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U.S. Export Promotion in the Foreign Assistance Program

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U.S. EXPORT PROMOTION IN THE FOREIGN ASSISTANCE PROGRAM

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INTRODUCTION

The United States has multiple objectives in furnishing economic assistance to developing countries. Foreign assistance is commonly recognized as an instrument of foreign policy and as a means of improving the economic and social conditions of people in the developing world. The beneficial impact of foreign assistance on the U.S. export community and the U.S. economy is less frequently acknowledged. This article will focus on the commercial aspects of two programs authorized by the Foreign Assistance Act[1]— the Commodity Import Program[2] and the Trade and Development Program.[3]

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* The authors, who are attorneys with the Agency for International Development, are expressing personal views and not necessarily those of the Agency. Mr. Fries is an Assistant General Counsel and Ms. Frame is a Deputy Assistant General Counsel.

1. Foreign Assistance Act of 1961, Pub. L. 87–195, 75 Stat. 424 (1961), *as amended* Pub. L. 96–257, 94 Stat. 422 (1980) (codified at 22 U.S.C. § 2151 *et seq.* (1980)).

2. This is the name given to funding primarily under the Economic Support Fund, 22 U.S.C. § 2436 *et seq.* (1979). *See* discussion in text, *infra,* at 179—80.

3. Authority for the Trade and Development Program is to be found in § 607(a) of the FAA, Pub. L. 87–195, 75 Stat. 441 (1961) *as amended* Pub. L. 96–53, 93 Stat. 366 (1979) and in § 661 of the FAA, Pub. L. 87–195, 75 Stat. 424 (1961) codified at 22 U.S.C. § 2421 (1981).

Section 607(a), which had its origin in the Mutual Security Act of 1954, states in pertinent part:

> Whenever the President determines it to be consistent with and in furtherance of the purposes of part I and within the limitations of this Act, any agency of the United States Government is authorized to furnish services and commodities on an advance-of-funds or reimbursement basis to friendly countries, international organizations . . .

Section 661 of the FAA of 1961, Pub. L. 87–195, which was added to the FAA by Section 31 of the Foreign Assistance Act of 1974, Pub. L. 93–559, 88 Stat. 1795 (1974), states in pertinent part:

> The President is authorized to use $4,000,000 of the funds made available for the purposes of this Act for the fiscal year 1981, to work with friendly countries, especially those in which the United States development programs have been concluded or those not receiving assistance under part I of this Act, in (1) facilitating open and fair access to natural resources of interest to the United States and (2) stimulation of reimbursable aid programs consistent with part I of this Act. Any funds used for purposes of this section may be used notwithstanding any other provision of this Act.

BACKGROUND

The U.S. foreign trade balance has deteriorated significantly in the last decade. Imports have outstripped exports, leaving the United States with a balance-of-trade deficit each year since 1976.[4] The U.S. Department of Commerce reported that for 1980 the deficit totalled $26.7 billion.[5]

The deficit is due largely to the tremendous rise in imported oil prices following the Arab-Israeli war in 1973 and the growing foreign penetration of the U.S. market in automotive and other manufactured products. Various conservation measures and import substitution efforts have been undertaken to reduce the import volume.

The dramatic increase in U.S. exports in recent years has been an important factor in preventing the deficit from becoming even larger. The U.S. share of the world export market has been increasing since 1977.[6] Presently U.S. exports amount to twenty percent of the U.S. gross national product (goods only), twice the figure of ten years ago.[7]

In large measure one can attribute the increase in U.S. exports to the markets in developing countries. These Third World markets are presently the fastest growing export markets for U.S. goods and services. In 1979, U.S. exports to developing countries amounted to approximately $63 billion, or almost thirty-five percent of total U.S. exports.[8] U.S. exports to Third World countries now exceed those to Japan and the European Economic Community combined.[9]

The U.S. Government is involved in promoting exports through the use of export credits, tax incentives, and marketing information services.[10]

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4. U.S. DEPT. OF COMMERCE. INT. TRADE ADMIN., UNITED STATES FOREIGN TRADE ANNUAL 1973–1979, at 3 (1980).

