

Vol. 34, No. 9

March 3, 2014

Exports Supporting Fewer Jobs, Commerce Report Shows

The employment benefits of trade have dropped sharply in the last 20 years, with each billion dollars in exports creating just 5,590 jobs in 2012 compared to 1990 when a billion in exports produced 19,100 jobs, according to Commerce data. A Commerce press release Feb. 25 boasted about the increase in jobs created by exports, but an accompanying report measured the growth from 2009, the nadir of the Great Recession and a year that saw exports drop almost 20%.

An unstated corollary of the latest Commerce report is the smaller impact imports have on displacing U.S. jobs. This should temper the pro and con debate over trade but probably won't.

Based on preliminary data, there were 7.1 million export-related manufacturing jobs in 2012, compared to 6 million in 2009, Commerce said. Export-related service jobs rose to 4.2 million from 3.6 million. In a similar report on trade-related jobs in 1992, the department found 4,178,000 jobs in manufacturing and agriculture were supported by exports in 1990 and 2,992,000 jobs in services were export related. In the five years from 1986 to 1990, export-related jobs grew 42%, it showed. In comparison, from 2009 to 2013, export jobs rose just 16.5%, the new Commerce report indicates. While exports grew 275% from 1990 to 2013, export-related jobs rose just 60%.

The smaller impact of trade on jobs follows a similar pattern for manufacturing jobs overall, with fewer workers needed for each unit of production. This has been one explanation for why unemployment has not fallen as much as manufacturing has grown since the end of the recession. Just as with all manufacturing, exported goods need fewer workers because of increased productivity, technology and automation. Some in industry also note that foreign parts, components and materials make up a larger share of the value of final goods made in the U.S.

U.S. Sanctions on Ukraine on Hold as Turmoil Continues

The upheaval in Ukraine over the Feb. 22-23 weekend and the collapse of the government of President Victor Yanukovich interrupted plans the U.S. and European Union (EU) were working on to coordinate sanctions on some senior officials in the Yanukovich administration and to block exports of crime-control equipment. Nonetheless, the

EU Council of Ministers Feb. 20 suspended all export licenses to Ukraine for any equipment that might be used for internal suppression, froze the assets of certain individuals and also stopped granting them visas. “The White House was circulating last week a set of internal export control options to be considered,” W. Scott Reid III, deputy director of State’s conventional arms threat reduction staff, told WTTL. “I think it is premature for me to say exactly what form it is likely to take, but I think they will be seriously considered,” he added.

“We have consulted with the European Union. We have consulted with other major trading partners beyond. We have even had discussions with the Russians,” Reid said. He cautioned, however, that “things are moving so fast, and these are not the things that have immediate effect. It may be a second tier when this comes into place,” he told WTTL.

Due to the demonstrations and economic problems in Ukraine, U.S. trade with the former Soviet republic has declined sharply in the last three months. In December, U.S. exports to Ukraine were down 34% from December 2012, while imports were off 48%.

The EU Foreign Council also “agreed to reassess export licences of equipment covered by Common Position 2008/944/CFSP which defines common rules governing control of export of military technology and equipment,” the United Kingdom’s Export Control Organization (ECO) said in a Feb. 24 notice to exporters. “We are currently reviewing extant licences to determine which ones we assess to be for equipment which might be used for internal repression and would therefore be subject to suspension. We will notify exporters directly in the event that a licence is to be suspended,” the ECO added.

ECO said it is reviewing whether it is necessary “to revoke, suspend or amend any additional extant licences where the proposed transfer is no longer consistent with the Consolidated EU and National Arms Export Licensing Criteria.” This includes an assessment of exports that would provoke or prolong armed conflicts or aggravate existing tensions. “Exporters should be aware that there is still a good degree of uncertainty as to how the situation in the Ukraine will develop. This may result in longer processing times for export licence applications for the Ukraine,” ECO said.

USTR Will Look at Whole Special 301 Process

In response to criticism of the usefulness and perhaps legality of the Special 301 review of trading partners’ intellectual property protection, the U.S. Trade Representative’s (USTR) office plans to take a look at the entire process. “The committee has agreed to convene at the end of this year’s 301 review cycle to ... take a top to bottom look at the Special 301 process,” Susan Wilson, director for intellectual property and innovation at USTR, told a Special 301 hearing Feb. 24. The interagency Special 301 committee will post a notice requesting public comments in “late spring, early summer,” Wilson said.

