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CASE COMMENT

Section 1912 of the Export-Import Bank Act and the Bombardier Subway Car Case

by Michael Scott*

I. INTRODUCTION

On July 13, 1982, the Treasury Department ruled that non-competitive financing was not likely to be a determining factor in the award of the New York City Metropolitan Transit Authority (MTA) subway car contract to Bombardier of Canada. The ruling was made pursuant to section 1912 of the Export-Import Bank Act. This note will analyze the decision, examine the background of section 1912 and review the history and purpose of the International Arrangement on Officially Supported Export Credits (Arrangement). In addition, the heavy criticism the decision fostered and the subsidized export finance proposals will be analyzed. This note will (1) aid attorneys who wish to avail themselves of section 1912, and, (2) help decrease the "attractiveness" of proposed protectionist countermeasures.

II. FACTS

On May 18, 1982, the MTA ordered 825 subway cars from the Bom-
Bombardier Corporation of Canada. Bombardier had a license to produce these cars from Kawasaki Heavy Industries of Japan. The MTA had previously ordered 325 cars from Kawasaki with financing terms of 8.5% interest and the principal paid back over a five-year period. The Bombardier contract was contingent upon receiving financing from Canada's official export finance entity, the Export Development Corporation (EDC). The EDC finance package offered 9.7% interest with the principal to be paid back over fifteen years, covering 85% of the contract value. The MTA put up 15% of the contract value before delivery and the EDC advanced Bombardier the balance. At that time, the prime rate in the United States was 16.5%. Although the cars were to be assembled in Vermont, the Bombardier contract promised 16% New York content.

One day before, the Treasury had received a telex from the Budd Company requesting an investigation of Bombardier's financing and the implementation of section 1912 of the Export-Import Bank Act. This was the first time that this section was used. Under section 1912, if the Secretary of Treasury finds that foreign non-competitive financing is being offered as part of a foreign sale to the United States, he is empowered to authorize matching funding from the Export-Import Bank of the United States to counter the official subsidized financing.

On June 8, the MTA was ordered to show cause why an injunction should not be granted to stop them from awarding the contract to Bombardier. Thereafter, a stipulation was entered into between Budd, Bombardier and the MTA whereby the contract would not be submitted to

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5 Id.
6 Id.
7 Id.
8 Id.
9 Id.
10 "Content" refers to the percentage of work on the car to be done in a given municipality, which in this case was New York State.
11 The Budd Co., located in Troy, Michigan, is the sole producer of railway passenger cars in the United States. The other major producers of railway passenger cars—Pullman, St. Louis Car, G.E., Rohr, and Boeing—have all fallen by the wayside. Letter from Dudley A. Ward, Vice Chairman, Budd Co., to Donald T. Regan, Secretary of the Treasury (May 20, 1982).
12 Letter from John P. Doane, Treasurer, Budd Co., to John Lange, Director, Office of Trade Finance, U.S. Treasury (May 20, 1982).
14 The Export-Import Bank is the official export finance entity in the United States. See generally infra notes 20-29 and accompanying text.
16 Budd Co. v. MTA, No. 82 CIV. 3744 (S.D.N.Y. June 8, 1982) (Order to show cause why a preliminary injunction should not issue).
the New York State Public Authorities Control Board\textsuperscript{17} for approval until a decision was reached on the section 1912 action. MTA could also cancel under the stipulation on or before July 15 if matching funding was to be awarded.\textsuperscript{18}

III. SECTION 1912: HISTORY AND PURPOSE

The language of the Export-Import Bank Act\textsuperscript{19} shows that the Export-Import Bank (EXIM) is to aid overseas objectives. The MTA case was unique in that a domestic industry was asking EXIM for help with an entirely domestic project.

Section 1912 was enacted, in part, to meet the challenge of subsidized export financing. Section 1912 relief was made possible by Congress' 1978 amendments to the Export-Import Bank Act of 1945.\textsuperscript{20} Section 635a-1(a)}
of the amendments authorizes the President to begin negotiations at the ministerial level with major trading partners to end predatory export financing.\(^2\) The result of those negotiations was the International Arrangement on Officially Supported Export Credits (Arrangement).\(^2\) The 1978 amendments also authorize EXIM to extend credit at a level competitive with government-supported export instrumentalities of other nations.\(^2\) Section 1912's matching process takes three steps. First, the Treasury must receive information that existing practices, to which the United States and its trading partners are parties, have been violated by the offering of finance terms below agreed-upon rates and/or exceeding agreed-upon terms.\(^2\) The Treasury will then investigate the possibility of the financing being non-competitive.\(^2\) Second, if the Secretary of the Treasury determines that the financing is non-competitive, he shall request immediate withdrawal by the foreign official export credit agency.\(^2\) Third, if there is a refusal or no response, the Secretary shall notify the country offering the financing, and all concerned parties, that EXIM may be authorized to provide competing U.S. sellers with matching financing. EXIM financing shall only be authorized if the availability of foreign official non-competitive financing is likely to be a determining factor in the award of the contract, provided that the financing is not withdrawn by the date EXIM receives the Secretary's authorization.\(^2\)

The legislative history of section 1912 is sparse.\(^2\) Congress merely

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\(^1\) The Secretary of the Treasury, together with the Export-Import Bank and such other relevant government agencies as the President determines, shall "begin negotiations at the ministerial level with other major exporting countries to end predatory export financing programs . . . including mixed credits, in third country markets as well as within the United States." 12 U.S.C. § 635a-1(a) (1982).

