

2018-1116, -1117, -1118

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SUNPREME INC.,

Plaintiff-Appellant

v.

UNITED STATES, SOLARWORLD AMERICAS, INC.

Defendants – Cross-Appellants.

**Appeal from the United States Court of International Trade in
Court No. 16-00171, Hon. Claire R. Kelly**

***AMICUS CURIAE* BRIEF OF
TR INTERNATIONAL TRADING COMPANY
IN SUPPORT OF PLAINTIFF-APPELLANT'S OPPOSITION TO
DEFENDANT-CROSS-APPELLANT'S PETITION FOR PANEL
REHEARING AND REHEARING *EN BANC***

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September 24, 2019

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Sunpreme Inc. v. United States

Case No. 18-1116

CERTIFICATE OF INTEREST

Counsel for the:

(petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

TR International Trading Company

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
TR International Trading Company	N/A	N/A

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

Michael K. Tomenga, Neville Peterson LLP
Lawrence J. Bogard, Neville Peterson LLP

FORM 9. Certificate of Interest

**Form 9
Rev. 10/17**

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

Sunprime Inc. v. United States, CIT No. 18-168; TR International Trading Company v. United States, CIT No. 19-00022, and Thatcher Company, Inc. v. United States, CIT No. 19-00173, pending before the U.S. Court of International Trade will be directly affected by this Court's decision in this appeal.

9/24/2019

Date

/s/Michael K. Tomenga

Signature of counsel

Please Note: All questions must be answered

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Printed name of counsel

cc: _____

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INTRODUCTION

Amicus Curiae, TR International Trading Company (“TRI”), submits this brief in opposition to the Petition of the United States for Panel Rehearing or *En Banc* rehearing of the Court’s decision in this matter (“*Petition*”). As discussed herein, the Merits Panel correctly concluded that United States Customs and Border Protection (“Customs”) lacks authority to suspend liquidation of entries in the administration of the antidumping and countervailing duty (“AD/CVD”) laws absent an express instruction from the U.S. Department of Commerce (“Commerce”). TRI is a victim of the confusion and injustice in the execution of the AD/CVD statutes that result when Customs *sua sponte* suspends liquidation and demands payment of substantial AD/CVD duties without a determination by Commerce clarifying the scope of ambiguous AD/CVD orders. The Merits Panel correctly held that Customs’ action in the absence of instructions from Commerce is contrary to the statutory and regulatory scheme. The *Petition* should be denied.

INTEREST OF AMICUS CURIAE

Pursuant to FRAP 29(c), Petitioner and Cross-Appellant have indicated their consent to TRI’s motion for leave to file the instant *amicus* brief. Respondent does not oppose the motion.

TRI is a veteran-owned and operated private business that imports and distributes chemical products sourced globally. TRI is the plaintiff in an action pending before the U.S. Court of International Trade (“CIT”) challenging Customs’ suspension of liquidation and subsequent assessment of AD/CVD duties against seventeen entries of citric acid anhydrous **from India**, pursuant to AD/CVD Orders against *Citric Acid and Certain Citric Acid Salts from the People’s Republic of China*¹ when: (1) neither the language of the AD/CVD Orders, nor any Commerce determinations concerning their scope, establish that products of **India** are covered by them; (2) Commerce issued no liquidation instructions directing Customs to suspend liquidation of, or assess AD/CVD duties pursuant to those orders on, any merchandise imported from **India**; and (3) Commerce had previously issued the Final Results of its administrative reviews for the period during which TRI’s seventeen entries for citric acid from India were imported, and directed Customs to lift suspension of liquidation of entries made

¹ *Citric Acid and Certain Citrate Salts from Canada and the People’s Republic of China: Antidumping Duty Orders*, 74 Fed. Reg. 25,703 (Dept. Commerce May 29, 2009); *Citric Acid and Certain Citrate Salts from the People’s Republic of China: Notice of Countervailing Duty Order*, 74 Fed. Reg. 25,705 (Dept. Commerce May 29, 2009).

during that period.² Consequently, TRI is challenging the same kind of *sua sponte* scope decision by Customs that the Merits Panel held to be unlawful.

