TIED AID CREDITS AND THE NEW OECD AGREEMENT

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1. INTRODUCTION

Wealthy governments frequently "tie" their foreign aid by linking official support for developing nations to the procurement of goods and services from the donor nation.¹ Sometimes the use of tied aid is "intended to supplement the working of the market... [by enabling] trade to take place when and where it does not attract commercial financing..."² More often, aid-tying is intended to benefit national exporters. For example,

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The most recent example of a U.S. tied aid credit offer involved a $13 million sale of an air traffic control system to Tunisia. In response to stiff competition from France, the Export-Import Bank of the United States ("Eximbank") approved tied aid support that enabled Westinghouse Electric Corporation to win the Tunisian contract. The resulting Eximbank mixed credit package consisted of a 40% grant element ($5 million) and a 60% direct loan ($7.9 million). See EXPORT-IMPORT BANK OF THE UNITED STATES, REPORT TO THE CONGRESS UNDER SECTION 15(G) OF THE EXPORT-IMPORT BANK ACT OF 1945, AS AMENDED (Section 19 of the Export-Import Bank Act of 1986, Pub. L. No. 99-472) 7 (June 18, 1992); Exim Approves Mixed Credit for Sale of U.S. Goods, Services To Tunisia, 9 INT'L Trade Rep. (BNA) 1487, 1495 (Aug. 26, 1992); see also EXPORT-IMPORT BANK OF THE UNITED STATES, REPORT TO CONGRESS UNDER SECTION 15(G) OF THE EXPORT-IMPORT BANK ACT OF 1945, AS AMENDED 12 (Apr. 26, 1993) [hereinafter 1993 EXPORT-IMPORT BANK REPORT].

² John E. Ray, COMMERCIAL VIABILITY IN THE HELSINKI PACKAGE, SECRETARIAT OF THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT 2 (Dec. 18, 1991). For example, a developing nation may be unable to obtain project financing either because the project is unattractive to commercial lenders or because a market imperfection exists. Id.
by tying its aid, the donor nation may help a domestic exporter win a contract from a developing nation that would otherwise go to a foreign competitor. Such practices, however, interfere with the normal functioning of the market.

Often, major industrialized nations attempt to design foreign aid packages to benefit the recipient nations while stimulating their own economies, a practice which causes market imperfections. The United States, however, has traditionally focused most of its foreign assistance on helping developing nations meet basic human needs. As a result, U.S. businesses have lost global market share not because their goods are of lower quality or are overpriced, but because foreign businesses benefit from their governments’ export promotion policies. As a practical matter, commercially-motivated tied aid practices by other industrialized nations shut U.S. exporters out of a $10 to $12 billion market in capital goods transactions, leading to an annual loss in U.S. exports of $2.4 to $4.8 billion.

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3 Export-Import Bank Report to Congress On Tied Aid Credit Practices: Hearing Before the Subcomm. on Int’l Economic Policy and Trade of the House Comm. on Foreign Affairs, 101st Cong., 1st Sess. 1 (1989) [hereinafter 1989 Eximbank Hearing] (statement of Rep. Sam Gejdenson, Chairman). For example, in 1986, an American company lost an $8 million contract to install a cellular communications system in China to a Swedish company because the Swedish government offered a substantial amount of grant assistance linked to its company receiving the contract. The $8 million initial contract had an estimated $80 million of follow-on business through 1995, reflecting an even greater loss for the U.S. company. Id.

4 See Ray, supra note 2, at 2. Ray discusses the concept of “additionality,” which suggests that government supported funds (i.e., non-commercial financing) should be in addition to commercial financing. “To minimize trade distortion, non-commercial financing should increase flows of resources,” not replace commercial financing. Id. (emphasis in original). See also Int’l Financing, supra note 1, at 35.


6 ERNEST H. PREEG, CENTER FOR STRATEGIC AND INT’L STUDIES, THE TIED AID CREDIT ISSUE: U.S. EXPORT COMPETITIVENESS IN DEVELOPING COUNTRIES 6 (1989) [hereinafter PREEG CSIS STUDY]. This study of tied aid credits was undertaken after Eximbank reported to Congress on the issue in 1989. Ambassador Preeg criticized the Eximbank report for its gross underestimation of the damage that other nations’ use of tied aid credits does to the U.S. economy. Eximbank had reported that U.S. exporters are shut out of a $4 to $6 billion market in capital goods, resulting in an annual sales loss of $400 to $800 million. 1989 Eximbank Hearing, supra note 3, at 14-15 (statement of William F. Ryan, Acting President and Chairman, Export-Import Bank of the United States). Preeg’s figures have generally been accepted in lieu
Members of both Congress and the business community have strongly urged the U.S. government to utilize tied aid credit practices and to increase general support for capital projects financing. In both of these areas, the United States has lagged far behind other industrialized nations.\(^7\) Such a policy would enable U.S. exporters to regain lost global market share, which in turn would strengthen the U.S. domestic economy by creating more jobs in the United States.\(^8\) Moreover, as economic strength supersedes military strength as a key indicator of a nation's international status, this policy would ensure that the United States maintains its leadership role in international affairs.

This Comment examines the practice of aid-tying, the history of U.S. tied aid policy, the current international agreement covering tied aid credit practices, and congressional and domestic business dissatisfaction with current U.S. policy. Section 2 of this Comment describes the aid-tying process and explores the problems created by the use of tied aid credits and mixed credits.\(^9\) Section 3 reviews the history of the U.S. government's efforts to reduce the use of tied aid credits through negotiations within the Organization for Economic Cooperation and Development of Eximbank's conclusions.

Congress sharply criticized the 1989 Eximbank Report for its failure to make recommendations. \textit{Id.} at 19. The Bush Administration subsequently offered suggestions in a letter to the Speaker of the House and the President of the Senate. Letter from Nicholas F. Brady, Secretary of the Treasury, and John D. Macomber, President and Chairman of Eximbank, to Thomas S. Foley, Speaker of the House of Representatives (Sept. 11, 1989), \textit{reprinted in PREEG CSIS STUDY, supra}, at Appendix B.

\(^7\) Capital projects financing is particularly susceptible to tied aid credit practices. Moreover, capital projects financing is attractive to donor nation governments because it enables them to expand exports, to penetrate markets, to establish standards that induce follow-on exports, and to support domestic industrial policy goals. \textit{See INT'L FINANCING, supra} note 1, at 36. The 1989 Eximbank report estimated that the 83% of Organization for Economic Cooperation and Development notifications of tied aid credit offers were in the five major capital infrastructure sectors of computer equipment, earthmoving equipment, electric power generating equipment, rail transportation equipment, and telecommunications. \textit{1989 Eximbank Hearing, supra} note 3, at 10 (statement of William F. Ryan).

In 1988, the United States spent 14.3% of its bilateral aid on capital projects. By contrast, France spent 27.7%; Germany, 46%; Japan, 60.7%; the United Kingdom, 41.8%; Canada, 30.2%; and Italy, 61.2%. \textit{INT'L FINANCING, supra} note 1, at 38.

\(^8\) \textit{See infra} note 35.

\(^9\) This Comment will use the terms "tied aid credits" and "mixed credits" interchangeably.
Section 3 also includes with an explanation of the Helsinki Package, which is the most recent OECD agreement covering tied aid credits, and the general Bush and Clinton Administration reactions to the Helsinki Package. Section 4 surveys Congressional responses, particularly legislative initiatives, to the problems created by tied aid and to the possibility of expanded U.S. participation in the international capital projects market. Section 5 examines the positions of the U.S. business community on tied aid credits and on the Helsinki Package. This Comment then concludes that the U.S. government should bring its foreign aid policy more in line with the aid policies of other industrialized nations either through the aggressive use of tied aid credits or through increased funding for capital projects which result in substantial domestic economic benefit.

