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Initial Investigation

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The Hon. Donald Evans
Secretary of Commerce
U.S. Department Of Commerce
Attn: Import Administration
Central Records Unit, Room 1870
14th Street & Constitution Avenue, NW
Washington, DC 20230

Re: Respondent's Comments on the Market Economy Status of Ukraine in the Antidumping Investigation of Carbon and Certain Alloy Steel Wire Rod from Ukraine

Dear Secretary Evans:

On behalf of Krivorozhstal Iron & Steel Integrated Works ("Krivorozhstal"), a producer of carbon and certain alloy steel wire rod from Ukraine, we hereby respond to the December 21, 2001 submission of Co-Steel Raritan, Inc., GS Industries, Keystone Consolidated Industries, Inc., and North Star Texas, Inc. ("Petitioners") regarding certain comments of on the market economy status of Ukraine ("Petitioner's Comments").

I. INTRODUCTION

Ukraine has cast aside its state-planned economy and has fully graduated to market economy country status. Since gaining independence in 1991, Ukraine has struggled toward recognition as a market economy country. The final stage of this reform occurred in the years 1999-2001. Unlike some other post-socialist countries, historically speaking, Ukraine had no experience with independent Western-style macroeconomic and political management. Its political and economic system had to be established from the ground up and went through a series of political and social compromises. Nevertheless, most significant cornerstones of

Ukraine's market economy were laid in 1994-97, and the major course of reforms was completed in 2000. Moreover, there were strong indications of a maturing market economy itself in 2000-01.

Petitioners placed their main emphasis on the fact that "since the Department of Commerce last considered Ukraine's non-market economy ('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." This simply is not true, however, because much has changed since 1997, both in terms of the applicable laws of Ukraine and the business environment in general. Since then, Ukraine removed most government restrictions on trade and business activity, lifted barriers to foreign direct investment in areas previously closed to foreigners, and made significant progress in privatization and land reform.

More importantly, the Petitioners' statement is not corroborated by the wealth of economic data available on the topic. In 1999, economic stabilization became a reality. Declines in Gross Domestic Product ("GDP") were suspended and a pattern of sustainable economic growth over the past three years was achieved. Starting in 1999, manufacturing output grew by 4.3 percent. Manufacturing of consumable goods (+7.2 percent), including nonfood products (+10.2 percent), experienced major growth. An expansion of industrial output can be seen in 21 regions. Capital investment in fixed assets grew by 2.9 percent. Construction of housing grew by 7.5 percent. The budget deficit has substantially decreased from 6.6 percent of GDP in 1997 to 1.5 percent in 1999. Inflation has halted. The country has even experienced periods of deflation in 2001.

In addition, economic growth has followed this stabilization in 2000-01. These phenomena directly result from a program of major economic reforms that had its roots in 1992. Major achievements for the Ukrainian economy include low inflation, economic growth in the industrial and agricultural sectors, free floating of the national currency, growth in export and import trade, a low budget deficit, large-scale private sector activity in the economy, improvements in bad debt settlement, and judicial reform, to name just a few of the numerous measures introduced in Ukraine over past five years. On January 24, 2002, the well known rating agency Moody's graded Ukraine's foreign currency denominated bonds "B2" and its foreign currency denominated bank deposits "B3." Furthermore, Moody's noted that its "B2/B3" ratings and stable outlook reflect a sound monetary policy in Ukraine.¹

Similarly, in December 2001 Standard & Poor's upgraded Ukraine's currency risk rating (both foreign and domestic) to "B" and assessed its long-term outlook as "stable."² Japan's Nomura Securities, another respected rating agency, gave Ukraine a "BB+" rating for its international bond issue in 1998.³ Thus, Ukraine's success in building a market-based economy is clearly recognized worldwide by the private sector financial industry.

This economic stabilization and growth have been made possible through a program of restructuring for the private sector and an institutionalization of the infrastructure for a market economy. Importantly, the state is no longer in control of the industry and agriculture. The private sector in industry now accounts for 75 percent of total output; over 70 percent in the services sector; and, for agriculture, individual farms alone now account for over 66 percent of

total production.⁴ In actuality, all sectors of the economy show “points of growth” with the largest statistical figure of 23.6 percent in timber industry and least 7.8 percent in food industry.⁵ Moreover, the Parliament and the Cabinet of Ministries of Ukraine have passed certain laws permitting business agents to operate in a market-oriented economy. Moreover, the system for enforcement of laws is much more efficient than at the time of the Cut-to-Length Carbon Steel Plate from Ukraine⁶ (“CTL Plate”) decision cited in the Petitioners’ Comments.

Therefore, it is no great surprise that the Canadian Customs and Revenue Agency considered certain Ukrainian steel making industries to be operating under market economy conditions in 2001.⁷ Ukraine has also been removed from the list of non-market economy countries by the European Union and other countries.

Notwithstanding changes in Ukraine over the past five years, the petitioners have misstated certain facts about the economic, legal and political system of Ukraine, which could mislead the Department in making its findings regarding this issue. One of the petitioners’ major allegations is that corruption and cronyism dominate the Ukrainian political and economic system.⁸ However, most of the cited criminal allegations relate to the years 1994-96, when Ukraine was struggling to develop its principal strategies of economic reform—a period when large-scale privatization started and the clash of state-run and market factors in the economy were called into question.

More importantly, corruption and cronyism are irrelevant to a finding of whether a country can be considered a market-based economy. For example, Afghanistan, Iran, and Iraq are all considered market economy countries.⁹ In addition, Indonesia and India are considered market economy countries, even though Indonesia under General Mohamed Suharto was considered by many as the epitome of crony capitalism.

Although corruption and cronyism are irrelevant, since 1996, Ukraine clearly has modified substantially its economic and legal systems to fight corruption and separate market forces from political pressures. The Ukrainian Government has developed comprehensive and transparent national programs to fight corruption and cronyism. Privatization and integration with the global economy have also facilitated the fight against corruption from the standpoint of “political economy.”

Therefore, we respectfully request that the Department find that the Ukrainian economy has changed substantially in both structural and substantive ways to be differentiated from those countries the Department considers to have non-market economies.

II. LEGAL STANDARDS AND PRECEDENT

A. Legal Standard

The Department has a clear legal standard to apply in its determination. This standard involves a combination of five factors provided in Section 771(18) of the Tariff Act of 1930, 19 U.S.C. § 1677(18). Notwithstanding the petitioners’ allegations of corruption and cronyism, Respondents submit that the Department must base its decision on the economic status of

Ukraine—an inquiry that must take into consideration the actual economic, legal and statistical data of Ukraine, not mere allegations of an abstract nature.

19 U.S.C. § 1677(18) specifies six factors that the Department shall consider in determining whether a country is, or remains, a non-market economy, namely:

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;
5. the extent of government control over the allocation of resources and over the price and output decisions of enterprises; and,
6. such other factors as the administering authority considers appropriate.

The statements made by non-governmental organizations (“NGOs”) and business agents cited by the petitioners should be afforded little if any weight. We further submit that the persistent repetition of the phrase “corruption and cronyism” by the petitioners is not supported by any evidence. To the contrary, during recent years, Ukraine has enacted substantial legislation, which is effective today, to fight corruption including well publicized campaigns against allegations of corruption within the Ukrainian economic system and political “elite.”

In recent years, the following bills have been enacted into law in Ukraine:

- The Law of Ukraine “On Fight with Corruption,” No.356-95 BP, dated October 5, 1995;
- Decree of the President of Ukraine, No.1242/2000, dated November 16, 2000, “On Additional Measures as to Strengthening of the Fight with Corruption and Other Illicit Actions in Social and Economic Sphere and Ensuring of Economical Expenditure of the Governmental Funds”;
- Decree of the Cabinet of Ministers of Ukraine “On Approval of the Plan of Measures Aimed at Fight with Corruption for 2001,” No. 179-p, dated May 6, 2001; and,
- Concept of Fight with Corruption for 1998-2005, approved by the Decree of the President of Ukraine, No.367/98, dated April 24, 1998.¹⁰

All but one of these laws were enacted after 1997; and, therefore, the petitioners’ allegations that Ukraine has preserved the status quo in its political and economic systems in recent years are distorted and not supported by the evidence. Therefore, the Department should not accept allegations regarding “corruption and cronyism” with respect to the economic changes affected in Ukraine.

Of course, corruption and cronyism are found in all varieties of economic and political systems. By themselves, “corruption and cronyism” do not denote the market or non-market economy status of a particular country. Rather, the institutionalized system of corruption, prevention and punishment (and, perhaps, its transparency) may be considered in determining whether a country has a market versus non-market economy system.

Various measures introduced since 1996 have significantly improved the business climate in Ukraine, substantially eliminated corruption and cronyism in that country and vastly improved its economy. Unfortunately, in its transition to a democratic society and market economy, Ukraine has earned a litany of negative publicity. The Department should consider the fact that such negative publicity substantially impairs Ukraine's image from the viewpoint of global investors, businesses and governments alike that have no tangible experience with the business climate in the country. Moreover, as indicated above, corruption and cronyism should be of little significance in determining whether a country has a market or non-market economy. We remind the Department again of the example of Indonesia, which must be considered the epitome of "crony capitalism."

