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OECD Credit Arrangement Is “Fracturing,” Hochberg Warns

The Organization for Economic Cooperation and Development (OECD) Arrangement on official export financing is “fracturing” as members try to find new, unregulated ways to fund exports and investment, Fred Hochberg, president and chairman of the Export-Import Bank (Ex-Im), told the bank’s advisory committee May 28. “The very polite wording of the arrangement is somewhat fracturing,” he said.

“There are more and more financing tools that are being deployed by other countries that are helping their exporters and thereby having an impact on U.S. competitiveness and U.S. companies competing in those markets,” Hochberg said. The OECD Arrangement’s goal of assuring a level playing field in export financing among developed countries and to prevent cut-rate financing is “increasingly challenged today,” he said.

A draft of Ex-Im’s annual competitiveness report for 2012 shows so-called “unregulated” financing by arrangement participants growing 70% to \$107.6 billion in 2012 from \$63.5 billion in 2011. In addition, financing by non-OECD members was estimated at nearly \$71 billion in 2012, up from \$65.3 billion in 2011, with most of that funding coming from China. The increase in unregulated financing is attributed to “market windows” through which OECD export credit agencies (ECAs), particularly Korea, provide market-rate financing untied to domestic production but limited to companies in their countries plus the growth in foreign investment insurance programs, especially by the Japanese.

Europe’s financial crisis “had a tremendous impact on the ECA landscape,” Isabel Galdiz, Ex-Im’s OECD coordinator, told the committee. Because European banks, which were major sources of export financing, were unwilling to back exports due to their liquidity problems, European ECAs stepped in, offering alternative financing that was outside the OECD rules. Japan is offering “very significant programs” for foreign investment to its trading companies. “We are concerned about that,” Galdiz added.

Froman Faces Questions on U.S. Trade Policy

Michael Froman, President Obama’s nominee to be the next U.S. Trade Representative (USTR), is expected to get a friendly reception at a Senate Finance Committee confirmation hearing June 6, but will face tougher questions than former Deputy USTR

Demetrios Marantis encountered when he appeared before the panel in March (see WTTL, March 25, page 2). Marantis skirted committee questions on administration positions in the Trans-Pacific Partnership (TPP) talks and plans for a U.S.-European Union (EU) free trade agreement, as well as a date for starting work on legislation to renew the president's fast-track negotiating authority, also known as Trade Promotion Authority (TPA).

Froman, who now serves as Obama's deputy national security advisor for international economic affairs, is likely to get questions on the U.S. stand in the TPP talks on drug research data protection, investor-state dispute settlement and textiles, as well as the impact of Japan's entry into the talks. Committee members also will want more details on how the administration will handle tough issues, such as agriculture, data protection and audiovisual rules in the U.S-EU negotiations.

Committee sources consider Froman to be one of the most knowledgeable candidates on trade issues for the USTR post in recent years and accordingly will expect more detailed answers from him than some other presidential nominees have faced. Some sources say they considered him to be the driver of U.S. trade policy during Obama's first term, playing a key role in the revisions to the U.S.-Korea FTA and setting the stage for negotiations with the EU. As a result, he won't be able to deflect questions, claiming he doesn't know the details of any trade policy.

Total S.A. Pays \$398 Million for Bribing Iranian Oil Official

In the first coordinated action by French and U.S. law enforcement in a major foreign bribery case, a French oil and gas company listed on the N.Y. Stock Exchange agreed to pay almost \$400 million to Justice and the Securities and Exchange Commission (SEC) to settle charges of paying \$60 million in bribes to an Iranian government official to obtain contracts from 1995 to 2004. Under a three-year deferred prosecution agreement with Justice, France's Total S.A. agreed May 29 to pay a \$245.2 million penalty and under a cease-and-desist order with the SEC, it will pay \$153 million in disgorgement and prejudgment interest.

A criminal information filed against Total in the Alexandria, Va., U.S. District Court charged the company with one count of conspiracy to violate the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA), one count of violating the internal controls provision of the law, and one count of violating the FCPA's books and records provisions.

