

Before the Office of Import Administration

International Trade Administration

US Department of Commerce

Case No. A-485-805

Certain Small Diameter Carbon and

Alloy Seamless Standard, Line and

Pressure Pipe from Romania

**Inquiry Into the Status of Romania  
As a Non-Market Economy Country Under the US Antidumping  
And Countervailing Duty Laws**

**Comments of the Government of Romania**

October 23, 2002

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## **I. BACKGROUND**

The starting point for the transition process in Romania was, in many respects, more difficult than those of other Central and Eastern European countries. In the late 1980s, the Romanian economy was characterized by an over-sized, inefficient heavy industry that was rapidly depleting the domestic energy resources. Unlike the status of other transition economies, when the political system changed in 1989 no attempts to reform had yet been made. However, in the past decade Romania has undertaken far-reaching political, economic, and social reforms in spite of this difficult legacy. Although the successful implementation of some of the reforms has not yet completed, the progress made towards a free market in Romania is substantial and is ongoing.

The legal framework for establishing a free market economy in Romania has been gradually set in place since the early 1990s and the progress has been steady and noteworthy. Strong pressure from the international financial institutions has furthered economic reforms and fiscal discipline reforms made by the new Romanian government that took office in December 2000. There is a general consensus, in Romania and in the international community, that the Romanian government has shown strong commitment to macroeconomic reform, privatization and a constant improvement of the investment climate.

International studies on Romania's economic progress over the last two years clearly show an upward trend in the country's economic performance and acknowledge the significant improvements brought by the current government's political resolve. For example, the European Bank for Reconstruction and Development ("EBRD") had the following to say in an investment profile presentation of Romania:

The investment framework in Romania began to improve under the outgoing administration and is expected to continue under the new government that took office in December 2000. Several important measures were taken in 1999-2000 to address issues such as corruption, excessive red tape and poor regulatory system that are major obstacles to attracting foreign direct investment.<sup>1</sup>

The same report also noted: “The Romanian economy has returned to growth after three consecutive years of recession” and that “The country also made successful efforts to strengthen macroeconomic stability.”<sup>2</sup>

The positive evaluation of Romania’s reform process has been reaffirmed over the 2001-2002 period as reflected in a recent Economist Intelligence Unit report on Romania:

The government signaled its commitment to macroeconomic stabilization and structural reform by securing a new stand-by arrangement with the IMF in October 2001...<sup>3</sup>

The same report further states that:

The IMF negotiator, Neven Mates, issued a statement on February 7<sup>th</sup> saying that the IMF broadly approved the macroeconomic progress made in 2001...Mr. Mates noted that several core components of the agreement for 2002, including the adoption of the budget, the reduction of payroll taxes and the adjustment of administered prices, had been achieved, and praised the government’s commitment to the objectives of the program.<sup>4</sup>

In effect, Romania has indeed replaced state controls with a functioning market economy where prices and costs adequately reflect market considerations. In fact, both Canada and the European Union ("E.U.") treat Romania as a market economy for purposes of antidumping investigations.

Romania has been an associate member of the E.U. since 1995, it is a member of the Central European Free Trade Agreement, and was a founding member of the World Trade

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<sup>1</sup> European Bank for Reconstruction and Development, Romania Investment Profile at 11 (April 2001) (“EBRD 2001 Report”) attached hereto as Exhibit 1.

<sup>2</sup> Id. at 3.

<sup>3</sup> The Economist Intelligence Unit, Romania Country Report at 8 (April 2002) (the “EIU 2002 Report”) attached hereto as Exhibit 2.

<sup>4</sup> Id. at 17.

Organization.<sup>5</sup> Additionally, the E.U. acknowledges Romania's progress, and in December 1999 invited Romania to begin accession negotiations. Had there been doubts about Romania's commitment to a free market, clearly none of these political achievements would have been possible.

It is also important to remember that none of Romania's neighbors, including Poland, Hungary, the Czech Republic, Slovakia or the Russian Federation, can claim that they have completed the transition to market economies. However, non-market economy status (“NME”) has been revoked by the Department with respect to each of these countries.

In sum, Romania is firmly and substantially set on its path to becoming a successful market economy. Romania does not impede or discourage free market enterprises, but instead operates on market principles of cost and pricing structures, so that sales of merchandise reflect the fair value of the merchandise. Therefore, it is an appropriate time for the U.S. Department of Commerce (the “Department”) to review Romania's NME status. As detailed below, we submit that such a review will result in the revocation of Romania's NME status under the antidumping laws.

## **II. ANALYSIS**

### **A. STATUTORY STANDARDS FOR NME STATUS REVOCATION**

19 U.S.C. § 1677(18) governs NME country determinations under the U.S. antidumping law. 19 U.S.C. § 1677(18)(A) states:

In General. The term "nonmarket economy country" means any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.

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<sup>5</sup> See EBRD 2001 Report at 14.

In addition, 19 U.S.C. § 1677(18)(B) states that the main determining factors in a NME

status revocation 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 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; and
- (vi) Such other factors, as the administering authority considers appropriate.

However, in its decisions to graduate certain countries to market economy status (such as the case of Slovakia, Latvia or Kazakhstan) the Department has consistently noted, at the outset of its analysis, that the six statutory tests above-listed must not be judged against a theoretical model or a perfectly competitive *laissez-faire* economy:

We note at the outset that each of the six statutory factors discussed is framed in terms of the *extent* of government intervention, and not in terms of absolutes, suggesting that complete *laissez-faire* or a perfectly competitive market economy is not the applicable standard. (emphasis in original).<sup>6</sup>

The Department explained that it shall consider the totality of facts in order to evaluate if the country being reviewed operates under market economy principles:

Instead, the Department must evaluate the totality of facts in determining whether a country has met the standard of market economy. The Department's determination is based on comparing economic reforms in the country to how other market economies operate, recognizing that market economies around the world have many different forms and features. *Although it is not necessary that the country fully meet every factor relative to other market economies*, the Department must determine that economic reforms have reached a threshold level such that the country can be considered to have a functioning

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<sup>6</sup> Memorandum for Troy Cribb, "Antidumping Investigation of Certain Steel Concrete Reinforcing Bars From Latvia – Request For Market Economy Status" at 20 (Jan. 10, 2001) ("Latvia NME Memorandum").

market economy in which prices and costs exist that can be tied to the U.S. antidumping law. (emphasis added).<sup>7</sup>

Over the last decade, Romania has implemented profound economic and social reforms, including:

- (i) Relaxation of controlled prices regime;
- (ii) Liberalization of labor relations whereby unions are empowered to freely negotiate wage rates;
- (iv) Amendment of legislation in the field of direct investment and privatization;
- (v) Speeding up the restructuring of large state companies and the privatization process; and
- (vi) Currency convertibility.

Thus, Romania meets each of the statutory requirements enumerated by the statute.

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<sup>7</sup> Memorandum for Faryar Shirzad, “Antidumping Duty Investigation of Silicomanganese from Kazakhstan – Request for Market Economy Status” at 4 (March 25, 2002) (the “Kazakhstan NME Memorandum”).

## **B. ASSESSMENT OF STATUTORY FACTORS**

### **1. The Romanian Currency Is Fully Convertible For Business Purposes**

*Summary of Comment:* *The foreign exchange regime in Romania is characterized by full convertibility of the Romanian currency on all current account transactions. Certain capital outflows are subject to authorization from Romania's central bank; however, most capital transactions related to foreign investment by non-residents may be performed freely.*

The currency market is free in Romania. The Romanian leu ("ROL") is based on a managed float and is fully convertible for business purposes. Foreign investors may freely repatriate profits and dividends in foreign currency and are permitted to maintain ROL accounts to purchase goods in the domestic market.<sup>8</sup> Romanian legal entities are also allowed to make payments on current account transactions from their foreign currency accounts, without any prior approvals.<sup>9</sup> Current account transactions include, *inter alia*, imports of goods and services, payment of dividends, and repatriation of profits. Though payments between Romanian entities must be made in ROL, payments between resident and non-resident entities may be effected in foreign currency through accounts with Romanian banks.

Romania does not have a law regarding the foreign exchange regime. Instead, the foreign exchange regime is governed by Regulations issued by the National Bank of Romania ("NBR"), the central bank, on the basis of its Statute. The foreign exchange regime is governed by NBR Regulation 3/1997, as amended, which came into force on January 29, 1998. This regime has been liberalized to a large extent in respect of capital inflows. Regulation No.3/1997 regarding

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<sup>8</sup> See U.S. Department of State, Romania Country Commercial Guide FY 2002 at 28 ("Romania CCG"), available at [www.usatrade.gov/website/ccg.nsf/ShowCCG?OpenForm&Country=ROMANIA](http://www.usatrade.gov/website/ccg.nsf/ShowCCG?OpenForm&Country=ROMANIA); attached as Exhibit 3 are relevant excerpts from this source.

