

## Subsidized Export Credits and the 1983 Amendments to the Export-Import Bank Act

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## NOTES

### SUBSIDIZED EXPORT CREDITS AND THE 1983 AMENDMENTS TO THE EXPORT—IMPORT BANK ACT

Export credit subsidies<sup>1</sup> play an important role in the export of complex capital goods,<sup>2</sup> because the high purchase prices of these goods can make financing the decisive factor in a sale.<sup>3</sup> Until the 1970s, U.S. producers were not seriously threatened by importation of capital goods from countries whose governments subsidize exports.<sup>4</sup> Since the mid-1970s, however, that situation has changed, and the United States has attempted to protect American producers' positions in the domestic market through legislation and international agreements.<sup>5</sup>

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1. An export credit subsidy, also referred to as an export bounty, is a government subsidy paid on certain exports in order to develop an industry or to increase a country's foreign trade. *DICTIONARY OF ECONOMICS* 159 (5th ed. 1970). They are usually granted to finance the sale of capital goods such as machinery and equipment and are extended either to suppliers to make them more competitive, or to buyers who need additional funds for purchasing. *ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], THE EXPORT CREDIT FINANCING SYSTEMS IN OECD MEMBER COUNTRIES 7* (1982) [hereinafter cited as *EXPORT CREDIT FINANCING SYSTEMS*].

2. Capital goods are economic goods, such as factories, buildings, and machinery, that are used in the production of other goods. *MCGRAW-HILL DICTIONARY OF MODERN ECONOMICS* 63 (3d ed. 1983). Complex capital goods are large-scale capital goods requiring major investments, such as rail systems and factories. See *EXPORT CREDIT FINANCING SYSTEMS*, *supra* note 1, at 7.

3. Favorable financing terms can reduce significantly the cost of expensive capital goods. For example, in a study of the commuter aircraft industry, the United States International Trade Commission found that favorable financing terms reduced the cost of foreign aircraft by 1.4% to 18.8%. *U.S. INT'L TRADE COMM'N, PUB. NO. 1328, ECONOMIC IMPACT OF FOREIGN EXPORT CREDIT SUBSIDIES ON THE U.S. COMMUTER AIRCRAFT INDUSTRY 32* (1982) [hereinafter cited as *COMMUTER AIRCRAFT REPORT*]; see *JOINT ECONOMIC COMM., 97TH CONG., 2D SESS., THE MERCANTILIST CHALLENGE TO THE LIBERAL INTERNATIONAL TRADE ORDER 51* (Comm. Print 1982) (J. Zysman & S. Cohen, authors).

4. See generally *U.S. Trade Policy: Phase I: Administration and Other Public Agencies: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means, 97th Cong., 1st Sess. 5-12* (1981) [hereinafter cited as *Trade Policy I Hearings*] (statement of William E. Brock, U.S. Trade Rep.) (summary of critical issues affecting U.S. trade).

5. *Id.* at 6; see Letter from William Brock, U.S. Trade Rep., to William Alberger, Chairman, U.S. Int'l Trade Comm'n (May 25, 1982) (I.T.C. Docket No. 838) ("The Administration and the Congress have become increasingly concerned over the potential for trade distortion resulting from foreign government subsidization of financing for exports of capital equipment, including exports to the United States, and the consequent adverse effect on U.S. industries.").

In the summer of 1982, a Canadian manufacturer that received subsidized export financing defeated a U.S. manufacturer, the Budd Company, in bidding for a contract to supply subway cars to the New York Metropolitan Transit Authority.<sup>6</sup> The Budd Company previously had petitioned the United States Export-Import Bank ("Eximbank") for matching financing under section 1912 of the Export-Import Bank Act Amendments of 1978.<sup>7</sup> Section 1912 authorizes the Eximbank to provide matching financing to domestic producers for sales in the U.S. market.<sup>8</sup> The Eximbank denied matching financing to the Budd Company, following a determination by Secretary of the Treasury Donald T. Regan that the availability of export credit subsidies was not a determining factor in the sale.<sup>9</sup> In 1983, Congress responded to the Budd incident by amending section 1912 of the Export-Import Bank Act.<sup>10</sup> The 1983 amendment imposes a time limit on the Eximbank's decision to provide matching financing and requires matching financing when it is likely to be a significant factor in the sale.<sup>11</sup>

This Note addresses the role of section 1912 in U.S. international trade law and examines the reasons for the 1983 amendment. It traces how the Budd Company's attempts to use section 1912 led to congressional action. The Note also suggests future roles for the amended section 1912 in U.S. trade law. Section I introduces export credit subsidies and international negotiations to control them. Section II examines the original section 1912. Section III discusses the deficiencies in section 1912 as revealed by the Budd incident. Section IV examines the 1983 amendments enacted in response to the Budd incident.

## I AN INTRODUCTION TO EXPORT CREDIT SUBSIDIES

### A. THE NATURE OF EXPORT CREDIT SUBSIDIES

A purchaser receives an export credit subsidy whenever a government provides financing at terms more favorable than those available

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6. Wall St. J., May 19, 1982, at 6, col. 3.

7. 12 U.S.C. § 635a-3 (1982). See *infra* note 73 for the full text of section 1912.

8. *Id.*

9. U.S. DEP'T OF THE TREAS., FINANCING OF SUBWAY CARS FOR THE METROPOLITAN TRANSPORTATION AUTHORITY OF NEW YORK: DECISION OF THE SECRETARY OF THE TREASURY DONALD T. REGAN (July 13, 1982) (on file at the offices of the *Cornell International Law Journal*). See *infra* notes 90-107 and accompanying text.

10. Export-Import Bank Act Amendments of 1983, Pub. L. No. 98-181, § 631, 97 Stat. 1262 (1983) (to be codified as amendments to 12 U.S.C. § 635a-3).

11. *Id.*

to the purchaser through private commercial institutions.<sup>12</sup> Export credit subsidies transfer resources from taxpayers to exporters, or to the importing country, without necessarily leading to long-term improvement in the terms of trade.<sup>13</sup> Nevertheless, all the major trading nations currently provide export credit subsidies<sup>14</sup> and use official export credit agencies to channel these subsidies to purchasers.<sup>15</sup>

In the 1950s, the major trading countries instituted official export credit programs designed to encourage the export of major capital goods to developing nations.<sup>16</sup> The high cost of these goods and the tenuous financial status of the buyers made credit sales necessary, while the long maturities and numerous risks associated with such sales virtually eliminated the private sector as a source of credit.<sup>17</sup> Government export financing thus served initially as a means to bolster exports by supplementing the purchasing power of developing nations.<sup>18</sup>

The role of export credit financing has expanded greatly during

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12. J. PEARCE, SUBSIDIZED EXPORT CREDIT 21 (1980). Export credit subsidies, the basic ingredient of official export financing, are a non-tariff "distortion" of trade. *Id.* at 41. A distortion is "a measure that reduces potential real world income, from 'that level attainable if resources and outputs are allocated in an economically efficient manner.'" *Id.*

13. In fact, the short-term effect of export credit subsidies is to worsen the terms of trade. *Trade Policy I Hearings, supra* note 4, at 300 (statement of Marc E. Leland, Ass't Sec'y for Int'l Affairs, Dep't of the Treas.).

14. United States export credit negotiators believe that six main reasons account for the widespread use of export subsidies: (1) Many countries view subsidies as an expedient method to improve trade or current account deficits; (2) Some nations' economic policies are biased toward state intervention for favored sectors, including the export sector; (3) Some foreign government officials believe that purchasing increased exports through credit subsidization is a relatively cheap alternative to unemployment and welfare payments; (4) Some policy makers believe that some "proper" or "natural" level for interest rates exists, and that stable and fixed export credit rates reflect this underlying "proper" level; (5) Some "countries hope to compensate their industries for their smaller scale of production" or other comparative disadvantages; and (6) Some officials view export credits as foreign aid to relieve the debt burden of the Lesser Developed Countries that receive the credits. *Export-Import Bank Budget Authorization: Hearings Before the Subcomm. on International Trade, Investment, and Monetary Policy of the House Comm. on Banking, Finance, and Urban Affairs, 97th Cong., 1st Sess. 441, 443-44 (1981)* [hereinafter cited as *1981 Eximbank Budget Authorization Hearings*] (statement of John D. Lange, Acting Deputy Ass't Sec'y, U.S. Treas. Dep't).

