel, Keystone Consolidated Industries, Inc., ISG Georgetown Inc. (page 12)

Rebuttal, explanation:

In Ukraine all entities of foreign exchange market have equal access to the exchange market of Ukraine. As an equal player on the exchange market, the NBU does not administratively affect setting the exchange rate. It only indirectly influences demand and supply of foreign currency on the exchange market by means of application of generally accepted market tools. The NBU's activity is aimed at support for exchange market stability and neutralization of destabilizing global unfavorable financial crisis effects.

In May of 2005 the intervention balance of the NBU decreased almost three times as compared with April (\$387 m against \$1127.5 m in April and \$1498 m in March). The NBU's participation in transactions on the interbank foreign exchange market decreased 2 times. In June the NBU did not participate in transactions on the market for one third of working days. It smoothed demand and supply fluctuations for the rest of the month. For the first time this year monthly intervention balance was negative (-\$10.5 m).

It should be noted that such standard practice is commonly used in many countries of the world. When the U.S. Department of Commerce granted market economy status to Hungary and Slovakia, the National Banks of these countries undertook interventions in the foreign exchange market in order to support their national currencies exchange rates<sup>2</sup>.

---

<sup>2</sup> See Hungary NME Memorandum, factor 1 and See Slovakia NME Memorandum, factor 1.

## ***2. The Extent to which Wage Rates are Determined by Free Bargaining between Labor and Management***

As it is stated in the Submission of May 10, 2005, wage rates in Ukraine are determined by free bargaining between labor and management.

Non-interference of the state in determination of wage rates in Ukraine is confirmed by conclusions of the EBRD experts<sup>3</sup>.

At the same time, we consider necessary to provide explanations to comments in opposition to the granting of market economy status to Ukraine.

### ***Comments in Opposition to the Granting of Market Economy Status to Ukraine:***

#### *Summary of Comments:*

*The Law “On Remuneration of Labor” provides Tariff Rate System, conditions, terms and forms of remuneration. There has been no change since 1997.*

Wiley Rein & Fielding LLP on behalf of the Rebar Trade Association Coalition (page 14), Collier Shannon Scott, PLLC on behalf of Gerdau Ameristeel, Keystone Consolidated Industries, Inc., ISG Georgetown Inc. (page 15), DLA Piper Rudnick Gray Cary US LLP on behalf of Eramet Marietta Inc. (page 3), American Iron and Steel Institute (page 8)

#### Rebuttal, explanation:

The Law # 1766-III of June 1, 2000 has amended Article 6 of the Law of Ukraine “On Remuneration of Labor” #108/95 – BP of March 24, 1995:

“Tariff rate scale (wages scale) is based upon:

tariff wage of a first-class worker amount of which *is not less than that determined by a general (sectoral) agreement...*”

Hence, tariff scale is not set by the state but it results from bargaining between labor and management.

Articles 23 and 24 of the Law of Ukraine “On Remuneration of Labor” (which set conditions, terms and forms of remuneration) meet requirements of the Convention 95 of the International Labor Organization “On Protection of Wages” ratified by Ukraine. The above Articles are included in Section IV “Rights of a Worker to Remuneration and their Protection” and that is why they present state guarantees of social protection of workers in Ukraine.

Before its adoption, in 1995 the Law of Ukraine “On Remuneration of Labor” underwent an examination of the International Labor Organization and was recognized as a law that meets international requirements.

---

<sup>3</sup> EBRD Report 2004

*Summary of Comment:*

*Freedom of movement of citizens of Ukraine is restricted by the residence permit system*

American Iron and Steel Institute (page 10)

Rebuttal, explanation:

The Resolution of the Constitutional Court of Ukraine #15-пп/2001 of November 14, 2001 (case #1-31/2001) has abolished the residence permit system. Citizens of Ukraine can freely change place of their residence as a result of this Resolution. This improves labor force mobility.

It is proved by official data provided by the State Committee on Statistics of Ukraine - 750.8 thousand persons changed place of their residence within the territory of Ukraine in 2004 and 229.2 thousand persons did it throughout the period from January to May of 2005.

*Summary of Comment:*

*There is a possibility of salary payment in form of goods (in accordance with the Law of Ukraine "On Remuneration of Labor")*

American Iron and Steel Institute (page 11)

Rebuttal, explanation:

In Accordance with Article 23 of the Law of Ukraine "On Remuneration of Labor" #108/95-BP of March 24, 1995 "salary in Ukraine shall be paid to employees in banknotes that are legal tender within the territory of Ukraine... As an exception, collective agreement can provide for partial payment of salary in form of goods (at prices not exceeding the prime cost) in amount that does not exceed 50 percent of a monthly salary in those sectors or to employees of those trades where such equivalent to monetary cost payments are usual or wishful for employees..."

