



## International Trade Committee Newsletter

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### Welcome

Welcome to the ABA International Trade Committee quarterly newsletter. The newsletter is intended to assist Committee members stay up-to-date on current international trade issues and Committee activities. The newsletter also provides a forum to discuss international trade ideas and opinions.\*

The Committee's website contains additional information about and resources from the activities of the Committee, like notices of upcoming events, past publications, and materials from previous programs. These materials are updated regularly. To visit the Trade Committee's website, click [here](http://apps.americanbar.org/dch/committee.cfm?com=IC776000) [http://apps.americanbar.org/dch/committee.cfm?com=IC776000].

The Committee is now also on LinkedIn and you can join the group [here](https://www.linkedin.com/groups/ABA-International-International-Trade-Committee-3707319/about) [https://www.linkedin.com/groups/ABA-International-International-Trade-Committee-3707319/about]. Members of the Committee are encouraged to become involved, and we look forward to hearing from you.

### ***Injunctive Relief Available to Prevent Assessment of Antidumping Duties at an Unlawful Cash Deposit Rate Established in an Earlier Administrative Review***

*By Rajib Pal\**

Interested parties involved in U.S. antidumping proceedings may now feel more confident that they need not undertake an administrative review for a particular

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*\*Please note that the views and opinions expressed in the newsletter are those of the authors and may not represent the views and opinions of the ABA or the Trade Committee.*

period of review (“POR”) solely to prevent entries of subject merchandise that took place during that POR from being liquidated at an unlawful cash deposit rate established in an earlier administrative review under the same antidumping order. This conclusion follows from the recent decision by the U.S. Court of International Trade (“CIT”) in *Navneet Publications (India) Ltd. v. United States*.<sup>1</sup>

Under the United States’ “retrospective” system for assessing antidumping duties, the Department of Commerce (“Department”), upon request, conducts annual administrative reviews to determine the antidumping duty liability for merchandise imported into the United States during a discrete prior period of time (the POR). The dumping margins determined in an administrative review serve two purposes: first, as the final assessment rate for entries of subject merchandise that took place during the POR; and second, as the cash deposit rate (i.e., estimated duty rate) for entries of subject merchandise that take place on or after the publication of the final results of the review.<sup>2</sup> If no administrative review is conducted with respect to a POR, then the Department automatically assesses antidumping duties for entries of subject merchandise that took place during that POR at the cash deposit rate applicable at the time of entry.<sup>3</sup> Consequently, the cash deposit rate established in an administrative review for a particular POR ends up functioning as the final assessment rate for entries that take place during a subsequent POR, if no administrative review is conducted with respect to that subsequent POR.

When an interested party has challenged the final results of an administrative review, obtained a preliminary injunction during the pendency of the litigation, and obtained a Court ruling that the margin determined in that review is unlawful, the Department is required to apply the revised margin resulting from the litigation as the final assessment rate for entries of subject merchandise that took place during the POR of the administrative review subject to Court challenge.<sup>4</sup> The Department, however, has not applied the revised margin to modify the cash deposits paid on entries that took place during a subsequent POR at the rate

## Upcoming Events

### **2015 Fall Meeting in Montreal, Quebec**

October 20-24, 2015

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### **2016 Spring Meeting in New York, New York**

April 12-16, 2016

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determined to be unlawful. The Department has suggested that an interested party must request and undergo an administrative review for the subsequent POR to ensure that the entries at issue are not liquidated at an unlawful cash deposit rate.

