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Nos. 07-1059 and 07-1078

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
EURODIF S.A., ET AL.,
Respondents,

USEC, INC., ET AL.,
Petitioners,
v.
EURODIF S.A., ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF TECHSNABEXPORT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF TECHSNABEXPORT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Amicus *curiae* Techsnabexport ("Tenex") respectfully submits this brief in support of respondents in this case.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae Tenex exports uranium products and uranium downblending and enrichment services from Russia. Tenex is also the agent of the Russian Federation's State Atomic Energy Corporation, Rosatom ("Rosatom"), the Executive Agent of the Russian Government under the Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons ("HEU Agreement").[2] Tenex is filing this brief because it has an interest in ensuring that the Court has a proper understanding of the HEU Agreement, the agreement that suspended the 1992 antidumping investigation of uranium from Russia,[3] and uranium market conditions.[4]

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[1] Pursuant to Rule 37.6 of this Court, Tenex states that no counsel for a party authored this brief in whole or in part, and no person, other than Tenex, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

[2] Feb. 18, 1993, Hein's No. KAV 3503, State Dep't No. 93-59, 1993 WL 152921. The Russian Ministry of Atomic Energy ("Minatom") was the original signatory to the HEU Agreement and was initially designated by the Russian Government as the Executive Agent with authority for implementation of the Agreement.

[3] *Antidumping; Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan; Suspension of Investi-*

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SUMMARY OF ARGUMENT

The view that the Federal Circuit's interpretation of 19 U.S.C. § 1673 would compromise U.S. foreign policy, national security and energy policy objectives by giving Russia incentives to scale back plans to downblend highly enriched uranium ("HEU") and saturate the U.S. market instead with low-enriched uranium ("LEU") manufactured through conventional enrichment is both legally irrelevant to this case and factually wrong. Tenex has no incentive to stop downblending HEU under the HEU Agreement in favor of conventional LEU production pursuant to separative work unit ("SWU") contracts.

As an initial matter, the Court's disposition of this case could have *at most* only minor, short-term effects on the HEU Agreement with Russia. That Agreement, which commenced in 1993, is nearing the end of its life and terminates in five years. That is

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gations and Amendment of Preliminary Determinations, 57 Fed. Reg. 49220 (Dep't of Commerce Oct. 30, 1992), and the amendments thereto ("Suspension Agreement"). Rosatom is the successor-in-interest to Minatom, the original party to the Suspension Agreement with the Department of Commerce.

[4] *Amicus* Tenex presents in this brief facts in support of its arguments and respondents' position. The General Director of Tenex certifies that the information contained in this brief is, to the best of his knowledge, complete and accurate. *See e.g.*, 19 C.F.R. §351.303(g) (the Department of Commerce's antidumping regulations requiring "with each submission containing factual information" the following certification from "the person officially responsible for presentation of the factual information: I, (name and title), currently employed by (person), certify that (1) I have read the attached submission, and (2) the information contained in this submission is, to the best of my knowledge, complete and accurate.")

a very short period within the context of the international uranium market. Most U.S. utilities have already locked into long-term purchase agreements that cover most of their requirements within or even beyond the remaining term of the HEU Agreement. Moreover, the United States Enrichment Corporation ("USEC") controls the distribution of SWU from the HEU Agreement by deciding whether its existing long-term contracts with U.S. and foreign utilities will be supplied using SWU obtained under the HEU Agreement or SWU from other sources (*i.e.*, self-production or stockpile). Because of commitments under long-term contracts, the available uncovered demand from U.S. utilities is limited. Hence, existing long-term contracts greatly diminish any incentive Russia might otherwise have to abandon HEU downblending and the transactions associated with the HEU Agreement in favor of commercial contracts for uranium enrichment.

In any event, even if the HEU Agreement were *not* approaching the end of its term, Tenex still would have no clear incentive to divert even a portion of its current HEU Agreement transactions with USEC to potential commercial SWU transactions. The current price formula by which USEC pays Tenex for SWU under the HEU Agreement is derived from a calculation of published market price indicators. Tenex has every incentive to maximize the market value of the HEU Agreement transactions rather than risk exporting LEU directly to U.S. customers in a manner that would drive down market prices and thereby undercut revenue from the HEU Agreement transactions. Exporting LEU to the United States in quantities and at prices that would disrupt the U.S. market also would be contrary to Russia's interests in con-

tinued cooperation with the United States on peaceful nuclear energy issues.