<sup>9</sup> *Id.*



foreign exchange transactions establishes the domestic current account convertibility of the ROL.<sup>10</sup> Once the last restrictions on current account transactions were lifted in February 1997, the Romanian authorities announced their intention to accept the provisions of Article VIII of the IMF Articles of Agreement. On March 25, 1998 the Romanian authorities notified the IMF of their decision to accept the obligations resulting from the provisions of Article VIII, effective of that date.<sup>11</sup>

The NBR still has control over some capital account transactions, controls that are common to many other countries. Pursuant to Regulation No.3/1997 capital outflows are subject to NBR authorization, as a general rule. Nonetheless, most of the capital transactions related to foreign investment by non-residents in Romania are performed freely and are not subject to restrictions or authorization.<sup>12</sup> However, the following transactions are subject to authorization: (1) acceptance of foreign securities on the Romanian capital market; (2) transactions with instruments specific to the monetary market; (3) transactions in deposit accounts opened by non-residents in ROL. At the same time, most of the capital transfers by residents abroad are also subject to NBR authorization.

Since 1999, the authorities have allowed the access of non-residents to the issuance of treasury bonds denominated in USD launched by the Ministry of Finance through public subscription. These may be bought by participants authorized on the government bonds market (banks) by subscription in their own name and account or on their own name and their clients' account, legal or natural persons, residents and/or non-residents in Romania.

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<sup>10</sup> See NBR Regulation No. 3/1997 attached at Exhibit 4.

<sup>11</sup> International Monetary Fund, Romania Accepts Article VIII Obligations, Press Release No. 98/22 (June 9, 1998) attached at Exhibit 5.

<sup>12</sup> See Romania CCG at 28.

The existence of certain restrictions on capital account transactions, common in many countries worldwide, is not a disqualifying factor for the purposes of Department's market economy graduation analysis. At the time the Department conducted its inquiry into Poland's request for revocation of its non-market economy status, the Polish currency was fully convertible on all current account transactions, while capital account transactions remained restricted.<sup>13</sup> Nevertheless, Poland was granted market economy status. In reference to this prong of the legal test, the Department explained that "full convertibility is not ... necessary to link Poland's economy to world markets; internal convertibility is sufficient."<sup>14</sup>

In short, the ROL is fully convertible for business purposes. As such, Romania meets the criterion that its currency be convertible into the currency of other countries.

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<sup>13</sup> Memorandum to the File, "Respondent's Request for Revocation of Poland's NME Status" at 10 (June 21, 1993) ("Poland NME Memorandum").

<sup>14</sup> Id.

## **2. Wages Are the Result of Free Bargaining Between Labor and Management**

*Summary of Comment: Trade unions in Romania are strong and effective advocates of workers' rights. Collective bargaining between employers and employees is engaged in freely without government intervention, and it is widely used throughout all the sectors of the economy as the main mechanism for wage setting in Romania.*

The Romanian Constitution and Law no. 54/1991 grant all workers, except for public officials, the right to associate freely, to engage in collective bargaining, and to form and join labor unions without any restrictions by the government.<sup>15</sup> The relationships between employers and employees are primarily governed by the Labor Code<sup>16</sup> and by the annual National Collective Labor Agreement. There are also a number of social security regulations that directly protect individual employees on specific issues such as minimum wage, leave for holidays, working hours, and the work environment. In addition, Romania adheres to the International Labor Organization standards for protecting workers' rights.

Collective bargaining is well established in Romania, with employers and employees free to negotiate collective agreements. In Romania, collective bargaining agreements are regulated by the Law Regarding Collective Labor Agreements,<sup>17</sup> which provides for the minimum rights to be addressed in any collective bargaining agreement. A typical collective agreement covers:

- wages;

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<sup>15</sup> Trade unions are allowed on the basis of the right of free association set forth in Art. 37 of the Romanian Constitution and in accordance with Law No. 54/1991, as amended by Government Ordinance No. 14/1992 and by Government Emergency Ordinance No. 62/1998.

<sup>16</sup> Law No. 10/1972, Official Monitor No. 140 (1 Dec. 1972) as repeatedly and subsequently amended.

<sup>17</sup> Law No. 130/1996, Official Monitor No. 259 (24 Oct. 1996), republished in Official Monitor No. 184 (19 May 1998).

- working conditions;
- social security provisions;
- dispute settlement mechanisms;
- protection of trade union leaders; and
- miscellaneous rights and obligations of employers and employees.

A collective agreement is generally for one year or more. At termination of the agreement, the parties may decide on an extension of the agreement with only slight changes or may work out an entirely different arrangement. Collective agreements are always concluded in written form and are registered with the local labor and social protection department of the Ministry of Labor and Social Solidarity. Any disputes arising as to the interpretation of a collective agreement may be referred to the courts for resolution.

As a rule, collective employment agreements are not mandatory. All employees covered by a collective employment agreement also enter into individual employment contracts with their employer, on similar terms as the collective employment agreement.<sup>18</sup>

The majority of workers in Romania are members of one of some 18 nationwide trade union confederations and smaller independent trade unions. Trade Unions in Romania are either based on the labor union concept (organized by industry or employer) or craft unions (organized by job classification). The trade unions are entitled to represent their members in the negotiation of collective bargaining agreements. At the same time they can represent their members during the collective labor conflicts. Likewise, they may negotiate with the company's management regarding jobs deemed hard, harmful and dangerous, so that the concerned employees may enjoy additional rights.

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<sup>18</sup> See Arthur Andersen, *Doing Business in Romania* (1999) at 13, excerpt attached hereto as Exhibit 6.

A comprehensive analysis of the Romanian labor market prepared by the Organization for Economic Co-operation and Development found that:

Although Romania is less economically advanced than any other OECD Member country, its labor market and social policies include most elements typically found in the latter...Taken together, these policies are more similar to those in western Europe than in most countries with levels of gross domestic product (GDP) per capita similar to Romania, reflecting historical contacts and widespread consensus about the desirability of a harmonization with European Union norms.<sup>19</sup>

The same report clearly states: “the basic legislation governing employment conditions and termination of job contracts is liberal by international standards, especially compared with many continental European countries.”<sup>20</sup>

Most wages rates are established through collective bargaining with individual businesses whether private or state-owned or, according to the case, individually, between employers and employees, without direct interference by the government.<sup>21</sup> “The government seldom intervenes directly in wage setting, apart from its role as employer in the public administration and a few regies autonomes.”<sup>22</sup> The government’s other role in the labor market is that of signatory party to the annual National Collective Bargaining Agreement.<sup>23</sup> The main role of such national agreements is to set the framework and the minimum rights and guarantees for all collective employment agreements. Thus, in the past years such national agreements have provided for minimum wage levels. At the enterprise level, the wage levels negotiated are based

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<sup>19</sup> Organization for Economic Co-Operation and Development, Labor Market and Social Policies in Romania (2000) at 11.

<sup>20</sup> Id. at 75.

<sup>21</sup> See Wage Law, Law No. 14/1991, Official Monitor No. 32 (9 Feb. 1991).

<sup>22</sup> Id. at 78.

<sup>23</sup> Id.

on minimum wages at the level of the country, which are guaranteed by Law No. 68/1993,<sup>24</sup> for the personnel engaged with working contract. The minimum wage at the country's level is established periodically, by government decision, depending on the evolution of consumer prices. Most workers earn substantially more than the minimum wage.

According to the Romanian Ministry of Labor and Social Solidarity data, during year 2001 wages were established through collective bargaining (as regulated by Laws No. 14/1991 and No. 130/1996) in about 7,479 companies. Another 13,840 companies negotiated the wages directly by individual working contracts.

Romanian trade unions and their leaders have been particularly vocal in the past few years in protecting their wages and other prerogatives, in response to massive economic restructuring and personnel layoffs.<sup>25</sup>

The liberalization of the Romanian labor market offers workers at least the same guarantees and protection offered by law to the workers in Kazakhstan, if not substantially more.

In its analysis of the Kazakh labor relations, the Department found that Kazakh workers were able to organize in unions and to negotiate individual labor contracts as well as collective labor agreements.<sup>26</sup> As argued above, the same options are available, by law, to Romanian workers, whether they are employed in private or state-owned companies. Labor strikes, which took place in the past decade, show that the labor unions are a strong partner in Romania and that they take full advantage of their legal prerogatives.

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<sup>24</sup> Official Monitor No. 246 (15 Oct. 1993).

<sup>25</sup> See also Romania CCG at 35-36.

<sup>26</sup> Kazakhstan NME Memorandum at 8.