The CIT’s decision in *Navneet II* makes it clear that the Department’s view is not in accordance with law. Prior to the *Navneet II* decision, a group of Indian producers/exporters, including Navneet, had challenged the rate assigned to them by the Department in the fifth administrative review of the antidumping order on lined paper products from India. Plaintiffs in this proceeding obtained a ruling from the CIT that their fifth review rate was not based in substantial evidence, thus compelling the Department to conduct a remand proceeding to reconsider their fifth review rate.<sup>5</sup>

For Navneet, its fifth review rate had also served as the cash deposit rate for some of its seventh POR entries. As to the seventh POR for Navneet, Petitioner and Navneet both initially submitted review requests but then both timely withdrew those requests. Once it became clear that no administrative review would be conducted with respect to the seventh POR for Navneet, Navneet applied for

<sup>1</sup> *Navneet Publications (India) Ltd. v. United States*, Slip Op. 14-119 (Ct. Int’l Trade October 6, 2014) (“*Navneet II*”).

<sup>2</sup> 19 U.S.C. § 1675(a); 19 C.F.R. §§ 351.212-213.

<sup>3</sup> 19 C.F.R. § 351.212(a) and (c)(1).

<sup>4</sup> See 19 U.S.C. § 1516a(c)(2) and (e).

<sup>5</sup> See *Navneet Publications (India) Ltd. v. United States*, Slip Op. 14-87 (Ct. Int’l Trade July 22, 2014) (“*Navneet I*”). On May 4, 2015, the CIT sustained the revised rate determined by the Department in its remand proceeding. See *Navneet Publications (India) Ltd. v. United States*, Slip Op. 15-41 (Ct. Int’l Trade May 4, 2015) (“*Navneet III*”).

a preliminary injunction to ensure that its seventh POR entries would not be liquidated at the unlawful fifth review cash deposit rate, but rather at the revised rate that results from the fifth review litigation (i.e., *Navneet I*).<sup>6</sup>

The CIT granted Navneet's application for a preliminary injunction over the Government's objections. Specifically, the CIT's Order both enjoined the liquidation of Navneet's seventh POR entries at the unlawful fifth review cash deposit rate, and expressly ordered that Navneet's seventh POR entries "shall be liquidated at the revised fifth review ... rate that results from the final court decision in this action."

In granting Navneet's application for a preliminary injunction, the CIT began by concluding that it had jurisdiction to ensure that Navneet's seventh POR entries are not liquidated at the fifth review rate that the CIT had determined not to be based in substantial evidence. The CIT explained that, pursuant to 19 U.S.C. § 1516a(c)(2), "if the court has jurisdiction over the final results of a review, then it may enjoin liquidation of entries 'covered' by those results, as long as the applicant shows proper grounds for relief."<sup>7</sup> It then concluded that the word "covered" in § 1516a(c)(2) had a "broad sweep," and "an administrative decision 'covers' an entry if it brings that entry within its scope or has binding legal effect on the entry."<sup>8</sup> Applied to the facts, the CIT explained that Navneet had invoked the CIT's jurisdiction under 28 U.S.C. § 1581(c) when it challenged the final results of the fifth administrative review.<sup>9</sup> Further, because there would be no administrative review for the seventh POR, the fifth review was the "only final agency determination that could possibly 'cover' the contested entries."<sup>10</sup> Therefore, the CIT found it had jurisdiction to enjoin the liquidation of Navneet's seventh POR entries at the invalid fifth review rate.

The CIT noted that an analogous situation had arisen in *Asociacion Colombiana de Exportadores de Flores* in the context of an investigation and an ensuing review, where the plaintiff had successfully challenged the rate determined in the original investigation and then sought

to enjoin liquidation of its first POR entries at the unlawful cash deposit rate set by the investigation. In that case, the Federal Circuit affirmed the CIT's grant of an injunction.<sup>11</sup> In *Navneet II*, the Government sought to limit *Asociacion* to situations where a plaintiff invalidates a cash deposit rate from an investigation, but the CIT held that *Asociacion* "should not be read so narrowly" and "[t]he lesson of *Asociacion* applies here with equal force."<sup>12</sup> Specifically, "the law also permits injunctions where plaintiff challenges and invalidates a deposit rate from a review."<sup>13</sup>

