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, Judge Claire R. Kelly

PLAINTIFF-APPELLANT, SUNPREME INC.'S RESPONSE TO DEFENDANT-CROSS-APPELLANT UNITED STATES' COMBINED PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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September 10, 2019

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Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Sunpreme Inc. **v.** United States

Case No. 2018-1116, -1117, -1118

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ■ (appellant) ☐ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

Sunpreme Inc.

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
Sunpreme Inc.	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:

John M. Gurley, Arent Fox LLP
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Diana Dimitriuc Quaia, Arent Fox 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.

September 10, 2019
Date

/s/ John M. Gurley
Signature of counsel

Please Note: All questions must be answered

John M. Gurley
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I. INTRODUCTION

Pursuant to Rule 35 of the Federal Circuit Rules and the Federal Rules of Appellate Procedure, Plaintiff-Appellant Sunpreme Inc. ("Sunpreme") respectfully submits this Response to Defendant-Cross-Appellant United States' Combined Petition For Panel Rehearing and Rehearing *En Banc* filed with this Court on July 29, 2019, ECF No. 80 ("Petition"), and the Amicus Curiae Brief filed by the Committee to Support U.S. Trade Laws filed on August 20, 2019. ECF No. 91 ("Amicus Br."). On August 19, 2019, the Court invited Sunpreme to file a Response Brief, ECF No. 87.

Sunpreme is a U.S. company that has developed proprietary bi-facial solar cells and modules using thin film technology. Sunpreme acted as the U.S. importer of record for its solar modules that were manufactured in the People's Republic of China. Sunpreme did not enter its products as type "03" entries subject to antidumping and countervailing ("AD/CVD") duties because it did not believe that its solar modules were covered by the AD/CVD orders on *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), Appx4810; 77 Fed. Reg. 73,018 (Dep't Commerce Dec. 7, 2012) (am. LTFV determ and AD order), Appx4812 ("*Orders"*). The *Orders* provided, in relevant part:

> The merchandise covered by this order is crystalline silicon photovoltaic cells, and modules, laminates, and panels, consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials.
>
> This order covers crystalline silicon photovoltaic cells of thickness equal to or greater than 20 micrometers, having a p/n junction formed by any means, …
>
> . . .
>
> Excluded from the scope of this order are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS).

77 Fed. Reg. at 73,017.

Sunpreme believed its products were not covered by the scope of the *Orders* for several reasons. Primarily, Sunpreme believed that its thin film cells are not crystalline cells and that they meet the *Orders*' express exclusion for thin film photovoltaic products produced from amorphous silicon. The solar modules had been certified exclusively to the industry certification for thin film products. *Sunpreme Inc. v. United States*, 924 F.3d 1198, 1211-1212 (Fed. Cir. 2019) ("*Sunpreme II*"). Sunpreme also believed that its thin film cells are less than 20 micrometers thick and do not have a p/n junction. *Id.* at 1206.

On April 20, 2015, U.S. Customs and Border Protection ("Customs") notified Sunpreme that it had to start entering its products subject to the *Orders* at combined AD/CVD rates of over 250% ad valorem and suspended liquidation on

those entries. *Sunpreme Inc. v. United* States, 145 F. Supp. 3d 1271, 1280 (Ct. Int'l Trade 2016) (granting preliminary injunction) ("*Sunpreme I PI*"). Later, Customs conceded that the rates applied were incorrect and demanded cash deposits at rates of 13.94% (AD) and 15.24% (CVD). *Id.* Customs continued to be unsure if the products were subject to the *Orders* and requested guidance from Commerce on June 3, 2015. Commerce indicated that a scope ruling should be requested by the importer or exporter on whether the products were covered by the scope. *Sunpreme II,* 924 F.3d at 1202. On July 6, 2015, Sunpreme provided Customs with test results from an independent laboratory identifying amorphous silicon thin films in its products. Appx386-408. At Sunpreme's invitation, on July 9, 2015, Customs visited Sunpreme's facilities in Sunnyvale, California to observe the production process. *Sunpreme I PI*, 145 F. Supp. 3d at 1281. Customs issued a laboratory report on September 30, 2015. *Id.* at 1282. Customs' own testing made clear that it detected thin films on Sunpreme's cells. *Id.* at 1280.

