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Judge Shoots Down Fokker Settlement

In a case that could affect future voluntary disclosures of export violations, D.C. U.S. District Court Judge Richard Leon Feb. 5 issued an order that could effectively derail the government's 18-month deferred prosecution agreement (DPA) with Fokker Services B.V. on charges of exporting aircraft parts to Iran. Leon denied a technical motion for Exclusion of Time Under the Speedy Trial Act, taking issue with Justice's proposed $21 million fine, the fact that no individuals are being prosecuted and the lack of an independent monitor to verify the company's compliance (see **WTTL**, Nov. 3, 2014, page 1).

> Justice has 30 days to appeal the ruling to the D.C. Circuit Court. Alternately, it could resubmit a new deal addressing Leon's concerns or drop the case altogether. Leon originally questioned whether Fokker's disclosure was truly voluntary, but seems to have been satisfied with Justice's status report presented at a hearing in October.

Fokker was charged with making over 1,100 separate shipments of aircraft parts and components to Iran, Sudan and Burma. The proposed fine in the DPA was equal to the firm's gross profits from those transactions. "After looking at the DPA in its totality, I cannot help but conclude that the DPA presented here is grossly disproportionate to the gravity of Fokker Services' conduct in a post-9/11 world," Leon wrote.

"Surely one would expect, at a minimum, a fine that exceeded the amount of revenue generated, a probationary period longer than 18 months, and a monitor trusted by the Court to verify for it and the Government both that this rogue company truly is on the path to complete compliance," he added. "In my judgment, it would undermine the public's confidence in the administration of justice and promote disrespect for the law for it to see a defendant prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time and for the benefit of one of our country's worst enemies," Leon wrote.

BIS Budget Would Build Higher Fence Around More Goods

When the Obama administration launched the export control reform initiative in 2010 it promised to put a "higher fence around a smaller yard." With the budget that President

Obama sent to Congress Feb. 2 for fiscal year 2016, which will start Oct. 1, 2015, the Bureau of Industry and Security (BIS) asked for the addition of 22 positions for export enforcement. "This is the higher walls part," BIS Under Secretary Eric Hirschhorn told WTTL in an exclusive interview. "We're putting walls around all the products we are responsible for," he said.

> The addition of staff to BIS enforcement is likely to fuel the concerns of defense firms that they face more legal actions and fines because their products were transferred from the U.S. Munitions List (USML) to Commerce Control List (CCL). Industry has been worried that BIS will have a heavier enforcement hand than State's Directorate of Defense Trade Controls.

The budget proposal for export enforcement, which still depends on congressional enactment, would increase the enforcement staff by 13% to 189 "full-time-equivalent" positions in government jargon. In comparison, export administration would have 214 FTEs, if the BIS budget request is approved.

Hirschhorn defended the enforcement increase based on the increase in the number of licenses and exports it will have to oversee due to the transfer. "We're doubling our licensing volume," he said. "There are still defense parts. The fact that they are considered less significant than some big sub-assemblies or some finished products doesn't mean they have become light bulbs that you pick up at Strossmeyer's Hardware Store," he added. "These are defense parts and we treat them as such," he said.

"We're not asking for as big a percentage increase in agents as the percentage increase we are seeing in what we are responsible for in exports," Hirschhorn said. "We're trying to stay even, making sure on the agent part and on the intel analysis part we are able to keep up with the same level of effort," he added. "The problem is if the number of transactions for what we are responsible goes up and the number of people doesn't, then we're doing less and we don't want to be there," he said.

Of the 22 new enforcement positions requested, 15 will be agents assigned either to BIS field offices or as analysts at agency headquarters to aid district enforcement efforts. "We're going to have more agents around the United States as well as more analysts to support them," Hirschhorn said.

Included in the budget request for enforcement would be the addition of three more Export Control Officers (ECOs) who work overseas to conduct license checks and verifications. These three would be in addition to the seven ECOs now in China, Hong Kong, India, Russia, Singapore, and the United Arab Emirates (UAE). One new ECO would be assigned to Frankfurt, Germany, Commerce budget statements explain. Another would go to Istanbul, Turkey, and a third to Dubai in the United Arab Emirates.