In addition to a series of measures fighting corruption, the last three successive Cabinets of Ministers in Ukraine (chief executive body in Ukraine)¹¹ have introduced extensive measures for market economy reforms. Moreover, independent statistical reporting provides a clear view of Ukraine's economic performance, which would not be available in a country mired in corruption and bribery.

Thus, Ukraine's market economy status is a matter of identifiable economic performance while allegations of corruption and cronyism should be simply irrelevant to the Department's determination.

B. Precedent

Previous decisions by the Department on the status of the Ukrainian economy are not binding upon it for the following reasons:

- The present Ukrainian economy closely mirrors the requirements established by the Department in previous determinations for countries in Eastern Europe that had their non-market economy status revoked;
- The Department's recent decision on the Ukrainian economy in 2001 included no substantive analysis and merely re-affirmed a prior determination due to a lapse of time for the submission of argument on the issue.

Ukraine has witnessed substantial economic changes since 1997 and has effectively implemented the principles of a market economy. Other nations have recognized these achievements. Since 1997, Canada has considered Ukraine a market economy country for the purposes of antidumping investigations.¹² The European Bank for Reconstruction and Development (EBRD)—well known for its expertise on transition economies—rates the Ukrainian economy at "3" for its liberalization of trade and foreign exchange. The EBRD's "4+" rating is the highest possible score.¹³

Most of the Petitioner's Comments relate to information taken from the Department's 1997 investigation on CTL Plate and do not reflect the current reality of the newly emerged state and market economy. Moreover, Ukraine has changed dramatically over the past five years and should now be considered a country with market based economy.

Of course, the Department is not required by law to follow its previous market economy status determinations if the proceedings have shown, to the Department satisfaction, that circumstances have changed sufficiently under the criteria provided by 19 U.S.C. § 1677(18). In fact, the Department should be consistent in applying such criteria and it should revoke the non-market economy status of Ukraine as it has done for other countries under similar circumstances. EBRD rankings demonstrate that Ukraine is much like Latvia—a former Soviet republic that the Department has graduated to market economy status.¹⁴

Although the Department reaffirmed Ukraine's NME status in October 2001,¹⁵ the Department did not make a substantive analysis under 19 U.S.C. §1677(18). Instead, due to an untimely submission, the Department merely relied on obsolete data and an analysis from 1997. Therefore, the recent determination cited in the Petitioners' Comments is not conclusive and should be reviewed on a substantive basis.

Therefore, the respondent submits that the precedent on Ukraine's market economy status is not binding upon the Department, and in accordance with Section 771(18) of the Tariff Act of 1930, should be reversed in light of the evidence presented herein.

III. THE RECORD EVIDENCE DEMONSTRATES THAT UKRAINE'S NME STATUS SHOULD BE REVOKED

Ukraine has undertaken a number of significant steps in distancing itself from a centrally planned economy, and the Ukrainian economy clearly is no longer controlled by the state. Since gaining its independence in 1991, Ukraine has implemented market-oriented legislation by copying legislative examples from countries in North America and Western Europe. In contrast to some other countries in Eastern and Central Europe, however, because Ukraine lacked experience with an independent democratic society and a market based economy, the development of these principles occurred gradually and in spite of some rather deep-rooted problems. These problems, most of which were noted in the Department's 1997 CTL Plate decision, have all been successfully resolved.

As of January 1, 2001, nearly 72,000 companies had been privatized and separated from state control.¹⁶ The process of privatization initially involved companies in the "consumption market" (e.g., shops, restaurants, public services, etc.). By 2001, however, major industrial companies had been privatized as well. Between 1997-2000, over 24,000 enterprises were privatized. There are now over 3.5 million people working in the private sector economy.¹⁷ The private sector industries that have employed largest numbers of people in 2000 include timber and paper processing with 80.6 percent total private employment, textiles with 79.2 percent, metallurgy with 77.7 percent, and food with 71.5 percent.¹⁸

In 1999, private companies accounted for more than 70 percent of the total production of industrial goods.¹⁹ The production share of privatized companies in the metallurgy and textile industries was 78 percent each; in the timber processing and paper and food industries, 73 percent each. The production share of privatized companies in overall production of chemicals, machine building, ferroalloys, glass and china, and construction materials range from 58 to 68 percent. For the oil, sugar, technological equipment for food industry, beer and tobacco

industries, privatized companies accounted for 90 to 99 percent of all production. In the tire and silk industries, privatized companies accounted for 100 percent of the production. In addition, the data show that private companies contributed more than 74.1 percent of tax payments in the state and local public funds.²⁰

The Ukrainian economy also has an established market infrastructure. In 2000, there were 203 commercial banks (including 28 with foreign participation, of which 6 are fully owned by the foreigners); 1,330 investment companies and funds; 2,250 auditing firms; 262 insurance companies; 365 stock, currency and commodity exchanges; and, 390 credit unions operating in Ukraine.²¹

One of the most dynamically developing areas of the Ukrainian economy has been international trade in goods and services. Total turnover in 2001 was equivalent to U.S. \$33.4 billion and exports as a share of Gross Domestic Product (“GDP”) grew from 26 to 53 percent over the 1993-99 period. Additionally, foreign direct investments increased from U.S. \$484 million in 1994 to U.S. \$3.9 billion in 2000.²²

The petitioners’ dismissal of the progress made by Ukraine towards a free market economy should not be given any weight. Because 19 U.S.C. § 1677(18) does not provide precise standards for differentiating economies in the process of transition to a market-based system, the respondent submits that evidence of market economy status should be considered in light of the experiences of other countries and previous decisions of the Department.

The respondents submit that the Ukrainian economy meets the terms of the criteria outlined by the Department in previous decisions regarding former centrally planned economies. Therefore, Ukraine’s non-market economy status should be revoked.

A. Evidence On The Record Demonstrates That The Rules And Procedures Of The Market Economy In Ukraine Should Be Considered Efficient

Ukrainian laws and their implementation are clear evidence of a transparent economic system with few problem areas. The Department’s decision on whether to graduate a country from non-market economy status must be based on the statutory factors, not merely allegations of corruption and cronyism, which are endemic in many developing market economy countries across the globe. The respondents submit that the Department should disregard the petitioners’ attempt to alter the legal standard applied in an NME status analysis.

Although the Department must consider additional factors in its determination, the arguments regarding such additional factors submitted by the petitioners are not supported by the evidence. The bulk of the petitioners’ evidence concern extracts from international ratings groups that do not explain the basis of the analysis or the criteria employed for their rankings. Therefore, the respondents request that the Department consider the petitioners’ arguments as unproved or, alternatively, as irrelevant to the issue of the market economy status of the metallurgical sector of the Ukrainian economy.

Moreover, it is apparent that the petitioners' submission conveniently omits any reference to recently adopted applicable laws employed to counter corruption and safeguard public institutions from cronyism in Ukraine. For example, competitive procedures are in place for the appointment of candidates for positions in public offices and civil service in Ukraine.²³ Corruption cases are high profile crimes punished according to Ukrainian and international law. Most of the economic sectors, including the metallurgical industry, are devoid of state control. Moreover, export trade, in particular trade in steel products, is not subject to state interference. Therefore, the issue of corruption or cronyism is irrelevant to Ukraine's market economy status.

As previously stated, section 771(18) of the Tariff Act of 1930, as amended, 19 U.S.C. §1677(18), includes five specific factors to be considered in determining the market status of the country. Although the provisions of the law permit the Department to take into account "such other factors as the administering authority considers appropriate,"²⁴ the Department should disregard corruption and cronyism, which are present in many market economy countries. Moreover, the petitioners' allegations of "corruption and cronyism" in Ukraine are not supported by sufficient evidence to establish a casual relationship between such charges and the graduation of Ukraine to market economy status.

IV. THE SPECIFIC FACTORS CONSIDERED UNDER SECTION 771(18)(B) DO NOT SUPPORT A CONTINUATION OF UKRAINE'S NME STATUS

A. The Extent To Which The Currency Of The Foreign Country Is Convertible Into The Currency Of Other Countries

Ukrainian currency has floated freely against other currencies since the second half of 1997. Since March 19, 1999, the official exchange rate of the Ukrainian hryvnia ("UAH") to U.S. dollars is based on information on market exchange rates that are formed on the inter-bank exchange market. The National Bank of Ukraine publishes the official rate for the currency, but this rate applies only the books of the companies. At the same time, the official rate is closely tied to the rate of inter-bank currency exchange, but not *vice versa*.

