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THE EXPORT INSURANCE AND GUARANTY PROGRAM OF THE EXPORT-IMPORT BANK

HARRISON S. HOWES*

> The foreign commerce of the United States of America today is infinitely more than the business of commercial interchange with other nations. It is a force in world affairs, reaching out to touch and in some degree to influence the attitudes of nations and the lives of men throughout the world.[1]

Exports and imports in United States foreign trade currently account for between six and eight percent of the gross national product, the smallest proportion for any free world industrial country. It is misleading, however, to consider the relationship of foreign commerce to the American economy in only these terms. In terms of overall amount, the international trade of the United States is greater than that of any other nation in the world. The United States is the largest industrial and agricultural producer in the world, and for many segments of the national economy, foreign markets are not merely important but crucial.

Since the end of the post-war reconstruction era exporters in all major industrial countries have been under constant pressure to grant more liberal trade credits to customers abroad, especially in those underdeveloped countries where balance of payment problems prevent the most favorable financial conditions.[2] Since these countries suffer from chronic adverse balance of payments which require an extension of credit in the form of deferred payment terms, exporters, banks or other financial institutions have not been able to assume the risks inherent in the extension of such credit. All credit transactions involve an element of risk and this risk increases in proportion to the length of time the credit is granted.

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1. Senate Comm. on Commerce, Final Rep., *The United States and World Trade: Challenges and Opportunities*, 87th Cong., 1st Sess. xvii (1961).

2. Senate Comm. on Interstate and Foreign Commerce, Interim Rep., April 1960, *Measures to Expand U. S. Exports: Present Export Credit Facilities and Proposals for New Mechanisms*, 86th Cong., 2nd Sess., 276,277. [hereinafter cited as *April 1960 Senate Hearings*].

In exporting abroad, especially to underdeveloped countries, commercial risks are only part of the problem encountered by the seller. An ever growing reality has been the increase of political, economic and social change within these countries, accompanied by an increasing array of non-commercial risks, such as expropriation without compensation, the violations of concessions or agreements, restrictions as to foreign exchange, or import restrictions. More subtle but of equal importance are the various forms of "creeping expropriation" employed by foreign governments to interfere with business operations, such as the refusal or delay of residence and labor permits for American personnel, the withholding of import permits, discriminatory taxes against foreigners and profit restriction. In addition, though governments in underdeveloped countries assume a greater role in business operations, they are frequently not capable of forming and implementing the sound economic policies necessary to attract and protect foreign trade and development. In industrialized countries where most of the foreign trade is undertaken by United States interests, these non-commercial risks are not a significant factor. In the underdeveloped countries, however, where the need is greatest for increased trade and investment, such problems have the effect of discouraging the participation of United States businessmen considered desirable both by the United States government and the various local governments concerned.[3]

For the past several years there has been a growing concern that the growth rate of the United States economy was being inhibited, in part, because of the increasing balance of payments deficit caused not so much by a declining rate of exports as by the increased expenditures abroad for military and economic assistance to allied and nonaligned nations. This resulted in pressure upon the United States dollar in the world market. President Kennedy expressed concern at this trend immediately on assuming office.

> The gold outflow of the past three years has dramatically focused world attention on a fundamental change that has been occurring in the economic position of the United States. Our balance of payments—the accounting which shows the result of all our trade and financial relations with the outside world—has become one of the key factors in our economic life. Mainly because that balance of payments has been in deficit we have lost gold.
>
> The loss of gold is naturally important to us, but it also concerns the whole free world. For we are the principle

3. Pugh, *Legal Protections of International Transactions Against Non-Commercial Risks*, LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 301-306 (Surrey & Shaw 1963); WHITMAN, UNITED STATES INVESTMENT GUARANTY PROGRAM AND PRIVATE FOREIGN INVESTMENT 9-12.

> banker of the free world and any potential weakness in our dollar spells trouble, not only for us but also for our friends and allies who rely on the dollar to finance a substantial portion of our trade. We must therefore manage our balance of payments in accordance with our responsibilities. This means that the United States must in the decades ahead, much more than at any time in the past, take its balance of payments into account when formulating its economic policies and conducting its economic affairs.
>
> In seeking over-all equilibrium we must place maximum emphasis on expanding our exports. . . . [t]he government must play a more vigorous part in helping to enlarge foreign markets for American goods and services.[4]

The problem of increasing exports in the face of growing noncommercial risks in underdeveloped countries presented a problem to United States foreign traders, in view of the lack of adequate legal safeguards available for their protection. This paper reviews the export credit insurance and guaranty programs administered by the Export-Import Bank of Washington together with the Foreign Credit Insurance Association, and various commercial banking institutions.

To a limited extent existing legal and political systems in countries to which exports are made may offer some protection to property and contractual rights of the exporter. Valid and effective protections are limited, however, by the economies in most underdeveloped countries. When exports are purchased by an individual buyer which involve payment in installments over a substantial period of time, local law may provide some provision for compensation if the goods are seized before title has passed to the buyer and before payment in full has been made. Also, some assurances may be granted by the exchange control authorities with respect to the availability and transferability of the foreign exchange required to make the installment payments. Any further protection is likely to be limited in scope. Moreover, even if local law affords protection, effective enforcement of these rights before the appropriate court, tribunal or agency may prove difficult.[5]

Accordingly, in the last twenty years the United States has negotiated a number of bilateral treaties of friendship, commerce and navigation with the purpose of protecting and encouraging foreign investment and commerce abroad.[6] These treaties provide generally that nationals of each contracting country may freely enter into business and receive nondiscriminatory treatment in the

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4. *Balance of Payments and Gold,* Special Presidential Message to Congress, 107 CONG. REC. 1705, Feb. 6, 1961.

