Nos. 07-1059, 07-1078

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EURODIF S.A.

Respondent.

USEC INC. and
UNITED STATES ENRICHMENT CORPORATION,

Petitioners,

v.

EURODIF S.A.; COMPAGNIE GENERALE DES MATIERES NUCLEAIRES; COGEMA, INC.; AD HOC UTILITIES GROUP; and UNITED STATES,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF THE COMMITTEE TO SUPPORT U.S. TRADE LAWS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DAVID A. HARTQUIST
Executive Director of the Committee to Support U.S. Trade Laws
KELLEY DRYE & WARREN LLP
3050 K Street, Suite 400
Washington, D.C. 20007
(202) 342-8400

Counsel for Amici Curiae

214723

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cited Authorities

Page

STATUTES

LEGISLATIVE HISTORY

Blank Page

INTEREST OF *AMICI CURIAE*

The *Amici Curiae* in support of the petitions for writs of certiorari in this case are the Committee to Support U.S. Trade Laws ("CSUSTL") and the following companies and trade associations members of CSUSTL: the American Iron and Steel Institute, the Coalition for Fair Lumber Imports Executive Committee, the Cold Finished Steel Bar Institute, the Copper & Brass Fabricators Council, Inc., Corey Steel Company, the Floral Trade Council, Florida Farmers, Inc., the Kansas Cattlemen's Association, the Lake Carriers Association, Lumi-Lite Candle Co., Inc., the Montana Cattlemen's Association, Nevada Live Stock Association, Nevada Committee for Full Statehood, Nucor Corporation, Steel Manufacturers Association, the Southern Shrimp Alliance, Specialty Steel Industry of North America, R-CALF USA, Republic Engineered Products, South Dakota Stockgrowers Association, and the Timken Company.[1]

In addition to the individual companies and trade associations identified, another member of CSUSTL on whose behalf this brief is submitted is the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International

---

[1] The parties have consented to the filing of this brief and their consent letters have been filed with the Clerk. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amici Curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel, made a monetary contribution to its preparation or submission.

Union ("USW"). The USW is the largest industrial union in North America with 850,000 active members manufacturing a broad range of goods, including tires, steel and pharmaceuticals.

The USW has been actively engaged in using the U.S. trade laws to ensure that its workers and industries are not lost to unfair import competition.[2] The USW firmly believes, as do the other *amici curiae*, that the decision by the Federal Circuit is not only erroneous – elevating form over substance – but outright dangerous because it provides a means for foreign manufacturers to engage in dumping with impunity merely by restructuring contracts. As noted by the Solicitor General, the manufacture of goods typically encompasses manufacturing or processing that could be contracted for separately in the same manner as Separate Work Unit ("SWU") contracts. For example, steel could be obtained by supplying the iron ore and contracting for smelting and rolling "services."[3] The USW and the other

---

[2] In fact, the USW was a petitioner in the antidumping investigation of uranium products imported from the former Soviet Union, and represents over 1000 highly-skilled workers employed at the United States Enrichment Corporation, the sole U.S. uranium producer. That investigation resulted in a suspension agreement that is now negatively affected by the *Eurodif* decision. The USW is the successor-in-interest in that distinct matter. The original petition was brought by the Oil, Chemical and Atomic Workers International Union ("OCAW") in 1991. In 1999, the OCAW merged with the United Paperworkers International Union to form the Paper, Allied-Industrial, Chemical & Energy Workers International Union ("PACE"). In 2005, PACE merged with the United Steelworkers of America ("USWA") to become the USW.

[3] Petition of Solicitor General for Writ of Certiorari at 25.

Amici Curiae stand ready to compete with fairly-traded imports from anywhere but cannot and should not be compelled to compete against dumped imports sold under the guise of "services." That is not what the trade laws intended.

Amici are advocates and beneficiaries of the antidumping statute and span a wide array of domestic industries as well as workers. Many of the CSUSTL individual members have filed petitions and successfully secured protection against unfair trade. All of the *Amici Curiae* are concerned that the U.S. antidumping law be maintained as a strong and viable remedial tool to address injurious dumping by imports. As discussed further in the Argument, the interest of *Amici Curiae* in this case stems from the significant loophole in the antidumping law that would result from the Federal Circuit's holding in *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir. 2005), *aff'd on reh'g*, 423 F.3d 1275 (Fed. Cir. 2005), *final judgment*, 506 F.3d 1051 (Fed. Cir. 2007). The breadth of the industries and companies that could be affected by the Federal Circuit's holding is expansive.