STATEMENT OF AUTHORSHIP

In accordance with FRAP 29(c)(5), TRI confirms that it has authorized the filing of this brief. No other party contributed to the drafting of the brief or contributed any money to the effort. The brief was drafted entirely by undersigned counsel for TRI.

² See Commerce liquidation message 8213307 and 8211318, available at Ex. 8 to TRI Complaint, CIT No. 19-00022, ECF4-1 at 52-56

STATEMENT OF THE CASE

The issue presented by the *Petition* is whether, after Customs' release of merchandise entered without deposit of AD/CVD duties and in the face of uncertainty as to the scope of AD/CVD orders, CUSTOMS may -- without any instruction from Commerce -- independently conclude that the released merchandise is subject to the orders, suspend liquidation, require estimated AD/CVD duties to be deposited, and assess AD/CVD duties in liquidation, in circumvention of the statutory process established by Congress.

In the instant case, Sunpreme imported a "hybrid" solar panel, not clearly described within the scope of AD/CVD orders against *Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, from the People's Republic of China* (the "CPSV Orders"). Without instructions from Commerce directing that the CPSV Orders encompassed hybrid solar panels and that liquidation of entries of such merchandise should therefore be suspended, Customs suspended liquidation of Sunpreme's entries and demanded deposits of estimated AD/CVD duties. Following Customs' decision, Sunpreme requested a scope determination from Commerce. Commerce then initiated a scope inquiry and

ultimately found that hybrid solar panels *were* within the scope of the CSPV orders, a decision upheld by the CIT and this Court.³

The Merits Panel decided that Customs' unilateral decision to suspend liquidation and demand deposits of estimated AD/CVD duties *prior* to initiation of Commerce's scope inquiry and suspension instruction was not in accordance with law. The Merits Panel noted that Title VII of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 ("*TAA*")⁴, confers upon Commerce the sole responsibility for defining the scope of AD/CVD orders and issuing liquidation instructions regarding same. The Merits Panel confirmed that Customs acts in a merely ministerial capacity:

When Commerce decides, . . . , to issue an antidumping or countervailing duty order, it issues an order to Customs, giving Customs authority to suspend liquidation on entries of the product covered by the antidumping or countervailing duty order. . . . As we explained in *Xerox*, "Customs makes factual findings to ascertain what the merchandise is, and whether it is described in an order." [*Xerox Corp. v. United States*], 289 F.3d [792], 794 [Fed. Cir. 2002]. When, based on examination of the product in question and the plain meaning of the words in an antidumping or countervailing duty order, there is no question that the product is either within or not within the scope of the order, Customs either suspends liquidation and collects cash deposits, or passes the entry without suspending liquidation and collecting cash deposits. In either instance, Customs performs what we have described as its assigned and lawful ministerial duties.

³ *Sunpreme Inc. v. United States*, 256 F. Supp. 3d 1265, 1278, 1292, 1294 (Ct. Int'l Trade 2017).

⁴ Act of July 26, 1979, Pub. L. 96-39, 93 Stat. 144.

Mitsubishi Elecs. Am., Inc. v. United States, 44 F.3d 973, 977 (Fed. Cir. 1994); *see also Xerox*, 289 F.3d at 794.

Sunpreme Inc. v. United States (“*Sunpreme II*”), 924 F.3d 1198, 1213 (Fed. Cir. 2019).

The Merits Panel noted that Customs may suspend liquidation of an entry pursuant to AD/CVD orders *only* after it has received unambiguous instructions from Commerce. The CSPV Orders defined certain products as being within their scope, while excluding others, without spelling out the scope of the exclusions. It was therefore Commerce’s responsibility -- not Customs’ -- to determine the Orders’ scope. Stating that “Ambiguity is the line that separates lawful ministerial acts from unlawful *ultra vires* acts by Customs,” the Panel observed that “[t]his is not a close case.” *Sunpreme II* at 1214.

