July 17, 2002

Case No. A-823-812
Total Pages: 24

PUBLIC DOCUMENT

BY HAND DELIVERY

The Honorable Faryar Shirzad
Assistant Secretary for Import Administration
Attn: Import Administration
Central Records Unit, Room 1870
U.S. Department of Commerce
Pennsylvania Avenue and 14th Street, N.W.
Washington, D.C. 20230

Attn: George Smolik, Room 3713

Re: Inquiry Into the Status of Ukraine as a Non-Market Economy in the Antidumping Investigation of Carbon and Certain Alloy Steel Wire Rod from Ukraine

Dear Assistant Secretary Shirzad:

Pursuant to the Department's notice of request for comments and opportunity for rebuttal comments in the above-referenced inquiry,[1] we submit the following rebuttal comments on behalf of Bethlehem Steel Corporation; National Steel Corporation; and United States Steel Corporation. These remarks respond to the filings made by respondent and various parties supporting the revocation of Ukraine's current non-market economy status.

---

[1] Investigation of Carbon and Certain Alloy Steel Wire Rod from Ukraine: Opportunity to Comment on the Status of Ukraine as a Non-Market Economy, 67 Fed.Reg. 19394 (Dep't Commerce Apr. 19, 2002) (request for comments).

Respectfully submitted,

Robert E. Lighthizer John J. Mangan Skadden, Arps, Slate, Meager & Flom LLP 1440 New York Avenue, N.W. Washington, D.C. 20005-2111 (202) 371-7000	Alan Wm. Wolff Bradford L. Ward Dewey Ballantine LLP 1775 Pennsylvania Avenue, N.W. Washington, D.C. 20006-4605 (202) 862-1000

Counsel to Bethlehem Steel Corporation, National Steel Corporation, and United States Steel Corporation

Enclosure

BEFORE THE
OFFICE OF IMPORT ADMINISTRATION
INTERNATIONAL TRADE ADMINISTRATION
DEPARTMENT OF COMMERCE
WASHINGTON, D.C. 20230

Case No. A-823-812
Inquiry Into the Status of Ukraine
as a Non-Market Economy
Under the Antidumping and
Countervailing Duty Laws

INQUIRY INTO THE STATUS OF UKRAINE AS A NON-MARKET ECONOMY UNDER THE ANTIDUMPING AND COUNTERVAILING DUTY LAWS

REBUTTAL COMMENTS OF
BETHLEHEM STEEL CORPORATION;
NATIONAL STEEL CORPORATION;
AND UNITED STATES STEEL CORPORATION

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111
(202) 371-70004

DEWEY BALLANTINE LLP
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-4605
(202) 862-1000

July 17, 2002

TABLE OF CONTENTS

I. Executive Summary of the Comments 1

II. Wage Rates in Ukraine Are Not Determined by Free Bargaining Between Labor and Management 4

III. Foreign Direct Investment in the Ukraine Remains Low and Impediments to Investment Remain High 8

IV. Extent of Government Ownership or Control Over the Economy Remains Dominant 11

V. Due to Rampant Corruption Ukrainian Firms' Costs Do Not Represent True Costs 19

VI. Conclusion 20

I. EXECUTIVE SUMMARY OF THE COMMENTS

In its eleven years of independence, Ukraine has failed create a market economy system. Old-style government policy, slow and incremental economic reforms, and a lack of commitment to market liberalization continue to hold back the nation's economy. Five years after the Department's 1997 determination that Ukraine is not a market economy, Ukraine is requesting another review of its status under the U.S. antidumping duties law.

Section 771(18) of the Tariff Act of 1930 requires the Department to examine six criteria to determine whether a non-market economy has completed the transition to a market economy.[2] These factors are:

(i) the extent to which the currency of the foreign country is convertible into the currency of other countries;
(ii) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management;
(iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country;
(iv) the extent of government ownership or control of the means of production;
(v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises;
(vi) such other factors as the administering authority considers appropriate.