In sum, CSUSTL and its individual supporting members identified are highly concerned that the effect of the appellate court's holding would essentially permit injurious dumping to continue unchecked, contrary to the purpose of the law. Accordingly, CSUSTL and its individual supporting members have a strong interest in this matter.

SUMMARY OF ARGUMENT

After conferring with the key Administration agencies involved in international trade and national defense issues and obtaining their support, the Solicitor General has for the first time in history asked the Supreme Court to hear an antidumping case. This request by the Solicitor General demonstrates the significance of the issues raised in the petitions for writs of certiorari and the importance of having the Federal Circuit's decision reviewed and reversed to preserve the efficacy of the U.S. antidumping law.

The appellate court's holding has potentially widespread implications for U.S. industries and workers that rely upon the U.S. antidumping law to obtain relief from injury caused by unfairly traded imports. Where merchandise was manufactured in a foreign country and imported into the United States for sale at a dumped price, causing injury to a competing U.S. industry, the Federal Circuit has held that the antidumping law does not apply because the foreign producer is merely providing a "service" not a "good." The activity of the foreign producer is plainly one of manufacturing with the end result being a finished good rather than a service as that term is traditionally defined (*e.g.*, banking, medical, legal). Based simply on the structure of the contract, the Federal Circuit has determined that parties can avoid the reach of the antidumping laws while still importing dumped goods into the United States. Left unreviewed, this determination presents an enormous loophole to the continued effectiveness of the U.S. antidumping law.

In addition, the Federal Circuit's failure to accord *Chevron* deference to the Commerce Department's reasonable interpretation of the antidumping statute to which it was entitled further warrants the granting of certiorari in this case. Commerce reasonably concluded, taking into account the statute's underlying purpose and the totality of the circumstances, that the antidumping statute encompasses transactions where a U.S. customer provides monetary payments and raw materials to a foreign producer in exchange for the production of a substantially transformed, finished product into the stream of U.S. commerce. The Federal Circuit erred when it applied its own interpretation of the statute, rather than deferring to Commerce as required by the *Chevron* doctrine. Because the Federal Circuit's lack of deference results in a holding that will have serious implications for the international trading system as a whole, the petitions for writs of certiorari should be granted in this case.

ARGUMENT

I. THE FEDERAL CIRCUIT'S HOLDING IN *EURODIF* CREATES A MAJOR LOOPHOLE UNDERMINING THE EFFICACY OF THE U.S. ANTIDUMPING LAW

For the first time in the history of the antidumping duty law, the Federal Circuit has held that a foreign producer that manufactures and exports a product to the United States may escape the reach of the U.S. antidumping law based simply on the terms of its contract with the U.S. purchaser. The Federal Circuit's holding has potentially widespread implications for

domestic industries that use the antidumping law to seek relief from injury caused by unfair trading practices of foreign producers. Under the Federal Circuit's holding, foreign producers of goods that are exported to the United States will be able to avoid the reach of the U.S. antidumping law simply by structuring their contracts in the manner used by the French uranium producer. This result elevates form over substance and creates a major loophole to the enforcement of the antidumping law, warranting the grant of certiorari in this case.

The salient facts at issue and errors in the Federal Circuit's determination as applied in the uranium case are set forth in detail in the Petition for a Writ of Certiorari of the Solicitor General as well as in the Petition for Writ of Certiorari submitted by USEC Inc. and United States Enrichment Corporation and will not be repeated here. Of major concern to CSUSTL, as reflected by the filing of this submission, is that the rationale of the Federal Circuit's decision extends well beyond the facts of this uranium case to other U.S. industries and companies. By concluding that contract manufacturing can be used to convert imported merchandise into a "service," the Federal Circuit's holding wrongly treats the sale of an imported good as a service, exposing domestic industries to injury from dumped imports without the remedy of the antidumping law.

