

May 3, 2007

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

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for Final Results of Expedited
Sunset Review of the Antidumping Duty Order on Low Enriched
Uranium from France (2002-2006)

Summary

We have analyzed the substantive responses of the interested parties in the sunset review of the antidumping duty order on low enriched uranium (LEU) from France. We recommend that you approve the positions described in the "Discussion of Issues" section of this memorandum. Below is the complete list of the issues in this sunset review for which we received substantive responses:

1. Likelihood of continuation or recurrence of dumping
2. Magnitude of the margin likely to prevail

History of the Order

On December 21, 2001, the Department of Commerce (the Department) published its final determination in the investigation of LEU from France finding dumping margins of 19.57 percent for Eurodif/AREVA¹ (Eurodif), and 19.57 percent for "All Others." See Notice of Final Determination of Sales at Less Than Fair Value: Low Enriched Uranium from France, 66 FR 65877 (December 21, 2001). On February 13, 2002, the Department published its amended final determination and the antidumping duty order on LEU from France revising the dumping margin for Eurodif/AREVA and "All Others" to 19.95 percent. See Notice of Amended Final

¹ Eurodif S.A. and its affiliate AREVA NC (formerly Compagnie Generale Des Matieres Nucleaires (COGEMA)).

Determination of Sales at Less than Fair Value and Antidumping Duty Order: Low Enriched Uranium from France, 67 FR 6680 (February 13, 2002). Since the issuance of the antidumping order regarding imports of LEU from France, the Department has conducted three administrative reviews of the order.

At the request of both Eurodif and the domestic interested party, USEC Inc. and its subsidiary United States Enrichment Corporation (collectively USEC), the Department conducted the first administrative review of the order covering the period July 13, 2001 to January 31, 2003. The amended final results of the review established a weighted-average dumping margin of 4.56 percent for Eurodif. See Notice of Amended Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium from France, 69 FR 58128 (September 29, 2004).

The second administrative review was conducted at the requests of Eurodif and USEC, covering the period February 1, 2003 to January 31, 2004. The amended final results of this review established a weighted-average dumping margin of 9.75 percent for Eurodif. See Notice of Amended Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium from France, 70 FR 61253 (October 21, 2005).

A third administrative review was conducted, again at the requests of both Eurodif and USEC, and covered the period February 1, 2004 to January 31, 2005. The final results of the third review established a weighted-average dumping margin of 14.60 percent for Eurodif. See Low Enriched Uranium from France: Final Results of Antidumping Duty Administrative Review, 71 FR 52318 (September 5, 2006).

A request for the deferral of the fourth review, covering the period February 1, 2004 to January 31, 2005, was received from Eurodif. USEC consented to this request. The Department deferred this review for one year. See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Administrative Reviews, 71 FR 17077 (April 5, 2006).

The Department has not conducted any changed circumstance reviews or duty absorption reviews of this order. The order remains in effect for all manufacturers, producers, and exporters of the subject merchandise from France.

Upon issuance of the antidumping duty (AD) order on February 6, 2002, the Department's determination in the less than fair value investigation was challenged by Eurodif and USEC before the U.S. Court of International Trade ("CIT"). USEC's complaint was subsequently withdrawn. Eurodif argued that the transactions which involved the enrichment of the uranium (so-called SWU² contracts) did not constitute sales of goods, but rather should have been considered service transactions which are not subject to the antidumping law. The CIT agreed, and the case was appealed to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). In Eurodif S.A., et al. v. United States, 411 F.3d 1355 (Fed. Cir. 2005) ("Eurodif I") and Eurodif

