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BY HAND DELIVERY
The Honorable Faryar Shirzad
Assistant Secretary for Import Administration
International Trade Administration
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Attn.: George Smolik Room 3713

Re: Inquiry into the Status of Ukraine as a Non-Market Economy Under the Antidumping and Countervailing Duty Laws

Dear Assistant Secretary Shirzad:

Pursuant to the Department's notice of initiation and request for comments in the above-referenced inquiry,[1] we submit the attached memorandum commenting on whether Ukraine's status as a non-market economy under the antidumping and countervailing laws should be modified. These comments are submitted on behalf of Bethlehem Steel Corporation, National Steel Corporation, and United States Steel Corporation.

Respectfully submitted,

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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).

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EXECUTIVE SUMMARY OF COMMENTS

Since its independence from the Soviet Union in 1991, Ukraine has failed to achieve significant progress in developing a market economy. The government's old-style economic policies and slow pace of reform measures reflected the largely unreformed Soviet thinking of the top policy-makers and resulted in nine consecutive years of GDP decline, a bleak record unmatched by any other East European transition economy. Now Ukraine requests that it be granted market economy status. The overwhelming weight of evidence bearing on the statutory criteria that the Department of Commerce (the "Department") must consider in its non-market economy ("NME") analysis shows that the Department should not grant this request. In the words of one recent study of Ukraine, "After almost ten years of independence, reforms to establish a market economy under the rule of law are still in an embryonic state."[2] The gap between implemented legislation on topics ranging from protection of foreign investment to labor freedom of movement and the *de facto* reality the Ukrainian economy remains wide.

In fact, all of the problems cited by the Department in its 1997 decision not to grant Ukraine market economy status are still present. In spite of some modest recent progress made toward a market economy, when examined through the lens of the Department's statutory criteria, Ukraine fails to qualify as a market economy under any of them.

2 "Ukraine Investment Policy Review," OECD, Directorate for Financial, Fiscal and Enterprise Affairs (Mar. 2001) at 13.

Criterion 1: The extent to which the currency of the foreign country is convertible into the currencies of other countries. Although Ukraine has made some progress toward making its currency, the *hryvnya*, convertible, it is not convertible outside of Ukraine. In addition, the government requires that 50% of all export proceeds be surrendered to the National Bank of Ukraine ("NBU"), which also regularly interferes in the foreign exchange market.

Criterion 2: The extent to which wage rates in the foreign country are determined by free bargaining between labor and management. Wage rates in Ukraine have yet to be determined on the basis of free bargaining, as the Government of Ukraine ("GOU") continues to restrict labor unions and worker rights, such as freedom of movement. The GOU also sets most of the wages of the economy through a complex "Tariff Rate System" law; workers are often paid with goods rather than money; and wage arrears continue to be a significant problem nationwide.

Criterion 3: The extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country. Foreign investment in Ukraine is incredibly low. There are many good reasons for this. High among them is the fact that protection of foreign investment in Ukraine continues to be sorely inadequate. Most importantly, a seemingly liberal Ukrainian law on foreign investment also contains 27 unfortunate provisos, which give precedence to other domestic laws, many of them discriminatory in nature, over the foreign investment law. Very high legal uncertainties surrounding all aspects of foreign investment remain.

Criterion 4: The extent of government ownership or control of the means of production. A large majority of the national GDP continues to be generated by government-owned or government-controlled enterprises. Privatization of large enterprises has been virtually non-existent until recently.

Criterion 5: The extent of government control over the allocation of resources and over the price and output decisions of enterprises. The GOU continues to exercise complete control over enterprises producing the majority of national GDP. The GOU also continues to set the levels of many prices in the economy.

Criterion 6: Such other factors as the administering authority considers appropriate. Ukraine also fails to exhibit any of the positive, mitigating factors that the Department has noted in past reviews involving other countries. Instead, there is widespread corruption on every level of the government that impedes investment and economic development generally, and a weak judicial system and an uncooperative government that undermine the rule of law, and have the same damaging economic effects.

I. INTRODUCTION

In 1997, the Department concluded that Ukraine should continue to be treated as an NME for purposes of the U.S. antidumping laws.[3] In so doing, the Department found that evidence bearing upon each of the five factors specified in 19 U.S.C. § 1677(18)(B) that it is required to consider in its NME analysis showed that Ukraine is not a market economy. Nothing has occurred since that time that would warrant a different conclusion now.

