No. 07-

IN THE

Supreme Court of the United States

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The antidumping law allows for duties to be imposed on "foreign merchandise . . . sold in the United States at less than its fair value." The Commerce Department construed that phrase as including transactions in which a U.S. customer furnishes cash and fungible raw material to a foreign producer and receives a substantially transformed finished product. The question presented in this case is whether the Federal Circuit erred in failing to accord *Chevron* deference to that construction, when a contrary one will prevent the Commerce Department from applying the antidumping law to imports causing or threatening material injury to a domestic industry.

RULE 29.6 STATEMENT

USEC Inc. owns 100% of the stock of United States Enrichment Corporation. USEC Inc. has no parent corporation and no publicly held company owns 10% or more of its stock. USEC Inc. is a publicly held company whose stock is traded on the New York Stock Exchange under the symbol "USU".

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USEC Inc. and United States Enrichment Corporation (collectively "USEC") respectfully petition for a writ of certiorari to review the judgment of the Federal Circuit in this case.

OPINIONS BELOW

The final judgment of the court of appeals is reported at 506 F.3d 1051. (App. 31a).

The question presented by this petition was raised and decided on interlocutory appeal; the court of appeals' judgment on interlocutory appeal is reported at 411 F.3d 1355 (App. 1a), affirmed on rehearing at 423 F.3d 1275 (App. 24a). The decision of the U.S. Court of International Trade from which interlocutory appeal was taken is reported at 281 F. Supp. 2d 1334 (App. 268a). The Department of Commerce's original determination is reported at 66 Fed. Reg. 65,877, (App. 41a), and its redetermination following initial judicial review, (App. 147a), is available at http://ia.ita.doc.gov/remands/03-34.pdf.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2007. Extensions of the time for filing a petition for writ of certiorari were granted by Chief Justice Roberts on December 11, 2007, and January 15, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1673 of Title 19, U.S. Code (2000), provides in relevant part that:

> If—
>
> (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that—
>
> (A) an industry in the United States—
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise, or by reason of sales (or the likelihood of sales) of that merchandise for importation,
>
> then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.

STATEMENT OF THE CASE

At issue is a fundamental question with regard to the scope of the antidumping law of the United States: whether the Commerce Department can reasonably determine that imported foreign merchandise has been "sold" within the meaning of that law where a foreign producer receives fungible raw material and cash from a U.S. customer and delivers a substantially transformed finished product.

Based on the totality of the circumstances, the Commerce Department concluded that the transactions in this case—involving low enriched uranium—constituted sales of merchandise under the antidumping law. Because the transactions were found to have taken place at dumped prices and to have injured a U.S. industry, the Department imposed off-setting duties. The Federal Circuit, however, reversed Commerce's determination, concluding that the transactions involved sales of services outside the scope of the antidumping law. It relied on its own interpretation of certain provisions of the contracts as creating a continuous chain of title in the buyer to the raw materials and finished product. The court's decision was subsequently implemented so as to exclude imports made pursuant to such contracts from the scope of the antidumping order.

The Federal Circuit's decision was clearly improper under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as it usurped the Commerce Department's authority to interpret and apply ambiguous terms in a statute the Department is responsible for administering. By giving conclusive

effect to the contract terms drafted by the foreign producer and U.S. customer, and ignoring the circumstances of the transactions and the purposes of the antidumping law, the decision undermines the ability of the Commerce Department to fulfill its statutory mission of protecting U.S. industries from unfairly priced imports. At the same time, the decision threatens a historic disarmament agreement between the United States and Russia. This agreement uses the U.S. commercial nuclear fuel market as a channel to facilitate the conversion of nuclear weapons of the former Soviet Union to peaceful use—an objective that will be jeopardized if that market is disrupted by unfairly priced imports of enriched uranium. Such market disruption would also threaten the viability of the sole remaining domestic uranium enrichment facility, as well as a project to build a new enrichment facility employing a more advanced enrichment technology, both of which utilize the only U.S. enrichment technologies available to meet U.S. defense needs.

Thus, the Federal Circuit's decision—indefensible under *Chevron*—has enormous implications for both the scope of the antidumping law and U.S. energy security and non-proliferation objectives.

I. STATUTORY BACKGROUND

"Dumping" describes the practice of international price discrimination whereby a producer or exporter sells its merchandise in an export market at less than fair value. The U.S. antidumping regulatory framework is embodied in the Tariff Act of 1930, as amended. The Tariff Act defines "dumping" as "the sale or likely sale

of goods at less than fair value," 19 U.S.C. § 1677(34) (2000).[1] The Act provides that, when "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," and when those sales are found to cause or threaten to cause "material injury" to an industry in the United States, antidumping duties shall be imposed on imports of that merchandise. *Id.* § 1673.

The Department of Commerce and the United States International Trade Commission are jointly responsible for administering the antidumping law. Commerce determines whether foreign merchandise is being sold in the United States at less than its fair value, *id.* §§ 1673(1), 1677(1), and the Commission determines whether a domestic industry producing a product "like" the imported merchandise has been materially injured or threatened with material injury. *Id.* § 1673(2). Upon the filing of a petition by an affected domestic industry, both agencies conduct their own investigations, and if both agencies make affirmative final determinations, Commerce will issue an antidumping duty order. *Id.* § 1673d(c)(1).

In its investigation, Commerce calculates a dumping margin based on the "normal value," which is generally determined by reference to the prices at which the producer or exporter sells the same goods in its home market or in third-country markets. The dumping margin is the amount by which the normal value exceeds the U.S. price of the subject merchandise. *Id.* § 1677b. Importers of merchandise subject to antidumping duty orders must then pay cash deposits in the amount of this dumping margin in order to enter that merchandise into the United States.

