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BY HAND DELIVERY
The Honorable Donald L. Evans
Secretary of Commerce
U.S. Department of Commerce
Import Administration
Central Records Unit, Room 1870
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Attn: George Smolik Room 3708
Lawrence Norton Room

Re: Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Romania

Dear Secretary Evans:

The Department has requested comments on whether Romania's status as a nonmarket economy under the antidumping and countervailing duty laws should be revoked.[1] We submit the attached memorandum on that issue on behalf of

The Honorable Donald L. Evans

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[1] Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe From Romania, 67 Fed. Reg. 57388, 57390 (Dep't Commerce Sept. 10, 2002) (prelim. results).

United States Steel Corporation, Bethlehem Steel Corporation, and National Steel Corporation.[2]

Respectfully submitted,

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On behalf of Bethlehem Steel Corporation, National Steel Corporation, and United States Steel Corporation

[2]United States Steel Corporation is a Petitioner in the above-captioned review in which the Department has requested such comments.

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B	“2002 Regular Report on Romania’s Progress Towards Accession,” Commission of the European Communities (Oct. 9, 2002)
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D	"Nations in Transit," Freedom House (2002)
E	Bucharest Rompres (Oct. 9, 2002) FBIS Doc. EUP20021009000488
F	"Romania: Country Reports on Human Rights Practices, 2001," Bureau of Democracy, Human Rights and Labor, U.S. Department of State (Mar. 4, 2002)
G	“Romania: Annual Survey of Violations of Trade Union Rights,” International Confederation of Free Trade Unions (2002)
H	"Romania - Economic Overview," Deloitte & Touche
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Q "Romania Country Commercial Guide FY 2002," U.S. & Foreign Commercial Service, U.S. Department of State (2002)

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S "Romania: Selected Issues and Statistical Appendix," IMF Country Report No. 01/16, International Monetary Fund (January 2001)

T A. Dochia, "New Private Firm Contributions to Structural Change in the Romania Economy," Romania 2000 - Ten Years of Transition (Oct. 2000)

U "Main Provisions of the Currency Regulation," National Bank of Romania, *available at* http://www/bnro.ro/En/Legi/Regval_se.asp, (last visited Nov. 4, 2002)

V From Romanian Business Journal, *available at* http://www.reoembus.org/english/business/buletine_economice/ec_bul_07_2002.htm (last visited Nov. 4, 2002)

W "Corruption Perceptions Index 2002," Transparency International (Aug. 28. 2002)

X "I Am Corrupt, Therefore I Am?" Buchares Evenimentul Zilei (Aug. 31, 2002) FBIS Doc. EUP20020902000141

Y I. Stefan, "The Baron's Disease," Romania Libera (Oct. 21, 2002), FBIS Doc. EUP20021023000164

Z I. Ionita, "Corruption Masking," Bucharest Adventul (Oct. 18, 2002) FBIS Doc. EUP20021019000038 (Oct. 18, 2002)

EXECUTIVE SUMMARY

The overwhelming weight of evidence bearing on the statutory criteria that the Department of Commerce (the "Department") must consider in its nonmarket economy ("NME") analysis shows that Romania unequivocally remains an NME. The relevant evidence bearing on each of these criteria is encapsulated below, and is discussed in detail in the succeeding sections of this submission. When these criteria are considered, whether individually or collectively, it is clear that Romania does not have the basic elements of a market economy.

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

- the extent to which wage rates in the foreign country are determined by free bargaining between labor and management;
- the extent to which joint ventures or other investments by firms of other countries are permitted in the foreign country;
- the extent of government ownership or control of the means of production;
- the extent of government control over the allocation of resources and over the price and output decisions of such enterprises;
- the extent to which the currency of the foreign country is convertible into the currency of other countries; and
- such other factors as . . . {the Department} considers appropriate.

Romania is seriously deficient by all of these measures.

The extent to which wage rates in the foreign country are determined by free bargaining between labor and management. Wage rates in Romania are not determined on the basis of free bargaining between labor and management, as labor unions and worker rights are heavily restricted in practice.

The extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country. In practice, Romania is not open to significant foreign direct investment. Foreign investment in Romania is incredibly low, as in practice, the legal and business environment in the country – including, inter alia, an unpredictable legal system, a cumbersome bureaucracy, and rampant corruption at all levels of business and government – effectively deter significant foreign investment, and a transition to a market economy.

