

REVAMPING THE EXPORT-IMPORT BANK IN 2002: THE IMPACT OF THIS INTERIM SOLUTION ON THE UNITED STATES AND LATIN AMERICA

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INTRODUCTION

Exports are critical to a nation's well-being, particularly in this era of increasing globalization and worldwide interdependence. Among the principal benefits that a country obtains from exporting its goods and services are a reduction of its trade deficit, creation of domestic jobs characterized by superior productivity and wages, enhanced economic diversification and stability, inexpensive products of higher quality triggered by increased competition, and strengthened commercial diplomacy as both exports and exporters act as effective disseminators of technological, cultural, and political information to foreign markets. In the proverbial (and seemingly elusive) perfect world, governments would not subsidize exports from their countries and free-market principles would thus reign supreme. With so much at stake with exports, however, the *laissez faire* ideal has proven, to date, unattainable, as nearly all major governments economically assist their respective domestic interests through export credit agencies (ECAs). These government agencies, in short, promote national exports by financing (which may include loans, guarantees, insurance, etc.) transactions when the private financial market is unwilling to participate because of unacceptably high levels of risk. Such governmental support is common for transactions or projects in developing regions, the so-called "emerging-market economies" such as Latin America, where default is commonplace.

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For its part, the United States utilizes the Export-Import Bank (Ex-Im Bank), which functions in accordance with a renewable charter that must be approved, and normally modified, on a periodic basis. Most recently, the operating authority of this U.S. agency was extended until 2006 by the Export-Import Bank Reauthorization Act of 2002 (Reauthorization Act).¹ Along with introducing various changes designed directly to benefit domestic exporters and the U.S. economy as a whole, the Reauthorization Act will also render numerous positive effects on Latin America. While not readily apparent, the Ex-Im Bank's fortified relationship with Latin America will yield affirmative results for the United States.

This article is organized in the following manner: the first Part provides a general overview of the functions of the Ex-Im Bank and briefly explains the legislative steps leading to the recent enactment of the Reauthorization Act. The second Part examines the direct benefits to the United States and its exporters generated by the Reauthorization Act. After discussing the Ex-Im Bank's significant (yet commonly unknown) involvement with Latin America and its implicit (yet nonetheless legitimate) mandate to assist this area and other developing regions, the third Part identifies the ways in which the Reauthorization Act will improve both Latin America and various aspects of U.S.-Latin American relations. Based on these benefits, this article concludes that, while the optimal solution would be to eliminate ECAs altogether, present circumstances warrant the continued existence of the Ex-Im Bank and its improved operation pursuant to the Reauthorization Act.

I.

THE U.S. EXPORT-IMPORT BANK: FUNCTIONS AND RENEWAL

Since its inception in 1934, the primary mission of the Ex-Im Bank has been to promote the export of U.S. goods and services and, in turn, create and maintain employment opportunities in the United States.² According to finance authorities, exports are pivotal to the U.S. economy since they currently constitute ten percent of the na-

1. Export-Import Bank Reauthorization Act of 2002, Pub. L. No. 107-189, 116 Stat. 698 (to be codified at 12 U.S.C. § 635).

2. See 12 U.S.C. § 635(b)(1)(A) (2000) (stating that purpose of Ex-Im Bank is to "foster expansion of exports of manufactured goods, agricultural products, and other goods and services, thereby contributing to the promotion and maintenance of high levels of employment and real income, a commitment to reinvestment and job creation, and to the increased development of the productive resources of the United States").

tion's Gross Domestic Product (GDP) and support approximately twelve million jobs, the majority of which enjoy wages that far exceed the national average.³ In accomplishing its objective, the Ex-Im Bank may not compete with financing that is available in the private sector, and thus intervenes only in cases of "market failure" where commercial institutions are reluctant to finance.⁴ This hesitance to support U.S. exports (especially to emerging markets) is due to the myriad of risks involved with international export transactions, including foreign exchange difficulties when payments are to be made in different currencies, complicated dispute resolution mechanisms, increased probabilities of troubles resulting from lengthy shipment of products, the unjust and unexpected confiscation by foreign officials of import licenses or property, wars, labor strikes, and insurrection.⁵ Due to its ability to act only when the private sector refuses to do so, the Ex-Im Bank has commonly been called a "lender of last resort."⁶

The Ex-Im Bank promotes the export of U.S. goods and services by offering four principal financial products. First, it extends export loans to foreign buyers so that they are able to purchase U.S. goods

3. *The Annual National Export Strategy Report of the Trade Promotion Coordinating Committee (TPCC): Hearing Before the S. Comm. on Banking Hous. and Urban Dev.*, 107th Cong. 17–21 (2002) (statement of Hon. Eduardo Aguirre, Vice-Chairman and First Vice-President of U.S. Export-Import Bank).

4. *Export-Import Bank Charter Renewal: Hearing Before the Subcomm. on Int'l Dev., Fin., Trade and Monetary Policy of the House Comm. on Banking, Hous. and Urban Affairs*, 102nd Cong. 73 (1992) (statement of Allan I. Mendelowitz, Director, International Trade and Finance Issues, General Government Division, General Accounting Office) (stating that Ex-Im Bank is required to (i) counter moves of foreign ECAs against whom U.S. exporters are competing, (ii) avoid competing with private sector financing, (iii) provide export assistance only when there is reasonable certainty that party will repay its loan, and (iv) reserve certain percentage of its budget for U.S. small business). Based on these mandates, Mendelowitz's testimony concludes that "the Ex-Im Bank has a very important, though constrained, role in assisting U.S. exports." *Id.*

5. U.S. GEN. ACCOUNTING OFFICE, REP. NO. GAO/GGD-93-39, REPORT TO CHAIRWOMAN, SUBCOMM. ON INT'L DEV., FIN., TRADE AND MONETARY POLICY, COMM. ON BANKING, FIN. AND URBAN AFFAIRS, HOUSE OF REPRESENTATIVES, EXPORT FINANCE: THE ROLE OF THE U.S. EXPORT-IMPORT BANK 13–14 (Dec. 1992).

6. Rita M. Rodriguez, *Ex-Im Bank: Overview, Challenges and Policy Options*, in THE EX-IM BANK IN THE 21ST CENTURY: A NEW APPROACH? 3–4 (Gary Clyde Hufbauer & Rita Rodriguez eds., Inst. for Int'l Econ., Special Rep. 14, Jan. 2001) (quoting U.S. Rep. James A. Leach); see also Chris Rugaber, *Senate Approves Ex-Im Bank Conference Bill, Clearing the Way for Presidential Signature*, 19 INT'L TRADE REP. 1036, 1036 (2002) (quoting Ed Rice, President, Coalition for Employment Through Exports); 148 CONG. REC. H3172, 1144 (daily ed. June 5, 2002) (statement of Rep. Oxley).

and services with the funds.⁷ Second, the Ex-Im Bank makes export loan guarantees to a private lender that agrees to make a loan to the foreign buyer desirous of purchasing U.S. exports.⁸ If the foreign purchaser/borrower defaults on the loan, the Ex-Im Bank is obligated to pay the lender the unpaid debt and interest thereon.⁹ Third, working capital guarantees are available to private lenders who provide funds to potential U.S. exporters to afford them the short-term cash necessary in a pre-export setting to bid on contracts, market products and services, finance account receivables, and enhance production to meet increased sales orders.¹⁰ Finally, the Ex-Im Bank offers export credit insurance that safeguards U.S. exporters against economic loss if a foreign buyer defaults on repayment due to political reasons (for example, war, expropriation, cancellation of an import license) or commercial reasons (for example, currency devaluation, economic volatility, unanticipated competition or deterioration of the market).¹¹ The Ex-Im Bank charges a series of fees for each of these four products, which vary based on the level of country risk, foreign buyer uncertainty, and type of transaction.¹² In terms of overall financing, in 2001, the Ex-Im Bank assisted nearly 2,400 U.S. export transactions, ninety percent of which involved small businesses.¹³

In addition to utilizing these four products, the Ex-Im Bank also attempts to promote U.S. exports by using its "Tied Aid Credit Fund" directly to counter efforts by other governments to place U.S. exports in a disadvantageous position. This is accomplished by offering financing terms exclusively to their own exporters that violate those set forth in multilateral agreements under the Organization for Economic Cooperation and Development (OECD). In 1978, the OECD nations

7. See EXPORT-IMPORT BANK OF THE UNITED STATES, MEDIUM AND LONG TERM PROGRAM, EX-IM BANK DIRECT LOAN PROGRAM, at <http://www.exim.gov/mlt-prog.html> (revised June 6, 2001).

8. See EXPORT-IMPORT BANK OF THE UNITED STATES, MEDIUM AND LONG TERM PROGRAM, GUARANTEE PROGRAM, at <http://www.exim.gov/guarantee.html> (revised June 6, 2001).

9. See *id.*

10. See *id.*

11. See EXPORT-IMPORT BANK OF THE UNITED STATES, EXPORT CREDIT INSURANCE, at <http://www.exim.gov/minsprog.html> (revised Oct. 26, 2001).

12. See 12 U.S.C. § 635(c)(1); see also S. REP. NO. 107-52, at 3 (2001) (stating "over the past five years the interest and fees collected by the Ex-Im Bank have earned the federal government over \$4 billion").

13. EXPORT-IMPORT BANK OF THE U.S., FISCAL YEAR 2001 ANN. REP. 14 [hereinafter FISCAL YEAR 2001 ANNUAL REPORT]. This annual report also stated that although ninety percent of the transactions concerned U.S. small businesses, less than eighteen percent of the Ex-Im Bank's overall funds promoted exports of these small entities. *Id.*

adopted the Arrangement on Guidelines for Officially Supported Export Credits (Export Credit Arrangement), which established rules designed to allow exporters the world over to compete based on the price and quality of their goods and services, rather than on which exporter is able to obtain the most favorable financing terms from a governmental agency.¹⁴ To combat breaches of this Export Credit Arrangement, the Ex-Im Bank is authorized to use a “war chest” containing approximately \$300 million (\$500 million in previous years) to match financing offers made by any foreign ECA that would undermine U.S. exporters’ ability to sell their goods and services in the international market.¹⁵ Moreover, in conjunction with the U.S. Treasury Department, the Ex-Im Bank uses the war chest as leverage in ongoing OECD negotiations to force other nations to reduce, and eventually eliminate altogether, government-supported export credits.¹⁶

The Ex-Im Bank operates under a renewable charter, thereby exposing itself to periodic congressional scrutiny and modifications. Having expired in September 2001, the Ex-Im Bank was recently subjected to intense debate in Washington. Amid a series of bills that served temporarily to extend the Ex-Im Bank’s operation until a consensus could be reached, potential changes to the institution’s charter were contemplated fervently by both branches of Congress.¹⁷ In particular, extensive hearings were held in the House of Representatives (Committee on Financial Services, Subcommittee on International Monetary Policy and Trade) and the Senate (Committee on Banking, Housing and Urban Affairs, Subcommittee on International Trade and Finance) regarding the Reauthorization Act.¹⁸ Despite significant sup-

14. ORG. FOR ECON. COOPERATION AND DEV., ARRANGEMENT ON GUIDELINES FOR OFFICIALLY SUPPORTED EXPORT CREDITS 7 (1998), available at <http://www.oecd.org/pdf/M00035000/M00035551.pdf> (last modified Oct. 2002).

15. Katherine P. Rosefsky, *Tied Aid Credits and the New OECD Agreement*, 14 U. PA. J. INT’L BUS. L. 437, 460 (1993); see also H.R. REP. NO. 107-142, at 4 (2001) (indicating amount available for Fiscal Year 2002 for use by Export-Import Bank).

16. *Export-Import Bank: Hearing Before the Subcomm. on Int’l Dev., Fin. and Monetary Policy of the House Comm. on Banking, Fin. and Urban Affairs*, 103rd Cong. 50–51 (1993) (statement of Allan I. Mendelowitz, Managing Director, International Trade, Finance, and Competitiveness, General Government Division, General Accounting Office).

17. Act of May 1, 2002, Pub. L. No. 107-168, 116 Stat. 131 (providing for temporary extension of Export-Import Bank of United States); Act of Mar. 31, 2002, Pub. L. No. 107-156, 116 Stat. 117 (providing, as well, for temporary extension of Export-Import Bank of United States).

18. See *Reauthorization of the Export-Import Bank: Hearings Before the Subcomm. on Int’l Monetary Pol’y and Trade of the House Comm. on Fin. Servs.*, 107th Cong. 2 (2001) [hereinafter *House Hearings (2001)*]; *Reauthorization of the Export-Import Bank of the United States: Hearings Before the Subcomm. on Int’l Trade and Fin. of*

port for rapid approval of the Reauthorization Act, the process was hindered on several occasions due to disputes with the U.S. Treasury Department regarding ultimate authority over use of the war chest,¹⁹ and partisan squabbling among certain members of Congress.²⁰ Approximately one year after its introduction, Congress enacted the Reauthorization Act in June 2002.²¹

II.

BENEFITS FOR THE UNITED STATES

As mentioned earlier, the broad mission of the Ex-Im Bank is to foster the export of U.S. goods and services. The advantages of enhanced exportation for the entire United States are widely recognized. Less understood, though, is the positive impact that the Ex-Im Bank has in several discrete areas. Examined below are some of the benefits derived from this agency, particularly under the recent Reauthorization Act.

A. *Strengthens U.S. Small Businesses*

In 2000, approximately eighty-six percent of the export transactions supported by the Ex-Im Bank involved U.S. small businesses. In economic terms, however, exports by domestic small businesses received only eighteen percent of the Ex-Im Bank's annual expenditures.²² Based on these statistics, critics of the Ex-Im Bank argue that large U.S. corporations, particularly those in the aviation industry, are

the Senate Comm. on Banking, Hous. and Urban Affairs, 107th Cong. (2001) [hereinafter *Senate Hearings (2001)*].

