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Justice Stands Behind Fokker Settlement Decision

Justice is standing behind the decision to treat its settlement with Fokker Services as a voluntary disclosure, the department told a federal judge Sept. 30. “There is nothing in the record to support the conclusion that Fokker Services was under investigation when it submitted its June 2010 disclosure. In fact, the record evidence is directly to the contrary,” the department said in a status report detailing its effort to confirm that Fokker qualified for credit under Justice policies for treating voluntary disclosures.

D.C. U.S. District Court Judge Richard Leon asked Justice to show that Fokker’s disclosure was truly voluntary. “Although one former prosecutor has suggested other (speculative) sources of information we might explore, we do not believe it would be fruitful to spend additional time and resources on such searches,” Justice argued.

“The belief that Fokker Services was under investigation when the company submitted its June 2010 disclosure is based on the tautology that, because the United States government obtained some information through the ASI [Aviation services International B.V.] investigation that indicated that Fokker Services may have been involved in conduct in violation of U.S. export control laws, Fokker Services was thereby ‘under investigation’,” Justice stated. Interviews with agents and prosecutors found that not the case.

Attached to Justice’s report was a copy of a July 18 letter it previously received from Bureau of Industry and Security (BIS) Special Agent in Charge of Boston Field Office John McKenna. McKenna said the BIS Office of Export Enforcement (OEE) did not consider Fokker’s submission voluntary because the firm’s management was aware two years earlier that it had violated export controls. Nonetheless, the “high degree of cooperation on the part of the company effectively rendered the voluntary self-disclosure issue moot from BIS’s standpoint,” he wrote.

Lawmakers Want Closer Look at Foreign Export Subsidies

The battle over reauthorization of the Export-Import Bank (Ex-Im) may take a different turn that would take it to the WTO dispute-settlement process. In a Sept. 29 letter to U.S. Trade Representative (USTR) Michael Froman, two Republican senators asked the

trade office to update its investigation into whether foreign export credit agencies (ECA) are violating the WTO's Subsidies and Countervailing Measures (SCM) Agreement.

The letter from Sens. Bob Corker (R-Tenn.) and Orrin Hatch (R-Utah) noted previous legislation that required Treasury to launch negotiations to bring more countries, particularly developing nations, under the export-subsidy disciplines of the Organization for Economic Cooperation and Development (OECD) with the ultimate goal of eliminating export subsidies. It's not clear that anything has been done to comply with that mandate, and the two lawmakers suggest a new tact might be looking at violations of the SCM.

"Because of the growth in ECAs since the SCM Agreement entered into force in 1995, particularly in non-OECD countries, only about one-third of officially supported export credit comes under the OECD Arrangement. We are concerned that some of our trading partners may be increasingly using their ECAs in a manner inconsistent with the SCM Agreement and the practices established under the OECD Arrangement, potentially setting off an export credit arms race," they wrote Froman.

They urged Froman to remain vigilant in enforcing the SCM to prevent unfair market distortions. "We respectfully ask for an update on your investigative efforts and analysis as to whether foreign competitors are operating their ECAs in a manner consistent with their obligations under the SCM Agreement, and what actions, including at the World Trade Organization, are being considered or taken to respond to any failure to conform to such obligations." Corker and Hatch wrote.

Incoming EU Trade Commissioner Defends EU Trade Policies

The incoming European Commission, which will take office in November, will continue the same trade policies as the outgoing commission, according to Cecilia Malmström, who has been designated to become the next European Union (EU) trade commissioner.

At a Sept. 29 confirmation hearing before the European Parliament's international trade committee, Malmström defended past EU trade policies and negotiating positions against a barrage of questions from many committee members who voiced skepticism about free trade deals with the U.S. and Canada, and concerns about how those agreements would affect among many things health and safety, government procurement, investor-state dispute settlement (ISDS) and geographical indications (GIs).

Malmström pointed to ISDS provisions in the just-signed Canada-EU Trade Agreement (CETA) as the model for what the EU will seek in the Transatlantic Trade and Investment Partnership (TTIP) with the U.S. "There is a very legitimate interest in protecting European investments," she said, citing the 1,400 bilateral agreements the EU already has.