In its analysis of Kazakhstan the Department noted the increase of real wages over the last two years as a positive factor.<sup>27</sup> The same holds true for Romanian workers whose real disposable wages increased by 4.5% in 2001 and are expected to rise by another 4% in 2002, according to the Economist Intelligent Unit.<sup>28</sup>

Furthermore, the Department noted in the Kazakhstan NME Memorandum that the Law on Labor provides that “wages may not be lower than the minimum monthly wage established by the government.”<sup>29</sup> This measure is similar to the provisions of the National Collective Bargaining Agreement applied in Romania, which establishes a minimum wage.

The Department also took note that the extent of the government’s intervention in Kazakhstan in labor matters has been influenced at times by factors other than economic efficiency, but by the need to soften the social pains inherent in restructuring state-owned companies:

The success of wage reforms in Kazakhstan has been attenuated by a longstanding problem with wage arrears. Wage arrears in Kazakhstan can be attributed largely to a slowdown in privatization reforms in certain sectors. The GOK has been reluctant to allow insolvent firms – mainly SOEs (“State Owned Enterprise”)–to enter bankruptcy, instead enabling them to continue operating without promptly paying their creditors or workers. Largely as a result of delayed industrial restructuring in Kazakhstan, companies that are effectively bankrupt have been able to amass wage arrears that erode living standards.

Irrespective of such type of government interventions in labor matters, namely of artificially sustaining bankrupt state-owned enterprises, the Department found that “the progress made by Kazakhstan under this factor supports market forces.” To the extent that such government actions may have occurred in the case of certain Romanian state-owned companies,

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<sup>27</sup> Id.

<sup>28</sup> See EIU 2002 Report at 24.

<sup>29</sup> See Kazakhstan NME Memorandum at 7.

they do not deny, as the Department recognized in Kazakhstan's case, the existence of market forces. See Kazakhstan NME Memorandum.



### **3. Foreign Investment Is Permitted and Encouraged**

*Summary of Comment:* Romanian law encourages inward foreign direct investment by offering equal treatment to foreign investors who may invest in any field of activity and in any legal form available for doing business in Romania. The percentage of foreign participation in Romanian commercial companies is not restricted and the repatriation of profits and dividends may be done freely after payment of Romanian taxes. Significant investments enjoy substantial incentives, tax breaks and a streamlined administrative process.

Attracting foreign investment, including joint ventures, has been a priority for all of Romania's post-communist governments and continues to be so. In recent years legislative reforms aimed at attracting foreign investments have been pursued more aggressively. Over the last ten years there has been no hesitation in the government's support of foreign investments and several laws and methods have been applied in order to create favorable investment conditions.

#### ***a. General Policy On Foreign Investments***

Romania's foreign investment policy is based on three principles: 1) equal treatment for domestic and foreign investors; 2) free market access; and 3) minimum government intervention. Joint ventures are specifically authorized by Romanian law, which identifies them as a form of foreign investment.<sup>30</sup> Out of the total cumulative US direct investments between 1990 and 2000, 52.9 percent was invested in joint ventures and green-field projects, and the balance was invested through sales contracts with the government.<sup>31</sup> US investments were made in a variety of sectors such as heavy industry, electronics, oil and gas, consumer goods, information technology. See

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<sup>30</sup> See Romania CCG at 26.

<sup>31</sup> Id. at 37.

pages 37-38 of the Romania CCG (attached as Exhibit 3) for a more detailed breakdown of the distribution of foreign investment in Romania.

According to Romanian National Office of the Trade Registry data, foreign direct investments in Romania totaled \$7.95 billion during the period 01/01/1990-03/31/2002, excluding equity funds. The same source indicates that the third largest foreign investor in Romania is the US with \$688.7 million (8.66% of the value of investments). The number of companies with foreign capital amounted to 83,934 at the end of March 2002, out of which 3,268 (3.89%) companies have US ownership.

The Authority for Privatization and Management of State Shareholdings had 31 investment contracts in force with US investors during the time period 01/01/1993-05/31/2002. The total value of the investments stipulated in these contracts amount to \$336.365 million, which need to be completed by year-end 2005.

The Romanian legislation was one of the main tools for stimulating the interest of foreign and local direct investors. The legal framework for investments was amended several times in an attempt to find the most suitable and efficient incentives to stimulate the development of the economy. A detailed list of the main laws applicable to foreign investments is provided at page 26 of the Romania CCG attached as Exhibit 3.

Emergency Ordinance No. 92/1997 as amended by Law No. 241/1998, which represents the current legislation on foreign investments, unifies previous regulations in this field and clarifies that legal and natural persons may invest in Romania without restrictions, in any field of activity and under any of the forms provided by law.<sup>32</sup> Without any discrimination, both

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<sup>32</sup> See Law No. 241/1998, attached as Exhibit 7.

domestic and foreign investors are entitled to benefit from the same general guarantees and incentives granted to direct investments in Romania.

The term of "direct investment" is defined as: participation in the start-up or expansion of a company organized in any of the forms provided by the company law; purchase of shares or social parts in a company, except for portfolio investments;<sup>33</sup> the start-up or the expansion in Romania of a branch of a foreign company.

A direct investment could be performed through:

- in kind contribution - fixed or current assets, tangible or intangible;
- financial contribution in hard currency or in ROL;
- participation in the increase of a company's assets, through any type of financing.<sup>34</sup>

As for the term of "investor", Emergency Ordinance No. 92/1997 as amended by Law No.241/1998, defines it as a legal or natural person, resident or non-resident, with its headquarters in Romania or abroad and who invests in Romania in any of the form provided by the ordinance.

#### ***b. Rights And Guarantees Recognized to Foreign Investors***

Both foreign and domestic investors are entitled to benefit from the same guarantees and rights:<sup>35</sup>

- the possibility to invest in any field of activity and in any legal form provided by the law;

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<sup>33</sup> Foreign investment can also take the form of portfolio investments and be recognized as such, except that it does not constitute "direct" foreign investment.

<sup>34</sup> See Law No. 241/1998, attached as Exhibit 7.

<sup>35</sup> Id.

- equal treatment for Romanian and foreign investors;
- no limit on foreign participation in commercial companies- a foreign investor may

establish a 100% owned enterprise in Romania;

- guarantees against nationalization, expropriation or against other measures with an equal effect.

Nationalization, expropriation or other measures with an equal effect may be enforced only in such limited cases that meet each of the following conditions:

- (i) they are necessary for a cause of public utility;
- (ii) they are non-discriminatory;
- (iii) they are carried out in accordance with the express stipulations of the law;
- (iv) upon payment of adequately and effective compensation.

However, since 1989 there have been no cases involving expropriation of U.S. property.<sup>36</sup>

Under a separate chapter, Emergency Ordinance No. 92/1997 as amended by Law No.241/1998, establishes guarantees and incentives recognized specifically to non-resident investors. Thus, non - resident investors benefit from the right to transfer abroad without any restriction (after paying the applicable Romanian taxes) the following revenue in hard currency:

- (i) the dividend or the benefit earned by a commercial company (or the profit from one of its subsidiaries), in case the non-resident investors are shareholders or associates;
- (ii) the income derived from the sale of their equity interests;
- (iii) amounts obtained from the voluntary liquidation of a commercial company or from the liquidation of a company according to the bankruptcy procedure;

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<sup>36</sup> See Romania CCG at 28.

(iv) the amounts obtained as compensation for an expropriation or for the application of other measures with an equal effect;

(v) other income, depending on the form of the investment.

The same ordinance stipulates the right of the investor to select the competent legal or arbitration courts for the settlement or other resolution of conflicts.

Law No.241/1998 provides that any commercial company involved in a productive activity, irrespective of the nationality of the associates or shareholders, even if 100% owned by foreign investors, may purchase land. A thorough description of the facilities granted to foreign investors under Romanian laws is included in the Romania CCG<sup>37</sup> as well as in the EBRD 2001 Report.<sup>38</sup>

### *c. Profit Repatriation*

In Romania, as discussed also in Section II.B.1. of this submission, repatriation of profits by foreign investors is allowed and is regulated by the National Bank of Romania Regulation No.3/1997(the "New Foreign Currency Regulations").<sup>39</sup> In case of both foreign direct investment and portfolio investment there are two situations that occur in practice:

- repatriation of dividends after the financial year is concluded;
- repatriation of capital in case of investment liquidation (winding-up a company or selling a portfolio investment).

#### (i) Repatriation of Dividends

Repatriation of dividends after the financial year is concluded is a free foreign currency operation. If the dividends are obtained in hard currency, the repatriation is a current account

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<sup>37</sup> Romania CCG at 25-27.

<sup>38</sup> EBRD 2001 Report at 11-12.

