

Report for Congress

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Export-Import Bank's Economic Impact Procedures: An Overview

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Summary

On June 14, 2002, President Bush signed P.L. 107-189, the Export-Import Bank Reauthorization Act of 2002. This Act made a number of changes to the Bank's charter, including changes in the way the Bank conducts its economic impact analysis. Congress has balanced its directive to the Bank to aid in financing U.S. exports with offsetting concerns over the potential adverse economic impact the Bank's programs may have on U.S. domestic employment. Congress altered the Bank's authorizing statutes relative to the way it provides its services to firms that export equipment that foreign firms will use to boost their production of articles that have been determined to be imported into the United States under certain "unfair" trade practices. These changes stemmed primarily from Congressional objections to the Bank's approval in December 2000 of a loan guarantee for a project that resulted in increased steel-making capacity in China at the same time the Bush Administration was considering measures to protect the U.S. steel industry from steel products imported from abroad.

Changes to the Bank's statute require it to automatically deny its services to firms for exports of capital equipment or other goods that foreign producers will use to increase their production of items that are the same as or substantially the same as those that are subject to an antidumping, countervailing duty, or a "Section 201" order. The Bank is also required to develop a set of policies to address the conditions under which it must deny its services to firms that export equipment or other items that could be used by foreign producers to increase their production of goods that are subject to a preliminary, rather than a final, injury determination in an antidumping or countervailing duty investigation or in a Section 201 injury determination.

These changes to the Bank's statute mean that a potentially larger number of U.S. firms and their products could be ineligible for Eximbank's services, but this conclusion is only tentative. Congress has granted the Bank broad discretionary powers that allow it to provide its services to firms even if they have been subject to a final duty order if the Bank determines that the overall damage to the U.S. economy and workers outweigh the benefits that would accrue to a smaller group of workers and firms. It is even possible that the Bank could deny its services to firms that ultimately are not subject to any final duty order or injury determination. This report will be updated as events warrant.

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Export-Import Bank's Economic Impact Procedures: An Overview

Overview

On June 14, 2002, President Bush signed P.L. 107-189 (S. 1372), the Export-Import Bank Reauthorization Act of 2002. This Act made a number of changes to the Bank's charter, including changes in the way the Bank conducts its economic impact analysis. These changes prohibit the Bank from providing loans or guarantees for exports of goods, primarily capital equipment, that foreign firms can use to increase their production of goods that are "substantially the same" as products that are subject to a countervailing or antidumping duty order under title VII of the Tariff Act of 1930, or a determination under title II ("escape clause relief") of the Trade Act of 1974. The Bank is also required to develop a set of policies regarding exports of equipment that foreign firms can use in the production of items that are subject to a preliminary, rather than a final, injury determination. As a result of these changes, the Bank issued a draft of its revised economic impact procedures on September 6, 2002 and is soliciting public comments before it finalizes those procedures.

Background

The Export-Import Bank (Eximbank) is an independent U.S. government agency that is charged with financing and promoting exports of U.S. goods and services. To accomplish these goals, Eximbank uses its authority and resources to: assume commercial and political risks that exporters or private financial institutions are unwilling, or unable, to undertake alone; overcome maturity and other limitations in private sector export financing; assist U.S. exporters to meet foreign, officially sponsored, export credit competition; and provide guidance and advice to U.S. exporters and commercial banks and foreign borrowers. The Bank operates under a renewable charter, the Export-Import Bank Act of 1945, as amended, and has been authorized through September 30, 2006.

Congress has directed the Bank through its authorizing legislation to balance a number of potentially competing directives in conducting its loan and guarantee activities. In particular, Congress has voiced concerns on a number of occasions over the potential adverse repercussions the Bank's activities could have on U.S. firms or industries. As a result, Congress has balanced its directive to the Bank to aid in financing U.S. exports with offsetting concerns over the potential adverse economic impact the Bank's programs may have on U.S. domestic employment, particularly if the Bank's programs assist foreign firms or industries that could become rivals to U.S. domestic firms or industries. To emphasize this point, Congress directed the Bank in the 1970s to:

...take into account any serious adverse effect of such loans or guarantees on the competitive position of United States industry, the availability of materials which are in short supply in the United States, and employment in the United States, and shall give particular emphasis to the objective of strengthening the competitive position of United States exporters and thereby of expanding total United States exports.¹

In the 1980s, Congress further stressed this point by specifically directing the Bank to consider the economic impact of its activities, especially if those activities caused “substantial” injury to U.S. producers. Congress also directed the Bank to deny its services to activities that established or expanded foreign production of any commodity for export if the Bank determined that:

- (i) the commodity is likely to be in surplus on world markets at the time the resulting commodity will first be sold; or
- (ii) the resulting production capacity is expected to compete with United States production of the same, similar, or competing commodity, and
- (B) the Bank determines that the extension of such credit or guarantee will cause substantial injury to United States producers of the same, similar, or competing commodity.²

Congress also directed the Bank to consider the financial viability of a project as a factor in determining whether to extend its programs to a project by expecting the project to offer a “reasonable assurance of repayment.”³ Furthermore, Congress limited the ability of the Bank to deny certain types of applications by directing the Bank not to deny applications for “nonfinancial or noncommercial considerations,” except in specific cases where the President, in consultation with Congress, determines that such a denial would be in the U.S. national interest by advancing U.S. policy in such areas as international terrorism, nuclear proliferation, environmental protection and human rights (including child labor).⁴

Countervailing, Antidumping, and Escape Clause Actions

In order to carry out the various directives and requirements Congress has placed on it, the Bank developed a set of Economic Impact Procedures. As part of those procedures, the Bank decided that it would automatically deny its services to exports of items to foreign firms if the items could be used to produce or to expand the production of goods that had been the subject of a final countervailing or antidumping duty order. Antidumping, countervailing duty and Section 201 orders are three methods the United States has adopted to give relief to U.S. industries that face certain types of unfair competition from abroad. As table 1 indicates, there are five possible stages to a countervailing or antidumping procedure: an investigation;

¹ 12 U.S.C. Sec. 635 (b)(1)(B); P.L. 92-126 (Aug. 17, 1971); P.L. 93-646 (Jan. 4, 1975); P.L. 95-630 (Nov. 10, 1978).

² 12 U.S.C. Sec. 635 (e)(1)(A); P.L. 99-472 (Oct. 15, 1986).

³ 12 U.S.C. Sec. 635 (b)(1)(B)

⁴ *Ibid.*

preliminary International Trade Commission (ITC) and Department of Commerce (DOC) determinations; and final DOC and ITC determinations.

Countervailing and antidumping duty law⁵, as contained in title VII of the Tariff Act of 1930, as amended, aims to offset any unfair competitive advantage foreign manufacturers or exporters may have as a result of foreign subsidies or sales at less than fair market value that causes or threatens injury to U.S. producers. As a result, investigations conducted under these statutes concern the actions of a specific foreign country with respect to U.S. imports from that country. Countervailing duties can be imposed when two conditions are met: 1) the Commerce Department determines that a good that is being imported into the United States is receiving a subsidy in the manufacturing, production, or exportation; and 2) the ITC determines that a US industry thereby is being materially injured or is threatened with material injury, or that the overall health of the U.S. industry is being materially retarded. If these investigations result in affirmative determinations, duties equal to the net amount of the subsidies are imposed upon imports of the subsidized goods into the United States.

Antidumping provisions concern investigations into whether an imported article is sold in the United States at less than fair value and causes or threatens to cause material injury to a domestic industry. Dumping, therefore, is a form of international price discrimination in which goods are sold in the importing market at prices that are lower than the prices at which comparable goods are sold in their home market or in third country markets. In both types of procedures, both the DOC and the ITC conduct preliminary and final investigations that lead to respective determinations (see table 1).

“Section 201” law (sections 201 to 204 of the Trade Act of 1974 [19 U.S.C. sections 2251 to 2254]) concerns investigations by the International Trade Commission into whether goods are being imported into the United States in such increased quantities that they are a substantial cause of or threaten to cause serious injury to a U.S. industry.⁶ Termed an “escape clause” mechanism, or global safeguards, these provisions authorize the President to withdraw or modify concessions and impose duties or other restrictions on imports of any article which is determined to cause or to threaten such injury to producing a like or directly competitive article. These investigations generally are broader in scope than countervailing or antidumping duty investigations and their remedies apply to any number of countries that are exporting a particular item to the United States. A Section 201 action does not require a finding of an unfair trade practice, but requires that the injury or threatened injury be “serious,” rather than merely “material,” and that the increased imports must be a “substantial cause” of the injury. As indicated in table 2, there are four stages to a Section 201 case: an investigation; an ITC injury determination; ITC relief recommendations; and Presidential action.

⁵ Reproduced in: *Antidumping and Countervailing Duty Handbook, Ninth Edition*, United States International Trade Commission, December 2001.

⁶ *Summary of Statutory Provisions Related to Import Relief*, United States International Trade Commission, January 1996.

