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India Throws WTO Bali Deals into Chaos

India, which almost sank the World Trade Organization's (WTO) ministerial meeting in Bali in December, has created another crisis by blocking a protocol to implement a deal on trade facilitation. Diplomats in Geneva are now scrambling to salvage the agreement before a July 31 deadline. At a WTO General Council meeting July 25, India insisted that permanent adoption of the trade facilitation protocol be put off until the end of 2014 and be tied to an agreement on food stockpiling (see **WTTL**, July 21, page 3).

In a statement, U.S. Trade Representative (USTR) Michael Froman said he was "deeply disappointed that backsliding on trade facilitation has brought the WTO to the brink of crisis." He said ministers in Bali had reached separate agreements on trade facilitation and food stockpiling and each had "its own work program and timetable." Agreement on food stockpiling was not due until the end of 2017.

"The current state of play on Trade Facilitation threatens to deal a serious blow to the credibility of the multilateral trading system and to set back the development needs of many countries around the world. We will be consulting with other WTO Members on appropriate next steps," Froman said. G-20 trade ministers failed to broker deal at meeting in Sydney, Australia, July 19. A European Union statement said it "is not ready to renegotiate basic elements or timelines that were agreed as integral part of the Bali package." The EU said it is ready to work to find a solution to the impasse by July 31.

At the General Council meeting, an Indian representative said India's expectations after Bali have been "completely belied" by lack of progress on issues other than trade facilitation. "As a consequence, even seven months after Bali, we do not have the required confidence and trust that there will be constructive engagement on issues that impact the livelihood of a very significant part of the global population," he declared. "All we are asking is that the public stockholding issue as well as other decisions of Bali be taken forward in the same timeframe as trade facilitation," he said in his prepared statement.

Uncovered Affidavit Questions Fokker's Voluntary Disclosure

The Fokker Services B.V. (FSBV) case is getting curiouser and curiouser. Two weeks after a federal judge put a stick in the wheels of Justice's deferred prosecution agreement

(DPA) with the Dutch company, Justice attorneys revealed new information that could put the whole deal even more in question (see WTTL, July 14, page 1). Two days before a scheduled status conference in D.C. U.S. District Court July 24, BIS provided Justice “for the first time” with a 2013 affidavit from an agency special agent, who retired in 2012, challenging claims that Fokker made a voluntary self-disclosure (VSD).

“Some of the opinions expressed in the Poole Affidavit raise questions that are relevant to the issues discussed in the government’s Supplemental Memorandum and are inconsistent with the government’s current understanding of the facts,” Justice conceded in a motion to postpone the hearing for two weeks. District Judge Richard Leon agreed to move the hearing to Aug. 21.

In addition to putting the Fokker settlement at risk, the new disclosures raise questions about how BIS and Justice treat VSDs and whether the government will disregard a VSD only when it has opened a formal investigation and not just when it has previous knowledge of the alleged violations. In general, BIS and Justice officials have broad authority to use VSDs to mitigate fines and prosecution.

The Export Administration Regulations (EAR) and BIS penalty guidance on VSDs give BIS’s Office of Export Enforcement (OEE) wide discretion in treating VSDs. “The provisions of this section apply only when information is received by OEE for review prior to the time that OEE, or any other agency of the United States Government, has learned the same or substantially similar information from another source and has commenced an investigation or inquiry in connection with that information,” notes EAR Section 764.5. BIS and Justice statements appear to be parsing these words to say Fokker’s disclosure counted because no formal investigation had been launched.

The affidavit by former Special Agent David Poole refuted Justice’s claim that the government learned of Fokker’s involvement from the company’s VSD. “Prior to my departure from federal service, I made clear that the submissions were neither self-initiated, truthful nor complete. Indeed, based on my investigation, I believe the conduct by FSBV was egregious and warrants prosecution of both the company and individuals and have informed the United States Attorney’s Office for the District of Columbia of this fact on repeated occasions prior to my departure.” Poole asserted.

One week prior to receiving that document from BIS, Justice filed a memorandum with the court supporting its decision to settle the case with a DPA. “Contrary to any suggestions in the press, the criminal conduct underlying the Information filed against Fokker Services was revealed to the government by Fokker Services itself following its own extensive internal investigation,” it wrote.