"TOTAL mischaracterized the payments under the various consulting agreements as 'business development expenses,' when they were, in fact, unlawful payments for the purpose of inducing the Iranian Official to use his influence in connection with the granting of development rights to the Sirri A and E and South Pars fields, and improperly characterized the unlawful consulting agreements as legitimate consulting agreements," the criminal information stated. The official was the chairman of an Iranian engineering company more than 90% owned by the Iranian government and headed an Iranian organization "concerned with fuel consumption."

In France, the prosecutor of Paris announced May 29 that he had requested that Total, Total's chairman and CEO, and two additional individuals be referred to the Criminal

Court for violations of French law, including France's foreign bribery law. "The French investigation that started in 2006 has reached the stage of resolution. Total reaffirms that it has not committed any offense under applicable French law," the company said in a statement. "These settlements, the outcome of which are customary in the United States, allow us to put an end to this investigation," said Total's CFO, Patrick de La Chevadière, in the statement. "We look forward to continuing our work and in demonstrating our strong commitment to ensuring ethical and legal compliance with the laws around the world," he added. Total also agreed to hire an independent compliance consultant and continue to implement an enhanced compliance program and internal controls designed to prevent and detect FCPA violations.

Nonprofits, Trade Groups Give U.S. Negotiators Long Wish List

A diverse group of nonprofits, trade associations and companies answered the USTR's call to testify on the proposed Transatlantic Trade and Investment Partnership (TTIP) in a Washington hearing May 29. Many of the organizations that testified simply repeated or read from the same written comments they had submitted to the USTR in previous public comments (see **WTTL**, May 20, page 3). Nonetheless, some raised new issues.

As in their written comments, witnesses highlighted a wide range of issues that will give negotiators a long to-do list, including everything from auto safety, logistics and product labeling to tobacco, food safety, internet privacy, intellectual property and the free flow of cross-border data. The differences in opinions expressed at the hearing on these issues foreshadow the problems the U.S. will face in setting negotiating goals for the TTIP.

For example, a consumer group, the Center for Science in the Public Interest (CSPI), suggested the creation of a Consumer Advisory Panel during the negotiations. "Without outside advice on particular issues, negotiators may suffer tunnel vision that precludes consideration of how a decision may affect issues more important to consumers than just choice and price," CSPI's Director of Food Safety Caroline Smith DeWaal told the panel.

Other groups said they want privacy and safety standards excluded from the talks, allowing countries to maintain their own standards or mutually recognize the others'. Some witnesses said they want to exclude certain products from the talks. An American Cancer Society representative urged the U.S. to table a general exemption proposal at the TTIP, similar to one tabled during the negotiations toward a Trans-Pacific Partnership (TPP), which would "recognize the unique status of tobacco products."

The American Automotive Policy Council (AAPC), which represents Chrysler, Ford and GM, said it wants reciprocal acceptance of U.S. and EU standards. "As an aspirational goal, we propose that vehicles built to the EU standards or the U.S. standards would be deemed safe for either market," testified AAPC President Matt Blunt. "Under our proposal, a vehicle built to self-certification in the U.S., built to our self-certifying standard, would be deemed safe for either market, and acceptable in either market, and the same would apply to Europe. A vehicle that was built to a certain standard of type approval would be deemed safe for either the EU or the U.S.," Blunt said.

A representative from the Maine Citizen Trade Policy Commission highlighted the need for the federal government to consult with state governments that must "conform their

democratically enacted domestic policies to the constraints and priorities set in trade and investment pacts.” The USTR should not seek fast-track trade promotion authority for the TTIP and “should increase consultation and transparency in the trade negotiation process, particularly with respect to state governments,” testified commission co-chair, Maine State Rep. Sharon Anglin Treat. “Currently, state officials have limited access to vital information on trade policy decisions and lack a meaningful role in forming U.S. positions for trade negotiations,” she said.