These provisions comply with requirements of Article 4 of the Convention 95 "On Protection of Wages" of the International Labor Organization.

In accordance with Article 4 of the Convention the national legislation, collective agreements or decisions of arbitral authorities may allow partial payment of salary in form of goods in those sectors or to employees of those trades where this form of payment is usual (for example, in agriculture) or wishful.

Gradual abolition of salary payment in form of goods is being worked out now in Ukraine.

Hence, salary is paid in monetary form in Ukraine. Partial payment of salary in form of goods is exceptional. It is carried out only on the basis of concluded agreements if it is



acceptable for employees. In any other cases payments of salary in form of goods are prohibited.

*Summary of Comment:*

*There are wage arrears especially in coal mining industry*

Wiley Rein & Fielding LLP on behalf of the Rebar Trade Association Coalition (page 17), American Iron and Steel Institute (page 10)

Rebuttal, explanation:

The Submission of May 10, 2005 (pp. 13, 14) contains detailed information of the Ministry of Economy about stable and unstoppable reduction of arrears of wages.

The fact that from March 1, 2005 (information in the Submission of May 10, 2005 was provided up to this date) to August 1, 2005 arrears of wages reduced by 14.3 m Hryvnias, proves stability of a trend towards reduction of arrears of wages.

Liquidation of arrears of wages is one of priority tasks of the Government of Ukraine. Amendments to the Law of Ukraine “On the State Budget of Ukraine for 2005” made in July 2005 are aimed at complete liquidation of arrears of wages especially in coal mining industry.

As a result, in August of 2005 arrears of wages to employees of coal mining enterprises were paid off. 303,535 m Hryvnias were paid for it.

*Summary of Comment:*

*Restrictions on activities of labor unions, requirement to register with the Ministry of Justice*

The Ad Hoc Committee of Domestic Nitrogen Producers (page 5), Wiley Rein & Fielding LLP on behalf of the Rebar Trade Association Coalition (page 16), American Iron and Steel Institute (page 11)

Rebuttal, explanation:

In accordance with Articles 14 and 15 of the Law of Ukraine “On Labor Unions, their Rights and Security of their Activities” labor unions and their associations act according to laws and their statutes.

In accordance with Article 16 of the above Law with the purpose of negotiating of labor, social and economic relations at respective level, labor unions, labor organizations and associations have to be legalized (officially recognized) by the way of notification about their compliance with declared status. Registration of labor unions is not required.

Legalization is performed by the Ministry of Justice and presents a confirmation of status declared by a labor union on the basis of documents submitted by the labor union (there are no cases of refusals of legalization of labor unions).

Labor unions and associations of labor unions obtain rights of legal entities from the date of approval of their statutes by congress, conference, constituent or general assembly of members of labor unions but not from the date of their legalization with the Ministry of Justice.

### ***3. Status of Joint Ventures and Foreign Investors on the National Market***

Ukraine is open for foreign investments. Certain restrictions exist in sectors that are of strategic importance for defense, economic and social security of Ukraine. It complies with international practice.

In addition to the Submission of May 10, 2005 we are submitting rebuttals and explanations regarding issues covered by comments in opposition to the granting of market economy status to Ukraine and which were not completely expounded in the Submission of May 10, 2005.

#### ***Comments in opposition to the granting of market economy status to Ukraine:***

##### *Summary of Comment:*

*Failure to provide protection of intellectual property rights*

American Iron and Steel Institute (page 20)

On July 6, 2005 the Law of Ukraine “On Amending Certain Legal Acts of Ukraine (on Regulation of Operations Related to Production, Export and Import of Discs for Laser Reading Systems, Equipment and Raw Materials for their Production)” #2734-IV was adopted.

The Law is aimed at improvement of state regulation of the order of production, licensing and exportation of discs for laser reading systems, equipment and raw materials for their production and introduction of more efficient tools of combating “piracy” in Ukraine.

This Law brings Ukraine’s legislation in compliance with requirements of the WTO multilateral TRIPS Agreement.

##### *Summary of Comment:*

*Low investments level*

DLA Piper Rudnick Gray Cary US LLP on behalf of Eramet Marrietta Inc. (page 4), The Ad Hoc Committee of Domestic Nitrogen Producers (page 11), Wiley Rein & Fielding LLP on behalf of the Rebar Trade Association Coalition (page 19)

As for July 1, 2005, total volume of direct foreign investments in Ukraine’s economy makes up about \$9039.2 m or \$190.6 per capita.

