

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :

4 Petitioner :

5 v. : No. 07-1059

6 EURODIF S.A., ET AL.; :

7 and :

8 USEC INC., ET AL., :

9 Petitioners :

10 v. : No. 07-1078

11 EURODIF S.A., ET AL. :

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13 Washington, D.C.

14 Tuesday, November 4, 2008

15 The above-entitled matter came on for oral
16 argument before the Supreme Court of the United States
17 at 11:06 a.m.

18 APPEARANCES:

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20 Washington, D.C.; on behalf of the Petitioner in No.
21 07-1059.

22 H. BARTOW FARR, ESQ., Washington, D.C.; on behalf of
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24 CAITLIN J. HALLIGAN, ESQ., New York, N.Y.; on behalf of
25 the Respondents.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 07-1059, United States v. Eurodif and 07-1058, USEC v. Eurodif.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE PETITIONER

IN NO. 07-1059

MR. STEWART: Mr. Chief Justice and may it please the Court:

The question presented in this case is whether the provision of enriched uranium under separative work unit or SWU contracts is covered by the Federal antidumping duty law. The resolution of that question turns on whether the performance of SWU contracts results in merchandise being sold in the United States. The Department of Commerce, which is the Federal agency entrusted by Congress with the administration of the antidumping duty law, concluded after an extensive investigation that SWU contracts do result in sales of enriched uranium. That determination was reasonable and should be sustained by this Court.

Now, the fundamental bargain in a SWU contract is that the customer, the utility, provides a

1 combination of feedstock or feed uranium plus cash, and
2 receives in return a specified quantity and assay of
3 enriched uranium, and by "assay" I mean the percentage
4 of weight of U-235 within the final product. Now, the
5 customer has discretion to choose among varying
6 combinations of feedstock and cash in order to complete
7 the transaction for a particular quantity and assay of
8 enriched uranium; but the enricher has its own
9 discretion. That is, having received the consideration
10 paid by the utility, the enricher is free to make its
11 own determination based on economic considerations as to
12 the relative proportions of feedstocks and SWUs that
13 should be used to make a given quantity of enriched
14 uranium.

15 So the overall -- the character of the
16 overall transaction is comfortably characterized as a
17 sale, because it involves the acquisition by the utility
18 of a product, merchandise, that it didn't own at the
19 outset of the transaction in exchange for consideration.

20 JUSTICE BREYER: I can imagine you could
21 have a grain mill and they have lots and lots of grain
22 absolute identical one to the other. And the farmer
23 takes his grain up and they operate on it, and then he
24 drives away with the grain, milled. Now, it may make no
25 difference to anybody whether the identical molecules

1 are the same; and I think in such a case you'd say they
2 are processing it; they are not buying and selling it.

3 MR. STEWART: Well, indeed, as we've
4 explained in our opening brief, at common law the
5 distinction between a bailment and a sale in that type
6 of circumstance depended upon whether the miller or the
7 equivalent processor was under an obligation to return
8 the very same thing in processed form. And if that
9 was --

10 JUSTICE BREYER: You are saying if we have
11 that, in fact, if the -- if the exact situation, if some
12 farmers up in North Dakota send their grain just to be
13 milled -- it's their grain -- up in Canada, and they
14 come back, and it -- you know, it may not be the
15 identical molecule, but it's identically the same; they
16 have done this for 100 years -- now suddenly this -- the
17 Commerce Department is going to say, that's a sale, and
18 the antidumping statutes apply?

19 MR. STEWART: We are saying that Commerce
20 could treat it as a sale. And --

21 JUSTICE BREYER: Well, would it or not?

22 MR. STEWART: I think Commerce in that
23 hypothetical -- again, if we were talking about grain
24 being provided by the customer to a miller overseas --
25 overseas, and then the finished product being brought

1 back into this country, I think the logic of the
2 Commerce determination here would suggest that it would
3 be a sale.

4 JUSTICE BREYER: I agree with you, and I
5 just wonder, what I would like to know, is if any
6 businessman involved in any of these or related things
7 before this decision of the Commerce Department would
8 have thought that that is how the Commerce Department
9 would have treated such a transaction?

10 MR. STEWART: Well, I don't think that
11 Commerce had before this incident dealt with exactly
12 this type of situation.

13 JUSTICE SCALIA: Well, but common law would
14 have treated it that way, you say?

15 MR. STEWART: Common law would have treated
16 it --

17 JUSTICE SCALIA: That's pretty good
18 authority.

19 MR. STEWART: It certainly suggests that
20 Commerce could permissibly treat it as a sale.

21 JUSTICE BREYER: I don't know. I'm
22 asking -- the question is the same as the last case, to
23 me: Not whether they could have done it; sure they
24 could have done it. My question is based on my question
25 of whether they had a rule that any reasonable person

1 would have thought that is how they treated it --

2 MR. STEWART: I --

3 JUSTICE BREYER: Because after all, you have
4 three precedents in related areas, not the direct area
5 but in related areas, that suggest that they wouldn't
6 have treated the millers that way.

7 MR. STEWART: I'm not sure exactly which
8 precedents you mean. If -- the one that is -- the
9 administrative determination that is cited most
10 frequently is SRAMS from Taiwan, in which the design
11 house provided, I believe it was a design mask to the
12 foundry, and the foundry manufactured the finished
13 equipment and in concluding that it was the design house
14 rather than the foundry that was properly treated as the
15 producer of the goods, the Commerce Department relied in
16 part on the fact that the design house had intellectual
17 property rights in the design mask.

18 JUSTICE BREYER: You know what, I'm thinking
19 of those things, they're something called "tollers." I
20 don't know exactly what tollers are. They seem to be
21 like people who give haircuts. They're sort of
22 servicers of some kind. They're talking about tollers
23 and -- and subcontractors. And that is a related area.

24 MR. STEWART: That's correct. And the SRAMS
25 cases is one of the toller or subcontractor cases. And

1 the Department of Commerce relied in part on the fact
2 that the design house had intellectual property rights
3 in the design mask. So it was not fungible property, it
4 was not an input that the foundry could have gotten from
5 another source.

6 The other thing we would say about the grain
7 hypothetical is that when you hear about the farmer
8 providing grain to the miller or the utilities providing
9 feedstock to the enrichers, it may conjure up images of
10 a tangible good that is in the physical possession of
11 the farmer or the utility that is then physically
12 transferred to the enricher. In the case of the miller
13 that is correct.

14 But the way that a utility provides
15 feedstock to an enricher is not by taking physical
16 possession of the feedstock and then by transporting it.
17 Rather, the utility simply makes financial arrangements
18 with the supplier of feedstock, basically cuts a check
19 or transfers funds --

20 JUSTICE STEVENS: Mr. Stewart, can I ask a
21 question about the scope of discretion involved here?
22 Assume the facts were not exactly as they are here, it
23 is not a fungible product, but that each shipment was
24 separately identified and each shipment was processed as
25 a different batch in France and then sent back. That I

1 assume would not normally be treated as a sale of goods?

2 MR. STEWART: Well, I think that Commerce's
3 determination suggests, without squarely holding, that
4 it would treat that as a sale of goods because it would
5 involve substantial transformation of the original item.