An additional position would be added to the BIS Information Triage Unit (ITU) and one more to Export Enforcement's Office of Enforcement Analysis (OEA). BIS is supposed to provide a deputy director for programs to the Export Enforcement Coordination Center (E2C2) that was established in 2010. Since then the job has been held by a special agent on temporary assignment. If the new budget is approved, BIS would assign a full-time deputy director plus two analysts. A Commerce budget guide says BIS processed more than 30,000 license applications in fiscal 2014, which began Oct. 1, 2013 (a 25% increase compared to prior years). "In FY 2015, BIS expects that number to be approximately 40,000," it adds. In fiscal 2014, there were 42,837 transactions under BIS jurisdiction, including individual licenses, exports under license exceptions and commodity classifications, the guide reports. It estimates that number will rise to 80,000 in fiscal 2015, which started Oct. 1, 2014, and to 100,000 in the fiscal year starting Oct. 1, 2015.

> Even with that increase, the agency is seeking only two more staffers for its export administration staff. The pair will be assigned to export compliance, the BIS training and outreach program. In previous budgets, BIS had been given funds to boost the export licensing staff, Hirschhorn noted.

In anticipation of the heavier licensing load, BIS has assigned 24 staffers to the licensing office handling 600-series licenses. Although the agency did not request additional licensing officers for the coming fiscal year, Hirschhorn said it is closely monitoring its workload to ensure it has enough staff. "We are following it very closely, literally everyday in fact," he said.

"If it turns out for any reason it's not enough, we may come for more. For the moment, we are keeping up with licensing volume and are comfortable with our ability to do that," he told WTTL. "We are still in the 14-15 day range for the average processing time for 600-series licenses," he added.

BIS Finds Foreign Availability of Etching Equipment

Ask and you shall receive. In response to claims from the Semiconductor Equipment and Materials International (SEMI) industry association, BIS has determined that foreign availability exists for anisotropic plasma dry etching equipment controlled for national security reasons under Export Control Classification Number (ECCN) 3B001.c.

> In the Federal Register Feb. 9, the agency determined that "the etching equipment of ECCN 3B001.c capability is available-in-fact to China, from a non-U.S. (Chinese) source, in sufficient quantity, and of comparable quality so that continuation of the existing national security export control would be ineffective in achieving its purpose," it said.

BIS says it has provided a proposal to State to submit to the Wassenaar Arrangement to remove the 3.B.1.c control from the regime's Dual-Use List. It also said it welcomes comments on this foreign availability determination on an ongoing basis.

BIS launched the rare foreign availability assessment in September 2014 (see **WTTL**, Sept. 8, 2014, page 1). "BIS conducted interagency meetings with stakeholders, obtained input from the exporting community, and visited, in China, a producer of anisotropic plasma dry etching equipment meeting the 3B001.c control parameters, and a foundry using a Chinese-produced anisotropic plasma dry etching tool," the agency said.

This type of semiconductor etching equipment is used in the production process of a variety of dual-use semiconductor devices such as flash memories, microwave monolithic integrated circuits, transistors and analog-to-digital-converters. The devices are suitable for use in a variety of both civil and military applications that include different types of radars, point-to-point radio communications, microprocessors, cellular infrastructure, and satellite communications, the agency added.

U.S. Exports, Imports in 2014 Edged Up

U.S. exporters overcame the headwinds of slower trade in Asia and South America and the rising dollar to achieve a 2.8% increase in merchandise exports in 2014, Commerce reported Feb. 5. Despite the sharp decline in oil prices, imports were still able to grow 3.4% over 2013 (see table).

Preliminary 2014 vs. 2013 U.S. Merchandise Trade Figures (in billions)

