Export Financing

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INTRODUCTION

The purpose of this article, as part of a legal symposium concerning international business transactions, is to focus upon the financing aspects of export transactions. Any anticipated commercial purchase of substantial magnitude will normally require that financing be available so as to enable the sales transaction to be completed. The fact that a sales transaction may result in an export from the United States does not cause financing requirements to disappear. In fact, particularly with respect to exports to developing countries, the need for credit may be greater than domestic credit requirements.

In the international business sphere, consequently, financing alternatives must be made available to the potential buyer-borrower for the transaction to be completed. Both the United States and other countries have recognized the need for governmentally sponsored export credit agencies to satisfy these demands. Absent monopoly conditions, if financing is not available from U.S. public or private sources, the foreign buyer will turn to non-U.S. sellers

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for a purchase that can be combined with financing support (public or private) from the country of the non-U.S. seller. In this age of substantial trade balance deficits the U.S. is, of course, not much interested in seeing those sales diverted to other developed countries. It is important, therefore, that the export financing mechanisms from both the public and private sector in the United States be available and be recognized.

In focusing on U.S. export financing, this article will attempt to analyze the functions of export financing, will describe the operations and activities of the U.S. Government export credit agencies (primarily, the Export-Import Bank of the United States, the "Eximbank"), and will also describe other potential sources of such export credit.[1] A bibliography of pertinent materials is appended which will enable the reader to refer to source material describing in greater detail the specifics of the several governmentally sponsored export credit programs.[2]

THE FUNCTION AND SCOPE OF EXPORT FINANCING

Simply stated, the function of export financing (particularly governmentally sponsored export credit programs) is to contribute to a favorable (*i.e.*, positive) balance of trade which, as a result, generates a vibrant domestic economy. In enacting the Export Expansion Act of 1971, the Congress of the United States, formally expressing its concern over the availability of competitive export financing services to American exporters, noted that:

> It is the policy of the United States to foster expansion of exports of goods and related services, thereby contributing to the promotion and maintenance of high levels of employment and real in-

1. Of the U.S. government export credit agencies, Eximbank provides the predominant amount of the support made available.

2. In many transactions, no need exists for government supported export financing. In such instance, the exporter may finance the transaction or his commercial bank may do so. For example, with respect to consumer goods where the term must be short, the seller might sell on open account, or a commercial bank might issue a letter of credit for a 180-day or lesser period. Also, many export transactions occur between parent and subsidiary corporations where a need for government supported export financing would often not exist. In a report to Eximbank by Klein & Saks, Inc. entitled "Financing of United States Exports, April-May-June 1971," it was indicated that on the basis of dollar volume almost 85% of export transactions were paid in 180 days or less. A summary description of export financing in the private sector is provided at 135 *infra*.

come and to the increased development of the productive resources of the United States.[3]

In its report, the Commission on International Trade and Investment Policy (the "Williams Commission") observed that a U.S. export-credit system fully competitive with those of other countries is vital if U.S. exporters are not to be disadvantaged in the coming decade.[4] The Commission noted that:

> The major industrialized nations all provide export finance assistance to their companies and banks in two major ways: guarantees and insurance for private export credits against commercial and political risks; and direct credits to reduce the cost of export finance and to provide funds which otherwise might not be available from private sources.[5]

A variety of approaches is used by government and government-related agencies in the principal exporting countries to support the financing of exports. These approaches include, in general: (1) the insuring or guaranteeing of credit extended by a domestic supplier; (2) the insuring or guaranteeing of credit made available by a private financial institution; (3) the direct extension of export loans to foreign buyers or domestic suppliers; and (4) the refinancing (discounting) of credits extended by financial institutions in support of exports. Those principal countries whose exporters compete with U.S. exporters on the basis of recent export trade statistics are, in particular, the United Kingdom, France, Germany, Italy and Japan.[6]

The competitive zeal to complete exports (by providing export credit arrangements) must, of course, be made subject to such restraints as to preclude terms from being so excessive that they exceed the useful life of the asset being purchased. The repayment term and amounts should have some substantial relationship to the cash flow projected to be received through use of the financial export.[7] In general, this idea is reflected in a consensus

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3. Export Expansion Finance Act of 1971, 12 U.S.C.A. § 635(b)(g) (1971). To meet this objective, Eximbank was directed, in that legislation,

> . . . in the exercise of its functions to provide guarantees, insurance and extensions of credit at rates and on terms and other conditions . . . available for the financing of exports from the principal countries whose exporters compete with United States importers.

4. REPORT TO THE PRESIDENT BY THE COMMITTEE ON INTERNATIONAL TRADE AND INVESTMENT POLICY, at 122 (July, 1971).

5. *Id.*

6. The Congress has directed Eximbank, in the exercise of its functions, to assure that its programs are competitive with Eximbank counterparts in these countries. Export Import Bank Act of 1945 (hereinafter Eximbank Act), 12 U.S.C.A. § 635(b)(1) (Supp. 1973).

7. To a certain extent, controls over the granting of excessive credit terms are exercised by the Berne Union, with respect to short term credits, and by the Organization for Economic Cooperation and Development (OECD), with respect to medium and larger term credits.

(sometimes violated to obtain a particular item of business) with respect to "terms customary in international trade."

THE EXPORT-IMPORT BANK OF THE UNITED STATES

Eximbank, as the primary U.S. government export credit agency, views its mandate from Congress as assuring the U.S. exporter that the sale by him to his foreign customer will not falter for lack of financing. Accordingly, Eximbank has, in the last several years, become a particularly significant participant in the expanding U.S. export trade. This section provides a general survey of the various support programs which are available from Eximbank to assure to U.S. suppliers a competitive position in the world marketplace.

Eximbank-An Overview

Basic Programs

The four basic export financing programs of the Bank are: (1) direct credits to borrowers located outside the United States, (2) export credit guarantees, (3) export credit insurance, and (4) discount loans. These four programs, and several others, *e.g.*, the Cooperative Financing Facility and the lease payments guarantee program, are discussed below. Eximbank is to provide support only when there exists a "reasonable assurance of repayment" and, accordingly, does not make grants.[8]

With respect to the guarantees and insurance issued by Eximbank, protection can be provided against both political and commercial risks. Political risks include, in general, the risks of (i) war, hostilities and civil war, (ii) expropriation or confiscation by a government authority and (iii) non-transferability of local currencies into dollars (*i.e.*, currency inconvertibility). Commercial risks are the risks of protracted default and insolvency of the foreign buyers, *i.e.*, the type of risks that does not cross national boundaries.

Congressional Mandates and Limitations

Congress has prescribed in the legislation governing Eximbank's

8. *See* Eximbank Act, *supra* note 6 at § 2(b) (1), 12 U.S.C.A. § 635(b) (1) (Supp. 1973), which includes the "reasonable assurance of repayment" requirement.

activities: (1) that Eximbank should supplement and encourage, rather than compete with, private capital; (2) that loans made should offer reasonable assurance of repayment; (3) that in making loans, Eximbank should take into account possible adverse effects upon the United States economy; and (4) that the fees and premiums to be charged for guarantees and insurance should be commensurate with the risks covered.[9] Eximbank is authorized under its Export Expansion Facility, however, in order to actively foster the foreign trade and long-term commercial interests of the United States, to support a limited amount of export transactions which may not meet the test of "reasonable assurance of repayment," but which nevertheless offer "sufficient likelihood of repayment" to justify Eximbank's support.[10]

Eximbank's overall lending authority is now limited by congressional legislation to $20 billion.[11] The Export-Import Bank Act of 1945 also provides for several specific restrictions on Eximbank's activities.

