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. 06-75 (May 18, 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 or Department) 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). Pursuant to that remand (Eurodif S.A. v. United States, Slip Op. 06-2 (Jan. 5, 2006 CIT) (Eurodif III)), on March 3, 2006, Commerce submitted to the CIT its Final Results of Redetermination Pursuant to Court Remand, recalculating the dumping margin by excluding all low enriched uranium (LEU) covered by separative work unit (SWU) contracts from our calculation. On May 18, 2006, the CIT again remanded this matter to Commerce, stating that we should amend the scope of the order and address the objections of Eurodif, S.A., AREVA NC and AREVA NC Inc. (formerly COGEMA and COGEMA Inc.) (collectively, Eurodif). The CIT otherwise sustained Commerce's March 3 Remand Redetermination. Eurodif S.A. v. United States, Slip Op. 06-75 (May 18, 2006 CIT) (Eurodif IV).

In accordance with the Court's instructions, we have amended the scope of the order, and we have addressed the objections of Eurodif to our prior remand. We have also outlined the method we intend to use to ensure entries are properly excluded from this order in accordance with the decisions of the courts.

BACKGROUND

On February 13, 2002, Commerce published an antidumping duty (AD) order on LEU from France. Respondents challenged the 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 agreed, and the case was appealed to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). In Eurodif I and II, the Federal Circuit ruled that SWU contracts constitute sales of enrichment services, not goods, and, therefore, LEU imported pursuant to SWU contracts was not subject to the AD law. While the Department respectfully disagrees with the conclusion that SWU contracts do not result in the sale of LEU by French producers/exporters to U.S. customers, consistent with the Court's specific remand instructions, we removed all sales made pursuant to SWU contracts from the calculations of the March 3 remand redetermination and we have expressly excluded such merchandise from the scope of the antidumping duty order in the present remand redetermination. For purposes of the present remand redetermination, Commerce is implementing the holdings of Eurodif I and II as instructed by the CIT in Eurodif III and IV. We will review the possibility of seeking certiorari after final judgement has been rendered in this matter.

EURODIF IV

For the reasons set forth in Commerce's March 3, 2006 Remand Redetermination and the United States' March 31, 2006 Response to Parties' Remand Comments, we respectfully disagree with the Court's conclusion in Eurodif IV that Eurodif I and II cannot be implemented without amending the description of the scope of the antidumping order. In accordance with the

Court's remand order, we are hereby amending the scope of the order to exclude LEU sold pursuant to SWU contracts and we address below the objections raised by Eurodif to the Court in its comments on the March 3, 2006 Remand Redetermination.

AMENDED SCOPE

Pursuant to the CIT's order in Eurodif IV, we hereby amend the scope of the AD order on LEU from France to include the following language:

> Also excluded from the scope of this order is LEU produced and imported pursuant to a separative work unit ("SWU") transaction. For purposes of this exclusion, a SWU transaction means a transaction in which the parties only contract for the provision of enrichment processing, and the purchasing party is responsible for the provision of natural uranium feedstock to the enricher. At no time, before, during or after enrichment, does the enricher own or hold title to the LEU product delivered under the contract. In order to qualify for the exclusion, the SWU transaction must be performed in accordance with the relevant terms of a written contract for the provision of SWU. Entries pursuant to such SWU transactions must be accompanied by the certification of the end user and enricher.

The certification we will instruct U.S. Customs and Border Patrol (CBP) to require from the utility and enricher upon entry is attached to this redetermination. We will also require that copies of these certifications be filed with the Department of Commerce, and that each certification form filed with the Department include the corresponding entry date and number.