6 JUSTICE STEVENS: That's really what I
7 wanted to ask you. Even if the facts were more extreme,
8 just as in the example I gave, do you think the Commerce
9 Department would have discretion to treat that as a sale
10 of goods?

11 MR. STEWART: We do. And I think it's
12 important, to carry on with the thought I was sketching
13 out previously about the way in which the raw materials
14 are provided to the enricher.

15 If you imagine my buying a suit from a
16 tailor, and the tailor says: The price is \$600; \$300 of
17 that accounts for the cost of the cloth; \$300 is the
18 labor that's involved in sewing it into a suit.
19 Clearly, that's a sale of merchandise, even though the
20 price has been broken up --

21 JUSTICE STEVENS: But then supposing they
22 send the suit back to a different person for
23 alterations, and they say, well, this is part of the
24 sale, so we want to treat it as a sale of goods?

25 MR. STEWART: Well, the alterations would

1 just be a finishing process and that wouldn't involve
2 substantial --

3 JUSTICE STEVENS: What is the difference
4 between that and what we've got here?

5 MR. STEWART: But the point I was going to
6 make about the suit, and it applies equally to the
7 uranium enrichment process, is if I say to my tailor,
8 rather than I pay you \$600 and you pay your cloth
9 supplier \$300, how about I just give you \$300 and I will
10 give \$300 to your cloth supplier, and it will amount to
11 the same thing in the end, because you won't have to pay
12 for the cloth? If the tailor accepts that arrangement,
13 the economic substance is exactly the same. And it
14 would seem strange to say that it's a sale if I just pay
15 \$600 to the tailor, but it's not a sale if I break down
16 the cost in the way that I've described.

17 CHIEF JUSTICE ROBERTS: Could you articulate
18 precisely what your test is, because you have been going
19 back and forth between whether the raw materials are
20 fungible and whether there is a fundamental
21 transformation in the product? So, how would you merge
22 those two in an articulable test so that business people
23 can know when they are going to be subject to this
24 regime and when they were not?

25 MR. STEWART: I think that the Commerce

1 determination -- that Commerce did not purport to either
2 promulgate a regulation or announce a test that
3 precisely defined the term "sale". I think the thrust
4 of the Commerce Department's determination was that
5 substantial transformation was enough, but that the case
6 was much easier by virtue of the fact that the
7 producer -- the enricher dealt with fungible goods and
8 also had substantial discretion to decide how much of
9 the feedstock would be used vis-a-vis --

10 CHIEF JUSTICE ROBERTS: You would say your
11 ultimate touchstone is whether there is substantial
12 transformation, and whether it's a raw material or
13 discretion, those go into that determination?

14 MR. STEWART: That's correct, although it
15 would certainly be appropriate for this Court if it
16 didn't want to address the situation in which only
17 substantial transformation was present, to say that at
18 least when both circumstances were present there was a
19 sale.

20 And again, to distinguish this somewhat from
21 the miller hypothetical, the miller in making grain into
22 flour may have discretion as to which individual grains
23 to use for a particular batch of flour, but it won't
24 typically have discretion as to what weight of grain
25 will be used to make what weight of flour. And the

1 enricher has that discretion as well; that is, to
2 produce a particular quantity and assay of enriched
3 uranium, the enricher can either use more feedstock and
4 fewer SWU's --

5 JUSTICE SCALIA: What's a SWU? You lost me
6 on the SWU. What's a SWU?

7 MR. STEWART: A SWU is a unit of work and
8 it's work in the sense of output; that is, it is the
9 work necessary to separate out a particular quantity of
10 enriched uranium --

11 JUSTICE SCALIA: If you put in more time
12 with the uranium, with the same amount of 235, if you
13 put in more time you can get out more?

14 MR. STEWART: That's right. The amount
15 of -- the separation process or the enrichment process
16 involves a separation of the original feedstock into the
17 enriched uranium and what is referred to as the tails,
18 which is the residue or the depleted uranium.

19 CHIEF JUSTICE ROBERTS: I'm sure you're
20 prepared for a wide variety of hypotheticals. What
21 about a diamond? You have a chunk of rock that contains
22 a diamond. You send it to Antwerp and they carve it
23 away into something that, I guess you could say it's
24 been substantially transformed. It's not just a rock.
25 It's now a glittering diamond. Is that covered by --

1 MR. STEWART: I'm not sure whether Commerce
2 would treat that as substantial transformation.

3 CHIEF JUSTICE ROBERTS: Neither am I, and
4 it's kind of -- it's sort of a bit of a concern. It's a
5 fluctuating test that is hard to determine how it's
6 going to be applied in a wide variety of cases.

7 MR. STEWART: Now, in this case -- in this
8 particular case, Commerce noted that there was no
9 dispute among the parties that the enrichment process
10 did result in substantial transformation. So that --
11 that uncertainly is not present here.

12 But I agree that there is a gray area with
13 respect to substantial transformation that isn't present
14 when you are trying to answer the question: Is the
15 customer getting back the same thing in modified form or
16 is he getting back a different thing? That is, although
17 the contracts between the utility and the enricher deem
18 the enriched uranium to have been produced with the
19 customer's own feedstock, everybody acknowledges that
20 that is not the fact in the real world.

21 And so, what the customer receives back is
22 not like your diamond hypothetical, in which he receives
23 an improved version of the original product. It is as
24 though you had a diamond company that said, we need
25 inventory all the time, and we're prepared to work out

1 an arrangement where if you send us a raw diamond plus
2 cash, we will send you back a different cut diamond.
3 That would be a sale, regardless of whether there was
4 substantial transformation, because you would have
5 payment of consideration for a product that you
6 indisputably didn't own at the outset.

7 JUSTICE GINSBURG: Mr. Stewart, we're
8 reviewing a decision of the Federal Circuit. And the
9 Federal Circuit relied dominantly on the Florida Power
10 case in which the same issue was presented, albeit under
11 a different statute.

12 But I -- reading that Florida Power, where
13 the Federal Circuit adopted the Government's position,
14 the Government's position then was that this very same
15 transaction involved the rendition of services and not a
16 sale of goods.

17 Does the Government have a distinction
18 between those two cases, or are you now saying in
19 hindsight you realized that the position that you took
20 before the Federal Circuit in the early case was wrong?

21 MR. STEWART: I don't think we have
22 disavowed the position we took in the Florida Power &
23 Light case. Now, in all candor, I would have to say the
24 question of the Contract Disputes -- Disputes Act's
25 applicability to SWU contracts is of a lot less interest

1 to the Federal Government now than it was then, because
2 the reason that arose in a case involving the Federal
3 Government was that at that time USEC was a Government
4 instrumentality and we were representing USEC in its
5 governmental incarnation.

6 Now that USEC has been privatized, the
7 Federal Circuit is unlikely to confront the question
8 whether the Contract Disputes Act applies to this sort
9 of, because these are not -- this is not a Federal
10 entity, in any event.

11 The reason that we think the two cases are
12 reconcilable is that the Contract Disputes Act, as its
13 name implies, is a statute that governs the resolution
14 of disputes between contracting parties. And in that
15 situation, it's much more appropriate to look to the
16 form of the parties' arrangement. And the court -- the
17 Federal Circuit in Florida Power and Light placed a lot
18 of emphasis on the fact that the contract was styled as
19 one for enrichment services. And that is an appropriate
20 consideration to take into account when you are
21 resolving disputes between the contracting parties, but
22 when the whole purpose of the antidumping statute is to
23 prevent contracting parties from entering into
24 arrangements that are mutually beneficial to themselves,
25 but that would and unfairly disadvantage domestic

1 competitors, it was appropriate for Commerce to look
2 behind the form of the contract and to look at physical
3 and economic reality.

