8-1-1984

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Recommended Citation
Mark D. Fernald, Export Credits: The Legal Effect of International and Domestic Efforts to Control Their Use, 7 B.C. Int’l & Comp. L. Rev. 433 (1984),
http://lawdigitalcommons.bc.edu/iclr/vol7/iss2/10

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Export Credits: The Legal Effect of International and Domestic Efforts to Control Their Use

1. INTRODUCTION

Export credits are loans offered by an exporter, or by a private or public lending institution in the exporting country, to foreign purchasers of goods from the exporting country.¹ This Comment deals with those export credits that are granted by governments or that are granted by private banks at interest rates subsidized by the government.

In the post-war era, governments began to offer export credits as a way to promote their exports of capital goods.² Over the past decade these promotion efforts have intensified into an export credit war with nations offering export credits at rates well below commercial market rates in an effort to undersell competing nations and boost their exports.³ The use of subsidized export credits runs counter to two policy considerations. First, subsidized export credits are expensive, costing industrialized countries more than $5.5 billion in 1980.⁴ Second, they are contrary to the principle of free trade, for they give an unfair advantage to the industry that benefits from the subsidy,⁵ which can distort trade and reduce world economic efficiency.⁶

Countries wishing to control the use of subsidies, including export credit subsidies, have two options.⁷ A country that is importing a subsidized product

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¹ See Mullen, Export Promotion: Legal and Structural Limitations on a Broad United States Commitment, 7 LAW & POL’Y INT’L BUS. 57, 84 (1975). There are two types of export credits. Supplier’s credits are granted by lending institutions to exporters who then relend to their customers. Id. at 85. Buyer’s credits are loans made directly to export purchasers. See id.; Streng, Government Supported Export Credit: United States Competitiveness, 10 INT’L LAW. 401, 408 (1976).
⁷ See generally J. Jackson, supra note 5, at 754-832.
can negate the unfair advantage caused by the subsidy by imposing a countervailing duty. The usefulness of countervailing duties in controlling the use of subsidies is limited, however. The trade distortions effected by subsidies are often felt in international markets, where the subsidized exports of one country displace the exports of another. An injured exporter cannot use countervailing duties to protect itself since countervailing duties have only a domestic effect.

The second option for controlling subsidies is through international agreements to limit their use. The General Agreement on Tariffs and Trade (GATT) has included rules governing the use of subsidies since its inception in 1947. The GATT signatories agreed to expand the GATT subsidy rules in 1955. A subgroup of GATT signatories agreed to a stricter application of the GATT subsidy rules in 1979 when they signed the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariff's and Trade (Subsidies Code). The Subsidies Code prohibits the use of export subsidies, including subsidized export credits. The Subsidies Code provides an exception from this general prohibition, however, for those government supported export credits that are granted within the terms of the Agreement on Guidelines for Officially Supported Export Credits (Arrangement).

8. Id. at 755. The effect of a countervailing duty may be seen in the following illustration. Suppose that country A subsidizes the manufacture of widgets by paying one dollar to manufacturers for each widget produced. If some widgets are exported to country B, they will have an unfair advantage over country B's domestically produced widgets that are produced without any government subsidy. Country B can eliminate this unfair advantage by imposing a countervailing duty of one dollar, equal to the amount of subsidy, on each imported widget. See id. at 754-55.


10. See Barcelo, supra note 6, at 797-98.


12. See J. JACKSON, supra note 5, at 754-80.


17. Id. art. IX.

18. Id. Annex A, item k.

19. Id.

20. Agreement on Guidelines for Officially Supported Export Credits, OECD Doc. TD/ Consensus/78.4 (1st revision) (Feb. 22, 1978) [hereinafter cited as Agreement].
The Group on Export Credits and Credit Guarantees of the Organisation for Economic Co-operation and Development (OECD)\(^{21}\) drafted the Arrangement in February 1978.\(^{22}\) The Arrangement sets minimum interest rates and maximum terms for government supported export credits in an effort to control the expense of subsidized export credits.\(^{23}\) The Arrangement has substantially reduced export credit subsidies, but it has not eliminated them.\(^{24}\) In recent years a number of products imported into the United States have benefitted from subsidized export credits.\(^{25}\) In response, American manufacturers have filed countervailing duty petitions against these subsidized imports with the International Trade Administration (ITA).\(^{26}\) Two of these petitions have led to precedent-setting decisions by the ITA which established that countervailing duties can be imposed against subsidized export credits under U.S. law.\(^{27}\)

In the *Ceramic Tile From Mexico* case, the ITA found that the government of Mexico had aided its exporters of ceramic tile by making available to them funds at below market interest rates which they could relend to their foreign purchasers.\(^{28}\) In the *Railcars From Canada* case, the ITA ruled that Bombardier, a Canadian producer of railcars, had benefitted from Canadian government export credit subsidies worth $90,882,000 in its contract to sell 825 subway cars to the New York Metropolitan Transit Authority (MTA).\(^{29}\)

These cases were decided against the backdrop of a dispute between the United States and the European Community concerning the use of countervailing duties against export credits. The European Community argues that because


\(\text{\textsuperscript{22}}\) Arrangement, *supra* note 20.

\(\text{\textsuperscript{23}}\) See id. para. 3.

\(\text{\textsuperscript{24}}\) See *National Advisory Council on International Monetary and Financial Policies, Annual Report to the President and to the Congress for Fiscal Year 1981*, at 49 [hereinafter cited as NAC REPORT]; see also note 207 and accompanying text.


\(\text{\textsuperscript{26}}\) See *supra* note 25 and investigations cited therein. The International Trade Administration (ITA) is a primary operating unit within the Commerce Department. The Secretary of Commerce created the ITA on January 2, 1980. Department Organization Order No. 10-5, 45 Fed. Reg. 6141 (1980). By this order, the Secretary delegated to the ITA the authority vested in the Secretary by 19 U.S.C. §§ 1671-1677f (1982).


\(\text{\textsuperscript{28}}\) Ceramic Tile, *supra* note 27, at 20,014-15.

\(\text{\textsuperscript{29}}\) See *Railcars Final Determination, supra* note 27, at 6571-73. See also *infra* the text accompanying notes 288-94.
of the exception made in the Subsidies Code for the Arrangement, export credits that comply with the Arrangement are not countervailable under the countervailing duty rules of the Subsidies Code. United States trade negotiators, however, argue that the Subsidies Code does allow the countervailing of any subsidized export credit. This issue was raised in both the Ceramic Tile From Mexico and the Railcars From Canada cases, but no official U.S. position has been taken on the issue as the ITA refused to consider it.

This Comment explores whether the Subsidies Code permits the use of countervailing duties against subsidized export credits that are in compliance with the Arrangement. Initially, this Comment explains how and why subsidized export credits are granted and why their use should be reduced or eliminated. The author then discusses the efforts to control subsidies in general under GATT and the Subsidies Code and the efforts to control subsidized export credits in particular by the OECD. After analyzing the arguments advanced by the United States and the European Community in their dispute over the use of countervailing duties against subsidized export credits, this Comment concludes that the United States' interpretation of the Subsidies Code should prevail, given the policy objectives that were the motivation for the Code.

II. Preliminary Considerations

A. The Use of Government Supported Export Credits

The granting of government supported export credits had its origins in the post-war era. At that time the reconstruction of Europe and Japan and the implementation of development programs in the newly independent countries had created a large demand for capital goods. While developing countries had historically borrowed from private banks in order to finance their purchases of capital goods, this source of credit had largely disappeared due to the risk of default in the financial chaos of the 1930s. As a result, the burden fell on manufacturers to provide credit in their sales to developing countries.

30. Brief of the European Communities, Certain Commuter Airplanes From France and Italy, 47 Fed. Reg. 37,309 (1982) [hereinafter cited as Brief of the European Communities] (This case was terminated before any determination of the matter of subsidy, and the parties have retained control of their case files).
31. Telephone interview with John Greenwald (Dec. 6, 1982) [hereinafter cited as Greenwald interview]. Mr. Greenwald served in the Carter Administration as Deputy Assistant Secretary of Commerce for Import Administration and as Deputy General Counsel, Office of the Special Representative for Trade Negotiations, Executive Office of the President. In the latter capacity, Mr. Greenwald took part in the negotiation of the Subsidies Code.
32. Ceramic Tile, supra note 27, at 20,014; Railcars Final Determination, supra note 27, at 6578-9.
34. Id.
35. Id.
manufacturers and their commercial banks, however, were unwilling and unable to bear the risk of providing export credits for sales to developing countries.\textsuperscript{37} Most industrialized countries then realized the need for government support of export credits in order to promote their exports of capital goods.\textsuperscript{38}

Governments support export credits in a variety of ways. The Export-Import Bank of the United States and the Export-Import Bank of Japan obtain their funds at the government bond rate\textsuperscript{39} and then relend them to exporters or their customers.\textsuperscript{40} Private banks in the Netherlands that offer export credits borrow from the Central Bank at the government bond rate.\textsuperscript{41} In the United Kingdom, the Export Credits Guarantee Department sets the interest rates at which private banks may offer export credits.\textsuperscript{42} Any difference between these rates and commercial loan rates is made up by a direct government payment to the banks.\textsuperscript{43} In France and Italy, the Banque Française du Commerce Extérieur and the Mediocredito Centrale support export credits with funds obtained at the government bond rate and with direct government payments.\textsuperscript{44}

**B. Policy Arguments Against the Use of Government Supported Export Credits**

Despite the widespread use of government supported export credits, two policy considerations argue strongly for the limitation of their use. First, they are expensive for those countries offering them.\textsuperscript{45} Second, they are contrary to the principle of free trade which forms the basis for GATT.\textsuperscript{46}

1. Cost Considerations

With the exception of Switzerland and West Germany, all of the industrialized countries offer export credits at rates below commercial rates,\textsuperscript{47} indicating that a

\textsuperscript{37} Id. at 2-3; United Nations, \textit{supra} note 33, at 5.
\textsuperscript{38} OECD, \textit{supra} note 2, at 8.
\textsuperscript{39} Id. at 12. The government bond rate is that interest rate a government must pay to borrow on the private capital markets. Because government bonds have a low risk, they command an interest rate several points lower than that on commercial loans. M. Stigum, \textit{The Money Market; Myth, Reality, and Practice} 25 (1978). Government bonds bear different rates of interest, depending on their term. \textit{Id}. The government bond rate applicable in the export credit field is that on medium term bonds, which have terms of three to ten years, depending on the issuing country. See A. Wallen, \textit{supra} note 4, Annex I, at 1. By borrowing at the government bond rate, export credit agencies can relend at rates below commercial rates while still turning a profit. See Note, \textit{supra} note 9, at 1070.
\textsuperscript{40} OECD, \textit{supra} note 2, at 12.
\textsuperscript{41} Id. at 11.
\textsuperscript{42} Id at 229.
\textsuperscript{43} Id. at 10.
\textsuperscript{44} Id. at 10-11.
\textsuperscript{45} See A. Wallen, \textit{supra} note 4, Annex II, at 1.
\textsuperscript{46} See GATT, \textit{supra} note 13, preamble.
\textsuperscript{47} See OECD, \textit{supra} note 2, at 9-12.
government subsidy is provided. 48 The European governments began to subsidize their export credits in the early 1970s to match the export credit terms of the United States Export-Import Bank, which could offer export credits at low rates without subsidization due to low interest rates in the United States. 49 When the oil price shocks of the 1970s caused balance of payments deficits and unemployment in the West, subsidized export credits were increasingly used in an attempt to increase exports, thereby reducing unemployment and easing the balance of payments deficit. 50