“The limited information about Fokker Services that the government learned in an earlier inquiry did not lead the government to take any investigate [sic] step focused on Fokker Services. Instead, Fokker Services became the subject of the government investigations that led to this criminal charge when it chose to come forward and confess its wrongdoing,” Justice added. In June, Fokker agreed to pay \$21 million to settle over 1,100 charges of illegal exporting and re-exporting of aircraft parts, technology and services to Iran, Burma and Sudan from 2005 through 2010, violating U.S. sanctions.

Press reports that the government learned of Fokker’s involvement from its ongoing investigation into Aviation Services International (ASI) caused Judge Leon to ask for the

status hearing rather than simply approving the DPA. Several sources have confirmed those reports and Poole's affidavit further supports that view. "As part of the ASI investigation, a number of entities remained under investigation, either formerly or informally, as the ASI cooperation furthered and developed. This included an investigation against FSBV," he wrote.

In a July 23 letter attached to the Justice motion, John Sonderman, OEE deputy director, wrote that he spoke with the special agent in charge of OEE's Boston field office and Stephen LaForest, the lead special agent on this case. "Based on these conversations, I believe the following to be true: OEE had taken no investigative steps focused on Fokker Services B.V. prior to the submission of their initial disclosure in June 2010; OEE has no evidence that Fokker Services B.V. was aware of the investigation prior to the submission of their initial disclosure; and Fokker Services B.V.'s disclosures were complete and accurate," Sonderman wrote.

To add a little mystery, the witness to Poole's sworn affidavit appears to be Stephen LaForest himself. Sonderman also called into question whether Poole had the latest information in the case. "At the time that Mr. Poole signed this affidavit, he had been retired from the agency for approximately one year and had no access to any of the details of the investigation or any submissions made by Fokker Services B.V. subsequent to his retirement," he wrote.

Judge Leon is himself no stranger to controversy. In March 2012, he dismissed the last charges against 22 gun dealers for violating the Foreign Corrupt Practices Act (FCPA) despite the cases' high profile. Just after that, he sentenced Richard Bistrong, who had cooperated with Justice in those cases, to a longer sentence than Justice had requested.

In another 2006 FCPA case Leon also sentenced the defendant to a longer term than was recommended. "How are we going to deter other people from bribing Iraqi officials and doing the kinds of things your client was involved in if all they are going to get is probation? That's the problem," he ruled. "It is not just deterrence. It is punishment too. It is not just a question of deterrence, although that's very important. It is not just to deter him. He is probably deterred. It is to deter others," Leon said.

CBP Releases Eligibility Conditions for Export Version of C-TPAT

In the first step toward creating an "export entity" under its current Customs-Trade Partnership Against Terrorism (C-TPAT) program, which is now only for importers, Customs and Border Protection (CBP) released guidance July 2 on conditions exporters would have to meet to be eligible to join C-TPAT. While the benefits for exporters that qualify aren't clear, CBP sees the expanded program as a way to enhance its cooperation with foreign customs agencies that recognize authorized economic operators (AEOs).

"As the C-TPAT program has continued its evolution, it has become apparent that exports also have an important role in international supply chains and, while this sector is not as heavily owned by U.S. Customs and Border Protection (CBP) and the C-TPAT program, developing an export component for C-TPAT would further enhance both the program and its relationship with other mutually recognized Foreign Customs administrations," CBP said in its Minimum Security Criteria. The criteria define an exporter

as: A person or company who, as the principal party in interest in the export transaction, has the power and responsibility for determining and controlling the sending of the items out of the United States.” To be eligible for the program, an exporter must be an active U.S. exporter that exports from the U.S.; have a business office staffed in the U.S. and have an Employee Identification Number (EIN) or Dun & Bradstreet (DUNS) number.

In addition, it must “have a documented export security program and a designated officer or manager who will act as the C-TPAT program main point of contact. An alternate point of contact is also needed in case the designated point of contact is unavailable.”

