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Editor & Publisher: Samuel M. Gilston • P.O. Box 5325, Rockville, MD 20848-5325 • Phone: 301.570.4544 Fax: 301.570.4545

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Push for More Small- and Medium-Size Exporters Comes Up Short

The government's obsequious effort to get more small- and medium-size (SME) companies to become involved in exporting showed minuscule results in 2012, according to new data released by the Census Bureau. The number of exporting SMEs increased just 0.4% from 2011 (from 296,800 in 2011 to 298,000 in 2012), while the number of large companies, defined as having 500 or more employees, exporting increased by 2.7% from 6,692 to 6,872, Census said in its "Profile of U.S. Importing and Exporting Companies, 2011 - 2012."

> Using the number of locations a firm operated as a gauge, the report found that 9.4% of all known exporters in 2012, the latest period for which data are available, (28,700) were multiple-location companies but accounted for 75.7% of the known exports by value. In contrast, 276,200 single-location companies made up 90.6% of exporting companies but contributed 24.3% of known exports by value.

On the import side in 2012 the picture looked the same, with 10.7% of all identified importers having multiple locations but accounting for 77.5% of known imports by value. Single location companies, made up 89.3% of importing companies but contributed just 22.5% of known import value.

Overall, large identified companies were responsible for 67.4% of known export value and 69.1% of known import value. They represented only 2.3% of all identified exporters and 2.9% of all known importers. In the manufacturing sector, the dominance of large firms was even greater, with large manufacturers (2,552) representing just 3.4% of all manufacturing but accounting for 81.9% of manufacturing export value ($686 billion of $837 billion), the report states.

Talks with Japan Make No Progress Before Obama Trip

Meetings between U.S. Trade Representative (USTR) Michael Froman and Japanese Economic Minister Akira Amari in parallel talks toward a Trans-Pacific Partnership (TPP) ended in a draw April 18, with neither a victory speech nor admission of defeat from either side. As a result, President Obama will visit Japan April 23 with no deal in

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his pocket and little chance his talks with Japanese Prime Minister Abe will produce a breakthrough in the bilateral talks. "The round we just completed was focused but difficult," a statement from Froman's office said April 18. "After more than 20 hours of negotiations, we continue to make progress, and we are now faced with a reasonable number of outstanding issues," it said. "These issues are important to both sides and considerable differences remain," it added. Differences in agriculture and the automotive sector have long frustrated the negotiations (see **WTTL**, April 14, page 6).

> The USTR statement seemed to belittle Japan's offers for a deal, while remaining hopeful of future cooperation. "We have worked to be as creative as possible to address Japan's political sensitivities, while pursuing the overall objective of achieving meaningful access to its market," USTR noted. "We look to Japan to make similar efforts," it continued.

Appellate Court Should Give Deference to CIT, Professors Argue

The Court of Appeals for the Federal Circuit (CAFC) should give deference to the opinions of the Court of International Trade (CIT) in antidumping and countervailing duty cases, a group of seven law professors contend. When Congress enacted the Customs Courts Act of 1980 (CCA80), which created the CIT, it "expressly created a 'substantial evidence' standard" for the CIT to apply in trade remedy cases "but did not expressly create a standard of review for the Court of Appeals for the Federal Circuit," they wrote in an amicus brief filed in the Supreme Court in support of a petition for a writ of certiorari that NSK Corporation submitted to the high court, seeking to reverse a CAFC ruling in *NSK v. ITC* (see **WTTL**, Nov. 4, page 3).

> In a nonprecedential ruling in November, a divided CAFC rejected NSK's request for en banc review of its decision to overturn the CIT's repeated remands of an International Trade Commission (ITC) determination in a "sunset" review of ball bearing imports. In that ruling, however, two of the three judges hearing the case declared that the CAFC doesn't have to give deference to the CIT's decisions and can conduct its own "substantial evidence" review of cases *de novo*.