² Separative Work Unit

S.A., et al. v. United States, 423 F.3d 1275 (Fed. Cir. 2005) ("Eurodif II"), the Federal Circuit ruled that SWU contracts constitute sales of enrichment services, not goods, and, therefore, that LEU imported pursuant to SWU contracts was not subject to the antidumping law. The Department continues to respectfully disagree with the conclusion that SWU contracts did not result in the sale of LEU by French producers/exporters to U.S. customers. In this regard, the Department noted in its June 19, 2006 remand results³ that the possibility of seeking certiorari with respect to the Eurodif I and Eurodif II decisions would be reviewed after final judgement has been rendered. Consistent with the Federal Circuit's decisions and the CIT's specific remand instructions (see Eurodif S.A. v. United States, 442 F.Supp.2d 1367 (Ct. Int'l Trade 2006) ("Eurodif III"), the Department issued a remand redetermination on March 3, 2006 that removed sales made pursuant to SWU contracts from the calculation of the dumping margin. The CIT subsequently ruled that the Department was also required to amend the scope of the order to exclude, at the time of entry, imports of LEU made pursuant to SWU transactions without an opportunity to conduct an administrative review of the entries in question. Eurodif S.A. v. United States, 431 F.Supp.2d 1351 (Ct. Int'l Trade 2006) ("Eurodif IV"). The Department respectfully disagrees with the CIT's conclusion in Eurodif IV, that Eurodif I and Eurodif II cannot be implemented without amending the description of the scope of the antidumping order such that the entries in question are not subject to administrative review by the Department. On June 19, 2006, the Department issued a remand redetermination that would amend the scope of the order in accordance with the CIT's order in Eurodif IV upon final and conclusive judgment being entered in this case. This issue, and other issues, are currently pending before the Federal Circuit as a result of appeals filed by the United States and USEC. As of this date, no final and conclusive judgment has been entered in this case.

With respect to each of the completed administrative reviews conducted by the Department for this antidumping duty order, interested parties have challenged the Department's final results in the CIT. Proceedings in these cases have been stayed by the court pending the resolution of the case stemming from the initial investigation, as described above.

Background

On January 3, 2007, the Department initiated a sunset review of the antidumping duty order on LEU from France pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). See Initiation of Five-Year (Sunset) Reviews, 72 FR 100 (January 3, 2007) (Notice of Initiation). The Department received a notice of intent to participate from USEC within the deadline specified in 19 CFR 351.218(d)(1)(i). USEC claimed interested party status under section 771(9)(C) of the Act, as a domestic producer of LEU. The Department also received a complete substantive response from USEC within the 30-day deadline specified in 19 CFR 351.218(d)(3)(I).

³ See Low Enriched Uranium from France: Final Results of Redetermination Pursuant to Court Remand Eurodif S.A., et al v. United States, Consol. Ct. No. 02-00219, Slip Op. 06-75 (May 18, 2006 CIT) (June 19, 2006) at page 2 (June 19th Remand Redetermination).

The Department received a substantive response from respondent interested party, Eurodif, within the specified deadline. In addition, the Department received a substantive response from the Ad Hoc Utilities Group (AHUG), whose members are owners and operators of U.S. nuclear power plants. In response to USEC's substantive response, AHUG submitted rebuttal comments on February 13, 2007; Eurodif submitted rebuttal comments to USEC's substantive response on February 14, 2007.

Although AHUG claimed respondent interested party status under section 771(9)(A) of the Act, the Department determined it was not a respondent or an interested party pursuant to section 771(9)(A) of the Act for purposes of its adequacy determination. See Memorandum to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration; Sunset Review of the Antidumping Duty Order on Low Enriched Uranium from France: Adequacy Determination dated February 22, 2007 (Adequacy Determination) which is on file in Room B-099, the Central Records Unit of the main Commerce building (CRU). However, the Department has considered AHUG to be an industrial user and consumer organization pursuant to 19 CFR 351.312, and, as such, AHUG is allowed to submit relevant information and argument. As indicated below, the Department has considered AHUG's substantive response for purposes of these final sunset review results.

On February 22, 2007, the Department determined that the respondent interested party, Eurodif, did not submit an adequate response to the Department's Notice of Initiation. Therefore, the Department determined that it should conduct an expedited (120-day) review. See Adequacy Determination.

On March 13, 2007, AHUG submitted an update to its substantive response, stating that certain information on SWU purchases was unavailable at the time of the original filing. On March 14, 2007, USEC, Eurodif and AHUG, respectively, submitted comments on the Adequacy Determination. In their respective comments, USEC supported the Department's adequacy determination, while Eurodif and AHUG argued that the Department must reverse its determination and conduct a full sunset review. The Department responded to these comments by issuing a memorandum affirming that it would not reverse its decision. See Memorandum to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration; Comments Regarding the Adequacy Determination: Sunset Review of the Antidumping Duty Order on Low Enriched Uranium from France dated April 5, 2007 (Comments on Adequacy Determination). Therefore, pursuant to 19 CFR 351.218(e)(1)(ii)(C)(2), the Department is conducting an expedited sunset review of this antidumping duty order.