A report prepared by Wharton Econometric Forecasting Associates demonstrates the motivation for the use of subsidized export credits. 51 This report shows that the cost of subsidized export credit can be justified by its effects. 52 If subsidized export credit makes the difference in winning a contract, the increase in economic activity incident to the exports causes a rise in government tax receipts that pays for the cost of the subsidy many times over. 53 However, favorable export credit terms offered by one country are usually matched by competing countries, so that the competitive advantage to be gained in making the subsidized credit is lost. 54 The competition in subsidized export credits has become so intense that it cost the industrialized nations as much as $5.5 billion in 1980. 55 American trade officials believe that the cost was even higher in 1981. 56

48. See id. at 9. It is difficult to compare the cost of government-supported export credits given the variety of ways in which the export credit programs are run. Suppose, for example, that the United Kingdom and the United States both offer export credits at 11%. Assume also that the medium-term government bond rate in each country is 10% and commercial credit is available in both countries at 15%. The United States would officially be making a profit on its export credits since the Export-Import Bank would be borrowing at 10% and lending at 11%. The United Kingdom, however, would be making available export credits at 11% by paying to private banks the 4% difference between commercial interest rates and the export credit rate set by the government. If one holds that a subsidy can exist only when there has been a government expenditure, then it would appear that the United Kingdom was subsidizing its export credits while the United States was not, even though both countries would be offering export credits at the same interest rate. In order to evaluate government export credit programs equally, this Comment defines a subsidized export credit as one offered at an interest rate below commercial interest rates. Compare Note, supra note 9, at 1070 n.6 with Subsidies Code, supra note 16, Annex A, item k and with Streng, supra note 1, at 402.

49. Moore, supra note 10, at 145.

50. Gentlemen prefer disagreements, supra note 3, at 59. As American exporters lost contracts to foreign competitors who could finance their exports with export credits at more favorable terms, Congressmen spoke for the need to either match these foreign export credits or negotiate their prohibition. See Hearing, supra note 4. The gravity of losing export sales was underscored by the Commerce Department's estimate that a billion dollars in exports generates 40,000 to 50,000 jobs. House Report, supra note 3, at 10.


52. See id.

53. Id. at 71.

54. See Hearing, supra note 4, at 131, 134 (testimony of Reuben Askew, U.S. Trade Representative).

55. A. Wallen, supra note 4, Annex II, at 1.
The real beneficiaries from the competition in export credit terms are often the importing countries, which have occasionally set one country against another in an attempt to get better financing terms. By offering export credits at below market rates, countries are in effect giving aid to the buyer.

2. Free Trade Considerations

The free argument against the use of subsidized export credits can be broken down as follows; arguments for fair competition and arguments for economic efficiency. The fair competition concerns stem from the belief that all subsidies are a form of unfair competition. If the exports of a country can be bought with government supported export credit at preferential rates, those exports will have an unfair advantage over the products of other countries that can be bought only with credit at commercial rates. The economic efficiency argument holds that subsidized export credits should be eliminated because they distort trade and reduce world economic well-being. In a free market, consumers base their purchasing decisions upon the price and quality of a product. Sellers seek to lower prices and improve quality in order to attract customers, thereby increasing economic efficiency and raising the world standard of living. Government supported export credits harm free trade by focusing the purchaser's attention on credit terms offered by exporting countries, thereby reducing the importance of price and quality. A purchaser may buy a more expensive or lower quality product because the exporting country offers credit on terms more favorable than those available elsewhere.

In light of these policy considerations, trading nations have negotiated international agreements to limit the use of subsidies in international trade. The initial 1947 GATT provisions on subsidies, however, were so general as to be of

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58. See Fy, The coming assault on export subsidies, 1980 The Banker 71; Plaut, Export-Import Follies, Fortune, August 25, 1980, at 76. See also Moore, supra note 11, at 149.

59. J. Jackson, supra note 5, at 755.

60. See id.

61. See Barcelo, supra note 6, at 798.

62. See generally B. Stigum & M. Stigum, Economics 1-54 (1968); see also generally P. Samuelson, Economics 41-71 (10th ed. 1976).

63. Steitl, Tariffs and Other Measures of Trade Control: A Survey of Recent Developments, 11 J. Econ. Literature 857 (1973), reprinted in J. Jackson, supra note 5, at 10. See Barcelo, supra note 6, at 798.

64. United Nations, supra note 33, at 5; L. Nehrt, supra note 2, at 2.

65. See Petition Filed With the United States Trade Representative Under Section 301 of the Trade Act of 1974, as Amended, reprinted in Office of the United States Trade Representative [Docket No. 301-32], 47 Fed. Reg. 51,764, 51,765. The Railcars From Canada case is a recent example of the market distortions export credit subsidies can cause, In the spring of 1982, the New York Metropolitan Transit Authority put out to bid specifications for 825 subway cars. Though the Budd Company of Troy, Michigan submitted the lowest bid and the earliest delivery date, the contract was awarded to Bombardier of Canada, whose offer included Canadian government export financing at 9.7%. Id.
little value. More recent efforts to control subsidies by some of the GATT nations have led to the Subsidies Code, which prohibits the use of export subsidies. Simultaneously, the member-nations of the OECD have negotiated significant limitations on the use of subsidized export credits.

III. INTERNATIONAL EFFORTS TO CONTROL SUBSIDIES

A. Within the GATT Framework

As originally drafted in 1947, GATT contained only one paragraph on subsidies, which requires a contracting party to notify in writing all other contracting parties to GATT of any subsidy that operates to increase its exports or to reduce its imports of a product. In cases where a subsidy has seriously prejudiced the interests of another contracting party, the subsidizing party must, upon request, discuss with the affected party, or with the contracting parties, the possibility of limiting the subsidy. These notification and consultation requirements have been of little value, however, for they have apparently never resulted in the limitation of the use of a subsidy.

In 1955 the GATT signatories agreed to prohibit those export subsidies on non-primary products which result in an export price for a product lower than the product's domestic price. This amendment, which became Paragraph Four of Article XVI of GATT, was not put into effect until 1962, however, and has been accepted by only seventeen countries. Although Paragraph Four provides more precise guidelines for the use of subsidies than the original Article XVI notification requirements, it has not been very useful in limiting the use of subsidies because it prohibits an export subsidy only after a showing of an export price lower than the domestic price, a showing which involves the complicated task of measuring prices in different currencies. The usefulness of Paragraph

66. See GATT, supra note 13, art. XVI; see also infra notes 69-71 and accompanying text.
67. See Subsidies Code, supra note 16; see also infra notes 83-92 and accompanying text.
68. See Arrangement, supra note 20; see also infra notes 93-201 and accompanying text.
69. GATT, supra note 13, art. XVI.
70. Id. GATT does not indicate who is to make the determination of serious prejudice called for in Article XVI. The contracting parties to GATT have agreed that an official GATT determination is not required, but rather, that any nation may request consultations if it feels seriously prejudiced by the subsidy practices of another party. J. Jackson, supra note 14, at 391.
72. Protocol, supra note 15, Section II.
73. Id. Section L.
74. Declaration Giving Effect to the Provisions of Article XVI:4 of the General Agreement on Tariffs and Trade, Done Nov. 19, 1960, 13 U.S.T. 2605, T.I.A.S. No. 5227, 445 U.N.T.S. 294 [hereinafter cited as 1960 Declaration]. This declaration was accepted by Austria, Belgium, Canada, Denmark, France, West Germany, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Rhodesia, Sweden, Switzerland, the United Kingdom, and the United States. GENERAL AGREEMENT ON TARIFFS AND TRADE, STATUS OF LEGAL INSTRUMENTS 11-4.2 (Supp. No. 10, April 1982).
75. Rivers & Greenwald, supra note 71, at 1461.
Four has also been hampered by the lack of any definition of the term "export subsidy." To remedy this deficiency, a 1960 GATT Working Party filed a report that listed those practices considered subsidies by the signatories to the Declaration which gave effect to Article XVI, Paragraph Four. One of the practices listed was "[t]he grant of governments (or special institutions controlled by governments) of export credits at rates below those which they have to pay in order to obtain funds so employed." Thus, a signatory to the Declaration could theoretically use the dispute resolution provisions of GATT to petition for the end of the use of subsidized export credits by another signatory to the Declaration. In practice, however, the GATT dispute resolution provisions have never been invoked on this issue. A perhaps insurmountable barrier to such a petition is the proof of different domestic and export prices, since subsidized export credits lower a buyer's cost but do not affect the price.

In April 1979, upon completion of negotiations on the Subsidies Code, a group of GATT signatories agreed to follow a stricter interpretation of the GATT subsidy rules. The signatories agreed to seek to avoid causing injury to one another through the use of any subsidy. The Subsidies Code sharply distinguishes between domestic subsidies and export subsidies. On the one hand, it recognizes domestic subsidies as important instruments of social and economic policy and puts no restrictions on their use. Export subsidies, on the other hand, are prohibited by Article IX, Paragraph One when applied to any products other than certain primary products.

76. Id. at 1461-62.
77. Provisions of Article XVI:4, in General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents 185, 186-7 (9th Supp. 1961) [hereinafter cited as GATT, Basic Instruments].
78. 1960 Declaration, supra note 74.
79. GATT, Basic Instruments, supra note 77, at 187.
80. For an explanation of such a use of the GATT dispute resolution provisions, see Note, supra note 9, at 1078-80.
81. For those subsidies issues that have been submitted to dispute resolution, see generally GATT, Basic Instruments, supra note 77.
82. See L. Nehrt, supra note 2, at 2; United Nations, supra note 33, at 5.
83. Subsidies Code, supra note 16. The Subsidies Code has been signed by Australia, Austria, Brazil, Canada, Chile, Egypt, the European Community, Finland, India, Japan, the Republic of Korea, New Zealand, Norway, Pakistan, Spain, Sweden, Switzerland, the United Kingdom, the United States, Uruguay, and Yugoslavia. General Agreements on Tariffs and Trade, Status of Legal Instruments 16-4.2-4.4 (Supp. No. 10, April 1982).
84. Subsidies Code, supra note 16, art. VIII, para. 3; art. XI, para. 2.
85. See id. art. VIII, para 1; art. IX, para 1; art. XI, para 1.
86. Id. art. VIII, para 1; art. XI, para 1.
87. Id. art. IX, para 1. Certain primary products are defined as any product of farm, forest, or fishery in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade. Id. art. X n.1; Protocol, supra note 15, Section II.
refers to the illustrative list of export subsidies in Annex A to the Code. It provides that

The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters of financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms. Provided, however, that if a signatory is a party to an international undertaking on official export credits to which at least twelve original signatories to this agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original signatories), or if in practice a signatory applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this agreement.