For example, Eximbank cannot provide support to transactions involving the sale of military equipment to developing countries.[12] Eximbank cannot provide support for transactions with communist countries unless the President determines that it is in the national interest to do so, and his determination is reported to the Congress.[13] Eximbank is not permitted to guarantee, insure or extend credit in transactions with any country (or national of such country) engaged in armed conflict with the Armed Forces of the United States.[14] Eximbank is not permitted to guarantee, insure or extend credit in connection with the purchase of any product, technical data or other information by a national or agency of any nation if the President determines that any such transaction would be contrary to the national interest.[15]

Eximbank also cannot provide support for the sale of U.S. goods

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9. *Id.*

10. 12 U.S.C.A. § 635(j)(a) (Supp. 1973). It is understood that funds under this facility have been substantially exhausted.

11. Legislation has been introduced into the 93d Congress to increase that amount to $30 billion. *See* S. 1890, 93d Cong., 1st Sess. § 1(d).

(1) (Supp. 1973), which includes the "reasonable assurance of repayment" 1973). The Interest Equalization Tax provisions serve as guidelines as to whether a country is a developing country.

13. Eximbank Act, Section 2(b)(2), 12 U.S.C.A. § 635(b)(2) (Supp. 1973). Pursuant to Presidential determinations, Eximbank can presently provide support for transactions with Yugoslavia, Romania, Poland and the U.S.S.R.

14. Eximbank Act, Section 2(b)(3), 12 U.S.C.A. § 635(b)(3) (Supp. 1973).

15. *Id.*

if those goods are not shipped in accordance with Public Resolution No. 17.[16] That resolution specifies that products financed by Eximbank shall be carried exclusively on U.S. vessels, unless the U.S. Maritime Administration grants appropriate waivers.

Intergovernmental Review

As part of the Bretton Woods Agreements Act, an intergovernmental committee was established to coordinate the policies and operations of the various U.S. government agencies which engage in international financial transaction.[17] Known presently as the National Advisory Council on International Monetary and Financial Policies (NAC), the NAC reviews the activities of Eximbank (as well as other U.S. governmental agencies and representatives to international financial institutions) to determine whether they are in conformity with overall U.S. Government policy.[18]

Direct Lending-Participation Financing Program

Direct Loans

Direct loans are U.S. dollar credits extended by Eximbank directly to borrowers outside of the United States to enable them to purchase U.S. goods and services. Proceeds of the loans do not, in fact, go to the foreign borrowers but, rather, are used to directly pay U.S. suppliers for those goods and services.[19] These loans, plus interest, are to be repaid in U.S. dollars by the borrowers.

The general purposes of the direct lending program are:

a. To supplement private sources of financing when private financial sources are then unwilling or unable to assume the

16. Pub. Res. No. 17, 73d Cong., approved March 26, 1934; amended by Pub. L. 74-835, 49 Stat. 1985, (1936).

17. Bretton Woods Agreements Act of 1945, Pub. L. 79-171, 59 Stat. 512 (1945). *See also*, Exec. Order No. 11,269 (February 14, 1966), issued by authority of Reorganization Plan No. 4 (1965).

18. The NAC is chaired by the Secretary of the Treasury, with the other representatives being the Secretary of State, Secretary of Commerce, Chairman of the Federal Reserve System and the President and Chairman of Eximbank. A full-time staff located within the Treasury Department handles daily matters.

19. An exception to this rule is provided where the foreign purchaser has previously paid for the goods and services and he is then reimbursed by Eximbank. However, in sizeable transactions the borrower's cash flow does not permit the use of this technique.

political and/or commercial risks in a proposed transaction;

b. To extend credit, when justified by the circumstances, on terms longer than those that private lenders are able to provide; and

c. To enable U.S. suppliers to offer to their foreign customers terms which are at least equal to those offered by other government-sponsored export financing institutions.[20]

This program is usually available only in connection with a long-term (over five years) transaction.[21]

The rate of interest charged by Eximbank on its direct loans is currently 6 percent per annum.[22] Repayment is normally required to be made in semiannual installments beginning six months after delivery of the equipment purchased or six months after completion of the project financed.[23] Because Eximbank must commit the allocation of funds authorized for each transaction, Eximbank charges each borrower a commitment fee equal to ½ percent per annum of the undisbursed balance of the authorized loan.[24]

Applications for direct loans are made by the prospective borrower. The application must include or be supplemented by information sufficient to enable Eximbank to fully review the technical, economic and financial aspects of the transaction.[25]

Participation Financing

Eximbank has a policy of requiring participation financing in any

20. The use of the term "institutions" is intended to include public export credit organizations, whether support is provided directly by direct credits or indirectly by guarantees, insurance or otherwise.

21. *See*, as an exception to the "five-year rule," the discussion at 127, *infra*, concerning the financing of feasibility studies.

22. The rate of interest has remained at 6 percent since 1969, notwithstanding substantial money cost fluctuations in the interim. The hope is that stabilized borrowing costs will better encourage the purchase of U.S. products. Such an interest rate is also essential for purposes of adequately competing with the export credit agencies of other countries which currently provide rates equivalent to the cost of the Eximbank package. *See* note 29, *infra*.

23. It is the general experience that at approximately the six-month point, the cash-flows from the financed project will enable commencement of the repayments.

24. Although Eximbank is required to allocate these funds by reason of its governing statute, a commitment fee is, of course, in accord with normal commercial banking practices.

25. No specific application forms have been prescribed and the application can be in the form of a letter.

transaction involving Eximbank direct lending.[26] This policy has as its purposes:

a. To encourage private financial institutions to provide export credit in many areas of the international trade arena;
b. To assure that Eximbank's financial resources supplement, rather than compete with, private sources of export financing; and
c. To extend the availability of Eximbank's cash resources to the largest possible number of purchasers and projects.[27]

The interest rate on the private financing (normally higher than Eximbank's 6 percent rate) is negotiated between the private financial institution and the foreign borrower.[28]

This "blending" of an Eximbank direct credit (at the 6 percent per annum interest rate) with privately supplied funds (at the commercial rate of interest) results in an effective rate of interest to the customer which is normally competitive with the rate charged or guaranteed by foreign export credit institutions on comparable transactions. Eximbank is prepared, when necessary, to entirely finance the later maturities of the total credit through direct lending. This means that the private lender obtains repayment of its loan in the first half of the term, thereby further reducing the overall effective rate of interest to the borrower.[29]

Financial Guarantees

If requested by the private lender, Eximbank can extend its

26. The normal formula is 10 percent cash payment (from offshore sources), with the remainder being financed in equal amounts by Eximbank and the private commercial bank.

27. As noted, Eximbank is limited by its charter to obligating the U.S. government to a total of $20 billion. The amount will be exhausted within the next several years. Legislation has been introduced to increase that amount to $30 billion. However, even with such an increase the availability of credit should be conserved by use of the present pattern, thereby encouraging maximum private participation.

28. With uncertain money costs the rate negotiated has recently been a fluctuating rate, *e.g.*, 1 percent over the lender's private rate, changing when that prime rate changes.

29. *For example*, assuming Eximbank's rate to be 6 percent, and assuming the commercial bank's rates to be 8 percent (fixed), the overall rate for a ten year maturity, with the commercial bank having the first five years would be something less than 7 percent, rather than the overall 7 percent cost if the maturities were repaid *pari passu*.

financial guarantee to assure repayment of the private lender's portion of the total financing. This guarantee can cover both commercial and political risks of nonpayment. This financial guarantee is available to both U.S. lenders and non-U.S. lenders.[30] The guarantee would cover the repayment of principal, plus interest thereon at the lower of (1) the rate agreed upon between the lender and the borrower or (2) a per annum rate equal to the U.S. Treasury rate for similar maturities, plus 1 percent.[31] This guarantee by Eximbank is backed by the full faith and credit of the United States.[32]

The financial guarantee can sometimes serve as a substitute for direct lending by Eximbank, or, as noted above, the guarantee may be effectively combined with Eximbank direct lending, when Eximbank direct credit participation is necessary to supplement the private sources of funds (*i.e.*, reduce the overall borrowing cost) in a particular transaction. Eximbank charges a guarantee fee of ½ percent per annum on the outstanding balance of the guaranteed loan.