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1. Unless otherwise indicated, all references to the United States Code are to the 2000 edition.

Id. § 1673e(a)(3). The actual amount of duty owed on particular imports is determined retrospectively through administrative reviews that may be requested on an annual basis. *Id.* § 1675(a)(1).

II. FACTUAL BACKGROUND

Nuclear power plants generate approximately 20% of the electricity consumed in the United States each year. The fuel for these plants is fabricated from low enriched uranium ("LEU"), which typically is produced through a process of enrichment. Enrichment involves increasing the level of fissionable U_{235} from 0.711% (the percentage by weight found in natural uranium) to levels that will sustain a chain reaction needed to generate electricity (generally 3-5%). Uranium in which the U_{235} content has been enriched to a level of 20% or more is weapons-grade material and is referred to as "highly enriched uranium" or "HEU."

The United States has only one plant in operation that produces LEU for nuclear fuel. This plant is owned by the U.S. government and operated by USEC pursuant to a lease entered into under the terms of the USEC Privatization Act of 1996, 42 U.S.C. § 2297h.

Companies that produce LEU such as USEC and the French company in this case, Eurodif S.A., are called "enrichers." Transactions between enrichers and their utility customers generally involve one of two types of contracts: "EUP" contracts (or "enriched uranium product" contracts) or "SWU" contracts ("separative work unit" contracts). There is no difference in the LEU that is produced and delivered to the customer in the two transactions.

In an EUP transaction, the utility contracts for the delivery of LEU and pays a cash price that covers the entire value of the LEU. There is no dispute that LEU imports pursuant to EUP contracts involve sales of merchandise subject to the antidumping law.

In a SWU transaction, the utility also contracts for the delivery of LEU, but pays cash and delivers raw material (natural, or "unenriched," uranium) to the enricher. There is no requirement in the contract that the LEU be produced from the unenriched uranium delivered by the customer. Because of the nature of the production process[2] and the fact that natural uranium is fungible and is not physically segregated by the enricher according to who supplied it, the LEU delivered to a customer is not produced from the batch of natural uranium delivered by that customer. Enrichers continuously produce LEU from their fungible inventory of unenriched uranium, and the LEU delivered by an enricher may have been produced even before the utility provided any natural uranium pursuant to its contract or even before the order for the LEU was placed. App. 49a, 219a.

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2. Both USEC and Eurodif use the gaseous diffusion method for producing LEU. Their plants are among the largest industrial plants in the world. The gaseous diffusion process involves continuously forcing and recycling uranium hexafluoride gas under pressure through more than 1,000 cascades, each of which contains porous membranes or diaphragms. As U_{235} molecules are lighter than the U_{238} molecules that are also contained in uranium as it comes out of the ground, the process results in two streams of gas, one slightly enriched in U_{235} and one that is somewhat depleted in U_{235}. *See* World Nuclear Ass'n, Information Paper: Uranium Enrichment (Oct. 2007), http://www.world-nuclear.org/info/inf28.html.

III. THE PROCEEDINGS BELOW

A. The Commerce Proceedings

On December 21, 2001, following a year-long antidumping investigation, Commerce published a notice of final determination regarding LEU from France. *Low Enriched Uranium from France*, 66 Fed. Reg. 65,877 (Dep't of Commerce Dec. 21, 2001) (App. 41a), *as amended*, 67 Fed. Reg. 6,680 (Dep't of Commerce Feb. 13, 2002) (App. 90a) (collectively "Final Determination"). In its Final Determination, the Department found that LEU from France was being sold, or was likely to be sold, in the United States at less than fair value. In addition, the U.S. International Trade Commission determined that the domestic uranium enrichment industry was being injured or was likely to be injured by the foreign imports. As a result of these determinations, Commerce issued an antidumping duty order with regard to imports of French LEU. The Department calculated an antidumping duty rate of 19.95 percent.[3]

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3. At the same time Commerce also issued an affirmative countervailing duty determination (*i.e.*, a determination regarding subsidies provided by foreign governments to the production of the imported merchandise) involving LEU from France, as well as affirmative countervailing duty determinations involving LEU produced by another foreign enricher and imported from Germany, the Netherlands, and the United Kingdom. While the initial appeals involved those countervailing duty determinations as well as the antidumping duty determination on LEU from France, the countervailing duty orders have either been revoked or are not at issue here.

The central issue in the antidumping proceeding before Commerce, and in the subsequent appeals to the U.S. Court of International Trade (CIT) and Federal Circuit, was whether LEU imports pursuant to SWU transactions constituted sales of merchandise, subject to the antidumping law, or sales of services, outside the scope of that law.

Commerce concluded that all LEU entering the United States from France was subject to the antidumping law "regardless of the way in which the sales for such merchandise were structured," App. 47a, 54a, and that this conclusion furthered Congress's intent in enacting the antidumping law. App. 63a.

Commerce found that enrichment accounts for 60% of the value of the LEU, and that it substantially transforms the unenriched uranium, thereby creating a "new and different article of commerce." App. 62a-63a. The Department also noted that imports under either form of contract involve trade in goods, and that exclusion of imports pursuant to "contract manufacturing" from the scope of the antidumping law would have "profound implications for the international trading system as a whole" by enabling parties to convert "trade in goods into trade in so-called 'manufacturing services'. . . . We simply do not consider a major manufacturing process to be a 'service' in the same sense that activities such as accounting, banking, insurance, transportation and legal counsel are considered by the international trading community to be services." App. 63a-64a. The Department found that the overall arrangements in both EUP and SWU transactions involved the sale of LEU and that "[i]n reaching this

conclusion, we have looked beyond the four corners of the contract and have examined the totality of the circumstances surrounding the transactions. . . ." App. 80a.

