United States Court of Appeals for the Federal Circuit

SILFAB SOLAR, INC., HELIENE, INC., CANADIAN SOLAR (USA), INC., CANADIAN SOLAR SOLUTIONS, INC.,
Plaintiffs-Appellants

v.

UNITED STATES, UNITED STATES CUSTOMS AND BORDER PROTECTION, UNITED STATES INTERNATIONAL TRADE COMMISSION, CHAIRMAN RHONDA K. SCHMIDTLEIN, COMMISSIONER KEVIN K. MCALEENAN, OFFICE OF THE U.S. TRADE REPRESENTATIVE, U.S. TRADE REPRESENTATIVE ROBERT E. LIGHTHIZER, SOLARWORLD AMERICAS, INC.,
Defendants-Appellees

SUNIVA, INC.,
Defendant

2018-1718

Appeal from the United States Court of International Trade in No. 1:18-cv-00023-TCS, Chief Judge Timothy C. Stanceu.

Decided: June 15, 2018

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JONATHAN THOMAS STOEL, Hogan Lovells US LLP, Washington, DC, argued for plaintiffs-appellants. Also represented by CRAIG ANDERSON LEWIS, MITCHELL REICH, ROBERT B. WOLINSKY.

JEANNE DAVIDSON, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendants-appellees United States, United States Customs and Border Protection, Kevin K. McAleenan, Office of the U.S. Trade Representative, Robert E. Lighthizer. Also represented by CHAD A. READLER, TARA K. HOGAN, JOSHUA E. KURLAND, STEPHEN CARL TOSINI.

JOHN DAVID HENDERSON, Office of the General Counsel, United States International Trade Commission, Washington, DC, argued for defendants-appellees United States International Trade Commission, Rhonda K. Schmidtlein. Also represented by DOMINIC L. BIANCHI, ANDREA C. CASSON.

TIMOTHY C. BRIGHTBILL, Wiley Rein, LLP, Washington, DC, for defendant-appellee SolarWorld Americas, Inc. Also represented by TESSA V. CAPELOTO, LAURA EL-SABAAWI, USHA NEELAKANTAN, MAUREEN E. THORSON.

DANIEL L. PORTER, Curtis, Mallet-Prevost, Colt & Mosle LLP, Washington, DC, for amicus curiae Government of Canada. Also represented by CHRISTOPHER A. DUNN, JAMES P. DURLING.

Before DYK, MOORE, and REYNA, *Circuit Judges*.

DYK, *Circuit Judge*.

Silfab Solar Inc., Heliene Inc., Canadian Solar (USA) Inc., and Canadian Solar Solutions Inc. (“appellants”)

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sought a preliminary injunction to bar the enforcement of presidentially imposed tariffs on solar products. The Court of International Trade ("CIT") denied the injunction. We affirm. We conclude that the President's actions here were lawful and that accordingly, appellants have not established a probability of success on the merits as required for a preliminary injunction.

BACKGROUND

I

Section 201 of the Trade Act of 1974 is commonly known as the "escape clause" and authorizes the President to impose tariffs under prescribed conditions. Section 201 provides that if the International Trade Commission ("ITC" or "the Commission") determines that

> an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article, the President, in accordance with this part, shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.

19 U.S.C. § 2251(a) (emphases added). Such actions are typically referred to as "safeguard measures." Section 2253(a) provides the same authorization that

> [a]fter receiving a report . . . containing an affirmative finding regarding serious injury, or the threat thereof, to a domestic industry, the President shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to

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> make a positive adjustment to import competition and provide greater economic and social benefits than costs.

19 U.S.C. § 2253(a) (emphases added).

In May 2017, a United States manufacturer of solar products, Suniva, Inc., filed a petition with the ITC, requesting that the President undertake measures to protect U.S. solar manufacturers against foreign imports. The goods at issue in this case are crystalline silicon photovoltaic (CSPV) cells, manufactured and sold either as standalone cells or as functional modules. In accordance with Section 2252(b)(1)(A), the ITC conducted an investigation "to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." 19 U.S.C. § 2252(b)(1)(A). On November 17, 2017, the ITC issued a report, in which it made an affirmative serious injury determination under 19 U.S.C. § 2252(b). The ITC determined that solar products were "being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry producing an article like or directly competitive with the imported article." J.A. 92.

When making the determination, there were only four Commissioners serving on the ITC. While the four Commissioners were united in their affirmative finding of serious injury, they divided into three groups with respect to relief. Vice Chairman Johanson and Commissioner Williamson recommended a tariff of 30% on imports in excess of 1 gigawatt for the first year. Similarly, Chairman Schmidtlein recommended both tariffs and quotas under which (1) cells that exceed the 0.5 gigawatts volume level would be subject to a 30% tariff, (2) modules would be subject to 35% tariff, and (3) a tariff of 10% *ad*

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valorem to be instituted on imports of up to 0.5 gigawatts. Commissioner Broadbent recommended a quantitative restriction on cells and modules. Since no recommendation received the assent of "a majority of the commissioners voting" or of "not less than three commissioners," none was an official Commission recommendation under 19 U.S.C. § 1330(d)(2).

After determining that a serious injury was occurring, the ITC reported specifically on imports from Canada. This appeal only involves solar imports from Canada, and not Mexico. The NAFTA Implementation Act requires that

> the International Trade Commission shall also find (and report to the President at the time such injury determination is submitted to the President) whether (1) imports of the article from a NAFTA country, considered individually, account for a substantial share of total imports; and (2) imports of the article from a NAFTA country, considered individually or, in exceptional circumstances, imports from NAFTA countries considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports.

Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified at 19 U.S.C. § 3371) (emphases added). The ITC explained in its finding on "substantial share" that Canada contributed only roughly 2% of the relevant solar imports during the applicable period. The industry in Canada was not among the top five suppliers of imports of CSPV products during the relevant time period and, on average, was the ninth-largest source of solar products. The ITC also pointed out that imports from Canada declined between 2015 and 2016, even though global imports continued to increase. A 3-1 majority of the ITC concluded that Canadian imports did not account for a "substantial share" of solar imports.

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