5. Pugh *supra* note 3, at 304-306, 310-311; RUBIN, PRIVATE FOREIGN INVESTMENT: LEGAL AND ECONOMIC REALITIES 82 (1962).

6. Walker, *Modern Treaties of Friendship, Commerce and Navigation,* 42 MINN. L. REV. 805, 806; RUBIN *op. cit. supra* note 5, at 76.

other contracting country in accordance with the status enjoyed by nationals of the other contracting country. Foreign nationals are also freed from restrictions regarding ownership and management, receive assurances of convertibility of earnings and capital, and in the event of expropriation, are promised prompt and adequate compensation. The treaties guarantee the products of export of each contracting country most-favored-nation treatment as to customs duties and other charges that may be imposed, and subject them to all related rules and formalities. Once the goods are in the foreign country, they are guaranteed national treatment as to sale, distribution, international taxation, storage and use. The foreign exporter also gains the right to have access to local courts and tribunals for ordinary commercial claims, and protection against arbitrary imposition of exchange controls, but each country retains the right to impose controls on imports or exports which have the effect of imposing exchange restrictions.

Perhaps the area of greatest contention and sensitivity between the have and have-not nations is that of expropriation or nationalization.[7] In *Banco Nacional de Cuba v. Sabbatino*,[8] the Supreme Court of the United States stated:

> There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a State's power to expropriate the property of aliens. There is, of course, authority, in international judicial and arbitral decisions, in the expressions of national governments, and among commentators for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate, and effective compensation. However, Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and under-developed countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect "imperialist" interests and are inappropriate to the circumstances of emergent states.
>
> The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital ex-

7. The terms "expropriation" and "nationalization" have sometimes been considered to have different connotations. The term expropriate is sometimes applied to measures taken in individual cases, while the term nationalization is often used for takings resulting from a change in the economic and social structure of a state. It is now generally held, however, that from a doctrinal viewpoint the distinction between the terms may have little practical significance in the reality of international legal relations, and the more general term of "taking of property" may well be preferable. Domke, *Foreign Nationalizations: Some Aspects of Contemporary International Law,* 55 AM. J. INT'L L 585, 588.
8. 376 U.S. 398 (1964).

> porting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system. It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations.[9]

While it is true that the treaties provide some standard for arriving at the responsibility of the taking state, under most of the treaties the compensation provisions are impaired by the exchange provisions under which a state is required to make "reasonable provision" for the withdrawal in foreign exchange of compensation for expropriated property only after providing for goods and services essential for the health and welfare of its people. Moreover, in a case of general expropriation the taking country would almost always find it difficult or impossible to make payment in dollars.

The extent to which these treaties provide protection against so-called "creeping expropriation" such as wage and labor controls, price controls, import and export restrictions, or confiscatory taxation is also questionable. Specific safeguards incorporated into a treaty can always be circumvented by the harassment and persecution of an unfriendly government. Without a mutual recognition of the benefits of trade between the countries, the point at which legitimate regulation ceases, and becomes a "taking" is essentially unanswerable. As a result, in recent years creeping expropriation has become more feared than the outright variety.[10]

The treaties provide for national or most-favored-nation treatment with respect to payments, remittances and transfers of funds or financial institutions between the contracting countries. They also provide that neither party shall impose exchange restrictions, but nearly all permit the suspension of convertibility under certain conditions to the extent necessary to prevent the monetary reserves from falling to a new level, to effect an increase in the reserves in order to bring them up to an adequate level, or both. In the event restrictions are imposed pursuant to the escape clause, provision is made that the country concerned shall, after providing whatever may be necessary to assure the availability of foreign exchange for goods and services essential to the health and welfare of its people, make reasonable provision for the withdrawal in the currency of the other party of compensation for expropriated property, earnings and capital. Although these provisions limit to some extent the sovereignty of the restricting country, the scope

9. *Id.* at 428-430.
10. WHITMAN, *op. cit. supra* note 3, at 14, 15.

and flexibility of the exceptions are sufficiently vague and open to abuse so as to give little assurance to the foreign businessman.[11]

Another factor which causes concern in the context of the political instability of many underdeveloped areas is that "risks of confiscation or seizure cannot be fully eliminated through treaties so long as the possibility exists of a change in government in the foreign country through revolution or war."[12] Although this problem has always existed it becomes more significant in the area of politically unstable countries where a faction which succeeds to power may not concede the rights of a foreign property owner at all, and moreover, may gain much political support by repudiating such treaties.[13]

Each of the treaties contains a provision stating that nothing in the treaty shall preclude the application of measures necessary to protect its essential security interests, but the construction of the phrase "security interests" might include internal or economic security and so the possibility exists that this could be the basis of wholesale rejection of the treaty obligations.[14] Moreover, in view of the scope and flexibility of the permitted exceptions, and the broad and often ambiguous phraseology of the treaty protections, the failure of the treaties to include any provisions guarding against creeping expropriation or to provide for the failure of a state to fulfill contractual or other undertakings, the treaties offer only limited measures of effective legal protection.[15] These limitations reflect a fundamental difference of approach between the United States and underdeveloped countries. The United States investor and exporter requires more in the way of safeguards than the politicians in underdeveloped countries can promise without losing the support of their electorates. Consequently, the fact that these treaties can reflect only existing points of view results in what has been suggested in an unfortunate paradox. That is, that where the treaty assurances are meaningful they would probably not be necessary, and where they are necessary they either cannot be negotiated or, if they can be, often result in a document which satisfies neither side and, if anything, only increases the aura of resentment and mistrust so fatal to effective business relationships.[16]

Up to 1962 the United States had negotiated only seven of these treaties with underdeveloped countries which were ratified by both contracting countries.[17] Even if it can be assumed that the American

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11. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 218 (1962).
12. U.S. DEP'T OF STATE, POINT FOUR 73 (1950).
13. WHITMAN, *op. cit. supra* note 3, at 15.
14. Report by the Am. Bar Ass'n. Committee on International Trade and Investment Section of International and Comparative Law, *The Protection of Private Property Invested Abroad* 56 (1963).
15. Pugh, *supra* note 3, at 330.
16. WHITMAN, *op. cit. supra* note 3, at 15.
17. Ethiopia, Iran, Israel, Korea, Muscat and Oman, Nicaragua, Pakistan, FATOUROS, *op. cit. supra* note 11, at 97.

exporter can expect a degree of protection from these seven countries, the remaining areas where no treaty protection exists present considerable potential danger.

