

MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Joseph A. Spetrini
Deputy Assistant Secretary
for Policy and Negotiations

SUBJECT: Issues and Decision Memorandum for the Sunset Review of the
Agreement Suspending the Antidumping Investigation on Uranium
from the Russian Federation; Final Results

Summary:

We have analyzed the comments and rebuttals of interested parties in the full sunset review of the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation (“Suspension Agreement”). We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum. Below is the complete list of the issues in this final results of the full sunset review for which we received comments and rebuttals by parties:

1. Likelihood of Continuation or Recurrence of Dumping
 - a. Volume of Imports
 - b. Future Likelihood of Dumping and Effect on U.S. Market Prices
2. Scope of the Subject Merchandise
3. Magnitude of Margin Likely to Prevail

Background

On April 3, 2006, the Department of Commerce (“Department”) published in the Federal Register a notice of preliminary results of the full sunset review of the Suspension Agreement pursuant to Section 751(c) of the Tariff Act of 1930, as amended (“the Act”) (63 FR 16560) (Preliminary Sunset Notice). This notice was accompanied by the “Issues and Decision Memo for the Sunset Review of the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation; Preliminary Results,” from Joseph A. Spetrini, Deputy Assistant Secretary for Policy and Negotiations, to David M. Spooner, Assistant Secretary for Import Administration (March 24, 2006) (“Preliminary I&D Memo”), which can be found at <http://ia.ita.doc.gov/frn/summary/russia/E6-4738-1.pdf>. In our preliminary results, we found that revocation of the Suspension Agreement on uranium from Russia would likely lead to a continuation or recurrence of dumping at the weighted-average margin of 115.82 percent for all producers/exporters from Russia.

On April 17, 2006, we received case briefs on behalf of Power Resources, Inc. (“PRI”) and Crow Butte Resources, Inc. (“Crow Butte”); USEC Inc. and United States Enrichment Corporation (collectively, “USEC”); the Ad Hoc Utilities Group (“AHUG”)¹; and AO Techsnabexport (“Tenex”).² On April 24, 2006, we received rebuttal briefs on behalf of Power Resources and Crow Butte, USEC, and AHUG. On April 26, 2006, USEC requested that the Department reject AHUG’s rebuttal brief because it contained new information not permissible under the Department’s regulations. On May 24, 2006, the Department notified AHUG that it was returning AHUG’s rebuttal brief because it contained information not timely filed under the regulations and offered AHUG the opportunity to redact the new information and to re-submit the brief to the Department within two days. On May 26, 2006, AHUG re-submitted its rebuttal brief; however it failed to redact all references to the new information that appeared in its May 24, 2006 rebuttal brief. We requested again that AHUG re-submit its rebuttal brief without the references to the new information, by the close-of-business on May 30, 2006. On, May 30, 2006, AHUG filed its rebuttal brief and redacted all new information. Additionally, on May 26, 2006, AHUG submitted a letter to the Department which also contained new and untimely filed

¹ The Department does not consider AHUG an interested party, as defined in section 771(9) of the Act and 19 CFR § 351.312, because its members are not foreign manufacturers, producers, or exporters, or the United States importers, of subject merchandise. However, because AHUG is an industrial user of the subject merchandise, the Department is considering AHUG’s comments in this sunset review. See Memorandum from Sally C. Gannon to Ronald K. Lorentzen entitled “Sunset Review of Uranium from the Russian Federation: Adequacy of Domestic and Respondent Interested Party Responses to the Notice of Initiation and Decision to Conduct Full Sunset Review” (January 17, 2006).

² We note that Tenex did not file either a waiver of intent to participate in this sunset review pursuant to Section 351.218(d)(2) of the Department’s sunset regulations or a complete substantive response to the notice of initiation pursuant to Section 351.218(d)(3).

information. On May 30, 2006, the Department notified AHUG that it was returning this additional May 26, 2006 letter because it contained information not timely filed under the Department's regulations. No interested party requested a hearing in this sunset review.

We have addressed the comments and rebuttals received from interested parties below.

Discussion of the Issues

In accordance with section 751(c)(1) of the Act, the Department is conducting this sunset review to determine whether termination of the suspended antidumping investigation would likely lead to continuation or recurrence of dumping. Section 752(c) of the Act provides that, in making this determination, the Department shall consider the weighted-average dumping margins determined in the investigation and subsequent reviews and the volume of imports of the subject merchandise for the period before and the period after the issuance of the antidumping duty order or suspension agreement. In addition, section 752(c)(3) of the Act provides that the Department shall provide to the ITC the magnitude of the margin of dumping likely to prevail if the order or suspension agreement is revoked.

Below we address the comments and rebuttals of interested parties.

1. Likelihood of Continuation or Recurrence of Dumping
 - a. Volume of Imports in Absence of Suspension Agreement

PRI's and Crow Butte's Comments

PRI and Crow Butte argue that the Department properly determined in its preliminary results that exports of Russian uranium products would be likely to increase significantly if the suspended investigation were terminated and that these findings are supported by substantial evidence on the record and otherwise in accordance with law. PRI and Crow Butte state that the Department, in reaching this conclusion, correctly agreed with them with respect to the stabilizing effect of the Suspension Agreement, and its inter-relationship with 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"), on the U.S. market since its issuance. PRI and Crow Butte further state that the Department properly noted that the Suspension Agreement enables Russian uranium to enter the U.S. market in an orderly and predictable manner and that the agreement is necessary to the measured entry of highly-enriched uranium ("HEU") feed pursuant to the USEC Privatization Act.

PRI and Crow Butte also agree with the Department's finding that, without the disciplines of the Suspension Agreement in place, it is highly likely that Russia would redirect its enrichment capacity to commercial export sales of uranium products. They note that the Department based this finding on record evidence indicating that Russia's domestic demand for separative work

units (“SWU”) is very low in relation to its production capacity, as well as evidence that Russia’s current re-enrichment of depleted uranium tails is not the most economically viable use of its capacity compared to enrichment of natural uranium for commercial SWU sales. PRI and Crow Butte further argue that the Department appropriately concluded from record evidence that the United States is the largest market for uranium in the world, offering the most sales opportunities with respect to open demand in the near to mid-term. They contend that this factor, coupled with the restrictions on imports of Russian uranium in other markets, such as the European Union and Asia, led the Department to determine correctly that Russia would likely redirect uranium exports to the United States without the disciplines of the Suspension Agreement.

USEC’s Comments

USEC argues that the Department correctly determined in its preliminary results that future import volumes of Russian uranium products would likely increase in the absence of the Suspension Agreement and that the Department’s findings in this regard are supported by substantial evidence on the record of this proceeding and are in accordance with law. USEC notes that, as shown by the data on the record and recognized by the Department, Russia’s increasing and underutilized production capacity and substantial inventories, combined with the attractiveness of the U.S. market, would likely mean an increase in import volumes if the Suspension Agreement were terminated. USEC contends that the Department properly noted the stabilizing effect of the Suspension Agreement on the U.S. uranium market, as well as its connection to the HEU Agreement, which, USEC states, is a strategically important and historic U.S.-Russian non-proliferation agreement to convert HEU taken from dismantled Russian nuclear warheads into low-enriched uranium (“LEU”) fuel for use in U.S. nuclear power plants. USEC further contends that the record data fully bear out the Department’s conclusions in the preliminary results in this regard.