Several parties support the revocation of Ukraine's non-market economy (NME) status (hereinafter, pro-revocation parties) and argue that Ukraine is now a market economy. These

2 19 U.S.C. 1677 (18).

parties include Krivorozhstal State Integrated Works ("respondent"),[3] the Government of Ukraine through its Ministry of Economy and for European Integration Issues (GOU),[4] and the

3 Respondent's Comments on the Market Economy Status of Ukraine in the Antidumping Investigation of Carbon and Certain Alloy Steel Wire Rod from Ukraine (March 1, 2002) (Respondent's Submission).

4 Comments of the Government of Ukraine Concerning Market Status of Ukraine (October 17, 2001) (GOU NME Submission).

Ukrainian Association of the Enterprises of Ferrous Metallurgy ("UAEFM").[5] Pro-revocation parties claim that Ukraine has undergone significant reform since the Department's 1997 determination that Ukraine is a non-market economy country. This claim is incorrect. Analysis of the statutory criteria regarding labor and wages, foreign investment, government control of the economy, and the catch-all "other relevant factors" criterion demonstrates that Ukraine is not a market economy.

Criterion 2: The extent to which wage rates in the foreign country are determined by free bargaining between labor and management. Contrary to pro-revocation parties' assertions, wage rates in Ukraine are not determined as a result of free bargaining between labor and management. Labor mobility continues to be severely restricted by a national registration system; the Tariff Rate System, determined by the Department in 1997 to be a tool of government interference in the economy, is still in place and remains unchanged; and wage arrears continue to be a major problem in the economy.

Criterion 3: The extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country. In spite of pro-revocation parties' claims to the contrary, barriers to foreign investment in Ukraine remain formidable. Ukrainian laws fail to provide effective national treatment to foreign firms, foreign companies and individuals are still unable to own land, investment protection is inadequate and unpredictable, and as a result, foreign investment levels remain dismally low.

---

5 The Ukrainian Association of the Enterprises of Ferrous Metallurgy Comments on the Market Economy Status of Ukraine in the Antidumping Investigation of Carbon and Certain Alloy Steel Wire Rod from Ukraine (June 13, 2002) (UAEFM Submission).

Criterion 4. The extent of government ownership or control of the means of production.

The government continues to dominate the majority of the assets in the economy and is still responsible for the majority of the gross domestic product. So-called public sector enterprises account for a large percentage of national assets and national output. Government ownership and control of this sector is far-reaching and pervasive.

Criterion 6. Such other factors as the administering authority considers appropriate.

Corruption in Ukraine has reached such levels that business cannot be completed without significant payment of bribes. Bribery costs have become so regular that they should be counted as an ordinary expense of doing business in Ukraine. Such corruption costs cannot be captured in responses to the Department's antidumping questionnaires.

II. WAGE RATES IN UKRAINE ARE NOT DETERMINED BY FREE BARGAINING BETWEEN LABOR AND MANAGEMENT

Respondent has attempted to portray Ukrainian wage rates as freely negotiated. Respondent makes three assertions which are groundless with regard to wage rates. Respondent claims that labor mobility is not restricted in Ukraine, that the government does not interfere in the labor market by using its Tariff Rate System, and that wage arrears are no longer a serious problem in the economy. These claims are not borne out by the facts.

First, respondent and the UAEFM claim that labor mobility is not restricted in Ukraine, contending that the Soviet- era *propiska* system has been phased out.[6] However, the new mandatory registration system is similar to *propiska* in that employment is only available to workers registered in the area. The requirements of the new registration system cannot realistically be met by a new arrival to an area.[7] For example, the registration system requires that a newly arrived worker present a signed residential lease in order to register. This condition is unrealistic and cannot be met because Ukrainian landlords, in order to evade tax collection, never draft or sign residential leases.[8] The new registration system is only different from *propiska* in name and continues to severely restrict labor mobility.