Tech Groups Push for Expanded ITA in Geneva

With negotiators in Geneva the week of May 28, technology trade associations took the opportunity to renew their support for an expanded Information Technology Agreement (ITA). “A window has opened to conclude the talks by late summer of this year,” said a statement issued by 70 major technology trade associations from 29 countries. “Product expansion of the ITA, as well as expansion of geographic scope of the agreement would yield immediate and substantial benefits, removing tariffs on a vast array of tech products not currently covered,” the statement asserted.

In a call with reporters May 30, Information Technology Industry Council (ITI) Senior Vice President for Global Policy John Neuffer said his group was “quite encouraged” by the progress seen at the negotiations to date. Ian Steff, vice president for global policy at the Semiconductor Industry Association (SIA), told reporters that conclusion by the end of this summer “is needed to establish trust” in the process.

Neuffer said industry is “very happy” with the level of participation in the talks, which have representatives from 53 of 75 signatories of the original ITA. “A lot of folks are waiting in the wings to jump in,” he said. The industry statement noted that the ITA product list has not been updated in 16 years, before DVD players, and video cameras, GPS systems and digital displays were on the commercial market. In addition to ITI and SIA, the industry statement was signed by such U.S. groups as TechAmerica, Semiconductor Equipment & Materials International (SEMI), Computer and Communications Industry Association (CCIA), and Business Software Alliance (BSA).

Unions Complain about Ex-Im Bank’s Competitiveness Report

Union members of the Export-Import Bank’s advisory committee complained May 29 that a draft of the bank’s annual competitiveness report to Congress lacks support for contentions that Ex-Im requirements for domestic content, the use of U.S. ships and economic impact analysis are hurting the bank’s ability to compete with other foreign export credit agencies. At the committee’s meeting, Celeste Drake, a trade policy specialist with the AFL-CIO, presented comments drafted by fellow committee member Owen Herrstadt, director of trade for the International Association of Machinists and Aerospace Workers, saying the report’s findings are based on too small a survey of bank users and unsupported anecdotal statements.

The draft report contends the congressionally mandated requirements for an economic impact analysis had a “negative” impact on the bank’s programs; domestic content requirements had an “extremely negative” impact; and shipping requirements had a

“negative” impact. Ex-Im staff defended the report, saying these results weren’t based only on the survey of users but also from roundtable discussions with exporters (see related story below). “We use as much empirical data as we can, but before we make any large changes we want to make sure it has good strong data behind it,” Ex-Im Chairman Fred Hochberg told WTTL after the meeting (see **WTTL**, April 8, page 4).

Hochberg said these requirements are mandated by Congress. “That’s the fabric of democracy; that’s the fabric of how we operate,” he said. Ex-Im sent Congress a report May 30 on the results of its review of its domestic content requirements. According to sources, the report includes many findings but does not include any recommendation for changing the policy.

Hochberg also noted a memorandum of understanding (MOU) he signed last year with then-Transportation Secretary Ray LaHood to clarify the procedures the Maritime Administration (MARAD) follows in enforcing the 80-year-old Public Resolution 17 (PR17), which requires use of U.S.-registered ships to transport Ex-Im financed exports. In addition to making the process more transparent, the MOU clarifies the appeals process exporters can use to get a waiver from the PR17 requirement. “If an exporter says, ‘These fees are much higher than I can afford, I want to get recalculated,’ MARAD will look at it to make sure its fair,” Hochberg explained. While MARAD had the ability to issue waivers before, “it was not always terribly clear and transparent,” Hochberg said. The MOU “makes all that much clearer and easier for exporters,” he said.

U.S. shipping industry sources concede that prices and availability of U.S.-registered ships have not been competitive in the past and ships didn’t go regularly to some destinations. There are relatively few U.S. ships, although the number jumped from around two dozen a few years ago to nearly 70, primarily to meet Defense Department demands for shipping materiel to Iraq and Afghanistan. With the wars drawing down, those ships are increasingly available for commercial trade, and with overcapacity, prices are falling, one industry executive told WTTL. At the advisory committee meeting, a major U.S. exporter confirmed the greater availability and lower prices for U.S. ships.

