

2018-1116, -1117, -1118
United States Court of Appeals
for the Federal Circuit

SUNPREME INC.,

Plaintiff-Appellee,

v.

UNITED STATES, SOLARWORLD AMERICAS, INC.,

Defendants-Cross-Appellants.

On Appeal from the United States Court of International Trade,
No. 16-00171, Honorable Claire R. Kelly

**BRIEF FOR *AMICUS CURIAE*, THE AMERICAN ASSOCIATION
OF EXPORTERS AND IMPORTERS, IN OPPOSITION TO THE
PETITION FOR PANEL REHEARING AND REHEARING
EN BANC OF DEFENDANT-CROSS-APPELLANT
UNITED STATES**

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September 24, 2019

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Sunprime Inc. v. United States, Nos. 2018-1116, -1117, -1118

CERTIFICATE OF INTEREST

Counsel for *Amicus Curiae*, the American Association of Exporters and Importers, certifies the following:

1. The full name of every party represented by me is:
The American Association of Exporters and Importers
2. The name of the real party in interest represented by me is:
The American Association of Exporters and Importers
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:
None.
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:
None.
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).
None.

Dated: September 24, 2019

/s/ John M. Peterson
John M. Peterson

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REHEARING AND REHEARING *EN BANC* OF DEFENDANT-
CROSS-APPELLANT UNITED STATES**

Amicus Curiae the American Association of Exporters and Importers (“AAEI”) submits this brief in accordance with Federal Rule of Appellate Procedure 35(g), in opposition to the combined petition of the United States for panel rehearing and *en banc* rehearing of the Court’s decision in this case. As discussed herein, the Merits Panel decision correctly delineated the division of responsibilities between the U.S. Department of Commerce (“Commerce”) and the U.S. Customs

and Border Protection (“Customs” or “CBP”) in the administration of the antidumping duty (“AD”) and countervailing duty (“CVD”) laws. Each agency has been equipped with a distinct set of statutory tools to allow for the orderly and efficient administration and enforcement of these statutes. To allow CBP to direct suspension of liquidation of entries—a power which Congress has reserved to Commerce—would invite chaos and injustice in the execution of these laws.

CBP has adequate and separate powers which allow it to protect the revenue and redress suspected evasion of AD and CVD. The *en banc* petition should be denied.

INTEREST OF AMICUS CURIAE

AAEI has been, for nearly a century, the voice of American businesses in support of free and open trade among nations. AAEI represents numerous manufacturers, distributors, and retailers of a wide spectrum of products, including electronics, machinery, footwear, automobiles, automotive parts, food, household consumer goods, textiles and apparel—as well as international companies, freight forwarders, customs brokers, and banks. AAEI is the only national association that represents the interests of exporters and importers before the United States, its agencies, Congress, the trade community, foreign governments, and international organizations.

Counsel for Sunprime Inc., the United States, and Solarworld Americas Inc. have indicated their consent to the filing of the instant *amicus curiae* brief.

STATEMENT OF AUTHORSHIP

AAEI confirms that its board of directors 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 AAEI.

STATEMENT OF THE CASE

The issue presented is whether, in the absence of instructions from Commerce stating that particular goods are within the scope of an AD or CVD order, CBP may conclude unilaterally that they are, suspend liquidation, and assess estimated AD or CVD thereon. The Merits Panel (Prost, J., dissenting) concluded that CBP lacked this power.

CBP was confronted with Sunpreme's imports of a "hybrid" solar panel, which was not clearly described within the scope of AD and CVD orders against *Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, from the People's Republic of China*, 77 Fed. Reg. 73,017 (Dep't Commerce Dec. 7, 2012) (CVD order); 77 Fed. Reg. 73,018 (Dep't Commerce Dec. 7, 2012) (amended LTFV determination and AD order) (collectively "CSPV Orders"). CBP, acting *sua sponte*, suspended liquidation of Sunpreme's entries and assessed estimated AD and CVD duties thereon. Thereafter, Sunpreme requested a scope determination from Commerce under that agency's regulations, 19 C.F.R. § 351.225.

Upon initiating the scope proceeding, Commerce issued an instruction to CBP to suspend liquidation of “hybrid” panel entries.

Commerce found that the hybrid panels *were* within the scope of the CSPV Orders, a decision upheld by the CIT and this Court. The remaining question—which forms the basis for the instant rehearing petition—is whether CBP lawfully suspended liquidation of entries made *prior* to Commerce’s scope inquiry initiation, such that those entries could be liquidated with assessments of AD and CVD. Stated another way, “may CBP lawfully suspend liquidation of entries under the AD and CVD laws, in the absence of an unambiguous instruction from Commerce?”

The Merits Panel noted that Title VII of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979,¹ confers upon Commerce the sole responsibility for defining the scope of AD and CVD orders and issuing liquidation instructions regarding same. CBP, on the other hand, acts in a purely ministerial capacity:

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.

¹ See Act of July 26, 1979, P.L. 96-39, 93 Stat. 144.

Sunpreme Inc. v. United States, 724 F.3d 1198, 1213 (Fed. Cir. 2019) (“*Sunpreme II*”) (citing *Xerox Corp. v. United States*, 289 F.3d 792, 794 (Fed. Cir. 2002); *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994)).

