

Low Enriched Uranium from France
Final Results of Redetermination
Pursuant to Court Remand
Eurodif S.A., et al. v. United States
Consol. Ct. No. 02-00219, Slip Op. 06-2 (January 5, 2006 CIT)

SUMMARY

On January 5, 2006, the U.S. Court of International Trade (CIT) remanded the above-referenced proceeding to the Department of Commerce (Commerce) to revise the final determination (amended) and order in this proceeding in accordance with Eurodif S.A. v. United States, 411 F.3d 1355 (Fed. Cir. 2005) (Eurodif I) and Eurodif S.A. v. United States, 423 F.3d 1275 (Fed. Cir. 2005) (Eurodif II). Furthermore, the CIT specifically directed the Department to “explain how its final determination and order on remand has eliminated all SWU transactions as required by Eurodif I and II.” Slip Op. 06-2, at 2.

For these final remand results, we have recalculated the margin for the affiliated respondents in the investigation, Eurodif S.A., Compagnie Generale Des Matieres Nucleaires, and Cogema, Inc. (collectively, Eurodif), excluding all Eurodif sales made pursuant to separative work units (SWU) contracts, thus fulfilling the CIT mandate. As a result, Eurodif’s dumping margin is now 23.66 percent and the antidumping duty order will remain in place.

BACKGROUND

On February 6, 2002, Commerce issued an antidumping duty (AD) order on low enriched uranium (LEU) from France. Respondents challenged the determination (and a concurrent countervailing duty determination) arguing that the transactions which involved the enrichment of the uranium (so-called SWU contracts) did not constitute sales of goods, but rather should have been considered service transactions which are not subject to AD law. The CIT ruled

against Commerce, and the case was appealed to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in Eurodif I. The Federal Circuit ruled that SWU contracts constitute sales of enrichment services, not goods, and, therefore, that LEU imported pursuant to SWU contracts was not subject to the AD law. The Federal Circuit based its ruling on Florida Power & Light v. United States,¹ despite the fact that a different statute with different purposes was at issue. While the Department continues to believe that SWU contracts result in the sale of LEU by French producers/exporters to U.S. customers, consistent with the Court's specific remand instructions, we have removed all sales made pursuant to SWU contracts from the calculations of this redetermination. We will review the possibility of seeking certiorari after final judgement has been rendered in this matter.

On January 18, 2006, and January 27, 2006, we received comments from USEC Inc. and United States Enrichment Corporation (collectively, USEC), the U.S. producer of LEU, concerning this remand proceeding. Eurodif submitted comments on January 23, 2006, and January 30, 2006.

On February 7, 2006, we issued draft remand results. On February 13, 2006, we received comments on the draft remand results from Eurodif, USEC, and the Ad Hoc Utilities Group (AHUG). The Department's response to the parties' comments is included in the "Comments" section, below. The Department has not made any changes from the draft remand results.

¹307 F.3d 1364 (Fed. Cir. 2002) (accepting the Department of Energy's argument that, under the Contracts Disputes Act, its SWU contracts constituted purchases of services).

REMAND ANALYSIS OF SWU TRANSACTIONS

On page 8 of their May 1, 2001, questionnaire response, respondents state that they have “reported ‘SWU’ for sales of enrichment services, and ‘LEU’ for sales of enriched uranium,” and the databases of sales provided with the questionnaire response contained a field which so identified all reported sales. After removing all SWU sales, we recalculated Eurodif’s margin on the sales of LEU. The resulting dumping margin for Eurodif is 23.66 percent, compared to 19.95 percent in the original order. See Memorandum to Dana Mermelstein from Mark Hoadley, Remand Analysis of French Low Enriched Uranium (February 7, 2006) for the details of how the calculations and programming changed, and for the revised dumping margins. Because Eurodif’s rate is the basis for the “all others” rate, the all others’ rate is now 23.66 percent as well.

COMMENTS

Comment 1: USEC commented that the Department should have sought additional, transaction-specific information regarding the sales under investigation, as USEC proposed in its earlier comments. According to USEC, such information might have demonstrated that certain transactions made pursuant to SWU contracts were for purchases of goods, and were not service transactions “as understood by” the Federal Circuit in Eurodif I and II.