	2014 Exports	2013 Exports	% Change	2014 Imports	2013 Imports	% Change
Total	1,623.3	1,579.6	2.8%	2,345.8	2,268.3	3.4%
BY COUNTRY/REGION						
Canada	312.0	301.6	3.5	346.1	332.6	4.1%
Mexico	240.3	226.1	6.3	294.2	280.5	4.9
European Union (28)	276.7	262.2	5.5	417.8	387.6	7.8
Germany	49.4	47.4	4.4	123.2	114.3	7.7
France	31.2	31.7	-1.7	47.0	45.7	2.9
United Kingdom	53.9	47.4	13.8	54.0	52.8	2.3
Japan	67.0	65.2	2.7	133.9	138.6	-3.3
China	124.0	121.7	1.9	466.7	440.4	6.0
NICs: HK, Singapore, Taiwan, Korea	142.8	140.2	1.8	132.4	123.9	6.9
South/Central America	184.8	184.4	0.2	150.4	158.5	-5.1
BY SECTOR						
Agriculture	$144.2	$136.2	5.8%	$125.8	$115.1	9.2%
Aircraft, parts, engines	112.7	105.0	7.3	53.0	46.9	13.0
Autos, parts, engines	159.5	152.6	4.5	327.8	308.8	6.2
Clothing	3.2	3.4	-5.9	86.3	87.9	-1.8
Chemicals-Organic	39.6	42.5	-6.8	52.3	52.3	0
Chemicals-Inorganic	11.4	11.2	1.7	13.1	14.2	-7.7
Petroleum, total categories	145.7	137.6	8.1	334.1	369.7	-9.6
Iron & Steel	18.4	18.4	0	46.9	36.6	28.1
Metalworking Mach.	7.5	7.6	1.3	11.4	11.3	3.5
Pharmaceuticals	50.9	48.4	5.2	92.0	84.0	9.5
Semiconductors	43.5	42.6	2.1	44.0	41.4	6.2
Telecommunications	40.6	39.7	2.3	58.7	54.4	7.9

The economic slowdown in China caused exports there to rise only 1.9% compared to 2013 when they jumped nearly 11%. Imports from China rose at a faster pace than the year before, lifting by 6% and producing a $342.7% trade deficit, almost half of the total deficit of $722.5 billion.

Service exports increased $22.9 billion to $710.3 billion in 2014. The biggest service sector increases came in travel, which increased $5.9 billion, intellectual property in the form of royalties that increased $5.7 billion and financial services, which grew by $5.4 billion.

Service imports also rose, gaining $16.4 billion to $478.5 billion. Travel was also the main winner on the import side, growing by $6.7 billion, with business services increasing by $5.6 billion and transport by $3.7 billion. The near recession in the European Union (EU) didn't prevent a growth in exports to major markets in Germany and the United Kingdom, but France's economic problems contributed to a 1.7% decline in U.S. exports. For the second year in a row, U.S. imports from Japan declined, dropping by 3.3%, while exports to Japan rose only

2.7%. The U.S. steel industry's complaints about rising steel imports appear to be justified by the 28.1% surge in imports in 2014, far above any other major industrial sector. The consequences of the shift of production of pharmaceuticals offshore and the growth of imports on generic drugs are seen in the 9.5% increase in drug imports.

> Weak retail sales in 2014 may account for the 1.8% decline in clothing imports. Nonetheless, with most apparel imported, the trade deficit in this sector reached $83.1 billion. According to preliminary Census figures, Customs collected $11.2 billion in duties on apparel imports, representing nearly 35% of total estimated duties collected on imports.

The sharp fall in oil prices and lower consumption in the U.S., led to a 9.6% decline in imports of petroleum products. Despite lower global prices, U.S. exports of petroleum products still rose 8.1%. In other sectors, nonmonetary gold exports declined by $11.6 billion to $22.5 billion, reflecting lower sales in China and India. Excavating machinery exports dropped by $1.75 billion to $13 billion. Exports were up for industrial machines, electrical apparatus and scrap, which reached almost $21 billion.

Obama Reopens Fight over Trade Reorganization

In his budget proposal for fiscal 2016, which starts Oct. 1, 2015, President Obama has once again proposed a controversial consolidation of all trade agencies within the Department of Commerce. Three years ago when he first suggested the same idea, it was shot down forcefully by members of Congress and the business community.

> Once again Obama has called on Congress to give him the authority to combine into a reconfigured Commerce, all of the department's core business and trade functions, which would include the International Trade Administration and the Bureau of Industry and Security, the Small Business Administration, the Office of the U.S. Trade Representative, the Export-Import Bank, the Overseas Private Investment Corporation, and the U.S. Trade and Development Agency (see **WTTL**, Jan. 16, 2012, page 2).