Clear evidence of this arrangement may be seen in the wake of the world economic crises that hit Ukraine in the Fall of 1998. Had Ukraine been a closed, state-controlled economy, it would have experienced no major impact from the external economic and financial difficulties. However, it is clear that Ukraine was severely affected by the wave of economic turmoil following the Asian and Russian financial crises. The impact on the Ukrainian economy was substantial. The Ukrainian hryvnia was devalued by about 65 percent within two months.²⁵ The impact of this economic turmoil continued into early 1999, lessening by years' end with signs of a global recovery.

Ukraine was found to be in compliance with its obligations under the Article VIII of the IMF Statute,²⁶ which the Department established as a *per se* threshold for meeting a current accounts convertibility under the requirements prescribed by 19 U.S.C § 1677(18).²⁷

1. The Government Of Ukraine's Hard Currency Surrender Requirements Should Not Be Considered As Inconsistent With Market Economy Status

Although there is a requirement in Ukraine for mandatory sale of 50 percent of foreign currency earnings to be converted into UAH, it was enacted only to maintain the stability of the exchange market.²⁸ The world economic crisis of 1998 negatively impacted perceptions of trust in the recently introduced Ukrainian currency held by investors and local businesses. During that period, the supply of hard currency in the exchange market dropped dramatically, and the U.S. dollar became artificially overvalued due to such shortages. The National Bank of Ukraine was forced to secure a supply of hard currency in the market in order to prevent speculative operations and drastic drops in Ukrainian equity and currency markets.²⁹

In spite of the currency conversion requirement, the current regulations provide for a number of exceptions to its implementation. First, individuals (*i.e.*, corporate or institutional bodies) are not subject to the conversion requirement. Second, foreign direct investment ("FDI") and re-investment (except for certain privatization payments) are not subject to the requirement. Thus, investments, loans and financing, fixed assets and capital, donations and grants, and other transaction proceeds may be set aside by beneficiaries without an obligation for conversion.³⁰ Third, all non-resident companies (*i.e.*, offices, branches, missions and representatives of foreign and international companies and organizations) are not required to sell their proceeds in foreign currency.

The Ukrainian Government has also significantly decreased its control over the convertibility of the national currency since its introduction in 1996, notwithstanding statement of the petitioners to the contrary.³¹ In 1999, a new law on the National Bank of Ukraine was implemented. The law revises and redefines the authority of the National Bank, restricting its authority to intervene and regulate certain aspects of the market.³² In addition, on September 24, 1996, Ukraine announced its acceptance of certain obligations under Article VIII of the IMF Statute. In particular, Ukraine agreed to prevent restrictions on current payments and disallow currency discrimination practices. To date, no other nation or institution has ever accused Ukraine of noncompliance with such obligations. Moreover, Ukraine is now in good standing with the IMF. In 1998, the Ukrainian Government signed a \$2.6 billion arrangement with IMF, of which U.S. \$1.6 billion is now in use. An additional payment of some U.S. \$380 million was approved in September 2001. Thus, the petitioners' allegations regarding noncompliance with certain obligations (*i.e.*, "increase of control over the currency exchange")³³ are unfounded. All foreign exchange regulation in Ukraine corresponds to the requirements stipulated by Article VIII of the IMF Statute. Therefore, Respondents submit that Ukraine's discharge of its obligations under Article VIII of the IMF Statute effectively results in the full convertibility of the national currency for current payments.

In rare and irregular instances, the National Bank of Ukraine has conditionally intervened with the currency exchange market. Such intervention is crisis driven only and is exclusively aimed at sustaining the viability of the Ukrainian currency in periods of market downturns. However, it must be noted that this practice is common to most developed market economy systems, such as Japan, Korea and other countries.

As to the petitioners' statement regarding "the law 'On the Procedure of Making Payments in Foreign Currency' that requires that citizens return in foreign currency be placed in an authorized bank within ninety days of receipt of payment,"³⁴ the respondents note that Article 1 of this law addresses export proceeds rather than foreign currency. Furthermore, references to an "authorized bank" indicates any bank duly authorized to handle foreign currency (*i.e.*, a bank possessing valid business license). In November 2001, 80 percent of the 200 banks operating in Ukraine possessed such business licenses permitting operations in foreign currency.³⁵

The objective of the law is to prevent money laundering and diversion of funds from the Ukrainian economy. In fact, export proceeds may remain on a company's accounts abroad or be held in cash. A company has only to report them in its tax return. This measure was introduced to secure the transparency of certain business transactions by companies that had previously attempted divert funds from the Ukrainian economy through the exportation of goods for fraudulent purposes. However, the requirement of depositing proceeds in an authorized bank is not related to export activity or foreign currency regulations. In fact, the requirement is relevant only to the regulation of cash transactions, and which has proven effective in the prevention of organized crime and corruption. Thus, the main purpose of this provision is to prevent money laundering and bribery.

Article 3 of the law provides that residents who purchase foreign currency through authorized banks in order to perform obligations in the name of non-residents are obliged to transfer such funds to non-residents within five working days of receipt in their own accounts. Thus, the petitioners' misinterpret Article 3 of the law.³⁶ There is no obligation for resident companies or individuals to transfer purchased foreign currency to local currency accounts, as stated in the Petitioners' Comments.

Accordingly, the respondents submit that the petitioners' assertions regarding deliberate governmental policies designed to influence currency flows are unsupported.

2. The National Bank Of Ukraine Has Never Undertaken Sustained Interventions In The Foreign Exchange Market

Intervention in the foreign exchange market by the National Bank of Ukraine's does not signal a lack of currency convertibility. As the Department knows, other market economy countries such as Japan frequently intervene in the foreign exchange market to stabilize their home currency.

In critical times, it is not uncommon for a central bank to intervene in foreign exchange markets for the limited purpose of maintaining national currency stability. As for the frequency of such interventions, there is no factual information on the record of this investigation to demonstrate that Ukraine's occasional interventions are outside the norm. In fact, the National Bank of Ukraine has received the praise of several Western organizations for its sustained and independent policies in the currency exchange market. Ukraine has never been accused of over-regulation. Moreover, the EBRD rates the Ukrainian economy at "3" for its liberalization of trade and foreign exchange. The EBRD's "4+" rating is the highest possible score.³⁷ Considering the relative youth of its financial system, it is noteworthy that Ukraine is meeting

the high standards set by international institutions such as the EBRD and the IMF. In addition, recent rankings from U.S.-based private sector rating agencies such as Moody's (January 2002) and Standard & Poor's (December 2001) underscore the sound nature of Ukrainian monetary policy and its improving scores for debt instruments.³⁸

Generally speaking, the free market determines the exchange rate in Ukraine. However, the National Bank of Ukraine does monitor the exchange rate and makes certain allowances for inflation.³⁹ Pursuant to Regulation No.50, dated July 8, 1993 ("On the Ukrainian Inter-bank Currency Exchange") ("UICE"), suggestions are prepared for the management of the National Bank of Ukraine regarding currency exchange rates. UICE provides the NBU with a daily report regarding currency auction results. Based on such results, the NBU establishes a currency exchange rate for Ukraine. Generally speaking, market principles and mechanisms are the basis for establishing the currency exchange rate in Ukraine.

The petitioners themselves admit that foreign investors are permitted to transfer revenues and proceeds in foreign currencies. Although the petitioners state that the Government of Ukraine regulates the exportation of local currency, the petitioners provide no evidence of an unfavorable exchange rate as a result. Additionally, the petitioners do not offer evidence to support the statement that the "movement to liberalize currency exchange among Ukrainian commercial banks has been reversed in recent years" and that "measures of this sort have become more restrictive since the introduction of the UAH."

Moreover, there are other indications of capital accounts convertibility. Direct investments, loans, fixed assets and capital, donations and grants, and certain other transactions are excluded from currency conversion obligations. Similarly, all non-resident companies (*i.e.*, offices, branches, missions and representatives of the foreign companies and organizations), are under no such obligation. Permission is not required for the purchase of capital or real estate abroad; nor is permission required to engage in a commercial relationship abroad. Ukrainian residents are required only to report such property in their tax returns.⁴⁰ Therefore, respondents submit that this is sufficient evidence of a capital accounts convertibility for purposes of granting market economy status.⁴¹

The petitioners state that "licenses must be obtained from the NBU for almost any kind of foreign exchange operation." However, the usual practice is that the NBU issues individual (for those operations mentioned in the Petitioners' Comments) and general licenses to effectuate currency transactions that are subject to licensing under the Ukrainian laws.⁴² Fully 80 percent of Ukrainian banks are licensed to conduct all operations in foreign currencies.⁴³

The NBU issues general licenses to commercial banks and other crediting and financial institutions on equal terms for both foreign and local currency operations. There are no additional requirements related to the convertibility of currency. Licensure is equally required and awarded for operations in both national and foreign currencies. Such licensing is designed to preventing "financial pyramids" or windfalls, which seriously impaired the Ukrainian financial markets in the early 1990s. Thus, business licenses are issued only as a means of preventing money laundering and financial fraud.⁴⁴ Licensing has nothing to do with the currency convertibility.

