No. 07-1078

IN THE
Supreme Court of the United States

USEC INC. and
UNITED STATES ENRICHMENT CORPORATION,

Petitioners,

v.

EURODIF S.A.; AREVA NC; AREVA NC, INC.;
AD HOC UTILITIES GROUP; and
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONERS USEC INC. AND UNITED STATES ENRICHMENT CORPORATION

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RULE 29.6 STATEMENT

Petitioners' corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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The petitions filed by USEC and the United States raised the question whether the Federal Circuit erroneously failed to accord *Chevron* deference to the Commerce Department's construction of the term "merchandise . . . sold" in the antidumping statute. The petitions also showed why the Federal Circuit's decision, if left standing, will have serious ramifications for other domestic industries and for U.S. national security and energy independence. Respondents Eurodif and the Ad Hoc Utilities Group (AHUG) have failed to show why this case does not merit this Court's review.

I. THIS CASE RAISES IMPORTANT ISSUES REGARDING THE APPLICATION OF *CHEVRON* AND THE SCOPE OF THE ANTIDUMPING LAW.

The petitions demonstrated that the term "merchandise ... sold" in the antidumping statute is ambiguous, and that the Commerce Department's construction of that term was reasonable and therefore should have been accorded deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984). Respondents' arguments to the contrary simply repeat the interpretive errors of the Federal Circuit.

First, Respondents quote the Federal Circuit's assertion that the antidumping statute "unambiguously" applies to sales of merchandise and not sales of services. Eurodif Br. at 6, 10; AHUG Br. at 13, 17. No one has ever disputed that point. The critical ambiguity lies in what constitutes a sale of merchandise. As USEC noted (USEC Pet. at 23-27), statutory terms like "sale" or "purchase" appear in many regulatory regimes, with

considerable ambiguity. Agencies implementing those regimes have not been hamstrung by the contractual language of the parties or the contention that there is only one possible construction of such terms. Respondents, like the Federal Circuit, miss the flexibility of such language in the regulatory setting, where, as here, the rights of third parties are at stake.

Respondents cite two decisions of the Court of Federal Claims that the Uniform Commercial Code did not apply to Department of Energy SWU contracts. Eurodif Br. at 11; AHUG Br. at 6 n.6. As USEC noted in its petition (USEC Pet. at 30 n.7), decisions applying other statutory regimes cannot determine whether SWU transactions constitute sales of merchandise under the antidumping statute. This Court has recently emphasized that interpretations of terms in a regulatory statute must take into account the objects and purposes of that statute, as Commerce did here. *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1157-58 (2008) (rejecting narrow interpretation of "charge" that would be "in considerable tension with the structure and purposes" of the ADEA in favor of a standard "consistent with the design and purpose of the ADEA"). This critical principle of statutory construction reconciles the varying court and agency views of enrichment contracts, but was ignored by the Federal Circuit and the Respondents.

Eurodif also contends that the key factor that makes SWU transactions not sales of merchandise is that "the price term in a SWU contract does not cover the value of the uranium." Eurodif Br. at 10. This standard for

determining when a sale of merchandise takes place—which differs from the standard applied by the Federal Circuit under *NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997) (*i.e.*, transfer of ownership of LEU and consideration)—only serves to further demonstrate the ambiguity in the phrase "merchandise . . . sold" in the antidumping statute. In any event, Eurodif cites no support for its contention that the price term in the sale of a good must not only constitute consideration, but must reflect both the raw material and manufacturing components. This contention was correctly rejected by Commerce. USEC Pet. at 214a.

The second error made by the Federal Circuit and repeated by Respondents is to insist that the antidumping regime should be held hostage to the contractual terms negotiated by self-interested parties. Commerce's approach was to look at all the facts of record and the reality of the transactions to determine whether merchandise, rather than services, was being sold. The Federal Circuit rejected that approach, concluding that this issue should be resolved only from the intent of the parties as reflected in the language of their contract. As this Court recently made clear, "[w]here ambiguities in statutory analysis *and application* are presented, the agency may choose among reasonable alternatives." *Holowecki*, 128 S. Ct. at 1158 (emphasis added). Commerce's approach here was unquestionably reasonable.