19. Chris Rugaber, *Export-Import Bank Reserve Calculations Questioned; Reauthorization Deadline Looms*, 19 INT'L TRADE REP. 442, 443 (2002); see also *House Passes Ex-Im Authorization, Setting Up Fight on Tied-Aid*, INSIDE U.S. TRADE, May 10, 2002, at 22.

20. See Chris Rugaber, *Armed Threatens to Use Export Bills as 'Carrots' in Trade Legislation Fight*, 19 INT'L TRADE REP. 684, 684 (2002) (House majority leader, Dick Arney, contemplated delaying consideration of Reauthorization Act by House of Representatives as tactic to force Senate majority leader, Tom Daschle, to advance the Trade Promotion Authority bill). Arney stated that he did not want "to bring things through that are easy and obvious things for Daschle to do that makes him feel good about his accomplishments while he leaves the nation's larger, more important work [to] sit on the back shelf." *Id.*; see also *Arney Says EAA, Ex-Im Bills on Hold Until Senate Acts on Fast Track*, INSIDE U.S. TRADE, April 19, 2002, at 22.

21. Export-Import Bank Reauthorization Act of 2002, Pub. L. No. 107-189, 116 Stat. 698 (to be codified at 12 U.S.C. § 635).

22. *Fiscal Year 2001 Annual Report*, *supra* note 13 and accompanying text.

disproportionately and unjustly benefited.²³ From their perspective, the Ex-Im Bank is simply “corporate welfare with a fancy name” since this institution is engaged in an unsubtle wealth transfer whereby the taxpayers’ money is distributed to influential domestic and multinational corporations.²⁴ Proponents of the Ex-Im Bank, on the other hand, emphasize that small businesses benefit to a greater extent than the statistics indicate. Specifically, although big business receives the lion’s share of the total financing of the Ex-Im Bank, this arrangement actually helps many small entities that serve as suppliers or subcontractors. In many instances, these small businesses are unaware that their products are eventually exported (as inputs or components of a larger U.S. product) thanks to financing by the Ex-Im Bank.²⁵ For example, a large producer of agricultural equipment that benefits from Ex-Im Bank financing claims that building just one combine for export involves 235 small business suppliers from thirty-five states, that he terms “invisible exporters.”²⁶

In view of the existing controversy, the Reauthorization Act includes several provisions that will significantly benefit small business. First, the Ex-Im Bank is required to increase the minimum amount of total financing directed to small businesses from ten to twenty percent.²⁷ Second, the Ex-Im Bank will conduct outreach programs and increase loans to small businesses owned by disadvantaged individuals or women.²⁸ Third, the Ex-Im Bank must designate at least eight percent of its total financing to be used for small businesses employing less than one hundred persons.²⁹ Finally, in an effort to facilitate access to Ex-Im Bank programs and eliminate the burden of excessive

23. See, e.g., WILLIAM H. LASH III, WHO NEEDS AN EXIMBANK? 5 (1995) (referring to Ex-Im Bank as “Boeing’s Bank” since this aviation company receives large percentage of total annual support to combat subsidized competition in Europe).

24. *Id.* at 6.

25. See, e.g., *What Has Ex-Im Done for Small Business Lately?: Hearing Before the House Comm. on Small Bus.*, 107th Cong. 2 (2001) (statement of Hon. Donald Mazullo, Chairman, House Comm. on Small Bus.) (arguing that those adverse to Ex-Im Bank intentionally distort eighteen percent figure and explaining that “benefit of Ex-Im goes way beyond big exporting companies to workers who may not even know what they produce makes it overseas”); see also *House Hearings (2001)*, *supra* note 18, at 7 (statement of William Redway, Group Vice President of Small and New Business, Export-Import Bank) (stating that figures relating to Ex-Im Bank outlays do not even “take into consideration the tens of thousands of small businesses that benefit indirectly from exports from large corporations”).

26. *House Hearings (2001)*, *supra* note 18, at 39–40 (statement of Richard M. Christman, President, Case IH Agricultural Business of Casenwholland Inc.).

27. Export-Import Bank Reauthorization Act of 2002, Pub. L. No. 107-189, § 7(a), 116 Stat. 698 (to be codified at 12 U.S.C. § 635).

28. *Id.* § 7(b).

29. *Id.*; 12 U.S.C. § 635(b)(1)(E)(v) (2000).

amounts of paperwork, the Reauthorization Act requires the Ex-Im Bank to focus on technological improvements by implementing an electronic system that is capable of tracking all pending transactions and allows exporters to use the Internet to apply for all of the Ex-Im Bank programs.³⁰ In addition to these new statutory provisions designed to aid small business, the recent debate surrounding the Reauthorization Act has spurred other programs to help this segment of the U.S. business community. In May 2002, the U.S. Small Business Administration decided to increase its coordination of export promotion programs with the Ex-Im Bank, signing a "memorandum of cooperation" that contemplates regular meetings, joint marketing campaigns, educational publications, lender and small business training programs, etc.³¹ Together these efforts should improve exports by U.S. small businesses to many regions, such as Latin America, where support from the Ex-Im Bank is absolutely critical. According to the former head of the Small Business Association, "commercial banks will not finance small-business exports to emerging markets like Latin America."³²

*B. Achieves Broader Trade Policy Objectives Using the
"War Chest"*

International negotiations regarding export credits began in the 1970s because of fears that the global oil crisis would trigger an export subsidy war. As a result of these negotiations, the Export Credit Arrangement was adopted in 1978 under the auspices of the OECD.³³ The general purpose of the Export Credit Arrangement was to "encourage competition among exporters from the OECD-exporting countries based on quality and price of goods and services exported rather than on the most favourable officially-supported items."³⁴ Among the most notable guidelines set forth in the Export Credit Arrangement were those pertaining to "officially supported" exports and

30. Export-Import Bank Reauthorization Act of 2002 § 8.

31. Chris Rugaber, *Export-Import Bank to Promote Small Business Exports with SBA*, 19 INT'L TRADE REP. 873, 873 (2002).

32. Kent Hoover, *Small Firms Battle for Export-Import Bank Programs*, SACRAMENTO BUS. J., June 29, 2001, available at <http://sacramento.bizjournals.com/sacramento/stories/2001/07/02/smallb1.html>.

33. ORG. FOR ECON. COOPERATION AND DEV., *supra* note 14. Signatory countries to the Export Credit Arrangement are Australia, Canada, Czech Republic, the European Union countries (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom), Japan, Korea, New Zealand, Norway, Switzerland, and the United States. *Id.* at § 1(a).

34. *Id.* at 7.

“tied aid.” Regarding the former, this agreement places limits on the terms of “officially supported” export credits such that the amount of the initial cash down-payment, repayment terms, and interest rates all must adhere to certain standards.³⁵ With respect to the latter, the term “tied aid” is defined as monetary assistance “which is in effect (in law or fact) tied to the procurement of goods and/or services from the donor country.”³⁶ In other words, the government of one country will grant economic assistance to another nation, provided that the nation receiving such assistance will later use the funds to purchase goods and services from private exporters located in the donor country. The Export Credit Arrangement dictates that “tied aid” may not be extended to projects that are commercially viable—that is, projects that are capable of generating sufficient cash flow to cover the project’s operating costs and loan repayment schedule (capital plus interest)—if financing terms were determined by prevailing market rates.³⁷ If an OECD country intends to extend export financing in violation of the provisions regarding officially supported export credits or tied aid, the country must notify all other OECD nations in advance, specifying the terms and conditions upon which it intends to act.³⁸ The other OECD nations then have the opportunity to match the terms of the proposed financing, thus accomplishing the Export Credit Arrangement’s purpose of ensuring competition among exporters based on the quality and price of certain goods and services, instead of on the most favorable government-supported financing terms.³⁹

Although the Export Credit Agreement has undergone several amendments since its introduction, several shortcomings still exist, including: (i) the “arrangement” is non-binding and thus difficult to enforce;⁴⁰ (ii) certain language is vague, leaving loopholes by which other OECD countries can circumvent the spirit, if not the explicit provisions, of the agreement;⁴¹ (iii) the definition of “commercially viable” has never been completely resolved;⁴² and (iv) the existence of

35. *Id.* §§ 7, 10, 15.

36. *Id.* § 31.

37. *Id.* § 35(a)–(b).

38. *Id.* § 47(a).

39. *Id.* §§ 50, 52(a), 60.

40. Rosefsky, *supra* note 15, at 464–65.

41. U.S. GEN. ACCOUNTING OFFICE, REP. NO. GAO/GGD-93-39, REPORT TO CHAIRWOMAN, SUBCOMM. ON INT’L DEV., FIN., TRADE AND MONETARY POL’Y, COMM. ON BANKING, FIN. AND URBAN AFFAIRS, HOUSE OF REPRESENTATIVES, EXPORT FINANCE: THE ROLE OF THE U.S. EXPORT-IMPORT BANK 52 (1992).

42. U.S. GEN. ACCOUNTING OFFICE, REP. NO. GAO/T-GGD-94-96, TESTIMONY BEFORE THE SUBCOMM. ON INT’L DEV., FIN., TRADE AND MONETARY POL’Y, COMM. ON BANKING, FIN. AND URBAN AFFAIRS, HOUSE OF REPRESENTATIVES, EXPORT FI-

an escape clause whereby nations can proceed with a tied aid offer despite objections by other OECD nations if the donating nation claims that such action is in its national interest.⁴³ In order to address the inadequacies of the Export Credit Arrangement, in 1985, the Reagan Administration created a so-called "war chest" within the Ex-Im Bank comprised of \$300 million, which had two main purposes. First, placing such a large amount of money at the Ex-Im Bank's disposal was designed to give the United States leverage at future OECD negotiations since all member countries would be aware that the Ex-Im Bank was poised and economically prepared to counter any violations of the Export Credit Arrangement.⁴⁴ Second, the funds in the war chest could be used instantly to "level the playing field" for U.S. exporters by allowing the Ex-Im Bank to match any financing offered by other countries in violation of the Export Credit Arrangement.⁴⁵ Unfortunately, violations of the Export Credit Arrangement continue, thus necessitating the continued existence and perhaps increased use of the war chest as discussed in the following two subsections.

1. *Levels the Playing Field for U.S. Exporters*

Currently, two main factors hinder the ability of U.S. exporters to compete for projects on a fair level. First, other nations are circumventing the Export Credit Arrangement through "market windows," which are government-owned or -directed institutions claiming to operate entirely on a commercial basis, yet benefiting from some level of government support.⁴⁶ The most active market windows, the Kreditanstalt für Wiederaufbau (KfW) in Germany and the Export Development Corporation (EDC) in Canada, claim that they are not subject to the rules of the Export Credit Arrangement because their financing terms (for example, interest rate, repayment schedule, etc.) resemble those in the private market and thus are not "officially supported" financing, and none of their transactions are *expressly* tied to

NANCE: CHALLENGES FACING THE U.S. EXPORT-IMPORT BANK 4 (1993) (summary of statement of Allan I. Mendelowitz, Director, International Trade and Finance Issues, General Government Division, General Accounting Office).

43. *Id.* (summary of statement of Allan I. Mendelowitz, Director, International Trade and Finance Issues, General Government Division, General Accounting Office).

44. Rosefsky, *supra* note 15, at 448.

45. *Id.*

46. TRADE PROMOTION COORDINATING COMM., REPORT TO THE UNITED STATES CONGRESS ON THE 2002 NATIONAL EXPORT STRATEGY: THE ADMINISTRATION'S TRADE PROMOTION AGENDA, UNLOCKING AMERICA'S POTENTIAL 1 n.9 (2002).

exports.⁴⁷ Skeptics of these arguments point out, however, that the KfW and EDC enjoy several advantages over both a true private entity and an official ECA such as the Ex-Im Bank. For instance, the initial capitalization for these entities is derived almost exclusively from the government; they can offer lower-cost financing since they borrow with the full faith and credit of their respective governments, they do not pay dividends to any shareholders, and they do not pay taxes on their profits.⁴⁸ In short, “the government benefits give [the market windows] significant leeway to operate profitably while still offering financing on significantly more attractive terms than a financial institution owned by private shareholders would find possible.”⁴⁹ The second method by which other OECD governments hamper the ability of U.S. exports to compete fairly is the use of “de facto tied aid.”⁵⁰ As stated above, the Export Credit Arrangement expressly prohibits the use of tied aid. To skirt this restriction, many governments are now disguising their tied aid by not signing any legal agreements that explicitly require the recipient country to procure goods and services from exporters in the donor nation. Despite this lack of formal agreement, the aid is effectively tied because “the recipient country knows very well who is providing the funds and places orders accordingly.”⁵¹ If such circumventions manage to completely undermine the system of tied aid rules, they would prove quite costly for U.S. exports, causing them to lose up to \$20 billion annually.⁵²

47. Allan I. Mendelowitz, *The New World of Government-Supported International Finance*, in *THE EX-IM BANK IN THE 21ST CENTURY: A NEW APPROACH?* 159, 169–70 (Gary Clyde Hufbauer & Rita Rodriguez eds., Inst. for Int’l Econ., Special Rep. 14, Jan. 2001).

48. *Id.* at 173–74; see also *Senate Hearings (2001)*, *supra* note 18, at 45 (statement of C. Fred Bergsten, Director, Institute for International Economics). This economist identifies additional advantages of the market windows, including the ability to shift a portion of their administrative costs to the government since they operate within the government facility, the economic resources to pay competitive salaries to hire and retain talented personnel, and the capacity to respond rapidly and flexibly to commercial opportunities. *Id.*

49. Mendelowitz, *supra* note 47, at 174.

50. See *THE EXPORT-IMPORT BANK OF THE UNITED STATES, COMPETITIVE REPORT FOR 2001, REPORT TO THE U.S. CONGRESS ON EXPORT COMPETITION AND THE EXPORT-IMPORT BANK OF THE UNITED STATES, PART 3, TIED AID 40–41* (July 2002), available at <http://www.exim.gov/compet/competpart301.pdf> (revised on Oct. 2, 2002).