COMMENTS FROM PARTIES

On June 7, 2006, USEC submitted comments for Commerce to consider in this redetermination. It also submitted a suggested amendment to the scope description, and a proposed certification form. USEC's scope language, proposed certification form, and arguments address what it views as the four essential issues to be resolved in this redetermination:

1. Defining a SWU transaction by specifying the necessary elements thereof;

2. How these necessary elements should be certified, and who should certify;

3. How Commerce can confirm the accuracy of a certification; and,

4. The type of security needed, if any, between the time of entry and the confirmation of the certification.

After considering USEC's submission, we have concluded the amended scope language stated above and the attached certification form meet the remand requirements. USEC attempts to define the necessary elements of a SWU transaction. Using the elements it identifies, it proposes amended scope language that not only excludes SWU transactions from the scope of the order, but also provides an extended definition of what constitutes a SWU transaction. Similarly, USEC proposes a certification form that it also drafted around the necessary elements it identified. However, the proposed elements appear to be simply an elaborate way of describing the one fact the Federal Circuit found crucial in this case concerning whether a contract is for the provision of a good or service: namely, the transfer of title. For example, in Eurodif I, the Federal Circuit stated that "the SWU contracts in this case do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU. As a result, the 'transfer of ownership' required for a sale under NSK is not present here." Eurodif I, 411 F.3d at 1362 (referring to NSK Ltd. v. United States, 115 F.3d 965 (Fed. Cir. 1997)). Similarly, in Eurodif II, the Federal Circuit referred to the "critical importance of the indisputable fact that, pursuant to the contracts at issue in this case, enrichers never obtain ownership of either the feed (unenriched) uranium during enrichment or the final low enriched uranium ('LEU') product." Eurodif II, 423 F.3d at 1278.

It is not merely that the Federal Circuit cites the importance of possession of title as the first among many elements indicating that SWU contracts are contracts for services and not for goods, but, in fact, the Federal Circuit indicates almost no concern with any of the other facts involved in the Eurodif transactions at issue. The remaining elements noted by USEC are mentioned either incidentally in the Federal Cicuit's opinions, or not at all. While some of these elements are discussed by the CIT in its opinions, that court also offers a clear statement of its reasoning,[1] and it is not necessary to rely on the sampling of court statements collected by USEC in order to form a definition of a SWU transaction.

In so far as some of the factors cited by USEC might relate to evidence that a transaction is only a SWU transaction on its face, but in terms of performance is actually for the sale of LEU, the amended scope language addresses this concern by requiring that the transaction be performed in accordance with the terms of the written contract. Commerce recognizes that it cannot predict how the written terms and actual performance of contracts certified as "SWU transactions" may differ from the circumstances to which Eurodif I and II apply. Accordingly, in subsequent proceedings, such as the scope inquiry suggested by the Court, Commerce may determine that it is necessary to provide additional clarification of the scope of this order to further define the meaning of "SWU transaction" in accordance with Eurodif I and II and to modify the form of the required certification as circumstances warrant.

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[1] See, e.g., USEC Inc. and United States Enrichment Corporation, 281 F. Supp. 2d 1334,1340 (Sept 16., 2003 CIT) ("Because the enricher does not obtain ownership of the LEU enriched under SWU contracts, the transfer of LEU by the enricher to the utility cannot constitute a sale of merchandise . . . .").

Because performance of a transaction might not match the terms of an underlying contract, and because the structure of these transactions and the terms of the underlying contracts might change over time, the Department has included requests for certain facts in its certification form. These facts are relevant to some of the elements of a SWU contract identified by USEC, and we find that these requests for information do not place a significant burden on the end user and enricher who must provide such certifications. Answers provided to these questions are intended to assist Commerce in determining whether a scope inquiry is warranted or whether additional information should be requested.

Regarding USEC's suggestion that we outline a procedure for confirming the accuracy of Eurodif's certifications, we do not think that any procedures beyond the scope inquiries and administrative reviews that USEC can already request are necessary. We do not believe that there would be sufficient time to review relevant documentation before the merchandise enters U.S. customs territory, and therefore to approve of an entry's classification ahead of time, following a procedure similar to that used in suspension agreements. Moreover, given the Court's decision instructing Commerce to specifically exclude from the scope imports of LEU sold through SWU transactions, the Department has limited authority to instruct CBP to suspend liquidation on ostensibly out-of-scope merchandise until the Department has an opportunity to conduct an administrative proceeding after the merchandise has already been entered.

