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I. Introduction

The purpose of this article is multi-faceted. Part I provides an overview of the Export-Import Bank of the United States (Eximbank). Part II defines and analyzes export credits. Part III describes how export credits encourage the promotion of exports. Part IV furnishes an overview of mixed credits. Part V focuses on the use of tied aid credits. Part VI explains which nations promote exports through the use of tied aid credits and mixed credits. Part VII discusses what type of exports are generally assisted by tied aid credits and mixed credits. Part VIII examines the various mechanisms which the Organisation for Economic Cooperation and Development (OECD) and the European Community use to regulate tied aid credits and mixed credits. Part IX explains the United States' response to the growth of tied aid credits and mixed credits. Finally, Part X concludes that the use of subsidized export finance threatens United States export sales as well as "free export credits," and consequently, "free trade."

II. The Export-Import Bank of the United States

The primary role of Eximbank is "to aid in financing and to facilitate exports and imports and the exchange of commodities between the United States or any of its Territories or insular possessions and any foreign country or the agencies or nationals thereof."[1] Furthermore, Eximbank's task includes providing assistance to ex-

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1. Eximbank was originally organized under the name the Export-Import Bank of Washington, pursuant to Executive Order 6,581 of Feb. 2, 1934. The Export-Import Bank Act of 1945, ch. 341, § 4, 59 Stat. 528 (codified as amended at 12 U.S.C. § 635(a)(1) (1982)).

pand exports since this activity is important "to the promotion and maintenance of high levels of employment and real income and to the increased development of the productive resources of the United States."[2] Additionally, Eximbank's charter requires that the credit institution provide competitive terms and interest rates on export credits relative to those of other nations.[3] Eximbank's role in export financing complements private financing sources in the U.S.[4] Eximbank also plays an important role in expanding export sales by U.S. small and medium-sized companies.[5]

Eximbank engages in numerous activities and programs designed to achieve its tasks. For example, the Eximbank provides various guarantee programs. Among these are the "Eximbank Preliminary Commitment," which involves offers from the Eximbank on specific transactions, including the terms and conditions of guarantee/loan support.[6] The Eximbank also offers the "Eximbank Working Capital Guarantee" which provides eligible exporters with the capacity to obtain various working capital loans from commercial lenders.[7] Finally, the "Eximbank Guarantee" guarantees the repayment of export credits from either foreign or U.S. lenders to foreign purchasers of U.S. exports.[8]

The Eximbank employs loans in its effort to facilitate U.S. exports. Among these are the "Eximbank Direct Loan," providing funding to foreign purchasers of U.S. exports that encounter credit subsidies from other nations.[9] The Eximbank also provides an "Eximbank Intermediary Loan," which includes fixed interest rate lending to actors that extend OECD minimum fixed rate credits to purchasers of U.S. exports that compete with government-sponsored competition.[10]

The Eximbank also has an agency and reinsurance program

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2. 12 U.S.C. § 635(b)(1)(A) (1982).
3. 12 U.S.C. § 635(b)(1)(B) (1982 & Supp. III 1985).
4. *Id. See* Orr, *Hot Prospect: Trade Finance*, A.B.A. BANK. J., Sept. 1988 at 76-80 (explaining export credit financing by private banks); J. HILLMAN, THE EXPORT-IMPORT BANK AT WORK: PROMOTIONAL FINANCING IN THE PUBLIC SECTOR 3-14 (1982) (providing an overview of Eximbank's role in export credit financing).
5. *See* Gage, *Middle-Market Firms Find Exim Pilot Fills Trade Finance Gap*, CASH FLOW, July 1988, at 6-10 (discussing Eximbank's role in guaranteeing export trade financing for small and middle-market businesses). *See also* Lawrence, *Export-Import Bank Playing Lead Role in Bush Trade Policy*, Chicago Tribune, Jan. 14, 1990, at 14F (explaining that U.S. will launch more aggressive subsidized export credit program).
6. EXPORT-IMPORT BANK OF THE UNITED STATES, PROGRAM SELECTION GUIDE 1 (Oct. 1989) [hereinafter EXIM GUIDE]. *See* 12 C.F.R. § 400-410 (1990) (discussing various rules and regulations regarding Eximbank). For an extensive overview of Eximbank's activities *see* CHASE MANHATTAN BANK, CHASE GUIDE TO GOVERNMENT EXPORT CREDIT AGENCIES 141-55 (1985) [hereinafter CHASE].
7. EXIM GUIDE, *supra* note 6, at 1.
8. *Id.* at 2.
9. *Id.* at 3.
10. *Id.* at 4.

with the Foreign Credit Insurance Association (FCIA), an association of U.S. marine, property and casualty insurance corporations, that offers export credit insurance policies.[11]

The FCIA offers insurance policies designed to cover most types of export credit sales. The "FCIA New-to-Export Insurance Policy," is a one-year blanket policy insuring short-term export credit sales.[12] The "FCIA Umbrella Insurance Policy" meets the needs of those who have not used FCIA in the past two years and who have average annual export credit sales of less than $2 million for the previous two years, by providing a one-year blanket policy for short-term export credit sales.[13]

The "FCIA Bank Letter of Credit Insurance Policy" is a one-year blanket policy insuring commercial banks against any loss on irrevocable letters of credit issued by foreign banks for U.S. exports.[14] This policy applies only to irrevocable letters of credit issued by a foreign bank for which the insured has an approved issuing bank credit limit.[15] Individual short-term loans to foreign purchasers of exports of U.S. goods and services may be insured by the "FCIA Financial Institutions Buyer Credit Insurance Policy."[16] The "FCIA Multi-Buyer Insurance Policy" is a type of one-year blanket policy which insures either short-term, medium-term, or a combination of short-term and medium-term export credit sales.[17] The "FCIA Short-Term Single-Buyer Insurance Policy" is a single-buyer policy which insures individual short-term export credits sales.[18] The "FCIA Medium-Term Single-Buyer Insurance Policy" is a single-buyer policy which insures individual medium-term export credit sales.[19] Finally, the "FCIA Lease Insurance Policy" is a policy which insures both the stream of lease payments and the fair market value of leased products payments.[20]

III. Export Credits: An Overview

A "credit" is a deferred payment for goods and services re-

11. *Id.* at inside cover. FCIA acts in unison with Eximbank in providing export credit insurance. This insurance association was organized at the behest of Eximbank. *See* Lovell Manuf. v. Export-Import Bank of the United States, 843 F.2d 725 (3rd Cir. 1988); EXPORT-IMPORT BANK OF THE UNITED STATES, THE EXPORT-IMPORT BANK: FINANCING FOR AMERICAN EXPORT—SUPPORT FOR AMERICAN JOBS 13-22 (1979). *See also* Chapman, *The High Utility of FCIA Insurance to Banks in Financing Trade*, 9 HAST. INT'L & COMP. L. REV. 439 (1986); Holden, *Export Credit Insurance and the FCIA*, 14 U.C.C. L.J. 140 (1981).

12. EXIM GUIDE, *supra* note 6, at 5.

13. *Id.* at 6.

14. *Id.* at 7.

15. *Id.*

16. *Id.* at 8.

17. *Id.* at 9.

18. *Id.* at 10.

19. *Id.* at 11.