Accordingly, the antidumping order applied to all imports of LEU from France, including imports pursuant to SWU contracts.

B. CIT Review and Commerce's Redetermination

Eurodif S.A., the foreign enricher in this case, contested Commerce's Final Determination before the Court of International Trade. Eurodif argued that the importation of LEU pursuant to SWU transactions involved sales of services outside the scope of the antidumping law. Its arguments were based, in part, on Commerce's "tolling" regulation, 19 C.F.R. § 351.401(h) (2007). A tolling arrangement is one in which the tollee provides raw materials to the toller, who produces finished merchandise that is delivered to the tollee. The regulation provides guidance as to which entity's prices and costs (*i.e.*, the toller's or the tollee's) will be examined in determining whether dumping has occurred.

The CIT agreed with Commerce that the tolling regulation does not exempt imported merchandise from antidumping proceedings. *USEC Inc. v. United States*, 259 F. Supp. 2d 1310, 1325 (Ct. Int'l Trade 2003) (App. 131a). Nevertheless, the CIT remanded the case to Commerce for reconsideration of how the tolling regulation affected the Department's conclusion that transactions under SWU contracts involved a sale of goods, not services.

On remand, the Department considered both the tolling regulation and its prior precedent, and reexamined the extensive evidence of record regarding how SWU transactions were actually implemented. *Final Remand Determination, USEC Inc. v. United States* (Dep't of Commerce June 23, 2003) (App. 147a). The Department found that these transactions involve "the transfer of ownership [from the enricher to the utility] in the complete LEU product for consideration," App. 217a, and constituted a sale of merchandise. App. 219a-220a. Commerce explained that the enricher "hold[s] inventories of uranium from various sources, including uranium owned by the enricher itself, and produce[s] LEU without relying solely upon the input from a particular customer." App. 221a. Commerce found that the enricher, not the customer, owns the LEU from the time it is produced until the time it is delivered "because the LEU produced by the enricher cannot be identified as having been derived from the feedstock provided by any particular customer." App. 219a. Further,

> the record indicates that LEU delivered to a utility customer by an enricher under an enrichment contract may be produced before any natural uranium supplied by that customer could have been part of the production process for that LEU, thereby making it impossible to conclude that the LEU produced and delivered by the enricher is in any way derived from the uranium supplied by the customer.

Id. Based on these factors, Commerce concluded that the delivery of LEU pursuant to SWU transactions involves a sale of merchandise subject to the antidumping law. App. 222a.

The CIT, on review, rejected the Department's conclusion. *USEC Inc. v. United States*, 281 F. Supp. 2d 1334 (Ct. Int'l Trade 2003) (App. 268a). Focusing exclusively on the provisions of the SWU contracts, rather than the total evidence of record considered by the Department, the CIT found that the contracts create a "legal fiction" that the natural uranium delivered by the utility is enriched by the enricher and returned as LEU to the utility, and "suggest an intention to establish a continuous chain of ownership in the utility. . . ." App. 277a. In the CIT's view, regardless of the facts of the enrichment process and how SWU transactions are implemented, "the contracts delineate a transaction in which a utility provides raw material to an enricher, pays for the service of processing the material, and obtains the finished product after the manufacturing service has been performed." App. 278a.

C. Federal Circuit Decisions on Interlocutory Review

The parties then sought and obtained an order from the CIT permitting an interlocutory appeal to the Federal Circuit pursuant to 28 U.S.C. § 1292(d)(1). *USEC Inc. v. United States*, 27 C.I.T. 1925 (2003) (App. 306a). The Federal Circuit granted the interlocutory appeal and affirmed the CIT's decision. *Eurodif S.A. v. United States*, 411 F.3d 1355, 1361-64 (Fed. Cir. 2005) ("*Eurodif I*") (App. 11a-21a).

In evaluating what it referred to as "[t]he [c]haracterization of [e]nrichment [c]ontracts," App. 12a, the Federal Circuit placed central reliance on a previous case in which the court was called upon to characterize

U.S. Government SWU contracts under a different statute, the Contract Disputes Act (CDA), 41 U.S.C. § 601, *et seq.* (1988), to determine whether interest was payable on certain judgments against the United States, *Florida Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002). In that case, the court had agreed with the government's argument that contracts for the enrichment of uranium by the Department of Energy were service contracts not covered by the CDA. App. 15a-16a. The court below extended *Florida Power's* contract-based approach to this case. In its view, "the contracts in this case" made clear that ownership of neither the natural uranium nor the LEU was "meant to be vested in the enricher during the relevant time periods that the uranium is being enriched." App. 15a. "As a result, the 'transfer of ownership' required for a sale under [*NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997)] is not present here." App. 15a.

USEC and the United States then sought rehearing and rehearing *en banc*, in part based on the court's improper reliance on *Florida Power* as a basis for failing to defer to Commerce's construction of the antidumping statute. Subsequent to those filings, this Court handed down its decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), which clarified that a court must defer to an agency's construction of a statute even if the court had reached a different interpretation in a prior judicial decision unless that prior decision had found that the statute compelled the court's interpretation. *Id.* at 982-85. USEC and the United States brought this decision to the attention of the court in a Rule 28(j) letter. *See* Fed. R. App. P. 28(j). The Federal Circuit denied rehearing *en banc*, but granted rehearing for the limited purpose of addressing the

applicability of the *Brand X* decision. While acknowledging that under *Brand X* deference would be due to Commerce if the antidumping statute were ambiguous, the court stated, "We now clarify ... that the antidumping statute unambiguously applies to the sale of goods and not services." *Eurodif S.A. v. United States*, 423 F.3d 1275, 1278 (Fed. Cir. 2005) ("*Eurodif II*") (App. 28a).