15. Duff, *Outlook for Official Export Credits*, 13 LAW & POL'Y INT'L BUS. 891, 895 (1981). U.S. Trade Representative William Brock estimates that in 1980 France provided \$2.3 billion of export credit subsidies, the United Kingdom \$1 billion, Japan \$566 million, and the United States \$315 million. *Trade Policy I Hearings, supra* note 4, at 7 (statement of William Brock, U.S. Trade Rep.). In 1980, government export credit in the United States covered 12.8% of all manufactured exports. Meanwhile, the French government financed 25.2% of its exports, the British 50.8%, and the Japanese 42.4%. *Special Report: Export Subsidies*, 42 CONG. Q. 376 (Feb. 19, 1983).

16. J. PEARCE, *supra* note 12, at 2.

17. *Id.* at 2-3.

18. *Id.*

the past thirty years.<sup>19</sup> Export credits first became an important factor in trade competition in the 1960s.<sup>20</sup> When the major trading countries began to offer official medium- and long-term credit for capital equipment exports without regard for the importing country's purchasing power, the reason for export credit programs shifted from encouraging less developed countries' purchases to expanding the selling country's export markets.<sup>21</sup> As a result, the financing terms associated with purchases of large capital goods became an element in the competition for the sale of these items.<sup>22</sup>

Competition in export credit financing reached higher levels in the 1970s. Major trading nations attempted to increase exports in order to offset the inflated cost of imported oil caused by the 1973 oil embargo,<sup>23</sup> and competition to provide attractive export financing packages increased dramatically.<sup>24</sup> Previously, government intervention had been designed primarily to remove impediments to the attainment of export financing from private banks. In the 1970s, however, official export financing agencies assumed a more active role by subsidizing interest rates directly and providing lengthy repayment terms.<sup>25</sup> Between 1978 and 1982, foreign export credit subsidies reached unprecedented levels worldwide.<sup>26</sup> A sharp increase in market interest rates, coupled with a worldwide recession, led many governments to subsidize exports in order to stimulate their domestic economies and to create employment.<sup>27</sup>

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19. While European nations have provided official support for exports since 1919, support offered before 1950 was limited largely to insurance of political and commercial risks. Duff, *supra* note 15, at 895.

20. Duff, *supra* note 15, at 895-96.

21. J. PEARCE, *supra* note 12, at 3-4.

22. *Id.* at v.

23. Duff, *supra* note 15, at 900. Some policy makers view export credit subsidies as a method for improving the balance of payments. *See supra* note 14. *See also* U.S. EXPORT-IMPORT BANK, REPORT TO THE U.S. CONGRESS ON EXPORT CREDIT COMPETITION AND THE EXPORT-IMPORT BANK OF THE UNITED STATES FOR THE PERIOD JULY 1, 1980 THROUGH DECEMBER 31, 1980, at 83 (1981) [hereinafter cited as 1981 EXIMBANK REPORT TO CONGRESS] (attributing large deficits in the United States balance of payments to increased oil costs).

24. Duff, *supra* note 15, at 900.

25. J. PEARCE, *supra* note 12, at 6.

26. According to information compiled by the U.S. Department of the Treasury, "[t]he export credit subsidy problem reached critical proportions during 1981 . . . . The subsidy element—whether measured by the prevailing prime commercial interest rates or by the cost of money to governments—peaked at all currencies during the third quarter of 1981." Secretary of the Treasury, Report on International Export Credit Negotiations (1981-82), reprinted in *Export-Import Bank Programs and Policies: Hearings Before the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 2d Sess. 204 (1982) [hereinafter cited as Report of the Secretary].

27. *See supra* note 14. *See Trade Policy I Hearings, supra* note 4, at 300 (statement of Marc E. Leland, Ass't Sec'y for Int'l Affairs, Dep't of the Treas.).

## B. INTERNATIONAL NEGOTIATIONS ON EXPORT CREDIT SUBSIDIES

The fierce competition in export credits that began in the 1970s caused the major trading countries to recognize the need for international negotiation and agreement.<sup>28</sup> The Export Credit Group of the Organisation for Economic Co-operation and Development (OECD) sponsored negotiations<sup>29</sup> and, after several interim agreements, adopted the Arrangement on Guidelines for Officially Supported Export Credit (the Arrangement) in 1978.<sup>30</sup> The Arrangement specifies minimum interest rates and maximum maturity terms for subsidized export credit financing.<sup>31</sup> Permissible interest and maturity terms vary according to the wealth of the importing country; the highest rates and the shortest maturities may be extended to buyers in "relatively rich" countries, while progressively more lenient terms apply to "intermediate and relatively poor" countries.<sup>32</sup> Minimum interest rates under the Arrangement have always been lower than prevailing

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28. Duff, *supra* note 15, at 900; J. PEARCE, *supra* note 12, at 43. Economic leaders from France, West Germany, Italy, Japan, the United Kingdom, and the United States feared that the increased competition would trigger a "credit war." Duff, *supra*, at 900. These countries therefore initiated negotiations aimed at limiting this credit race. *Id.* These negotiations paved the way for a 1974 OECD declaration which emphasized the need for international cooperation, rather than competition. See *infra* notes 30-64 and accompanying text.

The International Union of Credit and Investment Insurers, the Berne Union, was an early private attempt to provide a forum for the exchange of information on export credit financing. Founded in 1934, the Union's members still meet regularly to discuss export credit insurance matters. Duff, *supra* note 15, at 898 n.30; 1981 EXIMBANK REPORT TO CONGRESS, *supra* note 23, at 22.

29. J. PEARCE, *supra* note 12, at 43; The member countries of the OECD are Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. EXPORT CREDIT FINANCING SYSTEMS, *supra* note 1, at 2. The Export Credit Group of the OECD was founded in 1963. Duff, *supra* note 15, at 897.

30. Arrangement on Guidelines for Officially Supported Export Credits (Trade Directorate of OECD, Feb. 22, 1978), *reprinted in* U.S. EXPORT WEEKLY (BNA) No. 196, at O-1 (Feb. 28, 1978) [hereinafter cited as the Arrangement]. For a discussion of interim agreements leading to the Arrangement, see Duff, *supra* note 15, at 900. All the OECD members, except Iceland and Turkey, are participants in the Arrangement. EXPORT CREDIT FINANCING SYSTEMS, *supra* note 1, at 7-8.

31. The Arrangement excludes certain categories of exports from its coverage: aircraft, nuclear power plants, military equipment, agricultural commodities, and some classes of ships. The Arrangement, *supra* note 30, at ¶ 10.

32. In a release discussing interest rate changes in the Arrangement, the Department of the Treasury provided the following summary of interest rates:

commercial rates.<sup>33</sup>

From 1978 until October 15, 1982, the Arrangement did little to curb export credit competition. The interest and maturity terms it established were not mandatory, but functioned as voluntary guidelines.<sup>34</sup> An OECD member could derogate from the established guidelines without violating the Arrangement if it notified other participants of its intention to do so at least ten calendar days before

Interest Rates as of July 1, 1982				
Classification of Borrowing Country		2-5 Years	5-8.5 Years	8.5-10 Years
I.	Relatively Rich	12.15%	12.4%	no credit
	GNP per capita	(11%) <sup>1</sup>	(11.25%)	
	income over \$4000	[8.55] <sup>2</sup>	[8./75%]	
II.	Intermediate Countries	10.85% (10.5%) [8%]	11.35% (11%) [8.5%]	no credit
	Countries newly graduated from III to II			
	Effective	10.5%	10.75%	10.75%
	Immediately	(10%) [7.5%]	(10%) [7.75%]	(10%) [7.75%]
	1/1/83	10.85%	11.35%	11.35%
III.	Poorest Countries	10% (10%) [7.5%]	10% (10%) [7.75%]	10% (10%) [7.75%]

<sup>1</sup> (Post Nov. '81 Interest Rates)

<sup>2</sup> [Pre Nov. '81 Interest Rates]

U.S. DEP'T OF THE TREAS., TREASURY NEWS 2 (July 1, 1982) [hereinafter cited as TREASURY NEWS].