2. TIED AID CREDITS AND MIXED CREDITS PRACTICES

2.1. Defining Tied Aid, Tied Aid Credits, And Mixed Credits

"Tied aid credits" and "mixed credits" are elusive terms that are often used interchangeably. Both are forms of "tied aid," a broad term that encompasses the provision of foreign assistance to a developing country on concessional terms tied to the procurement of goods or services from the donor country. Tied aid financing may be provided on a grant basis or as a "mixed credit." Mixed credits produce below-market interest rates by combining government grants, concessional government loans,

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10 Twenty-four nations, including the United States and other G-7 countries, are represented at the OECD, which was created after World War II to foster post-war economic recovery. Comprised of the world's wealthier countries, the organization has more recently coordinated the economic policy of industrialized nations vis-a-vis developing nations. Telephone Interview with Robert Y. Lee, Director, Office of Finance, Trade Development, and Int'l Trade Administration, U.S. Dep't of Commerce (Feb. 2, 1993).

11 Tied aid is defined by the Development Assistance Committee of the OECD as "aid funds required to be spent on imports mainly from the donor country or a few countries. Untied aid is available for procurement from essentially any source. Partially untied aid is available to finance imports from donor and substantially all developing countries." INT'L FINANCING, supra note 1, at 31. In principle, when a donor's aid is untied, exporters from other industrialized nations can access the aid funds. When aid is fully or partially tied, rival exporters' access is restricted. Id.
and commercial loans.12 "Tied aid credits" are mixed credits that are linked to the procurement of goods or services from the donor country.13

2.2. Commercially-Motivated Tied Aid

Unlike the United States, many industrialized nations use mixed credits and tied aid credits to promote capital goods exports.14 Through these credits, which often appear in the form of export subsidies, governments provide official assistance to their exporters, giving the exporters considerable advantage over foreign competitors. In effect, donor nations use their foreign assistance programs to influence procurement decisions by developing nations in favor of the donor's exporters.15 As a

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12 The grant element is the portion of the tied aid package which, in effect, does not have to be repaid and carries no interest. The grant element can appear either as an outright disbursement of funds that on its face carries no repayment requirements or as a significantly below-market rate loan. The latter type of "grant elements are determined by the present discounted value of future repayments of an aid loan against a hypothetical loan at market rates, expressed as a percentage (for instance, an aid loan with . . . 70% of grant aid and 30% of market loan)." Dean C. Alexander, The Export-Import Bank of the United States' Battle Against Subsidized Export Credits, 9 DICK. J. INT'L. L. 267, 273 (1991).

A simple way to think about it follows: if Government A offers a package of goods for sale for $10 million, consisting of $3 million in grant funds and $7 million in commercial loans, and Government B offers a $10 million package of similar goods financed solely by commercial loans, the donee will choose Government A's package. Since grant funds do not have to be repaid, the recipient nation owes Government A $7 million (plus interest), whereas it would owe Government B $10 million (plus interest). See id. at 272.


14 "Concessional funds are sometimes provided in the form of a general line of credit or a line which may be used for a group of projects. The donor nation, however, often requires that export credit funds and concessional funds be blended together in a predetermined ratio, or that the mixed credit is offered for one specific project." John A. Bohn, Jr., Eximbank's Role in International Banking and Finance: Loans, Reschedulings, and Development, 20 INT'L. L. 829, 834 (1986).

The main providers of tied aid credits are the other G-7 nations: Japan, Canada, France, Germany, the United Kingdom, and Italy. See infra Section 2.2.2.

15 See, e.g., supra note 3. In 1991, a $600 million low-interest loan by the Japanese government enabled a Japanese company to win an $850 million contract to build an electric power generating station in India. Steve Coll, Japan's Hands On Foreign Aid, WASH. POST, Jan. 13, 1991, at H1, reprinted
result, U.S. exporters lose between $2.4 and $4.8 billion annually.\textsuperscript{16}

The use of tied aid credits has created "spoiled markets." These markets include many Asian countries such as Indonesia, India, Thailand, China, and the Philippines.\textsuperscript{17} The governments of these countries expect to receive offers of tied aid credits, and they play one donor country off of another in order to receive the most lenient credit terms.\textsuperscript{18}

Mixed credit practices have also spoiled certain sectors of the recipient nations' economies, particularly capital infrastructure industries such as telecommunications, power, transportation, and construction equipment.\textsuperscript{19} Like spoiled markets, spoiled sectors predominantly receive trade-distorting tied aid offers instead of conventional commercial financing.\textsuperscript{20}

\textbf{2.2.1. U.S. Tied Aid Policy}

For the past twenty years, the United States has condemned the use of tied aid for commercial purposes.\textsuperscript{21} Such aid distorts both market forces\textsuperscript{22} and development assistance activities.\textsuperscript{23} It gives domestic exporters an unfair advantage and draws limited development assistance funds away from humanitarian efforts and towards capital projects.\textsuperscript{24}

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\textsuperscript{16} See supra note 6 and accompanying text.

\textsuperscript{17} Spoiled markets are so heavily blanketed with tied aid credit offers that exporters must have concessional financing support to enter these markets. INT'L FINANCING, supra note 1, at 40.

\textsuperscript{18} For example, while the current international agreement requires at least a 35% grant element, Indonesia is so flooded with tied aid credit offers that it can command a 40% grant element. 1989 \textit{Eximbank Hearing}, supra note 3, at 22-23.


\textsuperscript{20} Id. at 7.

\textsuperscript{21} S. REP. NO. 320, supra note 13, at 4. However, the United States ties a substantial amount of agricultural and military assistance to the procurement of U.S. goods. Id.

\textsuperscript{22} Senate Banking Hearing, supra note 1, at 53 (statement of William F. Barreda).

\textsuperscript{23} S. REP. NO. 320, supra note 13, at 4.

\textsuperscript{24} The Commerce Department explains that: .
The U.S. government draws a sharper line between export credits and development assistance than most industrialized nations. The Agency for International Development ("AID")\textsuperscript{25} reserves most development assistance funds to help under-developed countries meet basic human needs.\textsuperscript{26} This strategy has been part of AID's mandate since 1973. Commercial projects should be financed on commercial credit terms, which fall under the purview of the Export-Import Bank ("Eximbank").\textsuperscript{27}

Aid-tying is not an ideal practice. In principle, aid that is untied is more efficient because the recipient is allowed to import from the most suitable and cost-effective suppliers. Experience also suggests that tied aid can lead to inefficient and wasteful procurement practices, sometimes with relatively low development impact. Biases can be created favoring aid-giving for those economic sectors absorbing capital equipment and for relatively more industrialized developing countries, to the detriment of others.

\textit{INT'L FINANCING, supra} note 1, at 31.

\textsuperscript{25} AID is the principle U.S. government agency implementing the U.S. foreign development assistance program.

\textsuperscript{26} See Bohn, \textit{supra} note 14, at 834. In 1973, Congress shifted AID's focus to humanitarian aid, leaving large-scale capital infrastructure projects to multilateral development banks. Development assistance was directed to help meet basic human needs through rural, small-scale projects involving agricultural production, health, education, and nutrition. Where commercial interests were implicated, U.S. aid was designed to help develop compatible industries in developing countries instead of using the countries as markets for U.S. goods. James K. Jackson, \textit{Tied Aid Credits}, CRS ISSUE BRIEF, Oct. 21, 1991, at 3-4.

U.S. bilateral economic aid has three main components: project funding, mostly for basic human needs; cash transfers; and food aid. Ernest H. Preeg, \textit{The Aid for Trade Debate}, 16 WASH. Q. 99-100 (1993) [hereinafter \textit{Aid for Trade Debate}]. Preeg and others have also criticized the U.S. cash transfer program because transfers usually cannot be tied to the procurement of U.S. goods. \textit{Id.} at 100.

\textsuperscript{27} See Bohn, \textit{supra} note 14, at 834. Bohn's article describes the three major functions of Eximbank:

1. [T]o provide guarantees and export credit insurance so that exporters and their bankers will provide credit to foreign buyers;
2. to neutralize financing as a factor by offering loans direct to foreign buyers and loans to U.S. banks with interest rates and repayment terms which are competitive with other countries' export credit agencies; and
3. to participate in negotiations with other countries which are designed to reduce the level of subsidy in export credits.