20. *Id.* at 12.

ceived.[21] Export credits are financing tools which are "tied directly to the cross-border purchase of specific goods."[22] Consumers of export credits are generally from the Less Developed Countries[23] because these nations are generally undercapitalized and lack foreign exchange.[24]

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21. INTERNATIONAL TRADE ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, TRADE FINANCE: CURRENT ISSUES AND DEVELOPMENTS 35 (1988) [hereinafter TRADE FINANCE]. *See Eastern Europe, Tied Aid Will Focus On Export-Import Bank*, Daily Rep. for Exec. (BNA) No. 11, at S-20 (Jan. 17, 1990), (the Bush administration will use export financing and tied aid to help movement toward market economies in Eastern European nations).

22. THE WORLD BANK, THE ROLE OF EXPORT CREDITS IN ECONOMIC DEVELOPMENT FROM RESOURCES FOR DEVELOPMENT 163 (Development Committee Report No. 4 1984). *See* Murphy, *Trade Finance: More Garnish Than Substance?*, BANKER, March 1988, at 30 (discussing the utility and impact of export credits on exporter's competitiveness). *See also Export Financing Annual Survey of Developments in International Trade Law: 1985*, 16 GA. J. INT'L & COMP. L. 527 (1986); Graham, *Sources of Export Financing*, 14 GA. J. INT'L & COMP. L. 455 (1984) (examining various institutions and mechanics of export financing).

A buyer credit is defined as a "[f]inancial arrangement in which a bank and/or ECA [Export Credit Agency] makes a loan. Generally the proceeds can only be used to purchase specific imports. Disbursements may go either directly to the supplier or to reimburse the buyer for payments already made to the supplier." CHASE, *supra* note 6, at 164-65.

Supplier credit financing is defined as a "[f]inancial arrangement in which a bank or an ECA makes a loan to the supplier often collateralized by the pledge of export receivables held by the supplier. [The] Bank or ECA may purchase export receivables from the supplier. The purchase of export receivables may be at par or at a discount and may be with full, limited or no recourse to the supplier." *Id.* at 168.

23. TRADE FINANCE, *supra* note 21, at 35. *See generally* Duff, *The Outlook for Official Export Credits*, 13 L. & POL'Y INT'L BUS. 891 (1981).

24. TRADE FINANCE, *supra* note 21, at 35.

Export credit subsidies are bounties which are paid on specific export items so that a nation can increase exports or a relevant industry can develop. DICTIONARY OF ECONOMICS 159 (5th ed. 1970). These credit subsidies are often utilized to finance both capital goods (factories, buildings, and machinery) and large-scale investments such as infrastructure projects (water projects, rail systems, and roads). ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE EXPORT CREDIT FINANCING SYSTEM IN OECD MEMBER COUNTRIES 7 (1982). Generally, export credit subsidies occur when the government of the exporting country provides the importing purchaser with financing terms more beneficial than those accessible via non-public institutions. J. PEARCE, SUBSIDIZED EXPORT CREDIT 21 (1980). The effect of these export credit subsidies is to shift resources from one portion of the economy (taxpayers) to another (exporters), or, worse yet, to the importing nation, without a guarantee of improving the terms of trade. In reality, some would argue that this form of non-tariff distortion of trade misallocates resources and outputs, while actually exacerbating the terms of trade. *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. 300 (1981) (statement of Marc Leland, Ass't Sec'y for Int'l Affairs, Dept. of the Treas.). *See also* Diamond, *Economic Foundations of Countervailing Duty Law*, 29 VA. J. INT'L L. 767, 771 (1989) (discussing the GATT Subsidies Code and the U.S. law definition of "subsidy").

In 1981, Mr. John D. Lange, Jr., then Acting Deputy Assistant Secretary of Treasury, detailed the various reasons for which countries subsidize their exports:

> * Many countries suffer trade or current account deficits and seek to reduce the deficit quickly.
> * Some countries have economic policies biased in favor of state intervention for favored sectors, such as the export sector. They lack understanding that this may worsen their underlying competitive position.
> * There is a belief that increasing exports through credit subsidization is a relatively inexpensive alternative to unemployment and welfare programs.
> * Many have an "irrational conviction" that there is a proper or natural level for interest rates, unreflected in week-to-week, month-to-month or even year-to-year fluctuations.
> * Some countries hope to compensate their industries for their smaller scale of

Export credits of complex, high cost unit value goods and services include bulldozers, aircraft, power plants, and other capital goods and services. The value of credit for these items often ranges from $50,000 to $100 million, and these items possess repayment periods which last approximately 10 years. The terms of this export financing often mimic rates in the commercial market.[25]

IV. Export Promotion Through the Use of Export Credits: General Issues

In order to promote export growth, governments can offer interest rates below those generally available in the commercial arena. These below-market credits will enable an exporter whose competition can provide goods and services of similar quality a distinct advantage. Thus, government intervention in export credits can result in trade distortions.[26]

The role of export financing is vital since the terms available can have an impact on the final price paid by buyers. For example, suppose that the governments of the United States and Japan manufacture the same type and quality of widgets and compete for a $1 million sale to a Less Developed Country (LDC). Under the terms of their respective bids, Japan provides financing at 8% over a 10-year period, while the United States offers 9% for the same term (assuming both export credits are in United States dollars). Due to differences in these rates, over a 10 year period, the difference in interest payments rises to $55,000. As a result, this 1% variance in interest on the export financing is equal to 5.5% of the $1 million contract.[27]

> production, inefficiencies or other presumed disadvantages in the world export market.
>
> * There is a belief that export credit subsidies ease the debt burdens of the lesser developed countries that receive the credits.

Marsh, *Hopes Dim for Ending Predatory Financing*, AVIATION WEEK AND SPACE TECHNOLOGY, June 8, 1981, at 199. *Subsidized Exports Seen Causing Loss of 46,000 Jobs in U.S. in 1981*, Daily Rep. for Executives (BNA), No. 106, at L-1 (June 2, 1982) (discussing a report by the Labor-Industry Coalition for International Trade which states that officially subsidized export credits in industrialized foreign countries have resulted in a loss of 46,000 American jobs and at least $1.5 billion in U.S. exports).

25. TRADE FINANCE, *supra* note 21, at 34.

26. *Id.* at 36.

27. *Id. Export-Import Bank, Cuts to Eximbank Direct Loan Will Harm U.S. Competitiveness, Exporters Say*, Daily Rep. for Executives (BNA), No. 21, at B-10 (Jan. 31, 1990). An actual example of the severe implications of export subsidies to U.S. corporations is provided by the case of a Westinghouse Electric Corporation bid in 1981:

> Last year [1981], Westinghouse Electric Corp. lost to France's Framatome a $1 billion contract to construct two nuclear reactors in Korea. It wasn't that the French equipment was superior. Nor was Framatome's price significantly lower than Westinghouse was prepared to bid. But Westinghouse never even got to make a formal proposal because the French, using a winning combination of high-level political pressure and low-cost financing, made an offer that even America's Korean allies couldn't refuse. Compared to the best financing package typically offered by America's Export-Import Bank, France's bid, covering 85%

Thus, although both manufacturers were presenting identical products, the package with the most favorable financing, the Japanese bid, would likely be chosen by the importer.

As an executive at Caterpillar Inc. explains, "[e]xport financing is absolutely a key part of export competitiveness. It's not always enough to have a quality product at a competitive price — sometimes the financing itself determines what product is chosen."[28] Consequently, for U.S. goods and services to compete globally, they must not only be of high caliber and competitively priced, but must also offer aggressively priced export credits.

V. Export Promotion Through the Use of Export Credits: Mixed Credits

Promotion of national exports also occurs when aid and trade intersect. This situation is particularly apparent with mixed credits. Mixed credits occur when donor governments combine a large portion of export financing with a smaller degree of aid.[29] An example provides a better comprehension of the scope of mixed credits.

