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Chairman Bingaman, Ranking Member Domenici, Members of the Committee, I am pleased to appear before you today to address the recently-amended Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation ("Suspension Agreement") and important related issues.

First, I will give an overview of the history of the recently-amended "Suspension Agreement." Next, I will describe the "Suspension Agreement's" relevance and relation with the United States-Russia agreement on highly-enriched uranium, or "HEU." Then, I will outline the importance of the Suspension Agreement for the domestic uranium industry. I will finish by touching on a recent judicial ruling that has tremendous effect on the integrity of this Suspension Agreement and the potential to threaten the viability of the domestic uranium industry as a whole.

AD Suspension Agreement on Uranium from Russia

The antidumping duty ("AD") law provides a remedy against imported "merchandise [that] is being . . . sold in the United States" for less than its fair value (*i.e.*, "dumped"), and is a cause of material injury to a U.S. domestic industry. (See Section 731 of the Tariff Act of 1930, 19 U.S.C. §1673.) Merchandise is sold at less than "fair value" when the price of the imported merchandise sold in the United States is less than the price of comparable merchandise sold in the producer's home market or less than the cost of producing that merchandise. The difference is called the dumping margin. The AD law is designed to remedy the injury to U.S. industry from dumped imports by imposing an additional duty on dumped imports, equal to the amount of the dumping margin.

In 1991, the U.S. uranium miners and the union representing U.S. uranium enrichment and conversion workers filed an AD petition at the Department of Commerce against uranium imported from the former Soviet Union. Commerce initiated an investigation and preliminarily determined that there were dumping margins of 115 percent and the International Trade Commission determined that there was a reasonable indication that the U.S. uranium industry was materially injured or threatened with material injury. No AD order was ever issued, because, in October 1992, Commerce and the Russian Federation signed the "Suspension Agreement". The Suspension Agreement covered all forms of uranium, from natural uranium ore to bomb-grade, highly-enriched uranium ("HEU"), and permitted Russian uranium to enter the United States pursuant to five different quota provisions, one of which was later replaced by amendment in 1994. In recent years, two of the Suspension Agreement's quota provisions have remained operational, permitting the following: 1) unlimited imports of Russian low-enriched uranium ("LEU") derived from weapons-grade HEU, under a separate agreement known as the

"HEU Agreement," for use as nuclear fuel in U.S. nuclear power reactors, and 2) imports of Russian uranium products for reprocessing and re-exportation from the United States within 12 or 36 months.

On February 1, 2008, after lengthy negotiations between Commerce and Russia's then Federal Atomic Energy Agency (Rosatom), which is now a State Corporation, the two governments signed an amendment to the Suspension Agreement which will permit certain exports of Russian uranium products to the United States under a new quota system. The amended Suspension Agreement will prevent Russian exports of LEU through normal commercial channels through 2010. From 2011 through 2013 (when the HEU Agreement terminates), very small quantities of Russian LEU will be permitted to enter the United States. From 2014 through 2020, Russia will be limited to approximately 20 percent of the U.S. market for enriched uranium. The amendment is intended to promote a stable uranium market in the United States, which will encourage investment in new enrichment facilities. However, because of the Eurodif decision discussed below, which held that material sold under SWU contracts is not covered under the AD law, the new amendment does not now limit sales by Russia to U.S. customers of material sold under such contracts.

The HEU Agreement with Russia

In 1993, the United States and Russia signed the Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons ("HEU Agreement"). This so-called "megatons to megawatts" agreement, expiring at the end of 2013, permitted the Russians to export to the United States substantial quantities of LEU derived from the HEU in decommissioned nuclear weapons. To date, under this agreement, about 325 metric tons of HEU (the material equivalent to approximately 13,000 nuclear weapons) have been converted into LEU and exported to the United States. A further 175 metric tons from about 7,000 nuclear weapons will be processed and exported to the United States by 2013. This will result in the elimination of the equivalent of 20,000 Russian nuclear weapons over the agreement's life. The United States Enrichment Corporation ("USEC"), the U.S. Executive Agent under the HEU Agreement to the implementing commercial contract supporting the Government-to-Government HEU Agreement, is obligated to purchase the enrichment component of the 30 metric tons of this LEU from Russia each year through 2013. USEC re-sells this LEU to U.S. utilities and returns natural uranium equivalent to the LEU back to Rosatom. The LEU down-blended from HEU currently supplies over 40 percent of the enrichment needed to fuel U.S. nuclear reactors each year that generate about 10 percent of U.S. electricity overall.