\textit{Id.} at 829 (citation omitted). The author is the first Vice President and Vice Chairman of the Export-Import Bank of the United States.
2.2.2. The Position Of Other Major Industrialized Countries

The aid policies of Japan, Canada, the United Kingdom, Italy, France, and Germany, in contrast to U.S. policy, reflect an acknowledgement of the domestic political appeal of tied aid.\(^28\) Thus, these countries resort to tied aid more frequently than the United States. Two rationales support this behavior: (1) aid-tying builds political support from domestic businesses for higher foreign aid budgets; and (2) "defensive or compensatory" aid-tying is necessary to remain competitive with the exporters of nations that already tie their aid for commercial reasons.\(^29\) The widespread use of tied aid credits reflects a foreign assistance policy oriented towards capital projects,\(^30\) which yield substantially higher domestic economic returns than the U.S. foreign aid program.\(^31\)

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\(^{28}\) See 1989 Eximbank Hearing, supra note 3, at 13 (statement of William F. Ryan). However, not all OECD nations share the same attitude about tied aid credits. Some countries, like Canada and the United Kingdom, consider the practice a necessary evil that is expensive for their taxpayers. Id. at 42. On the other hand, the Japanese government has been heavily criticized for its business orientation. Japan provides large amounts of pre-project funding for feasibility studies. "At the pre-project feasibility stage, Japanese engineering and supplier companies are already engaged with the host country's implementing agencies . . . ." Aid for Trade Debate, supra note 26, at 100. These feasibility studies enable the Japanese companies to propose projects specifically designed for their areas of expertise. A relationship of trust develops between the Japanese company and the developing nation's government, and often the result is that the government selects the Japanese engineers. Although the Japanese have gone further than other nations in untying the procurement for many projects by making it subject to competitive bidding, this untying is largely technical, since the engineering portion is tied \textit{de facto} through the feasibility studies. \textit{Id.} at 101; see also Coll, supra note 15, at H1.

\(^{29}\) INT'L FINANCING, supra note 1, at 31.

\(^{30}\) For example, in 1988, the United States committed 14.3% of its bilateral aid to economic infrastructure and production, in sharp contrast to the other OECD nations during the same year. Italy committed 61.2%; Japan, 60.7%; Germany, 46%; the United Kingdom, 41.8%; Canada, 30.2%; and France, 27.7%. \textit{Id.} at 38.

\(^{31}\) The United States commits almost 75% of its foreign assistance to humanitarian goals and budget support. \textit{Id.} at 37. However, the advent of the Helsinki Package, discussed \textit{infra} at Section 3.2, appears to have coincided with a heightened awareness within the United States of the importance of capital projects assistance within a foreign aid program.
2.3. The Pros And Cons Of U.S. Engagement In Tied Aid Credit Practices

Some analysts argue that a more aggressive U.S. tied aid program is necessary because other governments’ use of aid tying causes significantly more damage to the U.S. economy than originally thought. The use of tied aid credits is much more pervasive than the 1989 report by Eximbank suggested. U.S. exporters are not only shut out of a $10 to $12 billion market in capital goods transactions, but also consequently lose millions of dollars in follow-on sales generated by the need for replacements, spare parts, and maintenance. Other supporters of tied aid credits argue that in the post-Cold War era, economic might, not military prowess, is necessary for the United States to maintain its status as a leader in international affairs. The use of tied aid credits for capital infrastructure projects will translate into higher U.S. exports, resulting in more jobs at home and a stronger domestic economy. Many members of both Congress and the business community argue that efforts to negotiate a reduction in the practice have failed. Only if the United States uses tied aid credits more aggressively will other countries be willing to change. Finally, since other countries have been reluctant to curb their use of tied aid credits, the United States must engage in mixed credit financing merely to remain competitive.

Opponents of tied aid credits and other export promotion subsidies argue that no conclusive evidence exists that such practices in fact promote exports. They argue that such subsidies would only alter the composition of U.S. exports, favoring

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32 See supra note 6.

33 Servicing and spare parts purchases can amount, annually, to 10-15% of the original project price. NATIONAL ASSOCIATION OF MANUFACTURERS, A KEY TO U.S. EXPORT SUCCESS 4 (rev. ed. May 11, 1992) [hereinafter NAM REPORT].

34 See infra Section 4.


36 See infra Sections 4 and 5.
subsidized goods while imposing significant costs on the taxpayer and on unsubsidized industries. The United States would merely be adding to the negative effects of tied aid credits. Mixed credit financing distorts world trade, producing inefficient capital markets and inefficient use of resources.

Other government officials argue that foreign aid must be used for humanitarian purposes, strategic and national security objectives, rather than for self-interested commercial reasons. The former objectives enhance American political influence abroad, while the latter arguably do not. Budget constraints would force a larger tied aid credit program to divert funds from current foreign assistance programs. This might enhance U.S. commercial interests, but at the cost of diminished U.S. political influence abroad.

3. THE HISTORY OF NEGOTIATIONS WITHIN THE OECD

Instead of joining in the mixed credit practices of other countries, the United States has attempted to negotiate a reduction in the use of tied aid credits. Most of these negotiations have been conducted within the framework of the OECD.

3.1. Negotiations In The 1970's And 1980's

International negotiations over export credits began in the 1970's in response to fears that the world oil crisis would provoke

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38 1989 Eximbank Hearing, supra note 3, at 15 (statement of William F. Ryan). Although Eximbank did not formally make recommendations in the 1989 report, Ryan's testimony nonetheless suggests that the agency opposed the use of tied aid credits at that time.

39 Id. at 16.

40 Aid For Trade Debate, supra note 26, at 104.

41 For a synopsis of the arguments for and against tied aid as well as a general discussion of export promotion and American foreign policy, see Curt Tarnoff & Larry Nowels, The Aid for Trade Debate, 3 POLICY FOCUS (Overseas Development Council, Washington, D.C.), at 2, 6-7 (1993) [hereinafter ODC PAPER]. This article is part of a series published by the Overseas Development Council, a non-profit organization, on major U.S.-Third World development issues.


43 For a thorough history of OECD export credit negotiations, see Moravcsik, supra note 5, at 176-90; see also INT'L FINANCING, supra note 1, at 53-58.
an export credit war. After the first oil price shock, various informal agreements within the International Monetary Fund ("IMF"), OECD, and G-5 summit meetings were reached among major industrialized nations to regulate export subsidies. In 1976, "the seven summit countries of the [OECD] reached a secret, non-binding . . . 'Consensus,' or 'Gentlemen's Agreement,'" to limit excessive export credit competition. In 1978, the members formalized and extended the Consensus in the "Arrangement on Guidelines for Officially Supported Export Credits." This Arrangement stabilized international competition, but countries still managed to circumvent it through the use of tied aid credits, which the Arrangement and previous informal agreements had ignored.

In the early 1980's, the use of tied aid credits began to attract attention. A fundamental restructuring of the Arrangement in 1983 banned tied aid credits having grant components of less than 20%. The 1983 agreement also required "greater discipline and transparency in the use of tied-aid credit" and eliminated most conventional export credit subsidies. That same year, Congress authorized AID and Eximbank to engage jointly in tied aid financing in an effort to U.S. businesses secure

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44 Moravcsik, supra note 5, at 180.
45 Id. at 180-81; See INT'L FINANCING, supra note 1, at 54.
46 Moravcsik, supra note 5, at 181. The Arrangement's current 22 members are known as the "Participants," an informal group affiliated with the OECD. See supra note 43; see also infra note 66. The Participants meet regularly to discuss and modify the Arrangement. INT'L FINANCING, supra note 1, at 54.

