INTRODUCTION

On behalf of Co-Steel Raritan, Inc., GS Industries, Keystone Consolidated Industries, Inc., and North Star Steel Texas, Inc. ("Petitioners"), this submission responds to the October 17, 2001 request by the Embassy of Ukraine (the "GOU NME Submission") that the Department revoke its designation under Section 771(18) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(18), that Ukraine is a non-market economy ("NME").[1] As discussed below, the preponderance and indeed the majority of the evidence available concerning Ukraine demonstrates that it does not yet possess a market economy.

EXECUTIVE SUMMARY

"After almost ten years of independence, reforms to establish a market economy under the rule of law are still in an embryonic state."[2]

Ukraine remains a non-market economy. Since the Department last considered 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. The impact of the 1998 Russian financial crisis and the continued presence of rampant corruption and cronyism have combined, with other factors, to retard Ukraine's efforts to shed its statist, centrally-controlled past.

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[1] The Embassy of Ukraine failed to serve Petitioners with the October 17, 2001 submission, contrary to the requirements of 19 C.F.R. § 351.303(f). Petitioners first learned that this document had been filed with the Department when told by a member of the Department's investigative team on November 26, 2001. A copy was provided to Petitioners' counsel on November 27, 2001

[2] Organization for Economic Cooperation and Development Directorate for Financial , Fiscal and Enterprise Affairs, Ukraine Investment Policy Review: The Legal and Institutional Regime for Investment: Assessment and Policy Recommendations at 9 ¶ 4 (Mar. 2001) (Exhibit 1 hereto) (available at http://www.oecd.org/pdf/M00004000/M00004571.pdf).

Ukraine's Economy is Characterized by Corruption and Cronyism

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).

The GOU Maintains Significant Currency Controls Rendering The UAH Insufficiently Convertible

As the Department found in its examination of the Ukrainian economy in 1997, the GOU still requires exporters to surrender 50 percent of hard currency earnings, requires citizens to deposit foreign currency returns into special banks, and places tight restrictions on the export of local currency. Licenses are required before persons 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.

The GOU Actively Interferes with Free Wages and Employment Negotiation

The GOU assigns wages to different occupations, thus making free wage negotiation impossible. The GOU regulates such things as the timing and location of wage payment, and maintains a program seeking full employment rather than freely negotiated wages. Ukraine's labor market is also hindered by high wage arrears and restrictions on labor mobility.

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 non-agricultural 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.

<u>The GOU Maintains Significant Ownership or Control of the Means of Production, Because Privatization Is Slow and Remains Incomplete</u>

Privatization in Ukraine has proceeded haltingly, and what privatization has occurred has usually been partial. The GOU retains significant ownership in most "privatized" companies. The single respondent in this investigation, Krivorozhstal, is wholly state-owned. Much of Ukraine's economy remains in the hands of the GOU. Like all aspects of Ukraine's attempts at economic liberalization, privatization has been plagued with cronyism and corruption, and Ukraine's "oligarchs" maneuver to seize control of Ukraine's businesses.

<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, the respondent in this investigation admits that exports of steel wire rod to the United States are subject to a price floor and must abide by GOU-set "indicative prices." Moreover, a complex and often opaque system of barter payments remains an important part of Ukraine's economy, even between Ukrainian state power utilities, their domestic customers and their Russian fuel suppliers.

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."[3] 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 other countries,

2. The extent to which wage rates in the foreign country are determined by free bargaining between labor and management,

3. The extent to which joint ventures or other investments by firms of other 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."[4]

B. Precedent

The Department has treated Ukraine as an NME in every proceeding to date.[5] The Department last undertook a substantive analysis of Ukraine's NME status in 1997, during the

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[3] 19 U.S.C. § 1677(18)(C)(i).

[4] 19 U.S.C. § 1677(18)(B)(vi).

[5] 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 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);

investigation of Certain Cut-to-Length Carbon Steel Plate From Ukraine, Inv. No. A-823-808 ("CTL Plate").[6] 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."[7]

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".[8] The Department noted that "much of the economy remains in the hands of the government . . .,"[9] and that even where industries were 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

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Notice of Final Determinations of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from Ukraine, 62 Fed. Reg. 61,754 (Nov. 19, 1997).

6 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).

7 CTL Plate, 62 Fed. Reg. at 61,755.

8 CTL Plate, 62 Fed. Reg. at 61,756.

9 Id.

ownership . . ..”[10] The Department also noted that the respondents in CTL Plate remained majority state-owned (though they were not wholly state-owned as Krivorozhstal appears to be).

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.”[11] [12]

II. THE PREPONDERANCE OF THE RECORD EVIDENCE DEMONSTRATES THAT UKRAINE’S NME STATUS SHOULD NOT BE REVOKED

Since the Department’s 1997 analysis in CTL Plate, 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, in the past four years Ukraine has made little progress towards a free market economy. Rampant corruption and cronyism and continuing legal and political difficulties have hindered and undercut its movement from a transitional economy to market economy.

A. The Corruption and Cronyism that Characterize Ukraine’s Political Economy Provide a Critical Context for the Department’s Analysis

Corruption and cronyism continue to retard Ukraine’s efforts to develop viable market economy institutions. These problems, and the extraordinarily negative impact they have had on

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10 Id.

11 Id.

12 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. The Department did not make a substantive analysis under section 771(18), however. The Department’s 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 outlined in section 771(B)(18) of the Act.” 66 Fed. Reg. at 50,404.

its attempts to shed its past, set the stage for the Department's inquiry. 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, categorizes Ukraine as a "parasitic authoritarian state" in the middle of the democratic market oriented countries.[13]

The extent and impact of corruption and cronyism in Ukraine have been documented by governmental and private sources. In the current Country Commercial Guide to Ukraine, the U.S. Commercial Service summarizes the present situation:

> Corruption in Ukraine includes both administrative "petty" corruption (bribes) and "state capture," where public officials are improperly enriching themselves through their position and leading firms or oligarchs use their political influence to secure favorable policy and legislation, court decisions, and central banking conditions. Corruption is ubiquitous and constitutes a major impediment to investment and business development.[14]

The U.S. Commercial Service analysis is compelling:

> Corruption acts a severe brake on investment. Ukraine consistently ranks among the most corrupt countries in Transparency International's annual review of transparency and corruption. A World Bank study published in 2000 ranked Ukraine among the worst Eastern European nations in terms of both administrative and state capture corruption. The World Bank defines administrative

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13 Adrian Karatnycky, Alexander J. Motyl, and Amanda Schnetzer, Eds., Nations in Transit 2001: Civil Society, Democracy, and Markets in East Central Europe and the Newly Independent States at 37 (Freedom House 2001) ("Nations in Transit") (Exhibit 2 hereto) (available at http://216.119.117.183/pdf_docs/research/nitransit/2001/04_ten_years.pdf). 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. See Exhibit 2 (http://216.119.117.183/aboutfh/ index.htm).