Wilson made the announcement after several speakers at the hearing on the next round of Special 301 designations questioned the very jurisdiction and legality of Special 301 under World Trade Organization (WTO) rules against unilateral adjudication of trade disputes. Other testimony focused on India and its designation on the annual Special 301 list. Like the International Trade Commission hearing on Indian trade policies two weeks before, industry and nongovernmental organizations took distinctly opposite sides

of the argument (see **WTTL**, Feb. 17, page 3). On one side, representatives of manufacturing and pharmaceutical industries recommended that the USTR designate India as a Priority Foreign Country (PFC), the highest level of concern under Special 301 rules, because of its patent policies and compulsory licenses. Brian Pomper, speaking for the Alliance for Fair Trade with India (AFTI), called the country's domestic policies "qualitatively worse" than it had been in generations. He said his organization, a coalition of associations, had a "real concern of the contagion effect" on other countries.

Public health and consumer groups, which were outnumbered at the hearing, argued that India's policies are compliant with the WTO's agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Peter Maybarduk, director of Public Citizen's Global Access to Medicines Program, argued the USTR needed to "differentiate between criminal activity [software piracy] and public policy." He suggested developing countries should be "given greater leeway" in the review process.

After the hearing, AFTI sponsored a letter to USTR Michael Froman from 50 state-based trade organizations, repeating the urgency of naming India a PFC. "This designation appropriately would rank India among the very worst violators of intellectual property rights and establish a process leading to concrete solutions," the letter said. "India's systematic discrimination against U.S. innovators and its growing theft of U.S. intellectual capital demand no less," it added.

Last year, the USTR designated Ukraine a Priority Foreign Country (PFC), the first such new designation since 2001 (see **WTTL**, May 6, 2013, page 6). The last country to earn that designation was Ukraine, which was removed from that list in 2005. Ukraine sent its chairman of the State Intellectual Property Service to defend itself at the USTR hearing this year, but some might say the country has bigger problems to solve, such as forming a new government and quelling unrest in its streets. The Special 301 report is due by April 30. Before that, the USTR's office Feb. 28 announced that it has removed Israel from its Special 301 "watch list" because Jerusalem has passed patent legislation that satisfies commitments it made in 2010 agreement with U.S.

Holleyman Nomination Brings Charges of Revolving Door

President Obama's nomination Feb. 27 of Robert Holleyman, the former president of the Business Software Alliance (BSA), to be deputy U.S. trade representative (USTR) has drawn praise from the business community but also charges that Holleyman represents another example of the government-industry revolving door. Holleyman would fill the deputy post that has been vacant since Demetrios Marantis left the job last May to join the technology firm Square.

Holleyman spent 23 years as president and CEO of BSA | The Software Alliance, leaving in 2013 to found Cloud4Growth, a cloud technology development company. As head of BSA, Holleyman "led public policy initiatives and programs that broke down trade barriers and opened new markets for innovators in PC and server software, mobile technologies, and cloud computing services," his bio on the Cloud4Growth website notes.

The White House has not yet named a replacement for Deputy USTR Miriam Shapiro, who announced in January that she would be leaving her post in February (see **WTTL**, Jan.

27, page 1). There had been speculation that she would be leaving her post ever since Froman took office in June. During her four years at the USTR's office there have been reports of friction between her and career staffers. The USTR's office continues to rank lowest among all government agencies in a survey of employee job satisfaction.

The revolving path between the administration and BSA, which has been staffed over the years with several former congressional aides, continued when the group named Victoria Espinel to replace Holleyman in September 2013. Espinel had served as the Obama administration's first intellectual property enforcement coordinator and earlier was assistant USTR for intellectual property and innovation.

Espinel applauded Holleyman's nomination. "Robert's deep experience in both the public and private sectors makes him an ideal person to lead trade negotiations as the Administration pursues an ambitious 21st century trade agenda," she said in a statement.

Jamie Love of Knowledge Ecology International, a nonprofit group that has criticized U.S. trade policies, sent several tweets Feb. 27 about Holleyman's nomination. "What an outrage. Former BSA nominated by president to new USTR post," he said in one. "In graduate school, the revolving door was seen a problem. For the UTradeRep and White House, appears to be seen as an opportunity," he said in a second one.

Holleyman has been a member of USTR's Advisory Committee for Trade Policy and Negotiations since September 2010. Prior to BSA, he served as senior counsel for the Senate Commerce Committee and before that was legislative director and assistant to former Sen. Russell B. Long (D-La.). He has a B.A. from Trinity University and a J.D. from Louisiana State University.

TPP Ministers Can't Overcome Traditional Divisions

While trade ministers tried to put a slightly positive spin on the conclusion of their latest round of talks in Singapore toward a Trans-Pacific Partnership (TPP) Feb. 25, no one is denying the obvious divisions that still remain. In a joint statement after their meeting, the 12 participating ministers and heads of delegation used this buzzword bingo. "While some issues remain, we have charted a path forward to resolve them in the context of a comprehensive and balanced outcome," the statement said. In a call with reporters Feb. 25, U.S. Trade Representative Michael Froman wasn't much more specific.

