

# Global Trade Report

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## EU Surrenders in Tech Trade Fight; President, Congress Work on China Bill

### EU Will Not Challenge Adverse WTO Panel Decision

In a surprise move, the European Union announced that it will not appeal from a recent World Trade Organization (WTO) dispute resolution panel report which ruled that the EU had violated its obligations under the international Information Technology Agreement (ITA).

The EU and the United States advised the WTO that the Europeans would not appeal the Panel decision, which found the EU guilty of violating tariff concession promises it had made regarding technology products. The WTO complaint, brought by the US and supported by Japan and Taiwan, had focused on three (3) product groups – multifunction printers, flat panel displays and set-top boxes. The Panel ruled that the EU had violated its ITA obligations for all three sets of products by imposing duties, rather than granting the duty-free treatment the ITA required.

As a result of the EU concession, the WTO panel report has been adopted.

In accepting the decision, EU officials suggested that the broader goals of the ITA

should not be blocked by litigation over a handful of products, and suggested that talks aimed at supplementing and clarifying the ITA should be initiated.

The EU had contended that, following the 1996 ITA agreement, added functionalities on information technology products had transformed many into “consumer” goods, which were not intended to be covered by the ITA. The Japan and Taiwan delegations to the WTO, however, asserted that the scope of the ITA should not be narrowed as information technology products became smarter and more capable.

Brussels now has 15 months to implement the decision and eliminate its tariffs on the products in question.

### Congress, White House Work on China Currency Legislation

Congress is working to amend and reform H.F. 2378, the “Currency Reform Fair Trade Act”, which seeks to target what many in Congress believe is China’s consistent undervaluation of its currency.

The bill would provide for the imposition of countervailing duties in cases where domestic

producers could prove that they had been materially injured by imports from countries which have a “fundamentally undervalued currency”. The bill is targeted at China, which critics maintain have kept their exports to the US strong by consistent currency undervaluation and manipulation. The bill would reverse a long-standing Commerce Department policy of refusing to consider currency undervaluation as a countervailable “subsidy”, and would instead direct Commerce to consider a number of factors in deciding whether to treat currency manipulation as a countervailable subsidy. Proponents of the bill assert that it is consistent with World Trade Organization (WTO) rules.

The bill would allow currency manipulation to be treated as a countervailable subsidy only where (1) the foreign government intervenes in currency markets in a way that confers a “financial contribution”, (2) a benefit is thereby conferred, and (3) the subsidy is tied to an export.

The bill would also set aside a longstanding Commerce practice not to treat currency intervention as a subsidy if the subsidy is available in some circumstances that do not involve exporting.

Congressional Republicans have questioned whether the measure is consistent with WTO rules, and have asked U.S. Trade Representative Ron Kirk to provide them with an analysis of the measure’s WTO-consistency. A group of former Cabinet officials, including several former U.S. Trade Representatives, have written a letter urging that the Congress not take unilateral action on the China currency issue.

President Obama recently told a Town Hall meeting that he believes China has undervalued its currency and has called upon the Chinese government to end the practice. He has received promises of action, but nothing has been done

yet. Congress could force the President’s hand by sending him legislation to declare currency undervaluation a countervailable subsidy.

## CIT Hands Importers A Victory on Redelivery Notices

Importers received a significant victory from the United States Court of International Trade, which ruled recently that United States Customs and Border Protection (CBP) was bound by its 30-day guideline for the issuance of Notices to Redeliver merchandise, and could not use a tardy notice as the basis for demanding liquidated damages against the surety’s bond.

In [United States v. Pressman Gutman Inc., Slip Op. 10-105 \(September 16, 2010\)](#), Customs had asked an importer to provide samples of a fabric, and the importer complied. The “conditional release” period for the goods expired 30 days after the samples were delivered. Under longstanding Customs guidelines and consistent Customs practice, the agency was required to issue demands for redelivery within 30 days after the conditional release period ends. In Pressman-Gutman, however, the government waiting until more than 90 days after the samples were delivered to request redelivery. By that time, the goods were no longer available. The government assessed a liquidated damages claim against the importer’s bond for failure to redeliver. When the importer refused to pay, the government sued the importer and the surety to recover the liquidated damages.