The first paragraph of item k makes clear that export credits offered at rates below government bond rates are a prohibited subsidy. The second paragraph of item k then creates an exception for export credits granted in conformity with an “undertaking on official export credits.” Such an undertaking, the Arrangement, was completed by the member nations of the OECD on February 22, 1978, and became effective on April 1, 1978.

B. Through the Framework of the OECD

1. Historical Background to the Arrangement

The Arrangement was the culmination of fifteen years of negotiations and discussions by the Group on Export Credits and Credit Guarantees of the OECD. The Group was established in 1963 as a forum for discussion and information exchange in order to reduce export credit competition. The first

88. Subsidies Code, supra note 16, art. IX, para. 2.
89. See id. Annex A, item k.
90. Id.
91. See id. Annex A, item k.
92. Id. Annex A, item k.
93. Arrangement, supra note 20.
94. See Moore, supra note 11, at 144-47.
95. Id. at 144. The Group is composed of senior government officials who have a policy making responsibility in the export credits field. These officials are advised by the heads of the export credit
products of the Group were “sector agreements” that governed the offer of export credit in the sale of ships and ground satellite communications stations. These agreements specified maximum repayment terms, minimum interest rates, and minimum down payments when export credits are offered in these sectors. In 1972, the OECD member countries agreed to exchange information whenever any country granted export credits with terms longer than five years. At the 1974 meeting of the International Monetary Fund, France, Italy, Japan, the United Kingdom, the United States, and West Germany agreed that export credits to developing countries should have a maximum term of three years and a minimum interest rate of 7.5%. It was not decided how these limitations would be implemented, however, leaving the parties with nothing more than “an agreement to agree.”

Negotiations to reach a final agreement on this 1974 understanding continued, but progress was impeded by a dispute within the European Community as to whether the European Commission or each individual member country had jurisdiction to negotiate export credit agreements. To circumvent this dispute, the participants at the November 1975 Rambouillet Economic Summit laid down principles for a “consensus,” rather than an “agreement,” on export credits. Countries became “parties” to the Consensus by unilaterally declaring their intention to adhere to the Consensus principles. By 1977, twenty countries had made such a unilateral declaration.

Under the Consensus principles export credits could have a maximum term of 8.5 years when offered to relatively rich and intermediate countries, and ten years when offered to relatively poor countries. Credits with terms from two to five years were to have a minimum interest rate of 7.5% when offered to relatively rich countries and 7.25% when offered to intermediate and relatively poor countries. For credits over five years the minimum rates were 8% for

agencies of their respective countries. United Nations, supra note 33, at 29. All of the OECD countries participate in the Group with the exceptions of Iceland and Turkey. See OECD, supra note 2, at 7-8.

97. Id. at 3; Moore, supra note 11, at 144-45.
98. House Report, supra note 3, at 3; Moore, supra note 11, at 144.
101. House Report, supra note 3, at 3; Moore, supra note 11, at 146.
102. The Summit participants were Canada, France, Italy, Japan, the United Kingdom, the United States, and West Germany. N.Y. Times, Nov. 16, 1975, at 3, col. 3.
103. House Report, supra note 3, at 3-4; see Moore, supra note 11, at 146.
104. House Report, supra note 3, at 3-4; see Moore, supra note 11, 146.
106. House Report, supra note 3, at 4; Moore, supra note 11, at 146.
relatively rich countries and 7.5% for intermediate and relatively poor countries.\textsuperscript{108} The Consensus also required a 15% down payment to be made on export credits.\textsuperscript{109} Credits offered for the purchase of aircraft, power plants, agricultural commodities, and steel mills were partially or wholly exempted from the terms of the Arrangement.\textsuperscript{110}

The negotiations within the Group on Export Credits and Credit Guarantees have been instrumental in reducing the differences in the disparate export credit operations of the OECD members.\textsuperscript{111} As participants have exchanged information on credit offers and discussed particular issues, they have generally conformed their export credit programs to those of the majority.\textsuperscript{112} This tendency to conform has paved the way for tentative partial understandings between the participants, which in turn has made possible negotiations on detailed understandings based on a particular practice which has become customary.\textsuperscript{113} The Arrangement is a product of this process of gradual progress to agreement in that many provisions in the Arrangement were carried over from the Consensus.\textsuperscript{114}

2. The Arrangement: Provisions and Effect

The Arrangement retained the Consensus limitations on minimum interest rates and maximum credit terms and continued the Consensus requirement of a 15% down payment.\textsuperscript{115} Like the Consensus, the Arrangement partially or wholly exempted from its provisions credits offered for the purchase of several types of exports, including power plants, ground satellite communication stations, ships, aircraft, military equipment, and agricultural commodities.\textsuperscript{116} The Arrangement

\begin{center}
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\hline
Classification of Country & Minimum interest Rate for Credits of & Maximum Years \\
& 2 to 5 & over 5 \\
& Years & Years \\
\hline
Relatively rich & 7.5% & 8% & 8.5 \\
Intermediate & 7.25% & 7.5% & 8.5 \\
Relatively poor & 7.25% & 7.5% & 10 \\
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\textsuperscript{108} Id. at 4. The Consensus contained the following matrix of minimum interest rates and maximum terms:

\textsuperscript{109} Id.

\textsuperscript{110} Id.

\textsuperscript{111} See Moore, supra note 11, at 146.

\textsuperscript{112} Id.

\textsuperscript{113} Id. at 146-47

\textsuperscript{114} Id. at 154.

\textsuperscript{115} Arrangement, supra note 20, para. 1.

\textsuperscript{116} Id. paras. 4 and 10.
was an improvement over the Consensus because it was a longer, more detailed document, and because it was uniformly adopted by the OECD nations, whereas the unilateral declarations that had put the Consensus into effect had varied slightly from one another, making interpretation and dispute resolution difficult.

The Arrangement has no legal effect in international law. Agreements between nations are legally binding only if there exists an intention to create, change, or define relationships under international law. In drafting the Arrangement, the signatories made clear that it was not a legally binding agreement, but instead was an "informal agreement" which was "in the form of guidelines." According to international law, the Arrangement is a "gentlemen's agreement," which is "an understanding which is clearly intended to affect the relations of the parties but not to be legally binding."

The OECD member nations drafted the Arrangement in the form of a gentlemen's agreement at the insistence of Japan and France. The U.S. negotiators agreed to the non-binding format because of their concern that if the Arrangement were made legally binding, it would be much more difficult to negotiate changes.

Given its non-binding form, the Arrangement has no enforcement provisions. Instead, if a participant intends to offer an export credit that derogates from the

117. Moore, supra note 11, at 146, 154.
118. See id.
119. See Arrangement, supra note 20, preamble.
120. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(a) (1975).
121. Moore, supra note 11, at 154.
122. Arrangement, supra note 20, preamble.
123. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 115, comment g (1965).
124. Telephone interview with Gary C. Hufbauer, (December 3, 1982) [hereinafter cited as Hufbauer interview]. Mr. Hufbauer was Deputy Assistant Secretary of the Treasury in the Carter Administration and a negotiator of the Arrangement.
125. During negotiations at the OECD Group on Export Credits and Credit Guarantees, the United States is represented by a team of negotiators which is usually composed of representatives from the Export-Import Bank, the Trade Representative's Office, and the Departments of Commerce, State, and Treasury. Moore, supra note 11, at 158. The United States negotiating position is coordinated by the National Advisory Council on International Monetary and Financial Policies (NAC). The NAC was created by the Bretton Woods Agreements Act of July 31, 1945, Pub. L. No. 79-171, 59 Stat. 512 (1945). The NAC was abolished as a statutory entity by Exec. Reorg. Plan No. 4 of 1965, 79 Stat. 1321, reprinted in 5 U.S.C. app. at 794 (1976) which transferred the functions of the NAC to the President. The NAC was reestablished by Exec. Order No. 11,269, 3 C.F.R. 534 (1966-1970 comp.), reprinted in 22 U.S.C. § 286b app. at 84 (1982), which empowered the Secretary of the Treasury, after consulting with the NAC, to direct representatives to international financial organizations. The composition of the NAC, set by Exec. Order No. 11,259, as amended by Exec. Order No. 11,808, 3 C.F.R. 902 (1971-1975 comp.), Exec. Order No. 12,164, 3 C.F.R. 444 (1980), and Exec. Order No. 12,188, 3 C.F.R. 131 (1981), is as follows: Secretary of Treasury, chairman; Secretary of State; U.S. Trade Representative; Secretary of Commerce; Chairman of the Board of Governors of the Federal Reserve System; President of the Board of Directors of the Export-Import Bank of the United States; and the Director of the International Development Cooperation Agency. 22 U.S.C. § 286b app. at 84 (1982).
126. Hufbauer interview, supra note 124.
Arrangement's limitations on maximum terms and minimum interest rates, Paragraph Nine requires the participant to notify all other participants at least ten days before issuing a commitment to supply the derogating export credit. At the end of this ten-day period, each participant has the right to make an export credit offer of its own to match that of the original derogating party. While this may appear to constitute a loophole in the Arrangement limitations, the notification requirements have in effect served as the enforcement provisions. By including the notification requirement, the signatories have encouraged respect for the Arrangement guidelines, since an attempt to gain an advantage with a purchaser by derogating from the limitations on terms and interest rates simply invites matching derogations from other countries before any contract is signed. Moreover, the communications carried out under Paragraph Nine, which can involve thousands of telex and telephone contacts a day between the export credit agencies, have done much to reduce mutual suspicions. Such suspicions were further reduced on June 30, 1982, when the Arrangement participants reached agreement on a set of amendments concerning three areas of export credits that had been the source of sometimes bitter debate: derogations, the interest rate matrix, and mixed credits.

3. The June 30, 1982 Amendments to the Arrangement

a. Derogations

The participants agreed that after October 15, 1982 they would not derogate from the maximum maturities and minimum interest rates specified in the Arrangement. Apparently, this agreement was a compromise through which the Europeans agreed to end their policy of derogations on interest rates if the United States would stop derogating on maturity lengths. In the past, when European export credit institutions had derogated from the Arrangement minimum interest rates, the United States Export-Import Bank had been at a disadvantage since, as a self-supporting institution, it had been unable to

127. Arrangement, supra note 20, para. 9(a)(1).
128. Id. para. 9(a)(2), 9(b)(2).
129. Moore, supra note 11, at 165; See Note, supra note 9, at 1085.
130. Moore, supra note 11, at 165; See Note, supra note 9, at 1085.
131. Fry, supra note 58, at 75.
132. See Moore, supra note 11, at 156.
match competitors' subsidized export credits. In 1981, the Export-Import Bank adopted a new policy to meet foreign competition by derogating from the Arrangement with longer-term credits, which are more attractive to borrowers since lengthening the term of a loan reduces the yearly payments. Other countries are unable to match American long-term loans because their domestic capital markets do not have the depth of the American market. As a result, other countries have difficulty borrowing even for fifteen years, whereas the United States government routinely borrows for twenty to thirty years. In agreeing not to derogate, the European Community and the United States have both given up their major weapon in the export credit war.