19 U.S.C. § 1677(18)(B) provides that, in determining whether a country is an NME, the Department shall take into account:

> (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 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 such enterprises; and
>
> (vi) such other factors as . . . {the Department} considers appropriate.

In the case of Ukraine, the evidence bearing upon each of the five specific factors identified in the statute indicates that the country continues to be an NME. In particular, the evidence shows:

- There are major limitations on the convertibility of the Ukrainian currency, the

3 Certain Cut-to-Length Carbon Steel Plate From Ukraine, 62 Fed. Reg. 61754 (Dep't Commerce Nov. 19, 1997) (final determ.) ("1997 Determination").

hryvnya;

- Wage rates in Ukraine are largely determined by government fiat, not by free bargaining between labor and management;

- Foreign investment in Ukraine is incredibly low by any standard;

- The state still has overwhelming control over the means of production;

- Both directly and indirectly, the Government of Ukraine controls the allocation of resources and the price and output decisions of enterprises.

In addition, corruption in Ukraine is rampant, and Ukraine lacks the effective rule of law. These are other factors that the Department should consider in its analysis because they have created a very hostile environment for foreign enterprises and for private businesses generally.

It is also worth noting that authoritative, independent observers are unanimously of the view that Ukraine has not developed a market economy. Ukraine has thus far taken only "baby steps" in that direction.

In its recent "Ukraine Investment Policy Review" ("OECD Investment Policy Review"), the Organization for Economic Cooperation and Development ("OECD") stated: "After almost ten years of independence, reforms to establish a market economy under the rule of law are still in an embryonic state."[4]

In its most recent report on Ukraine, Freedom House published an "economic liberalization" score for Ukraine, which showed modest progress during the year 2001, but still showed a lower score than for the year 1997, when the Department last considered Ukraine's NME status.[5]

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4 "Ukraine Investment Policy Review," OECD, Directorate for Financial, Fiscal and Enterprise Affairs (Mar. 2001) at 13-14 (emphasis added), attached as Exhibit A.

5 See Exhibit B.

Finally, the "Ukraine Country Commercial Guide 2002" ("2002 Ukraine USG Guide"), published recently by the Department's U.S. Foreign & Commercial Service and the U.S. Department of State, took note of recent liberalization measures taken by Ukraine, but placed them in the appropriate context:

> While these reform successes are welcome, they represent the beginning rather than the end of what will be a long process. At present, the investment and business climate in Ukraine remain fraught with difficulties.[6]

It went on to say that "{t}he jury remains out on Ukraine's commitment to further economic reform."[7]

II. THERE ARE MAJOR LIMITATIONS ON THE CONVERTIBILITY OF UKRAINE'S CURRENCY

Summary of Comments:

Although Ukraine has made some progress toward making its currency, the *hryvnya*, convertible, it is not convertible outside of Ukraine. In addition, the government requires that 50% of all export proceeds be surrendered to the National Bank of Ukraine ("NBU"), which also regularly interferes in the foreign exchange market.

Discussion:

Under 19 U.S.C. § 1677(18)(B)(i), in determining whether a country is an NME, the Department is directed to consider "the extent to which the currency of the foreign country is convertible into the currency of other countries."

In the 1997 Determination, the Department determined that there are major limitations on

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6 "Ukraine Country Commercial Guide," U.S. & Foreign Commercial Service U.S. Department of State (2002), at 2 (emphasis added), attached as Exhibit C.

7 Id. at 5, attached as Exhibit D.

the convertibility of the hryvnya. Specifically, the Department noted that, while the hryvnya is convertible within the "Newly Independent States," it is not yet convertible elsewhere.[8] The Department also observed that the GOU "retains control over the influx of foreign currency into its domestic economy by requiring that 50% of foreign export earnings be converted to hryvnyas through an Interbank Currency Exchange set up by the . . . {GOU} for that purpose."[9] Both of these limitations on the convertibility of the hryvnya continue to exist to such an extent that the hryvnya is not fully convertible, as stated by the EBRD.[10] Members of the international business community also recognize that the Ukrainian currency is not convertible outside Ukraine.[11] Primarily, governmental limitations on the hryvnya restrict its convertability.

