SOURCES OF EXPORT FINANCING

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The aim of my speech today is to present the subject of export financing on three broad levels. The discussion will focus first on the sources and types of export financing. Next I will concentrate on recent legislative action concerning export financing, and finally, I will touch on current international issues broadly affecting United States export financing in the 1980's and beyond.

I. SOURCES OF EXPORT FINANCING

Sources of export financing have traditionally been limited to institutions that can adequately absorb the financial risks inherent in the exporting business. In the 1980's, as in the past, these sources generally include larger commercial banks, a handful of official, government-sponsored organizations, and related private entities working in cooperation with a government agency. I will begin by discussing the two latter sources.

A. Government Export Credit Agencies and Related Organizations

Official export credit programs are offered by the governments of most industrial nations as a means of facilitating exports and stimulating their own national economies. The official United States export credit agency is the Export-Import Bank of the United States, which was created in 1934 and established as an independent government agency in 1945. Commonly referred to as the Eximbank, this agency is authorized by statute to provide United States exporters with financing competitive with that offered by foreign export credit agencies to assist sales by exporters in their

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1 The Export-Import Bank was created by Executive Order in 1934. Exec. Order No. 6,581 (1934), reprinted in 3 The Public Papers and Addresses of Franklin D. Roosevelt 76 (1934).

own nations. The supported transactions must provide for a reasonable assurance of repayment. Eximbank is directed by statute to supplement but not to compete with private sources of export financing while taking into account the effect of its activities on small business, the domestic economy, and United States employment.

To carry out its purposes, Eximbank has established a variety of services. Through its direct credit program, the Bank makes direct loans to foreign buyers of United States goods and services. In such cases, the Bank generally requires a down payment from the buyer, provides part of the financing from its own funds, and requires private financing for the balance. In cooperation with private insurers, the Bank also provides exporters with insurance against political and commercial risks. In addition, the Bank provides financial guarantees to commercial banks financing United States exports. Finally, Eximbank assists in making discount loans available to exporters by extending advanced commitment

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4 Id. See also EXIMBANK PROGRAM SUMMARY 1 (1984) [hereinafter cited as PROGRAM SUMMARY].


6 See PROGRAM SUMMARY, supra note 4, at 1. The Eximbank offers a wide range of specific programs which adapt to the different financing needs of United States exporters. Among these are direct loans and financial guarantees, medium-term credit programs, the Commercial Bank Guarantee Program, the Export Credit Insurance Program, the Small Manufacturers' Discount Loan Program, and the Export Trading Company Loan Guarantee Program. Id. at 5-9.

7 Id. at 2. Direct credits and financial guarantees are long-term financing mediums available for export transactions in which the contract value exceeds $5 million and which involve long construction periods. This program provides financing assistance for United States exports of heavy capital equipment as well as large-scale installations and projects abroad which are normally financed for a term of more than five years. A typical direct credit financial package includes a cash payment of at least 15% of the value of the export contract, and an Eximbank loan of up to 65%, up from the traditional 45 or 50%. Generally, the Bank will not provide long-term lines of credit or support for sales to developed or rich countries, sales of military goods or services, or sales of older generation aircraft. Id.

8 Id. at 8. The Export Credit Insurance Program is conducted through the Foreign Credit Insurance Association, which will be discussed more fully in the body of this paper. The program in essence protects the exporter against nonpayment due to political or commercial risks and is available to export firms of any size. Id.

9 Id. at 7. Eximbank, for example, provides guaranty for domestic banks and other financial institutions when they acquire medium-term export obligations from United States exporters. In doing so the Bank assumes a risk such financial institutions would not be willing to bear themselves. Id.
for discount debt obligations that United States commercial banks acquire.\(^\text{10}\)

Unlike its European counterparts, which act principally as insurers and refinancers, Eximbank operates like a commercial bank in that it often makes loans directly to borrowers.\(^\text{11}\) To determine the advisability of a loan, Eximbank assesses traditional banking criteria like the viability of the project and the likelihood of repayment.\(^\text{12}\) Most of Eximbank's borrowers are purchasers, often governments, in lesser-developed countries.\(^\text{13}\) The Bank's three biggest borrowers, for example, are Korea, Mexico, and Taiwan.\(^\text{14}\)

Although Eximbank is by far the most important export financer in the United States, export financing and insurance are also available through several closely-related organizations. Among these other sources of loans are the Foreign Credit Insurance Association (FCIA), the Private Export Funding Corporation (PEFCO), and the Overseas Private Investment Corporation (OPIC).\(^\text{15}\)

The FCIA consists of some fifty of the nation's leading insurance companies working in cooperation with the Eximbank to insure United States exporters against political and commercial risk in short- and medium-term transactions.\(^\text{16}\) The FCIA plays an important role in export financing, because its programs are the primary vehicles through which the Eximbank provides support for short-term transactions.\(^\text{17}\) The FCIA also has a medium-term credit insurance program which offers policies to cover political and commercial risks in sales of domestically manufactured goods and quasi-capital goods.\(^\text{18}\)

PEFCO is owned by a group of fifty-four commercial banks, seven industrial companies, and one investment banking firm, all

\(^{10}\) Id.

