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# The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits

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Janet Koven Levit\*

## I. INTRODUCTION

We are living through a defining moment in international law. The pace of globalization makes cooperation through international law and institutions vital. The recent SARS scare, exponentially magnified by the ease of international travel, poignantly illuminates the proactive, standard-setting role that international rules, such as World Health Organization regulations, can and should play.<sup>1</sup> Yet public impatience with international law is mounting.<sup>2</sup> Paradoxically, this unease may be the product of international

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1. See, e.g., Editorial, *Fighting a Mystery Illness*, WASH. POST, Apr. 2, 2003, at A16 (arguing that the SARS epidemic shows the need “for international cooperation and collaboration”); Press Release, U.S. Dep’t of State, *Lawmakers Say SARS Crisis Shows Need to Have Taiwan in WHO*, May 19, 2003 (members of Congress arguing that, despite political difficulties, Taiwan should become a member of the WHO because of the strong need for “international coordination”).

2. See, e.g., Bruce Nussbaum, *Building a New Multilateral World*, BUS. WK., Apr. 21, 2003, at 42 (arguing that the Iraqi conflict further demonstrates the inability of multilateral institutions to solve global problems). See also Richard S. Dunham et al., *Where Do the Neocons Go From Here?*, BUS. WK., May 12, 2003, at 73 (discussing neoconservative “impatience with . . . international institutions such as the U.N. that rein in U.S. power. Many in the movement would like to jettison institutions they see as managing the status quo rather than spreading democracy.”); Michael Ignatieff, *The American Empire: The Burden*,

law's maturity and success. For the first time since World War II, states have consistently embraced international institutions to assist in the management of prominent international issues. From the International Criminal Tribunal for the former Yugoslavia to the World Trade Organization ("WTO") to the U.S. engagement of the United Nations Security Council prior to the Iraqi conflict, states have turned to, or at least paused to reflect upon, international law, catapulting it prominently into public view. Admittedly, international law's record in these cases is mixed at best. But precisely because of widespread reliance on international law in these high-profile roles, its failures have become a focal point for public skepticism and criticism.

This public unease may also be a product of the type of international law that gains media and high-level policymaker attention, namely formal treaties and security agreements marked by choreographed signing ceremonies and diplomatic photo opportunities. Yet these headline treaties and agreements mask a universe of international rules that does not technically fall into the International Law 101 categories of formal international treaty or customary international law<sup>3</sup> but nevertheless performs its job and engenders sustained compliance. This Article will examine one example, an informal "Gentlemen's Agreement" named the Arrangement on Guidelines for Officially Supported Export Credits (the "Arrangement")<sup>4</sup> as a window into this important, but under-appreciated world of international legal regulation.

The Arrangement is a highly technical international agreement that effectively regulates export credit agencies ("ECAs"), such as the Export-Import Bank of the United States ("Ex-Im Bank"). ECAs are officially supported governmental institutions that provide financing in support of nationals' exports. In the 1960s and 1970s, many ECAs offered subsidized financing at below-market interest rates. In an unregulated world, the natural tendency is for ECAs to offer increasingly higher subsidies to promote nationals' exports, triggering a costly, market-distorting war in export subsidies.

Beginning in the 1970s, and gaining great momentum with the creation of the Arrangement in 1978, ECAs in the industrialized world voluntarily came together to regulate themselves. The Arrangement sets specific parameters on the type of financing packages that ECAs may offer, with the goal of eliminating all competition among ECAs. The Arrangement has evolved significantly over its twenty-five-year history, beginning as a modest effort to avert an export credit war and evolving into a comprehensive regu-

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N.Y. TIMES, Jan. 5, 2003, § 6 (Magazine), at 22 (suggesting that unilateral action on the part of the United States may be the last hope for democracy and stability given the inability of multilateral institutions to enforce their proposed solutions).

3. See *infra* notes 232–235 and accompanying text for a technical treatment of formal international law.

4. Organisation for Economic Co-operation and Development (OECD), *The Arrangement on Guidelines for Officially Supported Export Credits: Introduction*, 8, available at <http://www.oecd.org/dataoecd/52/3/2763846.pdf> (last visited Dec. 2, 2003) (on file with the Harvard International Law Journal) [hereinafter the Arrangement].

latory scheme affecting most export credit activities. The attached empirical data reveals that ECAs consistently comply with the Arrangement.

Yet the Arrangement is not a formal treaty—there are no signature, ratification, or amendment procedures, and the parties are not technically bound by it. Many would argue that the Arrangement is not law at all,<sup>5</sup> or is at best “soft law.”<sup>6</sup> In contrast with other international agreements that are the culmination of heralded, institutionalized drafting conferences and ambitious programmatic goals,<sup>7</sup> the Arrangement developed over years in a slow, modest, almost ad hoc fashion, with no fanfare and very little publicity. While the Arrangement manages U.S. \$50 billion annually in international trade,<sup>8</sup> it rarely receives mention in the press.<sup>9</sup> Nor has the Arrangement been the focus of any legal scholarship.<sup>10</sup> Yet the Arrangement achieves what

5. See, e.g., Timothy F. Geithner, *The Economic Policy Benefits of International Cooperation*, in THE EXPORT CREDIT ARRANGEMENT: ACHIEVEMENTS AND CHALLENGES, 1978–1998, 87, 87 (OECD 1998) (arguing that the Arrangement does not carry the “force of law”) [hereinafter THE EXPORT CREDIT ARRANGEMENT]. See also Lawrence H. Summers, *Continuing the Fight Against International Trade Finance Subsidies*, in THE EX-IM BANK IN THE 21ST CENTURY 258 (Gary Clyde Hufbauer & Rita M. Rodriguez eds., 2001) (arguing that the Arrangement is not legally binding).

6. See *infra* notes 241–244 and accompanying text for description of soft law. See also Jacques de Lajugie, *Soft Law, Hard Results*, in THE EXPORT CREDIT ARRANGEMENT, *supra* note 5, at 107, 107 (“[F]ew people are aware of the actual status of the Arrangement which in itself is somewhat of a legal curiosity. The Arrangement is one of the very few lasting and effective examples of ‘soft law.’”).

7. See, e.g., Press Brief, WTO, *Golden Jubilee of the Multilateral Trading System* (Feb. 5, 1998) (providing a detailed chronology of the lengthy, high-profile development of the GATT and WTO trading systems); Joanna Depledge, *Tracing the Origins of the Kyoto Protocol: An Article-by-Article Textual History*, UN Framework Convention on Climate Change, FCCC/TP/2000/2 (Nov. 15, 2000) (providing a lengthy history of the evolution of and high-level meetings leading up to the Kyoto Protocol). See also Allison Marston Danner, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel*, 55 STAN. L. REV. 1633, 1642–43 (2003) (offering a succinct background on the International Criminal Court).

8. See Export-Import Bank of the United States (Ex-Im Bank), REPORT TO THE U.S. CONGRESS ON EXPORT CREDIT COMPETITION AND THE EXPORT-IMPORT BANK OF THE UNITED STATES FOR THE PERIOD JANUARY 1, 2002 THROUGH DECEMBER 31, 2002, at 13, available at <http://www.exim.gov/bout/reports/compet/compet2002.pdf> (last visited Dec. 2, 2003) (on file with the Harvard International Law Journal).

9. From 1989 to present, the *New York Times* mentioned the Arrangement only one time in conjunction with the setting of Commercial Interest Reference Rates (CIRRs). See *infra* notes 71–73 and accompanying text for description of CIRRs. A search of the *Washington Post* from 1977 to present yielded three hits: two mentions were in passing and a third announced the tied aid package. See John D. Macomber, Editorial, *Aids to Trade*, WASH. POST, Feb. 26, 1992, at A17. A search of the *Wall Street Journal* from 1984 to present yielded one article on tied aid. See Gary Hufbauer, Editorial, *The Vicious Circle of Export Subsidies*, WALL ST. J., Sept. 23, 1985, at A30.

10. The Arrangement has been the subject of a few relatively outdated political science pieces. See, e.g., Daniel F. Kohler & Peter H. Reuter, *Honor Among Nations: Enforcing the ‘Gentlemen’s Agreement’ on Export Credits*, A RAND Note (Dec. 1986) (reviewing the Arrangement and making suggestions for its progressive development). See also JOHN RAY, MANAGING OFFICIAL EXPORT CREDITS: THE QUEST FOR A GLOBAL REGIME 52 (Inst. for Int’l Econ. 1995); Andrew M. Moravcsik, *Disciplining Trade Finance: The OECD Export Credit Arrangement*, 43 INT’L ORG. 173 (1989) (examining the Arrangement’s development from 1975 to 1985 from the perspective of international relations theory of international cooperation). But see Katherine P. Rosefsky, *Tied Aid Credits and the New OECD Arrangement*, 14 U. PA. J. INT’L BUS. L. 437 (1993) (analyzing the Helsinki Package for tied aid that Participants incorporated into the Arrangement in 1992).

much formal international law has not: deep, sustained compliance—even obedience<sup>11</sup>—among its constituents. For that reason, it warrants legal attention.

The Article unfolds by documenting compliance and then offering explanations for such compliance. In substantiating compliance, this Article first describes the rules with which states may—or may not—comply. Given the highly technical nature of official trade finance regulation, Part II of this Article explores the world of trade finance and ECAs as context for Part III's in-depth discussion of the Arrangement's rules. Part IV, coupled with Table 2: Participant Compliance with the Arrangement's Export Credit Provisions ("Table 2: Participant Compliance"), Table 3: Non-Participant Compliance with the Arrangement's Export Credit Provisions ("Table 3: Non-Participant Compliance"), and Table 4: G-7 Compliance with the Arrangement's Export Credit Provisions (1982–2003) ("Table 4: Historical Compliance") presents this Article's empirical core. Through in-depth scrutiny of ECA export finance programs throughout the world, the Article presents a picture of thorough, deep, and sustained compliance with the Arrangement's technical rules and processes. These data uniquely contribute to the world of trade finance by providing a look at industrialized states' disparate approaches to official trade finance and to compliance literature generally by quantifying compliance on an ECA-by-ECA basis.<sup>12</sup>

Having established ECA compliance with the Arrangement, the Article then explores why the Arrangement breeds compliance. Part V revolves around three categories of compliance factors: state interests (ECAs will comply with the Arrangement when it is in their interest to do so); the Arrangement's architecture (its historical evolution, constituents, architecture, legal form, and processes); and international systemic linkages (the Arrangement's relationship with other international institutions and legal systems). While all factors are undoubtedly part of the Arrangement's compliance puzzle, the Arrangement itself emerges as the integral piece. The Arrangement is elastic (its soft form permits experimentation and revision), pragmatic (its processes redefine compliance in a way that accommodates ECA practice within the Arrangement's rubric), measured (it embraces consensus decision-making without diluting its rules with generalities and platitudes), and the Arrangement is dialogic (the camaraderie of the Participants group and the Arrangement's unique processes assure that the Arrangement remains a vibrant and progressive discussion). In the end, Part V concludes that

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11. This reference to obedience, as opposed to mere compliance, is an ode to Professor Harold Koh, who argues that obedience to international law is much deeper and more "sticky" than compliance and thus should be the end goal of policymakers and lawyers alike. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2603 (1997).

12. While many scholars have explored compliance, few have attempted to quantify compliance. There are two notable exceptions. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002) (quantifying worldwide compliance with human rights treaties and arguing that ratification of human rights treaties may not improve a country's human rights record); Beth A. Simmons, *Money and the Law: Why Comply with the Public International Law of Money?*, 25 YALE J. INT'L L. 323 (2000) (quantifying compliance with the IMF rules regarding domestic restrictions on currency convertibility).

the Arrangement itself must be considered at a detailed and technical level to explain documented ECA compliance. In short, the Arrangement's rules "matter" significantly with respect to ECA compliance decisions.

The conclusion that "law matters" conflicts with both public perceptions of international law fueled by high-profile events and the dominant scholarly bent. When the United States engages Iraq without explicit U.N. Security Council approval, the public, in the United States and abroad, understands international law and institutions to buckle easily under the weight of U.S. power and interests in its security. Likewise, the course of international legal scholarship, beginning with the Cold War realists, has been decisively centered on state interests, with the content, rules, and dynamics of international law often receding into the crevices of compliance scholarship. Part VI forays briefly beyond the Arrangement case study to explore how this Article's fundamental conclusion—that the Arrangement's rules are integral to the compliance puzzle—bears on some extant theories of compliance. While the Arrangement, as a single data point in a complex web of international regulation, cannot alone provide the foundation for a new theory of compliance, the conclusions herein illuminate some strengths and weaknesses of current scholarship.

This historic moment, with international law on the cusp of both prominence and notoriety, demands a foil. The Arrangement serves that role. In its ability to generate widespread compliance, the Arrangement provides useful insight into the effective building of international legal frameworks and institutions, which are valuable lessons given that international institution building will increase in significance during the next decade. In its pragmatism, the elasticity of its soft form, consensus-backed incrementalism, and dialogue-enhancing procedures, the Arrangement is an international regulatory framework that effectively beckons compliance, thereby deserving attention and emulation. The Arrangement's dynamics and dynamism are the keys to understanding why ECAs overwhelmingly comply with its strictures.

## II. OFFICIALLY SUPPORTED INTERNATIONAL TRADE FINANCE

### *A. Export Finance and Official Export Credits*

Consider the following hypothetical transaction. A U.S. company, for example General Electric ("GE"), attempts to sell a gas turbine for U.S. \$10 million to a power project in Brazil. The Brazilian company entertains bids from GE's foreign competitors, such as Siemens of Germany or Mitsubishi of Japan. Then, the Brazilian buyer compares turbines in terms of price and quality indicators such as reliability, energy efficiency, and energy output. Because the Brazilian buyer likely does not want to expend cash by paying for the turbine in full immediately, it will request proposals from each of the bidders that include financing terms, such as extended terms of payment and favorable interest rates. The Brazilian buyer now chooses a turbine on the basis of price, quality, and the attractiveness of the financing package.

At this point, GE has several choices, including: (1) offer no financing package and (assuming that the foreign competition offered packages) likely lose the sale; (2) provide and carry "debt" to the Brazilian company on its own balance sheet; (3) borrow money from a commercial bank to "pay" for the cost of financing; or (4) contact Ex-Im Bank, the local ECA, to provide official support for the financing package. In this transaction, the first two options are usually unattractive.<sup>13</sup> GE could engage a commercial bank and ask it to participate in the financing transaction, either by having the bank issue a buyer credit<sup>14</sup> or a supplier credit.<sup>15</sup> This option may not be available or could be very expensive (and thus unattractive), depending on the commercial bank's current appetite for Brazilian risk. The fourth option, engaging the U.S. ECA to provide official export credit support for the transaction, becomes GE's most attractive option.

As the previous example illustrates, officially supported export credits are an important lubricant of international trade and, not surprisingly, support a giant market, exceeding U.S. \$50 billion in 2000.<sup>16</sup> Official export credit support may involve a below-market interest rate. It may involve an extended repayment term at a reduced fee. An official export credit package may merely offer liquidity in the face of private sector intransigence. Or it may involve some combination of the foregoing. Whatever its shape or form, officially supported export finance is a type of export subsidy,<sup>17</sup> carrying all of a subsidy's costs and benefits, advantages, and disadvantages.

13. To offer no financing package is to lose the sale. The second option, to finance off of GE's own balance sheet, is a possibility, but is neither attractive nor desirable. GE would likely do better conserving cash for making investments, paying dividends, and bolstering of the balance sheet to improve investor confidence.

14. In a buyer credit, a bank (creditor) loans money to the Brazilian buyer (debtor) to pay GE immediately and have the bank carry debt to the buyer.

15. In a supplier credit, the bank (creditor) loans money to GE (debtor) to cover the "cost" of financing (i.e., pay GE for the turbine up front), and GE repays the bank from proceeds received from the Brazilian buyer; if the buyer does not pay GE at any point over the financing relationship, GE still must repay the loan from its own cash reserves.

16. Export-Import Bank of the United States, *supra* note 8, at 13.

17. Moravcsik, *supra* note 10, at 177 ("A modest implicit subsidy is contained in most export credits, since the national credit agency is a nonprofit organization with access to capital at government rates."). For an economic description of export subsidies, tariffs, and quotas, see generally WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY* 738-42 (3d ed. 1985). While admittedly the Arrangement has actually squeezed most of the interest rate and repayment terms subsidies from official trade finance, see *infra* notes 149-157 for discussion of the evolution of Arrangement rules on interest rates and repayment terms and see *infra* notes 63-64 for discussion of standardization of repayment terms, a small subsidy still exists by virtue of ECAs raising funds to onlend at rates extended to government agencies. In addition, by offering financing in the face of private sector reluctance, governments grease nationals' exports by creating financing opportunities where none would otherwise exist or by creating "cheaper" financing opportunities than the private sector would offer.

Because Ex-Im Bank, the U.S. agency that delivers official trade finance support, provides some type of export "subsidy," it has come under attack from some liberals (who see big businesses as unworthy recipients of "corporate welfare") and conservatives (who believe that the government should not intervene in private markets) for doling out corporate welfare. See Paul Blustein, *White House Wants to Curb Ex-Im Lending*, WASH. POST, Feb. 14, 2001, at E3; Paul Blustein, *'Corporate Welfare' Fight Heats Up: White House Braces for Battle to Keep Export Assistance Agencies*, WASH. POST, Jan. 24, 1997, at D3.

States offer official export credits as a means to “grease” international trade<sup>18</sup> and promote domestic exports.<sup>19</sup> In the previous example, it is possible that GE’s transaction would not go forward without some type of official export support. Additionally, official export support may be necessary to “level the playing field”; if Siemens or Mitsubishi receives government support, then U.S. support is necessary to ensure that GE’s bid is not at a competitive financing disadvantage.<sup>20</sup>

Official export credit carries some international economic benefits as well. Admittedly, official export credit initially appears as a “zero-sum” game because either the United States, Germany, or Japan will earn the sale at the cost of the others; the Brazilian company will buy only one turbine. However, the sale might be a net positive to the international economy if it would not have occurred at all but for some official support and might, depending on the destination, have a positive developmental impact.<sup>21</sup>

18. Hidehiro Konno, *From Simple to Sophisticated*, in *THE EXPORT CREDIT ARRANGEMENT*, *supra* note 5, at 95, 95 (“If trade is the engine that drives the increasingly integrated global economy, export credit is the fuel that powers it.”); Moravcsik, *supra* note 10, at 176 (noting that “[e]xport credits are the financial lubricant that keeps the international trade system going”).

19. For a discussion of why exports are important, see J. David Richardson, *Exports Matter . . . And So Does Trade Finance*, in *THE EX-IM BANK IN THE 21ST CENTURY*, *supra* note 5, at 58–65 (providing twelve economic reasons why exports are important for any country). See also Moravcsik, *supra* note 10, at 173 (“Higher exports are viewed almost universally as a vital national objective. Governments mount export drives, mobilizing vast public and private financial resources to expand sales abroad.”). But see RAY, *supra* note 10, at 14 (arguing that the macroeconomic effect of export credits on balance of payments may be nominal, depending on the size of the economy). Export promotion is sometimes considered an important macroeconomic policy to counteract unwanted trade deficits. In our example, the connection between official support for the export of a U.S. \$10 million turbine and trade deficit reduction may be tenuous, but when the export is a fleet of Boeing airplanes or an entire oil refinery, the impact may be profound and discernable. For example, in Fiscal Year (“FY”) 2002, Ex-Im Bank guaranteed the export of over U.S. \$3.5 billion in Boeing aircraft. See EXPORT-IMPORT BANK OF THE UNITED STATES, ANNUAL REPORT FY 2002, 23–33 (list of transactions approved, and amount of such transactions, for FY 2002). Others argue that trade promotion leads to economic growth and job creation. See Richardson, *supra* at 59 (arguing that job creation is an important, but not unique, benefit to export promotion).

One governmental means to promote trade is government intervention in foreign exchange markets (a devaluation of local currency makes foreigners “perceive” goods as less expensive). See BAUMOL & BLINDER, *supra* note 17, at 766–67 (discussing devaluation and effects on balance of payments accounts). Another governmental means of promoting trade is utilizing different forms of industrial policy (direct subsidies to the industries manufacturing or producing the exportable goods or services, as opposed to subsidizing the finance piece). See Moravcsik, *supra* note 10, at 178 (citing Rita Rodriguez discussing export subsidies as a form of industrial policy). See also BAUMOL & BLINDER, *supra* note 17, at 793–94 (discussion of industrial policy).

20. For example, in the Export-Import Bank Act, Congress explicitly requires Ex-Im Bank to be “fully competitive with the government-supported rates and terms and other conditions available for the financing of exports from the principal countries whose exporters compete with United States exporters.” 12 U.S.C.A. § 635(b)(1)(A) (West Supp. 2003). Congress also requires that Ex-Im Bank submit a competitiveness report on an annual basis. *Id.* See also EXPORT-IMPORT BANK OF THE UNITED STATES, *supra* note 8.

21. For example, if our Brazilian power project is able to purchase a state-of-the-art, environmentally friendly turbine due to the provision of officially supported trade finance where it would not be affordable in the absence of Ex-Im Bank or other ECA support, then such financing positively contributes to the provision of cheap, clean energy to traditionally under-served parts of the globe. See Hiroo Fukui, *Export Credit Agencies and the World Bank: A Partnership*, in *THE EXPORT CREDIT ARRANGEMENT*, *supra* note 5, at 123, 123 (“ECAs are an essential component in the financing strategies of most developing countries: ECA credits provide them with financing in circumstances and on terms that would not otherwise be



Yet official export credit subsidies pose economic risks, as well as benefits. A competitive spiral in official export subsidies, with states vying for precious exports with increasingly aggressive subsidies, is costly for governments<sup>22</sup> and increasingly distortive of free trade. By shifting demand for any one country's exports independent of the economic fundamentals of price (related to the cost of materials and labor) and quality, economists argue that export subsidies contribute to inefficient global allocation of resources and, concomitantly, costly market distortions.<sup>23</sup>

### B. Ex-Im Bank and Export Credit Agencies

ECAs are government-owned and government-operated bank-like institutions that deliver official export credit support. Most industrialized countries have active ECAs.<sup>24</sup> Ex-Im Bank, the U.S. ECA, has been financing U.S. exports for over sixty-five years. Ex-Im Bank is an independent administrative agency governed by a bipartisan Board of Directors.<sup>25</sup> Ex-Im Bank supports U.S. exports through loans,<sup>26</sup> guarantees,<sup>27</sup> and insurance<sup>28</sup> backed by

available.”).

22. See *infra* notes 45–50 for discussion of the export credit wars in the 1970s and 1980s that essentially gave birth to the Arrangement.

23. See BAUMOL & BLINDER, *supra* note 17, at 392–96, 751–53 (discussing the effects of tariffs, quotas, and subsidies on efficient allocation of economic resources and comparative advantage). An international desire to guard against some of these market distortions clearly animated the creation of the Arrangement, as evidenced in its preamble: “The Arrangement seeks to encourage competition among exporters from the OECD-exporting countries based on quality and price of goods and services exported rather than on the most favourable officially supported terms.” The Arrangement, *supra* note 4, Introduction, at 7. While demonstrations from Seattle to Genoa to Doha reveal some public skepticism about the magnitude of the benefits of free trade, especially when compared to the costs, see, e.g., Manny Fernandez, *Varied Paths, One Goal: Taming Global Capitalism*, WASH. POST, Sept. 5, 2001, at B1, a debate about the merits of free trade is certainly beyond the scope of this project and a resolution of the “free trade” issue is irrelevant to the conclusions herein.

24. See, e.g., Harvard Business School, *Export Credit Agencies*, available at <http://www.hbs.edu/projfnportal/ecas.htm> (last visited Dec. 2, 2003) (providing links to ECAs around the world). See also OECD, EXPORT CREDIT FINANCING SYSTEMS: IN OECD MEMBER COUNTRIES AND NON-MEMBER ECONOMIES (6th ed. 2001).

25. Ex-Im Bank is a sunset agency, meaning that Congress must renew its operating charter every few years. Ex-Im Bank's reauthorization historically coincided with the presidential election cycle. However, during Ex-Im Bank's last reauthorization, Congress decided to “delink” the timing of the process from the frenetic atmosphere that frequently accompanies the first year of a new administration. Ex-Im Bank is currently scheduled to be reauthorized in September 2006. 12 U.S.C.A. § 635(f) (West Supp. 2003).

26. Ex-Im Bank's direct loan program provides fixed-rate loans at CIRR to credit-worthy public and private sector buyers. The program is not as large or as active as Ex-Im Bank's guarantee and insurance program. See <http://www.exim.gov/products/directloan.html> (last visited Dec. 2, 2003).

27. Ex-Im Bank's loan guarantee program provides unconditional guarantees to commercial banks that have signed a Master Guarantee Agreement with Ex-Im Bank. The applicant (exporter or bank) must apply to Ex-Im Bank for the guarantee and arrange for a commercial bank lender. The guarantee program is divided into two segments: the medium-term program covers transactions up to U.S. \$10 million with repayment terms of less than 5 (sometimes 7) years; the long-term program covers transactions of any amount with repayment terms longer than 5 (sometimes 7) years. See [http://www.exim.gov/products/loan\\_guar.html](http://www.exim.gov/products/loan_guar.html) (last visited Dec. 2, 2003).

28. Ex-Im Bank's insurance program provides a conditional guarantee of payment to an exporter or lender in case of default caused by commercial or political circumstances. It is conditional in that prior to payment of any claim, the insured party must file a claim (in the same way that one files a claim on a car

the full faith and credit of the U.S. government. As a child of the Depression, Ex-Im Bank's mission is "U.S. jobs through exports."<sup>29</sup>

The Bank operates in a manner similar to a commercial bank; it borrows money from the U.S. Treasury at government rates and charges fees for its services that cover most of the Bank's operating expenses.<sup>30</sup> Ex-Im Bank is not an aid agency, and all loans, guarantees, and other forms of official export credit support must offer Ex-Im Bank a "reasonable assurance of repayment."<sup>31</sup> While most of Ex-Im Bank's support is in the form of insurance or guarantees, which only require Ex-Im Bank to outlay funds in the case of a default and subsequent claim, Ex-Im Bank still bears transaction-by-transaction costs in the form of "charges" against its program budget,<sup>32</sup> much in the way that commercial banks must meet minimum capital and loan loss reserve requirements.<sup>33</sup>

Nonetheless, as a government agency, Ex-Im Bank is prohibited from competing with the private sector,<sup>34</sup> making financing available only where commercial banks will not lend (because their lines to a particular country are tapped or because they deem a particular market too risky to lend) or where the risk premium (as reflected in the interest rate) is so high that the transaction is no longer commercially viable. Ex-Im Bank thus operates in a narrow band, creating additional exports that are not attractive financing

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insurance policy), and Ex-Im Bank will not pay out unless certain conditions are met. Some insurance products involve an element of co-insurance, meaning that Ex-Im Bank will pay out at a rate of 90% or 95% on the dollar for the insured amount. Insurance programs cover both short- and medium-term transactions. Short-term transactions generally have repayment terms of 180 days or less; medium-term transactions are defined as in the loan guarantee program. See *supra* note 27. Short-term transactions are outside the scope of the Arrangement. See The Arrangement, *supra* note 4, art. 2, at 9 (The Arrangement applies only where the repayment term is 2 or more years.). Ex-Im Bank's insurance program offers a wide array of products. Any description here is beyond this Article's scope. For more information, see <http://www.exim.gov/products/insurance/index.html> (last visited Dec. 2, 2003).

29. See Ex-Im Bank, *Mission Statement*, available at <http://www.exim.gov/about/mission.html> (proclaiming that Ex-Im Bank's reason for being is "to maintain and create U.S. jobs and contribute to a stronger national economy") (last visited Dec. 2, 2003). See also 12 U.S.C.A. § 635(a)(1) (West Supp. 2003) ("The Bank's objective in authorizing loans, guarantees, insurance, and credits shall be to contribute to maintaining or increasing employment of U.S. workers.").

30. Ex-Im Bank income and cash flow statements suggest that the fees and reserves for losses clearly cover operating expenses and losses from bad debts. See Ex-Im Bank, *supra* note 19. However, if claims, losses, and direct loans exceed reserves and income, then Ex-Im Bank borrows from the U.S. Treasury at rates extended to U.S. government agencies. See *id.* at 35.

31. 12 U.S.C.A. § 635(b)(1)(B) (West Supp. 2003).

32. The program budget works like a commercial bank's capital reserve. For each authorized non-insurance transaction, Ex-Im Bank must "charge" its program budget a percentage of the transaction, with the "charge" rate related to the transaction's risk, which in turn is linked to a variety of factors, most notably the obligor's country (based on a U.S. government risk rating system called the Inter-Agency Country Risk Assessment System ("ICRAS")), whether the obligor is a public or private entity, and the duration of the loan/guarantee/insurance policy.

33. Bank rules on capital adequacy requirements, which involve a risk-based capital ratio system, are found at 12 C.F.R. §§ 208 (Regulation H), 225 (Jan. 1, 2003).

34. See § 635(b)(1)(B) ("It is also the policy of the United States that the Bank in the exercise of its functions should supplement and encourage, and not compete with, private capital.").

candidates in the private sector but nonetheless offer the U.S. government a “reasonable assurance of repayment.”<sup>35</sup>

Even within this band, Ex-Im Bank may not support exports unless (1) they are truly U.S. exports (and satisfy highly technical U.S. content rules);<sup>36</sup> (2) their destination is “permissible”;<sup>37</sup> (3) they will be used “legitimately”;<sup>38</sup> (4) neither the exporter nor importer is on any U.S. government “blacklist”;<sup>39</sup> and (5) they will not have an adverse impact in terms of moving U.S. jobs overseas.<sup>40</sup> Furthermore, as an engine of domestic economic growth and job creation (or preservation), Ex-Im Bank may only support exports that pass an “additionality” test, whereby exporters must prove that their exports are indeed “incremental”—would not have happened but for Ex-Im Bank financing—and that Ex-Im Bank financing is not sought as a substitute for readily available private sources of financing.<sup>41</sup>

In the hypothetical GE transaction, financing likely would be in the form of an Ex-Im Bank guarantee to a commercial bank buyer credit, as diagrammed in Figure 1. The Bank’s Board of Directors must approve the guarantee prior to committing resources.<sup>42</sup> In the GE example, if the Brazilian buyer de-

35. See *id.*

36. Because Ex-Im Bank sees itself as preserving U.S. jobs, a key part of its mission depends on exports actually being U.S. exports and not a mere re-export of foreign goods and/or services (possibly packaged or assembled in the United States). In the latter case, most of the “jobs” associated with the exports are abroad. The foreign content rules are rather technical but, in short: (1) goods or services must be shipped from the United States; (2) the goods and/or services must be produced in the United States; and (3) the contents of the goods and services (e.g., subcomponents) must be of U.S. origin. In the case of a piece of equipment like the GE turbine, the exporter would be responsible for “guesstimating” (with a high degree of precision) the percentage of the turbine that is U.S. content, and Ex-Im Bank engineers would corroborate. Ex-Im Bank will only finance the U.S. content part of the transaction. For additional information, see EXPORT-IMPORT BANK OF THE UNITED STATES, *Foreign Content Policy for Medium- and Long-Term Exports*, available at [http://www.exim.gov/products/policies/foreign\\_content.html](http://www.exim.gov/products/policies/foreign_content.html) (last visited Dec. 2, 2003).

37. The Ex-Im Bank Country Limitation Schedule does not permit support to: (1) any Marxist-Leninist country; (2) any country in which the United States is engaged in armed conflict; or (3) any country that, due to economic conditions, could not host a transaction with a reasonable assurance of repayment. See [http://www.exim.gov/tools/country/country\\_limits.html](http://www.exim.gov/tools/country/country_limits.html) (last visited Dec. 2, 2003).

38. For example, Ex-Im Bank may not support the export of “defense articles” or “defense services” unless such articles or services are being used for “anti-narcotics” purposes or any other use that the President determines is in the national self-interest. 12 U.S.C.A. § 635(b)(6)(A)–(B) (West 2001 & Supp. 2003).

39. One example is the U.S. Treasury Department’s Office of Foreign Asset Control list of 7,000 names of individuals and organizations. This “master list” can be viewed and downloaded. See U.S. TREASURY, *Office of Foreign Assets Control: Specially Designated Nationals and Blocked Persons*, available at <http://www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf> (last visited Dec. 2, 2003).

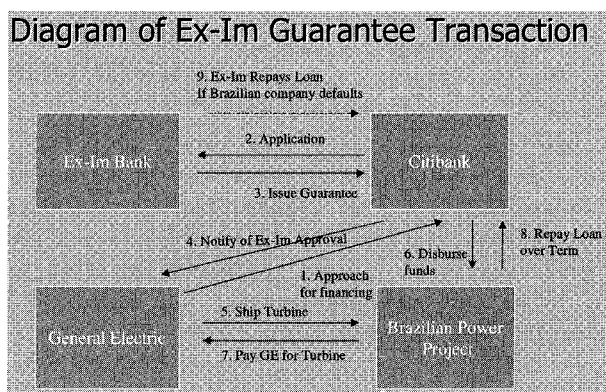
40. 12 U.S.C.A. § 635(e) (West 2001 & Supp. 2003).

41. For a discussion of the additionality requirement, see Rita Rodriguez, *Ex-Im Bank: Overview, Challenges, and Policy Options*, in THE EX-IM BANK IN THE 21ST CENTURY, *supra* note 5, at 4. In satisfaction of this requirement, Ex-Im Bank requires all applicants for Ex-Im Bank support to prove that they face “foreign competition” or that private financing is unavailable. See Ex-Im Bank, Preliminary Commitment & Final Commitment Application, available at <http://www.exim.gov/pub/pdf/95-10ap.pdf> (last visited Dec. 2, 2003).

42. The internal process is as follows: an Ex-Im Bank case or credit officer will prepare the file on behalf of the applicant (which may be either Citibank or GE) and will argue the case before the Board. The case officer must assure the Board that the transaction passes certain jurisdictional thresholds, and in reality, absent an extremely compelling reason, a case officer will not present the Board with a case unless

faulted on its loan with Citibank, Ex-Im Bank would repay the loan to Citibank, assume the remaining debt, and attempt to recover against the Brazilian buyer. Ex-Im Bank involvement in this transaction is a “win/win” situation for both Citibank and GE. Citibank’s risk is the risk that Ex-Im Bank (U.S. government) reneges on its obligations, and GE is able to offer the Brazilian buyer a financing package without placing any pressure on its balance sheet. Ex-Im Bank assumes the risk that the Brazilian buyer will default, and, in the case of a claim, U.S. taxpayers may bear the ultimate cost.

FIGURE 1



### III. THE ARRANGEMENT ON GUIDELINES FOR OFFICIALLY SUPPORTED EXPORT CREDITS

#### A. *The Cooperative Moment: The Arrangement's Birth*

ECAs deliver official export credits, which bring benefits but also carry some economic risks. With the specter of a competitive spiral in official export subsidies looms the potential for skyrocketing government costs and increasing market distortions. The industrialized ECAs poignantly confronted these risks in the 1970s and thereby began coordinating efforts to curtail export subsidies.

Prior to the 1970s, disparities in official export financing mechanisms,<sup>43</sup> coupled with relatively low interest rates (which correspond to relatively low

it meets these thresholds. See *supra* notes 36–40 and accompanying text.

Most of the Board's deliberations will focus on Ex-Im Bank's "reasonable assurance of repayment" mandate, i.e., assuring that the transaction, and thus the buyer, or obligor, meets certain threshold standards of commercial viability. In some cases, Ex-Im Bank will require a guarantee by the government, a local commercial bank, or some entity more credit-worthy than the foreign buyer; in other cases, Ex-Im Bank "takes" a security interest in a particular asset, but this has proven problematic in many instances because of the technical difficulties of filing security interests in certain foreign countries.

43. In the late 1960s and early 1970s, the United States met foreign buyers' demands for export credits with long repayment terms and relatively low down payments and, true to U.S. free market bent, did not believe in interest rate subsidies. See *id.* at 180 (discussing the U.S. reluctance to use interest rate

subsidy costs), precluded meaningful international cooperation in export finance.<sup>44</sup> In the 1970s, however, the industrialized countries found themselves in an accelerating, self-propagating export credit war. On the macroeconomic side, the 1973 oil shock caused large trade deficits for oil importing countries (most of the OECD members), which, in turn, led to an increase in interest rates.<sup>45</sup> At the same time, the industrialized, oil-importing world faced an unrelenting urge to promote exports as a means to reduce trade deficits,<sup>46</sup> prompting a sharp increase in ECA lending.<sup>47</sup>

With rising interest rates, official interest rate subsidies became increasingly expensive; as a means to “win” exports, ECAs aggressively offered export credit packages at a significant negative spread from ECA borrowing rates.<sup>48</sup> The rising costs of export subsidies placed additional weight on overburdened government budgets.<sup>49</sup> Given these economic conditions—high interest rates, large trade deficits, and limited government resources—all OECD ECAs braced for an inevitably costly export credit race, but also recognized that their own internal budget situation might not permit unfettered participation in that race. In response, finance ministers from OECD countries conceived the Arrangement in the hallways at a World Bank/IMF meeting in 1973.<sup>50</sup> In its initial form, the Arrangement was referred to as the 1976 “Consensus on Converging Export Credit Policies,”<sup>51</sup> followed by the first incarnation of the Arrangement in 1978.

subsidies and the European inability to offer extended repayment terms). See also Rolf Geberth, *The Genesis of the Consensus*, in THE EXPORT CREDIT ARRANGEMENT, *supra* note 5, at 27. The European ECAs that did not have access to capital markets that allowed refinancing of such long-term debt offered below-market interest rates to entice buyers to purchase European goods. See Moravcsik, *supra* note 10, at 180. This tension between the U.S. insistence on market-based interest rates (with long repayment terms) and the European facility with interest rate subsidization (with shorter repayment terms) created a stalemate.

44. For a discussion of the pre-Arrangement history, see RAY, *supra* note 10, at 45–52. See also Moravcsik, *supra* note 10, at 180–81.

45. From 1973 to 1980, long-term interest rates in the United States steadily increased from 6% to 14%. British and French interest rates increased similarly. See Moravcsik, *supra* note 10, at 183–84.

46. For example, the United States enjoyed a trade surplus of U.S. \$1.9 billion in 1973 that deteriorated to a trade deficit of U.S. \$19.4 billion by 1980. EXECUTIVE OFFICE OF THE PRESIDENT, COUNCIL OF ECONOMIC ADVISORS: ECONOMIC REPORT OF THE PRESIDENT, available at <http://w3.access.gpo.gov/eop/index.html> (last visited Dec. 2, 2003).

47. See RAY, *supra* note 10, at 49–50 (showing that between 1972 and 1982, ECA long-term lending (including guarantees and insurance) increased almost fivefold).

48. ECAs typically borrow from government treasuries and therefore benefit from rates offered to government borrowers. See EXPORT-IMPORT BANK OF THE UNITED STATES, *supra* note 19, at 35 (“Ex-Im Bank borrows from the U.S. Treasury for its cash needs for loan disbursements and claim payments that are in excess of amounts appropriated for claim losses.”).

49. Budget deficits increased significantly from 1969 to 1981. Congressional Budget Office, *Revenues, Outlays, Surpluses, Deficits, and Debt Held by the Public, 1962–2002*, available at <http://www.cbo.gov/showdoc.cfm?index=1821&sequence=0#table1> (last visited Dec. 2, 2003).

50. See Geberth, *supra* note 43 at 27–28. See also Moravcsik, *supra* note 10, at 180.

51. The Consensus was not a “multilateral” agreement but rather was “implemented” through a series of “unilateral but parallel undertakings.” RAY, *supra* note 10, at 52.

