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FINAL
REMAND DETERMINATION
USEC Inc. and United States Enrichment Corporation v. United States
Court Nos. 02-00112, 02-00113, 02-00114 and Consol. Court Nos. 02-00219, 02-0000221, 02-00227, 02-00229, and 02-00233
Slip Op. 03-34, (March 25, 2003)

SUMMARY

This remand determination, submitted in accordance with the order of the U.S. Court of International Trade on March 25, 2003 (Slip Op. 03-34), involves challenges to the initiations and final affirmative determinations by the U.S. Department of Commerce (the Department) in the antidumping and countervailing duty investigations on low enriched uranium from France, Germany, the United Kingdom, and the Netherlands. *Notice of Initiation of Antidumping Duty Investigations: Low Enriched Uranium From France, Germany, the Netherlands, and the United Kingdom*, 66 FR 1080 (Jan. 5, 2001); *Notice of Initiation of Countervailing Duty Investigations: Low Enriched Uranium From France, Germany, the Netherlands, and the United Kingdom*, 66 FR 1085 (Jan. 5, 2001); *Notice of Final Determination of Sales at Less Than Fair Value: Low Enriched Uranium From France*, 66 FR 65877 (Dec. 21, 2001) *("Final French AD Determination"); Notice of Final Affirmative Countervailing Duty Determination: Low Enriched Uranium From France*, 66 FR 65901 (Dec. 21, 2001); and *Notice of Final Affirmative Countervailing Duty Determinations: Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 66 FR 65903 (Dec. 21, 2001).

The challenges pertain to the Department's interpretation and application of its "tolling or

subcontractor" regulation, 19 C.F.R. § 351.401(h), for purposes of determining industry support; for selecting the exporters or producers for purposes of establishing export and/or constructed export price, and normal value; and for purposes of determining whether the government of France has purchased goods, as compared to services, for more than adequate remuneration.

BACKGROUND

On December 21, 2001, the Department published notices of final affirmative determinations in the antidumping duty investigation on low enriched uranium from France, and in the countervailing duty investigations on low enriched uranium from France, Germany, the Netherlands, and the United Kingdom. *Final French AD Determination*, 66 FR 65877 (Dec. 21, 2001); and *Notice of Final Affirmative Countervailing Duty Determination: Low Enriched Uranium From France*, 66 FR 65901 (Dec. 21, 2001); and *Notice of Final Affirmative Countervailing Duty Determinations: Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 66 FR 65903 (Dec. 21, 2001).

On March 25, 2003, the U.S. Court of International Trade (the Court) issued an opinion in the above cases, remanding the above issues to the Department for further explanation and consideration of its determinations. *USEC Inc. and United States Enrichment Corp. v. United States*, Slip Op. 03-34, (Mar. 25, 2003). The Court's opinion on each of the issues is summarized in the particular sections of this redetermination.

On June 6, 2003, the Department issued a draft remand redetermination in the above cases. Comments pertaining to the Department's draft redetermination were filed on June 13, 2003, by

Urenco and Eurodif in a combined submission; USEC; PACE, on behalf of the domestic workers; and the Ad Hoc Utilities Group (AHUG) on behalf of U.S. utility companies.

A. INDUSTRY SUPPORT

a. *The Department's Decision to Initiate the AD and CVD Investigations on LEU*

In making its decision to initiate the investigations on low enriched uranium, the Department was required to determine whether the petitions were "filed by or on behalf of the industry."[1] To do so, the statute directs the Department to determine whether there is sufficient support for the petition by "the domestic producers or workers" who are eligible to file a petition. To determine whether a company qualifies as a "domestic producer," the Department "examines production operations to determine whether a company qualifies as a producer of the domestic like product." *Determination of Industry Support for the Antidumping and Countervailing Petitions on Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom* (Dec. 27, 2000) ("*LEU Industry Support Mem.*"), at 8. The Department stated that "[a]t a minimum, a finding that a company is a producer of the domestic like product requires that a company perform some important or substantial manufacturing operation." *Id.* at 7. To determine whether a company may be a member of the domestic industry, the Department adopted the same test the U.S. International Trade Commission (ITC) employs to determine the appropriate domestic industry for purposes of its injury investigation, analysis and determination. To make its determination, the ITC examines a company's "production

[1] Under the countervailing duty law, section 702(c)(4) of the Tariff Act of 1930 ("the Act"); and for the antidumping duty law, section 732(c)(4) of the Act.

related activities in the United States." The Department noted that the ITC's six-factor test "focuses upon the 'overall nature' of the production related activities in the United States, to determine whether production operations are sufficient for a company to be considered a member of the domestic industry." *Id* at 8. *See, e.g., Certain Cut-to-Length Steel Plate from France, India, Indonesia, Italy, Japan, and Korea*, Inv. Nos. 701-TA-387-391 and 731-TA-816-821 (Final), USITC Pub. 3273 at 8-9 (Jan. 2000). The Department stated that "[t]he Commission typically considers six factors: (1) the extent and source of a firm's capital investment; (2) the technical expertise involved in U.S. production activity; (3) the value added to the product in the United States; (4) employment levels; (5) the quantities and types of parts sourced in the United States; and (6) any other costs and activities in the United States leading to production of the like product." *LEU Industry Support Mem.*, at 8.

In applying the test, the Department found USEC to be the sole producer of the domestic like product based upon its analysis of USEC's manufacturing operations. *Id*. at 5. The Department found that "USEC performs all of the processes necessary for enriching converted uranium." *Id*. at 8. The Department concluded that:

> In light of the fact that USEC is the only entity in the United States that enriches converted uranium to produce LEU; is the only entity with the technology and technical expertise to produce LEU; that enrichment is a necessary and major manufacturing operation in the production of LEU; and that the product output from USEC's enrichment facilities constitutes the domestic like product, we find that USEC is the only producer of LEU in the United States.

Id. at 5.

In reaching this conclusion, the Department also determined that the agency's regulation on the

treatment of subcontractors and "tolling," 19 C.F.R. § 351.401(h), was not applicable for purposes of making industry support determinations.[2] The Department reasoned as follows:

> First, we do not interpret section 351.401(h) of the Department's regulations (i.e., the "tolling regulation") to be applicable to our determinations on industry support. Instead, consistent with the language of the regulation, we find that section 351.401, including subsection (h) on tolling, was intended to "establish certain general rules that apply to the calculation of export price, constructed export price and normal value," and not for purposes of determining industry support. Our interpretation that the tolling regulation is intended for purposes of calculating antidumping margins is further supported by the absence of any parallel provision on tolling in the CVD regulations.

The Department also examined the purpose of the provisions in which the term "producer" appeared, and set forth its rationale for not applying the tolling regulation in its industry support analysis, stating as follows:

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[2] **SUBPART D - CALCULATION OF EXPORT PRICE, CONSTRUCTED EXPORT PRICE, FAIR VALUE AND NORMAL VALUE**

§ 351.401 In General

(a) *Introduction.* In general terms, an antidumping analysis involves a comparison of export price or constructed export price in the United States with normal value in the foreign market. This section establishes certain general rules that apply to the calculation of export price, constructed export price and normal value. (*See* section 772, section 773, and section 773A of the Act.)

* * *

(h) *Treatment of subcontractors ("tolling" operations).* The Secretary will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product.

19 C.F.R. § 351.401 (2000).

> In practice, moreover, the Department has never applied, nor relied upon, section 351.401(h) to determine industry support, with good reason. The purpose of the tolling regulation is to identify the party responsible for setting the price of subject merchandise sold in the United States. Under section 351.401(h), therefore, the Department focuses on which party controls the relevant sale of the subject merchandise or foreign like product. By contrast, to determine industry support, the Department seeks to identify the entity or entities (or workers) that are engaged in the production or manufacture of the identical merchandise set forth in the petition. Thus, identifying the seller for purposes of respondent selection and identifying the domestic producers for purposes of industry support are separate questions that require different examinations for different purposes.

Id. at 7.

b. *The Court's Remand on the Department's Industry Support Determination*

The Court has now remanded this issue to the Department for further examination and explanation, as appropriate. *USEC Inc. and United States Enrichment Corp. v. United States*, Slip Op. 03-34, (Mar. 25, 2003) (*USEC*). In its remand decision, the Court stated that "Commerce's decision not to apply the tolling regulation to determine who is the producer in connection with its industry support determination is based on the agency's assessment of the purpose and context of the regulation." *USEC*, at 38. The Court acknowledged that "the purpose of the tolling regulation is accurate calculation of export or constructed export price, and that the regulation does not arise in connection with the industry support determination." Id. The Court noted, however, that "it is unclear from Commerce's explanation why the definition of 'producer,' a term that is not statutorily defined, should differ between one subsection of the statute and another." Id.

In addition, the Court noted the potential incongruity that "Commerce may determine that the

utility companies are not producers of LEU for the purpose of the industry support determination, but subsequently may determine, as a result of applying the tolling regulation, that the same companies are producers for the purpose of determining export price or constructed export price." Id. at 39. Citing the principle enumerated in *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (*SKF USA*), the Court stated that "[w]here a term appears in multiple subsections within a statute, we 'presume that Congress intended that the term have the same meaning in each of the pertinent sections or subsections of the statute, and we presume that Congress intended that Commerce, in defining the term, would define it consistently.'" *Id*. at 39, quoting *SKF USA* at 1382. The Court stated that "Commerce is permitted to apply different definitions of such a statutory term only if it provides 'an explanation sufficient to rebut this presumption.'" *Id*., quoting *SKF USA* at 1382. The Court then stated that:

> as the Court is remanding the Department's determination for reconsideration of its decision not to apply the tolling regulation, Commerce also will have the opportunity to reconsider the effect of the tolling regulation on its industry support determination. If Commerce finds that the tolling regulation applies here, the agency must consider whether those entities determined to be 'producers' under the tolling regulation are also 'producers' for purposes of the industry support determination. Should Commerce determine that this is not the case, and that, in effect, a different definition of 'producer' applies in the industry support context than in the context of the export price calculation, the agency is directed to articulate an appropriate basis for such a conclusion.

Id. at 40.

c. *Analysis and Discussion of the Industry Support Determination*

In accordance with the Court's direction, the Department has reconsidered its interpretation of its tolling regulation in the industry support context. In this case, we note that in the original LEU

investigations the Department uniformly determined uranium enrichers to be the producers of LEU, both for purposes of industry support and for establishing U.S. price and normal value (NV). Because the Court has recognized the potential for reaching incongruous results (i.e., finding enrichers to be domestic producers for purposes of industry support, while finding that utility companies may, under the tolling regulation, be considered foreign producers for purposes of establishing U.S. price and NV), the Department will explain its analysis further with respect to the different definitions of the term "producer" used in these contexts. Based upon our examination and interpretation of the statutory provisions governing industry support and U.S. price and NV, together with the relevant legislative history, we find that different legislative purposes behind these statutory provisions warrant the use of different definitions of the term "producer" in order to fulfill the intent of Congress, as we will explain.

1. The Statutory Definitions

In determining whether to initiate AD and CVD investigations, the statute directs the agency to examine whether the petition has been "filed by or on behalf of the industry" under sections 702(c)(4) of the Act for countervailing duties; and section 732(c)(4) of the Act for antidumping duties.[3] Section 771(4)(A) of the Act defines the industry as "the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product."[4] Thus, to determine whether there is adequate industry

[3] 19 U.S.C.§§ 1671 and 1673a(c)(4)(A). For convenience, hereinafter we will refer to the statutory provisions under the antidumping law. Parallel provisions, however, in the countervailing duty law also apply.

[4] 19 U.S.C. § 1677(4)(A).

support for a petition, the Department must first identify the domestic like product. Once the product is identified, the agency examines the industry's production for purposes of determining whether the petition is filed by or on behalf of the industry. Specifically, section 732(c)(4) of the Act states that "the administering authority shall determine that the petition has been filed by or on behalf of the industry," if two conditions are established:

> (i) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product, and
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> (ii) the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by the portion of the industry expressing support for or opposition to the petition.

19 U.S.C. §1673a(c)(4)(A). The statute also defines the term "domestic producers or workers" for purposes of industry support determination, stating that "[f]or purposes of this subsection, the term 'domestic producers or workers' means those interested parties who are eligible to file a petition under subsection (b)(1) of this section."[5] In turn, subsection (b)(1) states that an antidumping proceeding shall be initiated whenever an interested party described in subparagraph (C), (D), (E), (F), or (G) of section 1677(9) of this title files a petition . . .".[6] The statute enumerates those parties that may file a petition, specifically listing "a manufacturer, producer, or wholesaler in the United States of a domestic like product" under subsection (C), and "a certified union or recognized union or group of workers

[5] 19 U.S.C. § 1673a(c)(5).

[6] 19 U.S.C. § 1673a(b)(1).

which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product" under subsection (D).[7]

By contrast, the statutory provisions governing the determination of export price (EP), constructed export price (CEP) and normal value (NV), refer to "the producer or exporter" of the subject merchandise.[8] Section 772(a) of the Act, for example, states that "[t]he term 'export price' means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise . . .". The term "exporter or producer" is expressly defined in the statute as

> the exporter of the subject merchandise, the producer of the subject merchandise, or both where appropriate. For purposes of section 773, the term 'exporter or producer' includes both the exporter of the subject merchandise and the producer of the same subject merchandise to the extent necessary to accurately calculate the total amount incurred and realized for costs, expenses, and profits in connection with production and sale of that merchandise.

Notwithstanding the fact that the term domestic producers or workers and the term exporter or producer are separately defined in different provisions of the statute, the term "producer" is contained in both the provisions governing industry support and the provisions governing EP, CEP, and NV. The statute, however, does not define the term "producer."

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[7] Notably, section 771(9)(A) also confers interested party status upon, *inter alia*, "a foreign manufacturer, producer, or exporter or the United States importer, of subject merchandise" but does not confer eligibility upon such entities to file antidumping or countervailing duty petitions.

[8] See Sections 772(a) and (b), and 773(1)(B). 19 U.S.C. § 1677a... and § 1677b.

2. *The Federal Circuit Decision in SKF USA*

In *SKF USA*, the Federal Circuit ruled that:

> In the antidumping statute Congress has used the term "foreign like product" in various sections, and has specifically defined it in 19 U.S.C. § 1677(16). We therefore presume that Congress intended that the term have the same meaning in each of the pertinent sections or subsections of the statute, and we presume that Congress intended that Commerce, in defining the term, would define it consistently.

263 F.3d at 1382. The Federal Circuit stated that "[w]ithout an explanation sufficient to rebut this presumption, Commerce cannot give the term 'foreign like product' a different definition (at least in the same proceeding) when making the price determination and in making the constructed value determination. This is particularly so because the two provisions are directed to the same calculation, namely the computation of normal value (or its proxy, constructed value) of the subject merchandise." Id. Citing the Supreme Court decision in *Sorenson v. Treasury*, 475 U.S. 851 (1986), the Federal Circuit in *SKF USA* also noted that this "normal rule of statutory construction" applies with particular force where Congress has specifically defined the term. 263 F.3d at 1381-82.

In this case, however, the term "producer" is not defined in the statute. As we explain further below, to fulfill the legislative purpose of the different provisions at issue, the Department must engage in a different examination, and thereby define the term differently depending upon the context. Unlike the term "foreign like product," which is directed to the same computation of normal value, the term "producer" is being applied in distinct provisions of the statute and for different purposes, requiring different examinations by the agency.

However, even under the circumstances in *SKF USA*, where the term is expressly defined and is directed to the same computation, the Federal Circuit recognized that the agency could rebut the presumption, and interpret the same term differently provided it provides a reasonable explanation. *SKF USA*, 263 F.3d at 1382. Indeed, the Federal Circuit has now ruled on the issue in *SKF USA*, affirming the Department's use of different definitions based upon the agency's further explanation on remand. *FAG Kugelfischer Georg Schafer AG, Et Al, and SKF USA, Et Al v. United States*, 02-1500, 02-1538, 2003 U.S. App. LEXIS 11607 (June 11, 2003).

3. *Discussion of "Producer" for Purposes of Industry Support*

As discussed above, for purposes of industry support, the statute defines the term "domestic producers or workers" by referring back to "those interested parties who are eligible to file a petition under subsection (b)(1) of this section."[9] Thus, to have standing to file a petition, or to support or oppose a petition, the same "interested party" requirements contained in the statute must be satisfied.

The statute, however, does not define the term "manufacturer" or "producer" of the domestic like product. Where Congress has not defined a term or otherwise indicated what criteria Commerce is to use in determining what constitutes a "producer," the agency has been granted broad discretion to establish its own methodology for determining who qualifies as a producer of the domestic like product. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). In the case of industry support, we believe any definition of such terms as "producer" or "manufacturer"

[9] Subsection (b)(1) expressly refers to an interested party described in subparagraph (C), (D), (E), (F), or (G) of section 1677(9).

must be informed by the statutory definition of the term "industry" that also appears in the industry support provisions discussed above.

The legislative history pertaining to the definition of the industry is instructive. The Statement of Administrative Action accompanying the URAA clarifies that:

> The definition of domestic industry in Article 4 is virtually identical to that in the 1979 Code and current U.S. law. See S. Rep. No. 249, 96th Cong., 1st Sess. 47, 63 (1979); H.R. Rep. No. 317, 96th Cong., 1st Sess. 51, 59-60 (1979).

SAA at 811. In turn, the Senate Report accompanying the 1979 Act that is referred to in the SAA of the URAA above, states:

> The standing requirements in section 702(b)(1) for filing a petition implement the requirements of Article 2(1) of the agreement. The committee intends that they be administered to provide an opportunity for relief for an adversely affected industry and to prohibit petitions filed by persons with no stake in the result of the investigation.

