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

CORRECTED *AMICUS CURIAE* BRIEF OF THE COMMITTEE TO SUPPORT U.S. TRADE LAWS IN SUPPORT OF DEFENDANT- CROSS-APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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August 20, 2019

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

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)

Committee to Support U.S. Trade Laws

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
Committee to Support U.S. Trade Laws	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:

Thomas M. Beline, Cassidy Levy Kent
John M. Herrmann II, Kelley Drye & Warren LLP

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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).

Sunpreme Inc. v. United States, CIT Ct. No. 18-168, currently pending before the U.S. Court of International Trade will be directly affected by this Court's decision in this appeal. Counsel is not aware of any cases pending before this Court that will directly affect or will be directly affected by this Court's decision in this appeal.

8/12/2019
Date

Signature of counsel

Please Note: All questions must be answered

Thomas M. Beline
Printed name of counsel

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IDENTITY AND INTEREST OF AMICUS CURIAE AND SOURCE OF AUTHORITY TO FILE BRIEF

The Committee to Support U.S. Trade Laws ("CSUSTL") is an organization composed of more than 420 companies, trade associations, labor unions, workers, and individuals, representing more than 160 industries, agriculture, and mining sectors. CSUSTL and its members are committed to preserving and enhancing U.S. trade remedy laws. CSUSTL works in multiple fora to strengthen trade laws and trade enforcement, and to ensure that the trade laws are not weakened through legislation or policy decisions in Washington, D.C., in international negotiations, or through dispute settlement proceedings at the World Trade Organization and elsewhere. CSUSTL's interest is further explained in the accompanying motion for leave to file this brief.

Counsel for Defendant - Cross-Appellant SolarWorld Americas, Inc. authored this brief in part. However, no party or person besides CSUSTL contributed money toward preparation and submission of this brief and the accompanying motion.

ARGUMENT

CSUSTL believes that the issue presented in the United States' petition for rehearing is fundamental to the effectiveness of the U.S. trade remedy laws. As shown in the petition, the panel's opinion in *Sunpreme Inc. v. United States* seriously and unnecessarily curtails the authority of U.S. Customs & Border Protection

("CBP") to enforce the nation's trade remedy laws, in a way that is inconsistent with the Tariff Act of 1930, applicable regulations, and this Court's previous holdings. As a result, the panel's decision will have the effect of preventing CBP from taking appropriate actions to protect the revenue of the United States where there is a dispute over whether an imported good falls within the scope of an unfair trade order and to enforce unfair trade orders obtained by domestic industries that have been injured or threatened with injury by unfairly traded imports.

Crucially for domestic industries that the U.S. trade remedy laws were enacted to benefit, the panel's decision discourages importers from seeking clarification from Commerce regarding whether an imported good falls within the scope of existing antidumping and/or countervailing duty orders. Rather, importers will be able to exploit any claimed ambiguity in the scope of such orders as a shield against suspension of liquidation and CBP's collection of an estimated duty as security against potential future liability for antidumping and/or countervailing duties, and accordingly will have no incentive to seek resolution of that ambiguity from Commerce. Domestic industries are not in a position to monitor such behavior, as they lack access to confidential importer records and data that would otherwise enable them to request clarification of the matter themselves.

Further, in finding that CBP may not suspend liquidation or require estimated antidumping duty deposits from an importer with respect to incoming merchandise

unless the scope of the relevant antidumping duty order is perfectly and inarguably clear, the panel misconstrues CBP's discharge of its statutory responsibilities to fix duties and protect the revenue as an unlawful "interpretive" act.

Finally, in finding that regulations issued by the U.S. Department of Commerce ("Commerce") act to limit, or otherwise reflect a limit on, CBP's authority in this regard, the panel has ignored the purpose of the regulations.

Below, CSUSTL further discusses these concerns to explain why the question presented in the United States' petition merits panel rehearing and/or *en banc* consideration.