D. Proceedings on Remand from the Federal Circuit

Following remand to Commerce, *Eurodif S.A. v. United States*, 414 F. Supp. 2d 1263 (Ct. Int'l Trade 2006) (App. 317a), Commerce stated that it would not assess antidumping duties on imports under SWU transactions. It concluded, however, that it need not amend the scope of the antidumping order because LEU imported pursuant to SWU transactions is physically indistinguishable from imports of LEU pursuant to EUP transactions that would continue to be covered by the order. Rather, in future administrative reviews it would examine the facts of record regarding particular imports and apply the Federal Circuit decisions to those imports. *Low Enriched Uranium from France*, (Dep't of Commerce March 3, 2006) (final results of redetermination) (App. 320a).

On appeal, the CIT rejected Commerce's approach and ordered it to modify the scope of the antidumping duty order to exclude all entries of French LEU imported pursuant to SWU transactions. *Eurodif S.A. v. United States*, 431 F. Supp. 2d 1351 (Ct. Int'l Trade 2006) (App. 327a).

Commerce then adopted language limiting the scope of the antidumping order, while continuing to note its disagreement with both the Federal Circuit's decisions in *Eurodif I* and *II* and the CIT's rejection of its first redetermination. It also specified a form by which the French enricher and U.S. utility customer could certify that particular imports met the conditions for exclusion from the order. *Low Enriched Uranium from France*, (Dep't of Commerce June 19, 2006) (final results of redetermination). (App. 340a).

E. Final Federal Circuit Decision

Following the CIT's affirmance of Commerce's second redetermination, *Eurodif S.A. v. United States*, 442 F. Supp. 2d 1367 (Ct Int'l Trade 2006) (App. 356a), the United States and USEC again appealed to the Federal Circuit. The United States argued that the CIT had erroneously rejected Commerce's first redetermination approach. USEC argued that the determination whether particular imports of LEU were excludable from the order pursuant to the Federal Circuit's earlier decision should be affected by certain additional factors, *e.g.*, whether an affiliate of the enricher supplied the unenriched uranium in the transaction and whether the unenriched uranium was delivered to the enricher after the delivery of the LEU to the utility customer. The Federal Circuit concluded that both appeals raised issues that could best be resolved when particular facts were at issue, and dismissed the appeals as unripe. *Eurodif S.A. v. United States*, 506 F.3d 1051 (Fed. Cir. 2007) (App. 31a).

With the Federal Circuit's dismissal of the appeals, the Federal Circuit's interlocutory decisions in *Eurodif I* and *Eurodif II* have now become incorporated in a final judgment. Absent review by this Court, those decisions will become the governing law regarding the dividing line between trade in goods that are subject to the antidumping law and trade in services that are outside the scope of the antidumping law.

F. Proceedings Regarding Imports of Russian LEU

The impact of the Federal Circuit's decisions is already being felt in another important antidumping case. It is one that has significant implications for the continued successful implementation of a bilateral program for the importation of Russian LEU derived from the dismantling of nuclear weapons of the former Soviet Union. The case involves an antidumping investigation into uranium imported from Russia that was suspended in 1992 as a result of an agreement between the United States and Russia. The agreement currently limits imports of Russian LEU but permits the importation of LEU that has been produced through a process of down-blending the highly enriched uranium in the weapons material with uranium with a much lower U_{235} content. In the pending case, Commerce has conducted a sunset review and concluded that terminating the suspension agreement would likely lead to the continuation or recurrence of dumping. *Uranium from the Russian Federation*, 71 Fed. Reg. 32,517 (Dep't of Commerce June 6, 2006).

On September 27, 2007, however, in light of the Federal Circuit's decisions in *Eurodif*, the CIT remanded that determination and directed Commerce to exclude future imports of Russian LEU pursuant to SWU transactions from the scope of that case. *Techsnabexport v. United States*, 515 F. Supp. 2d 1363 (Ct. Int'l Trade 2007). On December 21, 2007, Commerce filed the results of its remand with the CIT. In its remand results, Commerce applied the *Eurodif* precedent, and concluded based on the specific facts in that review that dumping would likely continue or recur if the suspended investigation were terminated. Other parties in the case, including an association of U.S. utilities and the Russian exporter of LEU, have filed comments with the Court of International Trade urging the court to expressly direct Commerce to explicitly exclude all imports of Russian LEU pursuant to SWU contracts from the case. The court has not yet ruled on Commerce's remand determination.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decisions improperly narrow the scope of the antidumping statute. They significantly limit the protection that law was meant to afford to domestic producers from injurious, unfairly priced imports. Because of the Federal Circuit's exclusive role in the appellate review of antidumping cases, its decisions will conclusively decide the question presented absent review by this Court.

The antidumping statute clearly applies to sales of merchandise, but it does not define when merchandise is "sold." In particular, Congress has not "directly spoken

to the precise question at issue" in this case: whether the statute encompasses import transactions where the U.S. customer supplies cash and raw materials to the foreign producer and the foreign producer delivers a substantially transformed finished product. In this circumstance, the Federal Circuit's failure to defer to Commerce's reasonable construction of the statute is fundamentally inconsistent with *Chevron*, 467 U.S. 837.

The Department considered the language and purpose of the antidumping law and examined the "totality of the circumstances" to determine that the import transactions in this case constitute sales of merchandise under the antidumping statute. The reasonableness of that construction is illustrated by cases interpreting other regulatory statutes applying to the "sale" or "purchase" of goods, where courts have interpreted such terms broadly—looking beyond the formalities of the contract—to effectuate the regulatory purposes of the statute at issue. Moreover, Commerce's approach to the dividing line between what constitutes a transaction involving goods, rather than one involving services, is consistent with how Congress has drawn that line in another trade statute. *See* 19 U.S.C. § 2114b(5) (defining "services" as "economic activities whose outputs are other than tangible goods" for purposes of delineating the U.S. Trade Representative's authority for negotiating international agreements on trade in services).