While the no-derogation pledge seems to be a simple compromise, it has worked a fundamental change on the Arrangement. When derogations were allowed, the Arrangement was not in reality an agreement to limit interest rates and terms on government supported export credits. Rather, it was a set of fair trading rules designed to cut down on export credit competition through its notification requirements. The pledge to eliminate all derogations has transformed the Arrangement into an agreement that fixes limits, not just procedures. Just what limits should be set has been another area of heated discussion.

b. The Interest Rate Matrix

From the beginning the United States was dissatisfied with the Arrangement because the minimum interest rates allowed by the Arrangement were below commercial rates and thus constituted a subsidy. During the negotiation of the Arrangement, the United States delegation nearly walked out when it could get no agreement on higher minimum interest rates. A deadlock was averted only when the Swedish delegation proposed a compromise whereby all parties agreed

136. HOUSE REPORT, supra note 3, at 5; COMPTROLLER GENERAL OF THE UNITED STATES, Report to the Congress; Financial and Other Constraints Prevent Eximbank From Consistently Offering Competitive Export Financing for U.S. Exports, at i (April 30, 1980), reprinted in Hearing, supra note 4, at 68.
137. N.Y. Times, November 21, 1980, at D8, col. 3.
139. To stay competitive, Ex-Im goes long term, Bus. Wk., May 17, 1982, at 33.
140. Id.
141. See Arrangement, supra note 20, para. 9.
143. See generally Hearing, supra note 4, at 1-208.
144. See Moore, supra note 11, at 147. Published tables of commercial interest rates are not available. However, the following interest rates prevailed on government bonds in February 1978: France, 9.55%; West Germany, 5.40%; Japan, 9.15%; the United Kingdom, 19.11%; and the United States, 7.67%. These figures are monthly averages of the rates on government bonds with medium to long terms. M. STIGUM, supra note 39, at 25.
145. Moore, supra note 11, at 147.
that Mr. Axel Wallen, the head of the Export Credit Agency of Sweden, would review the question of minimum interest rates. 146

Mr. Wallen presented his report to the OECD on April 24, 1980. 147 He proposed two alternatives to the interest rate matrix of the Arrangement. 148 The first of these was a differentiated rate system whereby a different minimum interest rate would be specified for each currency of the OECD countries. 149 This proposal was aimed at correcting the basic inequality of the Arrangement, which sets the same minimum interest rates regardless of the currency in which the credit is denominated. 150 When one minimum interest rate applies to all currencies, those countries with domestic interest rates higher than the minimum subsidize their credits if they offer credits at the minimum, while countries with domestic interest rates below the minimum are not able to subsidize their credits at all. 151 Mr. Wallen's differentiated system provided that the Arrangement minimum interest rate for each currency be equal to the market rate for medium-term government bonds in that currency. 152 In this way the amount of subsidy relative to commercial market rates would be minimized and would tend to be equal among currencies. 153 Alternatively, the participants could agree to a certain amount of subsidy that would be defined as a function of the market government bond rate for each currency. 154

Wallen's second proposal called for a "uniform moving matrix," where one interest rate applicable to credits in all currencies would be determined by calculating a weighted average of the government bond rates of each currency. 155 The uniform moving matrix would not eliminate subsidized export credits since those countries with interest rates above the uniform rate would be able to

146. Id.

147. A. Wallen, supra note 4.

148. See id.

149. Id. at 7.


151. Id. For example, suppose that in country A the interest rate for commercial loans of 5 to 8.5 years is 16%, while the equivalent rate in country B is 7%. The Arrangement minimum at that time for credits of this term to rich countries was 8%. If country A offers credits at the 8% minimum, it would be subsidizing the transaction by paying one half of the normal financing costs. For country B the Arrangement minimum rate is in excess of normal commercial rates, so B cannot offer subsidized credits.

152. A. Wallen, supra note 4, at 7. If this system had been implemented when Mr. Wallen presented his report, it would have resulted in minimum interest rates of 14.5% for the British pound, 12.875% for the French franc, 10.375% for the U.S. dollar, 9% for the Japanese yen and 8.25% for the German mark. Id. Annex II, at 2.

153. Id. at 7.

154. Id.

155. Id. at 17. The weight given to each currency would be equal to its proportion in the basket of currencies which make up the Special Drawing Rights of the International Monetary Fund. Id. The weighted average is calculated as follows: first, the weight of each currency is multiplied by the government bond rate of that currency; second, all of the products of weight and bond rate are added together; and third, the resulting sum is divided by the sum of all the weights. The final figure is the uniform rate for all currencies.
subsidize their export credits, while those countries with market rates below the uniform matrix would not. The uniform matrix would reduce subsidization, however, because it would express an average of market rates. Thus, it would avoid the possibility of all currencies having market rates above the Arrangement minimum, in which case all countries would be able to subsidize their export credits.

With both of these proposals, the report envisioned that the minimum rates would be adjusted every six or twelve months to account for changes in market rates. The Arrangement signatories would continue to offer credits to relatively rich countries at rates higher than those offered to intermediate and relatively poor countries. The rates for the latter two groups would be equal to 95% and 90%, respectively, of the rates offered to the relatively rich countries.

The United States preferred the differentiated rate system since it embodied the most effective means to eliminate subsidized export credits. The differentiated rate system received little serious negotiation, however, because some countries, most notably France, would not accept a system that would prohibit them from subsidizing the exports of certain industries. Countries with high inflation and interest rates, such as France and Italy, further argued that a differentiated rate system would put them at a disadvantage. They based their arguments on the theory that purchasers are subject to “interest rate illusion,” meaning that purchasers look only at the interest rate of a credit, preferring a Swiss franc rate of 4% over a British pound rate of 10%, even though the Swiss inflation rate might be 2% and the British rate 15%. There is no evidence to support the “interest rate illusion” proposition, however, which is contrary to sound economic reasoning.

The OECD did consider the uniform moving matrix seriously, but France also

156. Id. at 17.
157. See id. at 17.
158. See supra note 48 and its definition of subsidized export credits.
159. A. Wallen, supra note 4, at 7, 17.
160. Id. at 19.
161. Id.
162. House Report, supra note 3, at 8; Hearing, supra note 4, at 136 (testimony of C. Fred Bergsten, Assistant Secretary for International Affairs, Department of the Treasury) [hereinafter cited as Bergsten testimony].
163. Hearing, supra note 4, at 137 (Bergsten testimony). As one French official explained it, “you have a clash of economic philosophies. We basically believe in government support for private business until these commercial enterprises prove that they don’t need it, while the Americans believe in not intervening until it is proven that a company needs help.” Bassett, U.S. Pushing Europeans For Tighter Financing, Aviation Wk. & Space Tech., March 10, 1980, at 26.
164. Hearing, supra note 4, at 138 (Bergsten testimony).
165. Id. at 138.
166. Plaut, supra note 58, at 77.
rejected this proposal.\textsuperscript{167} Although it was supported by the European Commission and by the eight other members of the European Community,\textsuperscript{168} the unanimity rule of the European Community\textsuperscript{169} allowed France to veto any proposal to support the uniform moving matrix.\textsuperscript{170} Unable to gain reform of the Arrangement matrix, the United States worked to reduce export credit subsidies by raising the minimum interest rates specified in the Arrangement.\textsuperscript{171} In May 1980, the Arrangement Participants agreed to raise the minimum interest rates for relatively poor countries by .25% and the minimum interest rates for intermediate and relatively rich countries by .75%.\textsuperscript{172} In October 1981 they agreed to raise all minimum interest rates by 2.5%, with the exception of the minimum interest rate on credits to relatively poor countries with terms over five years, which were raised by 2.25%.\textsuperscript{173} This increase was adopted only after Japan was exempted from the Arrangement minimum rates and allowed a minimum rate of 9.25% on all credits.\textsuperscript{174} That the United States was at all successful in pushing through increases in the minimum rates was apparently due to the other signatories' desire to reduce their subsidy costs, which had soared with the rise in interest rates.\textsuperscript{175}

In June 1982, the Arrangement participants agreed to a new adjustment of the Arrangement matrix.\textsuperscript{176} Minimum interest rates were raised 1.15% for relatively rich countries and .35% for intermediate countries.\textsuperscript{177} They also agreed to change the definition of the country classifications.\textsuperscript{178} Relatively poor countries are now defined as those eligible for financing through the International Bank for Reconstruction and Development.\textsuperscript{179} Relatively rich countries are those with a 1979 per capita GNP of $4000 or more.\textsuperscript{180} All other countries are in the

\begin{itemize}
\item \textsuperscript{167} House Report, supra note 3, at 8; Moore, supra note 10, at 147-48.
\item \textsuperscript{168} House Report, supra note 3, at 8; Moore, supra note 11, at 148.
\item \textsuperscript{169} Treaty Establishing the European Economic Community, done March 25, 1957, art. 138, 298 U.N.T.S. 11, 68.
\item \textsuperscript{170} House Report, supra note 3, at 8; Moore, supra note 11, at 148.
\item \textsuperscript{171} See Moore, supra note 11, at 146-48. See supra note 108 for the original Arrangement minimum rates.
\item \textsuperscript{172} House Report, supra note 3, at 8.
\item \textsuperscript{173} Agreement on Export Credit Terms, OECD Observer, Nov. 14, 1981, at 14.
\item \textsuperscript{174} See Arrangement, supra note 20, para. (3)(b). Japan insisted on this special minimum because its domestic lending interest rate was 8.5%. Requiring Japan to offer credits at the Arrangement minima of 10-11.5% would have in effect been a penalty on Japanese exporters. Export credits: The Debits, The Economist, Nov. 14, 1981, at 88.
\item \textsuperscript{175} High Interest Rates Slow the Export Subsidy Race, Bus. Wk., Aug. 31, 1981, at 62. France was spending as much as $2.5 billion on export credits subsidies in 1981. Id.
\item \textsuperscript{176} Treasury News, supra note 133.
\item \textsuperscript{177} Id.
\item \textsuperscript{178} Exim News, Press Release of the Export-Import Bank of the United States (July 1, 1982) [hereinafter cited as Exim News].
\item \textsuperscript{179} Id.
\item \textsuperscript{180} Id.
\end{itemize}
intermediate class.\textsuperscript{181} For credits to those countries newly placed in the intermediate class, the new higher interest rates were phased in, and credits of up to ten years can still be offered to those countries.\textsuperscript{182} Japan continues to be exempted from the Arrangement matrix. Japan has agreed to charge 0.3\% over the yen long-term prime rate when offering export credits.\textsuperscript{183} Japan has also agreed to open its capital market so that foreign export credit agencies can offer yen financing.\textsuperscript{184}

c. Mixed Credits

Mixed credits is the term which describes the practice of offering export financing to a foreign purchaser that is composed in part of export credits at the Arrangement minimum rate, and in part of a foreign aid loan at an interest rate well below the Arrangement minimum, typically 3.5\%.\textsuperscript{185} When the two loans are "mixed," or expressed as one credit, the resulting interest rate is below the Arrangement minimum.\textsuperscript{186} Mixed credits are a French innovation that have been strongly criticized by the other Arrangement participants, because they can be used to circumvent the minimum interest rates set by the Arrangement.\textsuperscript{187} France has maintained that mixed credits are an important and necessary way of aiding less developed countries.\textsuperscript{188} The aid argument is weakened when one considers that mixed credits have been granted to countries such as Brazil, Israel, and Mexico, which can afford export financing without resorting to