AHUG argues that SWU transactions constitute sales of services because "the contracts make clear that the utilities are *deemed* to receive back their own

uranium." AHUG Br. at 19 (emphasis added).[1] That "legal fiction"—as it was characterized by the Court of International Trade (USEC Pet. at 122a)—is contrary to the reality of a SWU transaction. Accordingly, Commerce declined to give it dispositive weight in determining the application of the antidumping statute. USEC Pet. at 12.

Respondents do not dispute three fundamental facts that characterize SWU transactions: (1) the enricher produces a new and substantially transformed product from commingled and fungible uranium; (2) the LEU is not produced from the uranium supplied by the customer; and (3) from the time of production until final transfer and delivery to a particular customer, no customer can claim ownership of that LEU. *See* USEC Petition at 26. These and the other facts of record—not contested in any way by Respondents—impelled Commerce's conclusion that a transfer of ownership of the LEU occurs. In applying a regulatory statute like the antidumping statute, the reality of a transaction must hold sway over "legal fictions" adopted by the parties for their own purposes.

A clear demonstration that the essence of a SWU transaction is not the performance of a service on the customer's goods lies in the fact that an enricher may

1. AHUG endeavors to reinforce this fiction by repeatedly stating that enrichers enrich "the" uranium delivered by the customer, thereby suggesting that enrichers are performing a "service" on the customer's goods. *See*, *e.g.*, AHUG Br. at 2, 4, 10. That is far from the reality of how LEU is produced or delivered, as discussed in Commerce's June 2003 remand determination. USEC Pet. at 217a-223a.

deliver LEU to a utility that the enricher itself did not produce and where the LEU may not have even been produced through an enrichment process. For example, this takes place when USEC delivers LEU produced from dismantled (*i.e.*, down-blended) Soviet weapons in fulfillment of SWU contracts with U.S. utilities. This conclusively demonstrates that the object of a SWU transaction—like an EUP transaction—is the delivery of merchandise (LEU), not the provision of a service on the customer's uranium. *See* USEC Pet. at 6-7.

Respondents argue that Commerce's tolling regulation and certain decisions thereunder are at odds with Commerce's conclusion in this case that LEU imports in SWU transactions are subject to the antidumping law. Contrary to AHUG's characterization (AHUG Br. at 8-9), however, the tolling regulation does not establish a rule as to when sales are within or outside the antidumping law. Rather, it only provides guidance as to which party in a particular tolling transaction—the toller or the tollee—should be selected as a respondent for purposes of determining relevant prices and costs. As recognized by the Court of International Trade, the tolling regulation "does not provide a basis to exclude merchandise from the scope of an investigation." USEC Pet. at 113a-114a.[2] In any event, the tolling regulation was not relied upon in any way by the Federal Circuit and is not pertinent to the issue

2. Moreover, Commerce fully explained in its June 23, 2003 remand determination why its decision here was not inconsistent with language in previous determinations under the tolling regulation. USEC Pet. at 110a-132a. Respondents do not even cite to this determination, much less refute it.

whether imports of LEU are subject to the antidumping law.[3]

Finally, Respondents fail to address the implications of 19 U.S.C. § 2114b(5) (Congress's definition of "services" as "economic activities whose output are other than tangible goods" discussed in USEC Br. at 27-28). Although this definition is not part of the antidumping law, it demonstrates the reasonableness of Commerce's conclusion that SWU transactions involve the provision and sale of a good, not a service, because enrichment is an economic activity that produces tangible goods that are imported into the United States.[4]

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3. Because the tolling regulation has been misinterpreted by the CIT to permit U.S. purchasers to be treated as foreign producers of the imported merchandise, Commerce has recently announced it is withdrawing the regulation. *See* Withdrawal of Regulations Governing the Treatment of Subcontractors ("Tolling" Operations), 73 Fed. Reg. 16,517 (Mar. 28, 2008).