### B. Arrangement Rules

The Arrangement regulates ECAs with the goal of “leveling the playing field” among ECAs,<sup>52</sup> thereby encouraging “competition among exporters from the OECD-exporting countries based on quality and price of goods and services exported rather than on the most favourable officially supported terms.”<sup>53</sup> The Arrangement is self-designated a “Gentlemen’s Agreement” among ECA participants.<sup>54</sup> It is not a formal treaty—there are no signature or ratification processes. There are no parties, only participants. While the Arrangement’s text can be found on the OECD’s Web site and the Arrangement borrows from the OECD’s resources, the OECD serves as a mere administrative home;<sup>55</sup> the Arrangement is not an OECD Act.<sup>56</sup> Participants own the Arrangement, and the Participants group is autonomous; nonetheless, the Participants frequently liaison with the Export Credit Group of the OECD Trade Directorate.<sup>57</sup>

The Arrangement’s substantive rules (or disciplines) govern officially supported export credits and tied aid. Under the Arrangement, “official support” is form neutral, meaning that it may come in the form of direct loans, refinancing, interest rate support, export credit insurance, or loan guarantees.<sup>58</sup> The Arrangement covers the export of goods and services<sup>59</sup> with repayment terms of two or more years, usually excluding the export of small, consumer goods and including the export of most capital equipment.<sup>60</sup>

52. The Arrangement, *supra* note 4, Introduction, at 7 (stating that the Arrangement seeks to encourage competition among competitors on the basis of price and quality rather than attractiveness of terms).

53. *Id.*

54. *Id.* at 8 (“The Arrangement, developed within the OECD framework, came into being in April 1978 following agreement among its Participants. The Arrangement is a ‘Gentlemen’s Agreement’ among the Participants. The Arrangement is not an OECD Act, although it receives the administrative support of the OECD Secretariat.”).

55. See RAY, *supra* note 10, at 33, 42, suggesting that:

{The Arrangement} is obviously “in” the OECD, and yet it has never been officially part “of” the OECD. Thus, although the Secretariat of the Organization provides a small staff and services and although the Arrangement is widely known as the “OECD Arrangement,” it does not exist officially within the OECD . . . . It is not an “act of the Organization.”

56. The Arrangement, *supra* note 4, Introduction, at 8.

57. Additional information on the Export Credit Group (otherwise known as the Export Credit Division), can be found on the OECD Web site, available at [http://www.oecd.org/department/0,2688,en\\_2649\\_34169\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/department/0,2688,en_2649_34169_1_1_1_1_1,00.html) (last visited Dec. 2, 2003).

58. See The Arrangement, *supra* note 4, art. 2, at 9 (stating that “[o]fficial support” can take the form of direct credits/financing, refinancing, interest rate support, aid financing (credits and grants), export credit insurance and guarantees”). See also *id.*, Introduction, at 7 (Participants have not been able to agree upon a definition, rather than a categorical description, of “official support” and have placed the issue on the table for “future work.”).

59. The Arrangement, *supra* note 4, art. 2, at 9. Special guidelines govern select industries. See Sector Understanding on Export Credits for Ships, *id.* Annex I, at 47. See also Sector Understanding on Export Credits for Nuclear Power Plants, *id.* Annex II, at 51; Sector Understanding on Export Credits for Civil Aircraft, *id.* Annex III, at 54. In addition, the Participants have experimented with special rules for project financings. See Understanding on the Application of Flexibility to the Terms and Conditions of the Arrangement on Guidelines for Officially Supported Export Credits in Respect of Project Finance Transactions for a Trial Period (until Aug. 31, 2002), *id.* Annex VIII, at 73 [hereinafter Project Finance Understanding].

60. The Arrangement, *supra* note 4, art. 2, at 9.

Tied aid is aid for exports, or aid conditioned on the donee using the aid to purchase the donor's exports. An ECA will provide aid in the form of a grant, concessional financing,<sup>61</sup> or a mix of a grant and officially supported financing (which may be concessional). While the Arrangement has effectively regulated many aspects of tied aid,<sup>62</sup> this Article will nonetheless focus on compliance as it relates to the export credit side of the Arrangement.

The Arrangement has evolved considerably over its twenty-five-year history, and Table 1: History of the Arrangement ("Table 1: History"), tracks the milestones in this evolution. Currently, the Arrangement regulates most facets of officially supported export credits. The Arrangement sets maximum repayment terms on the basis of a World Bank scheme which classifies borrowers as either category I, eligible for a maximum 8.5-year repayment term, or category II, eligible for a maximum 10-year repayment term.<sup>63</sup> The repay-

61. *Id.* at 28. For the Arrangement's purposes, concessional financing occurs when governments offer financing terms more favorable than those permitted under the Arrangement. The Arrangement defines (and regulates) concessionality based on the difference between the nominal value of the loan and the discounted net present value of all future debt service payments. The concessionality level is the discount expressed in percentage terms. For example, in a grant of U.S. \$1 million, the lender does not expect to be repaid; the concession is U.S. \$1 million and the concessionality level is 100%. Alternatively, if the tied aid is given in the form of a U.S. \$1 million loan at 0% interest to be repaid over 20 years, the net present value is approximately U.S. \$317,846. Thus, the concession or grant portion of the loan is U.S. \$682,153, and the concessionality level is over 68%. This calculation is based on a discount rate of 5.90% which is based on the average U.S. dollar CIRR from January 15, 2002, to January 14, 2003, of 4.75% and a margin of 1.15%. *See id.* art. 38, at 29.

62. In the Helsinki Package, participants restricted tied aid's ability to act as a "hidden" subsidy. *Id.* art. 34, at 26–27. The Helsinki Package dictates that tied aid is only available to countries with a per capita income less than the World Bank's benchmark. Tied aid is generally not available for projects that are "commercially viable if financed on market or Arrangement terms." The Arrangement, *supra* note 4, art. 35, at 27. A project is not commercially viable if (1) cash flow is insufficient to cover operating costs and costs of capital; and/or (2) the project cannot be financed on market or Arrangement terms. *Id.* *See also* OECD, *Tied Aid: Ex Ante Guidance*, available at [http://www.oilis.oecd.org/olis/2003doc.nsf/LinkTo/tdpg\(2003\)13](http://www.oilis.oecd.org/olis/2003doc.nsf/LinkTo/tdpg(2003)13) (last visited Dec. 2, 2003). Any official commitment of tied aid must be at a concessionality level of at least 35%, or 50% for Least Developed Countries ("LLDCs"), which are designated by the United Nations as least developed countries. *See supra* note 61 for a description of concessionality. *See also* 2002 COUNTRY CLASSIFICATION FOR EXPORTERS AND TIED AID, available at <http://www.oecd.org/dataoecd/56/39/1946021.pdf> (last visited Dec. 2, 2003) (presenting a chart which separates LLDCs from other countries that are eligible for tied aid). The underlying rationale here is that if Participants are going to evade some of the Arrangement's disciplines through the award of tied aid, then the award must have a strong aid component and not just be a ruse to avoid the Arrangement's export credit disciplines.

63. *See* The Arrangement, *supra* note 4, art. 12, at 13–14; art. 10(a), at 13. The country classification is based on a World Bank designated per capita income threshold. The 2001 "graduation" threshold, which is the basis of the Arrangement's 2002 classification, is U.S. \$5,285 per capita annual income. *See also* 2002 COUNTRY CLASSIFICATION FOR EXPORTERS AND TIED AID, *supra* note 62. If the World Bank does not publish per capita income information on any country, the Arrangement will defer to the World Bank's estimates on whether the country in question has a per capita income that is less than or greater than the threshold then used for separating category I and II countries.

The Arrangement also explicitly regulates the process of reclassification of countries from category I to category II. The World Bank sets the per capita "graduation level" annually on the basis of country-by-country recalculations of per capita income. If, on the basis of a revised graduation level and a revised per capita income for that particular country, a country moves from category II to category I, for example, the Arrangement will not change the classification unless the revised classification remains unchanged for 2 consecutive years. At that point, all Participants will be notified of the change, which will occur two weeks following notification. *Id.*

ment clock begins ticking at the starting point of credit, which is a term of art tied to the Berne Union's definition.<sup>64</sup> Borrowers must pay 15% of the export contract value as an up-front cash payment.<sup>65</sup> The export contract value is the total price (indicated on an invoice) of the goods and services, excluding interest, local costs included in the price, and foreign content that is not eligible for financing but is nonetheless included in the price.<sup>66</sup> Borrowers repay equal installments of principal and interest semi-annually,<sup>67</sup> which are not capitalized during the repayment period.<sup>68</sup> "Local costs" are expenditures for "goods and services in the buyer's country, that are necessary . . . for executing the exporter's contract."<sup>69</sup> The Arrangement permits Participants to finance local costs to the extent of the cash payment.<sup>70</sup>

The Arrangement has eliminated most interest-rate subsidy from official export credit.<sup>71</sup> Throughout the Arrangement's history, Participants grappled with ways to eliminate interest rate competition while respecting legitimate variances in interest rates from market to market. After much trial and error,<sup>72</sup> Participants developed a market-based system of Commercial Interest Reference Rates ("CIRRs"), whereby each Participant providing direct loans or interest rate support does so at an interest rate that is, for most currencies, 100 basis points above a prescribed basket of government bonds.<sup>73</sup>

64. See The Arrangement, *supra* note 4, art. 8–9, at 11–12. If the export is a piece of equipment that is "useable" in and of itself, the starting point is the mean date (in the case of separate shipment of components) or the actual date when the buyer takes physical possession. In the case of a piece of capital equipment to be installed in a plant or factory where the supplier has no responsibility for "commissioning," the starting point is when the buyer takes physical possession of all the equipment, according to Article 9(b). *Id.* If the supplier not only provides the equipment but also runs the plant or factory that will house the equipment, the starting point is when tests prove that the equipment and/or plant are operable. *Id.* art. 9(d), at 12.

The Berne Union is similar to the Participants group, except that it focuses solely on credit insurance products, particularly short-term credit insurance products. For more information on the Berne Union, see <http://www.berneunion.org.uk/> (last visited Dec. 2, 2003).

65. The Arrangement, *supra* note 4, art. 7(a), at 11.

66. Many ECAs, like Ex-Im Bank, finance the export of only local goods and services. Given that many sub-components of any piece of capital equipment may be imports from third countries, a piece of equipment, like the GE turbine, might actually have a relatively high percentage of "foreign content." Ex-Im Bank has elaborate rules on the calculation of foreign content and, if foreign content exceeds 15% of the export contract value, Ex-Im Bank will only finance the U.S. content. Other ECAs are less sensitive to foreign content issues. Nonetheless, if a particular agency is not permitted to finance foreign content, such foreign content should be excluded from the export contract value for the purposes of calculating the cash payment. See *id.* art. 7(d), at 11.

67. *Id.* art. 13(a), at 14.

68. *Id.* art. 14(a), at 14.

69. *Id.* art. 25(a), at 20.

70. *Id.* art. 25(b), at 20.

71. Interest rates are particularly relevant when ECAs engage in direct lending. When ECAs offer a guarantee or insurance, the banks set the interest rate, which usually is linked to LIBOR or some other internationally accepted floating rate.

72. See *infra* notes 149–159 and accompanying text.

73. The Arrangement, *supra* note 4, art. 16, at 15–16. CIRRs are 100 basis points above a base rate which is either the 5-year government bond rate for all maturities or a three-tiered system which uses the 3-year government bond rate for repayment terms up to and including 5 years; 5-year government bond rate for repayment terms greater than 5 years and up to 8.5 years; and 7-year government bond rates for



Borrowers pay a premium or fee for ECA loans, insurance, and guarantee services. The Arrangement's most recent efforts at eliminating, or at least minimizing, competition among ECAs centered on standardization of minimum premium rates. The result was the Knaepen Package, which became effective on April 1, 1999. The Knaepen Package is a technical, and rather complicated, minimum premium benchmark system which attempts to link minimum premiums to market risk, while simultaneously adjusting premiums to compensate for disparate export credit systems and products.<sup>74</sup> At its core, the minimum premium benchmark system classifies countries into seven risk categories based in great part upon an econometric model that takes into account financial, economic, and political market indicators related to a country's ability to service its external debt.<sup>75</sup> Each category is assigned a minimum premium benchmark, which is the pricing of sovereign risk,<sup>76</sup> assuming a comprehensive,<sup>77</sup> standard product.<sup>78</sup> This minimum premium benchmark may then be adjusted for several reasons, including: (1) the quality of ECA product;<sup>79</sup> (2) the percentage of cover;<sup>80</sup> (3) the claims waiting period;<sup>81</sup> and (4) political-risk coverage.<sup>82</sup> Minimum premium benchmarks are

repayment terms longer than 8.5 years. Rates are adjusted on a monthly basis.

74. See *id.* arts. 20–24, at 17–20. See also *The Knaepen Package: Guiding Principles for Setting Premia Fees Under the Arrangement on Guidelines for Officially Supported Export Credits*, available at <http://www.oecd.org/dataoecd/59/4/1910218.pdf> (last visited Dec. 2, 2003) (on file with the Harvard International Law Journal).

75. This model measures country credit risk, which includes whether the country has issued a general moratorium on repayments, whether there are any circumstances that would make it difficult to transfer money to pay the debt (e.g., currency controls), local legal provisions that require repayment in local currency, and the history of force majeure events. The Arrangement, *supra* note 4, art. 20(c), at 17. The econometric model, the Country Risk Assessment Model ("CRAM"), takes into account the financial indicators (in terms of liquidity and financial solvency) and the major macroeconomic indicators for each country/market ECA payment experience. *The Knaepen Package: Guiding Principles*, *supra* note 74, at 3.

76. "Sovereign risk" is the risk attached to debt backed by the full faith and credit of a government usually through its Ministry of Finance or corresponding governmental entity. See *The Arrangement*, *supra* note 4, art. 22(e), at 18. See also *The Knaepen Package: Guiding Principles*, *supra* note 74, at 4.

77. A "comprehensive product" is a guarantee or insurance product that covers both political and commercial risks.

78. "Standard products" are direct loans or "conditional" insurance products (products that pay a claim only after the insured party satisfies several conditions) with a coverage rate of 95% including interest payments during the claims waiting period. See *The Arrangement*, *supra* note 4, art. 23(b), at 19.

79. If the product is above standard, meaning that it is an unconditional guarantee, then the Participant should assess a premium surcharge; if the product is below standard, meaning that it is a conditional insurance product that does not cover interest during the claims waiting period, then the Participant should assess a discount. *Id.* art. 23(b), at 19.

80. Some ECA products incorporate some degree of risk-sharing (i.e., upon claim, the ECA pays out at a rate of 90% of the covered (disbursed) principal), with the underlying principle being that risk-sharing entices the insured or guaranteed party to mitigate the chances of default. The Knaepen Package links minimum premium benchmarks (standard product) to 5% risk-sharing (or 95% cover). If the insured/guaranteed party bears more than 5% risk, the Participant shall discount the minimum premium benchmark. Accordingly, if the insured/guaranteed party bears less than 5% risk, the Participant shall surcharge the minimum premium benchmark. *Id.* art. 23(d), at 19.

81. The "claims waiting period" is the "period between the due date of payment by the buyer/borrower and the date that the insurer/guarantor is liable to reimburse the exporter/financial institution." See *id.* art. 23(a), at 19.

82. If a Participant offers a "political risk only" product (as opposed to a comprehensive product), the Participant shall use the country credit risk benchmark, which is 10% lower than the minimum pre-

also sensitive to the length of the drawdown period,<sup>83</sup> repayment terms, and the timing of the premium payment.<sup>84</sup> In addition, in certain circumstances where the parties structure a transaction to externalize or mitigate country credit risk during the term of the loan, Participants may discount minimum premium benchmarks.<sup>85</sup>

In the hypothetical GE example, Ex-Im Bank would likely follow the Arrangement and offer GE the following terms:

|   |  |
|---|--|
| Export Contract Value<br>(assuming 100% U.S. content) | U.S. \$10 million                            |
| Interest Rate   | 4.75% (CIRR) <sup>86</sup>                   |
| Down Payment  | 15% or U.S. \$1,500,000                      |
| Principal   | 85% or U.S. \$8,500,000                      |
| Repayment Terms                                       | Maximum of 10 years <sup>87</sup>            |
| Installments  | Semi-annual, equal principal, and interest   |
| Starting Point  | Brazilian buyer taking possession of turbine |

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mium benchmark for sovereign risk. *See id.* art. 22(f), at 18.

83. *See The Knaepen Package: Guiding Principles, supra* note 74, at 28–29. *See also* Ex-Im Bank Exposure Fee Advice Table, available at [http://www.exim.gov/tools/exposure/fee\\_advice\\_tables.html](http://www.exim.gov/tools/exposure/fee_advice_tables.html) (last visited Dec. 2, 2003).

84. *See The Knaepen Package: Guiding Principles, supra* note 74, at 4–7.

85. The “permitted exceptions” include: third-country unconditional guarantees, multilateral or regional institutions’ intervention, offshore escrow account to “catch” future cash flow streams, offshore security (hard or asset-based), in-country asset-secured or asset-based financing, third-country insurance or guarantee, local currency financing, debtor representing better risk than sovereign, and co-financing with international financial institution. *See id.* at 8–9.

86. ECAs charge interest only when they are loaning money directly; therefore, the CIRR is only relevant to the direct loan activities of ECAs. The CIRR quoted in the text is based on a repayment term of 10 years; a shorter repayment term would result in a lower CIRR. *See generally* Export-Import Bank of the United States, *About CIRR Rates*, available at [http://www.exim.gov/tools/cirr\\_about.html](http://www.exim.gov/tools/cirr_about.html) (last visited Dec. 2, 2003).

87. Brazil is a category II country and thus qualifies for a repayment term of up to 10 years. However, if the applicant wanted to bring this application as a medium-term credit (credit application U.S. \$10 million and under), and thus avert a more lengthy Board process, the maximum repayment term would have to be consistent with Ex-Im Bank’s medium-term program (generally maximum repayment of 5 years). *See supra* note 27 for a description of Ex-Im Bank’s medium-term program. *See also* Ex-Im Bank’s description of its medium-term programs, available at [http://www.exim.gov/products/insurance/medium\\_term.html](http://www.exim.gov/products/insurance/medium_term.html) (last visited Dec. 2, 2003).

|              |  |
|--------------|--|
| Exposure Fee | 14.78% of disbursements <sup>88</sup>                      |
| Local Costs  | U.S. \$1.5 million (down payment)<br>eligible for coverage |

Japan Bank for International Cooperation and Hermes, the respective Japanese and German ECAs, would offer the similar terms, except that the CIRR would be linked to market rates and the contract value would likely be quoted in local currency. In this world, the playing field is level. The Brazilian buyer can focus on underlying economic fundamentals of price and quality, and the ECAs can focus on servicing local exporters rather than competing with foreign ECAs.

#### IV. COMPLIANCE WITH THE ARRANGEMENT: THE EMPIRICAL EVIDENCE

International legal scholars long avoided the subject of compliance, in part because international lawyers assumed, given anecdotal evidence, that compliance occurs “almost all of the time,”<sup>89</sup> and in part because, compliance is difficult to document and even more difficult to quantify.<sup>90</sup> This Part and the appendices to this Article document, primarily through empirical research, sustained and pervasive compliance among Participants. This evidence is compiled in three tables appended hereto, and summarized in some bar graphs that are incorporated in the text. The first two tables—Table 2: Participant Compliance and Table 3: Non-Participant Compliance—present a 2003 snapshot of ECA compliance with the Arrangement. The third table—Table 4: Historical Compliance—demonstrates sustained compliance over the life of the Arrangement.

Prior to presenting this data, this portion of the Article will describe the methodology for compiling the data and quantifying the results. Then, it will examine Ex-Im Bank’s compliance record in some detail, not only as an accessible ECA case study but also as a window into the type of information that this Article gathered as a predicate to compiling the ECA-by-ECA information in the Tables. Finally, this Part will present the composite data for

88. This quote assumes a 10-year repayment term, twelve-month drawdown period, and a financed fee, as drawn. Given the Knaepen Package rules, the longer the repayment term, the higher the premium or exposure fee. As noted in *supra* note 87, the exporter would likely choose a shorter repayment term of 5 years, which would result in a more reasonable exposure fee of 8%. For a detail of loan calculations, see Export-Import Bank of the United States, *Ex-Im Bank Exposure-Fee Calculator*, available at [http://www.exim.gov/tools/fee\\_calc.html](http://www.exim.gov/tools/fee_calc.html) (last visited Dec. 2, 2003).

89. LOUIS HENKIN, *HOW NATIONS BEHAVE* 42 (2d ed. 1979) (“[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”) (emphasis omitted). For a detailed discussion of the historical evolution of compliance as a part of international law and relations scholarship, see Hathaway, *supra* note 12, at 1942–62.

90. Hathaway, *supra* note 12, at 1963 (“Any study seeking to evaluate compliance . . . faces a serious measurement problem” not only in terms of defining “compliance” but also in terms of gathering “information on state practices.”).

all Participants, as well as some non-Participants, highlighting the breadth and depth of compliance with the Arrangement.

### A. The Methodology

#### 1. Scope

This study documents and analyzes ECA compliance with the standard export credit rules of the Arrangement. It does not deal with tied aid and the complex set of tied aid rules that the Helsinki Package introduced.<sup>91</sup> Nor does it analyze ECA compliance with any of the sector-specific rules, such as the Sector Understanding on Export Credits for Ships<sup>92</sup> and the Sector Understanding on Export Credits for Civil Aircraft.<sup>93</sup> These addenda to the Arrangement are rich and interesting in their own right and may be worthy of further study. However, the decision to maintain a fairly narrow focus was a pragmatic choice driven by the type of data readily available.

The Arrangement's export finance rules are in and of themselves complicated, filling over twenty-one articles. Table 2: Participant Compliance and Table 3: Non-Participant Compliance respectively assess Participant and non-Participant compliance with four categories of export-credit-oriented rules: (1) interest rates;<sup>94</sup> (2) repayment terms, which includes the term of repayment,<sup>95</sup> starting point,<sup>96</sup> and repayment installments;<sup>97</sup> (3) the size of the credit, including down payment<sup>98</sup> and coverage of local costs;<sup>99</sup> and (4) the premium rate or cost of the credit.<sup>100</sup> I chose these rules because, as described in Part III, they set the fundamental parameters for all official export financing packages. Furthermore, these rules lend themselves to objective documentation rather than subjective anecdote.

Table 2: Participant Compliance includes all Participant countries, even those, like Ireland, that have abolished their ECAs. The research also surprisingly uncovered some significant compliance among non-Participants. Of approximately twenty-six non-Participant ECAs worldwide, many, especially in Latin America, simply do not comply with the Arrangement, and I

91. See *supra* notes 61–62 for a discussion of the tied aid rules that the Helsinki Package introduced in 1991. See also Table 1: History of the Arrangement for a summary of the evolution of the tied aid rules [hereinafter Table 1].

92. See The Arrangement, *supra* note 4, Annex I, at 47.

93. See The Arrangement, *supra* note 4, Annex III, at 54. Nor does the Arrangement assess ECA compliance with the trial Project Finance Understanding. See The Arrangement, *supra* note 4, Annex VIII, at 73.

94. Interest rates are now linked to CIRR. See *supra* note 73.

95. See the Arrangement, *supra* note 63 (maximum repayment term of 8.5 or 10 years depending on country classification).

96. See the Arrangement, *supra* note 64 ("repayment terms" clock starts at a point consistent with Berne Union definition of "starting point").

97. See the Arrangement, *supra* notes 67–68 (semi-annual, equal installments).

98. See *supra* text accompanying note 65 (minimum of 15%).

99. See *supra* text accompanying note 69 (equal to the level of the down payment).

100. See *supra* text accompanying notes 74–85 (Knaepen Package of minimum premium benchmarks).

have not included those countries in Table 3: Non-Participant Compliance.<sup>101</sup> Table 3: Non-Participant Compliance only includes non-Participants that are members of the OECD, non-Participants that are not members of the OECD but are applicants for E.U. membership, and Taiwan and Hong Kong, which are significant trading partners with OECD members.

## 2. Sources

There are three types of sources from which this Article could pull compliance data: (1) high-level diplomatic or ministerial statements; (2) ECA representations of their own programs; and (3) transactional data. Table 2: Participant Compliance and Table 3: Non-Participant Compliance rely on publicly available programmatic information from ECAs, primarily from ECA Web sites, annual reports, and a periodic OECD publication, *Export Credit Financing Systems*.<sup>102</sup> Fortunately, plentiful ECA promotional material provides a relatively transparent view of ECA programs and products.<sup>103</sup>

While high-level diplomatic statements may be colorful and illuminating, ECA programmatic information is a more reliable and useful data source. Diplomatic statements tend to be rather general and thus do not offer the type of specific, rule-by-rule compliance data that the Tables seek to capture. Furthermore, it may be necessary, for political or diplomatic reasons, for a Minister of Finance or even the President of an ECA to represent publicly and diplomatically that their ECA is compliant with the Arrangement. It is quite another matter for ECAs to represent to their customers—via public promotional material—that they are voluntarily limiting the terms and size of export subsidies. Written materials directed at the customer base may thereby provide a more unadulterated view of ECA compliance with the Arrangement.

Due to the fact that ECAs handle confidential business information, it is impossible to measure compliance on a transaction-by-transaction basis. Yet even if the transactional information were available, I do not believe that the results of this empirical survey would dramatically change. When communicating to its customers in promotional material, an ECA has little incentive to represent loyalty to the Arrangement unless it is indeed true. Many customers would prefer unfettered and unconstrained official financing in

101. For a complete list of ECAs, see Harvard Business School, *supra* note 24.

102. OECD, *supra* note 24.

103. In my experience, most ECAs operate in a quasi-commercial/quasi-public world. On the one hand, they are government agencies, and, unlike commercial banks, they are not primarily motivated by profit but rather by trade expansion. On the other hand, ECAs operate side-by-side with commercial bankers, investment bankers, financial advisors, attorneys, and many ECA employees who worked in the private sector at one point in their career. Consequently, a private sector mentality permeates ECAs to a much greater degree than other government agencies. As part of this private sector mentality, most ECAs "advertise" their services in promotional material, understanding that it will be difficult to fulfill the underlying ECA mission if exporters are unaware of ECA services, or intimidated by the bureaucracy that sometimes accompanies government programs.

the name of promoting their exports. Furthermore, once an ECA designs programs to conform to the Arrangement, institutional momentum and inertia help to assure transactional compliance. Finally, as will be discussed at great length, the Arrangement's procedures make transaction-by-transaction non-compliance very difficult, if not impossible.<sup>104</sup>

### 3. *Qualitative Judgments*

For each ECA, I qualitatively assessed the level of compliance with each of the seven Arrangement rules. "Compliance" means that the ECA explicitly claims to comply with the particular Arrangement rule.<sup>105</sup> "Probable compliance" means that it is a realistic assumption that the ECA is complying with the terms of the Arrangement. An ECA that claims generally to comply with the Arrangement, in the absence of more specific information, is deemed to be in "probable compliance." "No compliance" means that the ECA does not appear to be complying with the terms of the Arrangement. "Not applicable" means that the Arrangement's rules do not apply given the ECA's particular export credit financing system.<sup>106</sup> "Unavailable" means that it is impossible, given the limited programmatic information publicly available, to draw any conclusion about whether a particular ECA complies with a particular Arrangement rule.

While the assessments embedded in the Tables necessarily involve some subjective judgment, three individuals—the author and two research assistants—independently classified each ECA's compliance with each parameter and jointly resolved any discrepancies that surfaced during the independent reviews.

### 4. *The Compliance Index*

From this qualitative data, this Article attempts to quantify compliance in the form of a compliance index. The compliance index not only permits comparisons among sub-groups of Participants and between Participants and non-Participants but also dramatizes succinctly but poignantly the extensive compliance that the documentary evidence revealed. Quantifying compliance with any international regime is generally problematic and imprecise, and measuring compliance in the context of the Arrangement is no ex-

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104. See *infra* notes 212–226 for a discussion of institutionalized derogations.

105. When an ECA claims that "credit terms" or "terms and conditions" are consistent with the Arrangement, I consider this to encompass starting point, repayment term, and repayment installment, which are the three components that are integral to standardizing the length and tenor of repayment.

106. For example, if an ECA does not give direct loans, then the CJRR would not apply (guarantees are given to commercial banks that would likely link interest rates to LIBOR or some other internationally accepted floating rate). Also, Ireland has exited the official export credit business and thus, although a Participant through its membership in the European Union, the Arrangement has no applicability. See OECD, *Ireland*, in EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 1.

ception. Nonetheless, I believe the compliance index to be adequately realistic for comparative purposes.

In calculating the compliance index, I first assigned a numeric value to each Arrangement rule, weighing each of the four categories of Arrangement rules—interest rates, repayment terms, size of credit, and premium—equally. For example, in examining whether Participants complied with the interest rate provisions of the Arrangement, I measured Participant compliance with the CIRR. Yet in determining whether Participants complied with the repayment terms, I looked at the term of repayment, starting point, and repayment installments. To equalize the weight that the compliance index gives to interest rates and repayment terms, the CIRR is given a weight of one, while each component of “repayment terms” (term of repayment, starting point, and repayment installments) is given a weight of 1/3. Using similar analysis, the “minimum premium” rule has been assigned a weight of one, while cash payment and local costs, the two variables that determine the size of the credit, are each assigned a weight of 1/2. The compliance index, therefore, is a scale of 0 to 4, with interest rates, minimum premiums, repayment terms, and size of credit each accounting for one point.

I next assigned a relative weight to each qualitative compliance assessment for each Arrangement rule: “compliance” at 100%; “probable compliance” at 75% compliance;<sup>107</sup> “unavailable” at 25%;<sup>108</sup> and “no compliance” at 0%.

Calculation of the compliance index involves multiplying the point value assigned to each Arrangement rule by the weight assigned to each compliance assessment and then aggregating the points for each country. For example, Table 2: Participant Compliance reveals that the United States complies with each element of the Arrangement and therefore its compliance index is 4. New Zealand’s compliance index calculation is more complex:

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107. For Austria, the probability was 50% upon an explicit statement that Austria would only use CIRRs for transactions in foreign currency, which we estimated would occur in about 50% of the transactions. See Table 2: Participant Compliance with the Arrangement’s Export Credit Provisions [hereinafter Table 2].

108. If we simply excluded the “not available” information from the calculus, then the calculations become skewed in favor of those countries that do not disclose information. One has to at least consider that the ECA does not disclose information because it is trying to “hide” non-compliance, so a probability of less than 50% is in order. However, an ECA that simply does not provide a transparent view into its operations is more likely to be in compliance than an ECA that explicitly states that it does not comply with the Arrangement. Therefore, we decided on 25% for unavailable information.

|                          | Maximum<br>Point value | Compliance<br>assessment | Weight | Points toward<br>compliance<br>index |
|--------------------------|------------------------|--------------------------|--------|--------------------------------------|
| Interest rates           | 1.00                   | Unavailable              | 25%    | .25                                  |
| Starting<br>point        | .33                    | Unavailable              | 25%    | .08                                  |
| Repayment<br>Term        | .33                    | Compliance               | 100%   | .33                                  |
| Repayment<br>Installment | .33                    | Compliance               | 100%   | .33                                  |
| Cash Pay-<br>ment        | .50                    | Unavailable              | 25%    | .13                                  |
| Local Costs              | .50                    | Compliance               | 100%   | .50                                  |
| Minimum<br>Premiums      | 1.00                   | Probable<br>compliance   | 75%    | .75                                  |
| Compliance<br>Index      |                        |                          |        | 2.4                                  |

Those rules that were “not applicable” to any country’s compliance profile did not impact the compliance index.<sup>109</sup> Figures 2, 3, and 4 average compliance indices for Participants, non-Participants, or significant subgroups of Participants or non-Participants.

### 5. *Historical Data*

Table 4: Historical Compliance spreads data incrementally over a 20-year period, applying the same basic methodology described above with a few exceptions. First, Table 4: Historical Compliance, unlike Table 2: Participant Compliance, analyzes only those Participants that were also members of the G-7: Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States. The narrower scope of review should not decisively alter the portrait of compliance because these Participants have historically accounted for over 85% of all official export credit activity.<sup>110</sup> Second, because

109. For example, in Greece, the ECA does not provide direct loans, so the CIRR does not apply. Therefore, the “interest rate” rule falls out of the analysis and Greece’s compliance index is effectively on a three-point scale. However, to maintain the compliance index as a meaningful comparative tool, Greece’s three-point index is appropriately converted to the four-point scale. See Table 2.

110. See OECD, *Medium- and Long-Term Export Credits by Reporting Country*, available at <http://www.oecd.org/dataoecd/13/44/7084900.pdf> (last visited Dec. 2, 2003) (G-7 Participants account for 88% of official export credits in 1998 and 85% in each year from 1999 to 2001).



Participants did not attempt to harmonize minimum premiums via the Knaepen Package until April 1999, Table 4: Historical Compliance measures compliance with only three categories of Arrangement rules: interest rates, repayment terms (starting point, term of repayment, and repayment installments), and size of credit (cash payments and local costs). Thus, in nominal terms, the compliance index for the historical data is a three-point index, but, for purposes of comparison with Table 2: Participant Compliance, I have scaled the historic indices to correspond to the four-point index used in Tables 2 and 3.<sup>111</sup> Third, the Arrangement rules evolved over time, and Table 4: Historical Compliance measures compliance with the rules that existed at each particular historical moment. Fourth, while Table 2: Participant Compliance and Table 3: Non-Participant Compliance rely on multiple sources—OECD publications, ECA Web sites and annual reports—Table 4: Historical Compliance relies only on the OECD publication, *Export Credit Financing Systems*.<sup>112</sup> Otherwise, the methodology behind the compliance indices in Table 4: Historical Compliance is identical to that of the methodology behind the indices compiled from Tables 2 and 3.

### B. Ex-Im Bank Compliance

An in-depth examination of Ex-Im Bank's implementation of the Arrangement provides a clear window into how this Article assesses compliance for each ECA. Ex-Im Bank implements the Arrangement's rules with precision, care, and tenacity. Ex-Im Bank board members have consistently praised the Arrangement as *the* significant regulatory framework for export credits.<sup>113</sup> In practice, the Arrangement is a core, constituent document that

111. The "2003" column in Table 4 takes the compliance indices directly from Table 2, which includes minimum premiums (the Knaepen Package). Thus, the indices in the "2003" column are based nominally on four potential points and are not converted from a three-point to a four-point scale, as Table 4 does in all other columns. See *infra* Table 4: G7 Compliance with the Arrangement's Export Credit Provisions (1982–2003) [hereinafter Table 4].

112. See OECD, EXPORT CREDIT FINANCING SYSTEMS (5th ed. 1995) [hereinafter EXPORT CREDIT FINANCING SYSTEMS 1995]. See also OECD, EXPORT CREDIT FINANCING SYSTEMS (4th ed. 1990) [hereinafter EXPORT CREDIT FINANCING SYSTEMS 1990]; OECD, EXPORT CREDIT FINANCING SYSTEMS (3d ed. 1987) [hereinafter EXPORT CREDIT FINANCING SYSTEMS 1987]; OECD, EXPORT CREDIT FINANCING SYSTEMS (2d ed. 1982) [hereinafter EXPORT CREDIT FINANCING SYSTEMS 1982].

113. Rita M. Rodriguez, *Ex-Im Bank: Overview, Challenges, and Policy Options*, in THE EX-IM BANK IN THE 21ST CENTURY, *supra* note 5, at 10 (The Arrangement "succeeded in leveling the playing field for 'officially supported' export credits . . . . The age of blatant export credit subsidy competition among governments appears to be over."). The president and chairman of Ex-Im Bank, during periodic reauthorization hearings, explicitly and implicitly represented to Congress, on the public record, that Ex-Im Bank is "bound" by the Arrangement. See Press Release, Office of Public Affairs, Statement by Chairman Robson (June 19, 2001) Hearing Before House Committee on Banking (pushing for further OECD negotiations to bring "market window" and "untied aid" financing under the Arrangement's auspices, and exhibiting confidence in the Arrangement and implying that the Arrangement's rules are being improperly (maybe even illegally) evaded by use of "market windows" and "untied aid"). See also Press Release, Office of Public Affairs, Statement by John B. Taylor, Undersecretary, Department of Treasury (June 19, 2001) ("[B]ecause ExIm exists, the United States has a seat at the international table that sets rules for how official export financing operates."); *Reauthorization of the Export-Import Bank of the United States: Hearing Before the Subcomm. on Int'l Fin. of the S. Banking, Housing and Urban Affairs Comm.*,

is agency law, just as domestic laws that restrict exports to “bad actor” countries<sup>114</sup> or prohibit exports of certain products such as arms or drugs.<sup>115</sup>

Specifically, Ex-Im Bank requires a 15% cash payment, as the Arrangement demands.<sup>116</sup> Ex-Im Bank’s repayment terms are explicitly linked to the Arrangement and, in no case, longer than 10 years,<sup>117</sup> from a “starting point” that is consistent with the Arrangement’s definition.<sup>118</sup> Ex-Im Bank demands repayment in equal, semi-annual installments.<sup>119</sup> For direct loans, Ex-Im Bank uses a three-tier CIRR as its interest rate.<sup>120</sup> Ex-Im Bank will

105th Cong. (1997) (statement of Mr. James A. Harmon, President and Chairman, Export-Import Bank of the United States) (stating that “[w]e attempt to mitigate competition and achieve budget savings through multilateral negotiations in the OECD . . . . Today, as a result of ten years of hard bargaining and consistent Congressional support for Ex-Im Bank, there are no losses as a result of the interest rates charged on our loans.”); *Ex-Im Bank Reauthorization: Hearing before the Subcomm. on Int’l. Trade, Investment and Mon. Policy of the House Comm. On Banking, Finance and Urban Affairs*, 98th Cong. 8 (1983) (statement of Chairman Draper) (“Our interest rates have been reduced to the minimums allowed under the OECD International Arrangement . . . . The vast majority of cases are getting approved, have been approved all through 1982, and all of those cases, practically speaking, are currently at the OECD minimums.”).

114. 12 U.S.C.A. § 635(b)(2) (West 2001). See also *supra* note 37.

115. 12 U.S.C.A. § 635(b)(6)(C)(ii) (West 2001). See also § 635(b)(6)(A)–(B), *supra* note 38.

116. See Export-Import Bank of the United States, *Loan Guarantee: Competitive Financing for International Buyers*, available at [http://www.exim.gov/products/loan\\_guar.html](http://www.exim.gov/products/loan_guar.html) (last visited Dec. 2, 2003).

117. Under the Arrangement, the maximum repayment term is 10 years, 8.5 years for countries on the World Bank graduation list. For Ex-Im Bank’s medium-term program, the maximum repayment term is 5 years (capital equipment under U.S. \$10 million); for Ex-Im Bank’s long-term program, the maximum repayment term is 10 years (transactions over U.S. \$10 million, excluding project finance transactions). See *id.* This excludes project financings, which are treated uniquely by the Arrangement and by Ex-Im Bank. See generally Project Finance Understanding, *supra* note 59, at 73. See also Export-Import Bank of the United States, *Standard Repayment Terms*, available at <http://www.exim.gov/pub/pdf/ebd-m-26.pdf> (last visited Dec. 2, 2003) (on file with the Harvard International Law Journal).

118. See *Loan Guarantee: Competitive Financing for International Buyers*, *supra* note 116. See also *Standard Repayment Terms*, *supra* note 117. (“The most common starting point is the date of shipment by the exporter or supplier.”).

119. See *Loan Guarantee: Competitive Financing for International Buyers*, *supra* note 116. See also *Standard Repayment Terms*, *supra* note 117. (“Repayment begins approximately six months after the starting point, and payments of principal and accrued interest generally must be made semiannually.”).

120. Ex-Im Bank sets CIRRs on the 15th of every month based on U.S. Treasury rates for the preceding month, as published by the Federal Reserve on the Monday following the last day of the previous month. See *About CIRR Rates*, *supra* note 86. Consistent with the terms of the Arrangement, Ex-Im Bank calculates CIRRs by adding 100 basis points to the 3-year U.S. Treasury rates for repayment terms less than or equal to five years, the 5-year U.S. Treasury rates for repayment terms greater than 5 years and less than or equal to 8.5 years, and the 7-year U.S. Treasury rates for repayment terms greater than 8.5 years. See also The Arrangement, *supra* note 4, art. 16, at 15; OECD, *Commercial Interest Reference Rates: The Official Lending Rates of Export Credit Agencies*, available at [http://www.exim.gov/tools/cirr\\_rates.html](http://www.exim.gov/tools/cirr_rates.html) (last visited Dec. 2, 2003).