For a comparison of the agreements and Arrangements from 1969-1987, see Moravcsik, supra note 5, at Table 1.
47 France pioneered the practice of mixed credits in the 1970's, with the Japanese and British following suit. Moravcsik, supra note 5, at 181-82. France was roundly criticized for flouting the Consensus through its use of tied aid credits. The High Cost of Export Credit, THE ECONOMIST, Feb. 14, 1981, at 92 (U.S. ed. at 78).
48 INT'L FINANCING, supra note 1, at 54-55.
50 Moravcsik, supra note 5, at 186.
51 Tied aid and mixed credits differ from conventional export subsidies insofar as the former combine conventional export credits with concessional aid. INT'L FINANCING, supra note 1, at 54.
contracts. 52

The Reagan Administration preferred to deal with the problem of tied aid credits through negotiations, instead of engaging in the practice itself. 53 Throughout the 1980's, both the Reagan and Bush Administrations worked within the OECD framework to raise the cost of mixed credit practices by increasing the required grant element. By raising the cost to the donor nation, the United States hoped to decrease the use of commercially-motivated tied aid. 54

Contrary to the Administration's preference for negotiation, Congress repeatedly argued that other nations would respond only if the United States extended tied aid credits aggressively enough to defeat foreign competition. 55 Under pressure from Congress, the Reagan Administration announced in 1985 its intention to establish a $300 million Tied Aid Credit Fund, also known as the "War Chest," within Eximbank. 56 The War Chest was intended to provide leverage for the U.S. delegation to the OECD negotiations on tied aid credit practices. 57 Eximbank used the War Chest offensively against countries whose practices obstructed the negotiations process. 58

52 Id. at 57 (AID would provide the grant element, and Eximbank would provide the export credit).

53 But see Gentlemen, Please, THE ECONOMIST, Sept. 8, 1984, at 16 (U.S. ed. at 16) (describing Eximbank's threat to pull out of the Gentlemen's Agreement if the guidelines were not followed more closely). See also Aid and Trade: Mixing It Up, THE ECONOMIST, Dec. 1, 1984, at 45 (U.S. ed. at 27) (observing that at the then upcoming OECD negotiations, the United States would try to raise the grant element for mixed credits from the 20% to 50% so that "the aid ought to be such a big chunk of a mixed credit that exporting countries which want a plain commercial deal in disguise ought not to bother with the device at all").

54 Aid and Trade: Mixing It Up, supra note 53.

55 See infra Section 4.


57 INT'L FINANCING, supra note 1, at 57. See S. REP. No. 320, supra note 13, at 4 ("In the words of the statute, the War Chest was established 'For the purpose of facilitating the negotiation of a comprehensive international agreement restricting the use of tied aid and partially untied aid credits for commercial purposes ... .' ").

58 Moravcsik, supra note 5, at 187 (citation omitted); see INT'L FINANCING, https://scholarship.law.upenn.edu/jil/vol14/iss3/5
In 1987, the Participants modified the Arrangement by raising the minimum grant component of mixed credits from 25% to 35%. The minimum concessionality level for the least developed countries was raised to 50%. After the conclusion of this new agreement, the Administration restricted the use of the War Chest to the policing of the Arrangement, instead of using it as a negotiating lever.

Contrary to U.S. expectations, the 1987 Arrangement did not deter mixed credit practices. Consequently, in 1989, Congress directed Eximbank to use the War Chest aggressively both to police the agreement and to facilitate negotiations to restrict tied aid practices further. The reauthorization of the War Chest in 1989, combined with congressional pressure, helped prompt the Administration to begin a new round of OECD negotiations.

In September 1989, the Bush Administration announced a policy change: it would vigorously pursue negotiations aimed at reducing tied aid credit practices. The Administration shifted the use of the War Chest from policing activities back to leveraging support for new negotiations. To this end, it

**supra** note 1, at 57 (“Eximbank also began to initiate its own concessional financing offers, as distinct from the earlier purely defensive posture of matching offers initiated by others.”).

60 For an overview of the effects of the 1987 Arrangement, see Export Credits: Mixed Bag, THE ECONOMIST, Mar. 21, 1987, at 75 (U.S. ed. at 75).

61 S. REP. No. 320, supra note 13, at 4. Consequently, Eximbank used $78 million of its $100 million War Chest appropriation in fiscal year 1987 ("FY87"), and only $7.6 million of its $110 million FY88 appropriation. In FY89, Eximbank did not use the War Chest. Id. at 4-5.

62 Id. at 5. The Administration did not, however, seek to establish a separate tied aid credit program. INT'L FINANCING, supra note 1, at 57.


64 S. REP. No. 320, supra note 13, at 5. As a result of the shift in Administration policy, use of the War Chest rose from zero in FY89 to $53.3 million in FY90 to $145 million in FY91. Id. FY91 appropriations were $150 million. 1991 EXPORT-IMPORT BANK REPORT, supra note 19, at 7. Thus, almost all of the FY91 War Chest funds were expended. Id.

U.S. negotiators at the OECD focused their efforts on eliminating "the most important tied aid trade distortions, which center on telecommunications, transportation, and communications equipment, and eliminat[ing] tied aid..."
targeted War Chest funds primarily at spoiled sectors and markets. In May 1990, AID and Eximbank created a joint $500 million pool of funds for capital goods financing to target the spoiled markets of Indonesia, the Philippines, Thailand, and Pakistan. Also in 1990, the Administration proposed to OECD members to keep Central and Eastern Europe "tied aid free."

3.2. The New OECD Arrangement: The Helsinki Package

The pressure for negotiations finally culminated in an agreement that entered into force on February 15, 1992. The latest Arrangement is commonly known as the Helsinki Package.

3.2.1. General Terms Of The New Agreement

Effective February 15, 1992:

1. Tied aid credits to higher income countries (countries whose 1990 per capita income exceeded $2,465) are barred.
2. Tied aid credits to lower income countries ("LLDC's") extended for both public and private projects must have a minimum concessionality level of 50%.
3. Tied aid credits to middle income countries are

in countries that can clearly afford not to be subsidized." Eximbank Holds Meetings with Kuwaitis on U.S. Support for Post-War Project, 8 Int'l Trade Rep. (BNA) 299 (Feb. 27, 1991).

" TREASURY, supra note 62, at 4.

" Senate Banking Hearing, supra note 1, at 58. At the Houston Summit in July 1990, leaders of the major industrialized nations reaffirmed their commitment to try to keep Central and Eastern Europe free of tied aid. Secretary of State James Baker noted the importance of keeping the region free of tied aid credits in remarks before a session of the Council of Ministers' meeting of the Conference on Security and Cooperation in Europe on June 19, 1991. Economic Transition in Central and Eastern Europe, 1991 U.S. Dep't of State Dispatch (July 1, 1991). The OECD Ministers agreed to "try to avoid Tied Aid credits other than outright grants, food aid and humanitarian aid into Central and Eastern Europe." Senate Banking Hearing, supra note 1, at 58 (statement of William E. Barreda).

" The United States initiated parallel efforts within the Export Credit Arrangement forum (sometimes referred to as the Export Credit Group, or "ECG") and the Development Assistance Committee ("DAC"), both of which are formal organs of the OECD. Senate Banking Hearing, supra note 1, at 55 (statement of William E. Barreda). The Participants are an informal group whose members sometimes meet formally as the ECG to discuss tied aid credits. Telephone interview with Robert Y. Lee, supra note 10. See also supra note 46.

https://scholarship.law.upenn.edu/jil/vol14/iss3/5
prohibited unless the project (a) is not financially viable or (b) would be financially viable but cannot be financed on Arrangement or on market terms. Such tied aid credits must have a minimum concessionality level of 35%.67

Instead of raising the concessionality level of tied aid credits,68 the Helsinki Package focuses on the concept of financial viability. A project is financially viable if “with appropriate pricing determined on market principles . . . [the project can] generate cash flow sufficient to cover the project’s operating costs and to service the capital employed.”69 By concentrating official development assistance on projects that are not financially viable, the total flow of resources to developing countries—including commercial credits, officially supported export credits, and official development aid—will increase.70

The Arrangement also institutes a comprehensive reporting and consultations process in order to enforce the rules and to increase the transparency of tied aid credit offers. Upon the requisite notification of an intended tied aid credit offer, any

67 Aid credits refer to tied or partially untied aid credits over SDR 2 million with concessionality of less than 80%, but do not refer to untied aid credits. OECD, ARRANGEMENTS ON GUIDELINES FOR OFFICIALLY SUPPORTED EXPORT CREDITS 8, OCDE/GD(92)95, Paris, 1992 [hereinafter ARRANGEMENT]. The SDR is “the IMF Special Drawing Right weighted average of the interest rates . . . [based on] the U.S. dollar, Deutsche mark, Japanese yen, French franc and pound Sterling.” Id. at 25. The new Arrangement makes tied aid credits for commercially viable projects extremely costly by requiring an 80% grant element.