A Country A contract offer of $2 million of Country A's goods includes $1.6 million of export credits and $400,000 of aid to Country C.[30] The aid is composed of a grant (i.e., funds that do not need to be repaid and which carry no interest). In contrast, Country B offers an identically priced package of Country B's goods export credits, but no aid is appended.[31] All things being equal, Country A would most likely receive the contract because the buyer would receive $2 million of goods, but would only be required to repay the $1.6 million in principal, plus interest.[32]

Although at first glance mixed credits appear to be in accord with "fair" export financing practices (i.e., the interest rate of the loan is in compliance with OECD guidelines), upon closer scrutiny, one comprehends that part of the credit does not have to be repaid. Nevertheless, nations that offer mixed credits maintain that their "donations" are simply forms of aid for development programs.[33] In reality, these measures distort trade through subsidization of credit

of the project at a fixed interest rate of 7.6% over 22 years, will save the Koreans about $235 million, according to Westinghouse.

Reilly, *Outgunned in the Export Credit War*, DUN'S REV., July 1981, at 41.

28. *Export-Import Bank, Cuts to Eximbank Direct Loan Will Harm U.S. Competitiveness, Exporters Say*, Daily Rep. for Executives (BNA), No. 21, at B-10 (Jan. 31, 1990).

29. TRADE FINANCE, *supra* note 21, at 39. "A mixed credit includes [public as well as] some private funds. If the grant element is more than 25 percent, the credit is considered aid and is not covered by the Guidelines." CHASE, *supra* note 6, at 163.

30. TRADE FINANCE, *supra* note 21, at 39.

31. *Id.*

32. *Id.*

33. *Id.* at 40.

while promoting their nation's distinct commercial interests.[34]

Even though aid to LDCs could be provided by giving these nations monies and allowing them to choose how to use these funds, political pressure in the donor country often prohibits such activity.[35] Rather, aid is combined with traditional export financing, whereby the donor country will be able to export its goods to the recipient nation. More specifically, grant elements are determined by the present discounted value of future repayments of an aid loan against a hypothetical loan at market rates, expressed as a percentage[36] (for instance, an aid loan with a 70% of grant aid and 30% of market loan).

Several explanations have been offered concerning the benefits of mixed credits as aid. The first justification rests on the notion that appending aid to export credits augments the donor nation's resources available for assisting LDCs.[37] Second, adherents of mixed credits as aid proffer that, for some LDCs, mixed credits are essential because these nations cannot afford traditional export financing and are ineligible for credits involving high concessional aid.[38] Yet, debate remains regarding the extent to which mixed credit financing plays a role in promoting attractive export projects, such as power plants, locomotives, construction projects, and telecommunications.[39]

VI. Export Promotion through the Use of Export Credits: Tied Aid Credits

"Tied aid" describes the practice of certain companies who offer export credits financed through foreign aid assistance in the form of lower interest rates to developing countries. Donor country subsidization of this export credit makes the interest rate which the importer must pay much lower, thereby making the deal more attractive.[40] The term tied aid is also used to describe a situation in which a government provides aid to a LDC on the condition that the latter purchase goods and services from the export credit lender government.[41]

Tied aid credits inhibit the free market system in which American exports formerly competed. This view was expressed by Ex-

34. *Id.*
35. *Id.* at 41.
36. *Id.* at 40.
37. *Id.* at 41.
38. *Id.*
39. TRADE FINANCE, *supra* note 21, at 41.
40. *Administration Expected to Present Tied Aid Recommendations to Capital Hill Today*, Washington Insider (BNA), (Sept. 12, 1989).
41. Rodes, *U.S. Export-Import Bank: Changes With World Trading Environment*, BUS. AM. Nov. 9, 1987 at 2. "A tied aid credit is one which is provided for development and purposes financed exclusively from public funds." CHASE, *supra* note 6, at 163.

imbank President and Chairman John Macomber, who said that tied aid is "an enormously expensive subsidy for the whole world."[42] Numerous American corporations have been hurt by tied aid credits offered by other developed nations. For example, for over 20 years, M.W. Kellogg Company, a United States nitrogen fertilizer factory manufacturer, sold these big-ticket items to China.[43] Yet in 1988, the Chinese stopped purchasing from the Kellogg Company and began purchasing these items from French and Italian corporations.[44] This switch from American to European corporations, which cost the Kellogg Company approximately $300 million, was due to tied aid credits offered by the European governments, rather than because of superior European technology or price.[45]

Developing nations like to receive offers of tied aid credits because these incentives reduce the cost of their imports.[46] America's principal trading partners rely on government-subsidized funding to boost their exports.[47] As a result, many American exporters cannot compete with offers sweetened by government-supported loans, unless similar United States government subsidization exists.[48]

While American use of mixed credits and tied aid has become more prevalent in the 1980s, U.S. commercial banks have significantly reduced trade finance.[49] The impetus for this change is diverse: U.S. banks have reduced risky foreign lending;[50] U.S. bank stockholders have called for a severe reduction of foreign lending;[51] there has been a decline of "relationship banking" between banks and U.S. exporters;[52] U.S. banks have shied away from this type of lending because of its high-cost and low profitability;[53] and tax law modifications of U.S. foreign tax credits have reduced its desirability.[54]

42. *"Bundling" Would Facilitate Exports to Mexico, Eximbank's Macomber Says*, 7 Int'l Trade Rep. (BNA), No. 4, at 120, (Jan. 24, 1990).

43. Aeppel, *U.S. Studies Use of Tied Aid*, Christ. Sci. Mon., Aug. 30, 1989, at 9, col. 1. *See The Export-Import Bank*, Washington Post, Feb. 10, 1990, at C2, col. 2 ("The Export-Import Bank is making a $10.4 million grant to help China build a subway in Shanghai. The grant will be part of a $23.1 million U.S. financing package to encourage the Chinese government to buy equipment from American companies, against competition from similar subsidies offered by France and West Germany.").

44. *Id.*

45. *Id.*

46. Rodes, *supra* note 41, at 3.

47. TRADE FINANCE, *supra* note 21, at 76. For a discussion of the European Economic Community's procedures concerning export credits, *see* ORGANIZATION FOR ECONOMIC CORPORATION AND DEVELOPMENT, THE EXPORT CREDIT FINANCING SYSTEMS IN OECD MEMBER COUNTRIES 13-15 (1987) [hereinafter FINANCING SYSTEMS].

48. TRADE FINANCE, *supra* note 21, at 76, 78.

49. *Id.* at 78, 81.

50. *Id.* at 82.

51. *Id.* at 78.

52. *Id.* at 81.

53. *Id.* at 82.

54. *Id.* at 83.

VII. A Survey of Nations Which Promote Exports through the Use of Tied Aid Credits and Mixed Credits

Various nations provide loans at less than fair market interest rates in order to promote their countries' exports. The tied aid credit and mixed aid credit programs of France, Italy, and Japan will be addressed below.