Customary international law offers little protection for the alien exporter contracting with a private party or autonomous government agency.

During the nineteenth century and until the end of the Second World War, it was generally held in international legal theory that the right to nationalize or expropriate property was founded upon the duty of a sovereign to make prompt, adequate and effective compensation.[18] As the Supreme Court points out, in *Banco Nacional*, this standard is no longer respectable. And this is especially true in view of the position assumed by the Soviet Union and other Socialist oriented states.[19]

Although it is recognized that a sovereign has the right to dispose of natural resources and other assets located in its territory, notwithstanding that such property may belong to foreign nationals, this principle is sometimes qualified to the extent that such property must be taken for a public purpose or in the public interest.[20] It has become increasingly difficult, however, to limit what a state may consider necessary for the general welfare or benefit, the requirements of sound welfare, or a public need in the national economy. An international authority or another state would not be competent in almost every instance to pass judgment on the adequacy of such a purpose.[21]

The act of nationalization by a sovereign state involves two elements, (1) the act of taking, and (2) the act of making compensation or the failure so to act. Although there arises an issue of illegality in connection with the element of compensation, the taking itself cannot be considered a violation of international law. This, as the Supreme Court points out, is because of the principle that the only recognized limits on the sovereign's right to nationalize are those imposed in a treaty obligation.[22] It has been suggested that it is doubtful whether under customary international law a state is obliged to pay compensation for property nationalized even in so far as the nationalization may affect title to the property of aliens.[23] Under the international law a state has no duty towards the owners of nationalized property, but only towards the state of their nationality, and then only if and when the state chooses to assert

18. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 23 (1959).
19. Dawson and Weston, *Prompt, Adequate and Effective: A Universal Standard of Compensation?* 30 FORDHAM L. REV. 727, 740-749 (1962).
20. Domke, *supra* note 7, at 590, n. 58.
21. *Id.* at 591.
22. 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 471 (1943); Domke, *supra* note 7, at 585.
23. Baade, *Indonesian Nationalization Measures Before Foreign Courts-a Reply*, 54 AM. J. INT'L L. 801, 804 (1960).

its own rights flowing from these duties.[24] Since a state may either expressly or by implication, wholly or partially, waive its claims against another state for compensation arising from the nationalization of its national's property, a nationalization of the property of aliens is not, under international law, invalid *per se*.[25]

The Supreme Court recognized this difficulty in *Banco Nacional* when it said:

> Respondents contend that, even if there is not agreement regarding general standards for determining the validity of expropriations, the alleged combination of retaliation, discrimination, and inadequate compensation makes it patently clear that this particular expropriation was in violation of international law. If this view is accurate, it would still be unwise for the courts so to determine. Such a decision now would require the drawing of more difficult lines in subsequent cases and these would involve the possibility of conflict with the Executive view. Even if the courts avoided this course, either by presuming the validity of an act of state whenever the international law standard was thought unclear or by following the State Department declaration in such a situation, the very expression of judicial uncertainty might provide embarrassment to the Executive Branch.
>
> Another serious consequence of the exception pressed by respondents would be to render uncertain titles in foreign commerce, with the possible consequence of altering the flow of international trade. If the attitude of the United States were unclear, one buying expropriated goods would not know if he could safely import them into this country. Even were takings known to be invalid, one would have difficulty determining after goods had changed hands several times whether the particular articles in question were the product of an ineffective state act.[26]

Also, in the areas of creeping expropriation such as taxation, exchange control, currency control and measures involving the exercise of police power, the sovereign may exercise broad freedom in altering the contractual relations between aliens and local entities. International law provides little or no protection against such governmental measures.[27]

There has long been a concern with these problems among industrialized countries which have recognized the importance of international trade in their economic well-being. In order to encourage these exports to the underdeveloped countries, national governments have initiated government sponsored and supported systems

24. BISHOP, CASES AND MATERIALS ON INTERNATIONAL LAW 627 (1962).
25. Baade, *supra* note 23, at 804.
26. 376 U.S. 398, 433-434 (1964).
27. Metzger, *Multilateral Conventions for the Protection of Private Foreign Investments*, 9 J. PUB. L. 133, 136 (1960).

of export credits, export guaranties or credit insurance. As competition among the countries increased, there developed competition over the terms of payment which were influenced in turn by how far each government has been prepared to go in providing support to the exporter in the form of credits, guarantees, or insurance.[28] Today, some form of export credit insurance is being written in some 30 countries.

> Export Credit Insurance is considered vital by many countries dependent on foreign trade and has become an important instrument of their commercial policy. Exports generally represent between 15 and 20 percent of the national income in the Western European countries where export credit insurance was initially developed. This proportion rises to around 30 percent in the Belgium-Luxembourg Union and around 40 percent in the Netherlands. In Japan, exports represents about 15 percent of the national income.
>
> The availability of export credit insurance has undoubtedly had an important role in the expansion of exports in the post-war period. Between 1951 and 1961, the value of exports increased by 81 percent in Western Europe. The increase reached 146 percent in Austria, 42 percent in the Belgium-Luxembourg Union, 68 percent in France, 229 percent in Germany (Federal Republic), 121 percent in Italy, 106 percent in the Netherlands, 74 percent in Switzerland and 38 percent in the United Kingdom. Japan's exports rose by 200 percent in the same period.[29]