In support of its contentions, USEC states that the Department recognized the compelling arguments and evidence regarding Russia’s massive inventories of HEU material and its huge enrichment capacity in considering the likely import volumes if the Suspension Agreement were terminated. USEC contends that the Department noted Russia’s status as the largest enricher in the world and acknowledged that Russia has made clear its plans to increase this capacity to approximately 26 million SWU by 2010. The Department also noted, USEC further contends, that there are also indications that Russia will increase its mining of uranium in the coming years. USEC argues that the Department contrasted Russia’s large enrichment capacity and inventories with evidence that Russia’s domestic demand for SWU is quite low in relation to its capacity and that Russia is using some of its current capacity to re-enrich depleted uranium tails, which is not the most economically-viable use of its capacity. In addition, USEC notes the Department’s preliminary finding, based on record evidence, that the United States is the largest market for uranium products in the world and offers the most sales opportunities with respect to open demand in the near to mid-term.

AHUG's Comments

AHUG notes that the Department's preliminary results contain a number of legal and factual errors, including the assumption that removal of the Suspension Agreement would jeopardize the continued effectiveness of the HEU Agreement and the assumption that Russia has excessive inventories of uranium products and services that could be directed to the U.S. market. AHUG references its previous comments in this sunset review on these points. See Preliminary I&D Memo.

AHUG's Rebuttal Comments

AHUG contends that, in its case brief, it pointed out that contemporaneous data was available for the relevant market that demonstrates what would happen under current market conditions if the Suspension Agreement were terminated. AHUG claims that, in its prior adequacy filings, it submitted factual information regarding the current state of the uranium fuel production industry. See AHUG's August 31, 2005 Substantive Response and September 9, 2005 Rebuttal Comments. AHUG alleges that the Department acknowledged the current market information provided by AHUG; however, it ignored this information in its preliminary results.

Regarding the issue of volumes of imports in the absence of the Suspension Agreement, AHUG then reiterates the points it made in its previous filings such as: there is rising worldwide demand for SWU to fuel new reactors planned in Russia, China and India; and Russia does not have enough U3O8 to support its energy plans, and will need additional supplies just to fill its own market demand. AHUG contends that these facts demonstrate, in part, the following (in relation to the issue of volumes of imports): global demand is increasing faster than global supply; and Russian suppliers are unlikely to redirect substantial quantities of uranium products and services towards the U.S. market. AHUG concludes its argument stating that the Department should refrain from using the outdated and irrelevant information contained in the 1991 petition on the U.S.S.R. in favor of current and accurate data supplied by AHUG for today's uranium market.

Department's Position

While AHUG notes its disagreement with the Department's conclusions in the preliminary results and reiterates points it made regarding volumes of imports in previous filings, AHUG provides no further substantive arguments to support its contentions that the preliminary results contain a number of legal and factual errors. USEC, PRI and Crow Butte state their agreement with the Department's preliminary conclusion that future import volumes of Russian uranium products would likely increase in the absence of the Suspension Agreement.

In these final results, we continue to agree with PRI's and Crow Butte's assertions with respect to the stabilizing effect that the Suspension Agreement, and its inter-relationship with the HEU Agreement, has had on the U.S. uranium market since its issuance. We do not find in these final

results that AHUG has presented persuasive arguments to counter the record evidence on this point. The Suspension Agreement has provided a vehicle through which Russia's down-blended HEU material, pursuant to the HEU Agreement, can enter the U.S. market in an orderly and predictable manner (in addition to the other uranium products allowed entry over the years under the various quota provisions of the Suspension Agreement). Also inter-related to the USEC Privatization Act is the measured entry into the U.S. market of returned HEU feed. In the absence of the Suspension Agreement, we believe that the increased commercial sales of uranium products that Russia would almost certainly direct to the U.S. market would undermine this stabilizing influence and also potentially jeopardize the continued effectiveness of the HEU Agreement because additional commercial sales may be more financially and economically attractive overall to Russia. See Preliminary I&D Memo at 14.

With respect to the issue of future volumes of imports, we continue to be persuaded in these final results by the compelling arguments and evidence placed on the record by the parties regarding Russia's massive inventories of HEU material and its huge enrichment capacity. We do not find in these final results that AHUG has presented any persuasive arguments to counter the record evidence on this issue. It is evident that Russia is the largest enricher in the world, and Russia has also made clear that it is planning to increase this capacity by 2010. See Preliminary I&D Memo at 14. In contrast to Russia's large enrichment capacity and inventories of material, the arguments and evidence presented indicate that Russia's domestic demand for SWU is quite low in relation to its capacity. After accounting for domestic demand, third-country exports, and the SWU used by Russia to re-enrich tails for use in down-blending HEU for delivery to USEC, the record evidence indicates that Russia is evidently using its remaining capacity to re-enrich depleted uranium tails. However, as noted by the parties, this is not the most economically-viable use of its capacity, in comparison with enriching natural uranium for commercial SWU sales. Thus, in the absence of the Suspension Agreement, we believe it is highly likely that Russia would redirect its enrichment capacity to commercial export sales of uranium products. The record evidence also includes indications that Russia will increase its mining of uranium in the coming years. See Preliminary I&D Memo at 14-15.

Furthermore, we continue to find in these final results that the record evidence makes clear that the United States is the largest market for uranium products in the world and offers the most sales opportunities with respect to open demand in the near to mid-term. In addition, the parties presented compelling arguments for the record regarding the restrictions on the imports of Russian uranium products in third-country markets, such as the European Union and Asia, which make it even more likely that Russia would redirect its uranium product exports to the U.S. market in the absence of the Suspension Agreement. See Preliminary I&D Memo at 15. We do not find in these final results that AHUG has presented any persuasive arguments to counter the record evidence on this issue. Thus, as noted in the preliminary results, the record evidence leads us to believe that it is highly likely Russia would seek sales opportunities in the U.S. market for uranium products, including for natural and enriched uranium and/or SWU, if the restrictions of the Suspension Agreement were no longer in place. See Preliminary I&D Memo at 15-16. Therefore, we determine in these final results that there is a likelihood that future import volumes

of Russian uranium products into the U.S. market would increase significantly in the absence of the Suspension Agreement.

b. Future Likelihood of Dumping and Effect on U.S. Market Prices

PRI's and Crow Butte's Comments

PRI and Crow Butte contend that the Department properly determined in its preliminary results that termination of the Suspension Agreement would lead to suppression or depression of U.S. uranium prices and correctly noted that uranium is a highly fungible product for which purchasing decisions are based almost exclusively on price. They further contend that the Department properly relied on compelling record evidence illustrating how prices of Russian uranium products have been consistently lower than the prices for uranium from Western sources and have the propensity to continue to be lower in the future. PRI and Crow Butte argue that the Department correctly concluded that the likely outcome of terminating the suspended investigation would be an increase in the availability and supply of Russian uranium products in the U.S. market, based on the laws of supply and demand and its findings in previous cases. They agree with the Department's conclusion that this supply increase would, in turn, drive down the prices for U.S. uranium products. Therefore, PRI and Crow Butte argue, the Department's preliminary findings that termination of the suspended investigation would likely result in the decline of the prices for uranium products and a continuation or recurrence of dumping are correct and should be affirmed in the Department's final results.