Rather than deferring to the Commerce Department's reasonable construction of the antidumping law, the Federal Circuit placed significant weight on its own characterization of U.S. government SWU contracts in *Florida Power*, a case that arose under a different statute with a different

purpose. The court's approach would remove imported merchandise from the scope of the antidumping law based solely on the manner in which the parties choose to structure their transaction—a result that the Commerce Department reasonably concluded could not have been intended by the Congress.

Finally, the Federal Circuit's decisions are having a significant impact beyond the immediate case. By removing antidumping constraints on LEU imports when SWU contracts are employed, the Federal Circuit's decisions jeopardize conditions of fair pricing in the U.S. LEU market. This in turn threatens the continued successful implementation of a historic agreement between the United States and Russia for the importation of LEU down-blended from nuclear weapons of the former Soviet Union. In addition, by removing legal constraints on unfairly priced LEU imports, the decision also threatens market disruption that could undermine the viability of the only operating U.S. enrichment plant, and jeopardize initiatives to expand U.S. capacity to produce enriched uranium. Such initiatives include a multi-billion dollar project now being deployed by USEC at U.S. government facilities pursuant to agreements with the Department of Energy using the only advanced U.S. enrichment technology available to meet future U.S. defense needs.

I. THE COMMERCE DEPARTMENT REACHED A REASONABLE CONSTRUCTION OF AN AMBIGUOUS STATUTORY PHRASE.

This petition presents a classic example of the trouble that a federal appellate court can cause when it fails to follow the basic framework of *Chevron*. Under that decision, the court must first determine whether the Congress has "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If not, then the court must "not simply impose its own construction on the statute as would be necessary in the absence of administrative interpretation," but must defer to a "permissible construction of the statute" by the agency. *Id.* at 843 (citation omitted); *see National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction . . . even if the agency's reading differs from what the court believes is the best statutory interpretation."). Here, the Federal Circuit failed to follow this fundamental principle.

A. Congress Has Not Directly Spoken to the Question Presented in This Case.

The antidumping law does not define the terms "merchandise" or "sold," and Congress has not spoken directly to the precise question at issue here. There is no explicit congressional guidance as to whether the phrase "foreign merchandise . . . sold" includes transactions such as the ones at issue here: where the U.S. customer supplies cash and raw materials to the

foreign producer and the foreign producer delivers a substantially transformed finished product.

In *Eurodif II*, the Federal Circuit concluded that "the antidumping statute unambiguously applies to the sale of goods and not services." App. 28a. But this conclusion missed the central point. No one contests that the statute applies to the sale of goods and not services. The question is what "sale of goods" (or, more precisely, "merchandise . . . sold") means, and whether that phrase encompasses transactions like the ones at issue in this case. On that issue the statute is ambiguous.

This Court has previously held that analogous statutory terms were ambiguous. For example, this Court has concluded that whatever the term "sale" may mean in other contexts, its meaning in the Securities Exchange Act of 1934 was not unambiguous and required an examination of the Act's purpose and its relation to the particular conduct at issue. *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 466-67 (1969). As the circuit courts have similarly observed, "[t]he phrase 'any purchase and sale' . . . is . . . not to be limited or defined solely in terms of commercial law of sales and notions of contractual rights and duties." *Bershad v. McDonough*, 428 F.2d 693, 696-67 (7th Cir. 1970) (collecting cases). "'Whatever the terms "purchase" and "sale" may mean in other contexts,' they should be construed in a manner which will effectuate the purposes of the specific section of the Act in which they are used." *Id.* (quoting *SEC. v. Nat'l Sec., Inc.*, 393 U.S. at 467 (alteration in original omitted)).

This is consistent with a more general principle: "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). "[W]ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at, not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed.'" *Dist. of Columbia v. Carter*, 409 U.S. 418, 420 (1973) (quoting *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253, 258 (1937)).

B. Commerce's Construction of the Antidumping Statute Was Reasonable.

Given the antidumping statute's silence as to how the phrase "merchandise . . . sold" should be applied where a customer supplies raw materials to a foreign producer and in exchange receives a finished product, Commerce appropriately considered the statute's underlying purpose and the totality of the circumstances relating to the SWU transactions. On that basis it reasonably concluded that, like imports of identical LEU under EUP contracts, LEU imports pursuant to SWU transactions involved a sale of merchandise. Commerce's approach in this regard was consistent with precedent in other regulatory settings where agencies and reviewing courts had to determine if a "sale" subject to

the regulatory statute had taken place, and other indicia of how Congress wants the line drawn in international commerce between what constitutes trade in goods and what constitutes trade in services.

1. The Term "Sale" Has Been Broadly Construed When Used in Regulatory Statutes.

Many regulatory statutes apply to "sales" of goods between contracting parties. In interpreting the reach of such statutes, regulatory agencies and courts have looked beyond the contract language to determine whether a "sale" or "purchase" subject to the regulatory regime has taken place, and have given due regard to the realities of the transaction at issue and the purpose of the underlying statute.