The Program of the Export-Import Bank

The Export-Import Bank of Washington (hereafter Eximbank) was established in 1934 as a banking corporation under the laws of the District of Columbia. The original purpose of the Bank was to finance the expected increase in trade between the United States and the Soviet Union following the establishment of diplomatic relations between the two countries, but because of the failure of Russia to discuss the outstanding debts in the United States, no loans for trade with the Soviet Union were ever made by the Bank. The emphasis of the Bank was then changed to that of financing United States trade and it has developed to become the principal instrument of the United States government in assistance and financing of the export trade of this country.[30]

The operations of the Bank are designed to support and encourage the export and import trade of the United States, and

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28. See Surrey and Goekjian, *The Role of Export Credits, Guaranties and Insurance in International Trade*, INTERNATIONAL FINANCING AND INVESTMENT 377 (McDaniels ed. 1963) for a history of foreign export guaranty programs and a summary of the provisions of their respective programs.
29. Committee for Industrial Development of the United Nations Economic and Social Council, Survey Rep. (1963).
30. Middleton, *Export-Import Bank*, LAWYERS GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 391 (Surrey & Shaw 1963); LOOMIS, PUBLIC MONEY SOURCES FOR OVERSEAS TRADE AND INVESTMENT 17 (1963).

not to promote the economic development of less developed foreign countries, as such. Although the Bank makes loans for specific development projects, the purpose behind such long-term financing is the development of the export trade of the United States. By contrast, the Agency for International Development has as its primary purpose the furthering of economic and social development of underdeveloped countries, and AID has no program for financing, fostering or assisting directly in the import or export activities of individuals or institutions of the United States, but does administer a program of investment guaranties.[31]

The Eximbank was completely revised by the Export-Import Bank Act of 1945,[32] and it is operating today under this Act, as amended. In 1953 the Committee on Banking and Currency of the Senate conducted an extensive study of the Bank's operations, particularly in Latin America, which resulted in the Export-Import Bank Act Amendments of 1954, which further reorganized the Bank.[33]

On May 21, 1953, the Act was amended to include subsection (c) of paragraph 2 which authorized the Bank to provide insurance for United States exports against certain kinds of political risks.[34] Under this authority, however, the Bank failed to develop any extensive or effective program of guaranties or insurance. In 1955, 25 comprehensive guarantees were issued covering export transactions in the amount of $8.8 million. In 1956, two were issued covering only $259,000. The Bank issued one guarantee against political risk under this section, in 1955, in the amount of $875,000, and this was subsequently cancelled. Exports of cotton and other agricultural products were financed by the Bank under comprehensive guarantees from 1955 to 1957. No further guarantees were issued in 1958 or 1959.[35]

During this time Congress began to receive complaints that more and more business was being lost by American exporters because of the highly competitive foreign markets. These complaints emphasized that Western European and Japanese concerns were able to offer credit terms superior to those of United States firms because of the government backed insurance plans in force in those countries, which not only offered guarantees against commercial risks but, more important, insured against political risks as well. In order to compete with these foreign firms United States exporters had to offer payment terms which were equally attractive. To do so the domestic exporter had to have financing, but because

31. See Clubb and Vance, *Incentives to Private U.S. Investment Abroad Under the Foreign Assistance Program*, 72 YALE L.J. 475 (1963); Miller, *Protection of U.S. Investments Abroad: The Investment Guarantee Program of the United States Government*, 32 GEO. WASH. L. REV. 288 (1963); WHITMAN, *op. cit. supra* note 3.

32. 12 U.S.C. §§ 635-635 (h) (1945).

33. 12 U.S.C. § 635 (a) (1954).

34. 12 U.S.C. § 635 (1953).

35. *April* 1960 *Senate Hearings* 278.

of the risks involved, particularly those political risks peculiar to the export trade, banks were disinclined to accommodate him.

In 1956, S. 2256 was introduced in the Senate with the purpose of amending the Eximbank statute to provide for guarantees of exports "against certain risks of a political nature." Officials of Eximbank were not enthusiastic about the bill since they maintained that (1) such guarantees were not necessary and (2) Eximbank already had authority to provide protection against such risks, particularly on a medium-term basis. As for short-term guarantees, Mr. Samuel C. Waugh, Eximbank's president and Chairman of the Board of Directors stated:

> Experience has shown that political or transfer difficulties seriously affecting international payments can generally be foreseen as much as 180 days in advance. . . . If the insurance is to be available only for shipments to safe areas . . . it would be of little value to the exporter.[36]

The bill died, but the clamor of exporters continued. In 1958, S. 3149 was introduced in the Senate in another attempt to provide export insurance guarantees. Eximbank officials again expressed the opinion that such a program was unnecessary. Mr. Hawthorne Arey, an official of Eximbank, explained the Bank's position as follows:

> [O]ur participation with the individual exporter in purchasing from him on individual transactions a percentage of his paper without recourse gives him all of the coverage that any foreign insurer gives to its exporters. We have that program, which is entirely distinct from this insurance that I was speaking of, and which to my knowledge is not offered by any other country. . . . After it becomes a sale to the foreign buyer, we are prepared, and we have been throughout the life of the bank to participate with the exporter by purchasing some of his paper without recourse. We obtain exactly the same end that is obtained through the sale of exporter credit insurance. We have covered everything. We have taken the paper off his hands.[37]

Mr. Waugh then added:

> . . . but we class these as loans along with our other credits because we take the paper of the foreign buyer off the hands of our exporter.[38]

The confusion in the discussions between members of Eximbank

36. *Hearings on S. 2256, Senate Committee on Banking and Currency,* 84th Cong., 2nd Sess. 41 (1956).
37. *Hearings on S. 31409, Senate Committee on Banking and Currency,* 85th Cong., 2nd Sess. 19 (1958).
38. *Ibid.*

and members of Congress appears to have resulted from a failure to distinguish clearly between the concepts of export credit or financing, and export guarantees which are essentially a form of insurance. Bank officials reasoned that their practice of nonrecourse purchases in effect performed the same function as a guaranty or an insurance policy. The two functions of financing and insurance are separately performed in practice, however. Commercial banks are concerned with the extension of loans at prescribed interest rates to individual borrowers in specific cases. Insurance, on the other hand, protects the insured against loss from any one of a variety of causes in return for a premium calculated on an actuarial basis to absorb the losses of a few out of fees paid by the many. This basic difference in purpose and approach makes for a basic difference between banks and insurance companies in point of view and administration, and suggests the reason for the confusion in the discussions regarding the need for export guarantees. Eximbank by its practice of nonrecourse financing removed the risks from those transactions in which it participated. But what of the exporter who either wished to provide his own financing through his own bank, or was in a position to finance his transactions himself? For him insurance remained a necessity if he were to compete successfully in the foreign market.