The CAFC's *de novo* standard of review "is inconsistent with both Congress' recognition of CIT expertise and Congress' creation of a structure to further advance CIT expertise in trade remedy matters expressed in the CCA80," the professors said. "AD and CVD determinations involve complex, detailed, and extensive factual matters and very intricate law, both domestically and internationally," they added. "Thus, unsurprisingly, Congress intended to have the most intensive review of those determinations handled by experts on the CIT. Congress has expressly recognized that CAFC is not a 'specialized court' and less than 5% of CAFC's caseload is trade cases." their brief said.

The professors also cited an earlier CAFC standard of review decision in *Atlantic Sugar,* which they claimed "is also inconsistent with Congressional intent to reduce duplicative and redundant review of AD and CVD determinations and Congressional objectives to reduce the time frame for deciding AD and CVD cases." The CAFC itself "has admitted the misguided approach of *Atlantic Sugar* over the past two decades by beginning to accord an ill defined level of deference to CIT decisions," they noted. "Amici submits that CAFC has varied in the level of deference it enunciates, and has inconsistently

applied these adjustments to its original *Atlantic Sugar* ruling, leaving trade litigants and lawyers facing considerable uncertainty. It is respectfully submitted that CAFC should be applying a 'misapprehended or grossly misapplied' standard of review to CIT decisions in AD and CVD cases. Supreme Court clarification of the appropriate standard of review to be applied by CAFC is now critically necessary because of the split among CAFC judges and the decades of inconsistent CAFC jurisprudence," they argued.

> "Amici thus request that the Court accept certiorari in this case to overturn the standard of review adopted in *Atlantic Sugar, particularly since CAFC has inconsistently applied the standard for decades,*" prayed the brief filed by William G. Dittrick of Baird Holm LLP in Omaha, Neb., and Matthew Schaefer, professor of law at the University of Nebraska College of Law [original emphasis].

Joining in the brief were law professors Padideh Ala'i, American University Washington College of Law; Steve Charnovitz, George Washington University Law School; William Davey, University of Illinois College of Law; Robert Howse, New York University School of Law; Petros Mavroidis, Columbia University Law School; and Claire Wright, Thomas Jefferson School of Law.

Treasury Stops Short of Naming Currency Manipulators

While critics of Chinese trade policies continue calling for the U.S. to name Beijing a currency manipulator, Treasury April 15 again stopped short of tagging China in its semi-annual report to Congress. In its report on international economic and exchange rate policies, Treasury didn't name any country as a manipulator but merely criticized China along with Japan, Korea, Germany, five other countries and the Euro area.

> "No major trading partner of the United States met the standard of manipulating the rate of exchange between their currency and the United States dollar for purposes of preventing effective balance of payments adjustments or gaining unfair competitive advantage in international trade," report found.

"The Chinese authorities have been unwilling to allow an appreciation large enough to bring the currency to market equilibrium, opting instead for a gradual adjustment which has now been partially reversed," it noted. "China has continued large-scale purchases of foreign exchange in the first quarter of this year, despite having accumulated $3.8 trillion in reserves, which are excessive by any measure. This suggests continued actions to impede market determination," it added.

"Although Korea does not publish data on its foreign exchange intervention, during the second half of 2013 the Korean authorities are believed to have intervened to limit the pace of won appreciation," it said. "The magnitude of these changes is larger than can be reasonably expected from simple interest earnings on the existing stock of reserve assets or valuation changes. The Korean authorities should limit foreign exchange intervention to the exceptional circumstances of disorderly market conditions and increase the transparency of their interventions in foreign exchange," the report noted.

"Japan has not intervened in the foreign exchange markets in almost two years," the report noted. However, Tokyo has shifted to fiscal consolidation, it said. "It is

important that Japan carefully calibrate the pace of overall fiscal consolidation. Monetary policy cannot offset excessive fiscal consolidation nor can it substitute for necessary structural reforms that raise trend growth and domestic demand," Treasury wrote. U.S. Big Three carmakers are insisting that U.S. address Japanese currency manipulation in Trans-Pacific Partnership agreement (see **WTTL**, April 14, page 6).