Because the Suspension Agreement permits unlimited imports of the LEU down-blended from HEU under the HEU Agreement, the two agreements are inter-related and have facilitated stability in the U.S. uranium market for more than a decade. Given the difficulties of down-blending HEU, Russian profits on U.S. sales of such LEU under the HEU Agreement are lower than the profits Russia could earn by making commercial sales of LEU produced from natural uranium. Thus, Russia has an incentive to prefer commercial sales in the U.S. market to sales through USEC under the HEU Agreement. Competition from Russian commercial sales would

reduce USEC's sales and profits under the HEU Agreement, which, in turn, would threaten USEC's ability to continue to purchase Russian LEU under that agreement. In order to preserve the HEU Agreement, it is important to ensure that Russia cannot make unlimited commercial sales of LEU in the U.S. marketplace at dumped prices. Therefore, the amended Suspension Agreement supports the HEU Agreement by severely limiting the quantities of LEU that Russia can sell in the United States through normal commercial channels until 2014.

State of the U.S. Industry

As you know, the United States is currently experiencing a resurgence in interest in nuclear power, popularly referred to as the "nuclear renaissance." This has translated into plans for expansion of nuclear power capacity, including possible construction of new reactors in the United States in the near future. In addition, with demand increasing for all uranium products, prices have risen to record high levels in the past year.

The United States currently has one operating uranium enricher, USEC. USEC operates a gaseous diffusion enrichment facility in Paducah, Kentucky. Because this technology is outdated and energy-intensive, USEC is in the process of developing new state-of-the-art enrichment capability, its American Centrifuge Plant in Piketon, Ohio. In addition, Louisiana Energy Services, L.P. ("LES") owned by the European enrichment consortium, URENCO, is developing a U.S. enrichment facility in New Mexico which will use Urenco's gas centrifuge technology. Two additional companies, General Electric and AREVA S.A., have also announced plans to develop future enrichment capability in the United States.

SWU Contracts

When U.S. utilities purchase LEU abroad, they follow one of two procedures. Sometimes, they simply purchase the finished LEU from a foreign enricher. More commonly, however, they follow a somewhat more complex procedure. The U.S. utility purchases natural uranium "feedstock" and arranges for it to be delivered to a foreign enricher. The foreign enricher then delivers to the U.S. utility uranium enriched from its own feedstock inventory. The U.S. utility compensates the foreign enricher by giving the foreign enricher title to the feedstock that the utility arranged to be delivered to the foreign utility, and by paying for the value of the enrichment. This arrangement is referred to as a separative work unit ("SWU") contract, because the value of the enrichment is measured in SWUs (defined as the standard measure of enrichment processing). The value of the feedstock used to produce the exported LEU is offset by the value of the feedstock supplied to the foreign enricher by the U.S. utility.

Commerce's AD and CVD Investigations of LEU from France

In 2001, Commerce issued an AD order on LEU from France and countervailing duty ("CVD") orders on LEU from France, Germany, the United Kingdom and the Netherlands. In its AD determination, Commerce found that LEU imported pursuant to SWU transactions was subject to the AD law because, through such transactions, U.S. utilities obtained ownership of imported LEU for less than fair value. The impact of this imported LEU on the U.S. domestic

industry was no different from that of LEU imported through conventional transactions. Commerce rejected the argument advanced by Eurodif (the French respondent in the investigation) that uranium enrichment was a service, so that the LEU resulting from that service was not subject to the law. Commerce did not consider uranium enrichment to be a true service (like banking, insurance, or medicine), but a manufacturing process that transformed one tangible good (uranium feedstock) into another tangible good (LEU). Commerce determined that the merchandise resulting from such a manufacturing process should be subject to the AD law, in the same manner as identical merchandise purchased through more conventional arrangements. (See Commerce's *Final Determination*, 66 Fed. Reg. at 65879.)