Criteria for Direct Loans and Financial Guarantees

Three principal criteria are applied by Eximbank in considering applications for a direct loan and a financial guarantee:

a. The borrower should have financial capability sufficient to provide Eximbank with "reasonable assurance of repayment" over the scheduled term of the requested financing;[33]
b. The purchase for which the financing is requested should be economically, financially and technically sound for both the borrower and the borrower's country; and
c. The goods or services being exported must be of U.S. origin.[34]

Local Cost Financing

Eximbank is prepared to assist U.S. exporters in obtaining local cost financing for their customers when necessary to complete

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30. The guarantee may be for repayment to a non-U.S. lender in another foreign currency (*i.e.*, other "hard currency").

31. The term "similar maturities" is interpreted to be the remaining outstanding term, rather than the original term.

32. 42 Op. Atty. Gen. 3 (1961). *See also*, 42 Op. Atty. Gen. 40 (1971).

33. This determination of a "reasonable assurance of repayment" is required, by the Eximbank legislation, to be made in each transaction. 12 U.S.C.A. § 635(b)(1) (Supp. 1973).

34. Eximbank's governing legislation does not limit the Bank's activities to the support of U.S. exports. *For example*, 12 U.S.C.A. § 635(a)(1) (Supp. 1973) states that "the objects and purposes of the Bank shall be to aid in financing and to facilitate exports and imports and the exchange of

foreign sales of U.S. goods and services. Eximbank will guarantee local cost financing up to an amount equal to 15 percent of the value of the goods and services exported from the United States in the related transaction. Local costs are those expenses incurred by the buyer in his own country for the purchase of goods and services associated with the U.S. transaction.[35] They may include expenses for engineering services, public utility connections, locally available construction materials, labor, equipment installation, employee housing, and similar items of host country origin.

The local cost guarantee covers loans made by non-U.S. financial institutions for the financing of local costs where:

a. Eximbank is participating, either through a direct loan, a financial guarantee or a combination thereof, in financing the procurement of U.S. goods and services; *and*
b. a clear demonstration is made that:
   i) for transactions in developing countries, local cost support is essential to achieve an important contract or purchase arrangement, and mobilization of the required funds does not appear feasible in the absence of Eximbank assistance; *or*
   ii) for transactions in developed countries, local cost support is necessary to counter foreign competition offering publicly assisted local cost financing.

Non-U.S. financial institutions are eligible for participation in the local cost financing program. These might include foreign branches of U.S. commercial banks, overseas offices of U.S. trading companies and financial institutions, non-U.S. commercial, investment and development banks, either public or private, and non-U.S. trading companies and financial institutions.

Preliminary Commitments

Eximbank is prepared to provide a "Preliminary Commitment"

commodities between the United States . . . and any foreign country or agency thereof." However, with the continuing substantial negative U.S. balance of trade occurring, Eximbank's emphasis must prudently be on export financing. This flexibility in its charter will, in the future, permit Eximbank to engage, for example, in "barter" transactions which might be deemed in the national interest.

35. *I.e.*, third country costs cannot be financed under "local cost financing."

outlining the amount, terms and conditions of the financial support it will extend to purchasers of exports of goods and services. Buyers, suppliers and financial institutions can apply for Eximbank's preliminary commitment in the following circumstances: if it is useful or necessary to know the amount, terms and conditions of financing that will be available if goods and services are supplied from the United States; if the general description of the project or purchase is known; and if the general estimates of cost, financing and time requirements are known. The commitment, provided without cost or obligation, may be used in full or in part or may be terminated and, where appropriate, changes may be negotiated between the applicant and Eximbank.

The preliminary commitment can be used advantageously by U.S. exporters in their marketing efforts. It may be particularly useful when submitting proposals in response to bid invitations requiring plans for financing. Foreign buyers can also obtain preliminary assurance of Eximbank financial assistance early in their purchase planning process. This can contribute importantly to the decision to proceed on a project.

Principal elements of Eximbank's preliminary commitment include:[36]

a. The amount, interest rate and terms of repayment of the direct loan that may be available from Eximbank.
b. The amounts, terms and conditions of guarantees of repayment that may be available from Eximbank for loans from other sources.
c. The amounts of financing required from sources other than Eximbank and any requirements regarding terms and conditions on these portions of the total financing needs.
d. The conditions under which loans and guarantees will be made available, such as cash payments and the participation of the U.S. supplier in the financing.
e. Any requirement for a guarantor or an alternative security arrangement satisfactory to Eximbank, if deemed necessary by Eximbank to provide a "reasonable assurance of repayment."
f. A schedule of information or assurances required before final approval can be awarded.

36. Applications for preliminary commitments, direct loans and financial guarantees may be submitted to Eximbank in the form of a letter. Eximbank does not use a standard application form for these programs. The letter which the applicant submits to Eximbank, however, should include or be accompanied by sufficient information to enable Eximbank to appraise the technical, economic and financial aspects of the proposed transaction.

g. The expiry date of the preliminary commitment.
h. Any other conditions precedent to a final commitment by Eximbank.

Export Credit Programs

Commercial Bank Exporter Guarantees

Under its commercial bank guarantee program Eximbank will guarantee repayment of medium-term export debt obligations (*i.e.*, those having terms of six months to five years) acquired by U.S. banking institutions from U.S. exporters. The purpose of this program is to encourage and assist greater participation by commercial banks in supporting U.S. exporters who are required by their foreign buyers to provide deferred credit terms on their sales of goods eligible for medium-term financing.

If guarantee coverage is desired, the commercial bank applies to Eximbank for a guarantee against the buyers' credit or political risks of nonpayment. When shipment is made, Eximbank's guarantee is issued to the commercial bank on advice from the bank that it has purchased the buyer's promissory notes without recourse to the exporter. The commercial bank is protected by Eximbank's guarantee against defined credit or political loss. The exporter thereby eliminates the risk of loss, and immediately receives the funds from its bank to devote to its business operations.

The exporter may be a U.S. corporation, partnership or individual, or a foreign corporation, partnership or individual doing business in the United States.[37] Only financing for the export of U.S. goods and services is eligible for coverage under the program. Repayment terms cannot exceed terms customary in international trade for the type of goods shipped.[38]

Any U.S. commercial bank or Edge Act corporation is eligible for guarantees under this program. Transactions between a bank

37. The phrase "doing business in the United States" has normally been interpreted merely as requiring a qualification to do business as a foreign corporation under the laws of a state of the United States. It has not been applied so as to require active U.S. business operations.

38. As noted in note 7, *supra*, the terms customary in international trade evolve from the Berne Union, an organization representing the export credit agencies of the major exporting countries. In larger transactions, of course, the fixing of the terms must be related to the cash flows anticipated from the financed items.

and Eximbank are initiated by the execution of a Master Guarantee Agreement between that participating bank and Eximbank. This agreement specifies the terms and conditions of the protection afforded by the guarantee, and each guarantee authorized is subject to those terms and conditions. The specific terms and conditions can be summarized as follows:

a. *Buyer Payment.* The exporter must receive from the buyer a cash payment of a specified percentage (usually 10 percent) on or before delivery.

b. *Exporter Retention.* The exporter must retain not less than 10 percent of the financed portion (2 percent for agricultural commodities) in equal amounts of each installment, for his own account and risk.

c. *Available Coverage.* The remainder of the financed portion is financed by the commercial bank, without recourse to the exporter. The remainder of the contract price (*i.e.*, the financed portion) will be evidence by promissory notes or other acceptable obligations of the buyer, providing for payment in U.S. dollars in the United States in approximately equal installments of principal, with interest on unpaid balances payable concurrently with payments of principal. Installments normally are to be payable not less often than semi-annually. U.S. commercial banks seeking Eximbank's guarantee to cover financing can choose between the following two coverage plans.