Eximbank's Economic Impact Procedures

P.L. 107-189 made a number of changes to the statutes authorizing the Bank, including the conditions under which it must deny its services to U.S. firms for exporting items to foreign producers that could be used to manufacture items that are subject to an antidumping or countervailing duty order or a Section 201 investigation. Under section 18 of P.L. 107-189, titled "Outstanding Orders and Preliminary Injury Determinations," the Bank is prohibited from extending loans or guarantees

to an entity for the resulting production of substantially the same product that is the subject of – (i) a countervailing duty or antidumping order under title VII of the Tariff Act of 1930; or (ii) a determination under title II of the Trade Act of 1974.⁷

In addition, Congress directed the Bank to

establish procedures regarding loans or guarantees provided to any entity that is subject to a preliminary determination of a reasonable indication of material injury to an industry under title VII of the Tariff Act of 1930. The procedures shall help to ensure that these loans and guarantees are likely to not result in a significant increase in imports of substantially the same product covered by the preliminary determination and are likely to not have a significant adverse impact on the domestic economy.⁸

This change to the Bank's statutes was driven in large part by Congressional objections to the Bank's approval in December 2000 of a loan guarantee for a project that resulted in increased steel-making capacity in China. The Eximbank approval consisted of an \$18 million medium-term loan guarantee to support a \$21.7 million export of computer software, control systems and main drive power supplies by General Electric Company and other U.S. suppliers to the Benxi Iron & Steel Company, Benxi, Liaoning, China. The Bank's Board of Directors approved the loan guarantee even though the members knew it would be used to increase steel making capacity at the plant. They based their decision on an estimate by GE that the deal would support 300 jobs at the GE plant in Salem, Virginia that would supply the equipment and on indications by the Chinese that if Eximbank denied the guarantee they would procure similar equipment from French and German companies. In this case, the Bank reasoned, the plant modernization would occur regardless of the Eximbank guarantee, so that by supplying the guarantee the U.S. would at least benefit from the sale of the equipment.⁹ Some Members of Congress, however, rejected this line of reasoning and questioned how the Bank could approve such a

⁷ P.L. 107-189, Sec. 18.

⁸ *Ibid.*

⁹ *Ex-Im Bank Supports \$22 Million Sale of U.S. Equipment to China*, Press release, Export-Import Bank, January 2, 2001.

project when “the existence of excessive foreign steel capacity was well known and the domestic steel industry was in a state of severe crisis...”¹⁰

The most notable change for the Bank affects the markers it must use to evaluate whether certain kinds of exports by U.S. firms qualify for its services. According to P.L. 107-189, Eximbank is directed to deny its services to exports by U.S. firms if the item in question could enable a foreign buyer to establish or increase production capacity of an item that is the subject of a countervailing or antidumping duty order under title VII. In addition, P.L. 107-189 directs the Bank to “establish procedures” as a part of its overall decision-making process that set criteria for denying its services for U.S. exports that foreign producers could use to help manufacture products that are subject to a countervailing or antidumping duty investigation as soon as the ITC has made an affirmative preliminary determination of a reasonable indication of material injury, rather than waiting for a final injury determination. In these procedures, the Bank is directed to ensure that its activities “are likely to not result in a significant increase in imports of substantially the same product covered by the preliminary determination and are likely to not have a significant adverse impact on the domestic industry.”¹¹

Regarding Section 201 cases, Congress directs the Bank to deny its programs to U.S. firms for exports that can assist a foreign buyer in establishing or in increasing production of articles that are the subject of an affirmative ITC injury determination, regardless of any subsequent ITC relief recommendations and Presidential actions. For instance, the Bank would be prohibited from providing its services to U.S. firms that are shipping computer equipment to a foreign buyer if the buyer is using the equipment to produce steel products once the ITC announced its injury determination. In cases involving transactions over \$10 million, Congress also directed the Bank that it “shall consider investigations ... that have been initiated at the request of the President of the United States, the United States Trade Representative (USTR), the Committee on Finance of the Senate, or the Committee on Ways and Means of the House of Representatives, or by the International Trade Commission on its own motion.”¹² This seems to mean that the Bank is specifically required to look at those cases that have been initiated by the government entities when the transaction is over \$10 million. It is unclear if the Bank is similarly required to look at cases that are initiated by other entities.

¹⁰ Senate Report 107-52, August 3, 2001.

¹¹ Prior to passage of P.L. 107-189, the Bank automatically reviewed as part of its own internal procedures the potential economic impact of projects by firms that were subject to a preliminary countervailing or antidumping duty determination if the transaction totaled more than \$10 million and if the Bank believed the transaction posed the risk of “substantial injury” to U.S. firms, or if the transaction could affect more than 1% of U.S. production in the affected industry. See: *Economic Impact Proposal*, Export-Import Bank, September 6, 2002.