USEC's Comments

USEC argues that the Department correctly determined in its preliminary results that the likely outcome of termination of the Suspension Agreement would be the decline of prices for uranium products, and a continuation or recurrence of dumping, in the U.S. market. USEC points out that the Department recognized both that uranium is a fungible commodity and that compelling evidence exists illustrating how the prices of Russian uranium products have been consistently lower than the prices for uranium from Western sources and have the propensity to continue to be lower in the future. USEC notes the Department's findings regarding the likely increase in the availability and supply of Russian uranium products if the restrictions of the Suspension Agreement were removed, which would in turn drive down prices for U.S. uranium products. USEC contends that these findings were based on substantial evidence on the record and were in accordance with law.

AHUG's Comments

AHUG notes that the Department's preliminary results contain a number of legal and factual errors, including the assumption that increased imports of Russian uranium products and services would undermine U.S. market prices. AHUG references its previous comments in this sunset review on this point. See Preliminary I&D Memo. AHUG asserts that the Department should

reconsider its preliminary results and conclude in its final results that dumping would not be likely to recur if the Suspension Agreement were removed.

AHUG's Rebuttal Comments

AHUG contends that in its case brief, it pointed out that contemporaneous data was available for the relevant market that demonstrates what would happen under current market conditions if the Suspension Agreement were terminated. AHUG claims that, in its prior adequacy filings, it submitted factual information regarding the current state of the uranium fuel production industry. See AHUG's August 31, 2005 Substantive Response and September 9, 2005 Rebuttal Comments. AHUG alleges that the Department acknowledged the current market information provided by AHUG; however, it ignored this information in its preliminary results.

Regarding the issue of future likelihood of dumping and the effect on U.S. prices, AHUG then reiterates the points it made in its previous filings such as: the price of U3O8 has increased dramatically since 1992; and the restricted and unrestricted price differential is not indicative of any dumping of Russian uranium or SWU. AHUG contends that these facts demonstrate, in part, the following (in relation to the issue of future likelihood of dumping and the effect on U.S. prices): market prices for uranium products and services are increasing dramatically and will remain high for the foreseeable future; and given global market supply and demand, any Russian products and services that did enter the U.S. market most likely would not be at dumped pricing levels. AHUG concludes its argument stating that the Department should refrain from using the outdated and irrelevant information contained in the 1991 petition on the U.S.S.R. in favor of current and accurate data supplied by AHUG for today's uranium market.

Department's Position

While AHUG notes its disagreement with the Department's conclusions in the preliminary results and reiterates points it made regarding future likelihood of dumping and the effect on U.S. prices in previous filings, AHUG provides no further substantive arguments to support its contentions that the preliminary results contain a number of legal and factual errors. USEC, PRI and Crow Butte state their agreement with the Department's preliminary conclusions that the termination of the Suspension Agreement would likely result in the decline of prices for uranium products, and a continuation or recurrence of dumping, in the U.S. market.

We continue to agree with USEC and PRI and Crow Butte in these final results that, absent the Suspension Agreement, imports of Russian uranium and SWU would likely undercut and depress or suppress U.S.-market prices for uranium products. As the Department has stated, both in the first sunset review and in its preliminary results of this review, uranium is a highly fungible commodity for which purchasing decisions are based almost exclusively on price. See Preliminary I&D Memo at 22. See also "Issues and Decision Memorandum for the Sunset Review of Uranium from Russia; Final Results," from Jeffrey A. May, Director, Office of Policy, to Troy H. Cribb, Acting Assistant Secretary for Import Administration (June 27, 2000) ("First

Sunset Final I&D Memo”) (Comment 3) at 15. Therefore, it is likely Russia would direct its exports of uranium products to the United States at prices that would undersell U.S. uranium products in the absence of the Suspension Agreement.

The record evidence indicates that all of the parties acknowledge the post-Suspension Agreement distinction between the “restricted” and “unrestricted” uranium market prices. In these final results, we continue to find, based on the weight of the evidence USEC, PRI and Crow Butte presented, that the prices of Russian uranium products have been consistently lower than the prices for uranium from Western sources and have the propensity to continue to be lower in the future. See Preliminary I&D Memo at 22-23. Furthermore, we believe that the likely outcome of the removal of the restrictions of the Suspension Agreement would be the increase in the availability and supply of Russian uranium products in the U.S. market which would, in turn, drive down prices for U.S. uranium products. As noted in our preliminary results, the Department has already determined in at least two previous cases that the basic laws of supply and demand suggest that an increase in supply, all else being equal, would be accompanied by downward pressure on prices. See Preliminary Results of Full Sunset Review: Silicomanganese From Ukraine, 65 FR 34440, (May 30, 2000), and accompanying Issues and Decision Memorandum. See also Preliminary Results of Five-year Sunset Review of Suspended Antidumping Duty Investigation on Ammonium Nitrate from the Russian Federation, 70 FR 61431 (October 24, 2005), and accompanying Issues and Decision Memorandum (“Ammonium Nitrate from Russia”). We do not find in these final results that AHUG has presented persuasive arguments to demonstrate that the normal principles of supply and demand would not apply in this case.

Therefore, we determine in these final results that, due to the fungible nature of uranium products and the likely increase of supply of Russian uranium products into the U.S. market absent the Suspension Agreement, the likely outcome of termination the Suspension Agreement would be the decline of prices for uranium products, and a continuation or recurrence of dumping, in the U.S. market.

2. Scope of the Subject Merchandise

AHUG’s Comments

AHUG takes issue with the Department’s assertions in its preliminary results with respect to the litigation related to the antidumping duty order on LEU from France. In its brief, AHUG specifically refers to the Federal Circuit’s decisions in Eurodif S.A. v. United States, 411 F.3d 1355 (Fed. Cir. 2005) (“Eurodif I”), aff’d, and Eurodif S.A. v. United States, 423 F.3d 1275 (Fed. Cir. 2005) (“Eurodif II”). AHUG argues that, under the bedrock principle of *stare decisis*, the Department is bound by legal decisions of its governing court regardless of the finality of those decisions.

AHUG argues that the Federal Circuit confirmed in Eurodif I and Eurodif II that the antidumping

laws do not apply to SWU transactions or the LEU imported pursuant to such transactions. Therefore, according to AHUG, the Department cannot base a dumping determination of any kind on SWU transactions and cannot include LEU imported pursuant to SWU transactions within the scope of merchandise subject to an antidumping order or suspension agreement. AHUG contends that the application of the Eurodif I and Eurodif II holdings in this sunset review requires that the Department exclude SWU transactions from its analyses of both the likelihood of continued or recurrent dumping and the likely margin of dumping but that the Department did not do either in its preliminary results. AHUG further contends that the Department instead relied on estimates of enrichment services sales for its projection that import volumes would be likely to increase, and prices decrease, if the Suspension Agreement were terminated. AHUG argues that the Department also continued to depend on SWU transaction information provided in the petition, dating to before the break-up of the Soviet Union, in determining that the most likely margin of dumping would be 115.82 percent.

