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Unregulated Export Financing Exceeds G-7 Lending

For the first time, unregulated export financing by Brazil, India and China (BICs) in 2010, exceeded medium- and long-term aid disbursed by the seven major industrialized nations (G-7), whose export credit agencies (ECA) must comply with the export financing arrangement of the Organization for Economic Cooperation and Development (OECD). The BICs provided $72.7 billion in financing compared to $69.7 billion for the G-7 last year, according to a draft of the Export-Import Bank's annual competitiveness report, which will go to Congress June 30.

> "We've reached a turning point where more than 50% of the export competition in the world is from the BIC countries that are not part of the arrangement, are not part of OECD," said James Murray Jr., managing director of Court Square Ventures and chairman of the Ex-Im Bank Advisory Committee, which reviewed the report at its May 17 meeting. "In the years ahead, we are going to have to learn a lot more about what the BIC countries are doing one way or another," he added.

The 2010 competitiveness report is the first to include extensive data and analysis of BIC lending. Of their $72.7 billion in financing, China accounted for $45 billion (62%), Brazil for $18.2 billion (25%) and India $9.5 billion (13%). The standards for China's loans "are somewhat ambiguous and non-specific," the draft says. Unlike OECD rules that prohibit tied aid to all but least-developed countries, China's program supports viable projects anywhere, it states. Ex-Im says there is not much public information available about the terms for Chinese lending, but it notes allegations that Beijing's loan rates may be as low as 1-2% for 20-to-30 years.

Based on a survey of Ex-Im clients, the bank's core financing programs and practices rate high compared to other G-7 ECAs, the draft report notes. Exporters and banks that use Ex-Im financing, however, complained about "public policies" that often restrict its financing ability, including domestic-content requirements, environmental reviews and a "carbon policy" adopted in 2009 to encourage low-carbon exports and restrict financing for high-carbon projects. Ex-Im Chairman Fred Hochberg defended the domestic-content requirements at a May 17 Senate Banking Committee hearing on renewal of the bank's charter. "With close to 9% unemployment, it's hard to justify dropping content as a way to increase employment," he said.

BAE Systems Pays $79 Million for Export Violations

The long-awaited second shoe has dropped on United Kingdom's BAE Systems plc (BAES) over a year after it reached a settlement with Justice on charges of making false statements to the

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U.S. government. In a May 16 consent agreement with State's Directorate of Defense Trade Controls (DDTC), BAES agreed to pay a $79 million penalty over the next four years for 2,500 alleged violations of U.S. export laws. As part of settlement, DDTC imposed a policy of denial for export licenses going to three BAES subsidiaries. Separately, the agency issued guidance on how it will handle existing licenses to those three entities and requests for waivers.

> The agreement settles alleged violations of the Arms Export Control Act and International Traffic in Arms Regulations (ITAR), including unauthorized brokering of U.S. defense articles and services, failure to register as a broker, failure to file annual broker reports, causing unauthorized brokering, failure to report the payment of fees or commissions, and failure to maintain records involving ITAR-controlled transactions. BAES neither admitted nor denied DDTC's charges

DDTC suspended $10 million of the $79 million penalty to offset past and future BAES spending to improve compliance. The agreement doesn't affect BAE Systems, Inc., the company's U.S. subsidiary. The settlement also includes a presumption of license denial for BAE Systems CS&S International, Red Diamond Trading Ltd., and Poseidon Trading Investments Ltd., including their subsidiaries, divisions, business units and successor entities. In separate guidance issued May 17, State said a notice will be published in the Federal Register regarding BAES' statutory debarment and reinstatement, as well as the policy on presumption of denial.

Applications for licenses or other approvals for the three subsidiaries "will be presumed to be denied and may be denied or returned without action, unless the license falls" within specific exceptions, the guidance states. State will accept on a case-by-case basis requests for exceptions to the policy of denial for several reasons, including when the exception is "warranted by overriding U.S. foreign policy or national security interests," the guidance adds. Existing approvals for the three subsidiaries "granted prior to Monday, May 16, 2011, where any of the above referenced subsidiaries of BAES are a party are still valid," it advises.