---

6 Respondent's Submission at 16, UAEFM Submission at 8.

7 "On the Move," Transitions Online (Feb.8, 2002), attached as Exhibit I to Comments of the Domestic Steel Producers in the Inquiry into the Status of Ukraine as a Non-Market Economy in the Antidumping Investigation of Carbon and Certain Alloy Steel Wire Rod from Ukraine (June 17, 2002) (Domestic Steel Producers' Submission).

8 Id.

Second, the government uses the Tariff Rate System (TRS), part of the "Law on Remuneration of Labor," to influence the economy.[9] While respondent claims that the TRS is not being used by the Ukrainian government to interfere in the economy,[10] the Department determined in its 1997 decision that the Ukrainian government used the TRC to stay "heavily involved" in determining wage rates and employment.[11] Respondent has not pointed to any significant changes to the TRC since 1997. The situation in Ukraine has remained materially unchanged since the 1997 determination, and respondent is simply re-arguing points considered and dismissed by the Department in 1997.

Third, respondent also argues that the wage arrears problem, which it claims was not present outside the state sector, has essentially been solved in Ukraine,[12] citing the website of the Ukrainian Cabinet of Ministers.[13] That website, however, does not contain such information in English. The Department's regulations require documents submitted in a foreign language to be translated in their entirety into English.[14] Neither the untranslated document respondent claims supports its position nor a translation thereof is on the record. The Department cannot use non-record information that is not in English. The Department and the parties cannot analyze the

9 See Domestic Steel Producers' Submission at 9.

10 Respondent's Submission at 14.

11 Certain Cut-to-Length Carbon Steel Plate From Ukraine, 62 Fed. Reg. 61754, 61755 (Dep't of Commerce, Nov.19, 1997) (Final) ("1997 Determination")

12 Respondent's Submission at 15.

13 See <http://www.kmu.gov.ua/>.

14 19 C.F.R. 351.303 (e).

accuracy of such information or otherwise evaluate and corroborate it. UAEFM contradicts respondent, stating that wage arrears have decreased by only 45%.[15]

Contrary to the arguments presented by the pro-revocation parties, the wage arrears situation remains grim. An August 2001 study by the International Labor Organization (ILO) found that 40% of Ukrainian workers were owed at least three months of wages.[16] Substantial arrears continue to cause labor dissatisfaction and unrest. Months and years' worth of wage arrears led over 1,000 miners to strike in November 2001 and hundreds more in February 2002, demanding payment of arrears.[17]

Respondent also states that wage arrears are a criminal offense punishable by law. The facts show that making wage arrears illegal in Ukraine has not prevented or significantly reduced them.

UAEFM cites the graduation of Russia to market economy status in spite of its wage arrears problem to claim that wage arrears have not been and should not be a significant factor in determining a nation's market economy status.[18] However, Russia had reduced its wage arrears

15 UAEFM Submission (June 13, 2002) at 8.

16 "Rising Unemployment, Salary Arrears, Debt… Everything Is Going Up in the Ukraine Except Life Expectancy," International Confederation of Free Trade Unions (Aug. 10, 2001), attached as Exhibit J to Domestic Steel Producers Submission. The survey included 1,800 enterprises and 8,200 workers.

17 "Ukraine Plans More Coal Sector Investment," Coal Week International (Nov. 19, 2001), "Ukrainian Workers Demonstrate For Payment of Wage Arrears," BBC Monitoring International Reports (Feb. 12, 2002).

18 Id.

to less than one ninth of their high levels before graduating from NME status.[19] Such improvement is not present in Ukraine.

The contention that Ukrainian labor freely negotiates wages is not supported by an analysis of the facts in the Ukrainian economy. The Tariff Rate System criticized by the Department in 1997 as a tool of government intervention in the labor markets and the economy is still in place. Wage arrears and other obstacles still impede labor mobility significantly. Accordingly, the Ukrainian economy is plainly non-market with respect to this criterion. Wage rates in Ukraine cannot be characterized as the outcome of free bargaining between management and labor.