The GOU has admitted that it continues to require the surrender of 50 percent of foreign currency earned on export sales.[12] It evidently has no plans to eliminate that requirement. In its 2001 "Ukraine Investment Policy Review," the OECD urged the GOU to undertake a number of actions to make its legal and institutional regimes more accommodating to investments and private sector development.[13] One of the recommended actions was that the GOU "review the

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8 1997 Determination, 62 Fed. Reg. at 61755.

9 Id.

10 "Ukraine Investment Profile 2001," European Bank for Reconstruction and Development (Apr. 2001) ("EBRD Investment Profile") at 9, attached as Exhibit E.

11 "Doing Business in Ukraine," Ernst & Young (2001) at Section A.1.

12 Comments of the Government of Ukraine concerning Market Status of Ukraine (Oct. 17, 2001) ("GOU NME Submission") at 2.

13 OECD Investment Policy Review, at 22, attached as Exhibit F .

suitability of its currency regulations, notably the export proceeds surrender requirement."[14] Subsequently, the GOU reported to the OECD on the actions that it has taken, or plans to take, to implement the OECD's policy recommendations.[15] The section of that report that referred to the OECD's policy recommendations relating to the Ukraine's "trade and currency regime" – including the foreign currency surrender requirement – listed a number of actions that the GOU has taken, or plans to take, to implement those recommendations. These actions did not include any reference to a possible change in the foreign currency surrender requirement.[16]

Finally, frequent and massive interventions in the foreign exchange market have helped support the currency. Criticizing these interventions, the International Monetary Fund (IMF) has stated that the National Bank of Ukraine needs to "allow greater exchange rate flexibility."[17]

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

Summary of Comments:

Wage rates in Ukraine have yet to be determined on the basis of free bargaining, as the Government of Ukraine ("GOU") continues to restrict labor unions and worker rights, such as freedom of movement. The GOU also sets most of the wages of the economy through a complex "Tariff Rate System" law; workers are often paid with goods rather than money; and

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14 Id.

15 "Actions taken by the Government of Ukraine towards implementation of OECD recommendations," OECD-Ukraine Forum on Investment and Development (Feb. 21-22, 2002), attached as Exhibit G.

16 Id. at 18-19.

17 "Ukraine: Fifth and Sixth Reviews under the Extended Arrangement, Staff Report," International Monetary Fund (Nov. 2001) at 10, 25, attached as Exhibit H.

wage arrears continue to be a significant problem nationwide.

Discussion:

In its NME analysis, under 19 U.S.C. § 1677(18)(B)(ii), the Department must consider "the extent to which wage rates in the foreign country are determined by free bargaining between labor and management."[18] As the Department observed in the 1997 Determination,[19] the GOU is "heavily involved" in setting wage rates and in other employment-related issues.[20] The Department noted, inter alia, that the GOU has a so-called "Tariff Rate System," under which all jobs are graded and salaries are set based upon the level of complexity of the job and workers' qualifications.[21] All state-owned enterprises must base their wage and hiring decisions on this system, and all non-state-owned enterprises must compile their own job classification and wage rates to reflect the standards established by that system.[22] According to the website of the Ukranian Parliament, Verkhovna Rada, this law has not been repealed or even significantly amended since 1997 and remains in effect.[23] Therefore, the Department's determination should be the same now as in 1997.

The "Tariff Rate System" remains in effect. This has been acknowledged by the

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18 1997 Determination, 62 Fed. Reg. at 61755.

19 Id.

20 Id.

21 This mechanism was established pursuant to the Ukraine's Law on Remuneration on Labor (1995). Id. See also, Ukraine National Law #108/95, "Law on Remuneration of Labor" Verkhovna Rada, March 24, 1995, as amended Jan 23., 1997 at Art. 8-17.

22 Id. There are criminal penalties for employers who do not abide by the system. Id.

23 <http://www.rada.kiev.ua/laws/pravo/new/> (in Ukrainian).

Respondent Krivorozhstal Iron and Steel Integrated Works.[24]

In its submission to the Department, the GOU dwells at length on the fact that the Ukrainian Constitution and the 1992 Law on Citizens' Organizations provide for the right to join labor unions and limit the government's authority to interfere with union activities.[25] But this is essentially beside the point. The Department was well-aware of this when it made its 1997 Determination.[26] The Department properly determined that the "Tariff Rate System" heavily affects wages in Ukraine.

Three points in addition to those which formed the basis for the Department's 1997 Determination are also worth noting.