> Critics of China trade policy criticized the report. "President Obama's approach to this ongoing problem has been completely inadequate, and that it has cost American jobs," said Alliance for American Manufacturing (AAM) President Scott Paul in a statement. "It's disappointing, too, that Congress has done nothing to respond to China's cheating on currency, this year or last. But in the absence of congressional action, the president, with his 'pen and phone' tools, could do a lot. And he hasn't," Paul added. AAM is a nonprofit partnership of U.S. manufacturers and the United Steelworkers.

CAFC Rejects Customs Reclassification of Sauce

Customs and Border Protection (CBP) can't use a notice of action letter to revoke a Ruling Letter without going through a notice and comment period required by Customs law, the Court of Appeals for the Federal Circuit (CAFC) ruled April 14. The decision is the latest in a long-running legal battle that International Customs Products, Inc., (ICP) has fought since 2005 to keep the white sauce it imports under the tariff classification that CBP first granted in a Ruling Letter rather than a new classification in the notice of action letter, which raised the import duty by 2,400%. The CAFC ruling affirmed a CIT decision that also sided with ICP (see **WTTL**, Nov. 26, 2012, page 3).

> After a bench trial, CIT Judge Gregory Carman had found the Ruling Letter applied to the ICP's entry and rejected Customs' argument that ICP had made material misstatements that rendered the Ruling Letter *void ab initio*. "The CIT concluded the Notice of Action's reclassification of all pending and future entries of white sauce effectively revoked the otherwise controlling Ruling Letter without adherence to Section 1625(c)'s notice and comment procedures," CAFC Judge Evan Wallach noted in opinion for the three-judge panel in *International Custom Products v. U.S.* (2013-1176).

"Once Customs issued the Ruling Letter, ICP and other importers were entitled 'to expect certainty' that Customs 'w[ould] not unilaterally change' the classification 'without providing proper notice and an opportunity for comment'," he wrote, quoting from the congressional report accompanying the NAFTA implementation legislation that included the comment requirements.

"The Notice of Action's reclassification of all pending and future white sauce entries after over six years of ICP's reliance on the Ruling Letter was just the type of 'change [in] the rules' that section 1625(c) was designed to address," Wallach wrote. "Customs must be held to the broad scope of its reclassification even though it was communicated through a notice of action," he added.

Wallach rejected the government's contention that it would be administratively infeasible to apply section 1625(c) to notices of action. "The CIT did not hold that *all* notices of action are now subject to notice and comment procedures. The CIT held only that the

Notice of Action in this case—which effectively revoked the Ruling Letter and was issued after relevant OR&R deliberation—was subject to section 1625(c)'s procedures. To the extent the government is not using notices of action to surreptitiously revoke ruling letters, its slippery slope argument is vastly overstated," he declared.

Remand Ordered to Explain Surrogate Data in NME Case

A lot of trade lawyers will lose business when China is no longer considered a non-market economy (NME) after 2016. The almost never-ending – sometimes nitpicking – debate over the calculation of surrogate data in antidumping (AD) and countervailing duty (CVD) cases against Chinese products has produced thousands of billable hours for lawyers for petitioners and respondents and numerous court decisions challenging how Commerce selects and applies data in these cases.

> In a new ruling from CIT April 16, Judge Delissa Ridgway needed a 92-page decision to explain why she was remanding the department's use of surrogate data in 15th administrative review of the dumping order on garlic from China. "This matter must be remanded to Commerce for further consideration of the surrogate value for whole raw garlic bulbs, the surrogate wage rate, and the surrogate financial ratios, as well as to permit the agency to review the application of its 'zeroing' methodology in the administrative review at issue in light of Xinboda's arguments and all relevant intervening legal developments," Ridgway ruled (slip op. 14-45).

As in many NME cases involving China, Shenzhen Xinboda Industrial Co., Ltd., challenged Commerce's selection of certain data from India, which was used as the surrogate country, and its exclusion of other data. The ruling underscores the difficulty in finding similar matching data on products, wages and costs and choosing the sources of data to use. In her lengthy decision, Ridgway found that Commerce had not adequately explained its choices or made the wrong choices.