4 JUSTICE STEVENS: But isn't it correct that
5 the universe of transactions that is the subject of this
6 Act is sales? Is that not right? Rather than service
7 contracts.

8 MR. STEWART: Well, it is true that the
9 antidumping statute requires that merchandise be sold in
10 the United States, and we don't contend that the statute
11 applies to price discrimination in services like
12 insurance or banking.

13 JUSTICE STEVENS: But do you -- do you
14 contend the word "sold" is an ambiguous term, requires
15 construction by a particular agency?

16 MR. STEWART: It is ambiguous at the
17 margins; that is, the classic arrangement, the classic
18 sale is an exchange of --

19 JUSTICE STEVENS: Do you think Congress
20 intended the ambiguity to be resolved by an agency
21 rather than judges applying the rules of common law and
22 the rules of sales law generally?

23 MR. STEWART: Yes, and I think this is a
24 statute that has been around for, I believe, close to
25 90 years now; and in order for it to remain efficacious

1 in this area, Commerce has to be able to adapt its
2 principles to new forms of transactions. Again, that
3 doesn't mean that Commerce's discretion is limitless,
4 but it has some discretion at the margins.

5 If I may, I would like to reserve the
6 balance of my time.

7 CHIEF JUSTICE ROBERTS: Thank you, Mr.
8 Stewart.

9 Mr. Farr.

10 ORAL ARGUMENT OF H. BARTOW FARR

11 ON BEHALF OF THE PETITIONERS

12 IN NO. 07-1078

13 MR. FARR: Mr. Chief Justice, and may it
14 please the Court:

15 I would submit, as the questions this
16 morning have indicated, one of the difficulties in this
17 case, obviously, is this is the kind of transaction that
18 can be thought about reasonably enough in different
19 ways. It is possible to look at this very narrow set of
20 circumstances where a customer is providing raw
21 materials of the kind that the producer uses to make a
22 good, and to say in that circumstance we could look at
23 it as the customer providing two kinds of consideration
24 for the good it's receiving; or we could look at it, as
25 the Respondents do and as the Federal Circuit did, as

1 saying, the other way to look at it is this is
2 essentially the customer receiving a service on its own
3 goods.

4 Now it seems to me to begin with, the
5 question that is before the Court properly is whether
6 Commerce, which is undoubtedly the agency charged with
7 enforcing this statute, has adopted a reasonable view
8 when it's taken one of those two positions.

9 JUSTICE BREYER: What -- what do we do about
10 the question that is bothering me? Maybe at some
11 point -- maybe it's not a relevant question -- but I
12 will assume for the sake of argument Commerce does have
13 the power to classify it either way.

14 What is bothering me, and maybe that's not
15 in this case, is that as the -- as your brother lawyer
16 just said, this statute has been around for 90 years.
17 There has been trillions of dollars worth of foreign
18 commerce during that time. Yet I don't find cited here
19 any instance in which Commerce ever before said that
20 when you have title to a good, and you send it abroad,
21 for even a big change in it, and then it comes back,
22 that that is a sale.

23 Now, I might -- I don't know all the
24 Commerce cases; maybe they did. But what I found here
25 is like a blank on that side, and on the other side the

1 tolling cases, Florida Power & Light, the pizza case, to
2 the point where I thought, if I was a lawyer advising a
3 client, and that client said if I keep title to the
4 good, am I home free, I would have to say, yes, you are.

5 MR. FARR: Okay.

6 JUSTICE BREYER: Now that's the -- the
7 question I want responded to in the legal context of,
8 has Commerce made a significant change in its policy?

9 MR. FARR: Several things about that,
10 Justice Breyer. First of all, as we have indicated in
11 our brief, Commerce did have a policy prior to the
12 tolling regulation, where it did treat these kinds of
13 transactions as sales of goods.

14 JUSTICE BREYER: And I read -- at what page
15 do I find all these cases?

16 MR. FARR: That is in our brief. I'm sorry,
17 I don't have --

18 JUSTICE BREYER: Well, roughly. I'll find
19 it. I will find it.

20 MR. FARR: But it's in --

21 JUSTICE BREYER: But I will see a lot of
22 cases where --

23 MR. FARR: Where we discuss Commerce's
24 tolling precedent. And then it went and it essentially
25 decided that what it had done in that precedent, it

1 wanted to reexamine that, because it thought in the end
2 what was happening in all of those cases is there was a
3 resale of the merchandise; and it thought it would be a
4 better practice to focus on that sale of the merchandise
5 for purposes of applying the statute.

6 When it did that, however, it found it had
7 created a loophole in the case where there wasn't a
8 further sale. So it has gone back to that. So at least
9 in terms of the precedent, Commerce has been on
10 different sides of that, but they have been wrestling
11 with exactly the problem that I outlined at the
12 beginning, which is dealing with a question that
13 essentially has no ready answer to it and trying to pick
14 among the plausible answers that were available to it.

15 Secondly, just about the specific situation
16 here, I don't believe that there is any chance that the
17 utilities and the enricher in this case could claim
18 unfair surprise or unjust reliance; because they say in
19 their own briefs, they did not set their transactions up
20 in this way in order to try to comply with prior
21 decisions of Commerce.

22 They say -- they make a point in their brief
23 in saying we have perfectly innocent intentions here,
24 that they set their transactions up purely for
25 historical and commercial reasons.

1 So -- now, the other question that
2 Justice Breyer raises is about the cases, and
3 Justice Ginsburg I think mentioned earlier the Florida
4 Power & Light decision. And again, Florida Power &
5 Light is a case in which there is no agency that is
6 before the Court.

7 So at that point there is no question of
8 Chevron deference, no question of whether this is a
9 reasonable position; all that the Court had to decide
10 was, given the possible choices, which did it think was
11 the better choice under those circumstances? And
12 particularly I think it's important in that case, is the
13 Federal Circuit said, this is a case that doesn't fall
14 readily into either of the two categories. So it went
15 ahead and had to decide it on its own.

16 But it seems to me that when you say in a
17 case with an agency involved, and the agency has made
18 one determination, that a case could fall within either
19 of categories -- of categories --

20 JUSTICE STEVENS: Mr. Farr, are there
21 earlier cases that applied Chevron deference to the
22 Commerce's determination of what a sale is?

23 MR. FARR: No, there are not, Your Honor,
24 that I am aware of. But --

25 JUSTICE KENNEDY: You agree that the Chevron

1 case is not a substantial evidence case?

2 MR. FARR: I do think so, although I must
3 say the line between the two is not enormously clear to
4 me, to be honest. But -- but the fact is if I were
5 trying to figure out where on the side of the line it
6 goes, it seems to me that this is a case in which you
7 are talking about the application of a legal standard to
8 a particular set of circumstances. I mean, in Chevron,
9 you have the situation, is a certain kind of facility a
10 stationary source or whatever? I mean that -- you could
11 say, well, that is a factual question in some way, but
12 it seems to me ultimately the better way to think about
13 it is Commerce's responsibility is to interpret the law
14 in the light of cases that come up.