Airbus Ruling Won't Put Genie Back in Bottle

A World Trade Organization (WTO) Appellate Body (AB) ruling May 18, confirming that European countries provided illegal subsidies to Airbus for 40 years, won't undo the consequences of that aid, which has helped propel Airbus into a major civil aircraft manufacturer and allowed it to capture roughly 50% of the global market for passenger planes. The decision will have little impact on Airbus' older fleet of planes that benefitted from the support. At best, if Airbus actually restructures existing and future loans at commercial terms, the ruling will slightly crimp its development of its coming A350 plane, which will compete with Boeing's 787 Dreamliner, narrow profits for its already troubled A380 jumbo jet and reduce its ability to undercut Boeing on pricing for all its planes.

> The AB ruling doesn't end the dispute between the U.S. and European Union (EU) over subsidies they have both given to their aircraft industries. The EU has 180 days to come into compliance with the decision, but based on past experience with disputes over bananas, beef and genetically modified organisms, the two trading partners could spend years fighting over whether the EU's remedies fully comply with the AB's findings (see **WTTL**, April 4, page 2).

The ruling has renewed speculation that the U.S. and EU eventually will have to reach a negotiated settlement on government aid for civil aviation. With the AB confirming that Airbus received $18 billion in illegal subsidies and a dispute-settlement panel saying the U.S. gave Boeing $5.3 billion in illegal aid, the U.S. and EU face something comparable to the banking sector's "too-big-to-fail" problem: the cost of compliance or retaliation for the civil aircraft business might be too big to swallow, not just for Airbus and Boeing, but for airlines that buy their planes. As with previous WTO rulings on Airbus and Boeing subsidies, both the U.S. and EU claimed victory with the AB decision. While the U.S. hailed the AB's confirmation of the EU's illegal subsidies to Airbus, the EU applauded its rejection of U.S. claims that the

subsidies were "prohibited" subsidies, that R&D aid to Airbus was illegal and its finding of $18 billion in illegal subsidies instead of the $20 billion found by the dispute-settlement panel.

Appellate Body Sets Standard for "Prohibited" Subsidies

In rejecting the U.S. claim that four EU countries had provided "prohibited" *de facto* subsidies to Airbus tied to export requirements, the WTO Appellate Body articulated a new standard May 18 on when WTO rules against such aid apply (see story above). When a subsidy is not explicitly required by statute to support exports, "we consider that the factual equivalent of such conditionality can be established by recourse to the following test: is the granting of the subsidy geared to induce the promotion of future export performance by the recipient?" the Appellate Body report stated. U.S. Trade Representative General Counsel Tim Reif told reporters the U.S. "is comfortable with the test."

> "In reaching this interpretation of the standard for *de facto* export contingency under Article 3.1(a) and footnote 4 of the *SCM Agreement*, we do *not* suggest that the standard is met merely because the granting of the subsidy is designed to increase a recipient's production, even if the increased production is exported in whole," the report continued. Rather, these provisions "would be met when the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy," it stated.

"Where the evidence shows, all other things being equal, that the granting of the subsidy provides an incentive to skew anticipated sales towards exports, in comparison with the historical performance of the recipient or the hypothetical performance of a profit-maximizing firm in the absence of the subsidy, this would be an indication that the granting of the subsidy is in fact tied to anticipated exportation," the report added. The standard does not depend on why the subsidy was granted, but "*what* the government did, in terms of the design, structure, and modalities of operation of the subsidy, in order to induce the promotion of future export performance by the recipient," it explained.

Dividing Lines Remain over Mexican Trucking, Comments Show

In its effort to block a proposed pilot program to resolve the cross-border trucking dispute between the U.S. and Mexico, the Teamsters Union produced more than 1,000 comments from individuals against the proposal. Transportation's Federal Motor Carrier Safety Administration has received more than 2,000 comments in all on the latest proposal that could eventually lead to Mexican trucks having full access to U.S. highways (see **WTTL**, April 18, page 2).

> "I urge Transportation Secretary Ray LaHood to listen to his conscience and to the vast majority of Americans, not to corporate interests that have no loyalty to the United States," said Teamsters General President Jim Hoffa in a May 16 statement noting the negative comments. "He should show that the democratic process works by pulling the plug on this program," Hoffa argued.