III. FOREIGN DIRECT INVESTMENT IN THE UKRAINE REMAINS LOW AND IMPEDIMENTS TO INVESTMENT REMAIN HIGH

19 Decision Memorandum in the Inquiry into the Status of the Russian Federation as a Non-Market Economy Country Under the U.S. Antidumping Law. (Dep't Commerce, June 6, 2002), citing "Russian Economic Trends (Monthly)," Russian-European Center for Economic Policy, February, 2002, pp. 6-7 and Tables 3 and 6, and October 2000, 10. <http://ia.ita.doc.gov/download/russia-nme-status/russia-nme-decision-final.htm>

Foreign direct investment (FDI) in Ukraine is low and continues to be hampered by a variety of significant obstacles. Although respondent and the Ukrainian government claim that Ukraine has made progress and is open to foreign investment, the reality for foreign investors remains very difficult. Contrary to respondent's representation, Ukrainian investment laws create formidable obstacles to investment, they do not provide national treatment to foreign investors, and the right of foreigners to own land is ambiguous at best. As a result, FDI overall remains pitifully low.

First, respondent's statement that foreign investors are afforded national treatment in Ukraine[20] is simply untrue. While the "Law on the Regime of Foreign Investment" purportedly provides protection for investors, that protection is effectively nullified by 27 provisos giving priority to conflicting domestic legislation and significantly limiting the application of national treatment.[21] Investors are faced with a vast body of contradictory laws, and cannot know which of these would be used by the courts to determine the outcome of a dispute. A number of foreign investors who have suffered economic harm as a result of the contradictory and unpredictable legal framework governing investment in Ukraine have been unable to redress their losses.[22] Reflecting the severity of problems with foreign investment conditions in Ukraine, the U.S. Overseas Private Investment Corporation (OPIC) and the Export-Import Bank of the United

---

20 Respondent's Submission at 16.

21 "Ukraine Investment Policy Review," OECD, Directorate for Financial, Fiscal, and Enterprise Affairs, (Mar. 2001) ("OECD Investment Policy Review") at 44.

22 These incidents have already been discussed in the original submission of the Domestic Steel Producers in this case. See Domestic Steel Producers' Submission at 15-16.

States (Ex-Im Bank) are not participating in new investment projects in the country, pending resolution of various investment disputes.[23]

Second, the GOU claims that the new Land Code, which allows foreigners to purchase land, takes precedence under Ukraine's Constitution over other laws contradicting it.[24] Yet the GOU cites no specific provision of the Constitution to support this claim. As with national treatment, a web of contradictory legislation in fact disfavors foreigners' rights with regard to land ownership. The European Bank for Reconstruction and Development (EBRD) has concluded that 15-20 additional pieces of legislation are needed to implement the new Land Code and that, even if this is accomplished, sales of land to foreigners will not be legal until 2005.[25] Consistent with these findings, the U.S. Commercial Service 2002 Guide to Ukraine reports that most law firms advise foreign investors not to conduct land transactions in Ukraine.[26]

Finally, the pro-revocation parties have attempted to create an inflated picture of investment in Ukraine since the Department's 1997 determination. Anecdotal evidence of opening McDonald's restaurants notwithstanding, the facts show dismal investment levels. Ukraine, although a strategically located country of 50 million well-educated inhabitants and enormous natural resources, has managed to attract only $3.9 billion in FDI in over a decade of

---

23 "Ukraine Country Commercial Guide FY 2002," U.S. & Foreign Commercial Service U.S. Department of State (2002) ("2002 Ukraine USG Guide") at Ch.7N.

24 Additional Comments of the Ministry of Economy and for European Integration Issues of Ukraine with Regard to Ukraine's Compliance with the Market Economy Criteria Set by 771(18)(b) of the U.S. Tariff Act. (June 14, 2002) at 7.

25 "Law in Transition," European Bank for Reconstruction and Development, (2001) at 76.

