

Vol. 33, No. 3**January 21, 2013**

New Value-Added Analysis Changes Trade Perspectives

A new effort to measure international trade based on value added rather than gross trade figures significantly reduces the U.S. trade deficit with China, cutting it by more than 25%, while also showing that services play a larger role in manufactured exports than previously counted. According to the first results of research being conducted by the World Trade Organization (WTO) and the Organization for Economic Cooperation and Development (OECD), the reduction in the U.S. deficit with China would be offset by increases in the deficits with Japan and Korea, which supply China with many of the electronic components and semiconductors that go into final goods assembled in China (see **WTTL**, Oct. 8, page 1).

At a conference in Paris Jan. 16, WTO and OECD statisticians reported on their initial calculations based on what they call trade in value added (TIVA). Although their results change bilateral trade balances, they don't change a country's total balance of trade picture, they said.

WTO and OECD officials used the data to suggest a new mantra: imports create exports. They cited Germany's transportation exports, which contain one-third imported components. Similarly, 30% of China's electronics exports consist of imported materials. Overall, imports constituted 40% of China's exports, WTO and OECD statisticians estimate. TIVA accounting of U.S.-China trade in 2009, the last year for which they had data, shows a \$40 billion reduction in the U.S. trade deficit, they said. The data also show the U.S. trade deficit with Mexico and Canada is smaller than gross trade figures indicate because of the value of U.S. components in goods exported to the U.S. from its NAFTA partners.

CAFC Clarifies "Domestic Industry" Meaning in Section 337

U.S. firms that conduct research and development on new technologies for licensing – even by foreign manufacturers – still qualify as a "domestic industry" whose patents can be protected under Section 337 of the Trade Act, the Court of Appeals for the Federal Circuit (CAFC) ruled Jan. 10. The decision confirms the court's

© Copyright 2013 Gilston-Kalin Communications LLC. All rights reserved. Reproduction, photo-copying or redistribution in any form without approval of publisher is prohibited by law.

WTTL is published weekly 50 times a year except last week in August and December. Subscriptions are \$697 a year. Additional subscriptions sent with full-priced subscriptions are \$100 each. Site and corporate licenses also available.

August 2012 ruling, which reversed an International Trade Commission (ITC) finding that Nokia had not violated an InterDigital Communications, LLC, patent on cell phone technology (see **WTTL**, Aug. 6, 2012, page 4). In its ruling, the court rejected a Nokia request for *en banc* rehearing of the earlier ruling, which was based on the technical characteristics of InterDigital's cell phone "code" in its patent. As part of its request for rehearing, Nokia raised new arguments challenging whether InterDigital qualified for Section 337 protection against unfair imports because it had not licensed its technology to a domestic firm for production.

The CAFC examined the three-leg definition of a "domestic industry" under Section 337 and particularly 1988 amendments to the law that added coverage under subparagraph (C) of paragraph 337(a)(3) to U.S. firms that make a "substantial investment in its exploitation, including engineering, research and development, or licensing" of a patent. As in its earlier ruling, the CAFC split in reaching its decision, with two judges agreeing that InterDigital qualified for Section 337 protection and Judge Pauline Newman dissenting.

"This is a classic case for the application of subparagraph (C)," wrote Judge William Bryson for himself and Judge Haldane Mayer. "Here's where all this leaves us: Under the clear intent of Congress and the most natural reading of the 1988 amendment, section 337 makes relief available to a party that has a substantial investment in exploitation of a patent through either engineering, research and development, or licensing," he wrote.

"It is not necessary that the party manufacture the product that is protected by the patent, and it is not necessary that any other domestic party manufacture the protected article. As long as the patent covers the article that is the subject of the exclusion proceeding, and as long as the party seeking relief can show that it has a sufficiently substantial investment in the exploitation of the intellectual property to satisfy the domestic industry requirement of the statute, that party is entitled to seek relief under section 337," Bryson stated.