Commerce’s Position: As stated above, while the Department continues to believe that SWU contracts result in the sale of LEU by French producers/exporters to U.S. customers, the CIT’s specific remand instructions require the Department to remove sales made pursuant to SWU contracts. The CIT’s instructions do not allow for a transaction-by-transaction analysis of each SWU contract or of the broader context of each sale made under these contracts.

Comment 2: Eurodif and AHUG argue the Department must revise the scope of the order to exclude SWU transactions. Eurodif proposes the addition of the following sentence to the scope of the order: “Also excluded from this order is LEU from France imported into the United States for the fulfillment of SWU contracts, provided that any such import is accompanied by the importer’s certification to that effect.”

USEC claims the scope of an antidumping order is a matter of physical characteristics, and not the nature of sales transactions. Because the LEU entered into the United States unquestionably fits the physical description of the subject merchandise, regardless of whether pursuant to so called “SWU” or “LEU” transactions, argues USEC, the nature of the sales transaction is irrelevant to the scope of the order, and instead pertains to the issue of assessment. USEC argues that all LEU entries are reviewable under the order, but that if the Department were to determine that a sale is not involved in an administrative review (in accordance with Eurodif I and II), it would simply not order assessment of duties for those entries in order to comply with the courts’ decisions. Furthermore, argues USEC, the certification proposed by Eurodif is inadequate, and only an analysis of each contract can determine whether each entry is a sale subject to antidumping law.

Commerce’s Position: We agree with USEC that the scope of the order should not be revised in order to address the Eurodif I and Eurodif II decisions by the Federal Circuit. The term subject merchandise is defined as the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, an order or a finding. See Section 771(25) of the Tariff Act of 1930, as amended. LEU imported into the United States for consumption that meets the description of the merchandise established in the AD order on LEU continues to be

subject merchandise. However, pursuant to the Eurodif I and II decisions, Commerce will not assess AD duties on imports of LEU sold under SWU transactions. Whether a sale is excludable on the ground that it constitutes a SWU sale is a question that must be determined in the context of an administrative review by the administering authority analyzing the terms and conditions of the contract, and the parties' performance of such contracts. If the contract in question is determined to be a SWU transaction, consistent with Eurodif I and Eurodif II, Commerce will not include the SWU sale in its dumping margin calculation. Based upon the above, Commerce has not revised the scope of the AD order on LEU.

Comment 3: AHUG states that it is disturbed by Commerce's assertion that it disagrees with the Federal Circuit's decision and is contemplating petitioning the Supreme Court for certiorari, despite having contemplated (as evidenced by Commerce's requests for extensions of time, it argues) and bypassed the opportunity to seek certiorari after the Federal Circuit issued its rehearing decision on September 9, 2005. AHUG argues that the approach being contemplated by Commerce is inconsistent with the objective of the interlocutory appeal process and interjects unnecessary uncertainty into the nuclear fuel market.

Commerce's Position: Commerce's decision concerning a petition for certiorari is not relevant to whether our draft redetermination properly fulfills the instructions of the CIT. We disagree with AHUG that Commerce, by leaving open the option of seeking certiorari, has acted in a manner inconsistent with the interlocutory appeal process. As stated above, while Commerce has respectfully complied with the CIT's order, the United States continues to believe that the decisions of the Federal Circuit in Eurodif I and II are erroneous, and will review the possibility of seeking certiorari after final judgment has been rendered in this matter.

FINAL RESULTS OF REDETERMINATION

For these final results pursuant to the CIT remand, the recalculated weighted-average margins are as follows:

<u>Company</u>	<u>Final Determination and Order</u>	<u>Final Results of Redetermination Pursuant to Remand</u>
Eurodif S.A., Compagnie Generale Des Matieres Nucleaires, and Cogema, Inc.	19.95%	23.66%
All Others	19.95%	23.66%

David M. Spooner
Assistant Secretary
for Import Administration

(Date)