\(^{11}\) See Annual Report, supra note 3, at 5.

\(^{12}\) See Program Summary, supra note 4, at 2-3.

\(^{13}\) See generally Eximbank's President Urges South Korea to Make More Use of Eximbank Financing, Export Financing, U.S. Export Weekly (BNA) No. 9, at 353 (Nov. 29, 1983).

\(^{14}\) Id. At the close of fiscal year 1983, Korea had borrowed $3.4 billion in loans and loan guarantees, compared to $2.4 billion for Mexico and $2 billion for Taiwan. Id.

\(^{15}\) See Annual Report, supra note 3, at 6-7.

\(^{16}\) Id. at 6-8. The programs offered through the combined efforts of the agencies include a short-term policy which normally covers up to 95% of commercial credit risks and 100% of political risks; a Master Policy which insures most or all of an exporter's eligible short-term and medium-term sales; and a special FCIA policy to support the export of services such as engineering and advertising. See Program Summary, supra note 4, at 8-9.

\(^{17}\) Id. Short-term transactions are limited to 180 days or less. Id.

\(^{18}\) Id. at 9. These policies cover transactions lasting from 18 days to five years. Id.
of which work in cooperation with Eximbank to mobilize non-bank funds for medium- and long-terms to foreign buyers of United States exports. PEFCO generally issues loans together with the Eximbank and commercial banks as part of a total financing package for a single export transaction.

OPIC is a self-sustaining Government corporation which insures and, in some cases, partially finances United States private investment in developing countries. Guided by the principle of "mutual benefit," OPIC seeks to assist private investments which would accelerate economic growth in developing countries without causing an adverse impact on the employment in or balance of trade of the United States. OPIC is best known for its insurance of private United States foreign investment against the political risks of inconvertibility of currency, loss of investment due to expropriation by the host government, and loss due to war, revolution, or insurrection.

B. Other Sources of Export Financing

In addition to the larger and more widely accessible financing facilities discussed above, export financing is also available from sources more localized or specialized relative to the particular exporter or type of product. For example, exporters may obtain short-term financing directly from local or regional commercial banks without the assistance of government-supported programs.

Another alternative for the smaller or medium-sized exporter is the state-government export finance agency, a relatively recent phenomenon in the export financing business. Currently established in only a handful of states, the state-level eximbank is designed to supplement federal government and other large-scale financing programs in an attempt to provide resources to smaller exporters.

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19 See ANNUAL REPORT, supra note 3, at 8.
20 Id. Since its creation in 1970, PEFCO has made export loan commitments in excess of $4.1 billion. Id.
22 OVERSEAS PRIVATE INVESTMENT CORPORATION: INTRODUCTION (1984). Since its inception, OPIC has settled approximately 150 insurance claims totalling more than $400 million and has denied only eight percent of the claims received. Id. at 2.
23 Id. at 1.
exporters on a local or regional basis. Finally, the financing of agricultural exports as a traditional function of the Department of Agriculture represents a specialized financing source based upon the uniqueness of agricultural commodities relative to manufactured goods as items of export.

1. Commercial Bank Financing

As a source of export financing, commercial banks generally offer only short-term financing of 180 days or less. The two major vehicles of such financing are commercial letters of credit and banker's acceptances.

As used in export financing, a letter of credit is a written instrument issued by a bank on behalf of the buyer to establish a commercial credit in favor of the seller for the value of the goods to be shipped. In effect, the bank issuing the letter of credit has substituted its own credit standing for that of the buyer. The commercial credit is never an absolute guarantee of payment to an exporter; rather, it is a contractual commitment that the bank will make payment if the exporter meets the terms and conditions of the credit agreement.

The other major instrument of commercial bank financing is the banker's acceptance, a short-term, discounted loan with a secondary market which allows for immediate distribution of the proceeds to the seller. Specifically, a banker's acceptance involves

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25 Id.
26 See infra notes 37-48 and accompanying text.
27 See INTERNATIONAL BANKING: PRINCIPLES AND PRACTICES 290-95 (E. Roussakis ed. 1983) [hereinafter cited as BANKING].
28 Id. at 295-97.
29 Id. at 289-98. Upon conclusion of a firm export sales contract, a commercial letter of credit may be designated as the financing medium in the transaction. In such case, the foreign buyer applies to his bank for the issuance of a commercial credit in favor of the seller for the purpose of inducing the seller to proceed with shipment of the goods. If the request is approved, the bank will issue an irrevocable letter of credit to the seller which represents an agreement that the seller may look to the bank, not the buyer, to make payment if the seller complies with the terms of the sale contract. Letters of credit issued to finance shipments require the seller to present the bills of lading, commercial invoices, and other appropriate documents before drafts can be honored or payment realized under the letter of credit. In any actual transaction, there will usually be more than one bank participating. In the simplest transaction, the letter of credit from the foreign bank is made payable to the seller's bank in his own country. Id.
30 Id. at 290.
31 Id. at 291.
32 Id. at 295-96. In addition to financing transactions "at sight" under a commercial letter of credit, commercial banks also honor drafts under letters of credit that are drawn on the
the bank’s issuance of a letter of credit on behalf of the buyer under which a draft will become available to the seller on a time basis related to the shipment period which is generally no more than 120 days. The bank’s acceptance of this draft manifests its promise to pay the face amount at maturity. By selling this obligation at a discount in the secondary market, the exporter can obtain immediate funds while contemporaneously extending credit to the buyer. The banker’s acceptance generally offers rates lower than that of a comparable short-term loan because of its discount feature. Not surprisingly, the use of commercial letters of credit and banker’s acceptance for short-term export financing has expanded greatly with the growth of international trade.