\(^2\) "The Arrangement provides internationally agreed guidelines to cover the export credit practices of the Export-Import Bank of the United States and similar agencies abroad. The purposes of these guidelines is to avert wasteful official export credit competition." DEP'T OF THE TREASURY, TREASURY NEWS 1 (Feb. 22, 1978).


\(^4\) Id. § 635a-3(a)(1).

\(^5\) "Non-competitive" is defined in 12 U.S.C. § 635a-3(a)(1) as exceeding the limits set by the Arrangement on Official Supported Export Credits, supra note 3.

\(^6\) Id. § 635a-3(a)(2) (1982).

\(^7\) Id. § 635a-3(a)(3), (b), (c).


[T]o encourage the sale of more American goods and services overseas by extending the U.S. Export-Import Bank for 5 years, through September 1983, and increasing its financing commitment authority from $25 billion to $40 billion . . . . U.S. exporters are often at a disadvantage because our major competitors in world trade, particularly Japan and France, offer more liberal government-backed
indicated its desire to use EXIM to assist U.S. concerns to be more competitive in the international marketplace.\textsuperscript{29} There are no other guidelines for implementation to be followed by a prospective petitioner, nor is there any clarification of key terms for the Secretary.

IV. \textbf{THE RELATIONSHIP BETWEEN THE ARRANGEMENT AND THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT}

The Organization for Economic Cooperation and Development (OECD) was formed in 1960 for the purposes of "promoting stability and growth of the member countries and economic development among non-members."\textsuperscript{30} The United States, Canada, Japan and the European Economic Community are all members of the OECD.\textsuperscript{31} The relationship between the OECD and the Arrangement is not one of substance. "The ar-

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{29} On the subject of competitiveness, the House Report indicates:
  \begin{quote}
  Since the Bank's previous authorization, world economic pressures have led many of our competitors to implement new export credit practices . . . . While programs of export credit support have been expanding abroad, Eximbank has maintained a very conservative posture with regard to innovations in its own programs.
  
  It is the opinion of the committee that in the recent past Eximbank has given too much attention to its mandate to offer market related rates and terms at the expense of its mandate to provide financing at rates and terms and conditions competitive with those offered by foreign export credit agencies. The result may have been a loss of a significant number of export opportunities to U.S. industry and a loss of U.S. employment.
  
  While the committee remains convinced that this first requirement is of fundamental importance, the current adverse U.S. trade balance, combined with the recent aggressiveness of Eximbank's foreign counterparts require that Eximbank make a greater effort to meet lower foreign rates and terms when they can be shown to be a decisive factor in the foreign buyer sourcing decisions.
  
  The committee does not want Eximbank to become an aid bank or to injure its overall profitability by beginning a program of heavy subsidization of U.S. exports. \textsl{Nor does the committee expect Eximbank to meet foreign competition in every instance. But the committee would like to see Eximbank make a greater effort to meet competition and to give more weight than that shown in recent years to this mandate in ranking its priorities.}
  
  H. REP. No. 1115, \textit{supra} note 28, at 7 (emphasis added).
  
  \textsuperscript{30} H. \textsc{Aubrey}, \textsc{Atlantic Economic Co-operation} 32 (1967).
  
  \textsuperscript{31} \textit{Id.}
\end{quote}
\end{itemize}
\end{footnotesize}
arrangement is not an OECD action, nor is it an international treaty. The OECD serves only as the negotiating forum and secretariat.\textsuperscript{23}

Under the 1978 amendments, the minimum interest to be charged was set at 11.25\% over a maximum of 8.5 years.\textsuperscript{28} The present arrangement is set out in Figure 1 and features an increase in the minimum interest rates. The present arrangement also re-classifies borrowing countries so that those with true need may take advantage of the favorable Schedule III rates.\textsuperscript{34}

\begin{table}
\centering
\begin{tabular}{|l|c|c|c|}
\hline
Classification of Borrowing Country & 2-5 Years & 5-8.5 Years & 8.5-10 Years \\
\hline
I. Relatively Rich & 12.15(11.0) & 12.4(11.25) & No Credits \\
GNP/capita of $4000 and over & (8.5) & (8.75) & \\
II. Intermediate & 10.85(10.5) & 11.35(11.0) & No Credits \\
All others & (8.0) & (8.5) & \\
Newly graduated from III to II & & & \\
Effective immediately & 10.5(10.0) & 10.75(10.0) & 10.75(10.0) \\
& (7.5) & (7.75) & (7.75) \\
Effective 1/1/83 & 10.85 & 11.35 & 11.35 \\
III. Relatively Poor & & & \\
IDA/IBRD-eligible borrowers & 10.0(10.0) & 10.0(10.0) & 10.0(10.0) \\
& (7.5) & (7.75) & (7.75) \\
\hline
\end{tabular}
\caption{Highlights of the New Arrangement Guideline}
\end{table}