Discussion of the Issues

In accordance with section 751(c)(1) of the Act, the Department conducted this sunset review to determine whether revocation of the antidumping duty order would likely lead to a continuation or a recurrence of dumping. Sections 752(c)(1)(A) and (B) of the Act provide that, in making these determinations, the Department shall consider both the weighted-average dumping margins determined in the investigation and subsequent reviews, and the volume of imports of the subject

merchandise for the period before and the period after the issuance of the antidumping duty order. In addition, section 752(c)(3) of the Act provides that the Department shall provide to the U.S. International Trade Commission (ITC) the magnitude of the margin of dumping likely to prevail if the order were revoked. Below we address the comments of the interested parties.

1. **Likelihood of Continuation or Recurrence of Dumping**

Interested Party Comments

USEC argues that revocation of this antidumping duty order would likely lead to a continuation or recurrence of dumping of the subject merchandise by the sole French producer, Eurodif, with margins equivalent to or greater than those found in the amended final determination of 19.95 percent. See Substantive Response of USEC (February 2, 2007) at 6. USEC notes that the Department's normal practice is to conclude that a revocation of an order is likely to lead to continuation or recurrence of dumping where dumping continued at any level above de minimis after the issuance of the order. USEC points out that the dumping margins in this case were 4.56 percent, 9.75 percent and 14.60 percent for the first, second and third administrative reviews, respectively. USEC also notes the Statement of Administrative Action Accompanying the Uruguay Round Agreements Act (SAA), H.R. Rep. No. 130-826 at 838; reprinted in 1994 U.S.C.C.A.N. 4040, 4174-75, makes clear that, even in the face of evidence of other likely outcomes, if there is evidence supporting a possible likely outcome of continuation or recurrence of dumping, the order will be continued. USEC argues the Department must conclude that the continuation or recurrence of dumping is at least one likely outcome of the revocation of the antidumping duty order, if not the only likely outcome of the revocation.

Eurodif notes the Department's proposed amended scope issued in the remand determination and argues that revocation of the order will not lead to the continuation or recurrence of dumping. This, Eurodif states, is because the scope as amended will no longer cover LEU produced pursuant to SWU transactions, and nearly all of Eurodif's deliveries to the United States are pursuant to SWU transactions. See Substantive Response of Eurodif (February 2, 2007) at 3. Eurodif argues that it does not foresee any change to this selling practice, which has prevailed in the industry for decades and is entirely driven by the requirements of its U.S. utility customers.

AHUG contends that, according to the Department's Sunset Policy Bulletin, the Department will normally determine that revocation of an order is likely to lead to a continuation or a recurrence of dumping where it finds at least one of the following: the existence of dumping, the cessation of imports following the issuance of an order or suspension agreement, or a significant decline in import volumes following the issuance of an order or suspension agreement. AHUG contends that none of these conditions are met here and, therefore, it is clear that revocation of the order would not lead to the continuation or recurrence of dumping. See Substantive Response of AHUG (February 2, 2007) at 6.

AHUG further states that the Federal Circuit has found that sales of enrichment services are not sales of merchandise, and therefore the Department cannot lawfully ignore the Court's legally

binding decision. AHUG contends that the Department lacks legal authority to treat SWU transactions as subject merchandise, and therefore can review transactions for enriched uranium products only. In addition, AHUG argues that, even if the Department ignored the amended scope and relied improperly on services for conducting its dumping analysis, current market conditions have eliminated the possibility of dumping since the market price for SWU has risen significantly since the time of the investigation, and is expected to rise further. AHUG also adds that these price increases are due to worldwide demand and supply conditions, and not to the imposition of the order on French LEU. With respect to the issue of whether imports have ceased or declined significantly since the issuance of the antidumping duty order, AHUG contends that, under the properly amended scope, there were virtually no imports even during the original investigation period, and therefore there has not been a relevant cessation or decline.

USEC rebuts Eurodif and AHUG's substantive response by arguing that the Department should arrive at a conclusion that the revocation of the order is likely to lead to a continuation or a recurrence of dumping, regardless of whether an amended scope is considered. USEC argues that, either way, one of the conditions the Department looks for would be met: under the original scope, dumping margins are above *de minimis*, and, under the amended scope, imports of subject merchandise (pursuant to enriched uranium product (EUP) contracts⁴) ceased after issuance of the order according to Eurodif. Furthermore, USEC points out, even if, as Eurodif and AHUG claim, there were no entries pursuant to EUP contracts during the sunset review period, it does not mean there will be no such entries once the order is revoked and there is a possibility that such imports may make a comeback. USEC also responds to Eurodif's claim that demand for EUP does not exist. USEC notes that AHUG states that its members have purchased LEU pursuant to EUP contracts from USEC for the period 2000 to the present.