First, Ukrainian workers' freedom of movement within the country is severely restricted in practice. This is true notwithstanding the fact that the residence permit system, *propiska*, that was instituted when Ukraine was part of the Soviet Union (and survived the fall of that country) has been abolished to comply with the European Convention on Human Rights (which has been signed by Ukraine).[27] Workers still must register their residence and, in order to do so, they must have a signed residential lease, a document that is often impossible to obtain.[28]

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24 Krivorozstal Iron and Steel Works NME Submission (Mar. 1, 2002) ("Krivorozstal NME Submission") at 14.

25 GOU NME Submission at 3-4.

26 1997 Determination, 62 Fed. Reg. at 61755.

27 "On the Move," Transitions Online (Feb. 8, 2002), attached as Exhibit I. Without a valid *propiska*, one could not find a job, collect a pension, or send children to school. Therefore, quitting a job to move to another job in a different district or city was extremely difficult.

28 Id. This is because residential leases are highly unpopular with Ukrainian landlords, as they prevent the landlord from hiding rental income from tax authorities.

Second, notwithstanding Respondents' claims to the contrary,[29] wage arrears remain an enormous problem in Ukraine. A study by the International Labor Organization published in August of last year, based on an extensive survey of Ukrainian enterprises and workers, estimated that more than two out of five workers had not been paid for at least three months.[30] The level of worker dissatisfaction that this has caused is enormous. In November 2001, over a thousand coal miners picketed government offices demanding that their arrears be paid.[31] In February of this year, mine-construction workers also went on strike to demand payment of substantial wage arrears.[32] In some industries with major arrears problems, such as metallurgy, the wages have only been paid as a result of massive government subsidy programs.[33]

Third, similar to many other former Soviet republics, in Ukraine, the gap between the *de jure* and *de facto* state of affairs remains wide. Although the Ukrainian Constitution and the 1992 Law on Citizens' Organizations provide for the right to join labor unions and government non-interference in union activities, the actual situation is quite different. In September 1999 a new and restrictive labor union law went into force.[34] This law was criticized by the independent

29 See Krivorozhstal NME Submission at 16.

30 "Rising Unemployment, Salary Arrears, Debt . . . Everything Is Going Up in Ukraine Except Life Expectancy," International Confederation of Free Trade Unions (Aug. 10, 2001), attached as Exhibit J.

31 "Ukraine Plans More Coal Sector Investment," Coal Week International (Nov. 19, 2001), attached as Exhibit K.

32 "Ukrainian Workers Demonstrate For Payment of Wage Arrears," BBC Monitoring International Reports (Feb. 12, 2002), attached as Exhibit L.

33 "2001 Country Reports on Economic Policy and Trade Practices: Ukraine," Bureau of Economic and Business Affairs and U.S. Department of State (Feb. 2001).

34 "2001 Country Reports on Economic Policy and Trade Practices: Ukraine," Bureau of

unions and the International Labor Organization, with the latter stating that the 1999 law placed Ukraine in violation of its commitments under Convention 87 on freedom of association.[35] Although the Supreme Court ruled that particular law unconstitutional in November 2000, labor unions continue to complain of companies disregarding labor union rights.[36] A conference of Ukrainian unions in February of 2001 identified major problems, including "extreme conservatism and unwillingness for dialogue on the part of the authorities" and numerous "artificial impediments on the free exercise of the right to strike" contained in various pieces of legislation.[37]

IV. FOREIGN DIRECT INVESTMENT IS INCREDIBLY LOW

Summary of Comments:

Foreign investment in Ukraine is incredibly low. There are many good reasons for this. High among them is the fact that protection of foreign investment in Ukraine continues to be sorely inadequate. Most importantly, a seemingly liberal Ukrainian law on foreign investment also contains 27 unfortunate provisos, which give precedence to other domestic laws, many of them discriminatory in nature, over the foreign investment law. Very high legal uncertainties surrounding all aspects of foreign investment remain.

Economic and Business Affairs and U.S. Department of State (Feb. 2001).

35 Id.

36 Ukraine Annual Survey of Violations of Trade Union Rights (2001)," Confederation of Free Trade Unions <http://www.icftu.org/displaydocument.asp?Index=991213854&Language=EN> attached as Exhibit M.