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|}
\hline
Classification of country & 2 to 5 & 5 to 8.5 & 8.5-10 \\
\hline
Relatively rich & 12.15\% & 12.4\% & No Credits \\
Intermediate & 10.85\% & 11.35\% & No Credits \\
Countries newly placed in the intermediate class & & & \\
\hspace{1cm} effective immediately & 10.5\% & 10.75\% & 10.75\% \\
\hspace{1cm} effective 1/1/83 & 10.85\% & 11.35\% & 11.35\% \\
Relatively poor & 10\% & 10\% & 10\% \\
\hline
\end{tabular}
\caption{Number of years in maximum repayment terms}
\end{table}

\textsuperscript{181} Id. Bahrain, Czechoslovakia, East Germany, Israel, and the Soviet Union were moved into the relatively rich category. Brazil, Chile, Hong Kong, Malaysia, Mexico, Morocco, Nigeria, South Korea, and Taiwan were moved into the intermediate category. Europe, July 3, 1982 (No. 3404) at 9.
\textsuperscript{182} Exim News, \textit{supra} note 171. As of June 30, 1982, the Arrangement matrix of minimum interest rates and maximum terms was as follows:

\textsuperscript{183} Treasury News, \textit{supra} note 133.
\textsuperscript{184} Id.
\textsuperscript{185} Moore, \textit{supra} note 11, at 149.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id.; see Hearing, \textit{supra} note 4, at 152 (Bergsten testimony).
foreign aid. In the opinion of a U.S. trade official, the aid argument is really a "cynical excuse" for greater subsidization of export credits.

Efforts to eliminate mixed credits have not been successful, and several countries, including Canada, the United Kingdom, the United States, and the Scandinavian countries, have begun to use mixed credits in order to match the French offers. On June 30, 1982, the Arrangement Participants agreed to limit the use of mixed credits by prohibiting mixed credits that have a grant element of less than 20%. U.S. negotiators consider this change only a first step, and have continued to press for a prohibition of mixed credits with a grant element of less than 50% in order to create a clear division between those credits granted as aid and those granted as normal credits.

4. The October 15, 1983 Amendments to the Arrangement

In the fall of 1983 the Arrangement Participants agreed to new interest rate guidelines similar to the uniform moving matrix proposed by Mr. Wallen in April 1980. The guidelines, which became effective on October 15, 1983, created a base interest rate to be determined by calculating the weighted average of the yields on long-term (approximately ten years) U.S., German, French, Japanese, and British government bonds on the secondary market. The base rate is then used to calculate the interest rate matrix. The minimum rate for credits to relatively rich countries for two to five years is determined by adding 205 basis points (2.05%) to the base rate. Credits for 5 to 8.5 years to those same countries is calculated by adding 230 basis points (2.30%) to the base rate. For intermediate countries, the minimum interest for credits of two to five years is determined by adding 75 basis points (.75%) to the base rate, while the minimum interest rate for credits of 5 to 8.5 years is determined by adding 125 basis points

190. Hearing, supra note 4, at 152 (Bergsten testimony).
191. Moore, supra note 11, at 149.
192. Treasury News, supra note 133. The OECD calculates the grant element as follows: the present value at the market rate of interest of each repayment is ascertained, assuming a market interest rate of 10%; the sum of these present values is then subtracted from the face value of the credit; the resulting figure is then stated as a percentage of the face value, giving the grant element of the credit. R. Poats, Development Cooperation, OECD Efforts and Policies of the Members of the Development Assistance Committee: 1983 Review 171 (1984) (report by the chairman of the OECD Development Assistance Committee) 171.
193. Telephone interview with Eileen Roulier (May 31, 1984) [hereinafter cited as Roulier interview]. Ms. Roulier is an economist in the Office of Trade Finance at the U.S. Treasury Department. Given the recent increases in the minimum interest rates allowable on export credits, mixed credits are the only avenue through which Arrangement Participants can grant credits containing substantial subsidies. Consequently, mixed credits are receiving the most attention in the current negotiations at the OECD. Id.
195. Id.
(1.25%) to the base rate. The minimum rates for credits of any maturity up to ten years to relatively poor countries are equal to the base rate minus ten basis points (.10%).\textsuperscript{196} The base rate and all the minimum rates calculated from it will be adjusted each January 15 and July 15 to reflect changes of one half of a percent or more in the average base rate of the preceding month, as compared to the average monthly base rate of the previous six-month period.\textsuperscript{197} The Arrangement Participants also agreed to temporarily lower rates to intermediate and relatively poor countries.\textsuperscript{198}

Those currencies with domestic commercial rates below or nearly below the Arrangement matrix rates will have one minimum interest rate under the Arrangement.\textsuperscript{199} This rate is equal to the commercial interest reference rate (CIRR) of that currency, which is defined as a margin over the monthly average borrowing costs of five-year fixed interest rate funds.\textsuperscript{200} The CIRRs are updated each month to reflect the average interest rate of the previous month.\textsuperscript{201}

<table>
<thead>
<tr>
<th>Classification of country</th>
<th>Number of years in maximum repayment terms</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2-5 years</td>
</tr>
<tr>
<td>Relatively rich</td>
<td>12.15%</td>
</tr>
<tr>
<td>Intermediate</td>
<td>10.35% (10.85%)</td>
</tr>
<tr>
<td>Relatively poor</td>
<td>9.50% (10.00%)</td>
</tr>
</tbody>
</table>

The numbers in parentheses are the rates that were in effect from July 6, 1982, to October 15, 1983, thus showing the amount of the temporary reduction in minimum interest rates offerable to those countries. The Arrangement Participants plan to increase these temporarily reduced rates in order to bring them back up to the rates that prevailed before October 15, 1983. Rates for credits of two to five years to intermediate countries and rates on all credits to relatively poor countries will be increased by twenty-five basis points on July 15, 1985, and again by twenty-five basis points on January 15, 1986. Minimum interest rates for credits of over five years to intermediate countries will be raised by thirty basis points on July 15, 1985, twenty-five basis points on January 15, 1986, and by ten basis points on July 15, 1986. These increases are in addition to any increases in the rates due to an increase in the base rate. If the base rate decreases, these scheduled increases are set off against the decrease. \textit{Id}. Note that countries placed in the intermediate category in July 1982 may still be offered credits with terms up to ten years long at the same interest rate as for credits in the 5 to 8.5 year range. See \textit{id.} and \textit{supra} note 182 and accompanying text.

\textsuperscript{196} Roulier interview, \textit{supra} note 193.
\textsuperscript{197} Treasury News, October 1983, \textit{supra} note 194. The current base rate is 10.1%, but is likely to increase in July 1984. Roulier interview, \textit{supra} note 193.
\textsuperscript{198} Treasury News, October 1983, \textit{supra} note 194. The Arrangement matrix of minimum interest rates and maximum terms now is as follows:

<table>
<thead>
<tr>
<th>Classification of country</th>
<th>2-5 years</th>
<th>5-8.5 years</th>
<th>8.5-10 years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Relatively rich</td>
<td>12.15%</td>
<td>12.40%</td>
<td>No credits</td>
</tr>
<tr>
<td>Intermediate</td>
<td>10.35% (10.85%)</td>
<td>10.70% (11.35%)</td>
<td>No credits</td>
</tr>
<tr>
<td>Relatively poor</td>
<td>9.50% (10.00%)</td>
<td>9.50% (10.00%)</td>
<td>9.50% (10.00%)</td>
</tr>
</tbody>
</table>

\textsuperscript{199} \textit{Treasury News, October 1983, supra} note 194.
\textsuperscript{200} \textit{Id.}
\textsuperscript{201} \textit{Id.} CIRRs now serve for the minimum rate for three currencies, the Japanese yen, the German Mark, and the Swiss franc, which had CIRRs of 8.30%, 9.65%, and 7.05%, respectively, in November 1983. Current CIRRs are available on request from the U.S. Treasury Department. \textit{Id.}
5. Conclusion

Though the Arrangement is not legally binding on its participants, it has moderated the competition in export credits. The Arrangement was strengthened by the amendments of June 30, 1982, which raised the minimum interest rates, ended the use of derogations and limited the offer of mixed credits. The guidelines adopted in October, 1983 greatly reduced the subsidization of export credits. Even so, the Arrangement minimum rates of 9.5 to 12.4% are below the commercial market interest rates of many countries. If these countries offer export credits at the Arrangement minimum rates, their exporters will have an advantage over the producers of other countries whose customers must borrow at commercial rates. The important issue then arises as to whether the Subsidies Code allows governments to use countervailing duties against imports that are financed by export credits that comply with the provisions of the Arrangement, but are below commercial interest rates. The U.S. trade officials who negotiated the Subsidies Code have maintained that the countervailing of such imports would be consistent with the United States' international obligations.