33. The following chart sets forth the Arrangement interest rate on 5 to 8.5 year credits to relatively rich countries, and the prime rate, on specified dates:

Date	(figures are percentage rates)		
	Arrangement Rate	Prime Rate	Difference
Jan. 1, 1977 <sup>1</sup>	8.00	6.25	-1.75
Apr. 1, 1978	8.00	8.00	—
June 1, 1980	8.00	11.50	3.50
July 1, 1980	8.75	11.00	2.25
Oct. 1, 1981	8.75	18.00	9.25
Nov. 17, 1982	11.25	16.00	4.75
June 1, 1982	11.25	16.50	5.25
July 6, 1982	12.40	15.50	3.10
Sept. 30, 1982	12.40	13.00	.60

<sup>1</sup> The OECD arrangement became effective on April 1, 1978. The arrangement rate shown for January 1, 1977, is from the OECD Consensus on Export Credits.

U.S. INT'L TRADE COMM'N, PUB. NO. 1340, ECONOMIC IMPACT OF FOREIGN EXPORT CREDIT SUBSIDIES ON CERTAIN U.S. INDUSTRIES 169 (1983) [hereinafter cited as FOREIGN SUBSIDIES IMPACT REPORT].

34. "The guidelines set out in this Arrangement represent the most generous terms for which participants intend in general to give official support." The Arrangement, *supra* note 30, at ¶ 8(a).

issuing a loan commitment.<sup>35</sup> After ten days, other Arrangement participants could issue export credits on the same terms unless the initiating participant withdrew the nonconforming terms.<sup>36</sup> On October 15, 1982, however, a "non-derogation" commitment among OECD members became effective.<sup>37</sup>

The United States took an active role in early OECD negotiations<sup>38</sup> and was an original signatory of the Arrangement.<sup>39</sup> After adoption of the Arrangement, the United States altered its position. It began to view the Arrangement as merely an important first step in eliminating export credit financing competition, not a solution to the problem of potentially destructive export subsidy competition among nations.<sup>40</sup> United States negotiators hoped to take advantage of the Arrangement's review framework<sup>41</sup> to effect changes in some of the guidelines, particularly those concerning interest rates and maturity terms.<sup>42</sup>

A review of official U.S. policy toward export credit subsidies is instructive. The U.S. government originally took the position that export credit subsidies are a legitimate element of international trade competition and should not be subject to unnecessary regulation.<sup>43</sup> The United States now takes the position that subsidized export credits distort trade and investment.<sup>44</sup> The government asserts that

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35. The Arrangement, *supra* note 30, at ¶ 9(a)(1). If another participant requested a discussion during this period, the initiating participant was required to delay an additional ten days. *Id.* Duff notes a problem with the original "notification of intention to derogate" principle. "[I]n practice . . . notification is often not given until a firm commitment has been made in connection with the signing of a contract or letter of intent." Duff, *supra* note 15, at 949-50.

36. The Arrangement, *supra* note 30, at ¶ 9(a)(2). If a participant requested a discussion during the first ten-day period, the second ten-day period became the relevant one.

37. *Subsidized Export Financing: Hearing Before the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 2d Sess. 18 (1982) [hereinafter cited as *Subsidized Export Financing Hearing*] (statement of Marc E. Leland, Ass't Sec'y Treas. for Int'l Affairs). The ultimate effect of this "non-derogation" agreement is beyond the scope of this Note.

38. See Duff, *supra* note 15, at 900.

39. The Arrangement, *supra* note 30, at annex C.

40. At a meeting of the OECD Ministerial Council in mid-June 1978, when the Arrangement had been in force for just two-and-one-half months, U.S. Treasury Secretary Michael Blumenthal drew attention to the need for a broadened and strengthened Arrangement. J. PEARCE, *supra* note 12, at 52. See *Export Financing: New Export Credit Agreement "Disappointing" to U.S.*, U.S. EXPORT WEEKLY (BNA) No. 196, at A-1 (Feb. 28, 1978).

41. "Participants will review, at least annually, the operation in practice of these guidelines." The Arrangement, *supra* note 30, at ¶ 13.

42. Duff, *supra* note 15, at 907 & n.76.

43. See NAT'L ADVISORY COUNCIL ON INT'L MONETARY AND FINANCIAL POLICIES, ANNUAL REPORT TO THE PRESIDENT AND TO THE CONGRESS, JULY 1, 1972 - JUNE 30, 1973, at 35 (1973).

44. TREASURY NEWS, *supra* note 32, at 1 (statement of Donald T. Regan, Sec'y of the Treas.); *Export-Import Bank Amendments of 1983: Hearings Before the Subcomm. on*



exports should compete on the basis of their price and quality, not on the basis of a government's ability to subsidize export financing.<sup>45</sup> The United States has also taken the position that only strengthened international agreements can provide a long-term solution to the subsidized export financing problem.<sup>46</sup>

Congress viewed the early international negotiations on export credits as ineffective.<sup>47</sup> Members of Congress expressed concern that despite international agreements, other countries' export credit policies were eroding markets for American capital goods.<sup>48</sup> Congress sought to strengthen the United States' position in export credit negotiations by improving the ability of Eximbank, the official American export credit agency, to compete with its foreign counterparts.<sup>49</sup>

Since the adoption of the Arrangement, the United States has expressed dissatisfaction with a number of Arrangement provisions.<sup>50</sup> In negotiations since the passage of section 1912, the United States has advocated increasing the minimum interest rate level to align it more closely with market conditions and changing the method used in the Arrangement to set minimum interest rates.<sup>51</sup> The ultimate American objective is to eliminate export credit subsidies as a factor in international trade.<sup>52</sup>

In 1978, the United States proposed an increase in the Arrangement's minimum interest rates.<sup>53</sup> At first, the European Economic

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*International Finance and Monetary Policy of the Senate Comm. on Banking, Housing, and Urban Affairs*, 98th Cong., 1st Sess. 55-56 (1983) [hereinafter cited as *1983 Export-Import Bank Amendments Hearings*] (statement of Marc E. Leland, Ass't Sec'y of the Treas. for Int'l Affairs).

45. See Report of the Secretary, *supra* note 26, at 202.

46. PRESIDENT'S EXPORT COUNCIL, THE EXPORT IMPERATIVE: REPORT TO THE PRESIDENT 97 (1980) [hereinafter cited as EXPORT IMPERATIVE REPORT]. The problem is essentially one of conflicting interests. United States policy has at different times recognized both the danger of widespread export credit activity to international trade relations and the detrimental effect this policy has on domestic producers. Without export credits, American manufacturers like the Budd Company cannot compete with their foreign counterparts who receive subsidies.

47. See *infra* notes 79-83 and accompanying text.

48. *Id.*

49. See, e.g., H.R. REP. NO. 1115, 95th Cong., 2d Sess. (1978).

50. See *supra* notes 40-42 and accompanying text. See J. PEARCE, *supra* note 12, at 52-53; U.S. EXPORT-IMPORT BANK, REPORT TO THE U.S. CONGRESS ON EXPORT CREDIT COMPETITION AND THE EXPORT-IMPORT BANK OF THE UNITED STATES FOR THE PERIOD APRIL 1, 1978 THROUGH SEPTEMBER 30, 1978, at 41 (1979) [hereinafter cited as 1979 EXIMBANK REPORT TO CONGRESS].

51. Duff, *supra* note 15, at 907 n.76. See generally *id.* at 907-14 for a discussion of the interest rate matrix negotiations.

52. *1983 Export-Import Bank Amendments Hearings*, *supra* note 44, at 56 (statement of Marc E. Leland, Ass't Sec'y for Int'l Affairs, Dep't of the Treas.).

53. The United States sought increases in the minimum interest rate level of 0.50 to 0.75%. Duff, *supra* note 15, at 907.