26 2002 Ukraine USG Guide at Ch.7B.

independence.[27] Over the same period, the OECD estimates that capital flight out of the country exceeded $20 billion.[28] The per capita level of FDI in Ukraine is far lower than in any other East European economy, except for the quasi-Communist, totalitarian Belarus. Only 0.4% of Ukrainian "industry" is now "the property of foreigners."[29] According to the U.S. Commercial Service, "difficulties have arisen over foreign acquisition of majority control of enterprises, with the government or the current management continuing to exercise effective control or veto power over company decisions."[30]

The facts speak for themselves: Ukraine's attempts to attract significant foreign investment have failed. Although incremental privatization continues, obstacles to foreign investment in Ukraine remain formidable. These obstacles stem from a confusing and contradictory legal framework as well as from the fact that enforcement of that legal framework is neither consistent nor reliable. The arguments of pre-revocation parties to the contrary should be rejected. Given the lack of significant improvement and continuous existence of an unfavorable investment climate, the Department should determine that Ukraine does not qualify as a market economy.

---

27 GOU NME Submission at 6.

28 OECD Investment Policy Review, at 41.

29 See "Nations in Transit 2001: Civil Society, Democracy, and Markets in East Central Europe and the Newly Independent States," Freedom House ("Nations in Transit") at 402.

30 2002 Ukraine USG Guide at Ch.7B.

IV. EXTENT OF GOVERNMENT OWNERSHIP OR CONTROL OVER THE ECONOMY REMAINS DOMINANT

Respondent and other pro-revocation parties contend that the Ukrainian government has limited control over the economy. This is plainly incorrect. Figures presented by respondent and the GOU that purport to show a low proportion of government ownership and control in the economy are inaccurate. The claim that "communal" property or property "owned by all the people of Ukraine" is private property is misleading and incorrect, and data based on this definition of private property cannot be accepted.[31] Frequent and important contradictions are present not only between various parties' documents, but also within respondent's different submissions to the Department.

Respondent and the GOU claim that a large majority of the country's gross domestic product (GDP) is produced by the private sector. This claim is false, as demonstrated by data and research provided by the Organization for Economic Cooperation and Development (OECD) and the EBRD.

According to the OECD, private sector contribution to GDP remains at a very low 20%.[32] A different OECD study found that the Ukrainian government has retained over 200 large

---

31 That pro-revocation parties claim communal property or property "owned by the people" is private property reveals the fundamental misconception of property rights inherent in a non-market economy system.

32 "Challenges and Policy Reforms for Improved Investment Environment in Ukraine," OECD/Ukraine Forum On Investment and Enterprise Development (Feb. 20-22, 2002).

enterprises that together account for about 70% of the national industrial output.[33] Eighty percent of all assets in the industrial and utilities sectors are controlled by the government through these 200 companies.[34]

The EBRD gave Ukraine a grade of "3-," lower than a "3," on its large-scale privatization effort.[35] According to EBRD definitions, a grade of "3" means that between 25% and 50% of large-scale enterprise assets had been privatized. Graded "3-" by the EBRD, privatization of large-scale enterprise assets in Ukraine is presumably closer to 25% than to 50%.[36] In fact, respondent itself, a large Ukrainian enterprise, admits that it "has not undergone any privatization."[37]

That most of the economy is still under government control is illustrated by respondent's statement that there are 3.5 million people employed in the non-governmental sector.[38] This is

---

33 OECD Investment Policy Review, at 13.

34 Id. at 29.

35 "Transition Report 2000," European Bank for Reconstruction and Development (2000) ("Transition Report") at 14.

36 It should be noted that on close examination this low grade does not contradict the EBRD estimate of private sector share of GDP (60%). The EBRD methodology for calculating the privatized sector in the former Soviet republics includes enterprises with minority private ownership, collective farms, and also apparently includes public property. See "Transition Report" at 14 n.1. In addition, a large percentage of the data relied upon by the EBRD comes from official Ukrainian sources, which, as shown below are both unreliable and erroneously include the public property sector in the private sector calculations.

