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BEFORE THE
INTERNATIONAL TRADE ADMINISTRATION
OF THE
U.S. DEPARTMENT OF COMMERCE

CARBON AND CERTAIN ALLOY STEEL WIRE ROD FROM UKRAINE

PETITIONERS' COMMENTS ON UKRAINE'S STATUS AS A NON-MARKET ECONOMY COUNTRY BRIEF

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Table of Contents

INTRODUCTION

On behalf of Gerdau Ameristeel, Keystone Consolidated Industries, Inc., and ISG Georgetown Inc., Petitioners in the underlying investigation and domestic producers of carbon and certain alloy steel wire rod ("Petitioners"), this submission is presented in accordance with the Department's April 26, 2005 notice initiating this changed circumstances review concerning the status of Ukraine as a non-market economy ("NME") country under Section 771(18) of the Tariff Act of 1930, as amended (the "Act"), 19 U.S.C. § 1677(18). 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 (Apr. 26, 2005). The Department initiated the review following a request from the Government of Ukraine ("GOU") dated April 2, 2005, which subsequently was supplemented by a substantive submission dated May 10, 2005 (the "May 10 Submission").

The Department last initiated a review of Ukraine's non-market economy status in 2002, during the original investigation in this proceeding.[1] At that time, in the face of overwhelming evidence that Ukraine remained a country whose economy operated on non-market principles of price and cost, and was riddled with corruption, cronyism, and the influence of petty oligarchs, the Department indefinitely deferred additional consideration of the issue.[2]

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[1] See Investigation of Carbon and Certain Alloy Steel Wire Rod from Ukraine: Opportunity to Comment on the Status of Ukraine as a Non-Market Economy Country, 67 Fed. Reg. 19,394 (Apr. 19, 2002). Prior to the original investigation in this proceeding, the Department's last full examination of Ukraine's NME status was in the course of its investigation of Certain Cut-To-Length Carbon Steel Plate from Ukraine. See 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 (Nov. 19, 1997) (hereafter "CTL Plate").

[2] See Antidumping Duty Investigation of Carbon and Certain Alloy Steel Wire Rod From Ukraine, 67 Fed. Reg. 52,536 (Aug. 8, 2002).

Between late 2002 and the Department's initiation of this changed circumstances review, some things have changed, yet much remains the same. No one can dispute the fundamental shift in Ukraine's political paradigm that apparently occurred in late 2004, when extraordinary civil protests, combined with an impressive demonstration of political will by the Ukrainian Rada and Supreme Court, invalidated a patently rigged election and permitted the Ukrainian voters to elect a new government. This new government, led by President Viktor Yushchenko and in power for less than six months, has stated its commitment to the mechanisms required to convert Ukraine's economy into one that operates on market principles or pricing and cost. While the current government's commitment is impressive and hopeful, however, its goal has not yet been achieved. Indeed, as discussed below, the evidence related to the Department's statutory criteria remains essentially the same as it was in 2002.

While the Department and the Administration may desire to change Ukraine's status for issues of political expediency, political expediency is not a valid consideration in the context of the specific criteria described under 19 U.S.C. § 1677(18)(B). The wealth of available information from multiple governmental and non-governmental sources all points to one and only one conclusion: that while Ukraine has asserted clear intentions of continuing its transition to a market economy and should be applauded for these statements, its goal has not yet been reached. Petitioners respectfully submit that the Department should affirm Ukraine's status as a non-market economy.

EXECUTIVE SUMMARY

> *Much remains to be done to achieve full economic liberalization. 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.*[3]

Ukraine remains a non-market economy. Since the Department last affirmed Ukraine's NME status in 1997, Ukraine has not yet made the difficult transition from a non-market economy to an economy operating on market principles of cost or pricing. Ukraine maintains hard currency controls that are inconsistent with free convertibility. Wage rates remain subject to governmental guidelines and controls. Joint ventures and other investments by foreign firms remains among the riskiest business undertakings possible. The government remains firmly in control of significant means of production, and in fact is in the process of "de-privatizing" certain significant assets that were the subject of highly corrupted privatization tenders. And corruption and cronyism remain the hallmarks of Ukraine's economy, affecting everything from medical care to the broadcast and print media to the operation of huge sections of Ukraine's industrial base. The GOU's May 10 Submission does not demonstrate that Ukraine has successfully made the transition to a market economy.

A. The GOU Maintains Significant Currency Controls Rendering The UAH Insufficiently Convertible

Ukraine permits only "authorized" banks to engage in most activities related to foreign currency, requires citizens to deposit foreign currency returns into special "authorized" banks, and maintains restrictions on the export of local currency. Licenses are required before persons

[3] U.S. & Foreign Commercial Service & U.S. Department Of State, Doing Business In Ukraine: A Country Commercial Guide for U.S. Companies at 67 (Feb. 8, 2005) (available at http://www.bisnis.doc.gov/bisnis/country/ukraine.cfm) ("Doing Business In Ukraine") (Exhibit 1 hereto).

can use hard currency as a security, open a bank account abroad, make an investment abroad, grant a hard currency loan, and make hard currency payments abroad from Ukraine. The National Bank of Ukraine engages in sustained intervention that distorts the true value of the UAH.

B. The GOU Actively Interferes with Free Wages and Employment Negotiation

The GOU maintains a tariff schedule that assigns wages to different occupations, thus making free wage negotiation impossible, and the GOU maintains a program seeking full employment rather than freely negotiated wages.

C. Foreign Investment and Joint Ventures Are Hampered By Uncertainty and Corruption

Opportunities to engage in foreign investment and joint ventures are hindered by a significant amount of corruption and cronyism. While ownership of nonagricultural land by foreign investors appears to be permitted, Ukrainian laws and Presidential Decrees concerning land ownership conflict. The resulting uncertainty and the lack of predictability when applying Ukraine's enforcement mechanisms render the area of foreign investment and joint ventures fluid and unpredictable.

D. The GOU Exercises Significant Control of the Means of Production, Because Privatization Remains Incomplete and Is Being Reversed In Some Cases

Privatization in Ukraine has proceeded haltingly, and what privatization has occurred has usually been partial. Indeed, much of the privatization that has taken place has been so badly tainted by corruption that large enterprises are being "renationalized" any may or may not be "re-privatized" at some later date. Like all aspects of Ukraine's attempts at economic liberalization, privatization has been plagued with cronyism and corruption, as Ukraine's "oligarchs" maneuver to seize and maintain control of Ukraine's businesses.