The CIT granted the importer’s motion to dismiss the government’s claim, calling the government’s position “bankrupt” and stating that the action should “not have been brought”. The Court noted that Customs had followed a longstanding and consistent administrative

practice of requiring redelivery notices to be issued within 90 days after the “conditional release” period ends. Customs Headquarters had repeatedly told port offices to follow that rule, even if it proved difficult. While Customs is free to change its administrative practice, Judge Delissa A. Ridgway held, it must provide notice to the public and a reasoned basis for doing so. Neither Customs generally, nor any individual Customs employee, has the right to extend the conditional release period on a case-by-case basis, by “fiat”.

The Court also held that Customs did not take “other appropriate action” in accordance with Section 141.113 of its regulations by telling the importer that there would be an extended period of uncertainty while the Customs Laboratory considered the samples considered.

The Pressman-Gutman decision should come as welcome news to importers who have grown frustrated with Customs’ disregard of its own formal and informal time limits for administrative action. The decision can be read here.

## ITC Initiates Investigation on Festive Articles

Responding to a request from U.S. Customs and Border Protection, the United States International Trade Commission (ITC) has initiated an investigation concerning possible amendments to the Harmonized Tariff Schedule of the United States (HTS) to provide duty free treatment, on a permanent basis, for certain functional articles (including apparel) having a festive motif.

The investigation, being conducted under Section 1205(a) of the Omnibus Trade and Competitiveness Act of 1988, considers Customs’ request for creation of a new provision

in Chapter 98 of the tariff to accord duty free treatment to such products.

In a hard-fought series of lawsuits conducted over the past two decades, importers secured a string of victories in suits asserting that goods which had a holiday motif, and which were of a kind typically displayed only on holidays, were properly classified as “festive” articles, duty free under HTS Heading 9505, even if they were primarily functional rather than decorative. Over the years, the courts rejected Customs’ arguments that the term “festive articles” should be restricted to tree decorations, to flimsy and cheap articles, or to articles intended purely for decorative uses.

The 2007 amendments to the international Harmonized System nomenclature created a new chapter note which disqualified most primarily functional products from classification under HTS heading 9505. This resulted in an increase in duty on many functional goods with festive motifs. The proposed new Chapter 98 provision granting duty free treatment is intended to allow the U.S. to meet its tariff binding commitments under WTO agreements.

The ITC is accepting comments from the public in its investigation through October 22, 2010.

## ITC Proposes Duty Free Status for Additional Pharmaceutical Products

The ITC also recently completed its fourth review of the Pharmaceutical Appendix to the HTS, providing its recommendations concerning the economic impact of adding some 735 new pharmaceutical substances and ingredients to the list of items entitled to duty-free entry into the United States.

The Pharmaceutical Appendix, created pursuant to the Uruguay Round multilateral trade agreements, contains more than 9,500 substances covered by United States “zero-for-zero” tariff elimination commitments. The appendix will contain more than 10,000 substances after the Fourth review is completed.

Additional discussions are underway at the WTO to further expand the Pharmaceutical Appendix.

## Customs Comments on Use of CF 28 and 29 to Commence Investigations

Customs and Border Protection, in a letter to the American Association of Exporters and Importers (AAEI), has commented on the use of Customs Form 28 Requests for Information, and Customs Form 29 Notices of Action, as instruments for notifying importer of the commencement of a Customs investigation into their importing activities.

The date a Customs investigation commences is of importance to importers, since notice that an investigation has been started terminates an importer’s right to file a “prior disclosure” under Section 592(c)(4) of the Tariff Act, and to avoid possible civil penalties arising out of the disclosed conduct. Customs does not have a uniform procedure or a specific form for notifying an importer than an investigation has been started.

According to Customs, the CF 28 Request for Information will not ordinarily be used to advise an importer than an investigation has been started. The agency stressed that CF 28, which is the most frequently used Customs form for initially seeking information from importers, does not usually portend a formal Customs

investigation into the transactions which are covered by the request.

However, Customs indicated, a CF 29 may, in some instances, be used to tell an importer that Customs is investigating its conduct in a way that cuts off the importer’s right to make a prior disclosure.