AHUG argues that the Eurodif I and Eurodif II decisions also confirm that LEU imported pursuant to SWU transactions must be excluded from the scope of the merchandise subject to the investigation and the Suspension Agreement and that the Department's preliminary results should have modified the scope of the investigation accordingly. AHUG also argues that the Department should have noted that, upon issuance of the final results, the Department would direct U.S. Customs and Border Protection ("CBP") to allow entry of LEU imported from Russia pursuant to enrichment services contracts.

AHUG takes issue with the Department's statement in the preliminary results that the appeals process with respect to the Eurodif litigation is not complete and the Court of Appeals for the Federal Circuit's ("CAFC's") ruling is not binding unless and until such ruling is final and conclusive. According to AHUG, the principle of *stare decisis* dictates that the Federal Circuit's decisions in the Eurodif cases are immediately applicable to the Department's determinations in this sunset proceeding. AHUG argues that *stare decisis* requires that entities subject to the authority of a higher court abide by the legal precedent issued by that court and that issues of law decided in a published and precedential legal opinion are immediately binding. AHUG further argues that there is no caveat stating that a legal ruling must have been fully appealed before it qualifies as binding precedent or that an appellate decision in a 28 U.S.C. § 1292(d) proceeding is not owed deference by the lower courts or subject administrative agencies just because the case as a whole may still be open to Supreme Court review.

AHUG contends that the Federal Circuit's holdings in Eurodif I and Eurodif II were clearly intended to set Federal Circuit precedent. AHUG notes that the Federal Circuit issued two decisive rulings explaining in deliberate detail their reasoning on the enrichment services issue and that the published decisions contain no language prohibiting or limiting their precedential value. Therefore, AHUG maintains, the legal conclusions reached in Eurodif have been resolved by the Federal Circuit and are currently binding on the Department and must also be followed in this sunset review. AHUG further claims that the Department cannot claim immunity from *stare decisis* because of its status as an administrative agency. Finally, citing to Canadian Lumber

Trade Alliance v. United States, 2006 WL 897177, *32 (Ct. Int'l Trade Apr 7, 2006) (No. 05-00324, Slip op. 06-48), AHUG argues that the Eurodif decisions have already been cited as controlling law in other court decisions and that this fact confirms their current status as binding precedent, under which the Department should also be bound.

Tenex's Comments

Tenex argues that the Department's preliminary results fail to acknowledge the current legal standard which declares that SWU-contract LEU cannot be deemed subject merchandise. Tenex contends that the Eurodif I and Eurodif II decisions establish that SWU transactions cannot be covered by U.S. trade laws and are valid and controlling precedent that should be followed by the Department, notwithstanding any remaining litigation related to the CAFC rulings. Tenex maintains that the Department's failure to acknowledge the CAFC's Eurodif rulings invalidates any of the Department's findings regarding the scope of this proceeding, the volume of subject imports, the likelihood of dumping and the effect on U.S. market prices, and the magnitude of the margin likely to prevail. According to Tenex, the Department should acknowledge the controlling precedent of the CAFC's Eurodif rulings and remove all SWU transactions from the scope of this proceeding and from consideration in its analysis.

Tenex argues that the CAFC rulings clearly state that SWU-contract LEU cannot be subject to the U.S. trade laws. According to Tenex, in light of the CAFC's decision, only LEU that is produced and sold pursuant to EUP transactions (*i.e.*, payment for both the natural feed component and enrichment component) can be subject to U.S. trade laws. Tenex maintains that LEU produced and sold pursuant to SWU transactions (*i.e.*, payment only for the SWU enrichment component) is not subject to U.S. trade laws because such transactions involve the sale of services, rather than the sale of goods. In support of its contentions, Tenex points to the CAFC's statements in Eurodif II.

Tenex maintains that the CAFC Eurodif rulings are binding and represent controlling precedent that may not be ignored by the Department in this sunset review. Tenex argues that the CAFC's holding that SWU contracts are not within the scope of the European AD/CVD orders would apply with equal legal force to the Department's analysis in this sunset review of the suspended investigation on uranium from the Russian Federation. According to Tenex, the fundamental premise of the CAFC's decision is that SWU contracts involve the sale of services, not goods, and, therefore, cannot be subject to trade laws.

Tenex takes issue with the Department's statements in the preliminary results that the litigation (*i.e.*, with respect to the CAFC's Eurodif decisions) had not been completed and that the Department was continuing to actively pursue all avenues in the litigation process. Tenex argues that the Department overlooked the procedural context of the CAFC's Eurodif decisions. Tenex notes that, in this case, the CIT certified particular issues for interlocutory appeal to the CAFC and, in order to certify interlocutory appeal, the CIT was required to find, in part, that a controlling question of law was involved. Tenex maintains that Klinghoffer v. S.N.C. Achille

Lauro, 921 F.2d 21, 24 (2nd Cir. 1990) (“Klinghoffer”), recognizes that an interlocutory decision provides controlling precedent for the disposition of similar issues in other cases. Tenex further maintains that District Court for the District of Columbia confirmed this reading of Klinghoffer in APCC Services, Inc. V. AT&T Corp., 297 F. Supp. 2d 101 (D.D.C. 2003) (“APCC Services”).

According to Tenex, applying Klinghoffer, the CAFC’s holding in Eurodif that SWU contracts are outside the scope of the European AD/CVD orders is controlling precedent for the CIT, the Department, and the International Trade Commission (“ITC”) in other cases facing a similar issue, notwithstanding the fact that it was an interlocutory decision and the litigation of other issues is pending. Tenex contends that the CAFC’s decisions in Eurodif were not appealed to the Supreme Court, and, thus, its ruling that LEU produced and sold pursuant to SWU contracts cannot be subject to U.S. trade laws is now the established law that the Department must follow. Tenex argues that, if the Department declines to follow the rule of law articulated in Eurodif, the Department must provide a reasoned factual and legal basis that explains why the legal precedent of Eurodif is distinguishable. Tenex maintains that there is no basis for the Department to distinguish the SWU contracts addressed in the Eurodif decisions from any SWU contracts that could be covered in this sunset review; therefore, Tenex argues, the Department should acknowledge the controlling precedent of the CAFC’s Eurodif decision in this sunset review, notwithstanding any remaining aspects of the litigation in that case.

Specifically, Tenex maintains that the Department, in order to properly apply the controlling precedent of the CAFC’s Eurodif decision, should remove SWU transactions from its analysis of the likely volume of subject imports if the suspended investigation were terminated. The Department’s analysis of the likelihood of dumping and the effect on U.S. market prices should, similarly, treat SWU-transaction LEU as non-subject merchandise. Likewise, the Department’s evaluation of the magnitude of the margin likely to prevail should be limited only to EUP transactions, but not SWU transactions.