5. Atkinson, *Trade Deficit Doubles in 4th Quarter,* Wash. Post, Feb. 6, 1981, at D1, col. 3–5 and D2, col. 5.

6. McCracken, *A United States 'Industrial Policy',* Wall St. J., Jan. 12, 1981, at 20, col. 3–6.

7. *Id.*

8. UNITED STATES FOREIGN TRADE ANNUAL *1973–1979, supra* note 4, at 1.

9. U.S. DEPT. OF COMMERCE. INT. TRADE ADMIN., U.S. TRADE WITH MAJOR WORLD AREAS *1973–1979,* at 4,5 (1980).

10. The Domestic International Sales Corporation (DISC) is an important tax device designed to make exporting more profitable by deferring corporate income taxes. 26 C.F.R. § 1.991 *et seq.* (1980). The Export-Import Bank of the United States (12 U.S.C. § 635 *et seq.* (1945) and the Commodity Credit Corporation (7 U.S.C. § 1691 *et seq.* (1954) promote exports through their export financing activities. The Departments of Commerce and Agriculture promote exports through marketing activities and the provision of marketing information. 15 U.S.C. § 171 *et seq.* (1912), 7 U.S.C. § 1691 *et seq.* (1954). *See also* HOUSE COMM. ON INTERNATIONAL RELATIONS, EXPORT STIMULATION PROGRAMS IN THE MAJOR INDUSTRIAL COUNTRIES: THE UNITED STATES AND EIGHT MAJOR COMPETITORS, H. R. Doc., 95th Cong., 2d Sess. 294 (1978).

Legislation specifically designed to encourage exports by facilitating the formation and operation of export trading companies and associations was introduced in the last Congressional session, was passed by the Senate without dissent, and is under further consideration by the present Congress.[11]

The Foreign Assistance Act [hereinafter the "FAA"][12] provides an additional vehicle for promoting U.S. exports. FAA export promotion activities focus exclusively on markets in developing counties. Although the promotion of U.S. exports is not a primary objective of foreign assistance, it is nonetheless an important feature of two programs authorized pursuant to the Foreign Assistance Act — the Commodity Import Program and the Trade and Development Program. This article will examine in detail the export promotion orientation of these two foreign assistance activities.

1. THE COMMODITY IMPORT PROGRAM[13]

A. *Background*

Export promotion in the form of export financing has been a feature of the U.S. foreign assistance program since the Marshall Plan[14] for the economic recovery of post-war Europe. The emphasis placed on it by the Congress and the Executive Branch has changed over the years.

Concessional assistance under the Marshall Plan, a predecessor of current foreign assistance legislation, was principally directed toward financing commodities essential to European economic recovery.[15] During the 1950s foreign assistance funds were mainly spent on the export of capital equipment and goods to developing nations.[16] In 1961 foreign assistance activities were continued under the authority of the FAA.[17]

In 1973 the FAA received a new emphasis on technical assistance furnished in support of projects in specific development sectors of critical importance to the lives of the poorest people of the world, rather than the large-scale capital projects and general purpose resource transfers of the past.[18] Development Assistance funds are now specifically reserved for

11. S. 2718, 96th Cong., 2d Sess. (1980).

12. Foreign Assistance Act of 1961 *supra* note 1, *as amended,* 22 U.S.C. § 2151 *et seq.* (1980).

13. *See supra,* note 2.

14. Foreign Assistance Act of 1948, Pub. L. No. 472, 62 Stat. 137 (1948).

15. *Id.*

16. *See* Mutual Security Act of 1951, Pub. L. No. 82–165, 65 Stat. 373 (1951), which was reenacted each year, with amendments, concluding with the Mutual Security Act of 1960, Pub. L. No. 86–472, 74 Stat. 134 (1960).

17. Pub. L. No. 87–195, 75 Stat. 424 (1961).

18. Foreign Assistance Act of 1973, Pub. L. No. 93–189, 87 Stat. 714 (1973).

development projects and activities primarily in the areas of agriculture, family planning and primary health care, energy, and education.[19] Commodities are purchased in connection with these projects even though they feature technical assistance.