The Reagan administration has been wholly supportive of the recent trends among OECD members to decrease the use and minimize the effect of predatory export credit subsidies. For example, Treasury Secretary Donald T. Regan, hailing the European Community's acceptance of the present Arrangement, stated:

\begin{quote}
Address by Assistant Secretary of the Treasury for International Affairs, Marc E. Leland before the Salzburg Seminar, Salzburg, Austria (Aug. 9-10, 1982).
\end{quote}

\begin{quote}
DEP'T OF THE TREASURY, TREASURY NEWS 2 (July 1, 1982).
\end{quote}

\begin{quote}
Id. at 1-2.
\end{quote}
At a time when many countries face domestic economic troubles and a more competitive international trading system, it is especially encouraging that the major exporting countries are able to retain their focus on the long-term goal of reducing wasteful and trade-distorting export credit subsidies. We welcome the EC's acceptance of the new Arrangement as a positive step in the international trade area.\textsuperscript{35}

Thus, the U.S. position is that export credit subsidies are trade distorting.\textsuperscript{36} The principles of free trade to which the present administration subscribes cannot tolerate predatory export finance or the effects it induces.\textsuperscript{37}

There is one other negative effect caused by subsidized export

\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Examples of the effects are illustrated in the work of a well-known commentator and in GATT panel reports:

Legitimate government policies reflecting various value judgments of a particular society can manifest themselves as benefits or detriments to particular segments of that society, some of which may be concerned with production of goods. This can then have an effect on the markets for those goods. An electronics firm in the United States may have competitive advantage over foreign competitors because of a range of United States government actions, such as aid to education of scientists, government sponsored research and development, and the stability of business and economies of scale that can result from large government-purchase contracts. Yet nobody is proposing that international controls be imposed on all such policies—although international bodies are now studying these policies. However, a different view prevails as to the subsidy of a particular good, such as a direct export subsidy. A system that maintains the domestic price of a product above worldmarket prices exists in some countries. When exports of products that are price-maintained area made at prices below those on the same domestic market, the effect on foreign markets may be the same as a direct subsidy for exports . . . . A subsidy may have a "trade diverting" effect rather than a "trade creating" effect, i.e., may shift sales away from another exporting country rather than increase the overall amount of the sale . . . . As tariffs and many quotas have been dismantled over the last two decades, subsidies, like other nontariff barriers, have become increasingly significant and increasingly visible as barriers to the free flow of trade.

J. Jackson, World Trade and the Law of GATT 366 (1969). "The panel considers it fair to assume that a subsidy which provides an incentive to increase production will, in the absence of offsetting measures . . . either increase exports or reduce imports." General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents 191 (9th Supp. 1961). "The substantial removal of quantitative restrictions and the progressive reduction of many tariffs have led to an increasing realization of the importance of subsidies as measures influencing international trade and the fact that they often closely resemble quantitative restrictions in their purpose and effect." General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents 203 (10th Supp. 1962). Export subsidies have the effect of distorting "comparative advantage," the basic economic model which free trade assumes. For a discussion of comparative advantage, see C. Kindleberger, International Economics (5th ed. 1974).
finance to which even those countries that do not subscribe to free trade must defer. Government sponsored export credits are a large drain on a country's national treasury. Two cited offenders are France and Japan. France derived 18.62% of its 1981 gross national product from merchandise exports.\textsuperscript{38} France spent $3.3 billion (U.S.) on export credit programs covering 8.5-10 year repayment periods (the maximum allowable under the Arrangement).\textsuperscript{39} Assuming that the cost of funds for a country's offer is represented by the prevailing government borrowing rate,\textsuperscript{40} France spent $280.3 million of goods exported, approximately 25%, in 1981.\textsuperscript{41} Japan spent $2.6 billion (U.S.) on export credit programs covering the same term.\textsuperscript{42} Again, assuming the cost of funds for a country's offer is represented by the prevailing government borrowing rate,\textsuperscript{43} Japan spent $3.2 million per billion in 1981, which is approximately 37%. These figures should give an indication of the amount of money committed to such programs. If allowed to go unchecked, every contract bid upon by more than one country would result in an increasing spending war with the likely winner being the bidder with the most "attractive" finance terms rather than the bid based upon the product's merits. "Although nominal export credit interest rates have risen every year, the cost of the respective government's borrowings have risen faster, resulting in a pronounced trend toward greater subsidies in every country."\textsuperscript{44} Surprisingly, some countries feel this drain is only a secondary evil and are willing to make the sacrifice.\textsuperscript{45}

\textsuperscript{38} Export-Import Bank of the United States, Report to the U.S. Congress on Export Credit Competition and the Export-Import Bank of the United States I (Dec. 1982).

\textsuperscript{39} The primary examples of export credit assistance are: Inflation Risk Insurance, which protects exporters against losses resulting from domestic cost increases for projects or equipment with lengthy fabrication periods; Exchange Risk Insurance, which covers exporters against losses which may be incurred when the contract payment is denominated in a foreign currency and that currency depreciates relative to domestic currency; Mixed Credits, which combine government foreign aid funds with official export credits to produce concessional financing packages; Local Cost Support, which consists of credit or guarantee support for costs incurred in the purchasing country that are associated with the export transaction; and Foreign Currency Loans, which provide funding in foreign currencies for export transactions. Id. at 7.

\textsuperscript{40} These rates are 7.7% for France and 7.94% for Japan. Japan paid 25% in yen, at an interest rate of 7.94%; and 75% in U.S. dollars, at a rate of 7.71%. Id. at 4.

\textsuperscript{41} Id. at 6.

\textsuperscript{42} Id. at 2.

\textsuperscript{43} Id. at 3.

\textsuperscript{44} Id. at 6.

\textsuperscript{45} Id.