51. *Senate Hearings (2001)*, *supra* note 18, at 45 (statement of C. Fred Bergsten, Director, Institute for International Economics).

52. *TRADE PROMOTION COMM.*, *supra* note 46, at 8 (Alluding to existence of “de facto tied aid,” this report claims that “[i]f the rules [regarding tied aid under the Export Credit Arrangement] unravel, trade-distorting financing faced by U.S. exporters is likely to be \$20 billion annually, based on historical averages”).

Critics of the Ex-Im Bank argue that, while the level-the-playing-field argument does have some merit, this institution should still be eliminated completely or have its budget significantly reduced because the need to counter subsidized competition from abroad is exaggerated. Because only one-third of all financing requests are submitted to the Ex-Im Bank in response to unfair foreign competition, they argue that “it is difficult to conclude that the U.S. economy is seriously threatened by a playing field tilted against it.”⁵³ This opinion, however, appears to be in the minority. Although many in the mainstream agree, in theory, that eliminating the Ex-Im Bank is an appropriate end goal, they underscore that while other governments continue to operate ECAs (as well as sanction market windows and de facto tied aid), the United States cannot afford to “unilaterally disarm” lest the domestic exporters be severely imperiled.⁵⁴ It is argued, furthermore, that if the situation is viewed solely in terms of economic theory, financing from the Ex-Im Bank may be considered simply a subsidy that is disruptive to the operation of free markets.⁵⁵ Nonetheless, as certain congressmen accurately point out, “we do not live in a theoretical world. We live in a real world.”⁵⁶ To further counter the argument that the Ex-Im Bank be immediately abolished, economists explain that such a free market theory overlooks the fundamental economic principle known as the “theory of second best.” This notion dictates that in a “rigged market” where export subsidies by foreign governments create artificial distortions, the logical solution is to

53. AARON LUKAS & IAN VÁSQUEZ, *RETHINKING THE EXPORT-IMPORT BANK* 11 (CATO Inst., Trade Briefing Paper No. 15, Mar. 12, 2002), available at <http://www.freetrade.org/pubs/briefs/tbp-015.pdf> (on file with the *New York University Journal of Legislation and Public Policy*).

54. *Reauthorization of the Export-Import Bank of the U.S.: Hearing Before the Subcomm. on Int'l. Fin. of the Comm. on Banking, Hous., and Urban Affairs*, 105th Cong. 24 (1997) [hereinafter *Senate Hearings (1997)*] (statement of Stuart E. Eizenstat, Undersecretary for Economic and Business Affairs, U.S. Department of State). This official states that weakening or abolishing the Ex-Im Bank would be tantamount to “unilateral economic disarmament.” *Id.*

55. See 148 CONG. REC. S1955 (daily ed. Mar. 14, 2002) (statement of Sen. Evan Bayh).

56. *Id.* (statement of Sen. Evan Bayh); see also *House Hearings (2001)*, *supra* note 18, at 2 (statement of Rep. Michael G. Oxley) (adopting same view that, while in “perfect world” there would be no need for Ex-Im Bank, an international trade system wherein every major actor utilizes ECAs dictates that Ex-Im continue to aggressively assist U.S. exporters); *Senate Hearings (1997)*, *supra* note 54, at 24 (statement of James A. Harmon, President and Chairman of Ex-Im Bank) (“We may not like [anticompetitive arrangements], we may want to see it change, and indeed, Ex-Im Bank is actively working to eliminate such practices. But, until then, we have to live in the real world. I can assure you, U.S. workers and companies do.”).

counter them with U.S. government initiatives that offset these subsidies.⁵⁷

2. *Reduces Export Subsidies at the Multilateral Level*

While the short-term objective of using the war chest is to level the playing field immediately for U.S. exporters, its long-term goal is eventually to eliminate export credits altogether through a multilateral agreement such as the Export Credit Arrangement.⁵⁸ Although the two aims may seem contradictory at first glance, further analysis reveals the coherency. For example, if one accepts the proposition that exports are beneficial to the overall economy and that foreign governments continue to subsidize (in violation of the Export Credit Arrangement), then the United States has three principal options: (i) abolish the Ex-Im Bank and leave the field to international competition to the detriment of U.S. jobs; (ii) engage in an escalating export subsidy “arms race” with the other governments; or (iii) give U.S. exporters a chance to compete with foreign competitors based on quality and price by sustaining the Ex-Im Bank in the short term, while simultaneously attempting through multilateral negotiations to limit or eliminate government export subsidization.⁵⁹ Without the war chest of the Ex-Im Bank, the possibility of accomplishing the United States’ ultimate goal of entirely eliminating ECAs seems unattainable.

Although the war chest (now known as the Tied Aid Credit Fund) has been in existence for nearly two decades, it has been utilized sparingly.⁶⁰ This minimal use of such a potentially powerful weapon is attributable, in large part, to a disagreement between the U.S. Treasury Department and the Ex-Im Bank regarding which agency has ultimate authority to administer the fund.⁶¹ Fortunately, the Reauthorization Act clarifies the role of each agency and devises a plan to foster cooperation in the future. The Reauthorization Act requires, for instance, that the Ex-Im Bank and the U.S. Treasury Department develop and submit to Congress within six months of its enactment the process and

57. *House Hearings (2001)*, *supra* note 18, at 43–44 (statement of C. Fred Bergsten, Director, Institute for International Economics).

58. *See id.* (statement of C. Fred Bergsten, Director, Institute for International Economics).

59. *Senate Hearings (2001)*, *supra* note 18, at 34 (statement of John E. Robson, President and Chairman of Ex-Im Bank).

60. U.S. GEN. ACCOUNTING OFFICE, REP. NO. GAO/GGD-93-39, REPORT TO CHAIRWOMAN, SUBCOMM. ON INT’L DEV., FIN., TRADE AND MONETARY POL’Y, COMM. ON BANKING, FIN. AND URBAN AFFAIRS, HOUSE OF REPRESENTATIVES, EXPORT FINANCE: THE ROLE OF THE U.S. EXPORT-IMPORT BANK 46–47 (1992).

61. Rugaber, *supra* note 19, at 443.

standards by which the use of the Tied Aid Credit Fund will be governed.⁶² This new charter also clarifies that the Ex-Im Bank shall make the final decision regarding the Tied Aid Credit Fund on a case-by-case basis, although the President can block any such decision that would materially impede the negotiation or enforcement of arrangements restricting the use of tied aid for commercial purposes.⁶³ In addition, the Reauthorization Act directs the U.S. Treasury Department to pursue negotiations aimed at placing untied aid under the purview of the Export Credit Arrangement and submit a progress report to Congress within one year.⁶⁴ With respect to market windows, the Reauthorization Act instructs the U.S. Treasury Department to seek multilateral negotiations concerning enhanced transparency over the activities of market windows, authorizes the Ex-Im Bank to match financing when foreign market windows offer financing terms that violate the Export Credit Arrangement, and calls for matching by the Ex-Im Bank if foreign ECAs violate or take advantage of loopholes to avoid the Export Credit Arrangements restrictions on tied aid.⁶⁵ Collectively, these new provisions should allow a more effective use of the Tied Aid Credit Fund in the future to combat market windows and de facto tied aid, as well as to spearhead negotiations under the OECD to eventually eliminate export credits altogether.

C. Facilitates "Betterment" of U.S. Business Through Increased Exports

One of the main goals of the Ex-Im Bank is to create jobs in the United States. To avoid any ambiguity as to this issue, the Reauthorization Act amends the statutory language to state that the Ex-Im Bank's objective in authorizing loans, guarantees and credits "shall be to contribute to maintaining or increasing employment of United States workers."⁶⁶ This express mandate notwithstanding, crit-

62. Export-Import Bank Reauthorization Act of 2002, Pub. L. No. 107-189, § 9, 116 Stat. 701-02 (2002) (to be codified at 12 U.S.C. § 635).

63. *Id.*

64. *Id.* § 10.

65. *Id.*; see also Chris Rugaber, *President Signs Measure Reauthorizing Ex-Im Bank Despite Untied Aid Provision*, 19 INT'L. TRADE REP. 1080, 1080-81 (2002). While President Bush signed into law the Reauthorization Act on June 14, 2002, he did not accept all provisions therein. In particular, Bush believed that Congress exceeded its authority by directing the U.S. Treasury Secretary to champion international negotiations on untied aid. According to a White House statement, such provisions interfere with Bush's constitutional authority to conduct foreign affairs. Therefore, "the executive branch [decided to] construe these provisions as precatory rather than mandatory." *Id.*

66. Export-Import Bank Reauthorization Act of 2002 § 2.

ics of the Ex-Im Bank are skeptical of the job-creation effects of this institution. According to a report by the General Accounting Office (GAO), export promotion programs do not produce a substantial change in the level of employment, which is more strongly determined by the macroeconomic policies of the United States and its trading partners, including exchange rates, interest rates, etc.⁶⁷ Concurring with this assessment, some economists have argued that instead of increasing overall employment, the Ex-Im Bank simply shifts the composition of various sectors in the U.S. economy.⁶⁸ Still others attempt to criticize the job-creation rationale by arguing that it is akin to the “broken window fallacy,” which can be summarized as follows: when a person throws a rock through a store window, it is arguable that he or she contributed to the economy because the merchant will be obligated to spend money to repair the window. The economic benefits of the broken window, however, are illusory when one considers the businesses and workers that would have benefited if the merchant were able to spend the money elsewhere. Under the broken window fallacy, the beneficiaries of the Ex-Im Bank (i.e., those particular U.S. exporters receiving assistance) are readily apparent. What is not so conspicuous, though, are the products that would have been manufactured, the businesses that would have been launched, and the jobs that would have been created if the taxes used to fund the Ex-Im Bank had remained with the U.S. citizens to spend as they so desired.⁶⁹

While doubts regarding the employment creation capacity of the Ex-Im Bank abound, scarce are the reproaches regarding this institution’s other job-related capabilities: to create “better” jobs, “better” businesses, and “better” exporting sectors. In support of the argument of better jobs, experts cite the fact that, in comparison to non-export positions, production workers at exporting plants earn 6.5 percent

67. U.S. GEN. ACCOUNTING OFFICE, REP. NO. GAO/T-GGD-95-169, TESTIMONY BEFORE THE SUBCOMM. ON PROCUREMENT, EXPORTS, AND BUS. OPPORTUNITIES, COMM. ON SMALL BUS., HOUSE OF REPRESENTATIVES, EXPORT PROMOTION: RATIONALES FOR AND AGAINST GOVERNMENT PROGRAMS AND EXPENDITURES (1995).

68. JAMES K. JACKSON, CONG. RESEARCH SERV., EXPORT-IMPORT BANK: BACKGROUND AND LEGISLATIVE ISSUES, at CRS-6 (2001); *see also* LUKAS & VÁSQUEZ, *supra* note 53, at 3–4. These authors argue that when U.S. exports increase, thanks to financing from the Ex-Im Bank, these goods and services must be purchased by foreigners with dollars. *See* LUKAS & VÁSQUEZ, *supra* note 53, at 3. These dollars are purchased on the international currency market, thereby causing the dollar to rise. *Id.* This, in turn, makes exporting for U.S. companies that did not receive assistance from the Ex-Im Bank more difficult and makes foreign imports more attractive to U.S. consumers. Both exports and imports increase, some jobs are created in the export sector while others are lost due to import competition, and the whole situation is a wash. *Id.*

69. 148 CONG. REC. H957 (daily ed. Mar. 19, 2002) (statement of Rep. Ron Paul).

higher wages and their productivity is up to twenty percent higher.⁷⁰ With regard to better businesses, statistics indicate that exporting firms enjoy superior productivity, growth and technological advancements.⁷¹ Finally, in terms of better sectors, “[t]he whole league ‘plays’ better with exports” because healthy competition causes accelerated growth, less failure, and numerous spillover benefits such as the creation of an export infrastructure comprised of trade journals, advertisers, consultants, logistic specialists, suppliers, etc.⁷² In addition to fostering this “betterment,” the Ex-Im Bank’s programs preserve jobs in the United States that would otherwise be relocated abroad. This threat of job relocation is worrisome to U.S. workers, but many U.S.-based multinationals appear unconcerned about the increase of foreign “market windows.”⁷³ Whereas companies that have the majority of their manufacturing facilities in the United States cannot access financing offered by these pseudo-government export agencies overseas, multinational companies based in the United States can simply source equipment or supplies in countries that provide the most attractive financing.⁷⁴ Accordingly, while a weakened Ex-Im Bank could seriously jeopardize countless U.S. jobs, the more mobile multinational enterprises “do not see themselves as seriously disadvantaged by the rise of foreign market windows.”⁷⁵ The continued operation of the Ex-Im Bank under the Reauthorization Act is therefore important because, even if this agency fails to create *more* jobs, it clearly generates *better* jobs and prevents *job loss* resulting from the departure of multilateral companies with a presence in the United States.

D. Fosters U.S. Exports In Case of “Market Failure”

As a governmental agency, the Ex-Im Bank is designed to intervene only in situations where the private sector is reluctant to do so, thereby “fill[ing] financing gaps” in order to maximize support for U.S. exports.⁷⁶ The relevant legislation on this issue is unambiguous, stating that the Ex-Im Bank is required to “supplement and encourage, *and not compete with*, private capital.”⁷⁷ In occupying this void, how-

70. David J. Richardson, *Exports Matter . . . and So Does Trade Finance*, in *THE EX-IM BANK IN THE 21ST CENTURY: A NEW APPROACH?* 55, 64 (Gary Clyde Hufbauer & Rita Rodriguez eds., Inst. for Int’l Econ., Special Rep. 14, Jan. 2001).

71. *Id.* at 63.