Presently most FAA-funded export financing occurs under the Commodity Import Program [hereinafter the "CIP"]. The CIP is financed almost entirely from the Economic Support Fund [hereinafter "ESF"] rather than the Development Assistance account.[20] Both activities are administered by the Agency for International Development [hereinafter "AID"].[21] The Commodity Import Program is so captioned to reflect its main purpose: to enable developing countries that are short of foreign exchange to import a wide range of commodities essential to their economic growth. To the U.S. supplier, however, the program is one of export financing.

In fiscal year 1980, approximately $726 million worth of commodities were exported to selected countries throughout the developing world under AID financing.[22] The CIP in Egypt is a particularly interesting example. In connection with Egypt's political reorientation toward the West and the U.S. interest in supporting Egyptian-Israeli peace negotiations, the Egyptian CIP is now the Agency's largest. In the five years ending with FY 1980, the Agency financed exports totalling $1.3 billion to Egypt.[23] These exports included raw materials (such as tallow, coking coal, and tinplate), capital

19. 22 U.S.C. §§ 2151a, 2151a–1, 2151b, 2151c, and 2151d (1979).

20. The Economic Support Fund, 22 U.S.C. § 2346 *et seq.* (1979), previously known as Security Supporting Assistance, was established to promote economic and political stability in countries where the U.S. has special security interests and has determined that economic assistance can be useful in helping to secure peace or to avert major economic or political crises. It makes little apparent difference to the U.S. exporter whether the commodity being exported is financed by funds derived from ESF or Development Assistance appropriations. The distinction may bear, however, on the exporter's tax treatment. Pursuant to a rather whimsical regulation, an exporter can defer tax as a Domestic International Sales Corporation (DISC) exporter only with respect to income earned on AID-financed sales financed with ESF funds, but not under Development Assistance. 26 C.F.R. §§ 1.993–1(j)(3)(i) (1980).

21. AID administers programs authorized by the Foreign Assistance Act of 1961, *supra* note 1, *as amended,* 22 U.S.C. § 2151 *et seq.* (1980). Since 1979, AID's FAA responsibilities derive from Exec. Order No. 12,163, 44 Fed. Reg. 56,673 (1979), and Delegation of Authority No. 1 from the Director of IDCA, 44 Fed. Reg. 57,521 (1979). IDCA was established pursuant to Reorg. Plan No. 2 of 1979, transmitted to the Congress on April 10, 1979, under the authority of chapter 9 of title 5 of the U.S. Code.

22. OFFICE OF COMMODITY MANAGEMENT, AID, COMMODITY IMPORT PROCUREMENT (1980). CIP activities account for two-thirds of these expenditures; the remainder is spent on commodities imported for particular projects.

23. *Id.*

equipment (such as buses, trucks, printing, microwave, and electrical equipment), and food items (such as corn, edible oil, and poultry).[24] The major features of the CIP export financing program are summarized below.

B. *Export Financing Procedure*

Current export financing procedures under the CIP are based on the experience gained during the Marshall Plan. Exports are now destined, not for Europe, but for the low-income countries of Asia, Africa, the Near East, Latin America, and the Caribbean. But the exports are generated by the same community of U.S. suppliers which, along with freight forwarders, ocean and air carriers, banks, and insurance companies, provided agricultural and industrial products to post-war Europe under U.S. Government financing.

The CIP provides buyers' credits to importers in countries with limited foreign exchange.[25] The credits are framed by a grant or loan (on concessional terms) from AID to a foreign government.[26] The grant or loan agreement sets forth certain terms and conditions and describes the eligible imports to be financed. The AID dollars are allocated by the foreign government to various purchasers (public or private) who import the required goods (usually from the United States). Payment is made to the U.S. supplier 1) by a U.S. bank under a letter of credit opened by the foreign purchaser (backed by an AID commitment to reimburse the bank) or 2) by AID pursuant to a direct commitment letter. In special cases AID advances funds directly to the foreign government to finance such imports or reimburses the government for its expenditures in eligible transactions. The loan or grant account is debited when AID funds are disbursed.