The Merits Panel noted that CBP may suspend liquidation of an entry pursuant to an AD or CVD order only when it has received unambiguous instructions from Commerce to do so. Noting that “[a]mbiguity is the line that separates lawful ministerial acts from unlawful *ultra vires* acts by Customs,” the Panel stated that “[t]his is not a close case.” *Sunpreme II*, 724 F.3d at 1214. It was for Commerce, not CBP, to conduct such a scope inquiry to determine whether liquidation of entries should be suspended.

Finally, a finding that Sunpreme’s hybrid cells are within the scope of the CSPV Orders did not exist until Commerce’s scope proceeding was final; the suspension of liquidation was tethered to the initiation of that inquiry. To hold otherwise, the Panel noted, would serve to “elevat[e] the roles of Customs from ministerial to substantive while collecting duties.” *Sunpreme II*, 724 F.3d at 1215.

The Panel also rejected the pleas of the United States and the domestic producers to disregard extensive Federal 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 for *en banc* Rehearing, the United States asks this Court to disregard its precedent and grant CBP the power to initiate suspensions of liquidations in cases where AD or CVD orders are unclear, rather than requiring Commerce to make that call. This Court should decline that invitation.

ARGUMENT

I. Congress Clearly Delineated Separate Roles for Commerce and CBP in the Administration of the AD and CVD Laws.

Prior to enactment of the Trade Agreements Act of 1979 (“TAA”), AD and CVD orders were administered solely by the Department of the Treasury, through the Customs Service (then part of Treasury). The TAA divested Treasury of its administrative and interpretive functions relative to the AD and CVD laws, transferring them to an “Administering Authority,” subsequently identified as the U.S. Department of Commerce, International Trade Administration. By law and regulation, Commerce conducts AD and CVD investigations, as well as 19 U.S.C. § 1675 annual reviews of AD and CVD orders, as well as scope and anticircumvention inquiries to ensure that the scopes of such orders are properly designed and applied. *See* 19 C.F.R. § 351.225; 19 U.S.C. § 1677j.

CBP was granted only a ministerial role, under which it carries out directions received from Commerce. *See e.g., Koyo Corp. v. United States*, 497 F.3d 1231, 1242 (Fed. Cir. 2007).

To ensure that CBP's role remained ministerial, rather than substantive, Congress also revised the system of administrative and judicial review employed in AD and CVD matters. Decisions entrusted to Commerce which merged in the entry's liquidation by CBP were made non-protestable, 19 U.S.C. § 1514(b), and placed beyond CBP's review powers. Congress instead crafted a system of judicial review under 19 U.S.C. § 1516a under which Commerce's AD and CVD determinations—including scope and anticircumvention determinations—were to be directly reviewed, prior to liquidation of entries, by the CIT and this Court, on the basis of the agency record compiled before Commerce. *Id.*, § 1516a(2)(B)(vi). The courts were given the (unusual) power to enjoin liquidation of entries while judicial review took place. To be clear, the courts were to review decisions of Commerce, not CBP.² These reviews were to be completed prior to the liquidation of entries, leaving CBP nothing to do but ministerially carry out the instructions of Commerce or the courts.

² This Court has recognized a narrow exception to this rule for situations where the scope of an AD or CVD order is unambiguous, and CBP makes an error in their application. *Xerox Corp., supra*, 289 F.3d at 795.

Commerce's power to define the scope of AD and CVD orders is essential to its ability to conduct proceedings under Title VII of the Tariff Act. Commerce's definition of an order's scope guide its determination of which foreign producers, exporters and importers of subject merchandise will be issued questionnaires in connection with annual reviews of AD and CVD orders.

The power to conduct inquiries and render decisions regarding 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 noted here, when CBP perceives an ambiguity in the scope of an AD or CVD order, it is not to act unilaterally, but must elevate the issue to Commerce. Commerce will then be (i) aware of scope issues which only CBP can identify at the time of entry; and (ii) empowered to lawfully address them.³

The Petition suggests that it is the obligation of an importer whose entry has been suspended from liquidation by CBP to initiate a scope inquiry with Commerce. However, the scope inquiry procedure is not established as a check on CBP's (non-

³ Certain issues relating to scope of AD and CVD investigations and orders may have been raised in confidential materials on Commerce's investigative record—materials which would not be available to CBP officers.

existent) suspension power. It is designed to have Commerce determine whether to generate a suspension instruction to CBP, not the other way around.

In some cases, a scope review may not be available to the importer whose entry has been suspended by CBP. At least one case currently pending before the CIT involves a situation where CBP suspended liquidation of an importer's entries *after* Commerce had completed its administrative reviews of the AD and CVD orders in question, which resulted in "no change" liquidation instructions.⁴ Despite the lack of any "change" in the liquidation instructions from Commerce, CBP proceeded to liquidate the entries with a *final* assessment of AD and CVD duties. In such a post-liquidation setting, a reviewing court would be forced to consider a scope decision of CBP, rather than of Commerce, on the basis of either a CBP agency record or a record made *de novo* before the court. Congress did not intend this result, which could raise the specter of inconsistent agency decisions.