The extent of government ownership or control of the means of production. The Government of Romania still accounts for a large majority of Romania's industrial production and half of all banking assets. Most of the land suitable for new investment and the best arable land remain in the hands of the Government.

The extent of government control over the allocation of resources and over the price and output decisions of enterprises. The Government of Romania continues to exert significant control over the allocation of resources and price and output decisions of enterprises. The Government does so through a variety of direct and indirect means, including price controls unrelated to any anti-inflationary objectives, and the provision of inputs, tax breaks, and credit on preferential terms to certain industries or enterprises.

The extent to which the currency of the foreign country is convertible into the currencies of other countries. There are a host of limitations on the convertibility of Romania's currency – in the form of licensing requirements for currency conversions in connection with many significant business transactions – and these limitations are likely to exist for some time to come.

Such other factors as the administering authority considers appropriate. There is widespread corruption on every level of business and government that impedes investment and economic development. Corruption in Romania is on such a massive scale as to be an important reason why that country has not developed a market economy.

I. INTRODUCTION

Several independent, authoritative observers have recently concluded, explicitly or implicitly, that Romania does not operate as a true market economy. These observers include the European Commission ("EC"), certain agencies of the U.S. Government itself, including the Department, the "watchdog" organization Freedom House, and even leading Romanian politicians.

The EC, in its regular reports on Romania's progress toward European Union ("EU") accession, repeatedly has found that Romania has <u>not</u> yet developed a functioning market economy. In its 2001 report, for example, the EC concluded that "Romania cannot be considered as a functioning market economy."[1] And in an updated report issued just last month, the EC, while recognizing that some progress has been made, stressed the "incompleteness of the transition process."[2]

Significantly, the Department and the U.S. Department of State, in their current country commercial guide for Romania, essentially concurred with the EC assessment. Specifically, they stated that:

> When restructuring and privatization are completed and the basic elements of a market economy are in place, the {Romanian} govern-

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[1]"2001 Regular Report on Romania's Progress Towards Accession," <u>Commission of the European Communities</u> (Nov. 13, 2001) at 31, 38, attached as Exhibit A.

[2]"2002 Regular Report on Romania's Progress Towards Accession," <u>Commission of the European Communities</u> (Oct. 9, 2002) at 49, attached as Exhibit B.

> ment's role in the economy will diminish. In the meantime, the government plays an extremely important part in the economy.[3]

Freedom House, in its 2002 report on "Nations in Transit," concluded that "Romania remains a laggard in terms of liberalization, privatization, and economic restructuring."[4]

Even leading Romanian politicians have indicated that the country does not have a market economy. Just last month, a former Prime Minister and current President of the National Liberal Party, Theodore Stologan, said that Romania was the only one of the 12 countries seeking EU accession "which continued to have a non-functional market economy."[5]

These findings by objective observers should weigh heavily in the Department's mind as it considers whether Romania has, in fact, developed a market economy.

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[3]"Romania Country Commercial Guide FY 2002," U.S. & Foreign Commercial Service and U.S. Department of State (2002) at Chapter 2 at 5 attached as Exhibit C.

[4]"Nations in Transit," Freedom House (2002) at 313, attached as Exhibit D.

[5]Bucharest Rompres (Oct. 9, 2002) FBIS Doc. EUP20021009000488, attached as Exhibit E.

II. THERE ARE MAJOR LIMITATIONS ON FREE BARGAINING BETWEEN LABOR AND MANAGEMENT

Summary of Comment:

Wage rates in Romania have yet to be determined on the basis of free bargaining, as labor union and worker rights are heavily restricted in practice.

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." "The reference to 'free bargaining between labor and management' reflects concerns about the extent to which wages are market based, i.e., about the existence of a market for labor in which mobile labor service providers and employers are free to bargain over the terms and conditions of employment."[6] Because wages are an important component of producer costs and prices, the manner in which they are set is "an important indicator of a country's overall approach to setting costs and prices in an economy."[7]

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[6]Memorandum from George Smolik, Economist, Office of Policy, Import Administration to Faryar Shirzad, Assistant Secretary for Import Administration, re: Antidumping Duty Investigation of Silicomanganese from Kazakhstan - Request for Market Economy Status (Mar. 25, 2002) ("Kazakhstan Market Economy Memo").

[7]Id. at analysis of section 771 (18)(B) Factors Section

To be sure, Romania may have laws "on the books" that ostensibly protect labor union and worker legal rights. But they are enforced poorly, if at all.