<sup>39</sup> See Exhibit 4.

operation. In the most frequent situation, when the dividends are in ROL, the repatriation of dividends is a capital account operation.

The foreign investor may order the transfer of funds representing dividends into the personal current account. From the personal account the funds can be exchanged into hard currency at the request of the client in maximum 180 days from the date of the payroll/payment document. The exchange is a free operation, the approval of National Bank of Romania not being requested, the only restriction being the period of 180 days.

After the exchange of funds into hard currency, the bank will transfer at order the dividends in the country of origin of the foreign investor.

(ii) Repatriation of capital in case of investment liquidation

Subsequent to the liquidation procedure (Government Emergency Ordinance No. 32/1997) and the preparation of a Liquidation Report confirming the settlement of all debts and the amount of remaining capital, the investor may request the exchange of this amount into the currency of the initial investment. This request must be made in 180 days from the date of the Liquidation Report. The bank will transfer these funds at order in the country of origin of the foreign investor.

***d. Bilateral Governmental Agreements to which Romania is a Party***

Romania has concluded a number of bilateral treaties regarding the mutual guarantee and the encouragement of investments. At the same time, Romania is a party to numerous bilateral treaties regarding the avoidance of double taxation. In 1992 Romania became a member of the Multilateral Investment Guarantee Agency (“MIGA”).

Where Romania enters into a bilateral agreement regarding the mutual promotion and protection of investment with a country whose citizens are investors in Romania, and the

provisions of such an agreement are more favorable than the Romanian investment legislation in force, the investors can claim the benefit of the more favorable provisions of such a bilateral agreement.

*e. Additional Facilities for a “Significant Direct Investment”*

As of June 2001, Romania has a new stimulating legal framework for the promotion of direct investments, established by the provisions of Law No. 332/2001 concerning the “Promotion of Direct Investment with Significant Impact on the Economy.”<sup>40</sup> According to Law No. 332/2001 an investment made by natural or legal persons, Romanian or foreign, with a value exceeding 1 million US dollars or the equivalent in other convertible currencies (a “significant investment”) benefits from the following incentives:

- the granting of a fiscal credit representing 20 percent of the value of the investment;
- exception from the payment of custom duties for technological tools, installations, equipment, measuring and control devices, automation equipment and software products, according to a list approved by Joint Order of the Ministry of Development and Prognosis and Ministry of Public Finances;
- extension of time to pay V A T on the above-mentioned goods either imported or purchased domestically, until the 25<sup>th</sup> day of the following month after the investment becomes operational, and
  - accelerated depreciation.

Foreign investment in Romania is governed by the provisions set forth in the foreign investment law in force at the time they are made, unless a subsequent law contains more favorable provisions.<sup>41</sup>

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<sup>40</sup> Attached as Exhibit 8 is a copy of Law No. 332/2001.

<sup>41</sup> Id.

*f. Toward a One-Stop-Shop System for Foreign Investments*

A recent government initiative is the creation of the Romanian Agency for Foreign Investment, an institution for information and promotion of foreign direct investment in Romania, whose main responsibilities are to develop strategies to attract foreign investment and to propose legislative measures designed to streamline procedures and eliminate red tape.<sup>42</sup> The Romanian Agency for Foreign Investment was established by Law No. 390 of June 13, 2002, published in the Official Gazette No. 443 of June 24, 2002.

The establishment of the Department for Relationship with Foreign Investors at the beginning of year 2001 was another important step for improving the institutional and legislative framework concerning foreign investments. This institution was conceived as a “one –stop-shop” for foreign investors with major foreign investments (over \$10 million) and subordinated to the Prime Minister.<sup>43</sup> The activities of the Department for Relationship with Foreign Investors were transferred this year to the Romanian Agency for Foreign Investment and, at that time, the Department for Relationship with Foreign Investors ceased to exist. The Romanian Agency for Foreign Investment deals equally with all foreign investors and its purpose is to assist foreign investors with all substantive and procedural requests.

In sum, the openness of the Romanian foreign investment regime demonstrates the government’s willingness to go to great lengths to encourage foreign investment. There seems to be no serious concern by foreign firms that the playing field in Romania is not level.

In the opinion of international financial institutions an earlier governmental ordinance regarding foreign investments, in effect between 1998-1999, was too generous in the fiscal

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<sup>42</sup> See EIU 2002 Report at 20.

<sup>43</sup> Id.



incentives it granted foreign investors. The ordinance at issue regarded foreign investments amounting to \$50 million or more and provided exceptional income tax exemptions during the first years of the life of the investment.<sup>44</sup> However, under heavy fire from international financial institutions, in particular the IMF, in 1999 the government suspended the investment incentives provided to large foreign investors in order to ease budgetary constraints. In compensation for the loss of such incentives, the tax reform that took effect in 2000 reduced corporate taxes from 38 percent to 25 percent, reduced VAT from 22 percent to 19 percent and reduced excise duties.<sup>45</sup>

Romania's progress in creating a favorable investment climate has been acknowledged internationally. The legislative and regulatory changes introduced since 1999 are certain to have a positive effect on investment inflows.<sup>46</sup> The EBRD assesses the status of the investment climate in Romania in 2001 as follows:

Romania has worked to create a legal framework consistent with a market economy and investment promotion. Gradually it has been moving to strengthen tax administration, enhance transparency and create legal means to reach expeditious resolution of contract disputes. In May 1999 the government enacted a package of legislation approved by the World Bank that addressed many of the failings in Romania's legal framework concerning private enterprise.<sup>47</sup>

Making a comparative review of the foreign investment regime in Romania and the foreign investment regime existent in Kazakhstan, as such regime is summarized in the Kazakhstan NME Memorandum, it appears that foreign investors in Romania enjoy practically all the facilities described in the Department's Kazakhstan NME Memorandum.<sup>48</sup> The one notable difference between the two countries is that Romania does not have the oil resources of

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<sup>44</sup> See Romania CCG at 29.

<sup>45</sup> See EBRD 2001 Report at 12.

<sup>46</sup> See EBRD 2001 Report at 11.

<sup>47</sup> See EBRD 2001 Report at 12.

<sup>48</sup> Kazakhstan NME Memorandum at 8-9.

Kazakhstan and that foreign investment in Romania is more dispersed throughout various economic sectors,<sup>49</sup> whereas in Kazakhstan most of the foreign investment is centered on the oil and gas industry.<sup>50</sup>

In 1993, when the Department analyzed Poland's status as a NME country, it found that Poland was generally open to foreign investment, permitting joint ventures and 100 percent foreign equity participation. However, the Department recognized that foreign investment was restricted in certain sectors of the Polish economy: real estate purchases, certain strategic industries and the acquisition of state-owned enterprises.<sup>51</sup> By comparison, Romania's legislation after 1999 is more liberal, more permissive and it offers more incentives to foreign investors than Poland's legal framework allowed at the time the Department reviewed its NME status.

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<sup>49</sup> See EBRD 2001 Report at 11 for a list of economic sectors where foreign investment was made.

<sup>50</sup> Kazakhstan NME Memorandum at 8-9.

<sup>51</sup> Poland NME Memorandum at 13.

#### **4. Government Ownership and Control of the Means of Production**

*Summary of Comment: Recent privatization laws allow the accelerated privatization of the remaining state-owned enterprises, and the government of Romania has achieved significant results in its privatization efforts, including the privatization programs endorsed by the World Bank. The share of the private sector's contribution to the GDP has been constantly climbing over the last years, currently reaching 72.4 percent. Land ownership is guaranteed through the Romanian Constitution and 100 percent foreign owned Romanian companies may own land for the conduct of their business.*

Under this fourth factor of the NME analysis the Department analyzed two distinct aspects in its review of Kazakhstan's request for market economy treatment, as well as in other recent reviews: (a) privatization reforms and (b) the right to own property and in particular the status of land reform.<sup>52</sup>

##### ***a. Privatization***

Privatization of state-owned companies has been at the heart of the political agenda in Romania during the past decade and it has taken several forms, from the granting of ownership certificates to Romanian citizens, to tender procedures, to allowing privatization agents to sell-off state-owned companies. At the present time, the privatization process is proceeding through three main channels: (1) privatization/liquidation through sales agents under the World Bank led Private Sector Adjustment Loan ("PSAL"); (2) direct sale of state enterprises by the Authority for Privatization and Management of State Shareholdings ("APAPS") and (3) the privatization of national companies and commercial companies from the energy sector and the defense industry by the Office for State Participations in Industry ("OPSI").

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<sup>52</sup> Kazakhstan NME Memorandum at 9.