E. <u>The GOU Retains Significant Control Over Resource Allocation, Prices, and Output</u>

As it did in 1997, the GOU retains significant control over resource allocation, prices, and output. Price controls and regulations remain in place. The GOU can require businesses to give precedence to state orders over other production. In addition, during the original investigation in this proceeding the respondent admitted that exports of steel wire rod to the United States were subject to a price floor and must abide by GOU-set "indicative prices." There is no record evidence that this requirement has changed.

F. <u>Ukraine's Economy Remains Characterized by Corruption and Cronyism</u>

Ukraine has been plagued by corruption and cronyism since the breakup of the former Soviet Union. These factors have an enormously detrimental impact on Ukraine's development of viable market-economy mechanisms and processes. Ukraine's corruption and cronyism, and their consequences, are properly before the Department as "other factors" under Section 771(18)(B)(vi). They pervade all levels of Ukraine's political economy, and define the proper context in which to assess the five specific factors set forth in section 771(18).

DISCUSSION

I. LEGAL STANDARD AND PRECEDENT

A. Legal Standard

The Department's designation of a country as an NME "shall remain in effect until revoked by the administering authority."[4] Section 771(18) of the Act, 19 U.S.C. § 1677(18), identifies five specific factors that the Department considers when assessing whether a country is, or remains, a non-market economy:

1. The extent to which the currency of the foreign country is convertible into the currency of others,
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 foreign countries are permitted in the foreign country,
4. The extent of government ownership or control of the means of production, and
5. The extent of government control over the allocation of resources and over the price and output decisions of enterprises.

19 U.S.C. §§ 1677(18)(B)(i)-(v). Section 771(18) also includes a sixth factor, allowing the Department to take into account "such other factors as the administering authority considers appropriate."[5]

B. Precedent

The Department properly has treated Ukraine as an NME in every proceeding to date.[6] The Department last undertook a substantive analysis of Ukraine's NME status in 1997, during

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[4] 19 U.S.C. § 1677(18)(C)(i).

[5] 19 U.S.C. § 1677(18)(B)(vi).

[6] See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From Ukraine, 66 Fed. Reg. 50,401, 50,404 (Oct. 3, 2001); Notice of

(...continued)

the investigation of Certain Cut-to-Length Carbon Steel Plate from Ukraine, Inv. No. A-823-808 ("CTL Plate").[7] In CTL Plate, the Department determined that "Ukraine's economy, while in transition, does not yet qualify as a market economy under the antidumping law."[8]

In making this determination, the Department considered each of the five factors described in Section 771(18). First, with respect to currency convertibility, Ukraine's currency, the hryvnia ("UAH") was only convertible in the Newly Independent States, and the GOU retained significant currency controls. Id. Second, concerning wages and employment, the GOU remained heavily involved in wage rate determination and employment decisions. Id. Third, concerning foreign investment and joint ventures, while Ukraine was generally open to foreign direct investment ("FDI"), areas of significant concern remained, "in particular the reportedly burdensome and unpredictable arbitration and enforcement system" as well as the prohibition on foreigners owning land.

Fourth, concerning GOU ownership or control of the means of production, privatization in Ukraine had proceeded "unevenly thus far".[9] The Department noted that "much of the economy remains in the hands of the government . . . ,"[10] and that even where industries were

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(...continued)
Preliminary Determinations of Sales at less Than Fair Value: Steel Concrete Reinforcing Bars from Poland, Indonesia, and Ukraine, 66 Fed. Reg. 8343 (Jan. 30, 2001); 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 (Nov. 19, 1997).

[7] See 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 (Nov. 19, 1997). While the Department initiated a review of Ukraine's NME status during the original investigation in this proceeding, as noted above it suspended its review before completion. Antidumping Duty Investigation of Carbon and Certain Alloy Steel Wire Rod From Ukraine, 67 Fed. Reg. 52,536 (Aug. 8, 2002).

[8] CTL Plate, 62 Fed. Reg. at 61,755.

[9] CTL Plate, 62 Fed. Reg. at 61,756.

[10] Id.

alleged to have been "privatized" it remained "unclear whether those figures reflect 100 percent privatization of the enterprises in question, or some continued level of government ownership . . . ."[11] The Department also noted that the respondents in CTL Plate remained majority owned (though they were not wholly state-owned as Krivorozhstal appeared to be during the original investigation in this proceeding).[12]

Fifth, with respect to allocation of resources and control over pricing and output decisions of enterprises, the Department found that the GOU retained "significant control over the means of production and in allocating resources regarding all state-owned business enterprises, as well as those enterprises leasing state-owned enterprises."[13]

II. THE PREPONDERANCE OF THE EVIDENCE DEMONSTRATES THAT UKRAINE'S NME STATUS SHOULD NOT BE CHANGED

Since the Department's 1997 analysis in CTL Plate and its 2001 determination in Certain Hot-Rolled Carbon Steel Flat Products From Ukraine, Ukraine has not made the difficult transition from a non-market economy to an economy that operates on the basis of market principles of cost or pricing structures. Taken as a whole, even though the change in government

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[11] Id.

[12] As discussed below, Krivorozhstal was the subject of a much-disputed 2004 privatization tender in which the company was sold to Viktor Pinchuk, the son-in-law of former President Leonid Kuchma for a price widely acknowledged as being substantially less than market value. Currently, the Yushchenko government is challenging the privatization, and may "renationalize" the enterprise. Pinchuk, for his part, is fighting the government and has filed a lawsuit in the European Court of Human Rights.

[13] CTL Plate, 62 Fed. Reg. at 61,756. In October 2001, the Department reaffirmed Ukraine's NME status in the context of the investigation of Certain Hot-Rolled Carbon Steel Flat Products From Ukraine, Inv. No. A-823-811. In that proceeding, the Department did not publish a substantive analysis under section 771(18). The Department's published decision to affirm Ukraine's NME status was based on the fact that the GOU's responses to the Department's NME questionnaire were "submitted so late in the proceeding" that the Department was "unable to adequately consider and analyze them, as mandated by the criteria outline in section 771(18)(B) of the Act." 66 Fed. Reg. at 50,404.

earlier this year brought with it a significant increase in pro-market economy pronouncements, in the past four years Ukraine has made only limited progress in its transition to a free market economy. Graduating Ukraine to market economy status at this time would be premature.

A. The Extent to Which the Currency of the Foreign Country is Convertible Into the Currency of Other Countries

Section 771(18)(B)(i) of the Act instructs the Department to consider the extent to which the currency of a foreign country is convertible into the currency of other countries.[14] In its 1997 determination, the Department found that the UAH was not fully convertible.[15] The May 10 Submission fails to show that this has changed. The GOU makes a number of assertions to support its claim for currency convertibility, but at the same time admits that its currency is not yet fully convertible. Coupled with the National Bank of Ukraine's ("NBU") frequent interventions in the foreign exchange market, substantial evidence exists that Ukraine continues to lack the level of currency convertibility required under section 771(18)(b)(i).