2. Agricultural Exports

United States agricultural exports are financed through the Commodity Credit Corporation (CCC), a financing agency organized and operated by the United States Department of Agriculture. The two basic types of financing currently offered by the CCC are export credit guarantee programs and blended credit programs, which combine the features of insurance and direct loans in fixed ratios.

Of the two types of financing, the more widely available is the credit guarantee program, or the GSM-102, which provides both commercial and non-commercial risk insurance of up to ninety-eight percent of the exporter’s F.O.B. or F.A.S. value. This guar-

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See generally id. at 314.

34 Id. at 500.

35 Id. at 296.

36 See generally id. at 295-97.

37 The CCC was created by the Commodity Credit Corporation Charter Act, Pub. L. No. 806, 62 Stat. 1070 (1948).

38 The CCC has created these programs under the authority of Congress expressed in 15 U.S.C. § 714(c)(1982).

antee program is available where credit is needed to maintain domestic agricultural exports to a foreign market and where a private financial institution would be unwilling to provide financing without CCC's guarantees. The program is not intended to offer guarantees in situations where cash sales would otherwise take place.

Such guarantees are often used by countries with improved financial conditions, particularly those countries achieving an economic status above that of poverty level in terms of per capita GNP, to purchase on fully commercial terms.

Less available is the CCC's blended credit program, or the GSM-5, which provides combinations of loans and insurance in specific ratios pre-established by the CCC for each eligible country. These blended credits are available on an extremely limited basis at the discretion of CCC officials, because this program involves the direct outlay of funds. Requests for blended credits are generally made by the governments of lesser-developed countries. The selection of eligible countries is largely one of policy, and the CCC bases its choice upon information obtained from United States agricultural attaches abroad. Currently, blended credits are available only for purchasers in Morocco, Egypt, and Algeria. The average ratio of insurance to direct loans is presently six to one.

3. State Export Finance Agencies

The most recent source of official export financing is the state export finance agency. In the past two years eight states' governments have established export finance organizations, most of which resemble the Eximbank in form. As previously noted, the states target these programs toward smaller and medium-sized exporters,
and local and regional banks. Critics of such programs contend that there is no particular need for official export financing at the state level and that the problem of small and medium-sized exporters is not a lack of financing but their lack of business expertise in obtaining available commercial financing.

Although the federal government generally supports the idea of state eximbanks as a means of supplementing the United States Eximbank's limited resources, officials of the Bank have warned state representatives of the tremendous financial risks involved. Additionally, federal government officials have repeatedly cautioned state officials that any programs offered by the state must comply with the General Agreement on Tariffs and Trade and with the minimum financing provisions of the Organization of Economic Cooperation and Development Arrangement on Guidelines for Officially Supported Export Credits. Thus, the states cannot proceed with their original proposals to use federal tax-exempt securities to fund their own eximbanks. The eight states which have adopted eximbank programs are Illinois, Indiana, Louisiana, Minnesota, South Carolina, Tennessee, Washington, and Wisconsin. Many other states are considering eximbank legislation.

II. LEGISLATIVE ISSUES

Generally, most proposed federal legislation regarding export financing focuses on the activities of the Eximbank. Recently, Congress amended the Eximbank charter to include some of the most significant statutory changes adopted in the history of the Bank. To appreciate fully the important new legislation, some familiarity with basic structure and operation of the Bank, as well as its track record to date, is necessary.

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50 Id. at S-2.
53 See Supplement, supra note 24, at S-4. This position, also taken by Eximbank officials, stems from the Administration's concern that if states excessively subsidize exports, then the United States position in negotiations with other OECD nations to reduce or eliminate export financing subsidies will be seriously weakened. Id.
54 Id. at S-5 - S-6.
55 See generally id. at S-7 - S-15.
56 Id.
A. Introduction: The Statutory Scheme and History of Eximbank

When Eximbank became an independent government agency in 1945, the federal government provided it with a $1 billion start-up fund. To date Eximbank has received no other government funding, and it is in fact required by statute to be self-sustaining. The Bank receives fees for its services and obtains funds from repayments of principal and interest on outstanding loans as well as from loans made by the United States Treasury and the Federal Financial Bank. Since its creation, Eximbank has supported more than $160 billion in domestic export sales and has paid back to the Treasury, its sole shareholder, more than the $1 billion of its initial capitalization.