PRI’s and Crow Butte’s Rebuttal Comments

PRI and Crow Butte disagree with AHUG’s and Tenex’s arguments that the Department needs to amend the scope of the suspended investigation to exclude “LEU imported pursuant to SWU transactions” pursuant to the Eurodif I and Eurodif II decisions. PRI and Crow Butte point out that the Department has previously and clearly concluded that it is inappropriate to evaluate scope issues and make scope determinations in the context of a sunset review, citing to Uranium from Russia: Final Results of Full Sunset Review of Suspended Antidumping Duty Investigation, 65 FR 41439 (July 5, 2000) and the accompanying First Sunset Final I&D Memo at Comment 1. PRI and Crow Butte then continue by stating that, in the first sunset review, respondent interested parties argued that the Department should have revised the scope of the suspended investigation to exclude HEU. The Department, however, declined not only to alter the scope but to even analyze or address the scope issues in the first sunset review, stating that the sunset review is not an appropriate venue for evaluating scope issues or revising scope language. PRI and Crow Butte, therefore, urge the Department to adhere to its practice, as

applied in the prior sunset review of this proceeding, and decline to evaluate scope issues in the context of this sunset review.

USEC's Rebuttal Comments

USEC argues that the Federal Circuit decisions, Eurodif I and Eurodif II, cited by Tenex and AHUG do not alter the Department's preliminary results. USEC maintains that the Eurodif I and Eurodif II decisions are not controlling in this sunset review because, as the Department correctly noted, the appeal of those decisions is ongoing. USEC notes that filings to the CIT with respect to this litigation illustrate that the precise scope of these decisions has not yet been fully clarified such that it would be entirely premature to attempt to apply these rulings to this review when their specific impact has not yet been determined even for the proceedings from which they arose. USEC takes issue with AHUG's argument that the Federal Circuit's decisions in the Eurodif cases are immediately applicable to the Department's determinations in this proceeding due to the principle of *stare decisis*. According to USEC, *stare decisis* does not apply here because the Eurodif decisions involved mixed questions of law and fact regarding the particular features of European SWU contracts and whether those contract features made them contracts for the sale of goods or services. Citing to 18 Moore's Federal Practice, § 134.05[3] (Matthew Bender 3d ed.), USEC argues that the Department is not bound to follow these decisions in this review because "the doctrine of *stare decisis* has been held not to apply to mixed questions of law and fact."

USEC rejects AHUG's and Tenex's arguments that exports of enriched uranium pursuant to SWU transactions cannot be considered by the Department in its analysis of whether dumping would likely continue or recur if the Suspension Agreement were terminated due to the CAFC's holdings in Eurodif I and Eurodif II. USEC argues that neither AHUG nor Tenex provide any support for the proposition that all or any of this enriched uranium would in fact be exported pursuant to SWU transactions, rather than pursuant to enriched uranium product ("EUP") transactions, which, USEC states, are admitted by all to be subject to the antidumping duty law. USEC notes that Tenex has submitted no evidence regarding the types of sales it would make in the United States if the Suspension Agreement were terminated and that any claim regarding future sales of LEU fitting within the scope of the Eurodif holdings is pure speculation. According to USEC, in the absence of a factual basis for making a determination, it would be wrong for the Department to exclude enriched uranium exports from its analysis.

USEC argues further that, even if enriched uranium were sold pursuant to SWU contracts, both Tenex and AHUG make the unwarranted and unsupported assumption that these contracts and transactions would be identical in all material respects to the contracts and transactions analyzed by the Federal Circuit in Eurodif I and Eurodif II. USEC takes issue with AHUG's and Tenex's positions given that the Department, in a sunset review, is necessarily looking at the likely future events if an order is revoked or a suspension agreement terminated. Furthermore, USEC maintains, neither AHUG nor Tenex have submitted evidence regarding the transactions that would occur if the order was revoked or the suspension agreement terminated. Therefore, USEC

contends that it is sheer speculation for Tenex and AHUG to argue that future enriched uranium exports would be made pursuant to contracts that are exactly like the Eurodif contracts in all material respects.

USEC maintains also that, even if the Eurodif I and Eurodif II decisions were relevant to this sunset review as argued by AHUG and Tenex, they would not require the Department to change its conclusion in the final results. According to USEC, unlike the investigation related to the Eurodif decisions which covered LEU only, the subject merchandise in this sunset review is a broad class or kind of merchandise that covers a wide variety of uranium products, including natural uranium. USEC argues that the Department concluded in its preliminary results that the class or kind of uranium products as a whole would be dumped absent the discipline of the Suspension Agreement after not only considering the potential future exports of enriched uranium but also analyzing the Russian natural uranium industry, its production capacity, and the likely price effect in the U.S. natural uranium market. Therefore, USEC maintains that, even if future imports of Russian LEU were pursuant to SWU transactions that were identical in all respects to the transactions at issue in the Eurodif decisions, the ultimate conclusion of the Department's preliminary results, *i.e.*, that dumping would continue or recur for the subject merchandise, would remain undisturbed.

Department's Position

AHUG and Tenex maintain that the Eurodif I and Eurodif II decisions are binding legal precedent by which the Department must abide in this sunset review proceeding. As a result, they argue that the Department must remove all SWU transactions from the scope of this proceeding and from consideration in its analysis of the likely volume of future imports and the magnitude of the margin likely to prevail if the suspension agreement were terminated. AHUG further argues that the Department should have noted in its preliminary results that it would direct CBP, upon issuance of the final results, to allow entry of LEU imported from Russia pursuant to enrichment services contracts.

We disagree with AHUG's and Tenex's contentions with respect to the Eurodif I and Eurodif II decisions, which were issued in the context of litigation pertaining to the antidumping duty order on LEU from France. As the Department noted in its preliminary results, the litigation related to these rulings has not been completed, and the Department is continuing to actively pursue all avenues in the litigation process. See Preliminary I&D Memo (Comment 1(b)) at 23. This case was once again remanded to the Department on May 18, 2006. In addition, the appeals process is not complete, and the CAFC's ruling is not binding unless and until such rulings are final and conclusive. Therefore, this litigation has no effect on the Suspension Agreement or this sunset review of the Suspension Agreement, and AHUG's arguments are not valid in this context. We note that the Klinghoffer and APCC Services cases cited by Tenex, contrary to Tenex's argument, do not stand for the proposition that the all decisions on interlocutory appeal are controlling decisions which must be followed before the litigation is final and conclusive. Further, the issues and circumstances of the Eurodif litigation do not fall into category of

decisions which would be controlling under those cases.

Furthermore, we agree with USEC's argument that it would be entirely premature to attempt to apply these rulings to this sunset review proceeding when their specific impact has not yet reached finality even for the proceeding from which they arose. As previously stated, since the appeals process is not yet complete, the impact of the Eurodif I and Eurodif II decisions on the LEU from France antidumping duty order is not yet complete or final. Therefore, these rulings are not binding precedent in this sunset review of the Suspension Agreement, an entirely different and separate proceeding. In addition, as noted by USEC, there has been no evidence placed on this record regarding SWU transactions that might take place in the future in the absence of the Suspension Agreement, including whether or not such SWU transactions would be identical to the SWU transactions examined in the LEU from France proceeding. Therefore, even if appropriate without the finalization of the litigation process, any attempt by the Department to make associations between the LEU from France transactions and future Suspension Agreement transactions would be entirely speculative and inappropriate in this sunset review proceeding.