The World Bank's PSAL program is proceeding in two stages: the PSAL 1 with a value of \$300 million was fully consumed and all tranches released and the PSAL 2 for another \$300 million loan for another wave of privatizations.<sup>53</sup> The government's negotiations for the PSAL 2 program have been concluded and this agreement has been approved by the World Bank's Board on September 12, 2002, in recognition of the government's commitment to finalize the privatization process in Romania. The list of largest assets to be sold includes the national airline, major metallurgy companies, the national oil company and six major tourism companies.<sup>54</sup> A detailed breakdown of the status of the privatization is provided in Exhibit 15.

The progress made in the privatization area in the past two years has renewed international confidence in Romania's commitment to privatization. The International Monetary Fund stated in its November 2001 Staff Report on the Stand-By Agreement with Romania that, with respect to privatization, "After a slow start, the government is now firmly committed to moving ahead with several major projects."<sup>55</sup>

In light of the accession negotiations initiated between the EU and Romania in 1999 and of Romania's EU membership aspirations, the EU has been monitoring very closely Romania's political and economic developments. To this end the EU has set high macroeconomic and structural reform targets for Romania, which have been periodically analyzed. In its November 2001 Report the EU noted that:

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<sup>53</sup> See Romania CCG at 7 and EBRD 2002 Report at 13.

<sup>54</sup> See EBRD 2001 Report at 11 and 13.

<sup>55</sup> IMF 2001 Report at 19.

The authorities have renewed their commitment to privatization. In the closing months of 2000, the privatization process effectively ground to a halt. However, during the first six months of 2001, privatization activity started again. The government reaffirmed its commitment to sell 64 of the largest state-owned enterprises, and it has developed a broad timetable to fulfill it. The sale of Banca Agricola and the largest loss-making steel producer SIDEX were two important successes with a high symbolic value. In recent months, the authorities sold about 40 medium sized companies and more than 180 small enterprises.<sup>56</sup>

A new legislative proposal regarding the acceleration of the privatization, Law No. 37/2002, provides among other things for the sale of unprofitable state enterprises at the symbolic price of 1 Euro, if the buyer pledges to bring in new investment.<sup>57</sup> Together with its implementation norms, this new law promotes streamlined procedures for the privatization of state-owned companies, such as:

- (i) Instituting a “special administration” of the state-owned companies during the privatization period;
- (ii) Diversifying the methods of reducing the state’s ownership by: (a) offering the possibility to dilute the state’s interest in the target company through private share capital increases and (b) the transfer upon payment or free of charge of the assets of social nature;
- (iii) The sale of shares owned by the state in at a symbolic price of 1 EURO;
- (iv) The restructuring of a target company’s debts (complete or partial writing off or rescheduling of outstanding budgetary debts, including those to the local budgets, as well as writing off of the payments for delay increases and their related penalties);
- (v) Simplifying certain privatization procedures, and
- (vi) The shortening of certain procedural terms.

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<sup>56</sup> European Union, 2001 Regular Report on Romania at 36-37 (Nov. 2001) (the “EU 2001 Report”); excerpts attached at Exhibit 10.

<sup>57</sup> See EIU 2002 Report at 20.

In parallel with the privatization process there has also been a rise in private enterprise and green-field investments. According to an IMF study, in 1999 sixty percent of the Romanian GDP was contributed by the private sector, which represents the most dynamic sector of growth in the Romanian economy.<sup>58</sup> By April 2001, the EBRD estimated that the private sector represented 62 percent of GDP.<sup>59</sup> The November 2001 EU Report calculated that in 2000, the private sector accounted for 65 percent of GDP.<sup>60</sup> Finally, other economic data on Romania estimates that as of January 2002, 72.4 percent of the employed worked in the private sector.<sup>61</sup> Since this data was collected there have been additional companies privatized. Thus, today the preponderance of private sector contributions to the GDP over the public sector is even more significant.

The contribution of the private sector to the gross domestic product increased year by year, reaching 67.1 percent in 2001 from only 16.4 percent in 1990, according to the Romanian Ministry of Development and Prognosis, based on data collected by the Romanian National Institute of Statistics. This evolution is due both to the privatization of state owned enterprises and, mainly, to the emergence of a new private sector, where small and medium size enterprises (“SMEs”) have a significant role. The distribution of private sector participation by branches is the following:

- In agriculture, the share of private sector participation is overwhelming: 95.5 percent in 2001 compared to 12.8 percent in 1990;
- In construction private sector participation is of 88.4 percent in 2001 compared to 1.9 percent in 1990;

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<sup>58</sup> See Romania: 2000 Article IV Consultation - Staff Report No. 00/159; Statement by Staff Representative; and Public Information Notice Following Consultation, at 31 (December 2000).

<sup>59</sup> See EBRD 2001 Report at 3.

<sup>60</sup> See EU 2001 Report at 36.

<sup>61</sup> EIU 2002 Report at 23.

- The services sector is a field characterized by a significant increase in private sector contribution: from 3 percent in 1990 it reached over three quarters of total volume of activity in 2000;
- In the industry sector the private sector ownership reaches a majority share of 57.5 percent as of year 2000.

The most recent data show that 75 percent of employees work in the private sector.

Supplementary data regarding the share of private sector in the composition of the GDP is provided in Exhibit 11.

The EU 2001 Report acknowledges that “Romania’s policy towards industry is moving towards the principles of EC industrial policy, i.e. market-based, stable and predictable”<sup>62</sup> and that “[m]ost of the legal framework of a market economy is already in place; however the institutions to implement and enforce it are either weak or have not yet been established.”<sup>63</sup> Nevertheless, the fact that the implementation of privatization measures has been lengthy is not characteristic only to Romania and does not preclude a favorable assessment under this factor of the Department’s NME analysis. Indeed, most countries graduated to market economy status in the past years were still in the process of privatizing their means of production, while at the same time experiencing difficulties or a slow-down of the privatization process. This was true in the cases of Slovakia, Poland, Latvia and Kazakhstan, as explained below in more detail.

In its review of Latvia’s graduation to market economy status, the Department found that “the private sector accounted for 65 percent of GDP,”<sup>64</sup> while in the case of Poland’s graduation to market economy status the Department noted that state-owned enterprises accounted for 60

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<sup>62</sup> EU 2001 Report at 71.

<sup>63</sup> EU 2001 Report at 37.

<sup>64</sup> Latvia NME Memorandum at 12.

percent of Poland's output.<sup>65</sup> In Kazakhstan's case, the share of the private sector reached 60 percent at the time the Department conducted its NME analysis.<sup>66</sup>

At the time Latvia was granted market economy status the Department found that the "state owned enterprises in the energy, transport and telecommunication sectors, enterprises which the government has been slow to privatize, still account for a significant share of GDP."<sup>67</sup>

Furthermore the Department acknowledged that the privatization efforts in Kazakhstan had slowed down considerably in the three years preceding the Department's analysis of Kazakhstan. The slow-down was attributed to a variety of causes:

One reason is that the GOK appears reluctant to quickly force insolvent SOEs into bankruptcy that are the main employers in certain town or regions due to possible resulting social unrest. Another reason ... is the fear of local vested interest groups and state managers in many sectors that privatization will lead to the imposition of foreign management and control and additional scrutiny.

Another concern... is the GOK's view that certain industries are in "strategic sectors" requiring government involvement. The GOK recently announced that it intends to retain ownership of 17 SOEs. Although many of these are natural monopoly providers (e.g. transportation, utilities) they also include enterprises in commercial sectors.<sup>68</sup>

However, the Department took the position that continuing government involvement in certain sectors and that setbacks in privatization efforts are not per se incompatible with market economy principles:

...such policies are not a per se indicator of non-market economy.<sup>69</sup>

Nevertheless, Kazakhstan's lack of recent progress under this factor does not alter the fact that remaining SOEs operating in major sectors of the economy are subject to market forces in the form of foreign and domestic private competition. Competition in

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<sup>65</sup> Poland NME Memorandum at 16.

<sup>66</sup> Kazakhstan NME Memorandum at 10.

<sup>67</sup> Latvia NME Memorandum at 1.

<sup>68</sup> Kazakhstan NME Memorandum at 10.

<sup>69</sup> Id.



major sectors of the economy indicates that market forces are largely dictating output and pricing decisions in Kazakhstan.<sup>70</sup>

The fact that Kazakhstan currently enjoys market economy status, while following a gradual approach to privatization, is a clear illustration that the privatization prong of the NME analysis is not reviewed by the Department in absolute terms.

In Romania the current extent of government ownership and control of the means of production is relatively small, and is becoming even smaller. Moreover, it is comparable to the extent of government ownership in other countries which have recently graduated to market economy status under the Department's analysis. Therefore Romania fully qualifies under this test of the Department's NME analysis.

***b. Land Ownership Reforms***

As land ownership is essential to the development of a strong private sector, in Romania land ownership is recognized both to individuals as well as to legal persons and it is guaranteed through Article 41 of the Constitution of Romania. Excluded from private property are mineral rights, air rights and national water and roadways, which are part of the public domain.