I. The Panel's Decision Has Serious, Negative Effects for the Hundreds of Domestic Industries Who Use the Trade Remedy Laws

The panel's decision stands to uniquely disadvantage and harm the intended beneficiaries of the U.S. trade laws, *i.e.*, domestic industries that have successfully petitioned for relief from unfairly traded goods. While Commerce, at the time it issued its regulations, contemplated that domestic interested parties would constitute the typical parties filing scope requests, *Antidumping Duties; Countervailing Duties,* 62 Fed. Reg. 27,296, 27,328 (Dep't Commerce May 19, 1997) (final rule) ("Preamble"), in CSUSTL's experience, this is in fact rarely the case. Domestic industries lack access to importer records and data that would enable them to determine what potentially subject products are being imported into the United

States, by whom they are being imported, and – most importantly – whether the relevant importers are self-declaring these goods as subject to antidumping and/or countervailing duties.

Rather, importers are overwhelmingly the sources of requests for scope rulings, precisely because they disagree with CBP's treatment of goods that the importers contend are out of scope. Indeed, as Chief Judge Prost recognized, Sunpreme only sought a scope ruling from Commerce after CBP forced the company's hand by requiring cash deposits – years after the original antidumping and countervailing duty determinations. Accordingly, the panel's decision has the perverse effect of rewarding importers that delay or forego scope rulings.

The panel suggests that the answer is not for CBP to suspend liquidation and collect deposits pursuant to its statutory duty to fix duty rates and protect the revenue, but for CBP to contact Commerce so that Commerce can timely initiate a scope proceeding. CSUSTL sees two fundamental problems with such a process.

First, as the United States argues in its petition, and Chief Judge Prost notes in dissent, there is no statutory or regulatory basis for such a process. *Sunpreme Inc. v. United States*, 924 F.3d 1198, 1219-20 (Fed. Cir. 2019) (Chief Judge Prost, dissenting in part) ("*Sunpreme II*"). Indeed, the solution proposed by the panel reverses the burdens established by statute to force CBP and Commerce, rather than importers, to undertake the importers' burden of exercising "reasonable care" and

supplying the information required to enable CBP to properly assess antidumping duties. *See* 19 U.S.C. § 1484; *see also id.* §§ 1671h(a) and 1673g(a).

Second, as the panel itself noted, CBP did indeed reach out to Commerce here. *Sunpreme II* at 1215. But Commerce did not act. Thus, domestic industries can take little comfort from the panel's suggested enforcement approach. Just as domestic industries are not in a position to review and challenge importers' declarations of goods as subject or non-subject, they are not in a position to police Commerce's responsiveness to communications from CBP or, indeed, even to know when such communications have occurred. The facts underlying *Sunpreme Inc. v. United States*, 892 F.3d 1186 (Fed. Cir. 2018) ("*Sunpreme I*") – including Sunpreme's multi-month effort to convince CBP that its goods were not subject without seeking Commerce's expertise – came to the petitioner's attention only after Sunpreme sued CBP and was forced to publicly identify itself and place certain facts regarding its imports on a public docket. Had the panel's decision in *Sunpreme II* been in effect at that time, it is likely that Sunpreme would still be importing without payment of antidumping duties.

While this dispute arose in the context of the trade remedy orders on Chinese solar products, the panel's decision threatens to harm the administration and enforcement of orders across hundreds of industries and products. Questions relating to ambiguities – whether genuine or supposed – in the language of trade

remedy orders are common, stemming from the fact that the scope language of such orders must necessarily be written "in general terms." 19 C.F.R. § 351.225(a). Indeed, litigation alleging or finding ambiguity in scope language has recently arisen with respect not only to solar cells, but products as diverse as plastic film, oil country tubular goods, solid fertilizer grade ammonium nitrate, and magnesia carbon bricks. *See Fedmet Res. Corp. v. United States*, 755 F.3d 912 (Fed. Cir. 2014); *Mitsubishi Polyester Film, Inc. v. United States*, 321 F. Supp. 3d 1298 (Ct. Int'l Trade 2018); *Bell Supply Co. v. United States*, 179 F. Supp. 3d 1082 (Ct. Int'l Trade 2016); *Kirovo-Chepetsky Khimichesky Kombinat, JSC v. United States*, 58 F. Supp. 3d 1397 (Ct. Int'l Trade 2015). These cases represent only a small subset of the trade remedy orders in which questions of ambiguity have arisen, or may arise.