In March of this year, the U.S. Department of State, in its "Country Report on Human Rights Practices" for Romania, made a number of specific, negative findings concerning the protection of union and worker rights in that country.[8] The report found that "it continues to be difficult to hold a legal strike because of lengthy and cumbersome procedures."[9] The Department of State also observed that Romanian unions believe that the courts have a propensity to declare illegal the majority of strikes on which they are asked to rule.[10] Moreover, the report pointed out, an amendment to Romania's labor law in September 2000 permits companies to claim damages from strike initiators if the strike is deemed illegal by a court.[11] Finally, the report noted that unions have reported that, as a general matter, the Government of Romania ("GOR") interferes in trade union activities, collective bargaining, and strikes.[12]

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[8] See Exhibit F.

[9] Id. at 13.

[10] Id.

[11] Id.

[12] Id. at 12.

Finally, as others have noted, many companies make employment conditional upon agreeing not to join or create a union, or form "yellow unions" to counteract the activities of independent trade unions.[13]

III. IN PRACTICE, ROMANIA IS NOT OPEN TO SIGNIFICANT FOREIGN DIRECT INVESTMENT

Summary of Comment:

Foreign investment in Romania is incredibly low. This is because the legal and business environment in that country is quite hostile to such investments in practice.

Discussion:

Under 19 U.S.C. § 1677(18)(B)(iii), the Department must examine the “extent to which joint ventures and other investments by firms of other foreign countries are permitted in the foreign country” to determine the presence of a market economy. As the Department noted in its determination that Kazakhstan had completed its transition to a market economy:

> Opening an economy to foreign investment tends to expose domestic industry to competition from market-based suppliers and the management, production and sales practices that they bring. It also tends to limit the scope and extent of government control over the market,

[13]“Romania: Annual Survey of Violations of Trade Union Rights,” International Confederation of Free Trade Unions (2002) at 2, attached as Exhibit G.

> since foreign investors, as a general rule, demand a certain degree of autonomous control over their investments.[14]

In evaluating this question, the Department does not simply analyze whether the formal legal framework for foreign direct investment appears to be hospitable. As its decision in the recent Kazakhstan case shows, the "legal framework" is but the starting point for its analysis.[15] The Department then proceeds to evaluate "developments in the economy" to determine whether the country in question is truly open to foreign direct investment.[16]

In the case of Kazakhstan, the Department found the country to be "an investor-friendly country" with clear investment and tax laws, a stable business environment, and a high level of foreign direct investment ("FDI").[17] The Department noted that Kazakhstan's relatively high level of FDI itself was "a strong indicator" that the Government of Kazakhstan effectively enforced its laws at the national level and actively encouraged foreign investment.[18]

In stark contrast, the environment in Romania is hostile to foreign investment and, as a consequence, FDI in Romania remains incredibly low. Roma-

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[14] See Kazakhstan Market Economy Memo.

[15] Id. at analysis of section 771 (18)(B) Factors Section.

[16] Id.

[17] Id.

[18] Id.

nia's business environment was ranked 52nd out of 60 countries included in Economist Intelligence Unit's global ranking for the period 1997-2001 and 9th out of 10 countries in its regional ranking.[19]

As a result, despite being Europe's second largest transition economy (after Poland),[20] Romania received only $6.4 billion in FDI over the 10-year period 1991-2000, while Poland received more than $30 billion in FDI during the same period, and much smaller countries like Hungary and the Czech Republic each attracted some $20 billion in FDI over the same period.[21]

A significant impediment to investment in Romania is the unpredictable and confusing legal environment in which businesses must operate. Regulations can change overnight without notice.[22] The executive branch of the government frequently "legislates" through emergency ordinances, a practice that the EC, among

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[19] See "Romania - Economic Overview," Deloitte & Touche, attached as Exhibit H at 15. The ten countries included in EIU's regional ranking were Azerbaijan, Bulgaria, Czech Republic, Hungary, Kazakhstan, Poland, Romania, Russia, Slovakia and Ukraine. Id.

[20] "Memorandum of the President of the International Bank for Reconstruction and Development and the International Finance Corporation to the Executive Directors on a Country Assistance Strategy for the World Bank Group for Romania," The World Bank (May 22, 2001) at 32, attached as Exhibit I.

[21] "Corporate Governance in Romania," OECD (2001) at 52, attached as Exhibit J.