S. Rep. No. 249, 96th Cong., 1st Sess. 47 (1979) (emphasis added). For AD, see id at 63.

In determining who has standing to file petitions, the court in *Brother Industries (USA) Inc. v. United States* has recognized that "[t]he language in the legislative history is broad and unqualified. It contrasts industries suffering adverse effect with those having no stake: the former have standing; the latter do not." 801 F. Supp. 751, 756 (CIT 1992) (citing S. Rep. No. 249, 96th Cong., 1st Sess. 47 (1979))(*Brother*), aff'd 1 F.3d 1253 (Fed. Cir. 1993). In addressing the same statutory term "producer," the court in *Brother* recognized that "ITA has discretion to utilize any methodology reasonably suited to fulfilling the statutory goals." Id. at 757.

In exercising its discretion, the Department has adopted the ITC's six-factor test to determine

whether a company is a producer of the domestic like product. Like the ITC, the Department's longstanding practice has been to examine the overall nature of a company's manufacturing operations.[10] "At a minimum, a finding that a company is a producer of the domestic like product requires that a company perform some important or substantial manufacturing operation." *LEU Industry Support Mem.*, at 7.

The Department adopted and applied this test to fulfill the statutory goals intended by Congress. Whether a company is at risk from unfairly traded imports depends on the nature and extent of its operations in the United States. It stands to reason that a company may be injured by unfairly traded imports where it is in the business of producing the domestic like product. Thus, the "stake in the result of the investigation" that Congress contemplated would justify the filing of a petition is not the interest of an industrial user in pursuit of lower priced goods. The legislative history makes clear: the law was intended to protect from dumped and subsidized imports those U.S. industries that are at risk of injury due to dumped or subsidized imports.[11] The Department's practice, like that of the ITC, therefore, reasonably recognizes that "whether a company is at risk depends on the nature and extent of its operations in the United States." *Brother* 801 F. Supp. at 756 (citing the ITC's six-factor test).

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[10] *See*, *e.g.*, *Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, From Japan; Termination of Circumvention Inquiry of Antidumping Duty Order*, 59 Fed. Reg. 23693 (May 6, 1994). In that case, Commerce determined that the U.S. company's limited manufacturing operations were not sufficient to confer domestic producer status upon the company.

[11] Citing S. Rep. No. 96-249, 96th Cong., 1st Sess. 63 (1979), the court in *Brother* has recognized that "[t]he statute grants petitioner status to an industry that is at risk of injury due to dumped imports." *Brother*, 801 F. Supp. at 756.

Second, the legislative history indicates Congress' intent that the domestic producers in the industry would be engaged in the actual production of the domestic like product. The Senate Report states:

> The term industry is not defined in either the Antidumping Act or in section 303. As noted in the committee report on the Trade Act of 1974 (S. Rept. 93-1298, pp. 179-181), in practice, the phrase "an industry in the United States", as used in both laws, has been interpreted by the ITC as referring to all the domestic producer facilities engaged in the production of articles like the subsidized or dumped imported articles, although a number of investigations have been concerned with the domestic producer facilities engaged in the production of articles, which while not like the imports concerned, are nevertheless competitive with the imports in domestic markets. In either case, the industry has generally been considered to be a national industry involving all domestic facilities engaged in the production of the domestic articles involved.

S. Rep. No. 249, 96th Cong., 1st Sess. 82 (1979) (emphasis added).

The Senate Report of the 1979 Act further states that:

> Section 771(4) enacts in many respects current ITC practice, and delineates important concepts with respect to the definition and treatment of the term "industry" as that term is used in determining whether an industry in the United States is materially injured, threatened with material injury, or the establishment of an industry is being materially retarded. "Industry" generally means: (1) All the domestic producers who produce products like the imported articles subject to the investigation, or, if no such product exists, the product most similar in characteristics and in use to the imported article subject to the investigation . . . .
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> * * *
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> In examining the impact of imports on the domestic producers comprising the domestic industry, the ITC should examine the relevant economic factors (such as profits, productivity, employment, cash flow, capacity utilization, etc.), as they relate to the production of only the like product, if available data permits a reasonably separate consideration of the factors with respect to production of only the like product.

S. Rep. No. 249, 96th Cong., 1st Sess. 83-84 (1979) (emphasis added). As is clear from the legislative history, for the ITC to make its determination, it must examine data directly relevant to those companies with domestic facilities actually engaged in the production of the domestic like product, such as profits, productivity, employment, and capacity utilization "as they relate to production of only the like product." While the ITC's test is not binding upon the Department, the connection between the respective determinations cannot be ignored. Companies that have standing to file a petition should reasonably be those same companies at risk from dumped or subsidized imports. Accordingly, both agencies seek to identify domestic producers engaged in the actual production of the domestic like product.[12] Commerce's test fulfills the legislative purpose of the industry support provisions in the statute in that it recognizes that to be at risk from dumped or subsidized imports reasonably requires a company, at a minimum, to be engaged in some important or substantial manufacturing operation.

By contrast, if the Department were to interpret its tolling regulation as applicable in the industry support context, and the Department were to apply that regulation in a manner so as to bestow domestic producer status upon industrial users and consumers of the domestic like product, or other entities that have no stake in the result of the investigation (as the term was intended by Congress), the industry at risk from unfairly traded imports would be denied the opportunity to obtain relief, thereby defeating the fundamental purpose of the law.

Other incongruities could also arise from such an application that would frustrate the intent of

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[12] "The definition of domestic industry is important to the Commission's injury analysis and Commerce's initiation determination." SAA at 857.

Congress. For example, by using very different tests, the Department and the ITC could reach significantly different determinations as to the domestic producers in an industry. Because of the significant differences in the tests, each agency could potentially identify different domestic producers, and therefore different industries. In our view, such anomalous results would be inconsistent with the intent of Congress because the adversely affected industry would be denied its opportunity for relief.

Another incongruity would arise in the industry support context with respect to domestic workers if the tolling regulation were to apply. In our view, such an application would deprive domestic workers of the opportunity to obtain relief under the AD and CVD laws, and thereby defeat a fundamental object of the law.

The statutory provisions governing industry support establish that domestic workers are entitled to file and support petitions for relief from unfairly traded imports, as discussed above.[13] The SAA accompanying the URAA further clarified that the position of workers is equal to that of firms producing the domestic like product for purposes of the Department's industry support determinations. The SAA states:

> New sections 702(c)(4)(A) and 732(c)(4)(A) recognize that industry support for a petition may be expressed by either management or workers. The Administration intends that labor have equal voice with management in supporting or opposing the initiation of an investigation. Commerce's implementing regulations will make clear that in considering the views of labor, Commerce will count labor support or opposition as being equal to the production of the domestic like product of the firms in which the workers are employed.

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[13] "[W]orkers, as well as companies, may file and support petitions." Sen. Rep. 412, 103rd Cong., 2nd Sess., 35 (1994).

SAA at 862.[14]

We interpret the statute and the accompanying SAA to indicate that Congress intended the domestic workers to encompass those workers engaged in the actual production of the domestic like product. Moreover, the legislative history indicates that Congress intended that domestic workers, who are eligible to file petitions, to be those workers employed by the firms engaged in such production. Thus, the statute and SAA contemplate that the identification of the domestic producers must involve the identification of firms with workers and facilities that produce the domestic like product.

4. *Review of the Industry Support Determination in the LEU Investigations*

In this case, Commerce examined the production operations that were necessary to manufacture LEU. In determining whether USEC was the domestic producer of LEU, Commerce examined the nature and extent of USEC's manufacturing operations, finding that:

> USEC performs all of the processes necessary for enriching converted uranium. In fact, the Nuclear Regulatory Commission (NRC) requires enrichment facilities to be licensed in order to operate in the United States. The information on the record from the NRC indicates that USEC's two gaseous diffusion plants in Paducah, Kentucky and Portsmith, Ohio are the only facilities in the United States that are licensed to enrich uranium. Accordingly, USEC is the only company in the United States with the technology and the technical expertise necessary to produce LEU. And, all LEU

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[14] In implementing its regulation on industry support, Commerce discussed the position of workers in the preamble to its proposed regulation, stating that "[c]onsistent with the SAA at 862, an opinion expressed by workers will be considered to be of equal weight to an opinion expressed by management. Thus, for example, if a union expressed support for a petition, the Department would consider that support to be equal to the production of all of the firms that employ workers belonging to the union. On the other hand, if management and workers at a particular firm expressed opposite views with respect to the petition, the production of that firm would be treated as representing neither support for, nor opposition to, the petition." *Antidumping Duties; Countervailing Duties; Proposed Rule*, 61 FR 7307, 7314 (Feb. 27, 1996). *See also* 19 C.F.R. § 351.203(e)(3) (2000).

> produced in the United States must be enriched by USEC.
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> Further, the information on the record indicates that enrichment is a major manufacturing process in the production of LEU, responsible for a substantial portion of the total value of LEU; and that enrichment is a necessary process for the production of LEU. Finally, we note that the product output from enrichment facilities is LEU, as defined in the petition.
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> In light of the fact that USEC is the only entity in the United States that enriches converted uranium to produce LEU; is the only entity with the technology and technical expertise to produce LEU; that enrichment is a necessary and major manufacturing process in the production of LEU; and that the product output from USEC's enrichment facilities constitutes the domestic like product, we find that USEC is the only producer of LEU in the United States. Accordingly, we determine that petitioner accounts for 100 percent of LEU production in the United States.

LEU Industry Support Mem., at 4-5.

By contrast, Commerce determined that utility companies were purchasers of LEU rather than producers, finding that:

> the utility companies do not qualify as producers of LEU. These companies do not engage in any type of manufacturing activities related to the production of LEU: they make no claim to have any LEU manufacturing operations; no capital investment in production facilities; they add no value to the product through the performance of any manufacturing operations; and have no employees dedicated to manufacturing. Unlike producers, we find that the utility companies are purchasers and industrial users of LEU.

Id. at 8 (citation omitted).

Citing the ITC factors used by the Department in *Certain Portable Electric Typewriters from Singapore: Rescission of Initiation of Antidumping Duty Investigation and Dismissal of Petition*, 56 Fed. Reg. 49880 (Oct. 2, 1991), the agency stated, "[t]he utilities make no claim as to any of these factors." *LEU Industry Support Mem.*, at 8, n. 16. Nor is there any evidence on the

record to indicate, or support the conclusion, that utility companies have satisfied any of the factors used to determine whether a company is a producer of the domestic like product.

The Department's determination comports with the remedial purpose of the law and the clear intent of Congress. The "stake in the result of the investigation" is not the interest of a consumer or industrial user in pursuit of lower priced goods, as discussed above. Rather, the law was intended to protect from unfair trade those U.S. industries that are at risk due to dumped or subsidized imports. The utility companies are not at risk of injury due to dumped or subsidized imports of LEU. To the contrary, as the Department determined: "[u]nlike producers, we find the utility companies are purchasers and industrial users of LEU." *Id*. at 8. "The principal use of LEU is for the generation of electricity." *USEC Petition*, Prop. Doc. 1, at I-9. It is undisputed that the U.S. utility companies are in the business of producing electricity for sale to consumers in the United States.[15] As such, their business interest, like that of any industrial user, lies in obtaining lower priced LEU in an effort to keep the cost of producing electricity down. Accordingly, unlike domestic producers, they have no stake in the result of these investigations, as envisaged by Congress.

As for the domestic workers, in this case, PACE, the union representing the workers engaged in the actual production of LEU, joined USEC in the AD and CVD petitions. The Department found that the domestic workers provided an independent basis for industry support. *LEU Industry Support*

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[15] "LEU is purchased by U.S. utilities for fabrication and manufacture into fuel subassemblies, which are used for nuclear reactors in the production of electricity." *USEC Petition*, Prop. Doc. 1, at I-9. The respondents have conceded this point as well. See Plaintiffs' Brief at 24, recognizing that "the utilities consume the nuclear fuel in their reactors."

Mem., at 5. By contrast, the utility companies were found to "have no employees dedicated to manufacturing [of LEU]." *Id*. at 8.

Finally, we find that any application of the tolling regulation for purposes other than the establishment of U.S. price and normal value also presents the potential incongruity of broadly defining the U.S. domestic industry based upon how an entity purchases or obtains the domestic like product, rather than upon its stake in the results of an investigation. For example, if U.S. utilities, by virtue of the tolling regulation, could qualify as domestic producers of LEU based upon how the contractual arrangements are structured, then any entity that obtains LEU from a U.S. enricher, under similar contractual arrangements, could also qualify as a member of the U.S. domestic industry. Accordingly, to the extent that Japanese, French or British utility companies, for example, obtain LEU from USEC under similar arrangements as U.S. utilities, then these foreign utility companies would also qualify, by virtue of the tolling regulation, as members of the U.S. domestic industry. It is inconceivable how a foreign utility could be adversely affected by unfairly traded LEU in the United States. More importantly, in our view, such a result is not what Congress intended when it enacted the provisions on industry support. Nothing in the statute or the relevant legislative histories supports such a broad application of the AD and CVD laws. In our view, the application of the tolling regulation in this context would frustrate the intent of Congress because it would fail to provide an opportunity for relief for an adversely affected industry, and conversely would fail to prohibit petitions filed by persons with no stake in the result of the investigation, contrary to Congress' intent.

5. *"Producer" for Purposes of Establishing U.S. Price and Normal Value*

Unlike industry support determinations, where the legislative purpose of the provisions is to identify those entities that, by virtue of their facilities and workers dedicated to the production of the domestic like product, have a stake in the results of an investigation, the purpose of the provisions governing U.S. price and normal value is to identify the seller of the subject merchandise and foreign like product, as discussed below.

The term "producer" appears in the statutory provisions governing the establishment of U.S. price and normal value. As noted above, section 772(a) of the Act, directed at export price, states that export price means "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise."[16] Similar language on "producer or exporter" is contained in the constructed export price provision.[17] Under these provisions, the Department need not identify and select the foreign "producer" as the respondent in an antidumping investigation. For respondent selection, the statute provides that export or constructed export price may be established by the sale of either "the producer or exporter" of the subject merchandise. While the legislative histories of the trade acts provide no guidance as to whether the Department is to establish a preference for exporter over producer, the statutory provisions, including section 773(a)(1)(B) governing the determination of normal value, all focus upon the price of

[16] 19 U.S.C. § 1677a(a) (emphasis added).

[17] See 19 U.S.C. § 1677a(b).

the subject merchandise or foreign like product.[18] Accordingly, the Department selects the respondent in an investigation or administrative review based upon which entity sells the subject merchandise and foreign like product.

In promulgating its regulation governing the calculation of U.S. price and normal value, and in particular the subsection addressing "subcontracting" or "tolling," the Department recognized that the focal point of the regulation is the sale of subject merchandise and foreign like product. Specifically, the relevant subsection of the regulation states the Department "will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product."[19]

The regulation was promulgated to assist the Department in establishing U.S. price and normal value. Accordingly, for purposes of establishing U.S. price and normal value, the Department does not consider it essential that the entity selected as an appropriate respondent be engaged in any manufacturing operations. Rather, the traditional functions of a producer in this context are not essential to the determination of whether the entity sold the subject merchandise and foreign like product. To clarify further, producers frequently sell the merchandise they produce, and thus they may be identified and selected as the appropriate respondents. The relevant sale of subject merchandise, however, may be made by other companies, such as exporters. In such cases, the Department selects

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[18] See 19 U.S.C. § 1677b(a)(1)(B).

[19] 19 C.F.R. § 351.401(h).

the exporter as the appropriate respondent.[20] This is also the case with resellers in proceedings in which the reseller has sold the subject merchandise. Thus, in this context, the performance of traditional producer functions, such as manufacturing operations in which value is added to the product, is not essential to the fulfillment of the object and purpose of the regulation, which is to establish U.S. price and normal value. Accordingly, the Department will select the exporter or reseller of subject merchandise over the producer, not based upon the producer's performance of any producer-type functions, but based upon the Department's determination of which entity sells the subject merchandise to or into the United States.[21]

In promulgating its tolling regulation, the Department indicated the relevance of the traditional manufacturing operations when it stated that "[t]he Department will not consider the subcontractor to be the manufacturer or producer regardless of the proportion of production attributable to the subcontracted operation or the location of the subcontractor or owner of the goods." *Antidumping Duties; Countervailing Duties; Proposed Rule*, 61 FR 7307, 7330 (Feb. 27, 1996). In such cases, the Department looks to the seller of the subject merchandise as the respondent, regardless of whether

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[20] See, e.g., *Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat From Canada*, 68 FR 24707, (May 8, 2003) (selecting the Canadian Wheat Board as the mandatory respondent based upon its status as exporter of the subject merchandise).

[21] *See*, *e.g.*, section 773(a)(1)(B) of the Act establishing normal value as "the price" at which the foreign like product is first sold. See also section 773(a)(3)(A), where producer knowledge "at the time of the sale that the merchandise was destined for exportation" is a factor in determining whether the producer's sale in the home market will be used to establish normal value. *See also Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Taiwan*, 64 FR 15493, 15498 (Mar. 31, 1999).

the seller has manufacturing operations. This definition of producer fulfills the purpose of the statute in that it enables the agency to establish as accurately as possible U.S. price and normal value for purposes of determining the margin of dumping.