While agricultural land can be owned only by Romanian citizens or legal entities, Romanian companies, including 100 percent foreign owned companies registered in Romania, have the right to purchase land needed for the conduct of their business.<sup>71</sup> However, pursuant to Law No. 268/2001, foreign investors may buy shares in agricultural companies and can lease land from the State Land Agency.<sup>72</sup> Restitution of land confiscated by the communist regime more than forty years ago to its initial owners has been a lengthy process, as in many cases it has been difficult to establish who are the legal owners of such assets. Nevertheless, the effort to

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<sup>70</sup> Kazakhstan NME Memorandum at 11.

<sup>71</sup> See Romania CCG at 30. See also EBRD 2001 Report at 12.

<sup>72</sup> See Romania CCG at 30.

ensure that real property is returned to its rightful owners continues with the launching of an amended land restitution law. The EIU 2002 Report explains some of the details of the new land restitution law.<sup>73</sup>

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<sup>73</sup> See EIU 2002 Report at 20.

**5. To A Large Extent Control Over the Allocation of Resources and Over the Price and Output Decisions Rests With the Private Sector**

*Summary of Comment:* Domestic and foreign entrepreneurs alike benefit from the guarantees and incentives afforded by Romanian law and small and medium-sized companies are especially encouraged and enjoy additional benefits. Free market pricing is the norm, with more than 80 percent of the prices in the consumer price index fully liberalized. The banking sector is undergoing a complete restructuring and privatization process, which has raised the share of private banking to 54 percent of the country's total bank assets.

Under this fifth factor of the NME analysis, in its review of Kazakhstan's request for market economy treatment, as well as in other recent NME cases, the Department analyzed three distinct aspects: (a) the degree to which individuals and businesses can engage in entrepreneurial activities; (b) the extent of price liberalization; and (c) resource allocation, specifically, the status of commercial banking reform.<sup>74</sup>

***a. Entrepreneurial Initiative is Encouraged***

As explained in Section II.B.3.*supra*, foreign and domestic investors alike enjoy substantial guarantees and incentives under Romanian laws. Foreign and domestic entrepreneurs have numerous options under Romanian law for organizing their business. The legal framework is provided by the Company Law, Law No. 31/1990, as amended in 1997 and 1999. An analysis of the main business forms under Law No. 31/1990 is provided at pages 12-14 of the US Department of State's Romania CCG attached as Exhibit 3.

In recent years, the government has afforded particular attention to small and medium enterprises ("SMEs"). An "Action Plan for the Abolition of Certain Barriers to SMEs" was adopted in May 2001, which aims at the simplification of registration and licensing procedures

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<sup>74</sup> Kazakhstan NME Memorandum at 11.

for SMEs, streamlining the legal framework, reducing and simplifying the tax system, promoting access to finance and to public contracts and providing an information system for SMEs.<sup>75</sup> To better focus support for the SME sector the current government has created a new ministry dedicated to these companies, the Ministry of Small and Medium-Sized and Cooperation Enterprises.<sup>76</sup> Further, as of May 2001 “one-stop-shops” have been instituted in the regional Chambers of Commerce, where new companies can be registered and obtain all necessary operating permits within 20 days.<sup>77</sup>

The start-up of the simplest business venture requires mandatory bureaucratic procedures in all countries. While Romania has not reached the efficiency levels of Delaware in terms of amount of time needed to set up a company, substantial progress has been achieved. Romania’s bureaucratic procedures for new entrepreneurs are not restrictive but comparable with those existent in other European countries.

***b. Prices Are Liberalized To A Large Extent***

There is little, if any, government involvement in setting prices on the Romanian market. As mentioned in Section II.B.4.a.*supra*, the private sector accounts for a large part of the production and of the services in the market. The power to make decisions related to the allocation of resources and over price and output decisions of enterprises belongs to the private sector. The Romanian government has no means of controlling the activity of the private sector. The year 2000 edition of the U.S. Department of State’s Romania CCG, reported the “elimination of price controls early in 1997 . . .”<sup>78</sup> This finding was buttressed by other sources:

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<sup>75</sup> See EU 2001 Report at 73.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See U.S. Dept. of State, “Country Commercial Guide for Romania Fiscal Year 2000” at 4.

The liberalization of prices in the economy, initiated in October 1990, and performed in several stages, has become nowadays a comprehensive reality: the prices of over 90% of the production and consumer goods are currently regulated by demand and supply.<sup>79</sup>

A 1999 report of the World Trade Organization Secretariat (the "WTO Report") confirming this fact, acknowledged that "price and exchange rate liberalization is complete."<sup>80</sup> The WTO Report also noted the short term high inflation associated with a radical step in price liberalization: "The rate of inflation was 155%, partly reflecting price measures due to the final stage of price de-controls in early 1997." Id.

Finally, in its most recent report on Romania, the EU also noted: "Most prices in Romania are liberalized" and that "The share of regulated prices in the consumer price index is 18% of which 9% are energy prices."<sup>81</sup> Thus, it cannot be said that the extent of government control over the allocation of resources and over the price and output decisions of enterprises is significant. The government's privatization objectives for 2002 include the initiation of the privatization of companies in the gas distribution and electricity distribution sectors,<sup>82</sup> which will bring further price liberalization.<sup>83</sup> However, the same EU report also went on to remark that "sporadic price controls tend to create distortions," referring to the fact that the government had intervened during the year 2000 to cap energy prices for several months.

In Romania, ever since 1997 there are neither products nor services to the population that are subsidized. In 1998 and 1999 several corrections were made to the electricity price, which were meant to remove the so-called "cross-subsidies." The result was the unification of

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<sup>79</sup> Romanian Development Agency, Romania, Yes! An Investment Guide (1997).

<sup>80</sup> See WTO Press Release TPRB/115, Trade Policy Review Romania September 1999 (September 28, 1999) Exhibit 12.

<sup>81</sup> EU 2001 Report at 36.

<sup>82</sup> See IMF 2002 Report at 19.

<sup>83</sup> See EBRD 2001 Report at 11 and 13 and 20-21.

electricity prices applied to both households and businesses. The status of price liberalization can be summarized as follows:

- More than 80 percent of products in the consumer basket have market-determined prices;
- Seventeen prices are still administered, as fully explained in Exhibit 13, of which:
  - Fourteen of them are subject to approval of the Office for Fair Trading, of which seven are not included in the consumer basket (e.g. passport-related services and transport via main pipelines);
  - Prices of two products are subject to the approval of the National Authority for Energy, i.e. electricity and thermal power;
  - The price of natural gas is subject to the approval of the National Authority for Natural Gas.

Any change the administered prices must be notified to the three institutions mentioned above, which must either approve or reject the proposed changes within a two weeks term. The approved measures are published in the Romanian Official Gazette (called “Monitorul Oficial al Romaniei”) and take effect after 30 days from publication. Therefore, regulated prices can be divided into three categories:

- Virtually free prices – for which the authorities require prior notification (postal services, telephone communications, medicines). Full liberalization is to take place in the foreseeable future;
- Prices for goods and services for which market conditions are still incipient (water and sewerage; public transportation). The improvement of market conditions will pave the way for full liberalization; and
- Public monopolies (electricity and thermal energy, natural gas) for which the government is aiming to create a competition-driven market, which, in any country is a difficult and time-consuming process.

Domestic prices applied by the Romanian natural monopolies stand at levels comparable with those of other world producers. The level of market prices is rather a political issue and,

therefore, upward/downward deviations between international prices and those of Romanian producers were sometimes recorded. The variations in energy prices are determined as follows:

- The oil price in the Romanian market is in line with current prices on foreign markets and it is not administered;
- The price of natural gas is calculated as a weighted average between international prices for imports by Romania and the domestic prices for operating costs at home.

The adjustments in energy prices applied since the last stage of price liberalization (1997) are presented in Exhibit 12.

Nevertheless, government control over energy prices is not limited to Romania. Similar price controls existed also in the Russian Federation, Slovakia, the Czech Republic, Latvia and Kazakhstan at the time the Department decided to revoke their respective NME status. For example, in the case of both Slovakia and the Czech Republic, the Department found that their respective governments imposed price controls on certain goods and services, “primarily for household consumption, covering energy products, utilities, rents and some public services.”<sup>84</sup>

Similarly, in Kazakhstan’s case the government exercises control over prices related to natural monopolies.<sup>85</sup> Yet, the Department noted that the price controls existent in Kazakhstan are “the same as those in which many Western countries exercise price regulation, i.e. transportation, utilities, telecommunications and post services,” thus such controls did not conflict with a market economy determination.<sup>86</sup>

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<sup>84</sup> See Memorandum for Robert S. LaRussa, “Antidumping Duty Determination on Cold-Rolled Carbon-Quality Steel Products from the Slovak Republic – Market vs. Non-Market Economy Analysis” at 12 (October 13, 1999); See Memorandum for Robert S. La Russa, “Antidumping Investigation on Certain Small Diameter Carbon and Alloy Seamless Standard Line and Pressure Pipe from the Czech Republic: Non-Market Economy (“NME”) Country Status” at 12 (Nov. 29, 1999).