"What the commission has tried to do is elaborate in the agreement with Canada in CETA a new way to make sure that there will be no frivolous claims," she said. "That it is absolutely clear that states have the right to regulate when it comes to public safety, public services and so on," she added. "It defines the term illegal expropriation," Malmström noted. In addition, CETA includes a code of conduct to prevent conflicts of interest among arbitrators who judge ISDS cases and transparency requirements to make

proceedings and documents public. CETA does not include an appeal mechanism for ISDS cases and that is something the EU will try to get included in TTIP, she said.

Malmström expressed concerns about how trade agreements are ratified in the EU under rules that give negotiating authority to the European Commission but give the European and national parliaments responsibility for approving them. CETA, which includes mixed competency provisions, will be the first test case. Although it was signed Sept. 26, the deal still needs “legal scrubbing” and translation into 27 EU languages before it will be sent to the parliament for approval. That won’t be until next summer, she said.

The commission is seeking legal advice on the mixed competency issue, including the possibility of asking the European Court of Justice to interpret the rules. “I’m not sure we can get clarity once and for all because there are certain areas that have mixed competency,” she conceded. “It is going to be very complicated in the future if we are going to have 28 parliaments and subparliaments to ratify agreements,” she said. If the current commission doesn’t resolve the issue before leaving office, Malmström said she will continue discussions with her legal advisors on seeking an opinion from the court.

The trade skepticism displayed by trade committee members raised concerns for Myron Brilliant, vice president and head of international affairs at the Chamber of Commerce. “It was disturbing to hear how question after question in today’s hearing was aimed at handcuffing not just Commissioner-designate Malmström but the TTIP itself,” Brilliant said in a statement. He said he was particularly concerned about “the campaign of disinformation” against ISDS in Europe.

Gloom and Hope Overhang Expectations for TPP

A mixture of optimism and pessimism hangs over Trans-Pacific Partnership (TPP) talks, with prognostications ranging from the basics of a deal being reached this year to talks dragging on for several more years and perhaps never reaching a conclusion. While some trade observers say there is just a little left to do to finish a deal, others say there is too much left to reach an accord soon. A general consensus is forming around prospects for an agreement sometime in the spring of 2015, with the hope of getting a vote in Congress before the next presidential election cycle starts in full in 2016.

Those who foresee a deal this year point to meetings President Obama will attend in Asia in November. He will join gatherings of the Asia-Pacific Economic Cooperation Forum (APEC) in Beijing, the G-20 in Brisbane, Australia, and the East-Asia Summit in Myanmar. High profile conferences such as these often force negotiators to have “deliverables” for their leaders to announce and TPP would certainly be a top priority.

On the negative side, many point to the recent breakdown in U.S. talks with Japan aimed at a bilateral agreement to open the Japanese agriculture and auto markets (see **WTTL**, Sept. 29, page 2). Even if Tokyo and Washington were able to bridge their differences, other TPP countries still have unresolved issues, including on other agriculture market access, textiles and footwear, access to medicines, and state-owned enterprises. So far, U.S.-Japan talks appear to be following the pattern of the last 30 years of bilateral negotiations, with the Japanese officials holding out against a deal until the very last

moment to save face at home and then making some kind of concession. U.S. farm sources privately say they recognize that and are prepared to accept a long-term phase-out of Japanese agriculture restrictions as long as some market access is achieved in the short run even if not a total opening of the market.

Andrew Robb, Australia's trade and investment minister, is among those who still have a positive outlook for TPP. "We could conclude the basics of the agreement by the end of the year. It's just political will," he told the Global Services Summit Sept. 30. "I haven't got a sense of how strong the political will is," he conceded.

For Australia, disagreement over investor-state dispute settlement (ISDS) provisions in TPP appears to be open to resolution. "There have been different views between the two major competing parties, but we had a change in government 12 months ago," Robb noted. He said Australia has reached ISDS agreements with 28 countries, including Korea. Australia considers the ISDS issue on a case-by-case basis, he said. In the Korean accord there was a carve-out for normal health and environmental regulations. "This reflects the political position in our country," Robb said.

"The landing zones are pretty clear, I think, on 90% of the deal," he told reporters afterward. "We are at the hard ink" part now and "we've got to expect some rocky sessions in getting to it," he added. "If the agriculture market access comes together, not all agriculture; if we have some significant conclusions there, I think the momentum will be huge after that," he said.