Industry Support Conclusion

Based upon the above, the Department may interpret the term producer in the U.S. price and normal value contexts differently than in the industry support context, depending on the circumstances of the case, in order to fulfill the legislative purposes behind these provisions, as envisaged by Congress. With respect to the Department's tolling regulation, the Department has never applied its regulation on tolling for purposes of industry support because to do so would frustrate the intent of Congress to properly identify those domestic producers engaged in the production of the domestic like product, and thus it would fail to provide U.S. domestic industries with the opportunity to obtain relief as intended by Congress.

Comments from Parties

USEC[22] and the workers' union, PACE,[23] filed comments supporting the Department's analysis and conclusion on industry support. These parties have also made suggestions to the Department for clarification purposes. We have made changes to the remand determination as appropriate for clarification purposes.

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[22] USEC Inc., and United States Enrichment Corporation (collectively USEC).

[23] The Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO and Local 5-689 (PACE).

The Ad Hoc Utilities Group (AHUG) submitted comments on industry support. Urenco and Eurodif have not submitted comments on this issue, but have instead indicated their support and agreement with AHUG's comments. *Urenco/Eurodif Comments*, June 13, 2003, at 3, n. 2.

AHUG's Comments on Industry Support

AHUG advances several points to support its contention that the justifications provided by the Department's industry support determination do not satisfy the standard for giving the same term in the statute different meanings. AHUG's Comments, at 3. AHUG first contends that the Department's draft remand ignores the plain language of the statute, and relies instead upon legislative history that does not pertain to the applicable section of the statute. *Id*. at 4-5. AHUG further contends that the Department lacks authority to require manufacturing operations in order to determine whether entities are producers for purposes of industry support. *Id*. at 7. AHUG further asserts that the Department's practice does not require manufacturing operations for purposes of industry support. *Id*. at 7-8.

Next, AHUG argues that the Department's interpretation of the term "producer" in the industry support context contradicts the plain language of the statute and the Department's own regulation on tolling. *Id*. at 6. Instead, AHUG argues, the statute provides mechanisms for preventing domestic producers benefitting from unfairly traded imports from blocking initiation of investigations, while recognizing that such producers are still part of the domestic industry. *Id*. at 9. Finally, AHUG contends that it remains unclear whether USEC has a cognizable stake in the domestic industry.

Department Position:

At the outset, we note that, fundamentally, AHUG is arguing that the Department, as a matter of law, is prohibited from applying the ITC's 6-factor test to determine whether an entity is a "producer" for purposes of industry support. This same test has been expressly approved by Congress in the relevant legislative history, and was held to be a reasonable interpretation of the statute by the Court of International Trade in *Brother*. Accordingly, we have continued to apply the test in this case. Each of AHUG's points is discussed further below.

With respect to the relevance of the statutory definition of the term "industry" and its legislative history, AHUG contends that the Department is attempting "to avoid the plain language of the statute by asserting that the legislative history related to the definition of industry in Section 771(4) evidences congressional intent to limit the domestic industry for industry support purposes to those entities with manufacturing facilities." *Id*. at 5. AHUG argues that, to the contrary, the legislative history confirms that Section 771(4) was intended to reflect and apply to the practice of the ITC in determining whether an industry is materially injured. AHUG claims that the statute plainly distinguishes between the analysis required for the ITC to identify the relevant industry to determine injury, on the one hand, and the domestic interested parties pertinent to the Department's industry support determination, on the other. According to AHUG, the Department cannot refer to legislative history of another, distinct provision to interpret already clear statutory language." *Id*. at 5.

We disagree with AHUG. Rather, we find that Congress intended the term "industry," as defined in section 771(4)(A) of the Act, to be relevant and applicable to the Department's analysis for

purposes of industry support. First, as discussed in the body of the Department's remand determination above, to determine whether to initiate AD and CVD investigations, the statute directs the agency to examine whether the petition has been "filed by or on behalf of the industry" under sections 702(c)(4) of the Act for countervailing duties and section 732(c)(4) of the Act for antidumping duties. The legislative history that we relied upon, moreover, expressly refers to the standing requirements for filing a petition. The legislative history addressing the term "industry" states:

> The standing requirements in section 702(b)(1) for filing a petition implement the requirements of Article 2(1) of the agreement. The committee intends that they be administered to provide an opportunity for relief for an adversely affected industry and to prohibit petitions filed by persons with no stake in the result of the investigation.

S. Rep. No. 249, 96th Cong., 1st Sess. 47 (1979) (emphasis added). For AD, see id at 63. As discussed above, the court in *Brother* recognized the relevance of, and specifically relied upon, the same legislative history of the 1979 Act in affirming the Department's use of the 6-factor test to determine whether the entity at issue in that case was a producer of the domestic like product.[24] Finally, the SAA accompanying the URAA clarifies that:

> The definition of domestic industry is important to the Commission's injury analysis and Commerce's initiation determination. With the exception of conforming changes in terminology and . . . , section 222(a) of the bill does not change the basic definition of domestic industry in section 771(4)(A).

SAA at 857 (emphasis added). Accordingly, we do not accept AHUG's conclusion that the definition

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[24] AHUG dismisses the relevance of the court's decision in *Brother* because that decision pre-dated the adoption of the Department's tolling regulation. AHUG, however, does not address the court's reliance upon the legislative history pertaining to the term "industry" in that case and its relevance to the Department's determinations.

of the term "industry" defined in section 771(4), and its legislative history, is not relevant to the Department's determinations on industry support.

Next, AHUG contends that the Department's application of the tolling regulation as limited to the context of defining the "producer or exporter" for EP or CEP is contradicted by the plain language of the statute and the Department's regulation on tolling. AHUG contends that "the tolling regulation, by its terms, applies to the identification of a 'manufacturer or producer.'" *AHUG's Comments*, at 6. AHUG argues that if the tolling regulation were focused solely on identifying the party responsible for the export price, it would not have substituted the term "manufacturer or producer" for the statute's use of the term "producer or exporter." AHUG concludes that the only reasonable interpretation of this difference in terminology is that the tolling regulation applies to toll manufacturing generally. Because established rules of statutory and regulatory construction require that regulations must be read to give effect to every word, AHUG asserts, the Department's interpretation of its tolling regulation is impermissible because it would replace the term "manufacturer" with the term "exporter." *Id*.

We disagree. First, by its own terms, the regulation states that the provision applies for purposes of establishing EP, CEP and NV, as discussed above. Thus, the plain language of the regulation supports the Department's interpretation that it is not applicable for purposes of industry support. Second, as discussed above, the application of the regulation for purposes of determining industry support would be contrary to the intent of Congress established in the legislative history.

AHUG next contends that the Department's practice does not require manufacturing operations for purposes of determining industry support. *Id*. at 7. AHUG argues that the Department incorrectly

relies upon *Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, From Japan; Termination of Circumvention Inquiry of Antidumping Duty Order*, 59 FR 23693, 23694 (May 6, 1994) (*Industrial Belts From Japan*). According to AHUG, the salient issue in that case was not whether the company, Brecoflex, had manufacturing facilities, which it did, but rather whether the activities performed in the United States altered the essential nature of the imported merchandise such that it could be considered domestic like product. Based upon that inquiry, AHUG argues, that case has no bearing whatsoever on whether or not a tollee is required to have manufacturing operations to be counted as part of the domestic industry in an industry support analysis. *AHUG's Comments*. at 7-8.

We disagree. The Department has stated that to be a domestic producer, an entity, at a minimum, must engage in some important or substantial manufacturing operation. While it was established in *Industrial Belts From Japan* that Brecoflex engaged in some processing operations, i.e., finishing and packaging, the Department found that the operations were not sufficient or adequate for the company to be considered a domestic producer. Thus, the test applied in that case was not limited to whether Brecoflex had manufacturing facilities. To the contrary, the test allowed the agency to determine the nature and extent of Brecoflex's operations in determining whether the entity should qualify as a domestic producer. Thus, AHUG is correct in that having some manufacturing or finishing operation alone may not be sufficient to establish the entity as a producer of the domestic like product. This is a minimum requirement. In our view, *Industrial Belts From Japan* stands for the principle that, at a minimum, an entity must establish that it performs an important or substantial manufacturing

operation to be considered a producer of the domestic like product. Accordingly, the decision in *Industrial Belts From Japan* is consistent with the decision in the instant case to consider the nature and extent of the manufacturing operations in determining whether the entity qualifies as a producer of the domestic like product.

Next, AHUG cites two cases, *Ferrovanadium From China and South Africa*[25] and *Live Cattle From Canada*,[26] to support its proposition that the Department's recent cases indicate that an entity need not have like-product manufacturing operations to be considered part of the domestic industry, and that the Department need not align its domestic industry determination with that of the ITC. *Id*. at 8-9. Specifically, AHUG contends that in *Ferrovanadium* three of the five petitioners were tollees with no like-product manufacturing of their own. In *Live Cattle*, AHUG contends, the Department included wholesalers of the domestic like product within the industry for purposes of industry support.

We disagree with AHUG's points. With respect to *Live Cattle*, the case involved wholesalers of the domestic like product who qualified as interested parties, respectively, under subsection 771(9)(C), and associations thereof under subsection 771(9)(E) of the Act. *Live Cattle Industry Support Memorandum*, at 17. In the case of LEU, no party claims, nor does the evidence on record support a conclusion, that the U.S. utility companies are wholesalers of LEU. The Department's 6-

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[25] *Initiation of Antidumping Duty Investigations: Ferrovanadium From China and South Africa*, 66 FR 66398 (Dec. 26, 2001) (*Ferrovanadium*).

[26] *Initiation of Antidumping Duty Investigations: Live Cattle from Canada and Mexico*, 63 FR 71886 (Dec. 30, 1998) (*Live Cattle*).

factor test is to determine whether a company qualifies as a domestic producer, not a wholesaler, of the domestic like product.

With respect to tollees, in *Ferrovanadium*, a case initiated after the initiations of the LEU investigations, the Department made no affirmative finding that tollees are to be considered producers of the domestic like product. The notice of initiation indicates that the Department "received no opposition to the petitions." *Id*. at 66399. The Department found that two companies in that case, "BMC and Shieldalloy together account for 100 percent of U.S. product of ferrovanadium." Therefore, the Department had no need to address the status of tollees in that case. There is no discussion of the tolling regulation and its application; and no industry support memorandum was prepared given the above facts as to BMC and Shieldalloy. The issue of which companies qualify as domestic producers and upon what basis was not an issue for purposes of initiation and was not addressed in a meaningful way in the initiation notice. Consequently, we believe that the status of the other companies in that case was not sufficiently highlighted and therefore the case should not be considered to represent a change in practice for the agency.

Instead, the Department's practice in this area is more clearly reflected in the recent case of *Certain Color Television Receivers from Malaysia and the People's Republic of China*.[27] In that case, the Department examined the operations of a toller to determine whether the entity was a producer of the domestic like product for purposes of industry support. The petitioning company

[27] *Notice of Initiation of Antidumping Duty Investigations: Certain Color Television Receivers from Malaysia and the People's Republic of China*, 68 FR32013 (May 29, 2003).

submitted information on the 6-factors. The Department concluded that the company was a domestic producer because, *inter alia*, it added significant value in its CTV production and had substantial capital investment in its CTV production facility. *See* *CTV Industry Support Memorandum*, at 5. That decision went on to state that the Department's tolling regulation was not applicable for purposes of industry support determinations, based upon the language and purpose of the regulation to establish U.S. price and normal value. *Id*. In sum, the Department continues to maintain in practice the position that to be a domestic producer, a company must, at a minimum, engage in some important or substantial manufacturing operation, and that the 6-factor test continues to be an important part of the agency's practice with respect to determining whether an entity is a producer for purposes of industry support.

In its next point, AHUG contends that the Department's alleged requirement that producers have manufacturing facilities in order to prevent parties benefitting from unfairly traded imports from blocking initiation of investigation is unfounded. According to AHUG, Congress expressly provided a mechanism for discounting the opinion of members of the domestic industry when they are related to foreign producers or are importers of subject merchandise. AHUG argues that because Congress has already determined the precise circumstances under which a party's opinion may be disregarded on the basis that it benefits from dumped or unfairly subsidized imports, the Department cannot go beyond the existing statutory scheme to disqualify parties that are neither related to foreign manufacturers nor importers.

We disagree with AHUG on this point. First, the issue of whether an entity qualifies as a

member of the domestic industry revolves around whether the entity has a stake in the results of an investigation, as discussed above, i.e., whether the entity can be at risk from unfairly traded imports. AHUG's arguments as to other provisions of the statute, such as those governing the treatment of domestic producers who are related to foreign producers, and who are importers of subject merchandise, do not shed light on how the Department is to interpret the term "producer" for purposes of industry support in the first instance. We note, moreover, that AHUG has not attempted to explain how the utility companies, under any scenario, would be at risk from unfairly traded imports of LEU. Apart from legal arguments concerning the interpretation of the language of the statute and tolling regulation, and the relevant legislative histories, AHUG makes no argument as to why Congress would have intended to extend the relief available under the AD and CVD laws to cover entities which are not at risk from unfairly traded imports.

As a final matter, AHUG argues that it remains unclear whether USEC has a cognizable stake in the domestic industry. *AHUG Comments*, at 10. AHUG states that it is a matter of public record that USEC imported 5.5 million SWUs from Russia in 2000. AHUG points out that USEC exports the great majority, if not all, of the LEU produced at the U.S. facilities, while it delivers Russian origin material to U.S. utility companies. AHUG complains that the Department has not dealt with the legal implications of allowing a company to use the trade remedy law to protect sales in the United States of its imports from a third country, rather than domestic production." *Id*.

We note first that AHUG does not set out a legal basis for the Department to undertake the analysis it suggests, nor any statutory provisions that would support such an examination. We note, for

example, that the statute contains no public interest provision. Instead, the statute states that an antidumping proceeding "shall be initiated whenever an interested party" alleges the necessary elements under section 731 of the Act. The statute does not require, nor provide a basis for, the Department to determine whether to initiate an investigation based upon how a producer disposes of its domestic production, whether it sells it abroad or in the United States. The relevant issues for determining industry support in the 20-day period following the filing of a petition involves, *inter alia*, resolution of whether the entity is a producer of the domestic like product, and whether there is sufficient industry support for the petition for purposes of initiation. To the extent a domestic industry is materially injured by unfairly traded imports from the countries identified in the petitions, the law provides a remedy to the domestic industry, regardless of which markets domestic producers choose to serve by virtue of their sales of the domestic product.

Second, we note that if the facts are as AHUG suggests, i.e., that USEC sells its domestic production abroad, but sells its Russian SWUs to U.S. utility companies, then the potential incongruity of applying the tolling regulation in the industry support context, as discussed in the body of this remand determination, would be present in this case. As noted above, if U.S. utilities, by virtue of the tolling regulation, could qualify as domestic producers of LEU based upon how the contractual arrangements are structured, then any entity that obtains LEU from a U.S. enricher, under similar contractual arrangements, could also qualify as a member of the U.S. domestic industry. We noted, therefore, that to the extent Japanese, French or British utility companies, for example, obtain LEU from USEC under similar arrangements as U.S. utilities, then these foreign utility companies would also qualify, by virtue of

the tolling regulation, as members of the U.S. domestic industry. Under the facts presented by AHUG, however, USEC sells its domestic production abroad, but sells its Russian LEU, downblended from HEU, to the U.S. utilities. Thus, apart from the incongruity of applying the tolling regulation in this context, such an application in this case would not establish the U.S. utilities as domestic producers of LEU. We believe, therefore, that the facts in this case further demonstrate the potential incongruity of applying the tolling regulation in the industry support context, consistent with the reasons stated above.

B. THE AGENCY'S TOLLING REGULATION

a. *The Department's Analysis Under the "Tolling Regulation"*

In making its final affirmative determination, the Department examined and addressed, *inter alia*, the distinct issues of whether the AD and CVD law applies to LEU entering the United States pursuant to enrichment contracts; and separately, whether foreign enrichment companies are the appropriate respondents in the AD investigations, based upon the Department's tolling regulation and application to the facts in this case.

(i) *Scope of the AD and CVD Law*

Separate from our analysis and conclusions in the final determinations with respect to the Department's tolling regulation, we determined that "all LEU from the investigated countries entering the United States for consumption is subject to the AD and CVD laws." *Final French AD Determination*, 66 FR at 65878. In making that determination, we stated that "the AD and CVD laws were enacted to address trade in goods." We further stated that "the issue of whether merchandise entering the United States is subject to the AD and CVD laws depends upon whether the merchandise produced in, and exported from, a foreign country is introduced into the commerce of the United States." *Id*. We also found that:

> In these investigations, no party disputes that the LEU entering the United States constitutes merchandise. As the product yield of a manufacturing operation, the Department continues to find that LEU is a tangible product. Second, it is well established, and no party disputes, that the enrichment process is a major manufacturing operation for the production of LEU, and that enrichment is a required operation in order to produce LEU. Thus, we find that the enrichment process constitutes substantial transformation of the uranium feedstock. We continue to find, therefore, that

> the LEU enriched in and exported from Germany, the Netherlands, the United Kingdom and France is a product of those respective countries.

66 FR at 65879.

We also stated that "the LEU at issue {i.e., under SWU or enrichment transactions} enters the commerce of the United States. Thus, the question of whether enrichers sell enrichment processing, as compared to LEU, is not relevant to the issue of whether the AD and CVD law is applicable. Rather, it is only relevant in these investigations for purposes of determining how to calculate the dumping margin and how to determine who is the producer/seller of subject merchandise." *Id*.