Exporters need to “commit to maintaining the C-TPAT supply chain security criteria as outlined in the C-TPAT Exporter agreement.” The exporter would have to “create and provide CBP with a C-TPAT supply chain security profile which identifies how the Exporter will meet, maintain, and enhance internal policy to meet the C-TPAT Exporter security criteria.” Finally, the exporter must have “an acceptable level of compliance for export reporting for the latest 12-month period and be in good standing” with Commerce, State, Treasury, Defense, the Nuclear Regulatory Commission and Drug Enforcement Administration.

“Where an exporter outsources or contracts elements of its supply chain, such as to a warehouse, logistics provider, carrier or other export supply chain element, the exporter must work with these business partners to ensure that effective security measures are in place and adhered to throughout the entire supply chain,” CBP said.

George Rudy of CBP’s C-TPAT staff told the President’s Export Council Subcommittee on Export Administration (PECSEA) in March that 286 exporters had already indicated interest in joining an export version of C-TPAT (see **WTTL**, March 31, page 1). The goal is to have the program in place by the end of 2014, with all participants being volunteers, Rudy said.

Russia Takes Complaints about Trade Sanctions to WTO

The U.S., EU and other countries that imposed trade sanctions on Russia in response to Moscow’s interference in Ukraine and its annexation of the Crimea violated WTO rules by denying Russia the trade rights guaranteed by the WTO, a Russian representative complained to the WTO General Council July 24 (see related story, page 8).

The charge probably was mostly for propaganda purposes and isn’t likely to lead to any WTO action since members can invoke national security justifications for their actions and the WTO has never challenged that excuse.

The Russian official highlighted the July 16 sanctions Washington imposed on several Russian companies and financial institutions, including Rosneft, Novatek, Gazprombank, and Vnesheconombank (see **WTTL**, July 21, page 1). “We consider the recent U.S. sanctions against Russian companies as a challenge to our trade and economic interests guaranteed by the WTO regulations,” he said in his statement. If Russia is forced to protect its WTO rights, “the U.S. actions might cause the unfortunate chain of events that would ultimately undermine the credibility of the multilateral trading system,” he said. Among the WTO rules the U.S. allegedly violated is the General Agreement on

Trade in Services (GATS). The blocking of Russian property and the freezing of assets “is a direct violation of the U.S. obligations under the GATS – MFN (GATS Article II) and National treatment (GATS Article XVII), Market Access Commitments (GATS Article XVI), Specific Commitments, Domestic Regulation Disciplines (GATS Article VI) and Payments and Transfers Rules (GATS Article XI), the official claimed.

“We also would like to express our concern in respect of measures against Russian trade and economic interests which contradict the WTO rules, announced by some other members,” he added. “We joined this organization with strong belief that it is rule-based and politically unbiased. We expect that the activities of the organization and its members will remain constructive, responsible and politically neutral,” he said.

BIS Advisors Look Toward Wassenaar List Changes in 2015

Even as technical working groups are still working on potential changes to Wassenaar Arrangement controls list for adoption at the regime’s annual plenary meeting in December, Bureau of Industry and Security (BIS) advisors have started considering proposals for adoption at Wassenaar’s 2015 meeting. At its July 23 meeting, the BIS Information Systems Technical Advisory Committee (ISTAC) began looking at proposals for changes to categories 3, 4 and 5 on the Wassenaar list, including the decontrol of several items and changes to control levels for others.

While no proposals were adopted in the TAC’s open session, the committee will need to be ready to make its recommendations later this year. U.S. proposals for changes to Wassenaar lists must first go through interagency review and be supported by all agencies before they are taken to Wassenaar for consideration early in 2015. Wassenaar technical groups then spend a year debating and preparing proposals for the December plenary.

Many of the controls on the list are not only out-of-date, but don’t reflect a shift in the technology used in electronic products, ISTAC members suggested. One example they discussed are current controls on instrumentation data recorders under Wassenaar list number 3A002.a.6.

Controls now cover devices that record on magnetic media, while the technology has shifted to solid state devices (SSD) that can hold much more data and process it faster. Although there is believed to be electronic warfare uses for these recorders, many mass-market consumer products now include SSD systems and cannot be controlled, members said. ISTAC is expected to support a proposal Canada made to Wassenaar previously to decontrol these recorders.