BIS Recognizes New Digital World of Trade Data

BIS concedes that recordkeeping rules currently in the Export Administration Regulations (EAR) don't reflect the modern digital world and especially the move toward electronic records for trade data. So in the Oct. 1 Federal Register it asked for public comments on how it should modernize those EAR rules to reflect current industry practices.

The changes it intends to make would "more effectively describe those records and persons subject to the requirements while attempting to reduce burden, improve clarity, take into account current data management processes, and maintain the necessary tools for effective compliance and enforcement," the notice said. Comments are due Dec. 1, 2014.

"Helpful comments will include a description of a problem or concern, available data on cost or economic impact, and a proposed solution," BIS noted. The agency said it is seeking comments specifically on: positive or negative effect on organizations; outdated provisions; transactional distinctions; any difference between maintaining and creating records; and good examples of recordkeeping requirements under U.S. or other laws.

Froman Continues to Oppose Financial Services in TTIP

As U.S. and EU trade officials met near Washington Sept. 29-Oct. 3 for another round of TTIP negotiations, USTR Michael Froman repeated U.S. opposition to including rules on financial services in the pact. Froman told the Global Services Summit Sept. 30 that

other international agreements provide adequate oversight of financial services so there is no need for TTIP to include more. “Particularly since the financial crisis of 2008-2009 there has been an explosion of financial regulatory cooperation,” Froman said.

In addition to the bilateral dialogue between U.S. and EU financial regulators, there is also cooperation among members of the G-20 and several international financial arrangements, he argued. That is why “we don’t see the value added bringing it into the trade agreement, per se,” he added.

Rupert Schlegelmilch, the EU’s director of services and investment, said the EU and the U.S. “don’t see eye-to-eye” on financial services. The EU believes including the sector in TTIP would add value to the agreement, he told the summit.

Decade-Long Brazil Cotton Dispute Ends with Payoff

Eight months after the 2014 Farm Bill and its changes to agricultural subsidies went into effect, the Obama administration Oct. 1 officially ended a decade-long dispute with Brazil over cotton. Under a bilateral Memorandum of Understanding (MOU), the U.S. will make a one-time final contribution of \$300 million to the Brazil Cotton Institute to settle the dispute. The payment will bring to nearly \$900 million the amount the U.S. has paid Brazil to protect U.S. cotton subsidies.

In exchange for the money, Brazil agreed not to bring new WTO actions against U.S. cotton support programs while the current Farm Bill is in force or against agricultural export credit guarantees under the GSM-102 program as long as the program is operated consistent with the agreed terms. The MOU also includes new rules governing the GSM-102 loan program.

Specifically, U.S. said it “shall not offer guarantees under the GSM-102 Program for loans of longer than 18 month tenor.” It pledged not to extend or renew the tenor of a guarantee after it is issued. “However, debt arising from default under a guaranteed obligation may be rescheduled. Guarantees under the GSM-102 Program shall not be used for debt rescheduling purposes,” the MOU says. The U.S. also agreed to provide semi-annual reports to Brazil on the operation of the GSM-102 program.

In a statement, Brazil’s foreign ministry welcomed the deal for “successfully settling a dispute that stretched for more than a decade.” The accord is restricted to the cotton sector and preserves Brazil’s right to challenge in the WTO, if necessary, the legality of other provisions of the American Farm Bill regarding other crops, the ministry noted.

U.S. Wheat Associates and the National Association of Wheat Growers said the GSM-102 program “remains a vital option to our customers.” The MOU “means that this important program will continue operating, though with its features somewhat modified,” they said.

Brazil initiated a WTO dispute against the U.S. cotton program in 2002, claiming domestic subsidies to U.S. cotton growers and export credit guarantees such as GSM-102 were incompatible with WTO agreements. In June 2010, after the U.S. failed to comply with a WTO ruling that said Brazil was right and Brazil threatened to retaliate against U.S. exports, the two nations reached a framework agreement. Under that deal, Brazil put off retaliation in return for the U.S. paying Brazil \$147.3 million in compensation annually

and pledging to address subsidy issue in the 2012 Farm Bill. When that didn't happen, Brazil again threatened retaliation (see WTTL, Oct. 29, 2012, page 2). The new farm bill repealed crop subsidy programs for upland cotton, including direct and countercyclical payments, and used part of the savings to create an expanded crop insurance program.