On November 21, 2003, Ex-Im Bank’s published CIRR rates, effective through December 14, 2003, were: 3.26% for repayment terms less than or equal to five years; 4.19% for repayment terms less than or equal to 8.5 years; and 4.75% for repayment terms longer than 8.5 years. The OECD’s published CIRRs were identical. See The Arrangement, *supra* note 4. Sometimes, an exporter will approach Ex-Im Bank for some type of preliminary commitment that it can use in bidding for a sale. Since CIRRs change every month, the CIRR on the preliminary commitment may be different than the CIRR at the time of the official application to Ex-Im Bank. Upon request and payment of a premium, Ex-Im Bank will “lock in” the CIRR for a maximum of 120 days for a charge of an additional twenty basis points. See also *About CIRR Rates*, *supra* note 86. This policy is consistent with the Arrangement, which permits fixing CIRRs for 120 days (as opposed to monthly or every 30 days) for a charge of twenty basis points. See The Arrangement, *supra* note 4, art. 17(a), at 16.

cover local costs up to 15% of the contract value, coinciding with the 15% cash payment.<sup>121</sup> As discussed above, the Knaepen Package introduced a minimum premium benchmark system, effective April 1, 1999.<sup>122</sup> Even though Ex-Im Bank's premiums had been calculated using an inter-agency rating system,<sup>123</sup> Ex-Im Bank migrated to the Knaepen system by the April 1, 1999, deadline and, since that time, Ex-Im Bank's fee structure has tracked, with specificity, the intricacies of the minimum premium benchmark system.<sup>124</sup> As a powerful counterexample to many U.S. policymakers that proclaim the futility of international agreements, the Arrangement's rules define Ex-Im Bank's rote, everyday programs.<sup>125</sup>

### C. Foreign ECAs

Foreign ECAs also take their Arrangement obligations seriously and comply significantly with the export credit provisions of the Arrangement. In public statements, high-level trade officials and ECA administrators applaud the Arrangement as engendering widespread compliance and effectively managing officially supported export finance within an expanding and increasingly connected international economy.<sup>126</sup> In addition, many ECAs, in

121. See Export-Import Bank of the United States, *Local Cost Policy*, available at [http://www.exim.gov/products/policies/local\\_cost.html](http://www.exim.gov/products/policies/local_cost.html) (last visited Dec. 2, 2003).

122. See The Arrangement, *supra* note 4, arts. 20–25, at 17–20 and accompanying text.

123. See *supra* note 32 for a description of the ICRAS country rating system.

124. While staff initially resisted the premium rate shift, Ex-Im Bank's management, determined to comply with OECD commitments, advocated the institutionalization of the new fee structure, and mandated OECD fee training sessions for all Ex-Im Bank employees. Today, the Knaepen system is an embedded, organic part of Ex-Im Bank.

Ex-Im Bank introduced the new fee system to its users with the following: "One of the last major uncovered aspects of official export finance support was the fees charged by ECAs for the risk that a transaction would not be repaid. We changed our exposure fee system in concert with all major ECAs to charge no less than the OECD minimum risk fees for every market." See Export-Import Bank of the United States, *Exposure Fee Advice*, available at [http://www.exim.gov/tools/exposure/fee\\_advice.html](http://www.exim.gov/tools/exposure/fee_advice.html) (last visited Dec. 2, 2003). Ex-Im Bank calculates minimum premium benchmarks consistent with the Arrangement. Compare Ex-Im Bank's policies, at *Exposure Fee Advice* and Export-Import Bank of the United States, *Exposure Fee Calculator*, available at [http://www.exim.gov/tools/fee\\_calc.html](http://www.exim.gov/tools/fee_calc.html) (last visited Dec. 2, 2003), with The Arrangement, *supra* note 4, arts. 20–25, at 17–20, and *The Knaepen Package: Guiding Principles*, *supra* note 74.

Given that the Knaepen Package minimum premium benchmarks are based on public sector risk, Ex-Im Bank then adds a transaction risk increment for private sector transactions to measure the risk specific to the transaction and the parties. The transaction risk increment is linked to the ICRAS that, prior to the Knaepen Package, was the sole determinant of Ex-Im Bank's fees. See also *Ex-Im Bank Exposure Fee Calculator*, *supra* note 124. The Arrangement is concerned about premiums as "hidden subsidies" and thus does not prohibit Participants from charging above the minimum premium benchmarks. See also the Arrangement, *supra* note 4, art. 20(e), at 17.

125. Throughout my tenure at Ex-Im Bank, I attended hundreds of credit committee meetings and dozens of Board of Director sessions, and I do not recall a standard export credit transaction (as opposed to a project finance transaction) that fell outside the bounds of the Arrangement.

126. See A. Ian Gillespie, *A New World for the Export Credit Agencies*, in *THE EXPORT CREDIT ARRANGEMENT*, *supra* note 5, at 111 (arguing that the Arrangement has "proven useful" in "avoiding a destructive and expensive export-credit race"). See also Fumio Hoshi, *A Japanese Perspective*, in *THE EX-IM BANK IN THE 21ST CENTURY*, *supra* note 5, at 237 (contending that the Arrangement has almost successfully "level[ed] the playing field" and squeezed most "subsidy elements" from official export finance);

their customer-oriented publications, make broad claims of allegiance to the Arrangement.<sup>127</sup>

Yet the proof of compliance is not in these general statements but rather in how ECAs structure daily interactions with exporters. Table 2: Participant Compliance uniquely analyzes and compiles this public information for such indicia of compliance. A quick glance at Table 2: Participant Compliance reveals consistent, widespread Participant compliance with the Arrangement. As Figure 2 illustrates, the average Participant compliance index is currently 3.4 on a four-point scale. The compliance indices for a majority of Participants are 3.8 or higher, with most over 3.0; a few outlying Participants, namely Greece, New Zealand, and Spain place a drag on the average compliance index, not because they are blatantly non-compliant but because their programs are not transparent enough to make qualitative compliance assessments possible.<sup>128</sup>

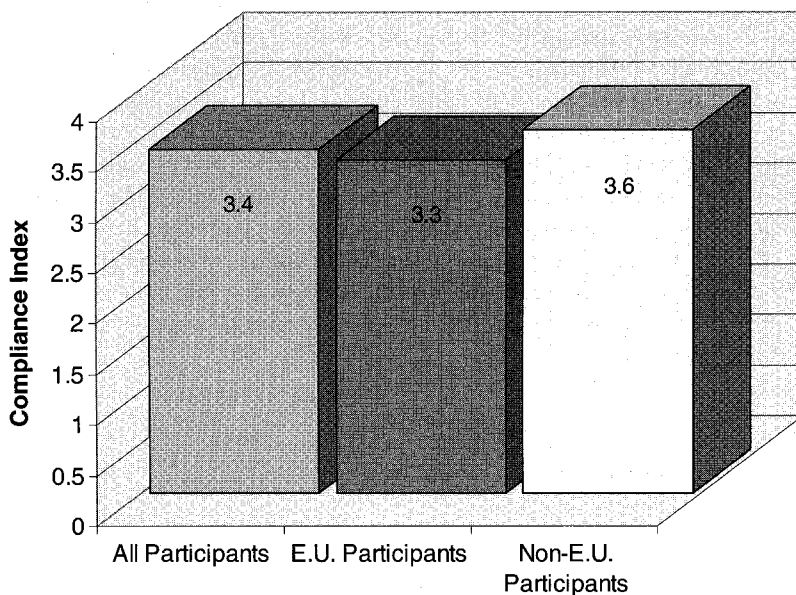
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Hidehiro Konno, *From Simple to Sophisticated*, in THE EXPORT CREDIT ARRANGEMENT, *supra* note 5, at 95, 95 (noting that the Arrangement has served the purposes of “global prosperity” through “promoting trade” while managing the export credits which are the “fuel that power[s]” international trade); Michael Kruse & Eckhardt Moltrecht, *A National Perspective: The View from Germany*, in THE EXPORT CREDIT ARRANGEMENT, *supra* note 5, at 99, 99–101 (arguing that the Arrangement has been a success and that future success depends on further evolution and modernization); Hans W. Reich, *A German Perspective*, in THE EX-IM BANK IN THE 21ST CENTURY, *supra* note 5, at 222 (acknowledging that, with the conclusion of the Knaepen Package and the harmonization of minimum premium levels for sovereign risk, officially supported export credits “have indeed been fairly uniform”); Soledad Abad Rico et al., *The Arrangement from a Spanish Perspective*, in THE EXPORT CREDIT ARRANGEMENT, *supra* note 5, at 39, 43 (“The Arrangement has been a successful example of international co-ordination in a difficult area where the inclination is to beat competing countries through an uncontrolled credit race.”).

127. As this Article already suggested, these representations may actually be more indicative of reality than those of high-level policymakers. See, e.g., EFIC, ANNUAL REPORT 2002, 19 (2002) (“We [Australia] provide these [medium term] facilities under the ‘Consensus Arrangement.’”); Oesterreichische Kontrollbank Aktiengesellschaft (OeKB), *Export Financing Scheme*, available at <http://www.oekb.at/english/1/03/10300000.shtml> (last visited Dec. 2, 2003) (“Credits according to Kontrollbank’s export financing scheme are provided in conformity with the rules of the OECD Arrangement on Guidelines . . . .”); Export Development Canada, EDC, *How We Work, International Agreements*, available at [http://www.edc.ca/corpinfo/whoware/how\\_we\\_work\\_e.htm](http://www.edc.ca/corpinfo/whoware/how_we_work_e.htm) (last visited Dec. 2, 2003) (“Canada Account financing is structured following OECD guidelines . . . .”); Eksport Kredit Fonden (EKF), available at <http://www.ekf.dk/> (under “International” link, then the “Agreements” link) (last visited Dec. 2, 2003) (“The basis for the use of officially supported exported credits is the ‘Arrangement. . . .’”); Finnvera, *OECD*, at <http://www.finnvera.fi/index2.cfm?to=612> (last visited Dec. 2, 2003) (“[A]ll credits guaranteed by Finnvera must adhere to rules, laid down in the OECD Consensus.”); Export Risk Guarantee Agency (ERG), *Basis of ERG*, available at <http://www.swiss-erg.com/portrait/international/e/index.htm> (last visited Dec. 2, 2003) (“Primarily the aim is to implement reasonable principles for credit terms in international trade and to avoid competitive distortion due to official support. The most important organisations to this effect are OECD and Berne Union.”); Export Credits Guarantee Department (ECGD), *Products & Services*, available at [http://www.ecgd.gov.uk/print/home/ps\\_home/creditterms/creditterms\\_mi.htm](http://www.ecgd.gov.uk/print/home/ps_home/creditterms/creditterms_mi.htm) (last visited Dec. 2, 2003) (“[W]e are bound by the OECD Consensus on government support for export credits and tied aid finance, which has been incorporated into EC law.”).

128. See “Compliance Index” column in Table 2.

FIGURE 2



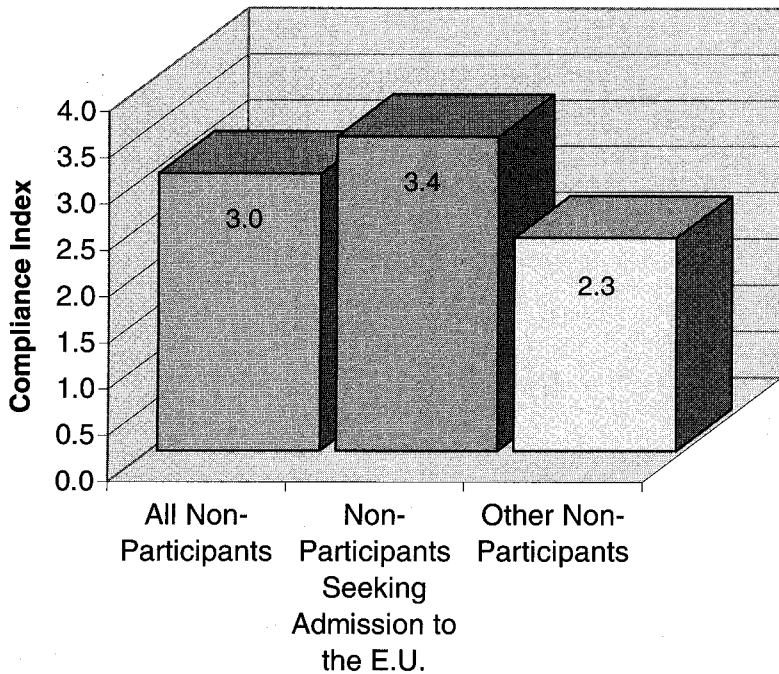
Source: Table 2: Participant Compliance with the Arrangement's Export Credit Provisions.

Also significant, several non-Participant countries also comply with the Arrangement. Many of these ECAs profess their adherence to the Arrangement.<sup>129</sup> As Figure 3 illustrates, the average compliance index for non-Participants is 3.0, and as high as 3.4 for those seeking admission to the European Union.<sup>130</sup>

129. See, e.g., Hungary's ECA claims that "the terms and conditions of the loans with maturity over two years are in line with the rules of the Arrangement." OECD, *Hungary*, in EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 8; Poland's ECA proclaims, "For credits over one year, the rules on the Arrangement on credit terms and down payment apply." OECD, *Poland*, in EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 5; Romania's ECA states, "The Arrangement is always applied as a benchmark." OECD, *Romania*, in EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 8; and Turkey's ECA proclaims, "In the implementation of the [medium- and long-term export credits] programme, the Bank fully complies with the Arrangement." OECD, *Turkey*, in EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 10.

130. It is important to recognize that this figure does not represent compliance among all non-Participants. See discussion of scope in text accompanying *supra* note 101.

FIGURE 3

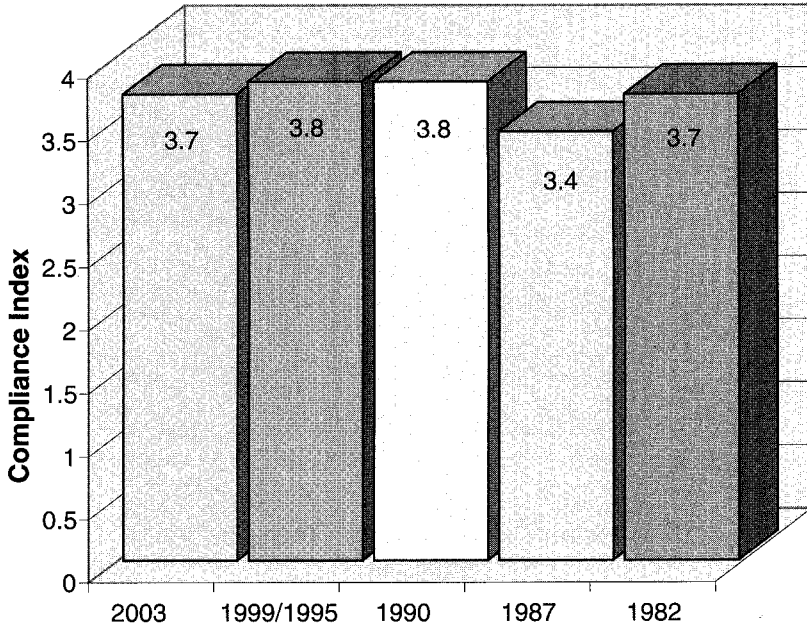


Source: Table 3: Non-Participant Compliance with the Arrangement's Export Credit Provisions.

While this Article calculates average compliance indices of 3.4 for Participants and 3.0 for non-Participants, these indices are less important in a nominal sense but very significant in (1) their relative proximity to perfect compliance; and (2) that some non-Participants comply with the Arrangement to almost the same extent as the Participants themselves.

Figures 2 and 3 offer a 2003 snapshot of compliance. Figure 4, below, based on the data from Table 4: Average Compliance, illustrates compliance over the life of the Arrangement. Compliance indices for the G-7 Participants hovered in a narrow range from 3.4 to 3.8.

FIGURE 4



Source: Table 4: G-7 Compliance with the Arrangement's Export Credit Provisions (1982–2003).

Notably, Figure 4 illustrates that compliance with the Arrangement is not epiphenomenal but rather has been high, sustained, and steady throughout the Arrangement's life.

#### V. WHY COMPLIANCE?

In the Sections that follow, this Article explores reasons why Participants and non-Participants alike have embraced the Arrangement, incorporating its spirit and its specific, at times tedious, rules into export credit programs. While it is often impossible to know precisely why a state chooses to comply with a particular international rule, the following Sections offer enlightened hypotheses, some substantiated with hard data and others with softer conjectures, as to why Participants, and select non-Participants, became enthusiastic adherents to the Arrangement's rules.

The following sections look at state interests, the Arrangement itself, and the broader international legal context to construct a compliance story. Section A begins where much international compliance scholarship begins—with the simple proposition that states will comply with international rules

th the simple proposition that states will comply with international rules when it is in their interest. This realist, and subsequently rationalist, state-centered view may explain the Arrangement's initial combusive moment but is not robust enough to explain the profound and sustained compliance that the data reveal. Section B then peers into the Arrangement's history, evolution, processes, and form for an understanding of compliance. While turning to the international rules that are the subject of the compliance inquiry may seem like an obvious analytic step, much realist and rationalist compliance work neglects any piercing, detailed analysis of legal rules, explaining, in part, why such theories are limited in their explanatory and predictive value. Section C looks to the broader, systemic context in which trade finance regulation is enmeshed. Through vertical linkages between the Arrangement and domestic law and horizontal linkages between related areas of economic regulation, a web of interlocking law has emerged which, while not decisive in explaining compliance throughout the Arrangement's history, clearly fortifies the Arrangement and helps assure that compliance will continue into the future. This Part concludes with a weighing of the compliance factors, arguing, that while state interests and systemic linkages play some role in explaining sustained compliance, it is the Arrangement itself—its dynamic processes, measured evolution, and loose form—that is the key engine of compliance.

#### A. *State Interests and the Initial Commitment*

The realists have hijacked international legal scholarship, particularly the compliance question.<sup>131</sup> The underlying realist contention is that, in an anarchical world, states act in self-interest, typically derivative of power politics, and that compliance with international law is not compliance at all but rather naked coincidence of state interests and international "rules."<sup>132</sup> Classic realists argue that a powerful state will have the luxury of acting unilat-

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131. See Simmons, *supra* note 12, at 328 (arguing that the estrangement of "law" and "international relations" theory is largely a function of the dominance of realist thinking and further arguing that "hegemony in realist thinking" discouraged "inquiries into the role that international law might play in explaining international outcomes."). See also Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 206 (1993) ("[T]he theoretical scholarship in both international law and international relations can be understood as either a response to or a refinement of [the realist] challenge [to international law].").

132. For a sampling of the realist critique, see generally FRANCIS BOYLE, *WORLD POLITICS AND INTERNATIONAL LAW* (1985); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (5th ed. 1978); Francis A. Boyle, *The Irrelevance of International Law: The Schism Between International Law and International Politics*, 10 CAL. W. INT'L L.J. 193 (1980); Stanley Hoffman, *The Role of International Organizations: Limits and Possibilities*, 10 INT'L ORG. 357, 364 (1956).

In more refined versions of the realist critique, state interests are not subsumed solely by sheer power but are rather derivative of the structure of the international system. See generally KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979). For a modern review of the realist critique, see Jonathan D. Greenberg, *Does Power Trump Law?*, 55 STAN. L. REV. 1789 (2003) (arguing that the realist critique remains a potent force in international law and international relations and exhorting international legal scholars to take the realist critique seriously).



erally in its own interests; less powerful states must define their own self-interests in relation to their more powerful brethren.<sup>133</sup> International law, therefore, is not law at all but a shrewd and ephemeral reflection of state power, interests, and preferences. The realists thereby leave little room for legal institutions and fundamentally challenge the relevance of international law.<sup>134</sup>

In deconstructing the notion of "state interest," rationalists seek to disprove the simplistic, anachronistic, and empirically problematic contention that power-driven self-interest is the sole determinant of state behavior. Rationalists, most notably regime theorists,<sup>135</sup> assume that states are unitary, rational actors that will pursue their self-interests. Unlike realists though, rationalists recognize that state interest is not always coincident with immediate self-interest and power. Using game theory and other familiar tools of economic analysis, rationalists view "self-interest" as embracing notions of the "collective good," "systemic utility maximization," "long- versus short-term gains," or "zero sum vs. positive sum gains."<sup>136</sup> Rationalists use these tools to explain why states often coalesce in cooperative, self-restraint to form regimes with core unifying norms. Distinct from the realists, regime theorists find a role for law and legal institutions, preserving states' systemic long-term interests in the face of immediate and competing short-term interests. Typically, however, rationalists view international law as a passive backdrop against which state interests evolve and play out.

133. MORGENTHAU, *supra* note 132, at 5 ("We assume that statesmen think and act in terms of interest defined as power.").

134. See Boyle, *supra* note 132, at 198 (arguing that "International law is devoid of any intrinsic significance within the calculus of international political decisionmaking."). See also Hoffman, *supra* note 132, at 370 (arguing that power politics, particularly cold war politics, limit and paralyze international institutions).

135. "Regimes can be defined as sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations." Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L ORG. 185, 186 (1982). See Oran R. Young, *International Regimes: Problems of Concept Formation*, 32 WORLD POL. 331, 332-42 (describing regimes in terms of a substantive component, a procedural component, and implementation).

For prominent examples of regime theory, see THE ANATOMIES OF INTERDEPENDENCE (John Gerard Ruggie ed., 1983); ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); ROBERT O. KEOHANE, *AFTER HEGEMONY* (1984); ORAN R. YOUNG, *COMPLIANCE AND PUBLIC AUTHORITY: A THEORY WITH INTERNATIONAL APPLICATIONS* (1979); Robert Jervis, *Security Regimes*, 36 INT'L ORG. 357 (1982) (describing conditions in which security regimes, or cooperative security arrangements, will come into existence); Robert O. Keohane, *The Demand for International Regimes*, 36 INT'L ORG. 325 (1982); Stephen D. Krasner, *Regimes and the Limits of Realism: Regimes as Autonomous Variables*, 36 INT'L ORG. 497 (1982); Charles Lipson, *The Transformation of Trade: The Sources and Effects of Regime Change*, 36 INT'L ORG. 417 (1982); Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT'L ORG. 299 (1982). See also Stephan Haggard & Beth A. Simmons, *Theories of International Regimes*, 41 INT'L ORG. 491 (1987); Oran R. Young, Book Review, *International Regimes: Toward a New Theory of Institutions*, 39 WORLD POL. 104 (1986).

136. See, e.g., Young, *supra* note 135, at 109 ("[A]ctors frequently experience powerful incentives to accept the behavioral constraints associated with institutional arrangements in order to maximize their own long-term gains.").

The rationalists identify historical moments such as the 1973 oil shock that immediately preceded the Arrangement, when states' interest may shift and realign, as propitious for international cooperation and regime-building.<sup>137</sup> Using game theory, the rationalist form of analysis, consider the following highly simplified model of pre-Arrangement export credit dynamics:<sup>138</sup>

|                      | Country Y No Subsidy  | Country Y Subsidy  |
|----------------------|---|--|
| Country X No Subsidy | -\$500 (50% chance of losing \$1,000 export),<br>-\$500 (50% chance of losing \$1,000 export)                   | -\$750 (75% chance of losing \$1,000 export),<br>-\$350 (\$100 subsidy cost + 25% chance of losing \$1,000 export)                   |
| Country X Subsidy    | -\$350 (\$100 subsidy cost + 25% chance of losing \$1,000 export), -\$750 (75% chance of losing \$1,000 export) | -\$600 (\$100 subsidy cost + 50% chance of losing \$1,000 export), -\$600 (\$100 subsidy cost + 50% chance of losing \$1,000 export) |

X,Y = cost to Country X, cost to Country Y

While a classic prisoner's dilemma game predicts that both countries will opt to subsidize exports,<sup>139</sup> that outcome does not further either country's goal

137. See generally KEOHANE, *supra* note 135; RUGGIE, *supra* note 135; Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 362-68 (1989).

138. Assume that, before the oil shock, unfettered by any regulation, Country X and Country Y competed for exports under the following circumstances: the cost of export subsidies is \$100; the value of the export in question is \$1,000; the chance of winning the export for its nationals is 50% if both Country X and Country Y subsidize at a level of \$100 or if both do not subsidize; if Country X provides an export credit subsidy while Country Y does not, the chance that the foreign buyer will "buy from Country X" rises to 75%, and vice versa.

These games are based on the treatment of prisoner's dilemma games in DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 31-35 (1994) (describing collective action problems in terms of the prisoner's dilemma game).

139. Assume that each country fully understands the costs and benefits not only of its decision to provide an export credit subsidy but also of the other country's decisions and further assume that neither country knows whether or not the other country will provide an export credit subsidy. *Id.* at 10 (referred to as "complete but imperfect information"). Consider Country X's options. If Country X subsidizes, its costs are \$350 if Country Y does not subsidize and \$600 if Country Y subsidizes; if Country X does not subsidize, its costs are \$500 if Country Y does not subsidize and \$750 if Country Y subsidizes. Notwithstanding Country Y's decision (to subsidize or not to subsidize), Country X is always better off if it subsidizes. In this sense, Country X has a "strictly dominant" strategy of providing export credit subsidies. *Id.* at 11. Now consider Country Y's options. If it subsidizes, its costs are \$350 if Country X does not subsidize and \$600 if Country X subsidizes; if Country Y does not subsidize, its costs are \$500 if Country X does not subsidize and \$750 if Country X subsidizes. Notwithstanding Country X's decision (to subsidize or not to subsidize), Country Y is always better off if it subsidizes. Country Y's strictly dominant strategy is also to subsidize. If game theory's assumption that players are rational is correct, then

of promoting exports because equivalent subsidies effectively cancel each other. Yet because it is worse for each country to unilaterally eliminate subsidies, neither country will want to make the first move. Country X/Country Y cooperation could resolve this collective action problem, but cooperation presents a costly hurdle, especially because bilateral elimination of subsidies requires simultaneous reduction in subsidies to identical levels at an identical pace. Otherwise, differentials remain in the system that permit subsidies to remain a manipulative economic force and potentially ignite a powerful subsidy war.

In 1973, some of the underlying economics changed.<sup>140</sup> The cost of export subsidies nearly doubled from 1972 to 1973.<sup>141</sup> Given the same assumptions as the previous game, but this time with doubled subsidy costs, Country X and Country Y viewed their respective subsidy tradeoffs as:

|                      | Country Y No Subsidy | Country Y Subsidy |
|----------------------|----------------------|-------------------|
| Country X No Subsidy | -\$500, -\$500       | -\$750, -\$450    |
| Country X Subsidy    | -\$450, -\$750       | -\$700, -\$700    |

X, Y = cost to Country X, cost to Country Y

Even with increased subsidy costs, each will independently gravitate toward the "subsidy" position. However, the sharply rising cost of the strategy, which still does not produce any competitive advantage, is all the more poignant at a moment of tight government budgets that feel the strain of rising

both the United States and United Kingdom will subsidize exports and each country will assume a cost of \$600. *Id.*

140. See *supra* notes 45-49 for a discussion of the macroeconomic impact of the 1973 oil shock.

141. As the subsidy level rises, for example as the spread between domestic interest rates (the rates at which ECAs borrow funds) and ECA lending rates (which would decrease in an export-credit war as a competitive way to gain exports) increases, the hard cost of these subsidies increases. Historical interest rate data reveal that the interest rate spread at a minimum doubled in Japan, France, West Germany, the United Kingdom, and the United States from 1972 to 1973. See Moravcsik, *supra* note 10, at 183.

|                   | 1970 | 1971  | 1972  | 1973  | 1974  | 1975  | 1976   | 1977  | 1978  |
|-------------------|------|-------|-------|-------|-------|-------|--------|-------|-------|
| France            | 2%   | 1.50% | 1%    | 3%    | 2%    | 1.50% | 2%     | 1%    | 1.50% |
| Fed. Rep. Germany | 2%   | 2%    | 2%    | 3.50% | 2%    | 0.50% | -1.50% | -2%   | 0%    |
| Japan             | 1%   | 1%    | 1%    | 2.50% | 1.5%  | 0%    | 0%     | -1%   | 0%    |
| U.K.              | 3%   | 2.50% | 2.50% | 8%    | 8%    | 7.50% | 6%     | 6%    | 6%    |
| U.S.              | 1%   | 0%    | 0%    | 0.50% | 0.50% | 0.00% | 0%     | 0.50% | 1%    |

Source: Moravcsik, *supra* note 10, at 183 (relying on IMF statistics and John Ray, *The "OECD Consensus" on Export Credits*, THE WORLD ECONOMY 9 (1986) to compile a chart of interest rates in the G-5, as well as the ECA benchmark lending rates).

subsidy costs.<sup>142</sup> This economic moment may provide Country X and Country Y with the incentive to cooperate. Rationalists argue that hard cooperation will occur if the costs of reaching a credible agreement that breeds confidence in the stability of the “no subsidy” position are less than the costs of bilateral subsidies.<sup>143</sup> The 1973 oil shock, which coincides with the initial cooperative discussions on the periphery of IMF/World Bank and G-5 meetings, apparently altered the cost/benefit tradeoffs of officially supported export finance. States’ interests in maintaining fiscal discipline outweighed states’ interests in preserving wide latitude over export promotion policies, and this change effectively united states in an urge to cooperate to control the skyrocketing costs of export subsidies.

At first glance, the rationalists tell a compelling story of why ECAs from the industrialized world committed in 1973 to controlling export subsidies. Of course, the simplifying assumptions of the game mask the complex, multidimensional dynamics of the official export subsidy race. A more nuanced view, rooted deeper in historical and empirical data, reveals weaknesses in the rationalists’ arguments, as well as constraining limitations in the model’s use.

In reality, during the 1970–73 period, the period immediately preceding the initial cooperative discussions, the cost of subsidies in the United States remained virtually unchanged, and the cost of subsidies in the United Kingdom, for example, almost tripled.<sup>144</sup> The game now looks like this:

|                 | U.K. No Subsidy  | U.K. Subsidy   |
|-----------------|--|--|
| U.S. No Subsidy | –\$500 (50% chance of losing \$1,000 export),<br>–\$500 (50% chance of losing \$1,000 export)              | –\$750 (75% chance of losing \$1,000 export),<br>–\$550 (\$300 subsidy + 25% chance of losing \$1,000 export)              |
| U.S. Subsidy    | –\$350 (\$100 subsidy + 25% chance of losing \$1,000 export), –\$750 (75% chance of losing \$1,000 export) | –\$600 (\$100 subsidy + 50% chance of losing \$1,000 export), –\$800 (\$300 subsidy + 50% chance of losing \$1,000 export) |

X,Y = cost to the U.S., cost to the U.K.

In this scenario, the United States will continue to subsidize. The United Kingdom will choose to eliminate subsidies. The United States has no in-

142. See Congressional Budget Office, *supra* note 49.

143. See BAIRD, *supra* note 138, at 34. See also Abbott, *supra* note 137, at 364 (discussing the importance of the relative size of payoffs).

144. See Moravcsik, *supra* note 10, at 183.

centive to cooperate because the United Kingdom will unilaterally eliminate subsidies no matter what the United States does. The cooperative urge should not emerge here—if anything, it should harden the United States' resolve to maintain autonomy over subsidy decisions. Yet we know that 1973 marked the beginning of a concerted cooperative effort. Of course, with different pairings of different countries the model would likely produce distinct outcomes, simply highlighting the multidimensional complexity of official export credits and the limitations of the rationalists' flat, static modeling.

Furthermore, if the rationalists are right and if the rise in the cost of subsidies indeed tips states' interests toward cooperation, then the data suggest that rationalist predictive precision is incorrect. Granted, in 1973 the cost of subsidies rose significantly for the G-5 countries, explaining the initial cooperative discussions.<sup>145</sup> Yet from 1973 to 1977 the cost of subsidies for all countries except the United Kingdom actually fell to pre-1973 levels, or lower, resulting in a steady post-1973 reduction in the cost of subsidies to 1970 levels.<sup>146</sup> If the rationalists are correct in the theory that international cooperation is all about states acting in their rational self-interest in maintaining fiscal discipline, then the cooperative moment should have self-combusted from 1973 to 1978, as the cost of subsidies once again decreased. Instead, cooperation deepened with the advent of the 1976 Consensus and the 1978 Arrangement.

Even if the rationalist model correctly pinpoints states' initial commitment to the Arrangement, it is insufficient to explain sustained commitment to the Arrangement despite subsequent fluctuations and divergences in the cost of subsidies and, concomitantly, states' interests in maintaining autonomy over subsidies. Nor does it make predictions or provide guidance as to what form cooperation should take. In fact, the rationalists would likely find the use of an informal, non-binding arrangement a paradoxical way to ensure the credibility necessary to maintain states' no subsidy position. Official export credit dynamics are much more complex than any unitemporal prisoner's dilemma game could reasonably depict. In peripheralizing legal institutions and rules, rationalist theory, rooted in state interest, divests itself of a powerful explanatory tool that could add robust predictive flavor to its otherwise flat approach.

### *B. Sustained Compliance: Arrangement-Centered Explanations*

This Section turns to the Arrangement in search for an explanation for sustained compliance. In conducting a probing review of the Arrangement, this Section examines the Arrangement's negotiating history, technical processes, and soft form and identifies specific Arrangement features that contributed to ECA compliance. In the end, this Section paints a picture of an

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145. See *supra* note 141.

146. See Moravcsik, *supra* note 10, at 183. See also *supra* note 141.

Arrangement that astutely packages several features, coddling—or gently directing—Participants toward a path of compliance.

### 1. *Negotiating History*

#### a. *Incrementalism and Consensus*

Before the Arrangement became the Arrangement, it was called the “Consensus.” This name may have more appropriately captured the Arrangement’s essence. Scholars generally argue that consensus decision-making enhances states’ compliance with an international norm.<sup>147</sup> Indeed, absolute consensus, as opposed to a majority, supports all of the Arrangement’s rules. So, at each moment in the Arrangement’s history, the Arrangement represents a negotiated consensus—a type of equilibrium—centered on certain specific issues. When consensus becomes impossible to garner, the Arrangement simply “reserves” that particular issue for later discussion and consensus building. As a result, there are still several prominent areas that the Participants have identified as ripe for regulation but for which no consensus has congealed, and the Participants have placed these items on a “future work” list that is incorporated into the Arrangement itself.<sup>148</sup>

The Arrangement’s consensus-driven decision-making enabled, if not necessitated, incrementalism. As Table 1: History highlights, the Arrangement evolved to its current place slowly, with each subsequent innovation building upon the previously laid foundation. An in-depth examination of efforts to eliminate interest rate subsidies, as well as the establishment of minimum premium benchmarks, illustrates the compliance benefits of the Arrangement’s gradual unfolding.

While the elimination of interest rate subsidies was the primary impetus behind the Arrangement, it nonetheless spanned sixteen years, involving much experimentation.<sup>149</sup> The 1978 Arrangement set an interest rate floor of 7.5–8%, favoring high interest rate countries by preserving their subsidy (the spread between the market rates and the floor) and disadvantaging low-interest-rate countries (by not only eliminating their subsidy but by requiring these countries to charge a premium).<sup>150</sup> The minimum rates, or the “uniform matrix,” were nominal, meaning they did not differentiate be-

147. See, e.g., Edith Brown Weiss, *Conclusions: Understanding Compliance with Soft Law*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BONDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 535 (Dinah Shelton ed., 2000) (“Generally the research confirmed that consensus about the norm positively affected compliance.”).

148. See The Arrangement, *supra* note 4, arts. 85–88, at 46. In addition, the Participants have reserved certain industries such as ships, aircraft, and nuclear power plants for special Sector Understandings, see *supra* text accompanying notes 92–93, pragmatically recognizing that the generic regulations in the Arrangement’s main body would not address particular industry needs with appropriate specificity without placing a rather strong drag on the consensus-driven process.

149. For a summary of the gradual elimination of interest rate subsidies, see Table 1.

150. Moravcsik, *supra* note 10, at 181.

tween interest rate conditions in various countries.<sup>151</sup> In 1983, after interest rates soared in the late 1970s and early 1980s, the Participants raised minimum matrix rates to 10–12% for high-interest Participants<sup>152</sup> and created a rudimentary automatic adjustment mechanism to approximate market conditions for low-interest Participants.<sup>153</sup> By 1987, Participants agreed to a differentiated, market-based CIRR formula for Participants with interest rates below the minimum matrix.<sup>154</sup> CIRRs, linked to baskets of government bonds in each market, are market rates that effectively preclude below-market interest rate subsidization.<sup>155</sup> In 1991, the Participants applied the CIRR formula to all Participants, except credits to the poorest countries, thereby eliminating almost all interest rate subsidies.<sup>156</sup> The 1994 Schaerer Package institutionalized CIRRs as the universal interest rate system for high- and low-interest Participants, and for loans to all countries, including the very poorest countries.<sup>157</sup> With this development, the Arrangement had succeeded in virtually eliminating all interest rate subsidies. Notably, at each historic juncture, as Table 4: Historical Compliance illustrates, Participants complied with the prevailing interest rate rules.

From 1978 (or even 1976 with the Consensus), the Participants approached the issue of interest rate subsidies in a controlled, incremental way. In doing so, however, the Participants successfully eliminated subsidies and innovated the CIRR. The CIRR importantly introduces the concept of automatic adjustment mechanisms into the Arrangement; Participants do not have to reconvene to set and reset CIRRs because the CIRR formula self-corrects to reflect market conditions. The CIRR also embodies a market-specific view of Arrangement rules, recognizing that the Arrangement's success depends on its ability to tailor itself to individual Participants' market conditions. The Participants could not have achieved all of this—virtual elimination of interest rate subsidies, automatic adjustment, market differentiation—spontaneously at the Arrangement's inception without placing a strong drag on the process and/or breaking a commitment to consensus decision-making at critical junctures. Without the use of incremental steps, along with a certain degree of economic “serendipity” (i.e., a large spike in interest rates that convinced even high-interest-rate Participants that subsidies needed to end),<sup>158</sup> the Participants would not have arrived at today's unambiguously successful CIRR, which embodies innovative concepts, such as automaticity, that now run through other areas of the Arrangement.<sup>159</sup>

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151. *Id.*

152. *Id.* at 188.

153. *Id.* at 186.

154. RAY, *supra* note 10, at 57–58.

155. See *supra* notes 71–73 for detailed discussion of CIRRs.

156. RAY, *supra* note 10, at 98.

157. OECD, *The Arrangement: What It is All About, in THE EXPORT CREDIT ARRANGEMENT, supra* note 5, at 17, 20.

158. See *supra* note 141 (table).

159. See, e.g., *infra* notes 227–231 for a discussion of automatic reclassification.

The 1997 Knaepen Package of minimum premium benchmarks is the Arrangement's newest innovation.<sup>160</sup> In 1994, responding to an OECD Group on Export Credits and Credit Guarantees study on ECA premium rates and cash flow, the Participants placed "premium harmonization" on the Arrangement's official list of future work.<sup>161</sup> The Participants then designated a working group of technical experts to develop a proposal ("Working Group").<sup>162</sup> In 1997, the Participants accepted the Knaepen Package, or the Guiding Principles for Setting Premia and Related Conditions,<sup>163</sup> which proposes standardization of premiums through application of general principles and a seven-tiered country classification scheme.<sup>164</sup> The Knaepen Package, while incorporated into the Arrangement in 1997,<sup>165</sup> was not implemented until 1999, allowing ECAs to amend their internal rules, train staff, and change processes.<sup>166</sup> Participants understood the Knaepen Package as a mere "starting point" that "is subject, over time, to improvement and enhancement in light both of experience and developments in international trade and in the ECA's working and political environment."<sup>167</sup> Through an elaborate Electronic Exchange of Information system, Participants share financial and experiential information on the guiding principles, and the Working Group assesses this information in a forward-looking, potentially revisionary vein.<sup>168</sup> The Working Group has used this information to compile and publish specific guidance on each permitted exception to the minimum benchmarks, as well as to provide additional transparency into the country classification scheme and the econometric formulas for the calculation of the benchmarks.<sup>169</sup> The Knaepen Package's measured conception, staggered implementation, and forward-looking revisionism is another example of the Arrangement's productive evolutionary process.