   Plan I. A political risks guarantee of the "early installments" (defined as the first half of the installments, up to a maximum of 18 months),[39] and a comprehensive guarantee (*i.e.*, both political and commercial risks coverage) of the "later installments" (*i.e.*, the remaining installments); or

   Plan II. A comprehensive guarantee of 90 percent of the commercial bank's participation in all installments and, additionally, a political risks guarantee for the remaining 10 percent of the bank's participation. For those transactions with a final maturity date of three years or more, the applicant bank can receive full comprehensive coverage (*i.e.*, commercial coverage of the remaining 10 percent) of the last half of the installments at the mid-point of payment if Eximbank is satisfied that the remaining maturities will be paid promptly and that the credit will otherwise continue to operate satisfactorily (*i.e.*, if the loan is "seasoned").

39. *For example*, if the term is five years, the commercial bank would bear the commercial risk for the first 18 months.

d. *Risks Covered.* The commercial risks covered by the Eximbank guarantee are the insolvency of the buyer, or the failure of the buyer to pay the amount due at due date. The political risks covered are delays in converting local currency payments into U.S. dollars (*i.e.*, "transfer delays"), the inability to pay due to expropriation or confiscation of the foreign purchaser's assets, and losses incurred by the purchaser due to war, revolution or civil disturbance.
e. *Claims.* Claims resulting from insolvency or default of the buyer, if valid are paid promptly after receipt of notice. Claims resulting from inconvertibility of local currency payments are paid within three months of submission of evidence that the local currency deposit was made on the due date, or within ninety days thereafter. Claims resulting from other political risks, if valid are paid promptly after receipt of notice.
f. *Guarantee Charges.* Eximbank's fees for exporter guarantees vary, based on the length of the credit period and the classification accorded the country of import (based on economic and political conditions).[40] Instructions issued to banks under this program include a table of fees applicable to the various credit periods (181 days to five years), and a list of all eligible countries, indicating the fee classification of each country and special conditions, if any.

Besides guaranteeing the repayment of principal to the extent described above, Eximbank guarantees payment of interest to the commercial bank at a rate equal to 1 percent above the U.S. Treasury borrowing rate for comparable maturities, with a minimum coverage of 6 percent per annum or such lesser rate as the obligation may bear. Eximbank does not, however, prescribe the interest rate to be paid to the commercial bank by the foreign buyer. Such interest rate is negotiated between those parties and is, of course, determined by the normal forces of the marketplace.

Since the commercial bank guarantee program is a support

40. Eximbank is continually reassessing "country conditions" to determine whether future economic or political conditions might reasonably be deemed to preclude the future availability of foreign exchange. This assessment encompasses, *inter alia*, the reserve position with respect to foreign exchange and future debt service requirements.

program for commercial bank financing, in approving the transaction Eximbank relies to a considerable extent on the credit judgment of the commercial bank. Banks experienced in export financing, upon their request, may be granted specified limits of "discretionary authority," permitting them to commit Eximbank to the issuance of guarantees within those specified limits, without prior Eximbank approval.

Sales to distributors (for resale to the ultimate users) are generally restricted to a maximum term of three years, except for passenger cars where the term is limited to two years.[41] When shipments are on a continuous and repetitive basis to distributors or other buyers, a revolving guarantee is available, thereby eliminating the need for arranging a separate guarantee for each shipment. Guarantee coverage of the distributor's short-term obligations during a floor plan period is offered in conjunction with coverage for repetitive sales to distributors.

Political risk guarantees are also available for equipment on consignment abroad and guarantees may be provided to cover the deferred sale from consignment. Guarantees are in certain instances available to provide preshipment cover for the exporter to protect against insolvency of the buyer and political risks occurring during the period of manufacture of specially fabricated products.

Export Credit Insurance

The Foreign Credit Insurance Association (FCIA), a group of some fifty of the principal U.S. maritime, casualty and property insurance companies, has offered export credit insurance to U.S. exporters since 1962. To facilitate the sale of U.S. goods and services to other countries, FCIA insurance provides a broad-based protection against both commercial and political risks which could result in the default of payment from a foreign buyer.

Insurance on both short-term (up to 180 days) and medium-term (six months to five years) credits extended to foreign purchasers is issued to exporters through FCIA. Eximbank reinsures FCIA on all political risks and on a portion of the commercial risks. Most policies require the exporter to retain from 5 percent to 10 percent of the financed portion (2 percent for agricultural commodities) for its own account and risk. Policies with a reduced premium rate are available with a first-lost deductible (for the

41. Eximbank is currently in the process of developing a program to cover "on-going sales," *i.e.*, sales to the distributor's customers.

exporter's account) in an amount negotiated between the insurer and the exporter. The deductible provision allows for greatly reduced paper work, a much lower premium, and greater flexibility in allowing the exporter to continue to make the most of his own credit decisions.

The insured exporter often assigns the promissory note received from the foreign buyer, along with the right to the proceeds of its policy, to a commercial bank or other source of financing. This enables the exporter to receive immediate payment for the transaction. Eximbank may, on a case-by-case basis, approve the issuance to the financing source of a Hold Harmless Guarantee Agreement which guarantees repayment to that financing source of all the obligations arising from exports insured under a policy with a deductible provision, whether or not the non-payment falls within the deductible amount. Eximbank will, of course, protect itself in such an instance by obtaining appropriate reimbursement undertakings from the insured exporter.

In short-term and some medium-term policies, FCIA and Eximbank seek a balance between an exporter's high and low risk situations; and in short-term insurance, the exporter is required to insure all, or at least a reasonable spread, of its eligible export credit sales. Medium-term insurance is also available on a case-by-case basis. Insurance cover for medium-term transactions is issued on much the same basis as medium-term guarantees, including the requirements for cash payment by the foreign buyer and partial assumption of risk by the United States exporter. Premiums charged for this insurance are comparable to fees charged under the commercial bank exporter guarantee program.

To meet the various needs of exporters, several types of policies are offered by FCIA:

a. A Master Policy which provides blanket coverage (normally 90 percent) both for political and commercial credit risks, for all of an exporter's eligible short-term credit sales, as well as medium-term credit sales (ranging up to five years). This type of policy includes a deductible provision. Under exceptional circumstances, the Master Policy is offered to cover political risks only.

b. A special policy developed for small businesses which are either new to export trade or have had a very modest export sales volume. This policy provides comprehensive coverage for both short-term and medium-term sales to all foreign buyers, or for all sales to only those buyers which the exporter wishes to insure.

c. A short-term policy which provides the exporter with blanket coverage for all of its foreign buyers who purchase consumer items, parts and accessories, plus other products normally sold on terms of 180 days or less.

d. A medium-term policy offered on a buyer-by-buyer basis to cover the export of capital and quasi-capital equipment and other products normally sold on terms from six months to five years.

e. A combined short-term medium-term policy designed specifically for manufacturers who sell through a foreign dealer-distributor network. It provides coverage under a "floor plan" arrangement, as well as subsequent receivable protection after sale by the dealer to an end user.

Discount Programs

Eximbank has two "discount programs" to assist U.S. commercial banks in financing exports of U.S. goods and services from the United States: a short-term discount program for obligations having an original maturity of 364 days or shorter, and a medium-term discount program for obligations having a maturity of 12 months or longer. The purpose of these discount programs is to assure commercial banks that export loans made by them will not reduce funds available for their general lending purposes in periods of tight liquidity.[42] Absent such a discount program, banks would, during periods of tight money, naturally tend to prefer their domestic customers over their foreign borrowers.

Eximbank makes advance commitments to extend discount loans for up to 100 percent of the "Eligible Export Debt Obligations" arising from current United States exports.[43] Eximbank will consider applications from commercial banks, as well as Edge Act and "Agreement" corporations operating under sections 25 and 25 (a) of the Federal Reserve Act.[44]

42. These are not "discount" programs in the traditional sense. The commercial bank can borrow up to the full amount of the export obligation then outstanding.