Although the Bank receives no appropriation through the annual federal budget process, Congress does impose a limitation on the amount of obligations which the Bank can undertake in each fiscal year. Thus, it is inappropriate and misleading to say that the Bank received congressional funding at a particular level in a particular year, for Congressional authorization establishes only the maximum levels at which the Bank can commit its own funds. In fiscal year 1982, for example, Eximbank ceilings were $3.5 billion for direct loans or credit and $5.8 billion in guarantees and insurance; in fiscal year 1983, direct loans or credits were limited to $845 million, while the ceiling on guarantees and insurance was lowered to $8.2 billion. The Bank’s full commitment authority is limited by statute to $40 billion in loans, guarantees, and insurance outstanding at any one time.

Over the past few years, Congress has lowered Eximbank’s yearly authorization levels. These decreases have been attributed partly to federal government austerity measures and partly to congressional response to official criticism that the Bank, like its foreign counterparts, functions in such a manner as to contravene the basic principles of free and undisturbed world trade. Indeed,
traditional United States policy in this area opposes export credit subsidization as a distortion of normal international trade flows and supports the use of a full range of domestic and international measures to penalize those trading partners who engage in such subsidies. In creating the Bank, however, Congress did not intend that its underlying function would be the matching of foreign competition at every turn, and in reality the Bank has not served such a purpose. Thus, because of its operating mandate, Eximbank has never been fully competitive with its foreign counterparts in every program offered.

Recently, however, the increased visibility of the use of subsidized export credit financing by United States trading partners has led to a surge of support for expanding the role of Eximbank in domestic export sales. The precipitating event occurred in May, 1982, when the real impact of subsidized export financing was felt for the first time on a large scale in the United States market. The New York City Metropolitan Transit Authority (MTA) announced at that time it would place an order for 825 stainless steel self-propelled subway rail cars with the Canadian firm of Bombardier of Quebec, which had obtained 9.7% financing for a ten-year period from the Export Development Corporation (EDC), Canada’s official export credit agency. In choosing Bombardier, the MTA rejected the competing bid of the Budd Company of Troy, Michigan.

The reaction within the United States government to the loss of the bid to a foreign firm supported by government financing was one of utter outrage. In the midst of a rising tide of protectionist pressures, the New York subway car transaction represented to many the assault of foreign subsidized export credit financing on the jobs of American workers. Within a matter of days, both Congress and the Executive Branch began to explore ways to counteract the preferential financing. The range of proposals considered by Congress included increased authorization levels for Eximbank, mandatory Eximbank funding to counteract the MTA situation, and a general $2 billion “war chest” set aside in a separate fund.


*Id.*

*See MTA Subway Case May Lead to Unilateral U.S. Action on Credits, McNamara Warns, U.S. Export Weekly (BNA) No. 410, at 309 (June 1, 1982).*

*Id.*

*Id.*

*See id.*
designed to combat foreign official export credit subsidies.\textsuperscript{72}

Eximbank itself became a target of renewed attack as a result of the MTA situation. The United States business community revived its familiar refrain of criticism against the Bank for focusing more on limiting its losses than on meeting foreign financing competition.\textsuperscript{73} Other internal pressures for Eximbank reform confronted Congress in the form of growing demands for greater Eximbank support for small business exports.\textsuperscript{74}

B. \textit{Statutory Reform of Eximbank}

Coinciding with mounting domestic and international tensions over export financing was the consideration by Congress in late 1983 of a legislative package providing for the continued funding of various international financial institutions as well as the reauthorization of Eximbank for fiscal years 1984 and beyond. On November 18, the last day Congress was in session before its adjournment for the year, a compromise package was adopted.\textsuperscript{75} Congress approved legislation extending Eximbank's authority for another three years, including in the compromise extensive amendments to the Bank's present charter and dictating the most fundamental changes in Eximbank policy in a decade.\textsuperscript{76} Although federal government officials desired a simple extension for the Bank, the Eximbank measure escaped an otherwise likely veto by virtue of its joinder with the critical International Monetary Fund (IMF) funding supported by the Administration.\textsuperscript{77}

Perhaps the most significant statutory change is the requirement that Eximbank be "fully competitive" with other nations in all its programs, although it need not provide programs exactly equivalent to those of competitor nations.\textsuperscript{78} In keeping with this general charge, the statute specifically mandates a new medium-term credit program competitive with those of other countries.\textsuperscript{79}

\begin{itemize}
\item \textsuperscript{72} Id.
\item \textsuperscript{73} See \textit{Congress Extends Eximbank Authority as Part of IMF, Housing Legislation, 20 U.S. Export Weekly} (BNA) No. 8, at 301 (Nov. 22, 1983) [hereinafter cited as \textit{Legislation}].
\item \textsuperscript{74} See \textit{Eximbank President Seeks to Persuade Congress Bank Serves Small Businesses, 20 U.S. Export Weekly} (BNA) No. 5, at 164 (Nov. 1, 1983).
\item \textsuperscript{75} See \textit{Legislation, supra note 73}.
\item \textsuperscript{76} Id. at 302.
\item \textsuperscript{77} Id.
\item \textsuperscript{78} Id. The statute directs that the terms and conditions of Eximbank loans should be established so as to have the effect of neutralizing the impact of subsidized foreign credit on international sales competition. 12 U.S.C.A. § 635(b)(1)(B) (West Supp. 1984).
\item \textsuperscript{79} Id. § 635(a).
\end{itemize}
Another major change lies in the Bank's authorization to use mixed credits, a blend of official export credits and foreign aid, in order to offer particularly concessional financing to poorer importing nations. While Eximbank and the Agency for International Development (AID) are directed to establish mixed credit programs, the legislation stipulates that the National Advisory Council on International Monetary and Financial Policies (NAC) must not only coordinate such transactions but must give them unanimous approval as well. NAC is chaired by the Secretary of Treasury, and its membership includes the secretaries of Commerce and State and representatives of the Office of the United States Trade Representative (USTR), AID, Eximbank, and the Federal Reserve.