4. Respondents reference to a December 28, 2000 communication by the United States in the GATS negotiations as suggesting that the United States believes enrichment falls within the services sector (Eurodif Br. at 13-14, AHUG Br. at 18 n.11) fails to note that Annex A to the communication states: "[t]his exercise does not prejudge . . . which of these activities fall within the scope of GATS."

II. THE FEDERAL CIRCUIT'S DECISION CREATES A SIGNIFICANT LOOPHOLE IN THE ANTIDUMPING LAW THAT WILL HARM OTHER DOMESTIC INDUSTRIES.

Respondents claim that the *Eurodif* decision has no impact outside trade in uranium. Eurodif Br. Argument II; AHUG Br. Argument B. They assert that it applies only to the relatively few imported goods that are consumed, and that other imported goods produced through similar contractual arrangements are ultimately resold in transactions that can be captured by the antidumping law. This argument both mischaracterizes the Federal Circuit's holding and grossly understates the significance of the loophole created by the Federal Circuit.

First, the Federal Circuit's holding could not have been clearer:

> We therefore conclude that the SWU contracts at issue in this case were contracts for the provision of services and not for the sale of goods. Accordingly, we find that *the LEU produced as a result of these contracts is not subject to the antidumping statute*. . . .

USEC Pet. at 19a (emphasis added).

Thus, under *Eurodif*, imported goods produced in certain kinds of transactions are not subject to the antidumping statute *at all*. What happens to those goods after importation—whether they are consumed or resold—is irrelevant.

Second, even if the resale of such goods could somehow bring the imports back within the scope of the statute, there are many situations where goods entering the United States are not resold. For example, imported equipment or machine tools may be used in the production of other goods and not resold. Similarly, many imported products are used as material in the production of another good (*e.g.*, auto manufacturers who use imported steel in the production of a car).[5] Thus, Eurodif's claim that enriched uranium is "sui generis" in this regard (Eurodif Br. at 16) badly misses the mark.

Indeed, it is precisely because of the broad effect of the Federal Circuit's decision on other industries that the Committee to Support U.S. Trade Laws and its members have filed an *amicus* brief in this case.

III. THE FEDERAL CIRCUIT'S RULING WILL HAVE SIGNIFICANT ADVERSE EFFECTS FOR THE NATION'S SECURITY AND ENERGY INDEPENDENCE.

The stakes in this case are high. Respondents' effort to minimize the importance of this case is amply refuted by the fact that the four federal agencies responsible for national security, energy, foreign affairs, and trade issues—the Departments of Defense, Energy, State, and

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5. AHUG cites 19 U.S.C. § 1677a(e) for the proposition that the antidumping statute allows the capture of sales of imported products when the merchandise is incorporated into other products that are sold. This provision, however, allows the capture of such sales only where, unlike here, the transaction is between affiliated parties.

Commerce—have joined with the Solicitor General in urging this Court's review.

Respondents' attempts to downplay the ramifications boils down to an exhortation to let Congress or the President fix the problem. But this hardly suffices. Congress could always undo a court's erroneous interpretation of a statute by passing a new law. But that has not prevented this Court from granting *certiorari* to address a court's important misinterpretations of statutes or its refusal to accord *Chevron* deference to an agency construction of a statute.[6] More fundamentally, the mere fact that a bill has been introduced should not deter this Court from reviewing and correcting the Federal Circuit's misinterpretation of existing law and its failure to apply *Chevron* deference—particularly where, as here, the Federal Circuit's decision may mislead, by erroneous reasoning, future decisions of the Federal Circuit and other courts in dealing with similar *Chevron* issues.

Eurodif also contends (at 20-21) that the President can use his extraordinary powers under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-07, or Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, to counter the national security threats resulting from the decision below. While the President may have the power to declare a national emergency and take action to target Russia under those provisions, such drastic steps against

6. Legislation to amend the trade laws is always highly controversial. Moreover, in light of the significant lobbying power of AHUG's utility members, who oppose such legislation, the prospect for such legislation is, at best, uncertain.

