

**BY HAND DELIVERED**

January 26, 2006

Honorable David Spooner  
Assistant Secretary for Import Administration  
Central Records Unit, Room 1870  
US Department of Commerce  
14<sup>th</sup> Street and Constitution Avenue , NW  
Washington, D.C. 20230

Re: **Comments in Respect to Inquiry into Status of Ukraine as a Non Market Economy  
For Purposes of the Anti Dumping Law**

Dear Secretary Spooner:

We submit the comments herein on behalf of the R&J Trading Company International, Inc. (hereafter, "R&J), a United States Corporation established under the laws of the State of New York. The submission is pursuant to the Department's Notice of Request for Comments and Extension of Final Results<sup>1</sup> which requests comments "... on whether Ukraine should continue to be treated as a non market economy for purposes of the antidumping duty law." Our comments are offered for the proposition that no change in Ukraine's status is warranted.

Respectfully submitted,

---

Jack I. Heller, Counsel  
R&J Trading Company International, Inc.

---

<sup>1</sup> 71 FR 2904, January 18, 2006

**Inquiry into the Status  
of Ukraine as a non market  
economy for purposes of  
antidumping duty law**

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

**COMMENTS OF R & J TRADING COMPANY INTERNATIONAL, INC  
(In Opposition to a Change of Status)**

**COMMENT  
Table of Contents**

A. Executive Summary .....Pg 2

B. Comment

1. Ukraine’s reform government has not reduced the burdens of official .....Pg 3  
lawlessness on foreign investments. They continues to be severely burdened  
by corruption which reaches to the highest levels of officialdom.

2. Background of the R&J Case .....Pg 4

3. Recent Corrupt Events Actions in the Presidential Secretariat Related.....Pg 5  
to the R&J Case

4. Conclusion .....Pg 6

C. Exhibit 1 The Non Paper (3 pages)

**Executive Summary**

The recent events relating to the R&J expropriation case which are described in this Comment occurred since the Department’s earlier closure of the record They illustrate concretely how official disregard of the rule of law continues, a year after the Orange Revolution, severely to limit the “..extent to which Ukraine permits joint ventures or other investments by firms of other foreign countries..” Illustrating the persistence of corruption at the highest levels of Ukrainian Officialdom they are also emblematic of the widespread corruption which continues to permeate Ukrainian officialdom at all levels. They support the conclusion that changing Ukraine’s status at this time is statutorily unwarranted. See Factors (iii) and (iv), Tariff Act of 1930, Section 771(18)(B)

## COMMENT

### 1. Ukraine's Reform Government has not Reduced the Burdens of Official Corruption on Foreign Investment. Foreign Investors Continue to be Victimized by Lawlessness at all Levels of Officialdom, Including the Highest..

Contrary to the Orange Revolution's promise of anti-corruption reform and the rhetorical fealty of its leaders to the rule of law, official corruption continues to infect all levels of government, including its highest reaches. As exemplified by the events which are the subject of this Comment, corruption in the office of the Ukraine's President (the Presidential Secretariat) appears no different qualitatively than the corruption which reportedly permeated President Kuchma's Office of Presidential Administration.

The Orange Revolution is a year old. When it swept a new "reform" government into power in January, 2005, it created a widely held expectation that the new political leadership, by both example and fiat, would introduce a new era of public probity<sup>2</sup>. However, changing deeply ingrained political and cultural habits is difficult and, as yet, there has been disappointingly little meaningful anti corruption reform. Corruption has not discernibly abated and continues to burden foreign businesses in Ukraine. and to inhibit inflows of new investments from abroad..

The events described in this Comment occurred at the topmost level of the Presidential offices. and are emblematic of the deep rooted lawlessness which pervades Ukrainian officialdom at all levels. They also have special significance , however, because meaningful reform at the middle and lesser levels of the public service is wholly unlikely so long as the disregard of the rule of law which is evidenced by these events is rampant and condoned at its pinnacle. The extent to which the Government of Ukraine (the "GOU") tolerates corruption at its top provides an accurate gauge or litmus test of its commitment to reform at all levels of government,

Although foreigners are "permitted to invest in Ukrainian joint ventures" or other businesses, the events described in this comment illustrate that, as a practical matter, such investment continues to be severely limited by the perils of Ukraine's lawless investment environment. Foreign investors are reluctant to invest there because of the hazards of its notorious corruption, while those which are already in the country must regularly adapt their business practices to the abnormal market circumstance of constant vulnerability to official lawlessness. This will not change so long as Ukraine's senior executive leadership corruptly disregards the rule of law.