Under the Federal Circuit's decision, if a U.S. purchaser supplies or arranges for the supply of raw materials to a foreign manufacturer to be transformed through a manufacturing process into a different product, which is then exported back to the purchaser in the United States, the foreign producer's activities

are considered merely a "service" and not the production of a "good." *Eurodif*, 411 F.3d at 1363-64. The Federal Circuit reached this conclusion based simply on the terms of the contract between the parties and without regard to the extensive manufacturing process undertaken by the foreign producer, the significant value-added by the foreign producer, the substantial transformation that occurred to produce the uranium from the raw material, or the fact that merchandise – not a "service" – was imported into the United States. *Id.* The antidumping statute expressly contemplates that "imports" of "merchandise" will be subject to antidumping duties where dumping occurs. 19 U.S.C. § 1673(1) (2000).[4] The appellate court failed to recognize that, irrespective of the contract terms, the Commerce Department was attempting to impose duties on imports of dumped merchandise as the antidumping law requires.

This broad holding by the Federal Circuit means that even if merchandise is imported as the statute contemplates, the merchandise will not be subject to the law so long as the transaction is structured essentially as a toll processing transaction. A variety of products, including in particular steel and other metal products, chemicals, and textiles, are often sold under toll processing arrangements. In a toll processing sale, the purchaser retains title to the input material and pays the manufacturer to produce and export the finished product from that input. Under the Federal Circuit's holding, structuring a sale as a toll sale would permit the evasion of antidumping duties, creating a serious loophole to the law.

---

[4] Unless otherwise indicated, all references to the United States Code are to the 2000 edition.

For example, a foreign brass manufacturer may purchase copper as a raw material input and manufacture that copper into brass sheet and strip for export to the United States. Alternatively, the foreign producer could be provided that same copper by a U.S. customer for manufacture into brass sheet and strip. Notably, the U.S. customer need not physically obtain the input material and transport it to the foreign manufacturer, but may simply structure this transaction so that the customer is the title holder of the copper input product. As a practical matter, under this arrangement, the customer is carrying the finance cost of the work in process that would otherwise be carried by the foreign producer. The foreign manufacturer is engaging in the same production operations and producing the same product, the only difference is that the foreign manufacturer does not finance the raw material costs. This arrangement does not transform the activity of the foreign manufacturer in producing the good into that of providing a service and does not change the fact that merchandise is imported from that foreign producer into the United States.

Similarly, in both scenarios the foreign manufacturer can offer a dumped price for the brass sheet and strip that it is producing and that dumped price can undercut competing U.S. brass producers' prices, causing the U.S. producers to lose sales and profits. By law, material injury to a U.S. industry caused by dumped imports is to be remedied by the imposition of antidumping duties. 19 U.S.C. §§ 1673(1), 1677(7). Under the Federal Circuit's holding, however, if the foreign manufacturer structures the transaction such that the purchaser retains title to the input raw material, it can deliver the finished brass

product at the same injurious, dumped price without any recourse under the antidumping laws by the injured U.S. industry that must compete with these dumped imports. Based on a simple restructuring of the transaction, the Federal Circuit considered the activity to constitute the provision of a "service" rather than the sale of a "good" and, as such, beyond the reach of the antidumping law.

The implications of the Federal Circuit's holding, accordingly, extend far beyond the trade in uranium at issue in this case and implicate all merchandise imports. If ownership of raw materials changes the sale of a finished product from foreign "merchandise" into the sale of a "service," virtually every import transaction involving a manufactured product could be restructured to avoid the application of the antidumping law. In the steel industry, for example, U.S. purchasers could export scrap to China, pay Chinese steel producers to melt the scrap, extrude the steel, hot-roll and cold-roll the steel to produce cold-rolled sheet, and export that cold-rolled sheet back to the United States, claiming all they had provided was a "service" not a good.

Similarly, purchasers of imported pasta could supply wheat to be transformed into pasta; purchasers of semiconductors could supply sand to be processed into semiconductors; and purchasers of bedroom furniture could supply wood to be manufactured into furniture. So long as each of those foreign producers structured the contract so that the purchaser retained title to the input and characterized its role as providing a "service," the overseas manufacturing operations – no matter how significant those operations and no matter that they substantially transformed the raw materials into another

product that was then exported back to the United States – would not be subject to the antidumping law. It should not be the case that merely by structuring the terms of the transaction in a particular manner foreign producers can escape the payment of antidumping duties that would otherwise be owed.