Judge Newman in her dissent also quoted extensively from the legislative history of the 1988 amendment and the testimony that led to its adoption. "The panel majority erred in holding that the domestic industry requirement is met by licensing the importation of foreign-made products," she wrote. "The purpose of the licensing amendment to Section 337 was to enlarge the benefit and incentive to domestic industry by giving licensors access to ITC exclusionary procedures; the purpose was not to eliminate the requirement of domestic manufacture of the licensed articles," Newman added.

U.S., Peru Agree to Five-Point Forest Action Plan

After meetings in Lima Jan. 10, the U.S. and Peru agreed to a five-point plan to support Peru's efforts to protect its forestry sector and its implementation of its obligations under the U.S.-Peru Trade Promotion Agreement (PTPA). "This bilateral action plan will deepen the two Governments' ongoing cooperation with regards to the sustainable management of bigleaf mahogany and Spanish cedar, which are protected under the Convention on International Trade in Endangered

Species of Wild Fauna and Flora (CITES),” said the U.S. Trade Representative’s (USTR) office Jan. 11. The plan is intended to implement the PTPA’s Annex on Forest Sector Governance.

The destruction of Peru’s forests has been the target of complaints from environmental groups and indigenous people. Peru has the second-largest share of the Amazon rainforest in South America. Protests have also targeted the development of oil and mining in the forests and road construction.

In April 2012, the nonprofit Environmental Investigation Agency (EIA) formally petitioned the USTR to take action under the PTPA to investigate and verify the legal origin of shipments from at least two Peruvian companies and to audit dozens more. “It is the responsibility of the U.S. Government to make sure that the U.S. is not an accomplice in illegal logging activities hiding behind the formal timber trade coming from Peru – activities that not only have a terrible impact on biodiversity but also contribute to human rights violations and corruption,” said Julia Urrunaga, head of EIA’s Peru programs, at the time.

In a letter Dec. 6, USTR Ron Kirk told EIA that his office would not investigate the group’s charges, but said it was working with Peru on the action plan. He also reported on Peru’s own efforts to investigate lumbering practices.

“Of the 29 concessions for which EIA requested audits, under this system Peru has initiated sanctions proceedings (PAUs) against 26 concessions, initiated preliminary investigations to determine whether to initiate PAUs against two additional concessions and scheduled or conducted new supervisions of four concessions. As a result... only seven of the 29 concessions remain in operation. Of this seven, OSINFOR [Peru’s Agency for Supervision of Forest Resources and Wildlife] is either taking additional steps to further review (e.g. preliminary investigations or new supervision) and potentially sanction the concessions or has concluded its review and administered penalties as deemed appropriate,” Kirk wrote.

According to a joint U.S.-Peru communiqué, the plan’s five points would: (1) Strengthen physical inspections of bigleaf mahogany and Spanish cedar contained in plans of action (POA) prior to their approval; (2) Strengthen accurate POA development and implementation; (3) Ensure timely criminal and administrative proceedings to sanction any concessionaire, forest engineer, government official or other responsible party that violates Peru’s forestry and wildlife laws; (4) Improve systems to track and verify the chain of custody of timber exports of bigleaf mahogany and Spanish cedar; and (5) Strengthen the implementation of Peru’s National Anti-Corruption Forest and Wildlife Sector Plan, specifically activities aimed at eliminating the submission and approval of false POAs.

U.S. Formally Jumps into WTO Services Agreement Talks

The U.S. officially intends to join negotiations with 20 other countries toward a plurilateral services agreement under the auspices of the World Trade Organization (WTO), U.S. Trade Representative (USTR) Ron Kirk told Congress Jan. 15. Tech-

nical meetings are supposed to start Jan. 29-30, but U.S. participation in formal negotiations will start in Geneva “no later than 90 days after the transmittal of this notification,” the letter to House Speaker John Boehner (R-Ohio) said.