On November 16, 2015, Sunpreme applied for a scope ruling under 19 C.F.R. § 351.225(k)(1), Appx164. On December 30, 2015, Commerce initiated a formal scope inquiry pursuant to 19 C.F.R. § 351.225(e). Appx4668. While Sunpreme's request was pending, Commerce made a scope ruling on another hybrid product, the Triex Ruling, finding that the hybrid Triex cells 'are neither dispositively covered nor clearly excluded from the scope of the Orders.'"

Sunpreme II, 924 F.3d at 1203. On July 29, 2016, Commerce found that Sunpreme's cells are within the scope of the *Orders* relying on the Triex Ruling. Appx4685. This Court affirmed the U.S. Court of International Trade's ("CIT") decision upholding Commerce's scope determination:

> the CIT found it undisputed that Sunpreme's solar modules contain layers of thin film, but that Customs' laboratory tests confirmed those modules also contain crystalline silicon. The CIT noted that, although the Orders expressly include "crystalline silicon photovoltaic cells" within their scope and expressly exclude "thin film photovoltaic products" from their scope, the Orders do not define the term thin film products. That led the CIT to characterize the scope language in the Orders as ambiguous with respect to Sunpreme's solar modules.

Sunpreme II, 924 F.3d at 1202 (citations omitted). This Court also determined that the scope was ambiguous. *Id.* at 1214.

To summarize, the evidence on the record shows that Customs, Commerce, the CIT and this Court all agree that the scope was ambiguous as to whether Sunpreme's products were within the scope. The Majority of this Court (and the CIT), held that because the statutory scheme only allows for Commerce to interpret an ambiguous scope, the suspension of liquidation of the subject entries and Customs' request for cash deposits was an unlawful *ultra vires* act. *Id.* at 1214-1215. The Majority also held that Commerce's instructions to Customs to continue suspension of liquidation on entries made prior to the date of initiation of the scope inquiry was unlawful. *Id*. at 1216.

Defendant-Appellant, supported by Amicus, petition this Court for a panel

rehearing and a rehearing *en banc*. They take the position that even when an order is ambiguous, Customs may still require deposits and suspend liquidation of entries. Petition at 9-11; Amicus Br. at 6-9. Their position is contrary to the statutory scheme which vests Commerce with the authority to interpret an orders' scope and provides Customs with ministerial authority. Further, it would mean that Customs' actions in requiring deposits and suspending liquidation would never be subject to judicial review because this Court has already determined that the court cannot review such actions under 28 U.S.C. §1581(i). *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1192, 1194 (Fed. Cir. 2018).

II. ARGUMENT

A. Customs Does Not Have the Authority to Interpret Scope

Defendant-Appellant states that Customs is required to administer all duty orders at the border regardless of their clarity and that the holding in *Sunpreme II* "limit{s} CBP's initial decision making to circumstances when the language of the duty order is clear." Petition at 10.

The Court's opinion in *Sunpreme II* reaffirms Customs' ministerial role in the administration of AD/CVD orders in light of this Court's precedent. As the Court explained:

> 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 collects cash deposits . . . In either instance, Customs lawfully performs its ministerial duties because the duty order in question is not ambiguous as to whether it applies to the particular imported products.

Sunpreme II, 924 F. 3d at 1213, citing *Xerox Corp. v. United States*, 289 F.3d 792, 794, 795 (Fed. Cir. 2002) and *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994).

In order to fix the amount of duties chargeable for an importation, Customs is required to make factual findings to determine "what the merchandise is, and whether it is described in an order." *Xerox*, 289 F.3d at 794. But the agency with the power to interpret scope language in the first instance is Commerce, not Customs. *Sunpreme II*, 924 F. 3d at 1213; *see also Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096-97 (Fed. Cir. 2002). Customs acts beyond its authority when it interprets an order beyond the plain language of the order. *See Xerox*, 289 F. 3d at 794-95 (Commerce's authority in interpreting the scope of an order is protected by precluding CBP from deciding whether an order covers particular products).

As the CIT and this Court determined, "it cannot be seriously disputed that, at the time Customs suspended liquidation and the scope inquiry was later initiated, the scope of the Orders was ambiguous with respect to Sunpreme's solar modules." *Sunpreme II*, 924 F.3d at 1215.