With respect to arguments raised that enrichment is a service beyond the scope of the AD and CVD law, we noted, *inter alia*, that "reference to the term 'services' mischaracterizes the nature of enrichment operations, and attempts to place a major manufacturing operation which produces merchandise squarely outside the realm of trade in goods, based solely upon the way in which particular sales of such merchandise are structured." *Id*.

Some parties argued that the AD and CVD laws are inapplicable because the utility companies cannot be considered the sellers of subject merchandise since they do not sell LEU, but instead sell electricity to U.S. consumers. These parties concluded that the law is not applicable because no entity sells the subject merchandise. In that context, we stated that "[i]t does not matter whether the producer/exporter sold subject merchandise as subject merchandise, or whether the producer/exporter sold some input or manufacturing process that produced subject merchandise, as long as the result of the producer/exporter's activities is subject merchandise entering the commerce of the United States."

Id.

The Department also addressed respondents' and AHUG's arguments that the tolling regulation provides a basis for obtaining an exemption under the law for the LEU at issue, stating that "we do not interpret section 351.401(h) of the Department's regulations to be relevant or applicable in determining whether merchandise entering the United States is subject to the AD and/or CVD laws." *Id*. 66 FR at 65880. The Department stated:

> Instead, section 351.401, including subsection (h) on tolling, was intended to "establish certain general rules that apply to the calculation of export price, constructed export price and normal value," and not for the purpose of determining whether the AD and/or CVD laws are applicable. Our interpretation that the tolling regulation is intended solely for purposs of calculating dumping margins is further supported by the absence of any parallel provision on tolling in the CVD regulations.
>
> Furthermore, in practice, we have never applied, nor relied upon, section 351.401(h) to exempt merchandise from AD proceedings, nor have we ever applied the provision in CVD proceedings. Moreover, our application of the tolling regulation in SRAMs from Taiwan does not support AHUG's or respondent's claim for exemption from the AD and CVD laws. In that case we applied the tolling regulation, seeking to determine which party made the relevant sale of subject merchandise.

Id. 66 FR at 65880 (citations omitted).

(ii) *Determination of the Producers of Subject Merchandise*

The Department determined that the foreign enrichers are the producers of the subject merchandise for purposes of establishing U.S. price and normal value for several reasons. First, the Department found that "the enrichment process is such a significant operation that it establishes the fundamental character of the LEU." *Id*. 66 FR at 65884. "Second, the enrichers control the production process to such an extent that they cannot be considered tollers in the traditional sense

under the regulation. Third, utility companies do not maintain production facilities for the purpose of manufacturing subject merchandise." *Id*. Finally, the Department reasoned that "the overall arrangement, even under the SWU contracts, is an arrangement for the purchase and sale of LEU." *Id*.

b. *The Court's Remand on the Department's Tolling Regulation*

The Court has now remanded this issue to the Department for further reconsideration of its decision not to apply the tolling regulation in this case. *USEC*, Slip Op. 03-34, (Mar. 25, 2003). In reviewing the case, the Court stated that the circumstances in this case largely resemble the tolling arrangements seen in earlier determinations by the Department. The Court noted that, like the producer, Akai, in *Certain Forged Stainless Steel Flanges from India*, the utilities in this case direct and control the process of producing the merchandise, i.e., nuclear fuel. Using contractors at each step, the Court noted, they coordinate the production of uranium, LEU, and fuel rods. As in *Polyvinyl Alcohol from Taiwan*, where the contracting company provided the material to be processed, the utilities in this case provide the feed uranium to the enrichers and pay separately for the work performed, measured in SWUs. The utilities, by supplying the feed uranium, accept the risk of fluctuations in the price of UF6 and can make the decision as to how much UF6 versus how many SWUs to purchase in a given transaction. *USEC*, at 22-23.

The Court examined the contracts, finding that SWU contracts require the utility customer to provide the quantity of feed necessary to produce the desired quantity and assays of LEU. The Court also found that the utility customer retains title to the feed uranium until it is enriched. Upon enrichment and delivery of the LEU, the title to the feed is considered extinguished and the customer gains title to

the LEU. *Id*. at 23. The Court also found it significant that the contracts for LEU state that once the separative work is performed and the LEU is delivered, the feed material shall be deemed to have been enriched; whereupon the customer takes title to the LEU associated with such feed material and title to the feed material will be extinguished. *Id*. The Court found that "[t]hese contractual provisions acknowledge the fungible nature of feed uranium while establishing a legal fiction that the enrichment process will be performed on the uranium provided by the customer." *Id*. at 24. Based upon its examination of the contracts, the Court found that the SWU contracts indicate that the provision of feed uranium is not treated by the parties as a payment in kind, but the provision of specific material, owned by the customer, to be enriched. The Court concluded that "the contractual provisions, without more, do not support Commerce's interpretation that the provision of feed uranium is substantively a payment in kind." *Id*.

Moreover, the Court found that the designation by the utilities of particular assays for the LEU and for uranium tails is analogous to DuPont's provision of specifications to Chang Chun in *Polyvinyl Alcohol from Taiwan*, and to Akai's control of the specifications in *Certain Forged Stainless Steel Flanges from India*, where the Department found these companies to be producers of the subject merchandise. In the case of LEU, the Court found that the designation of quantities and assays is based on (1) the design of the core reactor, which determines the level of U235 needed by that reactor, and (2) the utility's needs at a particular time, depending on its operating cycle and the amount of fuel that has been spent. *Id*. at 24-25. The Court stated that the utilities provide these specifications to the enricher, which then produces LEU in the required quantities and assays. *Id*. at 25.

Citing *SRAMs from Taiwan* and *Certain Forged Stainless Steel Flanges from India*, the Court stated that "Commerce has previously indicated that control over the specifications of the final product was sufficient control to be considered a producer. Companies that did not engage in actual manufacturing processes have previously been held to be producers of subject merchandise." *Id*. The Court concluded that "if the text of 19 C.F.R. § 351.401(h) and Commerce's prior decision were applied to the evidence on this record, the SWU contracts would be treated as contracts for the performance of services, and the enrichers would be treated as tollers and the utilities as the producers of LEU." *Id*. at 26-27.

The Court then examined the Department's grounds for treating the enrichers as producers. Finding unpersuasive the Department's basis that the enricher's operations establish the fundamental character of LEU, the Court reasoned that in prior tolling cases, it has been the toller that created the "essential character" of the finished good by transforming the raw materials or inputs into subject merchandise. In the case of LEU, the Court noted, the enricher transforms feed uranium into LEU. "Yet, as in earlier cases, while the enricher's operations create the 'essential character' of LEU, the enricher does not acquire ownership over either the feed or the final product, and neither its operations nor its pricing account for the full value of the finished LEU." *Id*. at 27-28. Second, the Court found unpersuasive the Department's conclusion that enrichers control the production of LEU under SWU contracts because, like Akai in *Certain Forged Stainless Steel Flanges from India*, the utilities control the specifications of the final product, even though, as in past determinations by the Department, "the actual processes of creating the product are left within the control of the tollers." *Id*. at 28-29.

Third, the Court found unpersuasive the Department's reasoning that the utility companies have no production facilities for the purpose of manufacturing subject merchandise. Citing *SRAMs from Taiwan*, *Certain Pasta from Italy*, and *Certain Forged Stainless Steel Flanges from India*, once again, the Court noted that in prior determinations the Department found entities to be producers who did not maintain manufacturing facilities, but that this did not prohibit the application of the tolling regulation. *Id*. at 29. Finally, the Court found unpersuasive the Department's basis that "the overall arrangement, even under the SWU contracts, is an arrangement for the purchase and sale of LEU." The Court noted that under any tolling arrangement, the "overall arrangement" is one for acquisition of a good, usually manufactured by the toller. Again, the Court reasoned that the agency previously distinguished toll-produced goods on the grounds that the toller does not acquire ownership, and the toller's price for its work does not represent the full value of the good. *Id*. at 30.

The Court, therefore, concluded that it could not "reconcile the Department's prior distinctions between tolling services and sale of goods with the agency's statements in this case that EUP and SWU contracts are 'functionally equivalent' and '[i]t does not matter whether the producer/exporter sold subject merchandise as subject merchandise, or whether the producer/exporter sold some input or manufacturing process that produced the subject merchandise, as long as the result of the producer/exporter's activities is subject merchandise entering the commerce of the United States.'" *Id*. at 30-31. The Court stated that "Commerce's claim that the sole difference between enrichment transactions and sales of LEU under EUP contracts is the way such transactions are structured fails to take into account a critical difference between the two transactions: what is purchased." *Id*. at 31.

The Court found that the SWU transactions do not contemplate the sale of the completed product, and do not include the significant cost of the natural uranium, which is approximately 35 percent of enriched uranium's total value. *Id*. at 32. The Court pointed out that the Department previously recognized "where the price paid for the subject merchandise does not include the entire value of such merchandise, but instead only that portion of the value added by the services performed, there is no cognizable sale under the antidumping law." *Id*. at 32-33.

In remanding the case, the Court acknowledged that "[w]hile Commerce correctly states that 19 C.F.R. § 351.401(h) does not 'exempt merchandise from (antidumping) proceedings,' the regulation is applicable in determining who is the producer in order to determine export price or constructed export price. Thus, a determination that the enricher provides a tolling service would mean that the price charged by the enricher to the utility for the enrichment cannot form the basis of the export price for the purpose of determining dumping margins." *Id*. at 33 (citations omitted). The Court noted that the Department is authorized to depart from its prior practice as long as the agency articulates a "reasoned analysis" which demonstrates that the departure is supported by substantial evidence and in accordance with law. The Court found that "Commerce's decision not to apply the tolling regulation to a case that appears similar to earlier tolling cases . . . represents a departure from the practice authorized by a regulation 'having the force and effect of law.' As such, Commerce's decision requires a more persuasive explanation than provided in the agency's determinations." *Id*. at 34 (citations omitted).

Because the Department's reasons for distinguishing the instant case, and consequently for

declining to apply the tolling regulation, were found to be unpersuasive, the Court concluded that the Department's decision "to treat these contracts as contracts for sales of a good is neither supported by substantial evidence nor in accordance with law." *Id*. at 34-35. Accordingly, the Court remanded this case for the Department to reconsider its decision not to apply the tolling regulation. *Id*. at 34-35, and 40.

a. *Analysis and Discussion of the Department's Tolling Regulation*

In accordance with the Court's direction, the Department has reconsidered the application of its tolling regulation in these investigations. Pursuant to that reconsideration, the Department has determined that the enrichment companies are the producers of LEU, and thus are the appropriate respondents for purposes of establishing the U.S. price of the subject merchandise and its normal value. An examination of the facts of this and prior determinations on tolling arrangements is discussed below.

(i) *The Tolling Regulation*

The Department's regulation addressing the "calculation of export price, constructed export price, fair value, and normal value" states that "[i]n general terms, an antidumping analysis involves a comparison of export or constructed export price in the United States with the normal value in the foreign market. This section establishes certain general rules that apply to the calculation of export price, constructed export price, and normal value." 19 C.F.R. § 351.401(a). One of the general rules promulgated by the Department speaks to the treatment of subcontractor or tolling situations. That provision states that the Department "will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the

relevant sale, of the subject merchandise or foreign like product." 19 CFR § 351.401(h).

As a general rule, the language of the tolling subsection was intended to "establish[] certain conditions under which the Department will not find a toller or subcontractor is the producer of the subject merchandise." *Final Results of Antidumping Duty Administrative Review; Polyvinyl Alcohol From Taiwan*, 63 FR 32810, 32813 (June 16, 1998) (*Polyvinyl Alcohol from Taiwan*). In administering the regulation, the Department has consistently stated that "[t]he purpose of the tolling regulation is to identify the seller of the subject merchandise for purposes of establishing export price, constructed export price, and normal value." *LEU from France*, 66 FR at 65878; *Taiwan Semiconductor Manufacturing Co. Ltd. v. United States*, *Remand Determination*, (May 2, 2000). at 4 (*SRAMs from Taiwan*).[28] In practice, the Department has also recognized that "the regulation does not purport to address all aspects of an analysis of tolling arrangements." *Polyvinyl Alcohol from Taiwan*, 63 FR at 32813. More specifically, the Department has recognized that it is "not restricted to the four corners of the contract" and will "look at the totality of the circumstances presented" in order to determine the appropriate respondent in a given case. *Id*.

The Court has cited several administrative determinations in which the facts appear to be similar to the facts of the instant case.[29] The Department has closely examined the facts and

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[28] The text of this determination can be found on the Department's Internet site at http://ia.ita.doc.gov/remands/00-48.htm.

[29] *Polyvinyl Alcohol from Taiwan; Final Results of Antidumping Duty Administrative Review*, 63 FR 32810, 32813 (June 16, 1998) (*Polyvinyl Alcohol from Taiwan*); *Taiwan Semiconductors Mfg Co. v. United States*, 143 F. Supp. 2d 958, 966 (2001); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Forged Stainless Steel Flanges from*

determinations made in those cases, and the facts in the instant case. Based upon our analysis and the express purpose of the tolling regulation, we have concluded that the tolling regulation cannot be applied to the facts and circumstances of this case without defeating the purpose of the regulation and the statutory provisions that the regulation is designed to implement, as discussed below.

A fundamental requirement upon which the tolling regulation is premised is that merchandise produced through a tolling operation is sold to a party in the United States. As discussed above, the tolling regulation focuses upon the sale of subject merchandise. It states, in part, that the Department will not consider the toller to be the manufacturer or producer where the toller "does not control the relevant sale" of the subject merchandise or foreign like product. In promulgating the tolling regulation, the Department did not contemplate the situation in which the tollee makes no sales of subject merchandise. In the preamble to its proposed regulation, the Department stated "where a party owning the components of subject merchandise has a subcontractor manufacture or assemble that merchandise for a fee, the Department will consider the owner to be the manufacturer, because that party has control over how the merchandise is produced and *the manner in which it is ultimately sold*." *Antidumping Duties; Countervailing Duties; Proposed Rule*, 61 FR 7307, 7330 (Feb. 27, 1996) (emphasis added) (*Proposed Rule*). The Department illustrated how it anticipated the regulation would work, stating as follows:

> For example, where Firm A sends raw materials to a subcontractor for

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India, 58 FR 68853 (Dec. 29, 1993) (*Flanges from India*); *Certain Pasta from Italy: Preliminary Results of New Shipper Antidumping Duty Administrative Review*, 63 FR 53641, 53642 (Oct. 6, 1998) (*Pasta from Italy*).

> finishing before Firm A sells the finished goods to the United States, the Department will base export price or constructed export price on the price charged by Firm A (or its U.S. affiliate) for the finished goods. Similarly, the Department will base normal value on Firm A's sales of the finished goods in its home market . . .

Proposed Rule, 61 FR at 7330.

In promulgating the tolling regulation, the Department only anticipated the situation in which both the toller and the tollee would make sales that could be construed as sales of subject merchandise. In the above illustration, the Department anticipated that Firm A, the tollee, would be selected as the respondent because the price Firm A charges is for the finished goods (*i.e.*, the subject merchandise). In its practice under the regulation, the Department has consistently faced a choice of respondents, based upon its analysis of the sales made by two entities - the toller on the one hand, and the tollee on the other, for all prior cases addressing tolling arrangements, including those referenced by the Court. In each of these cases, the tollee made sales of subject merchandise.

In *SRAMs from Taiwan*, for example, the Department was faced with a choice between sales made by TSMC, a foundry and a seller of wafer processing for a fee; and sales made by the U.S. design house, a seller of SRAMs to unaffiliated customers in the United States. *SRAMs Remand Determination*, at 5. In making its determination, the Department analyzed not only the foundry's sales of wafer processing, but also the sales made by the tollee, the U.S. design house, stating "we found that it was appropriate to treat the design house as the manufacturer, rather than TSMC in accordance with 19 CFR 351.401(h), because we concluded that the relevant sale was the sale between the design house and its customers." *SRAMs Remand Determination*, at 3 (citing SRAMs

Final Determination), and 5.[30] *See also* Flanges from India, 58 FR at 68856 (where Akai, the respondent selected by the Department, sold the flanges in question in the United States); *Pasta from Italy*, 63 FR at 53642 (where the respondent, Corex, was "solely responsible for the marketing and sales of the product"); *Final Determination of Sales at Less Than Fair Value: Chrome-Plated Lug Nuts From Taiwan*, 56 FR 36130, 36131 (July 31, 1991) (*Lug Nuts From Taiwan*) (where the Department found the respondent, Gourmet, to be the seller of the subject merchandise); *Polyvinyl Alcohol from Taiwan*, 63 FR 32810, 32811-32813 (June 16, 1998) (where producers, Chang Chun and DuPont, both sold the subject merchandise); *Notice of Final Determination of Sales at Less Than Fair Value: Collated Roofing Nails From Taiwan*, 62 FR 51427, 51435 (Oct. 1, 1997) (*Roofing Nails From Taiwan*) (where all production of subject merchandise is the property of, and sold by, the tollee). None of the prior cases provides guidance to the Department on its selection of the appropriate respondent where the tollee does not sell the subject merchandise. As noted above, we have recognized that "the regulation does not purport to address all aspects of an analysis of tolling arrangements." *Polyvinyl Alcohol from Taiwan*, 63 FR at 32813. In some cases, we must make a determination based upon "the totality of the circumstances presented" in order to determine the appropriate respondent in a given case. *Id*.