IV. Remedies Against Subsidized Export Credits: The Relationship of the Arrangement to International Law and U.S. Law

A. The Subsidies Code

The Subsidies Code provides two "tracks" of remedies that a signatory may use when it is adversely affected by the subsidy of another signatory. The first track is the use of countervailing duties. If a signatory of the Subsidies Code finds that one of its imports is subsidized by an exporting signatory, and that

202. See supra notes 119-126 and accompanying text.
204. See Treasury News, supra note 133; Exim News, supra note 171.
205. See Treasury News, supra note 133; Exim News, supra note 171.
206. See supra notes 195-201 and accompanying text.
207. For example, in March 1984, the following countries had government bonds with interest rates higher than the Arrangement minima: Belgium, 12.40%; Canada, 13.06%; France, 12.87% (Feb. 1984); Italy, 15.88% (Feb. 1984); and the United States, 12.45%. 37 INT'L FIN. STATISTICS (May 1984) 61 (published monthly by the IMF). As noted earlier, government bond rates are several percentage points below commercial rates. See supra note 39.
208. See supra notes 59-60 and accompanying text.
210. Subsidies Code, supra note 16.
212. Id. at 11.
subsidy is causing an injury to the importing signatory, it may impose a countervailing duty upon the subsidized import.\textsuperscript{213}

The second track of remedies involves the Subsidies Code's dispute resolution process.\textsuperscript{214} A signatory may request consultations with another signatory whenever it believes an export subsidy is being granted by the other signatory,\textsuperscript{215} or whenever the subsidy of another signatory injures its domestic industry, impairs its benefits accruing under GATT, or seriously prejudices its interests.\textsuperscript{216} If consultations do not lead to a mutually acceptable solution, a signatory may refer the dispute to the Committee of Signatories for conciliation.\textsuperscript{217} During the conciliation process, the Committee reviews the facts of the dispute and encourages the signatories to develop a mutually acceptable solution.\textsuperscript{218} If the matter remains unresolved, a signatory may request that the Committee establish a panel\textsuperscript{219} which reviews the facts of the dispute and presents its findings to the Committee as to the rights and obligations of the signatories.\textsuperscript{220} The Committee considers the panel's report and makes recommendations to the parties with a view to resolving the dispute.\textsuperscript{221} If the Committee's recommendations are not followed, the Committee may authorize appropriate countermeasures, including withdrawal of GATT concessions or obligations.\textsuperscript{222}

The Subsidies Code distinguishes between export subsidies, which are prohibited,\textsuperscript{223} and domestic subsidies, which are allowed.\textsuperscript{224} This distinction has no effect on the use of the countervailing duty remedy, which a signatory can impose against any subsidy as long as injury is shown.\textsuperscript{225} The distinction between export subsidies and domestic subsidies is important, however, with respect to the use of the dispute resolution process. That process can be initiated against prohibited export subsidies when there is no evidence of injury,\textsuperscript{226} whereas the process can be initiated against domestic subsidies only if the complaining party has been injured by the subsidy.\textsuperscript{227}

\textsuperscript{213} Subsidies Code, supra note 16, art. IV, para. 4. The Subsidies Code defines injury as material injury or threat of material injury to a domestic industry or material retardation of the establishment of such an industry. \textit{Id.} art. II, para. 2 n.1.

\textsuperscript{214} A. Stoler, supra note 211, at 11.

\textsuperscript{215} Subsidies Code, supra note 16, art. XII, para. 1.

\textsuperscript{216} Id. art. XII, para. 3.

\textsuperscript{217} Id. art. XIII, para. 1 and 2. The Committee of Signatories is composed of representatives from each of the signatories to the Subsidies Code. \textit{Id.} art. XVI, para. 1.

\textsuperscript{218} Id. art. XVII, para. 1.

\textsuperscript{219} Id. art. XVII, para. 3.

\textsuperscript{220} Id. art. XVIII, para. 1.

\textsuperscript{221} Id. art. XVIII, para. 9.

\textsuperscript{222} Id.

\textsuperscript{223} Id. art. IX, para. 1.

\textsuperscript{224} Id. art. VIII, para. 1, art. XI, para. 1.

\textsuperscript{225} See id. art. IV, para. 4. The countervailing duty provisions of art. IV require the finding of a subsidy, without distinguishing between domestic subsidies and export subsidies.

\textsuperscript{226} Id. art. XII, para. 1.

\textsuperscript{227} Id. art. XII, para. 3.
A dispute currently exists between the European Community and the United States as to whether the countervailing remedy of the Subsidies Code can be used against subsidized export credits that comply with the Arrangement. This dispute centers on the meaning of the second paragraph of item k of Annex A to the Code. It is clear that the first paragraph of item k prohibits subsidized export credits, and that the second paragraph creates some sort of exception for subsidized export credits that are granted in compliance with the Arrangement. In the American view, the second paragraph simply converts subsidized export credits from a prohibited subsidy to a non-prohibited subsidy with the same status as domestic subsidies. According to this view, subsidized export credits in conformity with the Arrangement are still considered a countervailable subsidy.

On the other hand, the European Community insists that the second paragraph was specifically added to item k to exempt export credits within the Arrangement from countervailing duty action. The second paragraph states that “an export credit practice which is in conformity with [the Arrangement] shall not be considered an export subsidy prohibited by this Agreement.” Therefore, in the opinion of the European Community, if subsidized export credits in conformity with the Arrangement are not prohibited, they cannot be export subsidies since all export subsidies are prohibited by Article IX. If they are not export subsidies they cannot be subsidies at all since it would be absurd to claim that subsidized export credits within the Arrangement are some form of domestic subsidy.

Support for the European Community’s position can be found in statements made by U.S. officials. On July 14, 1978, Gary C. Hufbauer, a negotiator of the Arrangement, told a House subcommittee that violation of the Arrangement “might well serve to trigger a countervailing duty investigation.” By this statement, Mr. Hufbauer implied that subsidized export credits within the Arrangement are not countervailable. Further, in a legal analysis of the Subsidies Code dated July 15, 1979, the International Trade Commission stated that...
“export credits at rates below those necessary to obtain private funds [are] export subsidies unless the signatory is party to a separate undertaking on official export credits.”240 One year later, U.S. Trade Representative Reuben Askew told a Senate committee that “there is a legal exception in the Subsidies Code . . . but the fact of the matter is [that export credit subsidies are] as much a government subsidy as anything else that you can think of, and it’s clearly against the whole spirit and thrust of the [Multilateral Trade Negotiations] and subsidies code even though specifically provided for.”241 The latter two statements indicate that, for purposes of the Code, subsidized export credits were not defined as subsidies.242 It follows then that if they are not subsidies, they are not countervailable.243

If the United States and the European Community cannot reach an agreement on this issue, they can request the Committee of Signatories of the Subsidies Code to resolve the issue under the dispute resolution procedures of Article XVIII of the Code.244 Resolution of this dispute will be difficult because item k was not a heavily negotiated issue, so there is little record of the signatories’ intentions at the time.245 According to the chief U.S. negotiator of the Annex to the Subsidies Code, the European Community’s interpretation of the Subsidies Code is not without merit, although he believes that the language of the Code does not preclude a countervailing action against subsidized export credits that are in conformity with the Arrangement.246 However this dispute is resolved, the solution may not have any legal effect on United States countervailing duty law.

B. United States Countervailing Duty Law

Under U.S. law, a countervailing duty investigation is initiated whenever the International Trade Authority (ITA)247 determines that an investigation is warranted, or whenever a United States manufacturer, wholesaler, union, or trade association248 petitions the ITA to commence an investigation.249 If the ITA finds


241. Hearing, supra note 4, at 128 (testimony of Reuben Askew, U.S. Trade Representative).

242. See ITC INVESTIGATION, supra note 240, at 81; see also Hearing, supra note 4, at 128 (testimony of Reuben Askew, U.S. Trade Representative).

243. See Subsidies Code, supra note 16, art. IV.

244. See supra notes 214-22 and accompanying text.

245. Hufbauer interview, supra note 124.

246. Id.

247. For a description of the ITA, see supra note 26.

248. See 19 U.S.C. §§ 1671a(b)(1), 1677(9)(C)-(E) (1982) for a definition of those parties that can petition for a countervailing duty investigation.

249. 19 U.S.C. § 1671a(a) and (b) (1982).
that an import has been subsidized and if the International Trade Commission (ITC) finds that the subsidized import is materially injuring a domestic industry, threatening a domestic industry with material injury, or retarding the establishment of a domestic industry, a countervailing duty must be imposed equal to the amount of the subsidy. Prior to the Trade Agreements Act of 1979, the statute required only a finding of a subsidy for the imposition of a countervailing duty. The injury test was added to U.S. law to bring it into conformity with the Subsidies Code. In signing the Subsidies Code each country agreed to take all necessary steps to conform their laws, regulations, and administrative procedures with the provisions of the Code.

1. The Statutory Definition of Subsidy

The Trade Agreements Act of 1979 also amended U.S. countervailing law by adding a definition of subsidy. Subsidy is defined in the statute as having "the same meaning as the term 'bounty or grant' as that term is used in § 1303 of this title." Section 1303 does not contain a definition of "bounty or grant," but the legislative history of the Trade Agreements Act makes it clear that Congress intended that, under U.S. law, subsidy retain "the meaning which practice and the courts have ascribed to the term 'bounty or grant' under [Section 1303]." In its consideration over the years of countervailing duty cases under Section 1303, the Treasury never decided whether subsidized export credits are coun-

253. H.R. Rep. No. 317, 96th Cong., 1st Sess. 45 (1979); S. Rep. No. 249, 96th Cong., 1st Sess. 44 (1979) reprinted in 1979 U.S. CODE CONG. & AD. NEWS 381, 430. The determination of injury is required only in those countervailing duty investigations that involve imports from a signatory of the Subsidies Code, from a non-signatory who substantially complies with the Code, or from GATT non-members with whom the United States has entered into agreements, the provisions of which require an injury determination before a countervailing duty can be imposed. See 19 U.S.C. §§ 1303, 1671(b) (1982).
254. Subsidies Code, supra note 16, art. XIX, para. 5(a). The injury test of 19 U.S.C. § 1671(a) (1982), however, does not conform exactly to that of the Subsidies Code. The Code requires a showing that the subsidized imports, "through the effects of the subsidy," are causing injury. Id. art. VI, para. 4. 19 U.S.C. § 1671(a) (1982) requires only a showing that the subsidized imports are causing injury. There are, therefore, circumstances where injury could be found under U.S. law but not under the Code — for example, when an import receiving a small subsidy is injuring a U.S. industry, not because of the subsidy, but because it is a higher quality product.
256. Id.
tervailable.260 Thus, the ITA has not been able to rely on precedent in deciding whether subsidized export credits are a subsidy within the meaning of the Trade Agreements Act of 1979.261

The statutory definition of subsidy also "includes, but is not limited to . . . any export subsidy described in Annex A to the [Subsidies Code]."262 Thus, incorporated by reference in the statute's definition of countervailable subsidy is the definition of subsidized export credits in the first paragraph of item k.263 It is not clear, however, if the exception in the second paragraph of item k is also incorporated by reference. On the one hand it has been argued that the second paragraph is not incorporated by reference since it does not describe an export subsidy, but merely an exception to the list of prohibited export subsidies.264 On the other hand, it is arguable that the statute incorporates the whole annex to the Code given that the whole annex, including the second paragraph of item k, was reprinted in the Congressional Record during the Senate debate of the Trade Agreements Act.265 Even if the ITA finds that the second paragraph is a part of U.S. law, however, the ITA must then decide if the second paragraph exempts from countervailing duty action those export credits in conformity with the Arrangement.266

261. See Ceramic Tile, supra note 27; Railcars Final Determination, supra note 27.
263. See supra note 90 and accompanying text.
264. Note, supra note 9, at 1081.
2. Administrative Interpretations of Subsidy in Export Credit Cases
   a. The Mexican Ceramic Tiles Case

Two recent countervailing duty cases before the ITA have involved the use of export credits and the issue posed by item k. On October 30, 1981, the ITA initiated a countervailing duty investigation of Mexican ceramic tile after receiving a petition from the Tile Council of America, Inc. The petition alleged that the government of Mexico was providing its domestic producers and exporters of ceramic tile with three types of benefits that were countervailable under U.S. law: tax credits on exports; tax credits on regional investment; and preferential export financing. Since Mexico is not a signatory to the Subsidies Code, there was no requirement of a finding of injury before a countervailing duty could be imposed.