72. *Id.* at 62–64.

73. *See* Mendelowitz, *supra* note 47, at 180.

74. *See id.*

75. *Id.*

76. *Fiscal Year 2001 Annual Report*, *supra* note 13, at 1.

77. 12 U.S.C. § 635(b)(1)(B)(ii) (2000) (emphasis added).

ever, the Ex-Im Bank must proceed with economic prudence by limiting its support to transactions that offer a “sufficient likelihood of repayment.”⁷⁸ In other words, the Ex-Im Bank may act only in cases where the private sector fails to assist an export transaction due to *false* perceptions of excessive risk.

As indicated previously, reasons for this “market failure” abound, especially in developing regions in which the Ex-Im Bank primarily works. Factors that tend to dissuade private sector participation in international export transactions include: foreign exchange difficulties when payments are to be made in different currencies, complicated dispute resolution mechanisms, troubles resulting from prolonged shipment of goods, unanticipated confiscation of property by foreign officials, military conflicts, labor strikes, social unrest, etc.⁷⁹ In addition, chronic economic turmoil in certain nations that threatens to infect neighboring countries often “makes for a very dynamic and often volatile environment in which to attract medium and longterm investment.”⁸⁰ An example of a potentially worthwhile endeavor that commonly lacks funding due to market failure is the telecommunications sector in Latin America. There is a tremendous demand for goods and services in this area because of increased phone use, privatization of government entities, and the introduction of the Internet.⁸¹ Financing from the private sector, however, is scarce as a result of the recent increase in credit-rating downgrades, loan defaults, and obligatory financial restructurings.⁸² This sector faces one major problem: the perception that it is a relatively high risk industry in a high risk region.⁸³ Aware of this phenomenon, the Ex-Im explains that “emerging market economies can pose credit risks of such magnitude that commercial banks are reluctant to finance U.S. exports to those countries even though they may present extraordinary opportunities for U.S. exporters.”⁸⁴ In such situations, the Ex-Im Bank finances export transac-

78. *Id.* § 635(j)(a).

79. See U.S. GEN. ACCOUNTING OFFICE, REP. NO. GAO/GGD-93-39, *supra* note 5 and accompanying text.

80. Carl Adams, *Risk Aversion: Using Risk Mitigation to Arrange Structured and Project Finance Transactions in Latin America*, PROJECT FIN., June 2001, at 2. This article states that many unstable countries in Latin America such as Argentina are negatively affected by internal and external elements alike. *Id.*

81. John F. Hegeman & Elizabeth A. Boch, *Comfort Calling*, PROJECT FIN., June 2001 Supp., at 23.

82. See *id.*

83. See *id.*

84. S. REP. NO. 107-52, at 2 (2001).

tions that would otherwise not occur, provided that there is a "sufficient likelihood" of success.⁸⁵

Advocates of absolutely free markets (and thus necessarily opponents of the Ex-Im Bank) reject the theory of market failure for several reasons. First, alluding to the fact that the Ex-Im Bank reports a default rate of less than two percent, they argue that this agency is actually in competition with the private sector.⁸⁶ The Ex-Im Bank contends that its high success rate is attributable in large part to its longstanding experience and relationships with foreign governments, which afford the agency extensive data on which to make financing decisions.⁸⁷ Critics, however, snub this explanation because: (i) a foreign business or government desirous of attracting financing for a truly plausible transaction would logically reveal its accounting and other pertinent records to *all* potential lenders; (ii) if it genuinely did receive better information through its relationships, the Ex-Im Bank could simply share it with the private sector instead of undertaking the project personally; and (iii) the claim that an agency of only 400 persons is better equipped to assess risk than hundreds of thousands of private-sector investors and analysts is dubious.⁸⁸ Based on these claims, they reason that the Ex-Im Bank, "at best, duplicates private financial activities and does little to boost the U.S. economy. At worst, it misallocates scarce investment capital and leaves the nation as a whole worse off."⁸⁹ Second, some trade pundits contend that the perceptions of excessive risk that dissuade the private sector from financing an export transaction are not "false."⁹⁰ On the contrary, this unwillingness to participate in certain export deals is an unmistakable signal from the market that the country soliciting the assistance of the Ex-Im Bank has not instituted the reforms (political, economic, judicial, etc.) necessary to attract private money voluntarily.⁹¹ Thus, they conclude, by artificially financing projects that the private sector would reject, the Ex-Im Bank is effectively creating debt instead of

85. *See generally* 12 U.S.C. § 635(b).

86. AARON LUKAS & IAN VÁSQUEZ, *supra* note 53, at 5–6. Other policy groups opposed to the Ex-Im Bank include the Competitive Enterprise Institute and the Inter-Hemispheric Resource Center. *See, e.g.*, LASH, *supra* note 23, at 2; Janice C. Shields, *Export-Import Bank*, 4 FOREIGN POL'Y IN FOCUS No. 18 (Interhemispheric Res. Ctr. and Inst. for Pol'y Studies), July 1999, at 1.

87. AARON LUKAS & IAN VÁSQUEZ, *supra* note 53, at 6.

88. *Id.*

89. *Id.* at 2.

90. *Id.* at 5.

91. *Senate Hearings (1997)*, *supra* note 54, at 43 (statement of Ian Vásquez, Director, Project on Global Economic Liberty, CATO Institute).

development by allowing a country to postpone the introduction of the reforms necessary to compete in a worldwide free market.⁹²

These charges notwithstanding, the Ex-Im Bank and its congressional supporters are steadfast in their conviction regarding the narrowness of this agency's scope: "We *only* step in where we are needed; that is, where the markets are too risky for the private sector to assume the risk, or to meet the government-sponsored export finance provided by our competitors."⁹³ Further justification for the restricted role of the Ex-Im Bank is its ability to help not only particular U.S. export transactions in the short-term, but also the entire U.S. economy in the long-term because of the "secondary effects." For example, initial export transactions lead to (i) follow-up sales of parts, services, and upgrades, (ii) an increase in brand awareness of U.S. products in the world's fastest-growing markets, and (iii) avoidance of U.S. production shift to other countries with ECAs that offer more attractive financing terms.⁹⁴ In other words, Ex-Im Bank financing that allows U.S. exporters to get in on the "ground floor" in developing regions with massive population growth will generate a customer base that likely will prove quite lucrative in the future.⁹⁵

While Ex-Im Bank opponents attempt to identify potential flaws in the market failure rationale, the statistical data and unsubstantiated statements on which these arguments are based are not determinative. Accordingly, until convincing evidence is proffered to support the extremely serious allegation that the Ex-Im Bank is operating (whether intentionally or inadvertently) outside of its statutory authority, the Reauthorization Act will allow it to continue to support worthwhile, albeit risky, transactions.

E. Diminishes Corruption in International Transactions

The Foreign Corrupt Practices Act (FCPA) was introduced in 1977 in reaction to expenditures by many U.S. companies that, after further investigation, were clearly either illegal political contributions

92. AARON LUKAS & IAN VÁSQUEZ, *supra* note 53, at 6–8.

93. *House Hearings (2001)*, *supra* note 18, at 6 (testimony of James Hess, Chief Financial Officer, Ex-Im Bank) (emphasis added).

94. *Cf. CLYDE V. PRESTOWITZ ET AL., ECON. STRATEGY INST., THE EXPORT-IMPORT BANK: THE CASE FOR REAUTHORIZATION* (Apr. 1997), at <http://www.econstrat.org/exim.htm> (on file with the *New York University Journal of Legislation and Public Policy*).

95. 148 CONG. REC. H1707 (daily ed. Apr. 30, 2002) (statement of Rep. Oxley) (arguing that "without Ex-Im, it will be more difficult for U.S. goods to reach emerging markets, effectively closing out the opportunity for U.S. businesses to build a customer base in those countries").

or questionable payments to foreign officials aimed at facilitating business transactions.⁹⁶ To rectify this situation, the FCPA (i) requires U.S. companies (including their foreign subsidiaries) to follow certain record-keeping and accounting practices designed to frustrate the companies' ability to establish "slush funds" from which illegal payments can be made clandestinely, and (ii) prohibits any person (including U.S. companies and individuals) from bribing any foreign official for the purpose of obtaining or retaining business.⁹⁷ Prior to the Reauthorization Act, the Ex-Im Bank avoided financing operations of corrupt companies by only *indirect* means. In particular, while the applicant had to certify that it had not violated the FCPA during a specified period of time, the Ex-Im Bank itself evaluated the possibility of corruption solely within the context of its "creditworthiness" analysis, during which it examines the character, past actions, and governance of a company that is applying for assistance.⁹⁸ From the perspective of certain congressmen, the FCPA analysis needed to be enhanced because "taxpayers should not subsidize the ventures of companies that use corrupt methods to obtain business or deceive taxpayers with false financial reports."⁹⁹ In response to this and other similar arguments, the Reauthorization Act strengthens the Ex-Im Bank's capability of detecting and then rejecting transactions made possible through fraud or deception. The Reauthorization Act provides, for instance, that the Ex-Im Bank can deny an application if it has "substantial credible evidence that any party to the transaction or any party involved in the transaction has committed an act of fraud or corruption in connection with the transaction."¹⁰⁰ Furthermore, this law requires each applicant to disclose whether it has been found by a U.S. court to have violated the FCPA within the preceding twelve months, a record of which the Ex-Im Bank must maintain for a period of at least three years.¹⁰¹ While these improvements in the Reauthorization Act alone will not eliminate business fraud and cor-

96. THE FOREIGN CORRUPT PRACTICES ACT, EXECUTIVE LEGAL SUMMARY No. 5, at 100.001 (William A. Hancock ed., Bus. Laws, Inc., 1999).

97. *Id.* at 100.001–100.003. This prohibition also applies to foreign companies and individuals that commit any act in furtherance of a bribe while located in the United States. *Id.* at 100.003; *see also* DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT §§ 2.1–2.2 (1995).

98. *House Reports (2001)*, *supra* note 18, at 11–12 (testimony of Elaine Strangland, Deputy General Counsel, Ex-Im Bank).

99. 148 CONG. REC. H1792 (daily ed. May 1, 2002) (statement of Rep. Dennis Kucinich).

100. Export-Import Bank Reauthorization Act of 2002, Pub. L. No. 107-189, § 16, 116 Stat. 698 (2002) (to be codified at 12 U.S.C. § 635).

101. *Id.* § 19.

ruption, they will prove highly effective as the Ex-Im Bank continues to finance transactions in developing regions such as Latin America, where corruption is pervasive at all levels.¹⁰²

F. Prevents Assistance of Entities Engaged in Unfair Trade Practices

The Ex-Im Bank has always been required to assess the potential economic effects on U.S. industries when deciding whether to provide assistance to a particular transaction. In fact, before authorizing any financing, the Ex-Im Bank must evaluate factors such as the competitive position of any U.S. industry that may be affected and the employment levels in the United States.¹⁰³ After conducting its analysis, this agency is prohibited from extending financing for the purpose of establishing or expanding production of any exportable good by another country if the good is likely to be either in surplus on world markets at the time it will first be sold or the resulting production capacity will compete with or cause substantial injury to U.S. producers of the same or similar good.¹⁰⁴ Despite these safeguards to protect the United States, the Ex-Im Bank recently came under intense scrutiny when it approved a loan guarantee to support the sale by General Electric Co. and other U.S. suppliers to Benxi Iron in China of \$21.7 million in computer software and systems, which was to be used to improve production at Benxi's hot-strip steel mill.¹⁰⁵ At the time, the flooded market and dropping steel prices were causing many U.S. companies to declare bankruptcy, and Benxi Iron later was accused of illegally dumping steel into the United States.¹⁰⁶ Although the Ex-Im Bank tried to defend its decision based on economic analysis, repre-

102. Cheryl W. Gray & Daniel Kaufmann, *Corruption and Development*, 35 FIN. AND DEV. No. 1, Mar. 1998, at 7; see Maria Gonzalez de Asis, *Reducing Corruption: Lessons From Venezuela*, PREM NOTES (Int'l Monetary Fund and The World Bank, Wash., D.C.), May 2002, at 7.

103. 12 U.S.C. § 635(b)(1)(B) (2000).

104. *Id.* § 635(e)(1)(A).

105. Rossella Brevetti, *Ex-Im Decision on Loan Guarantee to Chinese Steel Maker Comes Under Fire*, 18 INT'L TRADE REP. 69, 70 (2001); see also Gary G. Yerkey, *Commerce's Mineta Calls on Ex-Im Bank to Deny Funding for Chinese Steel Plant*, 17 INT'L TRADE REP. 1916, 1916 (2000).

106. Brevetti, *supra* note 105; see also 12 U.S.C. § 635(e)(1)(A). The Ex-Im Bank charter contains an exception that provides that, although certain U.S. industries will be injured, export financing may be extended if the Ex-Im Bank believes that the benefits (short-term and long-term) of doing so will likely exceed the potential injury to U.S. producers and overall domestic employment. 12 U.S.C. § 635(e)(2).

sentatives of the outspoken U.S. steel industry labeled the situation “disgraceful”¹⁰⁷ and “unbelievable.”¹⁰⁸

As a result of this incident, the Reauthorization Act includes additional protections for the U.S. economy focused on “dumping” and “countervailing duties.” In general terms, dumping is the practice of selling goods in the U.S. market at below “home market value” (i.e., the price at which the same goods are sold in the foreign producer’s home country) or at a price lower than the cost of production. While there are a number of non-malevolent reasons for which goods are dumped in the United States,¹⁰⁹ this practice is invariably detrimental to U.S. industry, leading to a reduction in profits, a surplus of certain goods in the market, layoffs of employees and corporate bankruptcy. Countervailing duty laws address the situation where foreign governments subsidize a product or industry, thereby facilitating the sale of certain goods in the U.S. market at an unfairly low price. As with dumping, the selling of subsidized goods in the United States generates harmful effects for competing U.S. industries, including lost profits, an excess of available goods, layoffs and bankruptcy. Examples of foreign “subsidies” include a direct rebate by the foreign government to a specific company for items exported, interest-free or below-market interest rate loans, cash grants, loan guarantees, currency retention schemes, favorable internal transport and freight charges on export shipments, and tax exemptions.¹¹⁰

If a U.S. industry suspects dumping or subsidizing, it files a petition with the Department of Commerce (DOC) and the International Trade Commission (ITC). Within forty-five days of the filing of the petition, the DOC is required to make a *preliminary determination* as to whether there is a reasonable basis to believe that dumping or subsidization has occurred, and the ITC is charged with determining if there is a reasonable indication of a material injury to the U.S. industry.¹¹¹ If, after conducting a thorough investigation, the DOC and ITC

107. 148 CONG. REC. H1708 (daily ed. Apr. 30, 2002) (statement of Rep. Bernard Sanders).