Rather than limiting Customs' ability to enforce AD/CVD orders, the Court's opinion recognizes the different responsibilities of the two agencies involved with the administration of orders: Customs and Commerce. It makes clear that in the narrow circumstances in which Customs suspends liquidation based on its improper interpretation of ambiguous scope language, such suspension is *ultra vires* and therefore Commerce cannot lawfully continue such a suspension. *Id.* at 1214-1215. As stated by the Majority,

> Ambiguity is the line that separates lawful ministerial acts from unlawful *ultra vires* acts by Customs. This is not a close case. The Orders in this case cover certain solar modules and expressly exclude others, without providing a definition of the class expressly excluded. Sunpreme's solar modules are hybrid products, mixing characteristics of the included and excluded solar cells.

Id. at 1214.

The scope determination finding Sunpreme's products covered by the *Orders* was affirmed under the substantial evidence standard, which provides in relevant part that "Commerce's findings 'may still be supported by substantial evidence even if two inconsistent conclusions can be drawn from the evidence.'" *Id*. at 1205 (citation omitted).

The record shows that Customs, Commerce, the CIT and this Court all agree that the scope was ambiguous as to whether Sunpreme's solar modules were within the scope. Commerce had to initiate a formal scope inquiry in order to make its scope determination eight months later. *Id*. at 1203. When Commerce initiated the

scope inquiry on December 30, 2015, it recognized that it was unable to determine whether Sunpreme's product was covered by plain language of the *Orders*.

While Defendant-Appellant seeks to put the burden of an ambiguous scope entirely on Sunpreme, suggesting that Sunpreme did not exercise reasonable care because it did not seek a ruling before importation, Petition at 16, that argument is unavailing. If reasonable minds may draw two inconsistent conclusions from the evidence, how, then, was Sunpreme acting without reasonable care by entering its solar modules as outside the scope of the *Orders*? As this Court has explained, Commerce has the responsibility to ensure that the scope of an investigation is administrable and sufficiently clear to provide "adequate notice of what conduct is regulated by the order." *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1300 (Fed. Cir. 2013) (citation omitted).

In the underlying decision, the CIT recognized that where the order was ambiguous, "the good must be considered outside of the scope until Commerce interprets the order and clarifies that the merchandise should be included in the context of a scope determination." *Sunpreme Inc. v. United States*, 256 F. Supp. 3d 1265, 1293 (Ct. Int'l Trade 2017). Sunpreme had valid reasons to believe its products were not within the scope of the *Orders* and therefore that it was acting with reasonable care in entering its merchandise. While Defendant-Appellant desires to shift the responsibility on Supreme, the statute does not require that

importers must seek clarification where the plain language of the order excludes their products. *See* 19 U.S.C. § 1484.

Defendant-Appellant also argues that in *Sunpreme I* this Court did not restrict Customs' ability to suspend liquidation pre-scope inquiry to circumstances when an order is clear. Petition at 11. However, there is no inconsistency between *Sunpreme I* and *Sunpreme II*. The Majority explained:

> As recognized in *Sunpreme I*, when Customs acts within its ministerial powers and suspends liquidation without exercising Commerce's authority to interpret antidumping and countervailing duty orders, its actions are lawful and continue during a scope inquiry.

Sunpreme II, 924 F. 3d at 1212, n.1 (citations omitted).

Customs' ability to enforce AD/CVD orders remains unchanged as long as Customs acts within the bounds of its ministerial role.

B. Under the Government's Interpretation, Customs' Scope Determinations Would Evade Judicial Review

Defendant-Appellant and Amicus argue that *Sunpreme II* restricts Customs' actions based on a regulation applicable to Commerce and thus confuses the statutory authority and the roles of the two agencies. Petition at 9-10; Amicus Br. at 6-9. While Defendant-Appellant concedes that an importer's recourse for scope determinations made by both Customs and Commerce is under the Court's jurisdiction in 28 U.S.C. § 1581(c), they claim that only Commerce's final determination is subject to judicial review. Petition at 10.

The positions taken in the Petition and Amicus Brief stand for the proposition that Customs has unfettered authority to require suspension of liquidation and corresponding cash deposits and that such authority *is not subject to judicial review*. Because such a position would give Customs discretion to interpret ambiguous scope language, an action which is reserved for Commerce, the Government's position cannot be sustained. This Court has already dismissed Sunpreme's case against Customs' determination to treat its entries subject to the *Orders* pursuant to the court's jurisdiction at 28 U.S.C. §1581(i). *Sunpreme I*, 892 F.3d at 1194.[1]

This Court explained as follows:

> We reversed on appeal because, under the circumstances presented, the CIT lacked jurisdiction under 28 U.S.C. § 1581(i) to entertain direct challenges to Customs' decision given that an alternative administrative remedy was available. . . That remedy was a scope ruling from Commerce interpreting the scope of the duty orders.