Level of direct foreign investments per capita in Ukraine exceeds respective levels in Romania and Lithuania at the time of granting market economy status to these countries:

Romania - \$52  
Lithuania - \$127

*Summary of Comment:*

*Limitation of non-residents' access to the following sectors:*

- *insurance*
- *information agencies – no more than 30 percent*
- *energy*

Collier Shannon Scott, PLLC on behalf of Gerdau Ameristeel, Keystone Consolidated Industries, Inc., ISG Georgetown Inc. (page 23)

Rebuttal, explanation:

Requirement that a foreign share under establishing an insurance company must not exceed 49 percent was repealed in 2001.

In accordance with the Law of Ukraine “On Information Agencies” of December 11, 2003, share of foreign investments in authorized fund of information agencies has been increased from 30 up to 35 percent.

As for fuel-and-energy complex and power industry, enterprises can be of various property forms. Restrictions exist only in certain complexes that are of strategic importance for the state security and defense:

- property ensuring integrity of Ukraine’s united power grid and central operative and technical control and management; bulk and interstate power supply and property of national research institutions;
- storages of oil, gas and products from them created in natural cavities;
- pipeline transportation due to its great economic and defense importance.

Current legislation of Ukraine does not provide for any other limitations of privatization including that by foreign buyers of enterprises of fuel-and-energy complex and power industry.

*Summary of Comment:*

*Drawbacks of the Commercial Code; inconsistencies and conflicts between the Commercial and Civil Codes*

The Ad Hoc Committee of Domestic Nitrogen Producers (page 5), American Iron and Steel Institute (page 17)

Explanation:

The Civil and Commercial Codes of Ukraine were adopted on January 16, 2003 and came into force on January 1, 2004. Analysis of their provisions and practical appliance of both codes revealed certain inconsistencies that can be solved within normative regulation

of relations only. The most serious problem is the agreeing of basic institutes of civil law provided for by these codes such as property, legal persons and obligations.

The Ministry of Justice in concert with concerned authorities has been working on improvement of the Commercial and Civil Codes of Ukraine.

As a result of this work, the Cabinet of Ministers of Ukraine has submitted to the Verkhovna Rada of Ukraine the Draft Law of Ukraine “On Amending the Commercial Code of Ukraine” (Registration #4445) in order to agree its provisions with the Civil Code of Ukraine. This Draft Law passed first reading in the Verkhovna Rada on February 17, 2004.

This Draft Law amends Article 8 “Participation of the State, State Authorities and Local Self-Governance Authorities in Economic Activities”, Article 10 “Fundamental Trends of the State Economic Policy”, Article 19 “State Surveillance and Control over Economic Activities”, almost completely amends Article 3 “Limitation of Monopolism and Protection of Entities of Economic Activities and Consumers from Unfair Competition”. It also amends Article 43 “Freedom of Entrepreneurship”, Article 51 “Suspension of Entrepreneurship”, Article 58 “State Registration of Entity of Economic Activities”, Article 59 “Suspension of Activities of Business Entity” and Article 63 “Kinds and Organizational Forms of Enterprises”.

The Draft Law also amends provisions of articles of Chapter 10 of the Code called “Enterprises of Cooperation, Associations of Citizens and Religious Organizations”. Besides, it amends Article 121 “Status of Enterprise – Participant of Association of Enterprises”, Article 146 “Privatization of State Enterprises and Utilities”, Article 159 “Authorities of Entities of Economic Activities in Regard to Commercial (the Draft Law adds “Trade”) Brand”, Article 163 “Securities and Kinds of them” and Article 181 “General Procedure of Concluding Commercial Agreements”.

The Draft Law completely excludes Article 28 “Responsibility of Entities of Economic Activities for Antimonopoly and Competition Offence”.

It also amends Article 315 “The Order of Settlement of Transportation Disputes”, Article 342 “Banking Accounts”, Article 343 “Responsibility for Breach of Terms of Payment”, Article 406 “Concession Activities in Ukraine” and some others.

The Draft Law also provides for that Article 33 “Capital Construction” comes into effect not on January 1, 2004 as the Code does but on July 1, 2004.

The Committee on Legal Policy of the Verkhovna Rada of Ukraine is preparing the Draft Law for its second reading now.