In the case of LEU, all parties agree that the utility companies do not sell LEU. *Final French*

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[30] In the *SRAMs Remand Determination*, the Department also noted that "*[w]e normally consider the producer to be the party that sets the price* to the United States except in cases where the producer does not know that the subject merchandise is ultimately destined for the United States. In those cases, we find that a subsequent reseller controls the relevant sale, rather than the producer." *SRAMs Remand Determination*, at n.4 (citation omitted) (emphasis added).

AD Determination, 66 FR at 65879. As discussed above, the utility companies are in the business of producing electricity for sale to consumers in the United States. To the extent that "the purpose of the tolling regulation is to identify the seller of the subject merchandise for purposes of establishing export price, constructed export price, and normal value," identifying the utility companies as the respondents would frustrate the purpose of the regulation to establish U.S. price and normal value for purposes of calculating dumping margins.

In light of the facts of this case, we must examine the totality of the circumstances in order to select the appropriate respondents in this case, as we did with respect to Perry in *Polyvinyl Alcohol from Taiwan*. Importantly, it was previously established in the case of LEU that enrichment is a required operation for the production of LEU; and that the enrichment process is a major manufacturing operation. *Final French AD Determination*, 66 FR at 65879. The Department found that enrichment accounts for an estimated 60 percent of the value of the LEU entering the United States. *Id*. at 65881. Thus, the Department concluded that "the enrichment processing adds substantial value to the natural uranium and creates a new and different article of commerce and therefore confers a different country of origin upon the product for purposes of the AD and CVD law." *Id*.

Further, the LEU at issue enters into the commerce of the United States. *Id*. The merchandise enters the customs territory of United States through U.S. Customs ports of entry. Further, the merchandise is introduced into the commerce of the country for purposes of consumption in the United States. In every instance, the utility companies obtain LEU, a separate and distinct product of the respective country subject to investigation, under either an EUP transaction in which the full value of the

LEU is contained in the contract, or through separate transactions for the purchase of the natural uranium feed component and the enrichment component. Given these facts, the Department has recognized that in every instance in which the utility customer obtains LEU for use in the generation of electricity, the merchandise is entering the commerce of the United States.[31]

The Department has recognized that once the merchandise enters the commerce of the United States, the Department must then determine the appropriate basis for establishing the price of the subject merchandise and its normal value, in order to calculate whether, and if so to what extent, dumping has occurred. As discussed above, the regulation does not contemplate the circumstances of this case. Moreover, the statutory provisions governing the establishment of U.S. price are silent as to how the Department is to calculate the price of the subject merchandise in such circumstances.[32]

In our view, the facts in this case warrant a determination based upon the totality of the circumstances, as it did with respect to Perry in *Polyvinyl Alcohol from Taiwan*, in order to select the

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[31] The Uruguay Round Agreements Act implements the international obligations made by the United States with respect to, *inter alia*, the Antidumping Agreement. In particular, Article 2.1 of that Agreement states that "a product is to be considered as being dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." As noted above, in this case it is beyond dispute that the LEU at issue is being introduced into the commerce of the United States.

[32] For normal value, section 773(a)(4) states that "If the administering authority determines that the normal value of the subject merchandise cannot be determined under paragraph (1)(B)(1), then . . . the normal value of the subject merchandise may be the constructed value of that merchandise . . ." Section 773(e) states, in part, that the constructed value of imported merchandise shall be an amount equal to the sum of "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise . . ." *See* section 773(e)(1). 19 U.S.C. § 1677b(e)(1).

appropriate respondent consistent with the limited purpose of establishing U.S. price and normal value. Based upon the totality of the circumstances in this case, we find that the enrichers are the producers of the subject merchandise because: (1) the enrichers make the only relevant sales that can be used for purposes of establishing U.S. price and normal value; (2) the enrichers are the only companies engaged in the production of LEU, whereas the utility companies have no LEU production or manufacturing operations; (3) the enrichers control the production of LEU; and (4) utility companies are industrial users and consumers of LEU. Apart from the determination of the producers, we also find that the enrichers are the exporters of the subject merchandise, and therefore, separately qualify as the "exporters or producers" of the subject merchandise under the circumstances of this case. Each of these points, and its relevance, is discussed below.

(ii) The Relevant Sales

Prior to changing its practice with respect to subcontracting or tolling, as codified in the tolling regulation, the Department calculated dumping margins in tolling situations based upon the sale of the processing, where such processing involved substantial transformation and conferred country of origin on that product. In *Color Television Receivers, Except for Video Monitors, from Taiwan; Final Results*, 55 FR 47093, 47100 (Nov. 9, 1990), for example, where a Taiwan company assembled third-country parts supplied by a Hong Kong company, the Department treated the Taiwan company, the toller, as the producer and exporter, and based U.S. price upon the tolling fee charged by the Taiwan company to the Hong Kong company for the assembly. In *Final Determination of Sales at Less Than Fair Value: Certain Headwear from the People's Republic of China*, 54 FR 11983,

11988, (Mar. 23, 1989), the respondent, a Chinese company, toll-processed material supplied by a Hong Kong company into subject merchandise, and the Department based U.S. price on the fee paid for processing. Similarly, in *Certain Small Diameter Welded Carbon Steel Pipes and Tubes from the Philippines; Final Determination of Sales at Less Than Fair Value*, 51 FR 33099, 33100 (Sep. 18, 1986), a U.S. importer purchased material inputs in Thailand and contracted with a toller in the Philippines to manufacture the inputs into pipe and tube. There, the Department treated the Philippine company as the respondent and calculated the margin for tolled sales based upon the price of the tolling charged by the Philippine company to the U.S. importer. In all of these cases, the producer, and thus the one selected by the Department as the respondent, was the entity actually engaged in the manufacture or production of the subject merchandise.[33]

The tolling regulation was promulgated to change the Department's practice in this area in order to calculate dumping margins based upon the full value of the sales of subject merchandise. Since the adoption of the tolling regulation, the Department has stated its preference to select the respondent whose price covers the full cost of production (i.e., the full value of the subject merchandise). *See SRAMs Remand Determination*, at 4-5. In that case, the Department also stated that "[b]ecause a subcontractor does not sell 'subject merchandise,' but rather only sells services and/or inputs, the export price (or constructed export price) cannot be derived from the subcontractor's 'sales.'" *Id*. at 4.

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[33] *See also Final Determination of Sales at Less Than Fair Value; Brass Sheet and Strip from Canada*, 51 FR 44319 (1986); and *Brass Sheet and Strip from Canada; Final Affirmative Determination of Circumvention of Antidumping Duty Order*, 58 FR 33610 (1993).

Our statements in that case, however, do not address the situation where the full value of the merchandise may not be reflected in any one transaction in the chain of commerce.[34] We did not intend to imply in *SRAMs from Taiwan* that a transaction cannot be subject to the antidumping law unless the price charged includes 100 percent of the value of subject merchandise. Nor did we intend to imply that a toller can never be selected to be a respondent, even in the situation where the tollee does not sell the subject merchandise, but rather uses or consumes such merchandise in its own production process. Accordingly, even if one were to focus solely upon the cash price paid by a utility customer in a SWU transaction, the fact that the cash price paid to the enricher may reflect less than 100 percent of the value of the imported LEU does not mean that the transaction is beyond the scope of the AD law. Transactions may occur whereby a party that might be considered a toller produces subject merchandise and transfers ownership to that merchandise to the purchaser (tollee) for consideration. As discussed below, under relevant Federal Circuit precedent, such transactions involve sales of subject merchandise.

In sum, our statements made in *SRAMs from Taiwan* fail to reflect the Department's authority to calculate margins where relevant sales may exist for purposes of calculating the U.S. price and normal value of the merchandise. Where relevant sales exist that can form the basis of the price of subject merchandise and foreign like product, the Department must exercise its authority to examine those sales and determine whether, and if so, to what extent, dumping has occurred.

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[34] We note that, in a meaningful sense, enrichment transactions do reflect the full value of the LEU since the things of value provided by the utility customer to the enricher (cash and natural uranium) account for the full value of the LEU received by the customer from the enricher.

Polyvinyl Alcohol from Taiwan is also instructive in this context in that it demonstrates, to some extent, the flexibility the Department has in administering the provisions governing the establishment of U.S. price and normal value. In that case, the Department rejected the U.S. importer's claims that it, Perry, was the producer of the subject merchandise, even though it had sold the subject merchandise and purchased the major input, vinyl acetate monomer (VAM), that was delivered to the processor, Chang Chun, to be manufactured into polyvinyl alcohol (*i.e.*, subject merchandise). Instead, the Department found Chang Chun, the processor, to be the producer. While the Department found that "the mere rearrangement of Perry's contractual relationship with Chang Chun insufficient to establish Perry as a producer of PVA," it is important to recognize that "Perry continued to purchase PVA from Chang Chun, albeit in two separate transactions instead of through a single purchase of the finished product." 63 FR at 32814. Accordingly, to calculate the price of the subject merchandise sold to Perry in that case, the Department added together the values from these two transactions to determine the U.S. price of the subject merchandise. *Id*. at 32815. Although the two relevant sales that were combined in that case - one sale of the processing and one sale of the material inputs - were made by affiliated companies, the case, nevertheless, is instructive in that it recognizes that the sale of subject merchandise may occur in two distinct transactions, as compared to the traditional stand-alone transaction for the sale of subject merchandise. Second, it recognizes that the statute, while not addressing this situation, accommodates the interpretation that such relevant sales may be combined to derive, and calculate, the price of the subject merchandise.

In the case of LEU, as in the case of *Polyvinyl Alcohol from Taiwan*, the Department seeks

to obtain the full value of the subject merchandise that has entered the commerce of the United States. Accordingly, in this case the Department calculated the price of the subject merchandise by combining the price of the enrichment component with the value of the natural uranium feed component to obtain the full value of the subject merchandise sold to U.S. utility companies. *Final French AD Determination*, 66 FR at 65885. The Department stated that

> In assigning a specific monetary value to the natural uranium component, we estimated the market value using the average price the enrichers charged their customers for natural uranium for LEU contracts. For SWU contracts, when comparing U.S. Price with Normal Value based on constructed value, we valued natural uranium using exactly the same value for both sides of the equation. For example, for any given shipment pursuant to a SWU contract we determined the quantity (i.e. kgs) of associated feed uranium by applying the industry standard formula for product and tails assay specified in the contract. We valued this quantity using POI average per-kg price for natural uranium charged by enrichers. This exact same amount was included in normal value.

Id.

Based upon the way in which the utility companies obtain LEU in these circumstances, we find that the transactions between the enrichers and the utilities are relevant for purposes of establishing the price of the subject merchandise for a number of reasons. First, these sales represent the transfer of ownership in the complete LEU product for consideration. Based upon the contracts and other evidence of record, we find that the enrichers own, and hold title to, all the LEU they produce. The enrichers transfer ownership of, and title to, the LEU to the utilities upon delivery of the merchandise for consideration. Second, because the completed product is entering the commerce of the United States through these transactions and because the pricing behavior of the foreign enrichers is relevant to the

issue of whether the LEU is being sold at less than fair value, we find that the enrichers' sales are relevant sales for purposes of establishing the U.S. price of the subject merchandise and its normal value under the facts and circumstances of this case. Each element is discussed below.

First, in this case, whether under EUP contracts or SWU contracts, the enrichers own, and hold title to, all the LEU they produce. In SWU contracts, the utility customers hold title to the natural uranium feedstock that they provide to the enrichers.[35] The contracts state that the enrichers transfer title to the LEU to the utilities upon production and delivery of the LEU.[36] At the time of delivery, title to the LEU is transferred to the customer, and title to the feed material is extinguished.[37] Based upon the terms of the contracts, the utility customers retain title to the

feed material until such time as the LEU product is delivered to the destination specified in the contract.

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[35] *See*, *e.g.*, Urenco Questionnaire Response, Vol. 1, Attachment B-1, [%]. *See also* Attachment B-3, between [%] and Urenco, at [%]; and Attachment B-2, between [%] and Urenco, at [%]

[36] *See*, *e.g.*, Urenco Questionnaire Response, Vol. 1, Attachment B-1, [%]. *See also* Attachment B-3, between [%] and Urenco, at [%]; and Attachment B-2, between [%] and Urenco, at [%]

[37] *See*, *e.g.*, Urenco Questionnaire Response, Vol. 1, Attachment B-1, [%]. *See also* Attachment B-3, between [%] and Urenco, at [%]; and Attachment B-2, between [%] and Urenco, at [%] (stating that [%]). For Cogema/Eurodif contracts, *see*, *e.g.*, the [%], and [%]; and in the contract between [%] *See also* the contract with [%.] The above contracts demonstrate that substantial evidence on the record reflects a standard approach in the industry with respect [%].

As the Court has recognized, however, "[t]hese contractual provisions acknowledge the fungible nature of feed uranium while establishing a legal fiction that the enrichment process will be performed on the uranium provided by the customer." Slip Op. 03-34, at 24. Accordingly, at the point in time in which the enricher produces the LEU but before delivery is performed, the customer only holds title to the natural uranium feedstock provided to the enricher under the contract. The customer does not hold title to the LEU, nor does she hold title to the feed material contained within the recently produced LEU because the LEU produced by the enricher cannot be identified as having been derived from the feedstock provided by any particular customer. The terms of the contracts at issue indicate that at this point in time, the customer only has title to the feed material. The enricher, by contrast, would have rights as to the LEU.

Moreover, the record indicates that LEU delivered to a utility customer by an enricher under an enrichment contract may be produced before any natural uranium supplied by that customer could have been part of the production process for that LEU, thereby making it impossible to conclude that the LEU produced and delivered by the enricher is in any way derived from the uranium supplied by the customer. Based upon the above, we find that between

the time in which the LEU is produced and the time in which it is delivered as specified under the contract, the enricher holds title and holds ownership in the complete LEU product. Because, under the terms of the contracts, the utility customers have no right of ownership with respect to the LEU that is produced, but not delivered, we find that the enrichers own the LEU, including the right to sell the LEU at issue to any buyer. Therefore, we find that the enrichers own all the LEU they produce.

Moreover, we find that enrichers make a relevant sale when they transfer ownership of the complete LEU to the utilities through the delivery of such merchandise for consideration. In *NSK Ltd. v United States*, the Federal Circuit addressed the meaning of the term "sold" in the definition of exporter's sales price (now CEP). In that case, the Court held that the term "requires both a transfer of ownership to an unrelated party and consideration." 115 F.3d 965, 973 (Fed. Cir. 1997) (*NSK*). *See also AK Steel Corp. v. United States*, 226 F.3d 1361, 1371 (Fed. Cir. 2000).

As discussed above, the contracts in this case provide that title to the LEU product is transferred to the customers upon production and delivery of the LEU. At the time of delivery of the LEU product, the contracts provide that the utilities' title to the natural uranium feedstock is extinguished. Under the terms of the contracts at issue, the enrichers transfer ownership of the LEU upon delivery of the LEU. Accordingly, we find that the enrichers transfer title to, and ownership in, the complete LEU upon delivery of the LEU as specified under the contracts. Thus, under the test in *NSK*, the sales at issue in this case represent the sale of subject merchandise in that they are transfers of title to, and ownership in, the subject merchandise for consideration.

We have also examined the transfer of title in *SRAMs Remand Determination*. In that case,

we placed little weight on the fact that the foundry held temporary title to the finished SRAM wafers and transferred title to the design house. We stated that "while TSMC may have held temporary title to the SRAM wafers in order to indemnify itself against the potential for loss, it did not, and could not, control the sale of these finished wafers because it never owned the intellectual property which is embodied within them." *Id*. at 5. In light of the decisions in NSK and AK Steel, we believe the Department was not precluded from selecting the foundry as the respondent in that case. Both entities, the foundry and the design house, held title to the finished product seriatim. In that case, however, the Department was faced with a choice of respondents, and used those sales that contained the full value of the subject merchandise, as contemplated by the regulation. Because the design house also owned the finished wafer, including the intellectual property contained within it and subsequently sold the subject merchandise, the Department selected the design house as the appropriate respondent.

There is, however, another important difference in these cases. In the case of LEU, the record shows that enrichers hold inventories of uranium from various sources, including uranium owned by the enricher itself, and produce LEU without relying solely upon the input from a particular customer.[38] This contrasts with the situation of the SRAM foundry in which the foundry does not own the intellectual property pertaining to the wafer design and "has no right to sell those wafers to any party other than the design house . . . " *SRAMs Remand Determination*, at 3. Unlike the case in SRAMs in which the foundry was prohibited from selling the finished wafer, the enrichers in this case are not

[38] Further, the record shows that COGEMA, the parent company of respondent, Eurodif, is a major world supplier of natural uranium for the production of LEU.

prohibited from selling the undelivered LEU to other customers. Given these facts, the foundry in SRAMs may hold temporary title to the finished wafer, but because it is not free to sell the finished product, it does not appear to hold ownership in that product. By contrast, in this case, the enrichers retain ownership in the undelivered LEU.

In examining the totality of the circumstances in this case, we find it relevant that the completed product, LEU, is entering the marketplace through the transactions at issue. Utility customers cannot obtain LEU by purchasing enrichment alone. Rather, in every instance in which the utility customer enters into a SWU transaction, it is obtaining LEU. Moreover, the transaction by which the utility obtains the LEU constitutes a "sale of merchandise" under relevant Federal Circuit court decisions. As such, this is a relevant sale in that it is the transaction by which the merchandise enters the United States market.