Community (EEC) firmly resisted all proposed changes,<sup>54</sup> but in 1980 it agreed to small increases in the Arrangement's minimum interest rates.<sup>55</sup> In September 1981, the EEC proposed increases of 2.0 to 2.5% in the basic matrix rate.<sup>56</sup> The United States regarded these proposed increases as an "exceptionally modest first step," and proposed a 4.0% increase in the matrix rates as an alternative.<sup>57</sup> Arrangement participants adopted a compromise position.<sup>58</sup>

Negotiations in 1982 resulted in significant changes—improvements, from the United States' point of view—in the Arrangement.<sup>59</sup> The classification of borrowing nations was reformed according to objective criteria.<sup>60</sup> Minimum interest rates were increased.<sup>61</sup> Effective October 15, 1982, participants pledged not to derogate from the

54. J. PEARCE, *supra* note 12, at 53. The countries of the EEC negotiate as a single entity in the Arrangement. *Id.* at 45-47.

55. On July 1, 1980, increases of 0.75% for relatively rich and intermediate countries and 0.25% for relatively poor countries went into effect. Duff, *supra* note 15, at 910. In December, 1980, the EEC agreed to increases of 1.7% for relatively rich and intermediate countries and 0.8% for relatively poor countries. *Id.* at 911. The United States characterized the interest rate increases offered by the Europeans as "trivial" and "grossly inadequate." *Trade Policy I Hearings, supra* note 4, at 306 (statement of Marc E. Leland, Ass't Sec'y for Int'l Affairs, Dep't of the Treas.); see also *1981 Eximbank Budget Authorization Hearings, supra* note 14, at 423 (statement of Margaret W. Kahliff, Dir., Export-Import Bank).

56. *Trade Policy I Hearings, supra* note 4, at 306 (statement of Marc E. Leland).

57. *Id.* at 307 (statement of Marc E. Leland, Ass't Sec'y for Int'l Affairs, Dep't of the Treas.). The proposed increase in the matrix rate of 4% would have brought the overall matrix up to approximately 12%. Report of the Secretary, *supra* note 26, at 208.

58. The Compromise Matrix was adopted on October 20, 1981 and was to take effect on November 16, 1981. This matrix is detailed below, with the previous minimum interest rates listed in parentheses for comparison.

	<u>Loan Term</u>		
	<u>2-5 Years</u>	<u>5-8.5 Years</u>	<u>Over 8.5 Years</u>
Rich Countries	11.0 (8.5)	11.25 (8.75)	<sup>1</sup>
Intermediate Countries	10.5 (8.0)	11.0 (8.50)	<sup>1</sup>
Poor Countries	10.0 (7.5)	10.0 (7.75)	10.0 (7.75)

<sup>1</sup> Not applicable.

*Trade Policy I Hearings, supra* note 4, at 307 (statement of Marc E. Leland).

Another positive result of negotiations to reduce export credits in 1981 occurred when the United States, France, Britain, and the Federal Republic of Germany adopted a "common line" on the financing of large commercial aircraft. *Id.* Despite these positive developments, the Treasury Department characterized progress in negotiating improvements to the Arrangement in 1981 as "frustratingly slow." Report of the Secretary, *supra* note 26, at 206.

59. See TREASURY NEWS, *supra* note 32, at 1-2.

60. A borrowing country's classification, whether "relatively rich," "intermediate," or "relatively poor" determines the permissible minimum interest rate for export credits to that country. Since July 1, 1982, the "relatively rich" category consists of countries with a 1979 per capita GNP of \$4,000 or more. To be classified as "relatively poor," a country must be eligible for International Development Association financing. All remaining countries are classified as "intermediate." *Export-Import Bank Programs and Policies: Hearings Before the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing, and Urban Affairs, 97th Cong., 2d Sess. 151 (1982)* [hereinafter cited

Arrangement's minimum interest rate and maximum repayment terms.<sup>62</sup>

## II LEGISLATIVE RESPONSE: THE EXPORT-IMPORT BANK ACT

In 1945, Congress created the Eximbank to "supplement the commercial financing of U.S. export sales."<sup>63</sup> The Eximbank has developed several programs to further this objective.<sup>64</sup> First, it offers long-term loans to foreign purchasers.<sup>65</sup> Second, it guarantees medium- and long-term loans to foreign purchasers by U.S. commercial banks.<sup>66</sup> Finally, in conjunction with the Foreign Credit Insurance Association,<sup>67</sup> the Eximbank provides export credit insurance coverage to U.S. exporters.<sup>68</sup> The Eximbank was created with an ini-

as *Eximbank Programs and Policies Hearings*] (statement of William H. Draper III, Pres. and Chmn., U.S. Export-Import Bank).

61. See *supra* note 32 for recently negotiated rates. The minimum Arrangement rates became high enough that if commercial interest rates continued to fall, the subsidy element in Eximbank lending would disappear completely. Report of the Secretary, *supra* note 26, at 220. At market interest rates prevalent in September, 1982, the new Arrangement significantly decreased the subsidy element in French and United Kingdom export credits and virtually eliminated the subsidy element for Japan and the Federal Republic of Germany. *Id.* at 220.

62. Report of the Secretary, *supra* note 26, at 212. See *supra* note 37 and accompanying text.

63. U.S. EXPORT-IMPORT BANK, FISCAL 1981 ANNUAL REPORT 13 [hereinafter cited as 1981 EXIMBANK ANNUAL REPORT]; see Export-Import Bank Act of 1945, ch. 341, § 2(b), 59 Stat. 527. The Eximbank supplements the financing of United States exports by extending loans and guarantees, and insuring repayment of loans provided by other institutions. *Id.* In 1978, Congress amended the Eximbank's charter, hoping the Bank would aggressively offer financing terms competitive with those offered by the export credit agencies of other Western governments. Export-Import Bank Act Amendments of 1978, Pub. L. No. 95-630, tit. XIX, 92 Stat. 3724 (codified at 12 U.S.C. §§ 635, 635a-1, 635a-2, 635a-3 (1982)).

The Eximbank recently surveyed a group of banks and exporters on the relative competitiveness of the export credit systems of the major trading nations. The exporters and bankers ranked Eximbank programs as the least competitive of the six national export credit systems included in the survey. 1981 EXIMBANK REPORT TO CONGRESS, *supra* note 23, at 17.

64. The Eximbank operates its programs in conjunction with the Foreign Credit Insurance Association, "a group of 50 leading private insurance companies and the Private Export Funding Corporation (PEFCO), which is owned by 54 commercial banks, 7 industrial firms and 1 investment banking firm." EXPORT CREDIT FINANCING SYSTEMS, *supra* note 1, at 241. 1979 EXIMBANK REPORT TO CONGRESS, *supra* note 50, at 124.

65. 1981 EXIMBANK ANNUAL REPORT, *supra* note 63, at 13. Export sales with a contract value in excess of \$5 million and/or which involve long construction or fabrication periods are eligible for the direct credit program. EXPORT CREDIT FINANCING SYSTEMS, *supra* note 1, at 247.

66. 1981 EXIMBANK ANNUAL REPORT, *supra* note 63, at 13-14.

67. See *supra* note 64.

68. 1981 EXIMBANK ANNUAL REPORT, *supra* note 63, at 14. The Foreign Credit Insurance Association works with Eximbank to provide insurance policies covering "repayment risks on short- and medium-term sales." *Id.* See *supra* note 64.

tial capitalization of one billion dollars.<sup>69</sup> Although government-owned, the Eximbank is a self-sustaining corporation.<sup>70</sup> Unlike most of its foreign counterparts, it does not receive public funds; rather, it obtains funds in the open capital market.<sup>71</sup>

In 1978, Congress passed a series of amendments to the Export-Import Bank Act of 1945.<sup>72</sup> Section 1912 was added to the Act. It authorized the Eximbank to provide matching financing to American producers whose domestic sales were jeopardized by foreign producers benefitting from foreign export credits at "noncompetitive" rates.<sup>73</sup> Section 1912 required that the Secretary of the Treasury initially

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69. The Export-Import Bank Act of 1945, ch. 341, § 4, 59 Stat. 528 (codified at 12 U.S.C. § 635b (1982)).

70. 1981 EXIMBANK ANNUAL REPORT, *supra* note 63, at 3.

71. The Eximbank receives no direct appropriations. Its loan activities, including interest and fees, generate revenues. EXPORT IMPERATIVE REPORT, *supra* note 46, at 96. The Eximbank also funds its operations by borrowing, principally from the Federal Financing Bank and the United States Treasury. 1981 EXIMBANK ANNUAL REPORT, *supra* note 63, at 13. The Eximbank possesses authority to borrow up to \$6 billion directly from the U.S. Treasury. It uses this authority to meet short-term cash needs. *Id.* at 22.