Ukrainian companies are required to inform the NBU about accounts held abroad in an effort to prevent money laundering and/or tax evasion. However, these practices should not be interpreted as restrictive, since most central banks attempt to maintain a balance of payments in their respective countries and require information of the same type sought by Ukraine. Such information is kept confidential and may be disclosed only upon a court order. Therefore, there is no governmental intervention in the field of foreign currency payments. A company's obligation to provide information has no impact on the convertibility of the Ukrainian hryvnia.

Having considered all of the applicable laws, the EBRD awarded Ukraine grade "3" and stated as follows:

The Ukrainian economy is characterized by removal of all quantitative and administrative import restrictions and almost full current account convertibility.⁴⁵

On the other hand, the petitioners' have referenced privately prepared reports in support of their argument.⁴⁶ The Ukrainian economy meets all of the criteria of U.S. trade law for purposes of market economy status. Although the respondents agree that exchange rate stability has a psychological importance for Ukrainian businesses, this fact cannot serve as legal basis for denying Ukraine market economy status. Therefore, the respondents submit that the NBU's occasional intervention in foreign exchange markets does not exceed the practices of central banks in most other market economy countries.

3. The Government of Ukraine's Exchange Rate Policies Do Not Affect Foreign Investment

There are no legal obstacles for foreign companies converting large amounts of currency through commercial banks. The petitioners' privately prepared reports from 2000 are now dated and provide little insight regarding the current convertibility of the UAH. And, while certain banks may have been short of cash or other assets to convert money at certain times, such a fact would be relevant only to the business community's choice of banking institution. It would not be relevant to an inquiry regarding the convertibility of Ukrainian currency. In fact, any shortages in Ukrainian currency on the foreign currency exchange may be accounted for by the recent large-scale privatization programs, where foreign investors attempted to convert substantial amounts of Ukrainian currency. Therefore, demand for hard currency was insufficient to meet foreign companies' expectations, which resulted in a decrease of hard currencies against the UAH.

In fact, as previously stated, there is no requirement to convert FDI or re-investments (except for certain privatization payments) into local currency. In addition, investments, loans and financing, fixed assets and capital, donations and grants, and certain other proceeds, may be kept by beneficiaries without obligation to sell them at the market.⁴⁷ Similarly, non-resident companies (i.e., offices, branches, missions and representatives of the foreign companies and organizations), are exempt from requirements to sell their proceeds in foreign currencies. Nor is permission required to purchase capital or real estate abroad. Ukrainian residents are required only to report such property in their tax returns.

Therefore, the respondents submit that this evidence is sufficient to establish the convertibility of capital accounts for the purpose of obtaining market economy status. Accordingly, Ukrainian currency is fully convertible for both current and capital account purposes, as previously held by the Department⁴⁸.

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

1. The Labor Laws Of Ukraine “On Remuneration Of Labor” Do Not Result In State Interference In The Labor Market

Ukrainian law and its enforcement provide a reliable framework for labor mobility and flexible conditions for wage rates determined by a process of free bargaining between labor and management.

As of 2000, over 3.5 million people were employed in the non-state sector of the Ukrainian economy. However, this figure is understated, as it does not account for small enterprises.⁴⁹ The largest number of employees involved in manufacturing are those working at privatized companies in industries such as timber processing and paper (80.6 percent), textiles (79.2 percent), metallurgy (77.7 percent) and food (71.5 percent).⁵⁰ The Ukrainian Government provides only a safety net for the unemployed and creates various incentives to raise the standards of its workforce.

The Law of Ukraine “On Enterprises in Ukraine,” dated March 21, 1991, indicates that collective bargaining should be practiced at all enterprises that employ a workforce. The collective bargaining process exists between the business owner or its authorized body and a workers’ collective or its authorized body, and may not contradict applicable Ukrainian law.⁵¹

The Law of Ukraine “On Collective Bargaining and Agreements,” dated July 1, 1993, determines legal grounds for drafting, entering and fulfilling collective bargaining in order to facilitate regulation of labor relations and the socioeconomic interests of employees and owners.⁵² The collective bargaining process determines the mutual obligations of the parties regarding regulation of production and socioeconomic relations. More particularly, it provides for:

- Changes in organization of production and labor;
- Provision of labor efficiency;
- Norms and labor payment, establishment of the form, system and amount of remuneration and other types of labor payments (additional payments, bonuses, etc.);
- Establishment of guarantees, compensations and benefits);
- Labor routine and hours; and,
- Labor conditions and protection.

Moreover, the Law of Ukraine “On the Ways of the Collective Labor Disputes (Conflicts) Settlement,” dated March 3, 1998, prescribes the framework for settlement of collective labor disputes.⁵³ The law provides principles and major forms for settlements, redefines rules for labor strikes, and sets out settlement bodies for disputes.

Employers are encouraged to assemble and establish employers' associations⁵⁴ to coordinate the negotiation of wages rates, whether on the national, sectoral or regional level. Were the wage rate to be determined by the Ukrainian Government, there would be no need for these associations and their activities. In fact, employers are encouraged to communicate with the Ukrainian Government and their employees, and participate in labor policy formation on the national, local and sectoral levels.⁵⁵

The petitioners allege that the state interferes with wage rate determinations. However, their statement is based solely on the Law of Ukraine, "On Remuneration of Labor," dated March 24, 1995. A comprehensive analysis of the other legislative acts in Ukraine establishes the fact that the petitioners' statement is incorrect.

The Law of Ukraine "On Remuneration of Labor," dated March 24, 1995, does not set wages. The law merely sets several frameworks for their development, much like the minimum wage law and other labor laws in the United States. Although Article 6 of the law deals with the "Tariff Rate System of Remuneration of Labor," it provides that tariff rate tables, tariff rates, salary schedules, and job evaluation catalogs form the basis for labor remuneration. Each of these factors may be recommended to achieve coherence in the payroll and social benefits system, however, they are not mandatory requirements. The Government of Ukraine only sets wages for public offices and government-controlled "kazenne" enterprises. In the Law of Ukraine "On Remuneration of Labor," the Government of Ukraine provides for minimal salaries, much like the minimum wage requirements in U.S. law. This mechanism is the Government's social guarantee with its citizenry and is mandatory on the whole territory of Ukraine for all type of businesses.⁵⁶ In fact, minimum wage standards are a common regulatory measure found in countries with market economies, since these directives provide a government the ability to control non-discrimination in labor payments and set standards of consumption.

Unlike general minimal salary requirements, minimal wages for a particular sector of the economy are determined through negotiations between employers' associations and trade unions (workers' collectives). Private companies and public-owned enterprises (including Krivorozhstal) set their salaries freely by means of a collective agreement between the workers' collective and management as a result free bargaining and are subject only to the minimal salary set by law.⁵⁷ Regarding the petitioners' reference to Articles 23 and 24 of the Law of Ukraine "On Remuneration of Labor," Article 23 states that the salary of employees on the territory of Ukraine is paid in currency that circulates legally in Ukraine. This is the normal practice of any country. Payment of salaries in the form of promissory notes and other debt documents is prohibited. Such prohibition is designated for protection of employees' rights only. At the same time, salaries can be paid by bank checks under the procedures established by the Cabinet of Ministers of Ukraine upon agreement with the National Bank of Ukraine.

Article 24 of the Law of Ukraine "On Remuneration of Labor" places no limitation on the payment of wages. This article simply provides that salaries are to be paid to employees regularly, within terms established by the collective bargaining agreement. As to the place of payment, Article 24 requires only that it be paid at the place of employment. At the same time, upon the request of an employee, payment of salary can be made through banks to the indicated account or address.⁵⁸

Thus, the laws of Ukraine provide a reliable framework for bargaining between management and labor and do not interfere in the determination of wage rates. The Government of Ukraine does not intervene with the collective bargaining process of management and labor, and all disputes are decided according to the legal remedies prescribed by the laws of Ukraine.

2. There Are No Restrictions On Labor Mobility In Ukraine That Prevent Free Negotiation Of Wages

Ukraine complies with its international obligations concerning free termination of employment contracts and timely payment of worker compensation and salary. Ukraine has acceded to a number of International Labor Organization instruments that deal with issues of the employment termination, timely payment of wages, and abolition of compulsory labor.⁵⁹ Ukraine complies with such obligations and reports to these international organizations as required by the language implementing these instruments.

The laws of Ukraine allow company management to dismiss workers provided that there are minimal provisions made for social safety. There is no policy that prevents or discourages companies from restructuring staff. To the contrary, the Government of Ukraine strives to make unemployment more transparent, so that it will be more manageable. In the course of the labor market reform in 1993-95, Ukraine adopted a number of acts that regulate unemployment and encourage labor mobility. The state and private sectors created a sophisticated network of employment centers, training opportunities, and educational courses. The state budget also provides for social security for temporarily unemployed people. The labor market infrastructure is efficient in placing qualified personnel in Ukraine as well as abroad. In this light, the petitioners' statement that the Government of Ukraine and Managers of Enterprise (not specified in the submission) distort the labor market pursuing employment over profit as a chief goal of business activity can only be viewed as misleading.