Further, the Merits Panel observed that, because Commerce cannot lawfully order the suspension of liquidation of entries made before Commerce initiated its scope inquiry, Customs cannot suspend liquidation of those entries on its own authority. To conclude otherwise, the Panel noted, would “elevat{e} the role of Customs from ministerial to substantive while collecting duties.” *Sunpreme II* at 1215. Accordingly, the Merits Panel rejected arguments urging it to disregard extensive Circuit precedent and “vest Customs with the authority to perform Commerce’s job.” *Id.* “When confronted with a scope question, nothing prevents Customs from picking up the phone and calling Commerce, or sending Commerce

an instant message, encouraging it to self-initiate a scope inquiry. 19 C.F.R. § 351.225(b)”. *Id.*

In its *Petition*, the United States again asks this Court to overturn precedent and conclude that Customs’ authority to take ministerial action when AD/CVD orders are unambiguous confers authority to make substantive determinations when the scope of such orders is unclear. The premise of the *Petition* is fundamentally flawed: Congress clearly intended that Commerce alone would make substantive scope determinations. The *Petition* should be denied.

ARGUMENT

1. Congress Has Assigned Customs a Ministerial Role in the Administration of the Antidumping and Countervailing Duty Laws

Prior to enactment of the *TAA*, Congress vested authority to administer the AD/CVD statutes in the Department of the Treasury, through the U. S. Customs Service (at that time, part of Treasury). In enacting the *TAA*, Congress expressly transferred administrative and interpretive functions concerning the AD/CVD laws, to Commerce (identified as the “Administering Authority”). By statute and regulation, Commerce conducts AD/CVD investigations, as well as administrative reviews of AD/CVD orders. It also conducts scope inquiries to clarify the merchandise they are intended to cover. *See* 19 C.F.R. §351.225. At the same time, Congress assigned Customs to a ministerial role in which Customs merely carries out instructions issued by Commerce, including instructions describing

when liquidation of entries should be suspended, when entries should be liquidated, the amount of AD/CVD duties to be assessed, the transactions subject to assessments, and the merchandise subject to AD/CVD orders. *See, e.g., Koyo Corp. v. United States*, 497 F.3d 1231 (Fed. Cir. 2007).

To ensure that Customs' role remained ministerial, rather than substantive, Congress revised the system of administrative and judicial review employed in AD/CVD matters. Decisions made by Commerce and implemented through a Customs liquidation were made non-protetable, *see* 19 U.S.C. § 1514(b), and thus unreviewable by Customs, while Customs's ministerial acts implementing Commerce's decision are beyond judicial review. Congress instead crafted a system of judicial review under 19 U.S.C. § 1516a under which Commerce AD/CVD determinations – including scope determinations – were to be directly reviewed, prior to liquidation of entries, by the CIT and this Court, on the basis of the administrative record compiled before Commerce. *See* 19 U.S.C. § 1516a (a)(2)(B)(vi). The courts were given the (unusual) power to enjoin Customs liquidation of entries while judicial review took place. The courts review decisions of Commerce, not Customs.⁵ Judicial review must be completed prior to

⁵ This Court has recognized a narrow exception to this rule for situations where the scope of an AD or CVD order is unambiguous, and Customs makes an error in their application. *See e.g., Xerox Corp. v. United States*, 289 F.3d 1198 (2002).

liquidation of entries, leaving Customs nothing to do but perform the ministerial task of carrying out the instructions of Commerce or the courts.

Commerce's power to define the scope of AD/CVD orders is essential to its ability to conduct AD/CVD proceedings. For example, Commerce's definition of scope will guide the agency in determining which foreign producers, exporters and importers of merchandise will be issued questionnaires in connection with administrative reviews of orders.⁶ This obligation could not properly be exercised if, for example, Customs were to suspend liquidations of different classes of merchandise, which *Customs* believed might be subject to an order, without notification to Commerce.