II. The Panel's Decision Misconstrues CBP's Statutory Duty to Require Appropriate Duties as an Unlawful "Interpretative" Act

In *Sunpreme II* at 1216-20, the panel held unlawful any suspension of liquidation by CBP as to an importer's goods, pursuant to a trade remedy order, prior to the date on which Commerce initiated a scope inquiry into those goods. As indicated in the United States' petition for rehearing, a fundamental premise of the panel's holding is that CBP has no authority to suspend liquidation or require deposits of antidumping duties with respect to any product that is not clearly and unambiguously described by the scope of an antidumping duty order. The panel reasons that this must be so because it is Commerce, rather than CBP, that is

authorized to make definitive interpretations as to the scope of antidumping duty orders. As such, in the panel's view, to conclude that CBP can suspend liquidation and require a cash deposit as security for potential future liability for antidumping and/or countervailing duties with respect to an imported product that might reasonably – but not incontrovertibly – be embraced by existing orders would be to sanction *ultra vires* acts of "interpretation" by CBP.

The panel draws an unworkable dichotomy between lawful "ministerial" enforcement of antidumping duty orders by CBP and *ultra vires* "interpretation" of such orders. *Id.* at 1218-19. Further, this dichotomy is by no means necessary to preserve Commerce's primacy as the agency with the ultimate authority to provide definitive guidance as to the scope of an unfair trade order. Instead, it stands only to render such orders substantially unenforced and unenforceable.

As Chief Judge Prost points out in dissent, the panel's conclusion that CBP may suspend liquidation and require the deposit of estimated trade remedy duties only as to goods clearly embraced by unambiguous scope language is not required by the Court's prior case law. *Id.* at 1217-18. Although certain precedents cited by the panel drew a distinction between "ministerial" enforcement and "interpretive" acts, they did so in meaningfully different contexts, and in certain instances, treated as "ministerial" acts that the panel would appear to believe are "interpretive." *Xerox Corp. v. United States*, 289 F.3d 792, 793 (Fed. Cir. 2002) (describing as

"ministerial" CBP's reading of an antidumping duty order manifestly against its terms).[1]

Nor can the panel's conclusion be squared with CBP's statutory duty to "fix the . . . rate of duty applicable" to imported goods, to "protect the revenue," inclusive of exercising its judgment as to the "security" necessary to do so, and to ensure that merchandise is not released from its custody in the absence of cash deposits. 19 U.S.C. § 1484(a)(2)(C); 19 U.S.C. § 1500; 19 U.S.C. § 1671h(a); 19 U.S.C. §1673(a); 19 C.F.R. § 141.103.

Likewise, the panel's conclusion is not required to preserve the supremacy of Commerce's interpretation of trade remedy orders. Existing statutes and regulations provide that while CBP is authorized to fix the rate of duty and exercise its judgment as to suspension and applicable antidumping duties, importers may then challenge CBP's actions in this regard by obtaining a scope ruling from Commerce. 19 U.S.C. § 1484(a)(2)(C); 19 U.S.C. § 1500; 19 U.S.C. § 1514(b); 19 U.S.C. § 1516a(a)(2)(B)(vi); 19 C.F.R. § 351.225. Should Commerce determine that CBP misapprehended the scope of the order, Commerce's determination will then control. 19 U.S.C. §1514(b); 19 C.F.R. § 351.225(1).