37 Krivorozhstal Response to Section A of the Department of Commerce Supplemental Questionnaire (January 2, 2002) (SAQR) at 7.

38 Respondent's Submission at 6, 13, 19.

only approximately 15% of the total estimated Ukrainian workforce of over 22 million.[39] Therefore, about 85% of the work force is employed by the state. This percentage of workers in the state sector corresponds more closely to the OECD and Freedom House figures for state sector GDP output and asset control (cited in the Comments of the Domestic Steel Producers June 17, 2002) rather than to figures provided by the GOU.

At the same time, the submission by the UAEFM claims that 15% of total workforce is working in the "small private sector," a subset of non-governmental employment.[40] The figure is derived from Ukraine's State Statistics Committee website. This again demonstrates the general unreliability of figures provided by the Government of Ukraine, which can apparently supply data to support even contradictory claims.

Finally, Freedom House cites a State Statistics Committee report acknowledging that a mere "1.1% of the industry is in purely private hands" and that the government retained 25-50% shares in the majority of the nation's industry.[41] The original source could not be consulted because the State Statistics Committee website is Ukrainian-only. Although OECD and EBRD analytical methodologies differ, their results lead to the same conclusion - very limited privatization of the industry has taken place in Ukraine.

The pro-revocation parties produce a panoply of inconsistent, unreliable, and sometimes undocumented figures, which originate in various sections of the Government of Ukraine. For example, the GOU claims in this proceeding that 58.3% of the country's industrial production

---

39 Central Intelligence Agency, "Ukraine," World Factbook <http://www.cia.gov/cia/publications/factbook/index.html>.

40 UAEFM Submission at 14.

41 Nations in Transit at 402.

comes from "denationalized" enterprises in 2000.[42] The source cited is not the State Statistics Committee, but a political speech. Respondent claims that the correct figure is 75%, citing the official website of the President of Ukraine.[43] In spite of numerous footnotes citing it,[44] this website provides no English translation of the numerous tables containing allegedly important economic data. This is once more a violation of the Department's rules. Both respondent's and GOU's figures are apparently current and neither provides a period for which the GDP share was measured or calculated.[45]

A significant difference between the figures cited by the OECD and the EBRD on the one hand, and by pro-revocation parties on the other, is the likely treatment of public or "communal" property. Ukrainian law defines three kinds of property: state-owned, public or "communal," and private. The notion of public property stems from the fictitious Soviet division of property into that owned by the Government and that owned by the "people." Thus, many Ukrainian enterprises that are purportedly "public" actually carry the Ukrainian adjective "state" in their names. For example, Krivorozhstal has retained the word "state" (*derzhavniy)* in its official title, yet that word has been omitted from the English translation of its name in its submissions to the

42 GOU NME Submission at 17.

43 Respondent's Submission at 2.

44 Respondent's Submission at 25/27 nn.4, 16, 19 & 49.

45 The Krivorozhstal submission also includes simple factual errors. For example, it overstates by nearly a thousand the number of medium and large enterprises privatized in Ukraine (See Respondent's Submission at 19) from the number actually stated in the cited U.S. government source. See 2002 Ukraine USG Guide at Ch.7A.

Department.[46] The respondent has acknowledged that public property is essentially a vestige of the Soviet regime.[47]

Respondent and the GOU maintain that "communal" or "public" property is not state-owned or controlled, and should not count as part of the state-owned or controlled sector. Furthermore, respondent counts public property as private property when citing high private sector GDP output and assets. Respondent belongs to the third category of Ukrainian enterprises - public property. All laws governing public property in Ukraine apply to respondent, and it is therefore useful to examine the degree to which it is subject to government control to determine the extent of government control for the public sector in general.