15 I mean, an agency does not -- is not
16 expected by Congress just to sit back and imagine all
17 the possible situations that could be a sale of
18 merchandise. I think what the agency is supposed to do
19 is, confronted with the circumstance in a particular
20 transaction, to apply its judgment on the statutory
21 language and say, yes, we do think this is a sale of
22 merchandise or no, we don't.

23 CHIEF JUSTICE ROBERTS: If we are to defer
24 to the agency's interpretation, what -- how would you
25 phrase its interpretation, apart from "this is a sale"?

1 MR. FARR: Well, I think -- the narrowest
2 interpretation, and it seems to me the one that is most
3 readily dealt with is, to say, in a situation where a
4 customer provides raw material that is the type of, but
5 not the precise raw material, used by a manufacturer to
6 make the good that it then delivers to the customer, in
7 that situation, we are going to treat the manufacturer
8 as having made a sale of that good for the consideration
9 of the cash and the raw material.

10 CHIEF JUSTICE ROBERTS: So it doesn't matter
11 whether there is a substantial transformation or not?

12 MR. FARR: I think it does,
13 Mr. Chief Justice, in this sense, that we are talking
14 about the sale of the merchandise and that is a new
15 good. So the substantial transformation is essentially
16 what moves the ball from -- from being the -- the raw
17 material supplied by the customer to something
18 different. And the question would be in this case,
19 could Commerce reasonably think that the manufacturer
20 had sufficient control over the new good to be deemed
21 the owner of that?

22 And I think it's important to look, if you
23 look at the -- there are two different commodities that
24 are being talked about in the case of this transaction:
25 One is the feedstock, the raw material; the other is the

1 LEU. And the idea that the Respondents posit is, well,
2 this is just a service performed on our material. All
3 we are doing is getting our material back after a
4 service has been performed on it.

5 But as everybody agrees, as a matter of
6 fact, that is simply not so. They are not getting their
7 material back with a service performed on it. They are
8 getting a product that has been produced, manufactured,
9 from raw material that is fungible and in the general
10 inventory of the manufacturer. And in that case, it
11 seems to me, Commerce can say, we are going to disregard
12 the fiction of the parties' contracts that say this
13 really is made from our material, and say we are going
14 to look at the actual nature of the transaction. And in
15 the actual nature of the transaction, as I said, it is
16 not made from their material.

17 CHIEF JUSTICE ROBERTS: So that -- so that
18 is the critical factor, whether it's made from their
19 material, regardless of whether there is a
20 transformation? If the domestic entity provides wood,
21 wooden two-by-fours, and the foreign entity coats it in
22 a certain way, but they can use any two-by-fours, they
23 are indistinguishable, you would say in that case
24 there's still -- that's still subject to Commerce's
25 position?

1 MR. FARR: No, I don't think Commerce would
2 say that. I am to some extent speaking for them here.
3 But I think what Commerce would say is, when you have a
4 fungible raw material in substantial transformation
5 without --

6 CHIEF JUSTICE ROBERTS: So it's got to be
7 both?

8 MR. FARR: I think that Commerce would say,
9 if you have both, that clearly can be regarded as a sale
10 of merchandise, and we will regard it as a sale of
11 merchandise. On the other hand, if you only have
12 substantial transformation but not fungibility, then I
13 believe Commerce would say, even in that situation,
14 because it's ultimately the effect on the domestic
15 competitor is exactly the same, we would retain the
16 discretion to treat even that as a sale of merchandise.

17 JUSTICE STEVENS: Would you --

18 MR. FARR: I would emphasize that's not the
19 case.

20 JUSTICE STEVENS: Would you do that if you
21 thought it was clear as a matter of common law or under
22 the Uniform Sales Act, or something like that, that it
23 was not a sale?

24 MR. FARR: I think because of the different
25 circumstances, under the common law, for example, I

1 should make very clear -- but I should make first my
2 answer to you, Justice Stevens. Under the common law,
3 the particular transaction we were dealing with here,
4 where it is not made from the identical material, is
5 clearly a sale under the common law. But if you -- if
6 Commerce were going to say, in a situation where it is
7 made from the identical material, we want to depart from
8 the common law, I think they would have to justify that.

9 JUSTICE STEVENS: Under common law, you
10 don't need deference.

11 MR. FARR: Pardon me?

12 JUSTICE STEVENS: I'm sorry. If it were
13 clearly a sale under common law, you wouldn't need to
14 rely on deference.

15 MR. FARR: Well, in the end, I think, in the
16 commercial setting, there is a reasonable chance, not
17 necessarily certain because you do have the UCC and you
18 have the possibility, in those situations, the courts
19 might say, in a commercial setting, we are going to pay
20 more attention to the parties' efforts to structure
21 their contracts in a particular way, so that between
22 them, we are going to treat the contract differently.
23 All our position is, is that Commerce, in applying the
24 antidumping law to protect a third party doesn't have to
25 observe the fictions in the parties' contract.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 MR. FARR: Thank you.

3 CHIEF JUSTICE ROBERTS: Ms. Halligan.

4 ORAL ARGUMENT OF CAITLIN J. HALLIGAN

5 ON BEHALF OF THE RESPONDENTS

6 MS. HALLIGAN: Mr. Chief Justice, and may it
7 please the Court:

8 I would like to start with Justice Breyer's
9 question about the way in which the Department of
10 Commerce has treated transactions for the processing of
11 goods and the uncertainty that their position in this
12 case will cause, not just in this industry but across
13 industries.

14 As you suggested, Justice Breyer -- you
15 referred to -- the Department of Commerce has treated
16 processors who are called "tollers", in the language
17 that Commerce uses, as performing a service. And the
18 transaction for the sale of that service has not been
19 treated as a cognizable sale under the antidumping law.

20 JUSTICE SCALIA: And those have been cases
21 where the very same product is returned with value
22 added, right?

23 MS. HALLIGAN: Not necessarily. Sometimes
24 that is the case, Your Honor, but not always. For
25 example, in the Taiwan Semiconductors case, which Mr.

1 Stewart referred to and which is cited in our brief,
2 what the U.S. company provided was simply a design to
3 for a chip. The Taiwanese company, which was the
4 processor in the case according to the Department of
5 Commerce, manufactured the chip, provided the silica,
6 used the design of the U.S. company, but no raw
7 materials at all. The Department of Commerce, in its
8 explanation as to why it treated the sale for purposes
9 of the antidumping law as the eventual sale by the U.S.
10 company and did not and could not treat the sale by the
11 processor as a cognizable sale, explained that the
12 statute itself requires Commerce to compare the U.S.
13 price, which is called the export price, the price at
14 which a good is sold or imported into the United States,
15 with the price at which the product is sold in the
16 company's home market. And because a processor does not
17 and cannot either provide all the essential components
18 of the product, because it's only providing the
19 processing service and not the raw materials, and
20 because it does not and cannot set the price at which
21 the product is sold in the United States, it is
22 therefore not the appropriate sale to look at that in
23 terms of the antidumping statute. That's --

24 CHIEF JUSTICE ROBERTS: What do you do about
25 the substance versus formality question? I mean, if you

1 do have fungible raw materials, why should it make a
2 difference whether the domestic company supplies those
3 to the foreign company or simply says -- gives them
4 money and says, buy them yourselves? And in the latter
5 case, you would say that's a sale, and in the former
6 case you would say it's not a sale?