Between 1934 and 1966, the Eximbank received more interest on its loans than it paid on its borrowing. The Bank's profits during this period totalled over \$3 billion. Of this amount, the Eximbank paid \$1 billion to the U.S. Treasury in the form of dividends, and retained \$2 billion in reserves invested as export loans. Since 1966, however, the interest rate on its outstanding debt has been greater than the proceeds on its loan portfolio. Because the Bank had invested its interest-free reserves and \$1 billion capital in export loans, however, the Bank was able to earn a profit through fiscal year 1982. 1981 Eximbank Budget Authorization Hearings, *supra* note 14, at 419-21 (statement of Margaret W. Kahliff, Dir., U.S. Export-Import Bank).

In recent years, the interest rate at which the Eximbank borrows has substantially exceeded its lending rate. Coupled with increased demand for the Bank's services, this led to the first net operating deficit in the Bank's history in fiscal year 1982. *Id.*

The Export-Import Bank Act of 1945 limits Eximbank's authority to lend, guarantee, and insure to \$40 billion outstanding at any one time. 12 U.S.C. § 635 (1982). For fiscal year 1983, Congress limited the Eximbank's direct lending authority to \$4.4 billion, and its ability to offer guarantees on commercial loans to \$9 billion. 41 CONG. Q. 378 (Feb. 19, 1983). In its fiscal 1984 budget request, the Reagan Administration asked for \$3.8 billion in direct lending authority, but it said it would offer a supplemental request for \$2.7 billion if additional funds proved necessary. The 1984 requested budget proposed to increase the loan guarantee ceiling to \$10 billion. *Id.* at 379.

72. Export-Import Bank Act Amendments of 1978, Pub. L. No. 95-630, tit. XIX, 92 Stat. 3724 (codified at 12 U.S.C. §§ 635, 635a-1, 635a-2, 635a-3 (1982)).

73. Pub. L. 95-630, § 1912, 92 Stat. 3726 (codified at 12 U.S.C. § 635a-3 (1982)). Section 1912 originally provided:

(a)(1) Upon receipt of information that foreign sales to the United States are being offered involving foreign official export credits which exceed limits under existing standstills, minutes, or practices to which the United States and other major exporting countries have agreed, the Secretary of the Treasury shall immediately conduct an inquiry to determine whether "non-competitive financing" is being offered.

(2) If the Secretary determines that such foreign "non-competitive" financing is being offered, he shall request the immediate withdrawal of such financing by the foreign official export credit agency involved.

(3) If the offer is not withdrawn or if there is no immediate response to the withdrawal request, the Secretary of the Treasury shall notify the country offering such financing and all parties to the proposed transaction that the Eximbank may be

determine that foreign goods were being offered to U.S. buyers at non-competitive prices.<sup>74</sup> This determination required the Secretary to request the foreign export credit authority to withdraw its noncompetitive financing. If the foreign export credit authority refused to withdraw its noncompetitive financing, or if it did not respond to the withdrawal request before the date the Eximbank was authorized to provide financing,<sup>75</sup> and if the Secretary determined that the financing was "*likely to be a determining factor in the sale*,"<sup>76</sup> the Secretary could authorize the Eximbank to provide matching financing to the competing U.S. producer.<sup>77</sup>

Section 1912 on its face seems to be directed primarily at improving the competitive position of U.S. producers.<sup>78</sup> But the legislative history of section 1912 reveals that Congress enacted it in order to improve the United States' position in negotiating and enforcing international agreements on export financing.<sup>79</sup> Senator Adlai Stevenson, who, with Senator John Heinz, offered the 1978 amendment on the Senate floor, expressed concern that foreign countries were violating their obligations under the Arrangement.<sup>80</sup> In introducing section 1912, Senator Stevenson emphasized that although the Eximbank

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authorized to provide competing United States sellers with financing to match that available through the foreign official export financing entity.

(b) The Secretary of the Treasury shall only issue such authorization to the Bank to provide guarantees, insurance and credits to competing United States sellers, if he determines that:

(1) the availability of foreign official non-competitive financing is likely to be a determining factor in the sale, and

(2) the foreign non-competitive financing has not been withdrawn on the date the Bank is authorized to provide competitive financing.

(c) Upon receipt of authorization by the Secretary of the Treasury, the Export-Import Bank may provide financing to match that offered by the foreign official export credit entity: *Provided, however*, That loans, guarantees and insurance provided under this authority shall conform to all provisions of the Export-Import Bank Act of 1945, as amended.

*Id.*

74. 12 U.S.C. § 635a-3(a)(1).

75. 12 U.S.C. §§ 635a-3(a)(3), 635a-3(b)(2).

76. 12 U.S.C. § 635a-3(b)(1) (emphasis added).

77. 12 U.S.C. § 635a-3(a)(3).

78. Section 1912(a)(3) provides that the Eximbank "may be authorized to provide competing United States *sellers* with financing to match that available through the foreign official export financing entity." 12 U.S.C. § 635a-3(a)(3) (emphasis added).

79. Our hope . . . is that with such authority to meet the competition, we will be in a stronger position to negotiate agreements and in a stronger position to enforce agreements aimed at controlling predatory financing of exports. The purpose of this amendment is not to declare or to accelerate a credit war. Its purpose is to put the United States in a position to end a credit war in the financing of exports. 124 CONG. REC. S32,836 (1978) (remarks of Sen. Adlai Stevenson).

80. "[B]ecause several governments continue to use low-cost export credits as a key instrument for overseas sales, it has been impossible to curb such practices." Proposal To Authorize the Eximbank To Counter Predatory Financing Practices of Foreign Governments: I. Rationale for the Proposal, 124 CONG. REC. S32,836 (1978).

existed "to provide guarantees, insurance, and extensions of credit at rates and on terms and other conditions which are competitive with the Government-supported rates and terms and other conditions available"<sup>81</sup> from principal export nations, it lacked authority to combat the predatory financing of exports to the United States.<sup>82</sup> Section 1912 was designed to provide this authority and to "deter other countries from engaging in predatory financing practices."<sup>83</sup>

In the first four years after its passage in 1978, section 1912 had no impact on the competitive positions of individual American producers. There were no attempts to use the section until the Budd incident.<sup>84</sup> One explanation for this failure to use section 1912 may be that the importation of noncompetitively financed goods was less widespread than the authors of the provision had anticipated. Non-competitive foreign financing of goods introduced into the United States had been far less a problem than similar financing of goods exported to third countries.<sup>85</sup> When subsidized export financing to U.S. markets had been available, it was not a critical element in buyers' decisions to purchase products.<sup>86</sup>

There is, however, evidence that the financing advantage is becoming more important in the export of foreign goods to the United States.<sup>87</sup> The tremendous increases in interest rates in recent years and the difficulties that some domestic purchasers face in obtaining credit have increased the importance of seller financing.<sup>88</sup> Thus, foreign sellers who benefit from subsidized financing have an increasingly important advantage over domestic manufacturers. In recent years,

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81. 12 U.S.C. § 635(b)(1)(A) (1982).

82. 124 CONG. REC. S32,836 (1978) (remarks of Sen. Adlai Stevenson).

83. *Id.*

84. *See infra* Section III (A). Congressman James Blanchard, sponsor of H.R. 6760, Press Release (July 12, 1982) [hereinafter cited as Blanchard press release] (copy on file at the offices of the *Cornell International Law Journal*).

85. In a survey conducted by the National Association of Manufacturers covering 1972-76, 57% of domestic manufacturers who responded to the survey reported lost export sales due to inadequate financing. The lost sales totalled \$3.2 billion for the survey group. NAT'L ASS'N OF MFR., NAM EXPORT CREDIT SURVEY SPECIAL REPORT (Dec. 28, 1977).

86. In a study of the commuter aircraft industry, the International Trade Commission concluded that financing was not a critical factor in the decision of U.S. airline operators to purchase commuter aircraft. In fact, U.S. airlines reported that in no instance did subsidized financing offered by foreign producers cause them to select a foreign commuter aircraft over a domestically built one. COMMUTER AIRCRAFT REPORT, *supra* note 3, at 38.