In its CVD determination, Commerce found that the French Government's purchase of LEU from Eurodif for more-than-adequate remuneration constituted a subsidy to Eurodif, notwithstanding that the applicable provision in the CVD law (Section 771(5)(E)(iv) of the Tariff Act of 1930, 19 U.S.C. 1677(5)(E)(iv)) treats as a subsidy only the purchase of ***goods*** by a foreign government for more-than-adequate remuneration and the French Government purchased the LEU through a SWU contract.

The *Eurodif* Decisions

In the AD case, the U.S. Court of International Trade ("CIT") ruled, and the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") agreed, that LEU produced abroad and imported into the United States was exempt from the AD law if it was imported pursuant to a SWU contract. The Federal Circuit interpreted the statutory requirement that "merchandise is being . . . sold in the United States" to require a transfer of ownership of the LEU, *as LEU*, from the foreign producer to the U.S. utilities. Because the SWU contracts created the legal fiction that the U.S. utilities owned the uranium while Eurodif performed the "service" of transforming it into LEU, the Federal Circuit found that there was, in fact, no transfer of ownership of the LEU, as such, from Eurodif to the U.S. utilities, but only a transfer of the "service" of enrichment. Hence, no sale of merchandise occurred and the AD law did not apply. *Eurodif v. United States*, 411 F.3d 1355, 1364 (Fed. Cir. 2005) and *Eurodif S.A., et al. v. United States*, 423 F.3d 1275 (Fed. Cir. 2005) (collectively "*Eurodif*").

The Federal Circuit's decision is in error. First, Eurodif did transfer title to finished LEU to the U.S. utilities. What the U.S. utilities owned was the feedstock that they had delivered to Eurodif. Eurodif did not enrich this feedstock, but feedstock from its own inventory. When Eurodif produced that LEU by enriching the feedstock, Eurodif owned that LEU. This would be true regardless of which feedstock was used because enrichment is a substantial transformation. Thus, if the utilities had not paid Eurodif for the enrichment, they would not have been able to demand that Eurodif return of "their" LEU – they would have been entitled only to the return of their feedstock. Second, the U.S. utilities did not start out with title to LEU. They acquired ownership of LEU from Eurodif. The Federal Circuit acknowledged that the U.S. utilities received "title in the LEU for which [they] contracted," as a result of the SWU contracts, but never identified the source. Thus, in substance, the SWU transactions were sales of LEU from Eurodif to U.S. utilities, for feedstock and cash. The fiction agreed between the U.S. utilities and

Eurodif, that Eurodif simply “serviced” uranium owned at all times by the U.S. utilities, is just that – a fiction.

In any event, even assuming arguendo that the enricher never acquires title to the LEU, the Federal Circuit's decision is still wrong. The Federal Circuit reasoned that, even though the operation of the SWU contracts makes clear that title to the LEU passes to the utility upon delivery of the LEU (and not before), no "sale" of LEU occurs because the parties' contracts evidence no intent to vest ownership in the enricher, and title therefore does not pass from the enricher to the utility. But there is no basis in the AD law for the Federal Circuit's mandate that title must vest in the manufacturer in order for there to be a "sale" of "foreign merchandise" within the meaning of the AD law. The question is not whether a particular person has "sold" foreign merchandise; rather, the AD law asks only whether foreign merchandise "is being sold," without regard to the identity of the specific parties or entities from which title is passing. 19 U.S.C. 1673(1). It is undisputed that, under the contracts at issue, a utility provides raw materials and monetary consideration to the enricher and, in exchange, receives delivery of and title to finished LEU that is not traceable to the particular lots of uranium feedstock supplied by the utility. The utility has thus received title to LEU that it did not previously own in exchange for the payment of consideration. Regardless of the identity of the seller, there is no question that what has occurred is a sale.