68 Another suggestion considered by the Participants was limiting the use of tied aid credits in spoiled markets and sectors. Ray, supra note 2, at 8.

69 ARRANGEMENT, supra note 67, at 9. Government aid funds are truly “additional,” see supra note 4, if they are designed for worthwhile aid projects that nonetheless lack the ability to “generate sufficient financial returns to make them attractive enough to call forth commercial financing and do not attract officially supported export credits.” Ray, supra note 2, at 9. This “is an attempt to replicate the efficient financing patterns of market economies.” Senate Banking Hearing, supra note 1, at 55 (statement of William E. Barreda).

In May 1991, the chairmen of both the Participants and the OECD's Development Assistance Committee expressed the following view: “OECD Members' export credit [and] tied aid policies should be complementary: those for export credits should be based on open competition and the free play of market forces; those for tied aid credits should provide needed external resources to countries, sectors, or projects with little or no access to market financing; ensure best value for money; minimize trade distortion; and contribute to developmentally effective use of these resources.” Ray, supra note 2, at 1.
Participant may challenge the project and request face-to-face consultations on possible trade motivations for the tied or partially untied aid credits.\textsuperscript{71} If there is not "substantial support" among the Participants for the use of tied aid credit in the project, the country offering the credit will be asked not to proceed. Over time, the consultations process will develop a body of "case law" defining financial viability.\textsuperscript{72}

While the current rules do not apply to Central and Eastern Europe, the Helsinki Package reaffirms the Participants' agreement, reached in June 1991, "to try to avoid . . . credits other than outright grants, food aid and humanitarian aid" in that region.\textsuperscript{73}

Additionally, several explicit exceptions to the new rules exist. First, if a country's offer of a tied aid credit does not receive "substantial support" in face-to-face consultations, the country may nonetheless proceed with the offer by notifying the Secretary General of the OECD that overriding non-trade related national interest has forced the action.\textsuperscript{74}

Another major exception to the new guidelines are the transition rules. These rules "grandfather" aid offers and credit lines committed prior to the entry into force of the agreement on February 15, 1992.\textsuperscript{75} In general, credit lines committed prior to February 15, 1992, are grandfathered for two years.\textsuperscript{76}

\begin{footnotesize}
\begin{enumerate}
\item ARRANGEMENT, supra note 67, at 13.
\item Hearing Before the Subcomm. on Int'l Economic Policy and Trade of the House Comm. on Foreign Affairs, 102d Cong., 1st Sess. 11-12 (1991) [hereinafter House Foreign Affairs Hearing] (statement of W.L. McCamey, Director, Office of Trade Fin., Dep't of Treasury); see also ARRANGEMENT, supra note 67, at 9.
\item ARRANGEMENT, supra note 67, at 26 n.7.
\item Id. at 13. However, "[t]he Participants expect that such an occurrence will be unusual and infrequent." Id. (emphasis omitted).
\item The February 15, 1992 deadline prompted a surge of tied aid credit notifications prior to February 15. During the first six weeks of 1992, 286 transactions were notified. 1993 EXPORT-IMPORT BANK REPORT, supra note 1, at 6. The Treasury Department explained that the "surge of such notifications . . . essentially represents an acceleration of notifications that would have been notified in any event." Senate Banking Hearing, supra note 1, at 56 (statement of William E. Barreda).
\item Credit lines to Mexico are grandfathered for one year, until December 31, 1992. 1993 EXPORT-IMPORT BANK REPORT, supra note 1, at 6.
\end{enumerate}
\end{footnotesize}
However, tied aid credit offers for individual projects under these credit lines operate under the old rules only through August 15, 1992. After the six-month grace period, tied aid credits under grandfathered credit lines may not be used to finance "commercially viable" individual projects. While the United States would have preferred less grandfathering, it understood that negotiations would have been impossible if the Arrangement did not recognize the "pipeline problem"; many aid agencies had already expended considerable funds on projects that would not conform to the new rules.

3.2.2. Preliminary Results Of The New Agreement

While there is a sense that the jury is still out on the effectiveness of the Helsinki Package, Eximbank's April 1993 semi-annual report to Congress for the first time presents data on the functioning of the new Arrangement. This data suggests that a body of case law has been developing on the definition of commercial viability. Since the Arrangement has come into effect, there have been 41 formal consultations. Of the 36 that have been completed, 13 tied aid projects were deemed "not commercially viable" and consequently could continue. Sixteen challenged tied aid projects were deemed "commercially viable." In seven of these, the governments proceeded through the derogation clause of the Arrangement by notifying the Secretary General that overriding non-trade related national interests permitted them to offer the credit. Eximbank noted that "[t]he U.S. expected derogations to be concentrated in the early stages of the implementation of the new rules... because the new tied

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77 Through December 31, 1992, tied aid credits offered to Mexico are governed by the old rules. Id.
78 Id.
79 1993 EXPORT-IMPORT BANK REPORT, supra note 1. This data is based on OECD figures which "are not precise." Id. at 5 n.2. In 1992, Congressmen Douglas Bereuter and Sam Gejdenson directed the General Accounting Office to report on what they expect to be the unreliability of the OECD data. The Report should be available by the end of 1993.
80 Id. at 6.
81 Id. at 7.
82 Id. Only one of these derogations involved a project in which a U.S. exporter wanted to compete. Eximbank offered to match the foreign tied aid offer, which involved a high-technology telecommunications project in Indonesia. Id. at 8.
aid credit rules represent a sharp break from the past." However, "the U.S. is signalling its intention that the current pace of derogations should not continue beyond the early implementation phase of the agreement." With regard to the tied aid free zone proposed for Central and Eastern Europe, the report states that in 1992, there were no notifications of tied aid for those countries.

The newly independent states of the former Soviet Union were initially classified as higher income countries under the Arrangement and were thus ineligible for tied aid. World Bank data for 1991, however, suggests that all but the five richest former Soviet republics would be eligible for tied aid. Nonetheless, the Participants agreed in March 1993 to wait another year before reclassifying these states.

3.2.3. Bush Administration Reaction To The New Arrangement

The Bush Administration welcomed the long-awaited Helsinki Package. Eximbank announced that "[the OECD] agreement is a major step forward in the long battle against trade-distorting use of aid. However, the jury is still out, and we will need to very closely monitor it." The President of Eximbank pointed out that U.S. companies would no longer have to bear an estimated annual loss of $4 to $6 billion as a result of subsidized financing by other industrialized countries. A senior Treasury Department official has stated:

[The administration] believes this agreement will significantly reduce the disadvantages faced by U.S. exporters who have had to compete against foreign firms with access to concessional financing. It will not eliminate trade-distorting aid practices, but it is our hope that it will permit U.S. business to compete more effectively by returning the emphasis of competition to price, quality

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83 1993 EXPORT-IMPORT BANK REPORT, supra note 1, at 8.
84 Id.
85 See supra note 73 and accompanying text.
86 1993 EXPORT-IMPORT BANK REPORT, supra note 1, at 9, 17.
87 U.S. to Use 'War Chest' to Police Compliance with OECD Tied Aid Pact, 9 Int'l Trade Rep. (BNA) 880 (Jan. 1, 1992).
https://scholarship.law.upenn.edu/jil/vol14/iss3/5
and service rather than financing subsidies.\textsuperscript{89} In response to the agreement, the Bush Administration shifted its War Chest policy from one of encouraging negotiations to monitoring compliance with the agreement.\textsuperscript{90} The Administration also announced its intention to work closely with Eximbank, AID, other interested agencies, and the U.S. business community to insure the aggressive implementation of the agreement.\textsuperscript{91} However, both the business community and Congress expressed skepticism over the Helsinki Package.