On June 13, 2006, Eurodif submitted objections to USEC's comments. According to Eurodif, by urging the Department to provide an extensive definition of a SWU contract and a corresponding certification form based on the definition, USEC is making an untimely attempt to reassert arguments the CIT and Federal Circuit have rejected previously regarding how to define

a SWU contract as narrowly as possible. Eurodif proceeds to examine each of USEC's proposed elements on a point-by-point basis, arguing that each has been dismissed by the courts previously or is not relevant to what the courts have emphasized in defining a SWU contract. According to Eurodif, the courts' emphasis has been on what the customer paid for: processing. Eurodif also argues that the Department has no authority to suspend entries of out of scope merchandise, and rebuts arguments made by USEC and Commerce (in our prior remand redetermination) that it is inappropriate to amend the language of the scope of this order.

We agree with Eurodif that USEC's proposed defining elements of a SWU transaction misconstrue the focus of the court's reasoning. As discussed above, we agree that the focus of the courts' reasoning has been that in a SWU transaction the enricher does not take title to the merchandise. We think our attached certification also reflects Eurodif's formulation of this focus: that SWU transactions provide for the payment of uranium processing, and nothing else, other than incidentals. Likewise, the certification does not attempt to define a SWU transaction using any other elements. We also agree that it would be inappropriate to attempt to suspend liquidation of entries certified as out of scope. We do not think it is necessary to offer sur-rebuttal regarding Eurodif's comments on our arguments in Eurodif III that it is inappropriate to amend the language of the scope in this case, as we were not asked by the Court in Eurodif IV to do so.

On one particular point, however, we disagree with Eurodif. We believe it is appropriate to require both the enricher and utility customer to complete the attached certification. As this Court has stated, the LEU entering the United States pursuant to SWU contracts is identical in all physical respects to LEU that actually has been purchased in France and imported. Thus, the

Department must devise a procedure that can be used by CBP and the Department to determine whether an entry is or is not covered by the scope of the antidumping duty order. The only parties who have the documentation necessary to demonstrate that an entry meets the requirements of a SWU transaction are the utility, which retains title to the feedstock as well as the LEU, and the enricher, which fulfills the terms of the SWU contract by processing the feedstock into LEU. Only both of these entities together can demonstrate that the LEU entering the United States is not subject to the antidumping duty order, since these are the two parties who are signatories to the very contracts that cause this merchandise to fall out of the scope.[2] Because it is only the utility and the enricher who can certify that the entry is being made pursuant to a SWU contract, and because there is no other way for CBP to be able to determine at the point of entry whether the LEU from France is or is not subject to antidumping duties, this certification is essential. The certification is the only vehicle through which CBP and the Department can implement, at the point of entry, the Court's decision to exclude LEU imported pursuant to SWU contracts from the scope of the order. In addition, the certification is not burdensome. A similar certification requirement is being applied to handle another exclusion from the scope of the antidumping duty order and there is no evidence that the certification is burdensome to the parties.

On June 13, 2006, the Ad Hoc Utilities Group (AHUG) also responded to USEC's comments. AHUG argues, as Eurodif does, that USEC's attempts to define SWU transactions do not match the statements of the courts. As stated, we do not believe the same can be said of our amended scope language and certification form. AHUG also argues that it is improper to "look

[2]In this case, the enricher's parent has been the actual signatory to the contract.

behind the enrichment contract" at the factual circumstances of the transactions' performance. We believe that the statements by the courts it cites on this issue refer to previous fact-based arguments made by USEC and the Department (e.g., regarding affiliated parties and the timing of feedstock delivery compared to the final product) and do not preclude examining the future performance of contracts to ensure that parties' performance matches the relevant terms of those contracts. AHUG also argues that no special proceedings are needed to confirm the parties' certifications and that we should not suspend liquidation on SWU transactions. As stated elsewhere in this redetermination, we agree with these conclusions.

On June 15, 2006, USEC submitted additional comments in response to those of Eurodif and AHUG. The Department was unable to consider these comments submitted two business days before this remand redetermination was due at the CIT. Consequently, the Department also did not consider comments filed by Eurodif on June 16, 2006, rebutting USEC's June 15th comments.