\textsuperscript{46} Address by Assistant Secretary Marc E. Leland, supra note 32: Most Participants agree with us that export credit subsidies are wasteful and distort trade. While most Participants seek to eliminate financing as a factor in ob-
Under the terms of the Arrangement, an offer of financing which deviates from the agreed-upon terms and rates is labelled a "deroga-
tion."\footnote{Arrangement, supra note 3, at 13, para. 9(a)(1).} The Arrangement has specific procedures to be followed, and should a participant wish to derogate, the procedures mandate that notice is to be provided by the derogating party and an opportunity for consul-
tation with other participants is to be afforded.\footnote{Id. at 13-14, para. 9(a)(1),(4).} Should consultation prove futile, other participants may match any non-conforming term or derogate on their own.\footnote{Id. at 13, para. 9(a)(2).}

The stipulated derogation procedures were utilized by the Canadians after they received word of the French finance package for their domestic producer, Francorail. This alleged derogation\footnote{See infra notes 54-60 and accompanying text.} by the French resulted in the requested implementation of section 1912.

V. TREASURY DECISION CALCULUS

The determination of whether or not to match non-competitive financing is made by the Secretary of the Treasury. Under section 1912, the first step that the Secretary must take is to determine whether non-competitive financing is being offered by an official foreign export credit agency.\footnote{12 U.S.C. § 635a-3 (1982).} To make such a determination, the Treasury must be informed of suspected non-competitive financing. In the MTA case, upon receipt of the May 17 telex, the U.S. missions in Paris and Ottawa began to make inquiries of the respective governments of France and Canada\footnote{Testimony of R.T. McNamar, Deputy Secretary of the Treasury, before the Senate Committee on Finance 4 (May 28, 1982).} to determine whether non-competitive financing had in fact been offered. Information was obtained via responses to these inquiries and additional telexes from Paris. The information contained in the communications indicated that 825 cars remained to be awarded on the installment contract for MTA. Another 325 cars were previously ordered from Kawasaki which was then producing at full capacity.\footnote{Financing of New York City Subway Cars: Treasury Department Investigation Under Section 1912, Export-Import Bank Act, reprinted in Dep't of the Treasury, Decision of the Secretary, Financing of Subway Cars for the Metropolitan Transportation Authority of New York 5 (July 13, 1982) [hereinafter cited as Treasury Investigation].}

The French firm’s (Francorail) initial bid in late 1981 was financed at
8.5% interest with the principal payable over 8.5 years for the first 400 cars. These terms were offered to match the terms that the Japanese had offered for the first installment. The French were under the mistaken impression that the Japanese were viable competitors for the remaining portion of the contract. The second 425 cars, under the French offer, were to be financed at 11% over a five year period. A combination of the two installments would result in an effective rate of interest equaling 9.7%. Francorail sought a “common-line” (equal rates and terms) with Canada’s EDC for the finance portion of the contract bid. The EDC simply never responded to their request.

On February 2, 1982, the EDC proclaimed that the French offer was a derogation from the Arrangement. The EDC, therefore, offered a 9.7% interest rate over an 8.5 year period. The proposed term was later extended to ten years. This bid was executed pursuant to the Arrangement derogation procedures.

Francorail received no response to their common-line proposal and consequently indicated in their May 12 telex to the MTA that they would be willing to “match any finance package” the EDC offered. Thus, the final finance packages offered by the French and the Canadians were identical.

From the French information, it appears most clearly that it was the Canadians who first derogated under pressure from the MTA. The uncooperative attitude of the EDC can best be explained by the highly competitive nature of the bidding. The EDC’s fear that the French offered more attractive financing to the MTA was unfounded because France

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56 Id.

57 Affidavit of Steven M. Polan, Special Counsel to MTA, reprinted in DEP’T OF THE TREASURY, DECISION OF THE SECRETARY, FINANCING OF SUBWAY CARS FOR THE METROPOLITAN TRANSPORTATION AUTHORITY OF NEW YORK, Tab E (July 13, 1982) [hereinafter cited as Polan’s Affidavit].

58 See French Telex, supra note 54, at 2.

59 Id. The Canadian Officials stated they were “determined that the French [not] be able to steal this project on the basis of cheap financing.” TREASURY INVESTIGATION, supra note 53, at 5-6.

60 Arrangement, supra note 3, at 13, para. 9(a)(1).

61 Id.

62 TREASURY INVESTIGATION, supra note 53, at 6.

63 Polan’s Affidavit, supra note 57, Tab E, at 10.

64 TREASURY INVESTIGATION, supra note 53, at 6.
knew that Japan was not in the bidding. France then sought a common-line with Canada so that the MTA award would be based on the merit of the product and not on the finance package.

As of May 17, 1982, the OECD minimum rate for "rich" countries was 11.25%, and the maximum term was eight years. The Treasury thus found that the Canadian offer of 9.7% for 10 years represented a derogation from the Arrangement and was therefore non-competitive as defined in section 1912. Therefore, the Treasury held for complainant Budd Co. under the first step of the matching process.

The second step required under section 1912 is that the United States must request the withdrawal of the non-competitive financing. Beginning in May 1982, the United States made five such requests of the Canadian government. Concurrent with each such request, notification of possible matching EXIM financing was given. On each occasion, the reply from Canada was that it could not withdraw without the permission of the MTA.