Industry Group Will Review List Reforms for Additional Changes

Industry representatives have formed a committee to review changes already made or proposed in the U.S. Munitions List (USML) and Commerce Control List (CCL) and to offer suggestions for further changes based on their experience. Some of these proposals may include changes to multilateral control regime lists. At a meeting Sept. 10, the representatives formed a working group they are calling Contributing to a Better List (CBL).

While the initial members come from the Bureau of Industry and Security (BIS) Transportation Technical Advisory Committee (TAC), all industry sectors are being invited to participate. Representatives of the academic community also have been invited to join. Many Transportation TAC members work for aviation industry firms whose products were the first to make the transition from USML Category VIII (aircraft) to the CCL and have the most experience with list changes.

Although the CBL will be a private-sector committee, it is inviting government officials to attend its meetings. Along with possible additional changes to the control lists, CBL also will make recommendations to improve the lists and suggest clarifications and interpretations, one member told WTTL. Another area of attention will be the new definition of "specially designed." While industry has generally been pleased with the new definition, many firms are still having trouble applying it to their products. "A lot of people are scratching their heads on how to implement it," the representative said.

China Not Ready to Be in Services Talks, Froman Says

The U.S. opposes China's participation in the Trade in Services Agreement (TISA) negotiations because Beijing has not shown it is ready to meet the "data points" that would indicate it is ready to meet the level of ambition and high standards that are the goal of the talks, USTR Michael Froman said Sept. 30. The data points the U.S. is looking at include China's behavior in Information Technology Agreement (ITA) talks, its implementation of a WTO ruling on online payment services and progress toward a U.S.-China Bilateral Investment Treaty (BIT), Froman told the Global Services Summit.

ITA talks have "basically run aground for more than a year now because China has not been willing to live up to the same level of ambition as the other participants," Froman said. He said the U.S. is talking with the Chinese about getting back in the talks and has made proposals to address their concerns. "But we're not there yet," he said. "To me, if you are having trouble closing the gap around a relatively small number of tariff lines, when it comes to making commitments about a vast array of services, that's an important data point," he said. Another data point is China's failure to implement the WTO ruling against its restrictions on online paying services. "We've been talking to them for more than a year. They lost the case; they have not yet implemented the rules necessary to

bringing themselves into compliance,” Froman said. He said the U.S. and China are making progress on the fundamentals for an agreement on a BIT deal. “That will also be an important indication, as we see the progress on these fundamental principles and ultimately on the negative list as to how China views its commitment to liberalization in these areas,” Froman said.

BIS Proposes Eliminating Special Comprehensive Licenses

Citing low usage and new superseding license exceptions created under export control reform, BIS proposed ending the availability of Special Comprehensive Licenses (SCL) in the Sept. 30 Federal Register. The need for SCLs has diminished in the last few years as new regulatory options have become easier to use. Some firms that used SCLs for exports to customers in China have switched to the use of Validated End User (VEU) authorizations. Exports that went under SCLs to Europe or other close allies can now be shipped license-free under License Exception Strategic Trade Authorization (STA).

“BIS has issued fewer than a dozen SCLs, and this limited number of license holders and the low volume of trade under SCLs are further indicators that the present and future value of an SCL is outweighed by the burdens exporters experience in applying for and administering an SCL. Included among these burdens are the high monetary and resource cost incurred by the SCL holders and their consignees,” BIS noted.

In public comments on the Export Administration Regulations in general, industry noted the “utility and unduly burdensome requirements associated with the SCL,” BIS wrote. Comments on this latest proposal are due by Oct. 30.

The BIS proposal would have all current SCLs expire one year from the date of publication of a final rule removing the SCL provisions from the EAR or the expiration date of the SCL under its individual license, whichever is earlier. “During that transition period, which could be up to one year after the publication of the final rule, BIS will not accept amendments, including renewals, to outstanding SCLs. After the publication of the final rule, SCL holders may choose to apply for four-year individual licenses for exporting and reexporting items under the EAR or use available license exceptions,” it said.