37 "Information Bulletin for Central and Eastern Europe," International Confederation of Free Trade Unions (April 3, 2001) < http://www.icftu.org/displaydocument.asp?Index=991212929&Language=EN>

Discussion:

Under 19 U.S.C. § 1677(18)(B)(iii), the Department must examine "the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country" to determine the presence of a market economy. In the 1997 Determination, the Department, noting that areas of concern for foreign investors still remain, highlighted Ukraine's "burdensome and unpredictable arbitration and enforcement system" and prohibition on foreigners owning land.[38]

The legal issues that concerned the Department remain, and actual foreign direct investment in Ukraine remains incredibly low. As of the year 2000, cumulative foreign direct investment in the Ukraine was only $3.9 billion, an insignificantly small figure for a country of nearly 50 million people.[39] Foreign direct investment in Ukraine pales in comparison to foreign direct investment in other countries in Eastern Europe. As noted in the 2002 Ukraine USG Guide, as of January 2001, cumulative foreign direct investment in Ukraine was only $3.9 billion, or about $78 per capita, while the level of foreign direct investment in Poland was nearly ten times as high.[40]

Although the GOU cite laws that allow for foreign investment, these laws do not reflect reality. For example, the concerns that the Department expressed in its 1997 Determination with respect to land ownership and the arbitration and enforcement system still exist. Although the

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attached as Exhibit N.

38 1997 Determination, 62 Fed. Reg. at 61756.

39 2002 Ukraine USG Guide at 6.

40 Id. at Chapter 7.

GOU claims to have remedied the prohibitions on land ownership by foreigners,[41] this is not actually the case. In November of 2001, after its submission of comments to the Department, the GOU adopted new land legislation that entitles foreign individuals and legal entities to own plots of nonagricultural land.[42] However, the law will not address the Department's concerns for some time. The "sale of land" to foreigners will only become legal at the earliest on January 1, 2005.[43] Further it is "anticipated that 15 laws and 20 by-laws are required" to implement fully the new Land Code.[44] Thus, real progress will not be made for some time, and the manner in which the law will actually be enforced remains to be seen.

Apart from the land issue, the laws governing foreign investments are numerous, contradictory, and quick to change without advance notice. At the time of Freedom House's most recent report, there were 130 normative acts governing foreign investment.[45] These often contradictory acts were adopted at different times.[46] "{M}ore than 100 local and state authorities have the right to inspect enterprises and other legal entities . . . Sixty different authorities have the right to seize bank accounts, revoke licenses, or impose similar punitive actions."[47]

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41 Government of Ukraine NME Submission (Oct. 17, 2001) at 6.

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

43 Id.

44 Id.

45 "Nations in Transit: Civil Society, Democracy, and Markets in East Central Europe and the Newly Independent States," Freedom House (2001) ("Nations in Transit") at 401, attached as Exhibit O.

46 Id.

47 Id.

Moreover, although a "Law on the Regime of Foreign Investment" providing protection and rights for foreign investors was passed in March 1996, it also contains 27 provisos which give precedence to conflicting domestic legislation. For example, one such proviso in the section dealing with national treatment gives precedence to certain Ukrainian legislation that, in turn, seriously limits the national treatment application.[48] Thus, a foreign investor could only be certain of his rights by reviewing an enormous body of Ukrainian legislation that goes far beyond the 1996 law. In addition, the law only protects rights of foreign investors as shareholders in enterprises, not the enterprises themselves. In other words, the Ukrainian government has essentially reserved the right to interfere with the operations of enterprises with foreign investment, resulting in the probable dilution of the foreign investment value.[49]

Surveys of foreign companies indicate that legal uncertainty and government failure to enforce laws are some of the biggest impediments to foreign investment in Ukraine.[50] Procedures for commercial arbitration of investor disputes in Ukraine remain unreliable and unpredictable, and only half of the judgments are ever enforced.[51] Both of these facts were cited by the Department as problems under Criterion 3 in the 1997 Determination.[52]

On many occasions, foreign investors have suffered ill treatment in Ukraine and were unable to secure redress in spite of numerous *de jure* protections provided by laws and treaties. For example, in July 2001 local partners of the Korean firm Daewoo forcibly evicted the Korean

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48 OECD Investment Policy Review at 44.