AID-financed export transactions follow normal commercial practice in most respects. Buyer and seller agree on the price and quantity of the material to be purchased. The sales contract covers inspection, delivery, insurance, and warranty terms as in any export transaction. Payment is made against such standard commercial documents as the invoice, the bill of lading, and inspection certificates.

But AID export financing also differs from normal commercial practice. Several procedures are tailored to accommodate the special interest of the U.S. Government in preserving the integrity of its funds. For example,

24. *Id.*

25. For a comprehensive discussion of a range of financing methods in international trade, including suppliers' credits as well as buyers' credits, *see generally* Mullen, *Export Promotion: Legal and Structural Limitations on a Broad United States Commitment*, 7 LAW & POL. INT'L BUS. 57—140, (1975).

foreign purchasers are required to observe competitive procurement procedures to assure reasonable prices, wide participation, and procedural fairness.[27] Prospective purchases are advertised in the American export community unless the procurement is of small value or the general import activity of the purchaser has already been published in the United States.[28] Procurement may be accomplished through formal competitive bid procedures or through informal negotiation with prospective suppliers.[29]

AID is required by law to approve the eligibility of the commodities it finances under the CIP.[30] The FAA specifically precludes the financing of military items.[31] Certain commodities (e.g., luxury goods) are ineligible as a matter of Agency policy; other items (e.g., fertilizer) may be eligible only when U.S. domestic requirements have been met. AID normally intervenes, moreover, to assure that specifications of equipment meet U.S. standards.[32]

Under the general terms of FAA Section 604(a), commodities financed by AID must be procured in the United States.[33] Procurement from any other country must be specifically authorized.[34] Procurement in the United States means that eligible items must be produced in and shipped from the United States.[35] Additionally, the FAA specifically limits the procurement of certain

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26. Whether payment comes from a loan or a grant is important to the exporter with regard to his ability to protest unfair procurement procedures. The General Accounting Office (GAO) presently accepts jurisdiction to review only those bid protests associated with export transactions financed by AID grants, not loans to foreign governments. COMP. GEN. DEC. B-185505 (1976) and B-194643 (1979).

27. 22 C.F.R. § 201.22 (1980).

28. AID uses its own notices as well as the Commerce Business Daily to advertise prospective procurements.

29. AID's export financing procedure for the CIP is set forth in AID Regulation 1, 22 C.F.R. §§ 201.22, 201.23 (1980).

30. 22 U.S.C. § 2354(f) (1968).

31. 22 U.S.C. § 2346(c) (1979).

32. 22 C.F.R. § 201.23(c) (1980).

33. 22 U.S.C. § 2354(a) (1961). To assist in their development, AID permits procurement in low-income countries as well as in the United States for projects funded under Development Assistance loans and Development Assistance grants to the relatively least-developed countries (RLDCs). This limited form of procurement source untying is the subject of a Memorandum of Understanding concluded under the auspices of the Development Assistance Committee (DAC) of the Organization for Economic Cooperation and Development, the major association of industrial donor countries. *Memorandum of Understanding on Untying of Bilateral Development Loans in Favor of Procurement in Developing Countries.* DAC/FA (73) 20. With certain reservations, all those countries adhere to it. Efforts in the DAC to achieve a more comprehensive reciprocal untying of bilateral development assistance, which would permit developing countries to purchase in any DAC country, have not been successful.

34. 26 Fed. Reg. 10,543 (1961).

35. 22 C.F.R. Part 201, Sub part B, §§ 201.10-201.15 (1980).

commodities to the United States. For example, Section 636(i) prohibits the financing of motor vehicles vehicles not of U.S. manufacture unless special circumstances exist[36] and agricultural commodities normally may not be bought outside the United States if their domestic price exceeds parity.[37]

The prices of AID-financed exports must not exceed prevailing U.S. export market prices.[38] AID enforces this price test by reviewing comparable export sales on a post-audit basis and by asserting refund claims against suppliers whose commodities are overpriced.