Among its challenges to Commerce's findings, Xinboda opposed the department's pricing of garlic bulbs bought by an Indian producer Azadpur APMC. "The record evidence that Xinboda has marshaled significantly undermines Commerce's representation that the Azadpur APMC prices used in the Final Results reflect farm gate prices for whole raw garlic bulbs, the intermediate input in question," Ridgway found.

She agreed that Commerce had not correctly applied a new methodology for determining wage rates in NME cases based on Court of Appeals for the Federal Circuit's *Dorbest IV* decision in 2010. "In response to the Court of Appeals' ruling in *Dorbest IV*, Commerce abandoned the surrogate labor calculation methodology codified in its regulations and implemented an interim methodology," she noted. She remanded this decision to Commerce "to allow the agency to address Xinboda's claims that the use of data from countries other than India was unreasonable and to allow the agency to evaluate and explain the feasibility of applying the Revised Labor Methodology here, in a manner consistent with the agency's actions in other similar proceedings."

Ridgway also told Commerce to explain its treatment of financial statements from Indian surrogate companies. "In sum, Commerce is required to provide a reasonably discernable path to its decision, so as to support judicial review," she wrote. "No such path is

discernable here. It may be possible for Commerce to articulate and adequately support a justification for its practice of "rely[ing] on information in financial statements on an 'as is' basis," and ignoring all other record evidence. But Commerce has not even attempted to do so yet," she added.

> "If Commerce were to determine on remand that it is appropriate for the agency to look beyond the face of a financial statement at least in some circumstances, it would be useful for Commerce to set forth the purpose or purposes for which the agency will undertake such a broader review," she ruled. "The law requires Commerce to make a reasoned decision as to the surrogate financial statement(s) on which it chooses to rely, and to both adequately explain its rationale and support its decision with substantial evidence," Ridgway explained.

Finally, in remanding Commerce's use of zeroing in the case, she said the department should have the opportunity to justify its decision in line with the CAFC ruling in Union Steel. "All parties agree that the explanation of zeroing set forth in the Final Results is insufficient. It would be inefficient to deprive Commerce of the opportunity to review its position in light of the numerous intervening legal developments and to clearly set forth the bases for its determination," she ruled.

* * * Briefs * * *

CJs on HOLD: DDTC April 14 posted notice on website saying "Due to technical issues, all new CJ submissions and those currently in process will be on hold until further notice. Updates regarding this web notice will be provided as new information is received." Agency last posted final CJ determinations March 20.

BROKERING: United Kingdom's Department for Business Innovation & Skills published request for comments, which it refers to as "call for evidence" on potential benefits and costs of a pre-licensing register for brokers. "We are considering whether a register should be established and how various models of a register might work. We are looking at a range of possible elements of a register to help us decide which, if any, might be suitable to bring forward as a formal proposal. We also seek views on whether any of these elements might be implemented on a stand-alone basis, without creating a formal register," department explained.

FOREIGN TRADE REGULATIONS: Census has extended effective date for enforcement of Foreign Trade Regulations (FTR) rules published in March 2013 (see **WTTL**, Nov. 18, page 8). Along with extending effective date to April 5 from Jan. 8, it issued FTR Letter April 3 to inform trade that it will extend "informed compliance" period 180 days. "During this time, no penalties will be issued for failure to comply with any new requirements found in the March 14, 2013 rule. Penalties may be issued for violations of regulations that remain unchanged from the FTR published on June 2, 2008. The period of informed compliance will take place from the revised FTR effective date of April 5, 2014 through October 2, 2014," letter said.

STEEL THREADED ROD: In final 5-0 negative vote April 17, ITC found U.S. industry is not materially injured by allegedly dumped imports of certain steel threaded rod from Thailand. As result, no antidumping duty order will be issued on these imports, ITC said. Vote on imports from India still pending (see **WTTL**, Aug. 12, 2013, page 8).