Having determined that it had jurisdiction to grant an injunction, the CIT went on in *Navneet II* to consider whether Navneet met the requirements to secure a preliminary injunction: (i) immediate and irreparable injury absent an injunction; (ii) a likelihood of success on the merits; (iii) service of the public interest by granting the injunction; and (iv) a balance of hardships that favors granting the injunction.<sup>14</sup> The CIT concluded that Navneet had satisfied each of these requirements because: (i) if the seventh POR entries were liquidated at the unlawful fifth review rate, the law provides no framework for reliquidation so the action could not be undone; (ii) Navneet had already obtained a ruling that its fifth review rate was not based in substantial evidence; (iii) allowing the liquidation of entries at an unlawful rate would be contrary to the public interest; and (iv) Navneet's hardship of losing its right to judicial review outweighs the Government's hardship of delaying the final collection of revenue.<sup>15</sup>

As for the Government's contention that Navneet should have participated in a seventh administrative review to ensure that its seventh POR entries were not liquidated at an unlawful cash deposit rate, the CIT rejected this argument, explaining that it "misconstrue[s] the law."<sup>16</sup> Moreover, the CIT stressed that forcing Navneet to participate in a review "simply to avoid having its goods liquidated at an invalid rate" would be harmful because "[r]eviews cost parties time and treasure," which is why the statute permits reviews by request only. Rather, avoiding

6 *Navneet II*, Slip Op. 14-119, at 3-5.

7 *Id.* at 6.

8 *Id.*

9 *Id.* at 5.

10 *Id.* at 7.

11 *Id.* at 8 (citing *Asociacion Colombiana de Exportadores de Flores*, 916 F.2d 1571 (Fed. Cir. 1990)).

12 *Id.* at 8-9.

13 *Id.* at 9.

14 *Id.* at 10 (citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983)).

15 *Id.* at 10-12.

16 *Id.* at 7-8.

a review when a party accepts liquidation of the contested entries at a court-approved rate is “an efficient course of action” that “prevent[s] waste.”<sup>17</sup>

The Government did not appeal the CIT’s decision in *Navneet II*, and therefore the Federal Circuit will not have an opportunity to opine on this issue that, although quite common, had not been previously litigated. However, given the Federal Circuit’s ruling in *Asociacion*, it seems likely that the Federal Circuit would affirm the CIT’s grant of an injunction in circumstances similar to *Navneet II*. Therefore, as a result of the *Navneet II* decision, an interested party involved in an U.S. antidumping proceeding should feel more comfortable not requesting an administrative review solely to avoid the liquidation of entries at an unlawful cash deposit rate established in an earlier administrative review. Rather, an interested party should be able to take the far more efficient course of obtaining a preliminary injunction from the CIT to ensure that the entries at issue are not liquidated at a cash deposit rate from an earlier administrative review that the party has established to be unlawful pursuant to litigation.

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<sup>17</sup> *Id.* at 11.

## **OFAC Fires a Warning Shot at PayPal on Sanctions Compliance**

Margaret Spicer\*

U.S. companies are beginning to feel the pressure from the government to proactively implement internal programs to ensure compliance with sanctions regimes. One of the most notable warning shots was recently fired at PayPal, Inc., the California-based money service provider. On March 25, the Department of Treasury’s Office of Foreign Asset Control (OFAC) announced that it had entered into a settlement with PayPal for roughly \$7.7 million for multiple violations of OFAC’s economic sanctions program.

OFAC alleged that PayPal processed more than 490 transactions over a 4-year period that violated multiple sanctions regimes, including the Global Terrorism Sanctions Regulations (GTSR) and Weapons of Mass Destruction Proliferators and Their Supporters (WMDPSR) programs. In some cases, the transactions contained explicit references to embargoed locations or individuals.

Although PayPal filters flagged multiple transactions for review of sanctioned terms, Risk Operations Agents repeatedly dismissed alerts without following through according to company procedure.