<sup>85</sup> Kazakhstan NME Memorandum at 12-14.

<sup>86</sup> Id.

The extent of Romania's decreasing regulation over the energy sector and few other public services is compatible with the Department's analysis for revocation of its NME status and is comparable to that of other former NME countries at the time their NME status was revoked.

*c. Bank Reform Is Proceeding At An Accelerated Pace*

Since 1990 the Romanian banking system has undergone a major restructuring process in accordance with the European Union banking directives, based on a Western European banking model. This process resulted in the organization of a two tier banking system, with the National Bank of Romania ("NBR") on the one hand and commercial banks on the other hand.

Some of the most important reform measures involved speeding-up bankruptcy procedures, privatization and improvements in the financial supervision of both bank and non-banking financial sectors.<sup>87</sup>

Today in Romania commercial banks can freely compete for business in the market, by taking deposits, by making loans, and by offering a variety of other banking services. The banking system now comprises 39 banks, of which 31 are Romanian commercial banks and 8 are branches of foreign banks.

The National Bank of Romania has been restructured starting with 1991 in order to become a modern central bank. Currently, the operations of the National Bank of Romania are regulated by Law No. 101/1998 modified by Law No. 58/1998 regarding banking activity, with further amendments.

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<sup>87</sup> See EBRD 2001 Report at 26-28 for a detailed profile of the current status of the Romanian financial sector.



The privatization process of the first major state-owned commercial bank was initiated in 1998. The Law on the Privatization of Banks, Law No.83/1997, established the legal framework for the transfer of state owned banks to the private sector and for the improvement of their financial situation. Pursuant to Law No. 83/1997, bank privatization may take place in one of the following ways:

- (i) Increase of the bank's share capital, through contribution of private capital in cash, on the basis of public offer or private investment;
- (ii) purchase of the bank's stock from the government by Romanian individuals; foreign individuals; private Romanian legal persons; financial investment companies; or private foreign legal persons;
- (iii) a combination of the two methods described above.

In 1998 and in the first months of 1999, the Romanian authorities succeeded in selling 51% stake in the Romanian Development Bank to the French bank Societe Generale and 45% of Bank Post (BANC POST) to a group formed by General Electric International Holdings and Banco Portugues de Investimento.<sup>88</sup> In April 2001 the privatization of Banca Agricola was concluded with the sale of a majority stake to a consortium formed by Raiffeisen Zentralbank and the Romanian–American Investment Fund.<sup>89</sup> The next state-owned bank up for privatization is the strongest Romanian bank, Banca Comerciala Romana (“BCR”) whose privatization will proceed under the World Bank PSAL program. As a preparatory action for this important privatization initiative, in October 2002 the government will have to approve the privatization

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<sup>88</sup> Id.

<sup>89</sup> Id.

strategy for its largest state-owned bank, BCR, which will involve the sale of the state's share of the capital in this bank and the transfer of control to a strategic investor.<sup>90</sup>

It is significant to note that according to the EU 2001 Report state-owned banks account for less than 50 percent of the country's total bank assets – only 46 percent of assets are held by state-owned banks, which means that the private bank sector accounts for 54 percent of total assets.<sup>91</sup> Also significant is the fact that commercial bank loans to state-owned enterprises account for only 10 percent of all lending activity.<sup>92</sup> Thus, Romanian banks are in an advanced state of reform where market forces determine lending decisions. While the reform of the banking sector is not yet complete, the banking system is currently functioning on sound foundations, privatization is progressing well and commercial banks compete freely for business on the Romanian market.

According to NBR data, at the end of March 2002 state-owned banks accounted for 43 percent and private banks accounted for 57 percent of the banking system's total net assets. The banks with full or majority foreign capital accounted for 54.2 percent of the country's total banks net assets. At April 30, 2002, the banks loans granted to the state owned companies represented only 15 percent out of the total banks' loans.

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<sup>90</sup> IMF 2001 Report at 19.

<sup>91</sup> EU 2001 Report at 37.

<sup>92</sup> Id.

## **6. Other Factors the Department Should Consider**

*Summary of Comment:* Romania enjoys an upward trend of economic growth due to its improving macroeconomic climate. Its markets are open to trade and competition, and the European Union treats Romania as a market economy country in international trade proceedings. International agreements such as those with the European Union, the World Bank and the International Monetary Fund strongly condition Romania to stay the course of reform.

Apart from the statutory factors analyzed above, several other factors exist which support the claim that Romania's NME status should be revoked. Those factors are addressed below.

### *a. Macroeconomic Climate*

According to the Romanian Ministry of Public Finances, based upon Romanian National Institute of Statistics data, the macroeconomic climate of the country can be summarized as follows:

- The macroeconomic climate in Romania has improved in the last two years. Romania has succeeded to maintain an upward trend of economic growth started in the year 2000, reaching 1.6 percent growth in 2000 and 5.3 percent growth in 2001. The increase of the current account deficit remained under control and the imports growth rate diminished in the first half of the year 2002. The consolidated budgetary deficit has decreased from 3.5 percent in 2000 to 3.3 percent in 2001. The inflation rate had a descendant evolution and is forecasted to reach about 20 percent in 2002. The total public debt of Romania remained at an acceptable level of 33.2 percent of GDP in 1999, 31.5 percent of GDP in 2000 and 29.1 percent in 2001.

- The share of private sector contribution in the GDP increased constantly during 1990-2001, from 16.1 percent in 1990 to 67.1 percent in 2001. The private sector increased also in the foreign trade of Romania, from 0.2 percent of total exports in 1990 to 66.7 percent in 2001 and from 0.4 percent of total imports in 1990 to 69.6 percent in 2001. During the same period, the private sector's share in the total investments has risen from 4.3 percent in 1990 to around 64 percent in 2001.
- The government's ownership over capital has decreased significantly in the last years. The number of companies in the portfolio of the Authority for the Privatization and Management of the State Shareholdings is in permanent decrease, from about 5,554 companies in 1998 to 1,444 companies in 2001.
- The performance of the banking sector improved during the few last years. The ratio of doubtful and loss claims diminished as share in GDP from 59 percent in 1998 to 35 percent in 1999, to 4 percent in 2000 and to 3.4 percent in 2001.

***b. Romania's Domestic Markets Are Open to Foreign Trade and Competition***

The Romanian legal system has changed dramatically since 1990, with new legislation having been updated and/or having replaced all centralized economy regulations. The harmonization of domestic laws with the laws of the E.U. has been the driving force of Romania's recent legislative efforts for private sector development. The E.U. approach was used for the new framework on regulations and standards. Romania's competition policy is also modeled on the E.U. approach.

Romania's competition policy is regulated by:

- Law No. 21/1996, the “Competition Law”, as amended, which protects, maintains and stimulates the free competition and the existence of a normal competitive environment in order to promote the consumers’ interests; and
- Law No. 11/1991, modified and completed by Law No. 298/2001 regarding unfair competition.

In spite of difficult economic circumstances, it is commendable that Romania has enforced one of the most liberal trade policies in Europe. Specifically all commitments regarding bound rates on customs duties were observed; no export subsidies were granted; and import restrictions were eliminated in 1992 while export restrictions were gradually relaxed and finally abolished as of 1998. During this period of time, no commercial defense action has been taken on a multilateral level, preference being given to competition as a way of speeding up restructuring and improving economic efficiency.<sup>93</sup> When deciding to enforce such a liberal trade policy, the Romanian government took into consideration two major goals: to make the Romanian economy act in accordance with multilaterally agreed instruments, mechanisms and rules; as well as to encourage the development of a competitive environment, capable of fostering the enforcement of market rules.

The entire commercial policy decision-making process is aimed at transforming the Romanian economy into a market economy, and at ensuring that producers act in a competitive environment. Among the most important steps taken to attain this objective, emphasis has been given to the transparency of trade policy and the non-discrimination of the measures taken.

Trade relations with the U.S. have been strengthened by the US-Romanian Trade Agreement (1993), the bilateral investment treaty (1994) and the granting of unconditional MFN status

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<sup>93</sup> See WTO Report at Exhibit 14.

treatment in August 1996.<sup>94</sup> In 1992 Romania became a member of the Multilateral Investment Guarantee Agency (MIGA).<sup>95</sup>

***c. Romania is Irreversibly Committed to Market Reforms Through International Agreements and Obligations***

Romania has undertaken several major international initiatives that show that it is irreversibly committed to free market reforms.