1. The GOU Maintains Controls on Foreign Exchange Flows

Clear restrictions on full convertibility appear in Ukraine's laws. The law "On the Procedure of Making Payments in Foreign Currency" requires that citizens' returns in foreign currency be placed in an authorized bank within ninety days of receipt of payment.[16] Article 3 requires residents who purchase foreign currency "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. Id. Art. 3. These measures reflect deliberate governmental policies

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[14] 19 U.S.C. § 1677(18)(B)(i).

[15] CTL Plate, 62 Fed. Reg. at 61,755.

[16] See Law of Ukraine, On the Procedure of Making Payments in Foreign Currency Art. 1 (Sept. 23, 1994) (Exhibit 2 hereto).

designed to influence currency flows, in this instance as a means of maximizing the government's hard currency holdings. This type of interference by the NBU and Government of Ukraine is not consistent with full convertibility of currency.

In addition to the GOU's regulation of the foreign exchange market, other obstacles to full currency convertibility remain. While foreign investors are permitted to transfer revenues and proceeds in foreign currency, exportation of local currency is closely regulated by the GOU. In November 2004, the GOU imposed tight restrictions on the export of hard currency from Ukraine.[17] While these limits were imposed to avoid a run on the Hryvnia during the late 2004 political tensions, the May 10 Submission provides no indication that these restrictions have been lifted or eased.

Additionally, the movement to liberalize currency exchange among Ukrainian commercial banks has been reversed in recent years. Indeed, measures of this sort have become more restrictive since the introduction of the UAH. For example, the GOU has reimposed a requirement that all transfers of hard currency be approved by the central bank.[18] The U.S. Commercial Service has noted the continued existence of restrictions on foreign exchange convertibility. Specifically, each transaction over $50,000 has to be approved by the NBU, and the NBU charges a fee to review the transaction. Licenses must be obtained from the NBU for almost any kind of foreign exchange translation.[19]

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[17] See BBC News World Edition, Limits Imposed on Ukrainian Banks (Nov. 30, 2004) (available at http://news.bbc.co.uk/2/hi/business/4055099.stm) (Exhibit 3 hereto).

[18] World of Information Business Intelligence Report: Ukraine at 25 (Walden Publishing Ltd. 2001) (available at www.lexis.com) ("Country Reports: Ukraine") (Exhibit 4 hereto).

[19] See Doing Business In Ukraine at Ch. 7 (available at http://www.bisnis.doc.gov/bisnis/country/ukraine.cfm) (Exhibit 1 hereto).

A finding that these types of foreign currency regulations are not compatible with market economy status is consistent with the Department's prior practice. A review of other NME status inquiries shows that countries that were granted market economy status did not have similar restrictions on the sale of foreign currency. In the Department's recent NME status determination, in the course of its investigation of Certain Steel Concrete Reinforcing Bars from Latvia, Inv. No. A-449-804 ("Rebar from Latvia"), the Department noted that "there are no FOREX surrender requirements" in Latvia.[20] Similarly, when the Department graduated Slovakia to market economy status, it partly relied on the fact that "individuals and firms (domestic and foreign) in Slovakia can now maintain foreign exchange ("FOREX") accounts without prior government approval and no longer have to surrender their export earnings or other FOREX receipts to banks."[21] This finding was also made in the Department's revocation of NME status for the Czech Republic.[22]

The UAH'S level of convertibility is far below that of other currencies whose countries were graduated to market economy status in prior NME inquiries. The GOU's admissions, other

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[20] See Memorandum From Christopher Smith and Kier Whitson, Case Analysts, AD/CVD Enforcement II, Office 5, Through Holly Kuga, Deputy Assistance Secretary, AD/CVD Enforcement Group II, to Troy Cribb, Assistant Secretary, Import Administration, Antidumping Duty Investigation of Certain Steel Concrete Reinforcing Bars from Latvia – Request for market Economy Status at 6 (Jan. 10, 2001).

[21] See Memorandum from Bernard Carreau, Deputy Assistant Secretary, AD/CVD Enforcement Group II, to Robert S. LaRussa, Assistant Secretary for Import Administration, Antidumping Duty Determinations on Cold-Rolled Carbon-Quality Steel Products from the Slovak Republic – Market vs. Non-Market Economy Analysis at 5 (Oct. 13, 1999).

[22] See Memorandum from John Brinkman, Program Manager, Office 6, AD/CVD Enforcement II, Norbert Gannon, Senior Analyst and Dennis McClure, Financial Analyst, Office 6, Enforcement II, Through David Mueller, Director, Office 6, AD/CVD Enforcement II, to Robert S. LaRussa, Assistant Secretary, Import Administration, Antidumping Investigation of Certain Small diameter Carbon and Alloy Seamless Standard line and Pressure Pipe from the Czech Republic: Non-Market Economy ("NME") Status at 5 (Nov. 29, 1999).

Ukrainian laws, and the Department's prior practice indicate that the UAH is not adequately convertible to satisfy the requirement of Section 771(18)(b)(i).

2. The NBU Has Undertaken Sustained Intervention in the Foreign Exchange Market

In its May 10 Submission, the Government of Ukraine acknowledges that it continues to "participate{} in the exchange market." May 10 Submission at 5. While the GOU contends that its participation does not interfere with market economy mechanisms of currency exchange and convertibility, its intervention is directly aimed at artificially influencing the currency exchange rate.

The nature and extent of the NBU's interventionist policies has been documented by the International Monetary Fund ("IMF"). In a study published in November 2001, the IMF concluded that "{m}onetary policy in 2000 and the first half of 2001 has been dominated by sizable, largely unsterilized foreign exchange interventions by the NBU."[23] The NBU's interventions were so troubling to the IMF that is emphasized the need of the NBU to "allow greater exchange rate flexibility if foreign exchange inflows continue, in order to attain the inflation target"[24] when identifying a short list of five "Issues stressed in the staff appraisal".[25] While recent IMF reports note some improvement in the GOU's fiscal policies, interventions continue, the currency does not freely float, and, much like the Chinese Yuan, the Hryvnia is undervalued and facilitates inflationary pressures.

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[23] International Monetary Fund, Ukraine: Fifth and Sixth Reviews Under the Extended Arrangement – Staff Report; Staff Supplement and News Brief on the Executive Board Discussion at 10 (Nov. 2001) (available at www.imf.org/external/pubs/ft/scr/2001/cr01216/pdf) (Exhibit 5 hereto).