43. Eximbank will also give advance commitments to purchase Eligible Export Debt Obligations, on a case-by-case basis, with full and unconditional recourse on the commercial bank.

44. The term "commercial banks" has been interpreted to include branches, but not agencies, of foreign banks.

The term Eligible Export Debt Obligation means the indebtedness of a foreign obligor incurred in financing the acquisition of products or services exported from the United States. The evidence of the foreign obligor's debt obligation may be in any form satisfactory to Eximbank, including, but not limited to, a promissory note, draft or contract.

In order to obtain a discount loan for any Eligible Export Debt Obligation, a bank must have applied for and received an advance commitment to obtain such loan from Eximbank. Application must be made before shipment of the products or services.[45] Advance commitments to make Discount Loans or purchases will be made without charge and will be valid for the entire term of the Eligible Export Debt Obligation.

The interest rate Eximbank charges on medium-term discount loans is 1 percent less than the interest yield to the applicant bank on such obligation, if the applicant bank requests a discount loan (based on its advance commitment) within 90 days after the bank has disbursed against the Eligible Export Debt Obligation. However, if the applicant bank requests a discount loan (based on its advance commitment) after that 90 day period, the interest rate Eximbank will charge on the discount loan will be the higher of (a) 1 percent less than the interest yield of that Eligible Export Debt Obligation to the bank, or (b) the Eximbank borrowing rate in the private market, as determined by Eximbank, for comparable maturities rounded to the next higher ¼ percent.[46]

The interest rate Eximbank charges on short-term discount loans is determined pursuant to a formula which varies both on the basis of the amount and the term (if a bank requests a discount loan, based on its advance commitment, within 90 days after the bank has disbursed against the Eligible Export Debt Obligation). If a bank requests a discount loan (based on its advance commitment) at any time later than 90 days after the bank has dis-

45. Each application for an advance commitment for a Discount Loan or purchase is to be accompanied by the following statement from the bank: "The Exporter has informed us that financing is necessary to complete the export transaction. This bank is not prepared to extend financing on the terms indicated unless Eximbank will commit to make a Discount Loan."

46. "Comparable maturities" is interpreted as the remaining term of the underlying Eligible Export Debt Obligation.

bursed against the Eligible Export Debt Obligation, the interest rate Eximbank will charge on the discount loan will be the higher of (a) the interest rate appropriate to the transaction resulting from the formula based on the amount and the term, or (b) the Eximbank borrowing rate in the private market, as determined by Eximbank, for comparable maturities rounded to the next higher ¼ percent.

Discount loans are to be repayable in approximately equal semiannual installments over such period as the bank may request, but no longer than the remaining term of repayment of the Eligible Export Debt Obligations against which a loan is made. Eligible Export Debt Obligations should have terms customary in international trade, normally not exceeding five years.[47]

A bank may prepay discount loans and repurchase obligations previously sold to Eximbank at any time without premium or penalty. The bank thereafter may offer the same Eligible Export Debt Obligations for another loan or loans in accordance with the interest formula described above.

The Cooperative Financing Facility

General Description

With its Cooperative Financing Facility (CFF) program, Eximbank helps make credit available to small and medium-size foreign purchasers of U.S. equipment and related services through banks in their own countries. Under the CFF concept, Eximbank arranges the cooperation of financial credit institutions (CIs) abroad to extend loans at the risk of those CIs to their customers who are purchasing U.S. goods. Eximbank lends these CIs one-half the funds at Eximbank's normal rate of interest (currently 6 percent per annum). The CIs provide the other half from their own resources or, if a CI wishes to borrow its one-half of the financing, Eximbank can assist by guaranteeing repayment to another lender of these funds.[48]

The CFF brings Eximbank financing to the doorsteps of small and medium-size enterprises that might not otherwise be able to purchase U.S. goods and services. The familiarity of the CI with its borrower's credit standing and local market conditions enables it and Eximbank to process loan applications expeditiously. The CFF enables a CI to broaden its lending capacity and increase its

47. To respond to demonstrated market conditions, Eximbank will consider, on an *ad hoc* basis, making discount loans on longer terms or with annual repayments.

48. This guarantee is normally made available only to benefit CIs located in developing countries.

resources. The CFF encourages U.S. suppliers to expand their export marketing efforts by providing assurance that financing will be available to support their export sales at the point of each sale.

Financial institutions eligible under this program include U.S. commercial banks with overseas branches or representative offices, private commercial and investment banks outside the United States, overseas government institutions, such as planning organizations and development banks, and other institutions significantly involved in financing international trade.

Operating Guidelines

The Cooperative Financing Facility is an agreement by Eximbank to consider specific export loans to the customers of the CI up to an agreed total amount. The availability period for approval of export loans under a CFF is normally 15 months from the date of Eximbank's formal approval. Each export loan under the CFF is submitted separately to Eximbank for approval, unless a discretionary authority has been approved.[49] A commitment fee of ½ percent per annum is charged to the CI on the undisbursed portion of Eximbank's share of a specific export loan, beginning 30 days from the date of final approval of each specific export loan.

A 10 percent cash payment by the CI's borrower is required for each transaction. Since one-half of each export loan is provided by Eximbank, its portion of an export loan will equal 45 percent of the export sale.

Eximbank will provide a financial guarantee to a participating financial institution (PFI) for funds it lends to a CI for U.S. export loans, if desired, to fund the other 45 percent.[50] A financial

49. On request by a CI, Eximbank will authorize a special discretionary line of credit, under which the CI may commit the Eximbank share of export loans without prior Eximbank approval, provided the Eximbank share of each individual export loan committed under such discretionary authority does not exceed $200,000. The amount of the discretionary line may be for any portion of the total amount of the CFF itself. However, a commitment fee of ½ percent, beginning 30 days after approval, is required on the entire amount of the credit line allocated to the discretionary authority.

50. This guarantee, also, is a full faith and credit obligation of the U.S. government. *See* note 32, *supra*.

guarantee is a comprehensive repayment guarantee in the currency in which the loan to the CI is made.[51] Eximbank charges the PFI a fee of ½ percent per annum on outstanding balances for this guarantee.

The CI may charge its customers interest on the Eximbank portion of an export loan at a rate 2½ percent above Eximbank's rate to the CI. At Eximbink's current lending rate of 6 percent, this would mean a rate of customers of 8½ percent for the Eximbank portion. If an Eximbank guarantee to the PFI is not required, a CI would charge its customary lending rate on its own half of the export loan.[52] While there are no Eximbank restrictions on this rate, an excessive rate would obviously reduce the effectiveness of the program. If an Eximbank guarantee to a PFI is required, the CI may charge its customer interest on the PFI's portion at a rate 2½ percentage points above the PFI's rate. Thus, the margin to a CI on funds it borrows from Eximbank, and from a PFI with Eximbank's guarantee, would be up to 2½ percent. With Eximbank's written approval, taxes and special charges particular to the country of the purchaser may also be passed on to the purchasers.

Repayment terms are those customary in international commercial trade for the type of transaction being financed. The CFF program is intended essentially to finance goods and related services for which the customary repayment term is up to five years. Terms of longer than five years may be considered when appropriate.

For transactions in countries other than that of the CI, Eximbank may provide the CI, on a case-by-case basis, a Convertibility Risk Guarantee on both its share and Eximbank's share of export loans to private customers. Eximbink charges the CI a fee of ¼ percent per annum on the outstanding balances for this guarantee.

Other Programs Providing Export Support

Guarantees of Lease Payments

Eximbank is prepared to extend to either a U.S. or a non-U.S. lessor a guarantee of payment by a lessee for the lease of U.S.

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51. If the PFI obtains the funds it lends to the CI from within the United States, the financial guarantee can cover only export loans to purchasers in developing countries.