The final step required by section 1912 is that the availability of foreign non-competitive financing is likely to be a determining factor in the award of the contract. The Treasury quickly discerned that the central issue in the MTA case would be the proper interpretation of the phrase "likely to be a determining factor." As already mentioned, nothing in the legislative history shed light on the intended meaning of this phrase, and an exhaustive examination of the United States Code likewise provides no help with interpretation. The Treasury, therefore, was left with the plain-meaning of the statute.

Section 1912 does not require that financing be the determining factor, but merely a determining factor. The Treasury found that what was required was an "analysis of the purchasing agency's corporate state of mind." However, section 1912 does not require a definitive policy state-

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65 See supra note 34 and accompanying text.
66 See Arrangement, supra note 3.
68 Section 1912 Decision, supra note 1, at 6. One such meeting was between Secretary Regan and Edward C. Lumley, Canada's Minister of State for International Trade. Id.
69 Id.
72 In Jones v. Liberty Glass, 332 U.S. 524 (1947) the U.S. Supreme Court stated: "In the absence of some contrary indication, it must be assumed that the framers of [a] statutory provision . . . intended to convey the ordinary meaning attached to the language used." Id. at 532.
74 Memorandum from Peter J. Wallison, General Counsel of Treasury, reprinted in DEP'T OF THE TREASURY, DECISION OF THE SECRETARY, FINANCING OF SUBWAY CARS FOR THE
ment regarding the factors which the purchasing agency will take into account in its contract award. This absence of statutory guidance allows the Treasury to exercise its own judgment to a great degree.26

The Treasury investigation in the MTA case concluded that the following were important and possibly "determining" factors: (1) cost and availability of financing, (2) price of the cars, (3) delivery schedule (including reliability), (4) quality, (5) dependence on a single supplier and (6) New York content.27 While testifying before the Senate Finance Committee,77 MTA chairman Richard A. Ravitch acknowledged the accuracy of the Treasury's findings. Ravitch explained that the MTA's five-year development plan was authorized in 1976 by New York and allowed the award of subway car contracts by negotiation. He further explained that the state had established the following statutory criteria for the award: price, financing, delivery schedule and New York State content.78

The facts surrounding the award of the MTA contract show that the Canadian offer was superior to the American offer for each factor listed by the Treasury except for the financing. With respect to the financing, the MTA found that the packages offered were essentially equal. However, American petitioner Budd Co. only offered a 17% finance cover as compared to Bombardier's 85%.79

The delivery schedule and the dependence factors also tipped in Bombardier's favor. MTA had previously awarded Budd Co. a contract for 130 commuter rail cars for the Long Island Railroad.80 This contract contained an option, which Budd Co. did exercise, for an additional 186 cars.81 The MTA's management was particularly concerned with the potential negative consequences that would result from putting all of their

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75 Not only is the Treasury not required to consult the corporate concern, but under section 1912, the Treasury is the only government agency empowered to make the determinations which authorize EXIM to matching finance.

76 Section 1912 Decision, supra note 1, at 8.

77 Testimony of Richard A. Ravitch, Chairman of Metropolitan Transportation Authority, before the Senate Finance Committee, reprinted in DEP'T OF THE TREASURY, DECISION OF THE SECRETARY, FINANCING OF SUBWAY CARS FOR THE METROPOLITAN TRANSPORTATION AUTHORITY OF NEW YORK, Tab K (July 13, 1982).

78 Id. at 4. Cf. supra note 76 and accompanying text.

79 One interesting irony in this case was that the Budd financing was backed by subsidies from Portugal and Brazil for components produced and exported from those countries. Thus, two nations who have been among the biggest recipients of development aid were to subsidize an American purchase of industrial goods. Budd is a wholly-owned subsidiary of German Tyssen Steel Corporation. Statement of R.T. McNamar, Deputy Secretary of Treasury, before the Senate Committee on Finance 5 (May 28, 1982).

80 Section 1912 Decision, supra note 1 (memorandum regarding MTA-Bombardier Subway Car Contract Award).

81 Id.
five-year development plan eggs into one Budd basket; Budd Co. was at this time operating at full capacity.82

Bombardier had also promised a higher New York State content, which meant more money and jobs for the state. Bombardier committed at least $104 million of New York State content while Budd proposed only $79 million.83

In addition to the Treasury's enumerated factors, Bombardier also had a licensing agreement with Kawasaki.84 Bombardier's car would be compatible with the car Kawasaki was turning out under the first installment of the 1150 car contract. For the MTA's purpose, similar engineering would be an advantage.85

Ultimately, the MTA considered the Bombardier offer superior on all counts except price, where the difference in the offers was negligible.86 Despite the importance of financing, it became clear that even if the EDC was matched by EXIM, there were other considerations (such as the Kawasaki preference and fear of over dependence) which still favored Bombardier's offer. As such, it was impossible for the Secretary to find that non-competitive financing was likely to be a determining factor in the award of the contract.

With the third step of the section 1912 requirements unfulfilled, the Secretary of the Treasury had no authorization to order EXIM to match the EDC's financing. He did not order such matching and the MTA, therefore, awarded the contract to Bombardier.87

VI. REACTION TO THE DECISION

A. Budd Company

The first reaction to the MTA decision came from the Budd Co. It attacked the Treasury decision on two grounds: (1) the Treasury was not competent to judge the technical standards involved with the award of a

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82 The second irony in this case was that with production commencing on the initial 130 car contract, Budd's Red Lion, Pennsylvania plant was operating at capacity. Thus, Budd was attempting to win a contract where assembly was to take place at their Hornell, N.Y. plant which was not yet constructed. Additionally the work would have been done by workers who had not yet been trained. Id. The New York Times also reported that Budd was experiencing production difficulties which would result in a five month delay in delivery of the Long Island Railroad cars to the MTA. N.Y. Times, Aug. 30, 1982, at 1, col. 1.