## 2. Background of the R&J Case

The GOU's conduct in respect to the R&J case has for many years been an accurate reflection of its willingness to condone and abet official corruption. Moreover, its posture towards this bell-weather case, today, is also an accurate litmus test of its commitment to the rule of law . – a test which it thus far has failed.

There are no genuine disputes of fact or law in this expropriation case. The facts have been well known within the GOU for many years They are authoritatively documented both in judicial and Procurator General documents and in numerous internal GOU investigative and Security Agency documents, many of which have come into R&J's possession. Briefly sketched immediately below, the history and issues of the R&J case are more fully described in Exhibit 1.(which includes of small sampling of the internal GOU document which obtained by R&J.)

R&J was a fifty percent partner in a Kiev based joint venture pharmaceutical company.(the Borchagivsky Pharmaceutical Company) In 1994, the joint venture's assets were embezzled in their entirety<sup>3</sup> by politically powerful persons who, with the support of President Kuchma and senior City of Kiev officials procured numerous corrupt judicial decisions which purported to legitimize the their felonious ownership of the stolen assets.. Their success at obtaining this tainted judicial assistance, however, was not complete. Thus, in 1996+, the country's then highest court (the Supreme Arbitration Tribunal) held that the assets had been embezzled, ordered that they be restored to the JV and recommended that the embezzlers be prosecuted. However, the embezzlers prevailed politically and the decision was ignored, the order was not executed and the recommendation was not acted upon.

Instead , shortly after the high court's decision, the embezzlers took the initiative and launched two separate lines of lawsuits, both based on sham allegations, in the politically compliant Kiev courts. While the embezzlers prevailed in all of the many lower court proceedings, matters briefly changed in 2000 when both lines of cases, almost simultaneously, reached the appellate courts. Based on evidence presented by the Procurator General that the embezzlers' claims and allegations in these proceeding rested entirely on forged and fraudulent documents and perjured testimony, the both appellate courts dismissed the sham suits and urged that the embezzlers be prosecuted..

R&J's victory was pyrrhic Within days of these decisions President Kuchma advised the appellate judges and the Procurator General that he did not want the assets restored to the foreign investors. The judges obliged promptly by reversing their decisions and the Procurator General desisted from further action in the case. Also, within weeks, the City of Kiev became owner of a 30 % interest in the stolen assets and longstanding warrants for the arrest of the embezzlers were quashed. The principal embezzler retains control over the stolen assets and is a candidate in the current round of parliamentary elections .

Thereafter all efforts in the period 2000-2004 to persuade the GOU to fairly consider R&J's claim for compensation were rejected. The GOU's consistent position was that the case had

---

<sup>3</sup> Such "asset stripping" was common in the early 1990's. In R&J, all of the JV's assets were fraudulently conveyed to a corporation especially created to serve as the recipient of the stolen assets.

been fully adjudicated and “was closed”. Informally, however, the company was repeatedly advised by senior GOU officials, including Prime Minister Yanukovch in 2004, that although its claim was meritorious, the case was “political” and could not be reopened or resolved without President Kuchma’s express consent<sup>4</sup>

### 3. Recent Corrupt Events Actions in the Presidential Secretariat Related to the R&J Case

Following discussions about R&J with senior officials in the Presidential Secretariat, and at their suggestion, the United States Ambassador to Ukraine, John Herbst, provided a “non paper”<sup>5</sup> (reproduced at Exhibit 1) in July, 2005, to the Secretariat describing the history, facts and issues of the case and suggesting a procedure for fairly and expeditiously resolving it. Thereafter, two Presidential Secretariat officers were promptly assigned to review the non paper and to evaluate R&J’s claim..

Although commenced with dispatch, work on the case was abruptly halted in early September when the President’s Chief of Staff (and head of the Secretariat) Oleksandr Zinchenko, resigned, leveled charges of corruption against many high-level officials and precipitated a political crisis which led to President Yuschenko dismissing his entire cabinet. In late October, after new Chief of Staff, Oleh Rybachuk, had been appointed the two secretariat staffers advised the Embassy that they had recommenced work on the case. . Subsequently, in early November they advised the Embassy that Mr. Rybachuk had signed a letter to the Embassy which relayed the Secretariat’s conclusions about the case. However, they cautioned, , the letter did not reflect their finding or conclusions. They had concluded that R&J’s claim is meritorious. The letter, written by unknown others, concluded that R&J’s claim is unfounded.