The power to conduct inquiries and render decisions regarding whether certain merchandise is within the scope of an AD or CVD order rests solely with Commerce, as does the power to order suspension of liquidation of entries once a scope inquiry is initiated – but not before. *See* 19 C.F.R. § 351.225(1)(3). As the Merits Panel observed, when Customs perceives an ambiguity in the scope of an AD or CVD order, it cannot not act unilaterally, but must refer the issue to Commerce. Only then is Commerce in a position to clarify any scope issues that Customs may have identified.

⁶ Commerce's regulations specifically provide that scope issues may, if timely raised, be considered concurrently with an annual review.

The *Petition* presumes – erroneously -- that only an importer may seek Commerce’s clarification of an ambiguous AD/CVD Order. Thus, the Government contends that Customs’ authority to suspend liquidation and demand deposit of estimated AD/CVD duties is essential in order to pressure importers to request a scope inquiry. Congress designed the scope inquiry process, however, to give Commerce the authority to determine whether suspension of liquidation is warranted and to implement that determination through instruction to Customs. In short, suspension of liquidation in a scope context originates with Commerce; it is not a tool by which Customs can leverage an importer to seek clarification of an order’s scope.

Reference to Customs liquidation authority, 19 U.S.C. § 1504, also makes clear that Customs has no authority whatsoever to decide whether to suspend liquidation. In the context of Customs obligations following removal of suspension of liquidation, the terms of Section 1504(d) make clear that suspension of liquidation occurs in only two circumstances, *i.e.*, “when required by statute or by court order.” Statutory authority to suspend liquidation for AD/CVD purposes rests solely with Commerce. *See* 19 U.S.C. §§ 1516a(g)(5)(C), 1671b(d)(2), 1671d(c)(1)(C), 1673b(d)(2), and 1673d(c)(1)(C). When liquidation of an entry is suspended, Customs role is to provide “notice of the suspension.” *See* 19 U.S.C. § 1504(c).

Further, the Government's argument presumes that meaningful scope rulings will be available to importers in all instances in which Customs suspends liquidation. That presumption is not correct. In TRI's case (and at least one other case currently pending before the CIT)⁷ Customs suspended liquidation of the importers' entries *after* Commerce had completed its administrative reviews of the AD/CVD orders in question, lifted suspension of liquidation, and issued "no change" liquidation instructions. Despite the lack of any "change" liquidation instruction from Commerce, Customs suspended liquidation and thereafter liquidated the entries with a *final* assessment of AD/CVD duties. In that a situation, Commerce is precluded from issuing a positive or negative scope determination affecting the pertinent entries because they have liquidated. Moreover, a reviewing court would necessarily be considering a scope decision made by *Customs* -- not Commerce -- in a post-liquidation proceeding lacking an administrative record at Commerce. That is not the procedure that Congress intended.

The proper course of action in such situations, as the Merits Panel correctly concluded is for Customs, when it has a question about the scope of an order, immediately to raise the issue with Commerce either informally or, if it wishes to have liquidation of an entry suspended, by requesting Commerce to self-initiate a

⁷ See *TR International Trading Company v. United States*, CIT No. 19-00022 and *Thatcher Company, Inc. v. United States*, CIT No. 19-00173.

scope inquiry. The decision whether to take action that results in suspension of liquidation in any event rests entirely with Commerce.

The *Petition* should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Michael K. Tomenga, an attorney with Neville Peterson LLP, and counsel to proposed *amicus curiae*, TR International Trading Company, am responsible for the foregoing Brief, relying on the word count feature of the word processing program used to prepare the foregoing Brief of Proposed *Amicus Curiae* TR International Trading

Company, certify that it complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) and Federal Circuit Court Rule 29(a). The Brief contains 2,487 words.

I, Michael K. Tomenga, certify that the Brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). This Brief has been prepared in proportionally spaced typeface using *Microsoft Office Word 2010* in 14 *point Times New Roman*.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Amicus Curiae* Brief, together with the enclosed Motion for Leave to File, was served on counsel of record by U.S. Mail and by electronic means (CM/ECF and E-mail) this 24th day of September, 2019.

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