As a result of the failure to pass S. 3249 and the growing demand for more effective guarantees for United States exports, the Senate Committee on Interstate and Foreign Commerce held hearings on this phase of the Bank's activity.[39] Testimony at these hearings reiterated that United States firms were consistently losing business in the highly competitive foreign markets because they were unable to compete with the credit terms offered by foreign concerns whose exports were insured by government or government-backed institutions. It was found that many American exporters, particularly in the medium and smaller size categories, felt that this factor was the principal competitive disadvantage with which they were faced.[40]

In May of 1960 the Bank embarked upon a program of short-term guarantees against political risks, which provided that a U.S. exporter could guarantee with the Bank 90 per cent of any losses he suffered on credits of 180 days or less as a result of nonconvertibility of foreign currencies, foreign government laws preventing delivery of goods, cancellation of the foreign buyer's import license, war, hostilities, rebellion, civil commotion, or expropriation of the exported goods. These guarantees could be purchased directly from Eximbank or from 149 banks and insurance companies

39. *April 1960 Senate Hearings.*
40. *Id.* at 276.

which agreed to serve as agents. The fees ranged from 25 cents per $100 of invoice value for 30 day credit service, to 50 cents where the credit term was between 151 and 180 days.

The Bank also provided at this time two "medium-term" guarantee programs (from 180 days to five years, or seven years in the case of jet aircraft) consisting of (1) a political risk guaranty similar to that available on short-term transactions, guarantying 90 per cent of losses, with a premium of about three-fourths of 1 per cent per annum on the declining balances guaranteed; and (2) comprehensive coverage costing 1.5 per cent per annum on the declining balance. The Bank, between March and December 1960, approved 109 short-term guarantees, including the participation of 32 commercial banks. In the first 11 months of 1960, 245 medium-term credits or guarantees were written by the Bank.[41]

In his State of the Union message on January 30, 1961, concerned with the overall unfavorable balance of payments situation in the country, President Kennedy promised an immediate program consisting of:

> A series of executive orders, legislative remedies, and cooperative efforts with our allies will get underway immediately, aimed at attracting foreign investment and travel to this country, promoting American exports, at stable prices and with more liberal governmental guarantees and financing . . . to provide for the common defense of the free world and the hopes for growth of the less developed lands.

On February 6, 1961, in his message to Congress on "U.S. Balance of Payments and Gold Outflow from the United States" the President went into further detail:

> Our Export-Import Bank must play an increasingly important role in our export promotion efforts. Last year the Export-Import Bank announced a widening of the facilities which it offers for extending credit to American exporters. Despite the improvements made, these facilities are not yet adequate, nor are they comparable to those offered by foreign countries, especially those offered to small and medium-sized exporting concerns and those offered for the financing of consumer goods. I am directing the President of the Export-Import Bank, by April 1, to prepare and submit to the Secretary of the Treasury, as Chairman of the National Advisory Council of International Monetary and Financial Problems, a new program under the Export-Import Bank to place our exporters on a basis of full equality with their competitors in other countries. Also, I

41. Senate Select Committee on Small Business on Encouragement and Expansion of Exports by Small Business, Rep. No. 89, 87th Cong., 1st Sess. (1961).

> have asked the Secretary of the Treasury to initiate and submit by the same date a study of methods through which private financial institutions can participate more broadly in providing export credit facilities.[42]

In September 1961, subsection (c) of section 2 of the act was amended to permit the Bank to guarantee, insure, coinsure and reinsure United States exporters doing business in the United States against political and credit risks of loss arising in connection with United States exports, and to issue such gurantees, insurance, etc. to exporters, insurance companies, financial institutions, "or groups thereof" and authorized the Bank to employ any of these instruments as agents in the issuance and servicing of such guarantees, insurance, etc. and the adjustment of claims arising thereunder.[43]

After a study by the Bank of the export credit insuring systems abroad, it was decided that the President's directive could best be implemented through an association of American insurance companies associating with the Bank to provide protection against the commercial credit and political risks to which exporters are exposed when extended credit is offered. This partnership arrangement is in accord with the policy of the Bank to employ private facilities to the fullest extent possible. Furthermore, the commercial insurance industry was unwilling to abdicate to the government its responsibility to respond to a legtimate insurance market should a feasible program be developed. The insurance industry also provided the existing machinery of agents and brokers on a national scale necessary to service such a program.

On October 27, 1961, President Kennedy announced the formation of the Foreign Credit Insurance Association (FCIA) which had an original membership of fourteen companies to assist in this program with the Bank. The program has grown to more than seventy stock and mutual companies in 1964.[44]

In February, 1962, a program was instituted by the Bank, to be administered by FCIA, in partnership with the Bank, which provided that the commercial credit risks of FCIA policies were to be shared equally by FCIA and the Bank and that the political risks were to be borne entirely by the Bank. The first policies of insurance were issued in February 1962. FCIA is a voluntary association of insurance companies the function of which is to insure trade credits granted by U.S. suppliers of products abroad who qualify as normal risks. The insurance covers the exporter up to an agreed percentage