Finally, also overstated is the potential threat that Russia could saturate the U.S. market with LEU. Russia's enrichment capacity is substantially committed to existing long-term contracts and increasing demand for Russian enrichment services. Demand for Russian LEU continues to grow in Russia and in third-country markets at a rate far exceeding that of the U.S. market. Concerns about Tenex diverting its enrichment capacity to supply the U.S. market also cannot be reconciled with the recent amendment to the Suspension Agreement. Under that amendment, Russia agreed to export limits equal to about twenty percent of U.S. market demand for the period 2014 to 2020.

FACTUAL BACKGROUND

I. The U.S.-Russia HEU Agreement

The United States and the Russian Federation concluded the HEU Agreement on February 18, 1993. HEU Agreement, *supra* note 2. The Recitals of the HEU Agreement reflect a mutual desire of both the United States and the Russian Federation "to arrange the safe and prompt disposition for peaceful purposes of highly enriched uranium extracted from nuclear weapons resulting from the reduction of nuclear weapons in accordance with existing agreements in the area of arms control and disarmament." The Agreement provides that, over a 20 year period between 1993 and 2013, Russia will "downblend" the HEU in the warheads of approximately 20,000 Soviet-era nuclear weapons and sell SWU, which will be used by electricity-producing nuclear plants. HEU

Agreement, Article I(1).[5] Under the terms of the HEU Agreement, "[e]ach Party shall have the right to terminate this Agreement upon twelve months written notification to the other Party." HEU Agreement, Article VI(3).

The Parties further specified their respective rights and obligations pursuant to the HEU Agreement in the Implementing Contract to the HEU Agreement.[6] In September 1996, the Implementing Contract was amended to give effect to the USEC Privatization Act.[7] Amendment No. 008 provided that USEC would purchase SWU only from Tenex.[8] Tenex would

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[5] Each Government designated an "Executive Agent" to implement the HEU Agreement: For the United States, the Executive Agent was initially the U.S. Department of Energy ("DOE"); for Russia, the Executive Agent was initially Minatom. HEU Agreement, Article III. The United States subsequently designated USEC as its Executive Agent, in place of the DOE. USEC was then wholly-owned by the U.S. Government. USEC was privatized in 1998, pursuant to the USEC Privatization Act, 42 U.S.C. § 2297h *et seq*. The Government of the Russian Federation subsequently appointed Tenex to act as Minatom's agent, acting on its own behalf but at the direction of and in the interest of Minatom, for the purposes of performing Minatom's obligations as Executive Agent for the implementation the HEU Agreement.

[6] Initial Implementing Contract for the Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons ("Implementing Contract"), executed on January 14, 1994.

[7] The USEC Privatization Act privatized USEC and established the annual amount of natural uranium that can be sold in the United States pursuant to the HEU Agreement transactions. 42 U.S.C. § 2297h *et seq*.

[8] The Implementing Contract originally provided that USEC would purchase the natural uranium component as well as the (Continued)

deliver LEU to USEC, but simultaneous with this delivery, USEC would deliver to Tenex's account (by book transfer) natural uranium that was deemed of Russian origin and of an amount equal to the natural uranium component of the LEU delivered by Tenex to USEC.

Given that USEC's delivery of the deemed-Russian natural uranium occurred at the same time as Tenex's delivery of LEU to USEC, and payment under Amendment No. 008 is designated for SWU only, USEC was paying only for the SWU component of the delivered LEU. Implementing Contract, Amendment No. 008, Sections 2(a) and 2(d). The Russian-origin natural uranium could be sold in the U.S. market pursuant to annual quota limits set forth in the USEC Privatization Act. 42 U.S.C. § 2297h-10(b)(5). Russia, however, has not sold to the U.S. market the maximum amounts of natural uranium permitted under this quota because of its obligation to down-

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SWU component of the LEU derived from HEU. Complications related to the terms of compensation for the natural uranium component of LEU delivered in the early years of the HEU Agreement led to the renegotiation of the terms of sale. Under Amendment No. 008, USEC no longer had any obligation to pay for the natural uranium component of any LEU delivered by Tenex pursuant to the HEU Agreement transactions. Amendment No. 008, dated September 4, 1996, to the Implementing Contract for the Agreement Between the Government of the United States of America and the Government of the Russian Federation concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons, executed on January 14, 1994, Section 2(a) ("USEC shall have no obligation to pay for the natural uranium component of any LEU delivered after calendar year 1996.").