108. 148 CONG. REC. E1007 (daily ed. June 10, 2002) (statement of Rep. Bart Stupak).

109. See Terence P. Stewart, *U.S.-Japan Economic Disputes: The Role of Antidumping and Countervailing Duty Laws*, 16 ARIZ. J. INT’L & COMP. L. 689, 697–98 (1999). This article explains that many reasons for dumping are acceptable to the business community, such as taking advantage of a protected home market, increasing profits by off-loading excess capacity abroad, and maximizing profit through cross-product subsidization. Other practices, such as market domination and predatory pricing, are not copasetic. *Id.*

110. See 19 U.S.C. § 1677(5) (2000).

111. *Id.* § 1673b.

make a *final determination* that dumping or subsidizing has occurred and that a U.S. industry has been materially injured, then an antidumping or countervailing duty *order* is imposed on the foreign producer to compensate for the unfair economic advantage from which it benefits.¹¹²

To address these two problems, the Reauthorization Act expressly prohibits the Ex-Im Bank from financing any entity desirous of manufacturing a product that is substantially similar to one that is subject to a countervailing duty or antidumping *order*.¹¹³ More importantly, the Reauthorization Act further directs the Ex-Im Bank to establish procedures within sixty days of enactment of this law regarding assistance to any entity that is subject to a *preliminary determination* by the U.S. government of a reasonable indication of material injury due to dumping or subsidizing.¹¹⁴ In this manner, the Reauthorization Act will provide enhanced protection to U.S. industries and employees that confront unfair foreign competition.

G. *Furthers the National Export Strategy*

On May 14, 2002, the Trade Promotion Coordinating Committee (TPCC) of the Bush Administration released its first National Export Strategy; the report makes sixty recommendations aimed at better promoting U.S. exports by, among other things, combating tied aid offered by other countries, developing various interagency efforts and programs, showcasing exportable services, streamlining the trade-finance process, and partnering with state and local governments to improve outreach, especially to small businesses.¹¹⁵ Along with the Overseas Private Investment Corporation and the U.S. Trade and Development Agency, the Ex-Im Bank is a key entity in the overall U.S. export promotion scheme. As proof thereof, in the National Export Strategy, the Ex-Im Bank is responsible for developing new project finance opportunities in pilot countries, creating packages of interagency services to improve customer service for U.S. exporters, establishing joint marketing and outreach programs with the Small Business Administration, and increasing the use of the Internet to im-

112. *Id.* §§ 1673, 1673e.

113. Export-Import Bank Reauthorization Act of 2002, Pub. L. No. 107-189, § 18, 116 Stat. 706 (2002) (to be codified at 12 U.S.C. § 635).

114. *Id.*

115. Chris Rugaber, *Bush Administration Releases First National Export Strategy*, 19 INT'L TRADE REP. 908, 908-09 (2002). The TPCC is an interagency committee headed by the Secretary of Commerce that was established pursuant to the Export Enhancement Act of 1992 to create a unifying framework to coordinate export promotion and financing by the U.S. government.

prove and expedite access to various governmental trade promotion programs.¹¹⁶ Due to the overlapping duties and the explicit requirement of interagency cooperation set forth in the National Export Strategy, elimination of even one component (for example, the Ex-Im Bank) would undermine the entire project. Accordingly, operation of the Ex-Im Bank under the Reauthorization Act is essential.

III.

BENEFITS FOR LATIN AMERICA

The Ex-Im Bank is primarily designed to benefit the U.S. economy by supporting domestic exporters of goods and services. This inward focus aside, the Ex-Im Bank also serves to benefit the nations in which U.S. export transactions occur, such as those in Latin America, by fostering economic development. As one Ex-Im Bank official explains, this institution can “rev up the economic engines of development” by financing infrastructure, transportation and health care projects that would have been unfeasible without government assistance.¹¹⁷ Accordingly, although the regulations governing the Ex-Im Bank are not explicit in this respect, this agency, in effect, has a dual role of assisting the United States and developing regions such as Latin America. In other words, “[w]hile we are chartered to support U.S. jobs by financing U.S. exports that would not otherwise be possible without our backing, our actions support economic development and growth in emerging markets, as well as in the United States.”¹¹⁸ Unbeknownst to many, the Ex-Im Bank historically has maintained a particularly close relationship with Latin America: the Ex-Im Bank’s first transaction in 1934 was designed to support U.S. exports to the region; more than sixty percent of the Ex-Im Bank’s transactions during its first decade involved Latin American countries; longstanding relationships exist with commercial banks, development agencies, and private-sector companies that do business in the region exist; and Mexico, Venezuela and Brazil currently comprise the three largest markets for Ex-Im Bank supported exports.¹¹⁹ On the basis of this significant activity, the Reauthorization Act will yield many positive effects for Latin America and various aspects of U.S.-Latin American relations alike.

116. See TRADE PROMOTION COORDINATING COMM., *supra* note 46, at xiii–xv.

117. Eduardo Aguirre, *Ex-Im Bank’s Firm Commitment*, PROJECT FIN., Feb. 1, 2002, at S20.

118. *Id.*

119. *See id.*

A. *Promotes U.S. Trade Policy in the Western Hemisphere*

The Bush Administration consistently has maintained that Latin America constitutes an important part of its foreign policy agenda. According to Otto Reich, Assistant Secretary of State for Western Hemisphere Affairs, President Bush deems this region a “high priority” because he “truly believes that our future is inextricably tied to that of our hemispheric neighbors”¹²⁰ Other representatives of the Bush Administration share this opinion, explaining that due to the growing interdependence between Latin America and the United States this region is “at the center of the President’s world view.”¹²¹ As a manifestation of the importance of increased hemispheric unity, the Bush Administration has identified the negotiation and completion of the Free Trade Area of the Americas (FTAA) by 2005 as one of its primary goals on the international trade agenda.¹²² Before these benefits can be attained, however, conditions in the area must be propitious, a somewhat daunting proposition in view of the current situation in many Latin American nations.

While the majority of U.S. efforts are directed toward the war on terrorism in the Middle East, several Latin American countries are experiencing serious problems that may prove detrimental to the FTAA process. For example, as a result of a violent coup in April 2002, during which over a dozen persons were killed and several hundred others incurred serious injuries, Hugo Chavez, the president of Venezuela, was forced to resign his position.¹²³ Although President Chavez was reinstated two days later, this event was a “sign of the troubled state of democracy” in Latin America,¹²⁴ a foreshadowing of

120. Otto Reich, Remarks Before the Center for Strategic and International Studies (Mar. 12, 2002) (transcript available from Federal News Service, Inc.). Citing the fact that political and economic instability in Latin America may lead to increased illegal immigration, drug trafficking, terrorism and social turmoil, Reich claims that the importance of the region cannot be underestimated: “It is hard to exaggerate all that we have at stake here.” *Id.*

121. Lino Gutierrez, Bush Administration Policies for Latin America and the Caribbean, Remarks before the Board of Directors of the Pan American Development Foundation (July 10, 2001), at <http://www.state.gov/p/wha/rls/rm/2001/4089pf.htm>.

122. 2001 INTERNATIONAL TRADE AGENDA, H.R. DOC. NO. 107-69, at 4; *see also* OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2001 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 102-04 (2002).

123. *See* David Adams & Phil Gunson, *Media Accused in Failed Coup*, ST. PETERSBURG TIMES ONLINE, (April 18, 2002), at http://www.stpetersburgtimes.com/2002/04/18/Worldandnation/Media_accused_in_fail.shtml (on file with *New York University Journal of Legislation and Public Policy*).

124. Howard LaFranchi & Phil Gunson, *Democracy Shaky in S. America*, CHRISTIAN SCI. MONITOR, Apr. 16, 2002, at 1. This article points out that Chavez is the second South American president to be removed from office in six months. *Id.* In December

additional coups or coup attempts in Venezuela in the near future,¹²⁵ and an opportunity to question the democratic principles of the United States.¹²⁶ Meanwhile, in Peru, the terrorist group Shining Path appears to be staging a comeback after nearly a decade of relative inactivity, detonating car bombs in close proximity to the U.S. embassy in Lima just prior to President Bush's recent visit in March 2002 and issuing death threats to those opposing the reintegration of the group.¹²⁷ Political volatility, criminal scandals, and an economic crisis in Argentina threaten to destabilize this country and possibly spread to its neighbors.¹²⁸ Specific examples of the present chaos in Argentina include: the appointment of five successive presidents during a two-week period in December 2001; the indictment of former President Carlos Menem and his aide Domingo Cavallo for allegedly approving more than \$100 million in illegal arms sales to Croatia and Ecuador in violation of international arms embargoes; and an economic recession that has devastated the country and triggered widespread social unrest.¹²⁹ As a result of the dreadful financial situation in Argentina and the overall unappealing nature of investments in emerging-markets, several reputable investment organizations in the United States have recently removed their most influential Latin American strategists and reduced their research and sales opera-

2001, former Argentine president Fernando de la Rúa was forced to resign amid a terrible economic crisis. *Id.*

125. *After the Coup, the Reckoning*, *ECONOMIST*, Apr. 20–26, 2002, at 34, 35 (warning that “many successful coups are preceded by botched attempts”); *see also Pressure Cooker*, *ECONOMIST*, June 1–7, 2002, at 36, 36 (assessing situation in Venezuela six weeks after attempted coup and concluding that unrest in Venezuela’s armed forces “remains close to boiling point”).

126. *See Chavez Redux*, *ECONOMIST*, Apr. 20–26, 2002, at 11, 12. Unconfirmed reports suggest that U.S. officials had prior knowledge of the coup and encouraged it because of the Bush Administration’s disagreement with Chavez, and speculates that “[a] message that George Bush welcomed the overthrow of inconvenient elected politicians would be noted in barracks everywhere [and] [t]hat is the last thing the region needs.” *Id.*; *see also* Marc Lisher, *Venezuela’s President Chavez Is Ousted in Military Uprising*, *WALL ST. J.*, Apr. 12, 2002, at A1.

127. Lucien O. Chauvin, *Rebel Group’s Presence Growing Near Peru’s Capital*, *CHRISTIAN SCI. MONITOR*, Apr. 12, 2002, at 7; Drew Benson, *Car Bomb Outside Embassy Kills 9*, *WASH. TIMES*, Mar. 21, 2002, at A15.

128. *See Don’t Watch My Lips*, *ECONOMIST*, June 8–14, 2002, at 34, 34–35 (explaining that economic crisis in Argentina would likely have spread to neighboring Uruguay if not for last minute intervention of International Monetary Fund); *Scraping Through the Great Depression*, *ECONOMIST*, June 1–7, 2002, at 35, 35–36.

129. *See* Colin Barraclough, *Argentines Look for New Leaders*, *CHRISTIAN SCI. MONITOR*, Apr. 5, 2002, at 1; Larry Rohter, *Argentina’s Former Economic Chief Indicted in Argentina*, *N.Y. TIMES*, Apr. 11, 2002, at A17.

tions.¹³⁰ In Mexico, one of the crucial components of the local economy, the manufacturing sector based largely in *maquiladoras*, continues to struggle in 2002 after eliminating nearly a quarter of a million jobs last year.¹³¹ To exacerbate the situation, due in part to Mexican President Vicente Fox's perceived inability to advance projects with the United States while simultaneously addressing Mexico's internal problems, this leader has lost congressional support to proceed with certain U.S.-Mexico initiatives.¹³² In Colombia, the national government, the Revolutionary Armed Forces of Colombia, and the United Self-Defense Forces of Colombia are engaged in a bloody guerilla war that entails conventional attacks, multiple bombings, mass killings, and kidnappings. Regional stability is threatened by the widespread violence and the Colombian rebels' proven involvement in drug trafficking and international terrorism.¹³³ In Central America, although no major events have occurred recently, experts contend that the area is nonetheless "stuck in poverty, corruption and an uphill experiment in democracy."¹³⁴ In Brazil, the enormous public debt, upcoming presidential elections, and absence of any feasible plan for economic stability, could easily lead to an Argentine-style crash within the next few months.¹³⁵ Finally, as a result of the economic recession triggered in part by the terrorist attacks of September 2001, many Latin American nations have suffered a drastic decrease in tourism, a diminishing U.S. demand for many items produced in the re-

130. Anthony DePalma, *Wall Street's Latin Spotlight Dims*, N.Y. TIMES, Mar. 31, 2002, at S3 (listing Morgan Stanley Dean Witter, Merrill Lynch, Goldman Sachs, and Lehman Brothers among firms that have introduced such "major strategic shift[s]").

131. Graham Gori, *Latest Data Dampens Mexico's Hopes*, N.Y. TIMES, Apr. 12, 2002, at W1 (warning that continued decrease in industrial production may "spell political trouble" for President Vicente Fox, whose campaign promises included sizable increase in employment opportunities).