With respect to AHUG's claim of increases in market prices, USEC responds that, while there may be influences in the market that may correlate with the price increases, it is undeniable that SWU prices rose in reaction to the order. Finally, USEC states that prices cited by AHUG are inapplicable because those prices reflect contracts that were signed based on historical prices.

Eurodif rebuts USEC's substantive response by noting that USEC disregards the CIT affirmation of the Department's remand determination when it urges the Department to use the original scope, which has already been adjudicated to be not in accordance with law by the Federal Circuit. Moreover, Eurodif argues, the Department itself has accepted that holding by deciding not to pursue the scope issue in its appeal. Therefore, Eurodif argues, the Department should reject USEC's entreaties and find that the scope of the order for purposes of these sunset proceedings excludes SWU transactions. Eurodif further adds that the amended scope, when finalized at the conclusion of litigation, will not only apply to the order but also cover all administrative reviews. This will result, Eurodif contends, in no imports of subject merchandise and therefore no dumping margins for those reviews. Eurodif states that it foresees no change in its selling practice and thus there is no likelihood that revocation of the order is likely to lead to recurrence of dumping under the amended scope of the order.

⁴EUP contracts cover both feedstock and enrichment services.

AHUG rebuts USEC's substantive response, stating that USEC's claim that the Department should rely on the original scope of the order is unsupportable because the Department is bound by the court's mandates and its own remand determination, and those holdings are stare decisis. AHUG argues that the Department cannot claim immunity from stare decisis because of its status as an administrative agency because administrative agencies are bound by the legal decisions of controlling courts just as lower courts are. AHUG notes the judge's comments in litigation related to the Russian uranium sunset review and the United States' position in pending litigation, which AHUG contends amounts to a statement that the Department accepts the amended scope of the order, as further support for its claims that the Department should not rely on the original scope of the order in this sunset review.

Department's Position

Pursuant to section 751(a)(1) of the Act and consistent with the guidance provided in the legislative history accompanying the Uruguay Round Agreements Act (URAA), i.e., the SAA at 879, and H.R. Rep. No.103-826, pt.1 (1994) at 56, the Department's determinations of likelihood will be made on an order-wide basis. In addition, under section 752(c)(1) of the Act, the Department normally will determine that revocation of an antidumping duty order is likely to lead to continuation or recurrence of dumping where (a) dumping continued at any level above de minimis after the issuance of the order, (b) imports of the subject merchandise ceased after the issuance of the order, or (c) dumping was eliminated after the issuance of the order and import volumes for the subject merchandise declined significantly. For the reasons set forth in Policy Bulletin 98.3 (63 FR 18871, 18872-18873 (April 16, 1998)) the Department considers these conditions to be highly probative of the likelihood of continuation or recurrence of dumping. In addition, pursuant to section 752(c)(1)(B) of the Act, the Department considers the volume of imports of the subject merchandise for the period before and after the issuance of the antidumping order.

The Department disagrees with the contention of Eurodif and AHUG that the Department's likelihood determination in this sunset review should be made in relation to a scope amendment not currently in effect. As explained in the Department's Comments to Adequacy Determination Memorandum, the order at issue in this sunset proceeding is the order that is presently in effect, the scope of which has not been amended as a consequence of the ongoing litigation to which AHUG and Eurodif refer. The scope amendment to which AHUG and Eurodif refer was expressly not put into effect by Commerce pending further appeal. See Remand Redetermination in Eurodif, et al. v. United States, Consol Ct. No. 02-00219 (June 19, 2006) at 10 ("Upon final and conclusive court decisions, Commerce will amend the scope of this order to include the language provided above"). Therefore, in the absence of a final and conclusive judgment that results in a change to the Department's determination in the less than fair value investigation, that determination, including the original scope of the antidumping duty order, continues to be in effect. The fact that the Department's remand determination, in which the Department complied under protest with the court's order to amend the scope, was affirmed by the CIT does not mean

that it has final and conclusive effect. In addition, with regard to the issue of whether SWU contracts are subject to the antidumping duty law, the Department explained in its remand determination:

While the Department respectfully disagrees with the conclusion that SWU contracts do not result in the sale of LEU by French producers/exporters to U.S. customers, consistent with the Court's specific remand instructions, we removed all sales made pursuant to SWU contracts from the calculations of the March 3 remand redetermination and we have expressly excluded such merchandise from the scope of the antidumping duty order in the present remand determination. For purposes of the present remand determination, Commerce is implementing the holdings of Eurodif I and II as instructed by the CIT in Eurodif III and IV. We will review the possibility of seeking *certiorari* after final judgement has been rendered in this matter.⁵

As the Department noted in its February 22, 2007 Adequacy Determination, the court decisions relied upon by Eurodif and AHUG relating to the scope of the antidumping duty order at issue in this sunset review are not final and conclusive. Since the appeals process is not yet complete, the impact of these decisions on the antidumping duty order are not yet complete or final. Thus, these rulings are not binding precedent in this sunset review. Therefore, it would be entirely premature to attempt to apply these rulings in the context of this sunset review proceeding since their specific impact has not yet reached finality for the less than fair value investigation from which the litigation arose. Accordingly, although Eurodif argues that nearly all of its imports of LEU were made pursuant to SWU transactions that would be excluded from the order under the amended scope, those transactions are covered by the scope of the order that is currently in effect.

The Department disagrees with AHUG's argument that price increases have eliminated the possibility of dumping in the future. Insofar as dumping margins reflect a comparison of U.S. prices and normal value, an increase in prices will not necessarily eliminate dumping, particularly if normal values are similarly increased.

The Department has determined, with respect to Eurodif's imports, that dumping continued after the issuance of the order. Given the continuation of dumping after the issuance of the order, as demonstrated by the existence of dumping margins at above de minimis levels in the three completed administrative reviews, the Department finds that dumping would likely continue or recur if the order were revoked.

⁵ See June 19th Remand Redetermination at page 2.

2. Magnitude of the Margin Likely to Prevail

Interested Party Comments

In its substantive response, USEC states that the antidumping duty margin likely to prevail if the order were revoked is 19.95 percent for Eurodif/AREVA, the only producer of LEU from France, as this is the applicable rate determined in the amended final determination. USEC adds that the Department should apply its normal practice here, which is to select the margin from the investigation because that is the only calculated rate that reflects the behavior of the exporter without the discipline of an order in place.

Eurodif states there is not likely to be any margin of dumping following revocation of the order, because there is no likelihood that there will be any importations of LEU from France within the scope of the amended order. AHUG did not specifically address what the antidumping duty margin likely to prevail is if the order is terminated.

In its rebuttal, USEC states that Eurodif has been found consistently to have dumped LEU regardless of whether the order covered all imports of LEU, or covered all imports except imports pursuant to SWU transactions. USEC argues that this is highly probative of what Eurodif's dumping margin would be on sales of LEU pursuant to EUP contracts if the order were revoked.

Department's Position

The Department normally will provide to the ITC the company-specific margin from the investigation for each company. See section 752(c)(3) of the Act. For companies not investigated specifically or for companies that did not begin shipping until after the order was issued, the Department normally will provide a margin based on the all-others or country-wide rate from the investigation. Exceptions to this approach include the use of a more recently calculated margin, where appropriate.

As discussed previously, the Department disagrees with the contention of Eurodif and AHUG that the Department's determination in this sunset review should be made in relation to a scope amendment that is not currently in effect. Imports within the current scope of the order have continued since the order was issued and Eurodif has not shown that such imports would cease if the order were revoked.

The Department determines that the antidumping duty margin from the investigation is the rate likely to prevail because that is the rate that best reflects the behavior of exporters without the discipline of an order in place. This is consistent with the view expressed in the SAA at 889.

After considering the arguments put forth, and the dumping margins determined in the investigation, the Department agrees with USEC that it is appropriate to report to the ITC the investigation rate of 19.95 percent for Eurodif and for the all-others⁶ rate, in accordance with its normal practice.

Final Results of Review

The Department determines that revocation of the antidumping duty order on LEU from France would be likely to lead to continuation or recurrence of dumping at the following weighted-average percentage margins:

Manufacturers/Exporters/Producers	Weighted-Average Margin (percent)
Eurodif/AREVA	19.95 %
All Others	19.95 %

Recommendation

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

AGREE _____

DISAGREE _____

David M. Spooner
Assistant Secretary
for Import Administration

(Date)

⁶ Since Eurodif is the sole French producer of subject merchandise, and the only respondent, its rate applies as the all-others rate.