87. Report of the Secretary, *supra* note 26, at 142 (statement of Amb. William E. Brock, U.S. Trade Rep.) ("The proclivity of foreign governments to provide subsidized export financing to U.S. purchasers has, in a number of instances, placed the U.S. firm at a serious disadvantage . . . the MTA case is not an isolated instance of this problem, but may be indicative of a growing trend.")

88. A U.S. International Trade Commission study of financing in the sale of commuter aircraft from 1977 to 1981 indicates that since 1977 leasing and seller financing of commuter aircraft purchases have increased in importance, while bank loans have decreased in importance. COMMUTER AIRCRAFT REPORT, *supra* note 3, at xi.

there have been many cases involving foreign subsidy of interest rates at noncompetitive levels.<sup>89</sup>

### III THE BUDD INCIDENT: DEFICIENCIES IN SECTION 1912 OF THE EXPORT-IMPORT BANK ACT AMENDMENTS OF 1978

#### A. THE BUDD INCIDENT

The U.S. Treasury Department received its first request from a domestic producer to institute a section 1912 investigation into non-competitive foreign export credit subsidies in May, 1982, two-and-one-half years after the addition of section 1912.<sup>90</sup> In November 1981, the New York Metropolitan Transit Authority (MTA) solicited bids for the manufacture of 1150 subway cars.<sup>91</sup> In January 1982, four subway car manufacturers submitted offers: the Budd Company (Budd), Nissho-Iwai American Corporation, representing Kawasaki Heavy Industries of Japan (Kawasaki), Francorail, a consortium of French companies, and Bombardier, Inc., a Canadian manufacturer and a licensee of Kawasaki.<sup>92</sup> In March 1982, the MTA separated 325 subway cars from its original proposal and awarded a \$274 million contract to produce these cars to Kawasaki.<sup>93</sup> The MTA continued to negotiate with Budd, Francorail, and Bombardier for the remaining 825 cars.<sup>94</sup>

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89. Including the Budd Case, in the first 10½ months of 1982 there were eight known incidents of foreign exports to the United States that benefitted from subsidized export financing at levels that violated the Arrangement. FOREIGN SUBSIDIES IMPACT REPORT, *supra* note 33, at 169. During this period, the Eximbank received notice of 17 potential derogations from the Arrangement involving export credits to the United States. In nine cases "either the product involved was not covered by the arrangement, or a credit that would violate the arrangement was discussed but apparently not granted." *Id.* at 169 n.1.

90. See *Subsidized Export Financing Hearing*, *supra* note 37, at 13 (statement of Marc E. Leland, Ass't Sec'y for Int'l Affairs, Dep't of the Treas.).

91. Affidavit of Steven M. Polan, Special Counsel to the New York Metropolitan Transit Authority 3 (May 28, 1982), reprinted in U.S. DEP'T OF THE TREAS., FINANCING OF SUBWAY CARS FOR THE METROPOLITAN TRANSPORTATION AUTHORITY OF NEW YORK: DECISION OF THE SECRETARY OF THE TREASURY DONALD T. REGAN (July 13, 1982) (on file at the offices of the *Cornell International Law Journal*).

92. *Id.*

93. *Id.* at 5. The Japanese government provided a loan "denominated in yen in an amount equivalent to \$126 million" as financing for this sale. The loan featured an interest rate of nine percent and a five-year repayment term. Kawasaki re-lent this money to the MTA in U.S. dollars, adding a surcharge to cover the foreign exchange risk. "With this surcharge, the effective dollar interest rate paid by the MTA was 12.25 percent." This rate was within the Japanese commercial interest rates and well above the minimum rate that the Arrangement required Japan to charge. *New York MTA Purchase of Canadian Subway Cars: Hearing Before the Senate Comm. on Finance*, 97th Cong., 2d Sess. 7 (1982) [hereinafter cited as *Senate Finance MTA Hearing*] (statement of R.T. McNamar, Dep'y Sec'y, Dep't of the Treas.).

94. *Id.* at 58 (statement of Richard Ravitch, chmn., N.Y.C. MTA).

On May 18, 1982, the MTA announced its intention to award a contract for the production of the remaining 825 subway cars to Bombardier.<sup>95</sup> On June 10, the MTA and Bombardier signed a \$663 million contract, which was contingent upon the availability of financing from the official Canadian export credit agency, the Export Development Corporation (EDC).<sup>96</sup> The EDC financing enabled Bombardier to offer a financial package that would save the MTA \$90 million in interest charges during the term of the purchase.<sup>97</sup>

On May 17, 1982, the Budd Company requested that the Department of the Treasury commence a section 1912 investigation of the allegedly noncompetitive financing.<sup>98</sup> Three days later, the Treasury Department asked the U.S. Embassy in Ottawa to investigate the Canadian financing offer and to urge the Canadian government to comply with the OECD Arrangement,<sup>99</sup> but these diplomatic efforts failed.<sup>100</sup>

Shortly before the signing of the MTA-Bombardier contract, Budd filed suit in the United States District Court for the Southern District of New York, seeking to enjoin execution of the contract until the Treasury Department decided whether matching financing from Eximbank would be offered under section 1912.<sup>101</sup> Budd, the MTA,

95. *Id.* at 8 (statement of R.T. McNamar, Dep'y Sec'y, Dep't of the Treas.). "The Bombardier proposal included a final negotiated price of \$803,000 per car, with final delivery May, 1987. Budd's final proposal for these 825 cars was \$770,000 per car, with final delivery October, 1986." *Id.* at 24 (statement of Gary N. Horlick, Dep'y Ass't Sec'y of Commerce for Import Admin.).

96. U.S. DEP'T OF THE TREAS., FINANCING OF SUBWAY CARS FOR THE METROPOLITAN TRANSPORTATION AUTHORITY OF NEW YORK: DECISION OF THE SECRETARY OF THE TREASURY DONALD T. REGAN 3 (July 13, 1982) [hereinafter cited as DECISION OF THE SECRETARY] (on file at the offices of the *Cornell International Law Journal*).

The Export Development Corporation (EDC), a Crown holding company established in 1969, is an autonomous, unsubsidized government corporation with total export support authority of \$22.2 billion (U.S.). Until recently the EDC's role in Canadian trade has been somewhat limited. However, due to changing economic conditions, Canada has placed increased emphasis on the use of export credit subsidies. See 1981 EXIMBANK REPORT TO CONGRESS, *supra* note 23, at 30-31.

97. *Senate Finance MTA Hearing, supra* note 93, at 61 (statement of Richard Ravitch, Chmn., N.Y.C. MTA).

98. *Id.* at 8 (statement of R.T. McNamar, Dep'y Sec'y, Treas. Dep't). The Canadian financing violated the Arrangement guidelines for sales to "rich countries" such as the United States. The Arrangement guidelines in force at the time of the sale specified: (a) cover: maximum 85% of export value (in this case about \$336 million); (b) term: 8.5 years maximum; (c) interest rate: 11.25% minimum. DECISION OF THE SECRETARY, *supra* note 96 (MTA Decision Fact Sheet, at 1-2). The Canadian financing offer provided for a cover of 85% of the total contract price (about \$560 million), a term of 10 years, and an interest rate of 9.7%. *Id.*

99. *Senate Finance MTA Hearing, supra* note 93, at 9 (statement of R.T. McNamar, Dep'y Sec'y, Dep't of the Treas.).