\textbf{3.2.4. Initial Clinton Administration Tied Aid Policy}

The Clinton Administration has made no significant operational changes in the U.S. tied aid credit policy developed by the Bush Administration.\textsuperscript{92} The tied aid issue is currently under review in three discussion arenas: the Trade Promotion Coordination Committee, the National Security Council-National Economic Council-Presidential Review Directive 20 group, and

\begin{footnotesize}
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  \item House Foreign Affairs Hearing, supra note 72, at 14 (statement of W.L. McCamey).
  \item "We expect to use the War Chest primarily to selectively match other countries' offers in cases where tied aid should not be used—particularly where face-to-face consultations have not resulted in the withdrawal of a tied aid offer considered inappropriate." \textit{Id.} at 23 (statement of James R. Sharpe, Executive Vice President, Eximbank).
  \item The United States had responded to the 1987 Arrangement with a similar policy shift. See supra Section 3.1.
  \item Telephone conversations with Robert Y. Lee, supra note 10; Clement K. Miller, Special Assistant to the Senior Vice President for International Lending, Export-Import Bank (July 22, 1993); Donna La Torre, Subcommittee Staff Consultant, Subcommittee on Economic Policy, Trade, and the Environment of the House Committee on Foreign Affairs (July 22, 1993); Peggy Houlihan, Executive Director, Coalition for Employment through Exports ("CEE") (July 22, 1993); Ernest H. Preeg, William M. Scholl Chair in International Business, Center for Strategic and International Studies (July 21, 1993). The Clinton Administration appears to be focusing most of its attention on domestic affairs, rather than on the foreign assistance program. Nonetheless, the Administration has made a series of statements suggesting that tied aid policy would change. See Brody \textit{Urges Reconsideration of U.S. Policy on Tied Aid}, Int'l Trade Rep. (BNA) (June 9, 1993) ("Eximbank is doing all it can to have the U.S. government change its position . . . . Given that other countries are using tied aid, perhaps the United States should rethink its policy."). However, the Administration has done little to indicate that change is indeed taking place.
\end{enumerate}
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a State Department study group. The business community and Congress continue to criticize current U.S. government policy and to suggest that participation in the OECD Arrangement is not enough to combat the problem.

4. CONGRESSIONAL INITIATIVES REGARDING THE TIED AID CREDIT PROBLEM

During the 1980's, Congress was the main impetus behind the Bush Administration's decision to confront the tied aid credit issue. The Administration reacted by vigorously pursuing negotiations within the OECD, but many in Congress preferred a legislative solution. A number of initiatives attempted to shift U.S. foreign aid philosophy away from humanitarian concerns and towards funding for capital infrastructure projects. One solution was to grant government agencies greater authority to participate in mixed credit activities, for tied aid credits are most commonly offered for capital infrastructure projects and thus represent an important tool for gaining entry to the market for capital projects. The majority of initiatives emphasized the funding of capital projects, either through tied or untied aid activity. Senator David Boren expressed one of Congress' fundamental concerns: in the post-Cold War era, "[m]ore and more leadership in the world is going to be determined as much by economic strength, if not more, than by military strength alone. We must adjust to the change in conditions in the world." Furthermore, many on Capitol Hill felt that the Bush Administration's strategy of "leading by example" was ideologically...
appealing, but unrealistic.97

4.1. Legislative Initiatives During The 102d Congress

4.1.1. The Aid For Trade Act Of 1991

In the late 1980’s and early 1990’s, Senators David L. Boren, Lloyd Bentsen, Robert C. Byrd, and Max Baucus were among the most ardent Capitol Hill proponents of modifying the U.S. foreign aid philosophy to yield more domestic economic benefit.98 Their 1991 “Aid For Trade Act,” S. 571, would have required Eximbank and AID to utilize more resources to help U.S. exporters gain market access to capital infrastructure projects.99 Senator Boren introduced the Aid For Trade Act, explaining that “[w]e must leverage our foreign policy assets in order to enhance our economic power.”100 Recognizing that other major industrialized nations openly use their foreign aid for domestic economic benefit,101 the bill would have allocated more foreign assistance

97 Frank, supra note 42, at S10,862 (“[T]he administration[’]s strategy of leading by example and hoping against hope for the best from OECD negotiations may be ideologically satisfying to free traders but it will never get results.”).

98 The four Senators sent a letter to President Bush in 1991 to express their concern about the failure of the OECD to reach a new agreement on the issue of tied aid credits. The letter points out that tied aid credits unfairly shut U.S. exporters out of foreign markets and deny the neediest countries access to limited funding resources. Letter from Senator Lloyd Bentsen, Senator David L. Boren, Senator Robert C. Byrd, and Senator Max Baucus to President George Bush (June 27, 1991), reprinted in 137 CONG. REC. S10,859-60 (daily ed. July 25, 1991). For a thorough discussion of the Senators’ views, see 137 CONG. REC. S10,858-69.

99 Senator Joseph I. Lieberman subsequently joined the efforts of these Senators, who were often referred to as the “Four B’s.”

100 The President of Eximbank remarked that the proposal played a role in the success of the OECD negotiations because it aroused “fear that the Americans might in frustration adopt a more commercial edge to their aid programs.” John D. Macomber, Aids To Trade, WASH. POST, Feb. 26, 1992, at A17.

101 “The Congress finds that . . . other governments, which incorporate national commercial considerations into their export policies, provide their firms with a wide variety of export financing assistance, including . . . mixed credit financing. . . . [Moreover,] the United States provides far less in capital project assistance than do the other major OECD countries.” S. 571, 102d Cong., 1st Sess. (1991), reprinted in 137 CONG. REC. S2808 (daily ed. Mar. 6, 1991).
funds to capital projects, which reap greater economic return than AID's traditional humanitarian projects.\textsuperscript{102} Ultimately, the bill died.

4.1.2. Boren Amendment To The Foreign Assistance Authorization

The Senate overwhelmingly adopted an amendment based on the Aid For Trade Act in the 1991 foreign assistance authorization legislation.\textsuperscript{103} While the amendment passed by a vote of 99-0, the foreign assistance legislation never became law. However, the debate on the amendment is informative of Congressional opinion. As in the introductory remarks about the Aid For Trade Act, the debate reflected Congress' concern that the United States is failing to adapt to a changing world, where economic power may mean more than military strength.\textsuperscript{104} Once again, the initiative echoed the concern that the United States does not reap nearly enough domestic economic benefit from its foreign assistance. Senator Boren emphasized that "ninety-plus percent of our aid virtually goes without strings attached. Only 8% of the foreign aid of the United States . . . this past year, went out with strings attached in the form of

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\textsuperscript{102} The bill mandates that over a period of five years, the minimum level of bilateral economic assistance used for capital projects would increase from 10\% to 35\%. \textit{Id.} at S2810-11 (summarizing the Boren-Bentsen-Byrd-Baucus Aid For Trade Act Of 1991).

Unlike AID's traditional projects, capital projects (such as transportation, power, and telecommunications systems) benefit not only the recipient nation, but also the donor nation since "the design, construction, and servicing . . . are done by national exporting companies." 137 CONG. REC. S2810-11 (daily ed. Mar. 6, 1991).

The Aid For Trade Act also restricts waivers, which AID had been granting rather liberally, of the requirement that all products purchased with U.S. foreign aid must be bought in the United States. \textit{Id.} at S2811.

Critics of the bill included the State Department, which said that "[i]t would severely restrict the administration's ability to promote U.S. political and security interests," and members of Congress who championed either the national security or the basic human needs rationale for aiding foreign countries. \textit{Aid for Trade Debate}, supra note 26, at 12.


\textsuperscript{104} See supra Section 4.
\end{footnotesize}
spending on capital projects that would require the purchase of American goods with the funds. In contrast, Japan spent 61% of its foreign aid on capital projects; Germany, 46%; and Italy, 62%. The Boren amendment would have created an AID Capital Projects Office with increased funding for capital projects. Directing both tied and untied aid credits to capital projects would bring greater economic return and would enable the United States to enter the capital projects market.

4.1.3. OPIC Reauthorization

While the foreign aid legislation ultimately stalled, the Boren amendment made its way into the reauthorization of the Overseas Private Investment Corporation ("OPIC"), which was signed into law. This new legislation, known as the "Jobs Through Exports Act," formally establishes the Office of Capital Projects within AID "to promote U.S. capital projects while at the same time promoting international development." It also directs AID

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105 137 CONG. REC. S10,859 (daily ed. July 25, 1991). However, Senator Paul Sarbanes noted that the 8% figure is misleading and argued that 65-70% of the total foreign assistance budget is spent in the United States. Id. at S10,868. On the other hand, Senator Boren appeared to be more concerned with the loss of follow-ons, like requests for servicing and spare parts, which annually bring in 10-15% of the project's original price, NAM REPORT, supra note 33, and help build a relationship of trust that makes future contracts more likely. 137 CONG. REC. at S10,866.