52. If the source of the CI's funds for its share of the export loan is the United States, the Convertibility Risk Guarantee will be available only to cover export loans to purchasers in developing countries.

equipment outside of the United States. Such a guarantee may be available with respect to either a "nonpayout" or a "full payout" lease.[53] The lease transaction must result in an export of the U.S. equipment.

Two types of guarantees are generally available to the lessor:

a. Political Risks Coverage—protection from the risks of war, hostilities, civil war, expropriation or confiscation by a government authority of the country in which the equipment is to be primarily used, nontransferability of local currencies into U.S. dollars, and the inability, when not due to the fault of the lessor, to re-export the equipment from that country upon early termination of the lease, default under the lease or, in the case of a nonpayout lease, upon conclusion of the lease transaction.

b. Comprehensive Risks Coverage—encompassing the political risks mentioned above, and the commercial risks of protracted default and insolvency of the lessee.

The fee for political risk coverage is ½ percent per annum, and for comprehensive risk coverage ¾ percent per annum, payable annually in advance and computed on the estimated average outstanding Eximbank liability for the following year.

The lessor will normally be required to retain a percentage of the equipment value (in equal amounts of each lease payment) and any residual value for his own account and risk. For used equipment, the minimum retention is 15 percent.

Equipment value for new equipment is defined as the U.S. sales price and other related U.S. costs, such as insurance and transportation. For used equipment which is purchased, the value is defined as the U.S. purchase price paid by the lessor. In the case of equipment previously used in the United States by the lessor, the value is its estimated fair market value, as verified by a knowledgeable and unrelated appraiser.

Eximbank requires credit worthy lessees supported by an unconditional guarantee of the lease, unless in Eximbank's judgment

53. Under a full payout lease the lessor's cost is intended to be fully recovered over the term of the lease. Under a nonpayout lease this cost is not recovered over the lease term.

such a guarantee is deemed unnecessary to provide reasonable assurance of repayment. The lease payments must be payable in advance and not less often than semiannually.

The length of a full payout lease guaranteed by Eximbank must not be longer than the terms customarily supported by Eximbank for sales of similar equipment.[54] The lease payments under a nonpayout lease guaranteed by Eximbank must be of sufficient magnitude to amortize the equipment value at an appropriate return to the lessor over Eximbank's customary term for sales of similar equipment.

When a guarantee is issued to a non-U.S. lessor, Eximbank requires that the non-U.S. lessor make a cash payment from offshore sources of a specified percentage (not less than 10 percent of the equipment value) for the purchase of the equipment. The remainder of the obligation is to be evidenced by promissory notes or other acceptable obligations of the lessor providing for payment in U.S. dollars over a term acceptable to Eximbank. If the non-U.S. lessor is located in the country where the equipment is leased, commercial risk coverage but not political risk coverage will be available. For non-U.S. lessors, a guarantee is only available on the initial lease of equipment purchased and exported from the United States for such purpose.

Equipment Political Risk Guarantee

U.S. contractors, in the course of their work outside of the United States, must frequently use their own or leased equipment, the value of which may be substantial. The use of this equipment outside the United States must, of course, be viewed as an export transaction. To minimize the risk of equipment loss to the U.S. contractors while performing in connection with foreign projects, Eximbank will provide political risk guarantee coverage on U.S. equipment used by U.S. contractors in their performance of contracts abroad.[55]

The program covers uncompensated loss with respect to equipment of U.S. origin and ownership which occurs as a result of:

a. war, hostilities, civil war, rebellion, revolution, insurrection, civil commotion or other like disturbances;
b. requisition, expropriation or confiscation of the equipment by

54. As noted earlier those terms are terms which are "customary in international trade."
55. The Overseas Private Investment Corporation (OPIC) has a program which provides somewhat similar coverage.

a governmental authority without adequate compensation; and

c. the imposition of any law or of any order, decree or regulation of a governmental authority of the host country having the force of law, which, under the circumstances not due to the fault of the U.S. contractor, prevents the removal by the contractor of the equipment from the host country.

During the period of coverage, the guarantee is to reimburse the owner for 75 percent of the depreciated equipment value at the time of loss, should a loss occur without compensation. The depreciated value is calculated from the equipment value at the time of importation and the expected depreciated value at contract conclusion, using straight line depreciation. The fee for this coverage is ½ percent per annum of the declining depreciated value, calculated on a monthly basis. The premium is payable in annual installments at the beginning of each one-year period of the guarantee.

Engineering, Planning and Feasibility Studies

The export sale of goods and services often follows the nationality of a feasibility study contractor. By assisting U.S. engineering firms to perform studies sponsored by clients outside the United States, an increased number of design and construction contracts for large projects should be executed with U.S. firms. Accordingly, Eximbank finances the costs involved in the preparation by U.S. firms of engineering, planning and feasibility studies for their non-U.S. clients on large capital projects.

The financial assistance which Eximbank offers can be directed to either the contractor or the client. If the contractor funds its study, Eximbank will provide a commercial bank exporter guarantee, thereby enabling the contractor to sell without recourse his debt obligation to a commercial bank.[56] Assistance by Eximbank to the client would be in the form of a loan or a financial guarantee of a loan extended by a bank.[57]

56. *See* the discussion concerning the financial guarantee at 115, *supra*.
57. *See* the discussion concerning the direct loan program at 109, *supra*. To provide maximum benefit, Eximbank is often receptive to providing all of the financing.

In general, Eximbank assistance under this program is available when:

a. the study may lead to a major project in which significant sales of U.S. engineering and construction services (in which U.S. technology is used) as well as U.S. manufactured goods are likely to result;

b. there is a request by a client outside the U.S. for the study; and

c. there is the endorsement of the host country government or a reliable private sector client for the study.

The terms of Eximbank assistance, through either its commercial bank exporter guarantee program or participation financing program, will usually permit one year's grace from the time of contract signing and two or three years, or five years when necessary to counter government-supported completion, for debt repayment in semiannual installments. Eximbank will normally require financial participation in the study by both the contractor and the client.[58]

Eximbank will require, in each contract between the contractor and the client, or the client and Eximbank, an unconditional promise to pay in full, regardless of the outcome of the study and regardless of satisfactory performance by the contractor. Protection for the customer against the contractor's nonperformance usually can be obtained by requiring the contractor to guarantee performance through a third party such as a bank, insurance or bonding company.

An important and attractive factor in the program is the possibility of refinancing the costs of the engineering, planning or feasibility study. If the client decides to carry out the general recommendations of the study, and Eximbank agrees to participate in the financing of the follow-on contract on the basis of the economic viability of the recommendations, the study cost can be refinanced into the U.S. export portion of the engineering design and construction contract.

EXPORT FINANCING THROUGH OTHER U.S. GOVERNMENT AGENCIES

Although Eximbank participates in the substantial majority of export transactions having U.S. government financing support,

58. An assumption of local costs by either or both may satisfy this requirement.

several other agencies also provide export financing support. These are, in particular, the U.S. Department of Agriculture and the Agency for International Development.[59]

Department of Agriculture

The Department of Agriculture has several programs to encourage the export of agricultural products from the United States. However, during the current shortage of agricultural products available for domestic purposes, the availability of these programs for using agricultural products has been curtailed and, accordingly, the most current information should be obtained from the Department of Agriculture when a sales transaction is being contemplated. On the assumption that these programs will be available for substantial utilization in the not too distant future, the essense of these several programs is outlined below.

Public Law 480 Concessional Sales Program

Public Law 480, as amended, states that it is U.S. policy

> to expand international trade; to develop and expand export markets for U.S. agricultural commodities; to use the abundant agricultural productivity of the United States to combat hunger and malnutrition and to encourage economic development in the developing countries, with particular emphasis on assistance to those countries that are determined to improve their own agricultural production; and to promote in other ways the foreign policy of the United States.