Respondent claimed in this proceeding that "the management of Krivorozhstal controls the company," and that, according to law, management "shall own, possess, and manage public property at its own discretion." [48] Respondent also stated that "[T]he Ukrainian laws prohibit the government from interfering with any business activities of the company."[49] Later in the proceeding, respondent admitted that "[A]s defined by law, state enterprise belongs to the people, Verkhovna Rada of Ukraine (Parliament) may dispose of this right in the name and on behalf of [sic] Ukrainian People."[50] Thus, by respondent's admission, the legislative branch of

---

46 See Ukrainian original Company Official Certification in the Antidumping Investigation of Carbon and Certain Alloy Steel Wire Rod from Ukraine (January 2, 2002) at unnumbered page 5.

47 Respondent's Submission at 21.

48 Krivorozhstal Response to Section A of the Department of Commerce Questionnaire (December 3, 2001) at 2. (AQR)

49 Id. at 3.

50 SAQR at 5.

the Ukrainian government holds and can sell the enterprise on behalf of the people, a fact that directly contradicts respondent's claim that management has ownership and control over Krivorozhstal.

Respondent's questionnaire responses reveal that several legal terms are used interchangeably to mean "state controlled" and "owned by the people."[51] Respondent has also acknowledged that a single Ukrainian legal term "derzhavna vlasnist" means both "state property" and "public property."[52] The question of the precise meaning of the terminology under Ukrainian law thus becomes important, yet Krivorozhstal has refused to provide a certified English translation of the law, claiming that there are numerous interpretations of certain terms.[53]

The Government treatment of public property indicates that such property is controlled by the government. Makeevsky is an enterprise owned 60% "by the people" and 40% "privately."[54] The Ukrainian Government has scheduled it for privatization and reorganized into a Public Open Joint Stock Company.[55] The 60% "people's share" is held by the Rada until privatization. Until privatization is complete, the executive branch has the right to appoint the

51 Petitioners' Comments on the Market Economy Status of Ukraine in the Antidumping Investigation of Carbon and Certain Alloy Steel Wire Rod from Ukraine. March 13, 2002 at 12. (Petitioners' Submission), citing Ukraine Krivorozhstal Response to the Department of Commerce Supplemental Questionnaire (February 11, 2002) at 8-9.

52 Id., citing Ukraine Krivorozhstal Response to the Department of Commerce Supplemental Questionnaire (February 11, 2002) at 8.

53 Id., citing Ukraine Krivorozhstal Response to the Department of Commerce Supplemental Questionnaire (February 11, 2002) at 10.

54 SAQR at 6.

55 Id.

board of directors and represent "the people" at shareholders' meetings.[56] Therefore, the government can dispose of public property by privatization at any point, "on behalf" of "the people," who supposedly own it. The proceeds of such sales go into state coffers.

As shown above, public property is held by the GOU on behalf of the people, the GOU can privatize it at will on behalf of the people, and collect the sale proceeds. Therefore, because the enterprises are owned by "all the people" of Ukraine, they are actually owned by none. There are no important characteristics of public property that distinguish it from state property. Given these facts, enterprises which are public property, such as Krivorozhstal and Makeevsky, are in fact under government ownership and control. The production and assets of such enterprises is not properly included in the private share of national income, output, assets, or wealth.

Respondent cites the Department's decision in Silicon Carbide from China for the proposition that an enterprise owned by "all the people" is not necessarily controlled by the government. However, the Department recognized in that determination only that the title itself can mean anything. The Department made clear that the public enterprise in question carries the burden of proof to show on both "…a *de jure* and *de facto* basis that there is an absence of governmental control."[57] Respondent has failed to carry this burden. Its responses, in fact, indicate the opposite.