83 See Polan's Affadavit, supra note 57, Tab E, at 10 where Polan states: "Since the [financing] of Bombardier and Francorail were essentially equal, the tie-breaker was the amount of New York State content in the contract. Bombardier had the highest New York State content of all three competitors and its offer therefore was recommended."

84 See N.Y. Times, supra note 4.

85 The benefits of car compatibility are ease of maintenance and part inventory.

86 TREASURY INVESTIGATION, supra note 53, at 16.

87 See supra note 4 and accompanying text.
subway car contract; and, (2) the June 10, 1982, stipulation\textsuperscript{88} required that the financing be a determining factor. The basis for Budd's second ground was that the MTA had stated it would reopen negotiations should the Treasury decide the section 1912 issue in Budd's favor.\textsuperscript{89}

The Treasury's position regarding Budd Co.'s reaction revolved around two main points. First, the Treasury's factual findings did not directly address the quality of Budd products, and furthermore, their findings were supported by the testimony of Chairman Ravitch and Special Counsel Polan.\textsuperscript{90} Secondly, the June 10 stipulation was not an admission by MTA that non-competitive financing was likely to be a determining factor. Again, negotiations were only to reopen if the Treasury decided the section 1912 issue in Budd's favor, which it did not do.\textsuperscript{91}

On June 3, 1982, Budd filed a countervailing duty complaint regarding the EDC financing with the U.S. International Trade Commission and the U.S. Department of Commerce.\textsuperscript{92} A countervailing duty is levied in the amount of a subsidy to offset the unfair advantage provided to the imported products.\textsuperscript{93} Under U.S. law and international agreement, the amount of the countervailing duty is not to exceed the amount of the subsidy.\textsuperscript{94} Additionally, the AFL-CIO filed a section 301\textsuperscript{95} action with the U.S. Trade Representative (USTR).\textsuperscript{96} The purpose of section 301 is to unilaterally respond to a foreign country's unfair trade practice in cases

\textsuperscript{88} See supra note 18 and accompanying text.

\textsuperscript{89} Letter from James H. McNeal Jr., Chief Executive Officer, Budd Co., to Donald T. Regan, Secretary of the Treasury (July 16, 1982).

\textsuperscript{90} See infra notes 77 and 88 and accompanying texts.

\textsuperscript{91} Under section 1912, the presence of a subsidy alone does not allow for matching financing. Export-Import Bank Act Amendments of 1978, Pub. L. No. 95-630, § 1912, 92 Stat. 3725 (1978). In this case, matching financing would not have changed the outcome.

\textsuperscript{92} Before the U.S. Dep't of Commerce and the U.S. Int'l Trade Commission, Petition for the Imposition of Countervailing Duties on Imports of Unfinished Stainless Steel Subway Cars, Shells, Parts, and Components Thereof, from Canada, Docket No. 841 (June 3, 1982).

\textsuperscript{93} J. JACKSON, supra note 37, at 402.


\textsuperscript{95} Trade Reform Act of 1974, 19 U.S.C. § 2411 (1982).

\textsuperscript{96} Petition Filed With the United States Trade Representative Under § 301 of the Trade Act of 1974, As Amended, In the Matter of Subsidized Export Credit to Canadian Firm Manufacturing Subway Cars. The petition was filed by the Industrial Union Department, AFL-CIO on behalf of themselves as well as for the United Automobile and Aerospace Workers, the International Association of Machinists and Aerospace Workers (Districts 19 & 31) and the United Steelworkers of America. Id.
where internationally agreed upon dispute-settling mechanisms do not provide an adequate remedy.\textsuperscript{97} The complaints were filed as supplementary forms of relief after the request to implement section 1912.

Two issues arise in considering the applicability of the supplementary relief measures requested by the Budd Co. The first is whether the United States can avail itself of countervailing duties and/or section 301 in situations where a foreign finance package is in accord with the OECD Arrangement. The second is whether countervailing duties and/or section 301 are precluded by a finding by the Treasury that non-competitive financing was \textit{not} likely to be a determining factor.

The first issue arises because the Subsidies Code illustrative list\textsuperscript{98} seems to provide an exception to countervailing duty law.\textsuperscript{99} Donald deKieffer answered this question definitively, speaking for the USTR in testimony before the Senate Banking Committee. In that text he stated that:

\begin{quote}
Nothing in the OECD Arrangement or the Subsidies Code obliges the United States to ignore the trade distortion inherent in the subsidy, or to modify the provisions or application of our countervailing duties statute, which provides an avenue for affected U.S. parties to seek relief from subsidy-induced trade injury. Subsidization of official export financing—whether a subsidization of interest rates or other government-supported financing concessions—offers an artificial competitive advantage to foreign manufacturers selling in the United States, which could cause
\end{quote}

\textsuperscript{97} Section 301 provides for unilateral "enforcement of U.S. rights under any trade agreement or to respond to any act ... that is inconsistent with provisions of ... any trade agreement or is unjustifiable and burdens ... U.S. commerce." 19 U.S.C. § 2411 (1982).