42. Message to Congress, *supra* note 4.
43. 12 U.S.C. § 635 (1961). Previous Sec. 2 (c) enacted by Public Law 30, 83rd Cong. (67 Stat. 28), May 21, 1953, authorized Eximbank to issue certain consignment insurance or reinsurance in favor of U.S. exporters up to an aggregate outstanding amount of $100,000,000.
44. HOLLIS, GUIDE TO EXPORT CREDIT INSURANCE 9 (1964); LOOMIS, *op. cit. supra* note 30, at 21.

against non-payment loss resulting from commercial credit and political hazards, or both, as specified. Eximbank and the FCIA jointly shared the commercial risk up to August 1, 1964, but as of that date the insurance syndicate became the sole insurer of the credit risk with Eximbank providing re-insurance to the insurance companies over certain limits of liability. Eximbank has always been the sole insurer of the political risks although policies are written and administered by FCIA, and all servicing is carried out by FCIA, as agent for the Bank and for the member insurance companies.[45]

Under the FCIA-Eximbank program insurance is available to any manufacturer or exporter who is a resident of and doing business in the United States or its territories, including the Commonwealth of Puerto Rico.

Under the short-term policies products are eligible for insurance if they are produced or manufactured in the United States to the extent that at least one-half of their value, exclusive of price mark-up, has been added by labor and material exclusively of U.S. origin. Medium-term policies are designed to cover income-producing capital goods, such as industrial, communications or transport machinery and equipment, certain types of livestock and certain other items provided they are produced or manufactured in the United States and are customarily sold in international trade on payment terms of 181 days to five years. Both short and medium term transactions are eligible if they are to credit-worthy buyers in "friendly foreign countries" within acceptable dollar limits which are customary and justified by normal trade standards. Payment must be made in U.S. dollars and shipment must be made from a U.S. port.[46]

The residence requirements for coverage include (1) an individual resident of the United States, (2) a partnership resident in the United States in which no partner is a "controlled foreign corporation" (defined as one which is 50 per cent or more owned or controlled, directly or indirectly, by United States interests), (3) a corporation organized and existing under the laws of the United States or any state or territory thereof or the District of Columbia, and (4) a foreign corporation doing business in the United States which is not a "controlled foreign corporation" as defined.

While FCIA insurance is not available for exports of a "controlled foreign corporation" it is available for shipments to such corporation if the goods will be utilized in manufacture by the controlled foreign corporation within the country of its incorporation, will be utilized or consumed in the business of the controlled foreign corporation within the country of its incorporation, or will be offered for resale

45. HOLLIS, *id.* at 19.
46. *Ibid.*

for consumption within the country of its incorporation. In order to obtain coverage the exporter need not be the manufacturer of the goods exported. Merchants are eligible if they hold title to the goods exported.[47]

Four basic types of policies, two short-term and two medium-term, are available. Although the comprehensive short and medium-term policies are the most widely used, the short and medium-term political risk only policies are available for those willing to assume all commercial credit risks themselves. The four policies are:

1. Short-Term Comprehensive policies which cover both commercial credit and political risks on sales of any product involving payment terms up to 180 days.

2. Short-Term Political Risk policies which insure political risks only, as defined, on sales of any type product on payment terms up to 180 days.

3. Medium-Term Comprehensive policies cover both commercial credit and political risks on sales of such items as machinery, equipment, certain types of livestock and other products which are normally sold in international trade on payment terms of 181 days to five years.

4. Medium-Term Political Risk policies cover political risks only on the same type of product and payment terms as those covered in medium-term comprehensive.[48]

The risks covered in all four policies are defined by the FCIA. Commercial credit risks are defined as (1) the insolvency of the buyer, or (2) the failure of the buyer to pay the insured within six months after due date for products delivered to and accepted by the buyer.[49] The Political risks, for which coverage is provided solely by Eximbank, are defined as (1) transfer risks, or the inability to convert the buyer's local currency deposit in payment of the insured obligation into dollars and to then transfer these dollars into the United States; (2) the cancellation or non-renewal of an export license or the imposition of restrictions on the export of products not subject to license or restriction prior to the date of shipment under circumstances not due to the fault of the buyer, or the cancellation, under circumstances not due to the fault of the buyer, of previously issued and valid authority to import such shipment. Also covered is the prevention of the import of such shipment into the buyer's country due to the imposition of any law or any other order, decree or regulation having the force of law

47. LOOMIS, *op. cit. supra* note 30, at 21, 22.
48. HOLLIS, *op. cit. supra* note 44, at 22, 23; LOOMIS, *op. cit. supra* note 30, at 24-26.
49. HOLLIS, *op. cit. supra* note 44, at 20.

under circumstances not due to the fault of the buyer. Coverage is provided for (3) war, hostilities, civil war, rebellion, revolution, insurrection, civil commotion or other like disturbance occurring on or before the due date; (4) requistion, expropriation, confiscation or intervention in the business of the buyer by a governmental authority occurring on or before the due date; (5) the imposition of any law or any order, decree or regulation having the force of law which, under circumstances not due to the fault of the buyer, prevents the buyer's local currency deposit, referred to in (1), supra, from being made; and (6) transport or insurance charges occasioned after shipment by interruption or diversion of voyage outside the United States due to political causes and which charges are impracticable to recover from the buyer.[50]

The FCIA policy specifies the percentage of loss insured by each type of coverage. For short-term comprehensive policies political risks are covered for 95 per cent and commercial credit risks are covered for 85 per cent. Short-term coverage for political losses alone is 90 per cent. Medium-term comprehensive and political coverage is for 85 per cent, however, in certain high risk countries selected by FCIA the coverage on medium-term comprehensive and political coverage is only 70 per cent.[51]

Certain risks are excluded from coverage. While each policy specifies its applicable exclusions, in general losses are excluded which are due to the fault of the exporter, are on any shipment sold to a buyer for any currency other than U.S. dollars, arise from unwillingness of the buyer to accept the products shipped, to losses with respect to which a dispute exists with the buyer until such dispute is settled to the satisfaction of the insurers, to any risk arising out of the exchange fluctuations or devaluation of the currency of the buyer's country occurring on or before the due date of the indebtedness or the date of deposit, whichever is later, and to any loss for which written claim is not made prior to the expiration of one year from the due date of the indebtedness.[52]