blend HEU and deliver LEU to the United States in accordance with the terms of the HEU Agreement.[9]

USEC estimates that the HEU Agreement program will result in payments of approximately $8 billion by USEC to Tenex for SWU over the 20-year life of the

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[9] Tenex retained a portion of this return natural uranium feed, while another portion was sold to Cameco, Cogema (now Areva), and Nukem (collectively "the Western Companies") pursuant to the March 1999 Commercial Feed Agreement. In June 2004, Tenex and the three Western Companies announced an amendment to the Commercial Feed Agreement whereby the Western Companies waived options to purchase the HEU return feed in order to ensure that Russia would have sufficient natural uranium to blend down HEU for the remaining term of the HEU Agreement. U.S. Department of Energy, *Report on the Effect the Low-Enriched Uranium Delivered Under the HEU Agreement Between the Government of the United States and the Government of the Russian Federation has on the Domestic Uranium Mining, Conversion, and Enrichment* Industries *and the Operation of the Gaseous Diffusion Plant*, at 4 (Dec. 31, 2004) ("*DOE 2004 HEU Agreement Effects Report*") (stating that the HEU Commercial Feed Agreement was amended to ensure Russia had sufficient uranium to meet its obligations under the HEU Agreement to blend down weapon-grade HEU and "in light of Russia's rising requirements for uranium to fuel their expanding nuclear plant construction program within Russia and abroad"), *available at* http://www.ne.doe.gov/pdfFiles /RptEffectLow-Enriched%20 UraniumDec312004.pdf); *see also* News Release, Cameco, Cameco Provides Details of Previously Announced Uranium Agreement: Companies Amend Deal for Uranium from Dismantled Russian Nuclear Weapons (Jun. 16, 2004) (stating that the Western companies waived their option rights to purchase uranium returned to Russia pursuant to and for the remainder of the HEU Agreement, effectively withholding for Russia's use 74 million pounds of uranium that otherwise could have been sold to the Western companies), *available at* http://www.cameco.com/media_gateway/news_releases/2004/news_release.php?id=85.

HEU Agreement.[10] Through 2006, the Department of Energy reported that 53.4 million SWU had been purchased, which had been derived from approximately 11,673 dismantled warheads, generating 292 metric tons of HEU.[11] For the remainder of the term of the HEU Agreement, Russia will sell 5.5 million SWU annually to USEC, *see* USEC Inc. News Release, which represents approximately 40 percent of the estimated U.S. annual SWU requirements of almost 14 million SWU. *DOE 2006 HEU Agreement Effects Report* at 6 (reporting that U.S. demand for 2006 is estimated to be nearly 14 million SWU). The DOE report noted that SWU prices in 2006 started the year at $116 per SWU and had increased over 15 percent to $135 per SWU by the end of the year. *Id.* For 2007, the reported month-end price range for SWU ranged from $128 to $143 per SWU.[12]

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[10] News Release, USEC Inc., Governments Approve New USEC-Russian Agreement; U.S. and Russia Approve New Market-based Pricing Terms to Convert Warheads to Nuclear Fuel (June 19, 2002) ("USEC Inc. News Release"), *available at* http://findarticles.com/p/articles/mi_m0EIN/is_2002_June_19/ai_87452712.

[11] U.S. Department of Energy, *Report on the Effect the Low Enriched Uranium Delivered Under the Highly Enriched Uranium Agreement Between the Government of the United States and the Government of the Russian Federation has on the Domestic Uranium Mining, Conversion, and Enrichment Industries and the Operation of the Gaseous Diffusion Plant* at 2 (December 31, 2006) ("*DOE 2006 HEU Agreement Effects Report*"), *available at* http://www.ne.doe.gov/pdfFiles/2006_HeuReport.pdf .

[12] NUCLEAR FUEL, *Secondary SWU Market Price Estimate (US$/SWU)*(Platts/McGraw Hill Companies, New York, N.Y.), Vol. 32, No. 4, Feb. 12, 2007 and Vol. 33, No. 2, Jan. 28, 2008 (reporting $128-$143 per SWU (Trade Tech) and $135-$143 per SWU (Ux Consulting) for 2007).