Members of the business community predict that scrutiny by the Treasury Department will effectively preclude the use of mixed credits. Government officials concede that the Treasury Department is not supportive on the matter of mixed credits and that the requirement of unanimous approval by the board members of NAC will make such credits more difficult to obtain.

Indeed, in keeping with United States international negotiating policy, the primary goal of NAC's preliminary proposal is to phase out the use of mixed credits except in those situations in which they are targeted to counteract particularly objectionable foreign mixed credit programs. Treasury officials have stated that while the appropriateness of the use of mixed credits will be determined on a case-by-case basis, it will employ them aggressively against what are essentially foreign subsidized commercial transactions. Eximbank officials, on the other hand, caution that retaliatory use of mixed credits, while politically attractive, does not necessarily discourage their use by foreign governments or increase United States exports.

Use of such packages will not affect existing Eximbank criteria.

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80 Id. § 635q(a)(3)(A).
81 Id. § 635s(a)(2).
82 Legislation, supra note 73, at 302.
83 Id.
84 See Business Pleased With Eximbank Changes, U.S. EXPORT WEEKLY (BNA) No. 9, at 347 (Nov. 29, 1983) [hereinafter cited as Business].
85 See Federal Guidelines on Mixed Credit Program to be Ready In a Few Weeks Congress Told, 20 U.S. EXPORT WEEKLY (BNA) No. 17, at 584 (Jan. 31, 1984) [hereinafter cited as Guidelines].
86 Id.
for excluding recipient countries not considered credit-worthy or eligible for Eximbank programs or projects yet to be funded which would contribute to a world oversupply. Finally, Eximbank officials have indicated that the Bank is not likely to match foreign financing where the grant by the foreign government exceeds thirty percent.\(^8\)

A third major area of Eximbank reform is the passage of new statutory provisions for the support of small business.\(^8\) In fiscal year 1984, the Bank is required to set aside six percent of its program resources for small businesses. In 1985, this figure will increase to eight percent, and by 1986 it will consume ten percent of those resources.\(^9\) Eximbank expects to be able to meet the small business mandate without any trouble due to its recent change in the definition of a small business.\(^9\) Under the new system, which is already being used by the Small Business Administration (SBA), each industrial classification is established differently based either on sales volume or on number of employees. Adoption of this new definition by Eximbank in effect allows many more companies to qualify as "small businesses."\(^9\)

Thus far, the Bank has undertaken an extensive marketing and outreach program for small businesses. In addition, prior to the enactment of the recent legislation, Eximbank had already taken major steps toward accommodating smaller exporters when in July of 1983 it modified its medium-term credit program and made its rates more competitive.\(^9\)

Less significant among the recent changes in Eximbank's structure are the provisions for a minimum of one small business representative among the five presidential appointees to the Board of Directors and the revival of the Advisory Committee system. Membership in the latter will increase from nine to twelve, and the reforms require that three of the committee members be small business representatives appointed by the Board.\(^9\) In addition, while

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\(^7\) Id.

\(^8\) See 12 U.S.C.A. § 635(b)(1)(E)(i) (West Supp. 1984). The statute directs the Eximbank to encourage the participation of small business in the international economy by developing programs which give fair consideration to small businesses in the provision of export loans and guarantees. Id.


\(^9\) See Business, supra note 85, at 84.

\(^9\) Id.

\(^9\) Id.

the directors will continue to serve at the pleasure of the President
during their respective terms, these terms are now fixed at four
years rather than being fully contingent upon the discretion of the
President. 94

Although many view the changes in Eximbank's charter as a ma-
jor victory for United States exporters, business representatives
have adopted a "wait and see" attitude with respect to the full
implications of these changes. 95 Many believe that the effectiveness
of the mandate to achieve full competitiveness will depend upon
the attitude of Eximbank personnel and the diligence with which
they carry out the legislative directions. 96 Government officials
have conceded that while strong messages were sent by Congress in
this legislation, there is still much discretion left to Eximbank's
management. 97 According to some sources, however, the very
threat of legislation has improved Eximbank's responsiveness to
exporters over the past six months. 98

C. Other Legislative Proposals Affecting Eximbank

Except for the usual annual fights concerning expenditure ceil-
ings, little congressional action affecting Eximbank is expected in
the near future. Congress is not expected to oppose the Adminis-
tration's requested 1985 Eximbank budget authority level of $3.8
billion, a figure $35 million below the 1984 authorization. 99