14 U.S. Commercial Service, Ukraine Country Commercial Guide FY 2002, Ch. 7.F. at 7 of 19 (Investment Climate Statement: Corruption) (Exhibit 3 hereto) (available at http://www.usatrade.gov/website/ccg.nsf/CCGurl/CCG-UKRAINE2002-CH-7:-005A5913.

> corruption as the taking of bribes and other illegal payments. In a 2000 business survey conducted by the International Financial Corporation (IFC), 100% of firms responding indicated that they had been compelled to pay unauthorized fees to obtain basic government services such as business permits, fire inspection reports, etc. An aggressive campaign instituted by the government of Ukraine to reduce over-regulation is leading to a decrease in administrative corruption but much remains to be done. * * * Many observers believe that state capture corruption represents a more severe threat to economic growth and foreign investment. The World Bank defines "state capture corruption" as occurring when politically influential individual or groups use their power to appropriate for themselves sections of the economy. In Ukraine, a group commonly referred to as "oligarchs" control a significant portion of the economy, particularly in the spheres of mass media, energy and heavy industries such as steel and chemicals. Many of these oligarchs enjoy immunity from prosecution thanks to their seats in the Rada (parliament).[15]

Indeed, Ukraine is tied for third in Transparency International's listing of most corrupt countries, due to the high levels of corruption that exist. Ukraine ranked 87 (tied with Azerbaijan) out of 90 countries in Transparency International's Year 2000 Corruption Perception Index.[16]

These problems, and their more salacious manifestations, have been well-documented throughout governmental and private sources. For instance, a widely-reported scandal involving the disappearance and murder of a Ukrainian reporter involved in publicizing governmental corruption has been publicized throughout the world, and serves as a stark reminder of the true nature of Ukraine's present economic reality.[17] Additionally, in late 2000, high-ranking officials

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[15] See U.S. Commercial Service, Ukraine Country Commercial Guide FY 2002 at Ch. 1 (Executive Summary) (Exhibit 4 hereto) (available at http://www.usatrade.gov/website/ccg.nsf/CCGurl/CCG-UKRAINE2002-CH-1:-005A4A32).

[16] See U.S. Commercial Service, Ukraine Country Commercial Guide FY 2002 at Ch 1 (Executive Summary) (Exhibit 4 hereto) (available at http://www.usatrade.gov/website/ccg.nsf/CCGurl/CCG-UKRAINE2002-CH-1:-005A4A32).

[17] See, i.e., Scheme and scandals in Ukraine, The Economist, Jan. 18, 2001 (Exhibit 5 hereto) (available at http://www.economist.com/displayStory.cfm?Story_ID=729969). See also

of Ukraine's principal energy producer, one the spouse of Ukraine's Deputy Prime Minister, were arrested on charges of embezzlement and fraud.[18] In June 2000, Ukraine's former Prime Minister was indicted in the United States for transferring $114 million in illegal kickbacks to the United States while in office, a small portion of the $880 million he is reputed to have "made" during his tenure in office.[19]

The corruption and cronyism affecting Ukraine have had significant consequences for its overall degree of economic liberalization. One study scores Ukraine's 2001 level of economic liberalization (an aggregate measure reflecting developments in privatization, macroeconomic policy, microeconomic policy, and social sector indicators) at 4.33. This measure is scored on a scale of 1 through 7, with 1 reflecting the greatest degree of economic liberalization and 7 the least. In 1997, the year when the Department last rejected the GOU's request for revocation of NME status, it scored 4.25.[20] On an aggregate basis, then, Ukraine has a lower degree of

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U.S. Commercial Service, Ukraine Country Commercial Guide FY 2002 at Ch. 1 (Executive Summary) ("The political unrest began in the fall of 2000 with the disappearance and subsequent confirmed death of a journalist, and with allegations of presidential involvement in the journalist's death. Preoccupation with the scandal and subsequent political infighting led to a virtual halt in the forward progress of reforms in many areas and even reversals in some.") (Exhibit 4 hereto) (available at http://www.usatrade.gov/Website/CCG.nsf/CCGurl/CCG-UKRAINE2002-CH-1:-005A4A32).

18 See, i.e., Nations in Transit at 400 (Exhibit 2 hereto) (available at http://216.119.117.183/pdf_docs/research/nitransit/2001/30_ukraine.pdf).

19 Nations in Transit at 400.

20 See Nations in Transit at 392 & 402-404. For perspective, Ukraine's score placed it 18th out of the 27 former Soviet states reviewed. Id. at 32. Importantly, Ukraine's economic liberalization score placed it significantly behind the other former Soviet states who the Department has decided have achieved market economies. Poland scored 1.67, Hungary scored 1.92, the Czech Republic scored 2.00, Slovenia scored 2.08, Latvia scored 2.50, and Slovakia scored 3.25. All of these countries were classified as "Consolidated Market" countries, whereas Ukraine was classified among the "Transitional Economies." Id.

economic liberalization now than it did when the Department last declined to revoke NME status.

The importance of these occurrences extends beyond the pall they cast. 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 principles of cost or pricing – even if given lip service – are not truly effective. While recent events in Ukrainian politics, including the appointment of a new prime minister whose administration voices bold plans of reform and economic development,[21] 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. THE SPECIFIC FACTORS CONSIDERED UNDER SECTION 771(18)(B) SUPPORT CONTINUATION OF UKRAINE'S NME STATUS

Within the context supplied by Ukraine's low degree of overall economic liberalization and the continued challenges of internal corruption and cronyism, analysis of the five factors specified in section 771(18) demonstrates that revocation of Ukraine's NME status is not warranted.