[24] Id. at 5 (Exhibit 5 hereto).

[25] Id. (Exhibit 5 hereto).

The NBU's activity has also been noted in privately-prepared reports. For example, materials available through the Lexis research service state that "the maintenance of a stable exchange rate sometimes appears to hold disproportionate psychological importance for the NBU."[26] Moreover, a supposed float of the UAH in February 2000 was actually heavily managed by the NBU, which "maintains extensive restrictions on commercial foreign currency transactions and has continued to sell dollar reserves to control the activities of currency speculators."[27] These types of interventions in the foreign exchange market frustrate the proper functioning of any mechanisms to set a market-based exchange rate, and inhibit the development of full currency convertibility. Importantly, the May 10 Submission provides no evidence that the GOU's pattern of interference with market mechanisms of currency exchange has changed.

3. The Government of Ukraine's Exchange Rate Policies Adversely Affect Foreign Investment

The GOU's restrictions on the sale of foreign currency earnings and the NBU's intervention in the foreign exchange market have created an environment hostile to foreign investment. The negative impact caused by these factors on the investment climate in Ukraine has been addressed by the U.S. Commercial Service and the State Department.[28] The most recent country commercial guide specifically highlights the difficulties related to Ukraine's currency exchange restrictions:

> The April 1996 "Foreign Investment Law" guaranteed the "unhindered transfer" of profits, revenues, and other proceeds in foreign currency after taxes and other mandatory payments. However, according to the National Bank of Ukraine (NBU)

[26] Country Reports: Ukraine at 15 (available at www.lexis.com) (Exhibit 4 hereto).

[27] Id. at 15 (Exhibit 4 hereto).

[28] See Doing Business In Ukraine Chapter 6 (page 69 of 95) (available at http://www.bisnis.doc.gov/bisnis/country/ukraine.cfm) (Exhibit 1 hereto).

> Resolution 482 effective 12 November 2004, foreign investment funds may only be brought into Ukraine via special commercial bank accounts, which must convert the hard currency into Hryvnia. Foreign investments, therefore, may only be conducted in Hryvnia. Likewise, the resolution stipulated that all payments to foreign investors must be made in Hryvnia to the investors' bank accounts in Ukraine. The banks are free to convert the Hryvnia into hard currency so that the payments may be repatriated. Although the NBU claims that this controversial new resolution is merely a complication of previously existing regulations, bankers and businesspeople complain that it renders international transfers more burdensome and costly for investors.[29]

Materials available from commercial research service also note the negative impact caused by the lack of full convertibility of the UAH on foreign investment in Ukraine, finding that "in late 2000, disparities remained between official and unofficial exchange rates, and foreign companies are likely to find it difficult to convert large amounts of currency through commercial banks, obliging the use of the Interbank Currency Exchange at an unfavorable exchange rate."[30]

In sum, the GOU continues to force the surrender of hard currency, restrict movement of hard currency and local currency, and artificially influence the exchange rate and foreign exchange market. These factors were not consistent with a market economy in 1997 and they are not consistent with a market economy at this time, notwithstanding the recent change in government.

[29] Id. at 4 (Exhibit 1 hereto).

[30] Country Reports: Ukraine at 25 (available at www.lexis.com) (Exhibit 4 hereto).

B. <u>The Extent To Which Wage Rates In The Foreign Country Are Determined By Free Bargaining Between Labor And Management</u>

Section 771(18)(B)(ii) of the Act requires the Department to consider the extent to which wage rates in a foreign country are determined by free bargaining between labor and management.[31]

In its 1997 decision the Department found that "with regard to wage rates and employment the government continues to be heavily involved."[32] First, the Government of Ukraine has established a "Tariff Rate system," which "grades all jobs and sets salaries based upon the level of complexity and workers qualifications."[33] Second, the Ministry of Labor of Ukraine uses job evaluation catalogs to establish job position criteria.[34] Third, all state-owned enterprises must base their employment decision on these criteria, and privately-owned firms must establish their own regulations within this framework.[35] Lastly, the government determines the manner in which workers are paid and prosecutes violations by employers.[36]

Nothing in the GOU's May 10 Submission indicates that these circumstances have changed. Despite several pages of discussion of the amounts its workers in various sectors are paid, it is apparent from the May 10 Submission that this system of artificially set wages system remains alive and well in Ukraine. The free negotiation of wages is still hindered by numerous

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[31] 19 U.S.C. § 1677(18)(b)(ii).

[32] <u>See</u> <u>CTL Plate</u>, 62 Fed. Reg. at 61,755.

[33] <u>Id.</u>

[34] Law of Ukraine, "On Remuneration of Labor", #108/95-Verkhovna Rada, 24 March 1995, #17 for 1995, as amended by Laws of Ukraine #20/97-VR of Jan. 23, 1997, per Resolution of Verkhovna Rada #50/97-VR dated Feb. 6, 1997 ("<u>Law on Remuneration of Labor</u>") (Exhibit 6 hereto).

[35] <u>Id.</u> (Exhibit 6 hereto).

[36] <u>Id.</u> (Exhibit 6 hereto).

factors, including government intervention, government control of timing and manner of wage payment, restrictions on labor mobility, and high levels of salary arrears.

1. The Law of Ukraine on Remuneration of Labor Results in State Interference in the Labor Market

The law "On Remuneration of Labor"[37] reveals significant involvement by the GOU in all aspects of employment, and particularly in the negotiation of wages. For example, Article 6, which outlines the "Tariff Rate system of Remuneration of Labor," and describes in detail the state's control over wage determination:

> Organization of remuneration of labor shall be based on the tariff rate system, which includes tariff rates tables, tariff rates, salary schedules and job evaluation catalogs.
>
> The tariff rate system of remuneration of labor is used to grade jobs according to their complexity and workers according to their qualifications and the tariff table. The tariff rate system is the basis for the formation of quantitative differentiation of pay. * * *
>
> Job evaluation catalogs shall be developed by the Ministry of Labor of Ukraine.[38]

This level of GOU involvement in determining wage rates clearly precludes a decision that Ukraine be considered a market economy insofar as wage rate determination is concerned.

Beyond wage determination, the Law of Remuneration of Labor even goes so far as to designate the form of payment, terms of payment and locations at which workers can be paid. Article 23 outlines acceptable forms of payment and prohibits others, underscoring the government's role in all aspects of the labor market.[39] Similarly, Article 24 places limitations on

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[37] Id. (Exhibit 6 hereto).

[38] Id. Art. 6 (Exhibit 6 hereto).