Congress may, however, wish to examine Eximbank's involve-
ment in financing projects in industries such as steel or copper in
which there is world overcapacity. Recently, for example, the Bank
announced its intention to finance a major steel complex in South
Korea. 100 After receiving strong protests from other government
agencies and trade unions, the Bank postponed action to approve
the financing of the complex. 101 Eximbank officials acceded to the
opinions of the Commerce Department and USTR that more study
was needed to determine whether construction of the giant steel-

94 Id. § 635(c)(8).
95 See Business, supra note 85, at 84.
96 Id. at 347.
97 Id.
98 Id. at 347-48.
99 See House Appropriations Committee Recommends Funding for Eximbank, Foreign
    Aid Programs, 1 INT'L TRADE REP. (BNA) No. 12, at 349 (Sept. 26, 1984).
100 See Eximbank Delays Action on Supporting Steel Mill After Strong Protests Made,
101 Id.
making project, on balance, would help or hinder the United States economy. The proposed construction of the project has increased the domestic steel industry’s concern over the third world’s excess capacity in steel, a concern which has recently escalated to the near crisis point. Obviously, the domestic steel industry would be particularly displeased over official government support for even more third world steel capacity.

Critics of the proposed steel project contend that even if the Koreans use the steel domestically as components for other products, those products would then be exported to the United States where they would compete with domestically manufactured goods. Others have argued that the proposed financing would violate the Foreign Assistance Appropriations Act of 1979, which forbids the use of foreign loans from Eximbank or OPIC to establish or expand production of any commodity for export by any foreign nation if the commodity is likely to be in surplus on world markets at the time and if the assistance will cause substantial injury to United States producers of a similar or competing commodity. This entire issue may surface during the next session of Congress.

Other likely magnets for Congressional interest in export financing are Eximbank actions on mixed credit and small business programs. If Congress does not perceive Eximbank to be making good faith efforts to obey the reauthorization mandate in either of these areas, response should be expected.

A final issue which may arise in the next congressional session is Eximbank’s heavy payment claims resulting from the debt problems of Latin America and other countries. Despite all the congressional attention directed at making the Bank more competitive, there has been little scrutiny of the Bank’s increasing repayment problems. Related to this is the broader issue of what Eximbank’s role should be with regard to these high-risk, debt-ridden countries. Congressional opposition, sparked by the Bank’s $2 billion lines of credit and guarantees to Mexico and Brazil, indicates that Eximbank’s role as a “credit bridge” could lead to future confrontations between Congress and the Bank.
III. INTERNATIONAL ISSUES

While official export credit programs like those of Eximbank have been in existence for over half a century, such programs have only in recent years caused much concern within the United States. As the international business environment becomes increasingly competitive, rising market interest rates greatly enhance the attractiveness of government subsidized export financing at lower rates. Due to increasing homogeneity in the quality and price of many products regardless of their place of manufacture, official financing can be the determining factor in many export sales. Thus, the availability of subsidized export credit is often the key link to successful competition in international markets.

Unfortunately, however, such circumstances have dramatically increased the risk of an all out credit war among the various official export credit agencies, as each seeks to bolster its own nation’s competitive position by lowering its financing rates. Recognizing these pressures relative to the tremendous economic importance of export sales, a group of industrial nations joined together in 1963 under the auspices of the Organization for Economic Cooperation and Development (OECD) to negotiate reductions in export credit competition.106

A. The OECD Arrangement

After many years of difficult and fruitless negotiations, the heightened intensity of export credit competition led the OECD countries to agree informally in 1976 that each would apply the same credit terms according to a hierarchy of classes of buyers.107 In 1978, these “consensus guidelines” were incorporated in the OECD-sponsored Arrangement on Guidelines for Officially Supported Export Credit.108 The so-called OECD Arrangement is not a treaty but simply a voluntary, non-binding understanding among the major exporting

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108 ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, ARRANGEMENT ON GUIDELINES FOR OFFICIALLY SUPPORTED EXPORT CREDITS (Dec. 1, 1982).
countries of the OECD.\textsuperscript{109} Its stated purpose is to prevent wasteful official export credit competition in order to restore unfettered market forces as the primary determinant of export trade. Among other things, the Arrangement requires a minimum down payment of fifteen percent of the export contract value of any transaction.\textsuperscript{110} Further provisions classify countries as relatively rich, intermediate, and relatively poor based on a matrix which establishes minimum interest rates and maximum repayment terms for each of the three levels.\textsuperscript{111} Traditionally, export sales of military equipment, agricultural commodities, aircraft, nuclear power plants, and ships have been excluded from coverage under the Arrangement.\textsuperscript{112}

The minimum interest rates and maximum repayment terms as set out in the Arrangement matrix are only guidelines. Under certain circumstances, a country desiring to offer lower rates or longer terms for an individual sale may legitimately do so under the Arrangement. The term “derogation” is used in the Arrangement to refer to this behavior, in which a country must follow certain agreed-upon procedures in order to infringe upon the spirit of the Agreement while not violating its letter.\textsuperscript{113} When derogation is contemplated, the derogating country must notify the other participants of the terms it intends to offer at least ten days before issuing any preliminary commitment.\textsuperscript{114} This advance notice allows other participants to discuss the issue with the initiating participant and to offer terms matching those of the derogation or to introduce a new derogation.\textsuperscript{115}