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[21] See, e.g., Ukraine's smooth new prime minister looks unlikely to stop the rot, The Economist, Aug. 11, 2001 (Exhibit 6 hereto) (available at http://www.economist.com/PrinterFriendly.cfm?Story_ID=729969).

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

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.[22] In its 1997 determination, the Department found that the UAH was not convertible outside the former Newly Independent States, and that the GOU required conversion of 50 percent of foreign currency earnings to be converted to UAH. The UAH thus was not fully convertible.[23]

The GOU makes a number of assertions to support its claim for currency convertibility, but importantly it does not present any information to demonstrate that circumstances described by the Department in 1997 have changed. In the present investigation, the GOU openly states in its request for revocation of NME status that the regulation requiring conversion of 50 percent of hard currency earnings is still in effect.[24] This and other stringent restrictions on foreign exchange earnings, coupled with the National Bank of Ukraine's ("NBU") frequent interventions in the foreign exchange market, provide substantial evidence that Ukraine continues to lack the level of currency convertibility required under section 771(18)(b)(i).

1. <u>The GOU's Hard Currency Surrender Requirements Are Inconsistent With A Market Economy</u>

Exporters in Ukraine are obligated by the GOU to surrender hard currency earned through their sales by converting 50 percent of such earnings to UAH. Indeed, the continued existence and enforcement of this regulation since the 1997 inquiry provides sufficient evidence

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22 19 U.S.C. § 1677(18)(B)(i).

23 <u>CTL Plate</u>, 62 Fed. Reg. at 61,755.

24 <u>See</u> <u>GOU NME Submission</u> at 2 ("In order to maintain the exchange market stability in Ukraine, there is a requirement for mandatory sale of 50 percent of exporters' foreign currency earnings.").

for the Department to find, without more, that Ukraine's currency remains not fully convertible. Even more troubling, however, is that this regulation did not exist when the UAH was introduced in 1996.[25] The Government of Ukraine's control over the convertibility of its national currency has therefore increased since its currency was introduced.

Other 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.[26] 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 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.[27] Additionally, the movement to liberalize currency exchange among Ukrainian

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25 Organization for Economic Cooperation and Development Directorate for Financial, Fiscal and Enterprise Affairs, Ukraine Investment Policy Review: The Legal and Institutional Regime for Investment: Assessment and Policy Recommendations at 22 (March 2001) (Exhibit 1 hereto) (available at http://www.oecd.org/pdf/M00004000/M00004571.pdf).

26 See Law of Ukraine, On the Procedure of Making Payments in Foreign Currency Art. 1 (Sept. 23, 1994) (Exhibit 7 hereto).

27 See PriceWaterhouseCoopers, New rules for moving currency across Ukrainian border (Oct. 2000) (Exhibit 8 hereto) (available at http://www.pwcglobal.com/ua/eng/ins-

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.[28]

The U.S. Commercial Service has noted the restrictions imposed by the GOU on foreign exchange convertibility in its 2002 Ukraine Country Commercial Guide. Specifically, licenses must be obtained from the NBU for almost any kind of foreign exchange transaction. Examples of these transactions include:

i) Using hard currency in Ukraine as a form of security;

ii) A Ukrainian resident opening a bank account abroad;

iii) A resident making an investment abroad, except in the event of inheritance, the acquisition of shares, or an ownership interest by a resident in a non-Ukrainian legal entity;

iv) A resident obtaining or granting loans in hard currency in excess of minimum levels established by the NBU; and

v) Making hard currency payments abroad from Ukraine.[29]

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 most recent revocation of NME status, in the course of its investigation of Certain Steel Concrete Reinforcing Bars from Latvia,

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sol/publ/taxaffairs/for/2000/10-00-02.html); Country Reports: Ukraine at 25 (Walden Publishing Ltd. 2001) (available at www.lexis.com) (Exhibit 9 hereto).

28 Country Reports: Ukraine at 25 (Exhibit 9 hereto).

29 See U.S. Commercial Service, Ukraine Country Commercial Guide FY 2002 Ch. 8.B. ("Trade and Project Financing: Foreign Exchange Controls") (Exhibit 10 hereto) (available at http://www.usatrade.gov/website/ccg.nsf/CCGurl/CCG-UKRAINE2002-CH-8:-005A5917).

Inv. No. A-449-804 ("Rebar from Latvia"), the Department noted that "there are no FOREX surrender requirements" in Latvia.[30] 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."[31] This finding was also made in the Department's revocation of NME status for the Czech Republic.[32]

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 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).

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[30] See Memorandum from Christopher Smith and Keir Whitson, Case Analysts, AD/CVD Enforcement II, Office 5, Through Holly Kuga, Deputy Assistant 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) (Exhibit 11 hereto).

[31] 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) (Exhibit 12 hereto).

[32] 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) (Exhibit 13 hereto).

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

In its October 17 submission, the Government of Ukraine acknowledges that the NBU "indirectly influences supply and demand on the foreign exchange market by using market mechanisms that are generally accepted in the world practice."[33] This vague statement deliberately downplays the NBU's intervention in the foreign exchange market, which has been frequent and sustained.

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."[34] The NBU's interventions were so troubling to the IMF that it emphasized the need of the NBU to "allow greater exchange rate flexibility if foreign exchange inflows continue, in order to attain the inflation target"[35] when identifying a short list of five "Issues stressed in the staff appraisal".[36]

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

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[33] GOU NME Submission at 5.

[34] 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) (Exhibit 14 hereto) (available at http://www.imf.org/external/pubs/ft/scr/2001/cr01216.pdf).

[35] Id. at 5.

[36] Id.

NBU."[37] 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."[38] 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.