49 Id. at 45.

50 Id. at 42.

51 Id. at 45; "Ukraine 2001 Investment Climate Statement," U.S. Embassy, Kiev at Ch. A1.

52 1997 Determination, 62 Fed. Reg. at 61756.

directors of the Ukrainian Radio Systems joint venture from their offices and took over control of the enterprise. In the meantime, the government refused to renew the Koreans' work permits, providing the local managers with a flimsy justification for their actions.[53] In a different case in 1999, a U.S. company's investment was expropriated in Ukraine without just compensation as provided for in the U.S.-Ukrainian Bilateral Investment Treaty. The U.S. Overseas Private Investment Corps ("OPIC") found the company's claim legitimate, paid it, and unsuccessfully sought to be compensated by the Ukrainian government.[54] In June 2001, OPIC and the Ex-Im Bank suspended approval of new investment projects in Ukraine, pending solution of disputes, thus demonstrating the dangers of foreign investment in Ukraine.

Finally, there are major limitations on the ability of foreigners to invest in key areas of the Ukrainian economy. Legislation "restricts foreign participation to 49% or less in the charter capital of enterprises in certain sectors" – e.g., insurance, publishing, broadcasting sectors, weapons manufacturing, and alcohol.[55] In strategic enterprises, such as TV and radio stations, the limit on foreign shares is 30%.[56]

At this time, then, the concerns expressed by the Department's in its 1997 Determination have still not been meaningfully addressed.

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53 "Wellcom's Woes," Sputnik Media (Aug. 9, 2001) <http://www.kpnews.com/main/9443/>.

54 2002 Ukraine USG Guide at Ch. 7-J.

55 Id. at 68.

56 Id.

V. THE GOU OWNS AND CONTROLS THE MAJORITY OF THE MEANS OF PRODUCTION IN THE UKRAINE

Summary of Comments:

A large majority of the national GDP continues to be generated by government-owned or government-controlled enterprises. Privatization of large enterprises has been virtually non-existent until recently.

Discussion:

In its NME analysis, the Department must examine "the extent of government ownership or control of the means of production."[57] The Department noted in its 1997 Determination that privatization has proceeded unevenly and that "much of the economy remains in the hands of government."[58] At the time of the Determination, the Department observed that "strategic" enterprises were ineligible for privatization.[59] These were the largest companies and "those with the greatest export potential."[60] Although in the 1997 proceeding, Ukraine stated that 44% of state-owned enterprises were privatized, the Department expressed concern that these enterprises were not fully privatized.[61] The issues that troubled the Department in 1997 still exist in 2002.

According to the State Statistic Committee, the share of GDP coming from the private sector in 1999 and 2000 was about 60%.[62] But this figure is highly misleading as the same

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57 19 U.S.C. § 1766(B)(iv) (1995).

58 1997 Determination, 62 Fed. Reg. at 61756.

59 Id.

60 Id.

61 Id.

62 Nations in Transit at 402.

source reports that only 1.1% of industry is in purely private hands and a minuscule 0.4% is the property of foreigners. 15.9% of industry is entirely state- or municipal-owned. The remaining 82.6% of industry is responsible for more than 54% of GDP – and this former state property has been converted to shareholding companies in which the state still retains between 25 and 50 percent.

The truly limited extent of privatization is also shown by other sources. The OECD estimates that eighty percent of the value of Ukrainian assets are in the public sector.[63]

Respondent Krivorozshstal's own submission stated that 3.5 million people now work in the private sector economy.[64] However, Ukraine's workforce is estimated at 22.8 million.[65] Thus, only about 15% of the population is employed in the private sector.

While it is true that Ukraine has privatized large numbers of small and medium-sized companies, the government has failed to do so with the great majority of large enterprises. As a result, the private sector contribution to the GDP remains at a very low 20%.[66] The GOU has retained over 200 large enterprises that alone account for about 70% of Ukraine's industrial output.[67] The reasons for the slow privatization of most the economy include:

> an underdeveloped legislative base without clear, easily understood procedures for selling state property; the absence of political will to overcome strong resistance from local authorities and enterprise directors; parliamentary

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63 OECD Investment Policy Review at 80.

64 See Krivorozhstal NME Submission (March 1, 2002) at 6.

65 See Ukraine: Central Intelligence Agency World Factbook. <http://www.cia.gov/cia/publications/factbook/index.html> (citing the labor force statistics from the end of 1997).