Consensus-driven incrementalism may have some drawbacks. It may delay important ends, as evidenced by the sixteen-year delay in eliminating all

160. For a description of the mechanics of the minimum premium benchmark system, see *supra* text accompanying notes 75–85.

161. Pierre Knaepen, *The "Knaepen Package": Toward Convergence in Pricing Risk*, in THE EXPORT CREDIT ARRANGEMENT, *supra* note 5, at 75, 76 ("In their Declaration of Principle of September 1994, the Participants recognized that premium and guarantee fees are an important and priority issue and agreed to investigate guiding principles with a view to producing convergence among premia.").

162. *Id.*

163. *Id.*

164. *Id.* at 78. See also *supra* text accompanying notes 75–76 for an explanation of the guiding principles, country classification scheme, and permitted exceptions from the country classification scheme.

165. The Arrangement, *supra* note 4, arts. 20–24, at 17–20.

166. During this transition period, Participants used "best efforts" not to reduce premiums below the basic benchmarks. *Id.* art. 22, at 18, n.3. Participants granted Korea, a 1997 newcomer to the Arrangement, a more gradual dispensation, requiring that Korea charge 40% of minimums by April 1, 1999, 60% of minimums by April 1, 2000, 80% of minimums by April 1, 2001, and 100% of minimum benchmarks by April 1, 2002. *Id.*

167. Knaepen, *supra* note 161, at 79.

168. See The Arrangement, *supra* note 4, art. 24, at 19–20. See also *The Knaepen Package: Guiding Principles*, *supra* note 74, at 9.

169. *The Knaepen Package: Guiding Principles*, *supra* note 74.



interest rate subsidies. In addition, it has circumscribed the Arrangement's reach. Agricultural products explicitly fall outside of the Arrangement's scope, and Participants have not yet reached consensus on regulation of the agricultural sector.<sup>170</sup> Participants have, for the most part, treated project financings,<sup>171</sup> typically the larger infrastructure projects, as outside the Arrangement's scope.<sup>172</sup> Many important issues remain on the Arrangement's "future work" list, such as a definition of "official support"<sup>173</sup> and "market window operations."<sup>174</sup> These examples are not intended to detract from the Arrangement's achievements, which are monumental and deserving of celebration. Instead, they are intended to provide some perspective on what the Arrangement has accomplished and what it still may strive to achieve. The Arrangement will undoubtedly grapple with some of these "scope" issues in the same measured, incremental manner that has guided it through its first twenty-five years. Consensus-driven incrementalism will insure that when the Arrangement does indeed tackle some or all of these issues, the ensuing rules will work in a way that is acceptable to Participants and thereby breed a level of compliance that is consistent with the Arrangement's record.

170. The Arrangement, *supra* note 4, art. 87(a), at 46.

171. Scott Hoffman suggests that:

Project finance is a "financing structure in which debt, equity, and credit enhancement are combined for the construction and operation, or the refinancing, of a particular facility in a capital-intensive industry, in which lenders base credit appraisals on the projected revenues from the operation of the facility, rather than the general assets or the credit of the sponsor of the facility."

SCOTT L. HOFFMAN, *THE LAW AND BUSINESS OF INTERNATIONAL PROJECT FINANCE* 4-5 (1998).

172. While the Participants have tried to bring project finance into the Arrangement's ambit through a set of guidelines with a trial period, these guidelines have not yet settled into the Arrangement. See Project Finance Understanding, *supra* note 59, at 73.

173. See The Arrangement, *supra* note 4, art. 88, at 46. ("It has not proved possible to reach total agreement on the definition of official support in light of differences between long-established national export credit systems . . . . Until agreement is reached, the current wording in the Arrangement does not prejudice present interpretations.")

174. See The Arrangement, *supra* note 4, art. 86, at 46. ("The Participants undertake to investigate further . . . the definition of market window operations in order to prevent distortion of competition.")

The definitions of "market windows" and "official support" have been of particular concern recently. Market windows are "private" financial institutions that enjoy significant government backing and thus are able to offer financing at below-market rates. Market windows, particularly in Canada and Germany, have been providing export trade finance on terms that are more flexible, and often more attractive from a domestic exporter's vantage point, than the Arrangement permits. See Allan I. Mendelowitz, *The New World of Government-Supported International Finance, in THE EX-IM BANK IN THE 21ST CENTURY* at 170-80 (describing market windows in Germany and Canada); Rodriguez, *supra* note 113, at 10-14 (describing market windows in Canada and Germany and expressing concern on behalf of U.S. exporters). Because the market windows are not official ECAs and because the Arrangement regulates only officially supported export credits, the countries who support market windows, principally Canada and Germany, argue that they fall outside the Arrangement. See The Arrangement, *supra* note 4, art. 2, at 9 ("The Arrangement shall apply to all *official support* for exports of goods and/or services . . .") (emphasis added). Obviously, unchecked market windows could infuse subsidized export credits and undermine the Arrangement. See also William Daley, *Maintaining Ex-Im Bank as a Major Force, in THE EX-IM BANK IN THE 21ST CENTURY*, *supra* note 5, at 246-47 (arguing that Ex-Im Banks should consider competing with market windows); Mendelowitz, *supra* note 174, at 180-84 (arguing that market windows are having a negative effect on U.S. exporters). Of course, this loophole could be closed upon a more precise definition of "official support," but to date no consensus has emerged.

*b. Specificity*

Notably, the Arrangement is specific and technical. Where the Arrangement could state that Participants will offer financing based on market-oriented rates, it instead defines a CIRR as having a specific relationship to a specific government bond of a specific maturity, leaving little room for Participants to claim “this was my best estimate of an interest rate reflecting market conditions.”<sup>175</sup> Likewise, the Arrangement could have stated that the maximum repayment term would be 10 years. Instead the Arrangement precisely linked repayment term to the starting point of credit, a term that the Arrangement precisely defines, as well as an elaborate World Bank country classification scheme.<sup>176</sup> These are just a few of many possible examples of precise, specific Arrangement regulation.

An international agreement will garner compliance if its terms are easily complied with—if the regulated do not have to guess what terms mean, struggle with implementation, or argue about ambiguities.<sup>177</sup> In its specificity, the Arrangement stands in contrast with many international legal agreements that echo general aspirational platitudes without any type of specific compliance roadmap. In human rights treaties, for example, general promises not to subject anyone to “torture or to cruel, inhuman or degrading treatment or punishment”<sup>178</sup> are laudable aspirations, but the prohibition raises unanswered questions: What is torture? What is other cruel, inhuman or degrading punishment? The states negotiating a treaty may all agree that torture is undesirable, but they may disagree on whether sleep deprivation, for example, constitutes torture.<sup>179</sup> In failing to include a detailed list of those practices that are clearly torture and those practices that are acceptable uses of police power, the treaty itself may become a roadblock to compliance.

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175. See *supra* text accompanying notes 71–73 for an explanation of CIRRs.

176. See The Arrangement, *supra* note 4, art. 9, at 11–12.

177. See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1857, 1863 (2002) (arguing that “vague statements” lead to a relatively low level of compliance because “reputational consequences” are not high when the obligations are ambiguous). See also ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 11 (1995) (“The broader and more general the language, the wider the ambit of permissible interpretations to which it gives rise.”).

178. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, Dec. 19, 1966, art. 7, 999 U.N.T.S. 171 (no one shall be subject to torture or cruel, inhuman, or degrading treatment). See also CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, Dec. 10, 1984, art. 1, 1465 U.N.T.S. 85. While the drafters added a little more specificity to the definition, it does not come close to including any kind of laundry list of the types of treatment that may be considered torture; furthermore, the exclusion of “pain or suffering arising only from, inherent in, or incidental to lawful sanctions” does not do much to clarify the precise meaning of the prohibition.

179. This was an issue in the wake of the terrorist attacks of Sept. 11, 2001, and the detention of members of Al Qaeda and the Taliban by U.S. forces. See Dana Priest & Barton Gellman, *U.S. Decries Abuse But Defends Interrogations: ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1. See also Alan Cooperman, *CIA Interrogation Under Fire: Human Rights Groups Say Techniques Could be Torture*, WASH. POST, Dec. 28, 2002, at A9.

In the case of ambiguous treaty mandates, some countries' non-compliance may be benign in that state actors reasonably, but mistakenly, believe that their conduct does not constitute torture or other cruel, inhuman, or degrading punishment.<sup>180</sup> In this case, clarity and precision in drafting might enhance compliance. In other cases, state actors have no pretense of compliance, but they use ambiguities as a convenient guise for their behavior and justify their actions in terms of these ambiguities rather than admitting their breach of international obligations. In this case, clarity and specificity in drafting would not necessarily improve compliance but would deprive these state actors of an excuse disguising their malignant behavior.<sup>181</sup>

Of course, specificity in drafting raises problems as well. State actors may abide by the clear, specific "black letter" of the international legal obligation, but, at the same time, take actions that are inconsistent with their overarching goals. Some ECAs, for example, are allegedly skirting the Arrangement by rerouting transactions through unregulated "market windows"<sup>182</sup> and "untied aid" programs,<sup>183</sup> prompting concern in Congress about the continued efficacy of the Arrangement.<sup>184</sup> While an in-depth review of these practices is beyond the scope of this Article, yet deserving of further study, it is worth noting here that specificity has costs, as well as benefits. Specificity, clarity in that which is legal and that which is illegal, may assist and expedite Participants' search for loopholes. Importantly, in the case of the Arrangement, Congress seeks to close the loopholes not by delegitimizing the Arrangement for permitting the loopholes to develop, but rather by seeking to envelop the loopholes within an emboldened Arrangement.<sup>185</sup>

180. Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175, 188 n.43 (1993) (arguing that interpretations of ambiguities in treaties are typically "invoked in good faith" but nonetheless evade the purposes of the treaty).

181. *Id.* (citing ORAN YOUNG, COMPLIANCE AND PUBLIC AUTHORITY: A THEORY OF INTERNATIONAL APPLICATIONS 106–08 (1979), which argues that interpretation of ambiguous provisions may be "deliberate attempts at 'evasion' of obligation").

182. *See supra* note 174 for discussion of market windows.

183. Untied aid is aid that is not explicitly linked to the donee's purchase of the donor's exports. Nonetheless, much of this aid comes with implicit understandings, supported by the threat of "turning off the spigot," which effectively accomplish the same end as tied aid. The Arrangement only purports to regulate tied aid, and thus, many countries argue that untied aid practices remain outside of the Arrangement's reach. For a description of untied aid, see *Reauthorization of Ex-Im Bank: Hearing Before the Subcomm. on Int'l Monetary Policy and Trade of the HR Comm. on Financial Services*, 107th Cong. 152 (statement by C. Fred Bergsten, Director, Institute for Int'l Econ.).

184. *See, e.g., Reauthorization of Ex-Im Bank: Hearing Before the Subcomm. on Int'l Monetary Policy and Trade of the HR Comm. on Financial Services*, 107th Cong. 75–76 (Hon. Doug Bereuter discussing untied aid and adding that it is sometimes a guise for tied aid). *See also* Rodriguez, *supra* note 113, at 10–19. *See generally* Mendelowitz, *supra* note 174, at 169–89 (discussing the growing problem of market windows); Pub. L. No. 107-189, 116 Stat. 698, § 15(b) (2002) (authorizing Ex-Im Bank to deviate from the Arrangement to match financing provided by "market windows"); *id.* § 9(a) (authorizing use of the Tied Aid Fund in accordance with the Arrangement, except that use of the Tied Aid Fund need not be in accordance with the Arrangement in response to a breach by a foreign ECA).

185. *Id.* § 10(a)(1) (ordering the Secretary of the Treasury to negotiate an untied aid agreement that would have the effect of subjecting untied aid to the Arrangement's rules); *id.* § 15(b) (authorizing Ex-Im

### c. Participants

In some ways, states are problematic objects of international regulation because individuals within states make compliance decisions, and the legal façade of the state often shelters individual decision-makers at the expense of accountability and compliance. The Participants group, as result of its size and composition, is a counterweight to this type of problem. First, the group of Participants is, and has been, relatively small and circumscribed. By definition, the Arrangement only regulates officially supported export finance, usually distributed through ECAs. At last count, only forty-nine countries officially supported export credit; the Participant club includes twenty-three countries, 47% of those countries with ECAs.<sup>186</sup> Some scholars correlate compliance with the size of the regulated group; arguably, smaller groups are easier to coordinate.<sup>187</sup> Other scholars argue that to the extent that reputation drives, or partially drives, a state's compliance,<sup>188</sup> a small group that precludes anonymity necessarily raises the reputational impact of compliance decisions. The Arrangement ostensibly supports these theories.

The Arrangement's Participant group indeed exhibits a camaraderie that is conducive to the consensus-driven incrementalism already discussed as significant to the Arrangement's compliance pull. A recent book collecting "reflections" on the Arrangement from former chairmen and vice chairmen of the Participants Group, as well as ECA/Participant negotiators, captures the collegiality of the Participant group.<sup>189</sup> The reflections exude great loyalty, admiration (and maybe even awe) toward the Arrangement as an institution that has a distinct and seductive identity independent of the constituent Participants.<sup>190</sup> This camaraderie is enhanced because Participants repeatedly interact in varied fora, such as the OECD, the G-8,<sup>191</sup> or in indi-

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Bank to deviate from the Arrangement in the face of aggressive use of foreign market windows to circumvent the Arrangement if such matching "advances the negotiations for multilateral disciplines and transparency within the OECD Export Credit Arrangement."

186. See Harvard Business School, *supra* note 24. This number will increase when the first wave of Central and Eastern European countries joins the European Union. See *infra* text accompanying notes 282–284.

187. Weiss, in COMMITMENT AND COMPLIANCE, *supra* note 147, at 547 ("The fewer the number of actors involved, the easier to regulate, and the more positive the effect on the benefit-cost ratio of complying.")

188. See *infra* text accompanying notes 307–312, presenting theories regarding the link between reputation and compliance.

189. See generally THE EXPORT CREDIT ARRANGEMENT, *supra* note 5.

190. This sense is reinforced by the fact that Participants frequently move professionally through a type of revolving door, from representing a Participant, to chairing the Participants group and serving as a liaison to the OECD's export credit group, to actually doing a detail in the OECD's export credit group. See FIDE LTD., ANNUAL REPORT 2001, available at <http://www.fide.fi/english/Annual%20Report/Annual%20Report%202001.pdf> (last visited Dec. 2, 2003).

191. The G-8 is a group of industrialized countries that periodically discusses economic, political, and social issues that have a global impact. The G-8 countries are: Canada, France, Germany, Italy, Japan, Russia, United Kingdom, and the United States. The European Union also attends G-8 meetings. For background information on the G-8, see generally SOMMET EVIAN SUMMIT 2003, *The G-8: Background*, available at [http://www.g8.fr/evian/english/navigation/the\\_g8/background\\_to\\_the\\_g8.html](http://www.g8.fr/evian/english/navigation/the_g8/background_to_the_g8.html) (last visited

vidual co-financing relationships.<sup>192</sup> Consequently, the Participants group assumes a club-like demeanor, punctuated by the rhetorical use of the term gentlemen's agreement, which accentuates the reputational impact of non-compliant behavior.<sup>193</sup>

In addition, the state representatives that negotiated the Arrangement, typically ECAs, sometimes in conjunction with the Ministry of Finance, are, for the most part, subjects of Arrangement regulation.<sup>194</sup> Some hypothesize that the higher the correlation between the group of regulators and the group regulated, the more likely there will be compliance.<sup>195</sup> The Arrangement is not an instance of government regulators creating a set of legal rules for the public or private industry.<sup>196</sup> Nor is this an instance of one executive agency negotiating a treaty designed to regulate a multitude of federal and state actors.<sup>197</sup> In the case of the Arrangement, the industrialized ECAs who

Dec. 2, 2003).

192. See *infra* text accompanying notes 273–278 for a discussion of co-financing.

193. Over the years, those who have negotiated the Arrangement have described the process in decidedly “club-like” language. See Eero Timonen, *The Birth of the ‘Helsinki Package,’* in THE EXPORT CREDIT ARRANGEMENT, *supra* note 5, at 51, 51–52 who observed:

Those present—Anthony Burger (Canada), Geb Ledebøer (the Netherlands), Kurt Schaerer (Switzerland), John Ray (the Secretariat) and myself—worked out the first proposal, the so-called “Helsinki Package.” We were able to agree on the text in one day. Geb Ledebøer volunteered to serve as typist as we constructed the sentences. I remember him sitting at my PC, a large cigar in his mouth dropping ashes on the keyboard as he wrote. The work was done in genuine harmony and so swiftly that we had time to enjoy a sauna, dinner and drinks that evening.

194. The U.S. Department of the Treasury sometimes negotiates alongside Ex-Im Bank. Recently, this has been a source of some intragovernmental tension. See, e.g., *Reauthorization of the Export-Import Bank of the United States: Hearing before the Subcomm. on Int’l Trade and Finance of the S. Cmte. on Banking, Housing and Urban Affairs*, 107th Cong. 18 (June 19, 2001) (Hon. John B. Taylor, Undersecretary of the Treasury for International Affairs, discussing tension between Ex-Im Bank and the Department of Treasury regarding a particular transaction (Valmont)); *Reauthorization of the Export-Import Bank of the United States: Hearing before the Subcomm. on Int’l Monetary Policy and Trade of the HR Cmte. on Financial Services*, 107th Cong. 7, 28 (May 2, 2001) (Testimony of Elaine Stangland, deputy general counsel of Ex-Im Bank, discussing the proper role of the Department of Treasury vis-à-vis Ex-Im Bank tied aid decisions).

195. This is the conclusion drawn in the case of compliance with voluntary technical standards, particularly environmental management standards, drafted by the International Standardization Organization. See Naomi Roht-Arriaza, “Soft Law” in a “Hybrid” Organization: *The International Organization for Standardization, in COMMITMENT AND COMPLIANCE*, *supra* note 147, at 263, 279 (“By far the strongest factor leading to success in terms of the actors involved in creating the standard was the participation of targets of the norm in the standard-setting and implementation processes.”).

196. See generally Daniel K. Tarullo, *Law and Governance in a Global Economy*, 93 AM. SOC’Y INT’L L. PROC. 105, 108 (1999) (arguing, specifically with reference to the Basle Accords, that “regulatory convergence type of governance mechanisms,” whereby states agree to a common form of regulation for private/public industry, as opposed to the “statutory/adjudicatory model,” has limitations). For an example of a legal instrument designed to regulate private industry, see OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, Dec. 17, 1997, 37 I.L.M. 1. See also WORKING PARTY ON EXPORT CREDITS AND CREDIT GUARANTEES, ACTION STATEMENT ON BRIBERY AND OFFICIALLY SUPPORTED EXPORT CREDITS, Feb. 20, 2003, TD/ECG(2000)15.

197. In the case of human rights treaties, for example, the State Department typically takes the lead in negotiating the treaty, possibly with the select federal agencies, but many of the rights are enforced through local law enforcement agencies that are many steps removed from the negotiators. See, e.g., INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 178, art. 9 (setting forth rights of those who are arrested or detained, including the right to be “informed” of charges, the right to be brought “promptly” before a judge); *id.* art. 10 (giving all detainees the right to “be subject to separate

negotiated the document are the parties regulated by the agreement. This congruence between negotiating parties and regulated parties enhances the match between the Arrangement as a text and the Arrangement's practical application. ECAs, as active participants in the creation of the Arrangement's rules, likely know best what types of rules and regulations are most workable given their position as a government agency that forays significantly into the private commercial world. The term "Participant" is not whimsical drafting. Given that the ECAs participate fully in the design, maintenance, and integrity of the legal regime, the term Participant could not be more appropriate.

## 2. Procedure

### a. Notice, Review, and Reporting

The more transparent an institutional arrangement, the more mutual trust the parties will have in the system and in others' compliance, and the more likely all parties will comply with the agreement.<sup>198</sup> In the name of transparency, Arrangement Participants exchange information, notify other Participants about decisions (particularly those decisions that do not conform, or may not conform, to the Arrangement), and engage in probing reviews of the Arrangement's functions.

Transparency is a delicate balance for the Arrangement. On the one hand, continued compliance with the Arrangement rests on mutual trust among Participants; transparency provides a window into Participants' legitimate and illegitimate actions and therefore buoys this trust. On the other hand, Participants analyze, evaluate, and structure their financing packages based on proprietary information from private sector exporters.<sup>199</sup> A Participant's ability to gather reliable and useful information from domestic private sector exporters depends in great part on these exporters trusting that this information will not, through the Arrangement's mandated information exchanges, fall into the hands of competitors. The Arrangement strikes this balance.

At the heart of the Arrangement is an elaborate notification process. As a general rule, Participants do not notify other Participants of an export credit

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treatment appropriate to their status as unconvicted persons" and the right to be in a penitentiary system that is geared toward "reformation and social rehabilitation").

198. See CHAYES & CHAYES, *supra* note 177, at 135–36 (citing rational choice theorists, such as Kenneth Abbott, James Boyle, Stephen Krasner, and John Gerard Ruggie, who argue that transparency "facilitates coordination," "provides reassurance," and "exercises deterrence" and thereby facilitates continued cooperation or compliance).

199. On an Ex-Im Bank application for a loan guarantee, for example, the exporter must provide information regarding the value of the export supply contract, the shipment dates, the covered goods and services, the project, the buyer (and the buyer's contact information), the lender (and the lender's contact information), credit ratings, and financial statements (even for privately held companies). See Export-Import Bank, *Preliminary Commitment and Final Commitment Application*, available at <http://www.exim.gov/pub/pdf/95-10ap.pdf> (last visited Dec. 2, 2003).

package that complies with the terms of the Arrangement; a derogation or a “permitted exception” triggers the notification process.<sup>200</sup> The Arrangement contains other notice-triggering events, such as the setting of a CIRR<sup>201</sup> or a change in the base rate which forms the foundation of a CIRR,<sup>202</sup> or the signing of any type of aid agreement or credit line.<sup>203</sup> In addition to defining notification events, the Arrangement specifies, in great detail, the form that such notifications should take.<sup>204</sup>

The Arrangement also institutionalizes information exchange. The Arrangement mandates the periodic exchange of information on specific topics, such as minimum premium benchmarks.<sup>205</sup> Participants may initiate formal or informal exchanges of information regarding third countries, particular transactions, and derogations from the Arrangement through the “enquiry”<sup>206</sup> and “face-to-face consultation” process.<sup>207</sup> Participants also agree to review the effectiveness of the Arrangement’s rules and procedures.<sup>208</sup> The Arrangement provides for annual review of the basic export credit and tied aid programs,<sup>209</sup> as well as periodic review of CIRRs<sup>210</sup> and minimum premium benchmarks.<sup>211</sup>

200. For export credits, Participants must give 10 days “prior notification” for derogations and “permitted exceptions,” which include premium rates below benchmarks due to externalization of country risk, repayment terms for low risk countries that exceed limits, repayment of principal and/or interest less frequently than semi-annual equal installments, and an application of a discount to the premium for political risk coverage. The Arrangement, *supra* note 4, arts. 47–48, at 33. For derogations and lower premiums due to externalization of risk, notice triggers a right to discussion and an extension of the 10-day period, during which Participants may discuss and object to the derogations or permitted exceptions, as notified.

201. *Id.* art. 78, 80, at 43.

202. *Id.* art. 16(e), at 15.

203. *Id.* art. 56, at 36.

204. *Id.* Annexes IV, V, at 66–69 (These forms specify the items that must be included in the notification, as well as a standard presentation for the notification).

205. For example, minimum premiums must be high enough to assure that ECAs will cover their long-term operating costs, as well as commercial losses. *Id.* art. 24, at 19–20. The Arrangement requires that Participants report periodically on premium feedback tools to assure that premiums enable Participants to meet their long-term operating goals. *Id.* In an effort to monitor and assess the viability of the entire minimum premium structure, which is the newest layer to the Arrangement’s regulatory structure, Participants must exchange premium-related information on a variety of topics including country risk classification, sample premium calculations, permitted exceptions, and matching procedures. *Id.* art. 81, at 44. The OECD Export Credit Division also compiles the cash flow statistics as they pertain to minimum premium benchmarks at OECD, *Cash Flow Report*, available at <http://www.oecd.org/dataoecd/29/18/2493679.pdf> (last visited Dec. 2, 2003).

206. *See* The Arrangement, *supra* note 4, arts. 67–68, at 39–40 (the Participants must respond to inquiries within 7 days). *See also id.* arts. 68–69, at 40 (noting that face-to-face consultations, upon request of a Participant, may occur at a mutually agreeable time and place; OECD secretariat will distribute to all Participants the outcome of the consultations).

207. *Id.* art. 69, at 40.

208. *Id.* art. 4, at 10 (“The Participants shall review, at least annually, the functioning of the Arrangement.”).

209. *Id.* art. 82(a), at 44 (The review will include, among other things, notification procedures, derogations, calculation of concessionality, tied aid procedures, and matching).

210. *Id.* art. 83, at 44.

211. *Id.* art. 84, at 44.

Participants do not assume that all works perfectly. On the contrary, the underlying assumption is that imperfection exists, will be illuminated through information exchanges, and should be corrected through the evolution of the Arrangement. Participants recognize that an Arrangement that functions well today may not function smoothly as economic and political conditions change. Through institutionalizing notification, information exchange, and review, Participants have institutionalized a type of dialogue, assuring that the Arrangement remains a living and evolving piece of work.

*b. Institutionalized Derogations*

The Arrangement importantly conceives of compliance dynamically, incorporating a significant tolerance for technical non-compliance. While the Arrangement includes a non-derogation engagement,<sup>212</sup> it pragmatically recognizes that Participants will not always abide by the Arrangement's rules. Perhaps the most unique of the Arrangement's features is its institutionalization of derogations, or legitimate ways in which Participants may cheat or defect from the Arrangement. The Arrangement thereby codifies a flexible, realistic view of compliance that disposes of a "take-it-or-leave-it" attitude that may breed the type of disenchantment that may otherwise cause states to withdraw from the Arrangement all together.

The Arrangement contains two types of institutionalized derogations: the notice-and-match process that is usually unilateral, and the common-line process that is consultative. The notice-and-match process is unique.<sup>213</sup> It begins with one Participant making a unilateral decision to derogate from the Arrangement's disciplines, perhaps by offering an interest rate that is below the appropriate CIRR. The derogating Participant must then notify other Participants of the derogation,<sup>214</sup> in some circumstances, give other Participants a chance to respond to and discuss the derogation,<sup>215</sup> in any case

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212. *Id.* art. 27, at 21–22 (export credit), art. 40, at 30–31 (tied aid).

213. This author has not found another international or regional agreement that deals with derogation in a similar manner. While some international agreements permit centralized bodies to approve deviations from legal norms, see Simmons, *supra* note 12, at 339 (stating that the IMF executive committee has the power to "exempt" exchange control behavior and thus may bring a derogation into the ambit of the IMF agreement), and others use "escape clauses" whereby parties can appeal to some entity for an "opt out" or "pass" on certain rules, see Thomas A. Behney, Jr., *Escape Clause Relief in the EEC and the United States: Different Approaches to the Dilemma of Adjustment to a New World Trading Environment*, 15 N.C. J. INT'L L. & COM. REG. 1 (1990) (discussing escape clauses in General Agreement on Trade Tariffs), the Arrangement is unique in allowing Participants, as opposed to some centralized authority, to drive the derogations unilaterally. As will be discussed, a Participant may unilaterally decide to deviate from the Arrangement as long as it provides notice; it does not have to justify its action. As long as the Participant complies with the Arrangement's procedures, its action falls within the Arrangement's bounds.

214. For export credits, the derogating Participant must give other participants at least 10 days notice. The Arrangement, *supra* note 4, art. 47(a), at 33. A Participant must notify other Participants of tied aid offers, giving at least 30 days prior notice for tied and untied aid offers. *Id.* art. 55, at 36.

215. For export credits, a Participant may, within the 10-day notification period, request a discussion among Participants regarding the derogation. *Id.* art. 47(a), at 33. For tied aid, which has a 30-day notification window, there is an implicit understanding that discussions among Participants should and will happen. These discussions may become formalized face-to-face consultations, in which case a dero-



providing other Participants an opportunity to match the non-conforming provision.<sup>216</sup> The decision to match, like the decision to derogate, is a unilateral decision. If the match is identical,<sup>217</sup> the matching Participant shall give all other Participants prompt notice of its intent to match.<sup>218</sup> If the match is not identical, then the matching Participant must give other Participants prior notice of its intent to match and provide an opportunity to match its non-conforming offer in turn.<sup>219</sup> As long as Participants follow the notice-and-match process, it is difficult, almost impossible, for a Participant not to be in compliance with the export credit rules of the Arrangement.

A "common line" is a consensual understanding among Participants to offer, usually on a transaction-by-transaction basis, terms that are more or less favorable than those permitted under the Arrangement.<sup>220</sup> Sometimes, an exchange of information, either through enquiries or face-to-face consultations, will lead to a common line. Other times, Participants, either individually or as a group, look to the common line process to resolve ambiguities that are not solved in the four corners of the document.<sup>221</sup> Participants must follow an elaborate process in arriving at common lines.<sup>222</sup> However,

gating Participant must give additional notice within 60 days of consultation if it decides to derogate in the face of unsupportive consultations. *Id.* arts. 62, 63, 65(a), at 38–39.

216. *Id.* art. 50, at 34 (export credits), art. 60, at 37 (tied aid).

217. *Id.* arts. 51, 52(c), at 34–35 (for tied aid, a match that leads to the same concessionality level and for export credits, a match that has the identical derogating element).

218. *Id.* art. 50, at 34 and art. 60, at 37.

219. This 5-day period may not elapse prior to the end of the derogating Participant's initial 10-day notification (for export credits) or 30-day notification (for tied aid). *Id.*

220. *Id.* art. 71, at 41. A common line is somewhat like an amendment to a contract in that if the parties to a contract later realize that they did not include a provision to cover a particular contingency or if they have a "change in heart" about a provision as originally negotiated, they may agree upon an amendment to the original contract as long as they follow any particular amendment procedures in the original contract. Thus, the Participants agree to bend or manipulate the Arrangement for a particular issue or transaction through acceptance of common line proposals.

221. For example, if a sales contract involves more than one destination, a country in category I (which allows 8.5-year repayment terms) and a country in category II (which allows 10-year repayment terms), Participants may use the common line procedures to determine the appropriate repayment term. *Id.* art. 10, at 13. If a Participant wants to provide financing in a currency of a non-Participant (and therefore there is no CIRR), the Participants may use the common line process to determine the appropriate CIRR. *Id.* art. 16, at 15–16.

222. See generally *id.* arts. 70–77, at 40–43. A Participant sends a proposal for a common line to the OECD Secretariat; the proposal must include a reference number, the name of the importing country and buyer, description of project, terms and conditions (as proposed by initiating Participant), the nationality and names of competing bidders, bid closing date, common line proposal, and any supporting analysis for the common line proposal. *Id.* art. 71, at 41. The common line proposals are then posted on the OECD's electronic bulletin board. *Id.* Participants must respond within 20 days with a request for more information, an acceptance, a rejection, or a proposal for common line modification. *Id.* art. 72, at 41. A Participant with no position on a common line is deemed to have accepted the common line. *Id.* After the lapse of the 20-day period, if not all Participants have accepted the common line (but none have rejected the common line) the proposal shall be left open for 8 more days. *Id.* art. 73, at 42. Any Participant that has not explicitly rejected the common line proposal during this additional 8-day period is deemed to have accepted the common line, unless any Participant conditions acceptance on explicit acceptance by one or more Participants. *Id.* art. 73(b), at 42. A Participant may reject one or more elements of a common line, and other Participants, including the initiating Participant, may then decide whether to accept the common line as modified. *Id.* art. 73(c), at 42. Once Participants agree on a common line, or, when the

once Participants accept a common line, it becomes an organic part of the Arrangement, usually for a specific transaction or to illuminate an Arrangement issue more generally. Participants may deviate from common lines with appropriate notice;<sup>223</sup> however, other Participants reserve the right to match derogations from common lines.<sup>224</sup> The OECD's Secretariat maintains for Participants a current electronic listing of the status of all common lines.<sup>225</sup>

The institutionalized derogation and common line processes functionally deconstruct the notion of compliance, transforming it from an "all or nothing" proposition to one that is decidedly less rigid. It is virtually impossible *not* to comply with the Arrangement's substance because the notify-and-match process and common line processes define deviations as compliant provided that Participants follow procedural requisites. As long as Participants provide notice of derogations from the Arrangement (and the opportunity for others to match), or properly propose a common line, they will be in compliance with the terms of the Agreement. The Arrangement's transparency building blocks, namely notice, information exchange, and review, lend integrity to this derogation process, enabling the Arrangement to maintain a climate of compliance despite small deviant decisions and actions.

In the end, it is this institutionalization of derogations, redefining deviant behavior in terms of compliance, that is one of the Arrangement's most significant contributions to institutional design. While many international scholars and policymakers accept as an inevitable reality that international compliance will not be absolute and complete,<sup>226</sup> they frequently view this non-compliant behavior as necessary and inevitable deviance as opposed to acceptable, or even desired, behavior that comports with, maybe even enhances, institutional architecture. The Arrangement embodies a nuanced, sophisticated notion of compliance, recognizing that compliance occurs in shades of gray. The Arrangement sets compliance priorities in that compli-

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20-day and 8-day periods have run and it becomes clear that Participants will not be able to agree on a common line, the period can be extended by mutual consent. The OECD Secretariat will notify participants of the status of the common line proposal. *Id.* arts. 74–75, at 42. Accepted common lines will become effective 3 days after such notification. *Id.*

223. *Id.* art. 77, at 40 (notice must be given 60 days before committing to any deviation).

224. *Id.* art. 77(e), at 43.

225. *Id.* art. 76, at 42.

226. See Simmons, *supra* note 12, at 333 (arguing that the compliance question rarely presents itself as a "transparent, binary choice" and further contending that a cogent definition of "compliant behavior" must precede any analysis of the "compliance" question). See also CHAYES & CHAYES, *supra* note 177, at 17 (arguing that an "acceptable level of compliance" depends on the type of agreement and may also be complicated because "compliance questions are often contestable and call for complex, subtle and frequently subjective evaluation."); Chayes & Chayes, *supra* note 180, at 176 ("[T]he treaty regime as a whole need not and should not be held to a standard of strict compliance but to a level of overall compliance that is 'acceptable' in light of the interests and concerns that the treaty is designed to safeguard."); Harold K. Jacobson & Edith Brown Weiss, *A Framework for Analysis, in ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 4–5* (Harold K. Jacobson & Edith Brown Weiss eds., 1998) (positing that compliance has several dimensions, including substantive obligations, procedural obligations, and the "spirit" of the agreement; and further arguing that "substantial compliance is what is sought by those who advocate treaties and agreements").

ance with legal process is an absolute necessity, while compliance with the substantive legal rules is merely a desired outcome. And, through reporting and review procedures, the Arrangement contemplates non-compliance with any particular substantive provision as a signal of a problem in the rules themselves rather than deviant or malicious behavior on the part of Participants. This dynamic view of compliance uniquely fortifies the Arrangement.

### *c. Self-Modulating Law: Automaticity*

The Arrangement remains vibrant, in part, through recourse to targeted automatic adjustment mechanisms. While the Arrangement mandates discourse among Participants, it also recognizes those areas where it can self-correct without unnecessarily cumbersome and technical Participant exchanges. As already noted, CIRR automatically adjust on a monthly basis, reflecting changes in domestic government bond rates.<sup>227</sup> The Arrangement delineates procedures for the automatic reclassification of countries from category I (World Bank high-income countries) to category II (World Bank low-income countries), or vice versa, which is significant for defining the maximum repayment term.<sup>228</sup> The Knaepen Package on minimum premium benchmarks contemplates automatic reclassification of countries into the seven risk categories on the basis of revised data from international organizations or major events that change the perceived country risk.<sup>229</sup> Although not explored here in depth, a Participant may offer tied aid only under limited circumstances, including minimum concessionality.<sup>230</sup> The level of concessionality for any tied aid offer is linked to a discount rate that, in turn, is linked to an annual CIRR average, which, as we have seen, self-adjusts in reaction to the market.<sup>231</sup> The Arrangement adjusts, particularly to market forces, without having to engage the Participants, or a sub-group of Participants, in the adjustment process, thus maintaining the vitality and instrumental focus of prescribed Participant exchanges.

### *3. The Form: Gentlemen's Agreement*

During the first week of class, almost all international law professors teach that international law comes in two principal forms: a formal international agreement/treaty or customary international law.<sup>232</sup> The Arrangement is

227. See *supra* note 73.

228. See *supra* note 63 and accompanying text for a detailed discussion of classification and reclassification of countries by the World Bank.

229. *The Knaepen Package: Guiding Principles*, *supra* note 74, at 14 (delineating procedures for periodically updating country-specific data).

230. See *supra* note 61 and accompanying text for discussion of concessionality.

231. The Arrangement, *supra* note 4, art. 38(a), at 29. See also *supra* note 227 and accompanying text.

232. See THIRD RESTATEMENT OF FOREIGN RELATIONS LAW § 102 (1987). See also BARRY E. CARTER ET AL., INTERNATIONAL LAW 1-7, 93-135 (4th ed. 2003); LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES & MATERIALS 56-133 (2001); MARK W. JANIS & JOHN E. NOYES, CASES AND COMMENTARY ON INTERNATIONAL LAW 20-121 (2001); BURNS H. WESTON ET AL., INTERNATIONAL

neither. The Arrangement is not a treaty.<sup>233</sup> Nor is it customary international law, as custom follows a pattern and practice stemming from a legal obligation,<sup>234</sup> and the Arrangement is not a mere codification of existing ECA practice but rather meant to condition such practice.<sup>235</sup>

The Arrangement is a gentlemen's agreement. Perhaps the handshake that often cements a gentlemen's agreement is the proper image, for handshakes are powerful in a reputational, peer-pressure vein and not, at least under U.S. law, in a legal sense.<sup>236</sup> Participants do not ratify the Arrangement. Further, they do not formally join the Arrangement, and they may leave at will (with the niceties of notification that one would expect from any gentlemen's understanding).<sup>237</sup> There are no formal voting or amendment procedures, and Participants effectively amend the Arrangement by reaching consensus on particular issues. There is no Arrangement dispute resolution process, nor are there formal sanctions for deviant behavior. From an institutional standpoint, the Arrangement officially stands alone.

Many scholars label this gentlemen's agreement as soft law. While the soft law means that the Arrangement is not a binding legal instrument, it does not affirmatively illuminate the Arrangement's legal, normative, or substantive standing. Soft law is not a precise legal term. It categorically includes myriad international instruments or, more inclusively, communications ranging from informal understandings or conversations to more formalized memorandums of understanding, diplomatic letters, protocols, codes of conduct, or even arrangements such as the one at question here.<sup>238</sup> As international

LAW AND WORLD ORDER: A PROBLEM-ORIENTED COURSEBOOK 74–132 (1997).

233. Although the Arrangement, in its specificity, "feels" like a treaty, the Participants clearly state in the introduction that "[t]he Arrangement is a 'Gentlemen's Agreement' among the Participants. The Arrangement is not an OECD Act, although it receives the administrative support of the OECD Secretariat." The Arrangement, *supra* note 4, Introduction, at 8. See also The Vienna Convention on the Law of Treaties (1969) art. 11, U.N. Doc. A/CONF.39/27, 1155 U.N.T.S. 331, 8 I.L.M. 679 ("The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."). The Arrangement does not satisfy any of the Vienna Convention's requirements.

234. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."). While there are some parts of the Arrangement that arguably may codify custom, most of the specific, technical provisions do not. Interest rates, for example, did not converge until the Arrangement's rules paved the way. ECAs did not harmonize premiums until the Knaepen Package was a *fait accompli*.

235. It is possible that, after ECAs follow each layer of Arrangement regulation for some time, particular rules, those requiring ECAs to finance a maximum of 85% of the contract value, will harden into customary norms. Yet, for anyone familiar with customary international law, it seems awkward, at best, to label norms custom that are as specific and technical as those in the Arrangement. Professor Guzman attempts to deal with some of this awkwardness in his theory of international law. See Guzman, *supra* note 177, at 1874–78. See also *infra* notes 307–314, 342–344 for a discussion of Guzman's theory of international law.

236. In U.S. law, under the Statute of Frauds, oral contracts are generally not enforceable unless the contract is less than U.S. \$500. See generally UCC § 2-201 (1994).

237. The Arrangement, *supra* note 4, art. 7, at 11 (Arrangement is of "indefinite duration," but a party may withdraw with 60 days notice.).

238. See Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT

rules proliferate in response to economic globalization and the ensuing environmental, health, and human rights issues, the line between soft international law and hard international law is becoming blurred. Hard legal instruments, such as treaties, may include soft legal promises, such as promises to use "best efforts" or "appropriate means" to accomplish stated ends.<sup>239</sup> Soft legal documents, such as the Arrangement, may include hard commitments, such as the technical rules regarding the calculation of CIRRs and minimum premium benchmarks, notice-and-match procedures, and the painstaking categorization of high- and low-income countries.<sup>240</sup> While transnational actors increasingly use soft law forms,<sup>241</sup> scholars have been slow to embrace their import, probably because of their elusive nature.<sup>242</sup>

Paradoxically, the use of a soft legal instrument in the case of the Arrangement may help explain Participants' initial commitment and subsequent compliance. Some who have been intimately involved with the Arrangement believe that the sense of legal ambiguity in whether the Arrangement is law or not played a significant role in the Participants' initial commitment to the Arrangement.<sup>243</sup> This view echoes some international legal scholars who argue that soft law lowers the commitment hurdle because the

AND COMPLIANCE, *supra* note 147, 21, 25–30 (discussing different soft law forms, including communiqués, minutes, "soft commitments" embedded in formal treaties, declarations, and agendas and proposes a classification scheme for soft law instruments). See also Edith Brown Weiss, *Introduction to INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS* (Edith Brown Weiss ed., 1997) (discussing non-binding norms); Joseph Gold, *Strengthening the Soft International Law of Exchange Agreements*, 77 AM. J. INT'L L. 443 (1983).

239. See Dinah Shelton, *Introduction: Law, Non-Law and the Problem of "Soft Law,"* in COMMITMENT AND COMPLIANCE, *supra* note 147, 1, 10–13 (arguing that the "line between law and not-law may appear blurred").

240. *Id.* See also Chinkin, *supra* note 238, at 31–34 (discussing the "hardening" of "soft law" instruments through use of specific normative mandates and transformative procedures).

241. See generally Wolfgang H. Reinicke & Jan Martin Witte, *Interdependence, Globalization and Sovereignty: The Role of Non-Binding International Legal Accords*, in COMMITMENT AND COMPLIANCE, *supra* note 147, at 75 (arguing that globalization has pushed private actors into the forefront of international norm formation and, by definition, private actors may only resort to soft law; we are thus witnessing an explosion in soft law norms).

242. *But see generally* COMMITMENT AND COMPLIANCE, *supra* note 147 (collection of articles examining the use of, and instances of compliance with, soft international law, with particular emphasis on the environment, trade and finance, human rights, and arms control). Scholars have long discussed the importance of informal norms in domestic law. For an excellent account of how informal norms influence the behavior of neighbors in Shasta County, Cal., see ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

243. John Ray, *The Arrangement from the Inside*, in THE EXPORT CREDIT ARRANGEMENT, *supra* note 5, at 33, 33 ("[I]ts very title—the 'Arrangement'—was carefully chosen to avoid any implication of a formal agreement, to say nothing of a treaty. No one really seems to be sure exactly what 'arrangement' signifies in international jurisprudence. The Participants in the Arrangement have been careful to keep it that way.").

This is the position taken by the U.S. Treasury Department. See Geithner, *supra* note 5, at 87 who commented:

Perhaps most impressive of all, the Arrangement's successes have been achieved while operating as a "Gentlemen's Agreement" among like-minded governments, without the force of international law. The Arrangement is an example of the more enlightened approach to resolving multilateral economic issues through discussion, negotiation and collaboration on which we must all increasingly rely in the new global economy.

soft law form circumscribes the legal/reputational costs of subsequent defections.<sup>244</sup>

If the slow, steady broadening and deepening of the Arrangement's substantive scope explains, in part, why ECAs accepted and abided by the Arrangement's increasingly intrusive restrictions on export finance, the flexibility of soft law explains, procedurally, how Participants effectively achieved such incrementalism.<sup>245</sup> Participants could tackle one or several issues at a time, reserving others without consensus support for subsequent consideration, in part because they did not face cumbersome amendment and ratification procedures at each substantive juncture.<sup>246</sup> In contrast, formal international treaties often contain elaborate, cumbersome, and legally complicated amendment procedures that require acceptance by a majority of state parties prior to taking effect and may result in a web of asymmetrical legal obligations.<sup>247</sup> In most countries, domestic legislatures must approve or ratify formal legal treaties,<sup>248</sup> adding not only procedural complexity to the commitment process but also domestic constituencies (e.g., Congress) that negotiators must placate prior to making legal commitments. The soft law structure, loosening the strictures of textual formality, enabled Participants to move steadily, sometimes slowly, but almost always in a progressive direction, toward a comprehensive, viable, and self-modulating regulatory regime.

In easing the ability to reverse or alter course and reducing the legal and reputational costs of subsequent deviance, soft law provides states freedom to innovate.<sup>249</sup> In the Arrangement's case, some of this imaginative effort

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244. See *infra* notes 307–314 and accompanying text (describing Professor Guzman's neo-institutionalism).

245. See Kurt Schaefer, *Flexibility in a Changing World*, in *THE EXPORT CREDIT ARRANGEMENT*, *supra* note 5, at 13, 14 (arguing that the combination of “as little rigidity as necessary” with “as much flexibility as possible” will safeguard the Arrangement's integrity).

246. Scholars note that soft law's flexible amendment procedures are particularly conducive to the type of evolutionary development that furthers compliance. See David A. Wirth, *Compliance with Non-Binding Norms of Trade and Finance*, in *COMMITMENT AND COMPLIANCE*, *supra* note 147, at 330, 331 (describing a piece in the same volume by Professor Beth Simmons and noting the importance of flexible amendment procedures).

247. See *VIENNA CONVENTION ON THE LAW OF TREATIES*, *supra* note 233, arts. 39–41 (discussing amendment procedures for multilateral agreements and contemplating that some parties to a multilateral treaty may have asymmetric obligations toward other parties). See, e.g., *AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION*, art. 10, Apr. 15, 1994, 1867 U.N.T.S. 155, 33 I.L.M. 1144 (setting forth elaborate amendment procedures, including procedures that require acceptance by two-thirds of the Members or three-fourths of the Ministerial Conference). See also *INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS*, *supra* note 178, art. 51 (requiring for amendment: (1) proposal of an amendment; (2) vote by at least one-third of state parties to call a U.N.-sponsored conference on the amendment; and (3) approval at the conference by a majority of those in attendance).

248. See Edward T. Swaine, *Unsigning*, 55 *STAN. L. REV.* 2061, 2066–71 (2003). See also Reinicke & Witte, *supra* note 241, at 88 (arguing that cooperation via treaties “is usually delayed because of the requirement of ratification”).

249. See Mary Ellen O'Connell, *The Role of Soft Law in a Global Order*, in *COMMITMENT AND COMPLIANCE*, *supra* note 147, at 100, 110 (describing how soft law forms may facilitate legal experimentation in areas such as the internet). See, e.g., Beth Simmons, *International Efforts Against Money Laundering*, in *COMMITMENT AND COMPLIANCE*, *supra* note 147, at 244, 245–63 (arguing that the non-binding nature of the Financial Action Task Force's rules on international money laundering are a necessary first step in catalyzing international harmonization of rules and implying that state parties were able to take this

yielded better, smarter solutions that, not surprisingly, endured to generate widespread compliance. Presumably, Participants, particularly high interest rate Participants, may have been reluctant to migrate to the CIRR and relinquish their interest rate subsidy if they had felt permanently locked in by the formality of a treaty.<sup>250</sup> It is equally unclear whether Participants would have agreed to minimum premium benchmarks if they had felt that the Knaepen Package was hard legal fiat rather than a soft experiment.<sup>251</sup> Yet these two innovations are critical to the Arrangement's goals of eliminating competition on the basis of "the most favourable officially supported terms."<sup>252</sup>

With no formal entry or exit requirements, the Arrangement's soft-law form may actually have enticed some non-Participants to comply with the Arrangement by dangling membership as an attainable, compliance-sensitive carrot. The Arrangement explicitly invites non-Participants to join through compliance rather than through a lengthy, formal legal process of membership involving invitation, signature, and/or ratification.<sup>253</sup> For non-Participants, compliance with the Arrangement is one, if not the, route to Arrangement membership as it signals to the Participant industrialized giants that their exporters can and will play on a level playing field.<sup>254</sup> In encapsulating this membership-through-compliance process, the Arrangement's soft form accommodates non-Participants' desires to become members of a prestigious group, be it the Participant group or even the European Union, without creating a formidable and often discouraging hurdle.

### C. International Systemic Explanations: Interlocking Legal Relationships

International law is like a loosely woven garment. No piece of law exists in isolation but instead is interwoven with myriad legal regimes, rules, and institutions. The loosening or unhinging of one thread at best weakens all, but may even result in the collapse of the entire interlocking system. From the perspective of any state actor, compliance with any one legal instrument implicates many other pieces of law. A state's decision to disregard one in-

experimental step, in part, because of the soft law form). See also Wirth, *supra* note 246, at 330 ("A non-binding 'soft' instrument can allow [states] to gain experience with more ambitious, aspirational goals in a less risky milieu.").

250. See *supra* notes 71–73 for a discussion of the evolution of the creation of the CIRR and *supra* notes 149–157 for discussion of the evolution of the CIRR.

251. See *supra* notes 74–85 and 162–169 and accompanying text for discussion of Knaepen Package on minimum premium benchmarks.

252. The Arrangement, *supra* note 4, Introduction, at 7.

253. *Id.* at 9 ("Other countries willing to apply these Guidelines may become Participants following prior invitation of the existing Participants.").

254. This sentiment is echoed strongly by Turkey:

Turkey has applied to be an observer member to the Participants Group, regarding the Arrangement On Guidelines For Officially Supported Export Credits (OECD Consensus). Turk Eximbank gives importance to international relations and to act in line with norms and arrangements of international organizations such as the WTO, E.U., Berne Union and OECD.

Export Credit Bank of Turkey, *Annual Report 2001*, available at <http://www.eximbank.gov.tr/eng/index.htm> (last visited Dec. 2, 2003).

ternational rule may, in reality, be a decision to disregard many interrelated international rules. This, in turn, may raise the stakes of complying with the original rule and sustain compliance.

The Arrangement's weave is both horizontal and vertical. On a horizontal level, the Arrangement is linked to several different international instruments and institutions, such as the WTO, the World Bank, and the United Nations. These links lend credibility to the Arrangement because a rebuke of the Arrangement is tantamount to a fractional rebuke of these companion institutions.<sup>255</sup> On a more micro-transactional level, countries often jointly offer financing packages, catalyzing, especially in the case of non-Participant countries, migration toward Arrangement principles. The Arrangement is vertically linked to other regional and domestic legal systems, making a violation of the Arrangement synonymous with a violation of regional or local law. In the view of the regulated parties, in this case the ECAs, these linkages transform the compliance question from one of compliance with a non-binding gentlemen's agreement to one of compliance with E.U. or U.S. law.

### 1. *Horizontal Linkages*

The horizontal weave was evident from the very inception of the Arrangement, which took place on the periphery of IMF, G-5, and OECD meetings.<sup>256</sup> Some linkages are evident on the face of the Arrangement. The Arrangement borrows from the United Nations and the World Bank to classify countries for purposes of calculating repayment term<sup>257</sup> and determining eligibility for tied aid.<sup>258</sup> Participants incorporate the Berne Union's definition of starting point into the Arrangement.<sup>259</sup> The IMF's calculation of special drawing rights is integral to tied aid concessionality calculations,<sup>260</sup> and the United Nations' "least developed countries" are entitled to a minimum concessionality of 50%.<sup>261</sup> While these might appear as mere definitional cross-references, they tie together the legitimacy of multiple institutions. For example, World Bank statistics are valuable only if used as meaningful measures throughout the international community; if Participants eschew the

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255. See Peter M. Haas, *Choosing to Comply: Theorizing from International Relations and Comparative Politics*, in COMMITMENT AND COMPLIANCE, *supra* note 147, at 43, 56 who suggests:

Linkages among institutions involved in an issue area may contribute to compliance. Dense networks of institutional factors, including such factors as numbers of international institutions involved in negotiations, and frequency of interactions could contribute to stronger levels of compliance by encouraging states to build up their reputation to anticipate reciprocity in other areas of potential importance.

256. See Moravcsik, *supra* note 10, at 180.

257. See *supra* note 63 and accompanying text for a discussion of the link between repayment term and World Bank country classification scheme.

258. See 2002 COUNTRY CLASSIFICATION FOR EXPORTERS AND TIED AID, *supra* note 62.

259. See *supra* note 64 for a definition of a "starting point" and its relationship to the Berne Union.

260. The Arrangement disciplines do not apply to any tied aid package that is less than U.S. \$2 million SDR or has a concessionality rate of 80% or more. The Arrangement, *supra* note 4, art. 36, at 27–28.

261. See *supra* notes 61–62 for a description of the tied aid rules on concessionality.



World Bank classifications, they in essence detract from its critical information-gathering function. If the Arrangement develops a new "starting point" definition where a Berne Union technical definition already exists, then the Berne Union is relegated to the fringe.

Probably the strongest horizontal linkage, a linkage with the WTO is not immediately apparent on the face of the Arrangement. One of the WTO's constituent documents is the Subsidies Agreement and Countervailing Measures ("Subsidies Agreement"), which effectively bans government subsidies or financial contributions conditioned on export performance, including direct expenditures such as loans and contingent expenditures such as loan guarantees.<sup>262</sup> Any violation of this prohibition triggers WTO dispute resolution mechanisms.<sup>263</sup> Official export credit, as an explicit export promotion tool in the form of a direct loan or guarantee, ostensibly violates the WTO's Subsidies Agreement. However, the WTO explicitly grants a type of safe harbor status to export credits in accordance with the Arrangement.<sup>264</sup>

The Subsidies Agreement prohibits official export credits unless (1) premiums are real in the sense that they are adequate to cover the "long-term operating costs and losses of the programmes";<sup>265</sup> and (2) there is no interest rate subsidy (i.e., governments are extending credit at or above their cost of funds).<sup>266</sup> ECA compliance with the Arrangement ensures that ECAs satisfy both of these conditions and thereby ensures that official export credit does not offend the Subsidies Agreement.<sup>267</sup> First, the Knaepen Package on minimum premium benchmarks is predicated on premium rates being adequate to "cover long term operating costs and losses."<sup>268</sup> Second, the Subsidies Agreement prohibits export credits (official export loans) at rates "below those which [an ECA] would have to pay for funds."<sup>269</sup> If ECAs are Participants,

262. AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES, art. 3, Apr. 15, 1994, 1867 U.N.T.S. 155, 33 I.L.M. 1144 [hereinafter SUBSIDIES AGREEMENT].

263. See *infra* note 272 and accompanying text.

264. The WTO granted a similar presumption or "safe harbor" in the Agreement on Technical Barriers to Trade to the standards emanating from the International Organization for Standardization. See Naomi Roht-Arriaza, "Soft Law" in a "Hybrid" Organization: The International Organization for Standardization, in COMMITMENT AND COMPLIANCE, *supra* note 147, at 263, 271.

265. SUBSIDIES AGREEMENT, *supra* note 262, Annex I(j).

266. *Id.* at Annex I(k).

267. GERHARD ABEL, *The Multilateral Trading System, the Export Credit Arrangement and the WTO*, in THE EXPORT CREDIT ARRANGEMENT, *supra* note 5, at 15.

268. The Arrangement, *supra* note 4, art. 24(a), at 19–20. In negotiating the minimum premium benchmark package, Participants recognized that the WTO required premium rates that covered long-term operating costs and losses, and they designed a package with this specific admonition in mind. See Knaepen, *supra* note 161, at 77. In fact, the Knaepen Package includes "premium feedback tools" explicitly designed to gather information over time to assure that minimum premium benchmarks are high enough that ECAs maintain long-term self-sufficiency. The Arrangement, *supra* note 4, art. 24, at 19–20. If, in gathering this information, the Participants discover that minimum premium benchmarks are "inadequate to cover long term operating costs and losses," the minimum premium benchmarks, and the method embodied in the Arrangement to calculate minimum premium benchmarks, will be reviewed and adjusted appropriately. See *id.* See also *The Knaepen Package: Guiding Principles*, *supra* note 74, arts. I(4), VIII.

269. SUBSIDIES AGREEMENT, *supra* note 262, Annex I(k).

or parties to any successor agreement, such ECAs are deemed to be providing export credits at CIRRs, which, by definition, are *above* “those which [ECAs] actually have to pay for the funds so employed.”<sup>270</sup> In upholding the Arrangement’s disciplines, Participants also ensure that their export credit programs are consistent with their undertakings in the Subsidies Agreement.<sup>271</sup>

In horizontally linking the Arrangement to the WTO, the Participants also import a sanction mechanism. Gross violations of the Arrangement may place a Participant’s export credit program in conflict with the Subsidies Agreement and expose the Participant to WTO sanctions, which include referral to a quasi-judicial dispute settlement process.<sup>272</sup> The cross-fertilization of international agreements thereby enables the Arrangement simultaneously to maintain its soft law exterior for negotiating flexibility and malleability and to import a de facto sanction regime typical of hard law instruments.

Other horizontal linkages occur on the level of individual transactions. ECAs frequently work together through co-financing arrangements,<sup>273</sup> and these arrangements exert a significant compliance pull, particularly in the case of non-Participant co-financing with Participant ECAs. Co-financing is a response to ECA local content rules on the one hand and the economic reality of foreign sourcing of capital equipment subcomponents on the other hand.<sup>274</sup> A piece of equipment, such as the GE turbine, may contain 50% U.S. content and 50% Mexican content. Ex-Im Bank will only finance the U.S. portion, and thus, GE might bear the financing costs of the other half.

270. CIRRs are 100 basis points above a prescribed basket of government bonds. See *supra* note 73. The Subsidies Agreement explicitly states:

[I]f a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rate provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

SUBSIDIES AGREEMENT, *supra* note 262, Annex I(k).

271. All Arrangement Participants are also Members of the WTO and, as such, are bound by the Subsidies Agreement. See *supra* note 247, art. II(2) (all WTO Members are bound by the “Multilateral Trade Agreements,” including the Subsidies Agreement).

272. If a WTO Member is not a Participant, or is a Participant but does not follow the Arrangement rules, then subsidized export credit may be a violation of the Subsidies Agreement and may expose that member to WTO dispute resolution procedures. The procedures in broad outline include: consultations, hearings before a panel established by the WTO’s Dispute Settlement Body, and appellate review. See WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, available at [http://www.wto.org/english/docs\\_e/legal\\_e/ursum\\_e.htm](http://www.wto.org/english/docs_e/legal_e/ursum_e.htm) (last visited Dec. 2, 2003). See Andrew Guzman & Beth A. Simmons, *To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the World Trade Organization*, 31 J. LEG. STUD. 205, 206–08 (2002) (summarizing the WTO dispute resolution process from consultation to panel investigation to appeal to decision).

273. For a general discussion of co-financing and its growing importance in trade finance, see Hiroo Fukui, *Export Credit Agencies and the World Bank: A Partnership*, in *THE EXPORT CREDIT ARRANGEMENT*, *supra* note 5, at 123.

274. Most ECAs will only finance “domestic” content. In the case of the United States, for example, there are elaborate U.S. content rules. See *supra* note 36 for a discussion of the U.S. content rules. With the application of these rules, a portion of a transaction may not be eligible for financing.

However, through a series of co-financing agreements, Ex-Im Bank and other ECAs pledge to work cooperatively to offer financing for their respective "shares" of the equipment.<sup>275</sup> In the current example, a joint reinsurance agreement between Ex-Im Bank and the Mexican ECA, Bancomext, permits GE to apply to Ex-Im Bank for coverage (up to 85%, per the Arrangement), and Bancomext agrees to "reinsure" Ex-Im Bank for the non-U.S. portion.<sup>276</sup> Through this reinsurance, or indirect coverage, Bancomext effectively accepts the same terms and conditions that Ex-Im Bank offers, which, of course, are consistent with the Arrangement.<sup>277</sup> By virtue of one ECA being bound by the Arrangement, the financing terms of the integrated package typically conform to the Arrangement's terms and conditions. Co-financing arrangements, in addition to facilitating finance for export transactions sourced from more than one country, raise the regulatory standards to the "greatest common denominator."<sup>278</sup> Non-Participant compliance thus is a de facto by-product of pragmatic co-financing relationships.

## 2. Vertical Linkages

The Arrangement is also intertwined vertically with E.U. and U.S. law. Beginning in 1978, the European Community incorporated the entirety of the Arrangement into law and, through a European Council decision (as opposed to a directive)<sup>279</sup> has made the Arrangement directly binding and applicable to all member states.<sup>280</sup> By virtue of incorporation into E.U. law,

275. See, e.g., Ex-Im Bank, *Cooperative Agreements with Foreign Export Credit Agencies*, available at <http://www.exim.gov/pub/ins/pdf/eib99-11.pdf> (last visited Dec. 2, 2003) (describing Ex-Im Bank's co-financing agreements).

276. *Id.*

277. In the case of other non-Participant ECAs, the co-financing agreement is not a reinsurance agreement, whereby one ECA fronts for another, but rather contains promises to coordinate financing of respective domestic content in an integrated financing package.

278. Similarly, the Basle Accords harmonized standards for banking regulation. Banks in non-member states comply in great part if they "wish to do business with Basle member countries." See Lawrence L. C. Lee, *The Basle Accords as Soft Law: Strengthening International Banking Supervision*, 39 VA. J. INT'L L. 1, 5 (1998).

279. For a discussion of the legal standing of a Council of Ministers decision, see DAVID MEDHURST, A BRIEF AND PRACTICAL GUIDE TO E.U. LAW 31 (2001). See also KLAUS-DIETER BORCHARDT, THE ABCS OF COMMUNITY LAW 69 (1999).

280. Council Decision 2001/76/EC 2000 O.J. (L 32/1) (replacing the Decision of April 4, 1978 on the application of certain guidelines in the field of officially supported export credits). As a Council decision, the European Community commands ECAs (or the local equivalent) to comply with the Arrangement on behalf of member states. See BORCHARDT, *supra* note 279, at 69.

In addition, in a recent directive, Directive on Harmonisation of the Main Provisions Concerning Export Credit Insurance for Transactions with Medium- and Long-Term Cover, the Council mandates member states to amend laws, regulations, and administrative processes related to medium- and long-term export credit insurance to comport generally with the Knaepen Package. Council Directive 98/29/EC 1998 O.J. (L 148/22). Interestingly, this directive uses the Arrangement as a "spring board," borrowing overarching principles from the Arrangement regarding the distorting effect of competition among export credit insurance, but actually transcends the scope of the Arrangement by, in effect, mandating harmonization of individual insurance policies. While the Arrangement, which has been incorporated into local law, addresses larger issues, such as premiums, the permissible term of the credit (including the starting point), the interest rate (in the case of a direct loan), and coverage of local costs, the

the Arrangement is no longer some type of quasi-law/quasi-gentlemen's agreement, but rather a hard piece of domestic law. As Figure 2 demonstrates, the compliance rate among E.U. Participants is currently very high, although on an essential par with the Participant group as a whole.<sup>281</sup>

While the European Union's hard incorporation of the Arrangement does not seem to have a dramatic impact in terms of Participant compliance,<sup>282</sup> it has profoundly impacted the propensity of non-Participants to comply. As Figure 3 illustrates, those non-Participant countries that have applied for E.U. membership appear to have strong incentives to comply.<sup>283</sup> Indeed, prior to becoming an E.U. member state, applicant countries must demonstrate that they are readily able to "adopt the common rules, standards and policies that make up the body of E.U. law."<sup>284</sup> Because E.U. law incorporates the Arrangement, demonstrated compliance with the Arrangement is an explicit precursor to E.U. membership. Consequently, non-Participant applicants for E.U. membership comply with the Arrangement.

Although the United States has not, like the European Union, incorporated the Arrangement in its entirety into local law, Congress has incorporated in Ex-Im Bank-related legislation much of the Arrangement's substance and even more of its spirit. The Export-Import Bank Act<sup>285</sup> codifies some of the Arrangement, either by borrowing direct language or by referencing part of the Arrangement. For example, Ex-Im Bank may only insure or guarantee 85% of the total contract value of a medium-term export.<sup>286</sup> The 85% is, of course, an Arrangement-imposed limit.<sup>287</sup> Ex-Im Bank must grant tied aid "consistent with the procedures established by the Arrange-

directive addresses some of the minutiae that must be clarified in any insurance policy, including an export credit insurance policy. Some of these issues include: the scope of cover (i.e., what types of risk will the insurance policy cover?), the permitted percentage of cover (i.e., will the exporter hold onto any risk?), whether the exporter may "participate out" of the uninsured percentage (and thereby not hold onto any risk), the types of losses for which the insurer is liable, claims processes and waiting periods, and country cover policy (i.e., the policy by which member states determine the buyer countries to which to extend cover or insurance).

281. See Figure 2. The compliance index for all Participants, E.U. and non-E.U., is 3.4, while the compliance index for E.U. Participants is 3.3.

282. In fact, the compliance index for non-E.U. Participants is 3.6, while that of E.U. Participants is 3.3. See *supra* Figure 2.

283. See Figure 3, indicating that the compliance index for non-Participants seeking E.U. membership is 3.4, while the compliance index for other non-Participants is 2.3.

The following countries have applied for E.U. membership: Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, the Slovak Republic, Slovenia, and Turkey.

284. See Europa, *Enlargement*, available at <http://europa.eu.int/comm/enlargement/print-enlargement.htm> (last visited Dec. 2, 2003). In particular, applicant states must create "conditions for its integration through the adjustment of its administrative structures, so that European Community legislation transposed into national legislations implemented effectively through appropriate administrative and judicial structures." Europa, *E.U. Enlargement: A Historic Opportunity*, available at <http://europa.eu.int/comm/enlargement/intro/print-criteria.htm> (last visited Dec. 2, 2003).

285. 12 U.S.C.A. § 635 (West Supp. 2003) (including the 2002 Amendments).

286. *Id.*

287. The Arrangement, *supra* note 4, art. 7, at 11.

ment.”<sup>288</sup> In addition, Ex-Im Bank will only offer direct loans at interest rates that are “consistent with international agreements.”<sup>289</sup> Interestingly, in the recent Export-Import Bank Reauthorization Act, Congress explicitly permitted Ex-Im Bank to deviate from the Arrangement in the face of foreign deviant behavior,<sup>290</sup> suggesting that Congress understands that Ex-Im Bank is otherwise bound by the Arrangement’s terms.

On a more general level, Congress clearly embraces the Arrangement as integral to Ex-Im Bank’s existence. Congress exhorts Ex-Im Bank to participate actively in negotiations to “minimize competition” and “reduce government subsidized export financing.”<sup>291</sup> Furthermore, Congress consistently requires Ex-Im Bank to negotiate expansions of the Arrangement to enhance coverage of export credit activity.<sup>292</sup> Legislative history accompanying several Ex-Im Bank reauthorizations reveals that Congress intends for Ex-Im Bank to be bound by a strong, all-encompassing Arrangement.<sup>293</sup> While the Arrange-

288. 12 U.S.C.A. § 635i-3(d) (West 2001). However, Congress explicitly allows Ex-Im Bank to deviate from the Arrangement in the face of a foreign ECA breach. Export-Import Bank Reauthorization Act of 2002, Pub. L. No. 107-189, 116 Stat. 698. This “exception” may, in and of itself, be consistent with the Arrangement because the Arrangement allows ECAs to match non-conforming tied aid offers. The Arrangement, *supra* note 4, art. 41, at 31.

289. 12 U.S.C.A. § 635(b)(1)(B) (West Supp. 2003). While the Act does not explicitly reference the Arrangement here, the fact that Congress added it to the Act in 1978, the same year that the Arrangement came into effect, strongly suggests that the phrase “international agreements” refers to the Arrangement.

290. 12 U.S.C.A. § 635i-9 (West Supp. 2003) which indicates that:

The Bank may provide financing on terms and conditions that are inconsistent with those permitted under the OECD Export Credit Arrangement to match financing terms and conditions that are being offered by market windows on terms that are inconsistent with those permitted under the OECD Export Credit Arrangement.

291. 12 U.S.C.A. § 635(b)(1)(A) (West Supp. 2003) (requiring that Ex-Im Bank draft an annual report on competitiveness with foreign ECAs).

292. *Id.* (asking Ex-Im Bank to negotiate an extension of the Arrangement to encompass market window activity); and 12 U.S.C. § 635(a) (requiring the United States to negotiate an expansion of the Arrangement to bring untied aid—or aid that is not “tied” to exports—into the confines of the Arrangement). *See also supra* note 183 and accompanying text.

293. *See Ensuring that Ex-Im Bank has the Resources to Enable it to Fulfill its Statutory Mandate for U.S. Exporters Both Small and Large to Provide Financing Terms and Conditions Competitive with those Offered by Foreign Export Credit Agencies: Hearing before the Senate Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. 406 (2001) (statement of Sen. Hagel) (“All export credit agencies are obliged to obligate the Bank to follow the arrangement negotiated in the . . . OECD, when offering financing through government entities.”). *See also* 148 CONG. REC. S1954 (statement of Sen. Sarbanes) (arguing that the Arrangement governs market windows, just as it governs the traditional ECA lending activities, and criticizing foreign ECAs for using market windows to circumvent the Arrangement, implying that the Arrangement governs all ECA and ECA-like lending activities); *The Export-Import Bank Reauthorization Act of 2001: Report of the Senate Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. 52 (criticizing foreign governments for evading the Arrangement through untied aid and market windows, and implicating embracing the Arrangement as the set of rules governing ECAs); *Export-Import Bank Reauthorization Act of 2001: Conference Report*, H.R. CONF. REP. NO. 107-487 (noting that the final, consolidated bill includes a provision to encourage Ex-Im Bank and the U.S. Department of the Treasury to further Arrangement negotiations so as to include market windows within the rubric of the Arrangement); *The Export-Import Bank Amendments of 1983: Report of the Senate Comm. on Banking, Housing, and Urban Affairs*, S. REP. NO. 98-111 (1983) which indicated:

As a result of the latest round of talks on export credits within the OECD, along with the steady decline in commercial interest rates, the subsidy element in official export financing has been virtually

ment, in its entirety, is not explicit law within the United States, Congress clearly intends for it to cast a “legal shadow” over Ex-Im Bank’s activities.

### 3. Compliance as a Function of Hardening of the Arrangement?

The Arrangement does not exist in isolation. By borrowing definitions and country classifications, the Arrangement intersects other international institutions. The WTO, in particular, lends weight to the Arrangement by transforming it into a safe harbor for purposes of the Subsidies Agreement. Vertically, the Arrangement has direct legal effect in all European Community member states, and the U.S. Congress has incorporated some Arrangement rules into U.S. law. In particular, the linkages with the WTO, as well as E.U. and U.S. law, create a de facto sanctions regime that increases the cost of non-compliant behavior.

This discussion inevitably leads to the question of whether the hardening of the Arrangement into law via these horizontal and vertical linkages accounts for the current snapshot of compliance, as set forth in Table 2: Participant Compliance and Table 3: Non-Participant Compliance. If, in fact, the hardening of the Arrangement is significantly linked to compliance, then many of this Article’s previous conclusions regarding positive correlation between compliance and soft law would be problematic. However, the data compiled in Table 4: Historical Compliance suggest that there is no discernable correlation between compliance and the Arrangement’s hardening into law.

If hardening of Arrangement rules through the WTO’s Subsidies Agreement were significant, then Table 4: Historical Compliance should reveal an increase in compliance rates after 1994, the year in which member states concluded the Subsidies Agreement. In fact, compliance rates remained relatively constant and did not increase significantly with the safe-harbor-like linkage between the WTO and the Arrangement.<sup>294</sup>

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eliminated for all of the major OECD countries, with the exception of France . . . . A continually competitive Eximbank, with continued strong support from the Congress, is essential for further success in the credit talks, until the goal of permanently eliminating official export credit as a factor in international sales competition is achieved.

*ExImBank Reauthorization: Hearing before the Subcomm. on Int’l Trade, Investment and Mon. Policy of the House Comm. on Banking, Finance and Urban Affairs, 98th Cong. 4, 32 (1983) (statement of Chairman Draper) suggesting that:*

Our interest rates have been reduced to the minimums allowed under the OECD international arrangement . . . . Under the revised guidelines of the OECD’s international arrangement, the minimum interest rates which were 7.5 percent to 8.75 percent when I joined are now 10 percent to 12.4 percent. On January 18 of this year, we reduced Eximbank’s rates to the arrangement minimums, removing the last differential between our competitors’ rates and our rates.

294. The aggregate compliance indices demonstrate that compliance remained remarkably steady from 1990 through 2003. The compliance index stayed constant through 1999. See *supra* Figure 4. The compliance indices for individual countries show that some countries became more compliant after 1994 (Italy’s index, for example, increased from 3.3 to 3.8) while other countries actually became less compliant in the years following the WTO Agreement (such as Canada’s index decreasing from 3.7 to 3.3). See *infra* Table 4. Nonetheless, all of these are marginal differences. Participants complied with the Arrangement prior to the Subsidies Agreement, and its advent did not have a dramatic impact on compliance levels.

Similarly, if the hardening of the Arrangement via E.U. law were a significant compliance factor, we would expect compliance to increase from the moment of incorporation into E.U. law. The European Community incorporated the Arrangement in 1978, immediately upon the Arrangement's inception.<sup>295</sup> Surprisingly, the data show that compliance among non-E.U. Participants is actually higher today than compliance among E.U. Participants.<sup>296</sup> Likewise, the historical data in Table 4: Historical Compliance do not reveal any dramatic discrepancies in compliance between E.U. and non-E.U. Participants through the life of the Arrangement.<sup>297</sup>

In the United States, Congress codified certain Arrangement rules, such as the Arrangement's requirement of a 15% cash down payment.<sup>298</sup> If the hardness of law were a decisive compliance factor, then Ex-Im Bank might comply with the hard rules at a higher rate than the soft rules. However, Ex-Im Bank is currently in full compliance with all the Arrangement export credit rules, whether hard or soft,<sup>299</sup> and has been at perfect, or close to perfect, compliance throughout the Arrangement's history.<sup>300</sup>

How, then, are the international systemic linkages relevant to this Article's exploration of compliance? First, the systemic linkages, in particular the hardening of the Arrangement through the E.U. and the intermingling through co-financing agreements, do have a profound and likely decisive impact on compliance among *non-Participants*. Second, while the systemic linkages or interlocking law may not have been the pivotal factor in historic compliance, these linkages inevitably fortify the Arrangement and help perpetuate Participants' compliance in the future. The Arrangement exists at the center of a three-dimensional web of law, norms, and legal institutions, which may unravel and disintegrate, some dimensions more than others, if the Participants eschew the Arrangement. This web of interlocking relationships adds a systemic, multidimensional quality to the Arrangement, transforming it from an isolated gentlemen's agreement into a robust set of rules that sometimes carries hard consequences. The Arrangement's systemic dimension certainly has not detracted from compliance and will likely bolster and propel compliance in the future.

295. See Council of Ministers Decision of 4 April 1978, as amended by Decision 93/112/EEC. See also *supra* note 280 for current decision.

296. See *infra* Table 2. The compliance index for E.U. Participants is 3.3, whereas the compliance index for non-E.U. Participants is 3.6.

297. See *infra* Table 4.

298. See *supra* note 286 and accompanying text (discussing the incorporation of certain Arrangement rules into U.S. law).

299. See *infra* Table 2, showing that the United States complies with each of the Arrangement rules. See also *supra* Part IV.B for discussion of Ex-Im Bank's compliance profile.

300. The compliance indices for the U.S. are: 4.0 (2003); 4.0 (1995); 4.0 (1990); 3.7 (1987); and 3.7 (1982). See *infra* Table 4.

#### *D. Why Compliance?: The Dynamics of the Arrangement*

This Article is designed as a robust case study of an instance of overwhelming compliance with a piece of international regulation. In-depth analysis of the Arrangement reveals a hodgepodge of possible explanations for Participants' compliance, broadly grouped as: state-interest-centered explanations, Arrangement-centered explanations, and international systemic explanations. The state-centered explanation that states comply because it is in their interest to do so explains why states may have initially joined the Arrangement but does not necessarily account for its sustenance, as well as its gradual deepening and broadening. While vertical and horizontal linkages between the Arrangement and other law and legal institutions fortify compliance, the historic data does not show these factors to be decisive.

So we are left with the Arrangement itself as the critical engine of compliance. The Arrangement synergistically bundles multiple features that entice Participants to comply. Consensus decision-making requires agreement among Participants prior to codification and necessitates the type of incremental evolution that results in the discovery of innovative and effective rules; the soft-law housing is accommodating to this measured unfolding and is non-intimidating to Participants when they dare to innovate (and may later want to amend and change course). The Arrangement's commitment to specificity enhances compliance by clarifying the standards to which Participants should conform. A Participants group that is relatively small and homogeneous not only makes it practical to proceed by consensus, but also breeds the type of camaraderie where the label of "deviant" tars not merely ECA, but also personal reputation. While the transparency-related procedures enhance trust among Participants and confidence in the regime, they also prompt the type of discussion and information exchange that prods evolution that is responsive to Participants' Arrangement needs. Institutionalized derogations pragmatically redefine compliance, inviting Participants who occasionally must defect from the Arrangement to remain within the Arrangement's sphere rather than alienating them as "deviant" within the closely knit Participants' group. Perhaps the Arrangement's soft form, which undoubtedly lowered the legal stakes of Participants' initial commitment decisions, provides the flexibility and malleability necessary to maintain, in some sort of delicate balance, the foregoing compliance factors within a coherent, yet evolving, Arrangement.

Indeed, much of the Arrangement's compliance power stems from a graceful dynamism—a delicate embrace of innovation and change that prevents law from becoming brittle and stale and open to disregard as irrelevant or anachronistic. Of course, the Arrangement could not effectively cause change if the Participants were not open to such change. Fortunately, an integral and productive attitude of humility and imperfection permeates the Arrangement. Prescribed reporting and assessment requirements are not mere information gathering but rather self-reflective moments designed to identify



weaknesses, inconsistencies, and potentially undermining fissures. The Arrangement's processes demand that each Participant be vigilant regarding the Arrangement's continuing viability and efficacy.

Unfettered dynamism could potentially disintegrate the core or essence of an international agreement. The Arrangement's juxtaposition of micro- and macro-dynamism protects against this risk. On the macro level, the Participants exchange information and experiences to assure that the Arrangement itself remains on an evolutionary, self-correcting, and self-bettering path. On the micro-level, the Arrangement's notice-and-match and common line processes enable Participants to ask for dispensation for a particular transaction without requesting a cure at the Arrangement-level. This micro-dynamism assures that law appropriately bends but simultaneously enables Participants to distinguish between necessary dynamism of the moment and dynamism necessary to forge a productive future.