The proper course of action when CBP has a scope question, as the Merits Panel indicated here, is for CBP to immediately raise the issue with Commerce either informally or, by requesting Commerce to self-initiate a scope (or anticircumven-

⁴ See *e.g.*, *TR International Inc. v. United States*, CIT No. 19-00022.

tion) inquiry. *Sunpreme II*, 924 F.3d at 1215. But the decision whether to take action—an action which could result in suspension of liquidation—rests entirely with Commerce.

II. CBP Has Adequate Statutory Weapons to Combat Evasion of AD or CVD Orders.

The Government rests its Petition on the notion that CBP, as a revenue collecting agency, has an obligation to “protect the revenue.” Petition at 8. However, AD and CVD are not imposed for the purpose of raising revenue, but rather as a remedial measure to combat unfair trade practices. *See e.g., Apex Exports v. United States*, 777 F.3d 1373 (Fed. Cir. 2015); *see also, United States v. King*, 891 F.2d 780, 781 (D.C. Cir. 1989) (statute which raises revenue but has a different main purpose not subject to challenge under the Origination Clause). It is uniquely the province of Commerce to determine the existence of unfair trade practices, identify the scope of products involved, and determine the amount of compensatory duties to offset those practices.⁵ Because ADs and CVDs are not imposed to raise revenue, the notion that CBP has a revenue protection mandate transcending or superseding Commerce’s statutory role has no foundation.

⁵ Unlike CBP, Commerce also has procedures to solicit comment from all stakeholders in an AD or CVD order, including the domestic petitioners.

The Government also argues that CBP must have power to suspend liquidation *sua sponte* to combat fraud and evasion. However, CBP has separate statutory tools to be wielded for this purpose. Where AD or CVD evasion occurs by false acts or practices, CBP may impose civil penalties under 19 U.S.C. § 1592, and may, in connection therewith, compel the restoration of withheld duties under § 1592(d).⁶ This is a particularly powerful remedy, since it can be exercised after entries are liquidated. CBP has five years from the date of a violation (in the ordinary case) to commence a penalty and/or withheld duty collection suit, and five years from the date of discovery of a fraudulent violation to bring such action. 19 U.S.C. § 1621.

In addition, in 2015, Congress enacted the Enforce and Protect Act (“EAPA”), 19 U.S.C. § 1517, which allows CBP, after investigation of a petition, to provisionally suspend liquidation of entries in cases where it suspects duty evasion in respect of goods *unambiguously* subject to an AD or CVD order. Where it is unclear whether the merchandise involved is “covered merchandise” under an AD or CVD order, the law requires that the matter be referred to Commerce for such a determination. *Id.*, § 1517(b)(4). This reinforces Commerce’s authority in determining the scope of AD or CVD orders. Had Congress believed that CBP possesses some inherent authority

⁶ See e.g., *United States v. Univar USA Inc.*, 375 F. Supp. 1305 (Ct. Int’l Tr. 2019); *United States v. Country Flavor Corp.*, 844 F. Supp. 2d 1348 (Ct. Int’l Tr. 2012); *United States v. Matthews*, 533 F. Supp. 2d 1307 (Ct. Int’l Tr. 2007).

to suspend liquidation of entries, it would not have enacted EAPA and its attendant procedures.

Furthermore, as the Merits Panel noted, if CBP believes a serious scope question is presented at the time of entry, it can request that Commerce self-initiate a scope determination proceeding. *Sunpreme II*, 924 F.3d at 1215. If Commerce self-initiates, a suspension of liquidation will be imposed, generally within a few days.

The just and efficient administration of the AD and CVD laws is best promoted if the role of Commerce as the master of these laws and directing agency is preserved and made exclusive, while CBP's sphere of activity is limited to its ministerial duties under the AD and CVD laws, and its separate investigation and enforcement powers.⁷ If CBP is permitted to intrude on Commerce's authority and unilaterally suspend liquidation of entries of merchandise where ambiguity exists in an AD or CVD order, there is the possibility of inconsistent agency determinations, and the presentation of scope issues to the courts based on CBP's liquidation decisions, rather than on Commerce's determinations made on an agency record. Congress cannot be presumed to have intended either eventuality.

⁷ Chaos would ensue if, for example, Commerce elected to exercise CBP's powers to impose penalties and demand payment of withheld duties under 19 U.S.C. § 1592. CBP's arrogation of Commerce's power to order suspension of liquidation is no less chaotic.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for *Amicus curiae*, the American Association of Exporters and Importers, was served on the parties by electronic means (CM/ECF) this 24th day of September, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Richard F. O'Neill, attorney with Neville Peterson LLP, and counsel to *Amicus curiae*, the American Association of Exporters and Importers, who is responsible for the foregoing brief, relying upon the word count feature of the word processing program used to prepare the brief, certify that this brief complies with the type-volume limitation under Rule 32(a)(7)(B) and contains 2,593 words.

Respectfully submitted,

/s/ Richard F. O'Neill

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NEVILLE PETERSON LLP

September 24, 2019