Under the Federal Circuit's holding, the terms of the transaction are the paramount consideration for assessment of whether the antidumping duty law applies to imported goods. If the importer purchased the product under terms of a conventional sales transaction, the product would be subject to the antidumping law. If, however, the sale was structured to be subdivided into separate sales of a raw material input and the processing of that input into a finished product, the same imported good would not be subject to the antidumping law.

Fundamentally, the Federal Circuit has erred by attempting to draw a line between what constitutes a "good" and what constitutes a "service" under the antidumping law on an artificial basis that does not comport with the real world marketplace. There can be no question that the French producer of uranium is engaged in a manufacturing process, that it produces a product or good, and that the good that it produces is exported to and enters the stream of commerce in the United States. Defining this activity as a "service" and finding that there has not been entry of a good into U.S. commerce when the uranium from France is imported into the United States simply does not comport with the facts.

In common parlance, the provision of services is recognized to relate to activities such as professional services (medical, legal, banking), maintenance or repair services or other types of aid that do not result in production of a tangible good.[5] Where a foreign company is engaged in a manufacturing operation whose output is tangible merchandise, that activity should be recognized as the production of a good, not a service. When, in turn, that merchandise or good is exported to the United States and enters U.S. commerce, it should be considered subject to the reach of the antidumping law, regardless of any contractual terms that may be agreed to between the parties.

The broad reach of the Federal Circuit's decision and its potential for undermining the effectiveness of the U.S. antidumping law cannot be overstated. The Federal Circuit has basically provided a roadmap to foreign producers interested in exporting products to the United States at unfair prices as to how their transactions should be structured to avoid antidumping duties. Such a result is not only inconsistent with longstanding agency practice and of significant concern to domestic industries that rely on these unfair trade laws when confronted with injurious, dumped imports, but it also largely eviscerates the purpose of the antidumping law. As the courts have recognized, "the antidumping law is remedial, not

---

[5] *See* 19 U.S.C. § 2114b(5) (defining "services" as "economic activities whose outputs are other than tangible goods" such as "banking, insurance, transportation, postal and delivery services, communications and data processing, retail and wholesale trade, advertising, accounting, construction, design and engineering, management consulting, real estate, professional services, entertainment, education, health care, and tourism.").

punitive, and remedial statutes are to be construed broadly." *Bomont Indus. v. United States*, 13 Ct. Int'l Trade 546, 550, 718 F. Supp. 958, 962 (1989) (citing 3 N. Singer, SUTHERLAND STAT. CONST. § 60.01 (4th rev. ed. 1986) and cases cited therein). The purpose of the antidumping law is to "equalize competitive conditions between foreign exporters and domestic industries affected by dumping." *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1379 (Fed. Cir. 2003) (citations omitted). Congress has emphasized that the purpose of the antidumping law is to protect domestic industries from injurious dumping. S. Rep. No. 249, 96th Cong., 1st Sess. 37 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 423; *see also Lasko Metal Prods. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) ("{t}he purpose of the {antidumping law} is to prevent dumping, an activity defined in terms of the marketplace.").

The United States is losing its manufacturing basis due, in significant part, to unfair competition from imported merchandise. The trade remedy laws, including in particular the antidumping laws, are the only defense available to U.S. manufacturers against unfairly traded imports. The loophole to the antidumping law contemplated by the Federal Circuit's decision would severely limit the viability of this remedial tool to domestic industries injured by dumped imports.

It is difficult to reconcile this remedial statutory purpose with the appellate court's decision that would permit injurious dumping of goods to occur unchecked. The intent of Congress in providing remedial relief from the unfair pricing of imported goods must determine whether the law applies to imported merchandise, not

the parties' contractual terms. When the effect on the marketplace is considered in light of the remedial purpose of the statute, the holding of the Federal Circuit cannot be considered anything but a seriously flawed interpretation of the statute that dramatically undermines the very viability of the antidumping law to U.S. industries and warrants review by granting the petitions for certiorari.

II. THE FEDERAL CIRCUIT FAILED TO ACCORD *CHEVRON* DEFERENCE TO COMMERCE'S REASONABLE INTERPRETATION OF THE ANTIDUMPING STATUTE

The Federal Circuit's failure to follow a fundamental principle established by this Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), provides another reason for granting certiorari in this case. Under the *Chevron* doctrine, courts are to accord deference to reasonable interpretations of a statute adopted by an administrative agency that has been "charged with responsibility for administering the provision." *Id.* at 865. Specifically, in assessing the validity of an agency's statutory interpretation, the courts must apply the following two-part standard:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency,

> must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (1984) (footnotes omitted). More recently, this Court further explained that deference is appropriate for ambiguous statutes even when a court has previously construed the statute. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.") (emphasis added). Filling "gaps" in ambiguous statutes "involves difficult policy choices that agencies are better equipped to make than courts." *Id.* at 980 (citing *Chevron*, 467 U.S. at 865-866).