It is true that in some instances, large enterprises have had difficulty paying salaries and that some wage arrears were created. However, this was only the case at the large state-owned enterprises, which were not able to pay wages out of cash reserves but had sufficient fixed assets to guarantee their debt. A number of judgments were entered in court and effectively enforced against such companies. The other wage arrears case reported by the petitioners relates to pensions, civil service and other public sector not-for-profit institutions such as universities, schools, and hospitals. As this area remains largely owned by the state, the settlements were achieved by the means of a collective dispute resolution. Currently there are no delays in the payment of wages in this sector.⁶⁰

As a corollary, constitutional documents of every enterprise, whether private or public owned, stipulate that "the Enterprise is being established with the aim of gaining profit through production and entrepreneurial activities." Thus, the business practice is profit oriented and in recent years, many employees were laid off in public-owned enterprises, in particular in the coal and metal sectors.

The labor market in Ukraine is free from governmental restrictions. The petitioners have provided argument but not any evidence to support the position that the Ukrainian Government distorts the labor market in Ukraine.

In fact, there are no restrictions on labor mobility in Ukraine. Certainly the petitioners have not provided any examples of such restrictions in their submission. In fact, all persons in Ukraine are free to choose his or her occupation and negotiate his or her wages, except in cases involving government-controlled enterprises. An employee has the right to terminate employment made for indefinite periods by giving notice to the owner or its authorized body.⁶¹ Moreover, an employee has the right to terminate employment at will if the owner or its authorized body does not fulfill its requirements under applicable labor laws or the terms of the collective bargaining or labor agreement in place.⁶² Thus, there is no restriction of labor mobility in Ukraine.

Under Ukrainian law, the accumulation of certain wage is a misdemeanor, punishable by the criminal courts.⁶³ Moreover, the civil courts of Ukraine have effectively enforced judgments against employers creating wage arrears. As documented by the U.S. Commercial Service, wage and pension arrears were drastically reduced in 2000, and certain arrears have been completely eliminated in many sectors of the Ukrainian economy.⁶⁴

Therefore, there is no distortion of the labor market in Ukraine. The labor market operates on free market principles and collective bargaining processes between labor and management fix wage rates.

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

Ukraine applies principles of national treatment to foreign investors and has been able to attract significant amount of FDI in the last two years. In fact, the Department has previously determined that Ukraine is generally considered to be open to foreign investors.⁶⁵ Moreover, since 1997, Ukraine has made its legislation and enforcement procedures more transparent. A large number of the foreign companies have opened sales offices or subsidiaries in Ukraine. Large numbers of joint ventures have been established in virtually every sector of the economy. To this day, foreign companies successfully participate in the acquisition and privatization of Ukrainian companies on a non-discriminatory basis.

In 2001, Ukrainian bonds returned more than 60 percent to investors, making them the some of the best emerging markets bond investment available today. Capital markets in Ukraine are being "internationalized." The World Bank has committed almost U.S. \$3 billion (and has already disbursed about U.S. \$2.2 billion) to projects in Ukraine (mostly in the energy, mining, agriculture, finance, and private sectors) since 1992. As of June 2001, the EBRD had approved 45 projects in Ukraine (34 of which are in the private sector) worth some €1.2 billion (U.S. \$1.1 billion). This figure excludes what would be the largest project for the construction of a highly controversial nuclear power plant.⁶⁶

In 1997, the Department concluded that Ukraine is open to foreign investment and that the necessary supporting legislation is in place.⁶⁷ Examples cited by the petitioners in their section on investment do not demonstrate that Ukraine is a hostile to foreign investments. As indicated by independent observers, “Ukraine’s image as bereft of Foreign Direct Investment is false. Moreover, about 80 percent of all FDI in Ukraine is Western—not Russian.”⁶⁸

Since 1997, Ukraine has lifted restrictions on FDI in the telecommunications, banking and insurance service sectors. Also, since 1997, Ukraine has improved basic telecommunications infrastructure and introduced modem-operating standards—key fundamentals for the development of modem telecommunications systems. A number of foreign telecommunications companies are active in Ukraine as made clear by several foreign experts in the media.⁶⁹

Contrary to the allegations made by the petitioners, large joint ventures were created in the space, telecommunications, and automotive industries, among others. Unilever, Coca-Cola, Cargill and other large multinational companies have developed production facilities using vast tracts of land. The New Land Code of Ukraine, adopted in 2001, permits foreign companies and individuals to own Ukrainian land.⁷⁰ Thus, the comments of the petitioners concerning the ownership of land have no factual basis.

The U.S. Commercial Service, among others bodies, provides the following success stories of FDI in Ukraine:

In 1997, McDonald’s opened its first restaurant in Ukraine (in Kyiv). By June 2000, the company had invested about \$70 million in building restaurants and developing local production infrastructure. Currently, it operates 37 restaurants in 13 major Ukrainian cities (Kyiv, Kharkiv, Odessa, Dnipropetrovsk, Donetsk, Lviv, Mykolajiv, Kryvyj Rig, Sumy, Chernigiv, Cherkasy, Simferopol, and Zaporizhya). The company employs around 2,000 people. About 35 percent of the products used in McDonald’s restaurants are made in Ukraine. Soon nearly 90 percent of McDonald’s products will be made from Ukrainian foodstuffs (buns will come from a bakery in Dnipropetrovsk, meat will be produced in Vinnitsa region, ketchup will be made in Kherson, and so on). McDonald’s has donated over \$2.5 million to various projects of social importance.

Cargill has opened a \$50 million sunflower seed processing plant near Donetsk. Here domestically produced sunflower seeds are crushed for use in oil, food and soaps. Cargill began its activities in Ukraine in 1991 with a corn research institute in Dnipropetrovsk. In 1994, the company started merchandising grain, oilseeds, petroleum, steel, sugar, fruit juice concentrate and cocoa, and from 1995 to 1997 they were involved in warehousing

and fertilizer blending. In 1999 the company bought its first grain elevator, and bought shares in a second one.

Tetra Laval, the Swedish food processing and packaging equipment manufacturer, is one foreign company that has been successful in selling food-processing and packaging equipment in Ukraine. The company has been aggressively pursuing business opportunities in countries of the former Soviet Union since 1991 and has its own office building in Kyiv, located next to their packaging materials factory. Tetra Laval manufactures and sells a wide range of equipment, but has been most successful selling packaging equipment for liquids (milk and juices).⁷¹

These stories speak for themselves and provide substantiated refutation for allegations of Ukraine's hostility to foreign capital.

Despite the allegations of the petitioners to the contrary, since 1997, Ukraine has vastly improved its legal system for the protection and enhancement of foreign investments. Ukraine joined the Washington Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of Other States and acceded to the Multilateral Investment Guarantee Agency ("MIGA").⁷² Ukraine has also entered into numerous bilateral agreements with different countries in order to assist and mutually protect foreign investments.⁷³

In terms of its enforcement of laws, Ukraine has established a conciliatory body on foreign investments with the Office of the President (the body involves major foreign investors to set up the policy for the treatment of foreign investments in Ukraine).⁷⁴ Moreover, Ukraine has established facilitating and mediating bodies to settle investment conflicts as an alternative to time-consuming litigation.

The tax system in Ukraine has significantly improved since 1997 with respect to foreign investors. A number of foreign investors and joint ventures with preferred tax status were able to recover their tax and customs duties arrears in the Ukrainian courts between 1996-2001. The Supreme Court of Ukraine and the Supreme Economic Court of Ukraine have consistently affirmed the benefits and privileges of the foreign-owned companies provided by Ukrainian legislation.

According to the State Statistics Committee of Ukraine, annual inflow of FDI increased more than 21 percent to U.S. \$922 million from 1997-98. As a corollary, according to the JP Morgan Investment Report, Ukraine had the highest return on direct investments in Central and Eastern Europe—57.1 percent in 2001.⁷⁵ Thus, Ukraine has developed an attractive environment for foreign investment and has effective legal remedies to warrant rights of the foreign investors.

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

Since 1997, Ukraine has passed the majority of its large-scale privatization, which follows the 1992-94 privatization of small and medium-sized companies. Stabilization and growth in the Ukrainian economy during 1999-2001 were the result of major economic reforms. These reforms allowed the Ukrainian economy to reach new lows in inflation, overcome an artificially strong hryvnia (as compared with other currencies over 1996-97), dismantle financial pyramids, and improve international trade.

A positive effect on economic growth has also been made by Ukraine's restructured companies, which have adapted to market conditions. "Points of growth" became visible in all industries. According to the U.S. Commercial service country report for Ukraine, more than 90 percent of all medium and large enterprises have been privatized to date—9,500 out of 10,000.⁷⁶ However, official Ukrainian statistics demonstrate that in 1999 and 2000 the number of enterprises privatized were 5,201 and 5,247, respectively.⁷⁷ With this growth in the number of small and medium enterprises that have been privatized, private enterprises have steadily become more important to Ukraine's economy. The state no longer plays the role of manager in the Ukrainian economy. No state orders are used to plan the output of industry or agriculture.