Drake and Herrnstadt urged the advisory committee to revise a draft letter it was issuing on the competitiveness report to reflect the lack of supporting data on public policy issues. The draft letter said these public policy issues “continue to be key concerns of Ex-Im stakeholders and should not be ignored even though Ex-Im continues to experience high volume growth. These issues still appear to undermine an otherwise successful Ex-Im and left unattended will arguably impact U.S. competitiveness.” In response to the comments from the two union members and industry representatives who support the report’s findings, Advisory Committee Chairman Nelson Cunningham, managing partner with McLarty Associates, conceded, “there is clearly a difference of views here.”

Court Stays Delta’s Suit Against Ex-Im Aircraft Financing

A federal judge has agreed to issue a stay in a lawsuit seeking to block Ex-Im’s financing of commercial aircraft exports. In response to a joint motion filed by Ex-Im, Delta Air Lines and the Airline Pilots Association, D.C. U.S. District Court Judge Rudolph Contreras issued an order May 17 staying Delta’s suit until 45 days after the D.C. U.S. Circuit Court issues a ruling in an earlier pending suit also challenging the bank’s financing (see **WTTL**, April 8, page 1). The stay comes as Ex-Im put in place new

economic impact analysis guidelines April 1, adopting new procedures for reviewing aircraft financing applications. The appellate court heard oral arguments May 14 on the earlier suit, *Air Transportation Association of America v. Ex-Im (ATA)*.

“While this case involves a different subject matter, the D.C. Circuit’s resolution of *ATA* is likely to impact this Court’s consideration of the legal issues in this case,” the joint motion argued. “That decision is therefore likely to inform the question whether the court may review the Bank’s financing decisions in this case, and if so, whether the Bank was obligated to conduct detailed economic assessments of the potential harms caused by its financing before approving each of the foreign airline applications challenged in this Complaint,” it added.

New Ex-Im guidelines on how the bank will conduct economic impact analyses includes for the first time requirements for reviewing aircraft financing. The changes, mandated in legislation rechartering the bank last September, aim to make the procedures more transparent, to expand the methodology used to review transactions to take into account more state-of-the industry data, to have more information presented to the Ex-Im board and to allow exporters to seek use of an alternative methodology to apply information from their own cost-benefit analysis.

At a May 29 meeting of Ex-Im’s advisory committee, Ex-Im Senior Vice President Jim Cruse provided a briefing on the new guidelines and noted that the bank hasn’t rejected many applications because of the results of previous economic impact analyses. The biggest impact “has been the chilling effect” of the analysis, Cruse said. He said the bank has been told by some potential applicants that didn’t seek aid that they would have applied if they didn’t face the review. Rather than applications being denied, they “disappear,” Cruse said.

Under the new methodology, aircraft financing will undergo a four-stage review process that will examine such areas as oversupply in the industry, the potential injury to U.S. airlines and the financing available to domestic U.S. carriers for their purchase of aircraft. “Given the historical distribution and nature of aircraft cases, it is anticipated that only 10% - 15% of cases would go through all four stages,” the guidelines state. “Unlike goods, which can be, and are, considered ‘commodities’ and therefore totally interchangeable for economic impact trade flow analysis, services (especially airline services) are by their nature highly differentiated. Hence, the mere existence of an alternative is not sufficient to say that Ex-Im Bank is actually helping to put in place competition that could (or should be considered to) displace U.S. services,” they add.

*** * * Briefs * * ***

EXPORT ENFORCEMENT: Lisong Ma, Chinese citizen, pleaded guilty May 30 in Brooklyn U.S. District Court to attempting to export weapons-grade Toray-type T-800 carbon fiber to China in March 2013. “The defendant was bent on exporting to China up to five tons of weapons-grade carbon fiber -- enough carbon fiber to stretch from Brooklyn to the Pacific Ocean,” said U.S. Attorney Loretta E. Lynch. Ma was arrested April 3 at Los Angeles Airport and remains in custody in Brooklyn.