To satisfy the *Chevron* standard, the courts must first determine "whether the statute's plain terms 'directly address the precise question at issue.'" *Id.* at 986 (citation omitted). If a "statute is ambiguous on the point," the agency's construction must be given deference if it is "a reasonable policy choice for the

agency to make" and must prevail in such cases, "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Id.* at 980 and 986 (citation omitted).

The Federal Circuit failed to follow the *Chevron* standard in this case. Nothing in the plain language of the antidumping statute suggests that imported goods can evade the reach of the antidumping law based on the structure of the contract. The antidumping law does not define the terms "merchandise" or "sold," and there is no congressional indication that the phrase "foreign merchandise is being, or is likely to be sold" does not encompass transactions where a U.S. customer provides monetary payments and raw materials to a foreign producer in exchange for the production of a substantially transformed, finished product that is imported into the stream of U.S. commerce. 19 U.S.C. § 1673(1). Here, Commerce reasonably concluded, taking into account the statute's underlying purpose and the totality of the circumstances, that products imported under such transactions are "foreign merchandise ... sold in the United States" within the purview of the antidumping law.

The Federal Circuit determined that Commerce's construction of the statute did not warrant deference under *Chevron* because "the antidumping statute unambiguously applies to the sale of goods and not services." *Eurodif*, 423 F.3d at 1278. This conclusion, however, focuses on the wrong issue. The question is not whether the statute only applies to the sales of goods and not services. Rather, as noted above, the relevant question is what "foreign merchandise is being, or is

likely to be sold" means and whether that phrase encompasses the transactions similar to those at issue in this case. It is precisely on this issue that judicial deference must be accorded to Commerce's construction of the statute.

Commerce's determination that the unfair trade laws must be applicable to imported merchandise produced through contract manufacturing and without regard to how the transactions are structured between the foreign producer and U.S. purchaser is not only proper but is also a reasonable policy choice for the agency to make. Indeed, the failure to adopt Commerce's approach leads to inconsistent treatment under the antidumping law for identical imported merchandise dependent upon the nature of the contract under which the merchandise is imported. Commerce's construction of the statute would preserve the integrity of the antidumping laws by allowing Commerce to fulfill its statutory objective of protecting domestic industries from dumped and injurious imports. Given the underlying statutory purpose, the Federal Circuit erred in refusing to accord deference to Commerce's reasonable policy determination as well.

In addition, the Federal Circuit erred when it relied on its prior holding in *Florida Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002), and concluded that a transaction it previously deemed to be a sale of a service under one statute cannot also be a sale of a good under an entirely different statute unless Congress expressly states that it is. *See Eurodif*, 423 F.3d at 1277-78 & n.1. This conclusion is a significant departure from the holding in *Brand X*, which requires

courts to approach its inquiry as if it were "reviewing the agency's construction on a blank slate." *Brand X*, 545 U.S. at 982-83. Because the statute does not compel the court's interpretation, it was improper for the Federal Circuit to not defer to Commerce's reasonable interpretation of the antidumping statute.

In sum, if the Federal Circuit's construction of the antidumping statute is upheld, an enormous loophole in the U.S. trade laws will be created that will encourage foreign producers of all industries to circumvent antidumping laws by structuring their transactions with domestic buyers as contracts for "services." Because of the Federal Circuit's failure to accord deference to Commerce's reasonable construction of the statute and because the Federal Circuit's holding will have serious implications for the international trading system as a whole, the petitions for writs of certiorari should be granted in this case.

CONCLUSION

For the above-stated reasons, the petitions for writs of certiorari should be granted.

Respectfully submitted,

DAVID A. HARTQUIST
Executive Director of the Committee to Support U.S. Trade Laws
KELLEY DRYE & WARREN LLP
3050 K Street, Suite 400
Washington, D.C. 20007
(202) 342-8400

Counsel for Amici Curiae