CASENOTES

Supreme Court Decision on Antidumping Law, Nuclear Fuel, and Deference to Agency Expertise

Eurodif v. United States, 555 U.S. ___ (2009)

The U.S. Supreme Court on January 29, 2009, issued its first-ever decision in an antidumping case, *Eurodif v. United States*, 555 U.S. ___ (2009). In a 9–0 decision, the Court reversed rulings by two lower-level federal courts and held that the U.S. Department of Commerce's application of antidumping duties to nuclear fuel (low-enriched uranium or LEU) imported pursuant to separative work unit (SWU) contracts was lawful.

Under SWU contracts, U.S. nuclear utilities provide raw uranium and cash to foreign enrichers who return an agreed-upon quantity of LEU. The utilities import a good deal of nuclear fuel, using this as well as other types of contractual arrangements, and domestically produced LEU competes with imported LEU.

In 2000, a U.S. enricher, USEC, filed an antidumping complaint targeting imports of LEU (including LEU imported pursuant to SWU contracts) from France and two other countries. The French respondent, Eurodif, contended that SWU imports could not lawfully be subjected to antidumping duties; the antidumping statute, it maintained, allows remedial duties on products "sold or offered for sale" in the United States, and the concept of a SWU contract is that no "sale" of goods occurs when LEU is imported. Foreign enrichers in SWU transactions simply process uranium that their U.S. utility customers already own. They are merely providing a processing "service," and the antidumping law's remit is limited to sales of "goods."

Commerce was not persuaded by this argument and issued an antidumping order applicable to all LEU from France. But at the first level of appeal, the Court of International Trade (CIT) reversed and required commerce to exclude SWU material from the antidumping order. The U.S. government (and USEC) sought further review at the Court of Appeals for the Federal Circuit (CAFC), which sustained the CIT's ruling that SWU material had to be exempted from the remedial antidumping duties.

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The CAFC normally has the last word in antidumping appeals. Here, however, the U.S. government (and USEC) asked the Supreme Court to grant certiorari. Their petitions cited grave threats to national security—contending that the rule announced by the CAFC was impairing the U.S. government's security-sensitive management of nuclear fuel trade with Russia—and concerns about the integrity of the antidumping remedy. The Supreme Court accepted the case; its decision, however, gave little attention to the broad concerns cited in the certiorari petitions. Rather, it was a straight-ahead administrative law opinion focusing on whether the challenged agency-level determination was lawful and reasonable.

Aside from its implications for the nuclear fuel trade and the enrichment sector, the *Eurodif* decision may be most notable for the manner in which it underscores principles of deference (under the *Chevron* framework) to expert agency determinations. Observing that the antidumping statute did not specifically address the fact pattern at bar, the court stated in one important passage that "[t]his is the very situation in which we look to an authoritative agency for a decision about the statute's scope, which is defined in cases at the statutory margin by the agency's application of it, and once the choice is made we ask only whether the Department's application was reasonable." Depending on how lower courts apply it, *Eurodif* may become the operative benchmark for deference to agency determinations involving both contested factual issues and close calls of statutory interpretation.

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Ontario Court of Appeal Reaffirms Canadian "Deferential Approach" to Arbitration

Dancap Productions Inc. v. Key Brand Entertainment, Inc., 2009 ONCA 135 (Ont. C.A.) per Sharpe, Armstrong and Watt JJ.A.

The recent decision by the Court of Appeal for Ontario in *Dancap Productions Inc. v. Key Brand Entertainment, Inc.* (*Dancap Productions*) reaffirms the Canadian "deferential approach" to the principle of competence-competence for arbitral jurisdiction.

The issue on appeal in *Dancap Productions* was whether the motion judge erred in refusing to grant a stay on account of arbitration and forum selection clauses in one of the contracts entered into by the respondents