In its final determination of the case, the ITA found that all three of the Mexican government programs under investigation were bounties or grants within the meaning of Section 1303 and imposed a countervailing duty of 15.84% on imports of Mexican ceramic tiles from manufacturers which benefitted from the programs. In its consideration of the export credits issue, the ITA found that Mexico had conferred benefits on its ceramic tile exporters through the Fund for the Promotion of Exports of Mexican Manufactured Products (FOMEX). Under this program, the Bank of Mexico administers the financing of FOMEX loans through financial institutions. The financial institutions in turn establish lines of credit with manufacturers and exporters of ceramic tile, through which they provide export financing in the currency of the importing country at 6% interest. The ITA calculated the subsidy element of these credits by computing the interest expense of the FOMEX credits and the

As a nonself-executing agreement, the Subsidies Code can have a domestic law effect in the United States only if implementing legislation is passed. Note, The Domestic Legal Effect of Declarations That Treaty Provisions Are Not Self-Executing, 57 TEXAS L. REV. 233, 234 (1980). Congress implemented the Subsidies Code by the Trade Agreements Act of 1979 which approved the Subsidies Code and the other Agreements of the Tokyo Round. Trade Agreements Act, supra note 243, § 2, 93 STAT. 147, (codified at 19 U.S.C. § 2503 (1982)). The Act provided, however, that if any provision of an approved agreement conflicted with a statute of the United States, the statute would prevail. Id. § 3, 93 STAT. 148, (codified at 19 U.S.C. § 2504 (1982)). Congress included this provision in the Act to make clear that the Multilateral Trade Negotiation Agreements have no domestic legal effect in the United States except to the extent that Congress expressly implemented them. Cohen, supra, at 105. Thus, if the Subsidies Code exempts from countervailing duty action those export credits in conformity with the Arrangement, the same is true for U.S. law only if Acts of Congress can be interpreted to that effect. See id.

268. Id.
269. Id.
270. Id.
271. Id. at 20,012-14.
272. Id. at 20,014.
273. Id.
interest expense of similar loans at the then commercially available rate of 23.49%. The ITA then allocated the difference in interest expense over the value of the tile imports to the United States. 

The government of Mexico contested the finding of an export credit subsidy, arguing that the FOMEX loans are comparable to loans authorized by the Arrangement, that loans within the Arrangement are not countervailable by virtue of item k of Annex A to the Subsidies Code, and that therefore FOMEX loans are not countervailable. The ITA refused to address these arguments, stating that Mexico is not a party to the Arrangement and that in any case, FOMEX loans have terms and rates different from those set by the Arrangement.

b. The Railcars From Canada Case

The problem posed by item k was again at issue in the Railcars From Canada case. This case grew out of the efforts of the New York Metropolitan Transit Authority (MTA) to finance its capital improvement program. In November 1981, the MTA issued an invitation to bid on 825 railcars, specifically requesting that the bids be supported by financing. Three companies — Budd, the sole remaining American producer of railcars; Bombardier, of Montreal; and Francorail, a French consortium — made bids. The Francorail and Bombardier bids both included government supported export credits at 9.7% to be repaid in seventeen semi-annual installments. Budd's bid also included government supported export credits provided by the governments of Brazil and Portugal, but since these credits were limited to components manufactured in those countries, the proportion of the bid covered by financing was much less than the 85% of the other two bids. To compensate for this deficiency, Budd petitioned for financing from the Export-Import Bank, but this effort was unsuccessful.

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274. Id. at 20,014-15.
275. Id. at 20,015.
276. Id. at 20,014.
277. Id.
278. See Railcars Final Determination, supra note 27.
279. See Tracking credit on the subway, Bus. Wk., Dec. 14, 1981, at 131 for a discussion of the financing alternatives pursued by the MTA.
280. Railcars Final Determination, supra note 27, at 6571.
281. Id.
282. Id.
284. Under 12 U.S.C. § 635a-3 (1982), the Secretary of the Treasury can authorize the Export-Import Bank to provide credit to U.S. bidders on a U.S. contract if the Secretary finds that foreign bidders on the contract are benefiting from export credits that exceed the limits set by international arrangements, and if the Secretary finds this non-competitive financing is likely to be a determining factor in the awarding of the contract.
On June 10, the MTA contracted with Bombardier for the 825 railcars, subject to the conclusion of a satisfactory financing agreement with the Export Development Corporation (EDC), a Canadian Crown Corporation owned by the Canadian government. On November 15, 1982, the EDC agreed to finance 85% of the Bombardier/MTA contract up to $750 million at 9.7% interest per year. The decisive factor in the rejection of Budd's bid, which included a lower price and an earlier delivery date than Bombardier's, was the lack of competitive financing. Bombardier won out over Francorail because it promised that 40% of the contract would be spent on U.S. components and assembly, with as much as half of that to be spent in New York state.

On June 24, 1982, Budd submitted a countervailing duty petition to the ITA alleging that Bombardier had benefitted from countervailable subsidies, specifically, preferential export financing and regional development grants in its contract with the MTA. The petition further alleged that subsidized imports of Canadian railcars were materially injuring, or threatening to materially injure, a U.S. industry. On July 14, 1982, the Industrial Union Department of the AFL-CIO, the United Automobile and Aerospace Workers, and the United Steelworkers of America, as representatives for union members in the Budd Company and its suppliers, requested to become co-petitioners with the Budd complaint. The ITA initiated its investigation on July 20, 1982.

On February 4, 1983, the ITA made its final determination that Bombardier had benefitted from subsidies in the amount of $91,216,125 in its contract with the MTA. The portion of this amount due to subsidized export credit, $90,882,000, was broken down into three sub-parts. First, the ITA concluded that the EDC financing at 9.7%, in the place of the MTA borrowing on the tax-exempt bond market, had a value of $65,229,000. Second, the ITA considered the "option value" of the financing agreement under which the MTA borrowing on the tax-exempt bond market, had a value of $65,229,000. Second, the ITA considered the "option value" of the financing agreement under which the MTA is

286. Railcars Final Determination, supra note 27, at 6571.
287. Id.
289. See ITC Preliminary Determination; Rail Passenger Cars From Canada; Determination, 47 Fed. Reg. 36,034, 36,043-44 (1982).
292. Id. at 31,415. Since Canada is a signatory of the Subsidies Code, a countervailing duty can be imposed against a Canadian product only upon a finding of subsidy by the ITA and a finding of injury by the ITC. See 19 U.S.C. § 1671 (1982).
293. Railcars Initiation, supra note 291, at 31,415.
294. Id.
295. Railcar Final Determination, supra note 27, at 6569 ($91,216,125 equals 825 cars multiplied by the $110,565 per car net subsidy estimated by the ITA).
296. Id. at 6572.
to use the available EDC financing as Bombardier delivers the railcars. The MTA can choose not to use the EDC financing, however, if other cheaper credit becomes available. The ITA found this flexibility to be worth $16,237,000. Third, the ITA concluded that the expense of providing the option would have been borne by Bombardier in a transaction free of government involvement. Therefore, the ITA calculated the interest expense Bombardier would have realized if it had borrowed an amount equal to the option price. The ITA computed this interest expense to be $12,219,000.

A threshold consideration in the Railcars case was whether the EDC financing at 9.7% constituted a countervailable subsidy. The MTA argued that the EDC financing was an effort to match the prior commitment of France to support Francorail’s bid with 9.7% financing. The MTA argued that because such matching is provided for in the Arrangement, the EDC financing was in compliance with the Arrangement. The MTA argued further that financing in compliance with the Arrangement is non-countervailable due to the second paragraph of item k of Annex A to the Subsidies Code. However, the ITA dispensed with this argument by pointing out that item k only exempts those export credits “in conformity with [the interest rate] provisions” of the Arrangement. Derogations and matching derogations are specifically identified by the Arrangement as “not in conformity” with the Arrangement, so that the item k exemption did not apply in this case. In a related matter, the MTA argued that export credits in conformity with the Arrangement should not be considered a subsidy and that therefore the calculation of the subsidy of the EDC financing should be made with reference to the minimum rate allowed by the Arrangement, rather than with reference to market interest rates. The ITA dismissed this argument as well, again holding that since the EDC financing was in derogation of the Arrangement, item k did not apply.

297. Id. at 6571, 6572.
298. Id.
299. Id. From this figure the ITA subtracted the extra administrative expenses the MTA incurred by arranging financing through the EDC rather than through the financial markets. Id. at 6573.
300. See id.
301. Id.
302. Id.
303. Id. at 6579.
304. See Arrangement, supra note 20, para. 9. See also supra notes 127-28 and accompanying text.
305. Railcars Final Determination, supra note 27, at 6579.
306. See id.
307. Id.
308. Arrangement, supra note 20, para. 9(a)(1).
309. See id.
310. Railcars Final Determination, supra note 27, at 6578.
311. Id. at 6579.
V. Future Treatment of Subsidized Export Credits Under U.S. Countervailing Duty Law

The Ceramic Tile and Railcars cases established several important precedents. Taken together, they established that supplier's credits and buyer's credits receive identical treatment under U.S. countervailing duty law.312 In Ceramic Tile, the Mexican government had used a supplier's credit program, FOMEX, to provide export credit to exporters and manufacturers of ceramic tile.313 The International Trade Authority (ITA) measured the benefit the FOMEX loans conferred by comparing the interest rates the ceramic tile exporters and manufacturers paid to FOMEX and the interest rate they would have paid on the commercial market.314 The Railcars case involved a buyer's credit transaction where the EDC provided credit directly to the U.S. buyer, the MTA.315 The MTA argued that since the EDC financing benefitted the MTA, the subsidy should be calculated with reference to the MTA's, and not Bombardier's, normal borrowing costs.316 This issue is important where the seller and buyer have different credit ratings, and was especially important in this case where the MTA could have raised money on the tax-exempt bond market.317 The ITA ruled, however, that Bombardier's commercial borrowing interest rate was the applicable benchmark for calculating the countervailable benefit since this rate reflected the rate that would have prevailed on equivalent financing arranged by Bombardier absent the EDC's intervention.318 Thus, these two cases have established that whether a countervailing duty case involves buyer's credits or supplier's credits, the subsidy will be calculated with reference to the borrowing costs of the exporter or manufacturer.