In an effort to bring some export credit harmonization into the increasingly intense competition, the OECD Arrangement countries met in October of 1981. After prolonged negotiations, the participants agreed to raise the minimum export credit rates and to set a floor for countries in which market interest rates were below the Arrangement floor.\textsuperscript{116}

One result of the Arrangement and the 1981 negotiations has been that established minimum interest rate levels have also become the de facto maximum rates. Countries are aware that any

\textsuperscript{109} Id. at 3.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 3-5.
\textsuperscript{112} Id. at 11-12.
\textsuperscript{113} Id. at 8-9.
\textsuperscript{114} Id. at 10.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 4-5.
financing offer above the minimum rate will not be competitive. Thus, the Arrangement has in effect established a ceiling as well as a floor for interest rates and repayment terms. While the Arrangement rates since 1978 have essentially remained fixed and uniform for all currencies, market interest rates have risen dramatically by different amounts in different countries.

Several major flaws in the Arrangement have limited its effectiveness as a deterrent to subsidized international export credit competition. One weakness lies in the extreme difficulty of altering fixed minimum interest rates through negotiations, a problem which prevents an accurate reflection of changes in domestic and international money market rates. Thus, in the face of rising market interest rates, the subsidy element in export credits has increased substantially since the Arrangement took effect in 1978. This flaw in the Arrangement has favored countries like France which do not place budgetary restrictions on their export credit programs.

Another shortcoming of the Arrangement is that the set interest rates are identical for all currencies, a circumstance which has created competitive advantages and disadvantages for various countries depending upon differences in the domestic rates for the various currencies. For example, if the minimum rate in the Arrangement is ten percent, the official export credit agency of a country in which domestic market rates are below ten percent must either charge a premium over domestic rates or decline to extend credit. On the other hand, export credit agencies in countries with domestic market rates above ten percent may direct subsidization of interest rates in these currencies. Yet another problem arises when a member of the Arrangement opts to derogate from its established terms. If a participant does not have the financial resources needed to match the term of the derogating party, no relief is available under the Arrangement. This shortcoming also works in favor of countries with no budgetary limits on their programs.

Finally, the Arrangement has no mechanism to prevent the problem of subsidizing the expansion of world capacity in industrial sectors already characterized by severe excess capacity. Com-

117 Id.

petition to increase exports of industrial machinery has led the major OECD countries to provide subsidized financing for steel and textile plants in non-OECD countries. These industries are already characterized by significant overcapacity, and it is quite likely that new plants would not be constructed if financing were available only at market rates and terms.

B. *New International Accord*

These and other pressing problems were the subject of another round of intense negotiations among the major participants in the OECD Arrangement during the latter part of 1983. Remarkably, a dramatic compromise was struck as the nations ultimately united behind an ambitious plan to curb export subsidies. Under this plan, the minimum export credit guidelines will now move automatically in accordance with market interest rates.119 While the new guidelines permit a slight immediate increase in the subsidy inherent in export credit programs, they also provide for the elimination of such subsidies by July 1986.120 The temporary increase was granted in response to a request by the French government to provide a period of adjustment and to allow the rates to go downward before automatically moving upward with commercial rates.121 If conscientiously followed, the new accord should eventually eliminate the inequities that have occurred in the past as financing was offered at rates fixed for all government export credits while borrowing costs fluctuated within different ranges among different governments. Generally, United States officials view the changes in the agreement as a negotiating triumph for the United States.122

Under the previous set of guidelines, the minimum rates for loans of five to ten years made to rich countries were fixed at 12.4% to intermediate countries at 11.35%, and to poor countries at ten percent.123 Then, every six months or so, the OECD countries would meet in Paris and, after much wrangling, would determine new rates.124 Since the guidelines were set only for a limited period of time, there was always the threat that no new guidelines

119 Id.
120 Id.
121 Id. at 86.
122 Id. at 85.
123 Id.
124 Id.
could be agreed upon and thus the entire Arrangement would collapse, increasing the potential for an export credit war among nations fighting to win export orders through cheap financing. 126

Under the new fluctuating matrix of the recent accord, the rate for loans to rich countries remains fixed at 12.4%, but the rates for intermediate and poor countries are lowered to 10.7% and 9.5% respectively. 128 The semi-annual adjustments in these rates will take place automatically in January and July of each year if the average rate of government bonds in the “Special Drawing Rights” currencies changes fifty basis points or more. 127 Thus, if the average commercial rate drops, the Arrangement rates would slide downward by only half of the commercial rate decline. 128 If, however, the average commercial rate rises, rates within the new matrix would move up by the full amount. In this way subsidies would be gradually squeezed out of the present system. If necessary to eliminate completely the subsidy element in the present matrix, semi-annual adjustments would be made beginning in July 1985 and continuing through July 1986. 129