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 U.S. Embassy Kiev, as published by the Department of Commerce's Business Information Service for the Newly Independent States ("BISNIS").[39] In its "Ukraine 2000 Investment Climate Statement," the U.S. Embassy Kiev cited these factors when describing Ukraine as one of the most difficult places to do business in Europe.[40] Moreover, the U.S. Embassy specifically underscores the issues discussed above in a warning to investors:

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37 Country Reports: Ukraine at 15 (Walden Publishing, Ltd. 2001) (Exhibit 9 hereto) (available at http://www.lexis.com).

38 Id. at 15.

39 See U.S. Department of Commerce, Business Information Service for the Newly Independent States ("BISNIS"), Area Reports: Ukraine (http://www.bisnis.doc.gov/bisnis/country/Ukraine.htm).

40 U.S. Embassy Kiev, Ukraine 2000 Investment Climate Statement at 1 (Aug. 22, 2000) (Exhibit 15 hereto) (available at http://www.bisnis.doc.gov/bisnis/country/000828investment_ua.htm).

> {E}nterprises with foreign investment are still required to convert half of their foreign currency revenues to national currency. Investors should be aware that such regulations change regularly and the NBU is sometimes forced to protect thin foreign currency reserves.[41]

Materials available from commercial research services 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."[42]

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 at this time.

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

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.[43]

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41 Id. at 4.

42 Country Reports: Ukraine at 25 (Walden Publishing, Ltd. 2001) (Exhibit 9 hereto) (available at http://www.lexis.com).

43 19 U.S.C. § 1677(18)(b)(ii).

In its 1997 decision the Department found that "with regard to wage rates and employment the government continues to be heavily involved."[44] 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."[45] Second, the Ministry of Labor of Ukraine uses job evaluation catalogs to establish job position criteria.[46] Third, all state-owned enterprises must base their employment decisions on these criteria, and privately-owned firms must establish their own regulations within this framework.[47] Lastly, the government determines the manner in which workers are paid and prosecutes violations by employers.[48]

These circumstances remain unchanged. The free negotiation of wages is still hindered by numerous 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"[49] reveals significant involvement by the GOU in all aspects of employment, and particularly in the negotiation of wages. For example, Article 6,

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44 See CTL Plate, 62 Fed. Reg. at 61,755.

45 Id.

46 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 (attached as Exhibit 16 hereto) (Law on Remuneration of Labor).

47 Id.

48 Id.

49 Id.

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.[50]

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 on Remuneration of Labor even goes so far as to designate the form, term, regularity and places in 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.[51] Similarly, Article 24 places limitations on all aspects of payment of wages.[52] In light of this evidence, the Department should conclude that wages are not determined by free negotiation between labor and management.

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[50] <u>Law on Remuneration of Labor</u> Art. 6.

[51] <u>Law on Remuneration of Labor</u> Art. 23.

[52] <u>Law on Remuneration of Labor</u> Art. 24.

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

The GOU's October 17 submission asserts that the state only provides for social protection of employees by establishing a minimum wage.[53] Evidence, however, shows that both government agencies and managers of enterprises continue to pursue employment, rather than maximization of efficiency or profit, as a central business goal.[54] This situation leads to an artificially influenced labor market in which managers and workers cannot negotiate wages that are economically appropriate. The U.S. Embassy in Kiev has noted that "slow movements on privatization and an unwillingness of larger enterprises to reduce staff have negatively affected the labor market's ability to respond to new market conditions."[55] 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.

3. Restrictions on Labor Mobility and an Increase in Wage Arrears for Workers Prevent Free Negotiation of Wages

A variety of other issues have prevented managers and workers from freely negotiating wages. The European Bank for Reconstruction and Development ("EBRD") identifies some of

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53 GOU NME Submission at 4.

54 See Ukraine Country Report at 26 (Walden Publishing Ltd. 2001) (Exhibit 9 hereto) (available at http://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.").

55 U.S. Embassy Kiev, Ukraine 2000 Investment Climate Statement, at 17 (Aug. 22, 2000) (Exhibit 15 hereto) (available at http://www.bisnis.doc.gov/bisnis/country/00828investment_09.htm). See also Walden Publishing, Country Reports: Ukraine at 26 ("central and in particular local authorities may intervene to prevent dismissals in sensitive areas, and many Ukrainian employers are reluctant to shed staff.") (Exhibit 9 hereto).

these factors in its publication, "Strategy for Ukraine."[56] According to the EBRD, poor working conditions, high wage arrears, low minimum wage levels and restrictions on labor mobility prevent the labor market from functioning smoothly.[57] In a situation in which the ability of workers to change jobs is eliminated by restrictions on labor mobility and it is impossible to know if workers will be paid on time, labor and management can not be able to freely negotiate to determine wages.

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."[58] 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 place.[59] 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.[60]

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56 See European Bank for Reconstruction and Development, Strategy for Ukraine at 36 (Exhibit 17 hereto) (available at http://www.ebrd.org/english/new/index.htm).

57 Id. at 36.

58 19 U.S.C. § 1677(18)(B)(iii).

59 See CTL Plate, 62 Fed. Reg. at 61,756.

60 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.

In its October 17 submission, the GOU asserted that "there is a vast legislative base that exists in Ukraine that regulates the foreign investors' activities."[61] Indeed, according to Ukrainian law, foreigners may wholly own and manage limited responsibility partnerships or joint-stock companies with the free repatriation of profits.[62] 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 GOU asserts that one major achievement since the Department's determination in Plate from Ukraine was the adoption of the Decree of the President of Ukraine of January 19, 1999, No. 32 "On Sale of Plots of Land for Nonagricultural Use."[63] This development, the GOU contends, indicates that "a foreign investor working in Ukraine that is recognized the legal person under Ukrainian law, can buy plots of land for nonagricultural use."[64] The essence of the Decree is that Ukrainian legal entities and citizens of Ukraine are given the right to purchase non-agricultural land, i.e., urban area land plots, provided, however, that they own real property located on the land they wish to purchase.[65]

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[61] See GOU NME Submission at 5.

[62] See Country Reports: Ukraine at 25 (Walden Publishing Ltd. 2001) (Exhibit 9 hereto) (available at http://www.lexis.com).

[63] GOU NME Submission at 6.

[64] GOU NME Submission at 6.