132. See Traci Carl, *Senate Denies Mexican President Permission to Travel to Canada, United States*, ASSOCIATED PRESS, Apr. 10, 2002, available at <http://archive.ap.org>. Mexican law dictates that the senate must authorize presidential trips outside of the country. Dissatisfied with Fox's "coziness" with the United States, the Fox Administration's policy toward Cuba, and Fox's perceived unwillingness to deal effectively with local problems, the Mexican senate recently refused to allow Fox to travel to the United States and Canada. *Id.*

133. Recent articles regarding the war in Colombia and its effect on regional stability, U.S. national security and worldwide terrorism are abundant. See, e.g., Ken Guggenheim, *Republicans Says [sic] Colombian Instability Threatens United States*, ASSOCIATED PRESS, Apr. 11, 2002, available at <http://archive.ap.org>; Susannah A. Nesmith, *Lawmakers Kidnapped from State Parliament Building in Cali*, ASSOCIATED PRESS, Apr. 11, 2002, available at <http://archive.ap.org>; Scott Wilson, *Colombia's Hit-and-Run War*, WASH. POST, Mar. 27, 2002, at A12.

134. Alfredo Corchado, *Bush Pledges to Fortify Ties with Latin America*, ORLANDO SENTINEL, Jan. 17, 2002, at A13.

135. *The 685 Billion Reais Question*, ECONOMIST, June 15-21, 2002, at 35, 35.

gion, and a slowdown in foreign investment.¹³⁶ The immediate result will be an increase in generalized poverty, which may transform itself into widespread social discontent that permits local leaders to capitalize by reintroducing increased state intervention or even authoritarian regimes.¹³⁷

Mindful that reaching the objective of successfully implementing the FTAA in 2005 depends on increased stability and economic growth in Latin America, the Bush Administration has recently introduced several initiatives, including the U.S. Central American Free Trade Agreement¹³⁸ and the renewal and expansion of the Andean Trade Preference Act.¹³⁹ Along with these two trade proposals, the Ex-Im Bank will play a critical role in preparing Latin America for the forthcoming hemispheric integration. Alluding to the Bush Administration's unwavering desire to fully realize implementation of the FTAA on schedule, one government official explains that the Ex-Im Bank is prepared to help fulfill its commitment to increasing economic stability in emerging markets, because "Latin America is more than a priority partner and market for U.S. exporters. It has consistently ranked as Ex-Im Bank's top market."¹⁴⁰ In light of the importance of Latin America's economy to the plan for hemispheric integration in the near future, operation of the Ex-Im Bank in accordance with the Reauthorization Act is pivotal.

B. *Helps Safeguard the Environment*

The major sectors in which most ECAs participate are oil exploration and refining, energy, telecommunications projects, mining, road construction, gas pipeline development, chemical plants, and manu-

136. See *Hard Times Ahead?*, 16 LATIN AMERICAN ECONOMIC POLICIES 1, 1 (4th Quarter, 2001).

137. See *Clouds on the Latin American Horizon*, 16 LATIN AMERICAN ECONOMIC POLICIES 2, 2 (4th Quarter, 2001).

138. Rossella Brevetti, *Bush to Discuss Central American FTA in Upcoming Trip to El Salvador*, *Reich Says*, 19 INT'L TRADE REP. 463, 463 (2002); WHITE HOUSE OFF. OF THE PRESS SEC'Y, FACT SHEET: U.S.-CENTRAL AMERICA FREE TRADE AGREEMENT, at <http://www.whitehouse.gov/news/releases/2002/01/20020116-11.html> (Jan. 16, 2002) (stating that proposed agreement would promote U.S. exports, support democratic and economic reform in Central America, and advance FTAA process "by increasing the momentum in the hemisphere toward lowering barriers, opening markets, and achieving greater transparency").

139. See Elisabeth Bumiller, *Bush Vows to Help Peru Fight Rebels and Keep Andes Region Stable*, N.Y. TIMES, Mar. 24, 2002, at A16; Jim Vandehei, *Bush, Democrats Remain at Loggerheads Over New Latin American Trade Accord*, WALL ST. J., Mar. 25, 2002, at A20.

140. Aguirre, *supra* note 117, at S20.

facturing.¹⁴¹ According to many environmental organizations, the majority of such financial institutions are not required to include the environmental impact of a proposed project in their evaluation.¹⁴² Consequently, many transactions in Latin America are financed and undertaken without the benefit of this extra layer of protection, which, some environmental groups claim, leads to a “race to the bottom.”¹⁴³ Aware of this situation and pressured by the special interest groups, the Ex-Im Bank’s charter was amended in 1992 to incorporate environmental concerns. It orders, in particular, that the Ex-Im Bank establish procedures to take into account the potential beneficial and adverse environmental effects of the U.S. goods and services for which financial support is requested.¹⁴⁴ In response to this congressional mandate, the Ex-Im Bank introduced an environmental policy in 1994 consisting of two main components: the Environmental Exports Program to support U.S. exports that are environmentally beneficial such as wastewater treatment plants and renewable energy plants, and the Environmental Procedures and Guidelines to ensure that foreign projects are implemented in an environmentally responsible manner.¹⁴⁵ Under this new policy, environmentally sound transactions financed by the Ex-Im Bank increased from thirteen in 1994 to over sixty in 2000.¹⁴⁶ In terms of Latin America, the Ex-Im Bank has made “significant strides” in supporting environmentally friendly exports to this region, including the recent signing of environmental cooperation agreements with Colombia, Argentina, and Venezuela.¹⁴⁷

This progress notwithstanding, certain environmental organizations still express concerns about the Ex-Im Bank’s support of power projects based on the use of fossil fuels. Although they laud the Ex-Im Bank for assuming a leadership position among ECAs worldwide by adopting minimum environmental standards, various policy groups urge the Ex-Im Bank to adhere to the stricter standards set forth in the

141. See BRUCE RICH ET AL., ENVIRONMENTAL DEFENSE FUND, EXPORT CREDIT AGENCIES IN BOLIVIA, BRAZIL, ECUADOR, PERU, AND VENEZUELA 5, at http://www.environmentaldefense.org/documents/634_LatinAmerica.pdf (Dec. 12, 2002).

142. See *id.* at 1.

143. *Id.* at 3; see also Danielle Knight, *Reform Urged of Export Finance Agencies*, INTER PRESS SERVICE, Dec. 13, 2000, available at 2000 WL 28920132.

144. 12 U.S.C. § 635i-5(a)(1) (2000).

145. *Senate Hearings (1997)*, *supra* note 54, at 64–65 (statement of James A. Harmon, President and Chairman of Ex-Im Bank).

146. EXP.-IMP. BANK OF THE U.S., 2000 ANN. REP. 17 [hereinafter 2000 ANNUAL REPORT]; see also FISCAL YEAR 2001 ANNUAL REPORT, *supra* note 13, at 14 (reporting that Export-Import Bank financed nearly \$400 million in exports of environmentally beneficial U.S. goods and services, many of which went to Latin America).

147. EXP.-IMP. BANK OF THE U.S., 1999 ANN. REP. 3.

U.S. National Environmental Policy Act (NEPA).¹⁴⁸ Specifically, they claim that the Ex-Im Bank intentionally circumvents NEPA provisions requiring the preparation and subsequent public review of an environmental impact statement by finding that many fossil fuel projects do not have a “significant impact” on the environment.¹⁴⁹ To address this issue, the Reauthorization Act provides that the Ex-Im Bank must promote the export of goods and services related to renewable energy sources and make an annual progress report to Congress thereon.¹⁵⁰ Moreover, although advances using this methodology have thus far been few, the Ex-Im Bank plans to continue attempts to negotiate agreements on common environmental guidelines with other ECAs under the OECD.¹⁵¹ In tandem with the environmental provisions added in the 1990s, these efforts should prove to more adequately protect the environment during the construction and operation of infrastructure projects in Latin America.

C. *Enhances Protection of Human Rights*

Violations of human rights are, unfortunately, a common occurrence in Latin America today. According to a recent assessment by the U.S. Department of State, certain human rights abuses were endemic in the region, including disappearances, extra-judicial killings by law enforcement officials, and torture of persons to obtain information.¹⁵² Additional regional human rights abuses are enumerated in

148. INST. FOR POL’Y STUDIES, ET AL., *OPIC, EX-IM AND CLIMATE CHANGE: BUSINESS AS USUAL? AN ANALYSIS OF U.S. GOVERNMENT SUPPORT FOR FOSSIL FUELED DEVELOPMENT ABROAD, 1992–98*, at 25–28 (Apr. 28, 1999), available at <http://www.foe.org/res/pubs/pdf/climatesummary.pdf>.

149. *Id.*; see also *House Hearings (2001)*, *supra* note 13, at 46–47 (statement of Dr. Brent Blackwelder, President, Friends of the Earth) (advocating even higher environmental scrutiny, this environmental protection group argues that Ex-Im Bank should (i) ensure timely input and comment by public on projects, making environmental assessments available, (ii) introduce ombudsman or independent review panel for each project, and (iii) follow series of recommendations recently issued by the World Commission on Dams).

150. Export-Import Bank Reauthorization Act of 2002, Pub. L. No. 107-189, § 13, 116 Stat. 705 (2002) (to be codified at 12 U.S.C. § 635).

151. EXP.-IMP. BANK OF THE U.S., *THE ANNUAL PERFORMANCE PLAN OF THE EXPORT-IMPORT BANK OF THE UNITED STATES FOR FISCAL YEAR 2001*, at 9, available at <http://www.exim.gov/pub/pdf/allplan.pdf>. As the only ECA to require environmental information from exporters, the Ex-Im Bank realizes that this “causes foreign buyers to place U.S. exporters at a competitive disadvantage with respect to exporters from other OECD countries when choosing suppliers to participate in the undertaking of projects.” *Id.*

152. BUREAU OF DEMOCRACY, U.S. DEP’T. OF STATE, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2001*, at 3, at <http://www.usis.usemb.se/human/2001/introduction.html> (Mar. 2002). In this governmental study, the concept of “human rights” is

recent reports by other reputable organizations such as Human Rights Watch,¹⁵³ Amnesty International,¹⁵⁴ and the Organization of American States.¹⁵⁵

Given its involvement in developing regions where human dignities may be violated, the Ex-Im Bank has been criticized for turning a blind eye to human rights issues. Certain policy analysts claim, for instance, that the Ex-Im Bank is so focused on servicing U.S. exports that non-economic criteria such as a nation's human rights record is "routinely overlooked."¹⁵⁶ Concurring with this opinion and noting the fact that Ex-Im Bank financing has been rejected only twice on human rights grounds, one congresswoman introduced an amendment to the Reauthorization Act that established an Office of Human Rights within the agency and required that each proposed U.S. export transaction in excess of ten million dollars be accompanied by a detailed human rights study.¹⁵⁷ Although this amendment was eventually re-

defined to include, among other things: (i) respect for the integrity of the person, including freedom from arbitrary or unlawful deprivation of life, disappearance, torture and other cruel, inhuman or degrading treatment or punishment, arbitrary arrest, detention or exile, denial of a fair and public trial, arbitrary influence with privacy, family, home and correspondence, and use of excessive force; (ii) respect for civil liberties, including freedom of speech and press, freedom of peaceful assembly and association, freedom of religion, freedom of movement within the country, and foreign travel or repatriation; (iii) respect for political rights; (iv) prohibition of discrimination based on race, gender, religion, disability, language or social status; and (v) workers' rights, including the right of association, right to organize and bargain collectively, prohibition of forced labor or child labor and acceptable work conditions. *Id.*

153. HUMAN RIGHTS WATCH, *WORLD REPORT 2002*, at 105 (2002). This report praises the minor progress made in the region in terms of human rights, yet emphasizes that "all over Latin America and the Caribbean, chronic problems such as police brutality, deplorable prison conditions, domestic violence, and labor abuses went largely unaddressed." *Id.*

154. AMNESTY INT'L, *AMNESTY INTERNATIONAL REPORT 2001: AMERICAS REGIONAL SUMMARY*, at <http://web.amnesty.org/web/ar2001.nsf/regAMR/regAMR?OpenDocument> (last visited Nov. 1, 2002). This report adds the following to the list of abuses common in Latin American countries: poor prison conditions, arbitrary arrest and detention of citizens, lack of legal due process, violence and threats against journalists, and overt discrimination against women, indigenous people, and homosexuals.

155. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *ORGANIZATION OF AMERICAN STATES, ANNUAL REPORT 2001*, at <http://www.cidh.oas.org/annualrep/2001eng/chap.1.htm> (last visited Nov. 1, 2002).

156. *Targeting Eximbank Subsidies*, 1 *FOREIGN POL'Y IN FOCUS* No. 2 (Interhemispheric Res. Ctr. and Inst. for Pol'y Studies), Oct. 1996, at 2. This critic argues that Ex-Im Bank's traditional neglect of human rights issues explains why the institution extends multibillion dollar financing to China while other U.S. aid agencies refuse to operate in a nation so infamous for human rights violations. *Id.*

157. 148 *CONG. REC.* H1982-83 (daily ed. May 1, 2002) (statement of Rep. Janice Schakowsky); *House Hearings (2001)*, *supra* note 18, at 24 (statement of Rep. Janice Schakowsky).

jected due to budgetary constraints and personnel limitations,¹⁵⁸ the Reauthorization Act does include new language designed to better protect human rights in Latin America and other developing regions. It now provides, in particular, that financing may be approved only if doing so would “clearly and importantly advance United States policy in such areas as . . . human rights (such as are provided in the Universal Declaration of Human Rights adopted by the United Nations General Assembly on December 10, 1948).”¹⁵⁹ This added language, along with a more cohesive information exchange between the U.S. Department of State (which conducts the annual assessments) and the Ex-Im Bank, will serve to lessen human rights violations in the region.

