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U.S. Supreme Court Backs Commerce, Says Work Contracts Subject to Dumping Law

Marking the first time the U.S. Supreme Court has heard an antidumping case, the high court Jan. 26 sided with the Commerce Department in ruling that the agency reasonably concluded separate work unit (SWU) contracts entered into by utilities and companies that enrich uranium feedstock were contracts for the sale of goods covered by the antidumping statute (*United States v. Eurodif S.A.*; *USEC Inc. v. Eurodif S.A.U.S.*, Nos. 07-1059 and 07-1078, 1/26/09).

In so ruling, the unanimous court reversed and remanded a decision by the U.S. Court of Appeals for the Federal Circuit. This dispute, which involves the reach of the antidumping statute, consists of two consolidated cases, *U.S. v. Eurodif*, 07-1059, and *USEC v. Eurodif and the Ad Hoc Utilities Group*, 07-1078.

The most obvious beneficiaries of the Supreme Court's ruling are USEC Inc. and its subsidiary, United States Enrichment Corp., which run the only uranium enrichment factory in the United States. Since 1998, they have leased the plant from the federal government, which built the facility in the 1950s.

Under the antidumping statute, 19 U.S.C. § 1673 or Section 731, Commerce may impose antidumping duties on imports of foreign goods when the merchandise is "being, or is likely to be, sold in the United States at less than its fair value" and the less than fair value sales—a practice called dumping—are materially injuring or threatening material injury to the U.S. industry. The antidumping statute does not extend to sales of services.

In 2001, Commerce found that French enricher Eurodif S.A. had dumped low-enriched uranium (LEU) into the United States. After the International Trade Commission found material injury to the

domestic uranium enrichment industry, Commerce imposed an antidumping duty rate of 19.95 percent on the French imports. USEC Inc. and its subsidiary United States Enrichment Corp., which runs the only uranium enrichment factory in the United States, had brought the dumping petition.

In the *Eurodif* case, utilities purchased uranium feedstock and sent it to the French enricher, which returned an equivalent energy value of low-enriched uranium, though not from the same feedstock, to fuel nuclear power plants. The transactions in the *Eurodif* case involve contracts known as separative work units, or SWUs, in which the utilities supplied the uranium feedstock plus cash and received an energy equivalent of enriched uranium from Eurodif.

The court explained that nuclear utilities obtain low enrichment uranium under two different types of contracts. Under an "enrichment uranium product" (EUP) contract, the utility purchases for cash a specified quantity and assay of LEU. Under the second option, a "separative work unit" (SWU) contract, the utility provides the feed uranium and pays the enricher for the SWUs to produce the quantity and assay required. In this scheme, the feed uranium is fungible. Thus, the contracts "do not require that the contractual number of SWUs actually be applied to the quantity of uranium provided," and the enricher can "overfeed or underfeed," as long as it delivers the specified LEU, the court explained.

Enrichment of uranium is an intermediate step in the manufacture of uranium fuel rods. Such rods are used in nuclear power facilities to generate electricity.

The U.S. Court of Appeals for the Federal Circuit struck down the antidumping duties by agreeing with Eurodif and ruling that LEU sold under SWU contracts constituted the sale of a service, not merchandise, and therefore was not covered by U.S. antidumping laws. The Federal Circuit affirmed a lower court ruling on the issue.

The U.S. government and USEC both sought reversal of the Federal Circuit decision. The two cases were consolidated for one hour of oral arguments on Nov. 4.

High Court Backs Commerce.

“The issue is whether the Commerce Department’s way of seeing the transactions as sales of goods rather than services reflects a permissible interpretation of § 1673. We hold that it does,” the court said in a unanimous opinion delivered by Justice David H. Souter.

“Where a domestic buyer’s cash and an untracked, fungible commodity are exchanged with a foreign contractor for a substantially transformed version of the same commodity, the Commerce Department may reasonably treat the transaction as a sale of a good under § 1673,” the court added.

“We therefore reverse the judgment of the Federal Circuit and remand the cases for further proceedings consistent with this opinion,” the court said.

The high court noted that Commerce stressed various features of the transactions in deciding that the SWU contracts are those for a sale of LEU. First, since enrichment accounts for approximately 60 percent of the value of LEU and works a “substantial transformation” on uranium feedstock, Commerce found that enrichment creates the essential character of LEU. Second, “enrichers not only have complete control over the enrichment process, but in fact control the level of usage of the natural uranium provided.” Third, utilities take no part in the manufacture of LEU and are the sole purchasers of the product. Fourth, Commerce rejected the argument that LEU transferred pursuant to SWU contracts should not be considered “sold” because of a “tolling” regulation then in effect. Last, Commerce reasoned that language in SWU contracts referring to the transactions as the sales of enrichment services could not control the outcome.

Reasonable Interpretation.

In reversing, the high court noted the 1984 *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984) decision under which an agency’s reasonable interpretation of an ambiguous statute must be affirmed. The court emphasized that the question “is not whether, for purposes of 19 U.S.C. § 1673, the better view is

that a SWU contract is one for the sale of services, not goods.” The inquiry asks simply whether the Commerce Department, as the statutorily named authority on the matter, has devised a permissible reading of the statute, the court said.