Moreover, as USEC correctly pointed out, the Eurodif decisions covered LEU only, whereas the scope of the subject merchandise in this review includes a broad class or kind of merchandise that covers a wide variety of uranium products, including natural uranium. Therefore, in determining the likelihood of future dumping and effect on U.S. market prices, the Department will base its likelihood determination on the scope of the merchandise in this sunset review, which includes enriched as well as natural uranium.

Finally, we agree with PRI's and Crow Butte's contention that the Department as a matter of policy does not evaluate scope issues or revise the scope of a proceeding in the context of a sunset review. See First Sunset Final I&D Memo (Comment 1) at 5. Rather, issues with respect to scope are raised by interested parties via scope inquiries under Section 351.225 of the Department's regulations.

3. Magnitude of Margin Likely to Prevail

PRI's and Crow Butte's Comments

PRI and Crow Butte argue that the Department properly determined in its preliminary results that the margin from the original investigation is the magnitude of the margin that would likely prevail if the suspended investigation were terminated. They state that the Department correctly rejected AHUG's arguments that political changes since the original investigation render use of the best information available ("BIA") margin calculated in that investigation unacceptable. PRI and Crow Butte contend that the Department properly determined that the BIA margin is the only margin that reflects the behavior of Russian producers/exporters without the disciplines of the Suspension Agreement based on the fact that the BIA margin is the only margin available, that no administrative reviews have been conducted, and that no Russian producer has participated in

this second sunset review. Therefore, PRI and Crow Butte submit, the Department's reliance on the BIA margin from the original investigation is supported by record evidence, statutory requirements, and precedent.

USEC's Comments

USEC argues that the Department correctly determined in its preliminary results that the magnitude of the margin likely to prevail if the Suspension Agreement were terminated was the 115.82 percent rate from the original investigation. USEC contends that the Department was recognizing its normal practice of using the margin from the preliminary determination in the original investigation for sunset reviews of suspended investigations, where the investigation was not continued, in its preliminary finding. USEC points out that the Department did recognize that circumstances have changed since the time of its original preliminary determination. However, USEC argues, the Department correctly noted that the BIA margin from the preliminary determination was the only margin available and that use of this margin was even more appropriate because the foreign producer declined to participate in this sunset review and did not submit a substantive response. USEC further notes that the Department made clear in this preliminary results, as well as in the last sunset review of this Suspension Agreement, that it is restricted by the Uruguay Round Agreements Act Statement of Administrative Action ("SAA") from calculating another margin in a sunset review. Therefore, USEC contends that the Department's use of the margin from the original investigation as probative of the behavior of Russian manufacturers/exporters if the Suspension Agreement were terminated is supported by substantial evidence and is in accordance with law.

AHUG's Comments:

AHUG argues that the Department cannot rely on information not specific to Russia. AHUG states that the Department's preliminary results relied on information from the initial 1991 petition in making its determination that Russian suppliers would be likely to resume the dumping of uranium products in the U.S. market at a margin of 115.82 percent but that this information is clearly not relevant to Russia in 2006. AHUG contends that the U.S. Court of International Trade ("CIT") confirmed in Uzbekistan v. United States, 25 C.I.T. 1084, Slip op. 01-114 at 11 (Ct. Int'l Trade Aug. 30, 2001), that, under the trade laws, the Department must base its dumping determinations on information specific to the country being reviewed. According to AHUG, in Uzbekistan v. United States, the CIT held that Commerce could not base its determination of likelihood for a post-Soviet state on a preliminary margin for the Soviet Union as a whole. Therefore, AHUG argues, the Department may not use the preliminary margin for the Soviet Union as a basis for finding the likelihood of dumping in this sunset review on Russia but, instead, must base its dumping margin determination on current data for the country at issue.

AHUG contends that it has placed current, country-specific information on the record of this proceeding that uranium products from Russia would not be dumped into the U.S. market if the

restrictions of the Suspension Agreement were removed. AHUG states, however, that the Department has refused to consider this information as evidence that no dumping would occur but has relied, instead, on the highly-adverse margin from the 1991 petition, which is neither specific to Russia nor backed by current information. AHUG maintains that using the unverified information from a fifteen-year-old petition on the Soviet Union as the best information available for determining whether Russian producers are likely to dump uranium products on the U.S. market in 2006 is unreasonable. In its final results, AHUG contends, the Department should base its dumping determination on current market information for Russia itself which suggests that no dumping would be likely to occur.

Tenex's Comments

Tenex maintains that the Department has failed to provide a valid analysis of the margin likely to prevail because it relies on an outdated and irrelevant margin calculated in the preliminary determination from the original 1992 investigation which has no probative value of the margin likely to prevail if the suspended investigation were terminated in 2006. Tenex cites to Uzbekistan v. United States in arguing that, in a past uranium sunset review, the CIT refused to affirm the Department's use of a margin calculated based on data from the petition on uranium from the Soviet Union as a valid basis to determine the margin likely to prevail for exporters from a former CIS country. Tenex contends that the Department has failed to recognize that current market conditions, conditions regarding the production and sales of Russian uranium, and the CAFC's Eurodif decisions holding that SWU transactions must be excluded now present a context for the consideration of dumping margins likely to prevail which is significantly different from that during the original investigation.

Tenex argues that the Department in its preliminary results merely applied the 1992 preliminary margin, derived from the petition against U.S.S.R. uranium, and refused to consider any of the events that have occurred since that determination, such as the fall of the U.S.S.R., the changes in the Russian uranium industry, and the changes in the supply and demand conditions that have significantly altered the global market for uranium. In addition, Tenex maintains, the Department's preliminary results are inconsistent with the Department's own determination that, effective April 1, 2002, the Russian Federation should no longer be treated as a non-market-economy country and, instead, should be recognized as a market-economy country. Tenex contends that the Department needs to explain in this sunset review how a 1992 margin based on a non-market-economy calculation methodology can have any probative value as to the margin likely to prevail in 2006 under a market-economy calculation if the suspended investigation were terminated.

Tenex further contends that the Department's reliance on the 1992 preliminary determination has no probative value because no AD/CVD order was ever imposed on uranium from the Russian Federation. Citing to Matsushita Elec. Indus. Co. V. United States, 12 CIT 455, 688 F. Supp. 617 (1988), Tenex argues that the CIT has recognized that preliminary determinations are not ripe for judicial review because the consequences of a preliminary determination are speculative

pending the issuance of the final determination. In addition, according to Tenex, the Department's use of the 1992 U.S.S.R. preliminary margin is particularly troublesome because the CIT specifically ruled in Uzbekistan v. United States that the Department could not base its likelihood determination on a preliminary margin based on data from the Soviet Union. Tenex points out that the CIT had previously cautioned the Department to adjust its procedures to account for the unique geopolitical changes in order to keep the antidumping process fair for the Newly Independent States, citing Techsnabexport Ltd. v. United States, 16 CIT 855, 859, 802 F. Supp. 469, 473 (1992) ("Techsnabexport II"). Tenex argues that the Department is blatantly disregarding the CIT's rulings in Uzbekistan v. United States and Techsnabexport II in making no effort to adjust its sunset review procedures to acknowledge the significant geopolitical and economic changes that have resulted since the dissolution of the U.S.S.R.