#### *Summary of Comment:*

*Accounting and Audit Systems do not comply with international standards*

The Ad Hoc Committee of Domestic Nitrogen Producers (page 10), Wiley Rein & Fielding LLP on behalf of the Rebar Trade Association Coalition (page 22)

Rebuttal, explanation:

At present, a new normative basis including 29 accounting provisions (standards) approved by the Ministry of Finance has been formed. All significant aspects of the standards are harmonized with international accounting norms. All issued normative and technical documents ensure application of fundamental principles, methods and assessments in accordance with international accounting standards by all Ukrainian enterprises and organizations.

The 2003-2004 TACIS Project resulted in a conclusion that accounting norms (standards) in Ukraine are based upon international accounting standards.

The Resolution of the Audit Chamber of Ukraine of April 18, 2003 envisages application of Audit and Ethic Standards of the International Federation of Accountants under auditing financial accounts of enterprises in Ukraine. The Audit Chamber is a member of the European Federation of Accountants and Auditors of Small and Medium Business.

*Summary of Comment:*

*Negative consequences of closure of free economic zones and priority development territories*

Wiley Rein & Fielding LLP on behalf of the Rebar Trade Association Coalition (page 22)

Rebuttal, explanation:

The Law of Ukraine “On Amending the Law “On the State Budget of Ukraine for 2005” and Some Other Legal Acts of Ukraine” #2505 of March 25, 2005 provides that from March 31, 2005 taxation of entities of economic activities which implement their investment projects in free economic zones and priority development territories, is performed in accordance with general procedures determined by relevant tax laws of Ukraine.

The above decision ensures implementation of a principle of forming of tax system provided for by the Law of Ukraine “On the Tax System”. It is the principle of equality, non-admission of any tax discrimination and equal approach to business entities (legal and physical persons including non-residents) under determination of obligatory payments of taxes and dues.

Besides, Ukrainian authorities have made analysis of results of functioning of the above zones. It showed that achievement of main goals of establishing special zones proceeded too slowly:

increase of investment inflows, first of all, to the least economically developed territories has not taken place though it was one of the fundamental goals of introduction of preferential tax treatment;

introduction of preferential tax treatment have not positively influenced solution of social and economic problems of regional development in most zones;

introduction of preferential tax treatment did not stimulate attraction of foreign capital to regions. Despite the fact that total volume of investments annually increases, share of foreign investments annually decreases;

high budget cost of introduction of preferential tax treatment for support for development of the territories also presents a problem. Rising imbalance between budget receipts from entities in free economic zones and priority development territories and preferences that have been granted to them proves it. (Negative balance made up 3.4 billion Hryvnias in 2004 and 5.2 billion Hryvnias from the date of introduction of preferential tax treatment.)

Besides, the analysis made by the Ministry of Finance of Ukraine showed that investment obligations such as volumes of attracted investments; volumes of sold production; creation and protection of jobs and payments of taxes and dues to the budget were fulfilled only within 15 projects. It makes just 2.9 percent of total number of projects in free economic zones and priority development territories.

With the purpose of settlement of problematic issues arisen due to the cancellation of preferential tax treatment in free economic zones and priority development territories the Cabinet of Ministers of Ukraine has established a Working Party that will draft a law on creation of favorable conditions for attraction of investments in Ukraine's economy and make proposals on minimization of negative consequences caused by the cancellation of preferential tax treatment for enterprises implementing the most important investment projects in these territories on the basis of agreements concluded before adoption of the Law "On Amending the Law of Ukraine "On the State Budget of Ukraine for 2005" and Some Other Legal Acts".

All the investors who honestly fulfilled their obligations in special economic zones and priority development territories will continue to enjoy preferences that existed before.

*Summary of Comment:*

*Barriers to investing in certain sectors of economy (service sector):*

*- foreign banks and insurance companies cannot open branches in Ukraine*

Wiley Rein & Fielding LLP on behalf of the Rebar Trade Association Coalition (page 23), American Iron and Steel Institute (page 16)

Rebuttal, explanation:

The Law of Ukraine of July 6, 2005 has amended the Law of Ukraine "On Insurance". It cancelled prohibition to open branches in Ukraine for insurance companies. The Law of Ukraine that amends the Law of Ukraine "On Banks and Banking Activities" and provides

for the cancellation of prohibition to open branches for foreign banks, passed first reading on July 7, 2005. This Law is planned to be adopted by the end of 2005.

*Summary of Comment:*

*Foreigners are prohibited from participation in the manufacture of alcohol*

American Iron and Steel Institute (page 18)

Rebuttal, explanation:

Alcohol is manufactured by business entities regardless of their property forms provided they have received licenses.