Between 1994-2001, the Ukrainian economy transformed from a state-controlled entity to one that is mostly privately owned. As of January 1, 2001, 71,877 companies were released from state control, whereas in the 1994-99 period, public-owned companies were incorporated and privatized. While the process of privatization initially involved companies in the consumption market (shops, public services, restaurants, etc.), by 2001, most of the major industrial companies have been privatized as well. Currently, over 3.5 million people are employed in the non-governmental sectors of the Ukrainian economy.⁷⁸ Most employees are working at privatized companies in the manufacturing sector in industries such as timber processing and paper (80.6 percent), textiles (79.2 percent), metallurgy (77.7 percent) and food industry (71.5 percent).

Over 70 percent of Ukraine's industrial output is produced by private sector companies. The production share accounted for by privatized companies in metallurgy and textile industries is 78 percent each. In the timber processing and paper, and food industries, the production share is 73 percent each. The production share accounted for by privatized companies in the chemical, machine building, ferroalloys, glass and china, and construction materials industries range from 58 to 68 percent. In the oil, sugar, technological equipment for food industry, and the beer and tobacco industries, 90 to 99 percent of all products in the sector were produced by privatized companies. For the tire and silk industries, privatized companies accounted for all production. Since first half of 1999, private companies made more than 75 percent of all tax payments.

In the agricultural sector, individual farms alone accounted for 64.7 percent of total output, including 59.0 percent of crops harvesting and 73.4 percent of stock-breeding.⁷⁹

Land privatization has been one of the main pillars of reform. More than 6.1 million citizens received land plots for private ownership before 1999. As of the mid-2001, more than

15 million individuals and companies became shareholders and owners in agricultural enterprises. Total land held in private ownership constitutes more than half of all the land in Ukraine. Moreover, as of January 1, 2001, the privatization of household land plots (e.g., gardens, summer cottages) has made more than 11 million citizens private land owners. All owners of land are treated equally. The priority of state ownership was abandoned in 1991.

Land reform started in 1994 with the adoption of the first Land Code of Ukraine, which permitted private ownership of land. The state and its compulsory collective farms were dissolved and their land was distributed to members and their families.⁸⁰ Each member of a collective farm has a right to plot or share, which was confirmed by a certificate of private ownership specifying the size and the value of the land plot.

Private ownership title permits a person to sell, cede, exchange, mortgage, put into trust and pass down through inheritance such land. Any member of a collective farm has the right to leave the farm and receive his land plot in private ownership, which is confirmed by a state-sponsored certificate of land ownership. State administrations and local governments (councils) conduct privatization of such plots through land sales to private owners. The document evidencing the contract for sale of the land certifies the right of ownership. Owners of privatized land have no restrictions on its enjoyment or the use their title. They may own, use and dispose of that land by means of sale, gift, transfer by will, exchange, mortgage, or disposal of the property by any other legal means.

The New Land Code of 2001 put an end to controversies over corporate and foreign ownership of land. According to Articles 81 and 82 of the Land Code, foreign companies and individuals may hold title to land. Thus, Ukraine has completed the land reform and the legislation provides guarantees for landowners—Ukrainian nationals and foreigners alike.

The Ukrainian economy has an established market infrastructure. By the end of 1999, there were 203 commercial banks, 1,330 investment companies and funds, 2,250 auditing firms, 262 insurance companies, 340 exchanges, and 390 credit unions in Ukraine. The government is not involved in market services and does not interfere with these private business sectors.

One of the most dynamically developing areas of the Ukrainian economy has been international trade where the share of goods and services exported grew from 26 to 53 percent as a share of GDP from 1993-99. FDI increased from U.S. \$484 million in 1994 to U.S. \$3.248 billion in 1999.

Extensive privatization of large-scale companies has occurred during the last two years. Most of the objectives set for privatization in various sectors of economy were achieved. The petitioners admit that the privatization program was implemented according to the plan. The telecommunications sector is being fully privatized. The metal sector has hardly any government involvement. The energy sector has already been privatized to a level where wholesalers of electricity and gas, and oil refineries are fully privatized. Most of the banking sector is privately held. Most cornerstone sectors of Ukraine's economy are under private control. In those instances where there is some government ownership interest, the Government of Ukraine cannot directly interfere with business operations. On July 13, 2000, the Law of Ukraine on

UkrTelecom privatization was adopted. Implementation is underway, confirming Ukraine's dedication and political will for the implementation of market economy principles.

EBRD estimates of the progress of large-scale privatization rate Ukraine's efforts at "3" ("4+" being the highest rating).⁸¹ This was the same index that used to measure the progress of privatization in Latvia. In terms of quality, this should indicate that Ukraine belongs with the group of countries where the process of privatization has reached a stage at which the state has effectively ceded its ownership rights, but where the corporate governance still needs some improvement.⁸² In small-scale privatization, Ukraine received grade "3+" meaning that nearly comprehensive program of privatization has been implemented.⁸³

Many foreign companies have successfully participated in privatization and won bids for the most attractive Ukrainian enterprises. In 2000-01 many public (state) shares for recently privatized enterprises were sold to investors in an open bidding process. The Ukrainian Government does not control the public shares that remained in these privatized companies. The shares of stock are managed by non-governmental entities chosen in a transparent procedure outlined by the President of Ukraine's Decree "On Ensuring Management of the Property, Which is in National Ownership, in the Process of its Privatization," dated June 19, 1995.

The petitioners have made several statements concerning Krivorozhstal's type of property. The respondents find each of these statements to contradict each other. First, the petitioners state that the Ministry of Industry of Ukraine owns Krivorozhstal.⁸⁴ Under Ukrainian law, ministries cannot own such enterprises. Either an enterprise belongs to the Government (i.e., belongs to the Cabinet of Ministries) or it is public property. In a few instances, the company may be held by Parliament or by the President's administration. However, the Ministry of Industrial Policy is not entitled to hold any property in ownership form.⁸⁵

Second, the petitioners allege that Krivorozhstal is a state-owned enterprise based on public property.⁸⁶ However, they fail to state whether there are any other enterprises based on public property. In fact, there are only two types of enterprises based on public property: (1) those owned by the people; and (2) those owned by the government and affiliated with the state treasury. Krivorozhstal is an entity based on public property despite the use of the word "state" in its official name. The Ukrainian Government does not own it.

Third, the petitioners allege that Krivorozhstal is solely possessed and controlled by the state.⁸⁷ The term "state" refers to "people," as the term was inherited from Soviet legal system terminology. Under such system, by communist doctrine, the word "state" was used to designate a "historical stage of the people's organization." In other words, under communist doctrine, the terms "people's property" and "state property" were used interchangeably.⁸⁸ Notably, the footnote referenced in the Petitioners' Comments, elaborates on the concept of government-owned enterprises (i.e., "kazennoye"), and not on the "public-" ("people's-") owned enterprises.

Major reforms, introduced by the Law of Ukraine "On Property" (adopted in 1991) and cited in the Petitioners' Comments demonstrates exactly the opposite. One may distinguish between "state" enterprises (i.e., the "people" as an owner), and those owned by the government, which may not dispose of the "people's" property. A second theme of this law establishes that

the government may not interfere with the business activity of “state” (i.e., owned by all people) enterprises.

In contrast, a government-controlled “exclusive” enterprise (i.e., “kazennoye”) is fully subordinated to the control and guidance of the government (i.e., relevant ministry or other agency); its assets are integrated with the treasury and the government shares joint liability with such company.

E. The Government Of Ukraine Does Not Exercise Control Over The Allocation Of Resources Or The Price And Output Decisions Of Enterprises

The Government of Ukraine does not control allocation of resources and output decisions by enterprises. The Ukrainian government has ceded its authority to regulate prices and pricing. Although there is a reference in the petitioners’ submission to state orders in Ukraine, it is important to note that the state order system is based on an open bidding procedures and that the state must guarantee payments.⁸⁹ The mechanism for state procurement of goods and services is contract based. Moreover, the state order system in Ukraine is no different from the public procurement systems used in market economy countries throughout the world. A number of regulations and laws have been introduced to ensure transparency of bidding, stability of rules and non-discrimination between resident and non-resident businesspersons.

Although some public enterprises may be declared “monopolists” for certain Ukrainian markets by the Antimonopoly Committee of Ukraine, these companies are subject to the same antitrust regulations and/or antitrust controls applied to any business agent. Despite the allegations of the petitioners, there is no mechanism for state allocation or state planning of goods and services output in Ukraine. The production of goods and services is based on market conditions. The only exception to this principle is for quotas applied to the production of sugar, which were established by the Law of Ukraine “On Procurement Of Goods, Work And Services For Public Funds,” dated February 22, 2000. As the Department knows, imports of sugar and sugar prices are regulated in the United States by the Department of Agriculture. Introduction of production quotas is due to the 1998 closure of the Russian sugar market for Ukrainian producers, which prompted a drastic imbalance of supply and demand in the domestic sugar market.