PRI's and Crow Butte's Rebuttal Comments

Citing Section 351.218(e)(2)(I) of the Department's regulations, PRI and Crow Butte argue that only under the "most extraordinary circumstances" will the Secretary rely on a dumping margin other than the one calculated and published in the prior determinations. In this case, PRI and Crow Butte argue, since no Russian respondent interested parties filed an adequate response to the Department's Notice of Initiation, the Department should not even consider AHUG's and Tenex's arguments that such "extraordinary circumstances" exist. PRI and Crow Butte contend that, even if the Department decides to address the issue of such circumstances, it cannot reasonably find the existence of "extraordinary circumstances" which support departing from the margin calculated in the original investigation because that is the only margin available that reflects the behavior of Russian producers and exporters without the discipline of the Suspension Agreement in place. PRI and Crow Butte assert that the Department should continue relying on the margin from the original investigation, which is consistent with the statute, the Department's regulations and past practices, for the reasons discussed below.

PRI and Crow Butte argue that AHUG's and Tenex's reliance on Uzbekistan v. United States is inappropriate. First, PRI and Crow Butte point out that the CIT dismissed the underlying action before it was fully litigated and even before the Department was able to issue a remand determination. Therefore, PRI and Crow Butte contend that, because the Uzbekistan v. United States case became moot soon after issuance, it has little precedential value. PRI and Crow Butte also cite W.Y. Moberly, Inc. v. United States, 924 F.2d 232, 236 (Fed. Cir. 1991), and Goldhofer Fahrzeugwerk GmbH & Co., v. United States, CIT 706 F. Supp.892, 895 (1989), as illustrative cases which became moot and were deemed by the court to have little precedential value. Second, PRI and Crow Butte assert that the factual circumstances surrounding Uzbekistan v. United States case are dissimilar to the facts in this sunset review. In Uzbekistan v. United States, the Government of Uzbekistan responded to the Department's Notice of Initiation and had offered to supply the Department with new information on which to calculate a revised dumping margin. PRI and Crow Butte allege that, contrary to Uzbekistan v. United States, no Russian entity, including Rosatom or Tenex, responded to the Department's Notice of Initiation. According to PRI and Crow Butte, while Tenex challenges the Department's preliminary

determination, it has submitted no information that the Department could even consider in relation to calculating a margin. PRI and Crow Butte state that AHUG's assertion that it has submitted evidence in this review that dumping would not continue or recur fails to recognize the limited value of that information and the absence of information from any party in a position to supply it. PRI and Crow Butte claim that, in its case brief, AHUG has simply cited to evidence that the U.S. uranium market has shown signs of improvement over the last few years. PRI and Crow Butte argue, however, that market improvements and rising uranium prices have no relation to the Department's dumping analysis, which evaluates the relationship between U.S. prices and normal value.

According to PRI and Crow Butte, the Department simply has no basis to even consider whether "extraordinary circumstances" might exist warranting a recalculation of the margin from the original investigation. Citing the SAA (at 891), PRI and Crow Butte caution the Department against calculating new margins in sunset reviews because it would involve "undue speculation regarding future selling prices, costs of production, selling expenses, exchange rates, and sales and production volumes." In this case, PRI and Crow Butte argue, such speculation would be particularly "undue" given the failure of Russian parties to participate and the fact that there has been no administrative review. Therefore, they conclude that the Department should continue to find that the margin from the original investigation remains appropriate.

Additionally, citing Section 351.218(e)(2)(I) of the Department's regulations, PRI and Crow Butte argue that Russia's graduation to market-economy status does not warrant reliance on a dumping margin other than the margin calculated in the original investigation. PRI and Crow Butte state that, in the case on tapered roller bearings from Hungary, the Department determined that despite the fact that the Hungarian economy was in the process of changing from state-run to free-market, "the margin calculated in the original investigation is probative of the behavior of Hungarian producers/exporters if the order were revoked as it is the only rate that reflects the behavior of these producers and exporters without the discipline of the order." See Final Results of Expedited Sunset Review: Tapered Roller Bearings From Hungary, 64 FR 60272, 60274-75 (November 4, 1999) ("Tapered Roller Bearings from Hungary"). Further, PRI and Crow Butte avouch that the Department determined in the recent two sunset cases that Russia's graduation to market economy did not invalidate margins calculated using non-market economy methodologies. See Solid Urea from the Russian Federation; Final Results of the Expedited Sunset Review of the Antidumping Duty Order, 70 FR 24528 (May 10, 2005) ("Solid Urea from Russia"), and accompanying Issues and Decision Memorandum. See also Ammonium Nitrate from Russia and Final Results of Five-Year Sunset Review of Suspended Antidumping Duty Investigation on Ammonium Nitrate from the Russian Federation, 71 FR 11177 (March 6, 2006) (where the Department adopted its decision from the preliminary results in its final results). In fact, PRI and Crow Butt contend that, in both cases, the Department found it was appropriate to continue to rely on the margins calculated in the respective original investigations.

Finally, citing the case of cement from Mexico, PRI and Crow Butte assert that the Department has previously rejected arguments that the particular methodology or calculation used in an

investigation was no longer appropriate based on interim changes. See Gray Portland Cement and Cement Clinker From Mexico; Preliminary Results of Full Sunset Review, 65 FR 10468 (February 28, 2000) (“Cement from Mexico”) and accompanying Issues and Decision Memorandum. PRI and Crow Butte contend that, in Cement from Mexico, the Department rejected arguments that it should not use margins in the original investigation because “the method used to calculate dumping margins in the original investigation {was} outdated and therefore obsolete.” Therefore, given a substantial case precedent, PRI and Crow Butte maintain that the types of facts presented by Tenex and AHUG are not “extraordinary circumstances” and that the Department’s preliminary results correctly relied upon the margin from the underlying investigation.

USEC’s Rebuttal Comments

USEC argues that the Department correctly determined that the magnitude of the margin likely to prevail if the Suspension Agreement were terminated was the rate calculated in the original investigation. USEC rejects AHUG’s and Tenex’s arguments that the Department cannot use this margin because it was issued for the Soviet Union as a whole, not Russia specifically, and because it is no longer applicable since Russia is now considered to be a market economy. USEC maintains that the investigation margin, since it is the only margin ever determined in this entire proceeding, remains the best information available regarding the dumping margin likely to prevail if the Department terminates the suspended investigation. USEC also contends that the SAA (at 891) makes clear that the Department should not calculate a margin in a sunset review. USEC further argues that, in the Final Results of Full Sunset Review: Uranium from Russia, 65 FR 41,439 (July 5, 2000), the Department recognized that the margin from the original investigation remains the appropriate margin to apply in sunset review proceedings, despite changes in circumstances from the time of the initial investigation.