The Federal Circuit disregarded the result of the transactions and instead focused on the intent of the parties, which was to regard the uranium as owned by the U.S. utilities at all times. This reliance on the intent of the parties was misplaced. The intent of the parties to a contract is logically paramount in settling a dispute between those parties as to their respective rights and obligations under that contract. Relying on the intent of the parties to a contract to determine whether a Federal regulatory scheme applies to that contract however, inevitably will frustrate that regulatory scheme. The parties, quite naturally, will draft the contract to ensure that the regulatory scheme does not apply. For this reason, it is the intent of Congress, as reasonably construed by Commerce (the agency entrusted by Congress to administer the statute), that must determine whether the AD law applies to merchandise imported pursuant to SWU contracts.

The Federal Circuit reached this erroneous result because it approached the issue, not from the perspective of the AD law, but from the perspective of one of its recent decisions – *Florida Power & Light v. United States*, 307 F.3d 1364 (Fed. Cir. 2002). In that case, the Department of Energy prevailed in asserting that, under a contract between the Department of Energy and Florida Power and Light, as governed by the Contract Disputes Act, SWU contracts constituted transactions for the provision of services. In Eurodif, without accounting for the fact that the application of the AD law and the interpretation of a contract under the Contract Disputes Act presented completely different issues, the Federal Circuit adopted its conclusion from *Florida Power and Light*, explaining only that Congress had not given specific guidance that the same result should not be reached in both contexts. Of course, the likelihood that Congress anticipated the *Florida Power & Light* dispute in drafting the AD law approaches zero. Congress did not decline to distinguish the two issues; it simply never considered the question. Consequently, the Federal Circuit had no basis for assuming that the holding of *Florida Power and Light* permitted it to overturn Commerce’s reasonable construction of the AD law.

In the CVD case, the Federal Circuit applied the "service" rationale of its dumping decision to conclude that there was no countervailable subsidy, because the French Government's purchase of LEU through a SWU contract for less than adequate remuneration constituted the purchase of a service not covered by the applicable provision of the CVD law and, thus, not even potentially a countervailable subsidy.

The U.S. Government filed a petition for a writ of certiorari with the Supreme Court in February, asking it to review the Federal Circuit's decision in the AD case. The Supreme Court should decide whether to hear the appeal this spring. If the appeal is accepted and the U.S. Government prevails, the decision likely will also have the effect of reversing the CVD decision.

Implications of *Eurodif* for the AD law

The immediate implication of *Eurodif* is that, in order to know whether LEU imported into the United States constitutes a good or a service, Customs will have to refer the contract pursuant to which the LEU is imported to Commerce for analysis. If the importer purchased the LEU pursuant to a conventional sales transaction, Commerce will determine that the LEU is a good subject to the AD law. If, however, Commerce determines that the sale was broken into separate sales of natural uranium and processing by means of a bona-fide SWU contract, Commerce will determine that the imported LEU is not subject to the AD law. In that case, the natural uranium component of the LEU also would escape scrutiny under the AD law.

Eurodif holds that the parties to an import transaction can bypass the AD law by having the U.S. purchaser supply raw materials to the foreign producer and pay that producer for what is described in their contract as the "service" of transforming raw materials into the merchandise to be imported. Consequently, *Eurodif* effectively provides a road map for circumvention of the AD law. The production of virtually all merchandise involves processing that could be contracted for separately, as a service, in the same manner as SWU contracts. For example, steel could be obtained by supplying iron ore for "smelting and rolling services"; lumber could be obtained by supplying trees for "harvesting and milling services"; and semiconductors could be obtained by supplying sand for "processing services." Thus, *Eurodif* potentially threatens the viability of the entire AD law.