The court accepted as given two “threshold propositions.” First, the agency reasonably determined that the terms of the statute do not limit the provision to cash-only sales. “Otherwise, any sale of a manufactured product could be exempted” from antidumping duties by virtue of “a contractual term stating part of the purchase price in terms of a commodity.”

Nor is the department bound by the “legal fiction” that “the exact same feed uranium that the utility delivered to the enricher is what is enriched and then returned as LEU to the same utility,” the court said. It acknowledged that “parties are free to contract as they wish, and they may genuinely regard SWU agreements as contracts for the sale of enrichment services.” But, drawing on tax law, the court said that “form should be disregarded for substance and the emphasis should be on economic reality.”

SWU contracts do not fit “neatly” into either the category of contracts for services or the category of contracts for the sale of goods, the court said.

Such a contract is not like the laundry ticket given to a customer who comes to a laundry with cash and dirty shirts, on the assumption that “the same shirts are supposed to come back, just minus the dirt around the collar.” That customer is “clearly purchasing cleaning services, not clean shirts,” the court said.

On the other hand, a SWU contract is also not “on all fours” with an agreement between a customer who gives cash and sand to a manufacturer of generic silicon processors. There, “it is inescapable that the silicon processors delivered are a separate good from the sand provided,” the court said. The customer is “clearly buying computer chips rather than sand enhancement services.”

Look to “Authoritative Agency.”

“Section 1673 simply does not speak with the precision necessary to say definitively whether it applies to the LEU and the agreement that gives the utility a right to get it,” the court said. “This is the very situation in which we look to an authoritative agency for a decision about the statute’s scope, which is defined in cases at the statutory margin by the agency’s application of it,

and once the choice is made we ask only whether the Department's application was reasonable," the court said.

Commerce relied on two related aspects of the transactions in deciding that the SWU contracts should be treated as a sale of LEU. Commerce stressed that the utility provides cash plus a fungible commodity that is not tracked after its delivery to the enricher in exchange for a product owned by the enricher in an SWU contract. Also, Commerce recognized that the enrichment process results in a substantial transformation of the unenriched uranium.

The high court said that the combination of these two factors "reasonably captures a common understanding of the sale of a good."

"These are good analytical grounds to show that SWU transactions are reasonably placed within the ambit of sale of goods, and the Department's reliance on them is reinforced by practical reasons aimed at preserving the effectiveness of the antidumping laws," the court said.

LEU sold under an EUP at less than fair value is indisputably subject to antidumping duties because there is a clear sale of goods and the domestic enrichment industry would be open to material injury if the price were set below fair value. "But the same injury would occur if a SWU contract were untouchable," the court said.

The court explained that any EUP contract could be set up as a SWU contract by splitting the transaction into a contract to buy unenriched uranium and another to enrich it. "And the restructuring would not stop with uranium; contracts for imported pasta would be replaced by separate contracts for wheat and wheat processing services, sweater imports would give way to separate contracts for wool and knitting services, and antidumping duties would primarily chastise the uncreative," the court said. "The Commerce Department's attempt to foreclose this absurd result by treating SWU transactions as sales of goods is eminently reasonable," it said.

Implications for Trade.

The opinion has far-reaching implications for international trade, according to attorneys at Steptoe & Johnson LLP, who represented USEC. "This is the first time the Court has addressed the antidumping law," Sheldon Hochberg, a partner in Steptoe's International Trade Group and lead

attorney in the matter, said in a press release. "The Court answered a question that lies at the heart of the antidumping law—when does an import transaction involve a sale of merchandise, rather than a sale of services. The Court closed a loophole created by the lower courts, which had limited the application of the antidumping law based on the intent of the parties to the import transaction. This decision is important to a great many U.S. industries that compete with foreign goods produced through arrangements in which a customer provides raw materials."

According to the Steptoe team, the decision has importance beyond the antidumping context by providing clarification that the application of a regulatory statute to a transaction cannot be limited by the parties' intent and that deference to an agency under *Chevron* must be given when the agency applies a statutory term in a particular context, and not just to the abstract interpretation of a statutory term.

"This decision also ensures that the domestic uranium enrichment industry can plan for future expansion to meet the energy needs of the United States without the threat of unfair import competition," Hochberg said.

The Bush administration had argued that the *Eurodif* case has national security implications because it might prompt Russia to abandon a bilateral program to downblend highly enriched uranium from nuclear weapons into nuclear power plant fuel, which is an expensive process, in favor of selling commercially produced low enriched uranium to utilities in sales outside the scope of the antidumping law.

For its part, Eurodif had responded that the petitioners failed to establish that the decision below compromised U.S. foreign policy or security interests.

Deputy Solicitor General Malcolm L. Stewart argued for the government. H. Bartow Farr, Farr & Taranto, Washington, argued for USEC. Caitlin J. Halligan, Weil, Gotshal & Manges, New York, N.Y., argued for Eurodif.

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