Each of the four policy coverages is subject to its individual conditions. For either of the two short-term policies the exporter must agree to a "whole turnover" requirement which provides that the exporter agrees to insure all eligible shipments to all foreign markets, although he may exclude all shipments to Canada and all shipments paid for in advance or under an irrevocable letter of credit. It may also be possible for other exclusions to be agreed upon for individual countries or products provided the remaining portion of sales offer FCIA acceptable volume and spread of risk.[53]

50. *Id.* at 20-21; LOOMIS, *op. cit supra* note 30, at 22, 23.
51. HOLLIS, *op. cit. supra* note 44, at 24.
52. *Id.* at 23.
53. *Id.* at 17; LOOMIS, *op. cit. supra* note 30, at 24.

Each of the medium-term policies is available on a case by case basis. Coverage is sold on a single sale or a series of repetitive sales to the same buyer during the ensuing twelve months. Repetitive medium-term sales coverage is primarily intended for the manufacturer or exporter who has a distributorship or similar arrangement with the buyer. By qualifying such buyer for credit, a series of shipments within that annual credit limit may be insured.[54] On all medium-term policies a downpayment is required from the buyer and the exporter is expected to retain a portion of the risk for his own account. The usual downpayment is at least 20 per cent but where the exporter can demonstrate that a foreign competitor can offer terms based on a lesser downpayment, a 10 per cent downpayment will be allowed. On the balance, or financed portion retained by the seller, the FCIA or the Bank will insure 85 per cent of the defined commercial or political risks, the exporter being expected to retain 15 per cent for his own account. Also, if the exporter insures all his medium-term transactions on a "whole turnover" basis, he can secure coverage of 90 per cent of his political risks and obtain a lesser premium fee. For the medium-term transactions the financed portion retained by the exporter must be evidenced in the form of a note issued and delivered to the exporter by the buyer, in a form substantially conforming to note forms available from the FCIA.[55]

Each policy of the four issued normally provides that coverage begins from the date of shipment, defined as the date when the products are shipped en route to the buyer. Under either of the policies, however, the exporter may for a small additional premium elect to insure from the date of the contract of sale. This coverage is intended to protect the exporter against loss on orders which involve a preliminary period of manufacture or assembly such as products designed to a customer's specifications. This coverage is in the form of an endorsement to the regular policy.[56]

Each of the FCIA policies may also be endorsed to cover transactions on which title to the products is retained by the policyholder while the products are in a foreign warehouse or are on consignment. Consignment coverage applies to current consignment shipments and to consignment or warehouse stocks already in foreign countries. Endorsement coverage is limited to political risks during the period of consignment, the full terms of the coverage become effective from the date of sale from the consignment stock and for

54. HOLLIS, *op. cit. supra* note 44, at 22; LOOMIS, *op cit. supra* note 30, at 25.
55. HOLLIS, *op. cit. supra* note 44, at 22, 23; LOOMIS, *op. cit. supra* note 30, at 25.
56. Pre-shipment coverage is designed to protect the exporter against loss on orders which involve a preliminary period of manufacture or assembly, especially on goods tailored to the customer's specifications. Under the short-term policies, the exporter may elect within ten days of the effective date of the contract to take pre-shipment cover either on a specific contract or on all contracts and the endorsement provides that shipments must be made within 180 days after the date of the contract. HOLLIS, *op. cit. supra* note 44, at 22, 23.

a period not to exceed 180 days. If consignment coverage is applied for and approved a limit of coverage for each country applied for is determined. Medium-term consignment endorsements for comprehensive and political risks only are also issued. The products covered must qualify for medium-term insurance, and consignment coverage is required when machinery, equipment or other items are consigned to a warehouse or to the custody of a third party for delivery to the exporter's distributor in order to replenish existing stocks. As products are withdrawn a 20 per cent downpayment is made and notes signed for the balance or financed portion of the contract price. Preshipment or consignment endorsements are subject to the same insured percentages as the policy to which they relate, with the exception that in determining a loss prior to shipment in an insured contract, the percentage is applied to the contract price instead of the gross invoice value on short-term and amount of default on a note under a medium-term policy. All policies require the exporter to retain the uninsured percentage at his own risk.[57]

In addition to the insurance program Eximbank offers a program of financial and guaranty assistance on medium-term export transactions from 181 days to five years. Under this program the exporter secures nonrecourse financing from his commercial bank and the Eximbank issues its comprehensive commercial and political risk guaranty on the transaction or takes a participation directly in the financing along with the commercial bank, or the exporter. The same persons, partnerships and corporations eligible for credit insurance are eligible for financial and guaranty assistance on medium-term transactions. The Eximbank will not provide assistance for a transaction unless the exporter has offered credit to a foreign buyer on terms which are "commercially customary in international trade" and which provide for payment within 181 days to five years. The single exception involves the sale of large jet aircraft, on which the Bank will permit a seven year period of repayment. To demonstrate that the terms are "commercially customary", the exporter will be expected to show that the terms are in accordance with those common to accepted commercial practice by exporters in a number of countries, or that any terms which appear long by this standard are being made available by foreign financial institutions. While the Eximbank has no inflexible standard applying to every product, it generally considers that financing of raw materials and consumer goods should be offered on a less than 180 day basis making them ineligible for medium term assistance, while financing for automobiles should be offered for no more than

57. HOLLIS, *op. cit. supra* note 44, at 23-25.

18 months, agricultural machinery and light construction equipment for no more than three years, and financing for most heavy equipment should not be for longer than five years.[58]