\textsuperscript{98} Subsidies Code, supra note 94, 31 U.S.T. at 547 (Annex(k)) (illustrative list of export subsidies).

\textsuperscript{99} Item (k) includes:

\begin{quote}
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 of them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, insofar as they are used to secure a material advantage in the field of export credit terms.
\end{quote}

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 the 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 rate provisions of the relevant undertaking in export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

\textit{Id.}
Thus, USTR not only echoes the Treasury condemnation of export credit subsidy practices, but supports active combat against them with domestic countervailing duty machinery.

The second issue arises because of the "material injury" and "causation" requirements of our countervailing duty law. Section 701(2)(a) of the 1979 Trade Agreements Act mandates that before any countervailing duty can be imposed, it must be shown that the subsidy in question is the threat or cause of material injury to the complaining party. If financing was not a determining factor in the Treasury consideration of section 1912 relief, then Budd Co. could not possibly show injury or prove causation. However, it must be remembered that the Treasury's decision was made in the context of how the MTA would perceive the facts.

In applying the altogether different countervailing duty law, a government agency looking at the same facts would use an entirely different analysis. A section 1912 action is concerned with the effect of a rate offered below the OECD minimum allowable interest rate. A rate that falls below the OECD minimum may or may not cause material injury. Even if no injury occurs by reason of a rate falling below the OECD minimum, injury may still occur because of the amount subsidized between the OECD minimum and the market rate. Section 1912 does not address any interest rate above the OECD minimum.

However, this hypothetical construct became obsolete when the U.S. International Trade Commission announced its preliminary finding of material injury or threat thereof by reason of imports of components of rapid transit rail passenger cars.

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100 Statement by Donald deKieffer, General Counsel, Office of the United States Trade Representative, before the Senate Committee on Banking 2 (July 22, 1982). Mr. deKieffer also indicated U.S. opposition to subsidized export finance:
If we are to realize fully the benefits of open trade, and if the trading system is to allocate resources efficiently on a global scale, trade flows must reflect natural competitive advantage and not government manipulation of the conditions of trade. It is an unfortunate fact that governments still engage in a variety of trade-distorting practices, designed to undermine the judgment of the marketplace. One such practice is export subsidies, that inhibit the normal competitive forces in the international marketplace. Indeed, one of the most difficult and damaging export subsidy problems facing the United States today is in the area of official export financing.

Id. Cf. supra note 33 and accompanying text.


102 See supra notes 74-75 and accompanying text.

103 See supra notes 93 and 100 and accompanying text.

B. Congress

The reaction of the Senate Banking Committee was one of outrage. The Treasury decision was viewed as an affront to American quality. One committee member queried how the private sector was to lead the United States out of recession when the government that made the plea was so eager to stab it in the back. The section 1912 action was viewed by the Senate Banking Committee as the dying gasp of the last American subway car manufacturer. With elections only three months away, the hearing quickly turned into a personal attack on the Treasury and Assistant Treasury Secretary Marc E. Leland. More important, however,

Mr. deKieffer noted in a hearing which took place after the Treasury’s section 1912 determination and the award of the contract to Bombardier that the imposition of countervailing duties in the MTA case may be inappropriate:

Our countervailing duty laws, for that matter, our section 301 statutes, are designed to deal with situations where there is a stream of commerce and where American industry can, indeed, benefit by extra duties being imposed on current imports which offset the value of the subsidy. When you have situations like we have in the MTA area, all that can be accomplished under our current law is the imposition of countervailing duties or some sort of retaliation internationally which can penalize consumers, with no real benefit to domestic industry, because by that time they have already lost the order.

Statement by Donald deKieffer, General Counsel, Office of the United States Trade Representative, before the Subcommittee on International Finance and Monetary Policy of the Senate Committee on Banking, Housing, and Urban Affairs 134 (July 22, 1982).


Now, it is frankly difficult for me as a U.S. Senator to believe that an American executive department or agency did the analysis which accompanied the report. The benefit of the doubt is consistently given to the Canadian bidder with regard to technological superiority, quality and reliability of workers, and quality and reliability of management, even though the Budd Co. has built 11,000 railway cars of stainless steel over the past 50 years and Bombardier has yet to build a single one. I thought for a while I was reading a brochure by the Canadian Chamber of Commerce.

Id.

Personal recollection of the author who was present at the hearing.

Hearing on Subsidized Export Financing, supra note 105, at 147. Chairman Heinz stated:

I suggest you do the following: go take your report, leave the office, get a drink in your hand, turn the TV set on, take a sip, get into a comfortable chair and read it, and then come back and tell me if you think it is in any way prejudicial or hostile to U.S. business . . . . Now, I don’t know what kind of record Treasury is trying to build here. It sounds to me that you’re trying to justify a Treasury decision after you’ve taken it, and I don’t think you’re cognizant of the damage you’re doing either to the reputation of the last remaining American manufacturer of light rail vehicles—you are doing a hatchet job on them that Mr. Ravitch would never con-
were the several protectionist bills introduced as a result of the decision. The first of the proposed protectionist bills was House Bill 6799.\textsuperscript{108} This bill sought to amend the current section 1912 by providing for automatic matching funds if financing at a level below the OECD minimum is not withdrawn upon request. The proposed automatic matching provision would result in a drain on an already troubled U.S. budget.\textsuperscript{109} Under the proposed bill, the “determining factor” test would also be eliminated. It is also trade-restrictive in its emphasis on financing rather than on the merits of any given product. This position is contrary to the present administration’s liberal trade policies.