[65] See i.e., Teren Plus Real Estate Agency, Peter Hacket and Partners, Property Lawyers, "Land Issue: Recently Adopted Decree of the President of Ukraine Opens the Possibility for Foreign Companies and Individuals to Own Urban Land." (Exhibit 18 hereto) (available at http://www.teren.kiev.ua/articles/articles_16a.html).

The "Guidelines for Development and Regulation of Urban and other Non-Agricultural Land Markets" that accompany the law (but that were not included by the GOU in its submission) provide a telling review of the current state of Ukraine's land market:

> The process of privatization of non-agricultural land parcels accelerated significantly after the Decree of the President of Ukraine was issued dated the 19th of January 1999 No 32 "Sale of Non-Agricultural Land Parcels". * * *
>
> At the same time the process of formation of market land relations goes at a slow pace. In 8 years only 60% of citizens of Ukraine who obtained land parcels in use have privatized them. Three times the dead line for privatization was extended.
>
> In some regions, in particular, in a number of towns and villages bodies of local self-government ignore laws and Decrees by the President of Ukraine about privatization of land parcels, which prevents attraction of investment and credit resources to the country's economy, does not support entrepreneurship and residential construction, and interferes with stable development of urban areas. Only 3% of land parcels where privatized subjects of entrepreneurship are located are owned by the said subjects.[66]

The GOU's own findings, then, establish the fundamental difference between Ukraine's economic reality and its aspirational pronouncements.

The GOU has provided no evidence that this dichotomy 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

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[66] Decree No. 168/2000, "Guidelines for Development and Regulation of Urban and other Non-Agricultural Land Markets" accompanying Decree Of The President Of Ukraine "About the Measures to Develop and Regulate Urban and other Non-Agricultural Land Markets" (Exhibit 19 hereto) (available at http://www.commerciallaw.com.ua/archive_e.html) (emphasis added). The Commercial Law Center is "a 3-year, USAID-funded project managed by Deloitte Touche Tohmatsu Emerging Markets Ltd. The Center is dedicated to commercial law reform in Ukraine."

the provisions of Ukraine's Land Code.[67] For example, the Land Code does not include Ukrainian legal entities among those who have the right of land ownership, 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 to play decisive roles.

The legal conflicts associated with these measures apparently extend even to whether the Presidential Decree or the Land Code has supremacy. Local Ukrainian sources opine that the Land Code supercedes the Decree of the President, which would indicate fundamental uncertainty for any business seeking to rely on the Decree for investment purposes.[68] Assuming that the apparent legislative supremacy of the Land Code would be respected, the Presidential Decree 32 should have no effect to the extent that it conflicts with the Land Code. In that case, the actual degree of land ownership liberalization will be significantly decreased.

Many foreign companies remain wary of Ukraine's opaque legal system, bureaucratic rigidity, and omnipresent corruption and cronyism.[69] As discussed above, Ukraine is near the bottom of Transparency International's corruption index due to the high levels of corruption that

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67 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 provisions.") (Exhibit 3 hereto) (available at http://www.usatrade.gov/website/ccg.nsf/CCGurl/CCG-UKRAINE2002-CH--005A5930).

68 Teren Plus Real Estate Agency, Peter Hacket and Partners, Property Lawyers, "Land Issue: Recently Adopted Decree of the President of Ukraine Opens the Possibility for Foreign Companies and Individuals to Own Urban Land" (Exhibit 18 hereto) (available at http://www.teren.kiev.ua/articles/articles_16a.html).

69 See Country Report: Ukraine at 25 (Walden Publishing Ltd. 2001) (Exhibit 9 hereto) (available at www.lexis.com).

exist - it was ranked the third most corrupt country (tied with Azerbaijan) out of 90 countries in Transparency International's Year 2000 Corruption Perception Index.[70]

As the U.S. Commercial Service has noted, "{c}orruption and crime inhibit legitimate business activity and foreign investment in Ukraine. President Kuchma has declared the fight against organized crime one of the top priorities of his administration, but with little or no effect to date."[71]

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,[72] 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: slow privatization; little restructuring of industry; burdensome governmental systems; a narrow tax base; overregulation; significant levels of corruption; and a largely unreformed agricultural sector.[73]

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[70] See U.S. Commercial Service, Ukraine Country Commercial Guide FY 2002 at Ch. 1 (Executive Summary) (Exhibit 4 hereto) (available at http://www.usatrade.gov/website/ccg.nsf/CCGurl/CCG-UKRAINE2002-CH-1:-005A4A32).

[71] See U.S. Commercial Service, FY 2002 Country Commercial Guide: Ukraine, Chapter 3.B. (Political Environment: Major Political Issues Affecting the Business Climate) (Exhibit 20 hereto) (available at http://www.usatrade.gov/Website/CCG.nsf/CCGurl/CCG-UKRAINE2002-CH-3:-005A58F9.

[72] See, e.g., U.S. Commercial Service, FY 2002 Country Commercial Guide: Ukraine, Chapter 3.B. (Executive Summary) ("Corruption acts a severe brake on investment.") (Exhibit 20 hereto) (available at http://www.usatrade.gov/Website/CCG.nsf/CCGurl/CCG-UKRAINE2002-CH-3:-005A58F9).

[73] Organization for Economic Cooperation and Development Directorate for Financial , Fiscal and Enterprise Affairs, Ukraine Investment Policy Review: The Legal and Institutional Regime for Investment: Assessment and Policy Recommendations at 6 (March 2001) (Exhibit 1 hereto) (available at http://www.oecd.org/pdf/M00004000/M00004571.pdf).

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.[74] [75] According to the Organization for Economic Cooperation and Development ("OECD"), Ukraine's tax system "tops the list of investment disincentives in Ukraine and drives an increasing number of domestic business operators into its "shadow economy."[76] Ukraine's shadow economy continues to distort economic activity in Ukraine with over half of the Ukraine economy operating in this "informal" manner.[77] Other factors include corruption, un-restructured Soviet-era industrial and agricultural sectors, a narrow tax base and slow privatization as factors that inhibit foreign investment.[78]

The U.S. Department of Commerce's Business Information Service for the Newly Independent States ("BISNIS") noted that "although foreign direct investment has risen since

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[74] See U.S. Commercial Service, Ukraine Country Commercial Guide FY 2002 at Ch. 7.A. (Investment Climate Statement: Openness to Foreign Investment) (Exhibit 3 hereto) ("A survey conducted by the International Finance Corporation (IFC), entitled "Ukrainian Enterprises in 2000," revealed that firms of all sizes agree that taxation -- both the overall tax burden and the administration of the tax regime -- ranks as the most serious barrier to investment.") (available at http://www.usatrade.gov/website/ccg.nsf/CCGurl/CCG-UKRAINE2002-CH-7:-005A5913).