ISTAC also discussed potential changes to controls on analog-to-digital converters (A/DC). According to a presentation by ISTAC member David Robertson of Analog Devices Inc., A/DCs are a \$2 billion market, with high-speed A/DCs accounting for \$250-300 million annually. U.S. firms dominate the market, but only 20% of sales are in the U.S., with China representing 30-40% of the market. Because of U.S. controls, Chinese firms are moving into the market. Controls have created “a sheltered niche” that is encouraging the Chinese to get into the business with the support of government subsidies, Robertson noted. Consumer products, including TV set-top boxes with multiple

channels that receive numerous programs at the same time, plus collision-avoidance systems in cars, are driving A/DC technology. Additional changes will come when cell phones move up to the 5G generation.

Robertson proposed revising current standards to move up the words-per-second speed thresholds for controls for 8, 10, 13, 14 and greater than 16-bit A/DCs. “You get meaningful relief when you move these numbers,” he said.

At the same time, he acknowledged that Defense is “uncomfortable with converters this fast.” The military uses this equipment in electronic warfare and target evasion systems that must operate in real time instantaneously, he noted. Because of this, “if I am too greedy, the conversation stops,” he said. In the commercial telecommunications sector, instant speed isn’t as important a factor.

To address Pentagon concerns, Robertson proposed building in a requirement for commercial products to have a latency period between when a sample is taken and when the digital output is completed. How long that latency period should be is a subject the TAC will debate and discuss with government officials.

BIS Advisory Opinion Clarifies Policy on Voice Recorders

Some new devices for speech processing don’t fall under export licensing requirements as long as the signals are not intelligible to human listening, BIS said in an unpublished advisory opinion to Qualcomm May 7. The firm asked BIS to clarify the interpretation of requirements under Export Control Classification Number (ECCN) 5A001.b.6, which controls certain digital voice coding products.

BIS “confirms that ECCN 5A001.b.6 is limited to systems/equipment that can perform voice coding such that the coded signals are intelligible to a human listener,” said the opinion issued by C. Randall Wheeler, director of BIS’ information technology controls division. “Applications such as those [described by Qualcomm], which do not provide the capability of reproducing the original signal, are not controlled under ECCN 5A001.b.6,” she wrote.

Qualcomm’s request had noted that 5A001.b.6 controls voice coding at rates below 2400 bits per second. Specifically, it asked BIS to confirm that “new types of applications of speech processing in which digital data are extracted from speech at bit rates below 2400 bits per second, such as speech to text conversion (e.g., dictation, voice commands), speaker recognition (e.g., identification of speakers on a multi-party call) and speaker state recognition (e.g., emotional state) are not controlled under ECCN 5A001.b.6,” the advisory opinion noted.

House Panel Subpoenas Ex-Ex-Im Employee Under Investigation

House Oversight and Government Reform Committee Chairman Darrell Issa (R-Calif.), who has issued subpoenas for almost everyone in the Obama administration except the president’s dog Bo, issued a subpoena July 24 to former Export-Import Bank (Ex-Im) staffer Johnny Gutierrez, who allegedly accepted payments from Ex-Im customers to help them secure bank financing. Gutierrez has been ordered to testify at a July 29 hearing

where Ex-Im Chairman and CEO Fred Hochberg also will testify. The charges against Gutierrez, who was fired from Ex-Im, and three other Ex-Im employees, were first reported in the *Wall Street Journal*. The allegations came up at a House Financing Services Committee hearing on the bank's rechartering June 25. Hochberg declined to comment at the hearing on the charges because they are part of an open investigation.

“The recently reported allegations against Mr. Gutierrez are extremely serious and shake the very core of the taxpayer funded Ex-Im Bank,” Issa said in a statement. “Congress needs to know exactly what occurred in this corruption scheme and will learn from both Mr. Gutierrez and Ex-Im Bank Chairman Hochberg what actions the bank is taking to ensure that the organization will eradicate this culture of corruption,” he added.

The hearing and the publicity it is likely to generate come at a bad time for Ex-Im, as it struggles to overcome opposition from conservatives in Congress to its reauthorization. The business community has mounted a major lobbying campaign in support of the bank, but that effort does not seem to have moved the hearts and minds of House leaders who have said they won't support Ex-Im reauthorization (see **WTTL**, June 20, page 1).