[39] Id. Art. 23 (Exhibit 6 hereto).

all aspects of payment of wages.[40] In light of this evidence and in the absence of any evidence that these extraordinary measures have changed, the Department should conclude that wages are not determined by free negotiation between labor and management.

2. The GOU and Managers of Enterprise Distort the Labor Market by Pursuing Employment Over Profit as a Chief Goal of Business Activity

Evidence that both government agencies and managers of enterprises continue to pursue employment, rather than maximization of efficiency for profit, as a central business goal.[41] This situation leads to an artificially influenced labor market in which managers and workers cannot negotiate wages that are economically appropriate. The practice by the GOU and employers to emphasize employment over efficient production creates a distorted labor market in which managers and workers are not able to negotiate an appropriate wage.

C. The Extent To Which Joint Ventures Or Other Investments By Firms Of Other Foreign Countries Are Permitted In The Foreign Country

Section 771(18)(b)(iii) requires the Department to consider "the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country."[42] In its 1997 decision to continue Ukraine's NME status, the Department found that Ukraine generally is open to foreign investment, and has the required supporting legislation in

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[40] Id. Art. 24 (Exhibit 6 hereto).

[41] See Country Reports: Ukraine at 26 (available at www.lexis.com) ("central and in particular local authorities may intervene to prevent dismissals in sensitive areas, and many Ukrainian employers are reluctant to shed staff.") (Exhibit 4 hereto). The Commercial Service also notes that "investors may encounter government resistance to trimming the work force to an efficient level", although "absolute demands to maintain employment levels are fading." See Doing Business In Ukraine at Chapter 6 (available at http://www.bisnis.doc.gov/bisnis/country/ukraine.cfm) (Exhibit 1 hereto).

[42] 19 U.S.C. § 1677(18)(B)(iii).

place.[43] The Department noted, however, that areas of concern remain for foreign investors, in particular the reportedly burdensome and unpredictable arbitration and enforcement system, and the prohibition in Ukraine's Land Code of 1992 on foreigners owning land in Ukraine.[44]

In its May 10 Submission, the GOU asserted that Ukraine "has a legislative base for investment activity."[45] The May 10 Submission lists several pieces of apparently relevant legislation, and indeed, according to Ukrainian law, foreigners may wholly own and manage limited responsibility partnerships or joint-stock companies with the free repatriation of profits.[46] Relying on the existence of legislation alone, however, is misleading. Ukraine lacks thorough and effective enforcement mechanisms and a commitment to their transparent and even-handed use to create an environment conducive to foreign investment.

The lack of transparent and effective mechanisms upon which foreign investors can rely is perhaps best illustrated in the realm of privatization. Ukraine's history of privatization is characterized by corrupt insider dealing, with no better example being provided than the 2004 "privatization" of the sole respondent in this proceeding, Krivorozhstal. Krivorozhstal was sold in 2004 to a consortium owned in part by the son-in-law of then-President Leonid Kuchma, for a price widely acknowledged as being less than half the amount offered by a competing

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[43] See CTL Plate, 62 Fed. Reg. at 61,756.

[44] See CTL Plate, 62 Fed. Reg. at 61,746. By analyzing the foreign investment/joint venture element of Section 771(18) in terms of Ukraine's enforcement mechanisms and land ownership prohibitions, the Department tacitly acknowledged the important distinction between having laws on the books, and having the rule of law carried out in practice. This situation remains unchanged – while legislation may exist, in practice the protections afforded by the written law are not realized in practice.

[45] See May 10 Submission at 16.

[46] See Country Reports: Ukraine at 25 (available at www.lexis.com) (Exhibit 4 hereto).

consortium of foreign purchasers.[47] The GOU has invalidated the sale, and has scheduled a new "sale" for October 24, 2005.[48] These developments, while apparently warranted as a partial response to the rampant corruption involved in the initial transaction, raise obvious concerns regarding procedural regularity for foreign investors, whose ability to depend on the integrity and finality of business dealings is fundamentally undermined by such governmental behavior.

The GOU has provided no evidence that the dichotomy between laws on the books and actions in the marketplace has changed. Moreover, apart from the gap between Ukraine's legislative provisions and its economic reality, important legal conflicts exist. Specifically, certain fundamental provisions of Presidential Decree 32 contradict the provisions of Ukraine's Land Code.[49] For example, the Land Code does not include Ukrainian legal entities among those who have the right of land ownerships, while a number of Presidential Decrees envisage the right of ownership of land by Ukrainian legal entities. This conflict presents important issues for prospective foreign investors, and presents a clear opportunity for the influence of corruption and cronyism.

Many foreign companies remain wary of Ukraine's opaque legal system, bureaucratic rigidity, and omnipresent corruption and cronyism.[50] As discussed above, Ukraine is near the

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[47] See, e.g., Associated Press, Ukraine Holding Repeat Privatization Action (July 1, 2005) (available at www.forbes.com/home/feeds/ap/2005/07/01/ap2120430.html) (Exhibit 7 hereto).

[48] Thus, at this point the company technically is not a private entity and in fact is unquestionably wholly-owned and operated by the Government of Ukraine (e.g., it is not owned "by all the people").

[49] See U.S. Commercial Service, Ukraine Country Commercial Guide FY 2002 Ch. 7.B. (Investment Climate Statement: Right to Private Ownership and Establishment) ("The Land Code of Ukraine, adopted in 1992, regulates the ownership, use and disposition of rights and interests in land. The Code was adopted four years before the Constitution (1996) and is inconsistent with it in some of its provision.") (Exhibit 8 hereto).

[50] See Country Report: Ukraine at 25 (available at www.lexis.com) (Exhibit 4 hereto).

bottom of Transparency International's corruption index due to the high levels of corruption that exist – it was ranked the 128th most corrupt country (coming after Sudan and only slightly ahead of Iraq) out of 149 countries in Transparency International's year 2004 Corruption Perception Index.[51]

As the U.S. Commercial Service has noted, Ukraine has not yet attracted the levels of foreign investment enjoyed by neighboring Central European countries. "While macroeconomic successes and some economic reforms have improved the investment climate, issues of corruption, transparency, and rule of law have discouraged foreign investment."[52]

Opportunities to engage in joint ventures and other forms of foreign direct investment ("FDI") are hampered both by Ukraine's corruption and cronyism problems generally, and by specific manifestations of such problems in Ukraine's business regulatory environment. Enormous disincentives to FDI in Ukraine result from the country's most pressing economic problems, including slow privatization; little restructuring of industry; burdensome governmental systems; an inefficient judiciary; overregulation; and significant levels of corruption.[53]

The difficulty of doing business in Ukraine is compounded by a vague, arbitrary and intrusive taxation system, along with burdensome tax rates for entities who actually pay them.[54] [55] According to the Organization for Economic Cooperation and Development

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[51] See Transparency International, Corruption Perceptions Index 2004 (available at http://www.transparency.org/cpi/2004/cpi2004.en.html#cpi2004) (Exhibit 9 hereto).