A. France

In France, mixed credits are viewed as an integral part of the nation's export finance system and development assistance program.[55] French policy does not clearly distinguish between the dominion of export credits and aid.[56] The basis for such reasoning stems from the French government's view that capital projects are equally attractive to both French commercial and development resources.[57] As a consequence, the French perceive that utilizing aid resources for economic infrastructure areas such as power-generating facilities, communications networks, and transportation systems, ameliorates both social and economic conditions.[58]

In addition, the French government uses mixed credits as a means of "stretching" economic development funding through combining these monies with commercial credits.[59] The use of mixed credits makes financing available to many developing nations who otherwise could not receive funding sufficient to permit them to purchase French exports.[60]

France, the "originator" of the mixed credit concept, uses several institutions to carry out these practices, including: the *Direction des Relations Économiques Extèrieures* (DREE); the Treasury Department; the *Banque Francaise du Commerce Extèrieur* (which provides OECD Arrangement-rate financing); and the *Compagnie Francaise du Commerce Extèrieur* (a part-private, part-public insurance company which provides credit insurance for commercial financing).[61] Also, the *Caisse Centrale de Cooperation Économique* (CCCE), although not involved in mixed credits, acts as a develop-

55. EXPORT-IMPORT BANK OF THE UNITED STATES, REPORT TO THE U.S. CONGRESS ON TIED AID CREDIT PRACTICES 51 (1989) [hereinafter TIED AID CREDIT]. *See generally Export Credit Agencies Seek New Strategies*, Euromoney Trade Finance Supp., Feb. 1989, at 5-8 (listing the various export credit agencies in France, Belgium, and the U.K.). For an overview of French export credit mechanisms *see* FINANCING SYSTEMS, *supra* note 47, at 43-50.

56. TIED AID CREDIT, *supra* note 55, at 51.

57. *Id.*; *See Eximbank Wants to Match "Last Minute" French Mixed Credit Offer*, Daily Rep. for Executives (BNA), No. 76, at L2, (Apr. 19, 1985) (discussing role of Eximbank in matching last-minute subsidized export financing in order to assist a U.S. power equipment manufacturer).

58. TIED AID CREDIT, *supra* note 55, at 51.

59. *Id.*

60. *Id.*

61. *Id.* at 52.

ment bank and offers tied, as well as untied, aid.[62]

The aforementioned government agencies distribute development assistance monies used for project financing through two main schemes: (1) tied aid loans and grants provided by the CCCE and (2) mixed credits granted under bilateral agreements or protocols.[63]

The French use of mixed credits has increased since the mid-1970s. For example, from 1977-78 to 1982-83, the amount of mixed credits offered by France rose by more than 50%.[64] Similarly, Treasury loans, which accounted for the concessional portion of mixed credits, grew to 3.2 billion francs in 1987 from a figure of 1.7 billion francs in 1979.[65] Another indication of export credit growth is demonstrated by the total lending of the CCCE (which accounts for over half of project finance) which increased from 1.6 billion francs in 1979 to 4.6 billion francs in 1983.[66] Since the period 1984-87, the financing totals have remained relatively stable.[67] More recently, however, from 1987 to 1988, the volume of French tied aid actually decreased from 2.6 billion francs to 2.4 billion francs.[68]

French mixed and tied credits benefit several key French industries, including transportation, electricity production, telecommunications, health, and agriculture.[69] Target projects of CCCE "productive investments" include transportation, telecommunications, mining, rural development, and oil field development.[70]

Although budget constraints will discourage significant increases in mixed and tied aid credits, French authorities are unlikely to reduce tied aid practices.[71] After all, the French contend that discontinuing such assistance is both politically and economically undesirable.[72] As a result, the French are not interested in engaging in negotiations regarding concessionality levels for mixed credits.[73] Given the recent changes in the OECD Arrangement,[74] the French government views any renegotiation of the Arrangement as premature.[75] Furthermore, the French government opposes the OECD's

62. *Id.*
63. *Id.*
64. *Id.* at 54.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 55.
69. *Id.*
70. *Id.*
71. *Id.* at 56.
72. *Id.*
73. *Id.* Concessionality Level is defined as the difference between the nominal value of a loan and the discounted present value of the future debt service payment to be made by the borrower, expressed as a percentage of the nominal value of the loan. The discount rate is differentiated by currency. Id. at 225.
74. See *infra* notes 118-39 and accompanying text.
75. TIED AID CREDIT, *supra* note 55, at 56.

program of consistently raising the level of concessionality.[76]

B. Italy

The Italian government views tied aid and mixed credits primarily as fair mechanisms with which to assist the development of LDCs. Nevertheless, the Italian program is used aggressively to assist in the marketing of Italian goods and services abroad.[77] As a result, the Italian government is able to assist its own exports which, in some cases, due to price and quality, would not otherwise be competitive.[78]

The *Mediocredito Centrale* administers the mixed credit/tied aid program through its Revolving Fund.[79] In 1987, legislation transferred policy formulation and aid implementation to the Interministerial Committee on Development Cooperation (CICS).[80] The CICS has set out strict guidelines for granting mixed credits and tied aid credits.[81] The Italian mixed credit/tied aid scheme focuses on specific geographic areas which are designated as either "first priority" or "priority" nations.[82]

Regarding the scope of Italian mixed credit financing, it is useful to note that in 1988 a larger proportion of aid funds were targeted for mixed credits. This enabled the Italians to comply with a new Arrangement Guidelines, which required a 35% grant element, while still providing the same amount of mixed credit support.[83] Additionally, 1984-86 statistics illustrate that 95%-98% of Italian aid funds were tied aid funds.[84] The volume of mixed credits commitments rose from 158.3 million dollars to 358.2 million dollars.[85]

In contrast to other nations which provide tied aid/mixed credits for specific export sectors, Italy provides mixed credits to any sector if that arena is vital to the development of the recipient nation.[86] The sectors to which these funds are applied include power generation, telecommunications, and petrochemicals projects.[87]

76. *Id.* at 56.
77. *Id.* at 69. For an in-depth discussion of Italian export credit activites, *see* FINANCING SYSTEMS, *supra* note 47, at 81-90.
78. TIED AID CREDIT, *supra* note 55, at 69.
79. *Id.*; *see also* CHASE, *supra* note 6, at 67-68.
80. TIED AID CREDIT, *supra* note 55, at 69.
81. *Id.* at 71. Mixed credits must have a minimum grant element of 35%. Tied aid credits must have a minimum grant element of 50%. *Id.*
82. *Id.* at 70.
83. *Id.* For a discussion of the OECD Arrangement *see infra* notes 118-46 and accompanying text.
84. TIED AID CREDIT, *supra* note 55, at 71.
85. *Id.*
86. *Id.* at 72.
87. *Id.* at 72-73.

C. *Japan*

Japan's strategy presents an alternative to the approach taken by the French and Italians. Japan's development assistance programs have focused on LDCs infrastructure areas such as communications, transportation, and energy.[88] Strengthening these sectors, the Japanese government holds, is important for the recipient nation's development.[89] Yet, recently, Japan has focused on more traditional development assistance, such as expanding its support for health care, medical care, education, and agricultural development; providing greater assistance in aiding economic adjustment; and improving the concessionality of its assistance programs.[90]

Numerous Japanese government agencies have important roles in development assistance. For instance, development assistance loans must be approved by the Ministry of Foreign Affairs, the Ministry of Finance, the Ministry of International Trade and Industry, and the Economic Planning Agency.[91] Two important public corporations, the Overseas Economic Cooperation Fund (OECF—which provides project lending) and the Japan International Cooperation Agency (which provides technical and other grant funded assistance) also play major roles in Japan's development assistance programs.[92]

Usually, Japanese development projects are supported by concessional Japanese OECF loans instead of commingling these loans or grants with export credits.[93] However, OECF funds are sometimes combined with export credit to assist Japanese exporters in matching situations.[94]

Japanese pledges of tied aid, partial aid, and associated financing totaled 1.6 billion dollars in 1984, 1.9 billion dollars in 1985, 1.8 billion dollars in 1986, and 2.7 billion dollars in 1987.[95] Since Japan's domestic goal is to develop its economic base, it is not surprising that, in practice, Japanese telecommunications, energy, and transportation are the main sectors benefitting from various types of subsidized export credits.[96]

88. *Id.* at 77. *See* Ozawa, *Japan's Largest Financier of Multinationalism*, 20 J. WORLD TRADE L. 599 (1986) (providing a thorough analysis of the Export-Import Bank of Japan). *See also* FINANCING SYSTEMS, *supra* note 47, at 183-90 (discussing Japanese export credit facilities and institutions).