D. Prevents Terrorism in Latin America Via Economic Stability

The Reauthorization Act is paramount to U.S. national security and its war against terrorism. In response to the terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001, President Bush declared a war on terrorism that was designed primarily to deprive all terrorists of financial resources.¹⁶⁰ Although it may not be instantly obvious, Latin America will be extremely important to the war on terrorism due to, among other things, the high incidence of drug trafficking and money laundering, both of which are inextricably linked to terrorism. With respect to drug trafficking, despite longstanding efforts by the United States to eliminate or minimize narco-terrorism in Latin America (and especially the Caribbean), recent studies by the U.S. State Department clearly indicate that many countries in the region either produce or serve as major transit points for illegal drugs.¹⁶¹ Still more distressing is the high degree of infiltration by several criminal groups in certain Caribbean countries and the potential harmful effects on the U.S.-led war on terrorism. According to the State Department study, “[t]errorist organizations could easily tap into the infrastructure built by international drug trafficking organizations operating in the region, *and may already have done so.*”¹⁶² Like

158. H.R. REP. NO. 107-292, at 11 (2001) (stating that amendment was rejected because a thorough human rights assessment is already performed by U.S. State Department, thus rendering similar efforts by Ex-Im Bank “wasteful and duplicative since Ex-Im does not have the expertise to do these assessments and the State Department already performs this work”).

159. Export-Import Bank Reauthorization Act of 2002, Pub. L. No. 107-189, § 15, 116 Stat. 705 (2002) (to be codified at 12 U.S.C. § 635).

160. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001).

161. U.S. DEP’T OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, at I-4 (2002).

162. *Id.* at VI-21 (emphasis added); see also *Narco-Terror: The Worldwide Connection Between Drugs and Terrorism, Hearing Before the S. Comm. on the Judiciary,*

narco-terrorism, money laundering is a severe problem in the region. In fact, a recent State Department study indicates that several Latin America countries are of "concern" or "primary concern" to the United States in terms of money laundering.¹⁶³

The Bush Administration is aware of the link between desperate economic circumstances and terrorism, especially in Latin America. One of the purposes of President Bush's trip in March 2002 to El Salvador, Mexico and Peru, in fact, was to refocus attention on the region and develop a strategy to eliminate terrorism's "breeding grounds in Latin America's [urban] slums and impoverished rural areas."¹⁶⁴ As President Bush expressed in a recent speech before the Inter-American Development Bank, while poverty does not directly cause terrorism, persistent oppression leads to hopelessness. If governments such as those in Latin America fail to counteract this dependency by meeting the basic needs of their people, then these areas will become "havens for terror."¹⁶⁵

Like the Bush Administration, members of Congress appear cognizant of the connection between development (or lack thereof) and terrorism in Latin America. For instance, during congressional debate in support of the Reauthorization Act, one congressman argued that the United States must face an inescapable fact in the wake of the terrorist attacks in 2001: it is essential to the well-being of the United States that it demonstrate to developing nations, "often beset by forces

107th Cong. 1 (2002) (statement of Martha Brill Olcott, Associate, Carnegie Endowment for International Peace), available at http://www.senate.gov/~judiciary/print_testimony.cfm?id=196&wit_id=344 (Mar. 13, 2002). Olcott explains that U.S. spending on international drug control measures reveals that this country has long been aware of the pervasiveness of the drug trade in Latin America. *Id.* According to her testimony, "[t]he U.S. priority has been on eradicating production and interdicting drugs originating in the Andean states, in Central America, and the Caribbean, and not in those half a world away, in a seemingly ungovernable part of the world." *Id.*

163. *Money Laundering Comparative Table of Countries/Jurisdictions of Concern*, 6 ECON. PERSPECTIVES: THE FIGHT AGAINST MONEY LAUNDERING 33, 33-34 (May 2001), at <http://usinfo.state.gov/journals/ites/0501/ijee/ijee0501.htm> (listing Latin American countries as including Antigua and Barbuda, Bahamas, Cayman Islands, Dominica, Dominican Republic, St. Vincent, Aruba, Barbados, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua).

164. Finlay Lewis, *A Stop in Mexico to Open Bush Latin America Trip*, SAN DIEGO UNION TRIB., Mar. 20, 2002, at A3.

165. President's Remarks at the Inter-American Development Bank, 38 WEEKLY COMP. PRES. DOC. 419 (Mar. 14, 2002); see also Jim Vandehei, *In Latin America, Bush Will Focus on Poverty and Drugs in Terrorism*, WALL ST. J., Mar. 21, 2002, at A24 (quoting U.S. National Security Advisor Condoleezza Rice as stating, "In countries where there are not good policies, and where there is hopelessness, and where there is poverty, you can create conditions of the kind that you had in Afghanistan, where these parasites can latch on").

of terror,” that free markets and open trade will generate prosperity for their citizens.¹⁶⁶ Dispelling any allegation of altruistic motives, this congressman concluded that “[o]ur national security improves when global stability prevails.”¹⁶⁷ Similarly, other state representatives have recognized the importance of the Ex-Im Bank in strengthening the current war on terrorism, emphasizing that this institution’s support of transactions in emerging markets is an essential component of U.S. foreign policy and national security.¹⁶⁸ While high-level diplomacy is effective in the war on terrorism, alone this tool will ultimately fail in the absence of supplementary engagements in the political, social and economic arenas. Based on this premise, the congressman argues that the pivotal role of the Ex-Im Bank in the war on terrorism is clear: “With each export transaction supported by the [Ex-Im] bank, we have made a new connection. We have developed a new familiarity with a market, a people, and a country that had been previously slightly foreign to us. With thousands of these transactions, we can take 1,000 steps forward toward a world of interdependence and prosperity; in short, a world in which terrorism would find it much more difficult to exist.”¹⁶⁹ Taking into account the relationship between economic development in Latin America and terrorism, the Reauthorization Act contains new language explicitly mandating that financing may be approved only if doing so clearly would advance U.S. policy in such areas as international terrorism “including, when relevant, a foreign nation’s lack of cooperation in efforts to eradicate terrorism.”¹⁷⁰ Together with other recent domestic and international initiatives, this statutory modification will serve to prevent further terrorism in Latin America.

E. Fortifies the U.S.-Mexico Partnership for Prosperity

While too often underestimated, the United States’ relationship with Mexico is clearly one of its most important. In the words of the U.S. Ambassador to Mexico, “[N]o country in the world has a greater impact on the daily life of Americans than does Mexico [because] what we buy, sell and make, the wages we pay and receive, the languages we speak, the illicit drugs and criminality that afflict us, and, in some locales, the very air we breathe and water we use is influenced

166. 148 CONG. REC. H1786 (daily ed. May 1, 2002) (statement of Rep. J.C. Watts).

167. *Id.*

168. 148 CONG. REC. H1777 (statement of Rep. John LaFalce).

169. *Id.* (statement of Rep. John LaFalce).

170. Export-Import Bank Reauthorization Act of 2002, Pub. L. No. 107-189, § 17, 116 Stat. 706 (2002) (to be codified at 12 U.S.C. § 635).

in significant measure by Mexico.”¹⁷¹ Mexico’s role in the setting of U.S. policy has increased exponentially in the last few years as a direct result of the signing of the North American Free Trade Agreement (NAFTA) in 1993.¹⁷² Based largely on the growing economic interdependence created by NAFTA, the U.S. government has consistently recognized that the manner in which the United States engages its southern neighbor “will have a direct effect on the lives and livelihoods of millions of Americans in the years to come.”¹⁷³

This sentiment is shared by the Bush Administration, which has consistently emphasized the importance of U.S.-Mexico relations. After his election, Bush delivered an unswerving message regarding his esteem for Mexico, while his Mexican counterpart, Vicente Fox, made similar announcements in his nation. During a visit by Fox in September 2001, for instance, the two leaders reaffirmed their cooperation during the arrival ceremony for Fox’s visit to the United States. In his remarks, President Bush stated that Mexico and the United States each share the “common interest[]” of addressing various challenges, including migration, the environment, drugs, crime, corruption, education, and commerce.¹⁷⁴ On that date, both nations committed themselves to being good neighbors and good friends under any circumstance. According to President Bush, “[f]riends deal in good faith, and disagree with respect. Friends stick together, in good times and in bad.”¹⁷⁵ Based on statements like these and other recent inter-

171. Jeffery Davidow, *United States-Mexico: New Opportunities*, *AMBASSADORS REVIEW*, Spring 2001, at 65, 65.

172. *Changing Hats Across the Rio Grande*, *ECONOMIST*, July 8–14, 2000, at 30, 30.

173. BUREAU OF INTER-AMERICAN AFFAIRS, U.S. DEP’T OF STATE, *FACT SHEET: WORKING WITH MEXICO: BUILDING AMERICA’S FUTURE* (June 10, 1998), at http://www.state.gov/www/regions/wha/fs_980610_mexico_working.html (last visited Nov. 21, 2002); see also Clifford Krauss, *Economic Pain Spreads from US Across Latin America*, *N.Y. TIMES*, Oct. 14, 2001, at A3. The strength of the relationship between Mexico and the United States is made clear upon examination of the economic trends of these two nations. As this article indicates, since the terrorist attacks on the United States on September 11, 2001, Mexico’s economy has “stumbled badly” due to a reduction in foreign investment, a lowering of prices on natural resources, a plunge in the stock and bond markets, an upsurge in interest rates, and a drastic decline in consumer spending. *Id.* Economists claim that “the severity of the slowdown will depend on the course of the United States economy.” *Id.* This article explains, moreover, that “[b]ecause of the geography and the North American Free Trade Agreement, Mexico is intricately linked to the United States.” *Id.*

174. President George W. Bush and President Vicente Fox, *Remarks at Arrival Ceremony* (Sept. 5, 2001), transcript available at <http://www.whitehouse.gov/news/releases/2001/09/20010905-2.html>.

175. *Id.*

actions between the two countries, policy analysts contend that the U.S.-Mexico relationship is becoming stronger than ever.¹⁷⁶

To further enhance this bilateral relationship, the Bush Administration introduced in March 2002 the "U.S.-Mexico Partnership for Prosperity," which is described as a private-public alliance designed to foster an environment in which Mexican citizens are not compelled to abandon their country due to a scarcity of jobs or other opportunities for advancement.¹⁷⁷ The action plan for this nascent partnership contemplates projects that facilitate investment in small business, infrastructure (for example, roads, ports, airports), and technology.¹⁷⁸ Despite the fact that the plan is in its early stages, some measure of success is already apparent.¹⁷⁹ According to officials at the U.S. State Department, Latin America continues to be a "top priority" for the Bush Administration, and this new U.S.-Mexico alliance is one of the most important international economic issues directly affecting the region.¹⁸⁰ As indicated previously, transactions involving Mexico are consistently the highest recipients of export assistance from the Ex-Im Bank.¹⁸¹ Logically, then, a key element to the success of the Partnership for Prosperity is the Ex-Im Bank, one of the institutions charged with playing a "more effective role in Mexican economic development."¹⁸² Mindful of the importance of the Ex-Im Bank, the official working group for this new project is evaluating, among other things, methods to form stronger ties between the Ex-Im Bank and its Mexican counterpart in order to stimulate foreign investment, bilateral

176. See Robert S. Leiken, *With a Friend Like Fox*, 80 FOREIGN AFFAIRS No. 5 (Sept./Oct. 2001), at 91, 91.

177. WHITE HOUSE OFFICE OF THE PRESS SEC'Y, FACT SHEET: U.S.-MEXICO PARTNERSHIP FOR PROSPERITY (2002), at <http://www.state.gov/p/wha/rls/fs/8919.htm> (Mar. 22, 2002) [hereinafter U.S.-MEXICO PARTNERSHIP FOR PROSPERITY]; see also Mike Allen, *Bush Proposes New Aid to Mexico*, WASH. POST, Mar. 20, 2002, at A4 ("Partnership for Progress will use U.S. government money to promote private investments in the Mexican countryside.").

178. U.S.-MEXICO PARTNERSHIP FOR PROSPERITY, *supra* note 177.

179. Brendan M. Case & Alfredo Corchado, *Investing in Opportunity: U.S. Firms Aid Initiative to Create Jobs in Mexico*, DALLAS MORNING NEWS, Mar. 19, 2002, at D1 (discussing turnarounds resulting from Partnership for Prosperity, including investment in chicken farming in Mexico by Tyson Foods, Inc., a company earlier indicted for immigration violations involving Mexican workers in United States).

180. Alan P. Larson, Under Sec'y for Econ. and Bus. Affairs, U.S. Dep't of State, U.S. Economic Relations in Latin America and the Caribbean, Remarks to the Sol M. Linowitz Forum (May 17, 2002), available at <http://www.state.gov/e/rls/rm/2002/10467.htm>.

181. FISCAL YEAR 2001 ANNUAL REPORT, *supra* note 8, at 22.

182. U.S.-MEXICO PARTNERSHIP FOR PROSPERITY, *supra* note 177.

trade, and employment opportunities.¹⁸³ In light of this burgeoning relationship between the United States and Mexico, and the fundamental role of the Ex-Im Bank thereto, passage of the Reauthorization Act was essential.

F. *Enhances Infrastructure and Corporate Citizenship*

Many private financial institutions are reluctant to participate in transactions involving Latin America for a number of reasons. For instance, the private sector will not fund exports to this region because it commonly lacks sufficient information to determine whether the credit risk is acceptable.¹⁸⁴ As a government entity working closely with many emerging-market governments, the Ex-Im Bank may be privy to financial or other pertinent information that is unavailable to the public.¹⁸⁵ The private sector is also hesitant to fund U.S. exports to Latin America because of the risky conditions attributable to the underdeveloped legal systems that are unable to adequately enforce contractual obligations or protect private property, a lack of general infrastructure, recurrent political unrest, and economic instability.¹⁸⁶ Recently, as a result of the terrorist attacks on September 11, 2001, and the ensuing generalized economic recession, export finance concerning Latin America has been even more limited. Citing the current economic crisis in Argentina and the drastic currency devaluation in

183. Rossella Brevetti, *Officials Preparing Proposals to Expand Mexican Job/Investment for March Meeting*, 19 INT'L TRADE REP. 325, 325 (Feb. 21, 2002).