In Silicon Carbide from China the Department determined that the public company at issue was not state-controlled because there was no *de jure* control, the government did not interfere with the company's export prices, and there was no government involvement in

56 Id.

57 Silicon Carbide from the People's Republic of China, 59 Fed. Reg. 22585, 22587 (Dep't of Commerce, May 2, 1994) (Final).

selection of management.[58] In this case, however, respondent is a public company that can be sold by the GOU at will, belying claims of lack of government ownership and control.[59] Also, the GOU has a significant measure of control over the company's export prices, which have to match the "indicative prices" set by the GOU.[60] In addition, although respondent states that it is only "obliged to notify" the Ukrainian Ministry of Industry of the selection of a new Director General, it states the Ministry appoints and hires the board of directors of Makeevsky steel plant.[61] If the GOU has such powers in regard to Makeevsky, which is 60% public and 40% privately held, the GOU almost certainly has at least as much authority over the 100% public respondent. The Director General in Krivorozhstal appoints all other management, so that control over this appointment amounts to control over the enterprise as a whole.[62] Unlike the Chinese company in Silicon Carbide from China, these two public Ukrainian companies are under tight governmental control. The attempt by respondent and the GOU to disguise public property as privatized should be rejected by the Department.

---

58 Id.

59 SAQR at 5.

60 AQR at 8.

61 SAQR at 7.

62 AQR at 8.

The fictitious division between state-owned and public property in Ukraine should be disregarded. It is clear that the government retains a large degree of control over public property in Ukraine, including the right to sell and influence board and management selection. Under Department practice, the burden is on the respondent to prove that public property is not under government control - an almost impossible undertaking given the degree and importance of government control over Krivorozhstal itself. The Department should, therefore, consider the output and assets of the public sector to be part of the state-owned and state-controlled sector of the economy. Properly considered as such, it is undeniable that the Ukrainian government controls the majority of the Ukrainian economy. Therefore, Ukraine fails to satisfy this statutory criterion and should be deemed a non-market economy.

V. DUE TO RAMPANT CORRUPTION UKRAINIAN FIRMS' COSTS DO NOT REPRESENT TRUE COSTS

Pervasive corruption prevents establishment of a rule of law in Ukraine. This situation continues to hamper Ukraine's transformation into a market economy. Respondent states that corruption is not important for the purposes of this determination, and that many new laws and measures have been passed against corruption.[63] In fact, corruption has reached such a significant level in Ukraine that it imposes a significant cost of production. That additional cost will not be accounted for in antidumping responses, however. This pervasive corruption also prevents investment and other entrepreneurial activities.

A business survey conducted by the International Finance Corporation (IFC) in 2000 showed that 100% of the firms polled reported that they had to pay bribes to obtain such basic government services as business permits, fire inspection reports, and other basic operating

63 Respondent's Submission at 2-3.

necessities.[64] The results of this survey were issued only a year before the first Ukrainian submissions in this case denying such problems. Because every firm has to pay such bribes, bribery has become a cost component equivalent to overhead or general and administrative expenses. Under such circumstances market analysis of Ukrainian firms' costs will not capture or accurately assign all actual costs. Although the Department has granted market economy status to nations with not-insignificant levels of corruption before, the 100% rate reported by the IFC makes this a considerably worse case than the Russian Federation or Kazakhstan.

VI. CONCLUSION

The Domestic Steel Producers respectfully submit that the above analysis and data make clear that Ukraine remains a non-market economy under the statutory criteria which the Department must consider. Ukrainian laborers are still unable to negotiate their wages freely. The foreign investment climate in the Ukraine continues to be poor, and foreign investment remains very low. Government involvement in the economy continues to be dominant, in part through the Government's control of so-called public property. Endemic corruption and the lack of a rule of law complete the picture of a country that cannot properly be considered a market economy under the Tariff Act of 1930.

Respectfully submitted,

64 2002 Ukraine USG Guide at Ch.1.

____
Robert E. Lighthizer
John J. Mangan
Skadden, Arps, Slate, Meager
& Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111
(202) 371-7000

____
Alan Wm. Wolff
Bradford L. Ward
Dewey Ballantine LLP
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-4605
(202) 862-1000

Counsel to Bethlehem Steel Corporation, National Steel Corporation, and United States Steel Corporation