Finally, there are special conditions applicable to the delivery of AID-financed exports. For example, AID reserves the right to vest title in itself and to divert cargo in transit to foreign destinations.[39] The major shipping requirement, however, is the Cargo Preference Act.[40] That Act requires that at least fifty percent of the gross tonnage of all AID-financed exports transported by ocean carriers move on U.S-flag vessels to the extent they are available at fair and reasonable rates for such vessels.[41] This shipping requirement applies to suppliers through the letter of credit if the supplier arranges the freight on a C & F transaction. The economic burden of cargo preference, however, falls on the purchaser. To the extent the use of U.S.-flag vessels increases the transportation cost of the export transactions AID finances, the value of the concessional assistance to the foreign government is reduced. FAA Section 640(c) permits AID to convert loans to grants to cover any ocean freight differential created by the Cargo Preference Act.[42] Informal estimates by Agency officials suggest this differential may exceed $25 million. These extra transportation costs also reduce the foreign assistance funds available for export promotion.

C. *The Commodity Import Program as Export Promotion*

As discussed above, the primary objective of the CIP is to provide foreign countries with foreign exchange at concessional rates to enable them to

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36. 22 U.S.C. § 2396(i) (1961).

37. 22 U.S.C. § 2354(e) (1966).

38. 22 U.S.C. § 2354(b) (1961); 22 C.F.R. Part 201, Subpart G (1980).

39. 22 C.F.R. §§ 201.46–201.47 (1980). Interesting international legal problems arise when AID exercises this right, as it did in 1975 with respect to $50 million worth of exports on the high seas bound for Vietnam. For example, the Agency may take possession of AID-financed cargo at some intermediate port pursuant to its right to vest title but the importer may also claim ownership as holder of the negotiable bill of lading.

40. 46 U.S.C. § 1241(a) (1954). Under the authority of 46 U.S.C. 1241(b) (1954), the Maritime Administration promulgates implementing regulations to the Cargo Preference Act. 46 C.F.R. Part 381 (1979).

41. *Id.*

42. 22 U.S.C. § 2399(d) (1973).

purchase needed goods and services. The CIP is particularly valuable to the foreign government when its economy can absorb a wide range of imports without internal disruption and when the U.S. exports are competitively priced.

Additionally, the CIP is of direct benefit to U.S. exporters. Because the financing is tied to the United States, foreign exchange is made available for U.S. exports which otherwise might not find a market. A large number of exporters take part in the program, supplying hundreds of different items, often in significant dollar amounts. In the Egyptian CIP alone over 450 suppliers have sold 124 different commodities since 1976; 31 suppliers have each had sales in excess of $10 million.[43] The U.S. exporter, although not receiving the financial concession extended to the foreign borrower or grantee, is nonetheless assured of prompt payment by the U.S. Government in accordance with the letter of credit or letter of commitment. Without the CIP the exporter might be forced to extend credit to the foreign purchaser and rely upon that purchaser's more uncertain credit-worthiness.

The long-term benefit of the CIP to the U.S. export community is less definite. Certainly, CIP financing assists U.S. exporters to enter, maintain, or expand foreign markets, particularly in countries or products where U.S. suppliers do not enjoy historical trading relationships or natural competitive advantages. But, because the market is limited to U.S. competition, the CIP does not maximize aggressive market development in the importing countries by U.S. exporters. Exporters who know that CIP funds are not available to European or Japanese competitors may not employ overseas agents, supply high quality products, or invest in the maintenance capability which would assure a competitive position without tied procurement. This potential consequence of tied procurement can be overcome in some measure by the use of parallel financing arrangements, whereby a purchaser solicits bids on a worldwide basis with the understanding that only if a U.S. supplier is selected will AID financing be applied to the transaction.