VEU: BIS in Federal Register June 3 added new end-user in China -- Shanghai Huahong Grace Semiconductor Manufacturing Corporation, Ltd. (HHGrace) -- which was result of merger of

two existing end-users, removed those two entities, and updated list of eligible items for CSMC Technologies Corporation (CSMC). In addition, BIS updated EAR to “improve the display and readability” of VEU list.

UKRAINE: USTR announced May 30 it will investigate Kiev’s treatment of intellectual property rights under Section 301 of Trade Act, month after it named Ukraine as Priority Foreign Country (see **WTTL**, May 6, page 6). USTR will hold public hearing July 18.

CARIBBEAN: U.S. and 15-member Caribbean Community (CARICOM) signed TIFA May 29, to “provide a forum for bilateral talks to enhance trade and investment and discuss specific trade issues,” USTR noted in announcement. TIFA replaces Trade Investment Council agreement that U.S. and CARICOM first signed in 1991 (see **WTTL**, July 29, 1991, page 4).

E-DISCOVERY: ITC amended its rules and procedures in May 15 Federal Register to limit which electronically stored documents have to be submitted during discovery phase of Section 337 proceedings. “The intended effect of the amendments is to reduce expensive, inefficient, unjustified, or unnecessary discovery practices in agency proceedings while preserving the opportunity for fair and efficient discovery for all parties,” commission said in notice.

IRAN: OFAC issued General License D May 30, authorizing exportation or reexportation to Iran of “fee-based services incident to the exchange of personal communications over the Internet, such as instant messaging, chat and email, social networking, sharing of photos and movies, web browsing, and blogging.”

RUSSIA: Russia gained observer status May 29 to the WTO committee on government procurement. When it joined WTO in August 2012, Moscow pledged to join Government Procurement Agreement within four years. “This represents a first step towards eventual accession by Russia as a full party to the Agreement on Government Procurement,” WTO said.

COOL: Canadian officials are “extremely disappointed” with new USDA country of origin labeling (COOL) rules for muscle cut commodities released May 23 and intended to bring U.S. into compliance with WTO ruling against previous regulation. “These changes will not bring the United States into compliance with its WTO obligations. These changes will increase discrimination against Canadian cattle and hogs and increase damages to industry on both sides of the border,” said Ed Fast, Canada’s Minister of International Trade, and Gerry Ritz, Canada’s Minister of Agriculture, in a joint statement. “Canada will consider all options at its disposal, including, if necessary, the use of retaliatory measures,” they added. WTO ruled against U.S. COOL rules in June 2012 (see **WTTL**, July 9, 2012, page 4).

EX-IM BANK: In FY 2012, Ex-Im financed three transactions for dual-use exports, first such financing since FY 2002, GAO found in annual report released May 29 (GAO-13-628R). Exports included: satellite for France’s Eutelsat; road construction equipment for government of Cameroon, and three satellites for government of Mexico. “At the time of publication of this report, little of the equipment financed had been delivered to end users,” GAO noted.

CARBON BRICKS: CIT Senior Judge Nicholas Tsoucalas in May 30 opinion upheld Commerce scope ruling that magnesia alumina carbon bricks fall under countervailing duty and anti-dumping orders on magnesia carbon bricks (slip op. 13-68).

IRONING BOARDS: While sustaining in part Commerce’s fifth administrative review of anti-dumping duty order on floor-standing, metal-top ironing tables from China, CIT Judge Leo Gordon remanded other parts of decision May 30, requiring department to better explain apparently different positions it has held on what constitutes publicly available financial data from surrogate country and calculation of container size and cost based on proximity of Since Hardware (Guangzhou) Co., Ltd. factory to port (slip op. 13-69). He sustained Commerce decision on surrogate wage rates and fabric costs.