[22] "Romania Country Commercial Guide FY 2002," U.S. & Foreign Commercial Service, U.S. Department of State (2002) at Chapter 7 at 8, attached as Exhibit K.

others, has "strongly criticized."[23] In its most recent report on the possible accession of Romania to the EU, issued just last month, the EC condemned this practice because it is non-transparent, and makes the law highly unpredictable.[24] In that report, the EC also noted that, despite its prior criticism of this practice, the use of such ordinances has not been substantially decreased by the GOR.[25] And, just last month, Britain's ambassador to Romania, Sir Richard Ralph, complained about the "legislative nightmare" in Romania, "which gives many headaches to those who wish to start a business in this country."[26]

Not only are Romanian laws unclear; the courts that enforce them have numerous, serious shortcomings. The World Bank has found that the Romanian court system is "weak," that proceedings take a long time to resolve, that judgments are "highly unpredictable," and that these factors significantly complicate Romania's business environment.[27] Such a “burdensome and unpredictable . . .

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[23]Exhibit B at 22.

[24]Id.

[25]Id.

[26]"Romania Excels in Corruption – Says the British Ambassador to Bucharest," Bucharest Adventul (Oct. 14, 2002) FBIS Doc. EUP20021014000060, attached as Exhibit L.

[27]Exhibit I at Annex H at 2.

enforcement system" was one factor that the Department cited in its 1997 determination not to revoke the NME status of Ukraine.[28]

According to the World Bank, the courts for commercial matters are understaffed, insufficiently skilled, and lacking in expertise in specialized commercial fields such as intellectual property.[29] But the unpredictability of judicial decisions is not solely due to inexperience and inadequate resources; corruption is also a serious problem.[30] According to a World Bank survey, nearly two-thirds of businesses believe that the judiciary is corrupt.[31] For example, Stephen Groningen, Chief Executive Officer of Romania's Banca Agricola, has reported that his company has lost "court cases where the evidence was overwhelmingly in his favor 'for all sorts of mysterious reasons,' and remains unconvinced that the courts will give 'an impartial decision in due time.'"[32]

In its most recent report on Romania's possible accession to the EU, the EC similarly expressed serious reservations about the judicial system, stating that

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[28] Certain Cut-to-Length Carbon Steel Plate From Ukraine, 62 Fed. Reg. 61754, 61756 (Dep't Commerce Nov. 19, 1997) (final determ.) ("areas of concern remain for foreign investors, in particular the reportedly burdensome and unpredictable . . . enforcement system").

[29] Exhibit I at Annex H, p. 2.

[30] Id.

[31] Id. at 10.

[32] "EU/Romania: Reluctant Reformers Chase Accession Carrot," European Report (May 22, 2002) at 3, attached as Exhibit M.

reform of the judiciary has been limited, and the main concerns previously raised by the EC have not been addressed.[33] The report stated:

> In particular, the involvement of the executive in judicial affairs has not been substantially reduced, the courts remain over-burdened, the General Prosecutor has retained an extensive right to introduce extraordinary appeals, and the combination of a lack of resources and an inadequate human resources policy means that the judicial system is severely strained.[34]

Other Romanian government officials likewise act in an arbitrary and/or corrupt fashion. As Freedom House reports,

> Romania is plagued by an extremely heavy and cumbersome bureaucracy, and this in part explains the high incidence of corruption. In addition to increasing opportunities for bribe taking, bureaucratic complexity is responsible for a high level of arbitrariness in administrative decision making, which sometimes gets mistaken for petty corruption. Also, excessive regulations, administrative controls, and inspections are stifling the activities of the private sector.[35]

The U.S. Government's current "Country Commercial Guide" has confirmed the existence of this corruption and arbitrariness in government decision-making. According to this report, customs, municipal zoning offices, local financial authorities, and other bodies are affected by corruption.[36] Demands for bribes and

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[33]Exhibit B at 24.

[34]Id. 24-25.

[35]Exhibit D at 324.

[36]Exhibit K at 10.

payoffs from mid- to lower- level officials “can reach the point of harassment.”[37] Moreover, “foreign investors feel they are unfairly targeted by Romanian tax authorities for audits and reviews and that Romanian authorities view them as ‘cash cows’ that can be milked to fill government coffers.”[38]

Jean-Pierce Vigroux, a partner in Pricewaterhouse Coopers, summarized the numerous problems confronting foreign investors as a result of the government's posture in a May 2002 interview:

> It is difficult to attract financing to a country like Romania, which is affected by very many corruption-related scandals . . . In relation to the fiscal policy, Romania was perceived as a country that breaks its commitments. There used to be some facilities granted to investors, which have vanished over time.[39]

For its part, the GOR has responded to foreign investors' complaints about corruption, smuggling, and government favoritism to state-owned enterprises by harshly criticizing the foreign investment community itself. Romania's Prime Minister, Adrian Nastase, has alleged that foreign investors "use various means to avoid paying the profit tax."[40] According to a press report:

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[37]Id.