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[1] In *Mitsubishi Elecs. Am. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994), this Court described liquidation as "ministerial" action on CBP's part, but has more recently described it as "more than . . . ministerial." *Cemex, S.A. v. United States*, 384 F.3d. 1314, 1324 (Fed. Cir. 2004).

Indeed, this Court has previously recognized that if an importer disagrees with CBP's decision to enforce a pre-existing order against the importer's product, the normal, statutorily provided remedy is to seek a scope ruling before Commerce. *See Sunpreme I*; *Sandvik Steel Co. v. United States,* 164 F.3d 596 (Fed. Cir. 1998). This is a result that: (1) recognizes CBP's responsibility to protect the revenue, (2) upholds the ultimate goal and purpose of the trade remedy laws (benefiting domestic industries that have been materially injured by unfairly traded imports), (3) and recognizes Commerce's expertise as the ultimate authority on whether an imported article falls within the scope of an unfair trade order. Conversely, the panel's decision would leave CBP unable to discharge its statutory duties, would harm the intended beneficiaries, and, as further explained above, would reward importers that do not seek Commerce's expertise.

III. The Panel Ignores the Purpose of 19 C.F.R. § 351.225(1)(1)

The fundamental question raised by the United States' petition is whether, in the absence of a definitive scope ruling from Commerce, CBP has the authority to require deposits of estimated antidumping duties from importers of goods that CBP views as potentially subject to existing antidumping orders in order to protect the revenue. In finding the answer to this question to be "no" unless the scope of the relevant order is completely clear, the Panel relied in major part on a Commerce regulation, 19 C.F.R. § 351.225(1). *Sunpreme II* at 1214.

As the United States explains in its petition, reading Commerce's regulation to limit the scope of CBP's statutory authority to fix duty rates and protect the revenue is unwarranted. A regulation cannot override a statute; further, a regulation issued by one agency with respect to that agency's actions cannot bind another agency, or otherwise override the second agency's statutory authorities and duties.

Further, while the panel held that CBP's authority with respect to the suspension of liquidation cannot exceed that of Commerce itself under 19 C.F.R. § 351.225(1), that regulation expressly contemplates that, at the time that Commerce issues a scope ruling, CBP may have already suspended liquidation and required cash deposits in order to protect the revenue with respect to incoming entries of the product subject to the scope ruling. 19 C.F.R. § 351.225(1); *see also* Preamble at 27,328.

Importantly, in construing the scope of the regulation, the panel ignores the regulation's purpose, as explained by Commerce itself. In the Preamble to its regulations, Commerce stated that its decision to limit its own authority to retroactively suspend liquidation was meant to prevent importers who were not requesting scope rulings themselves, and whose products were not viewed by CBP as described by an existing order, from being subjected to such suspension solely on the basis of a filing from a domestic party:

> {I}t would be extremely unfair to importers and exporters to subject entries not already suspended to suspension of liquidation and possible

> duty assessment with no prior notice and based on nothing more than a domestic interested party's allegation. Because, when liquidation has not been suspended, {CBP}, at least, and perhaps {Commerce} as well, have viewed the merchandise as not being within the scope of an order, importers are justified in relying upon that view, at least until {Commerce} rules otherwise.

Preamble at 27,328. This language establishes that while Commerce sought to avoid "surprising" importers with suspension simply upon the filing of a domestic producer's scope request, the agency believed that CBP had the authority to require suspension based on Commerce's pre-existing order, based on CBP's own view of that order's scope.

The language of both the Preamble and the regulation additionally demonstrate Commerce's understanding that such a CBP determination would remain in effect unless and until Commerce, pursuant to a duly requested scope ruling, overruled it. Nothing in Commerce's regulation (or the Preamble that accompanied it) suggests that CBP is authorized to suspend liquidation only where the scope of the order is perfectly and unambiguously clear.

For all of these reasons, CSUSTL urges rehearing and rehearing *en banc* of the panel decision.

Respectfully submitted:

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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