Two other proposed protectionist bills are Senate Bills 2732 and 2616. Senate Bill 2732\textsuperscript{110} would reduce financing from a “determining factor” to only a “relevant” factor in the consideration of a finance package. This bill would reduce the Treasury’s discretion in authorizing EXIM matching funds, but again presents the problem of monetary drain on the economy.

Additionally, Senate Bill 2616\textsuperscript{111} would amend the 1964 Urban Mass Transportation Act (UMTA) by prohibiting disbursement of federal aid to any domestic concern which has received benefits under a contract with a foreign entity where the terms of the contract violate the Subsidies Code. At the very least, such a provision in UMTA would invite retaliation from U.S. trading partners and would receive condemnation as being trade-restrictive.\textsuperscript{112}

VII. CONSIDERATIONS FOR USE OF SECTION 1912

As has been previously discussed, the legislative history of section 1912 is sparse.\textsuperscript{113} However, the procedural steps contained within the sec-

\begin{itemize}
  \item \textsuperscript{109} Cf. supra note 46 and accompanying text.
  \item \textsuperscript{110} S. 2732, 97th Cong., 2d Sess., 128 Cong. Rec. S8255 (daily ed. July 14, 1982).
  \item \textsuperscript{111} S. 2616, 97th Cong., 2d Sess., 128 Cong. Rec. S6595 (daily ed. June 9, 1982).
  \item \textsuperscript{112} While export credit subsidies are undesirable, the automatic exclusion of what may be a “superior” product makes no more sense than the award of a contract based on the presence of subsidized finance. It does not address the “merits” of the product and ignores comparative advantage. In this respect, section 1912 is adequate in that it addresses the importance of a subsidized finance package before authorizing retaliation.
  \item \textsuperscript{113} See supra note 28 and accompanying text.
\end{itemize}
tion are very clear. Section 1912 requires that a proposed finance package contain finance terms below those agreed upon under the Arrangement.\textsuperscript{114} Determining whether to provide matching funds is wholly an exercise of Treasury discretion.\textsuperscript{115} Therefore, potential petitioners should be encouraged to determine the objectives of the purchasing concern prior to the sale and then make an honest determination as to whether or not they are in a position to fulfill such objectives.

Consideration of this type would save an offeree embarrassment in open court or before Congressional committee, if a contract offeror affirms the Treasury's negative findings with respect to the offeree's abilities. Thereafter, should section 1912 proceedings be initiated, the purchasing concern should actively seek substantial communication between itself and the Treasury to make clear that the section 1912 complainant is capable of filling the purchasing concern's contract requirements. In the present case, the section 1912 action took approximately six weeks from petition to resolution.\textsuperscript{116}

In addition to the above considerations, it is important to note that should a petitioner receive a negative determination from the Treasury on its section 1912 action, other import relief measures will not be precluded.\textsuperscript{117} Section 1912 is compatible with U.S. countervailing duty law\textsuperscript{118} and is also compatible with section 301, subject to executive discretion.\textsuperscript{119} Therefore, these alternative measures should be pursued simultaneously upon the commencement of section 1912 proceedings.

\textsuperscript{114} Arrangement, supra note 3.

\textsuperscript{115} Supra note 75 and accompanying text.


\textsuperscript{117} See supra note 104 and accompanying text.

\textsuperscript{118} Id.

\textsuperscript{119} Id.

The author is of the opinion that nothing will stop a section 301 action should the White House choose to support one, given the absence of an injury test and the particular legislative history of section 301. That legislative history in part provides:

Under section 301(b) of the House bill the President would have been required to consider the relationship of any action taken under section 301 to the international obligations of the United States. The Committee on Finance agreed to delete this reference to U.S. international obligations since it felt that retaliation should be against the countries which discriminate against U.S. commerce and not against other countries which do not so discriminate. In addition, the Committee felt that there would be situations, such as in the case of unreasonable foreign import restrictions where the President ought to be able to act or threaten to act under section 301, whether or not such action would be entirely consistent with the General Agreement on Tariffs and Trade.

\textbf{Senate Finance Committee, Report on H.R. 10710, Trade Reform Act of 1974, S. REP. No. 1293, 93d Cong., 2d Sess. 166 (1974).} However, the author has also been informed that USTR chose not to proceed with the AFL-CIO complaint because of the Treasury findings in the section 1912 action. Telephone conversation with C. Michael Hathaway, Deputy General Counsel, Office of the U.S. Trade Representative (Jan. 12, 1983).
VIII. CONCLUSION

The Budd Co.'s attempted implementation of section 1912 was the first case decided under this section by the Treasury. This case resulted in judgment against a U.S. industry. Section 1912 was supposed to combat officially subsidized export finance. It must also be remembered that this case was only the first attempted implementation of the matching fund provisions contained in the section. Even if the decision had been in favor of Budd Co., one would have to question the propriety of EXIM funding a purely domestic project. In the MTA case, the Treasury appears to have had all necessary information to make a competent decision. Further, the MTA corroborated the Treasury's findings. More use of section 1912 is needed before determining whether provisions of 1912 should be amended. Certainly, any amendment cannot be as blatantly protectionist as those currently proposed if the United States is to continue to champion principles of liberal trade.

See supra note 19 and accompanying text.