In June 2002, the Implementing Contract between USEC and Tenex was amended again to provide for a market-based pricing structure for the SWU purchased by USEC for the remaining term of the HEU Agreement (*i.e.,* through 2013).[13] Previously, USEC had purchased SWU from Tenex pursuant to a price escalation formula for a specified period. Under the new SWU pricing terms, USEC's purchase price was calculated using a discount from an index of published market price indices widely used in industry practice. Because the current price formula by which USEC pays Tenex for SWU under the HEU Agreement is derived from a calculation of market prices, Tenex has every incentive to maximize the market value of the HEU Agreement transactions and to avoid pricing that would drive down market prices and thereby undercut revenue from the HEU Agreement transactions.

II. The Russian Uranium Suspension Agreement

In addition to the HEU Agreement, the Suspension Agreement is also relevant to the regulation of Russian uranium products imported into the United States.[14] The Suspension Agreement covers imports

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[13] *See* USEC Inc. News Release, *supra* note 10. USEC insisted that the price terms be renegotiated to include a multi-year retrospective market price index to minimize the disruptive effect of short-term market price swings and to include a discount component that allows USEC to purchase Russian SWU at below-market prices and resell at market prices. Id.

[14] On December 5, 1991, Commerce initiated an antidumping duty investigation of imports of uranium (including uranium ore, uranium concentrate, and enriched uranium) from the Union of Soviet Socialist Republics ("USSR"). Following the

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of Russian LEU produced through commercial enrichment. However, nothing in the Suspension Agreement prevents exports pursuant to the HEU Agreement. Suspension Agreement, section M.1, 57 Fed. Reg. at 49237 ("This Agreement in no way prevents the Russian Federation from selling directly or indirectly any or all of the HEU in existence at the time of the signing of this Agreement and/or low enriched uranium ('LEU') produced in Russia from this HEU to [USEC]").

Throughout the duration of the Suspension Agreement, exports of Russian uranium products to the United States consisted of (i) HEU Agreement transactions in which Tenex sold SWU to USEC,[15] (ii) reexport quota transactions in which Russian uranium was imported for further processing into fuel rods in the United States and then re-exported for non-U.S. consumption, or (iii) for a brief time, limited quantities of SWU, inventory materials or uranium sold

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USSR's dissolution on December 25, 1991, Commerce continued the antidumping investigation as to each of the newly independent states, and eventually entered into separate agreements with six of the countries, including the Russian Federation, to suspend the antidumping investigations. Suspension Agreement, 57 Fed. Reg. at 49220-49261.

[15] Suspension Agreement, section M.1, 57 Fed. Reg. at 49237. The October 3, 1996 amendment to the Suspension Agreement provided that exports of Russian-origin uranium products derived from the down-blending of HEU under the HEU Agree ment would not be counted against the export limits of the Suspension Agreement. *Amendments to the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation*, 61 Fed. Reg. 56665 (Dep't of Commerce Nov. 4, 1996).

under "matched sales contracts."[16] Russia and Commerce recently signed an amendment to the Suspension Agreement, effective February 1, 2008, granting Tenex the immediate right to enter into contracts for the sale of Russian uranium products directly to U.S. utilities in the United States. *Amendment to the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation*, 73 Fed. Reg. 7705, 7706 (Dep't of Commerce Feb. 11, 2008). Exports of Russian uranium pursuant to these commercial contracts would not begin until 2011 and would be subject to limits that increase each year, which from 2014 through 2020 are set at 20 percent of the estimated nuclear fuel market demand for the U.S. market. *Id*. at 7706; Press Release, U.S. Department of Commerce, United States and Russian Uranium Agreement Reached (Feb. 1, 2008) ("The Agreement, which has been under negotiation for two years, permits Russia to supply 20 percent of U.S. reactor fuel until 2020").[17]

Finally, the Amendment further provides that "[Commerce] will abide by the *Eurodif* decisions in its determination of the likelihood of continued or recurring dumping" and that the Suspension Agreement

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[16] The original Suspension Agreement provided for quotas for multi-year contracts (Section IV.C.2 ("Appendix A" contracts)); the exportation of Russian uranium pursuant to grand-fathered (Continued) contracts (Section IV.K ("Appendix C" contracts)); exports pursuant to inventory materials (Section IV.E.); and exports of Russian uranium that were entered for processing in the United States and subsequent re-export within 12 months of entry for consumption outside the United States (Sections IV.G., IV.H). 57 Fed. Reg. at 49236-37.