[52] Doing Business In Ukraine at Chapter 6 (page 67 of 95) (available at http://www.bisnis.doc.gov/bisnis/ country/ukraine.cfm) (Exhibit 1 hereto).

[53] See, e.g., Organization for Economic Cooperation and Development, Legal Issues With Regard to Business Operations and Investment in Ukraine at 5 & 11-12 (Oct. 2004) (available at http://www.oecd.org/home/0,2987,en_2649_201185_1_1_1_1_1,00.html) (Exhibit 10 hereto).

[54] See Doing Business In Ukraine at Chapter 1 (page 3 of 95) (available at http://www.bisnis.doc.gov/ bisnis/country/ ukraine.cfm) (Exhibit 1 hereto).

("OECD"), Ukraine's tax system is "a primary obstacle to Ukraine's investment climate and promoting enterprise development."[56]

In sum, while the GOU asserts that joint ventures and FDI are facilitated by law and fostered in practice, Ukraine's reality is more complex and less encouraging. Laws and Presidential Decrees conflict, setting the stage for future government power struggles. Local governments act as they see fit, hindering the efficacy of laws that may be in effect. Foreign investors are generally advised not to conduct land transactions based on presidential decrees that contradict the Land Code and may be challenged in court.[57] The Department's analysis of this aspect of the GOU's request should consider the entire situation confronting the potential foreign direct investors, and determine that Ukraine continues to lack sufficiently developed, transparent, and reliable mechanisms and practices for joint ventures and FDI.

D. <u>The Extent Of Government Ownership Or Control Of The Means of Production</u>

In the 1997 <u>CTL Plate</u> determination to continue Ukraine's NME status, the Department found that

> the Government of Ukraine has made significant progress in privatizing state-owned business enterprises. However, privatization has proceeded unevenly thus far, with relatively rapid results in small-scale privatization and a slower pace for large-

(...continued)
[55] <u>See</u> Law of Ukraine, "On Taxation System," #77/97 (Feb. 18, 1997) (Exhibit 11 hereto).

[56] Organization for Economic Cooperation and Development, <u>Legal Issues With Regard to Business Operations and Investment in Ukraine</u> at 12 (Oct. 2004) (available at http://www.oecd.org/home/0,2987,en_2649_201185_1_1_1_1_1,00.html) (Exhibit 10 hereto).

[57] U.S. Commercial Service, <u>Ukraine Country Commercial Guide FY 2002</u> Ch. 7.B. (Investment Climate Statement: Right to Private Ownership and Establishment) (available at http://www.usatrade.gov/website/ccg.nsf/CCGurl/CCGUKRAINE2002-CH-7:-005A5913) (Exhibit 8 hereto).

> scale privatization, and much of the economy remains in the hands of the government.[58]

The Department identified specific areas of concern, including the GOU's designation of certain industries as being ineligible for privatization, prohibition on direct participation in privatization by foreign investors, and GOU's practice of only partially privatizing entities, while retaining significant government ownership interests.[59] Eight years later, Ukraine's experience with privatization remains highly corrupted and risky. While the Yushchenko Government has stated its commitment to addressing problems with privatization, it is still too soon to tell whether it will be successful in reversing the entrenched practices that characterize the GOU's privatization efforts. Indeed, nothing in the May 10 Submission provides evidence that the problems discussed below have changed.

As examples of its receptiveness to foreign investment, the GOU's May 10 Submission provides a listing of several examples of privatization. See May 10 Submission at 17. Omitted from this list, however, is a striking example of deliberate interference with foreign direct investment that occurred when the GOU "privatized" Krivorozhstal, the respondent in the proceeding. As discussed above, instead of accepting a bid from U.S. and Russian investors, the GOU sold Krivorozhstal to the son-in-law of former President Leonid Kuchma for a price that reputedly was less than half the competing offer. The Krivorozhstal sale is not the only example, though it is perhaps most relevant to this proceeding. Doing Business in Ukraine specifically

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[58] CTL Plate, 62 Fed. Reg. at 61,756.

[59] Id.

notes that "the privatization process is not very transparent" and that "Ukrainian, and sometimes Russian, business interests use the weak institutional setting to circumvent privatization rules."[60]

The Krivorozhstal example provides substantial evidence that Ukraine's privatization process and its FDI regime are the subject of substantial state manipulation and risk. Indeed, Ukraine's privatization process continues to suffer from the same problems identified in 1997. The U.S. Commercial Service's 2005 report on Doing Business in Ukraine highlights some of the problems:

> A transparent privatization law provides for the cash sale of majority shareholdings in a number of strategic enterprises, open bidding procedures, and the use of financial advisers to assist Ukraine's State Property Fund (SPF). In practice, however, the privatization process is not very transparent. Privatization rules apply to foreign and domestic investors, and, in theory, a relatively level playing field exists. Foreign participation in privatization is limited for certain "strategic" enterprises (radio, television, energy, and insurance). Foreign shares of TV and radio broadcasting and publishing companies generally may not exceed 30 percent. The Rada may lift legislative restrictions on foreign ownership in specific instances and has done so on occasion.
>
> Mass privatization of small- and medium-scale enterprises was completed in 1999. These enterprises, now in private hands, contribute significantly to economic growth. Lack of clear regulatory control limits the Government's ability to privatize attractive enterprises in several strategic sectors. Ukrainian, and sometimes Russian, business interests use the weak institutional setting to circumvent privatization rules. The year of Presidential elections - 2004, was marked by hasty privatizations of large enterprises, including a highly controversial privatization of Ukraine's largest steel mill Krivorozhstal, which clearly discriminated against foreign bidders.[61]

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[60] See Doing Business in Ukraine at Chapter 6 (page 68 of 95) (available at http://www.bisnis.doc.gov/bisnis/country/ukraine.cfm) (Exhibit 1 hereto).

[61] Doing Business in Ukraine at Chapter 6 (page 68 of 95) (available at http://www.bisnis.doc.gov/bisnis/country/ukraine.cfm) (Exhibit 1 hereto).

Even where Ukraine has succeeded in implementing its privatization program, the GOU retains significant if not controlling interests in the "privatized" entity.[62] This issue, which is identical to the concern identified by the Department in its 1997 determination, results in partly-privatized companies that effectively remain controlled by the GOU.