89. TIED AID CREDIT, *supra* note 55, at 77.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 78.

95. *Id.* at 79.

96. *Id.* at 80.

VIII. The Eximbank Study and the Center for Strategic and International Studies Report

In a recent study, the Eximbank analyzed the impact of tied aid credit competition on five United States industries, namely: telecommunications; computers; electric power generating; rail transportation; and earthmoving.[97] These five sectors were chosen for review since they account for approximately seventy-five percent of foreign tied aid activity and the companies selected represent between fifty and one-hundred percent of the potentially affected companies within each product line.[98] The two main objectives of the Eximbank study were to measure the ramifications of tied aid credits and to address the consequences of the international competitiveness of the sectors examined and the strength of the areas selected.[99] The conclusion of Eximbank's case-by-case, company-specific review was that American companies have been losing export sales worth between 400 and 800 million dollars per year as a result of foreign tied aid credit practices.[100]

Most U.S. companies included in the Eximbank study reported that they lost over ten percent of their total sales to developing nations due to tied aid competition.[101] However, four sectors, including large-scale computers, boilers, communications satellites, and heavy earthmoving equipment, reported only minor losses.[102]

The Eximbank study exhibited that tied aid credits may have a direct impact on the American economy through lost sales to developing nations.[103] Yet, since sales to these nations represent a marginal proportion of domestic output, it is improbable that the affected industries would be more than slightly impaired by the loss of these exports. The Eximbank report further noted that such conclusions are particularly applicable to several categories of products including radio communications equipment, transmission equipment, and telecommunications equipment.[104] In other industries—railroad equipment, turbines, and satellite earth stations—the reduction of exports to developing nations might have a significant negative impact on U.S. domestic production levels.[105]

The Eximbank study also found that American corporations are moving their manufacturing plants from the United States to other

97. TIED AID CREDIT, *supra* note 55, at 135-220.
98. *Id.* at 136.
99. *Id.* at 138-39.
100. *Id.* at 142.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 146.
105. *Id.*

nations in order to obtain foreign tied aid credit financing.[106] This relocation has been witnessed to some degree in several sectors including turbines, boilers, locomotives, and transmission equipment.[107] An example of this trend includes an American business which filled an order through its Canadian subsidiary in order to meet the specifications for Canadian tied aid financing.[108]

Several important issues which the Eximbank addressed in its study were criticized in a report of the Center for Strategic and International Studies (CSIS). The CSIS study notes that losses to U.S. exporters due to a weak tied aid policy are between 2.4 billion dollars and 4.8 billion dollars, rather than the 400 million to 800 million dollar figure presented by the Eximbank.[109] Part of the discrepancy may rest in CSIS' estimate that the value-of-capital goods prospects in developing countries is between 10 billion and 12 billion dollars, while Eximbank cites a market of only 4 billion to 6 billion dollars.[110]

The CSIS report also attacks the Eximbank study as being both incomplete and as underestimating the impact of the tied aid credit practices of foreign nations.[111] First, CSIS contends that during 1984-87, the development assistance commitments for capital projects by tied aid sponsors such as Italy, Japan, United Kingdom, West Germany, France, and Canada totaled between 3.5 and 6.8 billion dollars.[112] These figures do not include tied aid use by Austria, Spain, Holland, Switzerland, and Belgium.[113] CSIS argued that the breadth of tied aid offered is close to 11 billion dollars.[114] Second, the report asserts that the U.S. War Chest fund is hampered by inadequate financing, lack of operational guidelines, and insufficient policy goals.[115] In fact, CSIS suggests the 300 million dollar fund earmarked in 1987 should be increased to 500 million dollars annually.[116] The study also suggests that the Agency for International Development (AID) should establish a new capital project

106. *Id.*

107. *Id.*

108. *Industry Groups Charge Eximbank Report Misrepresents Tied Aid Effects on U.S. Firms*, Daily Rep. for Executives (BNA), No. 94 (May 17, 1989).

109. E. PREEG, THE TIED AID CREDIT ISSUE: U.S. EXPORT COMPETITIVENESS IN DEVELOPING COUNTRIES, 36-39 (The Center for Strategic and International Studies, Significant Issue Series, Vol. 11, No. 11, 1989).

110. *Id.*

111. *Lost Exports From Lack of Tied-Aid Policy Greater Than Eximbank Estimates, Study Says*, 6 Int'l Trade Rep. (BNA), No. 49, at 62 (Dec. 13, 1989).

112. E. PREEG, *supra* note 109, at 7.

113. *Id.*

114. *Id.* at 8.

115. *Id.* at 2. For an explanation of the U.S. War Chest *see infra* notes 163-64 and accompanying text.

116. *Id.* at 27.

program.[117]

IX. Attempts to Regulate Mixed Credits and Tied Aid Credits

A. *The OECD Arrangement*

In order to counteract export credit subsidization, the Organization for Economic Cooperation and Development (OECD) has completed several agreements aimed at ending this activity. Seven nations formed a "Consensus" which set standards for officially supported export credits.[118] In the 1970's, the "Consensus" grew into the "Gentleman's Agreement."[119] Although the "Gentleman's Agreement" did not contain any provisions to punish violations, it did institute minimum rates of interest, maximum terms of repayment, and minimum cash payments.[120] By October 1983, the OECD had concluded an agreement known as the "Arrangement" which allowed for interest rate loan adjustments every six months, provided that the weighted average of five selected governments' bonds changed by a minimum of .50 percent since the previous change.[121]

On March 17, 1987, the Export Credit Group of the OECD, after lengthy negotiations, amended the Arrangement.[122] The new amended arrangement (Amended Arrangement), which became effective July 15, 1987, provided, *inter alia*, maximum maturity terms

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117. *Id.* at 26-28.

118. Bohn, *Eximbank's Role in International Banking and Finance: Loans, Reschedulings, and Development*, 20 INT'L LAW. 829, 831 (1986). *See generally* Moravcsik, *Disciplining Trade Finance: The OECD Export Credit Arrangement*, 43 INT'L ORG. 173 (1989) (discussing the current status of the OECD export credit arrangement). *See also* CHASE, *supra* note 6, at 157-60 (discussing the international union of credit and investment insurers).

119. Bohn, *supra* note 118, at 831.

120. *Id.* at 831-32.

121. *Id.* at 832. As of 1986, the basket of currencies, and their respective weights, were: U.S. dollar (42%); German mark (19%); Japanese yen (15%); Pound Sterling (12%); and French Franc (12%). The subsequent minimum rates arising from the Arrangement are actually a continuum of two spheres: three sectors of nations and two types of repayment terms. Category I, termed the "relatively rich" countries, include the United States, Japan, Canada, Australia, New Zealand, as well as most nations of Western and Eastern Europe. Category II, called the "relatively poor" countries, consist of those nations eligible for International Development Agency (IDA) aid of the World Bank and those nation-states that are not members of the World Bank as well as those ineligible for IDA assistance, though eligible because of per capita gross national products (GNP). *Id. See* Mendelsohn, *Cost Seen As Reason for Reduced Size of Export Credit Subsidies; Major Industrialized Countries Join to Limit Competition*, AM. BANKER, Jan. 2, 1985, at 2 (relating OECD Arrangement and rising costs connected with export credits). *See also* FINANCING SYSTEMS, *supra* note 47, at 231-55 (providing the text of OECD Arrangement and Protocol as of May 1986).