There are restrictions only on the manufacture of ethyl rectified grape and fruit alcohol and fruit alcohol and brandy alcohol that can be manufactured at state-owned enterprises only.

Collier Shannon Scott, PLLC on behalf of Gerdau Ameristeel, Keystone Consolidated Industries, Inc., ISG Georgetown Inc. (page 19)

*Summary of Comment: provisions of the Presidential Decree #32 of January 19, 2005 contradict the provisions of the Land Code of Ukraine*

Rebuttal, explanation:

The new Land Code of 2001 that has replaced the Land Code of 1990 does not contain any contradictions of that kind.

*Summary of Comment:*

*Whereas Ukrainian firms may use promissory notes upon importation of goods for re-export as a form of payment (with notes cancelled upon re-exportation), foreign firms have to wait from six to eighteen months to obtain VAT payments*

Wiley Rein & Fielding LLP on behalf of the Rebar Trade Association Coalition (page 19)

Rebuttal, explanation:

The Law of Ukraine “On Amending the Law of Ukraine “On the State Budget of Ukraine for 2005” and Some Other Legal Acts” #2505 of March 25, 2005 has amended Article 11 of the Law of Ukraine “On Value Added Tax”. These amendments allow enterprises with foreign investments to issue promissory notes for amounts totaling the VAT under importation of goods to the customs territory of Ukraine.

These amendments to the Law of Ukraine “On Value Added Tax” provide for equal tax treatment for Ukrainian manufacturers and enterprises with foreign investments with regard to use of promissory notes.



#### ***4. The Extent of Government Ownership or Control of the Means of Production***

Private sector development and competition strengthening were very important factors for forming positive trends of Ukraine's economy. As for today, 96 thousand objects have changed their property form in the course of privatization.

Share of non-governmental sector in industrial production increased from zero level up to 41 percent in 1995, about 80 percent in 2002 and 85.2 percent as for April 1, 2005.

According to the data provided by the State Committee on Statistics, as for January 1, 2005, a number of persons employed at enterprises of non-governmental property form made up 78.2 percent of total number of employees against 67.8 percent in 2000.

Thus, the process of transition of economy from government to private property has taken place in Ukraine. Private sector has been formed. Its share exceeds 65 percent of Ukraine's GDP<sup>4</sup>.

#### ***Comments in opposition to the granting of market economy status to Ukraine:***

##### *Summary of Comment:*

*Large enterprises are privatized slowly. There is a great number of partially privatized enterprises over which the state retains potential control. Only unprofitable enterprises will be privatized. Privatization of certain "strategic" enterprises is prohibited. The state still possess significant share of property in a number of sectors. As for January 1, 2004, private enterprises made up only 30 percent of all enterprises. The state sector alone accounted only for 32.2 percent of total employment in 2000.*

Collier Shannon Scott, PLLC on behalf of Gerdau Ameristeel, Keystone Consolidated Industries, Inc., ISG Georgetown Inc. (page 21), American Iron and Steel Institute (page 22, 24), DLA Piper Rudnick Gray Cary US LLP on behalf of Eramet Marrietta Inc. (page 5, 13), Wiley Rein & Fielding LLP on behalf of the Rebar Trade Association Coalition (page 26), The Ad Hoc Committee of Domestic Nitrogen Producers (page 15)

##### Rebuttal, explanation:

Ukraine has big area. It is a highly industrialized country with a great deal of large enterprises. In the Soviet Union enterprises of different sectors were located not according to the principle of meeting needs of each Soviet Republic but actually according to the principle of their concentration. As a result, complexes of large enterprises that satisfied needs of all Soviet Republics were established in Ukraine.

---

<sup>4</sup> The 2004EBRD Report

This very peculiarity is a determining factor of the privatization process in Ukraine. Large, even to a certain extent strategic for global production enterprises make a significant share of privatization objects.

Privatization of large enterprises in Ukraine successfully proceeds and it is not planned to be stopped.

Thus, in July of 2005 the Government of Ukraine included 5 large enterprises in the list of enterprises to be sold in 2005 (including 1 enterprise with a 100 percent government share). State share in authorized capital of three of the above enterprises will be completely liquidated.

In general, 38 percent of total number of Ukrainian enterprises with state share in their authorized capital have state shares that are less than 25 percent. As it was mentioned above, it does not allow to exercise significant management and control over activities of these enterprises. State share of other 34 percent of privatized enterprises varies from 25 to 50 percent. It also significantly limits rights of the state to manage these enterprises.