For example, in *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 392-400 (1965), the Court held that the phrase "sale in interstate commerce of natural gas" in the Natural Gas Act applied to a transaction in which the pipeline company did not purchase natural gas, but rather leased gas fields and arranged for the production of gas by another company. Because there was no transfer of title to the gas, the pipeline claimed there was "no sale." Nevertheless, this Court upheld the Federal Power Commission's decision that the Natural Gas Act applied. It found that the transaction was "very close in economic effect to conventional sales of natural gas," *id.* at 396. The Court stressed the importance of not undermining a regulatory

act's scope by applying overly technical interpretations of "sale" under local law:

> Without impugning in any way the good faith and genuineness of the transactions, we think it clear that the lease-sales here in question can nonetheless be considered "sales" of natural gas in interstate commerce for purposes of the Act. A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law.

Id. at 400 & n.7. The Court further stressed the need to interpret statutory terms "by reference 'to the purpose of the Act and the facts involved in the economic relationship' rather than exclusively by reference to common law standards or local law." *Id.*

The Court in *United Gas Improvement* relied on the "closely analogous" case of *Gray v. Powell*, 314 U.S. 402 (1941). In *Gray*, a railroad leased coal mines, mined the coal using a contractor, and then consumed the coal in its own operations. The railroad argued that it was not subject to the price controls of the Bituminous Coal Act of 1937 because there had been no "sale or other disposal" of coal within the meaning of the Act. Specifically, the railroad pointed out that, "as lessee of the mineral rights [the railroad] is the owner of the coal when it is extracted and until it is consumed and therefore no title ever passes" from the independent contractor to the railroad. The Court rejected this focus on title as the basis for identifying a "sale or other disposal" of goods, holding that "the purpose of Congress,

which was to stabilize the industry through price regulation, would be hampered by an interpretation that required a transfer of title, in the technical sense, to bring a producer's coal, consumed by another party, within the ambit of the coal code." 314 U.S. at 416.[4]

Indeed, courts have found a sale of goods for regulatory purposes even where there was no delivery of goods at all. In *Callery Properties v. FPC*, 335 F.2d 1004, 1021 (5th Cir. 1964), the court held that the Federal Power Commission could find a sale of natural gas based on payments under take-or-pay contract provisions even when no natural gas was delivered. "When viewed realistically in light of the imperative necessity for long term gas supply commitments, we agree with the Commission that this arrangement constitutes a sale within its power of regulation." The Supreme Court later expanded the relief granted, but did not disturb the ruling on the scope of "sale." *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223 (1966).

Just as the agencies in those cases, Commerce here looked to the purpose of the antidumping statute and the characteristics of the transactions in concluding that a sale of merchandise occurred. As Commerce concluded in its Final Determination, "Congress did not intend the [antidumping] and [countervailing duty] laws to be applicable to merchandise based upon the way in which parties structure their transactions. . . ." App. 65a.

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4. In addition, the Court rejected the railroad's claim that it was the "producer" of the coal within the meaning of the Act's exemption for coal "'consumed . . . by the producer'": "To determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry." *Gray*, 314 U.S. at 413.

These cases show that, in order to assure the effectiveness of a regulatory scheme, this Court has found a sale of goods even when there was no contractual transfer of title to the goods. Similarly, here Commerce reasonably could conclude that application of the antidumping law should not be undermined by the "legal fiction" in the parties' contracts that the customer retains title to a quantum of raw material until it receives the LEU. Commerce's conclusion is particularly reasonable in light of the facts found by the Department (and not disputed by the CIT or Federal Circuit):

- the enricher produces a new and substantially transformed product (LEU) from commingled fungible unenriched uranium (App. 62a-63a, 69a, 218a);

- the LEU is not produced from the raw material delivered by the customer—and may even have been produced *before* the customer delivered the unenriched uranium (App. 219a); [5] and

- from the time of production through the time of delivery of the imported LEU to the customer, no customer could claim ownership of the delivered LEU (App. 219a).

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5. Indeed, there is no requirement under a SWU contract that the enricher produce *anything* in response to the customer's order. An enricher may fill the order with LEU produced in the past or with LEU obtained from third parties, as is the case with USEC's delivery of Russian LEU down-blended from nuclear weapons of the former Soviet Union. This further indicates that the object of the transaction is not a service to be performed by the enricher on the customer's property, but rather the supply of LEU by the enricher—the same object as in the case of an EUP contract.

Thus, even in light of the definition of sale in prior Federal Circuit case law—"a transfer of ownership to an unrelated party and consideration," *NSK Ltd. v. United States*, 115 F.3d 965, 975 (Fed. Cir. 1997)—a "sale" could reasonably have been found here. Certainly, under the broad view of "sale" taken by this Court and the regulatory precedents cited, the Department's construction was permissible.

2. Commerce's Construction of the Antidumping Law Is Consistent With the Line Congress Has Drawn Between "Goods" and "Services" in a Relevant Trade Statute.

The proper interpretation of a law may be affected by a later enacted statute not directly amending the statute at issue. *See, e.g., United States v. Fausto*, 484 U.S. 439, 453 (1988) ("This classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute."). That principle of interpretation is relevant here.

An indication of congressional intent as to the dividing line for international trade purposes between trade in services and trade in goods is the provision of U.S. trade law, enacted in 1984, that authorizes the U.S. Trade Representative to negotiate trade agreements covering services. 19 U.S.C. § 2114a. It defines "services" as "economic activities whose outputs are other than tangible goods." *Id.* § 2114b(5). Congress's view that an economic activity resulting in the output of a tangible

good does not constitute a "service" for international trade purposes further supports the reasonableness of Commerce's interpretation that SWU transactions—which unquestionably involve the production and importation of a tangible good—do not constitute the provision or sale of a service.