184. *What Has Ex-Im Done for Small Business Lately?: Hearing Before the House Comm. on Small Bus.*, 107th Cong. 5 (2001) (statement of Vanessa Weaver, Board Member, U.S. Export-Import Bank of the United States).

185. *Id.* (statement of Vanessa Weaver, Board Member, U.S. Export-Import Bank of the United States).

186. *Senate Hearings (1997)*, *supra* note 54, at 1–2 (statement of Sen. Rod Grams, Chairman, Subcomm. on Int'l Fin.); *see also id.* at 45, 101 (statement of Richard P. Ferris, Executive Vice President, Norwest Bank Minnesota). According to Ferris, many commercial entities refuse to do export finance involving Latin America because (i) as a result of the international debt crisis in the 1980s, many U.S. banks suffered enormous losses and decided to reduce or entirely eliminate their international departments, (ii) the banking industry continues to consolidate and place greater emphasis on domestic transactions, and (iii) “the credit profile of most foreign companies would not meet our domestic lending standards” unless secured by a guarantee by an ECA like the Ex-Im Bank. *Id.*; U.S. GEN. ACCOUNTING OFFICE, REP. NO. GAO/T-GGD-95-169, TESTIMONY BEFORE THE SUBCOMM. ON PROCUREMENT, EXPORTS, AND BUS. OPPORTUNITIES, COMM. ON SMALL BUS., HOUSE OF REPRESENTATIVES, EXPORT PROMOTION: RATIONALES FOR AND AGAINST GOVERNMENT PROGRAMS AND EXPENDITURES 7 (1995) (statement of Allan I. Mendelowitz, Managing Director of International Trade, Finance, and Competitiveness) (indicating that while infrastructure projects in developing countries present “substantial opportunities for U.S. exporters,” perceived risks make many of these potential projects simply too dicey to undertake).

Venezuela, international finance practitioners predict that two trends will emerge: increased domestic financing and a greater reliance on government-supported trade finance for international transactions. This situation is evident in Florida where Miami's financial district, already damaged by the slowing economies in Latin America, has now been "smacked by the economic meltdown in Argentina."¹⁸⁷ In addition to its disinclination to participate in transactions because of the widespread economic slowdown, the private sector will be less likely to extend credit due to the increased terrorism-related government regulation on virtually all aspects of global business.¹⁸⁸ This deficiency of private-sector financing for transactions involving U.S. exporters and Latin America is tantamount to "market failure."

In such instances, the majority of proposed transactions would be unrealistic without the Ex-Im Bank, thereby damaging both the potential U.S. exporter and Latin America in general. Regarding the former, the domestic exporter is denied any profit that would have been generated by a successful transaction. As for the latter, a lack of Ex-Im Bank participation in cases of market failure would be detrimental to Latin America for two principal reasons.

First, without the participation of the Ex-Im Bank, some infrastructure projects that directly benefit the citizens of Latin American countries would never come to fruition. Many developing countries, for example, lack wastewater treatment plants that improve the overall quality of life and reduce health risks caused by poor sanitation.¹⁸⁹ Aware of the importance of potable water, these governments desire to construct treatment facilities, but lack the requisite funding.¹⁹⁰ Thus, unless the Ex-Im Bank provides support for such projects, the health

187. Jane Bussey, *Coping with the Meltdown*, MIAMI HERALD, Feb. 18, 2002, at 13G; see also Doreen Hemlock, *Small Businesses in Latin America in Line for Loans*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Nov. 5, 2001, available at 2001 WL 29953070 (explaining that small businesses in Florida will be critically injured during economic recession in Latin America because private financial institutions are reluctant or unwilling to make small loans that generate minimal banking fees. Referring to sales in Latin America, one exporter explains that "credit is king. If you can provide credit [to the potential foreign buyer], you can sell If you can't, you're dead in the water").

188. See Jenna Greene, *New, Costly Obstacles for Overseas Commerce?*, LEGAL TIMES, Sept. 24, 2001, at 17 (quoting George Weiss, former head of U.S. Customs Service as saying, "There's going to be heightened scrutiny by all governments, not just on goods coming in and out of the U.S. It's going to be global").

189. See *What Has Ex-Im Done for Small Business Lately?: Hearing Before the House Comm. on Small Bus.*, supra note 184, at 10-12 (statement of Sharon DeDoncker, Vice President of Sales, of Aqua-Aerobic Systems, Inc.).

190. See *id.* (statement of Sharon DeDoncker, Vice President of Sales, of Aqua-Aerobic Systems, Inc.).

of many persons in emerging markets may be imperiled.¹⁹¹ In addition to facilitating clean-water projects, the Ex-Im Bank has supported many transactions and projects during the last few years that promote local economic development and social advances in countries such as Argentina,¹⁹² Brazil,¹⁹³ Costa Rica,¹⁹⁴ the Dominican Republic,¹⁹⁵ Honduras,¹⁹⁶ Mexico,¹⁹⁷ and Venezuela.¹⁹⁸ With support of U.S.

191. *See id.* (statement of Sharon DeDoncker, Vice President of Sales, of Aqua-Aerobic Systems, Inc.).

192. Press Release, Export-Import Bank of the United States, Ex-Im Bank Approves Financing for B.P. Solar Exports to Power Rural Province in Argentina, *available at* <http://www.exim.gov/press/jul2501a.html> (July 25, 2001). The Ex-Im Bank guaranteed a loan to enable a Maryland company to export solar energy equipment to a utility company in Argentina that supplies electricity to a remote rural area. *Id.* According to one officer of the U.S. exporter, "Through the years, [our company] has proven its leadership in providing rural infrastructure solutions and has seen how they can transform lives in developing countries." *Id.*; *see also* Press Release, Export-Import Bank of the United States, Ex-Im Bank Backs Effort to Clean Wastewater in Argentina, *available at* <http://www.exim.gov/press/aug2098.html> (Aug. 20, 1998). The Ex-Im Bank insured a loan for the sale of approximately \$400,000 of environmental equipment from various U.S. manufacturers to Argentina to build a private water treatment facility. *Id.*

193. Press Release, Export-Import Bank of the United States, Ex-Im Bank Supports U.S. Exports to Equip New Hospital in Brazil, *available at* <http://www.exim.gov/press/aug0300.html> (Aug. 3, 2000). The Ex-Im Bank issued a thirty-five million dollar loan guarantee to help U.S. exports of hospital equipment to Brazil. *Id.* The chairman of the Ex-Im Bank explains that "[t]his transaction demonstrates the critical difference that Ex-Im Bank can make for both U.S. companies and their foreign buyers in developing markets." *Id.*; *see also* Press Release, Export-Import Bank of the United States, Ex-Im Bank Supports \$136.5 Million in U.S. Exports for Brazil's Araucaria Power Project, *available at* <http://www.exim.gov/press/oct0501.html> (Oct. 5, 2001). The Ex-Im Bank authorized a \$178 million loan to support the export of U.S. equipment to construct a power plant in Brazil. *Id.* According to the chairman of the Ex-Im Bank, "This transaction will support numerous U.S. jobs and help Brazil diversify its energy sources." *Id.*

194. Press Release, Export-Import Bank of the United States, Ex-Im Bank Director Dan Renberg Visits Costa Rica to Promote U.S. Exports, *available at* <http://www.exim.gov/press/mar2102.html> (Mar. 21, 2002).

195. Press Release, Export-Import Bank of the United States, Dominican Republic Theaters to Benefit from Ex-Im Bank Support, *available at* <http://www.exim.gov/press/aug1600.html> (Aug. 16, 2000).

196. Press Release, Export-Import Bank of the United States, Ex-Im Backs Hurricane Rebuilding Efforts in Honduras, *available at* <http://www.exim.gov/press/jun1699.html> (June 16, 1999). The Ex-Im Bank offered credit insurance to facilitate U.S. exports of paint products and computer equipment in the aftermath of Hurricane Mitch. *Id.*

197. Press Release, Export-Import Bank of the United States, Mexican Company to Recycle Tires with Help of Ex-Im Bank Financing, *available at* <http://www.exim.gov/press/jul1900e.html> (July 19, 2000). The Ex-Im Bank provided a \$2.07 million insurance policy to support a loan from a U.S. lender to a Mexican company, enabling the purchase of recycling equipment and the establishment of a recycling facility for tires. *Id.*

goods and services exports to Latin America exceeding three billion dollars in 2000, the region is consistently the most active region for the Ex-Im Bank.¹⁹⁹

Second, an increase of U.S. exports of goods and services to Latin America allows (or effectively obligates) U.S. corporations to benefit the region directly or indirectly. Concerning *direct* benefits for the region, when Ex-Im Bank financing permits U.S. companies to export services (for example, designing and constructing an infrastructure project such as a water treatment facility, an energy plant, a recycling center, etc.), these companies tend to take steps in order to be perceived as good corporate citizens: they enforce ethical business practices through use of voluntary codes of conduct; introduce environmental, health and safety standards that exceed those required by local law; offer compensation and benefits packages that surpass those provided by local companies; provide access to advanced technologies that improve the quality of life and foster sustainable development; and promote charitable giving and community activism.²⁰⁰ With respect to *indirect* benefits for Latin America, when the Ex-Im Bank finances the export of goods, many U.S. companies force the local suppliers and distributors to adhere to U.S. or international standards, both of which typically exceed those demanded locally.²⁰¹ Moreover, by setting these higher standards, U.S. companies actually exert pressure on domestic businesses to adhere to the same standards, lest they lose business and face disgruntled workers.²⁰² These benefits by multinational companies based in the United States are not given as an

198. Press Release, Export-Import Bank of the United States, Ex-Im Bank Supports Sale of U.S. Light Rail Equipment to Venezuela for Mass Transit Systems in Two Cities, *available at* <http://www.exim.gov/press/jan0102.html> (Jan. 2, 2002). The Ex-Im Bank approved two multi-million dollar guarantees to support U.S. exports of equipment for light rail mass transit systems. *Id.* According to one Ex-Im Bank official, this transaction “sustains U.S. jobs by helping a U.S. manufacturing industry compete in an important Latin American market, while promoting economic and infrastructure development for the emerging buyer market.” *Id.*; *see also* Press Release, Export-Import Bank of the United States, Ex-Im Bank \$1 Billion Program Ready to Finance U.S. Exports to Venezuela to Rebuild After Flood Damage, *available at* <http://www.exim.gov/press/jan0700.html> (Jan. 7, 2000). The Ex-Im Bank offered one billion dollars in financing to assist Venezuelan buyers in purchasing U.S. goods and services to rebuild in the wake of a massive flood. *Id.*

199. 2000 ANNUAL REPORT, *supra* note 146, at 6.

200. THE BUSINESS ROUNDTABLE, CORPORATE SOCIAL RESPONSIBILITY IN LATIN AMERICA: PRACTICES BY U.S. COMPANIES, at i–iv (2001), *available at* <http://www.brtable.org/document.cfm/585> (Aug. 2, 2001).

201. *Id.* at i–iii.

202. *See id.* at ii (“By setting and adhering to a standard beyond what is required by law, U.S. companies put pressure on domestic enterprises to also comply with these higher, international standards.”).

altruistic gesture; rather, they are commonly introduced due to pressure from non-governmental organizations.²⁰³ With the aim of protecting persons and the environment in developing countries, these groups use many weapons, such as negative publicity campaigns to obligate companies to behave acceptably. Their goal, in short, is to force businesses to meet certain internationally-accepted standards or risk the consequences of negative media coverage and consumer boycotts.²⁰⁴ Irrespective of the motives of these U.S. companies, the result is unchanged: improved conditions and prudent development in Latin America thanks to financing by the Ex-Im Bank.

IV. CONCLUSION

Exports are undeniably important to the soundness of a nation's economy. For that precise reason, governments are eager to promote the exportation of goods and services of private entities located in their countries, especially to certain emerging markets predicted to experience significant economic and population growth in the near future. One result of this zeal to export is the creation of ECAs like the Ex-Im Bank. As this article demonstrates, under the recently enacted Reauthorization Act, the Ex-Im Bank yields several benefits for the United States, including strengthening U.S. small businesses, countering maneuvers such as market windows and de facto tied aid that intentionally circumvent the Export Credit Agreement, creating better (if not more) jobs and businesses, intervening in cases of true market failure to salvage otherwise impossible transactions, diminishing corruption in international business, further protecting domestic industries against unfair trade practices, and fulfilling an important role in the National Export Strategy for 2002.

Additionally, and unbeknownst to many, the Ex-Im Bank is also beneficial to various aspects of U.S.-Latin American relations. This agency, for instance, will help prepare the hemisphere for economic integration in 2005 under the FTAA, protect the environment, foster respect for human rights, prevent international terrorism, fortify relations with Mexico through the Partnership for Prosperity, and ensure

203. Ethan B. Kapstein, *The Corporate Ethics Crusade*, FOREIGN AFFAIRS (Sept.-Oct. 2001), at 105, 105; see also Gary Gereffi et al., *The NGO-Industrial Complex*, FOREIGN POL'Y, July-Aug. 2001, at 56 ("Under increasing pressure from environmental and labor activists, multilateral organizations, and regulatory agencies in their home countries, multinational firms are implementing 'certification' arrangements.").

204. Kapstein, *supra* note 203, at 108. See generally Gereffi et al., *supra* note 203.

solid corporate citizenship from entities acting directly or indirectly in the region. Although a profound analysis of this point far exceeds the scope of this article, it suffices to say that a free market (i.e., one completely devoid of export credits) would represent the ideal situation. However, in light of the present circumstances, operating the Ex-Im Bank pursuant to the Reauthorization Act, while the United States continues to spearhead multilateral negotiations aimed at further limiting or altogether eliminating export subsidies, is a pragmatic interim solution.