Statements that the Government of Ukraine is planning to privatize only non-profitable enterprises are false. Only 2 enterprises from 36 that have to be privatized in 2005 according to the decision of the Government of Ukraine taken in July of 2005 are non-profitable.

State property is preserved mostly at enterprises of strategic importance for the state security and defense:

- enterprises related to ensuring defense and security of the state (especially enterprises of defense industrial complex);
- enterprises occupying monopolistic (dominating) position on state market of goods provided that these goods are of great social and economic importance;
- enterprises ensuring functioning of infrastructure of state importance especially electric communication and post; railway, air and sea transportation; trunk gas and oil pipelines;
- enterprises presenting scientific and technical potential of the country and the like.

Strategic importance of an enterprise does not imply that it is not subject to privatization.

216 enterprises of strategic importance for economy and security of the state or occupying monopolistic position on the state production market were 100 percent privatized in the process of property reforming in Ukraine by the end of 2004. It makes more than 61 percent of total number of strategic enterprises that are subject to privatization. Selling of others is still going on.

Share of privatized enterprises in various sectors is provided in Addendum 1.

We emphasize that prevailing (significant) state share in such sectors as infrastructure and energy is worldwide practice and it completely corresponds to the situation observed in Russia, Kazakhstan, Lithuania, Estonia, Slovakia and Romania when these countries were granted market economy status.

Statement about insignificance of share of privatized enterprises in Ukraine is false.

Ukrainian enterprises according to their property forms as for October 1, 2004:

Number of enterprises (percent)			Net income (percent)		
Private	State	Utilities	Private	State	Utilities
88.6 (including 2.1 of enterprises with corporate state rights)	3.9	7.5	78.8 (including 7.5 of enterprises with corporate state rights)	12.7	1.0

Share of non-governmental sector in industrial output increased from zero level up to 41 percent in 1995, about 80 percent in 2002 and 85.2 percent as for April 1, 2005.

Information on a number of persons employed at the state sector provided in the comments in opposition to the granting of market economy status to Ukraine is outdated.

According to the data provided by the State Committee on Statistics, as for January 1, 2005, a number of persons employed at state-owned enterprises made up 21.8 percent of total number of employees against 32.2 percent in 2000.

*Summary of Comment:*

*The Government is going to review privatization of about 3000 enterprises. Re-privatization can be hidden nationalization*

Wiley Rein & Fielding LLP on behalf of the Rebar Trade Association Coalition (page 29), DLA Piper Rudnick Gray Cary US LLP on behalf of Eramet Marietta Inc. (page 5, 6), Collier Shannon Scott, PLLC on behalf of Gerdau Ameristeel, Keystone Consolidated Industries, Inc., ISG Georgetown Inc. (page 22), The Ad Hoc Committee of Domestic Nitrogen Producers (page 14, 15)

Rebuttal, explanation:

The Government of Ukraine does not perform re-privatization. Privatization cases are considered in accordance with established procedures in courts of Ukraine. Only court can take a decision on re-privatization in case of non-fulfillment by new owners of their obligations regarding enterprises they have privatized (non-fulfillment of provisions of purchase contracts).

Provisions of current legislation of Ukraine ensure alienation of state property in favor of private persons in order to improve production efficiency according to the following scheme:

tender sale of object – control over implementation of terms of sale – abrogation of a contract in case of non-fulfillment of these terms and recovering of the object to state property – second sale of the object and recovering of money to former owner.

Consideration of privatization cases is aimed not at final recovering of property to the state due to non-fulfillment of terms of its sale but at logical continuation of measures on its alienation to really effective owner.

*Summary of Comment:*

*Delay in privatization of Ukrtelecom*

Wiley Rein & Fielding LLP on behalf of the Rebar Trade Association Coalition (page 26)6  
Collier Shannon Scott, PLLC on behalf of Gerdau Ameristeel, Keystone Consolidated  
Industries, Inc., ISG Georgetown Inc. (page 24)

Rebuttal, explanation:

Really, privatization of Ukrtelecom Open Joint Stock Company has turned out to be extended. But the only reason of it is the Government's wish to improve investment attractiveness of the enterprise with the purpose of the selling it at the highest price. Measures on preparation of Ukrtelecom OJSC for privatization are as follows:

- creation of mechanism of compensation of losses for providing public services at reasonable prices;
- setting strict and transparent requirements to operators in regard to the order of installation of monitoring equipment;
- guarantee of the right of a future investor to operative management of Ukrtelecom OJSC;
- issuing a license for cell communication to Ukrtelecom OJSC.