[75] See Law of Ukraine "On Taxation System," #77/97 (Feb. 18, 1997) (Exhibit 21 hereto).

[76] Organization for Economic Cooperation and Development Directorate for Financial , Fiscal and Enterprise Affairs, Ukraine Investment Policy Review: The Legal and Institutional Regime for Investment: Assessment and Policy Recommendations at 16 ¶42 (March 2001) (Exhibit 1 hereto) (available at http://www.oecd.org/pdf/M00004000/M00004571.pdf).

[77] Organization for Economic Cooperation and Development Directorate for Financial , Fiscal and Enterprise Affairs, Ukraine Investment Policy Review: The Legal and Institutional Regime for Investment: Assessment and Policy Recommendations at 16 ¶ 42 (Exhibit 1 hereto) (March 2001) (available at http://www.oecd.org/pdf/M00004000/M00004571.pdf).

[78] See U.S. Commercial Service, Ukraine Country Commercial Guide FY 2002 Ch. 7.A. (Investment Climate Statement: Openness to Foreign Investment) (Exhibit 3 hereto) (available at http://www.usatrade.gov/website/ccg.nsf/CCGurl/CCG-UKRAINE2002-CH-7:-005A5913).

independence, current levels fall short of fulfilling Ukraine's basic needs and pale in comparison to that of its Eastern and Central European neighbors."[79] For example, through January 2001, cumulative foreign direct investment ("FDI") raised USD 3.866 billion or about USD 78 per capita. During 2000, USD 792.2 million was invested in Ukraine, a 5 percent increase over 1999. For comparison purposes, however, annual FDI in Poland is nearly 10 times as high.[80]

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.[81] Private land ownership is fundamental to the existence of any market economy, yet this aspect of Ukraine's economy remains very much unsettled.[82] The Department's analysis of this aspect of the GOU's request should consider the entire situation confronting potential foreign direct investors, and determine

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79 U.S. Commercial Service, Ukraine Country Commercial Guide FY 2002 Ch. 7.A. (Investment Climate Statement; Openness to Foreign Investment) (Exhibit 3 hereto) (available at http://www.usatrade.gov/Website/CCG.nsf/CCGurl/CCG-UKRAINE2002-CH-7:-005A5913.

80 Id.

81 U.S. Commercial Service, Ukraine Country Commercial Guide FY 2002 Ch. 7.B. (Investment Climate Statement: Right to Private Ownership and Establishment) (Exhibit 3 hereto) (available at http://www.usatrade.gov/website/ccg.nsf/CCGurl/CCG-UKRAINE2002-CH-7:-005A5913).

82 See, e.g., Teren Plus Real Estate Agency, Land Issue: Recently Adopted Decree of the President of Ukraine Opens the Possibility for Foreign Companies and Individuals to Own Urban Land (Exhibit 18 hereto) ("That is why if an investor wishes to financially commit funds based upon the provisions of the Presidential Decrees, the investor should be either very careful, or better abstain from investing until the Ukrainian land legislation becomes more stable and concerted.") (available at http://www.teren.kiev.ua/articles/articles_16a.html).

that Ukraine continues to lack sufficiently developed, transparent, and reliable mechanisms and practices for joint ventures and FDI. [83]

D. The Extent Of Government Ownership Or Control Of The Means Of Production

In the 1997 CTL Plate 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-scale privatization, and much of the economy remains in the hands of the government.[84]

The Department specifically identified 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 the GOU's practice of only partially privatizing entities, while retaining significant government ownership interests.[85] Four years later, these circumstances remain essentially unchanged.

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83 As a result of the dismal business environment in Ukraine, a number of U.S. companies have recently departed from Ukraine. One notable example is that of Bristol-Meyers Squibb. The company stated that "BMS Corporate has taken a strategic decision to back away from those markets not offering high enough profit potential and focus resources on higher performing markets." See U.S. Department of State, FY2001 Country Commercial Guide: Ukraine, Ch. I. In addition, maritime management firm CERES-Ukraine left a joint venture with the Port of Odessa, citing reasons of differing management style. Id. While these reports do not refer to difficulties in Ukraine's FDI environment directly, the inference that such difficulties underlay the reasons cited for their departure may reasonably be drawn. Indeed, Bristol-Myers Squibb and CERES have demonstrated the lack of functional FDI institutions and mechanisms by "voting with their feet."

84 CTL Plate, 62 Fed. Reg. at 61,756.

85 Id.

The GOU asserts that since the Department's last review of Ukraine's NME status, "major changes have occurred in the sphere of privatization in Ukraine, including the conclusion of <<voucher privatization.>> The money-based privatization has begun with emphasis on privatizing the strategic enterprises or monopoly enterprises."[86] Specifically, the GOU asserts that "In its <<State Privatization Program for 2000 - 2002>>, the State Property Fund has set, as one of its major priorities, the privatization of enterprises having strategic importance for economy and security of the State or having monopoly status on the market by means of sale of such enterprises to industrial investors."[87]

As an initial matter, because both statements describe the GOU's privatization program as being "in process" and having goals not yet attained, it is evident that the same concerns identified by the Department in 1997 remain unchanged today.

Next, Ukraine's privatization process continues to suffer from the same problems identified in 1997. The U.S. Commercial Service's FY 2002 Country Report for Ukraine uses language very similar to that in the Department's CTL Plate determination to describe the present state of play:

> Privatization in Ukraine has proceeded unevenly thus far, with relatively rapid results in the small-scale privatization and a slower pace for large-scale privatization. While the reasons for delay are complex, factors include: an underdeveloped legislative base without clear, easily understood procedures for selling state property; the absence of political will to overcome strong resistance from local authorities and enterprise directors, parliamentary resistance; and a lack of clear incentives in the complicated privatization scheme. Privatization, for Ukrainian citizens as well as foreign investors, will remain a key variable that

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86 GOU NME Submission at 7-8.