107 Funding for capital projects would increase from $573 million in FY91 to $750 million in FY92 to $1 billion in FY93. 137 CONG. REC. S10,858 (daily ed. July 25, 1991). There had been concern that capital projects funding would drop to $420 million in FY92. Id. at S10,862 (statement of Sen. Boren).

108 Concern was also voiced that other nations are assisting the Eastern European countries with export credits, which involves sending their own goods to the recipients, whereas the United States has predominantly offered cash assistance, with relatively little tied to the purchases of U.S. goods. See Frank, supra note 42, at S10,861; see generally House Foreign Affairs Hearing, supra note 72, at 57-71 (statement of Randolph C. Lumb, Vice President, Strategy and Market Development, AT&T).


However, the Capital Projects Fund received no separate funding by the Appropriations Committee. The House Committee on Appropriations noted concern that the Administration had not requested a new Capital Projects Fund and that such funding would require a reduction of assistance to "critical development priorities such as health, education and child survival." H.R. REP. NO. 585, 102d Cong., 2d Sess. 67 (1992). The Committee also prohibited increasing the operating expenses of the Capital Projects Office. Id. at 68.
to coordinate with the Trade Promotion Coordinating Committee to support capital projects and to use funds available to AID for tied aid purposes.\textsuperscript{110} Furthermore, it urges the President to use $650 million in FY92 and $700 million in FY93 for developmentally-sound capital projects.\textsuperscript{111}

4.1.4. Export-Import Bank Reauthorization

The Export Enhancement Act of 1992 confronts the issue of tied aid credits directly by funding the War Chest. In this recharter of Eximbank, Congress finds that “exports are a crucial force driving the United States economy . . . [and] exports also support the global strategic position of the United States.”\textsuperscript{112} The legislation authorizes $500 million annually for the War Chest for each of fiscal years 1993-95.\textsuperscript{113} It also enables Eximbank to use the War Chest offensively, in contrast to the Bush Administration’s decision to use it only to police the new Arrangement.\textsuperscript{114} The bill makes clear that Eximbank has the authority to use the War Chest not only to match tied aid credits offered by foreign governments in violation of the OECD Arrangement, but also: (1) when it is in the economic interests to match a tied aid offer, particularly when that offer is part of a grandfathered credit; and (2) when a foreign government is engaged in “predatory financing practices” that circumvent the Arrangement without formally violating it.\textsuperscript{115} The legislation also establishes a Trade Promotion Coordinating


\textsuperscript{111} The bill explicitly states that these funds may not be drawn from development assistance accounts, which are AID’s main source of humanitarian funding. Jobs Through Exports Act § 306.

\textsuperscript{112} Export Enhancement Act of 1992 § 101.

\textsuperscript{113} Id. § 103. This three-year authorization was intentionally shorter than the five year authorization provided for the Eximbank charter itself. S. REP. NO. 320, supra note 13, at 6.


\textsuperscript{114} See supra Section 3.2.3.

\textsuperscript{115} S. REP. NO. 320, supra note 13, at 6-8. For example, the Japanese government has been roundly criticized for its technically “untied” aid practices which effectively tie its aid. See supra note 28.
Committee to coordinate export promotion and financing activities of the United States.\textsuperscript{116}

\textbf{4.1.5. Freedom Support Act}

On the level of general U.S. export promotion, the Freedom Support Act of 1992, a legislative assistance package for the former Soviet Union, helps U.S. businesses enter the individual markets in the Commonwealth of Independent States ("CIS"). Senator Lieberman offered an amendment to the legislation establishing a presidential Business Advisory Council to coordinate activities of government agencies with American business expertise. The Lieberman proposal, which was enacted into law as part of the legislation, encourages the President to fund capital projects in these states.\textsuperscript{117} The legislation also directs the President's attention to any country that violates the OECD agreement with respect to any of the independent states of the former Soviet Union.\textsuperscript{118}

\textbf{4.2. Legislative Initiatives In The 103d Congress}

During the 103d Congress, legislative initiatives focused on capital projects funding, not on the use of tied aid credits.\textsuperscript{119}

\textsuperscript{116} Export Enhancement Act of 1992 § 201.
\textsuperscript{118} Freedom Support Act § 306 ("Should the Secretary of the Treasury determine that foreign countries are engaged in tied aid practices with respect to any of the independent states of the former Soviet Union that violate the 1991 Helsinki agreement of the Organization for Economic Cooperation and Development, the President should give priority attention to combatting such practices.").

Under the Helsinki Package, independent states of the former Soviet Union are currently classified as higher income countries and are thus ineligible for tied aid credits.

4.2.1. The Aid For Trade Act Of 1993

Senator David Boren reintroduced the Aid For Trade Act, S. 722, in April 1993, along with Senators Baucus, Byrd, Lieberman, and Roth as original co-sponsors. This bill takes a different approach than the previous Aid For Trade legislation. Bypassing AID, the proposed bill would authorize $435 million for the Trade and Development Agency ("TDA") to finance capital projects. The findings section echoes the sentiments expressed during the previous Congress that the "United States must leverage its foreign assistance program, in a humane and balanced way, to enhance American economic competitiveness." The findings also note that "notwithstanding ... [the recent OECD agreement] to restrict the practice of tied aid, America's economic competitors are skillfully using their foreign assistance programs to expand markets for their goods." To date, there has been no action on the bill.

4.2.2. Foreign Assistance Authorization Act Of 1993

The House of Representatives version of the foreign aid bill, which passed in June 1993, would establish a capital projects pilot program within the TDA. The legislation authorizes $300 million for developmentally sound capital projects in developing countries and in countries making the transition from a nonmarket to a market economy. The House Committee on Foreign Affairs noted that it "is establishing this program because it is dissatisfied with the way AID has managed capital projects." The foreign assistance bill would require the President to...

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120 S. 722, 103d Cong., 1st Sess. § 3 (1993). The bill, if enacted, would also progressively cut cash transfers from the Economic Support Fund. Such a provision would decrease AID's funding for humanitarian projects, a step that many within the Administration and executive agencies are unwilling to take.

121 Id. § 2(2).

122 Id. § 2(3).

123 H.R. 2404, 103d Cong., 1st Sess. § 1505 (1993). During the 102d Congress, the OPIC Reauthorization established an Office of Capital Projects at AID, but the office never received funding by the Appropriations Committee. See supra note 111 and accompanying text.


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transfer, with certain qualifications, the $300 million from economic support funds, funds relating to assistance for the independent states of the former Soviet Union, and funds available under the Support for East European Democracy Act of 1989 to the capital projects pilot program. However, the Senate has not moved forward with its foreign assistance authorization. More importantly, the foreign assistance appropriation for FY94 passed by the House does not mention the $300 million fund. Even if the program remains unfunded in FY94, at the very least, the initiative suggests that many in Congress support funding capital projects as an integral part of the foreign assistance program.

5. RESPONSE OF THE U.S. BUSINESS COMMUNITY

In general, U.S. businesses have favored more aggressive solutions to the tied aid credit problem than the Bush and Clinton Administrations. Two groups have frequently testified before Congress to represent the interests of the American business community: the Coalition for Employment through Exports ("CEE") and the National Association of Manufacturers ("NAM").