Title I of Public Law 480 provides for concessional sales of such commodities, and over 70 percent of all commodities exported under Public Law 480 have been covered by this title.[60]

The Title I sales include long term dollar credit sales to foreign governments and private trade entities and "convertible local

59. As described below, the U.S. Department of Agriculture operates export financing functions through both the "P.L. 480" sales program and the Commodity Credit Corporation. The Overseas Private Investment Corporation, a U.S. government corporation, may incidently provide export financing support in transactions in which it is a participant. However, such support is only secondary to OPIC's primary function of insuring U.S. investors with respect to their investments made in developing countries.

60. P.L. CONCESSION SALES, FOREIGN AGRICULTURE ECONOMIC REPORT No. 65, U.S. Dept. of Agriculture, September, 1970, at 4. The other titles of Pub. L. 480 relate to donations and disaster relief, barter sales, and general provisions and requirements.

currency credit" (CLCC) sales.[61] Title I sales are made both on a U.S. government-foreign government basis and on a U.S. government-private entity basis.[62] For purposes of this discussion, the possible arrangements with private trade entities (PTE's) are described.

Agreements between the U.S. government and private trade entities are normally referred to by the U.S. Department of Agriculture as "private trade agreements." Any private trade entity of the United States or of a foreign country friendly to the United States may participate in this program. The PTE must be engaged in private enterprise or other nongovernmental activity.

The PTE obtains commodities from the open market and the Commodity Credit Corporation (CCC) provides a line of credit through a commercial bank. The PTE uses this to pay the U.S. supplier of the commodities and for ocean transportation.[63] At the same time the PTE incurs a debt obligation in dollars with the CCC. The maximum grace period is two years and the maximum credit period is 20 years. Whenever practicable, the PTE is required to pay 5 percent of the purchase price of the commodity on delivery. Although the repayment period of agreements previously signed has ranged from two to nineteen years, most range from six to fifteen years. The credit and grace periods begin on the date of the last delivery in any calendar year. The interest rate charged on private trade agreements is equivalent, as nearly as practicable, to the average cost of funds to the U.S. Treasury Department on outstanding marketable U.S. securities having maturities comparable to the maturity of the credits extended to the private trade entity. However, in no event is the rate less than the minimum rate specified for government to government dollar credit agreements.

These loans must be repaid in dollars.[64] The convertible local currency credit sales program (under which the U.S. government has the option to exercise rights of convertibility) is not available

61. Sales could previously also be made for repayment in local currency (without convertibility privileges); however, with the 1966 extension of Pub. L. 480, local currency sales were to be ended no later than December 31, 1971.

62. P.L. CONCESSION SALES, *supra* note 60, at 10.

63. The Cargo Preference Act requires that at least 50 percent of the quantity of all products exported under certain U.S. government programs be shipped on U.S. flag vessels, to the extent that these vessels are available at fair and reasonable rates. Pub. L. 83-664, which amended the Merchant Marine Act of 1936. This requirement applies to concessional sales under Pub. L. 480.

64. P.L. CONCESSION SALES, *supra* note 60, at 13-14.

for private sales.[65]

Commodity Credit Corporation

The U.S. Department of Agriculture is also authorized to extend credit for the export of U.S. agricultural products under the "CCC Export Credit Sales Program." The precise terms of this program are prescribed in "regulations covering Export Financing of Sales of Agricultural Commodities under the CCC Export Credit Sales Program (GSM-4)" issued by the Office of the General Sales Manager, Foreign Agricultural Service, U.S. Department of Agriculture.[66]

This program permits the financing of export sales of U.S. agricultural commodities for periods up to a maximum of 36 months. Whether or not the Commodity Credit Corporation will extend credit for a period in excess of 12 months will depend upon a demonstration that such extended term is necessary to:

a. meet credit terms offered by competitors from other free world countries;
b. prevent a loss or decline in established U.S. commercial markets;
c. substitute commercial dollar sales for sales for local currencies and sales on long term credits;
d. result in a new use of the imported agricultural commodities in the importing country;
e. increase total consumption of the agricultural commodities in the importing country, *i.e.*, expand the total U.S. dollar markets.[67]

The rate of interest charged by CCC is changed periodically, such changes being primarily attributable to the change in the cost of U.S. government borrowings.

Applications for financing approvals are submitted to the Commodity Credit Corporation by U.S. exporters. The granting of a

65. *Id.* at 14.
66. The most recent version of these regulations was published in October, 1971.
67. *See* GSM-4, § 1488.3(d).

financing approval enables the U.S. exporter to sell such agricultural commodities to the foreign importers on a deferred payment basis. When approval has been granted by CCC, the U.S. exporter may export the agricultural commodities on a deferred payment basis and receive payment in cash for the promissory note of the importer. The exporter must also provide an irrevocable letter of credit issued, confirmed or advised by a United States bank aceptable to CCC.

The commercial bank is protected against nonpayment due to political reasons. Political risk, as defined by CCC, means risk of loss due to:

(1) inability of the foreign bank through no fault of its own to convert foreign currency into dollars;

(2) prevention of importation into the country of destination due to withdrawal of a valid import license, or the imposition of a law prohibiting such import;

(3) inability of the foreign bank to make payment due to war, hostilities, civil war, rebellion, revolution, etc., in the country of destination; and

(4) failure of the foreign bank to make payment for any reason if it is an instrumentality of, or is wholly owned by, the foreign government.[68]

Agency for International Development

The Agency for International Development (AID) was created for the purpose of fostering the development of the less economically mature countries. However, in the administration of its programs, substantially as a result of U.S. balance of payments difficulties, AID loans were made available only on a buy-America basis.

The restrictions of this program have been somewhat relaxed, enabling procurement for projects financed by AID loans to come from developing countries, as well as from the United States. However, probably by reason of practices in the market place, the percentage of U.S. procurement has declined minimally since that relaxation.

AID has promulgated its Regulation 1 containing the rules and procedures applicable to U.S. exports financed by AID.[69] These regulations also provide that delivery services will be financed if shipment is made on U.S. flag vessels or aircraft. The cost of

68. *Id.* at § 1488.2(s).
69. 22 C.F.R. 201 (1973).

such services on non-U.S. flag vessels or aircraft may be financed only under limited circumstances.[70]

These regulations specify intricate procedural and documentary conditions which need to be satisfied to permit AID expert financing.[71] Accordingly, exporter (or his lawyer) should examine these regulations carefully before proceeding too far with an export transaction for which he contemplates obtaining AID financing.

Proposed Export Development Credit Fund

During the deliberations on the foreign aid bill by the 93d Congress, consideration was given to a new facility to expand U.S. exports and, concurrently, to advance the progress of the developing countries. This new facility would be called the Export Development Credit Fund.[72] Although eliminated from the foreign aid legislation (*i.e.*, the "Mutual Development and Cooperation Act of 1973") when passed by the House of Representatives, the concept is alive and will be continued to be debated.

The impetus for the creation of this fund has been primarily the desire to substantially transform the foreign aid program. This fund would supplement the traditional foreign economic aid program. The traditional aid program, now at about $1 billion level per year for the poor nations, would continue. However, such funds would be directed to social welfare programs, *e.g.*, population planning and literacy programs, rather than capital investment programs.