Before concluding this Part, it bears mention that the Arrangement's impact beyond the core group of Participants also opens a fresh window into the process by which international rules become standard-setting international norms. Interestingly, several non-Participants, including significant players in the international trading community, comply with most of the terms of the Arrangement. In this case, some states follow the Arrangement as a practical answer to co-financing relationships. Other states have ambitions to be a member of a certain club, such as the E.U., and voluntarily comply to satisfy membership requirements; the easy, attainable membership requirements of the Arrangement appear to accommodate these ambitions. Yet other states may comply to fall into the safe harbor of the WTO Subsidies Agreement. When a legal regime bestows benefits, whether reputational or otherwise, non-parties may voluntarily comply to share in such rewards. Under ripe conditions, international rules self-propagate.

## VI. COMPLIANCE THEORY AND THE ARRANGEMENT

This Article does not purport to draw a new, grandiose theory of compliance from this single, though rich, case study. By design, this Article is an empirical portrait of compliance that links compliance to the Arrangement's rules, form, and history; it consciously stands in contrast to the broad theoretical work that this Part will examine. However, the example of the Arrangement touches upon some of the most current, and heated, debates in international compliance theory. As such, this Article would not be complete without at least raising some of the theoretical issues that the Arrangement and its record of compliance implicate. This Part briefly examines how the Arrangement fits into existing compliance theory, but concludes that none of these theories are sufficiently robust to explain the Arrangement's entire compliance story. Therefore, this Part also uses the Arrangement as a vehicle to raise some of the questions that must be asked,

and answered, in contemplation of a newer, more inclusive theory of compliance.

### A. Neo-Institutionalism and Managerialism

As discussed at the outset of Part V, the dominant compliance theory (realism and rationalism) is decisively state interest-centered.<sup>301</sup> In its most basic form, states comply with international law when it is in their self-interest to do so; otherwise, states will defect. Yet state interests, while useful in explaining Participants' initial commitment to the Arrangement, were insufficient in accounting for sustained compliance. In composing the Arrangement's compliance story, the international regulations themselves played a starring role. Two newer compliance theories, neo-institutionalism and managerialism, consciously elevate international rules and institutions.

Neo-institutionalism is an outgrowth of institutionalism. Institutionalists, like some rationalists, employ tools of economic analysis and game theory and assume that states are unitary, rational actors that unapologetically pursue their self-interest.<sup>302</sup> But, institutionalists, more than their rationalist cousins,<sup>303</sup> believe that law and legal institutions independently mold and impact state behavior.<sup>304</sup> In other words, law is not a mere landscape upon which state interests develop.<sup>305</sup> State interests are by no means irrelevant to institutionalists, but these interests flow through an institutional sieve that may reshape and refine such interests. Institutionalists thus theoretically resuscitate law as an integral element of compliance theory.

301. See *supra* notes 131–139 and accompanying text.

302. For a sampling of institutionalist literature, see generally Robert O. Keohane & Lisa L. Martin, *The Promise of Institutional Theory*, 20 INT'L SEC. 39 (1995) ("Like realism, institutionalist theory is utilitarian and rationalistic."); Friedrich Kratochwil & John Gerard Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT'L ORG. 753 (1986); Duncan Snidal, *Political Economy and International Institutions*, 16 INT'L REV. L. & ECON. 121 (1996) [hereinafter *Political Economy*]; Duncan Snidal, *The Game Theory of International Politics*, 38 WORLD POL. 25 (1985) [hereinafter *Game Theory*]. In addition, many of the "regime theorists," see *supra* note 26 and accompanying text, evolved into institutionalists or have been deemed institutionalists from time to time. See Hathaway, *supra* note 12, at 1949 (arguing that modern literature uses the terms "regime" and "institution" interchangeably). In this Article, "institutionalists" refer to the subclass of rationalists that believe law independently impacts state behavior.

303. Institutionalists contend that regime theorists are quick to label any cooperative arrangement a regime and thereby diminish and dilute the notion of law so that it recedes passively into the backdrop of analysis. See Snidal, *Political Economy*, *supra* note 302, at 124 (stating that "[a]n ironic by-product of this [regime theory's] broadened understanding of international institutions, however, is that the role of IOs, and of international law, came to be largely neglected in the ensuing regime literature"). See also Abbott, *supra* note 137, at 345 (stating that regimes are often defined so broadly that they encompass much more than formal, treaty-based international institutions). Yet institutionalists and regime theorists do not merely disagree over semantics—regime (broad concept) vs. institution (narrower, concrete concept). For regime theorists, international regimes come into existence in a moment of cooperative combustion and, after their constitutive moment, become a backdrop—true window dressing—for the interaction of self-interested state actors that found it in their self-interest to create a regime. As such, the international regime—or international institution—"feels" exogenous to the continual compliance calculus.

304. See Snidal, *Political Economy*, *supra* note 302 (arguing that institutions are both exogenous and endogenous variables in compliance decisions and thus exert an independent pull on state decisions).

305. See *supra* notes 135–136 and accompanying text.

In practice, institutionalists tend to focus on formalized enforcement and sanction mechanisms found in hard treaty law and tend to neglect the other micro-operational rules that importantly contribute to the dynamics of law. Since most soft law does not offer any formal sanction or enforcement mechanisms, soft law is a virtual casualty of institutionalist analysis.<sup>306</sup> Consequently, classic institutionalist analysis tends to be narrow and would not necessarily offer insights apropos to the Arrangement.

A recent group of neo-institutionalists, for lack of a more appropriate label, looks more closely at the structure of law and legal institutions through the lens of a state's reputational capital.<sup>307</sup> Neo-institutionalists, particularly Professor Andrew Guzman, contend that once a state commits to an international rule, the state will have placed some of its reputation at stake and that the state's interest in following or violating the rule will be informed by the costs of compliance, which include not only the hard costs of formal sanctions,<sup>308</sup> if any, but also the reputational costs of non-compliance.<sup>309</sup> The

306. The institutionalist penchant for using game theory and other tools of economic analysis seems to limit the depth and breadth at which they look at international rules. When games are constructed in terms of "payoffs," formal sanction mechanisms are relatively easy to analyze because they are quantifiable. See Snidal, *Game Theory*, *supra* note 302, at 40–44 discussing the role of payoffs in international games. In addition, with use of games like the Prisoner's Dilemma, the Cold-War, national security context, and brinkmanship situations (e.g., the Cuban Missile Crisis) become an institutionalist favorite. While formal treaties (with sanction mechanisms) and diplomatic crises are quite interesting, these types of examples neglect not only soft law but also the non-sanction-oriented (non-payoff oriented) rules in hard law as well. See Snidal, *Political Economy*, *supra* note 302, at 124 (examining the question of "Why do so many formal institutions exist?" (emphasis added)). See also, e.g., Jacobson & Weiss, *supra* note 226 (impressively exploring international environmental accords, but illustrating the institutionalist penchant to look at formal treaties, which carry formal implementation and sanctions). See generally John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 VA. L. REV. 1 (1997) (looking at the formal mechanisms via which states can be "released" from treaty obligations).

Some institutionalists impressively dissect institutional arrangements into salient features and, using rationalist game theory and rational choice frameworks, predict when states will choose certain institutional configurations. See generally Barbara Koremenos, et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001). This work is important in that it pierces the black box of international institutions. This work is, however, self-admittedly not concerned with the compliance calculus but rather the calculus of institutional design. While the two inquiries may overlap at times, this neo-institutionalist work explicitly asks, "why are institutions designed as they are?" rather than, "do particular institutional designs enhance compliance?"

307. See Guzman, *supra* note 177, at 1823. See also Hathaway, *supra* note 12 (arguing that treaty ratification is an effective signaling device that can enhance a state's reputation and diffuse international pressure to ratify treaties); Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495, 533 (1991) (arguing that formal and informal agreements are means through which states signal different commitment levels and thereby place at risk different levels of reputational capital); Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819 (2000); Simmons, *supra* note 12, at 323 (arguing that states will commit to international norms prohibiting currency restrictions on current account transactions to signal commitment to free market practices which in turn signals a hospitable environment for foreign investment and trade).

308. Of course, formal sanction mechanisms such as trade sanctions, dispute resolution mechanisms, or other types of retaliatory sanctions increase the potential costs of disregarding a rule (once a state has committed to the rule). See Guzman, *supra* note 177, at 1865–72 (discussing the costs of direct sanctions and the types of direct sanctions that effectively calibrate costs in the name of compliance).

309. *Id.* at 1849 ("Because a country's reputation has value and provides that country with benefits, a

structure of law impacts these costs.<sup>310</sup> For example, the specificity of a legal commitment calibrates the reputational impact of deviant behavior. A state's eschewing of a clear, unambiguous mandate is more costly than a state's ignoring an ambiguous platitude for which there is no clear-cut compliance route.<sup>311</sup> Likewise, a state's reputation will not suffer if other state parties are unaware that it has violated an international rule. Reporting and other transparency-enhancing mechanisms that might illuminate violations of international law will derivatively increase the reputational impact of deviation.<sup>312</sup> In determining reputational costs, neo-institutionalists peer into legal structures more deeply than their institutionalist counterparts. Via reputation, law and legal structures regain stature.

Importantly for the purposes of this Article's examination of a soft gentlemen's agreement, Guzman conceives of law in functional terms. Law and legal structures function to calibrate the costs of compliance and deviance. While many international legal theories awkwardly deal with soft law as an afterthought, or merely ignore soft law all together, neo-institutionalists create analytically meaningful space for soft law as a zone on a long law continuum that determines, in part, how much reputation a state will risk to commit to a legal rule.<sup>313</sup> States may deem a soft legal instrument as less of a commitment, thereby making the initial commitment decision less consequential and lightening the reputational stakes of future deviance; with soft law, a state may more readily commit but more easily deviate. Conversely, a hard legal instrument, most prominently a treaty, heightens the reputational stakes, raising the initial commitment hurdle but deterring or making costly future deviations.<sup>314</sup>

country will hesitate before compromising that reputation."). Simmons, *supra* note 12, at 334, 361 commenting that:

[T]he making of legal commitments is one way in which actors signal their intentions to an international community of states, internationally active economic agents, and domestic civil society. . . . [T]he results presented here suggest that governments are keenly aware of the impact that non-compliance will have on their reputation, affecting their appeal as a venue for conducting international transactions within a reasonably stable legal framework that protects property rights.

310. See Guzman, *supra* note 177, at 1861–65 (calibrating reputational costs with the severity of the violation of international law, the reason for the violation, the clarity of the obligation (and violation), and any implicit understandings).

311. *Id.* at 1857, 1863 (arguing that the clearer the commitment, the more obvious a violation and the more likely that a country's reputation will be affected).

312. Guzman does not discuss transparency or other reporting mechanisms. In fact, his lack of attention to these types of details is a shortcoming of his theory. However, this example of transparency-enhancing mechanisms follows logically from his analysis.

313. See *id.* at 1882–83, suggesting that:

The new theory recognizes that the discrete categories of treaties, CIL, and soft law, though perhaps useful, do not themselves define international law or represent the only possible levels of commitment. Rather, they are attempts to describe the spectrum of commitment from which states choose the level that suits their purposes at any given time.

314. *Id.* at 1880 (Soft law agreements "are made with an understanding that they represent a level of commitment that falls below that of a treaty. The violation of such an agreement, therefore, carries a less severe reputational penalty than does violation of a treaty."). See also *id.* at 1856 ("Having the ability either to commit or not commit is valuable, then, but the ability to choose from a range of commitment

A second strand of scholarship treats compliance as a management issue and identifies the legal institutions and processes that are integral to maintaining compliance. In *The New Sovereignty*,<sup>315</sup> Abram and Antonia Chayes (“Chayes and Chayes”) develop an analytically seductive managerial model to explain why states maintain their international legal commitments. Their theory is rooted in a normative view of law, and they argue that the law has an inherent compliance pull that stems from the normative weight of “*pacta sunt servanda*—treaties are to be obeyed.”<sup>316</sup> As such, Chayes and Chayes examine compliance only within the rubric of formal law, which, in the case of international law, most often involves a formal treaty.<sup>317</sup> Their theory is also dialogic, in that the discursive process of legal definition, interpretation, and application reinforces law’s normative force.<sup>318</sup>

On top of this initial normative compliance pull, compliance must be managed through well-crafted legal rules. Legal rules that enhance transparency within treaty regimes not only reassure those states with an urge to comply that others who are similarly situated will comply but also deter those with an urge to deviate by exposure of the deviant behavior.<sup>319</sup> Precise legal drafting, coupled with appropriate dispute resolution mechanisms that can clarify ambiguity, illuminates the content of legal rules and assures that states understand the norms against which compliance will be measured.<sup>320</sup> Through flexible amendment, protocol, rulemaking, and review processes, treaties importantly remain “adaptable to inevitable changes in technology, shifts in substantive problems, and economic, social, and political develop-

levels is even more valuable. By varying the form of its promise, a state can choose its level of commitment and signal that commitment to other states.”).

315. CHAYES & CHAYES, *supra* note 177. See also Chayes & Chayes, *supra* note 180, at 187.

316. CHAYES & CHAYES, *supra* note 177, at 8 (arguing that the “fundamental norm” of international law is “*pacta sunt servanda*—treaties are to be obeyed.”). See also Chayes & Chayes, *supra* note 180, at 187 (“[S]tates, like other subjects of legal rules, operate under a sense of obligation to conform their conduct to governing norms.”).

317. See, e.g., CHAYES & CHAYES, *supra* note 177, at 8.

318. See *id.* at 113–34, 143. In this sense, Chayes and Chayes are members, perhaps founders, of the legal process school. Scholars in the legal process school, or, more recently the transnational legal process school, recognize that the state’s act of committing to an international norm, even a weak commitment, may catalyze a domestic process whereby state interests evolve in favor of compliance or even obedience. The domestic and international process of defining an international rule, refining the international rule, incorporating international rules into domestic legal systems, and enforcing international rules as domestic laws, engages a multitude of transnational actors that repeatedly interact in various forums, coalesce into a type of epistemic community, and ultimately reconstitute state interests in support of the international rule. See also Koh, *supra* note 11, at 2646; Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L. J. 1397 (1999); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996). However, Chayes and Chayes, unlike some who embrace transnational legal process, do not lose sight of the micro-dynamics of legal rules in the name of examining the process by which these rules transform state interests and become embedded in the domestic psyche.

319. CHAYES & CHAYES, *supra* note 177, at 22–24 (arguing that reporting, notification, data collection, verification, and monitoring are the engines of transparency and that the more effective these processes, the greater the free-flow of information and the higher degree of compliance).

320. See *id.* at 10–13.

ments.”<sup>321</sup> Chayes and Chayes advocate a pragmatic tolerance for non-compliance, recognizing not only that states might comply with most, but not all, of their obligations over time,<sup>322</sup> but also that deviance may indeed signal a law’s weaknesses.<sup>323</sup> They examine rules at a nuanced, micro-level, appreciating that law, in its flexible, dynamic, and self-reflective state, will help mold state interests and ultimately minimize deviant behavior.<sup>324</sup> Law does not merely function as a “switching system, facilitating the independent interactions of independent states,”<sup>325</sup> but instead participates in compliance. With their dynamic view of legal rules, Chayes and Chayes build possibly the most robust theory of compliance available in the extant literature.

### B. *The Arrangement, Managerialism, and Neo-Institutionalism*

#### 1. *The Arrangement, Neo-Institutionalism, and Reputation*

Through the lens of the Arrangement, Guzman’s reputation-infused neo-institutionalism and the Chayeses’ normative-based managerialism are ostensibly quite insightful. Guzman argues that legal structures, by virtue of their impact on reputation, significantly inform compliance.<sup>326</sup> In particular, Guzman finds a significant place for soft law as an organic zone on a law continuum where the reputational costs of deviance tend to be lower than those

321. *Id.* at 225 (citing ORAN O. YOUNG, *INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY* 76–77 (1994)). See also *id.* at 234 (discussing the importance of International Labor Organization review procedures of state parties in promoting compliant behavior). See generally *id.* at 243 (discussing OECD review procedures to monitor compliance with Codes of Liberalization of Capital Movements and Invisible Transactions).

322. *Id.* at 120 (arguing that in spite of Brazil’s imperfect compliance with IMF conditions in letters of intent, the overall compliance record is “not bad”); see Chayes & Chayes, *supra* note 180, at 197–98 (discussing an “acceptable level of compliance” and, concomitantly, contemplating an acceptable level of non-compliance).

323. As parties to a treaty share information, discuss the meaning of treaty provisions, and make individual decisions on whether to deviate from treaty terms, they may, in reality, be identifying treaty weaknesses—weaknesses that can and should be corrected—in the legal regime. CHAYES & CHAYES, *supra* note 177, at 230 (“The reasons advanced to excuse noncompliant conduct point to avenues for improvement and correction.”).

324. See *supra* text accompanying note 177. The way that Chayes and Chayes structure *The New Sovereignty* demonstrates this well. They first discuss sanctions, given that much of international relations and legal scholarship focus on sanctions, see *supra* note 177 and accompanying text, concluding that sanctions regimes do not, alone, explain compliance and further suggesting that scholarly attention on sanctions has been misguided. CHAYES & CHAYES, *supra* note 177, at 29–108. Chayes and Chayes then begin to dissect treaty regimes with in-depth examinations, ripe with current examples of transparency mechanisms, *id.* at 135–53, reporting and data collection, *id.* at 154–73, verification and monitoring, *id.* at 174–96, capacity building and technical assistance, *id.* at 197–201, dispute settlement mechanisms, *id.* at 201–25, amendment and protocol procedures, *id.* at 225–27, and institutionalized review and assessment of the regime and parties’ behavior under the regime, *id.* at 229–49.

325. *Id.* at 229 arguing that:

[W]hat is left out of th[e] institutionalist account is the active role of the regime in modifying preferences, generating new options, persuading the parties to move toward increasing compliance with regime norms, and guiding the evolution of the normative structure in the direction of the overall objectives of the regime.

326. See *supra* notes 310–312 and accompanying text. See also Jacobson & Weiss, *Assessing the Record and Designing Strategies to Engage Countries*, in *ENGAGING COUNTRIES*, *supra* note 226, at 541–42.

associated with formal treaty frameworks.<sup>327</sup> Indeed, in the case of the Arrangement, reputation (or more precisely a state's desire to maintain a certain reputation) appears to impact Participants' compliance decisions.

The Arrangement's soft law casing lowered the initial commitment hurdle in part because it limited the reputational costs of subsequent deviation.<sup>328</sup> After the initial commitment, Participants steered a compliance course in part as means to preserve their reputational stature. The Participants group is small, maybe even insular, with a great sense of camaraderie. Within the Participants group, states become synonymous with individual personalities, as opposed to anonymous collections of individuals, and the urge to protect and preserve reputations flourishes. Interlocking legal relationships effectively transform the Participant group from one that is focused solely on the Arrangement to a broader, trade finance community of individual policy makers. With multiple interactions in a host of international trade and finance-related forums, Participants' reputations for being compliers or deviants will follow from one forum to another. The interconnectedness of law thus maintains reputation's prominence in compliance decisions by compounding the impact of non-compliance in a domino-like fashion and thereby raising the actual and perceived reputational costs of deviance.

Reputation is most important in explaining documented compliance by non-Participants. With non-Participants, the compliance and commitment decisions are one in the same; because they have not made any type of commitment to the Arrangement, non-Participants do not incur reputational costs if they fail to comply with the Arrangement, but they gain reputational standing if they nonetheless comply. For some countries, particularly those waiting to become members of the E.U., achieving this reputational stature is an explicit precursor to membership. For others who want to play a major role in international transactions, either through co-financing arrangements or otherwise, voluntary adherence to the Arrangement's best practices enhances their economic and business standing. The reputational glow of the Arrangement is indisputably *the* driving force behind non-Participant compliance.

## 2. *The Arrangement and Managerialism*

*The New Sovereignty* argues fundamentally that legal rules should actively manage compliance and that certain types of legal rules—those that maintain transparency, appropriate specificity, elasticity, and a pragmatism (especially with respect to compliance itself)—will coddle and manipulate states toward compliance.<sup>329</sup> In short, Chayes and Chayes argue that dynamic law

327. See *supra* notes 313–314 and accompanying text.

328. See *supra* note 243 and accompanying text (observing that Participants noted that the soft form was instrumental in the commitment decision).

329. See *supra* notes 319–338 and accompanying text for the Chayeses' description of the types of legal rules that will enhance compliance. See also Chayes & Chayes, *supra* note 180, at 184 ("Treaties that last

breeds compliance. The Arrangement is dynamic. The Arrangement's rules—which Part V argues are integral to the Arrangement's compliance story—notably showcase the management techniques that Chayes and Chayes advocate. Just to recount a few, the Arrangement is replete with transparency-related procedures, from mandated reviews to information exchange to notification and reporting requirements, not only assuring that other Participants are complying but also providing a window into those parts of the Arrangement that work and those that do not. The Arrangement is notably specific, pausing for consensus and evolving incrementally before incorporating general rules that may befuddle questions of compliance with questions about the meaning of norms. Through the notice-and-match and common line procedures, the Arrangement embodies an elastic understanding of compliance that supports Participants' desires to be less than perfectly compliant. Automatic adjustment mechanisms ensure that the Arrangement remains current, especially in its linkage to variable macroeconomic indicators such as interest rates. The Arrangement's soft form loosens amendment procedures, encouraging Participants to experiment yet making it easy for them to make necessary corrections. This list is certainly not exhaustive but merely intended to illustrate that the Arrangement indeed bundles precisely the type of management techniques identified in *The New Sovereignty* as critical to the maintenance of compliance.

Chayes and Chayes are profound advocates of the simple proposition that “law matters.” Likewise, Part V of this Article concludes by arguing that the Arrangement, as a dynamic package of such management techniques, is the ultimate driver of compliance. This Article, like managerialism, examines legal rules, not just for formal sanctioning mechanisms, but rather to understand the micro procedures that govern the international instrument's day-to-day, rote interaction with constituent states. As such, this Article's mode of analysis neatly coincides with the Chayeses' view of law as actively interplaying with state interests in favor of compliance. The Arrangement ostensibly offers a robust case study to support managerialism.

### 3. *The Arrangement: Harmonizing Neo-Institutionalism and Managerialism*

While the Arrangement might appear as a perfect billboard advertisement for each neo-institutionalism and managerialism, the Arrangement also highlights their weaknesses. Guzman's neo-institutionalism makes important analytic space for soft law, but it conceives of soft law rather narrowly in terms of reputational capital and does not comprehend the true force of soft law as it relates to compliance.<sup>330</sup> Guzman insightfully argues that a soft law casing like the Arrangement might help Participants make a quick com-

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must be able to adapt to inevitable changes in the economic, technological, social and political setting.”).

330. Guzman, *supra* note 177, at 1880 (discussing the important role that soft law plays in international legal relations, but attributing this role to the reputational costs of eschewing soft law obligations).



mitment at a critical historic moment. Yet the predictive strength of his analysis diminishes in examining the Arrangement over time. Guzman predicts that the soft law form should not be as sticky in terms of continued compliance because the reputational costs of withdrawing from commitments may not be as great as those associated with hard law.<sup>331</sup> Instead, Participants consistently deepened and extended their commitment to the Arrangement over its life; as the empirical data offered herein shows, compliance rates have been consistently high and do not show any of the slippage that Guzman might expect.

The Arrangement demonstrates that the soft law form, or any form that permits law to evolve dynamically, is functional in its own right without passing through a reputational filter. In focusing on the reputational impact of soft law, Guzman simply does not explore the technical procedures that contribute to compliance and thus does not fully appreciate law's dynamism as an important, compliance-furthering trait.<sup>332</sup> In fact, with reputation at its center, Guzman's theory becomes heavily focused outward on the perceptions and receptions of other states at the expense of an inward focus on the intricacies of legal rules. As such, his theory evinces some of the same shortcomings as his institutionalist forefathers: paying some minor attention to law and legal structures but ultimately failing to consider law with any significant attention to detail. If Guzman's theory is also to serve as an accurate predictor of compliance, it must grow to further appreciate law up close.

331. *See id.* at 1857 ("The ability to modulate the level of obligation should not be mistaken for a system of truly enforceable promises. By choosing one form of international agreement over another, countries are varying the reputational stake that they have in the obligation."); *id.* at 1880 (soft law agreements "are made with an understanding that they represent a level of commitment that falls below that of a treaty.").

332. The neo-institutionalists, while better than the classic rationalists and institutionalists, are of a related breed and continue to analyze law, particularly soft law, at a macro, rather than a micro, level, at times treating law in rather general terms and at other times circumscribing a detailed analysis or law with heavy reliance on game theory and economics. At times, Guzman over-simplifies the commitment decision and the compliance decision as two "yes or no" decision points in a simple, bilateral game and does not focus on the technicalities or intricacies of law that continually function through the life of any international agreement. Furthermore, Guzman's theory focuses primarily on the bilateral, rather than multilateral, agreements; multilateral agreements may offer more complex and challenging contexts in which to explain and analyze compliance. Guzman concedes that he embraces rational choice theory and will use bilateral game models to develop his theory, but when he veers from pure game theory to offer descriptive examples that lend themselves to more detailed analyses of rules, he gravitates toward examples like bilateral investment treaties or other bilateral arrangements instead of the more complex, multilateral agreements. *See, e.g.,* Guzman, *supra* note 177, at 1851 (discussion of bilateral investment treaties). *But see* Simmons, *Money and the Law*, *supra* note 12, at 338 (examining the IMF rules on currency convertibility in great detail and linking these rules to patterns of compliance).

When Guzman does focus on specific rules, his main focus (law), remains on sanction-like mechanisms. *See* Guzman *supra* note 177, at 1855 for an examination of Guzman's analysis of the structure of sanctions. *See also* Simmons, *Money and the Law*, *supra* note 12, at 338–40 (discussing official enforcement mechanisms in the IMF currency convertibility rules), and other structures common to hard law instruments.

In all fairness, Guzman's piece is designed to present a theory and beckons further empirical work, which may indeed remedy this line of criticism.

The Chayeses' theory is not without its own shortcomings. The managerial model is too narrow in its view of formal international law, namely treaties, as a normative predicate for compliance.<sup>333</sup> In the case of the Arrangement, the managerial model has explanatory force in spite of or even because of the Arrangement's soft form. The Arrangement's compliance-furthering procedures exerted a powerful compliance pull independent of a formal treaty. In fact, the Arrangement's soft law form was particularly conducive to the amendment and reassessment processes that preserved the Arrangement's dynamism. While Chayes and Chayes are self-consciously reticent to extend their model beyond the formal treaty context, the Arrangement suggests that this constriction may stymie their model's growth and widespread applicability.

This Article is a first step toward some synthesis of neo-institutionalism and managerialism. The Chayeses' theory is attractive because it provides a detailed plan for a compliance-oriented microstudy of law. How transparent is the regime? What are the procedures for amending or changing the Arrangement? How specific are the legal commitments? Is there an institutionalized tolerance for reasonable non-compliance? Guzman's weakness is his myopic approach to compliance through the lens of reputation, a lens that focuses outward at states vis-à-vis other states rather than inward at the role that the micro-structures of law and legal institutions may play in furthering compliance. Managerialism could thus complement neo-institutionalism, providing a roadmap for an introspective examination of law that supplements the extant reputational focus.

Interestingly, in the case of the Arrangement, the very procedures that Chayes and Chayes identify as crucial to management of compliance, such as notice-and-match, reporting, the common line, and loose amendment procedures, ultimately force Participants to communicate to each other throughout the life of the Arrangement. When Participants have to participate in the law, share (and receive) information, notify others of derogations, and ask for advice on resolving interpretive ambiguities, they cannot recede into anonymity but rather must worry about their respective reputations. This institutionalized discussion, backed by effective communication processes unconstrained by the strictures of hard law, reinforces the camaraderie of the Participants group. Thus, the compliance management techniques that Chayes and Chayes identify derivatively reinforce the prominence of reputation in compliance decisions and thereby buttress Guzman's reputation-infused neo-institutionalism.

The Arrangement also assists in harmonizing some of the underlying assumptions that ground both managerialism and neo-institutionalism. In *The New Sovereignty*, Chayes and Chayes explicitly concede that some of their underlying assumptions are familiar institutionalist (and neo-institutionalist) as-

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333. See *supra* notes 316–318 for a discussion of the normative role of law in the Chayeses' analysis.

sumptions, specifically that states are self-interested, rational actors.<sup>334</sup> They, like Guzman, even recognize that reputation factors into a state's rational compliance choices.<sup>335</sup> Yet the normative foundation of managerialism (that management of compliance begins, and must begin, with a "legally binding" treaty) is profoundly distinct from Guzman's conception of international law as a continuum that embraces both formal and informal legal commitments.

The Arrangement strikes at managerialism's normative underpinnings, demonstrating managerialism's viability in spite of its soft-law form. The Arrangement thereby suggests that the normative pull of a formal treaty is not a necessary predicate to managed compliance. Consequently, the Arrangement permeates the foundational wall that stands between Chayes and Chayes and Guzman and places both theories on the same plane with common, or at least not starkly divergent, assumptions.

The foregoing analysis assumes that the Arrangement does not exert a normative pull because it is not a binding form of international law, and therefore suggests that managerialism, which is quite useful in explaining compliance in the Arrangement's case, may stand without its normative base. Alternatively, we must at least consider whether the Arrangement, despite its soft law form, nonetheless exerts a normative pull comparable to that of a hard treaty. In so doing, we inevitably confront the utility and functionality of the soft law/hard law categorical distinctions.

Current international norms pigeonhole international instruments into the categories of hard, binding international law,<sup>336</sup> which includes formal treaties, international agreements, and hardened customary international norms, or soft, non-binding international law that includes "everything else."<sup>337</sup> This classification scheme has been clumsy. The categorical approach is easy in the case of a formal treaty which is clearly hard law or in the case of the Arrangement whereby the Participants explicitly state in the preamble that the instrument is a mere gentlemen's agreement.<sup>338</sup> However,

334. Chayes and Chayes admit that much of their analysis is an expansion of the institutionalist enterprise. See CHAYES & CHAYES, *supra* note 177, at 229. They also recognize that state interests remain paramount in compliance decisions. *Id.* at 183 ("If issues of noncompliance and enforcement are endemic, the real problem is likely to be that the original bargain did not adequately reflect the interests of those that would be living under it."). *Id.* at 4-5 (arguing that treaty making is, in part, a process by which states "weigh the benefits and burdens of commitment" and that states comply because compliance saves "transaction costs"). See also *id.* at 134 (arguing that transparency mechanisms are important through use of the arguments of "economics, game theory, and related disciplines").

335. Chayes and Chayes also recognize that reputational costs are important in compliance decisions. CHAYES & CHAYES, *supra* note 180, at 240 (in discussing Brazil's willingness to abide by IMF arrangements, they argue that "stigma" or reputation is important in Brazil's compliance decisions). Where they deviate from most rationalists, be they institutionalists or any other breed, is in their ascribing to law an active role in the continual process of managing compliance.

336. See *supra* note 232 and accompanying text.

337. See *supra* note 238 and accompanying text.

338. The Arrangement, *supra* note 4, Introduction at 8.

there is a host of international instruments that fall somewhere in between and may defy comfortable categorization.<sup>339</sup>

In part because of the imprecision in the definition of soft law and in part because of the discomfort in using the term “law” to describe an instrument that is non-binding, scholars and policymakers frequently use the binding/non-binding axis as a surrogate for whether a rule actually qualifies as true (or hard) law. If, in the face of a “binding” international legal instrument a state disregards it, many are quick to proclaim that because the rule did not in practice “bind,” it must in fact be a “non-binding” norm, a term that is used to describe those international rules and regulations that are something less than true law.<sup>340</sup> In the world of international law, this predicament harkens the all-too-familiar “what is law” debate that questions the very existence of international law as a result of willful non-compliance in an anarchical world without any hard enforcement mechanisms.<sup>341</sup>

The case of the Arrangement poses a different conceptional problem. While the Arrangement is explicitly a non-binding gentlemen’s agreement, it nonetheless embodies the specificity and precision typical of hard law commitments. Additionally, in practice, the Arrangement catalyzes widespread compliance whereby states act as if they were bound. One inevitably wants to label the Arrangement “law” because it looks like law and performs as law is supposed to perform. Yet how can the Arrangement be law when it is a self-professed non-binding instrument? The Arrangement fundamentally challenges us to ask whether the law (hard law)/non-law (soft law) dis-

339. See BARRY CARTER & PHILLIP TRIMBLE, *INTERNATIONAL LAW* 4 (3d ed. 1999) (demonstrating how categories of international law create “ambiguities”). See also JONATHAN L. CHARNEY, *Compliance with International Soft Law*, in COMMITMENT AND COMPLIANCE, *supra* note 147, at 115, 115 (arguing that it is sometimes difficult to distinguish between a “legally binding” international agreement and a “non-binding” international agreement).

340. See generally Lipson, *supra* note 307, at 508 (“In international affairs, then, the term ‘binding agreement’ is a misleading hyperbole.”). This predicament is anomalous because we do not arrive at similar conclusions when individuals violate domestic law and statutes—such as local law requiring the carrying of a driver’s license.

341. See, e.g., JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 201 (1954) (“And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly called so) set by general opinion.”); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT’L L. 705 (1988) (framing the debate with the following question: “Why should rules, unsupported by an effective structure of coercion comparable to a national police force, nevertheless elicit so much compliance, even against perceived self-interest, on the part of sovereign states?”); LOUIS HENKIN, *HOW NATIONS BEHAVE* 13–27 (2d ed. 1979) (describing the critics of international law in the following terms: “In sum, to many an observer, governments seem largely free to decide whether to agree to new law, whether to accept another nation’s view of existing law, whether to comply with agreed law. International law, then is voluntary and only hortatory.”). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Introductory Note, Part I (“The absence of central legislative and executive institutions has led to skepticism about the legal quality of international law. Many observers consider international law to be only a series of precepts of morality or etiquette, of cautions and admonitions lacking in both specificity and binding quality . . . . These impressions are mistaken.”).

tinctions are really about law being binding or non-binding or whether hard law and soft law divide along some other axis.

In providing a logical, functional answer to this question, Guzman makes a unique and substantial contribution to the compliance literature. Guzman argues that the hard law/soft law distinctions are little more than cosmetic labels on a unified "law" continuum.<sup>342</sup> The difference between soft law and hard law is not a matter of falling inside or outside of the formal categorical definition of international law<sup>343</sup>—which in turn separates binding from non-binding instruments—but rather a matter of calibrating or signaling expected reputational costs of non-compliance. Guzman's conception thereby eschews the awkward binding/non-binding distinction as the pivotal axis. Soft law and hard law are equally binding or non-binding as the state's decision on whether to actually be bound to any international rule is a result of its rational weighing of the costs and benefits of deviance.<sup>344</sup>

Guzman's theory of international law importantly envelops instruments like the Arrangement. Under Guzman's scheme, the Arrangement is law—not hard law, not soft law, just law. The Arrangement's form, a soft exterior housing specific, technical rules typical of hard instruments, modulates the costs of subsequent non-compliance, suspended somewhere between the significant reputational commitment attached to a formal treaty and the limited reputational commitment of a private diplomatic handshake. In solving the Arrangement's paradox of high compliance in spite of its non-binding cloak, Guzman's reconception of international law is initially attractive and certainly deserving of further study.

In the end, this Article argues that the Arrangement itself—whether a soft "non-binding" instrument or, in Guzman's scheme, mere "law"—is an important, if not decisive, engine of profound and sustained compliance. Whether this conclusion applies beyond the Arrangement to international legal regulation more generally clearly demands additional comparative analysis. Regardless, the Arrangement is a powerful example for those—like Chayes and Chayes and Guzman—that embrace the import of international rules in compliance decisions. It is a potent counterexample for others, like

342. See Guzman, *supra* note 177, at 1881 ("Agreements among states lie on a spectrum of commitment. The same reputational issues influence such promises regardless of the form in which they are made, but the magnitude of the reputational effect varies with the level of commitment.")

343. See *id.* ("This theory makes the traditional separation of treaties from soft law difficult to maintain because the theory recognizes no clear distinction between treaties and other promises."). See also *id.* at 1882 ("The new theory recognizes that the discrete categories of treaties, CIL, and soft law, though perhaps useful, do not themselves define international law or represent the only possible levels of commitment.")

344. While Guzman's functional theory of international law uniquely makes room for soft law as law, other scholars are importantly examining the role of soft law norms. Jacobson & Weiss, *supra* note 226. A cluster of international legal scholars examine soft law in great detail, looking at types of soft instruments and attempting to link characteristics of soft law instruments with compliance. As impressive as this study is, however, it is, for the most part, as evidenced by its title, circumscribed by the notion that "non-binding norm" and "soft law" are interchangeable terms. Guzman's innovative contribution is that of delinking "soft law" from the "binding/non-binding" axis.

the realists and rationalists, who tend to minimize the importance of legal rules in explaining compliance. And maybe the Arrangement even challenges us to think critically about why we categorize only certain types of international rules as binding, or hard, international law. The Arrangement, and thereby this Article, cannot provide the answers to these fundamental, almost existential, theoretical questions. But the Arrangement is indeed provocative and may prove useful in furthering scholarly and theoretical debate in the future.

## VII. CONCLUSION

This Article concludes that the Arrangement's rules matter. Yet these rules do not matter simply because they are packaged in a form, like a treaty, that inherits the binding label. Indeed, much binding international law actually binds states, but so-called non-binding rules, such as those embodied in the Arrangement, may also in practice bind states, as dramatically illustrated by the Arrangement's strong record of compliance documented in this Article. The binding label is simply not the appropriate arbiter of compliance here. International rules must work effectively to steer, maybe even manipulate, states toward a path of steady compliance. The Arrangement works. It works because it dynamically engages Participants within a malleable form that is hospitable to innovation, evolution, and correction. It works because the nitty-gritty details force Participants to dialogue and engage the document's strengths and weaknesses. And it works because it embodies a flexible, practical understanding of compliance itself that invites rather than alienates. Indeed, states will continue to act in self-interested ways. But even if an international rule is in a country's self-interest, not all arrangements will effectively promote compliance and not all will attract the unswerving loyalty of state parties. At a moment when international law and international institutions are mounting, the Arrangement can teach much about legal rules and legal structures. But before we can meaningfully learn, we must consider a world beyond the formal treaties that adorn headlines. Here, in the underbrush, lies an agreement that lawyers do not recognize technically as law but nonetheless, in its elegance and dynamism, functions like law and shapes the everyday minutiae of state practice.