Defense Agency Aims to Increase Foreign Military Sales

The Defense Security Cooperation Agency (DSCA) issued an ambitious strategy called “Vision 2020” Oct. 1 to make the Foreign Military Sales (FMS) process more accommodating and competitive. One of the vision’s main objectives is to help the FMS program meet customer expectations and be more competitive against other defense suppliers.

DSCA said the strategy aims to “adapt the FMS process to changing business practices and purchaser requirements with innovative business models and more accommodating business rules.” In addition, it said it hopes to “increase confidence in FMS as a procurement option for partner nations by providing greater and more structured customer visibility and participation” during the Pre-LOR (Letter of Request) and case development phases and during FMS contracting. Over the next four years, the strategy will: identify

specific officials who have authority to make commitments for their country; review processes that use FMS customer funds – including Stand-By Letter of Credit Program, termination liability, case closure, payment schedules, and training pricing; and permit FMS purchasers to allow U.S. contractors specified in a valid commercial export authorization to have temporary possession of or access to defense articles procured via FMS without a separate retransfer authorization in order to perform integration, repair, refurbishment, or upgrade.

*** * * Briefs * * ***

EXPORT ENFORCEMENT: Kintetsu World Express (U.S.A.), Inc., freight forwarder in East Rutherford, N.J., agreed Sept. 25 to pay BIS \$30,000 to settle one charge of causing, aiding or abetting act prohibited by EAR. In May 2010, Kintetsu facilitated export of three spiral duct production machines and related accessories designated EAR99 and valued at \$250,000 to China National Precision Machinery Import/Export Corporation (CPMIEC) in Beijing without authorization. Company filed Shipper's Export Declaration (SED) indicating export was designated "NLR" (No License Required), BIS noted. CPMIEC was on OFAC SDN list. "At all times, KWE fully cooperated with the government and is pleased to have reached a swift and expeditious conclusion to this matter," Kintetsu company spokesperson said in email to WTTL.

MORE EXPORT ENFORCEMENT: Robbins & Myers Belgium, subsidiary of National Oilwell Varco, pleaded guilty Oct. 2 in D.C. U.S. District Court to four charges of violating International Emergency Economic Powers Act by exporting oil extraction equipment components to Syria without Commerce licenses in 2006. Company agreed to pay \$1 million in criminal fines in plea with Justice and \$600,000 in civil penalties under separate settlement with Commerce.

TRADE FIGURES: U.S. merchandise exports in August jumped 4.5% from year ago to \$138.8 billion, Commerce reported Oct 3. Services exports increased 3.2% to monthly record of \$59.6 billion from same month in 2013. Goods imports went up 3.8% from August 2013 to \$198.7 billion, as services imports gained 2.8% to \$39.9 billion.

SECTION 337: ITC Sept. 30 announced "new web-based tool that will help users find information about and track unfair import investigations brought under section 337." New site includes "robust search capability that enables users to identify investigations of interest; track ongoing investigations, appeals, and ancillary proceedings from filing to disposition; and conduct research with ease," ITC noted. For more information, go to <http://pubapps2.usitc.gov/337external/>

ANDEAN TRADE: Imports under Andean Trade Preference Act (ATPA) during 2013 had "negligible overall effect" on U.S. economy and consumers, ITC reported Sept. 30 (Pub. 4486). U.S. imports of \$2.6 billion from Ecuador under ATPA in 2013 represented "minor share" (0.11 percent) of total U.S. merchandise imports, ITC noted. Ecuador was sole remaining beneficiary country of ATPA when program expired July 31, 2013.

CENSUS: Effective Sept. 22, foreign trade division officially became international trade management division (ITMD) under new chief Dale Kelly. AES branch is now known as data collection branch; and regulations, outreach and education branch became trade regulations branch (see **WTTL**, Aug. 4, page 7). In addition, data dissemination branch moved to international trade indicator macro analysis branch of economic indicators division.

VIETNAM: After meeting between Secretary Kerry and Vietnamese Deputy Prime Minister Minh Oct. 2, State lifted ban on provision of maritime security-related items to Vietnam. State spokesperson Jen Psaki said department "has taken steps to allow for the future transfer of maritime security-related defense articles to Vietnam." Policy "supports Vietnam's efforts to improve its maritime domain awareness and maritime security capabilities," Psaki said.