Three types of participation are available from Eximbank. The Eximbank will, when a commercial bank is willing to provide financing on a nonrecourse basis, issue its guaranty to the commercial bank covering the commercial risk on the later maturities and the political risk on all maturities. This guaranty extends to the financed portion.[59] Eximbank sets its fee for the guarantee in accordance with the credit terms being offered the buyer and the country in which the buyer is located. The exporter deals only with the commercial bank, which in turn conducts negotiation with Eximbank.[60]

Where the commercial bank desires Eximbank to participate with it in financing the transaction, Eximbank will consider an arrangement whereby the commercial bank purchases the buyer's notes from the exporter and then issues a participation certificate to Eximbank covering the financing of the later maturities which the Eximbank provides. Under this arrangement the commercial bank takes the entire risk of non-payment, both commercial and political, on the early maturities and Eximbank assumes the risks, both commercial and political, on the later maturities. The exporter receives nonrecourse financing as in the case of a guaranty.[61]

If an exporter can show he has been refused financing by at least two commercial banks or other institutions, and in addition has been refused credit insurance from FCIA, Eximbank will consider a direct application from an exporter for either a guaranty or a direct participation in the financing. Under the FCIA insurance now available, specific approval of both FCIA and Eximbank is required before a policy will be issued. If an application for FCIA insurance should be refused by the Bank, it is doubtful if the transaction would be considered favorably for either a participation or a guaranty[62].

Eximbank provides guarantees for U.S. enterprises selling technical services and engineering services abroad, and guarantees are available for products shipped on a lease basis or on consignment awaiting sale, or on products and goods on exhibit at trade fairs. While these guarantees are for goods and related technical services which originate or are manufactured in the United States, the Bank will not automatically disqualify an item manufactured in the United States but which contains some foreign made com-

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58. LOOMIS, *op. cit. supra* note 30, at 28.
59. The exporter will be required to retain for his own account not less than fifteen percent of the invoice value remaining after the down payment by the purchaser.
60. Middleton, *supra* note 30, at 400, 401; Wrigley, *How to Get Export Credit Insurance Insurance or Guarantees*, 71 INT'L COMMERCE 17-19 (1965).
61. LOOMIS, *op. cit. supra* note 30, at 29, 30; Wrigley, *ibid;* Middleton, *supra* note 30, at 400, 401.
62. LOOMIS, *op. cit. supra* note 30, at 30; Wrigley, *supra* note 60, at 18, 19.

ponents. A determination of eligibility will be made on a case by case basis.

It is the policy of the Bank to make its facilities available for all goods which are legally exportable. Eximbank prefers to assist in the export of newly manufactured goods but will also consider used equipment, taking into consideration the condition of such equipment, the extent it may have been rebuilt or reconditioned and any warranties that may be placed upon it. Of particular importance to the Bank is the method used for determining value of this equipment.[63]

Both under the medium-term FCIA insurance policies and the medium-term guarantees to commercial banks, sales of large commercial jet aircraft are guaranteed on terms up to seven instead of five years. These sales are usually offered through a take-out arrangement with a commercial bank which provides the financing. The Eximbank extends a direct credit to the purchaser, as with a project credit, but requires a down payment and exporter participation.[64]

CONCLUSION

The program of Eximbank as only been in operation since 1962 and therefore it is difficult now to make a determination of its effectiveness. In its first year of operation FCIA wrote policies of insurance covering approximately $500 million in U.S. exports, and had assisted in financing, through its bank guarantee program, about $160 million in exports.[65] In the fiscal year ended June 30, 1964, FCIA insured approximately $744.5 million in exports, and Eximbank guaranteed about $272 million in exports.[66] Clearly, at this point the anticipated increase in export commerce has not materialized to a significant extent. This may be due to a number of factors which were not sufficiently taken into consideration in establishing the present program.

FCIA coverage on short-term transactions must be insured, under the present system, on a whole turnover basis. Although provision is made for waiving this requirement in respect to shipments to Canada, or when a reasonable spread of the risk can be shown, a problem may arise for the exporter in a competitive market where a premium based on a whole turnover may make the difference between overall success or failure. Underwriting experience will furnish the answer as to whether coverage can be provided on a case by case basis for short-term transactions, but

63. MIDDLETON, *supra* note 30, at 401, 402.
64. *Id.* at 401; Wrigley, *supra* note 60, at 18, 19.
65. Wrigley, *U.S. Exporters Non Offered Faster, More Flexible Credit Insurance: or Guarantees,* 69 INT'L COMMERCE 2 (1963).
66. Wrigley, 71 INT'L COMMERCE 15 (1965).

it would be desirable to conform short-term coverage, in so far as possible, with medium-term standards.

On the other hand, with the exception of jet aircraft, no provision is made for insurance or guarantees in the case where credit terms may be required for longer than five years. Some foreign credit insurance programs provide coverage of more than five years when it can be shown to be necessary to match the terms of a foreign competitor. Although Eximbank provides some facilities under its project loan activity to enable the financing of such a project, the foreign customer himself must go to considerable trouble and expense to obtain approval of the project, and afterwards the U.S. exporter runs the risk of losing the business to another U.S. competitor because of the length of time involved in obtaining approval.

There is also an absence in the program of any provision for insuring or extending guarantees to exports involving payment in currencies other than U.S. dollars. It is true that one impetus of the program was the concern with the balance of payments position of the United States, but the increasing number of hard, convertible currencies present opportunities to the U.S. exporter which might well be taken advantage of if the guarantee program could be extended to protect not only the exporter but also the U.S. dollar position.

Down payment requirements could also be changed to be made sufficiently flexible so that they could be applied differently to each case. Insurance requirements limiting coverage should remain fixed at a certain percentage, but the exporter could be allowed to assume a greater portion of the risk if he finds this necessary to compete in an individual case.

As experience is gained in the administration of the program, improvements in the position of the U.S. exporter will undoubtedly result. Close and continuous study not only of the United States program, but of the operation and effect of foreign guarantee systems should be undertaken with a view toward improving the position of the individual U.S. exporter and the foreign trade position of the United States as well.