Finally, under the circumstances of this case, we believe the transactions at issue are also relevant sales because the enrichment process is a significant portion of the value of the subject merchandise such that the pricing behavior of the foreign enrichers is relevant to the issue of whether the LEU is being sold at less than fair value. Based upon all of the above, we find that, under the facts and circumstances of this case, the sales at issue are relevant for purposes of determining the price of the subject merchandise and its normal value.[39]

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[39] We also note that, for the reasons set out at pages 86-88, below, in connection with the discussion of the applicability of the countervailing duty statute, that SWU transactions do not constitute the sale of a "service" under the ordinary meaning of that term or under other statutes addressing trade in services.

(iii) The Role of Utility Companies in the Production of LEU

The Court found that the designation by the utilities of particular assays for the LEU and for uranium tails was analogous to DuPont's provision of specifications to Chang Chun in *Polyvinyl Alcohol from Taiwan*, and to Akai's control of the specifications in *Certain Forged Stainless Steel Flanges from India* where the Department found these companies to be producers of subject merchandise. For LEU, the Court found that the designation of quantities and assays is based on (1) the design of the core reactor, which determines the level of U235 needed by that reactor, and (2) the utility's needs at a particular time, depending on its operating cycle and the amount of fuel that has been spent. *Id*. at 24-25. The Court stated that the utilities provide these specifications to the enricher, which then produces LEU in the required quantities and assays. *Id*. at 25. Citing *SRAMs from Taiwan* and *Certain Forged Stainless Steel Flanges from India*, the Court stated that "Commerce has previously indicated that control over the specifications of the final product was sufficient control to be considered a producer." *Id*. The Court noted that like the producer in *Certain Forged Stainless Steel Flanges from India*, the utilities control the specifications of the final product, even though, as in past determinations by the Department, "the actual processes of creating the product are left within the control of the tollers." *Id*. at 28-29.

In re-examining the above cases, we find the facts and circumstances to be very different from the case of LEU. In each of the cases cited by the Court, the tollee sold the subject merchandise, as contemplated by the regulation. Second, in nearly all of these cases, and in particular where the Department was required to examine the totality of the circumstances to determine the producer, the

tollee engaged in manufacturing or processing operations. In no instance did the Department determine an entity was a producer based solely upon its purchase of an input and the designation of product specifications. If it were to do so, the Department would be unable to distinguish between purchasers, who do little more than provide specifications, and producers themselves.

The above cases need to be viewed in light of the relevant facts and circumstances, taken as a whole. For example, in *Polyvinyl Alcohol from Taiwan*, Dupont not only provided product specifications to the processor, it produced the major input, VAM, and sold the subject merchandise to unaffiliated customers in the United States. In *Certain Forged Stainless Steel Flanges from India* the producer, Akai, not only purchased and retained title to the raw materials, and determined the quantity, size and type of flanges to be produced, it also performed processing on most of the flanges, and, moreover, it sold the subject merchandise to unaffiliated customers in the United States. 58 FR at 68856. In *SRAMs from Taiwan*, the U.S. design house

performed all of the research and development for the SRAM to be produced; it produced, or, at a minimum, arranged and paid for the production of, the design mask. *SRAMs Remand Determination*, at 3. In every instance the U.S. design house created the design that went into the SRAM wafer. The design did not equate to the provision of product specifications; rather, as the Department reasoned, "in an industry that is shaped by intellectual property considerations . . . the design is one of the primary determinants of the value of individual products." *Id*. at 5, (finding "no substantive difference" between

the product design and development phase of production, equating design to a physical input).[40] Finally, in every instance, the U.S. design house sold the subject merchandise to unaffiliated customers in the United States. We find that in all of the cases, the respondent selected by the Department engaged in more than the purchase of the input and the provision of product specifications.

With respect to whether the producer must engage in manufacturing or processing to be considered a producer, the Court found unpersuasive the Department's reasoning that the utility companies have no production facilities for the purpose of manufacturing subject merchandise. Citing *SRAMs from Taiwan*, *Certain Pasta from Italy*, and *Certain Forged Stainless Steel Flanges from India*, the Court noted that in prior determinations the Department found entities to be producers who did not maintain manufacturing facilities, but that this did not prohibit the application of the tolling regulation. *Id*. at 29.

Engaging in manufacturing operations is not a requirement under the regulation. In *Polyvinyl Alcohol from Taiwan*, however, the Department noted that the tolling regulation "only addresses the circumstances in which a toller will be considered a producer of the subject merchandise. Therefore, the Department is not restricted to the factors set forth in that regulation when determining whether a party other than a toller is the producer of merchandise under consideration." 63 FR at 32814. The

[40] By contrast, the product specification for LEU is not a proprietary design of the utility, whether the LEU is acquired under a SWU or an EUP contract. Further, LEU of a given assay is fungible with any other LEU of the same assay, can be delivered to any utility desiring such assay, and can be procured from any enricher under SWU or EUP contracts. Thus, the specification of product assays in the LEU investigations is not analogous to the tollee's provision of the design in *SRAMs from Taiwan*.

Department went on to recognize the importance of

engaging in production activities, noting that "while examining the production activities of a party may not be decisive in every case, whether a party has engaged either directly or indirectly in some aspect of the production of subject merchandise is an important consideration." *Id*. Importantly, in *Polyvinyl Alcohol from Taiwan*, DuPont produced the major input, VAM, that was sent to Chang Chun for processing into polyvinyl alcohol. *Polyvinyl Alcohol from Taiwan*, 63 FR at 32817. In that same case, the Department rejected Perry's claim that it was a producer, based in part on the conclusion that the new tolling arrangement "merely reordered the contractual relationship between the parties, but had no significant effect on how they conducted business;" but also based upon the conclusion that "whether a party has engaged either directly or indirectly in some aspect of the production of the subject merchandise is an important consideration." *Id*. at 32814. Unlike DuPont, Perry did not engage, directly or indirectly, in any manufacturing operations. If Perry had done so, the new tolling arrangement would not have been a mere "reordering of the contractual relationship" because there would have been a significant change in how the company was conducting business. Accordingly, in that case, whether Perry engaged in manufacturing or production operations was relevant to the determination of whether Perry had ceased to be a purchaser and reseller, and had become the producer of the subject merchandise, as contemplated by the tolling regulation.

Where an examination of the totality of the circumstances is warranted in order to determine the producer of the subject merchandise, the performance of manufacturing or processing operations may take on added importance, as it did in the case of Perry in *Polyvinyl Alcohol from Taiwan*. In

examining the functions performed by the tollee in *SRAMs from Taiwan*, for example, the Department found that "the design house performs all of the research and development for the SRAM that is to be produced. It produces, or arranges and pays for the production of, the design mask." *SRAMs Remand Determination*, at 3. The Department reasoned, *inter alia*, that "in an industry that is shaped by intellectual property considerations . . . the design is one of the primary determinants of the value of individual products." *Id*. at 5. Thus, the U.S. design house produces the intellectual property that is one of the main components of value in the SRAM.

In the case of LEU, the facts and circumstances, taken as a whole, are significantly different from the above cases where the tollee was selected as the producer of the subject merchandise under the tolling regulation. In LEU, the utility companies make no sales of subject merchandise; nor do they engage in any manufacturing or processing operations related to production of the subject merchandise. Rather, the facts in this case indicate that utility companies are industrial users of the subject merchandise. And, as the utility companies themselves contend, they consume the subject merchandise. *Final French AD Determination*, 66 FR at 65879. As such, a finding that these companies are also producers of the subject merchandise would be at odds with the ordinary meaning of the term producer as one "who produces a commodity. Opp. to *consumer*." *See The New Shorter Oxford English Dictionary*, (1993 ed.), at 2367 (emphasis in original). To interpret the term "producer" in this context as encompassing industrial users and consumers of the subject merchandise would yield absurd results, and would be fundamentally in conflict with the legislative purpose of the statutory provisions to establish the price of subject merchandise and its normal value.

Finally, with respect to the issue of control over the production of LEU, we find that the enrichment companies direct and control the manufacturing operations for the production of LEU sold pursuant to SWU contracts to the same extent they direct and control the production of LEU sold pursuant to EUP contracts. As such, the provision of product specifications by the utility customer does not, by itself, establish a basis for the Department to find that utility companies are producers of LEU.

Unlike EUP contracts, an enrichment or SWU contract allows the the customer to select the "transactional tails assay." By designating the transactional tails assay, the utility makes the decision of (1) the amount of natural feed uranium it must provide to the enricher in any given transaction; and (2) the amount of SWU to be paid for by the customer. In other words, the "transactional tails assay," a term that is well-known in the industry, allows a customer to optimize the amount of money and the amount of uranium it must provide for the LEU it will receive, based upon the commercial considerations of the customer. Their decision is based upon the commercial price of SWU and the commercial price of feed uranium.

By contrast, the transactional tails assay does not determine either the amount of natural uranium actually used by the enricher, nor the amount of energy actually expended by the enricher in producing the LEU under the contract. Rather, enrichers make business decisions as to whether they will overfeed or underfeed (*i.e.*, use more feed uranium and less energy, or vice versa). These decisions are wholly within the decision-making of the enricher, and are based upon different commercial considerations than those faced by the utility customer.

In our view, the terms of the SWU contracts specify a transactional tails assay because this assay establishes the price for the quantity of LEU to be delivered. The contract terms, however, do not specify how the enricher is to produce the LEU. To the contrary, it is common practice in the industry for the enricher to determine how much feed to use and how much energy to expend in producing the required amount of LEU at the specified assay.[41]

To illustrate the point, enrichers do not run their enrichment facilities at different levels of feed input and energy input based upon whose feed is entering the production process or based upon whose LEU is being produced under a particular contract. Only the enricher makes these types of production decisions. This is further demonstrated by the fact that enrichers can, and frequently do, provide LEU under SWU contracts from LEU that has already been delivered to fabricators and that is listed as the enrichers' inventory on the books and records of the fabricator (*i.e.*, book transfers). Indeed, book transfers are prevalent in the industry because LEU is largely a fungible product.

In sum, while a utility customer may select a "transactional tails assay" from a range of assays offered by the enricher and such a selection will determine the amount of SWUs the customer will have to pay for and the amount of uranium the customer must deliver to the enricher, it is the "operating tails assay" established by the enricher that determines the amount of energy and feed uranium that the enricher will actually use in its production of LEU. Accordingly, we find that enrichers have complete

[41] Similarly, the notice provision in the SWU contracts also does not establish how the enricher is to produce the LEU under the contract. The purpose of the notice provision is to allow the utility company to determine how much feed material or how much money she will provide in any given transaction, as discussed above.

control over the enrichment process and control the amount of uranium and energy actually used in producing the LEU that is ultimately delivered to the customer. In addition, while the utilities direct the timing of when they want LEU delivered, the utility does not control the timing of when the LEU that is ultimately delivered is produced by the enricher or delivered by the enricher to the fabricator.

Finally, apart from our determination that the enrichers are the producers of the subject merchandise, the facts in this case also indicate that the enrichers are the "exporters" of the subject merchandise, as referenced under section 771(28) of the Act, and under sections 772(a) and (b) for purposes of export and constructed export price, and for normal value as well under section 771(28). Accordingly, the foreign enrichers as exporters of the subject merchandise separately qualify as respondents under the circumstances of this case.

Conclusion on Producer or Exporter For Purposes of U.S. Price and Normal Value

Because enrichers make relvant sales that can be used to establish the U.S. price of subject merchandise and its normal value, engage in and control all aspects of enrichment processing, a necessary and significant manufacturing operation for the production of LEU, we find that, taken together, the facts and circumstances in this case indicates that the enrichers are the producers of LEU for purposes of establishing the U.S. price of the subject merchandise and its normal value. By contrast, because the utility companies do not sell LEU, but instead are consumers and industrial users of such merchandise, engage in no manufacturing operations of any kind related to the production of LEU, nor control the production of LEU, we find that, taken together, the facts and circumstances of

this case indicate that utility companies are not the producers of LEU for purposes of establishing the U.S. price of subject merchandise and its normal value.

Comments From Urenco/Eurodif and AHUG

Urenco/Eurodif assert that unlike in the industry support section of the determination, where the Department analyzes the statutory requirements in close detail, in the antidumping duty portion of the Draft Remand Determination, the Department runs from the statute as if it were the plague. They argue that the statute is the centerpiece of this case, as it is the driver of the Department's entire tolling practice, including its tolling regulation.

The respondents argue that, as the USEC Court described in detail, the Department has explicitly stated in its prior tolling determinations that the statute requires the Department to focus on a sale that captures all of the essential components of the subject merchandise. Urenco/Eurodif point out that, as the Court made clear, the Department recognized in *Polyvinyl Alcohol from Taiwan* that "the statute requires that we base comparisons on the price of the subject merchandise sold in the U.S. to the price of the subject merchandise sold to the home or third country markets, not the price of some processing of the subject merchandise." Urenco/Eurodif further contend that the Court also noted that the Department has uniformly taken the same position in every case since the adoption of its tolling regulation. In short, as the Court explained, "Commerce has recognized that where the price paid for the subject merchandise does not include the entire value of such merchandise, but instead only that portion of the value added by the services performed, there is no cognizable sale under the antidumping

duty law."

Given the foregoing, Urenco/Eurodif state that the Department's assertion that the statute is "silent as to how the Department is to calculate the price of the subject merchandise," where the tollee does not sell the merchandise, and its claim that "once the merchandise enters the commerce of the United States, the Department must then determine the appropriate basis for establishing the price of the subject merchandise and its normal value," are nothing short of disingenuous. Urenco/Eurodif contend that far from the principled decision-making sought by the Court, the Draft Remand Determination seeks stubbornly to justify the Department's final determination by relying on a theory that has already been rejected by the Court as a justification for the treatment of SWU contracts as sales of subject merchandise and the recitation of differences that do not distinguish its tolling jurisprudence. In doing so, the respondents assert, the Department evades the essential point: how the Department should implement the principle behind its tolling practice, which is the statute's requirement that a sale of subject merchandise must capture all "essential components" of the price. These parties state that "[a]s the USEC Court recognized, because the sale of enrichment services does not capture the cost or price of the uranium input - a substantial portion of the value of the LEU - the Department cannot treat the sale of enrichment services as a cognizable sale under the law."

Urenco/Eurodif further point out in particular that the Department's attempt to distinguish its prior tolling cases as irrelevant because they involved the choice of respondent, not the scope of the antidumping duty law, contradicts the USEC Court's directive to consider that the fundamental principles underlying the tolling regulation cannot be confined to the choice of respondent.

Urenco/Eurodif point out that, "as the USEC Court has noted the requirement that there be a sale of subject merchandise applies not only to the choice of the producer, but also to the determination of the basis of the export price used to calculate dumping margins." Urenco/Eurodif state that regardless of the context, the statutory requirements mandate that the relevant sale under the antidumping duty law be made by "the company that is in a position . . . to sell at less than fair value in or to the U.S. market," USEC Inc., Slip Op. 03-34 at 15 n.9. Therefore, Urenco/Eurodif contend, the sale of the enricher's "subcontractor's services" cannot be equated to the sale of the subject merchandise, LEU.

Urenco/Eurodif also assert that the Department reinvents history by claiming that in the prior cases it merely "stated its preference to select the respondent whose price covers the full cost of production (i.e., the full value of the subject merchandise)." Urenco/Eurodif contend that, as the Department explicitly recognized at the time, its determination was not an administrative "preference," but rather was required as a matter of law because, as noted above, the "statute requires that we base comparisons on the price of the subject merchandise sold in the U.S. to the price of the subject merchandise sold to the home or third country markets, not the price of some processing of the subject merchandise."

Moreover, Urenco/Eurodif contend that the Department's remand determination in *SRAMs from Taiwan*, which the Department now tries to offer in support of its argument, in fact explains why a processor cannot properly be chosen as a respondent: "because a subcontractor does not sell 'subject merchandise,' but rather only sells services and/or inputs, the export (or constructed export) price cannot be derived from the subcontractor's sales. Urenco/Eurodif assert that there is no principled

basis for the Department to claim here that it can "derive" the price of the subject merchandise where it previously said that such an approach was forbidden.

AHUG has separately addressed these same issues in its comments. AHUG first contends that the Department has not established that sales of enrichment services constitute relevant sales. Specifically, AHUG argues that the Department has failed to provide legitimate factual and legal bases for not applying the tolling regulation and its own precedents to the LEU investigations. AHUG divides its arguments into six main points.

First, AHUG asserts that the Department has no authority to disavow its tolling regulation when the Court has instructed it to reconsider the manner in which it applied the tolling regulation. Specifically, AHUG argues that the Department's assertion that in promulgating the tolling regulation, the Department only anticipated the situation in which the toller and tollee would make sales that could be construed as sales of subject merchandise and that the tolling regulation cannot be applied to the facts and circumstances of this case is not supported by the regulation nor its preamble. AHUG maintains that the regulation focuses on whether the toller owns the subject merchandise, controls its production, and makes the relevant sale and does not refer to the activities of the tollee. For these reasons, AHUG asserts that the Department lacks the authority to ignore the tolling regulation.

Moreover, AHUG argues that despite the Department's claim that *Polyvinyl Alcohol from Taiwan* provides justification for its position that the tolling regulation does not intend to address all facets of an analysis of tolling arrangements, the case does not provide a precedent for the Department's departure from the regulation. Instead, argues AHUG, the Court has already held that

Polyvinyl Alcohol from Taiwan is not an applicable precedent because in this case the utility purchases the feedstock from a party unrelated to the enricher, and, therefore, the purchase of the feedstock confers no economic benefit on the enricher. AHUG maintains that the instant case involves a genuine tolling arrangement, unlike *Polyvinyl Alcohol from Taiwan*, and, therefore, *Polyvinyl Alcohol from Taiwan* is not applicable.