As for price controls, the Government of Ukraine has shed much of its power in establishing prices. In particular, as amended by the Law of Ukraine “On Prices and Pricing,” regulatory pricing of products is based on market factors and provides for those instances where the Ukrainian market often experiences disruptions.⁹⁰ Moreover, in fact, many prices are not regulated despite the power of Ukrainian authorities to establish such prices. For example, prices for oil and, in contrast to the United States, natural gas are determined by supply and demand considerations. Ukrainian law strictly limits the authority of the government to establish prices.⁹¹

Floor prices are not strong evidence of government involvement in price setting. Companies may sell products above and below indicative prices. Thus, such indicative prices are not mandatory. The respondents do not agree with the petitioners that a non-transparent

system of barter payments exists in Ukraine. Such a system may have existed in the past. However, current economic data show that less than 10 percent of all transactions involve barter settlements, and that less than 0.5 percent of barter transactions were involved in Ukraine's international trade for 2001.⁹²

The respondents further submit that a tendency to use barter transactions may indicate weaknesses in the banking sector, but are not germane to the non-market status of the Ukrainian economy. Other than offering general statements, the petitioners have not offered any evidence that barter transactions play an important role in the industry subject to investigation, or the Ukrainian economy as a whole. Moreover, there is little or no relationship between government involvement in price setting and the phenomenon of a barter system. To the contrary, barter transactions provide evidence that companies may freely price their goods and services; and, thus, overcome cash flow shortages.

V. CONCLUSION

Based on the forgoing and the fact that Ukraine has successfully implemented significant market economy principles and practices, we respectfully request that the Department revoke the non-market economy status of Ukraine. Graduation of Ukraine to market economy status is supported by the evidence on the record and is consistent with previous determinations of the Department regarding the market economy status of Slovakia, the Czech Republic, Hungary and Latvia.

Should you have any questions or request additional information, please contact the undersigned.

Respectfully submitted,

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Attachments

cc: Lori Ellison, Room 7866

LIST OF EXHIBITS

- Exhibit 1 The Law of Ukraine “On Fight with Corruption”
- Exhibit 2 Edict of the President of Ukraine, No.1242/2000, dated November 16, 2000, “On Additional Measures to Enhance the Struggle Against Corruption and Other Unlawful Acts in the Socio-Economic Sphere, and to Secure Economic Spending of State Funds”
- Exhibit 3 Edict of the Cabinet of Ministers of Ukraine “On Approving the Corruption Control Action Plan for 2001,” No. 179-p, dated May 6, 2001
- Exhibit 4 Regulation “On Approving the Statute of Contest Procedure for the Vacant Positions of Civil Officers,” approved by the Resolution of the Cabinet of Ministers of Ukraine, No.782, dated October 4, 1995
- Exhibit 5 Article VIII of the International Monetary Fund
- Exhibit 6 Board of the National Bank of Ukraine Resolution “On Introduction of Obligatory Sale of Foreign Currency Proceeds to the Benefit of Resident Juridical Persons”
- Exhibit 7 Excerpt from the Law of Ukraine “On the National Bank of Ukraine” as of May 20, 1999
- Exhibit 8 The Law of Ukraine “On Collective Bargaining and Agreements”
- Exhibit 9 Law of Ukraine “On the Procedures of Settling Collective Labor Disputes (Conflicts)”
- Exhibit 10 Law of Ukraine “On Remuneration of Labor”
- Exhibit 11 Excerpt from the Labor Code of Ukraine
- Exhibit 12 President of Ukraine Decree “On Providing the Administration of the Property Owned by the State in the Process of Its Privatization,” dated June 19, 1995
- Exhibit 13 The Law of Ukraine “On Enterprises in Ukraine”
- Exhibit 14 The Law of Ukraine “On the Organizations of Employers” as of May 24, 2001

Exhibit 15	Article 175 of the Criminal Code of Ukraine
Exhibit 16	The Law of Ukraine “On Procurement of Goods, Work and Services for Public Funds” of February 22, 2000, No.1490-III
Exhibit 17	Land Code of Ukraine as of October 2001, Art. 80-82
Exhibit 18	Exclusive List Of The Pricing Authority Of The Government Of Ukraine
Exhibit 19	Moody’s Investors Service Sovereign Ratings List
Exhibit 20	Standard & Poor’s Sovereigns’ Rating List
Exhibit 21	Foreign Firms Push into Ukraine
Exhibit 22	European Bank for Reconstruction and Development Transition Report 2001
Exhibit 23	Ukraine, The Crouching Tiger
Exhibit 24	Telecommunications Infrastructure in Ukraine

ENDNOTES

¹ See Moody’s Investors Service Sovereign Ratings List (available at <<http://www.moodys.com/moodys/cust/staticcontent/2000400000333838/SovRatingsList.pdf>>); attached as Exhibit 19.

² See Standard & Poor’s Sovereigns’ Rating List (available at <<http://www.standardandpoors.com/RatingsActions/RatingsLists/Sovereigns/SovereignsRatingsList.html>>); attached as Exhibit 20.

³ “Foreign Firms Push into Ukraine,” Shawn Levsen & Maxim Bougriy, reprinted from BISIS Bulletin, December 1997/January 1998 at 2 (<<http://www.ukrainebiz.com/Articles/push.htm>>); Exhibit 21.

⁴ The data are from 2000. See Official Web-Site of the President of Ukraine (<<http://www.kuchma.gov.ua/tables/tab07.html>>).

⁵ See Address of the President to the Verkhovna Rada (Parliament) of Ukraine February 2000.

⁶ Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from Ukraine, 62 Fed. Reg. 61 (Nov. 19, 1997).

⁷ Canada Customs and Revenue Agency antidumping case concerning Certain Concrete Reinforcing Bar Originating In Or Exported From The Republic Of Indonesia, Japan, the Republic of Latvia, the Republic of Moldova, the Republic of Poland, Chinese Taipei and Ukraine (preliminary injury inquiry no. pi-2000-003) as of May 2, 2001 at 11. See also Final Determination - Concrete Reinforcing Bar (4258-111 AD-1247) (May 2, 2001) (available at <<http://www.ccr-aadrc.gc.ca/customs/business/sima/ad1247f-e.html>>).

⁸ See Petitioners’ Comments at 6-10.

⁹ See, e.g., In-Shell Pistachio Nuts from Iran, 51 Fed. Reg. 18919 (May 23, 1986).

¹⁰ The Ukrainian texts of these laws (and their English translations) are attached as Exhibits 1-3.

¹¹ First, the cabinet of Prime-Minister Valeriy Pustovoytenko (1998-2000); second, the cabinet of Prime-Minister Viktor Yushchenko (2000-2001); and third, the cabinet of Prime-Minister Anatoliy Kinakh (2001-present).

¹² See, e.g., decision of the Canada Customs and Revenue Agency cited in endnote 7.

¹³ European Bank for Reconstruction and Development Transition Report 2001 at 12-13 (EBRD Report); attached as Exhibit 22.

¹⁴ Id. See also Concrete Steel Reinforcing Bars from Latvia, 66 Fed. Reg. 8323 (Jan. 30, 2001).