Regulation of the Cabinet of Ministers of Ukraine #284-p of July 25, 2005 approved sale of Ukrtelecom OJSC in 2005.

*Summary of Comment:*

*While considering market status of Ukraine's economy, the European Commission pointed out some problems regarding implementation of bankruptcy laws*

The Ad Hoc Committee of Domestic Nitrogen Producers (page 21)

Rebuttal, explanation:

We claim that in general the European Commission is satisfied with the implementation of Ukrainian bankruptcy laws. At the same time, the European Commission requested to provide explanations of peculiarities of bankruptcy procedures of certain kinds of enterprises.

These enterprises are of strategic importance for economy and social policy of the state and their share in industrial production of Ukraine is insignificant (about 2 percent).

Ukraine has provided the explanations to the European Commission. The European Commission was satisfied with the answer and did not make any other comments.

*Summary of Comment:*

*Land reforms in Ukraine have not progressed to the point where there is a functioning market in land. There are restrictions on land ownership by foreign nationals*

Rebuttal, explanation:

Structural reform in agrarian sector of Ukraine is recognized by the World Bank as one of significant achievements of Ukraine<sup>5</sup>. The World Bank stated that reforms recently carried out in agrarian sector of Ukraine have created a basis for development of flourishing agrarian private sector.

Articles 81 and 82 of the Land Code provide that foreign citizens and stateless persons can obtain rights to ownership of non-agricultural land within and out of territories of settlements where real estate objects owned by them are located.

Foreign legal persons can obtain rights to ownership of non-agricultural land:

- within territories of settlements in cases of purchasing real estate and for construction of objects related to their business activities in Ukraine
- out of territories of settlements in cases of purchasing real estate

At the same time, foreign legal persons and foreign citizens can rent agricultural land.

Hence, there is a restriction only on purchase of land but use and ownership of land (without disposal) by the above persons is not limited by current legislation.

It should be noted that at the time of granting market economy status by the USA:

- 1) agricultural land could not be purchased by foreign citizens in Lithuania. It could be purchased by foreign companies from the EU countries exclusively<sup>6</sup>
- 2) ownership of land by foreign citizens was prohibited in Romania (except legal persons with 100 percent foreign share)<sup>7</sup>.

---

<sup>5</sup> The World Bank. Ukraine. Building Foundations for Sustainable Growth A Country Economic Memorandum, 2004, at 27

<sup>6</sup> See Lithuania NME Memorandum factor 4

<sup>7</sup> See Lithuania NME Memorandum factor 4

## ***5. The Extent of Government Control over Resources and Influence on Pricing and Output***

Progress in pricing liberalization in Ukraine is proved by the 2004 EBRD Report in which the EBRD liberalization price index is determined as 4 (maximum possible is 4+). It means:

“Overall price liberalization; government procurement at non-market prices have been mostly cancelled; prices are regulated only for insignificant number of goods.”

(In 2003 the EBRD liberalization price index for Ukraine was 3.)

Share of regulated prices does not exceed 10 percent, i.e. it complies with market economy generally recognized limits.

We would like to note that share of regulated prices in Romania made up 14 percent when it was granted market economy status<sup>8</sup>. Besides, state price regulation was noted by experts of the U.S. Department of Commerce under making decisions on granting economy status to Hungary<sup>9</sup>, Latvia<sup>10</sup>, Kazakhstan<sup>11</sup> and Russia<sup>12</sup>.

In addition to the Submission of May 10, 2005 we are submitting rebuttals and explanations regarding issues covered by comments in opposition to the granting of market economy status to Ukraine and which were not completely expounded in the Submission of May 10, 2005.

### ***Comments in opposition to the granting of market economy status to Ukraine:***

#### *Summary of Comment:*

*There are cases of Government subsidizing of certain sectors of industry*

American Iron and Steel Institute (page 28), Wiley Rein & Fielding LLP on behalf of the Rebar Trade Association Coalition (pages 32-34)

#### Rebuttal, explanation:

We believe that subsidizing should not be considered in the framework of market economy status of the country in the context of antidumping investigations.

According to the explanations provided by the U.S. Department of Commerce<sup>13</sup>, the following issues are considered in the framework of the above factor: 1) level of liberalization of prices; 2) indebtedness level; 3) reforming of commercial banks; 4) level of access of physical and legal persons to business activities.