Both CEE and NAM criticized the Bush Administration's sector-by-sector approach to OECD negotiations, claiming that it would lead to a piecemeal solution to the tied aid credit problem. During the 102d Congress, the business community

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125 H.R. 2404, § 1505.
126 H.R. 2295, supra note 119.
128 NAM is a trade association representing the interests of more than 12,000 member companies and subsidiaries. Much larger and more broadly-focused than CEE, NAM often works with CEE on the issue of export financing, which is CEE's primary focus.
129 See Eximbank Reports Progress in OECD Talks, But Industry Groups Fault Tied Aid Strategy, Int'l Trade Rep. (BNA) 566, 567 (Apr. 17, 1991). The sector-by-sector approach was endorsed by the Bush Administration in its September 1989 policy recommendations. TREASURY, supra note 62, at 45. The approach involves targeting tied aid credit offers in sectors and markets where U.S. exporters have specific commercial interests, especially in areas where other nations use tied aid credits extensively. See id.
supported the following: giving Eximbank the authority to use tied aid credits to match offers grandfathered under the Helsinki Package, the statutory establishment of AID's Office of Capital Projects, and the Freedom Support Act. In general, Congress' aggressive posture has reflected the attitudes of U.S. exporters as expressed by CEE and NAM.

Expressing frustration over the damage tied aid credits have wreaked on U.S. exporters, CEE has advocated increasing War Chest funding for offensive use, rather than relying solely on negotiations within the OECD to solve the problem. In 1991, CEE also supported the establishment of a $1 billion capital projects fund at AID. More recently, CEE has advocated establishing a capital projects program at TDA as authorized in the House foreign assistance bill. CEE chose this approach because TDA "already has a dual mandate of supporting development and promoting American exports," whereas AID has always been focused on development assistance programs that provide for basic human needs.

5.2. Business Community Criticism Of The Helsinki Package

While U.S. exporters are giving the Clinton Administration a grace period for the Helsinki Package to take effect, they nonetheless remain skeptical of the agreement's ability to solve the tied aid credit problem and to improve the relative international position of U.S. exports.

At a House hearing shortly after the Helsinki Package entered into force, CEE expressed several concerns: (1) the agreement

130 See supra Section 4.


133 See House Banking Hearing, supra note 35, at 156-58; see also Bankers Favor Eximbank Renewal; Worry About War Chest, Credit Reform, 9 Intl Trade Rep. 874 (BNA) (May 20, 1992). https://scholarship.law.upenn.edu/jil/vol14/iss3/5
is non-binding and, therefore, unenforceable;\textsuperscript{134} (2) a loophole overlooks many foreign aid offers, particularly Japanese offers, that have the effect of tied aid credits but are not technically "tied" as defined by the agreement; (3) using the War Chest to police the agreement will not be enough—it should be used selectively to meet foreign financing offers that are exempt under the Arrangement; and (4) AID should have more resources for capital projects that are allowed under the agreement. As mentioned above, CEE has recently supported a capital projects fund at TDA instead of AID.

NAM has expressed serious concern over the Arrangement's grandfathering clause—noting that it exempts about $10 billion in tied aid\textsuperscript{135}—and suggested better coordination of the tied aid credit programs by Eximbank.\textsuperscript{136} NAM also recommended increased funding for the War Chest and for feasibility studies through the Trade and Development Program.\textsuperscript{137}

Westinghouse Electric Corporation and AT&T share NAM and CEE's concerns regarding the Helsinki Package. Westinghouse expressed concern that enforcement of the agreement would depend "on the good faith and cooperation of the participant governments"\textsuperscript{138} and that the "national interest" exception in the Arrangement could be abused.\textsuperscript{139} Recommendations include: (1) maintaining an active War Chest, instead of shifting back to a defensive policy of policing;\textsuperscript{140} (2) maintaining an active dialogue with the U.S. exporting community so that as "financial

\textsuperscript{134} The U.S. business community is particularly concerned that the government will fail to police the agreement aggressively. See generally House Foreign Affairs Hearing, supra note 72.

\textsuperscript{135} See NAM Promotes Eximbank Charter Renewal, Increased Funding for Overall Program, 9 Int'l Trade Rep. (BNA) 436, 437 (Mar. 11, 1992).

\textsuperscript{136} See NAM REPORT, supra note 33, at Policy Recommendation.

\textsuperscript{137} These studies are one of the most effective ways for U.S. businesses to gain an advantage in bidding for projects in developing countries. See NAM Promotes Eximbank Charter Renewal, supra note 135, at 437. Feasibility studies are thought to be one reason for Japan's success in the capital projects market. See supra note 28.

\textsuperscript{138} House Foreign Affairs Hearing, supra note 72, at 50 (prepared statement of James C. Cox). "The burden of success [depends] on a level of peer pressure." Id. at 82 (statement of Bruce B. Talley, Director, Gov't Affairs, Asea Brown Boveri, Inc.).

\textsuperscript{139} See supra note 74 and accompanying text.

\textsuperscript{140} House Foreign Affairs Hearing, supra note 72, at 52 (prepared statement of James C. Cox). "At 68 (statement of Randolph C. Lumb).
viability" is defined, the United States does not compromise too much in response to pressure from other governments; (3) increasing coordination of Eximbank, AID, and TDA to help meet the problem of untied aid that damages U.S. exports; and (4) continuing congressional oversight of the problem, including close communication with the Administration and the business community. 141

AT&T criticized the agreement for not covering a number of tied aid practices. The company specifically noted that the agreement "doesn't control OECD practices, [and] isn't clear about whether it captures all bilateral funding stakes in restricted countries." 142 AT&T recommended expanding the use of the War Chest to combat these tied aid practices. 143

In short, U.S. companies recognize that the Helsinki Package has major loopholes. Moreover, whether the Clinton Administration will enforce it rigorously is uncertain. Strict enforcement of the Helsinki Package alone, however, will not suffice. The government must look beyond the OECD Arrangement. In order to respond to the needs of the business community, and ultimately the domestic economy, 144 the foreign aid program must encompass not only AID's humanitarian mandate, but also capital projects support, similar to the U.S.'s major competitors. 145

6. CONCLUSION

This Comment has described the implications of tied aid credit practices for U.S. export policy. When such practices are utilized by foreign governments, they reduce the flow of aid resources

141 Id. at 52-54 (prepared statement of James C. Cox).
142 Id. at 65 (statement of Randolph C. Lumb).
143 See id. at 68.
144 The NAM report discusses the widespread domestic impact of major export transactions. The report includes data from AT&T, Boeing, Fluor Daniel, and Arkel International on the significant ripple effect of export transactions on suppliers all over the United States. NAM REPORT, supra note 33.
145 During the 102d Congress, one popular proposal was to create a "Third Window" within AID to support capital projects. The Third Window would support U.S. exports for capital projects in developing countries, and its grants would not be subject to AID's basic human needs mandate. See INT'L FINANCING, supra note 1, at 65. However, general dissatisfaction with AID combined with acknowledgement of AID's humanitarian mandate has led to initiatives that would locate a capital projects fund at TDA. See supra Section 4.2.
and shut U.S. exporters out of foreign markets. In turn, U.S. industries and employment suffer. The Helsinki Package should help alleviate the problem. However, the new agreement's non-binding nature, grandfathering provisions, and loopholes which allow for de facto tied aid reflect the need for more extensive international limitations on these practices.

The government must update the 1973 humanitarian mandate for foreign assistance to include capital projects support. Like the other major industrialized countries, the United States should consider a foreign aid program that helps developing nations while also benefitting the U.S. domestic economy. More aggressive use of tied aid credits is one solution; such credits are an important tool for entry into the capital projects market. However, the Clinton Administration may prefer a solution which does not tend to distort market function and which is less costly for the U.S. taxpayer. Opponents of tied aid credits also stress that the credits draw needed funds from development assistance activities. A compromise might include softening the sharp distinction between foreign assistance and export promotion policy. Congress and the business community have suggested that better coordination among Eximbank, AID, and TDA will help U.S. exporters capture projects in developing countries and regain lost market share.

The Clinton Administration has not formally adopted a new policy regarding tied aid credits, although studies are underway. At the very least, the current Administration must look ahead to the economic changes that are sweeping through Central Europe, Eastern Europe, and the independent states of the former Soviet Union. These areas are major potential markets for U.S. exporters. Clinton entered the presidency promising change. Although the Helsinki Package represents a fine beginning, U.S. foreign assistance policy requires attention by the new Administration in order to assure that U.S. aid and trade policy is both helpful to recipient nations and carefully formulated to assure U.S. businesses broad access to foreign markets in the increasingly global economy.