7 MS. HALLIGAN: First of all, the Department
8 of Commerce has not until this case suggested that
9 fungibility of goods might make some sort of a
10 difference. In fact, in one of the cases that we cite
11 regarding flanges which were, according to the
12 Department of Commerce, fungible, they concluded that
13 the processing service there was not the cognizable
14 sale, the downstream sale of that product was.

15 But more importantly it doesn't change the
16 substance of the deal between the two parties. What the
17 utilities come to the table with is cash, and they
18 provide the feed. It is fungible as a matter of its
19 physical properties. It is a gas. And when the feed is
20 put into the gaseous diffusion chamber, which is the
21 large installation that the enricher uses to concentrate
22 the two different molecular isotopes, it takes a month
23 for the gas to work its way through this plant. The
24 enricher cannot feasibly segregate different lots of
25 feed, just like you can't with a grain elevator.

1 The analogy would be, with respect to a
2 grain elevator, you would have to run in one farmer's
3 bag of feed, run it all the way through the elevator and
4 through the mill, and wait until the product comes out
5 at the end, and then run another farmer's bag of feed
6 through. That's economically impractical and --

7 JUSTICE SCALIA: No, old mills used to do
8 that. The farmer used to take his harvest to the mill,
9 and it would be ground right there while he was waiting.

10 MS. HALLIGAN: But -- but there is nothing
11 about the economic transaction that requires that it --

12 JUSTICE SCALIA: That's absolutely true.

13 MS. HALLIGAN: -- that happen, and more
14 importantly, the enrichers don't end up at the end of
15 the day with any feed. They are also --

16 JUSTICE SCALIA: Your brief constantly
17 assumes that there has been no sale, that throughout the
18 entire transaction, the utility owned what ultimately
19 becomes the rods, as though it was indeed the same
20 feedstock that produced the rod that was ultimately
21 delivered. And that is simply not true. There is a
22 change -- there is a change of ownership. The feedstock
23 that somebody else put into the mix is now transferred
24 to the -- to the electric utility.

25 MS. HALLIGAN: It may be the same molecules;

1 it may not be. There is no way to know or to tell. And
2 there is --

3 JUSTICE SCALIA: That's exactly right. You
4 don't know. So, you had cannot say that there has been
5 no transfer of ownership.

6 MS. HALLIGAN: Respectfully, Your Honor, I
7 disagree. If you look at the contracts, and the
8 substance squares with the contracts because, at the end
9 of this transaction, what the enricher walks away with
10 is cash and what the utilities walk away with are the
11 same number of uranium molecules that they came to that
12 plant with.

13 JUSTICE SCALIA: No, we've got the same
14 molecules. I mean, when you are talking about whether
15 there has been a transfer of ownership or a transfer of
16 title, you are talking about molecules; you are not
17 talking about whether you ended up the same in, you
18 know, in monetary terms. You are talk about whether you
19 have the same thing that you delivered to the person
20 overseas. And you don't, or at least you can't say that
21 you do.

22 MS. HALLIGAN: You can't say for sure
23 because the gas molecules can't be segregated that way.

24 I think that you need to look at two things:
25 I think that you need to look at what each of the

1 parties to the transaction come to the table with and
2 what they walk away with. And with respect to the
3 utilities, they come to the table with uranium. It's a
4 very expensive commodity. The contracts are clear that
5 they hold title to it through the process until such
6 time as they take possession of the concentrated
7 uranium. It is clear from the contracts that there is
8 an intent to maintain a continuous stream of ownership.

9 JUSTICE SCALIA: That makes no sense, what
10 you just said. That contract makes no sense. They hold
11 title to it until they get the uranium rods, right?

12 MS. HALLIGAN: No, they hold title to it
13 until -- just to provide a --

14 JUSTICE SCALIA: Most of it is back
15 overseas. It's still mixed with the other fungible U
16 235.

17 MS. HALLIGAN: Your Honor, the contracts
18 provide several things. First of all, they provide that
19 the utilities will deliver their feed within a certain
20 number of days prior to the date on which they will have
21 the concentrated uranium product provided to them. It's
22 60 to 90 days, depending on the contract.

23 So, pursuant to the contract, they deliver
24 the uranium feed. The utilities run it through their
25 system. And at the end of that diffusion process, they

1 take the concentrated isotopes out and they provide that
2 to the utility. The enrichers don't receive any amount
3 of feed that they can then take on to the open market.

4 By distinction, if you look at a used car
5 sale, for example, which is an analogy the government
6 uses. If I want to trade my car in, I come to the
7 dealer and I bring with me two pieces of consideration.
8 I bring the used car, which is payment in time and I
9 bring cash. I walk away with my wallet a little bit
10 lighter and a new car, and the used car dealer has cash,
11 but also has an item that he can then go out onto the
12 market and sell.

13 That does not occur here.

14 JUSTICE SOUTER: That's only -- that's only
15 true because apparently they use up all the feed that
16 they get. If, in fact, they found a way to manufacture
17 to enrich more efficiently so that some feed was left
18 over, I presume you would not be here arguing that they
19 could not sell that feed on the open market even after
20 they had delivered the enriched uranium to the buyer?

21 MS. HALLIGAN: The price terms of the
22 contract provide only for the utilities to pay for the
23 amount of energy that is expended.

24 I would distinguish this from another kind
25 of contract per uranium feed, which we don't contest is

1 covered by the antidumping laws. There is a very small
2 percentage of concentrated uranium, of low enriched
3 uranium that is sold pursuant to what the parties call
4 an enriched uranium product contract, an EDP contract.
5 That sort of a contract is one in which the enricher
6 goes out into the market procures feed and performs a
7 processing service. The utility comes to the enricher,
8 pays them cash and walks away with the product.

9 By comparison, in these contracts, the
10 utilities are providing something that is very valuable.
11 The feed company --

12 JUSTICE SOUTER: Yeah, but why are they
13 providing something that is very valuable that, in fact,
14 could not be obtained by the enricher on the open market
15 if those were the contract terms? The enricher buys it
16 in the -- in the -- I forget the acronym in the case
17 that you just described -- and we don't know -- we have
18 no reason to believe the enricher couldn't go out on the
19 market and buy it if, in fact, the utility didn't supply
20 the feed.

21 MS. HALLIGAN: Those are very different
22 kinds of contracts, though, Your Honor.

23 The contract in which the enricher simply
24 provides some amount of enriched uranium for a price and
25 procures the feed, which is a sliver of the total

1 contracts -- it's 5 percent even for USEC -- is one in
2 which the enricher is bearing the cost of the feed and
3 the risk of those price fluctuations.

4 The reasons that the contracts are
5 predominantly, almost exclusively structured as services
6 contracts by distinction is that the utilities choose to
7 manage the process of procuring fuel themselves.