---

<sup>8</sup> See Romania NME Memorandum at 18

<sup>9</sup> See Hungary NME Memorandum, factor №5

<sup>10</sup> See Latvia NME Memorandum, factor №5

<sup>11</sup> See Kazakhstan NME Memorandum, factor №5

<sup>12</sup> See Russia NME Memorandum, factor №5

<sup>13</sup> See Russia NME Memorandum, factor №5

However, we assert that statements provided in the Comments in opposition to the granting of market economy status to Ukraine are false.

#### Automobile production

U.S. companies stated that in March of 2005 a new Law of Ukraine that exempted domestic motor vehicle producers from VAT payments and from paying duties on imports of machinery and components was adopted.

The Law of Ukraine “On Amending the State Budget of Ukraine for 2005” #2505 of March 25, 2005 has not introduced *but on the contrary has revoked preferences* for domestic motor vehicle producers for payments of VAT and import duties on machinery and components.

Besides, import quota for motor vehicles from the Russian Federation is set according to results of special protective investigation carried out in 2002.

#### Metallurgy

Export duties on metal scrap should not be considered as subsidizing because:

- 1) the reason of imposing of this duty was the necessity to provide Ukrainian metallurgical enterprises with metal scrap implying quantity but not pricing aspect;
- 2) Ukrainian consumers do not obtain financial profits that is an obligatory condition under determination of subsidizing according to the Agreement on Subsidies and Compensational Measures;
- 3) metal scrap prices in Ukraine are formed according to market demand-supply principles under metal scrap deficit on domestic market.

At the same time, we would like to mention that the Law of Ukraine of July 6, 2005 has repealed a ban on exportation of non-ferrous and alloy ferrous metals and introduced 30 percent export duty.

The Law on gradual liberalization of export duty on ferrous metals scrap is being considered at the Verkhovna Rada of Ukraine.

#### *Summary of Comment:*

*The State exercises control over prices for;*

- *sugar*
- *grain*
- *gas*
- *oil*
- *coal*
- *petrol*

DLA Piper Rudnick Gray Cary US LLP on behalf of Eramet Marrietta Inc. (page 8,9), Collier Shannon Scott, PLLC on behalf of Gerdau Ameristeel, Keystone Consolidated

Industries, Inc., ISG Georgetown Inc. (page 26), The Ad Hoc Committee of Domestic Nitrogen Producers (page 21), Wiley Rein & Fielding LLP on behalf of the Rebar Trade Association Coalition (pages 32-34)

*Sugar* – in pursuance of the Law of Ukraine “On State Regulation of Sugar Production and Sale” and Regulations of the Cabinet of Ministers of Ukraine #117 of February 4, 2004 and #289 of April 13, 2005 minimum prices for sugar have been set.

The situation observed on Ukrainian sugar market in summer of 2005 is a definite proof of non-interference of the Government in setting prices for sugar: prices significantly increased throughout this period. The Government of Ukraine has not issued any normative act which can be considered as interference in market pricing.

*Grain* – the state sets minimum and maximum purchase prices. State regulation of prices implies state interventions of the Agrarian Fund that allow to set fixing prices at level not less than minimum purchase prices and not higher than maximum purchase price.

*Gas* – state regulation of prices for natural gas is performed by means of setting limit levels of wholesale prices for natural gas for citizens, state institutions and organizations, heating power utilities and industrial consumers.

Policy of regulation of prices for all categories of consumers is formed in accordance with the principle of self-repayment of subjects of natural monopolies, ensuring complete reimbursement of economically grounded expenditures and openness of the procedure of consideration of price levels.

*Coal* – coal mining enterprises sell coal to consumers at free prices on the basis of concluded agreements. Prices for coal for residential use are subject to regulation.

*Oil* – the state does not interfere in pricing

*Petrol* – temporal (extremely limited in time) regulation of petrol prices in 2005 was aimed at *non-admission of unbalancing of motor fuels market* caused by groundless growth of prices throughout the period of keen demand.

With the purpose of prevention of interfering in oil market pricing the President of Ukraine has issued the Decree #823 of May 18, 2005 prohibiting the Government of Ukraine from taking relevant administrative measures in future.

*Summary of Comment:*

*While considering market status of Ukraine’s economy, the European Commission noted state interference in pricing by means of concluding memorandums (between the Government and producers)*

The Ad Hoc Committee of Domestic Nitrogen Producers (page 21)

Rebuttal, explanation:

Ukraine’s legislation does not provide any norms that allow to regulate activities of business entities by means of concluding memorandums. The memorandums mentioned by the European Commission should be considered as declarative, political documents which



do not bear any marks of a normative-legal act or agreement. They do not set obligatory rules that have to be observed by the parties of these memorandums. Hence, their non-observance does not result in any legal consequences or responsibility.