[17] *Available at* http://www.commerce.gov/NewsRoom/Press Releases_FactSheets/PROD01_005136?format_for_print=true.

will terminate on December 31, 2020. 73 Fed. Reg. at 7707.

ARGUMENT

I. The Nature of Uranium Trade and the Short Time Horizon for the HEU Agreement Limit Any Possible Effect of The Lower Court's Decision on the HEU Agreement

The view that affirmance of the decision below[18] would give Russia an incentive to stop downblending HEU under the HEU Agreement in favor of conventional LEU production, and that this would harm U.S. national security, foreign policy, and energy policy is both legally irrelevant[19] and factually incorrect. The HEU Agreement will terminate in 2013. That fact, combined with the prevalence of long-term contracts in the uranium industry, would sharply limit any effect that this Court's decision could have on Russia's performance under that agreement.

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[18] *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir. 2005) (Pet. App. 8a-28a), *aff'd on reh'g*, 423 F.3d 1275 (Fed. Cir. 2005) (Pet. App. 29a-35a), *final judgment*, 506 F.3d 1051 (Fed. Cir. 2007) (Pet. App. 1a-7a). Citations ("Pet. App.") are to the petitioners' appendix to the United States' petition for *writ of certiorari* in Case No. 07-1059.

[19] These policy considerations relate to neither the underlying factual record nor the administrative proceeding giving rise to the case now before the Court. Nor are such policy concerns in any way germane to the legal issues presented in this case, which concern the interpretation of a trade statute of general application. Finally, the Court should not disregard the literal terms of the statute and expand the scope of the antidumping law because of perceived "undesireable consequences." *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S.Ct. 2411, 2420 (2007) (a statute's perceived "undesireable consequences" is a "policy debate that belongs in the halls of Congress, not in the hearing room of this Court").

Long-term contracts have already locked up much of the market for the remaining five years of the HEU Agreement. As the U.S. International Trade Commission ("ITC") documented in 2006, long-term contracting dominated the U.S. uranium market for the previous five years. *Uranium from Russia*, U.S. Int'l Trade Comm'n Pub. 3872, Inv. No. 731-TA-539-C (Second Review) at II-4, Table II-1 (Aug. 2006)("ITC Second Sunset Determination")(reporting that 93.9% of SWU was purchased pursuant to long-term contracts from 2000 through 2005). It is indisputable that this remains the case today, and expectations are that long-term contracts will dominate the market for SWU transactions for the foreseeable future. *See e.g.*, Haruo Maeda, *The Global Fuel Market, Supply and Demand 2007-2030*, at 8 (World Nuclear Ass'n 2008) ("WNA, *The Global Fuel Market, 2007*") ("Most uranium continues to be traded on the basis of multi-annual contracts, based on perceived utility requirements").[20] Indeed, if anything, "both the percentage of utility fuel requirements being purchased pursuant to long term contracts and the length of the contract is increasing." ITC Second Sunset Determination at 42 (dissenting views of Commissioner Lane). In particular, U.S. utilities purchase uranium usually under long-term purchase contracts that run three to seven years, or longer. *Id*.

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[20] *The Global Fuel Market, Supply and Demand* is a leading source of market information. *See, e.g.*, ITC Second Sunset Determination at 26 n. 167 (*citing The Global Fuel Market, Supply and Demand* for its calculation of U.S. nuclear reactor uranium requirements); USEC, Inc. Annual Report (Form 10-K) at 57 (Feb. 26, 2008) (*citing The Global Fuel Market, Supply and Demand* 2005-2030 projections that globally 107 reactors will be added and 42 may be shut down by 2020, representing about a 22 percent net increase).

at 23 (majority views) and II-15 (reporting that U.S. utilities purchased the majority of the processing, *e.g.*, SWU, through long-term contracts, which are purchases made three or more years prior to use of the purchased service). Moreover, USEC decides whether it will fulfill existing long-term contracts with utilities using SWU obtained under the HEU Agreement or SWU from other sources (*i.e.*, self-production or stockpile).