In addition to resulting in companies that remain effectively under government control, Ukraine's privatization program implementation has been extremely slow:

> Overall the pace of privatization has been slow, so that the State still retains a significant share of fixed assets in a number of major sectors including energy transport and distribution, mining, fishing and transport (especially rail transport). There is also the long-standing proposal for the government to sell a 43 per cent stake in Ukrtelecom. Furthermore, with the exception of some successful Russian investment, mainly in the oil refining and mobile telecoms sectors, Ukraine has failed to attract major strategic investors from the West.[63]

As with other areas of Ukraine's attempts to develop and implement market economy mechanisms, privatization has been affected by corruption and cronyism. While the GOU has taken some steps to reduce its control of the means of production, its efforts in this area are incomplete. The GOU retains significant control over companies that have been partly privatized, and internal political divisions indicate that the necessary steps towards a truly transparent system of privatization are not in the offing.

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[62] See, e.g., European Bank of Reconstruction and Development, Strategy For Ukraine 2005-2007 at 22 (available at http://www.ebrd.org/country/country/ukraine/ index.htm) (Exhibit 12 hereto).

[63] Id. (Exhibit 12 hereto).

E. The Extent Of Government Control Over Allocation Of Resources And Over The Price And Output Decisions Of Enterprises

In its 1997 CTL Plate decision, the Department determined that the GOU retained "significant control" over allocation of resources, pricing, and output decisions in Ukraine.[64] Specifically, the GOU can demand that state-owned enterprises like Krivorozhstal and enterprises deemed to be "monopolies" (whether state-owned, "privatized" or actually privately held) fill state orders.[65] The GOU also continued to set domestic prices in some areas of the Ukraine economy.[66]

There is no evidence on the record that these controls have been removed. Indeed, in its May 10 Submission, the GOU admits that price controls remain in place:

> State regulation of pricing is carried out in accordance with the Law of Ukraine "On Prices and Pricing" #507-XII of March 20, 1992; Regulations of the Cabinet of Ministers "On Establishing Powers of Executive Authorities and Executive Bodies of City Councils for Prices (Tariffs) Regulation" of December 25, 1996; "On the Rules of State Regulation of Prices (Tariffs) for Production and Technical Goods, consumer Goods, Works and Services of Monopolies" #135 of May 22, 1995 and "On Improvement of the Pricing Order" #1998 of December 18, 1998.
>
> * * *
>
> Prices and tariffs for products and services which are subject to state regulation are as follows: economically and socially important goods and services and those produced or provided by natural and artificial monopolies (tariffs for public utilities and electric energy for individual consumption; prices for fuel and energy resources for individual consumption; tariffs for transportation etc.).[67]

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[64] Id. (Exhibit 12 hereto).

[65] Id. (Exhibit 12 hereto).

[66] Id. (Exhibit 12 hereto).

[67] May 10 Submission at 29.

This is consistent with the assessment provided by the U.S. Commercial and Foreign Service and the State Department in the most recent edition of Doing Business in Ukraine:

> The Cabinet of Ministers of Ukraine has price-setting authority with products, goods, and services in certain sectors. These lists include basic tariffs (e.g. electricity, telecommunications, transportation, utilities), and some crucial products such as sugar, grain, gas, oil etc. Government regulated prices and tariffs may change as a result of changes in production and sale conditions.[68]

Based on their dates of enactment identified above, it is apparent that these provisions remain unchanged since 1997, and similarly support a determination that Ukraine remains a non-market economy country. These price controls result from the law "On Prices and Price Setting", which was considered in CTL Plate and which remains in effect today.[69] There is no indication in the May 10 Submission that changes have occurred, and thus there should be no change in the Department's analysis.

Additional evidence already on the record of the original investigation in this proceeding supports this conclusion. In its Section A questionnaire response during the original investigation, Krivorozhstal Iron & Steel Integrated Works ("Krivorozhstal") stated that "{e}xports of steel wire rod to the United States are subject to a price floor/indicative prices in response to the section 201 case on steel wire rod."[70] Krivorozhstal further stated that:

> as a result of the section 201 investigation on wire rod and to deter dumping, Ukrainian government has published indicative prices (essentially – minimal customs value) to optimize market factors consideration in pricing. These indicative prices serve to set a price floor so as to deter dumping investigations. The market pricing

[68] Doing Business in Ukraine at Chapter 3 (available at http://www.bisnis.doc.gov/bisnis/country/ukraine.cfm) (Exhibit 1 hereto).

[69] CTL Plate, 62 Fed. Reg. at 61,756 (citing the "Law on Prices").

[70] See Section A Questionnaire Response of Krivorozhstal Iron & Steel Integrated Works at 5 (Nov. 30, 2001) (Exhibit 13 hereto) (excerpts).

> procedures are monitored by the government for the exported goods subject or likely subject to antidumping duty investigations by foreign governments. This monitoring procedure is governed by the President of Ukraine Decree # 124/96 as of February 10, 1996.[71]

Decree # 124/96 grants the GOU authority to set indicative prices for the following goods: (a) exports of which, anti-dumping measures are applied or anti-dumping investigations and procedures have been initiated in Ukraine or abroad; (b) to which special import procedures are applied according to the Article 19 of the Law of Ukraine "On Foreign Economic Activity"; (c) regarding the export of which a regime of quotas and licensing is applied; (d) regarding the export of which, special regimes are applied; (e) the export of which is carried out according to the procedure in Article 20 of the Law of Ukraine "On Foreign Economic Activity"; (f) in other cases concerning the fulfillment of the international commitments of Ukraine.[72]

Ultimately, this decree grants the Government of Ukraine the authority to set indicative prices on virtually any product that the government deems necessary. Clearly, the GOU can easily become actively involved in setting prices in Ukraine for both the domestic market and the export market.

The importance of this ability to control allocation of resources, pricing, and output decisions has been previously noted by the Department. In its recent antidumping duty investigation of Certain Steel Concrete Reinforcing Bars ("Rebar") from Latvia, Inv. No. A-449-804, the Department noted that government control over production decisions and the allocation of resources has a critical impact on the allocation of capital – specifically, bank credit.[73] In

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[71] Id. at 6.

[72] See Decree of the President of Ukraine #124/96 (Exhibit 14 hereto).

[73] See Antidumping Duty Investigation of Certain Concrete Reinforcing Bars From Latvia - Request for Market Economy Status at 15 (Jan. 10, 2001).

Ukraine, where the central bank applies interventionist policies, and banks are severely undercapitalized,[74] ample challenges to rational capital allocation exist.