The most notable violations involved transactions with a Turkish national Kursud Zafer Cire, who had been sanctioned as a Specially Designated National (SDN) under the WMDPSR program in 2009 for his involvement in the A.Q. Khan nuclear proliferation network. PayPal first failed to identify Cire as an embargoed individual when its filter designed to flag transactions with SDNs failed to work properly. Even when the filter did manage to flag Cire’s name, risk management employees dismissed the match. PayPal processed 136 transactions totaling over \$7,000 to or from Cire’s account during the time period in question.

OFAC’s finding that PayPal lacked an adequate compliance program and that company supervisors and management knew about the behavior leading to violations were considered aggravating factors in the ultimate decision that PayPal’s management demonstrated “reckless disregard” of the sanctions requirements. All things considered, however, PayPal’s settlement agreement is a fraction of the maximum \$17,018,443 penalty allowed for such violations. OFAC considered mitigating factors such as PayPal voluntarily reporting the transactions with Cire once they had been flagged, extensive efforts to improve internal compliance programs, and PayPal’s substantial cooperation with OFAC’s investigation.

While PayPal is certainly feeling the burn of the increased pressure on enforcement of sanctions regimes, other companies should certainly take note. Even voluntary reporting of violations may no longer be enough to get companies off the hook, and robust internal enforcement mechanisms are now a necessity to avoid PayPal’s fate.

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## **Article Contributions**

We are currently planning upcoming editions of the newsletter. Articles should relate to international trade and contain between 1000 and 2500 words. If you are interested in contributing, please let us hear about your suggestions or ideas about topics and articles. Please contact: [cdrury@goodwin.com](mailto:cdrury@goodwin.com)



## International Trade and America's First Freedom

by Sam Webb\*

Religious liberty is “the condition in which individuals or groups are permitted without restraint to assent to and, within limits, to express and act upon religious convictions and identity free of coercive interference or penalty imposed by outsiders, including the state.” The 800th anniversary of Magna Carta was June 15, 2015, and Magna Carta set forth, for the first time in Western law, the revolutionary idea that all people are subject to the rule of law. Magna Carta propounded 63 distinct liberties, first of which was the freedom of the English Church:

*“In the first place we grant to God and confirm by this our present charter for ourselves and our heirs in perpetuity that the English Church is to be free and to have all its rights fully and its liberties entirely.”*

This Western tradition of religious freedom, though wrought with inconsistencies, carried forward to the formation of the United States of America. America's cherished first freedom enshrined in the Bill of Rights states:

*“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”*

Religious liberty, however, is not just an American or Western value. The 1981 U.N. Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief set forth the truth that violations of religious liberty have “brought, directly or indirectly, wars and great suffering to mankind.” The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Declaration on the Elimination of Intolerance and Discrimination each decry the violation of religious liberty and are considered binding on roughly three-fourths of the world's nations.

Unfortunately, not all nations of the world respect religious freedom. The United States Commission on International Religious Freedom was created by the International Religious Freedom Act of 1998 as an independent,

bipartisan U.S. government advisory commission that monitors religious freedom worldwide and acts as policy advisors to the Executive and Legislative branches of the U.S. government. USCIRF bases its analysis and recommendations on its statutory authority and the Universal Declaration of Human Rights.

In its recently released 2015 Annual Report, USCIRF recommended the designation of 17 countries as Tier 1 countries of particular concern, or CPC, including China, Iran, North Korea, Saudi Arabia, Egypt, Pakistan and Vietnam. The USCIRF also placed 10 countries on the Tier 2 list, countries that do not fully meet the CPC standard, but are nonetheless characterized by at least one of the elemental violations of CPC countries. Those countries include Cuba, India, Turkey and Russia. These countries are marked not by the religious freedom guaranteed in Magna Carta, the U.S. First Amendment or U.N. Declaration, but rather act in violation of the first and most basic human right.