The CIP may be of particular interest in the case of U.S. exports that are internationally competitive but are not attractive to the foreign purchaser without concessional financing. It is possible for CIP loans at concessional rates to be made available in combination with other financing on harder terms from the Export-Import Bank or the purchasing country's own resources so that the purchaser will find the U.S. exporter's offer more advantageous than it would otherwise appear. AID is experimenting with procedures for using the CIP this way on a regular basis in connection with international procurements, particularly in Egypt. This use of the CIP may

43. COMMODITY IMPORT PROCUREMENT, *supra* note 22.

become more important in the future in view of the new Administration's proposed cutback of funding for the Export-Import Bank,[44] and present projections for the Economic Support Fund (from which CIP funds are derived) to increase slightly in 1982 over current levels.[45]

There are limitations, however, to the CIP as an export promotion device. Most obvious is the modest level of funds available.[46] Although increasing slightly, CIP resources are still quite limited. The allocation of these funds, moreover, is primarily for political and security reasons.[47] CIP funds are not provided to foreign countries on the basis of their potential as markets for U.S. goods and services.

Despite these limitations, the importance of AID export financing to the U.S. export community is evident from the dollar volume of CIP procurement and the intensity of competition for the business it generates.

II. THE TRADE AND DEVELOPMENT PROGRAM[48]

A. *Background*

The activities of the Trade and Development Program [hereinafter "TDP"] are authorized by two specific provisions of the FAA designed to promote development through the export of U.S. goods and services to Third World countries. The first provision, FAA Section 607(a) authorizes U.S. Government agencies to furnish goods and services to "friendly" countries and international organizations on a reimbursable basis. The second provision, FAA Section 661, authorizes foreign assistance funds (in FY 1981, $4 million) to be used as "seed money" to promote the sale of goods and services from the U.S. Government and the U.S. private sector.

B. *Section 607(a) Program*[49]

Sales of goods and services under Section 607(a) authority have increased dramatically in the past few years in connection with the expanded purchasing power of "middle-income" countries (many of which were former recipients of AID concessional assistance) and "oil-rich" countries. These countries are still importing capital goods and technical services but, unlike the recipients of AID concessional assistance, they have a measure of foreign

44. "Ex-Im Aid to Exports Goes Under the Knife," BUS. WK., Feb. 23, 1981, at 34–35.
45. AID CONGRESSIONAL PRESENTATION FISCAL YEAR 1982, at 5, Amended Version.
46. *See* text *supra* at 179 and note 22.
47. *See supra* note 20 concerning the Economic Support Fund.
48. *See supra* note 3.
49. *Id.* Pub. L. 96–53, 93 Stat. 366 (1979).

exchange available to purchase technical expertise, training, and modern technology from the United States. The U.S. provides no concessional assistance under this program; all of the costs (including overhead) incurred by a U.S. Government agency in furnishing the goods and services are reimbursed by the foreign country.

Section 607(a) authority is limited to the furnishing of goods and services which are "consistent with and in furtherance of" the economic development purposes of the FAA and "within the limitations of the Act."[50] The Director of the Trade and Development Program[51] determines whether a particular request for goods or services meets these statutory requirements.

The eonomic development purposes of the FAA allow the furnishing of a wide range of nonmilitary goods and services. For example, under Section 607(a) authority U.S. Government agencies have provided training for approximately 2500 Nigerians in mid-level technical skills, technical services to assist in the development of Brazil's navigable waterways, and assistance in modernizing Venezuela's public health system.[52]

Most of the limitations of the FAA do not apply to the Section 607(a) activities. The FAA limitations govern the use of funds appropriated for concessional assistance, not U.S. Government activities fully reimbursed by another country. For example, the FAA prohibits the furnishing of concessional assistance to communist nations, including the People's Republic of China (PRC), unless the President waives that prohibition under special conditions.[53] Following normalization of relations with the PRC in 1972, the U.S. Government looked for ways in which it could provide technical expertise in areas of interest to the PRC. The Section 607(a) program was a logical vehicle for the furnishing of such U.S. Government expertise. Under this program the U.S. Army Corps of Engineers is advising the PRC on several hydropower projects. The PRC is paying in full for these services.