Also to be included in the proposed new department are Treasury's Community Development Financial Institution Program, and statistical agencies at the Labor Department and National Science Foundation. The National Oceanic and Atmospheric Administration that is now in Commerce would move to the Interior Department.

Senate Finance Committee Chairman Orrin Hatch (R-Utah) was among the first to criticize the proposal. "The Administration's proposal to eliminate the Office of the U.S. Trade Representative as we know it is misguided at best. Folding an agency with a proven track record, like USTR, into a massive government bureaucracy would only undermine its effectiveness," Hatch said in a statement.

Finance and the House Ways and Means Committee have long considered the USTR their special creation and leverage into presidential trade policies and actions. Other committees have also jealously guarded their jurisdiction over pieces of the trade pie. Legislation that Sen. William Roth (R-Del.) introduced in 1983 to consolidate trade into a Department of International Trade and Investment (DITI) was killed because of the same congressional turf protection. "By bringing together the core tools to expand trade and investment, grow small businesses, and support innovation, the new department would coordinate these resources to maximize the benefits for businesses and the economy. With more effectively aligned and deployed trade promotion resources, strengthened trade enforcement capacity, streamlined export finance programs, and enhanced focus on investment in the United States, the Government could more effectively implement a strong, pro-growth trade policy," said a statement accompanying the budget.

Trade Deficit with FTA Partners Still Needs Explaining

As the Obama administration continues its push for more multilateral free trade agreements (FTAs), statistics released Feb. 5 show that the U.S. racked up a $62 billion trade deficit with the 20 countries with which it already has FTAs. While that figure seems large and trade critics will use against fast-track trade legislation and ongoing talks with the Trans-Pacific Partnership (TPP), the explanation comes down to two sectors: oil and autos.

2014 U.S. Trade with Free Trade Agreement Partners
(in millions)

Country	U.S. Exports	U.S. Imports	Balance
Australia	26,667	10,669	$15,998
Bahrain	1,060	965	$95
Canada	312,032	346,062	($34,031)
Chile	16,631	9,491	$7,139
Colombia	20,317	18,234	$2,083
Costa Rica	7,026	9,507	($2,481)
Dominican Rep.	7,955	4,519	$3,436
El Salvador	3,347	2,396	$951
Guatemala	6,057	4,217	$1,839
Honduras	5,932	4,643	$1,289
Israel	15,074	23,051	($7,977)
Jordan	2,052	1,357	$695
Korea, South	44,544	69,606	($25,062)
Mexico	240,326	294,158	($53,831)
Morocco	2,068	991	$1,077
Nicaragua	1,014	3,104	($2,090)
Oman	2,014	975	$1,039
Panama	10,398	400	$9,998
Peru	10,070	6,079	$3,991
Singapore	30,532	16,464	$14,068
TOTAL	$765,115	$826,890	($61,775)

The deficits with Canada (-$34.0 billion) and Mexico (-$53.8 billion) are the primary reason for the FTA deficit. Without those two countries, the other 18 FTAs would produce a $26 billion merchandise trade surplus (see chart).

With the current debate over building the Keystone XL pipeline and U.S. energy independence growing, crude oil policy has gained importance in the trade agenda.

Energy imports from Canada and Mexico account for the bulk of the deficit with those two partners. The U.S. imported $83.0 billion in crude oil from Canada in 2014 and $27.7 billion from Mexico.

Autos are another large factor in NAFTA trade that has drawn complaints from U.S. unions about trade with Mexico. While the U.S. has only $2.5 billion deficit with Canada for trade in cars, trucks and parts, it has a $63.0 billion deficit with Mexico.

The $25.1 billion deficit with South Korea creates another public relations challenge for trade supporters. But as with Mexico, the main cause of that shortfall is due almost entirely to auto trade, with the U.S. suffering a $21.4 billion deficit with Seoul in this sector. Among other FTA partners, the

U.S. is running a surplus with CAFTA-DR nations, mostly due to a decrease in apparel imports, as well as with some countries participating in TPP talks, including Australia, Chile, Peru and Singapore. The Census trade report didn't include country-by-country services trade which probably would increase the U.S. surplus.