The trade community has become concerned by the practice, in some ports, of CBP import specialists notifying importers of a duty increase and then stating, often as boilerplate, that the agency has initiated an investigation of the transactions, or of similar activities. Under CBP’s regulations and guidelines, an “investigation” is generally formally commenced when an investigation agent creates a “Memorandum of Information Received” (MOIR) concerning a subject. Even if an MOIR has been created, an importer may still qualify for prior disclosure treatment if it can prove to CBP that the importer had no knowledge of the commencement of an investigation at the time the disclosure is made.

Numerous problems arose because Import Specialists in some cases announced an investigation using a CF 29 when, in fact, no formal investigation had been started.

Since CBP has never created a specific form for notifying importers of an investigation – the agency has done this in the past using formal letters, oral communications, administrative subpoenas and other documents – the real question is what specific recital Customs must make to notify an importer of an investigation in such a way as to terminate “prior disclosure” rights.

In its recent letter to the trade, Customs indicated that it wished to encourage legitimate “prior disclosures”, and had no intention of

narrowing the situations in which such disclosures can be made.

The agency's letter can be reviewed [here](#).

## Exports: BIS Issues 2010 Edition of Enforcement Guide

The Commerce Department's Bureau of Industry and Security (BIS) has issued the 2010 edition of its "Don't Let this Happen to You" export enforcement guide. The guide is substantively similar to the 2008 edition, but has been updated to reflect more recent enforcement actions by the agency.

The Guide stresses that BIS, in determining whether to mitigate penalties for export licensing violations, places great weight on whether a company has an effective internal compliance program. BIS reiterated the nine (9) elements it believes characterize an effective compliance program; (1) the company has performed a meaningful risk analysis, (2) the company has a written compliance policy that is communicated to others, (3) there is appropriate senior management supervision, (4) there is adequate training of employees; (5) the company screens its customers and transactions; (6) the company complies with recordkeeping requirements; (7) the company has an internal program for identifying violations and making voluntary self disclosures (VSDs); (8) the existence of internal and external auditing programs; and (9) remedial action to remedy past violations.

Penalties for export violations can include large administrative fines, denial of export privileges and, in extreme cases, criminal charges.

Copies of the guide are available from our offices.

## Exports: BIS Hints at Stricter Enforcement Standards

The Department of Commerce, Bureau of Industry and Security (BIS) has announced a new, stricter export enforcement policy which will focus on penalizing individuals rather than simply the firms they work for.

David Mills, Assistant Secretary of Commerce for export enforcement, recently told a compliance seminar audience that BIS has typically focused on penalizing corporations rather than individuals, but that is about to change. In the future, when BIS perceives that a specific individual has been involved in an export violation, it will consider imposing administrative and even criminal penalties on the individual. BIS will focus on corporate supervisors who are responsible for the conduct of subordinates.

At the same time, BIS will focus increased attention on corporations whose export compliance programs are weak, or who are indifferent to export controls. Mills stressed that BIS will continue to provide favorable mitigation of fines and penalties to companies with strong export compliance programs.

Mills also stressed that his agency will be taking aim at illicit foreign procurement networks set up to benefit embargoed countries such as North Korea and Iran. These countries have set up a series of middleman companies to act as their alter egos in procuring American goods that would otherwise be denied them.

## APHIS Clarifies Rules for "Lacey Act" Declarations

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he Agriculture Department's Animal and Plant Health Inspection Service (APHIS) has clarified rules concerning the submission of import declarations required under the Lacey Act Amendments. The Amendments require importers of various "plant products" to file a declaration at the time of entry, identifying the genus and species of the plant products they are importing, and to identify the countries of origin of such plant products.

In a recent FAQ document, APHIS has indicated that importers of record are responsible for submission of Lacey Act declarations, and for the accuracy of information provided therein. Customhouse brokers may file Lacey Act declarations on behalf of their importer clients, but only if the broker holds an appropriate Power of Attorney from the importer.

APHIS also indicated that Customs brokers would have some legal responsibility for the accuracy of information contained on the PPQ 505 form which is filed to provide information required by the Lacey Act Amendments.

## Domestic Firms Lose Effort to Hold US Responsible for Uncollected Duties

**D**omestic manufacturers who petitioned for the imposition of antidumping duties cannot hold the Federal Government responsible for the failure of U.S. Customs and Border Protection (CBP) to collect all duties allegedly due, according to a recent decision of the U.S. Court of International Trade.