## APPENDIX

TABLE 1: HISTORY OF THE ARRANGEMENT

|      | Major Agreement    | Interest Rates   | Repayment Terms  | Cash Payments   | Minimum Premiums | Other Parameters   | Tied Aid | Individual Sector Understandings          |
|------|--------------------|--|--|---|------------------|--|----------|---|
| 1976 | <i>Consensus</i>   | <ul style="list-style-type: none"> <li>• Minimum interest rates</li> </ul>             | <ul style="list-style-type: none"> <li>• Maximum durations of credit</li> </ul>  | <ul style="list-style-type: none"> <li>• Minimum down payments</li> </ul>       |                  |  |          |   |
| 1978 | <i>Arrangement</i> | <ul style="list-style-type: none"> <li>• Minimum interest rates set at 7-8%</li> </ul> | <ul style="list-style-type: none"> <li>• Standardized repayment schedule</li> <li>• Maximum repayment term of 8½ years for OECD countries and 10 years for LDCs</li> </ul> | <ul style="list-style-type: none"> <li>• Minimum down payment of 15%</li> </ul> |                  | <ul style="list-style-type: none"> <li>• Common reporting procedures</li> <li>• Prior notification for derogation</li> </ul> |          | <i>'Commonline' Agreement on Aircraft</i> |

|      | Major Agreement                           | Interest Rates   | Repayment Terms | Cash Payments | Minimum Premiums | Other Parameters | Tied Aid   | Individual Sector Understandings                   |
|------|---|--|-----------------|---------------|------------------|------------------|--|--|
| 1981 |   | <ul style="list-style-type: none"> <li>Matrix minimum interest rates increased</li> </ul>  |                 |               |                  |                  |  | <i>Commercial Aircraft Understanding</i> tightened |
| 1982 | <i>No-derogation Engagement</i>           |  |                 |               |                  |                  |  |  |
| 1983 | <i>Agreement to Uniform Moving Matrix</i> | <ul style="list-style-type: none"> <li>Minimum matrix interest rates set at 10-12%</li> <li>CIRRs for low interest rate currencies introduced</li> </ul> |                 |               |                  |                  | <ul style="list-style-type: none"> <li>Minimum grant element of 20%</li> </ul> |  |
| 1984 |   |  |                 |               |                  |                  |  | <i>Nuclear Power Plant Understanding</i>           |



|      | Major Agreement   | Interest Rates   | Repayment Terms | Cash Payments | Minimum Premiums | Other Parameters | Tied Aid  | Individual Sector Understandings                                      |
|------|---|--|-----------------|---------------|------------------|------------------|---|---|
| 1985 |   |  |                 |               |                  |                  | <ul style="list-style-type: none"> <li>• Minimum grant element of 25%</li> <li>• 21-day advance notice for offers of grant aid between 25% and 50%</li> </ul> |   |
| 1986 | <i>Good Procurement Practices for Official Development Assistance</i> | <ul style="list-style-type: none"> <li>• Standard formula for setting CIRRs</li> </ul> |                 |               |                  |                  |   | <i>Civil Aircraft Understanding</i> incorporated into the Arrangement |

|      | Major Agreement            | Interest Rates  | Repayment Terms | Cash Payments | Minimum Premiums | Other Parameters  | Tied Aid  | Individual Sector Understandings |
|------|----------------------------|---|-----------------|---------------|------------------|---|---|----------------------------------|
| 1987 | <i>Wallén Package</i>      | <ul style="list-style-type: none"> <li>Matrix interest rate eliminated for exports of wealthier (Category I) countries</li> </ul> |                 |               |                  | <ul style="list-style-type: none"> <li>Face-to-face consultations for competitive offers</li> </ul> | <ul style="list-style-type: none"> <li>Elimination of subsidies in OECD and East-West trade</li> <li>Minimum concessionality level of 35%</li> <li>New method for calculating grants, the differential discount rate</li> </ul> |                                  |
| 1992 | <i>Arrangement revised</i> |   |                 |               |                  |   |   |                                  |

|      | Major Agreement                                    | Interest Rates  | Repayment Terms   | Cash Payments | Minimum Premiums | Other Parameters | Tied Aid | Individual Sector Understandings  |
|------|--|---|---|---------------|------------------|------------------|----------|---|
| 1994 | <i>Schaerer Package</i> (effective September 1995) | <ul style="list-style-type: none"> <li>• Matrix interest rates eliminated</li> <li>• CIRRs effective</li> </ul> | <ul style="list-style-type: none"> <li>• Classification of markets streamlined into two categories for maximum repayment terms</li> </ul> |               |                  |                  |          | <i>Agreement Respecting Normal Competitive Shipbuilding and Repair Industry</i> |
| 1996 | <i>Ex Ante Guidance for Tied Aid</i>               |   |   |               |                  |                  |          |   |

|      | Major Agreement                           | Interest Rates | Repayment Terms | Cash Payments | Minimum Premiums   | Other Parameters   | Tied Aid | Individual Sector Understandings   |
|------|---|----------------|-----------------|---------------|--|--|----------|--|
| 1997 | Knaepen Package (effective April 1, 1999) |                |                 |               | <ul style="list-style-type: none"> <li>Guiding principles for setting minimum risk-based premium fees for country and sovereign risks</li> </ul> | <ul style="list-style-type: none"> <li>Electronic Exchange of Information introduced to aid in transparency</li> </ul> |          | Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (effective February 15, 1999) |
| 1998 | Arrangement revised                       |                |                 |               |  |  |          | Project Finance Understanding  |

Sources: JOHN E. RAY, MANAGING OFFICIAL EXPORT CREDITS: THE QUEST FOR A GLOBAL REGIME 52 (1995); OECD, THE EXPORT CREDIT ARRANGEMENT: ACHIEVEMENTS AND CHALLENGES, 1978-1998 (1998); Andrew M. Moravcsik, *Disciplining trade finance: the OECD Export Credit Arrangement*, 43 INT'L ORG. 173 (1989); OECD, EXPORT CREDIT FINANCING SYSTEMS: IN OECD MEMBER COUNTRIES AND NON-MEMBER ECONOMIES (6th ed. 2001).

TABLE 2: PARTICIPANT COMPLIANCE WITH ARRANGEMENT'S EXPORT CREDIT PROVISIONS (2003)

|                         | INTEREST RATES (CIRRs) | STARTING POINT | REPAYMENT TERM | REPAYMENT INSTALLMENTS | CASH PAYMENTS | LOCAL COSTS         | MINIMUM PREMIUMS    | COMPLIANCE INDEX |
|-------------------------|------------------------|----------------|----------------|------------------------|---------------|---------------------|---------------------|------------------|
| AUSTRIA <sup>345</sup>  | Compliance             | Compliance     | Compliance     | Compliance             | Compliance    | Compliance          | Probable Compliance | 3.8              |
| AUSTRIA <sup>346</sup>  | Probable Compliance    | Compliance     | Compliance     | Compliance             | Compliance    | Compliance          | Compliance          | 3.5              |
| BELGIUM <sup>347</sup>  | Compliance             | Compliance     | Compliance     | Compliance             | Compliance    | Compliance          | Probable Compliance | 3.8              |
| CANADA <sup>348</sup>   | Compliance             | Compliance     | Compliance     | Compliance             | Compliance    | Compliance          | Compliance          | 4.0              |
| DEN-MARK <sup>349</sup> | Compliance             | Compliance     | Compliance     | Compliance             | Compliance    | Probable Compliance | Compliance          | 3.9              |
| FINLAND <sup>350</sup>  | Compliance             | Compliance     | Compliance     | Compliance             | Compliance    | Compliance          | Compliance          | 4.0              |
| FRANCE <sup>351</sup>   | Compliance             | Compliance     | Compliance     | Compliance             | Compliance    | Compliance          | Probable Compliance | 3.8              |
| GERMANY <sup>352</sup>  | Compliance             | Compliance     | Compliance     | Compliance             | Compliance    | Compliance          | No Compliance       | 3.0              |

|                            | INTEREST RATES (CIRRS) | STARTING POINT | REPAYMENT TERM | REPAYMENT INSTALLMENTS | CASH PAYMENTS  | LOCAL COSTS         | MINIMUM PREMIUMS    | COMPLIANCE INDEX |
|----------------------------|------------------------|----------------|----------------|------------------------|----------------|---------------------|---------------------|------------------|
| GREECE <sup>355</sup>      | Not Applicable         | Unavailable    | Compliance     | Unavailable            | Unavailable    | Unavailable         | No Compliance       | 1.0              |
| IRELAND <sup>354</sup>     | Not Applicable         | Not Applicable | Not Applicable | Not Applicable         | Not Applicable | Not Applicable      | Not Applicable      | Not Applicable   |
| ITALY <sup>355</sup>       | Compliance             | Compliance     | Compliance     | Compliance             | Compliance     | Compliance          | Compliance          | 4.0              |
| JAPAN <sup>356</sup>       | Compliance             | Compliance     | Compliance     | Probable Compliance    | Compliance     | Probable Compliance | Probable Compliance | 3.5              |
| KOREA <sup>357</sup>       | Compliance             | Compliance     | Compliance     | Compliance             | Compliance     | Compliance          | Unavailable         | 3.3              |
| LUXEMBOURG <sup>358</sup>  | Compliance             | Compliance     | Compliance     | Compliance             | Compliance     | Compliance          | Probable Compliance | 3.8              |
| NETHERLANDS <sup>359</sup> | Compliance             | Unavailable    | Compliance     | Unavailable            | Compliance     | Compliance          | Compliance          | 3.5              |
| NEW ZEALAND <sup>360</sup> | Unavailable            | Unavailable    | Compliance     | Compliance             | Unavailable    | Compliance          | Probable Compliance | 2.4              |
| NORWAY <sup>361</sup>      | Compliance             | Compliance     | Compliance     | Compliance             | Compliance     | Compliance          | Probable Compliance | 3.8              |

|                               | INTEREST RATES (CIRRS) | STARTING POINT | REPAYMENT TERM | REPAYMENT INSTALLMENTS | CASH PAYMENTS       | LOCAL COSTS         | MINIMUM PREMIUMS    | COMPLIANCE INDEX |
|-------------------------------|------------------------|----------------|----------------|------------------------|---------------------|---------------------|---------------------|------------------|
| PORTUGAL <sup>362</sup>       | Compliance             | Compliance     | Compliance     | Compliance             | Probable Compliance | Unavailable         | Compliance          | 3.5              |
| SPAIN <sup>363</sup>          | Compliance             | Unavailable    | Unavailable    | Unavailable            | Unavailable         | Unavailable         | Probable Compliance | 2.2              |
| SWEDEN <sup>364</sup>         | Probable Compliance    | Compliance     | Compliance     | Compliance             | Probable Compliance | Probable Compliance | Unavailable         | 2.8              |
| SWITZERLAND <sup>365</sup>    | Not Applicable         | Compliance     | Compliance     | Compliance             | Probable Compliance | Compliance          | Compliance          | 3.9              |
| UNITED KINGDOM <sup>366</sup> | Compliance             | Compliance     | Compliance     | Compliance             | Compliance          | Compliance          | Probable Compliance | 3.8              |
| UNITED STATES <sup>367</sup>  | Compliance             | Compliance     | Compliance     | Compliance             | Compliance          | Compliance          | Compliance          | 4.0              |

This Table uniquely aggregates information on ECAs. The footnotes include information on each ECA and the support for the entries on the chart.

*Compliance* means that the ECA explicitly stated that it complies with the particular Arrangement rule. When a country claims that “credit terms,” “terms and conditions,” or “lending terms” are consistent with the Arrangement, this is deemed to include starting point, repayment term, and repayment installment. “Cash payments,” which could be considered a “credit term,” is usually split out specifically. Therefore, “probable compliance” for “cash payments” is implied when ECAs claim to offer “credit terms” in accordance with the Arrangement.

*Probable compliance* means that one could realistically assume from publicly available information that the ECA is complying with the terms of the Arrangement. When a country claims generally that it complies with the Arrangement, in the absence of any more specific information, we have determined that this represents “probable compliance.”

*No compliance* means that the ECA does not appear to be complying with the terms of the Arrangement.

*Not applicable* means, given the particular ECA’s financing system, that the Arrangement’s rules do not apply. For example, if an ECA does not give direct loans, then the CIRR would not apply (guarantees are given to commercial banks, that would likely link interest rates to LIBOR or some other internationally accepted floating rate). Also, Ireland has exited the official export credit business and thus, although a Participant through its membership in the E.U., the Arrangement does not apply.

*Unavailable* means that it is impossible, given the information publicly available, to draw any conclusion about whether a particular ECA complies with a particular Arrangement rule.





|                             | INTEREST RATES (CIRRS) | STARTING POINT      | REPAYMENT TERM | REPAYMENT INSTALLMENTS | CASH PAYMENTS | LOCAL COSTS         | MINIMUM PREMIUMS    | COMPLIANCE INDEX |
|-----------------------------|------------------------|---------------------|----------------|------------------------|---------------|---------------------|---------------------|------------------|
| SLOVENIA <sup>375</sup>     | Compliance             | Compliance          | Compliance     | Compliance             | Compliance    | Compliance          | Probable Compliance | 3.8              |
| SOUTH AFRICA <sup>376</sup> | No Compliance          | Unavailable         | Compliance     | Compliance             | Compliance    | Unavailable         | Probable Compliance | 2.1              |
| TAIWAN <sup>377</sup>       | Compliance             | Compliance          | Compliance     | Compliance             | Compliance    | Unavailable         | Unavailable         | 2.9              |
| TURKEY <sup>378</sup>       | No Compliance          | Probable Compliance | Compliance     | Probable Compliance    | Compliance    | Probable Compliance | Probable Compliance | 2.5              |

The terms "compliance," "probable compliance," "no compliance," "unavailable," and "not applicable" are defined herein as in *Table 2*.

For a full listing of ECAs throughout the world, see <http://www.hbs.edu/profinportal/ecas.htm> (last visited Dec. 2, 2003), [http://www.oecd.org/countrylist/0,2578,en\\_2649\\_34169\\_1783635\\_1\\_1\\_1\\_37431,00.html](http://www.oecd.org/countrylist/0,2578,en_2649_34169_1783635_1_1_1_37431,00.html) (OECD member ECAs) (last visited Dec. 2, 2003), and [http://www.oecd.org/countrylist/0,2578,en\\_2649\\_34169\\_1783754\\_1\\_1\\_1\\_37431,00.html](http://www.oecd.org/countrylist/0,2578,en_2649_34169_1783754_1_1_1_37431,00.html) (non-OECD member ECAs) (last visited Dec. 2, 2003).

This Table includes only some non-Participant countries, as noted in the text, Part IV. Other non-Participant ECAs do not significantly comply with the Arrangement.

TABLE 4: G7 COMPLIANCE WITH THE ARRANGEMENT'S EXPORT CREDIT PROVISIONS (1982-2003)

|                | 2003 | 1999/1995 | 1990 | 1987 | 1982 |
|----------------|------|-----------|------|------|------|
| CANADA         | 4.0  | 3.3       | 3.7  | 3.2  | 3.4  |
| FRANCE         | 3.8  | 3.7       | 3.7  | 3.9  | 4.0  |
| GERMANY        | 3.0  | 4.0       | 4.0  | 3.5  | 4.0  |
| ITALY          | 4.0  | 3.8       | 3.3  | 3.3  | 3.0  |
| JAPAN          | 3.5  | 3.8       | 3.8  | 2.8  | 3.8  |
| UNITED KINGDOM | 3.8  | 4.0       | 4.0  | 3.7  | 4.0  |
| UNITED STATES  | 4.0  | 4.0       | 4.0  | 3.7  | 3.7  |
| AVERAGE        | 3.7  | 3.8       | 3.8  | 3.4  | 3.7  |

The terms "compliance," "probable compliance," "no compliance," "unavailable," and "not applicable" are defined herein as in *Table 2*.

The information compiled in this chart comes from earlier versions of OECD, EXPORT CREDIT FINANCING SYSTEMS. The 1995 version is an open binder, and some ECAs updated their information in that binder in 1999.





## COMPLIANCE WITH EXPORT CREDIT PROVISIONS (1987)

|                               | INTEREST RATES | STARTING POINT         | REPAY-<br>MENT<br>TERMS | REPAY-<br>MENT<br>INSTALL-<br>MENTS | CASH PAYMENTS          | LOCAL COSTS | MINIMUM PREMIUMS  |
|-------------------------------|----------------|------------------------|-------------------------|-------------------------------------|------------------------|-------------|-------------------|
| CANADA <sup>393</sup>         | Compliance     | Unavailable            | Compliance              | Unavailable                         | Probable<br>Compliance | Compliance  | Not<br>Applicable |
| FRANCE <sup>394</sup>         | Compliance     | Probable<br>Compliance | Compliance              | Compliance                          | Compliance             | Compliance  | Not<br>Applicable |
| GERMANY <sup>395</sup>        | Compliance     | Compliance             | Compliance              | Compliance                          | Compliance             | Unavailable | Not<br>Applicable |
| ITALY <sup>396</sup>          | Compliance     | Compliance             | Compliance              | Compliance                          | Probable<br>Compliance | Unavailable | Not<br>Applicable |
| JAPAN <sup>397</sup>          | Unavailable    | Compliance             | Compliance              | Compliance                          | Probable<br>Compliance | Compliance  | Not<br>Applicable |
| UNITED KINGDOM <sup>398</sup> | Compliance     | Compliance             | Unavailable             | Compliance                          | Compliance             | Compliance  | Not<br>Applicable |
| UNITED STATES <sup>399</sup>  | Compliance     | Unavailable            | Compliance              | Compliance                          | Compliance             | Compliance  | Not<br>Applicable |

## COMPLIANCE WITH EXPORT CREDIT PROVISIONS (1982)

|                        | INTEREST RATES (CIRRs) | STARTING POINT | REPAYMENT TERMS     | REPAYMENT INSTALLMENTS | CASH PAYMENTS       | LOCAL COSTS | MINIMUM PREMIUMS |
|------------------------|------------------------|----------------|---------------------|------------------------|---------------------|-------------|------------------|
| CANADA <sup>400</sup>  | Compliance             | Unavailable    | Probable Compliance | Unavailable            | Probable Compliance | Compliance  | Not Applicable   |
| FRANCE <sup>401</sup>  | Compliance             | Compliance     | Compliance          | Compliance             | Compliance          | Compliance  | Not Applicable   |
| GERMANY <sup>402</sup> | Compliance             | Compliance     | Compliance          | Compliance             | Compliance          | Compliance  | Not Applicable   |
| ITALY <sup>403</sup>   | Compliance             | Compliance     | Compliance          | Compliance             | Unavailable         | Unavailable | Not Applicable   |
| JAPAN <sup>404</sup>   | Compliance             | Compliance     | Compliance          | Compliance             | Probable Compliance | Compliance  | Not Applicable   |

|                               | INTEREST RATES (CIRRs) | STARTING POINT | REPAY-MENT TERMS | REPAY-MENT INSTALLMENTS | CASH PAYMENTS | LOCAL COSTS | MINIMUM PREMIUMS |
|-------------------------------|------------------------|----------------|------------------|-------------------------|---------------|-------------|------------------|
| UNITED KINGDOM <sup>405</sup> | Compliance             | Compliance     | Compliance       | Compliance              | Compliance    | Compliance  | Not Applicable   |
| UNITED STATES <sup>406</sup>  | Compliance             | Unavailable    | Compliance       | Compliance              | Compliance    | Compliance  | Not Applicable   |



345. Australia's ECA is the Export Finance and Insurance Corporation (EFIC), available at <http://www.efic.gov.au> (last visited Nov. 16, 2003). In the EFIC's literature for Australian exporters, it maintains that "[a]s Australia's export credit agency, EFIC must adhere to OECD guidelines for export credit agencies."

*Interest Rates (CIRRs)* "Interest rates charged to customers are set in accordance with OECD Guidelines for Officially Supported Export Credits." EFIC, *Managing Export Risk: Meeting Exporters Needs in an Increasingly Competitive Trading Environment*, Annual Report 2002, 56.

*Starting Point* The starting point is consistent with Arrangement guidelines. OECD, *Australia, in EXPORT CREDIT FINANCING SYSTEMS*, *supra* note 24, at 5.

*Repayment Terms* "Loan repayment period range from two years to a maximum of ten years." *Id.* at 11.

*Repayment Installments* Repayment of principal and interest "will be in a set number of equal and consecutive semi-annual installments. . . ." EFIC, available at <http://www.efic.gov.au>.

*Cash Payments* "EFIC can finance up to 85% of the value of an eligible export contract." OECD, *Australia, in EXPORT CREDIT FINANCING SYSTEMS*, *supra* note 24, at 10.

*Local Costs* "EFIC may finance up to 85% of the Eligible Contract Value, plus an additional amount towards the local costs incurred in the destination country in implementing the Contract. Under an EFIC loan. . ." See EFIC, available at <http://www.efic.gov.au>.

*Minimum Premiums* "Premiums are payable against exports declared. They are based upon factors such as buyer credit rating, country risk assessment, policy type, payment terms covered and transaction risks." OECD, *Australia, in EXPORT CREDIT FINANCING SYSTEMS*, *supra* note 24, at 6.

346. Austria's ECAs are the Bundesministerium für Finanzen (Federal Ministry of Finance), available at <http://www.bmf.gv.at>, and the Österreichische Kontrollbank AG (OKB), available at <http://www.oekb.at> (last visited Nov. 16, 2003).

*Interest Rates* "[R]ates are not subject to Arrangement guidelines." However, "[i]n cases of refinancing credits in foreign currencies, CIRRs are applied." OECD, *Austria, in EXPORT CREDIT FINANCING SYSTEMS*, *supra* note 24, at 8.

*Starting Point* "Terms and conditions of cover are based on the Arrangement." *Id.* at 5.

*Repayment Term* "[T]erms of payment . . . may not exceed . . . 10 years." See OKB, available at <http://www.oekg.at>.

*Repayment Installments* "Terms and conditions of cover are based on the Arrangement." OECD, *Austria, in EXPORT CREDIT FINANCING SYSTEMS*, *supra* note 24, at 5.

*Cash Payments* "Down payments and progress payment are required and amount in general to a minimum of 15% of the total contract value." *Id.* at 7.

*Local Costs* Austria includes "local costs up to the amount of the cash payment." OECD, *Arrangement on Export Credits, avail-*

- able at* <http://www.oekb.at/english/1/02/110200000.shtml> (last visited Nov. 16, 2003).
- "As of 1 April 1999, the Knaepen Package on Guiding Principles for Setting Premia and Related Conditions applies." OECD, *Austria*, in EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 5.
347. Belgium's ECA is the Office National du Ducroire/Nationale Delcredereinst (ONDD), *available at* [http://www.delcredere.be/Ducroire/WebSite.nsf/AllWeb/index\\_fr.htm](http://www.delcredere.be/Ducroire/WebSite.nsf/AllWeb/index_fr.htm) (last visited Nov. 16, 2003).
- Interest Rates*
- Starting Point*
- There is no published CIRR for Belgium. However, ONDD claims that its rates are consistent with the Arrangement. OECD, *Belgium*, in EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 4.
- "Cash payments, repayment schedules and cover for local costs are dealt with in accordance with the Arrangement." *Id.* at 6.
- Repayment Term*
- Repayment Installments*
- Id.*
- Cash Payments*
- Id.*
- Local Costs*
- Id.*
- Minimum Premiums*
- ONDD states that it complies with the Arrangement. *Id.*
348. Canada's ECA is the Export Development Corporation (EDC), *available at* [http://www.edc.ca/index\\_e.htm](http://www.edc.ca/index_e.htm) (last visited Nov. 16, 2003). Canada maintains it is in complete compliance with the Arrangement.
- Interest Rates*
- "Canada Account financing is structured following OECD guidelines." *See generally* ECD, at [http://edc.ca/index\\_e.htm](http://edc.ca/index_e.htm) (last visited Nov. 16, 2003).
- Starting Point*
- "The starting point of credit for these purposes is defined as final commissioning of the project or final acceptance of goods in accordance with the terms of the commercial export contract or will be determined by a date decided upon by EDC in accordance with the rules of the OECD Consensus." EDC, *Governing Agreements & CIRR Rates*, *available at* [http://www.edc.ca/ProdServ/Financing/exposurefees/agreements\\_e.htm](http://www.edc.ca/ProdServ/Financing/exposurefees/agreements_e.htm) (last visited Nov. 16, 2003).
- "The Consensus has set maximum repayment terms for every country." *Id.*
- Repayment Term*
- Repayments are made in equal semi-annual installments beginning from the starting point of credit. OECD, *Canada*, in EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 7.
- Repayment Installments*
- "Financing is normally provided for up to 85% of the Canadian portion of the contract." *Id.*
- Cash Payments*
- "Occasionally, [financing] may be increased to 100% to facilitate the financing for a local-cost component related to the exporter's contract." *Id.*
- Local Costs*
- "For officially supported business, EDC's return on each transaction must meet or exceed the applicable minimum premium of the Arrangement." *Id.*
- Minimum Premiums*
349. Denmark's ECA is the Eksport Kredit Fonden (EKF), *available at* <http://www.ekf.dk> (last visited Nov. 16, 2003).
- Interest Rates*
- "On 1 January 1997, the CIRR Programme for Export Credits and the CIRR Programme for Mixed Credits were

- Starting Point*  
 established." OECD, *Denmark, in EXPORT CREDIT FINANCING SYSTEMS, supra* note 24, at 2.  
 9. "For credits of two years or more, the normal Arrangement rules on credit terms and cash payments apply." *Id.* at 2.
- Repayment Term*  
*Repayment Installments*  
 "The maturity of the export credit must not be less than two years and can be up to ten years." *Id.* at 12.  
 "For credits of two years or more, the normal Arrangement rules on credit terms and cash payments apply." *Id.* at 9.
- Cash Payments*  
*Minimum Premiums*  
 "As of April 1, 1999, EKF adheres to the Knaepen Package. See EFK, *available at* <http://www.ekf.dk> (last visited Nov. 16, 2003).  
 350. Finland's ECAs are the FIDE Ltd., *available at* <http://www.fide.fi>, and Finnvera plc, *available at* <http://www.finnvera.fi> (last visited Dec. 1, 2003). FIDE generally maintains that "through FIDE, domestic and foreign investment-grade financial institutions domiciled either in Finland or abroad are able to provide export credits in accordance with the Arrangement." OECD, *Finland, in EXPORT CREDIT FINANCING SYSTEMS, supra* note 24, at 12.  
*Interest Rates*  
 Finland "provides interest rate stabilisation for officially supported export credits at CRRs in accordance with the Arrangement." OECD, *Finland, in EXPORT CREDIT FINANCING SYSTEMS, supra* note 24, at 4.  
 See FIDE: ANNUAL REPORT 2001, *available at* <http://www.fide.fi/english/Annual%20Report/annual%20report.htm> (last visited Dec. 1, 2003), at 7.  
 In accordance with the Arrangement: OECD, *Finland, in EXPORT CREDIT FINANCING SYSTEMS, supra* note 24, at 12.
- Repayment Term*  
 "Without grace period; normally in equal semi-annual instalments." *Id.* at 7.
- Repayment Installments*  
 "Down payment: minimum 15%." *Id.* at 7.
- Cash Payments*  
 "Local-cost financing may be covered within the limits of the Arrangement." *Id.* at 6.
- Local Costs*  
 "Finnvera's political and sovereign premium fees for risks exceeding two years have been adapted to conform with the minimum premium benchmarks under the Knaepen Package. . . ." *Id.* at 9.
- Minimum Premiums*  
 351. France's ECA is Compagnie Française d'Assurance pour le Commerce Extérieur (COFACE), *available at* <http://www.coface.com> (last visited Nov. 16, 2003).  
*Interest Rates*  
 "Medium-term export credits and the medium-term portion of long-term credits financed in French francs are stabilized by the BFCE on behalf of the Treasury. The BFCE makes up the difference between a reference rate (TRIBOR for credits in francs and PIBOR for credits in foreign currency) increased by the current bank margin (0.75% or 0.85%, the latter for loans or under FRF 20 million), and the cost of financing (the *taux de sortie*) in accordance with the Arrangement." OECD, *France, in EXPORT CREDIT FINANCING SYSTEMS, supra* note 24, at 11.  
 "In accordance with the Arrangement rules." *Id.* at 6.
- Repayment Term*

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| <i>Repayment Installments</i> | "Repayment of principal in equal half-yearly installments with no grace period." <i>Id.</i> at 7.  |
| <i>Cash Payments</i>          | "Generally, minimum cash payments of 15%. This may be increased up to 20 or 25% depending on the country and the buyer." <i>Id.</i>  |
| <i>Local Costs</i>            | "Local costs are covered and financed up to the amount of the cash payments and on the same terms as the export credit for the portion that may be repatriated. Assistance with local costs is provided only in exceptional cases and in accordance with the Arrangement." <i>Id.</i> at 7.  |
| <i>Minimum Premiums</i>       | "Premiums are invoiced when the policy is used and are calculated on the basis of the risks covered for the destination country and the period of exposure." Furthermore, COFACE refers to Categories I, II, and III when discussing its export finance programs. <i>Id.</i> at 7, 12.   |
| <i>Interest Rates</i>         | 352. Germany's ECAs are Hermes Kreditversicherungs-Aktiengesellschaft (Hermes), available at <a href="http://www.hermes-kredit.com">http://www.hermes-kredit.com</a> , C&L Deutsche Revision Aktiengesellschaft and Kreditanstalt für Wiederaufbau (KfW), available at <a href="http://www.kfw.de/EN/Inhalt.jsp">http://www.kfw.de/EN/Inhalt.jsp</a> (last visited Nov. 16, 2003), and C&L Deutsche Revision Aktiengesellschaft-Wirtschaftsprüfungsgesellschaft.<br>"Where official financing support is involved, export loans are subject to the regulations on minimum interest rates of the OECD Consensus. The minimum interest rate for such export loans is the "Commercial Interest Reference Rate" (CIRR)." KfW, CIRR, available at <a href="http://www.kfw.de/EN/Glossar/CIRR.jsp">http://www.kfw.de/EN/Glossar/CIRR.jsp</a> (last visited Nov. 16, 2003). |
| <i>Starting Point</i>         | "Depending on the type of export transaction, the starting point is the date of mean weighted delivery, the date of the last major delivery, or the date of readiness for operation of the equipment delivered." KfW, KfW/ERP Export Financing Programme, available at <a href="http://www.kfw.de/DE/Service/OnlineBib48/Merkblatt/182122.pdf">http://www.kfw.de/DE/Service/OnlineBib48/Merkblatt/182122.pdf</a> (last visited Dec. 1, 2003).  |
| <i>Repayment Term</i>         | "The maximum loan period varies between 8 ½ years from the starting point for industrialised countries and 10 years for developing countries." KfW, International Business is off to a Good Start, available at <a href="http://www.kfw.de/EN/Service/OnlineBib23/Export/export_eng.pdf">http://www.kfw.de/EN/Service/OnlineBib23/Export/export_eng.pdf</a> 10 (last visited Dec. 1, 2003).  |
| <i>Repayment Installments</i> | "In equal consecutive semi-annual instalments, depending on the loan term covered by HERMES." KfW, KfW/ERP Export Financing Programme, available at <a href="http://www.kfw.de/DE/Service/OnlineBib48/Merkblatt/182122.pdf">http://www.kfw.de/DE/Service/OnlineBib48/Merkblatt/182122.pdf</a> (last visited Dec. 1, 2003).   |
| <i>Cash Payments</i>          | "[T]he loan portion equals 85% of the contract value after deduction of down and interim payments." <i>Id.</i>   |
| <i>Local Costs</i>            | "Local-cost financing from German banks at market rates may be covered in accordance with rules laid down in the Arrangement." OECD, Germany, in EXPORT CREDIT FINANCING SYSTEMS, <i>supra</i> note 24, at 8.  |
| <i>Minimum Premiums</i>       | "A new premium system was put in place in July 1994. It replaces the old uniform rate systems and takes country risk into consideration. Five country categories have been established. Category I for the lowest country risk and Category V for the highest. Category III can be regarded as equivalent to the formerly used uniform rate, and   |

the premiums for the other categories are derived with respect to it. The premium rate in Category I corresponds to one-third of the Category III premium whereas the premium in Category V is double the premium in Category III." *Id.* at 10.

353. Greece's ECA is Export Credit Insurance Organisation (ECIO), *available at* <http://www.oaep.gr> (last visited Nov. 16, 2003).  
*Interest Rates*  
 "Commercial banks grant export credits directly. The interest rate is freely negotiable." OECD, *Greece, in* EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 5.

*Repayment Term*  
*Minimum Premiums*  
 ECIO implies that there is a maximum repayment term of five years. *Id.* at 4, 6.

"If export credit has been insured, the burden of the insurance premium must be added to the cost of financing. Premiums range from 0.3% to 3% of the invoice value of exports for credit terms up to nine months, and from 0.6% to 3.5% of the invoice for credit terms of up to three years. Premiums for longer credit, up to five years, are determined on a case-by-case basis. Premiums are generally flat-rate." *Id.* at 5-6.

354. Ireland's ECA was the Export Credit Section of the Department of Enterprise, Trade and Employment. "[I]t was announced on 8 February 1998 that the state was withdrawing from the provision of export credit insurance with immediate effect." OECD, *Ireland, in* EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 1.

355. Italy's ECAs are Istituto per i Servizi Assicurativi del Commercio Estero (SACE), *available at* <http://www.isace.it/portale/home.asp> and Società Italiana per le Imprese all'Estero S.p.A. (SIMEST S.p.A.), *available at* <http://www.simest.it> (last visited Nov. 16, 2003).

*Interest Rates*  
 "Interest rate support is provided for export credit in compliance with the Arrangement." OECD, *Italy, in* EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 8.

*Starting Point*  
 "The OECD Arrangement . . . sets out for all countries the maximum repayment terms for officially supported export credits. The Arrangement has also implications on premia." SACE, *available at* <http://194.185.79.118/Database/skpaesew.nsf/AB1CFEBA969A2BEEC1256C8700347935/994CAAF73CDB8FCC1256C87003520BD?OpenDocument> (last visited Nov. 16, 2003).  
 Consistent with Arrangement. *Id.*

*Repayment Term*

*Repayment Installment*

*Cash Payments*

"For buyer credits, 15% of the premium is payable in advance and 85% at each drawdown." OECD, *Italy, in* EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 6.

"SACE's premium system complies with the OECD discipline on benchmarks where applicable." *Id.*

*Minimum Premium*

356. Japan's ECAs are Export-Import Insurance Division Ministry of International Trade and Industry (EID/MITI), and Japan Bank for International Co-operation (JBIC), *available at* <http://www.jbic.go.jp/english/index.php> (last visited Nov. 16, 2003).

*Interest Rates*

"Most medium- and long-term supplier credits are refinanced by JBIC at the relevant Arrangement rate in combination with commercial bank participation at market rates." OECD, *Japan, in* EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 14.

- Starting Point*  
*Repayment Term*  
*Repayment Installments*  
*Cash Payments*  
*Minimum Premiums*  
 357. Korea's ECAs are the Korea Export Insurance Corporation (KEIC), available at <http://www.keic.or.kr/english/INDEX.HTML>, and the Export-Import Bank of Korea, available at <http://www.koreaexim.go.kr/web/eng/index.jsp> (last visited Dec. 1, 2003).  
*Interest Rates*
- "Normal credit terms insured are set in line with the Arrangement." *Id.* at 9.  
*Id.*  
*Id.*  
 "EID/MITI has a classification for various buyer countries based on their creditworthiness." *Id.*  
 "Eximbank generally applies minimum interest rates under the Arrangement, while co-financiers, if any, charge the prevailing market interest rates." OECD, *Korea, in EXPORT CREDIT FINANCING SYSTEMS*, *supra* note 24, at 8.  
 "[P]ursuant to the OECD Guidelines." KEIC, *Loans to Domestic Suppliers*, available at <http://www.koreaexim.go.kr/web/eng/products/M01/main.html> (last visited Nov. 16, 2003).  
 "5–10 years, pursuant to OECD Guidelines." *Id.*  
 "Basically semi-annual equal instalments." *Id.*  
 "Export loans and direct loans are available in foreign currencies of Korean won up to 100% of the export contract price, less a minimum 15–25% cash payment, on a medium- or long-term basis." OECD, *Korea, in EXPORT CREDIT FINANCING SYSTEMS*, *supra* note 24, at 8.  
*Local Costs*
- "Other terms and conditions under this credit must be in accordance with the OECD Guidelines." KEIC, *Loans to Domestic Suppliers*, available at <http://www.koreaexim.go.kr/web/eng/products/M01/main.html> (last visited Nov. 16, 2003).  
 358. Luxembourg's ECAs are Office du Ducroire (ODL), available at <http://www.ducroire.lu> (last visited Nov. 16, 2003), Société nationale de crédit et d'investissement (SNCI), available at <http://www.snci.lu>, and Luxembourg Export Promotion Committee (COPEL) (last visited Nov. 16, 2003).  
*Interest Rates*
- "The interest rate on export credits is set on a case-by-case basis in compliance with the relevant provisions of the Arrangement." OECD, *Luxembourg, in EXPORT CREDIT FINANCING SYSTEMS*, *supra* note 24, at 10.  
 "Payment in cash, repayment schedule and coverage of local expenses are consistent with the provisions of the Arrangement." *Id.* at 7.  
*Repayment Term*
- "Minimum six months, maximum five years. The maximum duration may be extended to ten years if authorised by the competent ministers." SNCI, available at <http://www.snci.lu/eng/index.htm> (last visited Nov. 16, 2003).  
 "In principle, repayment is done by quarterly fixed instalments." *Id.*  
*Repayment Installments*  
*Cash Payments*
- "Payment in cash, repayment schedule and coverage of local expenses are consistent with the provisions of the Arrangement." OECD, *Luxembourg, in EXPORT CREDIT FINANCING SYSTEMS*, *supra* note 24, at 7.  
*Local Costs*

- Minimum Premiums* "In principle, premiums are payable in advance. They are calculated according to the duration of the credit, the destination of the exports, the nature of the risks insured and the quality of the cover. They may be changed depending on the exporter, the amount insured, the geographical breakdown and the number of claims." *Id.*
359. The Netherlands's ECA is the Ministry of Finance, Export Credit Insurance and Investment Guarantees Directorate, *available at* <http://www.minfin.nl/default.asp> (last visited Nov. 24, 2003).
- Interest Rates* "Since 1998 . . . there are three different support facilities:  
 An interest-matching scheme which operates within the limits set by the Arrangement. For a specific individual transaction under this facility, the Dutch exporter is required to demonstrate the presence of a foreign competitor, which is eligible in this country for official financing support on Arrangement terms.  
 An interest-matching scheme, which allows Dutch exporters to offer export credits with interest rates below the minimum Arrangement level in the event of proven officially supported foreign competition on similar terms.  
 An automatic interest support scheme, which allows Dutch exporters to offer export credits at CIRR level without any proof of interest support offered by the government of the foreign competitor. Under this scheme, the presence of officially supported foreign competition is assumed. This arrangement is only available for exports to Indonesia, China and India." OECD, *Netherlands, in EXPORT CREDIT FINANCING SYSTEMS, supra* note 24, at 12.
- Repayment Term* "For (quasi) capital goods, the maximum maturity is five years; capital goods and construction work contracts may be covered on credit terms of up to ten years, depending on the size of the contract and the country of destination." *Id.* at 6.
- Cash Payments* "A minimum cash payment of 15% on or before delivery is required, of which 5% to be paid at the date the contract becomes effective." *Id.*
- Local Costs* "Cover of local costs is possible up to the amount of the cash payments." *Id.*
- Minimum Premiums* "For premium purposes, all countries are classified into seven categories." *Id.* at 7.
360. New Zealand's ECA is the Export Credit Office (ECO), *available at* <http://www.nz-exportcreditoffice-agent.dk> (last visited Dec. 1, 2003).
- Repayment Term* "The usual maximum credit lengths are . . . eight years depending upon value." OECD, *New Zealand, in EXPORT CREDIT FINANCING SYSTEMS, supra* note 24, at 3.
- Repayment Installments* "Repayment is normally in equal semi-annual instalments with no grace period." *Id.*
- Local Costs* "Local-cost financing may be covered within the limits of the Arrangement." *Id.*
- Minimum Premiums* "Premium and guarantee fees depend upon the categories of risks covered, the period of credit, and the creditwor-