100. DECISION OF THE SECRETARY, *supra* note 96, at 1.

101. Consultations with the Canadians resulted in a "standoff." *Subsidized Export Financing Hearing, supra* note 37, at 179.



and Bombardier stipulated to insert into the contract a clause that granted the MTA the option to cancel the contract if the Treasury Department authorized matching financing under section 1912 by July 15, 1982.<sup>102</sup>

On July 13, 1982, Secretary of Treasury Donald T. Regan announced that he would not authorize the Eximbank to match the subsidized Canadian financing for the MTA's purchase.<sup>103</sup> The Secretary found the EDC financing to be "noncompetitive" within the meaning of section 1912,<sup>104</sup> but he determined that the requirements of the section had not been met.<sup>105</sup>

The Department of the Treasury considered seven factors that might have affected the MTA's decision to award the contract to one manufacturer or another: the availability of adequate government-supported financing from the vendors; the cost of financing; the price of the cars; delivery schedules, including reliability of delivery; quality of design, engineering, and performance, including compatibility with Japanese-built cars that the MTA had already ordered; possible overdependence on a single supplier; and New York State manufacturing content.<sup>106</sup> Secretary Regan announced: "I have concluded that Bombardier would be awarded the contract even if Budd were able to offer matching financing. Thus, I am compelled to conclude that the noncompetitive financing offered by EDC is not likely to be 'a determining factor' in the MTA's decision."<sup>107</sup>

## B. DEFICIENCIES OF SECTION 1912

Analysis of the Treasury Department's investigation of the Budd incident reveals the deficiencies of section 1912. As it was written in 1982, the section required the Secretary to conclude that the availability of foreign noncompetitive financing was "likely to be a determining factor" in a sale before he could authorize the Eximbank to offer matching financing.<sup>108</sup> This "determining factor" standard does not appear in any other provision of the United States Code.<sup>109</sup> The

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102. Budd's suit sought to enjoin MTA from submitting the contract to the New York State Public Authorities Control Board for approval. DECISION OF THE SECRETARY, *supra* note 96, at 3.

103. DECISION OF THE SECRETARY, *supra* note 96, at 4.

104. *Id.* at 2.

105. "I have determined that the EDC financing offered in support of Bombardier's proposal exceeds allowable international limits on export credits, and that the EDC has refused to withdraw its non-competitive financing despite repeated requests by officials of the Treasury Department." *Id.*

106. *Id.*

107. *Id.* at 8.

108. *Id.* at 2.

109. 12 U.S.C. § 635a-3(b)(1) (1982). See *supra* notes 73-77, 105-08 and accompanying text.

sparse legislative history of section 1912 sheds no light on the interpretation of the phrase.<sup>110</sup> Moreover, no judicial decisions construe this language.<sup>111</sup>

The Treasury Department purported to construe the “determining factor” provision “according to [its] plain meaning, and not as [a] legal [term] of art.”<sup>112</sup> According to the Department’s construction, a factor was “determining” only if it *directly affected* the outcome of a transaction.<sup>113</sup> In the Department’s view, a number of factors could cause a purchaser to choose one seller over another, and any one of these elements could be “a determining factor.”<sup>114</sup> The Department asked whether the purchaser would have awarded the contract to the American bidder if its financing terms had been equal to those of the foreign bidder.<sup>115</sup> Thus, the Treasury Department believed that section 1912 required it to reconstruct private business decisions.<sup>116</sup> Because these decisions are often complex and sometimes confused, an attempt to reconstruct them is at best difficult and at worst artificial.<sup>117</sup>

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110. Memorandum from Peter J. Wallison, General Counsel of the Department of the Treasury, to Treasury Secretary Donald Regan 1 (June 23, 1982) (Deciding what ‘is likely to be a determining factor’ under Section 1912 of the Export-Import Bank Act Amendments of 1978), *reprinted in* DECISION OF THE SECRETARY, *supra* note 96 [hereinafter cited as Wallison Memorandum].

111. *Id.*

112. *Id.* The comments of Senator Adlai Stevenson reveal only that section 1912 was not intended to “permit across-the-board financing of U.S. domestic sales. Specified prerequisites would be established for the use of the authority.” Proposal To Authorize the Eximbank To Counter Predatory Financing Practices of Foreign Governments: I. Rationale for the Proposal, 124 CONG. REC. S32,836 (1978). *See infra* note 113.

113. In defining “determining,” the Treasury Department referred to the Oxford English Dictionary, which defines the term: “that which decides or leads to a decision; that which fixes a course of action.” Wallison Memorandum, *supra* note 110, at 1.

We are therefore remitted to construing the Section’s words as according to their plain meaning, and not as legal terms of art. In this connection, the Oxford English Dictionary defines “determining” to mean that which decides, or leads to a decision, that which fixes a course of action.

Wallison Memorandum, *supra*, at 1.

114. *See* Wallison Memorandum, *supra* note 110, at 2.

115. *Id.*

116. The Wallison Memorandum asserts that the Treasury Department is required to undertake “a close analysis of the purchasing agency’s corporate state of mind, and ultimately a judgment as to what it would have done had the financing terms been different from what they were in fact.” Wallison Memorandum, *supra* note 110, at 3. *See Subsidized Export Financing Hearing*, *supra* note 37, at 14 (statement of Marc E. Leland, Ass’t Sec’y for Int’l Affairs, Dep’t of the Treas.).

117. “The language of Section 1912 clearly requires the Treasury staff to conduct an inquiry which focuses entirely on the facts of the case *as seen by the MTA Board.*” Letter from Donald Regan, Secretary of the Treasury, to James McNeal, Jr., President and Chief Executive Officer, the Budd Co. (Aug. 19, 1982), *reprinted in Subsidized Export Financing Hearing*, *supra* note 38, at 191 (emphasis in the original).

The Treasury Department reviewed the MTA’s decision by discussing it with MTA officials and studying MTA documents. DECISION OF THE SECRETARY, *supra* note 96, at 8-9. The Department also reviewed statements of parties to the dispute in hearings before the

The timing of the Treasury Department's decision in the Budd incident revealed another deficiency in section 1912: it imposed no specific time limits on the Department's complex review procedure.<sup>118</sup> Secretary Regan's decision came almost sixty days after Budd requested an investigation. By then, the MTA had already signed a contract with Budd's foreign competition.<sup>119</sup> The Budd Company was thus forced to go to court in order to preserve its position while awaiting the administrative decision.<sup>120</sup>

As a result of these deficiencies, section 1912 did not attain Congress' goal of enhancing the United States' bargaining position in the OECD Arrangement. Section 1912 provided a remedy for domestic producers only when the noncompetitive financing was "a determining factor" in a sale.<sup>121</sup> This standard was difficult to satisfy, and it may not have been a credible threat to foreign governments considering subsidies for single-sale exports to the United States, because matching financing often came too late to affect a completed single-sale transaction.

#### IV AMENDMENT: CONGRESSIONAL RESPONSE TO THE BUDD DECISION

The decision to deny Budd matching financing prompted a flurry of activity on Capitol Hill. Within two weeks, the Senate Finance Committee held hearings to investigate the Treasury Department's action.<sup>122</sup> Ultimately, congressional concern over the application of section 1912 in the Budd case led to the introduction of legislation to amend it.<sup>123</sup> The 1983 amendment<sup>124</sup> changed section 1912 in two important respects: by imposing a sixty-day time limit for the initiation and completion of Treasury Department investigations under section 1912, and by requiring the Secretary of the Treasury to authorize matching financing if the availability of foreign financing is "likely to

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Senate Finance Committee and in a public hearing conducted by the MTA. *Subsidized Export Financing Hearing*, *supra* note 37, at 180 (U.S. Dep't of the Treas. Response for the Record, Answer to Question Raised by Sen. Riegel).

118. *See supra* note 74 and accompanying text.

119. The Decision of the Secretary is dated July 13, 1982. The Budd Company requested Treasury Department investigation on May 18, 1982. Statement by Secretary of the Treasury Donald T. Regan, at a Press Conference in Washington, D.C. on New York Subway Cars (July 13, 1982), *reprinted in* DECISION OF THE SECRETARY, *supra* note 96.

120. *See supra* notes 101-02 and accompanying text.

121. *See supra* notes 108-11 and accompanying text.

122. *See Subsidized Export Financing Hearing*, *supra* note 37, at 1-3 (opening statement of Sen. John Heinz).

123. H.R. 6760, 97th Cong., 2d Sess. (1982).

124. Export-Import Bank Act Amendments of 1983, Pub. L. No. 98-181, § 631, 97 Stat. 1262 (1983) (to be codified as amendments to 12 U.S.C. § 635a-3).

be *one of the significant* factors in the sale.”<sup>125</sup> Congress rejected a third proposal to remove wholly the discretion of the Treasury Department and the Eximbank in determining whether to provide matching funds.