Sunpreme II, 924 F.3d at 1202–03 (citations omitted).

In this action, Sunpreme is challenging Commerce's scope determination and the instructions to Customs in connection with the scope determination. Commerce knew that it clarified the scope to define "thin film products" only after the initiation of the scope inquiry. Therefore, this Court's review of Commerce's

[1] This Court also determined there was no jurisdiction to hear Sunpreme's claims against Customs' authority under § 1581(a) because Customs' decision is not protestable. *Id*. at 1192.

scope instruction to Customs to continue a suspension of liquidation that was void *ab initio* because Customs acted outside its authority, was proper. The Court's review was also necessary to make sure that such *ultra vires* actions were not insulated from judicial review.

Defendant-Appellant relies on this Court's opinions in *Sandvik Steel Co. v. United States*, 164 F.3d 596 (Fed. Cir. 1998) and *Xerox* to argue that Customs has discretion to interpret antidumping orders in the first instance. Petition at 11.

Sandvik is inapposite because the holding of that case was that an importer cannot challenge the applicability of antidumping orders by challenging Customs' denial of a protest under 19 U.S.C § 1581(a), where plaintiffs failed to seek scope determinations from Commerce. *Sandvik*, 164 F.3d at 598. As the CIT explained, this Court's decision in *Xerox* clarified *Sandvik's* holding and "held that {Customs} should not make a determination as to whether goods are covered in the first instance where the common import of the scope language does not permit CBP to place the goods within the scope based upon observable physical characteristics of the products." *Sunpreme Inc. v. United States*, 190 F. Supp. 3d. 1185, 1199 (Ct. Int'l Trade 2016) ("*Sunpreme I CIT*"). *Sunpreme II* is entirely consistent with this line of cases.

C. Where There Is Evasion, Customs Has the Legal Authority to Take Action

Customs has the legal authority to take action where there is duty evasion or

even where there is negligence. A penalty action under 19 U.S.C. § 1592 can result in additional duties paid by importers of record that are negligent (or grossly negligent or commit fraud) when entering goods into the United States.

Additionally, the anti-evasion actions under the Trade Facilitation and Trade Enforcement Act of 2015, 19 U.S.C. § 1517 *et seq.*, are dedicated to ensuring that importers are compliant with AD/CVD orders and to combat true evasion. "Evasion" is defined as entering merchandise covered under an AD/CVD order into the United States "by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material" and that results in AD/CVD duties being reduced or not applied. 19 U.S.C. § 1517(a)(5)(A). Sunpreme did not make material and false representations or omit any information to evade duties. "Only after Commerce clarified the scope of the Orders did Sunpreme have a rationale as to why the Orders covered its solar modules." *Sunpreme II*, 924 F. 3d at 1214.

Notably, even in cases of duty evasion or circumvention of AD/CVD orders, suspension of liquidation and cash deposits apply only to entries made on or after the initiation of these inquiries. *See* 19 U.S.C. § 1517(e)(1) and § 1517(d)(1)(A)(i) (authorizing suspension of liquidation for entries made on or after the date of the initiation of the investigation); 19 C.F.R. § 351.225(l)(2) (suspension of liquidation and cash deposits apply from the date of initiation of the anti-circumvention

inquiry). The position of the Government and Amicus that retroactive suspension of liquidation is required to avoid duty evasion is not supported by statute and regulations in analogous contexts.

D. For Ambiguous Orders, Requiring Suspension Of Entries After A Scope Inquiry Is Initiated Does Not Encourage Evasion

The Government and Amicus claim that *Sunpreme II* will encourage importers to delay or to avoid requesting a scope ruling. Petition at 15. Their policy concerns are unwarranted.

As the Majority explained, "the holding in this case applies only in a narrow set of circumstances because, when the duty order is clear and unambiguous, Customs can suspend liquidation of subject merchandise pre-scope inquiry and Commerce is free to continue that suspension." *Sunpreme II*, 924 F.3d at 1215. Here, the scope of the *Orders* was ambiguous. Requiring suspension after initiation of a scope inquiry for ambiguous orders incentivizes petitioners to draft scopes that are precise, administrable by Customs and provide fair notice to importers of what products are covered.