122. *Eximbank Announces Effective Dates for OECD—Approved Tied Aid Credit*, 4 Int'l Trade Rep. (BNA), No. 31, at 981 (Aug. 5, 1987) [hereinafter *OECD—Approved Tied Aid Credit*]. *See also* Mann, *Four Nations in Accord on Exports of Aircraft*, AVIATION WEEK AND SPACE TECHNOLOGY, Aug. 10, 1981, at 25. *See also*, Trade Directorate of the OECD, Arrangement on Guidelines for Officially Supported Export Credits, *reprinted in* U.S. Export Weekly (BNA), No. 196, at o-1 (Feb. 28, 1978) (discussing how the Export Credit Group of the OECD formulated "Guidelines for Officially Supported Export Credit"), *Trade Policy; OECD Adjusts Reference Rates On Government Export Credit*, Daily Rep. For Executives (BNA), No. 180 (Sept. 16, 1988) (expressing OECD's change of interest rate).

and minimum interest rates for subsidized export credits.[123] The rules set forth by the Amended Arrangement were to be implemented in several stages. First, a "minimum concessionality level" (the minimum amount of grant funds that must be offered in each transaction) for mixed credits was augmented to 30 percent from 25 percent.[124] This change made it more expensive for nations to offer tied aid.[125] Second, the concessionality mark for the poorest developing countries, who often received the majority of tied aid, was increased from 25 percent to 50 percent.[126] Third, the mechanism for calculating the concessionality level was changed in order to make tied aid deals more expensive for nations whose markets have low interest rates, such as Switzerland, West Germany, and Japan.[127] Eventually, the minimum concessionality benchmark was increased to 35 percent as a result of the Amended Arrangement.[128]

Under the Amended OECD Arrangement, the interest rates which various nations are charged on official export credit financing depends upon their respective wealth.[129] Nations are characterized, for these purposes, as relatively rich, intermediate, and relatively poor.[130] More specifically, the Amended Arrangement provided, that for the period between July 15, 1988, through at least January 15, 1989, newly-approved official export credits would be set at the following minimum levels:

	Credit Terms	
	2-5 Years	Over 5 Years
Wealthy countries	Market Rates	Market Rates
More affluent developing countries	9.65%	9.15%
Poorer developing countries	8.30%	8.30%[131]

It should be noted that these rates are subject to periodic adjustments.[132] In addition, these credit terms are not applicable to strong currencies, such as the Swiss franc, Japanese yen, and West German mark, which carry market interest rates under the Amended Arrangement minimum rates.[133] Loans in these currencies

123. OECD-Approved Tied Aid Credit, *supra* note 122, at 981.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. E. PREEG, *supra* note 109, at 22.
129. *Id.*
130. *See* CHASE, *supra* note 6, at 161 (listing OECD country classifications of rich, intermediate, and poor countries).
131. TRADE FINANCE, *supra* note 21, at 38.
132. CHASE, *supra* note 6, at 162 (relating automatic adjustment of interest rates).
133. TRADE FINANCE, *supra* note 21, at 37-38 n.6.

are available as long as the interest rate is unsubsidized.[134] As a consequence, governments have several options: they may lend in a low interest rate currency; lend in a high interest rate currency and subsidize down to the Amended Arrangement minimum; or forbear from lending and guarantee private financing at market interest rates.[135] Although the Amended Arrangement is in place, more affluent LDCs not parties to this agreement may use credit subsidies to circumvent the spirit of the Amended Arrangement.[136]

While the Amended Arrangement covers a wide range of activities, not all sectors of trade are included within its restrictions. For instance, special arrangements are set out regarding such sectors as shipping, nuclear power plants, and commercial aircraft.[137] Also, special "understandings" are included regarding intermediate and small aircraft.[138] The Amended OECD Arrangement does not cover ships, agricultural sales, or defense articles.[139]

Although the Amended Arrangement has resulted in some resolution of the tied aid and mixed credit phenomenon, no nation is completely content with the present structure.[140] The United States, West Germany, and the United Kingdom believe that raising the minimum grant element of mixed credits will reduce the trade-distorting consequences of this subsidized financing.[141] On the other hand, since some economic benefits to both the recipients and providers of subsidized export credits occur, this type of financing will likely continue in the future.

In September 1989, the Bush administration announced that it would launch a new round of tied aid credit negotiations.[142] These new negotiations, in a multilateral scheme, are necessary in order to reduce trade distortions and to guarantee that the development goals of tied aid recipient countries are met.[143] Additionally, the United States seeks progress in the following areas: effectively untying donor countries' aid programs for capital projects; limiting the use of tied aid in problem sectors and/or markets; limiting the use of relatively

134. *Id.* at 37 n.6.

135. *Id.* at 38 n.6.

136. *Id.*

137. Bohn, *supra* note 118, at 833.

138. *Id. See* FINANCING SYSTEMS, *supra* note 47, at 256-63, 267-78 (providing the text of the protocol to the Arrangement regarding ships, nuclear power plants, and civil aircraft).

139. TRADE FINANCE, *supra* note 21, at 37 n.5.

140. Bohn, *supra* note 118, at 835.

141. *Id.*

142. EXPORT-IMPORT BANK OF THE UNITED STATES, REPORT TO CONGRESS UNDER SECTION 15(G) OF THE EXPORT-IMPORT BANK ACT OF 1945 AS AMENDED (SECTION 19 OF THE EXPORT-IMPORT BANK ACT OF 1986 PUBLIC LAW 99-472) 4 (1989) [hereinafter BANK ACT].

143. DEPARTMENT OF TREASURY, REPORT TO THE U.S. CONGRESS ON TIED AID CREDIT PRACTICES ADMINISTRATION RECOMMENDATIONS FOR A U.S. RESPONSE 1 (Sept. 1989) [hereinafter TREASURY].

low-concessional aid to a certain proportion of a donor's total program; requiring open competitive bidding for transactions below a certain concessionality level as a way of precluding commercially motivated aid; banning the late introduction of tied aid credits into project bidding; and otherwise improving guidelines to enhance the developmental orientation of tied aid.[144]

Several countries, including France, want low-grant element tied aid as well as parallel financing placed under the same rules as mixed credits.[145] Other nations would accept this extension of the rules only if modest increases in the amount of the grant element are permitted.[146]

B. *The European Community's Efforts to Regulate Export Credits*

Other recommendations for regulating tied aid credits were offered by the European Community.[147] The European Community proposal, set forth in Spring 1986, recommended increasing the minimum grant element in two annual stages from 25 percent to 35 percent for most countries (to 50 percent for LDCs) and setting the grant portion with a different and floating rate for each currency, to exhibit the cost of funds in that currency.[148]

The European Community proposal also focuses on the importance of distinguishing between development funding and export credits. This distinction is useful to ensure that trade finance will be free of distorting concessional funding.[149] It is sometimes difficult, however, to distinguish between the two. More specifically, while the European Community could claim that it is providing development financing to LDCs for infrastructure equipment, it may, at the same time, be described as providing credits for its products.