In [Sioux Honey Assn. v. United States, Slip Op. No. 10-96 \(August 27, 2010\)](#), CIT Judge Timothy Stanceu dismissed the domestic producers' remaining claims against the Federal government, which charged had alleged that U.S.

Customs and Border Protection had failed to collect antidumping duties on a wide range of imported articles, including Chinese honey, mushrooms, garlic and seafood.

The CIT had previously dismissed the domestic firms' complaints against Customs bond sureties who had written bonds to secure the payment of duties owed by importers.

The domestic producers assert that, by virtue of a number of administrative errors and oversights, CBP failed to collect antidumping duties in all cases where such duties were owed. This injured the domestic producers, the case alleges, by depriving the government of Customs duties which would have been distributed to qualifying domestic producers of like goods, under the Continued Dumping and Subsidy Offset Act, more commonly referred to as the "Byrd Amendment".

The CIT had previously dismissed the domestic producers' claims against the surety bond companies, holding that the domestic producers.

Now, the court has dismissed the domestic producers' remaining claims against the government agencies responsible for administering the antidumping statute. The CIT ruled (1) that the domestic producers did not have standing to participate in CBP's administrative review of protests filed by the bond sureties; (2) that the Commerce Department failed to issue timely liquidation instructions to Customs, resulting in the "deemed liquidation" of many entries with little or no antidumping liability; (3) that Customs, despite having received liquidation instructions, failed to carry them out correctly; (4) that Customs failed to distribute antidumping duties it had collected; (5) that Customs had failed to collect antidumping duties from importers according to Commerce's requirements; (6) that Customs

failed to demand payment of antidumping duties from the importers' bond sureties; (7) that Customs improperly compromised claims for antidumping duties, (8) that Customs unlawfully "wrote off" certain antidumping liabilities, (9) that Customs canceled or released various antidumping bonds; and (10) that Customs failed to notify the Department of Justice of claims for the collection of antidumping duties which DOJ could have pursued.

The CIT held that, in many cases, the domestic producers had not alleged specific facts showing they had suffered an injury from Customs' actions or inactions. In other cases, the plaintiffs had failed to articulate a proper pleading entitling them to judicial relief. Finally, the plaintiffs lacked standing to pursue some of their claims.

The plaintiffs had alleged that Customs' failure properly to administer the antidumping statute had resulted in failure to collect "hundreds of millions of dollars" worth of antidumping duties, particularly in cases where the Commerce Department was considering "new shipper reviews" of particular exporters, and bonding requirements were suspended.

The CIT's opinion dismissing the domestic producers' claims is available [here](#).

## APHIS Issues Proposed Lacey Act Rules for "Common Cultivars" and "Common Food Products"

**A**PHIS, in conjunction with the Fish and Wildlife Service, also issued proposed rules to define "common cultivars" and "common food crops" that are

exempt from Lacey Act coverage. The proposed rules are designed to maintain protection of threatened and endangered plants while excluding "common" plants grown on a commercial scale.

APHIS proposes to define a "common cultivar" as a plant, excluding trees, that was selectively developed for specific characteristics, while a "common food crop" would be defined as a plant that has been raised, grown or cultivated for human or animal consumption. In both cases, the plant must be a species or hybrid cultivated on a commercial scale that has not been identified as endangered or threatened. All plants within the genus or species thus identified would be excluded from Lacey Act requirements, including the importer's declaration.

The agency has solicited public comments on its proposed definitions. Comments are due on or before October 4, 2010.

## United States Tightens Sanctions on Iran

**T**he United States government recently expanded the scope of its sanctions on Iran through legislative and regulatory actions. These measures are specifically intended to diminish trade between third countries and Iran, and provide for the imposition of penalties against foreign companies that conduct proscribed business activities with Iran.

First, the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 addresses is designed to limit parties located in third countries from supporting development of Iran's petroleum resources and that country's ability to produce refined petroleum products. They can apply to investments in Iran's

petroleum industry, as well as sales, leases, and provision of goods, services, and technology that facilitate the maintenance or expansion of Iran's domestic production of refined petroleum products

The legislation also authorizes the U.S. government to impose penalties on foreign companies that export or participate in the movement of refined petroleum products to Iran or provide support for Iran's ability to import such products. Shipping services are specifically included. The thresholds for imposition of penalties are set at \$1,000,000 for a single transaction or \$5,000,000 for transactions over a twelve month period.