Issa's announcement drew praise from House Financial Services Committee Chairman Jeb Hensarling (R-Texas), who has been the bank's most vocal opponent. “The allegations of kickbacks and corruption at the Export-Import Bank are as disturbing as they are serious. At our recent Financial Services Committee hearing on Ex-Im reauthorization, the Bank's chairman refused to answer repeated questions about whether he was aware of a criminal investigation into these allegations. So I'm pleased the Oversight and Government Reform Committee is taking this action,” Hensarling said in a statement.

WTO Package Offers Aid to African, Least Developed Countries

WTO Director-General Roberto Azevedo appears to have appeased the opposition of some African and least-developed countries (LDCs) to a trade facilitation agreement with the launch July 22 of a “trade facility” that promises to help those countries finance implementation of the agreement. The facility, however, won't become operational until WTO members agree to insert the trade facilitation agreement permanently into WTO rules. That step is now being blocked by India (see related story, page 1).

In June, Azevedo said he was preparing the trade facility plan to address the concerns of LDCs that they would not get the promised financial aid they need to improve their trade infrastructure and customs procedures (see **WTTL**, July 7, page 2). “With this new facility, developing and least-developed countries can be sure that they will receive the support they need to make the reforms enshrined in the trade facilitation agreement and share in the substantial economic gains that it will deliver,” Azevedo said at a news conference announcing the new program.

The new facility will complement existing aid programs run by international and regional agencies and bilateral donors, but mostly will serve as a coordinator of the help rather than a donor itself. It will assist countries in identifying needs and potential donors; sharing information between donors and recipients; and disseminating best practice advice for implementing trade facilitation measures. Azevedo also will serve as a “facilitator” to

help countries find funding for specific projects. Separately, the International Trade Centre (ITC), an arm of the United Nations based in Geneva, announced its own trade facilitation program July 22. The ITC plan aims to bring together public and private sectors to support implementation of measures to improve trade. It also would help LDCs develop plans for implementing facilitation measures, determine resource needs for implementation, find needed technical assistance and link donors to “bankable” projects.

European Ministers Adopt More Sanctions Against Russia

After overcoming initial disagreements, the European Union’s Council of Ministers agreed July 25 to impose additional sanctions against Russian and Ukrainian entities and persons in the wake of the shutdown of Malaysian Airlines flight 17. Earlier in the week, the ministers reportedly were divided over how tough new sanctions should be and which entities to target due in part to the large trade and investment relations many firms in Europe have with Russia as well as European reliance on gas imports from Russia.

Based on recommendations from the European Commission, the council added sanctions against 15 more persons and 18 entities responsible for action against Ukraine’s territorial integrity. The sanctions include an asset freeze and a visa ban. The action brings to 87 the number of persons and to 20 the number of entities hit with sanctions due to the situation in Ukraine.

“The Council also widened the designation criteria in the legal basis for the restrictive measures,” ministers said in a statement. “This paves the way for imposing asset freezes and visa bans on persons and entities that actively support or are benefitting from Russian decision makers responsible for the annexation of Crimea or the destabilisation of Eastern Ukraine,” they added. Ministers reportedly will meet again the week of July 28 to discuss additional potential sanctions (see **WTTL**, July 21, page 1). At press time, EU had not yet published names of latest targets, which should be in July 28 Official Journal.

According to the latest report from the U.S. Energy Information Administration (EIA), crude oil, petroleum products and gas accounted for 68% of Russia’s total export revenue in 2013. “Russia received almost four times as much revenue from exports of crude oil and petroleum products as from natural gas. Crude oil exports alone were greater in value than the value of all non-oil and natural gas exports,” it reported.

* * * Briefs * * *

EXPORT ENFORCEMENT: Epsilon Electronics Inc. in Montebello, Calif., also doing business as Power Acoustik Electronics, Sound Stream, Kole Audio, and Precision Audio, agreed July 25 to pay OFAC \$4,073,000 for violating Iran sanctions from August 2008 to May 2012. Epsilon allegedly issued 39 invoices for car audio and video equipment to “company that reexports most, if not all, of its products to Iran,” OFAC said. Epsilon issued five of these invoices after it received cautionary letter from OFAC in January 2012, agency noted.