Russia would almost certainly have serious diplomatic repercussions. In contrast, the 1992 Russian Suspension Agreement has provided a stable, established basis over sixteen years for addressing imports of LEU from Russia on a mutually-agreed basis.

AHUG also speculates that Russia will not abandon its obligations under the 1993 HEU Agreement (AHUG Br. at 25). But such speculation hardly rebuts the considered view of the Executive Branch on Russia's likely reaction. *See* United States Pet. at 26. Russia has in fact suspended shipments on several occasions during the history of the HEU Agreement.[7]

In addition, only 40% of the nuclear arsenal of the former Soviet Union is even covered by the current HEU Agreement. The United States may be interested in extending that Agreement when it expires in 2013 (or negotiating a new one) to cover the balance of those weapons. There will be no economic incentive for Russia to consider such an agreement if it can sell commercially produced LEU to U.S. utilities in transactions that are outside the scope of the antidumping law.

AHUG also claims that if USEC fails some other company could serve as Executive Agent for the United States under the HEU Agreement. AHUG Br. at 25 n.18. But, if the antidumping law is rendered inapplicable to SWU transactions, any other company would face the same economic problem that USEC faces: having to buy

7. For example, Executive Order No. 13,159 cited by Eurodif (at 20-21) was issued to resolve a suspension of shipments by Russia. It provided protection to the Russians against the attachment of their assets related to the HEU Agreement.

down-blended LEU at one price from the Russians and selling it at a lower price in a market depressed by unfairly traded imports.[8]

Similarly, Respondents suggest that the Government could step in and supply the needs of the U.S. military if USEC is forced out of business. Eurodif Br. at 21-22; AHUG Br. at 26-27. But such a nationalization of USEC's operations would fly in the face of Congressional policy reflected in the USEC Privatization Act, Pub. L. No. 104-134, 110 Stat. 1321-35 (1996), that the production of enriched uranium should be placed in the private sector. Moreover, the Government could not take over USEC's operations solely to maintain production of fuel for the military without also reinserting itself in the commercial enrichment market.

AHUG makes vague assertions about a possible lack of LEU supplies after the expiration of the HEU Agreement in 2013. AHUG Br. at 26. However, there are two current projects for deploying new enrichment plants in the United States (*i.e.*, by USEC and Louisiana Energy Services), and other companies (such as General Electric) are considering such projects. These new plants, together with fairly priced future imports, would ensure an adequate supply of LEU. But the economic

8. AHUG's contention that Russia does not have the capacity to sell substantial additional commercial LEU in the United States (AHUG Br. at 26 n.19) is refuted by findings of the International Trade Commission that "Russia has significant production capacity to make more uranium products for export" and much of its enrichment capacity "would be targeted to the U.S. market." *Uranium from Russia*, USITC Pub. 3872, Inv. No. 731-TA-539-C (Second Review) (Aug. 2006) at 27 & 28.

viability of those projects will be threatened if foreign enriched uranium can be dumped in the United States without any constraints under the trade laws.[9]

Finally, AHUG appears to believe that the economic benefit of allowing the utilities to obtain unfairly priced foreign nuclear fuel is worth the harm that would result to the health and successful expansion of the domestic enrichment industry. However, Congress has rejected that trade-off. The essential premise of the antidumping statute is that the long-term interests of U.S. consumers are better served by assuring that U.S. producers of goods are not injured by unfairly priced imported merchandise. That statutory objective is particularly pertinent here, where the vitality of the domestic enrichment industry is important to national security and energy independence.

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9. Louisiana Energy Services has stated that the loophole created by the *Eurodif* decision "is a matter of extremely serious concern to LES" and that LES's $2 billion investment, as well as future increases in the plant's capacity "could easily be imperiled by unrestrained imports from the Russian Federation." Letter from LES to Assistant Secretary of Commerce David M. Spooner, Inv. No. 821-802 (Jan. 10, 2008). General Electric Company, in a January 9, 2008 filing in that same proceeding, expressed similar concerns that unlimited imports of LEU would constrain its potential investment in a new enrichment technology and plant.

CONCLUSION

For all of the reasons discussed in USEC's petition and in this reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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