X. The United States' Response to the Growth of Mixed Credits and Tied Aid Credits

The United States generally opposed the use of tied aid credits in the 1960's and early 1970's, noting that foreign aid funds should be used essentially for developmental, rather than commercial, purposes.[150] Opposition to American use of tied aid stems from two other important sources. First, an effective tied aid policy would cost U.S. taxpayers approximately thirty-five cents for every one dollar

144. *Id.* at 2.
145. Bohn, *supra* note 118, at 836.
146. *Id.* at 835.
147. *Id.* at 836.
148. *Id.*
149. *Id.*
150. TIED AID CREDIT, *supra* note 55, at 14.

worth of exports.[151] Second, use of tied aid credits earmarks government funding to specific industries, places certain industries above others, and thereby causes an industrial policy to emerge.[152] Although there are benefits to a calculated industrial policy, the United States publicly contends that its official export credit system should not be described as such a scheme.[153] In practice, such a designation is warranted.

While the United States has provided LDCs with development aid for many years, the U.S. government must now couple such funding with offers of subsidized export credits.[154] The United States, which generally did not utilize this financing mechanism, led the negotiations with other OECD countries to differentiate between capital project/mixed credit financing and development assistance.[155] To display the seriousness with which the Reagan administration viewed these discussions, President Reagan proposed funds for a fund to counter OECD nations' mixed credit practices.[156]

Thus, in September 1985, the Administration asked Congress to establish a $300 million fund (the War Chest) to assist the U.S. in its negotiations with the OECD.[157] In 1985, Eximbank utilized the War Chest appropriations for both offensive and defensive measures.[158] However, in 1986, the use of the War Chest was limited to promoting negotiations, rather than simply promoting exports.[159] Also, in October 1986, a War Chest valued at $300 million was authorized, while only $100 million was appropriated.[160]

Despite the limited funds which Eximbank had available in the war chest, U.S. negotiators asserted that, in principle, the United States could augment this fund to match any of its competitors.[161] The United States thereby demonstrated to the other OECD nations

151. The minimum grant element in OECD Arrangement for poorer countries is 35%. As a result, if the U.S. provides a LDC with a tied aid package, a minimum of 35% — or 35 cents per 1 dollar — will be a grant; a cost to the U.S. taxpayer. *See supra* note 128 and accompanying text. *See also Administration Expected to Present Tied Aid Recommendations to Capitol Hill Today*, Washington Insider (BNA) (Sept. 12, 1989).

152. Farnsworth, *U.S. To Press For Talks On Aid Tied To Exports*, N.Y. Times, Sept. 12, 1989, at D20, col. 5; Dunne, *U.S. To Launch Diplomatic Offensive Against tied Aid*, Fin. Times, Sept. 13, 1989, at 6. *See* Book Review, National Journal, Jan. 13, 1990, No. 2, at 95 (reviewing E. PREEG, THE TIED AID CREDIT ISSUE: U.S. EXPORT COMPETITIVENESS IN DEVELOPING COUNTRIES (The Center for Strategic and International Studies Significant Issue series, Vol. XI, no. 11 1990)).

153. *See generally*, TIED AID CREDIT, *supra* note 55, at 222.

154. *See* Rodes, *supra* note 41. *See generally Aid Funds Should Be Used For Humanitarian Needs, Not Tied To U.S. Exports, Panel Told*, Daily Report. for Exec. (BNA), No. 88, (May 9, 1989).

155. Rodes, *supra* note 41.

156. *Id.*

157. *Id.*

158. *Id.*

159. TRADE FINANCE, *supra* note 21, at 42.

160. *Id.*

161. TREASURY, *supra* note 143, at 4.

that subsidized export financing could be provided by any nation, while also demonstrating that such lending was costly and inopportune.[162]

The War Chest, or Tied Aid Credit Fund, implemented in March 1987, has been used primarily in a defensive manner — to counter offers from nations that do not conform with the guidelines set out in the 1987 OECD Arrangement.[163] The War Chest was established in order:

> [A] to supplement the financing of a United States export when there is a reasonable expectation that predacious financing will be provided by another country for a sale by a competitor of the United States exporter with respect to such export; (B) to supplement the financing of United States exports to foreign markets which are actual or potential export markets for any country which the Bank determines — (i) engages in predacious official export financing through the use of tied aid or partially untied aid credits; and (ii) impedes negotiations to eliminate the use of such credits for commercial purposes; or (C) to supplement the financing of United States exports under such other circumstances as the Bank may determine to be appropriate for carrying out the purpose of this section.[164]

Some elements of the Bush administration perceive that increased use and support of the War Chest is needed.[165] As a result, for fiscal year 1990, the Bush Administration submitted a proposal to continue the War Chest level at $100 million.[166] This $100 million War Chest, in conjunction with commercial funds guaranteed by Eximbank, will enable the United States to compete with other nations' tied aid programs.[167] Although the $100 million figure is not as large as some years during the Reagan administration, War Chest funds will be supplemented with foreign aid money from other agencies.[168]

There are three possible approaches for implementation of the War Chest program. Under the first alternative, the U.S. would target exports to markets of nations who frequently use tied aid credits and at the same time oppose negotiations for reducing such credits.[169] Under the second method, often described as defensive, the U.S. would match tied aid credit in other nations, regardless of

162. *Id.*
163. *Id.* at 2-3.
164. 12 U.S.C.A. sec. 635i-3(b)(1) (1989).
165. Letter from Nicholas F. Brady, Sec. of Treasury and John D. Macomber, Pres. and Chairman of Eximbank to Thomas S. Foley, Speaker of the House, (Sept. 11, 1989) at 1 [hereinafter Brady].
166. TREASURY, *supra* note 143, at 3.
167. *Id.*
168. *Id.*
169. *Id.*

whether the other nation opposes discussions on the subject.[170] Although this strategy would underscore the U.S.' disdain for tied aid credits, because the U.S. offers are reactive, U.S. exporters capacity to win these bids would be weakened.[171] In the third and most aggressive approach, the War Chest would assist U.S. exporters to compete in specific sectors and markets where competition from other nations' subsidized export credits is extensive.[172]

The Bush administration believes that the last option is the most effective at the present time.[173] If international negotiations do not progress as smoothly as the United States wishes, appropriations to supplement the War Chest might be necessary.[174] If the United States is forced to increase appropriations for the War Chest, it would exemplify the adage — if you can't beat them, join them.

To implement the third option, increased cooperation and support between the Agency for International Development (AID), the Trade Development Program, and the Eximbank, particularly in capital project financing, will be necessary.[175] Such cooperation would serve to achieve several goals, particularly: assisting the development of the importing country; meeting Eximbank's creditor provisions; and strengthening U.S. position vis-a-vis its competitors.[176] Additionally, a study of how U.S. aid programs can assist the development of nations through support for capital projects and infrastructure will be made.[177] Some officials at Eximbank expressed the view that monies available from AID should support humanitarian projects, rather than be earmarked for mixed credit export financing.[178] Otherwise, the U.S. would provide export subsidies to certain nations while at the same time depriving fundamental aid to LDCs.[179]

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170. *Id.*

171. *Id. See Tied Aid Credit Practices, Hearing Before the Subcommittee on International Development, Finance, Trade, & Monetary Policy of the Committee on Banking, Finance, and Urban Affairs, House of Representatives*, 101st Cong., 1st Sess., 8-9 (1988) (discussing present difficulties facing U.S. exports due to tied aid credits). *Omnibus Trade Legislation (Vol. V), Hearing and Markup Before the Comm. on Foreign Affairs and Its Subcomm. on Int'l. Economic Policy and Trade*, 101st Cong., 1st Sess. 6-7 (1988) (outlining U.S. policy on mixed credits and tied aid financing).

172. TREASURY, *supra* note 143, at 4.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Aid Funds Should Be Used For Humanitarian Needs, Not Tied To U.S. Exports, Panel Told*, Daily Rep. for Executives (BNA), No. 88 (May 9, 1989).