Both suppliers and customers desire and benefit from predictability and market stability. Utilities want dependable and diverse supply sources of enrichment services and LEU. Suppliers like Tenex want diversity of customers as well as relative stability in sales revenues. Accordingly, suppliers need to maintain goodwill within the industry to achieve stability and predictability. Consistent with basic commercial and economic considerations, Tenex's near- and long-term interests lie in being perceived as a reliable supplier of the market. Avoiding potential litigation associated with the disruption of long-term contracts is also a relevant consideration. The view that Tenex is motivated solely by short-term economic opportunism is inconsistent with the complexities of uranium trade and Tenex's commercial interests.

As a practical matter, therefore, the vast majority of U.S. utilities' supply requirements have already been locked in under existing long-term contracts for the remaining five years of the HEU Agreement. Given this context, even if the Russian Government/ Rosatom chose to exercise the right to terminate the HEU Agreement with one year's notice (HEU Agreement, Article VI(3)), the available demand from U.S. utilities would be limited because U.S. utilities are

already committed to purchasing their requirements under pre-existing long-term contracts.

II. The Pricing Terms of the HEU Agreement Independently Deprive Russia of Any Substantial Incentive to Reduce HEU Downblending in Favor of Conventional Enrichment Techniques

Even apart from the temporal considerations discussed above, affirmance of the decision below still would not give Russia an incentive to scale back transactions dependent on downblending HEU in favor of conventional uranium enrichment, because doing so would deprive Russia of the higher revenues it otherwise stands to earn under the HEU Agreement.

The price that USEC pays Russia for SWU under the HEU Agreement is derived from the calculation of published market price indicators. USEC Inc. News Release, *supra* note 10. Hence, in order to maximize the market value of the SWU sold to USEC pursuant to the HEU Agreement, Russia rationally would try to avoid making sales at commercial prices that would drive the market prices down.[21] This would then be reflected in the indexed price USEC pays Russia for the HEU Agreement Russian SWU. As noted in USEC Inc. News Release, for the remainder of the term of the HEU Agreement, Russia will sell 5.5 million SWU annually to USEC, which represents approximately 40 percent of the estimated U.S.

[21] Revenue from Russia's sales pursuant to the HEU Agreement go to the Russian state, whereas the Russian state only receives monies in the form of taxes paid by Tenex on revenue derived from conventional uranium enrichment pursuant to Tenex's non-HEU, commercial transactions.

annual SWU requirements of almost 14 million SWU. *DOE 2006 HEU Agreement Effects Report* at 6 (reporting that U.S. demand for 2006 is estimated to be nearly 14 million SWU). As also noted, DOE calculated SWU prices at $116 to $135 per SWU for 2006. *Id*. Throughout 2007, uranium industry publications reported SWU prices were between $128 and $143 per SWU. NUCLEAR FUEL, *supra* note 12. Even under the pricing formula that was amended in 2002 to allow USEC to purchase at a discount to a historical index of long-term and short-term U.S. and international market prices, *see* USEC Inc. News Release, the amount of revenue generated solely from the SWU sales is significant. Using the lower-end DOE SWU price, which is known to be conservative, 5.5 million SWU at $116 per SWU would be $638 million per year.

In this context, it would not be economically rational for Russia to divert even a portion of the SWU volume under the HEU Agreement to pursue new commercial contracts for any of the smaller remaining amount of open U.S. market demand in a manner that would adversely affect the pricing on this large volume of sales to USEC. Tenex has economic disincentives to price aggressively low on new contracts because any underselling on new commercial contracts would ultimately drive down the price of the SWU sold to USEC under the HEU Agreement as the pricing formula is derived from published market price indicators. The large volume of HEU Agreement sales to the U.S. market – and the revenue stream associated with those sales – would deter a strategy aimed at pursuing below-market sales that would drive down prices under the HEU Agreement and ultimately reduce the revenue Russia derives from sales under that Agreement.

III. Concerns About Russia's Excess LEU Capacity Are Overstated Because They Ignore Russia's Expanding Home-Market and Third-Country Demand

Russia's enrichment capacity is substantially committed to existing long-term contracts and increased demand for Russian enrichment services in Russia and in third countries. ITC Second Sunset Determination at IV-19 (Rosatom statement to the ITC). *The Global Fuel Market, Supply and Demand* estimated that Russia's uranium requirements for nuclear reactors will increase by 23 percent from 2005 to 2010 because of three new reactors planned for start-up by 2010. Haruo Maeda, *The Global Fuel Market, Supply and Demand 2005-2030*, at 50 and 81 (World Nuclear Ass'n 2006) ("WNA, *The Global Fuel Market*, *2005*"). Russian companies supply all of the uranium fuel required by Russian nuclear reactors, and these requirements are expected to increase with the planned construction of new nuclear power plants in Russia. *Id.;* WNA, *The Global Fuel Market, 2007* 41-42 (Russia plans to build 42 new nuclear reactors by 2030) and 155 ("it is clear that the Russian system now has its own rising demand for fuel, and this must be satisfied first, so the fuel exports will likely fall substantially").