The Embassy was thereafter advised several times that the delivery of the letter was imminent. But, it was never received. Finally, in late November, the Embassy was advised by Secretariat staff that instead of sending the letter to it, the Chief of Staff had decided to refer it to the Ministry of Justice for further review.

At a December 8, 2005 informal meeting between the two Secretariat staffers, an Embassy official and a company representative the staffers explained some of what had happened. They said that, based on an exhaustive study of the case, they had concluded that R&J’s claim is meritorious. They were especially comfortable with this result because the Secretariat’s Legal Advisor and an investigative agency which follows the case had reviewed their findings and conclusions and concurred in them. After receiving these concurrences they prepared a letter to the Embassy for the signature by a Deputy Chief of Staff which reflected their findings and conclusion. The Deputy, however, refused to sign the letter because it “came to the wrong conclusion” and “helped a foreign investor against the national interest”. Mr. Rybachuk according to the staffers, also refused to sign the letter for the same reasons. They said that he was fully informed about their findings and conclusions and that a second letter been prepared for delivery to the Embassy.

---

<sup>4</sup> The Prime Minister agreed to a review of the case in 2004 at the urging of the US Embassy. When it became evident that this review was being conducted by corrupt officials who were loyal to the embezzlers, the Prime Minister ordered a separate independent review. Based upon extensive judicial records and investigative agency internal files, the independent review concluded that R&J’s claims were meritorious.

<sup>5</sup> That is, an unsigned, informally transmitted memorandum.

United States Ambassador Herbst met with Mr. Rybachuk the following day. At this meeting Mr Rybachuk told the Ambassador that he was astonished to learn that someone had ordered the quashing of a memo favorable to the U.S. investor. He agreed that this was deplorable and promised to look into it.

#### 4. Conclusion

The lawless rejection of the staff's exhaustively researched and independently supported findings and conclusions is inconsistent with what is ordinarily expected in a normal market economy..

A month and a half has passed since the President's Chief of Staff agreed to look into the circumstances surrounding the rejection of the staff findings. His apparent inaction is inconsistent with what is ordinarily expected in a normal market economy,.

As revealed in numerous internal, judicial and Procurator General documents, it has been widely known within the GOU for at least five years that R&J's claim is meritorious. The prolonged and currently continuing lawless denial of this foreign investor's claim is inconsistent with what ordinarily is expected in a normal market economy,.

The politically powerful persons who embezzled R&J's assets have repeatedly been identified as felons in judicial decisions and investigative agency documents. Yet, they have never been prosecuted and remain in undisturbed possession of the assets which they are known to have stolen. Indeed one of them is currently a candidate for election to the national parliament. None of this is consistent with what ordinarily is expected in a normal market economy..

Ukraine is not a normal market economy.

**EXHIBIT 1  
(NON PAPER)**

**The Borchagivsky Pharmaceutical JV Case**

The Borchagivski Pharmaceutical case<sup>1</sup> stands out among the current claims of United States citizens against the Government of Ukraine (hereafter, the “GOU”) as an especially aggravated example of the judicial corruption in the previous administration to which President Yuschenko often refers. It is also unique among these claims because of the apparently corrupt personal involvement of the former President. As discussed below, there is no genuine dispute about the facts from which the claim arose. They are well documented and understood within both the GOU and the United States Government. (hereafter, the “USG”) Further, because the case is so well known in Ukraine and in the US investor community, its resolution will not only remove a significant irritant in the US-Ukraine bilateral relationship, but will also serve as an important demonstration of the reality and strength of the Yuschenko Administration’s commitment to the rule of law. Finally the case is especially susceptible to prompt resolution and can be expeditiously and fairly resolved with a minimum of legal and judicial complexity. The concluding section of this memorandum discusses how this can be done.

**Summary History**

The undisputed facts are set out in the judicial record, various Procurator General memoranda, in formal<sup>2</sup> and ad hoc official GOU reports (such as a 2004 report prepared for the Prime Minister, see below) and in internal GOU documents (including some described below) which were clandestinely provided by GOU officials to the claimant.