The U.S. has been involved in preparatory talks on an International Services Agreement (ISA) for a year, but the notice to Congress complies with the now-expired provisions of “fast-track” negotiating authority that require advance notice and consultations with lawmakers before a trade agreement can be concluded. Fast-track will have to be renewed before the U.S. signs any ISA, and the notice is intended to demonstrate compliance with its conditions whenever the authority is reenacted (see **WTTL**, Dec. 17, 2012, page 1).

Although the USTR’s notice drew enthusiastic reactions from industry groups and members of Congress, ISA negotiations are expected to take over a year and face numerous hurdles, including within the U.S. Industry sources say federal and state regulatory agencies that oversee such areas as telecommunications, banking and insurance could object to being bound by international rules. In addition, China, Brazil and India still have not agreed to join the talks and their absence leaves three major markets excluded from any market-opening commitments.

“If business services achieved the same export potential as manufactured goods globally, U.S. exports could increase by as much as \$800 billion,” Kirk’s letter said. “The agreement must seek to secure greater transparency and predictability from our trading partners regarding regulatory policies that present barriers to trade in services and hinder U.S. exports,” he argued.

“To address this challenge, we will seek agreement on practices like providing the public with advance notice and an opportunity to comment on proposed regulations consistent with current U.S. practice. With regards to the substance of regulations, the agreement must respect the role of regulatory authorities across all levels of government and protect their ability to introduce new regulatory policies over time in fulfillment of their responsibilities,” the letter said.

Among the many trade associations lauding Kirk’s letter, the Coalition of Service Industries (CSI) applauded the move. “The world wants and waits for a new international services agreement,” said CSI President Peter Allgeier, a former U.S. ambassador to the WTO. “The services negotiations mark an overdue recognition of the need to break out of the Doha round straitjacket, and no longer let results be hostage to impasses in other negotiations,” he noted.

Doha Round Agriculture Talks Keep on Keeping on

Some diplomats in Geneva refuse to be discouraged by the atrophy of the Doha Round. One of them is New Zealand’s ambassador to the WTO John Adank, who also chairs the Doha Round negotiations on agriculture. At an informal meeting of farm negotiators Jan. 18, Adank suggested the coming year could be used to prepare agriculture proposals for ministers to address at their next ministerial conference in Bali, Indonesia, Dec. 3-6. “I would encourage those of you who are considering putting new ideas forward to do the necessary homework to determine

whether your proposals would have a reasonable amount of support from other members to secure agreement within the timeframe we have available for the preparations for [the Bali Ministerial] if the objective is to secure decisions by that time,” Adank is quoted as telling the meeting, according to the WTO.

Two issues that could be prepared for the ministerial would address tariff-rate quota (TRQ) administration and food security (see **WTTL**, Nov. 26, page 1). “I would suggest that starting in mid-February we need more focused discussions on where we are on the relevant issues and what the outlook for advancing particular issues,” he said.

The TRQ issue has been raised by members of the so-called Group of 20 (G-20) developing nations, while food security is a concern of the G-33 less developed countries. The WTO secretariat produced a report in December examining TRQ practices of WTO members and fill rates. Nonetheless, negotiators said they still want to collect more data on the issue.

At the agriculture negotiating group meeting, some countries questioned the idea of seeking an early agreement from ministers on TRQ and food safety issues. Norway reportedly said it would favor only having ministers indicate their reactions on the proposals but not agree on a specific text.

Others said they were concerned that public stockholding of food through price supports as a security measure would undermine the WTO Agriculture Agreement’s distinction between domestic support that distorts trade (the Amber Box) and support that does not (the Green Box). The U.S. representative called 2013 “the Year of the Questionnaire.”

House Trade Subcommittee Takes Shape

The House Ways and Means Committee Jan. 15 announced its subcommittee members for the 113th Congress. On the Republican side, the new chair of the trade subcommittee will be Rep. Devin Nunes (R-Calif.). Former Ways and Means Chairman Charles B. Rangel (D-N.Y.) will be its ranking member. Former trade subcommittee chairman Kevin Brady (R-Texas) has moved to chair the health subcommittee and former Ranking Member Jim McDermott (D-Wash.) will become ranking member on the health subcommittee.