8 JUSTICE SOUTER: Sure. They would rather
9 manage the risk of price fluctuation than, in effect,
10 pay the premium that the processor would have to charge
11 in order to hedge against price fluctuation --

12 MS. HALLIGAN: That's right.

13 JUSTICE SOUTER: That's why they are doing
14 that.

15 MS. HALLIGAN: And so, they go out into the
16 market and procure the feed pursuant to whatever
17 arrangements they have with their feed suppliers. By
18 comparison, all they are coming to the enricher for is
19 the service of concentrating that positional isotope
20 into the assay --

21 JUSTICE SOUTER: That is a way of looking at
22 it. But another way of looking at it is because they
23 choose to, in effect, take the risk of price fluctuation
24 as preferable to paying a higher ultimate price, they
25 are simply, for that reason, choosing to pay both in

1 cash and in a -- a valuable commodity, i.e., unenriched
2 uranium. You can look at it either way.

3 MS. HALLIGAN: They are. But they are
4 choosing to pay two completely different entities in two
5 unrelated and two unlinked transactions. So, it
6 doesn't -- we are not disagreeing that there is a
7 transaction for feed that the uranium -- that the
8 utilities engage in to procure their feed. There has to
9 be. But that is not part of the distinct services
10 contracts for processing only, which is all that the
11 Department of Commerce is looking to shoehorn into this
12 statute here.

13 JUSTICE SCALIA: Ms. Halligan, try this
14 hypothetical, and it really gives you the benefit of the
15 doubt. Let's assume a department store buys raw wool
16 from some sheep herder, sends it overseas. And it's
17 worth \$1,000, this raw wool. It is processed, spun and
18 knitted into sweaters, and then shipped back to the
19 department store. The sweaters, all made from the same
20 wool, not even fungible, so that's why this is even
21 better than your example -- the sweaters when they come
22 back, are worth not \$1,000, but \$20,000.

23 Do you think it would be unreasonable for
24 the Commerce Department to treat that as a sale of
25 sweaters by the European knitting wool or -- or home

1 knitters who did the sweaters?

2 MS. HALLIGAN: It would be perfectly
3 appropriate for the Department of Commerce to do what it
4 has done in the past, which is to treat the sale of the
5 sweater by the U.S. companies for \$20,000 as the
6 cognizable sale.

7 The only thing that makes this case --

8 JUSTICE SCALIA: Say it again?

9 MS. HALLIGAN: In your hypothetical --

10 JUSTICE SCALIA: I'm talking about the --
11 I'm talking about the sale from the European mills to
12 the American department store.

13 MS. HALLIGAN: That would be a processing
14 transaction.

15 JUSTICE SCALIA: A processing transaction.
16 It has changed a value of \$1,000 into a value of -- what
17 did I say -- \$20,000? And that's just processing?

18 MS. HALLIGAN: Let me give you an example of
19 what the Department of Commerce has looked at. They --
20 they looked at the processing of pasta. And the --
21 there the manufacturer came to a company -- this is a
22 place called Certain Pasta from Italy -- it's referenced
23 in the brief -- the company came to the processor with
24 wheat and presumably whatever other products went into
25 the pasta, some milk or eggs. The pasta was processed

1 and made into pasta from the wheat and given back to the
2 U.S. company.

3 The Department of Commerce concluded that
4 the appropriate sales target was not the making of the
5 pasta, the processing of the pasta, but the downstream
6 sale of the pasta in the United States.

7 And that is what the statute requires.

8 JUSTICE SCALIA: They said there was no
9 sale.

10 MS. HALLIGAN: They said that --

11 JUSTICE SCALIA: When the pasta was
12 imported, there was no sale into the United States.

13 MS. HALLIGAN: No, they said that --

14 JUSTICE SCALIA: But that's what we are
15 talking about here.

16 MS. HALLIGAN: We don't disagree, Your
17 Honor, that there is a product that comes into the
18 United States, it's low enriched uranium. But the
19 statute doesn't target the importation of products. And
20 in that way it is distinct from the companion statute,
21 the countervailing duty statute. What this statute, the
22 antidumping statute, covers is the sale of merchandise
23 into the United States.

24 That means that you have to have merchandise
25 as distinct from services, but by comparison to

1 countervailing duty statute covers both, which is part
2 of how we know that Congress means that distinction
3 tolls. And you have to --

4 JUSTICE SCALIA: Get back to your pasta
5 case. Was the holding of that case that there was no
6 sale into the United States?

7 MS. HALLIGAN: The question before Commerce
8 was which transaction is the appropriate transaction for
9 us to treat as -- as the one that establishes the price
10 all over the United States.

11 JUSTICE SCALIA: That's a different issue.
12 We are not talking here about which transaction
13 establishes the price. We are talking simply about
14 whether there was a sale into the United States.

15 MS. HALLIGAN: It turns on the same issue,
16 Your Honor, and here's why. In all of these processing
17 cases that the Department of Commerce has looked at,
18 they have explained that the reason why the cognizable
19 sale is the sale of the finished product in the United
20 States, the pasta, the sweater, or whatever it may be,
21 is because the statute gets at price discrimination.
22 And it instructs the Department to look at the price at
23 which the product is sold in the United States.

24 The price for the weaving of the sweaters,
25 even if it does add the sort of value that you are

1 talking about, is not the price at which the product is
2 sold, nor does it reflect all of the components of the
3 transaction, because there is some components that the
4 wool request. So to determine whether there is price
5 discrimination, you have to look apples to apples at
6 which the product is sold in the United States.

7 JUSTICE SCALIA: Now, wait. Suppose these
8 knitting mills in my example, in fact, are selling their
9 sweaters for a much higher price in Europe. Instead of
10 \$20,000 for this batch of wool, in Europe they are
11 selling it for \$40,000. And they nonetheless sell the
12 wool back into the United States for only \$20,000.

13 You are telling me that that transaction
14 doesn't -- doesn't count for purposes of our antidumping
15 law?

16 MS. HALLIGAN: To the extent that it may --

17 JUSTICE SCALIA: That you have to look at
18 the price at which the department store then sells to
19 individuals?

20 MS. HALLIGAN: That's right. Because that's
21 what the statute is intended to capture. The statute
22 was enacted --

23 JUSTICE SCALIA: But the department store is
24 not dumping. It's -- it's the knitting mills that are
25 dumping.

1 MS. HALLIGAN: But the question, Your Honor,
2 is -- is the price at which the product is sold in the
3 United States. Section 1677(a) defines "export price"
4 and "constructed export price" as the price at which the
5 subject merchandise is first sold in the United States.
6 And that is what you have to look at.

7 It may certainly be true that you may be
8 able to sell a product at less than its fair value to
9 the extent that you are obtaining processing services at
10 a price lower than what you could obtain them in a
11 foreign country. But the -- the bottom line is you have
12 to look at what the statute explicitly instructs, at the
13 price at which the subject merchandise is sold in the
14 United States.

15 JUSTICE SCALIA: Okay. And accepting that,
16 you -- you have to begin the whole thing, however, with
17 a sale, with a sale into the United States, right?

18 MS. HALLIGAN: A sale and I --

19 JUSTICE SCALIA: And I thought this is --
20 this is what you say fails in this case. That is the
21 link of the chain that doesn't exist. You say there is
22 no sale in the United States.