In 1995, the politically influential managers of the 50 % US-owned, Kiev based<sup>3</sup> Borchagivsky Pharmaceutical Joint Venture Company fraudulently transferred all of its assets to a new company established by them for the purpose of holding the stolen assets. In 1996, the Supreme Arbitration Tribunal found that this was a case of “large scale embezzlement,” ordered restoration of the stolen assets to the JV and referred the case for criminal prosecution<sup>4</sup> However, the order was not executed and no criminal proceedings were initiated..

Just after the proceedings before the Supreme Arbitration Tribunal ended the embezzlers launched two diversionary lines of lawsuits in the politically compliant Kiev courts. The first of these lines challenged the juridical existence of the JV by alleging that it not been lawfully established. The second line challenged the JV’s juridical existence by alleging that it had been dissolved in bankruptcy. The embezzlers were successful in the lower courts so that these sham cases dragged on until mid 2000 when both lines finally were dismissed on appeal. Based on evidence furnished by the Procurator (which urged that criminal actions be

---

<sup>1</sup> The claim of the US investor arises under both the United States Ukrainian Bilateral Investment Treaty (1965 (See, for example, Articles II, III, VI, and XI) and Ukraine’s Statute on the Regime of Foreign Investment (1996), See, for example, Section 10.

<sup>2</sup> E.g. See Report to President Kuchma of the Special Commission appointed by him to investigate the R&J case, July 27, 2000.

<sup>3</sup> The owner is R&J Trading International Inc, a US corporation, which is fully owned by US citizens.

<sup>4</sup> See opinion , March 14, 1996, Supreme Arbitration Tribunal, Case 57/7, and further decisions of June 6, 1996 and August 28, 1996. The Arbitration Tribunal found that the managers’ actions were statutorily impermissible, unlawful and criminal, finding which have never been denied or challenged in any court.

commenced) the appellate courts found that both lines of cases were based entirely upon the embezzlers' forgeries and perjured testimony.<sup>5</sup>

The findings of criminality and fraud made by these appellate courts, as well as those made in 1996 by the Supreme Arbitration Tribunal (discussed above and at footnote 4) are further corroborated in internal GOU documents. Some of these are: 1) May 2001, letter from Mr. Radchenko, Head of the State Security Agency (former KGB) to Mr. Marchuk,<sup>6</sup> Secretary, National Security Council; *inter alia*, says that based on numerous analyses it is clear the 1996 Supreme Arbitration Tribunal decisions were legally and factually sound, the JV was properly established, and the bankruptcy allegations were fraudulent, etc; 2) September 7, 2001, State Security Agency, memo from Head of Counter Intelligence and Economic Matters ( Mr. Tkach) to Head of Criminal Department (Mr. Petrovich); says, *inter alia*, the purpose of the fraudulent bankruptcy allegation was to steal the JV's assets, etc; 3) August 20, 2001, memo from Procurator's Office, (Mr Lebeduk) responding to document request from the State Security Agency (Mr. Kizul) with documents showing, *inter alia*, that the allegation that the JV was improperly established was based on forged documents..

However, despite the powerful evidentiary grounds on which they were based, the two appellate decisions did not endure. A few weeks after they issued President Kuchma convened an unusual meeting (July 15, 2000) at the stolen company's factory site where he addressed an audience comprising the Chief Judges of the Supreme Arbitration Tribunal and the Supreme Civil Court, the Ministers of Health and Internal Affairs, the National Security Advisor, many Federal and Kiev appellate court judges, the Mayor of Kiev and assorted other cabinet and sub-cabinet level law enforcement, tax, regulatory and national security officials). In his speech the President made clear that he did not want the stolen company to be restored to its foreign owners.<sup>7</sup> The courts complied within days. Ignoring the findings of fraud and forgery which it had made several weeks earlier, the Kiev Supreme Arbitral Tribunal rescinded its decision and ruled, essentially without comment, for the embezzlers. The decision of the Leningradsky Court, likewise, was mooted<sup>8</sup> and all pending criminal charges which had been strongly urged by the Procurator against the thieves were dropped. Finally, a thirty (30%) percent interest in the embezzlers' corporation which held the stolen assets was "sold" to the City of Kiev.<sup>9</sup>