87 GOU NME Submission at 8.

will shape Ukraine's success or failure in implementing market reforms.[88]

It should be noted that this pronouncement is made by a coordinate section of the Department of Commerce. Describing privatization as a "key variable that will shape Ukraine's success or failure in implementing market reforms" plainly implies that "market reforms" have not yet been implemented. This position is consistent with the Department's 1997 finding that Ukraine remains an NME.

Even where Ukraine has succeeded in implementing its privatization program, the GOU retains significant if not controlling interests in the "privatized" entity. 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. The Department of Commerce's BISNIS section has discussed this phenomenon:

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[88] U.S. Commercial Service, FY 2002 Country Commercial Guide: Ukraine at Ch. 2.C. (Economic Trends and Outlook: Government Role in the Economy) (Exhibit 22 hereto) (available at http://www.usatrade.gov/website/ccg.nsf/ShowCCG?OpenForm&Country=UKRAINE).

> The term "privatized enterprise" does not always mean that the company is actually privatized, according to the Ukrainian Center for Market Reforms. For example, the average privatized fraction of the companies' capital is 56 percent among medium and small enterprises privatized in 1992-1999. In the energy, metallurgy, chemical, and oil industry sectors, this portion is only 35 percent. Presently, the total charter capital of state companies is 54 percent of the total charter capital of all companies, whereas the total charter capital of privatized companies (with at least 70 percent of a company privatized) is 14 percent of the total charter capital of all companies. In 1999, the state still owned shares in 6,500 companies, or 58 percent of all incorporated companies.[89]

In addition to resulting in companies that remain effectively under government control, Ukraine's privatization program implementation has been extremely slow. According to the State Property Fund, 357 tenders were conducted in 1999. Of these tenders, only 45 privatization agreements had been made. The success rate was thus only 16.2 percent.[90] While small-scale privatization has been successful, privatization of larger size enterprises (including some of Ukraine's largest enterprises in metallurgy, chemicals and the energy sectors) has been slower.[91] This partly reflects opposition in the Ukrainian legislature (the Rada) to privatization, illustrating the political dimension of Ukraine's privatization problems. In terms of employed workers and value of output, more than half of the country's productive assets, including Krivorozhstal still

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[89] Andriy Ignatov, International Market Insight: The Overview Of Privatization In Ukraine (June 2000) (Exhibit 23 hereto) (available at http://www.bisnis.doc.gov/bisnis/country/000703privatiz-ua-jk.htm).

[90] See Andriy Ignatov, International Market Insight: The Overview of Privatization in Ukraine: June 2000 at 2 (Exhibit 23 hereto) (available at www.bisnis.doc.gov/bisnis/country/000703privatiz-ua-jk.htm).

[91] See European Bank for Reconstruction and Development, Strategy For Ukraine at 9 (Exhibit 17 hereto) (available at http://www.ebrd.org/english/new/index.htm).

remain in government hands.[92] Moreover, investors in Ukraine are extremely concerned over the transparency of the tendering system, corruption and inflexible labor and payment systems in state-owned industries, all of which have contributed to the reluctance of investors to buy into state enterprises.[93]

As with other areas of Ukraine's attempts to develop and implement market economy mechanisms, privatization has been affected by corruption and cronyism. In a recently-released report, the International Monetary Fund noted that Ukraine's 2001 privatization program has proceeded largely as planned, with the sale of six regional electricity distribution companies (oblenergos) being privatized in April in a transparent manner.[94] However, the IMF's report stated that, "the sale of several other high-profile enterprises has been marred by political disputes, bidders for a significant number of enterprises unable to be found, and further sales of oblenergos have been temporarily suspended pending an investigation of previous oblenergo sales."[95] Additionally, the report noted that the State Property Fund law, which would clarify the legal framework governing privatization, was adopted by the Rada in July 2001, but vetoed

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92 See U.S. Commercial Service, FY 2002 Country Commercial Guide: Ukraine at Ch. 2.C. (Economic Trends and Outlook: Government Role in the Economy) (Exhibit 22 hereto) (available at http://www.usatrade.gov/website/ccg.nsf/ShowCCG?OpenForm&Country=UKRAINE).

93 See Country Report: Ukraine at 15 (Walden Publishing Co. 2001) (Exhibit 9 hereto). (available at www.lexis.com)

94 See 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 13 (Nov. 2001) (Exhibit 14 hereto) (available at http://www.imf.org/external/pubs/ft/scr/2001/ cr01216.pdf).

95 Id.

by the President due to constitutional concerns whether the SPF would report to the legislative or executive branch of the government.[96] [97]

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. The U.S. Commercial Service's 2002 Country Commercial Guide aptly summarizes the situation:

> The IMF, the World Bank, the United States, and other donors have consistently delivered the same message to Ukraine during the past five years: in order to establish a market economy integrated into the European and world markets Ukraine needs to reduce the role of government in the economy, increase accountability and transparency while reducing corruption, establish the rule of law in all aspects of public life, and reduce the burdens placed on private enterprise.[98]

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96 Id.

97 One noteworthy example of the ongoing political dispute in Ukraine regarding privatization is the delay in the Rada of the privatization of the state-owned telecom giant, UkrTelecom. According to the U.S. Embassy in Kiev, four draft laws on privatization of UkrTelecom were submitted by the Government of Ukraine to the Rada. See U.S. Embassy Kiev, Update on the Privatization of Ukr Telecom (Feb. 1, 2000) (Exhibit 24 hereto) (available at http://www.bisnis.doc.gov/bisnis/country/000202telecom.htm). Moreover, Ukrainian government officials have continually announced plans to sell 25 percent of UkrTelecom shares and delegate management of the company to the investor who buys this 25 percent. Id. at ¶ 3. Under existing laws of sale, however, the sale cannot work without approval of the Rada. According to the latest reports, the government of Ukraine plans to sell a 49.9 percent in UkrTelecom in 2002. See BISNIS, State Property Funds of Ukraine Determines Companies to be Sold Next Year (Oct. 29, 2000) (Exhibit 25 hereto) (available at http://www.bisnis.doc.gov/bisnis/country/001205ukrspfpriv.htm). This will be a test of the government's ability and willingness to conduct transparent privatization. Whether or not the privatization of UkrTelecom will take place in 2002 is an open question given the government's previous attempts at privatization.