UKRAINE: Canada added sanctions April 12 against two individuals and one firm in Ukraine April 12: Valery Medvedev, chair of Sevastopol Electoral Commission, Mikhail Malyshev, chair of the Crimean Electoral Commission, plus gas producer Chornomornaftogaz, which also was

target of U.S. sanctions (see **WTTL**, April 14, page 8). Separately, at press conference April 17 to announce agreement with Russia to deescalate conflict in Ukraine, Secretary of State John Kerry said: "There was no discussion at this point in time of removal of any of the existing sanctions. I think everybody understands that would be premature at a moment where we're putting to test the bona fides of the proffers made today in the course and context of this agreement. So if this agreement pans out and they do indeed produce some change on the ground, then obviously, as we go down the road, I'm sure that is going to become a topic of conversation, but it's premature right now."

CENTRAL AFRICAN REPUBLIC: In Federal Register April 17, State amended ITAR to implement UN arms embargo against Central African Republic, adding blanket policy of export and import license denial. Exceptions include nonlethal defense articles and technical assistance solely for use by UN and African Union operations, French forces and EU operation in country.

IRONING BOARDS: CIT Judge Leo Gordon still isn't satisfied with way Commerce translated brokerage and handling fees for 20-foot containers to 40-foot containers used by Chinese exporter of floor-standing, metal-top ironing tables. Gordon April 15 remanded for second time Commerce's administrative review to correct its calculation and to address objections to its use of zeroing. "The court wonders what prevents Commerce from simply using Foshan Shunde's average number of units shipped per 40-foot container instead of weight," he wrote (slip op. 14-44). "Such an approach could spare Commerce the additional conversion effort as well as the additional risk of further error," he added (see **WTTL**, June 3, 2013, page 7).

FCPA: GlaxoSmithKline (GSK) April 16 responded to media reports of FCPA investigation of its employees in Jordan and Lebanon. "GSK can confirm we are investigating allegations regarding the activity of a small number of individuals in our operations in Jordan and Lebanon. We started investigating using internal and external teams as soon as we became aware of these claims. These investigations have not yet concluded," company said on its website. "We publicly disclose all cases of misconduct identified in the company. Last year there were 161 violations relating to breaches of our sales and marketing polices, resulting in 48 dismissals and 113 written warnings," it added.

USTR GOES HOLLYWOOD: Film paper Variety reported April 15 that Deputy USTR Michael Punke's novel "The Revenant" will go into film production this fall with Leonardo DiCaprio and directed by Alejandro Gonzalez Inarritu, who previously directed "Babel" and "21 Grams." Punke's book centers on 1820s story of frontiersman "on a path of vengeance against those who left him for dead after a bear mauling," Variety said. Sounds like WTO.

CUBA: CWT B.V., travel services provider in Netherlands, agreed April 18 to pay OFAC $5,990,490 fine to settle charges of violating Cuban sanctions. From August 2006 through November 2012, it provided travel services to or from Cuba for 44,430 people, agency claimed. It voluntarily self-disclosed violations to OFAC. CWT, also known as Carlson Wagonlit Travel, is owned by hotel giant Carlson, which also operates Radisson Hotels and TGIFridays.

CANADA: Bipartisan group of 32 House members sent letter April 10 to USTR Michael Froman, urging him to add Canada to Special 301 Priority Watch List for its "application of international inconsistent patent standards," including revoking of 18 patents for medicines "on the basis that they are not 'useful,'" letter said. "We believe that Canadian courts have significantly weakened patent standards through a misinterpretation of the internationally accepted utility standard, directly harming the competitiveness and economic growth of U.S. innovators," they wrote. Signers included Rep. Andre Carson (D-Ind.), whose Indianapolis district is home to drug company Eli Lilly, which is in legal fight with Ottawa over patents cited in letter.

RARE EARTH: China is expected to file its own appeal to WTO Appellate Body of dispute-settlement panel ruling against its treatment of rare earth exports. U.S. has also appealed portions of ruling (see **WTTL**, April 14, page 8).