Support for the proposal came from the Emergency Committee for American Trade (ECAT), the National Association of Manufacturers and the National Foreign Trade Council (NFTC). "By taking swift and decisive action to ameliorate this long-standing dispute, the United States will signify its commitment to fulfilling its international obligations to Mexico and the international community," ECAT wrote. "Doing so will restore the jobs lost by America's farmers, workers and businesses as a result of this dispute, increase U.S. exports and enhance America's position in a rules based global trading system," the NFTC commented. A joint comment from more than 40 members of Congress opposed the proposed new pilot. "We do not believe this cross border trucking program is in the best interests of the taxpayer or our security," the lawmakers wrote. The current system "is working well for both safety and border security," they added.

Working Group Proposes Ethics Code for Medical Device Exports

Just weeks after Johnson & Johnson paid $78 million to settle charges of bribing foreign doctors, an Asia Pacific Economic Cooperation Forum (APEC) working group presented a proposed code of ethics for the marketing of medical devices to APEC ministers meeting in Big Sky, Mont. A vote on the proposed "Principles for Codes of Business Ethics to Ensure Ethical Interactions Between Medical Technology Companies" was set to be taken May 21 during the meeting. The document aims to prevent the bribery of health officials by medical companies.

> "Ethical interactions ensure that medical decision-making is made in the best interest of the patient," states the principles, which are also known as the Kuala Lumpur (KL) Principles because they were drafted in the Malaysian capital. "To ensure that relationships meet this standard, interactions between Companies and HCPs [health care providers] should be conducted in accordance with the following principles: Integrity, Independence, Appropriateness, Transparency and Advancement," the document declares.

Of particular note is guidance on the long-held tradition of giving doctors free products. "Free products should not be used as a means of inappropriate inducement. However, Companies may provide reasonable quantities of products to HCPs at no charge for evaluation and demonstration purposes," the document advises. The KL Principles represent the first time in APEC history that voluntary ethical principles have been developed for a specific industry, Commerce said. They will be a model for APEC codes of ethics for other sectors such as construction.

* * * Briefs * * *

WASSENAAR ARRANGEMENT: BIS May 20 published changes to harmonize CCL with multinational control list updates agreed to at the December 2010 plenary meeting (see **WTTL**, Jan. 3, page 4).

GUATEMALA: USTR May 16 requested meeting with CAFTA-DR Free Trade Commission regarding Guatemala's apparent failure to enforce its labor laws effectively. U.S. formally launched case by requesting consultations in July 2010 (see **WTTL**, Aug. 2, 2010, page 2).

SYRIA: BIS May 18 suspended "certain licenses for the export and reexport to Syria of U.S. origin parts and components needed for the overhaul/refurbishment of certain long-range, high capacity commercial aircraft not currently in service." Separately, OFAC May 18 added Syrian President Bashar al-Assad and eight other officials to SDN list.

CHINA: Based on survey, ITC report (Publication 4226) released May 18 estimates U.S. firms lost some $48 billion in 2009 due to IPR infringement in China. Firms also spent about $4.8 billion to fight Chinese infringement, it says. "These figures may be understated because they do not reflect losses incurred by firms in the rest of the economy," report states. If China's IPR was comparable to U.S., impact would be: (1) $21.4 billion increase in U.S. exports of goods and services, (2) $87.8 billion increase in sales to U.S. majority-owned affiliates in China, and (3) potential 2.1 million increase in net U.S. jobs. Survey also found concerns about China's indigenous innovation policies but no clear data on its effects.

FCPA: Tenaris S.A., a steel pipe producer based in Luxembourg, entered into SEC's first-ever Deferred Prosecution Agreement (DPA) May 17 over charges it violated FCPA by bribing Uzbekistan government officials. Under DPA, Tenaris must pay $5.4 million in disgorgement and prejudgment interest. Tenaris also agreed to pay $3.5 million criminal penalty in Non-Prosecution Agreement with Justice.

ITC: James Holbein named commission secretary May 16. He joined ITC in 2008 and was named director of docket services in 2010. Previously, he served for 10 years as secretary of U.S. NAFTA Secretariat.

TAA-FTA: Obama administration officials May 16 drew line in sand, saying president won't submit Korea, Colombia or Panama FTAs to Congress until deal is reached on renewing TAA with 2009 improvements.

IRAN: House Foreign Affairs Committee Chairman Ileana Ros-Lehtinen (R-Fla.) and Rep. Howard Berman (D-Calif.) co-sponsored bill (H.R. 1905) May 13 to eliminate president's power to grant some waivers to Iran sanctions law and to impose new higher standard for waiver of energy sanctions.