"We leave this ministerial with the remaining issues being more narrowly defined and the path to conclusion clearer than ever before," he said. Pressed on particular issues, he said, "We were able to make very significant progress in the areas of state-owned enterprises, investment in services, telecom, and SPS issues." With the previous end-of-2013 deadline already missed, Froman said "the substance of the negotiations will determine the timetable." The date for the next ministers' meeting was not announced.

Supporters of a deal still back the talks, while opponents, both domestic and international, oppose core provisions of the agreement. U.S. Chamber of Commerce Vice President for Asia Tami Overby, who was in Singapore during the meetings, remained upbeat. "While difficult issues remain, it is encouraging that negotiators did not hastily

push to a close. The TPP is too important to rush, and negotiators clearly want to get it right,” she said in a statement. On the other side, Public Citizen’s Lori Wallach summed up the rock and hard place between which negotiators find themselves. “U.S. proposals for enforceable labor and environmental standards and disciplines on state owned enterprise face continuing opposition from other TPP nations, but the absence of such terms would make U.S. congressional approval of the TPP improbable,” she noted.

Another divisive issue in talks with Japan has long been market access for U.S. agriculture. In a letter sent prior to the talks, a bipartisan group of 18 senators asked Froman for a guarantee of an agreement on this issue. “We seek assurances from you that the U.S. will not close the TPP negotiations without an acceptable comprehensive agreement with Japan to eliminate tariff and non-tariff barriers in agriculture,” the letter noted. Signers included Sens. Charles Grassley (R-Iowa) and Michael Bennet (D-Colo.).

State Taking Slow Path Toward Arms Treaty Ratification

The Obama administration will send the United Nations Arms Trade Treaty (ATT) to the Senate for ratification “in due course,” W. Scott Reid III, deputy director of State’s conventional arms threat reduction unit, told the Bureau of Industry and Security’s (BIS) Feb. 24 Export Control Forum in Newport Beach, Calif., quoting a senior State official’s statement on the accord. “There are about eight different administration priority treaties out on the schedule ahead of us, so due course is really the best answer anyone can realistically give right now,” he said.

So far, 116 countries have signed the treaty but only 11 have ratified it, the most recent being Norway Feb. 12. The U.S. signed the ATT in September (see **WTTL**, Sept. 30, page 1).

“We’re doing a tremendous amount of internal work right now on it,” Reid said, noting that some of the work is not very exciting. State is also talking with Senate staff. “We’re on schedule with staff trying to talk to them about when we can do staff background meetings and key member meetings,” he reported. “That really does take a lot of time,” he added.

Some critics of the ATT have raised concerns that President Obama might try to skirt the Senate where there is strong bipartisan opposition to the pact. Reid emphasized that the ATT will be treated as a treaty model. “What people are getting at is whether this will be an executive order model. It is not that. It is a treaty model,” he said.

Section 337 Litigants Look to White House Report for Help

Both domestic petitioners and foreign respondents in Section 337 patent-infringement cases say they hope a White House paper due in the next two months will help resolve disputes over how to enforce International Trade Commission (ITC) exclusion orders. Because ITC orders are given to Customs and Border Protection (CBP) to enforce, there is no clear way to resolve disputes over the scope of the orders after they are issued, both sides complain. Alexander Neijelow, chief of staff of the White House Intellectual Property Rights Coordinator Office, told a Georgetown University Law School trade

conference Feb. 27 that his office will release a paper within seven weeks that will address issues raised in public comments on President Obama's intellectual property initiative. Among the goals of the paper will be addressing the trade community's call for more transparency, efficacy and efficiency in the enforcement of 337 orders.

CBP enforcement of the orders can be difficult because the orders don't identify infringing imports by serial number and Customs border agents need to be able to determine whether an import contains the blocked component. In addition, importers often claim that their goods involve a "design around" that excludes the infringing patent element. Petitioners complain that there is no regulatory framework to allow them to help Customs enforce the orders or to issue its rulings even when the decision is appealed to the Court of International Trade.

Richard DiNucci, acting CBP assistant commissioner for international trade, told the conference that Customs has tried to hold informal *inter partes* meetings with petitioners and respondents to get clarification on the scope and application of orders. But the sides "could not agree on what they want to talk about" because they don't want their competition to see what they are doing, DiNucci said. ITC Commissioner Dean Pinkert said parties are invited to apply to the commission for an advisory opinion on the coverage of an order, which can be faster than litigation but cannot be appealed and doesn't follow Administrative Practice Act rules.