But, what does this have to do with international trade law? Like the obligation to minimize or prevent certain human rights labor violations in the global supply chain, international trade law can be used to combat religious liberty violations around the world. In fact, United States Senator James Lankford, a Republican from Oklahoma, has taken the lead to make international religious freedom a cornerstone of American trade policy for the first time in the nation's history.

On May 18, 2015, the U.S. Senate unanimously passed Sen. Lankford's amendment to the Senate version of the Trade Promotion Authority bill by a vote of 92-0. The amendment added a provision to TPA's overall negotiating objectives requiring the Obama Administration to consider the religious freedom record of parties to trade negotiations. The amendment does not provide specific directives on how the Obama Administration should consider a country's religious freedom record in trade negotiations, but makes clear that the U.S. will take seriously the religious freedom of all people in all nations – religious liberty is of more importance than economic liberalization. The provision will be the first time in American history that religious freedom will be taken into account during unilateral trade agreement negotiations should it pass the U.S. House and be signed into law.

The trading partner most directly impacted by Sen. Lankford's religious liberty amendment to TPA is Vietnam, the only country currently party to the Trans-Pacific Partnership and named to the USCIRF Tier 1 CPC list. According to the USCIRF 2015 Annual Report, Vietnam severely restricts independent religious practice and represses individuals and religious groups its government views as challenging its authority. Individuals remain imprisoned for religious activity or religious freedom activity. The USCIRF has recommended that Vietnam be named a Tier 1 CPC every year since 2001.

It is unclear, though, just how Vietnam might be impacted by the amendment in TPP negotiations. The U.S. trade delegation could choose to minimize the objective, making a joint declaration in any trade agreement with no compliance teeth. The U.S. trade delegation may pursue a path with more teeth and tie the reduction of customs duty for goods sourced from Vietnam to the certification of liberalized religious liberty policies. The most aggressive, and least likely, would have the U.S. trade delegation negotiate a change in Vietnamese religious liberty policy parallel with a trade agreement. Regardless of the implementation, though, the existence of a negotiating objective related to the advance of religious liberty globally is a welcome sight even as the U.S. pursues trade liberalization.

Economic freedom is important, but religious freedom is more important. To echo Sen. Lankford's floor speech, the greatest American export is the "dignity of each person... [and that] every person should have protection of the government to live their faith, not the compulsion of the government to practice any one faith or to be forced to reject all faith altogether." The U.S. can pursue both policy goals – the expansion of religious liberty globally and trade liberalization. There is no dichotomous split between the goals and trade agreements can serve as a vehicle to effectively influence countries to pursue the "dignity of each person" by protecting religious liberty.

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## ***Deadline Approaches - The Bureau of Economic Analysis Requires the Mandatory Disclosure of U.S. Investment Abroad – Even by Private Equity Funds***

*By Frances Hadfield\**

### **Background**

The Bureau of Economic Analysis ("BEA") is an agency of the Department of Commerce that gathers and provides economic accounts data regarding the U.S. economy.<sup>1</sup> The cornerstone of BEA's statistics is the national income and product accounts ("NIPAs"), which feature the estimates of gross domestic product ("GDP") and related measures.<sup>2</sup>

Every five years, BEA conducts a benchmark survey. The 2014 benchmark survey is the agency's most comprehensive survey of such investment in terms of subject matter. It requires every U.S. entity with more than a 10 percent ownership interest in a foreign entity, whether direct or indirect, to submit a report on behalf of themselves and their subsidiaries.

### **New Reporting Requirements**

The BEA has historically required a BE-10 Filing from any U.S. person (including entities or individuals) that had a "Foreign Affiliate" at any point during the prior 5 years (e.g., the 2014 fiscal year).<sup>3</sup> U.S. companies with foreign affiliates, who are required to file BE-10 reports, are called

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1 It is part of the Department's Economics and Statistics Administration. Available at <http://www.bea.gov/> (last viewed June 8, 2015). Significantly, BEA prepares national, regional, industry, and international accounts that presents information on economic growth, regional economic development, inter-industry relationships, and the United States' position in the world economy.