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- ¹⁵ See Investigation of Certain Hot-Rolled Carbon Steel Flat Products from Ukraine, Inv. No. A-823-811.
- ¹⁶ Data from official web site of the President of Ukraine (<<http://www.kuchma.gov.ua/tables/tab07.html>>).
- ¹⁷ Id.
- ¹⁸ Address of the President of Ukraine to the Verkhovna Rada on February 22, 2000, "Ukraine: Entering the 21st century. Strategy of economic and social development for the years 2000 – 2004."
- ¹⁹ Official web site of the President of Ukraine (<<http://www.kuchma.gov.ua/tables/tab07.html>>).
- ²⁰ Address of the President of Ukraine to the Verkhovna Rada on February 22, 2000, "Ukraine: Entering the 21st century. Strategy of economic and social development for the years 2000 – 2004."
- ²¹ See official web site of the National Bank of Ukraine (<http://www.bank.gov.ua/B_syst/bank_st1.htm>).
- ²² See official web site of the Cabinet of Ministers of Ukraine (<<http://www.kmu.gov.ua>>; information on economic development in Ukraine, file <p_ukr_April_for PS KMU.pdf>).
- ²³ See Regulations "On the Procedure for Tenders for Filling Vacancies of Civil Officers," approved by the Resolution of the Cabinet of Ministers of Ukraine, No.782, dated October 4, 1995.
- ²⁴ 19 U.S.C. §1677(18)(B)(vi).
- ²⁵ "Budget Payoffs," News, Business No. 4 of January 25, 1999.
- ²⁶ See Exhibit 5.
- ²⁷ See Memorandum from David Mueller to Robert LaRussa, Antidumping Investigation of Certain Small Diameter Carbon and Alloy Seamless Standard Line and Pressure Pipe from the Czech Republic: Non-Market Economy ("NME") Country Status, dated Nov. 29, 1999; Memorandum from Bernard Carreau to Troy Cribb, Antidumping Duty Determinations on Cold-Rolled Carbon-Quality Steel Products from the Slovak Republic - Market vs. Non-Market Economy Analysis, dated Oct. 13, 1999.
- ²⁸ See Regulations of the National Bank of Ukraine on the Introduction of Obligatory Sale of Foreign Currency Proceeds to the Benefit of Resident Juridical Persons # 349 of September 4, 1998, as amended; attached as Exhibit 6.
- ²⁹ See id. at "Preamble."
- ³⁰ Id.
- ³¹ See Petitioners' Comments at 12.
- ³² See Excerpt from the Law of Ukraine "On the National Bank of Ukraine" as of May 20, 1999; attached as Exhibit 7.
- ³³ See Petitioners' Comments at 12.
- ³⁴ Id.
- ³⁵ Official Web-site of the National Bank of Ukraine (<<http://www.bank.gov.ua/STATIST/DANI/dani2001.htm>>).
- ³⁶ The Petitioners' Comments state: "[A]rticle 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."
- ³⁷ EBRD Report at 12-13.
- ³⁸ See Moody's and Standard & Poor's ratings cited in endnotes 1 and 2.
- ³⁹ See Excerpt from the Law of Ukraine "On National Bank of Ukraine" as of 1999; attached as Exhibit 7.
- ⁴⁰ Id.
- ⁴¹ See Memorandum from David Mueller to Robert LaRussa, Antidumping Investigation of Certain Small Diameter Carbon and Alloy Seamless Standard Line and Pressure Pipe from the Czech Republic: Non-Market Economy ("NME") Country Status, dated Nov. 29, 1999; Memorandum from Bernard Carreau to Troy Cribb, Antidumping Duty Determinations on Cold-Rolled Carbon-Quality Steel Products from the Slovak Republic - Market vs. Non-Market Economy Analysis, dated Oct. 13, 1999 at 5.
- ⁴² Decree of the Cabinet of Ministers of Ukraine "On System of Currency Regulation and Currency Control," No.15-93, dated February 19, 1993.
- ⁴³ Official Web-site of the National Bank of Ukraine (<<http://www.bank.gov.ua/STATIST/DANI/dani2001.htm>>).
- ⁴⁴ See Excerpt from the Law of Ukraine "On National Bank of Ukraine" of May 20, 1999, as amended.
- ⁴⁵ See EBRD Report at 12-13.
- ⁴⁶ E.g., Walden Publishing, Ltd., et al.
- ⁴⁷ See Resolution of the National Bank of Ukraine on Introduction of Obligatory Sale of Foreign Currency Proceeds to the Benefit of Resident Juridical Persons # 349 of September 4, 1998, as amended.

⁴⁸ See Memorandum from David Mueller to Robert LaRussa, Antidumping Investigation of Certain Small Diameter Carbon and Alloy Seamless Standard Line and Pressure Pipe from the Czech Republic: Non-Market Economy (“NME”) Country Status, dated Nov. 29, 1999 at 5; Memorandum from Bernard Carreau to Troy Cribb, Antidumping Duty Determinations on Cold-Rolled Carbon-Quality Steel Products from the Slovak Republic - Market vs. Non-Market Economy Analysis, dated Oct. 13, 1999 at 5.

⁴⁹ 2000 data. See Official Web-Site of the President of Ukraine (<<http://www.kuchma.gov.ua/tables/tab07.html>>).

⁵⁰ Address of the President of Ukraine to the Verkhovna Rada on February 22, 2000, “Ukraine: Entering the 21st century. Strategy of economic and social development for the years 2000 – 2004.”

⁵¹ See Article 17 of the Law of Ukraine “On Enterprises in Ukraine.”

⁵² See id. at “Preamble”; attached as Exhibit 8.

⁵³ Law of Ukraine “On the Ways of the Collective Labor Disputes (Conflicts) Settlement” as of March 03, 1998; attached as Exhibit 9.

⁵⁴ See Law of Ukraine “On the Employers Associations” as of May 24, 2001.

⁵⁵ Id. at Art. 5.

⁵⁶ See Article 3 of the Law of Ukraine “On Remuneration of Labor”; attached as Exhibit 10.

⁵⁷ Law “On Collective Bargaining (Agreements),” Articles 7 and 8; Law “On Remuneration of Labor” specifically refers to the above Law in Article 14.

⁵⁸ See Article 24 of the Law of Ukraine “On Remuneration of Labor.”

⁵⁹ See, e.g., Convention no. 29 Concerning Force or Compulsory Labour; TITLE C95 Protection of Wages Convention, 1949 REF Convention concerning the Protection of Wages (Note: Date of coming into force: #FORCE:24:09:1952. This Convention was partially revised in 1992 by Convention No. 173); Convention NO. 105 of the ILO Concerning the Abolition of Forced Labor; the texts of these and other relevant ILO instruments are available at <<http://www.ilo.org/public/english/index.htm>>.

⁶⁰ See official web site of the Cabinet of Ministers of Ukraine (<<http://www.kmu.gov.ua>>; information on economic development in Ukraine, file <p_ukr_April_for PS KMU.pdf>).

⁶¹ See Article 38 of the Labor Code of Ukraine; attached as Exhibit 11.

⁶² Id.

⁶³ See Article 175 of the Criminal Code of Ukraine.

⁶⁴ The U. S. Commercial Service. Ukraine Country Commercial Guide FY 2002 at 73.

⁶⁵ See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From Ukraine, 62 Fed. Reg. 61756.

⁶⁶ Ukraine, The Crouching Tiger, Sam Vaknin (<<http://www.ukrainebiz.com/Articles/crouching%20tiger.htm>>); attached as Exhibit 23.

⁶⁷ See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From Ukraine, 62 Fed. Reg. at 61756.

⁶⁸ Ukraine, The Crouching Tiger, Sam Vaknin (<<http://www.ukrainebiz.com/Articles/crouching%20tiger.htm>>); attached as Exhibit 23.

⁶⁹ See e.g., Telecommunications Infrastructure in Ukraine, Barbara Ristau, available at <<http://www.ukrainebiz.com/Articles/telecom.htm>>; attached as Exhibit 24.

⁷⁰ Land Code of Ukraine as of October 2001, Art. 81-82.

⁷¹ The U. S. Commercial Service. Ukraine Country Commercial Guide FY 2002 at 41-42.

⁷² 1985 Seoul Convention on Establishment of Multilateral Investment Guarantee Agency.

⁷³ Ukraine has concluded over 50 bilateral agreements with host countries of major investors and acceded to multilateral instruments of the investment protection, such as 1965 Washington Convention and Seoul Convention.

⁷⁴ See Decree of the President of Ukraine “On Advisory Council on Foreign Investments in Ukraine,” No.323/97, dated April 11, 1997.

⁷⁵ BBC Ukrainian Service Report, January 8, 2002.

⁷⁶ The U. S. Commercial Service. Ukraine Country Commercial Guide FY 2002 at 41-42.

⁷⁷ Institutional Changes and Transformations, an Official Web-Site of the President of Ukraine, Information on Agricultural Sector (<<http://www.kuchma.gov.ua/tables/tab06.html>>).

⁷⁸ 2000 data. See Official Web-Site of the President of Ukraine (<<http://www.kuchma.gov.ua/tables/tab07.html>>).

⁷⁹ Institutional Changes and Transformations, an Official Web-Site of the President of Ukraine, Information on Agricultural Sector (<<http://www.kuchma.gov.ua/tables/tab06.html>>).

⁸⁰ See President of Ukraine Decree as of 10.11.94 No. 666/94.

⁸¹ EBRD Transition Report at 13-14.

⁸² Id.

⁸³ Id. at 12-13.

⁸⁴ Petitioners' Comments at 34.

⁸⁵ See Law of Ukraine "On Property." The Ministry may only manage some assets.

⁸⁶ Petitioners' Comments at 34.

⁸⁷ Petitioners' Comments at 34.

⁸⁸ Similar to the modern use of the word "National" in English (e.g., National Park, National Academy, National Gallery). In the Ukrainian language it is used in instances like "State Park," "State Academy," and "State Gallery." It has been changing gradually since the mid-1990s.

⁸⁹ Article 2, paragraph 1 of the Law of Ukraine "On Supply of Production for State Needs," dated December 22, 1995, as amended on December 21, 1999. For the general description of the bidding procedures, see Law of Ukraine "On Procurement Of Goods, Work And Services For Public Funds" of February 22, 2000.

⁹⁰ In fact, this law has been amended several times since 1997.

⁹¹ See the exclusive list of the pricing authority of the Government of Ukraine in Exhibit 18. This list is exclusive and cannot be extended or interpreted as extended.

⁹² See official web site of the Cabinet of Ministers of Ukraine (<<http://www.kmu.gov.ua>>; information on economic development in Ukraine, file <p_ukr_April_for PS KMU.pdf>).