The Ceramic Tile case set the precedent that the United States will impose countervailing duties when governments that are not signatories to the Subsidies Code offer credits at interest rates below commercial rates to finance exports to the United States.319 These countervailing duties will be imposed without any determination of injury.320

The Railcars case established that when governments that are signatories to the

312. For the definitions of supplier's credits and buyer's credits, see supra note 1.
313. Ceramic Tile, supra note 27, at 20,014.
314. Id. at 20,014-15.
315. See Railcars Final Determination, supra note 27, at 6571.
316. Id. at 6577.
317. Tracking credit on the subway, supra note 279, at 131.
318. Railcars Final Determination, supra note 27, at 6574, 6578. In spite of this decision, the MTA's borrowing costs were relevant in the calculation of subsidy. This was due to the terms of the financing agreement under which the EDC agreed to buy MTA bonds that would pay 9.7% interest. The ITA compared this interest rate to the market rate for MTA bonds since in a hypothetical commercial financing arrangement free of government intervention, Bombardier would have been willing to buy MTA bonds at market rates because they could resell them at that rate. Id.
319. See Ceramic Tile, supra note 27.
320. Initiation of Ceramic Tile, supra note 276, at 53,731.
Subsidies Code offer export credits to finance exports to the United States at interest rates below Arrangement rates, the United States will impose countervailing duties if the ITC finds the subsidized imports are causing injury.\textsuperscript{321}

The Railcars case also established that in cases involving export credits at rates below Arrangement rates, the ITA will use commercial interest rates as the benchmark for calculating the countervailable subsidy.\textsuperscript{322} The MTA had argued that the minimum interest rates set by the Arrangement were the appropriate benchmark since, in their opinion, export credits at rates above the minimum are not a countervailable subsidy.\textsuperscript{323} The ITA dismissed this argument, holding that since the EDC financing was in derogation of the Arrangement, the second paragraph of item k did not apply.\textsuperscript{324} The ITA, however, was too quick to reject the MTA’s argument. Whether the EDC financing was in conformity with the Arrangement was relevant only in considering if the financing was a subsidy within the meaning of item k.\textsuperscript{325} The ITA correctly pointed out that even if export credits within the Arrangement are not considered a subsidy, the EDC financing is not exempted from countervailing duty action since it did not fit the item k definition of export credit “in conformity with” the Arrangement.\textsuperscript{326} Once the ITA established that the EDC financing was a subsidy, the issue then became what interest rate would serve as the benchmark from which the subsidy would be calculated.\textsuperscript{327} The MTA argued that the minimum interest rates allowable by the Arrangement should be the benchmark since, in the MTA’s opinion, credit at rates above the Arrangement minima are not considered a subsidy.\textsuperscript{328} Instead, the ITA applied the interest rate that would have prevailed in a financing agreement between Bombardier and the MTA free of Canadian government involvement.\textsuperscript{329}

This decision could lead to anomalous results in future cases.\textsuperscript{330} If the ITA later rules that item k does exempt export credits within the Arrangement from countervailing duty action, then an export credit at, for example, 12.5% would

\textsuperscript{321.} See Railcars Final Determination, supra note 27.
\textsuperscript{322.} Id. at 6574, 6578-79.
\textsuperscript{323.} Id. at 6578.
\textsuperscript{324.} Id. at 6578-79.
\textsuperscript{325.} Compare the Subsidies Code, supra note 16, Annex A, item k, with the Arrangement, supra note 20, para. 9.
\textsuperscript{326.} Railcar Final Determination, supra note 27, at 6579.
\textsuperscript{327.} Id. at 6571-72.
\textsuperscript{328.} Id. at 6578-79.
\textsuperscript{329.} Id. at 6572.
\textsuperscript{330.} The benchmark issue will not be further litigated in the Railcars case because Budd withdrew its complaint on February 9, 1983, saying that it had established the principle that fairness in the market should not be prejudiced by subsidized credit. N.Y. Times, Feb. 10, 1983, at B1, col. 8. The following day, the unions which had joined the Budd complaint also withdrew from the case after the MTA agreed to abide by federal “Buy America” standards in future railcar purchases through 1985. N.Y. Times, Feb. 11, 1983, at B1, col. 1. The “Buy America” provisions require 51% of the components of a product to be produced in the United States. Id. at B2, col. 7.
not be a subsidy, while an export credit at 12% would. According to the
Railcars decision, the subsidy of the 12% export credit would be calculated with
reference to a commercial rate benchmark, however, and not with reference to
the Arrangement minima that serve as the benchmark that exempts the credits
at 12.5%. Thus, the Railcars case would lead to two benchmarks in future
cases. Since a benchmark rate establishes the division between subsidized and
non-subsidized credits, two benchmarks would mean there are two definitions of
subsidy, a result not sanctioned by the statute. To avoid this possibility, the ITA
should have considered the item k issue, deciding whether export credits within
the Arrangement are exempt from countervailing duties. If such export credits
are found to be non-countervailable, the Arrangement minima, rather than
commercial rates, should serve as the benchmark in all export credit cases
involving Subsidies Code signatories.

In these cases, the ITA left unanswered the question of whether the Subsidies
Code has any effect on the United States definition of subsidy. The ITA has
several options for resolving this issue if it is raised in a future case. First, the
ITA could rule that the second paragraph of item k was not incorporated into
U.S. law by the Trade Agreements Act of 1979 and thus has no effect on the U.S.
definition of subsidy. Any export credits below commercial rates would then
be countervailable under the Ceramic Tile rule that, absent an effect by the
Subsidies Code on United States law, all export credits below commercial rates
are a subsidy. Although this stand on incorporation would not be unwar-
ranted, given the uncertainty as to what Congress intended to incorporate,
such a decision might be interpreted to be a rejection of the Subsidies Code.
Since the United States agreed to conform its laws to the Subsidies Code when it
became a signatory, it may damage trade relations if the ITA were to rule that
U.S. countervailing duty law is unaffected by the Subsidies Code.

If the ITA does find that the second paragraph of item k is a part of U.S. law,
it must then decide what the second paragraph means. Here again, the ITA will
be faced with two options, the U.S. and European Community interpretations,
both of which can be supported by good arguments given the ambiguities of the
Subsidies Code. The ITA should reject the European Community interpreta-
tion of the second paragraph, however, because it is contrary to the general
purposes of the Subsidies Code, which are to prohibit export subsidies and to

331. The current Arrangement minimum interest rates for credits to the United States are 12.15%
for credits of two to five years and 12.40% for credits of five to 8.5 years. Treasury News, supra note 133.
332. See Railcars Final Determination, supra note 27, 6578-79.
334. See supra notes 262-265 and accompanying text.
335. Ceramic Tile, supra note 27, at 20,014.
336. See supra notes 262-265 and accompanying text.
337. These interpretations are discussed supra in the text accompanying notes 228-243.
provide uniform rules for the countervailing of all subsidies.\textsuperscript{338} Subsidized export credits are export subsidies prohibited by the Subsidies Code, except that export credits in conformity with the Arrangement are not prohibited.\textsuperscript{339} Taking into consideration the argument of the European Community,\textsuperscript{340} it is unclear why an export subsidy that is not prohibited is considered no subsidy at all. Indeed, if the European Community interpretation were accepted, subsidized export credits in conformity with the Arrangement would be the only non-countervailable subsidy recognized by the Subsidies Code. It is more logical to accept the interpretation put forward by the U.S. negotiators of the Subsidies Code, who argue that non-prohibited subsidized export credits should be treated like non-prohibited domestic subsidies, which are countervailable.\textsuperscript{341} The ITA should adopt this interpretation of item k when the issue is appropriately raised in a future case.

\section*{VI. Conclusion}

Industrialized countries began to support export credits in the post-war years as a way to promote their capital goods exports. When the oil crisis of the 1970's intensified the competition for export markets, the industrialized countries rapidly increased their use of subsidized export credits as a way to increase exports. Like all subsidies, export credit subsidies are a form of unfair competition that cause trade distortions and economic inefficiencies. Countries have long used countervailing duties to negate the unfair advantage of subsidized imports, but the usefulness of countervailing duties is limited to the domestic market where they are imposed, so that they cannot be used to eliminate unfair competition in international markets.

GATT contains rules to limit the use of subsidies in international markets, but these have proven largely ineffective. Consequently, the OECD nations commenced discussions to limit the competition in export credits. The discussions culminated in the Arrangement on Guidelines for Officially Supported Export Credits (Arrangement), which set minimum interest rates and maximum terms for export credits. The Arrangement has not eliminated subsidized export credits and negotiations at the OECD have often been contentious, but the Arrangement has done much to limit the use of subsidized export credits. Recent changes in the Arrangement have succeeded in further restricting the use of subsidized export credits.

A year after the entry into force of the Arrangement, a sub-group of GATT signatories reached agreement on the Subsidies Code, which contains detailed rules on the use of subsidies and countervailing duties. All exports subsidies,

\begin{itemize}
\item \textsuperscript{338} See Subsidies Code, supra note 16.
\item \textsuperscript{339} Id. art. IX, Annex A, item k.
\item \textsuperscript{340} See supra notes 235-236 and accompanying text.
\item \textsuperscript{341} See supra note 231-232 and accompanying text.
\end{itemize}
including export credit subsidies, are prohibited. Item k of the annex to the Subsidies Code provides that export credit subsidies are not prohibited, however, if they are in conformity with the Arrangement. This exception is significant because many export credits that comply with the Arrangement are subsidized and are therefore potentially subject to countervailing duties. The European Community has argued that if subsidized export credits in conformity with the Arrangement are not prohibited, they are not a countervailable subsidy, because all export subsidies are prohibited. The United States has maintained that such credits are countervailable, arguing that non-prohibited subsidized export credits should be treated like non-prohibited domestic subsidies which are countervailable.

Two countervailing duty cases in the United States have dealt with this issue. In the Ceramic Tile case, the ITA established that export credits offered by Subsidies Code non-signatories at below commercial rates are countervailable. In the Railcars case, the ITA found that export credits offered by Subsidies Code signatories at below Arrangement rates are countervailable. In both cases the ITA stated that it need not decide whether subsidized export credits in conformity with the Arrangement are countervailable since that issue was not applicable to the facts.

Resolution of this issue in a future case will turn on two considerations. The ITA must first decide whether the second paragraph of item k was incorporated into U.S. law by the Trade Agreements Act of 1979. The legislative intent on this question is ambiguous, so that the ITA has discretion to rule either way. This Comment has argued that the ITA should find for incorporation since to do otherwise would indicate to our trading partners a U.S. belief that it need not conform its laws to the Subsidies Code, in spite of a specific provision to that effect in the Code. If the ITA does find all of item k incorporated into U.S. law, it must then interpret item k. This Comment has concluded that the European Community interpretation, which would define subsidized export credits in conformity with the Arrangement as a unique form of non-countervailable subsidy, is contrary to the purpose of the Subsidies Code, which is meant to control subsidies, especially export subsidies. The U.S. interpretation of item k, which would give identical treatment to subsidized export credits in conformity with the Arrangement and domestic subsidies, is the more logical approach.

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