USEC takes issue with AHUG’s and Tenex’s arguments that the original investigation margin cannot apply to Russia because it was issued for the Soviet Union as a whole, and not Russia in particular. Citing Solid Urea from Russia, and accompanying Issues and Decision Memorandum at cmts. 2 and 3 (“Solid Urea I&D Memo”), USEC argues that the Department faced this exact situation in 2005 and correctly applied the dumping margin initially established for the Soviet Union to Russia. USEC dismisses AHUG’s and Tenex’s reliance on Uzbekistan v. United States, citing to Solid Urea I&D Memo (at cmt. 2, n.7). In addition, USEC explains, Uzbekistan v. United States did not articulate a rule generally applicable to all sunset reviews or even a rule specific to margins based on pre-breakup data from the Soviet Union. According to USEC, the Court instead simply determined that the Uzbek respondents had to be given the opportunity to participate meaningfully in a sunset review after the Soviet Union’s demise where they undisputedly had tried to submit their own data but were rebuffed. USEC maintains that, in the current review, by contrast, no Russian respondent filed any substantive information, nor did any Russian respondent even submit a notice of appearance. Thus, USEC contends that Uzbekistan v. United States is irrelevant because the Department is not exercising its discretion to exclude from this proceeding data from Russian respondents for a margin calculation.

USEC argues that the change in Russia's status from a non-market economy to a market economy has no effect on the Department's use of the investigation rate calculated before Russia achieved market-economy status. USEC maintains that the Department anticipated this issue when it graduated Russia to a market-economy country in 2002, citing to the Department's Memorandum from Albert Hsu for Faryar Shirzad through Jeff May re "Inquiry into the Status of the Russian Federation as a Non-Market Economy Country Under the U.S. Antidumping Law" (June 6, 2002) ("Russia Market Economy Status Memorandum") at 2. USEC also points to Solid Urea I&D Memo (at cmt. 2) in support of its contention. According to USEC, because there has been no new margin calculated in an administrative review, the margin calculated in the original investigation continues to be probative of the behavior of Russian producers and exporters of the subject merchandise if the suspended investigation were terminated.

Finally, USEC rejects Tenex's and AHUG's arguments that the Department cannot make any determination as to the likely future margin that is based in whole or in part on future sales of enriched uranium pursuant to SWU contracts, in light of Eurodif I and Eurodif II. USEC maintains that this argument fails because it depends on an assumption not supported by record evidence that all future contracts under which Russian enriched uranium will be sold will be SWU transactions identical in all material respects to the contracts reviewed by the Federal Circuit.

Department's Position

The Department normally will provide to the ITC the margin that was determined in the final determination in the original investigation. For companies not investigated specifically, or for companies that did not begin shipping until after the order was issued, the Department normally will provide a margin based on the "all others" rate from the investigation (or, in the case of an NME investigation, the country-wide rate). Exceptions to this policy include the use of a more recently calculated margin, where appropriate, and consideration of duty absorption determinations. In addition, where the Department did not issue a final determination because the investigation was suspended and continuation was not requested, we may use the margin that was determined in the preliminary determination in the original investigation. The Department's preference for selecting a margin from the investigation is based on the fact that it is the only calculated rate that reflects the behavior of manufacturers, producers, and exporters without the discipline of an order or suspension agreement in place. In the original investigation on uranium from Russia, the Department calculated a weighted-average dumping margin of 115.82 percent for the Russia-wide rate in the preliminary determination.

With respect to Russia's graduation to market-economy status in 1992, we find that this change in Russia's status does not automatically make margins calculated during the investigation obsolete. Thus, in Solid Urea from Russia and Ammonium Nitrate from Russia, the Department determined that the graduation of Russia to market-economy status did not invalidate earlier margins based on non-market-economy methodology. Additionally, the Department's memorandum granting Russia market-economy status specifically addresses the issue of margins

the Department will use in the event of a country's transition to a market-economy status. This memorandum states:

For existing antidumping duty orders, the non-market economy-based rates will remain in effect until they are changed as a result of a review, pursuant to section 751 of the Act, of a sufficient period of time after April 1, 2002. For ongoing investigations, because the period of investigation pre-dates the effective date of this determination, the Department will continue to utilize non-market economy methodologies in those investigations. Again, any antidumping duty rates established pursuant to these investigations will remain in effect until they are changed as a result of a review, pursuant to section 751 of the Act, of a sufficient period of time after April 1, 2002.

See Russia Market Economy Status Memorandum. There have been no administrative reviews of the Suspension Agreement pursuant to section 751 of the Act since Russia gained market-economy status; therefore, consistent with the Department's decision in the Russia Market Economy Status Memorandum, the rates from the investigation continue to apply. Also, the Department finds, consistent with its decisions in Tapered Roller Bearings from Hungary and Cement from Mexico, that the fact that a different methodology would apply prospectively (as a result of Russia's graduation to a market-economy status), does not nullify the margin calculated in the investigation.

Further, although the Department recognizes that circumstances have radically changed from those existing at the time the uranium investigation against the Soviet Union, we disagree with AHUG that the Department should base its dumping margin on current data for Russia instead of the preliminary margin for the Soviet Union. Nor do we agree that "extraordinary circumstances" might exist warranting a recalculation of the margin from the original investigation. In fact, the SAA clearly states that the calculation of future dumping margins would involve "undue speculation regarding future selling prices, costs of production, selling expenses, exchange rates, and sales and production volumes." See SAA at 220.

The Department notes that there is also a substantial case precedent in its history that advises against recalculating margins in sunset reviews. Thus, in Tapered Roller Bearings from Hungary the Department determined that Hungary's graduation to market economy status did not constitute the "most extraordinary circumstances" specified in the SAA that warranted reliance upon on a dumping margin other than one calculated in prior determinations. Furthermore, the Department determined that "the margin calculated in the original investigation is probative of the behavior of Hungarian producers/exporters if the order were revoked as it is the only rate that reflects the behavior of these producers and exporters without the discipline of the order." See Tapered Roller Bearings from Hungary at 60275. Similarly, in Ammonium Nitrate from Russia the Department determined that the rates from the original investigation were the only calculated rates that reflected the behavior of producers or exporters of ammonium nitrate from Russia without the discipline of the suspension agreement in place, and the Department deemed those

rates to be the most appropriate to report to the ITC.

Moreover, the Department agrees with PRI and Crow Butte and USEC that AHUG's reliance on Uzbekistan v. United States is irrelevant for the purposes of this sunset review. As PRI and Crow Butte correctly pointed out, the Uzbekistan v. United States case became moot soon after issuance and, therefore, has little precedential value. Also, in contrast to Uzbekistan v. United States, where the Government of Uzbekistan responded to the Department's Notice of Initiation and had offered to supply the Department with information on which to calculate a revised dumping margin, no Russian respondent participated in this sunset review. Therefore, it is even more appropriate for the Department to use the BIA margin from the preliminary determination because the Russian producers have declined to participate in this proceeding and have not submitted a substantive response.

Thus, consistent with the Department's statute, regulations and past practices, we find that the margins calculated in the original investigation are probative of the behavior of Russian manufacturers/exporters of the subject merchandise were the Suspension Agreement to be terminated. As such, pursuant to section 752(c) of the Act, the Department will report to the ITC the rate of 115.82 percent from the original investigation as the magnitude of the margin likely to prevail if the Suspension Agreement were terminated. _____

Recommendation:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of review in the Federal Register.

Agree _____ Disagree _____

David M. Spooner
Assistant Secretary
for Import Administration

Date