66 OECD Press Statement.

67 OECD Investment Policy Review at 13.

resistance....[68]

In addition, privatization is often resisted by management and employees as well as by local and regional governments, "who view large state-controlled enterprises within their jurisdictions as an important tool for political influence and patronage...."[69]

Finally, structural and legal impediments to privatization still exist. As previously stated, foreigners still cannot own over a threshold percentage of enterprises in strategic industries. Nearly all joint ventures with multiple partners, equity investments, and share acquisitions require approval by Ukraine's anti-monopoly committee, which can be a lengthy and costly process.[70]

For all of these reasons, just as in 1997, much of the means of production remains in the control of the GOU.

VI. THE GOU EXERTS SIGNIFICANT CONTROL OVER THE ALLOCATION OF RESOURCES AND PRICE AND OUTPUT DECISIONS OF ENTERPRISES

Summary of Comments:

The GOU continues to exercise complete control over enterprises producing the majority of national GDP. The GOU also continues to set the levels of many prices in the economy.

Discussion:

Under 19 U.S.C. § 1677(18)(B)(v), in making NME determinations, the Department must also consider "the extent of government control over the allocation of resources and over the

68 2002 Ukraine USG Guide at Ch. 1.

69 Id.

price and output decisions of enterprises." In the 1997 Determination, the Department concluded that the GOU "continues to set domestic prices in some areas of the economy."[71] The Department noted that, under Ukraine's Law on Prices, "the government has authority to set prices on products which affect the entire economy, to set domestic prices of monopolies, and to render to the government any monopoly profits deemed excessive."[72] The Department also noted that the GOU will deem an enterprise a monopoly even when it has as low as a 35 percent market share.[73]

The facts bearing on this issue remain the same. The GOU acknowledges as much in its NME submission to the Department when it states that the Ukrainian Law on Prices allows the government to fix and set prices for products that:

> have a defining influence on the overall level and dynamics of prices on goods and services having decisive social significance, as well as on products, goods and services whose production is concentrated on enterprises having monopolistic status on the market.[74]

According to The U.S. & Foreign Commercial Service and U.S. Department of State, the Cabinet of Ministers of Ukraine has price-setting authority, and determines lists of products, goods and services whose costs are subject to approval by specific divisions of government."[75]

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70 Id. at 68.

71 1997 Determination, 62 Fed. Reg. at 61756.

72 Id.

73 Id.

74 GOU NME Submission at 10.

75 2002 Ukraine USG Guide at Ch. 2.

Controlled prices include the price of coal, set by the Energy Ministry.[76] Obviously, then, the scope of the GOU's power over the allocation of resources, and price and output decisions by enterprises, is enormous.

In the 1997 Determination, the Department also noted that the GOU has particularly strong control over the pricing and output decisions of state-owned enterprises and enterprises leasing state-owned enterprises.[77] The Department pointed out that, under Ukraine's Law on Enterprises, such enterprises were required to fill state orders at the request of the government.[78] Under Ukraine's Law on Supply of Production for State Orders, monopolies were likewise required to fulfill state orders (whether or not the "monopoly" is owned by the government).[79] No evidence has been presented to the Department that any of this has changed.

VII. RAMPANT CORRUPTION AND THE ABSENCE OF THE EFFECTIVE RULE OF LAW ARE OTHER FACTORS INDICATING THE UKRAINE REMAINS AN NME

Summary of Comments:

Ukraine also fails to exhibit any of the positive, mitigating factors that the Department has noted in past reviews involving other countries. Instead, there is widespread corruption on every level of the government that impedes investment and economic development generally, and a weak judicial system and an uncooperative government that undermine the rule of law, and

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76 "Union, Lenders Critical of Kinakh Coal Plan," Kiev Post (Sept 26, 2001). <http://www.thepost.kiev.ua/main/9757>, attached as Exhibit P.

77 1997 Determination, 62 Fed. Reg. at 61755.

78 Id.

79 Id.

have the same damaging economic effects.

Discussion:

Under 19 U.S.C. § 1677(18)(B)(vi), in making NME determinations, the Department is authorized to take into account "such other factors as . . . {it} considers appropriate." In the case of Ukraine, the Department should consider rampant corruption and the absence of the effective rule of law as other factors weighing against a finding that Ukraine is a market economy.

It may be true that other countries that the Department considers to be market economies are corrupt and have legal rules and institutions that are not fully effective. However, in the case of Ukraine, as numerous independent observers have noted, these problems are so great as to prevent it from developing a true market economy.