#### A. SIXTY-DAY TIME LIMIT

Section 1912 is unique in United States trade law in that it provides a domestic producer the opportunity to compete on equal financing terms with foreign manufacturers who benefit from export credit subsidization before the contract is awarded. If this remedy is to be effective, the Treasury Department's decision whether to award matching funds must be prompt.

Before the 1983 amendment, section 1912 contained no time limits for the notifications and investigations to be conducted by the Department. Section 1912 will now be of much greater value in allowing an individual producer of “big ticket” capital items to compete with subsidized foreign producers before the award of the sales contract, because the amendment forces the Treasury Department to render a prompt decision on matching financing.

The sixty-day time limit applies to all aspects of the decision to authorize matching financing. In the Budd case, even if Treasury Secretary Regan had authorized the Eximbank to award matching financing, an additional delay would have ensued before the Eximbank made its financing decision. The 1983 amendment prevents further delay by applying the time limits to the Eximbank's decision as well as to that of the Treasury Department.

#### B. SIGNIFICANT FACTOR TEST

Dissatisfaction with the Treasury Department's interpretation of what constitutes “a determining factor” in a sale prompted Congress to alter the standard to “a significant factor.”<sup>126</sup> The Treasury Department's previous interpretation procedure was highly subjective.<sup>127</sup> It asserted that financing was “a determining factor” only if the contract would have been awarded to the United States bidder had financing been equal. The Department's analysis was flawed; it assumed that if financing terms were changed other features of a man-

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125. *Id.* (emphasis added).

126. See also Blanchard press release, *supra* note 84. In an earlier proposal Congress used the words “relevant factor” instead of “significant” or “determining” factor. Congress wisely chose the word “significant” over “relevant” because financing is likely to be a “relevant factor” in *all* sales of capital goods. Section 1912 should prevent foreign competitors from winning contracts over domestic producers only when subsidized financing plays an important role in the sale.

127. See *supra* notes 116-17 and accompanying text.

ufacturer's offer would remain constant.<sup>128</sup> Had the Department and the Eximbank awarded matching financing to Budd, the MTA might have attempted to negotiate with Budd to change other aspects of the offer that the MTA considered unsatisfactory.<sup>129</sup> The absence of attractive financing may have destroyed the incentive to negotiate regarding other unsatisfactory terms.

In applying section 1912 to the Budd case, the Department of the Treasury effectively defined "a determining factor" to mean *the* determining factor. Under the Department's reading of the statute, matching financing would be awarded only when the provision of matching financing alone would cause a producer to award the contract to the United States bidder. The Treasury Department should have recognized that when matching financing is available, other features of an offer may not remain constant. Section 1912 as amended eliminates the possibility of such misinterpretation by adopting a more lenient standard. Now, in order for discretionary matching financing to be justified, foreign noncompetitive financing must only be a significant factor.

### C. TREASURY DEPARTMENT DISCRETION

The amended section 1912 not only adopts a more lenient and understandable standard for Treasury Department determination, it also reinstates the Department's discretion in awarding matching financing. One proposed amendment to section 1912, which Congress did not adopt in 1983, compelled the Treasury Department to authorize and the Eximbank to award matching funds whenever foreign financing is a significant factor in the foreign subsidized sale.<sup>130</sup> Congress wisely rejected this modification because it would have deprived both the Eximbank and the Department of the discretion to determine where to direct the limited Eximbank resources.<sup>131</sup>

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128. See Transcript of Proceedings, *In re Certain Rail Passenger Cars and Parts Thereof from Canada*, Prelim. Investigation No. 701-TA-182 (U.S. Int'l Trade Comm'n July 21, 1982) (statement of James H. Lundquist, Corporate Counsel, the Budd Co.).

129. In a hearing before the International Trade Commission during the preliminary investigation into the Budd case, Steven Polan, Special Counsel to the MTA, stated:

Our intention was in the event that EX-IM had matched [sic] to bring in all three bidders . . . . [t]hey would have all come in and they would have given their last and best shot with respect to financing, with respect to car price, New York state content, and every other factor that was of relevance to the MTA, and they could have and we hoped that they would all modify their offers significantly in our benefit.

*Id.* at 184.

130. S. 869, 98th Cong., 1st Sess., 129 CONG. REC. S3524 (daily ed. Mar. 21, 1983).

131. The Reagan Administration opposed any amendment to section 1912 which would remove the agencies' discretion to refuse matching financing. *Subsidized Export Financing Hearing*, *supra* note 37, at 22 (statement of Marc E. Leland, Ass't Sec'y for Int'l Affairs, Dep't of the Treas.).

Large amounts of money are necessary to finance the sale of capital goods. In the Budd case, the Canadian export credit agency agreed to finance approximately \$560 million of the purchase price of the Canadian subway cars. The Treasury Department estimated that the Canadian Government subsidized \$270 million of this figure.<sup>132</sup> Future sales could involve even greater subsidies. A large project that is found to warrant matching financing would significantly tax the Eximbank's resources.<sup>133</sup> The proposed modification of section 1912 would have stripped the Eximbank Board of its discretion to refuse matching financing. Congress wisely retained the provisions of section 1912 that grant the Department of the Treasury and the Eximbank the discretion to refuse matching financing. Without this refusal discretion, United States export credit policy would be short-term and reactive. Moreover, the United States' credibility in international forums, where it has advocated curbs on export credit subsidies, would be minimized if U.S. law instituted a mandatory program of aggressive export credit subsidies to aid U.S. manufacturers. Official support for American producers is justifiable only if it benefits the U.S. economy as a whole. The decision whether to match foreign subsidized financing should be a part of a long-term U.S. policy in the export credit area, acknowledging the effect that financing may have on international economies and relations.

### CONCLUSION

The 1983 amendment to section 1912 will make the section an important device in implementing U.S. international trade policy. Section 1912 now enables the producers of major capital goods to prevent the loss of a sales contract to foreign producers who benefit from subsidized export financing. Before the 1983 amendment, section 1912 was poorly drafted. In the Budd incident, ambiguous language in the statute prompted the Treasury Department to use an interpreta-

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We do believe it essential to preserve latitude for judgment in the application of the statute rather than making it an automatic process . . . . [t]o provide matching financing in all cases where foreign "non-competitive" financing into the United States exists, would establish an unacceptably expensive and unnecessary subsidy entitlement program.

*Eximbank Programs and Policies Hearings, supra* note 60, at 200 (emphasis in the original) (statement of Marc E. Leland).

132. *Subsidized Export Financing Hearings, supra* note 37, at 17 (statement of Marc E. Leland, Ass't Sec'y for Int'l Affairs, Dep't of the Treas.). "Credit of a similar size and terms by Eximbank, based on its [then] current borrowing costs of about 13.6 percent would involve a subsidy of probably about \$220 million." *Id.*

133. *See American and Foreign Practices in the Financing of Large Commercial Aircraft Sales: Hearing Before the House Comm. on Ways and Means, 95th Cong., 2d Sess. 73, 77 (1978)* (statement of Gary C. Hufbauer, Dep. Ass't Sec'y of the Treas. for Int'l Trade and Investment Pol'y).

tion that avoided the purpose of section 1912. With the 1983 amendment, Congress provided for the application of section 1912 in a manner consistent with its original goal of providing an effective remedy for domestic producers injured by subsidized export credits on foreign sales to U.S. markets. The Treasury Department and the Eximbank must now decide within sixty days whether to award matching financing to a domestic producer. This will help the domestic producer to compete with the subsidized foreign producer.

The amended section 1912 will also strengthen the bargaining position of the United States in international negotiations on export credit subsidies. As interest rates have soared, the latitude for government subsidization of noncompetitive export has increased. Foreign export credit agencies may hesitate to subsidize exports to the United States if there is a credible threat that the competitive advantage gained by such subsidy will be negated by an Eximbank award of matching financing to competing United States producers. If the benefits of export credit subsidization can be nullified, foreign governments may come to share the United States' view that financing should be a neutral element in international trade competition.<sup>134</sup>

*Steven P. Buffone*

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134. The futility of export credit competition is already acknowledged in many ways by the United States' competitors. Economic regulations of the European Economic Community, for example, do not permit subsidized financing within the EEC. *Trade Policy I Hearings, supra* note 4, at 300 (statement of Marc E. Leland).