*** * * Briefs * * ***

BIS: Ned Weant, director of BIS Office of Antiboycott Compliance (OAC) retired Feb. 24. He joined BIS in 1991. OAC Assistant Director for Enforcement Cathleen Ryan will serve as acting director. Ryan, who joined BIS in 1993, has B.S. from Georgetown University, MBA from New York University and J.D. from NYU. Also retiring Feb. 28 was Joseph Tosto Jr., export administration specialist in BIS' Newport Beach, Calif., office.

USTR: Carol Guthrie, assistant USTR for public and media affairs, left post Feb. 28 after five years with USTR's office. She will become head of Washington Center for Organization for Economic Cooperation and Development (OECD) starting in mid-March.

ANTIBOYCOTT: BWI Corporation, freight forwarder in Glen Burnie, Md., agreed to pay BIS \$9,000 civil penalty Feb. 12 to settle one charge of furnishing information about business relationships with boycotted countries and six charges of failing to report receipt of request to engage in restrictive trade practice. BWI included boycott language in shipping certificates and received requests in letters of credit from UAE and Oman.

SPACE EXPORTS: In final report on "deep dive" into space industry, BIS found only 26% of 3,780 respondents used export control system. Also, 51% or 1,941 of respondents provide products and services that may be impacted by export control reform, including 1,288 respondents that do not currently use export control system, agency found. Other findings: 405 respondents requested more information about export licensing, of which 44% are "currently using U.S. space-related export controls in some fashion," BIS reported. Agency previewed findings at President's Export Council's Subcommittee on Export Administration (PECSEA) meeting in September (see **WTTL**, Sept. 23, page 3).

SERVICES: Sixth round of talks on Trade in Services Agreement (TISA), which concluded Feb. 24 in Geneva, saw talks "gathering momentum" after eight days of meetings, EU reported. EU,

which chaired sessions, said 21 of 23 participants have now tabled offers, with only Pakistan and Paraguay still to put forward theirs. “Negotiators discussed maritime services, mode 4, financial services, domestic regulation, transparency, professional services, telecommunication services and electronic commerce,” EU statement noted. “Talks focused on technical issues and working groups have been set up to discuss texts based on participants’ proposals. The next round, chaired by Australia, will take place the week of April 28,” it said.

PERSULFATES: ITC voted 6-0 in “sunset” determination Feb. 24 that ending antidumping duty order on persulfates from China would cause renewed injury to U.S. industry.

WOVEN SACKS: In 5-0 “sunset vote” Feb. 28, ITC determined that ending antidumping and countervailing duty orders on laminated woven sacks from China would cause renewed injury to U.S. industry. Commissioner F. Scott Kieff did not participate.

PEC: President Obama Feb. 26 named Deloitte CEO Joe Echevarria to be member of President’s Export Council (PEC). Echevarria has been CEO since June 2011 and joined Deloitte in 1978. He served on Presidential Commission on Election Administration from 2013 to 2014. Echevarria received B.A. in Business Administration from University of Miami.

DEEMED EXPORTS: Intevac, Inc., of Santa Clara, Calif., agreed Feb. 19 to pay \$115,000 to settle five BIS charges of transferring controlled technology to Russian national working at its U.S. facility in 2007 and Chinese national at Chinese subsidiary in 2010 without Commerce licenses. Intevac allegedly transferred technology to Russian national while waiting on deemed export license that was eventually granted. Company filed voluntary self-disclosure but neither admitted nor denied charges.

IMPORT ENFORCEMENT: Three Philippine nationals were sentenced in L.A. U.S. District Court on charges of violating Arms Export Control Act (AECA) by importing defense articles into U.S. without licenses, including 12 fully automatic Bushmaster M-4 .223 caliber rifles, .50 caliber sniper rifle, M14 7.62mm assault rifle, single-shot grenade launcher, rocket propelled grenade (RPG-7) launcher, mortar launcher, AK-47 rifle and ballistic vests. On Feb. 26, Cesar Paolo Inciong Ubaldo was sentenced to 60 months in prison, followed by two years’ supervised release, and Arjyl Revereza was sentenced to 51 months in prison, followed by two years’ supervised release. Sergio Santiago de Leon Syjuco was sentenced Feb. 25 to 84 months in prison, followed by three years’ supervised release, and ordered to pay \$15,000 fine. Jury found trio guilty March 4, 2013, after 20-day trial. Then each filed motion for acquittal on ground that there is no extraterritorial jurisdiction under AECA, which court rejected. All originally were indicted Jan. 12, 2012 (see **WTTL**, Jan. 23, 2012, page 4).