AHUG also argues that whether or not the enrichers engage in substantial manufacturing operations is irrelevant. AHUG states that it has explained why the Department's argument that the enrichers control the enrichment process is irrelevant under the tolling regulations in its Letter from AHUG to Norman Y. Mineta Regarding Industry Support, December 19, 2000 at 8, AHUG Common Issues Brief at 17-18, and AHUG Opening Brief at 23.

Next, AHUG refutes the Department's assertion that the enrichers own, and hold title to, all the LEU they produce. AHUG maintains that the Court dismissed the Department's prior attempt to use *NSK v. United States*, 115 F.3d 965, 973 (Fed. Cir. 1997) ("*NSK*") as a precedent, stating that it was inapplicable because "there is no finding that the enrichers' rights rise to the level of ownership . . .". AHUG asserts that the Court's remand recognized that (1) utilities have title to the uranium feed provided to enrichers; (2) enrichers may not sell a utility's feed to a third party; and (3) title to the feed remains with the utilities until the moment it is replaced by title to the delivered LEU.

AHUG refutes the Department's ownership arguments, stating that, in fact, there is no moment in which enrichers own the LEU enriched under enrichment services contracts because the enrichers do not own the uranium feed they use to fulfill enrichment services contracts. That feed, argues AHUG, is

held by the enricher as a bailee for its utility customers. Under enrichment services contracts, the simultaneous transfer of the LEU and feed results in the transfer of the enrichment service (for which the enricher is paid) and the feed component (which the customer owns), in the form of LEU from the enricher as owner of the service and bailee of the feed component. Therefore, argues AHUG, the enricher must deliver LEU deemed to have been produced with the specific quantity of feed delivered to it by the customer and does not have the right, as claimed by the Department, to sell the LEU to any buyer. In addition, AHUG contends that, as a legal matter, the Court has already found that the enrichment process will be performed on the uranium provided by the customer.

Regarding the fact that the input is fungible, AHUG maintains that the draft remand determination does not offer any further justification for departing from the Department's past practice in the treatment of fungible goods.

AHUG's next point is that the Department can base its determinations only on relevant sales, which must comprise all elements of the value of subject merchandise. AHUG rejects the Department's claim that because the SWU transaction represents the final step in the purchase of LEU, it is a relevant sale in that it is the transaction by which merchandise enters the United States market. AHUG also dismisses the Department' s rejection of its own precedent in *SRAMs from Taiwan*. AHUG states that given that *SRAMs* was affirmed by the Court on the basis that it fulfilled a statutory requirement, AHUG disagrees that the Department has the discretion to treat as relevant sales transactions that do not reflect all elements of the LEU value.

Moreover, AHUG maintains that *NSK* cannot be used to justify departing from the

requirements of the statute. In *NSK*, the Federal Circuit ruled that the Department could not include free bearing samples provided by the respondent to U.S. customers in its calculations because there had been no sale of that subject merchandise. Therefore, AHUG argues that since there is no sale of LEU in enrichment services contracts, *NSK* supports AHUG's position that those contracts cannot be included in the calculations of export price or constructed export price. AHUG adds that in the circumstances of the instant case, it does not matter that the enrichers are exporters, since under enrichment services contracts there is not a sale of the subject merchandise at a price reflecting all elements of its value.

In its final point, AHUG argues that the Court has already made clear that the Department failed to focus on the critical distinction between EUP and SWU transactions, i.e., what is purchased. AHUG declares that the Department nevertheless uses imaginary transactions to construct a price by assigning a specific monetary value to the natural uranium component and that it estimated the market value using the average price the enrichers charged their customers for natural uranium for LEU contracts. However, AHUG argues, in enrichment services transactions, the enrichers do not charge utilities for the uranium feed and enrichers do not know the value of the feed. Therefore, the values used by the Department are not equivalent to what was purchased, AHUG maintains, and ignore the distinction between enrichment (SWU) and LEU (EUP) transactions.

Department Position:

As an initial matter, we disagree with Urenco/Eurodif and AHUG's interpretations of the Court's decision and remand as expressed in their comments. As we noted in the body of this

determination, the Court recognized that the circumstances in this case appear to resemble in large part the tolling arrangements in earlier determinations, and could not reconcile the Department's prior distinctions involving tolling with the Department's statements in this case. The Court specifically cited the Department's own statements made in the context of *SRAMs from Taiwan* and *Polyvinyl Alcohol from Taiwain*, but further noted that it is well-established that the Department is authorized to depart from its prior practice as long as the agency articulates a reasoned analysis which demonstrates that the departure is supported by substantial evidence and in accordance with law.

On the issue of the Department's conclusion that neither the statute nor the regulation on tolling contemplates the particular facts and circumstances in this case, we make several points. First, respondents and AHUG's argument concerning the statute and regulation seem to rest on the premise that the Department can only make determinations where precedents and agency practice have been previously established. Respondents have noted that the Department has cited no administrative cases to support its position. In cases of first impression, however, where past practice does not address the facts and circumstances of a case, the Department is required to exercise its authority and interpret the statute in the manner intended by Congress.

Moreover, respondents do not cite any language in the statutory provisions governing U.S. price and its normal value to indicate that the price of the subject merchandise cannot be derived from the subcontractor's sales in any instance. We specifically recognized above that past tolling cases do not address the facts and circumstances in the instant case. In their comments, respondents rely on the Court's statements that have properly focused the Department back upon its own statements made in

the context of *SRAMs from Taiwan* and *Polyvinyl Alcohol from Taiwan*. Respondents, however, make no statutory argument as to why the Department's statements in those cases should be considered the only reasonable interpretation of the statute. Instead, respondents assert that the Department has reinvented history by stating a preference to select the respondent whose price covers the full cost of production. Respondents insist it was not an administrative preference, but rather was required as a matter of law because, again using the Department's own words, "the statute requires that we base comparisons on the price of the subject merchandise sold in the U.S. to the price of the subject merchandise sold to the home or third country markets, not the price of some processing of the subject merchandise." This is incorrect. In the original investigation in polyvinyl alcohol from Taiwan, as cited by the parties, for example, the Department's memorandum reflects a choice between four viable options presented to the decision-maker.[42] Not only does the memorandum reflect the Department's view that it was faced with a choice of respondents, but we note that none of the options included an exemption from the AD law for merchandise entering the commerce of the United States. *Id*. Further, we note that if the Department were not faced with a choice of respondents, then it would have been required, as a matter of law, to treat Perry as a producer in the later administrative review in *Polyvinyl Alcohol From Taiwan*, based upon the contractual relationships, as discussed above.

More important, however, neither the tolling regulation nor the statute contemplate the circumstances of this case. In examining the statute and regulation, to the extent we stated that the AD

[42] *Memorandum From Team to Barbara R. Stafford, Treatment of DuPont's Sales of Polyvinyl Alcohol Tolled by Chang Chun*, (Aug. 8, 1995) at 5.

law requires the sale of subject merchandise and not the sale of processing, the broad implication of those statements would mean that merchandise entering the commerce of the United States would be considered outside the parameters of the AD law. We recognize that the statute does not directly address this circumstance, and we reject the implication of those statements to the extent they may be interpreted to mean that the AD law does not apply to merchandise traded and entering the United States for consumption. In our view, the objective of the tolling regulation is to obtain the full price of the subject merchandise. We also recognize, however, that there can be cognizable sales without 100 percent of the value of the subject merchandise reflected in the relevant sale.

With respect to AHUG and respondents' arguments that the facts in this case are consistent with the facts in *NSK* where there was no price for the sale of samples, we find such reliance upon *NSK* to be misplaced. In that case, the Federal Circuit found that because the sample merchandise in question lacked consideration, no sale existed, and thus "they should not be included in calculating United States price." *Id*. at 970. The Court held that a sale requires the transfer of ownership to an unrelated party for consideration. Unlike the case of *NSK*, in the case of LEU there are meaningful sales that can be used to calculate export and constructed export price, as discussed above. In light of the Federal Circuit decisions in *NSK* and *AK Steel*, we find the sales at issue to be relevant sales as the utility customer obtains LEU through a transaction in which ownership in the LEU is transferred for consideration.

AHUG and respondents also dispute the Department's finding as to the title and ownership of the LEU in question. The parties contend that the Court has already addressed this issue, and that the

Department is attempting to evade the Court's holding on this issue. We disagree. The Court expressly stated why the Federal Circuit decisions in *NSK* and *AK Steel* were inapplicable, noting that "[a]s there is no finding that the enrichers' rights rise to the level of ownership, *NSK* is inapplicable." *USEC*, at 24, n. 12. In the *French Final Determination*, we examined the overall arrangement and did not address the ownership of the LEU and the transfer of ownership under *NSK*. The Department has now addressed this issue in the determination.[43]

As to AHUG's allegation of imaginary transactions of feed uranium that formed the partial basis of the price of LEU, we disagree with AHUG's argument. As noted above, the Department seeks to obtain the full value of the subject merchandise. The Department specifically requested data from the respondents as to the value of the uranium feed. The Department has used the entry value of the feed as an estimate of the value of this component in order to obtain the value of the LEU at issue. This approach is consistent with the statute and fully comports with the Department's practice where specific information or data are unavailable.

Finally, with respect to AHUG and respondents' argument that whether enrichers control the enrichment process is irrelevant, we disagree. While we recognize, as stated above, that the relevance of the manufacturing operations is limited, we note that AHUG has attempted to view in isolation the factors used by the Department in making its determination that utility companies are not producers of

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[43] We note that nothing in the statute prohibits the Department from combining separate transactions to obtain the U.S. price of the subject merchandise. In such a case, the activities of the producer and seller of the input and the activities of the processor may reasonably be considered together for purposes of establishing U.S. price, as such activities are tied together by the transactions to the U.S. customer, as it relates to the entry of merchandise into the United States.

LEU. As we stated above, the facts taken together indicate that the utility companies are not producers of LEU. Utility companies do not sell LEU, as contemplated by the tolling regulation, but instead are consumers and industrial users of such merchandise; they engage in no manufacturing operations of any kind related to the production of LEU, and do not control the production of LEU. The Department's determination is based upon these factors, taken together. While we recognize that a tollee is not required to engage in manufacturing operations directly, or to have facilities for such manufacturing, we also recognize that where a company does not engage in any traditional manufacturing functions, and does not sell the subject merchandise, but rather acts in the capacity of a consumer of such merchandise, the entity is not satisfying any important functions either in the traditional sense or consistent with the purpose of the Department's tolling regulation - to calculate U.S. price of the subject merchandise and its normal value. Accordingly, if the Department were to treat U.S. utility companies as foreign producers, the purpose of the regulation would be defeated, and relevant sales would escape examination where such transactions may place the industry at risk from unfairly traded imports.

Urenco/Eurodif raise additional points. However, these points have been fully addressed in the body of this determination, and need not be repeated here.

C. APPLICABILITY OF THE COUNTERVAILING DUTY STATUTE

a. *The Department's Analysis of Countervailing Duties*

In the final affirmative countervailing duty determinations, the Department addressed the general scope of the countervailing duty law, and in particular, the specific program in the case of France in which the Department found that the Government of France provided a countervailable subsidy by purchasing goods for more than adequate remuneration, under section 771(5)(E)(iv) of the Act.

For the general scope issue, the Department stated that "in conducting countervailing duty investigations, section 701(a)((1) of the Act requires the Department to impose duties if, inter alia, 'the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States.' We believe the statute is clear that, where merchandise from an investigated country enters the commerce of the United States, the law is applicable to such imports." *Final French AD Determination*, at 65879.

For the program specific analysis of the purchase of a good for more than adequate remuneration with respect to LEU from France, the Department stated that "[b]ecause we have determined that SWU contracts involve the purchase of LEU, we determine that these transactions constitute the purchase of goods." *Id*. at 65883, n. 7.

b. *The Court's Remand on the Countervailing Duty Investigation*

In addressing the Department's determination as to the general applicability of the

countervailing duty law, the Court noted that the Department relied on the same rationale it employed in applying the antidumping duty law that because the LEU was entering the United States for consumption, the merchandise was subject to the law.

With respect to the specific program pertaining to "more than adequate remuneration" under section 771(5)(D)(iv) of the Act, the Court, noting that the Department had relied on the same analysis as in the antidumping context concerning the SWU contracts involving the purchase of LEU, stated:

> We have already determined that Commerce's determination regarding "functional equivalency" of EUP and SWU contracts is not supported by the record. Accordingly, we cannot sustain the Department's determination that for the purposes of applying the countervailing duty statute, SWU contracts involve the purchase of LEU.

Id. at 41. On remand, the Court stated, the Department will have an opportunity to reconsider the application of its tolling regulation to the transactions at issue here. The Court instructed the Department that it "must reconsider its countervailing duty determinations in that context." *Id*.

c. *Analysis of the Countervailing Duty Determinations*

(1) General Applicability of CVD Law

With respect to the general applicability of the countervailing duty (CVD) statute, we find that the law is applicable to the LEU entering the United States pursuant to SWU contracts. First, based upon the our analysis on remand in the antidumping context, pertaining to sales made under the SWU contracts between foreign enrichers and U.S. utilities, we found that the enrichers own and hold title to the complete LEU product subject to these investigations, and transfer ownership and title to the utility customers for consideration. Based upon that analysis, these sales are also relevant for purposes of the CVD law.

Second, we also find that, unlike the antidumping law, where the statute refers to a class or kind of merchandise being sold at the less than fair value, the scope of the CVD law is clearer in that the plain language of the statute provides that the law is applicable where the merchandise is either imported, or sold for importation, into the United States. Section 701(a)(1) requires the Department to impose countervailing duties upon the merchandise if it determines that "the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailing subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States." 19 U.S.C. § 1671(a)(1) (emphasis added).

Prior to the enactment of the Trade and Tariff Act of 1984 (1984 Act), section 701(a)(1) did not contain specific language pertaining to merchandise "sold (or likely to be sold) for importation." The legislative history of the 1984 Act indicates that Congress amended the provision to include sales of merchandise not yet imported into the United States.[44] Based upon the language of the provision and the legislative history, we believe the law was amended, not for purposes of narrowing the scope of its application, but rather to broaden its application to include not only imports of subject merchandise, but also sales of such merchandise that occurred for importation. Accordingly, we interpret the CVD

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[44] Trade and Tariff Act of 1984, 98th Cong., 2d Sess., 98-39, at 26. *See also* Conf. Rept., 98-1156, at 75 and 165-66. The legislative history states that the change "is intended to eliminate uncertainties about the authority of the Department of Commerce and the ITC to initiate countervailing duty cases and to render determinations in situations where actual importation has not yet occurred but a sale for importation has been completed or is imminent." H.R. Re. No. 98-725, at 11 (1984), *reprinted in* 1984 U.S.C.C.A.N 4910, 5137.

law to apply whenever a foreign government provides subsidies with respect to a class or kind of merchandise that is imported into the United States. In the case of LEU, there is no dispute that the merchandise at issue was imported into the United States. Accordingly, we conclude that the law is applicable to all imports of LEU from the respective countries under investigation.

Finally, because the tolling regulation was adopted for the limited purpose of providing guidance on the selection of the relevant sale for purposes of determining U.S. price and normal value under the AD law, it is not relevant for purposes of determining whether particular imports are subject to the CVD law. If a subsidy has been provided with respect to the production or importation of subject merchandise, countervailing duties may be imposed regardless of the characterization of the transaction (sale of goods or sale of services) pursuant to which such imports are made or the identity of the producer (toller or tollee) for purposes of the tolling regulation under the AD law. Accordingly, all of the subsidy programs which formed the basis for the calculation of the net subsidy rate in the CVD investigations on LEU from Germany, the Netherlands, and the United Kingdom, and the subsidy relating to the exoneration/reimbursement of taxes in the CVD investigation on LEU from France, would be unaffected by any determination as to whether enrichment transactions involve the sale of goods or services. For the reasons discussed below, we also conclude that the specific program in the French CVD investigation concerning the adequacy of remuneration involves a "financial contribution" within the meaning of section 771(5)(D) without regard to how SWU transactions are characterized for other purposes.

(2) Program Specific Analysis

With respect to the specific subsidy program in the French LEU case concerning the adequacy of remuneration, section 771(5) (D) lists financial contributions subject to the law as the following:

> (i) the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees,
> (ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income,
> (iii) providing goods or services, other than general infrastructure, or
> (iv) purchasing goods.

19 U.S.C. § 1677(5)(D).

Section 771(5)(E)(iv) states that a benefit is conferred "in the case where goods or services are provided, if such goods or services are provided for less than adequate remuneration, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration." 19 U.S.C. § 1677(5)(E)(iv). Thus, the statute establishes that a countervailable subsidy exists where a government provides goods or services for less than adequate remuneration, but limits the application to goods, as compared to services, where a government makes a purchase for more than adequate remuneration. The legislative history does not explain the basis for the limitation to goods where the government makes a purchase under subsection 771(5)(D)(iv). We believe the provision is aimed at the producers of merchandise who obtain a benefit by selling their merchandise to the government for more than adequate remuneration.

In this case, we find that EdF purchased a good, LEU, for more than adequate remuneration. For the same reasons that the SWU contracts involve the sale of merchandise in the antidumping context, we find that they involve the purchase of merchandise with respect to section 771(5)(D)(iv) of

the Act.