[38]Id. at 8.

[39]"It is Difficult to Attract Financing to a Country Affected by Corruption," Romania Libera (May 20, 2002) FBIS Doc. EUP2002052100215, attached as Exhibit N at 2.

[40]A. Sadeanu, "Without Giving Names or Providing Evidence, Nastase Accuses Multinational Companies in Romania of Tax Evasion," Bucharest Adventul (continued...)

> The prime minister's message was not well received, as most foreign businessmen criticized the offensive manner of its presentation and the fact that, as no names were given, all companies were lumped together.[41]

In part, Romania's failings reflect the fact that its government remains dominated by officials who held positions of authority under the Communist regime of Nicolae Ceausescu. A recent book by former Romanian President Emil Constantinescu made this point, noting that Romanian Prime Minister Nastase was a Ceausescu-era official, as was Dan Popescu, the Minister of Industry and Resources.[42] Gheorghe Cazan, the current Minister of Development and Planning, served for 15 years under Ceausescu in the State Council in Charge of Economic Planning, "the institution that coordinated the Communist centalized economy."[43]

In sum, the business environment in Romania is one of the most toxic in Europe toward FDI. "A complex, confusing, and constantly changing regulatory environment, erratic taxation, lack of transparency in major deals, pervasive bureau-cracy, and widespread corruption have often discouraged and chased foreign inves-

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[40](...continued)
(June 7, 2002), FBIS Doc. EUP20002060700000155, attached as Exhibit O at 1.

[41]Id. at 2.

[42]Excerpt from "Time to Demolish, Time to Build," Bucharest Ziva (Oct. 4, 2002) FBIS Doc. EUP20021004000216, attached as Exhibit P at 2.

[43]Id. at 2.

tors away."[44] The very limited influx of FDI demonstrates that Romania is not open to foreign investment.

IV. THE MEANS OF PRODUCTION REMAIN SUBSTANTIALLY IN THE CONTROL OF THE GOVERNMENT OF ROMANIA

Summary of Comment:

The GOR still accounts for a large majority of Romania's industrial production and half of all banking assets. Most of the land suitable for new investment and the best arable land remain in the hands of the GOR.

Discussion:

In its NME analysis, the Department must examine "the extent of government ownership or control of the means of production."[45] The GOR continues to control much of the means of production in Romania, in particular through its ownership of large industrial companies.

The pace of privatization has been slow by design. The GOR has been loathe to confront the social consequences of privatizing state-owned companies, or liquidating its large loss-makers. As the U.S. Government's current "Country Commercial Guide" notes:

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[44] "Romania Country Commercial Guide FY 2002," U.S. & Foreign Commercial Service, U.S. Department of State (2002) at Chapter 1 at 1, attached as Exhibit Q.

[45] 19 U.S.C. § 1766(B)(iv) (1995).

> Romania's current government has used a rhetoric that strongly supports the idea of fast privatization. Yet, in actual fact, institutional reorganization (the creation of a new Privatization Authority to replace the State Ownership Fund and the division of responsibility for privatization among the Privatization Authority, pertinent ministries, and local organizations) has slowed privatization down. . . . . When restructuring and privatization are completed and the basic elements of a market economy are in place, the government's role in the economy will diminish. In the meantime, the government plays an extremely important part in the economy.[46]

The state sector still accounts for over 68 percent of Romania's industrial production[47] and 55 percent of the value added in such production.[48] Indeed, according to the U.S. Government's current "Country Commercial Guide," 80 percent of Romania's industrial core has not been privatized.[49] In terms of percentage of gross domestic product, Romania's state-owned sector is much larger (approximately 40 percent[50]) than that of Russia (approximately 30 percent[51]), and of

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[46]Exhibit C at 5.

[47]Id. at 1. Similarly, the World Bank reports that "the state still holds shares in around 6,000 enterprises and accounts for about three-quarters of industrial output." Exhibit I at 9.

[48]Exhibit J at 47.

[49]Exhibit C at 1.

[50]Exhibit I at 9.