The procedure for using Section 607(a) authority is rather simple. A foreign government desiring certain goods or services makes a request to a U.S. Government agency. That agency then seeks a determination from the TDP Director that the request is consistent with FAA development purposes.

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50. *Id.*

51. The Trade and Development program, or TDP, operates under the authority of IDCA Delegation of Authority No. 4, 45 Fed. Reg. 46, 254 (1980). TDP is a separate operating unit within IDCA which, like AID and the Overseas Private Investment Corporation, receives policy guidance from IDCA. This organizational structure is under review by the present Administration, but as this article goes to press no decisions have been made concerning it.

52. AID CONGRESSIONAL PRESENTATION FISCAL YEAR 1981, at 86–88.

53. 22 U.S.C. § 2370(f) (1962).

If the U.S. Government agency receives such a determination it enters into an agreement with the foreign government. The U.S. agency may use its own resources (e.g., government personnel may provide technical advice), or those of private companies or individuals under contract.

The U.S. Government has provided goods and services under this authority to more than forty countries.[54] Many of these countries have previously received U.S. goods and technical advice under concessional AID programs. Consequently, they are familiar with the expertise which various U.S. Government agencies possess. Many agencies, including the Army Corps of Engineers, the Department of Energy, and the Environmental Protection Agency, have furnished goods and services under this program.

Foreign government purchases of goods and services under Section 607(a) authority represent export transactions facilitated by the FAA without cost to the U.S. taxpayer.

C. *Section 661 Program*[55]

FAA Section 661 authorizes the use of foreign assistance funds to encourage the export of development-oriented goods and services from the United States.[56] This program represents the "seed money" approach to export promotion. The amount of money authorized for such purposes has increased from $2 million when the provision was enacted in 1974 to $4 million in FY 1981.[57] Like the reimbursable program of Section 607(a), this export promotion program is aimed at the "middle-income" and "oil-rich" nations that desire U.S. technology and expertise for development purposes and have the resources to purchase them.

Section 661 funds are used in a variety of ways to promote U.S. exports. They may be used to finance U.S. technical experts who assist a developing country in defining its development needs. An expert typically assesses a project proposal, recommends a feasibility study, and provides a scope of work for such a study. Funds may also be used to determine the technical, economic, and financial feasibility of a particular project, and to provide a scope of work for implementing that project. Finally, Section 661 funds are used to sponsor technology workshops to familiarize foreign governments with the U.S. technology available in specific fields of interest to those countries.

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54. *Supra* note 52, at 87.
55. Pub. L. 87-195, 75 Stat. 424 (1961), (codified at 22 U.S.C. § 2421 (1981)).
56. Section 661 funds are used to promote the sale of goods and services provided by U.S. Government Agencies under the authority of Section 607(a), as well as goods and services from the private sector.
57. 22 U.S.C. §2421 (1981).

Section 661 expenditures are not now reimbursed either by the recipient country or the participating private firm. TDP is presently considering ways to obtain reimbursement of the funds it spends (e.g., if a firm that undertakes a Section 661-financed feasibility study obtains the follow-on construction contract, that firm could reimburse TDP for its initial expenditures).[58] TDP is also considering ways to share costs with foreign governments or private firms in order to stretch limited funds.

Follow-on U.S. exports are contemplated by the program.[59] Experience has shown that when the United States makes "seed money" available to countries to define needs and undertake feasibility studies, this initial investment often results in substantial follow-on sales of goods and services from the United States. TDP estimates that since the inception of the program in 1974 approximately $10 million in seed money has resulted in $1 billion of export sales.[60] In recent years, Section 661 funds have been used, for example, to finance 1) a $225,000 feasibility study for the construction of an offshore natural gas pipeline in Thailand which has resulted in over $97 million in U.S. sales for project implementation; 2) feasibility studies for industrial development projects in Tunisia that are expected to lead to the procurement of about $30 million of training services and equipment from the United States; and 3) a $33,000 feasibility study for a solid waste disposal and recycling project in Venezuela which has led to approximately $80 million in contracts with U.S. firms.[61]