We note that even if the transactions between EdF and Eurodif were not sales of merchandise, nonetheless, for two reasons EdF's payments of more than adequate remuneration to Eurodif were made in connection with EdF's "purchasing goods" as that term is used in section 771(5)(D)(iv). First, there is no question that EdF obtains LEU in a series of purchase transactions (i.e., the purchase of natural uranium, the purchase of conversion, and the purchase of enrichment). Accordingly, EdF's payment of more than adequate remuneration to Eurodif is made in connection with the major step in the process by which EdF is "purchasing goods."

Second, in our view, the fundamental purpose of the provision is to address subsidization of manufacturing operations that produce subject merchandise. In this context, the purchase of manufacturing or processing is a necessary component of the good. As a practical matter, goods include any manufacturing or processing that is necessary to produce the article. Thus, the sale of manufacturing or processing, which is a necessary component of the good, pertains to the purchase of goods, and does not constitute the purchase of a "service" in this context. The term "service" is not defined in the statute. Under its ordinary meaning, consistent with the purpose of section 771(5)(D), we interpret the term to mean "[t]he sector of the economy that supplies the needs of the consumer but produces no tangible goods, as banking and tourism."[45] *The New Shorter Oxford English*

[45] *The New Shorter Oxford English Dictionary* defines the term for economic purposes as "The sector of the economy that supplies the needs of the consumer but produces no tangible goods, as banking and tourism." (1993 ed.), at 2789. That source also indicates that a service is "The provision or system of supplying necessary utilities, such as gas, water, or electricity, to the public; the apparatus of pipes, wiring, etc., by which this is done." Also "Expert advice or assistance given by a

Dictionary, 1993 ed., at 2789. This definition is also consistent with the U.S. government's negotiating position as to the distinction between goods and services in the international trade context. Section 2114(b)(5) of Title 19 of the U.S. Code, addressing international trade in services, states that the term "services" in this context means "economic activities whose outputs are other than tangible goods. Such term includes, but is not limited to, banking, insurance, transportation, postal and delivery services, communications and data processing, retail and wholesale trade, advertising, accounting, construction, design and engineering, management consulting, real estate, professional services, entertainment, education, health care, and tourism." These definitions are relevant and useful for purposes of distinguishing between purchase transactions pertaining to goods and those pertaining to services. If a transaction is made that is directly related to the purchase of a good, such as the purchase of the manufacturing or processing component, for more than adequate remuneration, we interpret section 771(5)(D) to be applicable to the transaction, as explained further below.

In the case of LEU, even if, contrary to our finding above, the sales between EdF and Eurodif were solely for contract manufacturing, and were not found to be a transfer of ownership in the complete LEU, section 771(5)(D)(iv) of the Act would continue to be applicable to this circumstance because enrichment is a manufacturing operation leading to the production of a good. In this context,

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manufacturer or dealer to a customer after the sale of goods; the provision of the necessary installation, maintenance, or repair work to ensure the efficient running of machine etc.; a periodic routine inspection and maintenance of a motor vehicle etc." The ordinary meaning of the term indicates that a manufacturing operation producing a tangible good does not constitute a service within the meaning of the term. In this case, no party disputes the underlying fact that LEU is a tangible product resulting from the enrichment process.

enrichment is not a service, but is instead a critical component of the LEU, just as any manufactured product has within it a manufacturing component. Moreover, one cannot purchase LEU without purchasing the enrichment component. Thus, the sales of enrichment are directly related to the purchase of LEU. Where such sales are made at more than adequate remuneration, the sales directly benefit the manufacturing operations leading to the production of LEU. Therefore, we believe the transactions at issue embody the very types of subsidies the law was intended to address under section 771(5)(D)(iv) of the Act.

However, even if the subsidy in the French CVD investigation were characterized as the purchase at more than adequate remuneration of the "service" of producing the LEU, rather then the purchase of the LEU itself, the Department must look beyond the characterization to effectively administer the law. A payment of more than adequate remuneration to a producer of an acquired product may constitute a countervailable subsidy under section 771(5)(D) provided there is a nexus between the purchase transaction and the product acquired.

For example, where a foreign government purchases a good from a manufacturer, but separately purchases freight services from a company unaffiliated with the manufacturer, the statute does not contemplate the imposition of a countervailing duty on the provision of freight for more than adequate remuneration because any benefit provided to the freight provider by the government pertains to the purchase of a service, and does not benefit the production of merchandise.

If, on the other hand, the manufacturer of the merchandise provided both the merchandise and the freight service, but pursuant to separate transactions, the Department would need to examine

closely the arrangement between the manufacturer and the foreign government. If the facts indicated that, on its face, the good appeared to be purchased at adequate remuneration, but that the remuneration for the freight service far exceeded the value of the service, the Department may reasonably infer that the remuneration pertaining to freight is so excessive that, as a practical matter, it is reasonably related to the purchase of the merchandise (i.e., a good that falls within the ambit of the provision). In such a case, the Department could reasonably conclude that the foreign government in this instance has provided a subsidy to the manufacturer in connection with the purchase of goods for more than adequate remuneration.

While the above example is not directly relevant to the facts and circumstances of the French CVD investigation, the example is useful in that it recognizes that countervailable subsidies may occur by a payment of more than adequate remuneration to a producer of goods for an activity provided by the producer in connection with the production and delivery of such goods. In the case of LEU, the purchase transactions are more directly related to the purchase of goods, as discussed above, than in the above example.

Comments From Urenco/Eurodif and AHUG

Urenco/Eurodif argue that the Department offers two justifications for its finding that the CVD law is applicable to LEU entering the United States pursuant to SWU contracts: first, that the enrichment sale transaction is relevant "for purposes of the CVD law," and, second, that the CVD law is applicable to any merchandise imported into the United States. Urenco/Eurodif assert that neither of these justifications supports the application of the CVD law to enrichment transactions.

Urenco/Eurodif first contend that their discussion in the AD context as to why an enrichment transaction is not a sale of merchandise applies equally to the Department's first justification in this context; and that no further discussion in the CVD context is necessary. As for the second justification, Urenco/Eurodif assert that the Department's finding flatly ignores the statutory requirement that countervailable subsidies be provided "with respect to the manufacture, production or export of a class or kind of merchandise." They argue that the fact that LEU is imported into the United States says nothing about whether the subsidies found by the Department are with respect to the manufacture or production of LEU. Since, as shown above and throughout this proceeding, the respondents are engaged in rendering enrichment services, they assert that any subsidies supporting this activity cannot properly be treated as having been bestowed with respect to the manufacture of LEU.

Urenco/Eurodif further point out that just as the antidumping duty statute is quintessentially concerned with evaluating sales of merchandise to determine whether there has been unfair price discrimination, the CVD law is concerned with whether countervailable subsidies have benefited the manufacture or production of merchandise. Correspondingly, just as the antidumping duty law can be applied only to the sale of merchandise, these parties assert that the CVD law can be applied only to the subsidization of the manufacture or production of merchandise. Respondents point out that the Department does not refer to any case where the CVD law has been applied to the subsidization of a service, or where the reach of the CVD law has exceeded the reach of the antidumping law. Respondents conclude that there is no justification for the Department's finding that the CVD law is applicable to enrichment services transactions.

With regard to the French-specific program, respondents contend that since the Department's analysis in the antidumping context is completely flawed, it falls equally as hard when incorporated by reference here. Respondents contend there is no validity to the Department's alternative statement that "even if the sales between EdF and Eurodif do not involve sales of merchandise," there nonetheless can exist a countervailable subsidy because "under these transactions EdF has acquired the LEU in purchase transactions in connection with the purchase of goods." Respondents contend that the Department's claim is faulty. The phrase "in connection with" does not appear in the statute, and the utility company is not purchasing goods. Respondents state that enrichment transactions involve the purchase of services. Accordingly, respondents point out, the Department inaccurately claims that the dictionary and section 2114b(5) of an unrelated portion of Title 19 establish that a true service is one that results in "no tangible goods." Respondents argue that the attempted analogy does not work. Since the customer already owns the uranium at the start of the transaction, it is not contracting for the purchase of a "tangible good," but rather only separative work, which clearly is an "intangible." In addition, section 2114b(5) explicitly states that "construction" (which certainly results in the delivery of tangible goods) is included within the definition of services, thereby demonstrating that the fact that the services result in the final delivery of something tangible is irrelevant.

AHUG has also addressed this issue. AHUG first argues that "the Department cannot justify its conclusion that manufacturing services are not services." AHUG states that in the draft remand determination, the Department relies upon definitions of "services" that are neither consistent with the term's ordinary meaning nor the documented position of the U.S. government and foreign governments

in international trade negotiations.

According to AHUG, *Black's Law Dictionary* defines "service" within the context of contracts to be "[d]uty or labor to be rendered by one person to another.....[t]he act of serving the labor performed or the duties required....[p]erformance of labor for the benefit of another, or at another's command....." AHUG states that Webster's New Universal Unabridged Dictionary includes in its definition of "service" "work done or duty performed for another or others." AHUG contends that neither of these definitions comports with the Department's suggestion that manufacturing services must be treated as sales of goods under the trade remedy law. AHUG points out that both of its definitions encompass the provision of enrichment services.

AHUG also states that it previously established, contrary to the Department's argument, that the U.S. government considers uranium enrichment to be a service in the context of the General Agreement on Trade in Services (GATS) negotiations. In a submission to the WTO, the U.S. government defined energy services specifically to be "those services involved in the exploration, development, extraction, production, generation, transportation, transmission, distribution, marketing, consumption, management, and efficiency of energy, energy products, and fuels." Further, AHUG contends the United Nations Central Product Classification (CPC), which the WTO members have adopted for the purpose of identifying service sectors covered by the GATS, includes energy-related services with "Manufacturing Services" (Division 88). Specifically, AHUG claims, Division 88 includes the "Manufacture of coke, refined petroleum products and nuclear fuel, on a fee or contract basis." According to AHUG, the explanatory notes to Division 88 provide that "Manufacturing Services" are

"[s] ervices rendered on a fee or contract basis by units mainly engaged in the production of transportable goods, and services typically related to the production of such goods, and that "services incidental to manufacturing" include "manufacturing on a fee or contract basis, i.e. manufacturing services rendered to others where the raw materials processed, treated or finished are not owned by the manufacturer . . ." According to AHUG, the fact that manufacturing services cover such activities on a contract basis, where the raw materials processed are not owned by the toller (such as with enrichment of feed owned by utilities), confirms that uranium enrichment is a service distinct from the sale of LEU under trade law.

AHUG further states that it has previously pointed out that a number of countries have included manufacturing services in their schedule of commitments in the GATS, for example, Austria, Canada, Iceland, South Africa, the Dominican Republic, Indonesia, Kuwait, Malaysia, Nicaragua, Panama, Gambia and Lesotho, all of whom have undertaken to permit trade in manufacturing services.

Department Position:

We disagree with respondents' and AHUG's arguments on the application of the CVD law in general and the program-specific subsidy pertaining to the purchase of goods in the French CVD case.

AHUG argues that the Department "cannot justify its conclusion that manufacturing services are not services." AHUG challenges the Department's interpretation as being neither consistent with the ordinary meaning of the term nor the documented position of the U.S. government and foreign governments in international trade negotiations. *AHUG Comments*, at 18. AHUG points out that *Black's Law Dictionary* defines "service" within the context of contracts to be "[d]uty or labor to be

rendered by one person to another . . . [t]he act of serving the labor performed or the duties required . . . [p]erformance of labor for the benefit of another, or at another's command . . ." *Id*. (citing *Black's Law Dictionary*, 6th ed. at 1368 (1990).

The broad definition offered by AHUG would, if applied, turn the production of goods into a series of services composed of labor or work performed. As such, it does not provide a basis to distinguish between goods and services for purposes of the AD and CVD laws, or to distinguish between the General Agreement on Trade in Services (GATS) and the AD and CVD regimes established under the GATT and now within the WTO. In defining the term "services," *Black's Law Dictionary* states at the outset that "[t]he term has a variety of meanings, depending upon the context or the sense in which it is used." 5th Ed., at 1227. AHUG has cited to the contracts context. Under this definition, however, the international regimes established for the imposition of antidumping and countervailing duties would be subject to the terms and conditions specified in the parties' contracts. This is not a circumvention issue as much as it is an issue of form over substance. In this case, the respondents and AHUG agree that where LEU is sold pursuant to EUP contracts, any subsidies pertaining to the manufacture of the LEU are subsidies that pertain to the manufacture of goods. However, where the same subsidies pertain to the same manufacture of LEU that is sold pursuant to SWU contracts, AHUG and respondents propose that the subsidy no longer pertains to the manufacture of goods, but instead to services. Under such an interpretation, the contract alone would establish the parameters of the AD and CVD laws.

To administer these laws effectively and consistent with the intent of Congress, we recognize

that where a purchaser obtains foreign goods, or where a government obtains goods, the aim of the law to address unfairly traded imports, or to address subsidies pertaining to the purchase of goods for more than adequate remuneration. The object and purpose of these laws would be defeated if the Department were to adopt broad definitions of the term "services" in the context of the trade laws.

Second, the Department's definition reflects the position of the United States government with respect to its international obligations under the GATS. To be clear, the United States has made no commitment with respect to treating enrichment processing as a service within the meaning of the GATS. Nor has the United States made any commitment to treat LEU produced under contract manufacturing as an activity that is beyond the scope of the AD and CVD laws.

In making its arguments that enrichment processing is a service that falls within the ambit of the GATS, AHUG incorrectly assumes that the Provisional Central Product Classification of the United Nations (CPC) is controlling with respect to the commitments of the United States under the GATS. To the contrary, Article 1 of the GATS defines the services under GATS, not the CPC.[46]

Contrary to AHUG's presumption, the authoritative document relied upon by the WTO in its

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[46] See General Agreement on Trade in Services. Further, the purpose of the CPC was to "provide a framework for international comparison of statistics dealing with goods, services and assets . . ." CPC at 5. The CPC itself recognizes that its function of providing such a framework for comparison of statistics does not extend to distinguishing goods from services. The CPC states that "[t]he precise distinction between goods and services is interesting from a theoretical point of view and may be relevant for the compilation and analysis of certain economic statistics. However, there is no need to embody such a distinction into a classification such as the CPC, which is intended to be for general purpose and to cover both goods and services." *Id.* at 9. Thus, the CPC may be used as a starting point in negotiations, but the listing of services contained in the CPC does not represent an authoritative expression of the United States' commitments under the GATS.

negotiations is a note from the Secretariat dated July 10, 1991, MTN.GNS/W/120. That document lists the services sectoral classifications. Under section 884 and 885, the document specifically lists "[s]ervices incidental to manufacturing." *Id.* at 4. Enrichment of uranium is not listed. Moreover, the United States considers enrichment of uranium to be no more "incidental to manufacturing" than any other manufacturing activity that produces such merchandise as textiles, microchips, or steel.

To interpret the GATS as AHUG has proffered would mean that many manufacturing operations that produce merchandise currently subject to the AD and CVD would, sua sponte, be outside the purview of the AD and CVD law based upon its listing in the CPC. For example, the same CPC lists "manufacture of textiles" and "manufacture of basic metals" - manufacturing operations that produce textiles and steel. See Provisional CPC, at 149-150. Pub. Doc. 85, Exhibit 1, at Fr. 30-31. Nothing in the AD and CVD laws, nor the GATS, supports a such a sweeping conclusion that anything listed in the CPC would be outside the scope of the unfair trade laws.

In addition, we note that the U.S. government document relied upon by AHUG (i.e., a communication on energy services), dated December 18, 2000, was one of many proposals presented by the U.S. government in its negotiations on GATS. AHUG's Submission, Apr. 5, 2001, at Exhibit 3. As a proposal, the document demonstrates that there is no commitment currently in place, nor was there any commitment in place at the time period in which the agency conducted its AD and CVD investigations on LEU. Second, the document expressly states that the proposal is a "Draft - For Discussion Purposes Only" and that it is "intended to stimulate discussion." Exhibit 3, at Annex A, and Communication From The United States, at 1. The document also states that [t]his exercise does not

prejudge the questions of whether all possible energy service activities are listed or which of these activities fall within the scope of the GATS." *Id*. at Annex A. Thus, AHUG's continued reliance upon it as a reflection of the United States commitments under GATS is misplaced. As a final point, AHUG notes that other countries have included manufacturing services in their schedule of commitments under the GATS, and notes, in particular, that Canada has scheduled commitments for "toll refining services." However, commitments by other countries neither reflect the commitments of the United States, nor bind the United States to such commitments.

Finally, with respect to Urenco/Eurodif's argument that the Department does not refer to any case where the reach of the CVD law has exceeded the reach of the AD law or where the CVD law has been applied to the subsidization of a service, we need to clarify that the CVD law does not exceed the reach of the AD law. In the draft determination, we stated that, unlike the AD law, "the scope of the CVD law is clearer in that the plain language of the statute provides that the law is applicable where the merchandise is either imported, or sold for importation."

Based upon all of the above reasons and the analysis set forth in the body of this remand determination, we continue to find that the CVD law (and the AD Law) is applicable to the LEU at issue, and that the provision of subsidies through the French government's purchase of LEU for more than adequate remuneration is subject to the CVD law.

Final Remand Determination

This final redetermination is pursuant to the remand order of the Court of International Trade in *USEC Inc. and United States Enrichment Corporation v. United States*, Court Nos. 02-00112,

02-00113, 02-00114, and Consol. Court Nos. 02-00219, 02-0000221, 02-00227, 02-00229, and 02-00233, Slip Op. 03-34, (March 25, 2003).

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

Date