The 2002 Ukraine USG Guide states that "{c}orruption acts as a severe brake on investment."[80] It notes that "Ukraine consistently ranks among the most corrupt countries in Transparency International's annual review of transparency and corruption."[81] In fact, Ukraine ranked 83rd out of 91 countries surveyed in that organization's "2001 Corruption Perception Index."[82]

The European Bank for Reconstruction and Development has also made blunt statements about the pervasiveness of corruption in Ukraine and its effect on investment in that country. The EBRD 2001 Transition Report states that there is "a very high level of corruption" in

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80 See 2002 Ukraine USG Guide at 2, attached as Exhibit C

81 Id.

82 See "Press Release: New Index highlights worldwide corruption crisis, says Transparency International," Transparency International (June 27, 2001), attached as Exhibit Q

Ukraine.[83] It goes on to say that:

> Household and firm-level surveys conducted by the EBRD, the World Bank and independent researchers have all shown that the degree of corruption in Ukraine appears to be among the highest in the region. This has severely weakened the investment climate with major implications for the development of . . . {small and medium enterprises} and the level of foreign investment.[84]

Efforts to quantify the magnitude of this problem have yielded startling results. The OECD Investment Policy Review published last year estimated that bribery costs amount to 6.5 percent of the revenues of Ukrainian enterprises.[85] And a survey of businesses in the Ukraine published by the International Finance Corporation in 2000 reported that 100 percent of the firms polled responded that they had had to pay bribes to obtain basic government services, such as business permits, fire inspection reports, etc.[86]

The rule of law in Ukraine is also extremely weak. The 2002 Ukraine USG Guide states that "the rule of law in Ukraine remains in its infancy." It went on to explain, inter alia, that "{w}hile the government is attempting to pass new basic legislation to help improve the independence and professionalism of the judiciary, courts remain very weak and subject to political and other pressures."[87] The report goes on to state that Ukraine needs to "establish the rule of law in all aspects of public life" in order to "establish a market economy."[88] Note that the report talks about efforts to "establish" a market economy, not further steps to improve or

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83 EBRD 2001 Transition Report at 35.

84 Id.

85 OECD Investment Policy Review at 23, attached as Exhibit R

86 See 2002 Ukraine USG Guide at 6, attached as Exhibit S

87 2002 Ukraine USG Guide at 2, attached as Exhibit C.

88 Id. (emphasis added).

broaden an existing market economy.

Last year, the OECD Investment Policy Review expressed the view that the absence of the rule of law is severely impeding foreign investment in Ukraine:

> One of the most important issues to improve foreign investment is the reliability of the administrative and judicial system . . . There exists a vast body of law in Ukraine, but a coherent, effective, and transparent legal system is still lacking.[89]

The European Bank for Reconstruction and Development is also of the view that the rule of law in Ukraine is sorely lacking:

> A sound and effective legal framework for the creation of a market-based economy is still needed. Actual and consistent implementation, rather than passage of new decrees, is the chief missing ingredient. Ukraine is known for frequent and unpredictable legal and regulatory changes.[90]

Note that the EBRD's report also talks about the "creation" of a market economy; implicitly, the document is saying that such an economy does not presently exist. The EBRD goes on to say that, in funding investments in Ukraine, it "has experienced difficulty in obtaining authoritative interpretations of the existing laws making investment difficult and risky even in areas apparently covered by existing statutory regimes."[91]

VIII. CONCLUSION

In 1997, the Department concluded that progress had been made in Ukraine toward a market economy, but that progress was not sufficient to grant the country market economy status for antidumping law purposes. As demonstrated by the evidence in this review, Ukraine still lacks a market economy. In fact, the little progress made five years ago has been eclipsed in

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89 OECD Investment Policy Review at 14, attached as Exhibit T.

90 EBRD Transition Report 2001 at 6 (emphasis added).

91 Id.

some cases, by backsliding due to contradictory laws and lax law enforcement. To determine that such an economy operates on prices and costs that adequately reflect market considerations free of government control, would be to ignore the studied conclusions of the OECD, the IMF, and the EBRD, as well as the evidence on the record. Accordingly, the Department must determine that Ukraine "does not operate on market principles of cost or pricing structures, so that sales in the country do not reflect the fair values of the goods" and thereby should continue to be classified as a nonmarket economy.

Respectfully submitted,

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