23 MS. HALLIGAN: There is an importation of
24 LEU into the United States by the utilities. The
25 utilities consume that fuel in their reactors. They do

1 not sell it onward as the company would sell a sweater
2 or would sell a pasta or would sell Rya rugs. That is
3 something that makes this case somewhat different and --

4 JUSTICE BREYER: That is pretty important.
5 Tell me -- this is a hard area, obviously. But the --
6 imagine -- think of all the toller cases that they've
7 had.

8 Now -- now, is this right: That in every
9 one of those cases there were two companies, A and B;
10 and in every one of those cases A sells a finished
11 product into the United States. And also A sends the
12 product to B to have some major thing done on it. In
13 every one of those cases the Commerce Department could
14 say: We can take A as a Respondent; i.e. we think A
15 might violate the law, because maybe it's an Italian
16 company, or we think B might violate the law. Is that
17 true of all those cases?

18 MS. HALLIGAN: It is true.

19 JUSTICE BREYER: All right. Now, if it's
20 true of all those cases, then I think what the opposite
21 position is, what Mr. Farr said, I think -- I think, you
22 know, I will -- he will say: Look at page 40 and 41 of
23 their brief. When I look at those pages, I am going to
24 see a lot of cases. And I bet, when I look them up,
25 those Commerce cases are all going to use the word

1 "substantial transformation." And he will say: You
2 see, that's what they did here.

3 Then he's going to add -- I don't mean to
4 put words in his mouth if the words are wrong, but --
5 but he's going to add: Look at those tolling cases.
6 Those are all cases where Commerce had a choice of which
7 to consider the sale. It could have considered the sale
8 from the processor A to -- to B to A, the sale if it
9 wanted to; or it could have considered the sale into the
10 United States if it had wanted to, to be the sale for
11 purposes of calculating the price.

12 And so in choosing between those two, either
13 of which it could have chosen, it chose the latter sale,
14 the final sale, because that's how they could calculate
15 the price.

16 But in your case there is no such person A,
17 because the utilities are not people who could be
18 respondents. I mean they are not in the same position.
19 There is no sale onwards that they could choose. So we
20 will go to the other guy, the party -- the person who
21 does the processing. Are you following what I am
22 saying?

23 MS. HALLIGAN: Yes. And then it starts an
24 invidious --

25 JUSTICE BREYER: And what is the answer to

1 that?

2 MS. HALLIGAN: And here is why that's not
3 sufficient. It's the problem of the tail wagging the
4 dog, right? What the United States is saying is that
5 because in this single circumstance we do not have a
6 downstream sale of pasta, or a sweater, or whatever the
7 item might be, and we can't go after that transaction,
8 that, therefore, we are asking this Court to sign off on
9 essentially rewriting the statute.

10 The statute refers to a sale of merchandise.

11 JUSTICE BREYER: Yes. But, remember, they
12 are saying in the tolling cases, in my words: Hey, we
13 could have gone after the processor if we wanted --

14 MS. HALLIGAN: But that's --

15 JUSTICE BREYER: -- if there had been a
16 substantial transformation, because the key to this
17 concept of "sale" is the word "substantial"
18 transformation.

19 MS. HALLIGAN: Two responses, Your Honor:

20 First of all, the statute doesn't allow
21 that, and I would recommend to the court the remand
22 response that Commerce provided in the Taiwan
23 semiconductor case.

24 JUSTICE BREYER: In which --

25 MS. HALLIGAN: The Taiwan semiconductor case

1 which is cited in the brief. It explains why the
2 definition of "export price" and "constructed export
3 price" means you can't go after a processing
4 transaction.

5 Secondly, in order to find for the
6 government here and reverse the Federal circuit, you
7 would effectively have to agree with the government's
8 position that processing services where they are part of
9 the manufacturing operation somehow are within the terms
10 of the statute. And so that would mean that the
11 government can say in this case that because there's no
12 downstream sale that it can capture, it will choose to
13 go after the processing transaction. But there is no
14 way to gauge down the road whether it will make the same
15 choice. And here --

16 JUSTICE SCALIA: What does -- what does the
17 government do with respect to these other transactions
18 where, indeed, the utility does not provide the feed
19 uranium but just pays for, you know, getting -- getting
20 the rods?

21 MS. HALLIGAN: In those cases --

22 JUSTICE SCALIA: There is no down -- you
23 know, there is no domestic sale there, either. Is it
24 conceivable that there, therefore, can be no dumping in
25 such a case?

1 MS. HALLIGAN: No. Those cases -- we -- we
2 do not disagree -- are a sale of merchandise because the
3 utility is paying for the entire commodity.

4 What -- that is a substantial transformation
5 point, Justice Breyer. I would like to -- to return to
6 that.

7 There are many processing transactions which
8 involve some kind of substantial transformation where
9 you have a product like wheat and you turn it into
10 something else like pasta, or wool and you turn it into
11 --

12 JUSTICE STEVENS: Isn't it true that in all
13 of those cases there is no transfer of ownership of the
14 basic product? And here -- and I am not sure you have
15 really addressed it -- it is a fungible product, and you
16 are assuming you can't tell whether -- when it is in
17 process or whether it is one party's or the other's.

18 But if you could tell and you had some way
19 of identifying just which one here, but they wouldn't
20 care because they are all equally valuable, and if it
21 developed that it was actually a third party's product
22 that was being processed, then there would be a transfer
23 of ownership, and there clearly would be a sale. Isn't
24 that true?

25 MS. HALLIGAN: I think not, Your Honor,

1 certainly not for the same reasons that you would have
2 that in -- in a grain elevator. If the enricher goes
3 out and purchases the feed and holds title to that feed
4 while it is enriching it, then, yes, there would be a
5 transfer of ownership.

6 JUSTICE STEVENS: But you have the same
7 contract you've got here, but you are able to identify
8 that, in fact, there is a difference in the -- in the
9 commodity that -- that -- at least not a different raw
10 material that was sent to France and returned. It is
11 just a substitute. It seems to me that -- in that
12 context, within the meaning of your argument, that there
13 would have been the transfer of title to that -- that
14 commodity.

15 MS. HALLIGAN: First of all, you can't tell
16 -- and I don't think there is any -- any dispute as to
17 that fact. But, secondly, if you look at the common law
18 of --

19 JUSTICE STEVENS: Well, isn't it true, if
20 you can't tell, the odds are that there is some product
21 the title to which has been transferred?

22 MS. HALLIGAN: No, I -- I think you
23 certainly can't tell what molecules come out the other
24 end. I think --

25 JUSTICE KENNEDY: Can't we assume -- let's

1 assume that there is.

2 MS. HALLIGAN: Yes.

3 JUSTICE KENNEDY: Assume that there are --
4 are two sources for the uranium, A and B, and it goes to
5 the enricher. A gives it; B gives it. A ends up with
6 B's uranium. Justice Stevens is saying at some point
7 there is a transfer of title.

8 MS. HALLIGAN: And that's -- that's the
9 operative premise that I am disagreeing with, with all
10 due respect.

11 JUSTICE KENNEDY: No. We are asking you to
12 accept that hypothetical, so we can --

13 MS. HALLIGAN: I mean the legal -- the legal
14 consequences is -- is what I am --

15 JUSTICE KENNEDY: Are you saying the utility
16 doesn't have title to what was formerly B's uranium?

17 MS. HALLIGAN: The utility holds title to a
18 discreet amount of feed uranium. It's in -- I --

19 JUSTICE KENNEDY: The enrichment is done.
20 It's back in the United States. The utility says: This
21 is my uranium. I have title. Do you dispute that?