179. *Id. See U.S. Official Calls for Steps to Boost U.S.-Soviet Trade*, Reuter Business Report, Jan. 22, 1990 (noting Eximbank President Macomber's desire to remove "legislative underbrush" which impinges growth of U.S.-Soviet trade while Eximbank's foreign competitors — industrial nations' export credit agencies — already have provided $12 billion in financing to the Soviet Union).

Another way to assist U.S. exporters of capital goods in obtaining financing for their buyers is through a practice called bundling.[180] In bundling, numerous small export credits are joined into one large credit, which is then guaranteed by Eximbank.[181] Upon obtaining the guaranty, this credit can be sold in capital markets to institutional investors.[182] The benefit of this technique stems from the fact that smaller foreign importers would be able to obtain financing without requiring U.S. banks to increase their loans to developing countries.[183] The Eximbank Vice Chairman believes that "bundling" will make more funding available to importing countries and will increase U.S. exports.[184]

Moreover, in recent years, the United States has provided tied aid credits in order to compete with such practices by foreign governments.[185] The Eximbank has offered tied aid support to numerous projects since 1987, including:

FY	Country	Project	Export Value	War Chest Grant Amount
1987	Gabon	Earth Satellite Station	$ 21.2 mil.	$ 5.3 mil.
1987	Gabon	Cellular Telephones	$ 8.5 mil.	$ 2.1 mil.
1987	Brazil	Hospital Equipment	$ 35.0 mil.	$ 8.7 mil.
1987	Brazil	Airport Navigation Equipment	$ 52.6 mil.	$13.2 mil.
1987	India	Gas Turbines	$ 17.0 mil.	$ 8.8 mil.
1987	Thailand	Capital Equipment	$100.0	$40.0
1987	Total		$244.3	$78.1
1988	Jordan	Power Equipment	$ 18.3	$ 5.5
1988	Algeria	Telecommunications	$ 16.0	$ 2.1
1988	Total		$ 34.3	$ 7.6[186]

Additionally, as of October 20, 1989, the United States had outstanding offers under the War Chest to

Country	Project
Tunisia	Airport Equipment
China	Shanghai Metro
India	Computer Equipment
Indonesia	Telephone Switching System
Indonesia	Satellite Communication Equipment[187]

180. *"Bundling" Would Facilitate Exports to Mexico, Eximbank's Macomber Says*, 7 Int'l Trade Rep. (BNA), No. 4, at 120, (Jan. 24, 1990).
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. Rodes, *supra* note 41.
186. BANK ACT, *supra* note 142, attachment 3.
187. *Id.* attachment 2.

With reference to computer equipment for India's hydroelectric system, Eximbank offered a 40% concessionality level tied aid credit following a British Government 30% concessionality offer the day prior to the bid opening.[188] This action by the British is a strategy often utilized by nation's offering tied aid: the introduction of export subsidies late in the contract bidding procedure in order to "steal" business.[189] Although the U.K. later increased its grant offer to 100%, the United States supplier's goods were technically superior.[190] The Indian buyer has yet to decide which supplier to use.[191]

Similarly, immediately prior to a bid by an OECD nation for the sale of gas turbines to Malaysia, British and French suppliers offered a bid with tied aid credits, containing a 30% concessionality level.[192] Because the buyer was informed of the availability of tied aid well before the OECD participants were notified, the British and French violated the Amended Arrangement.[193] In response, Eximbank made an offer for a 40% concessionality level credit.[194]

More recently, in the highly competitive sale of a digital telephone system to Indonesia, the U.S. supplier, despite its technical advantage, faced competitive financing schemes by suppliers from France, Japan, and Australia, all of whom agreed to comply with an Indonesian law, known as Impres 8, which sets terms for concessional loans.[195] Impres 8 requires a 100% loan with a maximum interest rate of 3.5%, a minimum grace period of 7 years and a repayment term of 18 years.[196] These strict terms, corresponding to a concessionality level of 41.64%, are generally required by the Indonesian Government on multinational tenders.[197] This Indonesian law exemplifies the added complexity of some statutes which encourage the use of subsidized export credits.

XI. Conclusion

The threat to United States exports posed by export subsidization is real and critical. Such an appraisal was recently echoed by Congress which found that:

> (1) tied aid and partially untied aid credits offered by other countries are a predacious method of financing exports because of their market-distorting effects; (2) these distortions have

188. *Id.* at 2.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 3.
194. *Id.*
195. *Id.* at 4.
196. *Id.* at 3.
197. *Id.*

caused the United States to lose export sales, with resulting losses in economic growth and employment; (3) these practices undermine market mechanisms that would otherwise result in export purchase decisions made on the basis of price, quality, delivery, and other factors directly related to the export, where official financing is not subsidized and would be a neutral factor in the transaction; (4) support of commercial exports by donor countries with tied aid and partially untied aid credits impedes the growth of developing countries because it diverts development assistance funds from essential developmental purposes; and (5) there should be established in the Bank [Eximbank] a temporary tied aid program to target the export markets of those countries which make extensive use of tied aid or partially untied aid credits for commercial advantage for the purpose of facilitating the negotiation of a comprehensive international arrangement restricting the use of tied aid and partially untied aid credits for commercial purposes, and such a program should be aggressively used until such an arrangement is established.[198]

Thus, the United States must continue to implement effective unilateral actions (e.g., increase the funding and use of the War Chest) while on the multilateral level express its disdain for this form of unfair export credit scheme and negotiate for its timely demise.

It appears that the United States is pursuing such a two-fold strategy. First, in order to show its resolve during the OECD negotiations, the United States has increased the funding available to tied aid credits. More specifically, in May 1990, Eximbank and AID established a tied aid fund to assist United States exporters in selling to four Asian nations: Indonesia, Pakistan, Thailand, and the Philippines.[199] Under this funding scheme, each country will be allocated $125 million to be distributed among four sectors: transportation, telecommunications, construction equipment, and power.[200] The purpose of this $500 million fund is to challenge several affluent nations who have used aid to promote their exports to LDCs.[201] As aptly put by Eximbank Vice Chairman Lawson, this tied aid project "[is] designed to fight fire with fire."[202] Second, during the OECD negotiations in July 1990, the United States fervently urged that all nations must exclude the use of tied aid credits in specific business sectors, including power generation, telecommunications, and transportation.[203]

198. 12 U.S.C. § 635(i)-3 (1989).
199. *USAID/Eximbank Agree Tied Aid Pool*, Fin. Times, May 17, 1990.
200. *Id.*
201. *U.S. To Set Up $500-Million Trade Aid Fund*, Los Angeles Times, May 16, 1990, at 13, col. 3.
202. *Id.*
203. Miller, *U.S. Attacks Trading Rivals Who Use Aid To Win Business*, Reuter Busi-

While the U.S. approach to countering subsidized export credits of other nations with its own loans could be viewed in the short-run as hypocritical, it may, in the long run, prove faithful to the U.S. goal of reducing this form of trade-distorting financing. Such a view is credible if increased use of subsidized credit by the U.S. is so extensive that it will cause other such government creditors, who cannot allocate such funds for export financing, to call for the prohibition of subsidized export credits. However, creditors of subsidized export funds may have a much stronger resolve than at first perceived, and thus, augmented utilization of subsidized export credits by the U.S. will not cause the former to abandon their strategy. Additionally, the U.S. public and private sectors, upon witnessing huge rises in U.S. exports attributed to U.S. subsidized export credits, could be less inclined to call a stop to this method of financing.

ness Report, July 18, 1990.