Implications of *Eurodif* for the CVD law

The implications of *Eurodif* for the CVD law are not as serious as they are for the AD law, because the CVD law applies to imported goods even if they are not sold, as such, in the U.S. market. All that is necessary for the CVD law to apply is for a subsidy to have been provided with respect to the production or exportation of a good imported into the United States. Thus, the CVD law would apply to subsidized imports of LEU, even if they were imported pursuant to SWU contracts. Nevertheless, foreign governments would be free to purchase LEU from their uranium enrichers for more than adequate remuneration without incurring any exposure under the CVD law, provided they structured the purchase as a SWU contract. If this rule were extended beyond uranium, it could constitute a significant loophole in the CVD law.

National Security Implications of *Eurodif*

If *Eurodif* stands, the Russians will be free to make unlimited commercial sales of LEU in the U.S. market pursuant to SWU contracts, notwithstanding the continued existence of the Suspension Agreement. Given that Russia has enough enrichment capacity to supply its own domestic market and the entire U.S. market with LEU for the foreseeable future, these sales are potentially enormous. Thus, competition from Russian commercial LEU which is produced at a lower cost is likely to limit substantially USEC's ability to resell the down-blended LEU it is committed to purchase under the HEU Agreement. This will threaten USEC's ability to continue to make those purchases. In sum, by compromising the AD Agreement, *Eurodif* also compromises the HEU Agreement, which is a vital component of our non-proliferation strategy.

Eurodif also threatens the economic viability of the only U.S. flag producer of enriched uranium – USEC. Because USEC is the only U.S. producer of enriched uranium not subject to "peaceful use" limitations, only USEC can supply the enriched uranium necessary for use in the Tennessee Valley Authority reactors that produce tritium for U.S. nuclear weapons. As noted above, the Paducah facility operated by USEC enriches uranium through gaseous diffusion, which consumes vast amounts of electricity and, at current prices, is commercially obsolete. USEC is planning to replace the Paducah facility with a new centrifuge facility in Piketon, Ohio, for which it will need to raise billions of dollars in new capital on commercial markets. It will be very difficult for USEC to raise this capital if it does not appear that the U.S. market for enriched uranium will be reasonably stable and profitable for the next 10 to 15 years. Thus, by threatening the viability of USEC, *Eurodif* also threatens the maintenance of the U.S. nuclear arsenal.

Energy Security Implications of *Eurodif*

By threatening to drive USEC out of business, *Eurodif* also could leave the United States excessively dependent on imports of LEU from Russia to produce electricity. Should Russia be permitted to sell significant quantities of LEU above the agreed limit in the Suspension Agreement Amendment, U.S. enrichment capacity currently under construction or planned might not be completed. As a result, existing U.S. enrichment capacity combined with imports from Europe would be insufficient to replace what USEC plans to produce after 2013 with its new centrifuge facility in Piketon, Ohio. This would increase U.S. dependence on Russian LEU.

Efforts to Close the *Eurodif* Loophole

For all of the reasons discussed above, the Administration believes it is crucial that the loophole opened by the *Eurodif* decisions be closed in order to ensure that the Suspension Agreement and the HEU Agreement continue to work in concert. The Administration supports a simple legislative fix to address the adverse impact of the *Eurodif* ruling. In late December 2007, Senate Minority Leader McConnell, Senator Bunning and Representative Whitfield introduced legislation to address *Eurodif*. On December 21, 2007, the interagency group forwarded to the bill's sponsors a letter of support signed by the Departments of Commerce,

State, Energy and Defense. We look forward to working with this Committee, and the Congress as a whole, to resolve the issues *Eurodif* has created.

As noted previously, Commerce is also seeking Supreme Court review of the *Eurodif* decisions. The U.S. Government has filed a petition for a writ of certiorari with the Supreme Court, asking it to review the Federal Circuit's decision. The Court should decide whether to hear the appeal this spring.

Thank you for the opportunity to appear before you today. I am pleased to answer any questions you may have.