[51]Memorandum from Albert Hsu, Senior Economist, to Faryar Shirzad, Assistant Secretary, Import Administration, re: Inquiry into the Status of the Russian Federation as a Non-Market Economy Country Under the U.S. Antidumping Law (June 6, 2002) ("Russia Market Economy Memo") at 21.

the Czech Republic (approximately 20 percent[52]) when those countries were deemed market economies by the Department.

A report issued by the Organization for Economic Cooperation and Development on Romania's economy concluded that limited progress has been made in privatizing large state enterprises, and that very few large, lossmaking enterprises have been liquidated.[53] "For the most part, the {Romanian} government accepts the "OECD" criticism."[54]

In its most recent report on the possible accession of Romania to the EU, the EC also took note of the limited extent of privatization in Romania, and its negative implications for the restructuring of Romania as a market economy:

> {P}rivatization and restructuring are not yet completed in most sectors and are at a relatively early stage in some. In particular, several large loss-making enterprises that actually subtract rather than add value have survived with little or no restructuring thanks to direct and indirect government support. This has weakened market incentives and deprived the budgetary and private sectors of scarce resources.[55]

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[52]Memorandum from John Brinkman, Program Manager, to Robert LaRussa, Assistant Secretary for Import Administration, re: Antidumping Investigation of Certain Small Diameter Carbon and Alloy Seamless Standard Line and Pressure Pipe from the Czech Republic: Non-Market Economy ("NME") Country Status (Nov. 29, 1999) at 10.

[53]Bucharest Adventul (Sept. 25, 2002), attached as Exhibit R.

[54]Id. citing Eugen Dijmarescum Chief of the Economic Policies Department.

[55]Exhibit B at 49.

In the banking sector, state-owned banks account for half of all banking assets.[56] This provides an indirect, but powerful means for the GOR to control the means of production, given the state practice of propping up loss-making enterprises through the banking sector.[57]

The GOR also remains a key actor in the land market.[58] Most of the land suitable for new investment is under the control of government ministries, local authorities, and state-owned enterprises, making it difficult for private investors to acquire such land.[59] Similarly, the best arable land in the country is still owned by state farms.[60]

Finally, it should be noted that a number of "private enterprises" in Romania are nothing more than a device created to siphon off funds from state-owned companies. These companies, known as "tick firms," are organized by the managers of state-owned companies to sell raw materials to the state-owned company at high

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[56] Exhibit I at 9.

[57] Id.

[58] “Romania: Selected Issues and Statistical Appendix,” IMF Country Report No. 01/16, International Monetary Fund (January 2001) at 158, attached as Exhibit S.

[59] Exhibit I at Annex H, at 2.

[60] Id. at 10 (“the privatization of state farms, which are chronic loss-makers, remains a critical unfinished task”).

prices and/or buy its production cheaply.[61] Such entities do not represent private enterprises in any meaningful sense of the term; they are merely shell companies designed to facilitate theft.

Thus, all of the evidence indicates that the means of production remains substantially in the control of the GOR.

V. THE GOVERNMENT OF ROMANIA EXERTS SIGNIFICANT CONTROL OVER THE ALLOCATION OF RESOURCES AND PRICE AND OUTPUT DECISIONS OF ENTERPRISES

Summary of Comment:

The GOR continues to exert significant control over the allocation of resources and the price and output decisions of enterprises.

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 price and output decisions of enterprises." The GOR continues to exert significant control over the allocation of resources and price and output decisions of enterprises through a variety of direct and indirect means.

[61] A. Dochia, "New Private Firm Contributions to Structural Change in the Romania Economy," Romania 2000 - Ten Years of Transition (Oct. 2000) at 14-15, attached as Exhibit T.

To begin with, Romania continues to control prices to a significant extent. As the EC observed in its 2001 accession report, while "{m}ost prices in Romania are liberalized, . . . sporadic price controls tend to create large distortions . . . . "[62]

The GOR also directly controls the allocation of resources by a variety of means. According to the EC's report last month on Romania's possible EU succession:

> {G}overnment intervention has continued to affect enterprises' competitiveness, thereby holding back the process of restructuring. . . . {S}uccessive governments have continued to shelter a slowly diminishing number of sectors and enterprises from market discipline. This was achieved through the provision of explicit budgetary subsidies as well as through other less transparent and more pervasive forms of support. At different points in time, these have included controlling the price of key inputs for certain production sectors, writing off tax arrears to the budget on a regular basis, tolerating mounting inter-enterprise arrears, granting borrowing guarantees and implementing discriminatory trade and fiscal measures.[63]

The GOR has a very lenient attitude toward the accumulation of arrears on payments owed by enterprises and this, in turn, has greatly distorted prices and the allocation of resources. In its 2002 report on "Nations in Transit," Freedom House reported that "the unpaid debts of public companies now amount to a

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[62]Exhibit A at 36.