98 See U.S. Commercial Service: FY 2002 Country Commercial Guide: Ukraine, Chapter II (Major Trends and Outlook) (Exhibit 22 hereto) (available at http://www.usatrade.gov/website/ccg.nsf/CCGurl/ CCG-UKRAINE2002-CH-2:-005A58F2).

In this investigation, the single respondent itself is neither partly nor fully privatized. The most recent version of Iron and Steel Works of the World[99] lists Krivorozhstal as being owned by the Ministry of Industry of Ukraine.[100]

This is also clear from Krivorozhstal's Section A questionnaire responses, which stated that "Krivorozhstal is an independent, public-owned steel production and import and export company" located in Ukraine. Krivorozhstal AQR at 2. Scrutiny of this answer in light of the relevant GOU law indicates that Krivorozhstal is wholly state-owned. Article 2 of the law "On Enterprises In Ukraine" lists the types of enterprises permitted in Ukraine.[101] "Public-owned" enterprises appear to fall into the category "state enterprise based on public property, including 'exclusive state enterprises.'"[102] A footnote to that definition notes that the Ukrainian adjective used in the definition means "something solely possessed and controlled by the state."[103]

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.[104] Specifically, the GOU can demand that state-owned enterprises like Krivorozhstal and

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99 Henry Cooke, Ed., Iron and Steel Works of the World at 496 (Metal Bulletin Books Ltd. 1999).

100 Id.

101 See Law of Ukraine, "On Enterprises In Ukraine" No. 887-XII, Vidomosti Verkhovni Rady (VVR) (Bulletin of Supreme Rada), 1991, No. 24, art 272 at Art. 2 (Mar. 27, 1991) (Exhibit 26 hereto).

102 Id.

103 Id.

104 CTL Plate, 62 Fed. Reg. at 61,756.

enterprises deemed to be "monopolies" (whether state owned, "privatized" or actually privately held) fill state orders.[105] The GOU also continued to set domestic prices in come areas of the Ukrainian economy.[106]

In its October 17 submission, the GOU admits that price controls remain in place:

> State fixed and regulated prices and tariff shall be established for resources that have a defining influence on the overall level and dynamics of prices on goods and services having decisive social influence, as well as on products, goods and services whose production is concentrated on enterprises having monopolistic status on the market.[107]

It is apparent that these provisions remain unchanged since 1997:

> Article 4 of the Law <<On Prices and Price Setting>> stipulates a list of goods and services for which prices are regulated by the state bodies responsible for such regulation. In order to implement the provisions of this Article, Regulation of December 25, 1996 No. 1548 was adopted by the Cabinet of Ministers of Ukraine defining the authority of executive power bodies and municipal bodies to regulate prices (tariffs). In particular, the authority of such executive bodies as Ministry of Transportation, Ministry of Finance, National Electricity Regulation Commission is defined in the respect.[108]

It was exactly this law and its various implications that the Department considered in 1997.[109] There is no indication that changes have occurred, and thus there should be no change in the Department's analysis.

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105 Id.

106 Id.

107 GOU NME Submission at 10.

108 GOU NME Submission at 10 (emphasis added).

109 See CTL Plate, 62 Fed. Reg. at 61,756 (citing the "Law on Prices").

Additional evidence already on the record of this investigation supports this conclusion. In its Section A questionnaire response, 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."[110] 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 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.[111]

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.[112] Ultimately, this decree grants the Government of Ukraine the authority to set indicative prices on virtually any

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110 See Section A Questionnaire Response of Krivorozhstal Iron & Steel Integrated Works at 5 (Nov. 30, 2001).

111 Id. at 6.

112 See Decree of the President of Ukraine #124/96.

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.[113] In Ukraine, where the stock and corporate bond markets are underdeveloped, the central bank applies interventionist policies, and banks are severely undercapitalized,[114] ample challenges to rational capital allocation exist and significant concerns remain as to the long-term viability of private banks."[115]

Finally, due to the fact that both public and private liquidity are low in Ukraine, a multifaceted and often opaque system of barter payments has developed between the Ukrainian state power utilities, their domestic customers and their Russian fuel suppliers. Moreover, the IMF has warned that bringing payment discipline to the energy sector (i.e., obtaining cash payment in a timely manner) would be an essential prerequisite to the process of privatization in

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[113] See Antidumping Duty Investigation of Certain Concrete Reinforcing Bars From Latvia - Request for Market Economy Status at 15 (Jan. 10, 2001) (Exhibit 11 hereto).

[114] See Country Reports: Ukraine at 22 (Walden Publishing Ltd. 2001) (available at http://www.lexis.com) (Exhibit 9 hereto) ("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 under indirect state control.").

[115] See International Monetary Fund, Country Report No. 01/216, "Ukraine: Fifth and Sixth Reviews Under the Extended Arrangement - Staff Report; Staff Supplemental and News Brief and the Executive Board Discussion" (Nov. 2001) (Exhibit 14 hereto) (available at http://www.imf.org/external/ pubs/ft/scr/2001/cr01216.pdf).

the energy sector.[116] Again, this is clearly not an indicator of a market economy existing in Ukraine.

IV. CONCLUSION

Petitioners respectfully submit that the preceding analysis and the attached materials demonstrate conclusively that Ukraine remains a non-market economy. Research and analysis materials prepared by governmental and private sources uniformly support same conclusions on all aspects of the Department's analysis under Section 771(18) of the Act. 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 establishes that Ukraine remains an NME.

Please contact the undersigned with any questions that you may have.

Respectfully submitted,

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[116] See the International Monetary Fund Report at 6 (Exhibit 14 hereto) (available at http://www.imf.org/external/pubs/ft/scr/2001/cr01216.pdf).

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TABLE OF CONTENTS