In addition, Russia's substantial sales of LEU and SWU to third country markets are substantial and projected to experience significant growth.[22] This

[22] WNA, *The Global Fuel Market*, *2005* at 43, 46, 163 and 172 ("Given that {China and India} do not have abundant low-cost uranium reserves, it appears realistic to proceed on the assumption that if Russia supplies the reactor technology, it will also supply the fuel"); WNA, *The Global Fuel Market*, *2007* at 152 (Continued)

trend is consistent with the fact, as noted, *see supra* at 6-7, that Russia's uranium sales in the U.S. market are below quantities permitted under U.S. law. To meet substantial demand, including to ensure that Russia would have sufficient natural uranium to blend down HEU for the remaining term of the HEU Agreement, Tenex requested agreement by the Western Companies to waive their options to purchase HEU feed, *i.e.*, natural uranium, returned to Russia pursuant to the USEC Privatization Act and the HEU Commercial Feed Agreement.[23] Russia

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(stating that nuclear reactors in Russia, the former Soviet republics and in India and China are Russian-built and it is assumed Russia will supply these reactors for the foreseeable future). World-wide prices for LEU, SWU and natural uranium are at historic highs because of significant global demand and tight supply. WNA, *The Global Fuel Market*, *2005* at 99 ("[A strong market reaction] started in 2003 with a strong upward movement in world uranium prices (the spot market price tripled by the middle of 2005)"); WNA, *The Global Fuel Market*, *2007* at 97 ("The extent of the [spot market] price rise (a more than tenfold increase since early 2003, from $10/lb to over $135/lb in mid-2007) took the uranium market to historic levels in both real (inflation adjusted) and nominal terms"); ITC Second Sunset Determination at Figure V-2 (*citing* Ux Weekly 2002-2006). Projections are that global demand will outpace global supply by around 2016. WNA, *The Global Fuel Market*, *2007* at 166, Fig. 5.9.

[23] *DOE 2004 HEU Agreement Effects Report* at 4 ("In June 2004, Russia and the Western Consortium announced an amendment to the Commercial Feed Agreement…in light of Russia's rising requirements for uranium to fuel their expanding nuclear plant construction program within Russia and abroad…The removal of 74 million pounds of uranium and conversion from the uranium and conversion markets may have an effect due to the reduction in supply in markets that are cur-

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also is re-enriching depleted uranium to produce LEU, even though this is a relatively uneconomic process, because of the substantial demand for LEU in its home market and third country markets. ITC Second Sunset Determination at 27-28 and IV-17 (noting that *The Global Nuclear Fuel Market* reports that Russia is the world's largest re-enricher of depleted uranium); WNA, *The Global Nuclear Fuel Market, 2007* at 3 ("it is known that substantial spare Russian enrichment capacity has been used to re-enrich depleted uranium").

Finally, as noted, in the most recent amendment to the Suspension Agreement that became effective in February 2008, Russia agreed to annual export limits from 2014 to 2020 equal to twenty percent of U.S. market demand. Suspension Agreement, 73 Fed. Reg. at 7706. Even though Russia's SWU sales to USEC pursuant to the HEU Agreement currently account for more than twenty percent of U.S. market annual demand, Russia agreed to a lower share of the U.S. market through commercial sales directly to the U.S. utilities after the HEU Agreement expires. Given the projected increased demand in Russia, Asia and Eastern Europe and other non-U.S. markets, Russia was willing to agree to lower U.S. market share in order to achieve a more balanced and diversified sales portfolio.

(Continued)

rently in supply/demand balance"). Rosatom has stated that "[t]o help Russia meet its internal requirements for natural uranium…it plans to take back additional quantities of UF_6 that it receives under the HEU Agreement." ITC Second Sunset Determination at IV-18.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Federal Circuit should be affirmed.

Respectfully submitted,

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