F. Corruption and Cronyism Characterize Ukraine's Political Economy and Provide a Critical Context for the Department's Analysis

The Ukrainian economy and society generally have been beset with chronic corruption that continues to cripple the country's ability to make a complete and successful transition to a market-based economy. Virtually every source of research available that discuses Ukraine's economy makes a point of discussing corruption's hugely negative effect on Ukraine's ability to shed its centrally-controlled past.

Recently-published statements from the U.S. & Foreign Commercial Service and U.S. Department of State provide a state description of the U.S. Government's conclusions concerning corruption in Ukraine:

> Corruption pervades all levels of society and government and all spheres of economic activity in Ukraine. On Transparency International's Year 2004 Corruption Perception Index, Ukraine ranked 122nd on the list of the 145 countries. Russia ranked 90th. The incoming President has declared reducing corruption as a top priority. Corruption stems from rampant conflicts of interest, a lack of institutional traditions of transparent decision-making and societal understanding of the importance of corporate governance and transparency. Low public sector salaries fuel corruption in local administrative bodies such as the highway police and tax administration as well as in the education system. Miniscule salaries in the medical system mean that the state guarantee of "free medical care" has been largely supplanted by a system of informal payments where patients are expected to make a "charitable donation" to receive treatment. High-level corruption ranges from misuse of government resources and money laundering to non-transparent privatization and procurement procedures.

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[74] See Country Reports: Ukraine at 22 (available at www.lexis.com) ("As capital is scarce, banks are severely undercapitalized and the number is expected to fall to 100 over the medium term before the sector reaches sustainability. All but two of the banks are owned by non-government entities, although the majority of larger banks remain order indirect state control.") (Exhibit 4 hereto).

> In short, corruption impacts the daily lives of Ukraine's citizens and important decisions taken at the state level.[75]

These sentiments are echoed by the United States Agency for International Development:

> Many studies, workshops, and conferences have stressed the impact of deficiencies in the institutional infrastructure on economic growth in Ukraine. Lagging structural reforms have prevented domestic and foreign investors from responding fully to the opportunities created by an expanding export sector, often fueling imports instead. Overregulation, excessive interference, corruption, and the failure to ensure adequate physical and economic infrastructure impose significant costs on enterprises competing in either domestic or international markets. The weaknesses and uncertainties affecting domestic market architectures comprise major stumbling blocks to the progress of Ukraine's WTO accession. Though there have been some gains on the structural reform front, much remains to be done to transform Ukraine into a resilient market economy.[76]

Another example can be found in recent publications of the OECD:

> The level of corruption in Ukraine remains high. While preparing a strategy to combat corruption in Ukraine is beyond the scope of this Project, the Roundtable participants nonetheless felt it necessary to emphasize that the problem of corruption in Ukraine damages the overall business climate and hinders enterprise development. To illustrate, one of the Roundtable participants offered an extremely disturbing description of how this Roundtable participant was at one point "invited" to meet with three government tax and law enforcement officials, who all demanded that the Roundtable participant's business pay more taxes – despite the fact that it was already up to date on all of the taxes it was required to pay by law.[77]

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[75] Doing Business In Ukraine Chapter 6 (available at http://www.bisnis.doc.gov/bisnis/country/ukraine.cfm) (Exhibit 1 hereto).

[76] USAID, Ukraine: Competing in the Global Economy, Strategies for Success at 7 (Jan. 2005) (available at http://www.usaid.kiev.ua) (Exhibit 15 hereto).

[77] Organisation for Economic Co-operation and Development, Legal Issues With Regard To Business Operations And Investment In Ukraine at 11 (available at http://www.oecd.org/home/0,2987,en_2649_201185_1_1_1_1_1,00.html) (Exhibit 10 hereto).

Moreover, the European Bank for Reconstruction and Development lists Ukraine's corruption problem first among the "most urgent transition challenges" that it identifies in its "Strategy For Ukraine 2005-2007".[78]

In short, considered analyses describe an evident consensus that corruption and cronyism continue to retard Ukraine's efforts to develop viable market economy institutions. These problems, and the extraordinarily negative affect they have had on its attempts to shed its past, set the stage for the Department's analysis in this review. Virtually all international ratings and investment climate surveys place Ukraine among the least advanced transition economies of the former Soviet states. Freedom House, a non-profit, non-partisan organization, leaves Ukraine's corruption rating for 2005 "unchanged at 5.75 {out of the worst score of 7} as the old corrupt government and the regional and local administrations remain in office till the end of the year."[79]

The importance of Ukraine's pervasive corruption extends beyond the pall it casts. When assessing whether Ukraine is a market economy, the Department must remain cognizant of the important distinction between legislation that may exist in a country, and the reality that confronts persons and businesses seeking to conduct trade using market principles of cost or pricing. The widespread corruption and cronyism that remain in Ukraine characterize a system in which market principles remain largely irrelevant. A system in which governmental officials willingly engage in favoritism, self-dealing, and intimidation as methods of influencing determinations in areas such as privatization, taxation, and the like, is a system in which market

[78] See EBRD, Strategy for Ukraine 2005-2007 at Executive Summary (available at http://www.ebrd.org/country/country/ukraine/ index.htm) (Exhibit 12 hereto).

[79] Nations in Transit 2005: Ukraine at 4 (Freedom House 2005) ("Nations in Transit") (available at http://www.freedomhouse.org/research/nattransit.htm) (Exhibit 16 hereto); see also id. at 22-24. Freedom House is a not-for-profit, non-partisan organization that prepare annual analyses of political and economic development in the 27 former Soviet communist states. Freedom House receives funding from USAID and major charitable private organizations.

principles of cost or pricing – even if given lip service – are not truly effective. While recent events in Ukrainian politics should be applauded, and may portend future advances toward a market economy, the legacy of Ukraine's Soviet and post-Soviet past continues to establish the framework in which the present analysis must occur.

III. CONCLUSION

The preceding analysis demonstrates that Ukraine remains a non-market economy. Research and analysis materials prepared by U.S. governmental and other governmental and non-governmental sources uniformly support same conclusions on all aspects of the Department's analysis order Section 771(18) of the Act. Importantly, the Government of Ukraine, the party in control of the most current, complete and accurate information concerning Ukraine's economy and legal system, has not provided any evidence showing that the economic legacy of Ukraine's past has changed enough to warrant designation as a market economy. On the strength of the evidence, and the failure of the GOU to provide any information to demonstrate that the findings made by the Department in 1997 have changed, Petitioners submit that the Department should determine that the preponderance of the evidence continues to show that Ukraine remains an NME.

Respectfully submitted,

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