Justice Informs Court on New FOIA Law for Export Data

Justice attorneys hope to put to rest a lawsuit seeking release of BIS licensing information because of the lapse of the Export Administration Act (EAA) and its Section 12(c) data protections. In a letter filed in the Ninth Circuit Court Jan. 8, Justice attorney John Koppel informed the court that President Obama in December signed a bill (S. 1683) that "makes unmistakably clear Congress's intent to keep the records at issue in this litigation exempt from disclosure" under the Freedom of Information Act (FOIA).

> Justice filed the letter in the case of *Electronic Frontier Foundation* [EFF] *v. Dept. of Commerce*. "The legislation thus supports the arguments set forth throughout the government's opening and reply briefs in the instant case. Furthermore, this Court's case law also establishes beyond peradventure that the new legislation applies to this pending case," it continued.

With the new law, Justice is expected to seek dismissal of that suit, but no motion had been filed as of press time. The new law puts the EFF case "on the same footing" as *Wisconsin Project v. Dep't of Commerce* in 2003 and *Times Publishing Co. v. Dep't of Commerce,* which upheld nondisclosure of EAA license applications, Justice said.

Section 209 of the legislation declares that "Section 12(c) of the Export Administration Act of 1979 (50 U.S.C. App. 2411(c)) has been in effect from August 20, 2001, and continues in effect on and after the date of the enactment of this Act, pursuant to the International Emergency Economic Powers Act." It also says 12(c) comes under FOIA provisions excluding certain government information from release. The last extension of the EAA expired in 2001 (see **WTTL**, Dec. 15, page 1).

Changes in Cuban Relations Get Rough Reception in House

If where you stand depends on where you sit, then sitting on the House Foreign Affairs Committee is likely to put you in strong opposition to President Obama's renewal of relations with Cuba and his call for ending the 50-year trade embargo against the island. At a committee hearing Feb. 4, Obama's diplomatic initiative, as well as changes in trade and travel rules, drew bipartisan complaints. The only support for the policy came from a few members from farm states and loyal Democrats.

> Committee members had two main complaints about the new policy. They objected to not being consulted in advance on the change in policy and they are concerned the changes will benefit the Cuba government and not the Cuban people (see **WTTL**, Feb. 2, page 6).

"Members of Congress were left in the dark. Most of the administration, including the State Department, were left in the dark," said Chairman Ed Royce (R-Calif.). "Instead of dismantling a 50-year-old failed policy, the administration may have given a 50-year-old failed regime a new lease on life to continue its repression at home and militant support for Marxist regimes abroad," he said. Ranking Member Elliot Engel (D-N.Y.) was almost as harsh. "Normalizing relations with Cuba cannot be a one-way street, and, at this time, I believe that Congress must see a greater political opening in Cuba before lifting the embargo. There must be give and take on both sides," he said.

For nearly three hours, the committee grilled Assistant Secretary of State Roberta Jacobson, who had just returned from Havana where she discussed the first steps towards normalization of relations. BIS Deputy Assistant Secretary Matthew Borman and Office of Foreign Assets Control Deputy Director John E. Smith also testified but faced only technical questions and gave assurances that the embargo will continue to be enforced.

Among the numerous questions members posed to Jacobson were several dealing with the estimated 6,000 claims pending against Cuba for the confiscation of property and companies with a value of $8 billion. "I have been cognizant of the claims," Jacobson said. "It is a very important issue that they have to resolve," she added.

Ryan Spells out His Demands for Trade Agreements

The future of U.S. trade policy may hinge on bratwurst and Gouda cheese from Wisconsin, at least from the perspective of House Ways and Means Committee Chairman Paul Ryan (R-Wis.), who gave a forceful speech in favor of trade agreements Feb. 5, but also raised issues that he wants to see addressed in trade pacts with Asia and Europe. While advocating for passage of fast-track trade promotion authority (TPA), Ryan provided no specifics about when he would introduce or act on a bill.

Ryan's reference to sausages and cheese reflect his concerns about European Union (EU) demands for including protection of geographic indications (GIs) in the Transatlantic Trade and Investment Partnership (TTIP) being negotiated. "Our biggest beef with them is they impose food and safety standards based on self-interest instead of science-or sound policy," he said.