Indeed, the Federal Circuit's ruling creates a gap in Congress's allocation of responsibilities for international trade matters. The USTR has authority to negotiate trade agreements covering "services," which § 2114b(5) defines as not including economic activities whose outputs are tangible goods. As that definition makes clear, this authority covers such traditional services as banking, insurance, and advertising, but plainly does not cover manufacturing or processing that yields a tangible good, whether it is enriched uranium, a sophisticated computer chip, or a machine tool. Thus, the Federal Circuit has created a situation in which some key economic activities that result in imports into the United States are *neither* subject to the Commerce Department's jurisdiction under the antidumping law as sales of goods *nor* subject to the authority of the USTR to negotiate rules covering such imports under international agreements relating to services.

C. The Federal Circuit Departed From the Teachings of *Chevron* and *Brand X*.

Rather than deferring to Commerce's reasonable construction of the phrase "merchandise . . . sold" in the antidumping statute, the Federal Circuit focused on how the court itself had characterized SWU transactions in its own *Florida Power* decision. In that case, the court

was presented with the question of whether SWU contracts between the Department of Energy and U.S. utilities should be considered sales of goods or sales of services under the Contract Disputes Act, 41 U.S.C. § 601, *et seq.* (1988). The court found that the transactions had aspects of both categories: "In light of the evidence that DOE used feed material from other customers, and sometimes its own feed material, to fulfill a particular ... order of enriched uranium, *this case does not fall neatly into either the above categories....*" *See Florida Power & Light Co. v. United States*, 307 F.3d 1364, 1373 (Fed. Cir. 2002) (emphasis added).

Despite its recognition in *Florida Power* that SWU transactions do not "fall neatly" on either side of the goods/services divide, the Federal Circuit in *Eurodif I* treated this issue as having been decisively resolved: "Holdings of this court are no less decisive because they may have been difficult to develop." App. 17a. But that very "difficulty" in characterizing the DOE SWU contracts reflects ambiguity—precisely the sort of ambiguity that, when applied to this case, should have signaled to the court its duty to defer to Commerce's reasonable construction. But, on rehearing, the Federal Circuit nevertheless insisted that its decision in *Florida Power* was entitled to persuasive weight.[6]

The court's reliance on *Florida Power* was improper for two fundamental reasons. First, *Florida Power* interpreted an entirely different statute—the Contract Disputes Act. That statute is focused on delineating the rights of the parties to the contract relative to each other.

6. *See Eurodif II*, at App. 28a (noting that in *Eurodif I* the court had found *Florida Power* to be "persuasive" authority).

See Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 805 (2003) ("The CDA establishes rules governing disputes arising out of certain Government contracts."). This case, however, involves the Commerce Department's construction of the antidumping statute, the purpose of which is to protect *nonparties* to the import contracts—domestic producers that must compete with imports from foreign producers. In this context, contract provisions cannot be given dispositive weight. Given the starkly different purposes of the statutes at issue in *Florida Power* and here, reliance on that case was unwarranted.[7]

Second, even if *Florida Power* had interpreted the antidumping statute, its conclusion could not justify the court's refusal to give deference to Commerce's reasonable interpretation of the statute unless it was clear that Congress had unambiguously intended that imports pursuant to SWU transactions do *not* constitute sales of LEU. "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

7. For much the same reason, court decisions addressing commercial disputes between the parties to a contract are not relevant here. In that context, in declaring the relative rights of the parties, the court may properly seek to give effect to the intentions of the parties as reflected in the language of their contract. In addition, there is no agency application of a statute to be considered. Those cases are not determinative of how a transaction should be characterized under a regulatory regime where the interests of third parties are implicated and an expert agency has been designated to implement the statute.

discretion." *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). The court of appeals plainly expressed its unwillingness to "ignore our previous holdings" because of the factual similarities of the underlying transactions. App. 28a, *citing to* App. 17a. But that is precisely what it must do under *Brand X*. *See id.* (court must approach inquiry as if it were "reviewing the agency's construction on a blank slate"); *see also Skranak v. Castenada*, 425 F.3d 1213, 1220 (9th Cir. 2005) (under *Brand X*, a court reviews subsequent agency determination as if it had "never addressed the topic"). Since *Brand X* would have required the Federal Circuit to take a "blank slate" approach even if its earlier decision had interpreted the antidumping statute, the Federal Circuit's reliance on *Florida Power*—which arose under a completely different statute—is even less appropriate.

In short, the Federal Circuit's decisions in *Eurodif I* and *II* fail to follow the teachings of *Chevron* and *Brand X*. The court concluded that a transaction it deemed to be a sale of a service under one statute cannot be a sale of merchandise under an entirely different statute unless Congress specifically says it is. This conclusion is contrary to repeated instruction from this Court that the same words used in different statutes, or even in different parts of the same statute, can have different constructions depending upon the purposes of the law. *See, e.g., Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423, 1433-34 (2007); *United States v. Cleveland Baseball Co.*, 532 U.S. 200, 213 (2001); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). Moreover, the Federal Circuit's approach places a burden of explicit statement on Congress when

it has entrusted application of the second statute to an expert agency with knowledge of complex industry arrangements. And the Federal Circuit reached this conclusion despite the two statutes' very different terms and entirely different purposes; despite the role of the Commerce Department in interpreting the antidumping law; and despite the fact that the court in *Florida Power* itself found the characterization of such contracts to be a close question even under the Contract Disputes Act.

II. THIS CASE PRESENTS AN ISSUE WITH IMPORTANT NATIONAL IMPLICATIONS.

The Federal Circuit's decisions have important implications for U.S. trade law, for national security, for our nation's energy policy, and for jurisprudential principles of deference to Executive Branch agencies. Any of these implications alone would warrant this Court's granting certiorari. That all of these factors are present here makes this case especially worthy of this Court's consideration.