Section 661 funds are carefully allocated. Requests for funding normally come from a foreign country as they do with Section 607(a) activities. The requests are examined by the Trade and Development Office in Washington and projects are selected in accordance with a number of criteria designed to maximize the impact of the funds expended:[62] First, the project must be one of

58. In its Report on the International Development and Food Assistance Act of 1978, Pub. L. No. 95–424, the House Committee on International Relations stated that Section 661 funds were to be used "to stimulate the sale of American technology, development expertise and goods and services" from both the U.S. private sector and U.S. government agencies. HOUSE COMM. ON INTERNATIONAL RELATIONS, INTERNATIONAL DEVELOPMENT AND FOOD ASSISTANCE ACT OF 1978, H. R. REP. NO. 95–1087, 95th Cong., 2d Sess., 34–35 (1978). The Report added that when Section 661 funds were spent to encourage the sale of U.S. private sector goods and services, TDP should attempt to recover those expenditures from the private firm. *Id.* at 63.

59. *Id.*

60. U.S. TRADE AND DEVELOPMENT PROGRAM, IDCA CONGRESSIONAL PRESENTATION FY 1982, at 3 [hereinafter "U.S. TDP"].

61. TDP gives preference to infrastructure development projects in the areas of energy, agriculture and minerals, and technical training. AID CONGRESSIONAL PRESENTATION FY 1981, *supra* note 52, at 88.

62. U.S. TDP, *supra* note 60, at 5.

the foreign government's development priorities and of particular importance in the country's development plan. Secondly, there must be a substantial likelihood that the project will result in either a) the procurement of a large amount of U.S. goods and services (a probable minimum procurement from U.S. suppliers and contractors of fifty times the Section 661 expenditure within five years); b) the provision of technical services by U.S. Government agencies on a reimbursable basis; or c) facilitation of open and fair access to natural resources of interest to the United States. Third, funding for the implementation of the follow-on project must be available from the foreign country's own foreign exchange, international financial institutions, Export-Import Bank credits, or commercial borrowing, and the funding must be open to procurement from U.S. sources. Finally, Section 661 funds will not be used where a) it is likely that U.S. technology would be procured for the project in any event (e.g., where it is the only appropriate technology available) or b) where the U.S. technology is not internationally competitive.

Section 661 activities are usually carried out by private firms competitively selected.[63] Those firms are not precluded from engaging in follow-on work if it is clear in the original advertisement that a) follow-on work is probable and b) a firm that is awarded the preliminary contract will not be excluded from competition for the follow-on contract.

The export promotion feature of the Section 661 program is increasingly important today because the United States faces growing competition in the export of goods and services. For FY 1982 the Administration has requested the Congress to increase TDP's funding level to $7 million,[64] at a time when most U.S. Government programs are being cut back. This increase suggests that the Administration believes that export promotion is important and that TDP has been an effective program for generating U.S. exports of development-oriented goods and services to developing countries.

III. CONCLUSION

In the preceding discussion, the importance of the Foreign Assistance Act as an instrument for promoting U.S. exports has been emphasized. FAA funds stimulate U.S. exports in both the Commodity Import Program and the Trade and Development Program. A growing recognition of the export promotion potential of these programs is important in practical terms to the

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63. If TDP selects the firm, the procurement is governed by the Federal Procurement Regulations, 41 C.F.R. Parts 1 and 7 (1980). If a recipient country, as a grantee of Section 661 funds, selects the firm, it follows the procedures set forth in AID HANDBOOK 11, COUNTRY CONTRACTING.

64. U.S. TDP, *supra* note 60, at 3.

U.S. export community and to the public support for foreign assistance programs generally.

Whether FAA expenditures will have an increasingly favorable impact on U.S. exports will largely depend upon the level of funding the Administration seeks and the Congress provides for future activities under the export-oriented programs discussed above. The authors believe that FAA appropriations for those activities should be based on an evaluation of their potential for promoting U.S. exports to developing countries, as well as on their contribution to U.S. security interests and the long-term economic progress of the Third World.