EURODIF'S OBJECTIONS TO COMMERCE'S PRIOR REMAND REDETERMINATION

Eurodif asked the Court to direct Commerce to:

(1) Liquidate all entries without regard to antidumping duties on LEU imported to fulfill SWU contracts (and therefore refund cash deposits already tendered on such entries);

(2) Exclude LEU imported to fulfill SWU contracts from the scope of the order; and,

(3) Cease the suspension of liquidation and any deposit requirement on such entries.

If the Court affirms this remand redetermination and such judgment becomes final and conclusive, LEU imported pursuant to SWU transactions will thereby be removed from the scope

of the order as described above and Commerce will instruct CPB to cease suspension of liquidation of such entries, and to liquidate such entries without regard to antidumping duties. At such time, with respect to any prior entries not then under the jurisdiction of the courts, Commerce intends to issue instructions for CBP to refund cash deposits on entries of LEU subsequently certified as having entered pursuant to a SWU transaction, cease suspension of liquidation, and liquidate such entries without regard to antidumping duties. Thus, CBP will require the attached certification from any party claiming such an exclusion, termination of existing suspension, or refund of security. Accordingly, this remand redetermination addresses all of Eurodif's objections to Commerce's March 3, 2006 remand redetermination.

FINAL RESULTS OF REDETERMINATION

Upon final and conclusive court decisions, Commerce will amend the scope of this order to include the language provided above. Commerce will instruct CBP to cease the suspension of liquidation and any deposit requirements on entries of LEU produced pursuant to SWU contracts, and to refund deposits already collected. Commerce will also instruct CBP to require the attached certification from any party claiming such an exclusion, termination of existing suspension, or refund of security.

_____

David M. Spooner
Assistant Secretary
for Import Administration

_____

(Date)

ATTACHMENT: CERTIFICATION TO BE REQUIRED BY CBP UPON ENTRY

CERTIFICATION FOR ENTRIES OF LOW ENRICHED URANIUM (LEU) FROM FRANCE MADE PURSUANT TO SEPARATIVE WORK UNITS CONTRACTS

DOC Case Number: (*Nine digit case number*)
Entry Date:
Entry Number: (*For copy filed with DOC*)

_____ ("Utility") and _____ ("Enricher")
(*Name of utility*) (*Name of enricher*)
hereby jointly certify as follows:

1. On _____, 200_, Utility placed an order for the purchase of separative work units ("SWU") with Enricher. Attached are (i) a copy of the order issued by Utility; (ii) the contract for enrichment processing between Utility and Enricher pursuant to which the order was issued; and, (iii) any applicable certificate of the quantity and quality (CQQ) and any applicable nuclear material accountability document (e.g., DOE/NRC 741) for the LEU being imported. These documents are labeled Attachment A, B, and C, respectively.

2. Utility has delivered or will deliver _____ KgU of unenriched natural uranium to Enricher's facility for enrichment on _____, 200_, and Utility retains title to the unenriched natural uranium prior to sampling and weighing of the LEU before delivery pursuant to the purchase order.

3. Enricher produced _____ KgU of LEU (the "Excluded Merchandise") conforming to the product assay specified in Utility's order.

4. The following cylinders of the Excluded Merchandise are being imported pursuant to the purchase order:

Cylinder No.	Quantity	Assay

5. At no time during or after enrichment did Enricher own the Excluded Merchandise.

6. Utility and Enricher have performed and will perform the transaction pursuant to which this entry is made in accordance with the relevant terms of the attached contract and will inform U.S. Customs and Border Protection and the Department of Commerce, in writing, if the performance of the contract deviated from its written terms.

7. If any fees were paid to Enricher by Utility in connection with Excluded Merchandise in addition to the fee paid for enrichment processing, please describe the amount and purpose of those fees.

_____ _____
On behalf of Utility Date

_____
Title

_____
Address

_____
Contact Information

_____ _____
On behalf of Enricher Date

_____
Title

_____
Address

_____
Contact Information