- chiness of both buyer and country of destination." *Id.*
361. Norway's ECAs are Garanti-Instituttet for Eksportkredit (GIEK), available at <http://www.giek.no> (last visited Nov. 24, 2003), and A/S Eksportfinans (Norske Bankers finansierings-og eksportkreditinstitutt).
- Interest Rates* "An interest rate is fixed at the time of commitment, in accordance with the Arrangement." OECD, *Norway, in EXPORT CREDIT FINANCING SYSTEMS*, *supra* note 24, at 6.
- Starting Point* "For capital goods, credit periods, down payments, repayment terms and levels of local-cost financing must be within the limits of the Arrangement." *Id.* at 5.
- Repayment Term* *Id.*
- Repayment Installments* *Id.*
- Local Costs* "For capital goods, credit periods, down payments, repayment terms and levels of local-cost financing must be within the limits of the Arrangement." *Id.*
- Minimum Premiums* "Premiums and fees are calculated as a percentage of the credit amount of a transaction. Premiums depend upon variables such as: credit period, public or private buyers, securities available and general creditworthiness. For purposes of setting premiums for political risks, countries are classified in categories." *Id.*
362. Portugal's ECAs are Companhia de Seguro de Créditos, SA (COSEC), available at <http://www.cosec.pt> (last visited Nov. 24, 2003), and Conselho de Garantias Financeiras (CGF).
- Interest Rates* "The state provides interest rate subsidies on medium- and long-term foreign currency export credits to compensate for the difference between a market reference rate (LIBOR, to which is added a margin) and the cost of financing in accordance with the Arrangement." OECD, *Portugal, in EXPORT CREDIT FINANCING SYSTEMS*, *supra* note 24, at 9.
- Starting Point* "For the purpose of official support, credit terms must be consistent with international practice and agreements." *Id.* at 5.
- Repayment Term* *Id.*
- Repayment Installments* *Id.*
- Cash Payments* *Id.*
- Minimum Premiums* "For exports on medium- and long-term credit, the premium system conforms to the 'Knaepen Package on Guiding Principles for Setting Premia and Related Conditions' of the Arrangement." *Id.* at 6.
363. Spain's ECA is Compañía Española de Seguros de Crédito a la Exportación, S.A. (CESCE), available at <http://www.cesce.es>, and Instituto de Crédito Oficial (ICO), available at <http://www.ico.es/public/es/portada/index.html> (last visited Nov. 24, 2003).
- Interest Rates* The interest rate is fixed for the full length of the credit and is determined on the basis of the Arrangement, which defines the minimum applicable rate of interest, thus regulating international financial competition." OECD, *Spain, in EXPORT CREDIT FINANCING SYSTEMS*, *supra* note 343, at 7.
- Minimum Premium* "Premiums are calculated on the basis of the repayment period, the situation of the buyer's country and the



- buyer's creditworthiness." *Id.* at 5.
364. Sweden's ECAs are Exportkreditnämnden (EKN), available at <http://www.ekn.se>, and AB Svensk Exportkredit (SEK), available at [http://www.sek.se/templates/SEK\\_StartPage.asp?id=30](http://www.sek.se/templates/SEK_StartPage.asp?id=30) (last visited Nov. 24, 2003).
- Interest Rates*
- Starting Point*
- "Within the [State Supported] system, lending terms are based on the Arrangement on Guidelines for Officially Supported Export Credits." OECD, *Sweden, in* EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 9.
- "The maximum credit lengths that EKN accepts are in accordance with those agreed in the Arrangement on Guidelines for Officially Supported Export Credits and the Berne Union Understandings." *Id.* at 6.
- Repayment Term*
- "Within the [State Supported] system, lending terms are based on the Arrangement on Guidelines for Officially Supported Export Credits." *Id.* at 9.
- Repayment Installments*
- Id.*
- Cash Payments*
- Id.*
- Local Costs*
- Id.*
- Minimum Premiums*
- "EKN's premium system conforms with the Knaepen Package Guiding on Principles for Setting Premia and Related Conditions in the Arrangement on Guidelines for Officially Supported Export Credits." *Id.* at 6.
365. Switzerland's ECA is the Geschäftsstelle für die Exportrisikogarantie (ERG), available at <http://www.swiss-erg.com> (last visited Nov. 24, 2003).
- Interest Rates*
- "Export credits are provided by commercial banks on market terms. Official export credit financing (lending) is not available in Switzerland." OECD, *Switzerland, in* EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 3.
- Starting Point*
- "Matters such as the percentage of guarantee, terms of payment, guarantees, etc., are determined by the Board of Export Risk Guarantee in light of the country and project risk assessment. The prevailing rules of the Arrangement and/or the Berne Union are applied." *Id.* at 5.
- Repayment Term*
- Id.*
- Repayment Installments*
- Id.*
- Cash Payments*
- Id.*
- Local Costs*
- "Local costs not exceeding the amount of the cash payment may be covered." *Id.* at 4.
- Minimum Premiums*
- "The base premium for credit terms of two or more years is subject to the minimum premium benchmarks for the Arrangement." *Id.* at 5.
366. The United Kingdom's ECA is the Export Credits Guarantee Department (ECGD), available at <http://www.ecgd.gov.uk> (last visited Nov. 24, 2003).
- Interest Rates*
- "For exports on credit terms of two years or more, exporters and overseas borrowers have access to bank finance at fixed rates of interest, determined in accordance with the Arrangement guidelines." OECD, *United Kingdom, in* EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 9.
- Starting Point*
- "For credits in excess of two years, the normal Arrangement rules on credit terms and down payments apply, with

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|                               | a 5% down payment usually required on signature of contract." <i>Id.</i> at 5.  |
| <i>Repayment Term</i>         | <i>Id.</i>  |
| <i>Repayment Installments</i> | <i>Id.</i>  |
| <i>Cash Payments</i>          | <i>Id.</i>  |
| <i>Local Costs</i>            | "There are limits on the proportion of foreign and local costs that may be financed; generally, these are restricted to the level of payments due by the starting point of credit." OECD, <i>United Kingdom, in EXPORT CREDIT FINANCING SYSTEMS</i> , <i>supra</i> note 24, at 7.   |
| <i>Minimum Premiums</i>       | Based on the 'Premium Calculator' on ECGD's homepage, it appears that the United Kingdom follows the Knaepen Package. See ECGD, <i>available at</i> <a href="http://www.ecgd.gov.uk">http://www.ecgd.gov.uk</a> (last visited Nov. 24, 2003).   |
| 367. The United States' ECA   | is the Export-Import Bank of the United States (Ex-Im Bank), <i>available at</i> <a href="http://www.exim.gov">http://www.exim.gov</a> (last visited Nov. 24, 2003).  |
| <i>Interest Rates</i>         | "Commercial Interest Reference Rates (CIRRs) are the official lending rates of Export Credit Agencies." Ex-Im Bank, <i>About CIRR Rates</i> , <i>available at</i> <a href="http://www.exim.gov/tools/cirr_about.html">http://www.exim.gov/tools/cirr_about.html</a> (last visited Nov. 24, 2003).   |
| <i>Starting Point</i>         | "The most common starting point is the date of shipment by the exporter or supplier." Ex-Im Bank, <i>Ex-Im Bank Fact Sheet: "Starting Point" Guidelines for Payment Periods</i> , <i>available at</i> <a href="http://www.exim.gov/pub/ins/pdf/eib99-16.pdf">http://www.exim.gov/pub/ins/pdf/eib99-16.pdf</a> (last visited Nov. 24, 2003).   |
| <i>Repayment Term</i>         | "Generally, the repayment term of a transaction is determined by numerous variables including but not limited to the borrower's financial condition, the common repayment terms the market gives such products, specific industry practices, industry and country conditions, useful life, OECD and Berne Union agreements, and the matching of terms offered by other foreign government-sponsored financing. Repayment terms are generally in excess of seven years." Ex-Im Bank, <i>Products &amp; Policies, Direct Loan</i> , <i>available at</i> <a href="http://www.exim.gov/products/directloan.html">http://www.exim.gov/products/directloan.html</a> (last visited Nov. 24, 2003). |
| <i>Repayment Installments</i> | "Repayment begins approximately six months after the starting point, and payments of principal and accrued interest generally must be made semiannually." See Ex-Im Bank, <i>Standard Repayment Terms</i> , <i>available at</i> <a href="http://www.exim.gov/pub/pdf/eibd-m-26.pdf">http://www.exim.gov/pub/pdf/eibd-m-26.pdf</a> (last visited Nov. 24, 2003).   |
| <i>Cash Payments</i>          | "Ex-Im Bank requires the buyer to make a cash payment to the exporter equal to at least 15% of the U.S. supply contract." Ex-Im Bank, <i>Products &amp; Policies, Direct Loan</i> , <i>available at</i> <a href="http://www.exim.gov/products/directloan.html">http://www.exim.gov/products/directloan.html</a> (last visited Nov. 24, 2003).   |
| <i>Local Costs</i>            | "Ex-Im Bank can support up to 15% of the value of the U.S. exports for locally originated and/or manufactured goods and services subject to the following availability and eligibility guidelines." Ex-Im Bank, <i>Products &amp; Policies, Local Cost Policies</i> , <i>available at</i> <a href="http://www.exim.gov/products/policies/local_cost.html">http://www.exim.gov/products/policies/local_cost.html</a> (last visited Nov. 24, 2003).   |

*Minimum Premiums*

"Premiums are based on many factors, including length of terms offered, buyer type, country mix and transaction type." *Ex-Im Bank, Ex-Im Bank Multi-Buyer Export Credit Insurance Short-Term Political Risks*, available at <http://www.exim.gov/pub/ins/pdf/eib92-21.pdf> (last visited Nov. 24, 2003).

368. The Czech Republic's ECA is Exportní Garantní Pojistovací Společnost, A.S. (EGAP), available at <http://www.egap.cz> (last visited Nov. 16, 2003).

*Interest Rates*

"Interest rates correspond to the Arrangement and are determined on a case-by-case basis." OECD, *Czech Republic*, in EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 10.

*Starting Point*

Appears consistent with the Arrangement. EGAP, available at [http://www.egap.cz/english/produktu/pojisteni\\_se-stani\\_podporou/c/vseobecne\\_pojistne\\_podminky.php3](http://www.egap.cz/english/produktu/pojisteni_se-stani_podporou/c/vseobecne_pojistne_podminky.php3) (last visited Nov. 16, 2003).

*Cash Payments*

"Credit is provided for no more than 85% of the value of the export contract; the importer must pay at least 15% of the value in advance or no later than on delivery." OECD, *Czech Republic*, in EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 10.

*Minimum Premiums*

"The premium rates for cover of long-term commercial and political risks are based on a table of basic premium rates constructed in accordance with a mathematical model which takes into account country category, length of cover, and schedule of disbursement and repayment. *Id.* at 9. Furthermore, EGAP employs the same seven risk categories. EGAP, available at [http://www.egap.cz/english/produktu/pojisteni\\_se-stani\\_podporou/c/pojistne\\_sazby.php3](http://www.egap.cz/english/produktu/pojisteni_se-stani_podporou/c/pojistne_sazby.php3) (last visited Nov. 16, 2003).

369. Hong Kong's ECA is the Hong Kong Export Credit Insurance Corporation (HKECIC), available at <http://www.hkecic.com> (last visited Nov. 16, 2003).

*Starting Point*

"Normal Berne Union terms and Arrangement guidelines in respect of percentage of down payment and repayment period are strictly adhered to." OECD, *Hong Kong, China*, in EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 3.

*Repayment Term*

*Repayment Installments*

*Cash Payments*

*Minimum Premiums*

"Premiums are charged on the gross invoice value of goods or the contract value and are based on several factors, including the buyer's country, the length of credit, the nature of goods and the volume and quality of an insured's business and claims experience." *Id.* at 5.

370. Hungary's ECAs are the Magyar Exportthitel Biztosító Rt. (MEHIB), available at <http://www.mehib.hu>, and Magyar Export Import Bank Rt. (Eximbank), <http://www.eximbank.hu/Internet/index.html> (last visited Nov. 16, 2003).

*Interest Rates*

"Interest rates on credits with a maturity of two years or more are calculated in accordance with the terms of the Arrangement." OECD, *Hungary*, in EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 9.

- Starting Point*  
 "The terms and conditions of the loans with maturity over two years are in line with the rules of the Arrangement." *Id.* at 8.
- Repayment Term*  
*Repayment Installment*  
*Cash Payments*  
*Id.*  
 "A minimum of 15% cash payment is normally required for officially supported medium- and long-term cover." *Id.* at 7.
- Minimum Premiums*  
 "The premium is calculated on the basis of a number of factors, such as country risk, buyer risk, risk horizon and security obtained. Premiums are to be paid as disbursements/deliveries in accordance with the Arrangement." *Id.* at 7.
371. Mexico's ECA is The Mexican Bank for Foreign Trade (Bancomext), available at <http://www.bancomext.com/Bancomext/index.jsp> (last visited Nov. 16, 2003).
- Interest Rates*  
 "Interest rates, default interest rates and commissions are determined by Bancomext's Finance Committee and its internal Credit Committee. Bancomext's base rates for export credit are the LIBOR rate plus a spread determined by Bancomext for loans in dollars and CPP or CETES for loans to Mexican enterprises in new pesos. The intermediary institutions determine the applicable spread in the case of loans to Mexican companies." OECD, *Mexico, in EXPORT CREDIT FINANCING SYSTEMS*, *supra* note 24, at 23.  
 Bancomext acknowledges repayment terms up to nine years but does not specifically state the maximum repayment terms for export credits. *Id.* at 19.
- Repayment Term*  
 "A minimum down payment of 15% of the total export value is required to cover any medium- and long-term operation." *Id.* at 13.
- Cash Payments*  
 "Bancomext will finance up to 85% of the Mexican content of an international project, plus 30% of total local expenses in the country where the project will be carried out." *Id.* at 22.
- Local Costs*  
 372. Poland's ECA is the Korporacja Ubezpieczeń Kredytów Eksportowych Spółka Akcyjna (KUK SA), available at <http://www.kuke.com.pl/index.jsp> (last visited Nov 16, 2003).
- Interest Rates*  
 "For medium- and long-term credit, the Minister of the Economy gives support for bank commission, not interest rates. To date, it is not possible to support fixed-rate CRRs." OECD, *Poland, in EXPORT CREDIT FINANCING SYSTEMS*, *supra* note 24, at 6.  
 "For credits over one year, the rules on the Arrangement on credit terms and down payment apply." *Id.* at 5.
- Starting Point*  
*Repayment Term*  
*Repayment Installments*  
 "[C]redit should be repaid in equal amortisation instalments payable at regular 6 months intervals; the first instalment should be paid within a period of not more than 6 months from credit starting point. Interest accrued on the principal may not be capitalised within the credit repayment period and should be payable at regular 6 months intervals; the first instalment should be payable within a period of up to 6 months from the paid credit

- starting point." KUKE SA, *available at* [http://www.kuke.com.pl/eng/produktury/dlugoterminowe\\_eksport.html](http://www.kuke.com.pl/eng/produktury/dlugoterminowe_eksport.html) (last visited Nov. 24, 2003).
- "[C]redits for financing export contracts submitted for insurance must not exceed 85% of the contract value, that is the contract terms have to provide for 15% cash prepayment." *Id.*
- "For medium- and long-term credit, premiums are set for individual policies, according to the 'Guiding Principles for Setting Premia and Related Conditions for Officially Supported Export Credits: the Knaepen Package.'" OECD, *Poland*, in EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 5.
373. Romania's ECA is the Eximbank of Romania, *available at* <http://www.eximbank.ro> (last visited Nov. 16, 2003).
- Interest Rates*
- "The Arrangement is always applied as a benchmark." OECD, *Romania*, in EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 8.
- Starting Point*
- "The procedures for medium- and long-term cover are subject to the Arrangement and the Berne Union Understandings." *Id.* at 6.
- Repayment Term*
- Repayment Installments* *Id.*
- Cash Payments* *Id.*
- Local Costs* *Id.*
- Minimum Premiums*
- "Premium rates depend on the risks covered, payment conditions, the buyer's country risk category, the buyer's legal status and other factors." *Id.*
374. Slovakia's ECA is the Export-Import Bank of Slovakia (EXIMBANKA SR), *available at* <http://www.eximbanka.sk> ("Adjustment of our products according to the needs of the exporters under condition of compliance with EU and OECD requirements.") (last visited Nov. 16, 2003).
- Interest Rates*
- "Eximbanka offers interest rate support in relation to supplier and buyer credits. The level of the final interest rate may not drop below the rates agreed under the Arrangement (CIRR)." OECD, *Slovak Republic*, in EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 8.
- Starting Point*
- Under Direct supplier's credit, Eximbanka states that "procedures are subject to the terms of the Arrangement." *Id.* at 7.
- Repayment Term* *Id.*
- Repayment Installment* *Id.*
- Cash Payments* *Id.*
- Local Costs* *Id.*
- Minimum Premiums*
- "Insurance premiums vary according to the creditworthiness of the foreign buyer, the country of destination, the terms of payment and the length of the risk period. Buyer countries are classified into seven categories." *Id.* at 6.

375. Slovenia's ECA is Slovenska izvozna družba, družba za zavarovanje in financiranje izvoza Slovenije, d.d. (SID or SEC), available at <http://www.sid.si> (last visited Nov. 16, 2003).

*Interest Rates*

Refinancing "rates, as well as the (final) bank interest rates for the export credits refinanced . . . conform to the Arrangement." OECD, *Slovenia, in EXPORT CREDIT FINANCING SYSTEMS*, *supra* note 24, at 13.

*Starting Point*

See SID, available at <http://www.sid.si/sidang.nsf> (last visited Nov. 16, 2003).

*Repayment Term*

"Credit terms may be for five, eight and a half or ten years, depending on the type of goods and/or services exported, the size of the contract and the importing country." OECD, *Slovenia, in EXPORT CREDIT FINANCING SYSTEMS*, *supra* note 24, at 8.

*Repayment Installments*

"The maturity date of the first installment of loans exceeding one year is max. 6 months following the starting point of loan, which shall be repaid (the principal) in equal, max. 6 month installments. The interest on the loan shall be due simultaneously with the corresponding part of the principal. . . ." SID, available at <http://www.sid.si/sidang.nsf> (last visited Nov. 24, 2003).

*Cash Payments*

"A minimum down payment of 15% is required." OECD, *Slovenia, in EXPORT CREDIT FINANCING SYSTEMS*, *supra* note 24, at 8.

*Minimum Premiums*

"Premium benchmarks are expressed as an up-front rate applied to the amount of the credit and vary depending on the classification of the country (seven categories)." *Id.* at 10.

376. South Africa's ECA is the Credit Guarantee Insurance Corporation of Africa Limited (CGIC), available at <http://www.creditguarantee.co.za> ("Although longer credit terms might be a powerful competitive factor in bidding for large contracts this practice, if unrestrained in international competition, could lead to unwarranted escalation of credit terms. For this reason there is liaison between the credit insurance companies of most industrialised countries through an association known as the Berne Union.") (last visited Nov. 16, 2003).

*Interest Rates*

"Interest rates are to be negotiated between seller, buyer and lender. Provided such interest rates are market related, the amount of interest payable by the buyer/borrower can be included in the credit insurance cover." CGIC, available at <http://www.creditguarantee.co.za>.

*Repayment Term*

"The foreign buyer often asks for medium to long credit terms, ranging from 2 to 10 years." *Id.*

*Repayment Installments*

"The balance forms the subject of the credit. Payments must be made in equal half-yearly instalments, plus interest calculated on the reducing balance at 6-monthly intervals. First installment : 6 months after the start of the post-delivery period. *Id.*

*Cash Payments*

"Min 5%: The buyer pays this cash payment when he signs the contract, indicating that the work should begin. Approx 10%: The buyer must normally pay this by the end of the pre-delivery period. For large construction and supply contracts over extended periods part deliveries are accepted, and 10% of the value of each delivery is to be paid. This insures that at least 15% (1 and 2) of the contract price have been paid to the exporter by the buyer when the pre-delivery period ends." *Id.*

- Minimum Premiums*
377. Taiwan's ECA is the Export-Import Bank of China, *available at* <http://www.chinaxim.gov.cn> (last visited Nov. 16, 2003).
- Interest Rates*
- "For medium- and long-term export credits on a US dollar basis, Eximbank generally applies the minimum Arrangement interest rates for export credit uniformly to Category III countries." OECD, *Chinese Taipei, in* EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 10.
- Starting Point*
- "Terms normally do not exceed ten years, starting from the delivery date of the product or completion date of the overseas product. . . ." *Id.* at 8.
- Repayment Term*
- Repayment Installments*
- Cash Payments*
- "Repayment of interest and principle is scheduled in approximately equal semi-annual instalments." *Id.*
- "Percentage of financing does not exceed 85% of the contract value; that is, a cash payment of at least 15% must be received on or before the delivery of products." *Id.*
378. Turkey's ECA is Turk Eximbank (the Bank), *available at* <http://www.eximbank.gov.tr> (last visited Nov. 16, 2003). As such:
- Interest Rates*
- "Interest rates are determined according to the length of credit, the cost of funding and the credibility of the project exporter." OECD, *Turkey, in* EXPORT CREDIT FINANCING SYSTEMS, *supra* note 24, at 11.
- "In the implementation of the [medium- and long-term export credits] programme, the Bank fully complies with the Arrangement." *Id.* at 10.
- Starting Point*
- "Credits under this programme are granted for up to seven years." *Id.* at 11.
- Repayment Term*
- Repayment Installments*
- "In the implementation of the [medium- and long-term export credits] programme, the Bank fully complies with the Arrangement." *Id.* at 10.
- Cash Payments*
- Local Costs*
- "The foreign buyer is required to make a cash payment equal to 15% of the contract value." *Id.* at 5.
- Minimum Premiums*
- "In the implementation of the [medium- and long-term export credits] programme, the Bank fully complies with the Arrangement." *Id.* at 10.
- "For export insurance covering political and commercial risk, the exporter is charged a premium according to the risk classification of the buyer's country, the payment terms and the type of buyer (sovereign or private)." *Id.* at 5.
379. Canada (1995):
- Interest Rates*
- " . . . EDC is required, in order to match the competition, to offer minimum Arrangement interest rates." OECD, *Canada, in* EXPORT CREDIT FINANCING SYSTEMS 1995, *supra* note 112, at 8.
- Repayment Terms*
- "Repayment terms for the lending programmes are normally up to ten years depending on the nature of the market." *Id.*
- Cash Payments*
- Local Costs*
- "EDC normally provides up to 85 per cent support for export transactions subject to the Arrangement." *Id.*
- "Occasionally, this may be increased to 100 per cent to facilitate the financing for a local-cost component

- defined in the commercial contract." *Id.* at 9.
380. France (1999):  
*Interest Rates*  
 "In the case of medium- or long-term . . . credits . . . the cost is the rate applicable under the Arrangement. . . ." OECD, *France*, in EXPORT CREDIT FINANCING SYSTEMS 1995, *supra* note 112, at 10.  
*Repayment Terms*  
 "Repayment period . . . for heavy capital goods and major projects, five to ten years. . . ." *Id.* at 6.  
*Cash Payments*  
 "Generally, minimum cash payments of 15 per cent." *Id.*  
*Repayment Installments*  
 "Repayment of principal in equal half-yearly instalments with no grace period." *Id.*  
*Local Costs*  
 "Local costs are covered and financed up to the amount of the cash payments . . . in accordance with the Arrangement." *Id.*
381. Germany (1999):  
*Interest Rates*  
 "The rates correspond to the Arrangement on Guidelines for Officially Supported Export Credits." OECD, *Germany*, in EXPORT CREDIT FINANCING SYSTEMS 1995, *supra* note 112, at 15.  
*Starting Point*  
 "The terms and conditions . . . are based on and are in accordance with the Berne Union Understandings and the Arrangement on Guidelines for Officially Supported Export Credits." *Id.* at 9.  
*Repayment Terms*  
*Id.*  
*Repayment Installments*  
 "[The] leasing contract may (in accordance with the Arrangement on Guidelines for Officially Supported Export Credits) concede equal part payments instead of diminishing interest payments." *Id.* at 12.  
*Cash Payment*  
 "[A] down payment of 15% is indispensable." *Id.*  
*Local Costs*  
 "Local-cost financing . . . may be covered in accordance with rules laid down in the Arrangement on Guidelines for Officially Supported Export Credits and its Sector Understandings." *Id.* at 8.
382. Italy (1999):  
*Interest Rates*  
 "Interest rate support is provided for export credits in compliance with the Arrangement on Guidelines for Officially Supported Export Credits." OECD, *Italy*, in EXPORT CREDIT FINANCING SYSTEMS 1995, *supra* note 112, at 10.  
*Starting Point*  
 "Cover is provided on the conditions set out in the Arrangement on Guidelines for Officially Supported Export Credits." *Id.* at 6.  
*Repayment Terms*  
*Id.*  
*Repayment Installments*  
*Id.*  
*Cash Payments*  
*Id.*
383. Japan (1995):  
*Interest Rates*  
 "Most medium- and long-term supplier credits are refinanced by EXIM at the relevant Arrangement rate. . . ." OECD, Japan, in EXPORT CREDIT FINANCING SYSTEMS 1995, *supra* note 112, at 15.  
*Starting Point*  
 "Normal credit terms insured are set in line with the OECD Arrangement." *Id.* at 11.



*Repayment Terms*  
*Repayment Installments* *Id.*  
*Cash Payments* *Id.*

384. The United Kingdom (1999):

*Interest Rates*

"For exports on credit terms of two years or more, exporters and overseas borrowers have access to bank finance at fixed rates of interest, determined in accordance with the Arrangement on Guidelines for Officially Supported Export Credits." OECD, *United Kingdom, in EXPORT CREDIT FINANCING SYSTEMS 1995*, *supra* note 112, at 9.

*Starting Point*

"For credits in excess of two years, the normal rules of the Arrangement on Guidelines for Officially Supported Export Credits on credit terms and down payments apply, including a 5% down payment usually required on the signature of a contract." *Id.* at 5.

*Repayment Terms*  
*Repayment Installments* *Id.*  
*Cash Payments* *Id.*  
*Local Costs*

"There are limits on the proportion of foreign and local costs that may be financed; generally, these are restricted to the level of payments due by the starting point of credit." *Id.* at 7.

385. The United States (1995):  
*Interest Rates*

"Eximbank charges the minimum Arrangement rate." OECD, *United States, in EXPORT CREDIT FINANCING SYSTEMS 1995*, *supra* note 112, at 24.

*Repayment Terms*  
*Starting Point*

"Repayment terms on transactions supported by direct loans normally range from five to ten years. . . ." *Id.* at 23.  
 "Payments are usually made in semi-annual instalments, on the 15th of the month, beginning six months after final delivery, the mid-point of deliveries or completion of the project, whichever is appropriate." *Id.* at 18.

*Repayment Installments*  
*Cash Payments*  
*Local Costs*

"A 15 per cent cash payment from a buyer to an exporter is required." *Id.* at 23.  
 "When Eximbank is providing support for US exports for a foreign project, it may also provide up to 15 per cent of the US contract price in local-cost support. . . ." *Id.* at 18.

386. Canada: (1990):  
*Interest Rates*

"Interest rates charged by EDC are set in accordance with minimum rates applicable under the Arrangement and are also guided by EDC's overall earning criteria and by the requirement to match international competition on a case by case basis." OECD, *EXPORT CREDIT FINANCING SYSTEMS 1990*, *supra* note 112, at 210.

*Starting Point*  
*Repayment Terms*  
*Cash Payments*

"Cover is normally extended for both commercial and political risks from the date of contract or of shipment." *Id.* at 205.  
 "The maximum term offered is three years." *Id.* at 204.  
 "EDC normally provides funding for up to 85 per cent of the contract value." *Id.* at 209.

- Local Costs*
387. France (1990):  
*Interest Rates*  
 "ECD may provide local cost financing on a case by case basis, up to an amount equivalent to the percentage cash payments in accordance with the Arrangement." *Id.*
- Repayment Terms*  
 "The BFCE compensates the difference between a reference rate (TRIBOR) to which is added the current bank margin and the cost of financing (the 'taux de sortie') in accordance with the Arrangement." *Id.* at 49.
- Repayment Installments*  
 "Repayment period . . . five years for developed countries, eight and a half years for intermediate countries and ten years for developing countries. . . ." *Id.* at 46.
- Cash Payments*  
 "Repayment of principal in equal half yearly instalments with no grace period." *Id.* at 46.  
 "Generally, minimum cash payments of 15 per cent. This may be increased up to 20 or 25 per cent depending on the country and the buyer." *Id.*
- Local Costs*  
 "Local costs are covered and financed up to the amount of the cash payments and on the same terms as the export credit for the portion that may be repatriated. Assistance with local costs is provided only in exceptional cases and in accordance with the Arrangement." *Id.* at 47.
388. Germany (1990):  
*Interest Rates*  
 "The composite rate must adhere to the interest rate provisions of the Arrangement as government supported funds are involved." *Id.* at 68.  
*Starting Point*  
 "The terms and conditions of cover for insurable credits are based on and in accordance with an agreement with the Berne Union and the OECD Arrangement on Guidelines for Officially Supported Export Credits." *Id.* at 62.  
*Repayment Terms*  
*Id.*  
*Repayment Installments*  
*Id.*  
*Cash Payments*  
 "Application is made through a member bank and AKA typically refinances 80 to 85 per cent of the contract value (cash payment being 15 to 20 percent)." *Id.* at 69.  
*Local Costs*  
 "Local cost financing from German banks at market rates may be covered in accordance with rules laid down in the OECD Arrangement and its Sector Understandings." *Id.* at 61.
389. Italy (1990):  
*Interest Rates*  
 "The minimum rates applicable are those established by the Consensus and by other international agreements on export credits." *Id.* at 93.  
*Starting Point*  
 "Cover is provided on the conditions set out in the Arrangement." *Id.* at 90.  
*Repayment Terms*  
*Id.*  
*Repayment Installments*  
*Id.*  
*Cash Payments*  
*Id.*
390. Japan (1990):

- Interest Rates*  
 "[M]edium and long term supplier credits are refinanced by EXIM at the relative Arrangement rate. . . ." *Id.* at 220.
- Starting Point*  
 "The cover commences at the date of the contract or the delivery date." *Id.* at 216.
- Repayment Terms*  
 "Normal credit terms insured are set in line with the OECD Arrangement." *Id.* at 217.
- Repayment Installments*  
*Id.*
- Cash Payments*  
*Id.*
- Local Costs*  
 "EID . . . will extend support to local cost financing in accordance with the provisions on local costs of the Arrangement." *Id.*
391. The United Kingdom (1990):  
*Interest Rates*  
 "The fixed rates of interest charged . . . are determined by ECGD in accordance with the minimum interest rates set out in the Arrangement or at Commercial Interest Reference Rates (CIRRs)." *Id.* at 143.  
*Starting Point*  
 "Repayment and interest rate terms and conditions must normally be in accordance with the Arrangement." *Id.* at 139.  
*Repayment Terms*  
*Id.*
- Repayment Installments*  
*Id.*
- Cash Payment*  
 "Payments . . . will normally be 15 to 20 per cent, of which at least 5 per cent is usually required on signature of contract." *Id.*
- Local Costs*  
 "[L]ocal costs that can be considered for inclusion in credit insurance and in guaranteed financings up to the level of payments due at or by the appropriate starting point of credit." *Id.*
392. The United States (1990):  
*Interest Rates*  
 "Eximbank charges the minimum OECD rate applicable to the category of the importing country and the repayment period." *Id.* at 247.  
*Starting Point*  
 "[R]epayment terms are in line with those agreed under the OECD Arrangement." *Id.* at 246.  
*Repayment Terms*  
 "Repayment terms on transactions supported by direct loans normally range from 5 to 10 years. . . ." *Id.*  
*Repayment Installments*  
 "Payments are usually made in semi-annual instalments, on the 15th of the month, beginning six months after final delivery, the mid-point of deliveries, or completion of the project, whichever is appropriate." *Id.*  
*Cash Payments*  
 "Eximbank requires that the buyer make a cash payment to the U.S. exporter equal to at least 15 per cent of the U.S. export value." *Id.*
- Local Costs*  
 "Eximbank's loan or guarantee may support up to 100 per cent of the U.S. content of the item, but may not exceed 85 per cent of the total contract price of the item." *Id.* at 238.
393. Canada (1987):  
*Interest Rates*  
 "Interest rates charged by EDC are set in accordance with minimum rates applicable under the Arrangement

- ... "OECD, EXPORT CREDIT FINANCING SYSTEMS 1987, *supra* note 112, at 169.  
 "[I]t is not normal to insure credits exceeding five years." *Id.* at 164.  
 "EDC may provide local cost financing on a case by case basis, up to an amount equivalent to the percentage cash payments in accordance with the Arrangement." *Id.* at 169.  
*Id.*
- Local Costs*  
 394. France (1987):  
*Interest Rates*  
 "In the case of medium or long term French franc credits for Consensus Category II ... and Category III countries, or foreign currency credits for all categories ... the cost is the rate applicable under the OECD Arrangement." *Id.* at 50.  
 "Normally, the insurance or the guarantee covers post-shipment risks, but there are special provisions for pre-delivery financing, especially in connection with capital goods requiring substantial manufacturing lead times." *Id.* at 45.  
*Repayment Terms*  
 "Repayment period ... five years for the developed countries, eight and a half years for intermediate countries and ten years for developing countries." *Id.* at 46.  
*Repayment Installments*  
*Cash Payments*  
 "Repayment of principal in equal half yearly instalments with no grace period." *Id.*  
 "Generally, minimum cash payments of 15 per cent, or up to 20 to 25 per cent depending on the country and the buyer." *Id.*  
*Local Costs*  
 "Local costs are covered and financed, up to the amount of the cash payments ... only in exceptional cases and in accordance with the OECD Arrangement." *Id.*
395. Germany (1987):  
*Interest Rates*  
*Starting Point*  
 "The rates correspond in any case to the rates valid under the Arrangement." *Id.* at 66.  
 "The terms and conditions of cover for insurable credits are based on and in accordance with the Berne Union and the OECD agreements." *Id.* at 56.  
*Repayment Terms*  
 "Normally up to five years for capital goods, but eight and a half years when exported to a certain number of state-trading and developing countries, and ten years when exported to certain developing countries." *Id.* at 56-57.  
 "[M]inimum cash payment: 15 per cent for credit lengths of over six months." *Id.* at 57.
- Cash Payments*  
 396. Italy (1987):  
*Interest Rates*  
 "The lowest rates for financing in lire are appreciably higher than the minimum rates fixed by the international agreements on export credits." *Id.* at 88.  
*Starting Point*  
 "Cover is, in principle, provided on the conditions set out in the Arrangement." *Id.* at 83.  
*Repayment Terms*  
*Repayment Installments*  
*Id.*

- Cash Payments*  
397. Japan (1987):  
    *Starting Point*  
    *Repayment Terms*  
    *Repayment Installments*  
    *Cash Payments*  
    *Local Costs*  
    *Id.*  
    "The cover commences at the date of the contract or the delivery date." *Id.* at 184.  
    "Normal credit terms insured are set in line with the OECD Arrangement." *Id.* at 185.  
    *Id.*  
    "EID extends support to local cost financing in accordance with the provisions on local costs of the Arrangement." *Id.*
398. The United Kingdom (1987):  
    *Interest Rates*  
    *Starting Point*  
    *Repayment Installments*  
    *Cash Payments*  
    *Local Costs*  
    "ECGD's discretion foreign and local costs may be included may be included in credit insurance and in guaranteed financing... up to a normal maximum equivalent to the payments by delivery but subject to OECD and other restrictions, and reciprocal arrangements within the EEC." *Id.*  
    "Commercial bank is required to charge the Arrangement rate to the borrower." *Id.* at 228-29.  
    "Eximbank normally covers risks up to five years...but may cover longer maturities in the event of proven competition". *Id.* at 222.  
    "Regular (equal semi-annual) principal and interest instalments with no extended grace periods. . . ." *Id.*  
    "Minimum cash payment requirement for all markets is 15 per cent." *Id.*  
    "[T]he local costs guaranteed may not exceed the amount of the cash payment received." *Id.*  
    "The combined interest rate is as a rule somewhat higher than the minima set out in the OECD Arrangement." OECD, EXPORT CREDIT FINANCING SYSTEMS 1982, *supra* note 112, at 55-56.  
    "Occasionally maturities (typically 12 years) beyond those agreed in the OECD Arrangement have been offered to compensate for somewhat higher Canadian interest rates." *Id.* at 62.  
    "EDC provides local cost financing up to an amount equivalent to the percentage cash payment in accordance

- with the OECD Declaration on local costs." *Id.* at 61.
401. France (1982):  
*Interest Rates*  
*Starting Point*  
*Repayment Terms*  
*Repayment Installments*  
*Cash Payments*  
*Local Costs*
402. Germany (1982):  
*Interest Rates*  
*Starting Point*  
*Repayment Terms*  
*Repayment Installments*  
*Cash Payments*  
*Local Costs*
403. Italy (1982):  
*Interest Rates*  
*Starting Point*  
*Repayment Terms*  
*Repayment Installments*  
*Cash Payments*  
*Local Costs*
404. Japan (1982):  
*Interest Rates*  
*Starting Point*
- with the OECD Declaration on local costs." *Id.* at 61.
- "At present this rate is in conformity with the provisions of the Arrangement." *Id.* at 97.
- "In accordance with the rules of the OECD Arrangement. . . ." *Id.* at 93.
- "Repayment period . . . five years for the developed countries, 8 ½ years for intermediate countries, ten years for developing countries." *Id.* at 94.
- "[R]epayment in equal instalments, semi-annually and with no grace period." *Id.*
- "[G]enerally, minimum cash payments of 15 per cent, or up to 20 or 25 per cent depending on countries or buyers." *Id.*
- "Local costs are covered and financed, to a maximum of the amount of the cash payment and on the same terms as for the basic export credit." *Id.*
- "The refinancing terms of credit transactions . . . have to comply with those set out in the OECD Consensus." *Id.* at 110.
- "The terms and conditions of cover . . . are based on the Berne Union and OECD agreements." *Id.* at 104.
- "Maximum repayment terms . . . normally 5 years for capital goods, but 8 ½ years when exported to state-trading countries and 10 years when exported to developing countries." *Id.*
- "Regular semi-annual repayments with no grace period." *Id.*
- "Minimum cash payment 15 per cent." *Id.*
- "Local cost financing. . . may be included in the cover according to the rules laid down in the OECD Consensus agreement." *Id.*
- "As to the minimum interest rates charged to borrowers . . . the minimum rates are those established by the 'Consensus' and by other international understandings and contracts denominated in lire." *Id.* at 138.
- "In principal, cover is extended in compliance with Consensus terms." *Id.* at 133.
- Id.*
- Id.*
- Id.*
- "The interest rate blend is made up in such a way that the final rate is in conformity with the OECD Arrangement." *Id.* at 146.
- "Maximum post-shipment repayment terms are not fixed but are in line with international practice." *Id.* at 143.

- Repayment Terms*  
*Repayment Installments*  
*Cash Payments*  
*Local Costs*  
*Id.*  
 "Cash payments and repayment schedule are set in line with the OECD Arrangement." *Id.*  
*Id.*  
 "The EID extends support to local cost financing in accordance with the provisions of the OECD Declaration on local costs." *Id.*
405. The United Kingdom (1982):  
*Interest Rates*  
 "However, for exports on credit terms of two years or more exporters and overseas borrowers continue to have access to bank finance at fixed rates of interest determined in accordance with international guidelines." *Id.* at 237.  
 "Credit terms (including those contracts financed with ECGD guaranteed lines of credit) follow the established pattern for business in the particular market and are under no circumstances more favourable than those permitted in international agreements." *Id.* at 232.
- Starting Point*  
 "The normal limits of post-shipment credit insured are . . . up to ten years, with a normal maximum of five years for 'rich' countries and 8 ½ years for 'intermediate' countries." *Id.* at 233.
- Repayment Terms*  
*Repayment Installments*  
 "Repayments must normally be by semi-annual instalments from the Berne Union starting point of credit with no grace period." *Id.*
- Cash Payments*  
 "Downpayments are invariably required where credit exceeds 12 months. These will normally be 15-20 percent, of which at least 5 per cent is usually required on signature of contract. *Id.*
- Local Costs*  
 "[C]redit for local costs may be covered and financed within the limits laid down in the Consensus." *Id.*
406. The United States (1982):  
*Interest Rates*  
*Id.* at 251 (interest rate chart).
- Repayment Terms*  
*Repayment Installments*  
 "Repayment terms are generally over five years." *Id.* at 248.  
 "Regular (equal semi-annual) principal and interest instalments with no extended grace periods for the duration of the credit are required." *Id.* at 245.
- Cash Payments*  
*Local Costs*  
 "Minimum cash payment requirement for all markets is 15 per cent." *Id.*  
 "Eximbank may guarantee local cost financing in connection with an Eximbank direct loan. However, the local costs guaranteed may not exceed the amount of the cash payment received." *Id.*