Those countries which have interest rates below the present matrix would follow a specially determined commercial interest reference rate (CIRR) which would be adjusted periodically. 130 The Japanese CIRR, for example, would be ten basis points above the current long-term prime rate, so that if the long-term prime rate were 8.4%, the Japanese CIRR would be 8.5%. If the United States were to become a low interest rate country, it would use the AA bond rate, which is equivalent to the rate a strong domestic corporation would receive in the private sector. 131

The new OECD system will have important implications for the definition of an export credit subsidy under GATT. Until now, an export credit subsidy has been defined in accordance with the GATT Subsidies Code, which makes note of the OECD-Arrangement. 132 Under this Code, the definition of a subsidy includes government assistance offered at rates which are less than the cost of

126 Id. at 85-86.
128 Id. at 86.
127 Such currencies belong to those nations designated by the IMF to hold special rights to draw from its fund. See generally Banking, supra note 27, at 302.
128 See OECD Plan, supra note 118, at 86.
129 Id.
130 Id.
131 Id.
132 Id.
money to the government. Using the CIRR system, however, an export subsidy becomes any government-supported financing offered to a foreign entity at rates less than the CIRR. This rate is usually equivalent to the commercial rate obtainable by a strong domestic corporation, and it is also generally above the rate obtainable by the government.\textsuperscript{133}

The achievement of the new international accord will undoubtedly alleviate much of the pressure placed upon Eximbank through its recent legislative mandate to become fully competitive with its foreign counterparts. Indeed, the announcement of the new OECD arrangement in early October of 1983 took much of the steam out of the debate over the adoption of new legislation.\textsuperscript{134} Having pursued the implementation of an automatic market rate system throughout the long and difficult OECD negotiations, Eximbank officials view the international agreement as an answer to their prayers over the future of the Bank.\textsuperscript{135} Without the OECD movement to market interest rates, the Bank would have faced a pressing dilemma in reconciling its mandate for self-sufficiency with its new requirement of providing programs fully competitive with those subsidized by foreign governments.

C. \textit{Current International Proposals}

Other international agreements on export financing issues have been reached in the past year. Government officials representing nations exporting nuclear power plants and equipment, for example, have reached an agreement to establish a common line on the terms for official export financing. This agreement was forged during talks in Paris in late December as part of the ongoing OECD negotiations.\textsuperscript{136} It took effect on February 1 of 1984. As previously mentioned, the OECD Arrangement has, until now, excluded some commercial sectors such as nuclear power plants and equipment. The agreement reached by the nuclear exporting countries will be submitted to all of the twenty-two nations participating in the OECD export credit group. If no objections are raised by the end of January 1985, the agreement will automatically go into effect.

Export financing for agriculture, steel plants, and commercial

\textsuperscript{133} Id.
\textsuperscript{134} See Business, supra note 84, at 302.
\textsuperscript{135} See OECD Plan, supra note 118.
aircraft was also discussed during the December negotiations, but no definitive decisions were made. Negotiations in these areas will continue.\textsuperscript{137}

After a general discussion of the issue of mixed credits, the participants in the December negotiations agreed to submit descriptions of specific problems they are encountering due to the use of extremely concessional mixed credits by competitor nations. Currently, the Arrangement forbids mixed credits with grant elements of less than twenty percent, and it requires prior notification of the other parties in the Arrangement where there is a grant element of twenty to twenty-five percent.\textsuperscript{138} Financing with a grant element of twenty-five percent or more constitutes permissible "official development assistance." In recent years, however, observers have identified numerous foreign mixed credit sales with grant elements of less than twenty-five percent and have suggested that such offers are nothing more than thinly disguised export subsidies.\textsuperscript{139}

The United States stance in the mixed credit negotiations, as reflected in previously discussed positions taken in the domestic arena, calls for a phaseout of mixed credits by the industrial nations. In lieu of complete elimination, the United States supports a higher minimum grant threshold to constitute legitimate development financing under the Arrangement.\textsuperscript{140} Other OECD nations have been receptive to these efforts to tighten the guidelines.\textsuperscript{141} Congressional authorization of the Administration's proposed mixed credit program before the next round of negotiations in April 1985 would signify United States willingness to protect its interests if progress cannot be made multilaterally.

\textbf{IV. Conclusion}

Perhaps the most significant of recent issues concerning export financing are those arising at the international level, particularly the shift to market interest rates under the OECD Arrangement. If implemented and maintained as planned, this new agreement could bring an end to years of cutthroat competition among the official export credit agencies represented within the OECD. Elimination of the subsidy element at the international level will in turn

\textsuperscript{137} Id. at 497.
\textsuperscript{138} Id.
\textsuperscript{139} See Guidelines, supra note 85.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
alleviate pressure on the Eximbank to become fully competitive. Reduced pressure over the large-scale projects that were formerly the major target of such competition should enable Eximbank to focus greater efforts on smaller projects and exporters.

While the rise of state eximbanks is essentially the only recent development in new sources of export financing, new commitments to small business exporting at the federal level may also result in real growth in small business export support. Finally, new legislation in the area of export financing is likely to focus on the subsidized financing of expansion within an industry already characterized by overcapacity.