The GOU's position ever since the appellate court decision were overturned has been that because its courts have disposed of the case, "it is closed"<sup>10</sup> Unofficially, at the same time, the claimant was regularly advised by senior GOU officials that the case "is political" and can be resolved only by President Kuchma. – advice which was consistent with what the US Embassy learned on at least two occasions. The first, in March, 2003, was when Minister of

---

<sup>5</sup> E.g. in respect to the embezzlers' allegation that the JV was bankrupt, see decision June 7, 2000, in which the Kiev Supreme Arbitration Court, sustained a Procurator's Protest and found that the embezzler's had fraudulently created a "fictitious bankruptcy" In respect to the second line of cases, see opinion, July 3, 2000, Leningradsky District Court, which also sustained a Procurator General's protest, the Court noted that the embezzlers' allegation that the JV had not been properly established was based on "criminally altered documents" (forgeries by the embezzlers' attorney)

<sup>6</sup> Mr. Marchuk attended the President's July 15, 2000 speech which is discussed below.

<sup>7</sup> A summary transcript of this televised meeting was prepared and preserved by the US Embassy/Kiev. Office

<sup>8</sup> On August 8, without explanation, the Kiev Arbitration Court noted the Judicial Verification Board had canceled the July 7, 2000 and July 19, 2000 decisions. It also noted that the (now silenced) Procurator had failed to press criminal proceeding. It held there was no reason for further hearings. .

<sup>9</sup> Also an expropriation under Bilateral Investment Treaty Articles 111 and XI.

<sup>10</sup> But see Bilateral Investment Treaty Article II (3) (b) which in part provides " ... For purposes of dispute resolution under Article 3 VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.

Economy and European Integration, Valeriy Khoroshkovsky, advised the US delegation to a Bilateral Economic Commission meeting that he agreed the claim is meritorious and would attempt to resolve it. However, he was unable to take any steps towards doing this because President Kuchma expressly forbade him from proceeding. The second occurred in 2004, when the Prime Minister advised the US Ambassador that an independent study conducted for him<sup>11</sup> had confirmed the merits of R&J's claim but that he was powerless to resolve the case. The only person, he said, who could do this was the President. Subsequent discussions between the Ambassador and President Kuchma about the case were unavailing.

#### Suggested Procedure For Resolving the Case and Next Steps .

It is no longer practically feasible to restore the stolen assets to the JV<sup>12</sup> Moreover, the remedy to which the claimant is entitled pursuant to both the Bilateral Investment Treaty and under Ukrainian law is payment by the GOU as compensation for its loss. Fortunately, none of the material facts are in dispute and determining them judicially or in an arbitration proceeding is unnecessary. Hence, the prompt resolution of the case can be achieved efficiently; lawfully and fairly through international arbitration whose purpose is to decide the sole remaining issue – the appropriate amount of compensation.

Among the advantages of such arbitration is that the administration is already authorized under the Treaty and in Ukrainian law to submit the GOU to international arbitration. Another is that international arbitration is well understood and routinely engaged in by the GOU. Finally, perhaps the largest advantage is that use of this procedure will avoid the most frequently mentioned obstacles to an expeditious resolution: i.e. that; 1) resolving the case could require arduously reopening and re-litigating many extant judicial decisions (especially if the embezzlers enter these cases in opposition), and; 2) that there is no statutory or budgetary authority for paying such compensation without a judicial order or an action by the RADA.

Prior to the commencement of any such arbitration, the GOU and the claimant will need to agree upon: 1) the statement of “undisputed facts and issues to be decided” which is to be jointly submitted by them to the arbitrators; 2) the forum and location of the proceedings, and 3) other routine matters such as the selection and size of the panel, the governing law, the applicable rules of evidence, the allocation of costs etc. .

The US Embassy is prepared to lend its good offices to facilitate meetings between the claimant and representatives of the GOU as soon as is mutually convenient for them to reach agreement on these arbitration related matters.

---

<sup>11</sup> This study was performed after it was discovered in the Prime Minister's office that another study performed for him by the Cabinet of Minister's staff probably had been corruptly influenced.

<sup>12</sup> We take no position as to whether the GOU should prosecute the embezzlers or seek to obtain ownership of the stolen company in conjunction with such criminal proceeding.