(i) Reforms Enabling Accession of Romania to the E.U.

One of the priorities of Romanian foreign policy is the continuous development of Romania's relationship with the E.U. The agreement establishing diplomatic relations between Romania and the E.U. (the "Europe Agreement") was signed on February 1, 1993, and, in June 1995 Romania presented its official bid for accession to the E.U. The Europe Agreement provides the legal and constitutional basis for the further development of relations between Romania and the E.U. and it clearly spells out its main objective: to prepare Romania's accession to the E.U.

In the spring of 2000, the European Council decided to begin accession talks with Romania. The government is proposing an action plan for accelerated admission to the E.U. and hopes to open negotiations on all 31 chapters of the *acquis communautaire* (the body of E.U. law) by the end of this year, and to complete all negotiations by the end of 2004.<sup>96</sup>

The Association Agreement between Romania and the E.U., which entered into force on February 1, 1995, aims at Romania's trade integration in the E.U. It includes, as its main provisions, the liberalization of trade in goods, rules regarding trade in services, and bilateral

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<sup>94</sup> See Romania CCG at 3.

<sup>95</sup> *Id.*

<sup>96</sup> See EIU 2002 Report at 7.

political and social-economic dialogue. As far as trade in goods is concerned, the agreement encompasses all areas. The basic principles of the association are:

A free trade area to be achieved gradually, on an asymmetric basis; to this aim, the European Union eliminated, from the entry into force of the agreement, the customs duties on most industrial products, while Romania is gradually reducing up to elimination these customs duties, according to a calendar setting progressive reductions in periods of three-five years. The remaining customs duties for industrial goods were eliminated by Romania in 2002;

Mutual elimination of quantitative restrictions on imports, enforced from the entry into force of the Agreement;

- (i) Eliminating quantitative restrictions on exports: they were eliminated by the European Union from the entry into force of the Agreement and from 1 January 1998 by Romania (according to the timetable included in the Agreement); and
- (ii) Starting trade liberalization for agricultural goods on the basis of concessions granted one another.

Thus, Romania must liberalize its domestic market and continue economic reforms in order to achieve its main political aspirations.

(ii) Conditioning IMF and World Bank Assistance Upon Reforms

The World Bank and the IMF have assisted Romania through its transition to a free market economy by providing technical assistance and funding for reform projects. However, most of the loans made by the World Bank have been conditioned upon the attainment of certain reform goals. As discussed at section II.4.a *supra*, the World Bank's PSAL program is conditioned upon further progress in privatization efforts. Similarly, Romania's stand-by agreement with the IMF is linked to Romania's achievement of far-reaching macroeconomic stabilization factors and reform. See IMF 2001 Report. Therefore, the extraordinary pressure

exerted by these two important international financial institutions leaves no choice for the current government other than to continue market economy reforms.

***d. Romania is a Market Economy for Purposes of E.U. Antidumping Proceedings***

Romania's progress in terms of economic reform is acknowledged by its trading partners in the E.U., which, for purposes of the E.U. antidumping laws, classify Romania as a market economy country. The E.U. antidumping laws contain special provisions for determining normal value in the case of imports from non-market economy countries, similar to the NME provision of 19 U.S.C. § 1677(18).<sup>97</sup> Specifically, Article 2.A.7. of Council Regulation (EC) No. 384/96 regarding protection against dumped imports from countries not members of the European Community, states as follows:

In the case of imports from non-market economy countries and, in particular those to which Council regulation (EC) No. 519/94(5) applies, normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin. An appropriate market economy third country shall be selected in a not unreasonable manner...<sup>98</sup>

In a recent antidumping proceeding concerning imports into the EU of urea from Belarus, Bulgaria, Croatia, Egypt, Estonia, Lithuania, Libya, Poland, Romania and Ukraine, the European Commission applied the NME provision cited above and proposed Slovakia as a surrogate country for the purpose of establishing normal value with respect to two countries.<sup>99</sup> With respect to Romania, the Commission did not select a surrogate country because it does not

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<sup>97</sup> See O.J. L 56 6/3/1996, p.1.

<sup>98</sup> Article 2.A.7, Council Regulation (EC) No. 384/96, O.J. L 56 6/3/1996, p.1.

<sup>99</sup> See Antidumping proceeding concerning imports of urea originating in Belarus, Bulgaria, Croatia, Egypt, Estonia, Lithuania, Libya, Poland, Romania and Ukraine, O.J. C 301/2, 21/10/2000 p.1. (notice of initiation).



consider Romania a NME. In all E.U. antidumping proceedings involving imports from Romania the European Commission determines normal value based on the Romanian producers' actual costs and by comparing home market sales with export sales.

*e. Revocation of Romania's NME Status is Consistent with the Department's Practice*

When the Department revoked Poland's NME status in 1993, Poland's transition to a 100% successful market economy was not yet complete. For example, there was a relatively low level of foreign investment at the time. However, the Department concluded that Poland had liberalized its foreign investment rules in meaningful and sustained ways, thus NME revocation was appropriate. The Department attributed the relatively low level of foreign investment in Poland to Poland's transitional, inexperienced, and underdeveloped new financial and legal systems.<sup>100</sup> Similarly, when Hungary's NME status was revoked in the year 2000, it was clear that its transition to a market economy country had not yet been 100% successful, nor was it complete.<sup>101</sup>

In the respective cases of Kazakhstan and of the Russian Federation, the Department acknowledged the respective difficulties in the reform process among which the slow-down of the privatization process, the partial reform of the banking sector, the existence of price controls over natural monopolies and the remaining restrictions on certain foreign exchange capital account transactions.<sup>102</sup> However, the totality of the evidence supporting the six statutory factors

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<sup>100</sup> See Memorandum to the File, "Respondent's Request for Revocation of Poland's NME Status" (June 21, 1993).

<sup>101</sup> See Memorandum to Robert S. LaRussa, "Antidumping Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from Hungary - Market vs. Non-Market I ("NME") Analysis Memorandum" (Feb. 23, 2000).

<sup>102</sup> See Kazakhstan NME Memorandum.

of the NME analysis convinced the Department that both Kazakhstan and the Russian Federation should be treated as market economies for purposes of the US antidumping laws.<sup>103</sup>

Comparing Romania's fulfillment of each of the six statutory factors for NME revocation with the Department's analysis in the NME determinations for Poland, Slovakia, the Czech Republic, Hungary, Latvia, the Russian Federation and Kazakhstan, we find no basis to distinguish between Romania's readiness and the readiness of such other economies at the respective times when their NME status was revoked.

### **III. CONCLUSION**

Romania is no longer a NME country within the meaning of 19 U.S.C. § 1677(18). Romania's domestic markets, unlike those of a traditional NME, are open to trade and foreign investment and are not insulated or protected from external market influences. These changes have been meaningful and sustained. The Romanian government no longer exercises the type of microeconomic control over business entities that characterizes traditional non-market economies. In sum, the sale of goods in Romania reflects the fair value of such goods.

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<sup>103</sup> Id.

Since all the six determining factors in the Department's NME status revocation analysis indicate that Romania's NME status is no longer appropriate because such status does not correspond to the political and economic realities of Romania, it is hereby respectfully requested that Romania's NME status be revoked.

Eugen DIJMARESCU

Secretary of State,

DEPARTMENT OF FOREIGN TRADE

GOVERNMENT OF ROMANIA

## EXHIBIT LIST

1. European Bank for Reconstruction and Development, Romania Investment Profile (April 2001)
2. The Economist Intelligence Unit, Romania Country Report (April 2002)
3. U.S. Department of State, Romania Country Commercial Guide FY 2002 (excerpts)
4. NBR Regulation No. 3/1997
5. International Monetary Fund, Romania Accepts Article VIII Obligations, Press Release No. 98/22 (June 9, 1998)
6. Arthur Andersen, Doing Business in Romania (1999)
7. Law No. 241/1998
8. Law No. 332/2001
9. International Monetary Fund, "Romania: Request for a Stand-By Arrangement – Staff Report" (Nov. 2001) (excerpts)
10. European Union, 2001 Regular Report on Romania (Nov. 2001) (excerpts)
11. Supplementary data regarding the share of private sector in GDP
12. Impact of Energy Prices On Inflation
13. Goods and services with regulated prices for the year 2002
14. WTO Press Release TPRB/115, Trade Policy Review Romania September 1999 (September 28, 1999)
15. Status of the Privatization and Restructuring Process for the Companies Included in the Portfolio of the Authority for Privatization and Management of State Ownership.