First, this case involves the basic question: what is a sale of merchandise covered by the antidumping statute? This question is central to the jurisdiction of the Commerce Department and the scope of protection afforded domestic industries by that law. Because of the pivotal importance of this question, it was certified to the Federal Circuit, which issued two opinions attempting to address it. The Federal Circuit's rulings have the potential to create a significant loophole in the antidumping law that would exclude import transactions from the scope of that law based on how the contracts are structured. Arrangements for contract manufacturing are prevalent throughout industry—and will certainly become more prevalent in import transactions if the Federal Circuit's decisions are not reversed.

Second, application of the Federal Circuit's ruling to LEU has important implications for national security, as it endangers the continued successful implementation of a 1993 agreement between the United States and Russia for the dilution (or "down-blending") of weapons material and sale of the resulting LEU in the United States.[8] In that agreement (commonly known as the "Megatons to Megawatts" program), Russia agreed to sell 500 metric tons of highly enriched uranium converted to LEU over a period of twenty years. Under the agreement, USEC, as U.S. executive agent, each year purchases the down-blended LEU in amounts equal to approximately one-half of the annual U.S. consumption for LEU, and ten percent of total U.S. electricity consumption.

In doing so, USEC assumes all risk associated with the sale of the down-blended LEU, including the risk of maintaining a sufficiently large backlog of SWU and EUP contracts to absorb both the large quantity of down-blended LEU and the roughly equal amount of LEU that USEC produces in Kentucky, at the sole remaining U.S. uranium enrichment plant. The revenues from these contracts are used to pay for the LEU imported under the HEU Purchase Agreement, as well as the cost and upkeep of the domestic LEU plant and investment in a project (discussed below) to deploy new U.S. uranium enrichment technology that is critical to U.S. national and energy security.

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8. Agreement Concerning the Disposition of Highly Enriched Uranium Extracted From Nuclear Weapons, U.S.–Russ., Feb. 18, 1993, Temp. State Dep't No. 93-59, 1993 WL 152921 [hereinafter "HEU Purchase Agreement" or "Megatons to Megawatts"].

As of December 31, 2007, there remain approximately 178 metric tons of Russian HEU—equivalent to approximately 7,000 nuclear warheads—to be down-blended and sold in the United States. This represents approximately 35% of the total amount of weapons material to be down-blended under the program. Absent measures to restrain dumping of LEU imports, completion of the program is at risk.

In addition to producing LEU by down-blending the highly enriched uranium in nuclear warheads, Russia has significant capacity, through four large enrichment plants, to produce LEU from natural uranium far in excess of its domestic needs. If this Russian LEU can be imported into the United States outside the scope of the antidumping law, it would disrupt the market conditions needed to ensure the continued success of the weapons dismantling program, since imports of commercially-produced LEU at dumped prices would undermine USEC's ability to sell the down-blended Russian LEU.

The U.S. government has been able to maintain the necessary market conditions for the success of the Megatons to Megawatts program because of a 1992 agreement with Russia (referred to as the "Russian Suspension Agreement") that suspended an antidumping investigation on imports of uranium from Russia, including imports of LEU. That agreement permits imports of Russian LEU under the Megatons to Megawatts program, and pursuant to an amendment signed on February 1, 2008, will permit very limited

imports of commercial LEU under annual quotas.[9] However, if the loophole created by the Federal Circuit in this case is not corrected, the ability to enforce those quotas will be undermined. Since the Russian Suspension Agreement is predicated upon the antidumping law, unless the *Eurodif* loophole is closed Russia will be able to export unlimited quantities of LEU pursuant to SWU transactions over and above any quotas established in the Russian Suspension Agreement. Failure to correct this loophole would thus leave the U.S. government without the means to ensure that the market remains favorable to full implementation of the Megatons to Megawatts program.

Moreover, the Court of International Trade has concluded that, in light of the *Eurodif* decisions, imports of Russian LEU under SWU contracts cannot be subject to the antidumping law. *Techsnabexport v. United States*, 515 F. Supp. 2d 1363 (Ct. Int'l Trade 2007). Because the Federal Circuit's *Eurodif* decisions have been treated as controlling in the Russian proceeding, their foundations have not been reexamined in that case. Accordingly, this case alone provides a complete record for review of the statutory interpretation issue affecting both proceedings.

Third, USEC is currently seeking to finance and deploy a new multi-billion dollar enrichment plant under its 2002 Memorandum of Understanding with the United

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9. The amendment to the Russian Suspension Agreement is reproduced at 73 Fed. Reg. 7705 (Feb. 11, 2008).

States Department of Energy.[10] Removal of the protections that the antidumping law provides against unfairly priced LEU imports could undermine that endeavor. It would also threaten the viability of the existing U.S. enrichment plant. This could further increase the United States' dependence on foreign sources of energy at a time when energy independence is increasingly regarded as a vital aspect of economic and national security. Moreover, both USEC's new plant and its existing plant employ the only uranium enrichment technologies available to meet U.S. defense needs. Other enrichment plants that are being developed or under consideration would employ foreign enrichment technologies, which are subject to restrictions that render them unavailable for the defense needs of the United States military.

Finally, this case raises broader jurisprudential issues regarding lower courts' adherence to the principles set forth by this Court in *Chevron* and in *Brand X*. Those principles require due regard for Executive Branch functions and respect for expert agency determinations when construing and applying critical terms like "sale" in regulatory regimes created by Congress.

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10. *See* Press Release, USEC, "USEC and U.S. Energy Department Sign Accord" (June 18, 2002), *available at* http://www.usec.com/v2001_02/Content/News/NewsTemplate.asp?page=/v2001_02/Content/News/NewsFiles/06-18-02.htm.

CONCLUSION

Few international trade cases have the manifest importance of this one. On this rare occasion when a trade law decision implicates such significant national policies, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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