MORE EXPORT ENFORCEMENT: Bo Cai, Chinese national, pleaded guilty July 23 in Albuquerque, N.M., U.S. District Court to violating Arms Export Control Act in scheme to export ARS-14 MHD angular rate sensors to China without State licenses from March 2012 through December 2013. Cai was arrested in December 2013 at Los Angeles airport and is in custody. Sentencing has not been scheduled. His cousin Wentong Cai, Chinese national in U.S. on

student visa, entered not guilty plea and remains in federal custody pending trial, which is currently scheduled for Aug. 18. Wentong was arrested in Iowa in January 2014. Both were charged in superseding indictment Jan. 22.

IRAN: U.S. extended relief of some Iran sanctions under Joint Plan of Action (JPOA) through Nov. 24, after P5+1 countries -- U.S., UK, Germany, France, Russia and China -- and Iran "affirmed that they will continue to implement the commitments" described in JPOA, Treasury announced July 21. U.S. first eased sanctions in November 2013 under agreement to curb Iran's nuclear program and bring it under international inspections and established "favorable licensing policy" in January 2014 (see **WTTL**, Jan. 27, page 6).

IRON AND STEEL: In 6-0 "sunset" votes July 22 in separate cases, ITC determined that revoking antidumping duty orders on malleable iron pipe fittings and certain steel threaded rod from China would cause renewed injury to U.S. industry.

TIRES: In preliminary 6-0 vote July 22, ITC found U.S. industry may be injured by dumped and subsidized imports of passenger vehicle and light truck tires from China.

AGOA: U.S. imports from African Growth and Opportunity Act (AGOA) countries have increased since 2001, but AGOA countries' share of overall U.S. imports remains small and has been declining in recent years, according to Government Accountability Office (GAO) report published July 21 (GAO-14-722R). From 2001 to 2013, petroleum products accounted for over 80% of U.S. imports under AGOA (see **WTTL**, Dec. 16, 2013, page 8).

FCPA: Bernd Kowalewski, former president and CEO of BizJet, U.S.-based subsidiary of Lufthansa Technik AG, pleaded guilty July 24 in Tulsa U.S. District Court to conspiracy to violate FCPA and substantive violation of FCPA. He was charged with paying bribes to officials in Mexico and Panama in exchange for their assistance in securing contracts for BizJet to perform aircraft maintenance, repair and overhaul services. Indictment was unsealed in April 5 (see **WTTL**, April 15, 2013, page 10). Sentencing set for Nov. 12. Bizjet entered into DPA with Justice March 2012 and paid \$11.8 million to resolve related charges.

TRADE PEOPLE: Former USTR Associate General Counsel Joanna McIntosh, who also chaired USTR's Section 301 Committee, has joined Motion Picture Association of America, Inc. as executive vice president for global policy and external affairs. More recently, she was vice president of federal government relations at Verizon and vice president of international relations for AT&T. Prior to USTR, she was attorney at Kelley, Drye, Collier, Shannon.

WTO: Turkey has submitted invitation to host WTO's next ministerial conference in December 2015 in either Istanbul or Izmer. Kenya reportedly is also preparing invitation to host meeting.

SECTION 337: Divided Court of Appeals for Federal Circuit (CAFC) July 24 rejected Nokia petition for writ of mandamus to compel ITC to follow appellate court's order reversing earlier ITC ruling of patent infringement in Section 337 case brought by Interdigital involving scrambling codes. Two judges issued per curiam ruling denying petition. CAFC Judge Pauline Newman dissented. "An adjudicatory body subject to the appellate court's authority is without power to negate or ignore the mandate of the appellate court. Yet the Commission's violation of this rule is now ratified by my colleagues," Newman wrote. "My colleagues now state that their words 'may be raised' by Nokia did not mean that the commission must permit the issue to be raised by Nokia. If my colleagues did not intend these words to be understood as permitting Nokia to raise the issue, they should have been clear," she added.

ISOCYANURATES: Senior CIT Judge R. Kenton Musgrave agreed July 24 to Commerce request for voluntary remand to reconsider issues related to selection of surrogate country data and factors of production in sixth administrative review of chlorinated isocyanurates from China (slip op. 14-88).