2 The agency produces economic accounts statistics that are intended to enable government and business decision-makers, researchers, and the American public to follow and understand the performance of the Nation's economy. In order to effectuate this, BEA collects source data, conducts research and analysis, develops and implements estimation methodologies, and disseminates statistics to the public. Significantly, BEA produces some of the most closely watched economic statistics. BEA's economic statistics affect monetary policy, tax and budget projections, and business investment plans.

3 A BE-10 filing consists of the Form BE-10 and one (or more) of the Forms BE-10B, BE-10C and BE-10 D along with any 2014 annual report from the company to its stockholders.

“U.S. reporters.” Previously, when the 5-year benchmark survey was conducted in 2009, a BE-10 Filing was required only by those contacted by the BEA. However, now U.S. persons that satisfy the applicable reporting threshold are required to make a BE-10 Filing, regardless of whether the BEA has contacted the entity (currently or previously).<sup>4</sup>

On November 20, 2014, BEA published this new rule in the Federal Register and announced that U.S. companies with foreign subsidiaries were required to report on foreign investment by May 29, 2015 (fewer than 50 affiliates) and June 30, 2015 (more than 50 affiliates). For a U.S. Public company, the “U.S. reporter” is the consolidated U.S. domestic enterprise.

BEA’s new requirement resulted in such a significant number of questions and issues that on May 28, 2015, BEA extended the reporting deadline to June 30 for all first-time filers. That was already the deadline for U.S. companies with 50 or more foreign affiliates to report. However, extensions are now available to July 31 (over 50 forms) or August 31 (over 100 forms) by submitting a request. Extension requests should be made by completing a Request for Extension for Filing and submitting it through the eFile system available on BEA’s website.

U.S. companies subject to the reporting requirements are required to file consolidated reports on behalf of all U.S. entities that were part of their “consolidated domestic business enterprise” for fiscal year 2014 (i.e., all U.S. entities that are more than 50% controlled by the U.S. entity above it).

Finally, BEA has decided not to grant authorization for companies in the domestic business enterprise to file on a deconsolidated basis, even for businesses where the parent does not typically consolidate financial information, such as private equity funds.

<sup>4</sup> Available at <https://federalregister.gov/a/2014-27421> (last viewed June 8, 2015).

### Some of the Significant New Questions

1. For U.S. parent companies, BEA is collecting data on the U.S. imports of goods by the intended use of the goods and by whether the shipper of the goods is a foreign affiliate or an unaffiliated foreign entity.
2. For U.S. parent companies, data is collected on U.S. exports to and imports from unaffiliated foreigners in the following regions: Canada, Europe, Latin America and other Western Hemisphere, Africa, Middle East, and Asia and Pacific.
3. For larger majority-owned foreign affiliates (those with assets, sales, or net income greater than \$300 million), data is being collected regarding the top five countries (besides the U.S. and the country of the affiliate) to which the affiliates made sales.
4. For foreign affiliates with assets, sales, or net income greater than \$25 million, several questions were added to ensure that certain types of finance companies do not report intercompany debt to BEA that is already reported on Treasury International Capital surveys.
5. For foreign affiliates with assets, sales, or net income between \$25 million and \$80 million, a question was added to collect expenditures for research and development performed by the foreign affiliate.

### Confidentiality

A BE-10 filing is used for analytical and statistical purposes. Accordingly, BEA does not identify the company in the manner in which its results are published.

### Conclusion

The failure to make a BE-10 filing may result in civil penalties between \$2,300 and \$25,000. A willful failure to report may result in criminal penalties for the U.S. reporter, and any officer, director, employee or agent who knowingly participates in the violations. Accordingly, U.S. reporters should make certain they have filed with the BEA or requested the appropriate extension.