While the Dissent suggests that the Majority "rewards" Sunpreme "for its delay in filing a request for a scope inquiry," Sunpreme had no such intention. *Id.* at 1216 (Prost, J. dissenting). Rather, Sunpreme had no choice but to immediately dispute Customs' erroneous demand for AD/CVD cash deposits at a combined rate of over 250%. *Sunpreme I PI*, 145 F. Supp. 3d at 1280. Customs continued to

actively investigate Sunpreme's products and issued a laboratory report on September 30, 2015. *Id*. at 1282. What the Dissent characterizes as "delay" in filing a scope request was a transparent effort by Sunpreme to explain its technology to Customs, provide third party laboratory analysis and open its doors to Customs. Sunpreme's actions are consistent with its reasonable understanding that its products met the exclusion for this film products or did not fall within the scope for other reasons.

The Dissent argues that an importer should have been paying cash deposits for the pre-initiation period where Commerce's ruling confirms that the product is covered by the scope. *Sunpreme II*, 924 F.3d at 1220. However, we note that in promulgating its scope ruling regulations, Commerce specifically rejected a request that it suspend liquidation pre-scope inquiry:

> Suspension of liquidation is an action with a potentially significant impact on the business of U.S. importers and foreign exporters and producers. *The Department should not exercise this governmental authority before it has first given all parties a meaningful opportunity to present relevant information and defend their interests, and before the Department gives a reasoned explanation for its action.* Formal initiation of a scope inquiry by the Department represents nothing more than a finding by the Department that it cannot resolve the issue on the basis of the plain language of the scope description or the clear history of the original investigation. It 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.

Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27296, 27328 (Dep't

Commerce May 19, 1997) (final rule) (emphasis added).

Amicus claims the language above referred to when a domestic producer requested a scope ruling, as opposed to when an importer or exporter requested one. Amicus Br. at 11. The principle remains valid, however, that here, where Sunpreme had a good faith belief that its products were not within the scope, and Commerce had to clarify an ambiguous scope, it is extremely unfair to Sunpreme to be subject to cash deposits and suspension of liquidation. That Commerce ultimately found Sunpreme's modules covered by the scope does not cure Customs' unlawful actions. The detrimental impact of requiring importers to initially pay over 250% duty deposits based on Customs' improper interpretation of scope language is obvious. Such a determination blocks imports and potentially bankrupts the U.S. importer.

Finally, Commerce is not reliant solely on importers for scope inquiries. Any interested party, including petitioners may file a scope request and Commerce itself may self-initiate scope inquiries. 19 C.F.R. §§ 351.225(b)-(c). Just as domestic parties monitor import data to file AD/CVD petitions, nothing precludes them from using similar tools to file scope requests, when appropriate.

E. *Sunpreme II* Does Not Restrict Customs' Ability to Protect the Revenue

Just as important as the Government's concern to protect the revenue, "there is also a strong public interest in the proper execution of and compliance with the

law. 19 U.S.C. §§ 66, 1623. The public interest is served by the accurate and effective, uniform and fair enforcement of trade laws." *Kwo Lee, Inc. v. United States*, 24 F. Supp. 3d 1322, 1332 (Ct. Int'l Trade 2014).

The Senate Report cited at page 17 of the Petition is inapposite as it is centered on enforcement solutions for improving duty collection for unpaid AD/CVD duties. This is not a case of failed duty collections because Sunpreme paid the AD/CVD duties. It is a case of governmental overreach, where Customs demanded cash deposits without being able to point to scope language that clearly covered the products.

Defendant-Appellant argues that 19 U.S.C. §§ 1484(a)(2)(C) and 1623(a) grant Customs the authority to require security when "necessary for the protection of the revenue." Petition at 8. However, Customs' authority under 19 U.S.C. § 1623(a) is limited to instances where Customs reasonably determines that security is *necessary* to protect the revenue not merely "advisable" or "desirable." *Fedmet Res. Corp. v. United States*, 77 F. Supp. 3d 1336, 1348 (Ct. Int'l Trade 2015). Here, where all parties agree the scope was ambiguous, it cannot be said that it was "necessary" for Customs to require security (cash deposits) from Sunpreme.

III. CONCLUSION

Sunpreme respectfully requests that the Court deny Defendant-Cross-Appellant United States' Combined Petition For Panel Rehearing and Rehearing *En Banc*.

Respectfully submitted,

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September 10, 2019

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