22 MS. HALLIGAN: No, not at all.

23 JUSTICE KENNEDY: How does he get the title
24 from -- to the uranium that was formerly B's uranium?

25 MS. HALLIGAN: Because --

1 JUSTICE KENNEDY: At what point did that
2 title transfer?

3 MS. HALLIGAN: It -- maybe the useful
4 analogy is money -- is money in the bank, Your Honor.
5 If I take \$100 and I bring it to the bank, ten 10's, and
6 I take away five 20's, I may not have the same dollar
7 bills that I brought to the bank, but I don't think
8 anyone would argue that, somehow, the bank takes title
9 to my money. I retain ownership of that, and there is
10 nothing in the contract which suggests that there is any
11 change of ownership that is --

12 CHIEF JUSTICE ROBERTS: You don't -- you
13 don't retain ownership of that. And if you go to the
14 bank and say: Show me my money, they are not going to
15 say: Well, here's your money. They -- they have title
16 to it. They own it, and you have a claim against the
17 bank to what you gave them.

18 MS. HALLIGAN: But the bank could not hold
19 title to that as against me if I came and tried to take
20 the money out of my safe deposit box, nor could the
21 farmers at the -- at the grain elevator be told that
22 they -- they don't have title to the grain.

23 JUSTICE BREYER: Is there any point in time
24 from the time that the -- the processors get ahold of
25 the uranium until the time it leaves their control that

1 if they went bankrupt, anyone other than the utility
2 could get ahold of the product?

3 MS. HALLIGAN: No.

4 JUSTICE BREYER: No. Okay.

5 MS. HALLIGAN: And let me clarify this
6 because it's an important issue. These are very
7 expensive, offshore transactions that the utilities
8 engage in in order to purchase a feed. It is a very
9 valuable commodity. So what is critical to the --

10 CHIEF JUSTICE ROBERTS: Well, but if they go
11 bankrupt because -- I mean let's say they don't have all
12 the uranium. They have got five people who shipped them
13 uranium, and they have only got enough for four. Each
14 of the five can't say: I'm entitled to get mine back.

15 MS. HALLIGAN: But -- but the system doesn't
16 operate that way, Your Honor. The contracts provide
17 that the utilities have to deliver feed. And it's a
18 very different sort of business that the utilities are
19 engaged in, to go out into the market and make bets
20 based on the price fluctuations for uranium and procure
21 that uranium.

22 The enrichers are not in that business, and
23 so there would be no economic reason or any reason
24 provided for in the contracts for them to proceed that
25 way.

1 I would like to touch briefly, if I can, on
2 the purpose of the statute, because the government
3 relies very strongly on this notion that somehow the
4 processors' sales have to be cognizable in order to further
5 the antidumping statute.

6 This law is not a boundless license to
7 protect domestic industry from any competition. There
8 are other statutes that are written much more
9 broadly in the trade laws; for example, the
10 countervailing duties law, the safeguards law which
11 allows the Department of Commerce to impose quotas or
12 tariffs on the import -- not the sale but the import of
13 any goods, statutes regarding the protection of
14 intellectual property rights, all of which are cited in
15 the -- in the briefs.

16 So the notion that somehow to protect the
17 integrity of the statute you need to rewrite it to allow
18 them to address processing sales exclusively is really
19 not -- not well-founded.

20 Finally, with respect to the loophole
21 question that the government has relied on, I think it's
22 important to focus on what is specifically at issue
23 here. The government initially argued that it was
24 critical to address this case and these particular
25 transactions because of concerns about agreements with

1 the Russians.

2 That has been addressed as to U.S. concedes
3 in its -- legislation that has been implemented by
4 Congress. The government has consistently in court and
5 in its decisions -- not just in the Contract Disputes
6 Act that you referenced Justice Ginsburg, but in other
7 cases regarding the UCC which relates to the sale of
8 goods, the government has said: These very kinds of
9 contracts for the processing of uranium are contracts
10 for services. They are not covered by statutes that
11 reach the sale of goods or the disposal of property.

12 There is nothing that has changed with
13 regard to the statute or with regard to these kinds of
14 transactions; and, accordingly, we would ask you to
15 affirm the Federal Circuit. If there are no other
16 questions --

17 CHIEF JUSTICE ROBERTS: Thank you, Ms.
18 Halligan. Mr. Stewart, you have three minutes
19 remaining.

20 REBUTTAL ARGUMENT OF MALCOLM L. STEWART

21 ON BEHALF OF THE PETITIONER

22 IN NO. 07-1059

23 MR. STEWART: Thank you.

24 One of the things Ms. Halligan said, and I
25 think it's really a central theme of their brief, is

1 that utilities come to the enricher for services and not
2 for goods. And to understand what it is that utilities
3 acquire, I think it may be helpful to ask: Under what
4 circumstances would the utility have a valid breach-of-
5 contract right?

6 And it is very clear that the enricher's
7 obligation under the contract is to deliver a specified
8 quantity and assay of enriched uranium at a specified
9 time and place. And if the enricher complies with that
10 obligation, it doesn't matter that the enricher decided
11 to -- what they call in the industry -- "overfeed"; that
12 is, use more feed staff stock and fewer SWU's to produce
13 the final product.

14 And the utility in that circumstance
15 couldn't file a breach-of-contract claim by saying: I
16 paid for more SWU's than I actually received. Because
17 what the utility had contracted for was a given product.

18 The second thing -- and I think the
19 corollary to that is -- it's potentially misleading to
20 say that every contract is either one for merchandise or
21 one for services, especially when you are contracting to
22 acquire ownership of a commodity that doesn't exist at
23 the time the contract is formed. The only way you are
24 going to get to your ultimate objective is for somebody
25 to create it. And that can generally be described as a

1 service, but it still results in the sale of goods.

2 With respect to the used-car analogy, I
3 understood Ms. Halligan to acknowledge that -- that that
4 would be a sale even though the consideration paid by
5 the customer is partly in cash and partly in kind. And
6 if the customer and the car dealership characterize
7 their contract as one for car-refurbishment services and
8 said that the new car the customer receives shall be
9 deemed to be the used car that it traded in in
10 refurbished form, nobody would contend that that deeming
11 quality should be controlling.

12 Now here the -- the falseness of the
13 proposition that it's the same feedstock is less
14 apparent, but it's equally the case that the utility
15 doesn't receive back its original feedstock.

16 And finally the perspective of tolling
17 regulation in cases, Commerce has essentially said three
18 things:

19 First, we were dealing with a separate
20 question; that is, who is the producer, which sale is
21 relevant, and not whether the goods are covered at all.

22 Second, they said in those situations the
23 tollee was exercising much more control over the
24 ultimate process than is the case here where the
25 utilities don't manufacture anything. They simply pay

1 for one of the inputs.

2 And, finally, Commerce said that if at some
3 level of abstraction there is a tension or contradiction
4 between what we said previously and what we decide
5 today, then what we decide today controls. And Commerce
6 is entitled to make that determination.

7 CHIEF JUSTICE ROBERTS: Thank you, Mr.
8 Stewart. The case is submitted.

9 (Whereupon, at 12:07 p.m. the case was
10 submitted.)

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