Other Democrats assigned to the panel are Reps. Richard E. Neal (D-Mass.), John Larson (D-Conn.), Earl Blumenauer (D-Ore.) and Ron Kind (D-Wisc.). Republican members have not yet been released.

Nunes, who is starting his sixth term in Congress, voted for the Peru, Singapore and Chile Free Trade Agreements, as well as the Central American Free Trade Agreement. He voted against Trade Adjustment Assistance, which helps workers who lose jobs due to trade, in October 2007, but for it in September 2011, when it was attached to a measure extending the Generalized System of Preferences.

* * * **Briefs** * * *

OFAC: Dal-Tech Devices, Inc., of Boca Raton, Fla., dba Microwave Distributors, agreed Jan. 18 to pay \$10,000 fine to settle OFAC charges of violating Iranian Transactions Regulations (ITR) for unlicensed sale and export of radio frequency measurement devices (RF devices) worth \$3,226 to Austria with knowledge that items were intended for transshipment to Iran. Dal-Tech did not voluntarily disclose matter to OFAC. Firm also agreed to Deferred Prosecution Agreement with Justice in Wilmington, Del., U.S. District Court in November 2012. Payment of OFAC fine settled Justice claims.

EXPORT ENFORCEMENT: Timothy Gormley, of North Wales, Penn, was sentenced Jan. 17 in Philadelphia U.S. District Court to 42 months in prison for five counts of violating International Emergency Economic Powers Act (IEEPA) by exporting microwave amplifiers classified under ECCN 3A011 to China, India, Hong Kong, Taiwan, Thailand, Russia, Mexico and other countries without licenses. Gormley, who was employed by Amplifier Research in Souderton, Penn., pleaded guilty Oct. 17, 2012, admitting that he had altered invoices and shipping documents to conceal correct classification of amplifiers; listed false license numbers on export paperwork for defense article shipments; and lied to fellow employees about status and existence of export licenses. Amplifier Research voluntary disclosed violations in November 2011.

HANGERS: ITC made final determination Jan. 16 on 6-0 vote that imports of subsidized and dumped steel wire garment hangers from Vietnam are injuring U.S. industry.

STEEL PLATE: On divided 4-2 vote in "sunset" review, ITC determined Jan. 15 that revoking antidumping order on clad steel plate from Japan would likely lead to continuation or recurrence of material injury to U.S. industry.

VEU: In Federal Register Jan. 16 BIS revised Authorization Validated End-User (VEU) listings for four VEUs in China: updated current list of eligible destinations for Advanced Micro Devices China Inc. (AMD China) and LAM Research Corporation and list of eligible items for Hynix Semiconductor (China) Ltd. and SK hynix Semiconductor (Wuxi) Ltd. "These amendments to the authorizations of the named VEUs are not the result of activities of concern. The respective changes were prompted by factors arising from the companies' normal course of business or are being done at the request of the companies," notice said.

ENTITY LIST: In Federal Register Jan. 16 BIS removed four from its Entity List: Laurence Mattiucci and Toulouse Air Spares SAS, both located in Toulouse, France, "as a result of a successful request for removal." Based on annual review, BIS also removed Abubakr Abuelazm and Advanced Technology General Trading Company in Dubai, UAE. Notice also fixed spelling of one entity in Finland -- Olkebor Oy-- and removed redundant listing in Russia: Bolshaya Semenovskaya.

WIND TOWERS: ITC made final determination Jan. 18 on 3-3 vote that imports of subsidized utility scale wind towers from China and dumped towers from China and Vietnam materially injure or threaten to injure U.S. industry. Chairman Irving Williamson and Commissioner Shara Aranoff found U.S. industry is materially injured. Commissioner Dean Pinkert found industry is threatened with material injury. Commissioners Daniel Pearson, David Johanson, and Meredith Broadbent voted negative.