Penalties may be imposed against the companies engaged in such trade as well as related companies. The penalties specified include denial of Export-Import Bank loans, credits or guarantees, denial of export licenses for military or militarily useful technology, limits on loans from United States financial institutions, prohibitions of the award of United States government procurement contracts, restrictions on imports into the United States, and prohibitions of designation as a primary dealer in U.S. Government debt or acting as an agent for U.S. Government funds, on foreign exchange transactions in the United States, on transfer of credits or payments by financial institutions in the United States, and on dealing in property in the United States.

The statute also prohibits imports of goods and services from Iran, so the limited range of permissible imports (carpets and food) will soon be terminated.

In regulatory developments, the Office of Foreign Assets Control (OFAC) of the Treasury Department has adopted the Iranian Financial Sanctions Regulations to implement the

Comprehensive Act's financial provisions. The new regulations target foreign financial institutions that assist the Iranian government to avoid existing financial sanctions, such as those directed against Iran's development of weapons of mass destruction or sponsorship of terrorism and support for the "Revolutionary Guards". Foreign financial institutions found to have facilitated such proscribed activities will face restrictions on their ability to establish or maintain correspondent or payable-through accounts in the U.S. OFAC's new regulations additionally prohibit foreign financial institutions owned or controlled by a U.S. bank or other financial institutions from engaging in activities with or benefitting the Revolutionary Guards.

In addition, OFAC has included a large number of Iranian-government owned corporations located in third countries within coverage of existing sanctions. OFAC's Iranian Transactions Regulations restrict specified transactions with the Government of Iran, including government-owned and controlled companies. These restrictions apply to virtually all transactions by U.S. persons, and certain re-export transactions by non-U.S. persons, no matter where the transactions occur. OFAC's designation of Iranian government-owned companies expands the application of these prohibitions to include transactions in third countries.

## Final Procurement Regulations for American Recovery and Reinvestment Act of 2009 Issued

The General Services Administration (GSA) has adopted final regulations concerning the "Buy American" procurement provisions of the American

Recovery and Reinvestment Act of 2009 (ARRA). That legislation included controversial provisions that limited the federal government's ability to procure non-U.S. construction materials for ARRA-funded projects.

The regulations clarify that only "manufactured" construction materials are subject to ARRA's requirements for manufacture in the United States. "Unmanufactured" construction materials, by contrast, remain covered by the separate requirements of the Buy American Act and its implementing Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulations (DFARs). They also implement ARRA's mandate that iron or steel construction materials be entirely manufactured in the United States.

In addition, the regulations establish FAR and DFARs contractual clauses that are binding on federal contractors for ARRA-funded projects.

GSA has confirmed in the regulations that ARRA's origin requirements will not be applied in violation of trade agreements that preclude the use of "buy national" procurement measure. Construction contracts that are valued above the threshold for coverage by a trade agreement (such as the World Trade Organization's Government Procurement Code) will be open to equal competition between qualifying products of agreement signatory countries and products manufactured in the United States.

The regulations also provide direction on when the ARRA origin requirements may be waived, including unavailability of a domestically-produced construction material, unreasonable cost of the domestic material, or when application of the origin requirements would be contrary to the public interest.

## Small Business Act Contains Export Provisions

On September 27, 2010, President Obama signed into law the Small Business Jobs and Credit Act, a measure which seeks to provide over \$3 billion in tax relief and aid to smaller businesses. The measure contains a number of trade-related provisions.

In particular, the new law appropriates \$5 million to the United States Trade Representative to expand market access and trade enforcement programs; provides a 3-year pilot trade and export development program, under which the Federal government would help fund state export control efforts; and reorganize the Small Business Administration's Office of International Trade. The bill also provides increased funding and staffing for Commerce Department export promotion activities.

The bill also requires the Secretary of Commerce to report to Congress on tariff and nontariff trade barriers imposed by Columbia, South Korea and Panama – three countries the United States has negotiated potential free trade agreements with.

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