[63]Exhibit B at 50.

staggering 50 percent of GDP."[64] And, in the report on Romania's possible accession that the EU issued just last month, the EC observed that the GOR's toleration of these poor payment disciplines "continues to affect the workings of the price mechanism."[65]

In its previous accession report, the EC also noted that this practice has resulted in a significant misallocation of resources. Specifically, the EC stated that "unviable state-owned enterprises have been allowed to continue their operations because of the absence of hard budget constraints and, in many cases, large implicit state aid, typically granted by forgiving tax arrears and other debts to the state."[66] While such practices have allowed many loss-making state-owned companies to survive, they have also hindered the reallocation of resources to more efficient industries.[67]

Finally, in addition to such indirect transfers as debt forgiveness, many enterprises receive direct transfers and preferential access to credit from state-owned banks.[68]

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[64]Exhibit D at 326.

[65]Exhibit B at 45.

[66]Exhibit A at 39; see also Exhibit B at 67 ("{t}here are continuous problems with the treatment of debt cancellation – a form of state aid which is widely practised by public bodies").

[67]Exhibit B at 41.

[68]Exhibit I at 9.

Clearly, the scope of the GOR's control over the allocation of resources and price and output decisions by enterprises is enormous. As the EC has concluded, "{g}overnment policy towards the enterprise sector has often directed scarce resources to the support of the state owned sector at the expense of developing a strong private sector."[69]

VI. THE CONVERTIBILITY OF ROMANIA'S CURRENCY IS SIGNIFICANTLY LIMITED

Summary of Comment:

There are a host of limitations on the convertibility of Romania's currency – in the form of licensing requirements for currency conversions in connection with many significant business transactions – and these limitations are likely to exist for some time to come.

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. "The greater the extent of currency convertibility, for both trade and investment purposes, the

[69] Id. at 39.

greater are the supply and demand forces linking domestic market prices in the country to world market prices."[70]

There are major limitations on the convertibility of Romania's currency. Currency conversions in connection with numerous important business transactions require licensing by the National Bank of Romania. According to the website of the National Bank of Romania, these include:

"(a) admission of securities and units of foreign collective investment undertakings on the Romanian market;

(b) residents' transactions in securities and units of foreign collective investment undertakings;

(c) transactions in securities and other instruments currently traded on the money market;

(d) financial loans and credits granted by residents to non-residents less short-term financial leasing operations;

(e) short-term financial loans and credits granted by non-residents to residents;

(f) sureties granted by residents to non-residents;

(g) operations in deposit and current account operations opened by residents abroad;

(h) operations in . . . {Romanian currency} deposit accounts opened by non-residents in Romania;

(i) personal capital transfers in the form of loans granted by residents to non-residents;

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[70]See Russia Market Economy Memo.

(j) import and export of financial instruments – payment instrument in the form of cash."[71]

Not surprisingly, in July of this year, the Vice-Governor of the National Bank of Romania acknowledged that the Romanian currency "has a limited convertibility."[72] Moreover, he stated that he anticipated that it would not become fully convertible until 2004 at the earliest, and that this might not occur until 2007.[73]

[71]"Main Provisions of the Currency Regulation," National Bank of Romania, *available at* http://www/bnro.ro/En/Legi/Regval_se.asp, (last visited Nov. 4, 2002), attached as Exhibit U.

[72]From Romanian Business Journal, *available at* http://www.reoembus.org/english/business/buletine_economice/ec_bul_07_2002.htm (last visited Nov. 4, 2002), attached as Exhibit V.

[73]Id.

VII. RAMPANT CORRUPTION HAS BEEN AN IMPORTANT REASON WHY ROMANIA HAS BEEN UNABLE TO DEVELOP A MARKET ECONOMY

Summary of Comment:

There is widespread corruption on every level of business and government that impedes investment and economic development. Corruption in Romania is so great as to be an important factor in preventing the country from developing a true market economy.

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 Romania, the Department should consider rampant corruption as one other factor weighing against a finding that Romania is a market economy. As discussed above, there is widespread corruption on every level of business and government that impedes investment and economic development. While it may be true that other countries the Department considers to be market economies are corrupt, corruption in Romania is so great as to be an important reason why Romania has failed to develop a true market economy.