ITA: Commerce’s Inspector General issued notice Feb. 20 that at direction of Senate Appropriations Committee it was conducting audit of International Trade Administration’s (ITA) reorganization, which has consolidated four of its units into three (see **WTTL**, Oct. 21, page 1). “Specifically, OIG is to evaluate: management and leadership challenges related to the consolidation; relevant changes in staffing and funding levels in headquarters, domestic, and overseas offices; and expected increases or decreases in administrative and overhead costs,” notice said.

TOURISM: International visitors spent \$181 billion on travel and tourism-related goods and services in 2013, Commerce reported Feb. 28.

TARGETED DUMPING: CIT Judge Jane Restani Feb. 27 sustained Commerce’s administrative review of antidumping duty orders on ball bearings and parts from France, Germany and Italy. She agreed with department’s use of test from *Nails* case for determining whether targeted dumping has occurred and cited previous rulings that said targeted dumping must involve pattern of prices that differ among purchasers, regions or periods of time, and difference must be significant. “To the extent that some of the reasoning in the discussed cases might be

construed as inconsistent with Commerce's actions in this case, the court finds such minor inconsistency insufficient to conclude that Commerce abused the discretion granted to it in selecting an alternative methodology. The statute used by Commerce for guidance in conducting a targeted dumping analysis in reviews states that Commerce 'may' use the A-T methodology if the statutory criteria are met," Restani ruled.

WTO: It's not just trade agreements members can't agree on. Dispute-Settlement Body (DSB) remains deadlocked over selection of new Appellate Body member. At DSB's Feb. 26 meeting, Chairman Jonathan Fried, ambassador from Canada, reported on lack of progress after 10 months in filling AB vacancy. Selection committee has recommended reopening search process. Kenya, which is sponsoring one candidate, said DSB should take vote on four candidates, including from Kenya, Australia, Cameroon and Egypt, but suggestion was rejected by other countries that want to keep selection on consensus basis. Fried said decision on committee's recommendation would be made at next DSB meeting at end of March.

NIST: Federal government contributed \$1.1 million toward \$2.5 million National Institute of Standards and Technology's (NIST) 2012 annual conference in Orlando for participants in Manufacturing Extension Partnership, with NIST paying \$708,970 of that amount, Commerce Office of Inspector General (OIG) reported Feb. 21. NIST, however, failed to control conference spending adequately, OIG said. Event planner "retained and/or spent \$236,341 in sponsorship fees, commissions, concessions, and excess registration fees instead of returning these funds and benefits to the government," it found. NIST should seek to recover funds from event planner, International Management and Consulting LLC, including "retained Marriott concessions and benefits (golf greens fees, free rooms, travel points) for the May 2012 conference that could have been used to reduce the government's conference cost," it said.

CITRIC ACID: CIT Judge Judith Barzilay sustained Commerce remand decision Feb. 24 on administrative review of CVD order on citric acid and citrate salts from China (slip op. 14-21). Commerce reasonably concluded that Chinese respondent (RZBC) did not pay less than adequate remuneration (LTAR) for steam coal, but did benefit from LTAR for sulfuric acid, she ruled. RZBC wanted Commerce to use benchmark prices at 10 and 11-digit level of specificity, which "implies that Commerce must use benchmark prices that are nearly identical to RZBC's reported purchases to satisfy the regulation," Barzilay noted. "The regulation, however, does not manifest such a stringent standard. It requires only that the selected benchmarks be comparable. Considering that sulfuric acid is a commodity product, and that RZBC did not establish clear divisions within the sulfuric acid market, Commerce's selection of benchmark prices for sulfuric acid at the 4, 6, and 8 digit level is consistent with the regulation," she wrote.

METALLIC YARN: CIT Senior Judge R. Kenton Musgrave dismissed request to reconsider his December ruling upholding Customs classification of metallic yarn (see WTTL, Dec. 23, page 6). Best Key Textiles Co. Ltd. continued to argue that classification of its yarn as polyester with lower duty rate than metallic yarn hurt its ability to sell to sweater manufacturers that would pay higher duty for polyester sweaters. "The court agrees it is 'highly questionable' whether a Customs' ruling that lowers the rate of duty on a product the plaintiff has no expressed intention of importing can result in aggrievement or adverse effect to the plaintiff, either directly or under a 'zone of interests' analysis, as intended under the Administrative Procedure Act (APA)," Musgrave wrote (slip op. 14-22). "The court remains unaware of any other suit brought against the government on the claim that the plaintiff or its property should be assessed a higher rate of tax or duty," he added in footnote.