"The way they write regulations is pretty opaque," he said. "They're a little prickly about their labeling - or to be more precise, their geographical indications. So since a Wisconsin brat isn't from Germany, they want us to label it a 'bratwurst-like sausage' - which to me makes about as much sense as saying the Green Bay Packers engage in a 'soccer-like activity.' It's all a little humorous, but in recent talks, Canada agreed to accept some of these labeling standards for things like feta and fontina. The point is, if we do nothing, the red tape and barriers to our exports will only multiply," Ryan told the Washington International Trade Association.

"For TTIP, the European Union must eliminate all tariffs-every one of them-just as they promised at the outset. And they must go further. They must address those unjustified regulations. Labels are labels-they're meant to inform, not to frighten. And regulations are meant to keep people safe, not to keep politicians in office. The way I see it, this is their opportunity to set up a system that's transparent, coherent, and first-rate. And any agreement must include strong protections for cross-border data flows, investment, financial services, and intellectual property rights," he continued. With regard to the Trans-Pacific Partnership (TPP), the Wisconsin Republican focused on Canada and Japan.

Those two trading partners "just have to lower their agricultural tariffs," he said. "In some cases, Japan's tariffs reach as high as 700%. And Canada has big restrictions on dairy, poultry, and egg products. Those have to go. And if any of the 12 countries currently in the talks think our standards are too high, well, I'd complete the agreement without them and invite them to join it later," he declared.

> Without giving specifics on what he wants in TPA, Ryan said the legislation is needed because "every country at that table has to be able to trust us. They have to know that the deal the administration wants is the deal Congress wants, because if our trading partners don't trust the administration, if they think it will make commitments that Congress will undo later, they won't make concessions," he said.

"That's why we have to pass TPA before negotiations are complete. To get the best deal possible, we have to be in the best position possible. We can't negotiate with ourselves. We have to maintain a united front," he added.

* * * Briefs * * *

ECR: DDTC notice Feb. 4 said: "Effective immediately, DDTC will make a slight change to the validity dates for certain agreements affected by Export Control Reform. If an agreement contains multiple USML categories, the 'relevant final rule' now refers to the *last* rule impacting any of the categories contained in the agreement. This change has been made to alleviate the potential burden on exporters of seeking multiple authorizations or multiple amendments due to the staggered release of the revised USML categories. The *Guidelines for Preparing Electronic Agreements,* Table 20.1, Note 1, is hereby changed to read: 'If an agreement contains multiple USML categories, the "relevant final rule" refers to the last rule impacting any of the agreement's categories.'"

SHELVING: In 6-0 sunset vote Feb. 5, ITC said revoking antidumping and countervailing duty orders on kitchen appliance shelving and racks from China would renew injury to U.S. industry.

EX-IM FRAUD: Fernando Pascual-Jimenez, owner of CEMEC Commercial, S.A. de C.V. in Queretaro, Mexico, was arrested in Las Vegas Jan. 30 on charges of conspiracy to commit wire fraud by defaulting Ex-Im Bank loans of approximately $5 million. Co-defendant Richard M. Grinhaus remains at large and is believed to be residing in Queretaro or Mexico City, Mexico.

CENSUS: In Federal Register Feb. 9, Census updated its Foreign Trade Regulations (FTR) to reflect implementation of International Trade Data System (ITDS) and subsequent changes to access Electronic Export Information (EEI). Final rule "clarifies the confidentiality provisions of the EEI and facilitates the legitimate sharing of export data consistent with the goals for the ITDS." ITDS will provide single electronic system of exporting and importing information by end of 2016, President Obama ordered in February 2014 (see **WTTL**, Feb. 24, page 6).

WEST COAST PORTS: Pacific Maritime Association (PMA) Feb. 6 suspended weekend vessel loading and unloading operations along West Coast. "In light of ongoing union slowdowns up and down the coast which have brought the ports almost to a standstill, PMA member companies finally have concluded that they will no longer continue to pay workers premium pay for diminished productivity," it said in statement. Vessel operations were scheduled to resume Feb. 9. "Temporarily suspending port operations is just another example of the International Longshore and Warehouse Union and Pacific Maritime Association shooting themselves in the collective bargaining foot. The continuing slowdowns and increasing congestion at West Coast ports are bringing the fears of a port shutdown closer to a reality," National Retail Federation VP for Supply Chain Jonathan Gold said in statement.