In its recent determination of market economy status for Russia, the Department also found substantial corruption.[74] In Russia, however, the level of

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[74] See Kazakhstan Market Economy Memo at 28.

corruption was no higher than levels in some market economies and taxes were a greater concern to investors than corruption.[75] Corruption in Romania, on the other hand, pervades all levels of business and government and represents a significant impediment to the development of a market economy. The EC, in its 2001 report on Romania's progress toward accession, found that corruption in Romania is a rampant and systemic problem that hinders the development of a private sector. Specifically, the EC stated that:

> {C}orruption . . . was a widespread and systemic problem that undermined the legal system, the economy and public confidence in government. Despite a general recognition of the seriousness of this problem by the government there has been no noticeable reduction in levels of corruption and measures taken to tackle corruption have been limited.[76]
>
> Corruption is a serious problem which has hampered the development of the private sector.[77]

In a subsequent report issued in October of this year, the EC found that little progress has been made to reduce such corruption:

> Surveys indicate that corruption is a widespread and systemic problem in Romania that is largely unresolved. . . . Corruption remains a common aspect of commercial operations but is also widely reported in dealings with public bodies as well as at the political level. Such high levels of corruption undermine economic development and erode popular trust in state institutions. Independent observers have con-

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[75] Id.

[76] Exhibit A at 21.

[77] Id. at 37.

> cluded that there has been no noticeable reduction of corruption during the reporting period.[78]

Pervasive corruption is widely recognized in Romania itself. One Bucharest journal observed in August of this year that corruption has become a generalized phenomenon, all over society, a legacy of the Communist era in which the organs of state power (the Party and the secret police or "Securitate') "became the most corrupt elements in society."[79] Corruption

> is stimulated and rewarded . . . in a country where half the population lives below the poverty threshold, in a country lacking a functional market economy, where the state is inefficient and macro-managing things, and where privatization is politically-inspired – which makes foreign investors stay away . . . . [80]

The centrist daily newspaper Romania Libera notes that government officials have transformed themselves into so-called "harmless barons," who "have turned their

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[78]Exhibit B at 26.

In fact, Romania is one of the most corrupt countries in the world . Transparency International ranked Romania 77th out of 102 countries in its 2002 Corruption Perception Index. “Corruption Perceptions Index 2002,” Transparency International (Aug. 28. 2002) at 5, attached as Exhibit W. The countries with the lowest numbers are the least corrupt, and those with the highest numbers are the most corrupt. And Romania's numbers have been rising in recent years, not falling. Id. at 4.

[79]"I Am Corrupt, Therefore I Am?" Buchares Evenimentul Zilei (Aug. 31, 2002) FBIS Doc. EUP20020902000141, attached as Exhibit X.

[80]Id.

public positions into personal deals, meant to bring them huge profits."[81] The ruling party's "barons"

> acquire governmental funds in their own money-boxes . They acquire PHARE {EU reconstruction aid} funds. They traffic in oil. They purchase the newspapers that criticize them. They acquire factories by means of rigged bids. They receive money from "dubious" loans . . . They are Romania's owners.[82]

An editorial in Bucharest Adventul, a large, centrist daily newspaper, accepted these critical judgments as basically accurate, and commented that:

> As long as corruption remains at such high levels, Romania will never have a market economy. And if the country does not have a real market economy, we can say goodbye to EU accession, even in 2007, no matter how many successes the Adrian Nastase government will report.[83]

Clearly, then, corruption in Romania is on such a massive scale that it is an important reason why that country has failed to develop a market economy.

VIII. CONCLUSION

As demonstrated by the evidence in this review, Romania lacks a market economy. The overwhelming weight of evidence bearing on the statutory criteria that the Department must consider in its NME analysis shows that the country continues to be an NME. To determine that such an economy operates on prices and

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[81] I. Stefan, "The Baron's Disease," Romania Libera (Oct. 21, 2002), FBIS Doc. EUP20021023000164, attached as Exhibit Y.

[82] Id.

[83] I. Ionita, "Corruption Masking," Bucharest Adventul (Oct. 18, 2002) FBIS Doc. EUP20021019000038 (Oct. 18, 2002), attached as Exhibit Z at 2-3.

costs that adequately reflect market considerations free of government control would be to ignore the studied conclusions of the EC, World Bank, the U.S. Government itself, Romanians who are in a position to speak knowledgeably about the subject, and the other evidence on the record. Accordingly, the Department should continue to classify Romania as an NME.

Respectfully submitted,

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