As revealed at the hearings on the Mutual Development and Cooperation Act of 1973, U.S. exporters are at a growing disadvantage in the market of lowest income countries where U.S. commodity-tied development loans are declining.[73] These countries do not have the servicing capacity for a substantial volume of loans on normal Eximbank terms. In many cases, lack of financing

70. *See* 22 C.F.R. 201.13, 201.15 (1973).
71. *See* 22 C.F.R. 201.10 *et seq.* (1973).
72. Mutual Development and Cooperation Act of 1973, H.R. 9360, 93d Cong., 1st Sess., § 25. *See* the summary of the July 28, 1973, edition of the Congressional Quarterly at 2100, with respect to the elimination by the House of Representatives of the Export Development Credit Fund provision from this foreign economic assistance legislation for fiscal year 1974.
73. *See Hearings Before the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess., particularly, at 19-20, 219-20, 422, 447 and 508-15.

on competitive terms, rather than price or quality, explains the U.S. inability to compete for this market. The new fund would be established to finance sales of U.S. equipment to the developing countries on favorable terms. At the same time, hopefully, this would reverse the recent trend of decreasing U.S. participation in capital purchases made by developing countries.[74]

The Fund would offer financing for U.S. exports to the poorer countries at more competitive terms of, for example, 30 years maturity, 3 percent interest, and 10 years of grace.[75] This Fund could be administered in a variety of ways, *e.g.*, by Eximbank, the Department of Commerce, as an independent Fund, or by the Agency for International Development.[76] It would be closely coordinated with other interested government agencies through an advisory committee which would include State, Treasury, Commerce, and Eximbank.

It was proposed that the Fund be authorized to make loans in the amount of 25 percent of the limitation that applies to regular Eximbank obligations (now $20 billion). There would be a corresponding authority for the Fund to borrow either from the

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74. U.S. exports to all developing countries have been rising rapidly in recent years. These exports have increased by some 48 percent in the past five years, and their volume of $16.3 billion in 1972 nearly equalled the total of U.S. exports to the recently enlarged European Community (including the United Kingdom) and Japan. However, U.S. exports have been declining to the 60 percent of the people living in the category of the lowest income countries (those with a per capita gross national product below $200 per year). That decline has occurred both with respect to the absolute volume of U.S. sales and the share of that market.

U.S. sales to this latter market depend upon U.S. government financial support for about three-quarters of their financing, as contrasted to the about two-fifths support provided to sales to the developing countries with per capita GNP above $200. U.S. government financing for sales to the lowest income countries with their limited near term repayment capacity consists largely of aid and Pub. L. 480, and only 9 percent comes from Eximbank. By contrast, U.S. Government financing for sales to the rapidly growing market in countries above the $200 annual per capita income level consists chiefly of Eximbank support.

Over the period 1967 to 1971, exports from the five other largest lender-donor countries to all the developing countries have increased in volume at a rate ranging between 50 percent and 135 percent. Meanwhile, U.S. exports increased by less than 35 percent. At the same time, the official and private resource flows of some of these five other countries increased by as much as 168 percent, while U.S. official and private flows increased only 22 percent.

See Hearings, supra note 73, at 508-15.

75. *See* 119 CONG. REC. H. 6668 (daily ed. July 26, 1973) (remarks by Congressman Morgan describing the basic purposes and proposed structures of this Fund). *See also* at H. 6733, 6735, for Congressmen Passman's and Fraser's different viewpoints with respect to this proposal.

76. Most recently it has assumed that AID would be made responsible for the administration of this program.

Treasury or the public. This would place a current limit on the Fund's transactions of $5 billion, including a reserve of 10 percent for losses or a ceiling on Fund export credits of $4.5 billion.

Since the cost to the Fund for money at present market rates might average 7 percent and assuming that it would charge only 3 percent, there would be a loss of 4 percent on each loan. At a grace period of ten years and an average interest subsidy of 4 percent, each $1 billion of loans would cost $40 million annually. If the Fund added $1 billion each year of new loans for four years, the on-going annual cost of the interest subsidy at the end of four years would be $160 million. After five years, the subsidy would begin to reduce as the principal amounts started to be repaid to the Fund as the Fund used these repayments to reduce its debt.[77]

The experience with loans to the poorest countries over the past 20 years suggests that they can and will repay their debts. Occasionally, however, they encounter problems in meeting their repayment schedules and need to reschedule repayments when the terms of their debt are too hard. Since the Export Credit Development Fund would extend terms more commensurate with their ability to pay, the likelihood of these borrowers developing debt repayment problems would be reduced.

Although the first session of the 93d Congress has now effectively rejected the proposed Export Development Credit Fund concept, this is an idea whose time will and must come. It is, at this writing, under analysis by the Senate Finance Committee and, in concept, is supported by the Administration.[78]

EXPORT FINANCING IN THE PRIVATE SECTOR

The mandate to Eximbank in its charter is that its activities should supplement, rather than replace, private capital sources. The Eximbank participation financing program requiring matching private sector financing (which can be guaranteed) for Eximbank credits is an attempt to encourage private sector financing. An underlying premise for the providing of support by other govern-

77. *See Hearings, supra* note 73, at 509.
78. *See* testimony of John M. Hennessy, Assistant Secretary for International Affairs, U.S. Department of the Treasury, before the Sen. Finance Comm., September 6, 1973, concerning the Export Development Credit Fund, as proposed in S. 2335, 93d Cong., 1st Sess. (1973).

mentally sponsored export credit agencies is that they also not replace the private sector.

The experience of Eximbank has been that the risk for the second round of export transactions with a particular foreign purchaser may very well be assumed for their own account by the commercial banks or the U.S. exporters. This occurs by reason of the familiarity and confidence developed from the first episode of transactions. Of course, this absence of subsequent governmentally sponsored export financing support enables the government export credit agencies to thereby utilize their assets to commence a similar cycle elsewhere.

Many large commercial banks historically have provided significant amounts of export credit without the support of a governmental institution. This has been particularly true for short term transactions and for sales from substantial U.S. parent companies to their established foreign subsidiaries (normally located in developed countries). However, these banks have been reluctant to participate for their own account in risks in developing countries where political hazards and currency inconvertibility problems loom large.

Exporters have themselves also taken limited risks of holding their customers' receivables, normally for short term transactions. However, both the demands for cash flow and the historical reluctance to assume risks beyond the nation's borders have limited this exposure.

With the explosion in the last several years of international transactions and the experience developing in the world marketplace, commercial banks and exporters will, hopefully, gradually acquire the confidence (and desire) to finance those transactions where their risks are manageable.

Conclusion

This description of the various expert financing arrangements provides a starting point for the lawyer who is asked to assist his client in arranging the completion of an export transaction. Financing is, obviously, not the only consideration, but it is certainly a highly significant matter in larger and longer-term transactions.

From the viewpoint of the overall national interest, particularly in alleviating balance of payments deficiencies, it appears incumbent that the governmentally sponsored export credit programs be responsive to the needs of business and be of practical application in the marketplace. Of course, as noted above, greater access to the U.S. export credit market by the economically weak, developing countries is necessary if the U.S. is to maintain a substantial share of this potentially large marketplace. Hopefully, an idea similar to the Export Development Credit Fund will shortly find acceptance with the Congress to enable this to be accomplished.

SOURCE MATERIALS

1973, EXPORT IMPORT BANK OF THE UNITED STATES ANN. REP.

Eximbank Programs, Export-Import Bank of the United States, Vol. 3.

Export Financing: Eximbank, CCC and AID, Bureau of National Affairs, Tax Arrangement Portfolio, 64-3rd (Foreign Income).

A Handbook on Financing U.S. Exports, Machinery and Allied Products Institute and Council for Technological Advancement.

P.L. 480 CONCESSIONAL SALES, FOREIGN AGRICULTURAL ECONOMIC REPORT No. 65, U.S. DEPT. OF AGRICULTURE, (1970).

CCC Export Credit Sales Program—General Information, U.S. Department of Agriculture, October, 1971.

Regulations Covering Export Financing of Sales of Agricultural Commodities Under the CCC Export Credit Sales Program (GSM-4, As Revised and Amended), U.S. Department of Agriculture, October, 1971.

1972 NATIONAL ADVISORY COUNCIL ON INTERNATIONAL MONETARY AND FINANCIAL POLICIES ANN. REP.

Eximbank Regulations, 12 C.F.R. §§ 401-02 (1973).

AID Regulations, 22 C.F.R. § 201.