¹² P.L. 107-189, Sec. 18. Based on past experience, initiation of Section 201 investigations in this manner is quite rare, since most such investigations are initiated by petitions filed by the affected industry and/or labor.

According to the statutes, as amended by P.L. 107-189, the Bank can exercise some discretion in deciding whether to deny its programs to a project regardless of a preliminary or final determination in an antidumping, countervailing, or Section 201 case. Congress also made the new provision detailed above regarding Section 201 cases over \$10 million subject to an existing provision that allows the Bank to balance other interests against those advanced in the provision. It seems that in giving the Bank this discretionary authority, Congress intended to have the Bank weigh carefully the short- and long-term economic effects of such decisions on the U.S. economy as a whole relative to the potential economic injury encountered by any particular industry. This broad exception states that:

Exception - Paragraphs (1) and (2) shall not apply in any case where, in the judgement of the Board of Directors of the Bank, the short- and long-term benefits to industry and employment in the United States are likely to outweigh the short- and long-term injury to United States producers and employment of the same, similar, or competing commodity.¹³

Assessment

P.L. 107-189 made a number of changes to the Export-Import Bank's statute that could potentially deny the Bank's programs to a broad group of U.S. firms. The legislation requires the Bank to deny its services to U.S. firms that export items that foreign buyers could use to establish or increase their production of articles that are subject to a remedial duty order in injurious unfair practice cases, or to an ITC's determination of injury in Section 201 cases. This change is similar to the Bank's existing internal procedures, which require it to deny its services to U.S. firms that export goods that foreign buyers could use in their production of articles that are subject to a duty order. In addition, the legislation requires the Bank to develop procedures that could potentially cover U.S. firms that are exporting items that could assist a foreign buyer in producing articles that are subject to a preliminary, rather than a final, injury determination in unfair practice cases, or that are the subject of an investigation in Section 201 cases, subject to the Bank's own determination of potential injury. Under these circumstances, a much broader group of exports potentially could be determined to be ineligible to receive Eximbank's services.

As a result of the broad discretionary powers Congress has given the Bank to weigh various competing interests, it is not possible to determine with certainty the extent to which the Bank's actions regarding a broad group of U.S. firms that export products that could be used to enhance foreign production of items that are subject to antidumping, countervailing duty and Section 201 cases will be affected by P.L. 107-189. These powers allow the Bank to provide its services to firms that are exporting products that can be used to produce items that have been subject to a final duty order if the Bank determines that the overall damage to the U.S. economy and workers by denying its services would outweigh the benefits that would accrue to a smaller group of workers and firms. Moreover, it is possible that in some cases the Bank could deny its services to U.S. firms for products that are exported to foreign buyers that could be used in producing items that have been subject to an

¹³ 12 U.S.C. 635 (e)(3), redesignated as a result of P.L. 107-189.

antidumping or countervailing duty preliminary affirmative injury determination that are not subject to a final injury determination. In addition, the Bank could act in certain escape clause cases initiated by government agencies against U.S. firms that export products that foreign buyers could use to produce items that have been subject to an affirmative escape clause injury determination, but not subject to any final actions due to the broad discretionary powers that are available to the President, who can accept, reject, or modify any ITC injury relief recommendations. For instance, of the total of 72 escape clause cases that the ITC investigated under Section 201, affirmative injury determination was made in 40 cases, but the President took remedial action in only 15 cases, in many instances requiring less restrictive actions than those recommended by the ITC. Of the 72 cases, only eight were initiated by a government entity, and injury was found and remedy applied in seven of them.

On September 6, 2002, the Bank issued a draft of its revised economic impact procedures, and held a public meeting on these proposals. It is currently soliciting comments on those procedures. The draft included the ways in which the Bank believes it needs to alter its economic impact procedures to comply with P.L. 107-189, the various options the Bank is considering to address these changes, and those options it is favoring. Once the Bank has finalized its procedures, it will announce those procedures and make them available to the public. This report will be updated once the new procedures are available.

Table 1. Comparative Procedures for a Countervailing and Antidumping Duty Investigation

Procedures for a Countervailing Duty Investigation.	Procedures for an Antidumping Investigation.
Initiation of an Investigation.	Initiation of an Investigation.
<p>Who can initiate: Department of Commerce; an interested party; a manufacturer, producer, or wholesaler in the United States of a like product; a certified or organized union; a trade or business association; a coalition of firms; a coalition of trade associations.</p>	Same.
<p>Petitions filed with DOC and ITC; DOC must decide within 20 days to commence investigation.</p>	Same.
Preliminary ITC Injury Determination.	Preliminary ITC Injury Determination.
<p>Within 45 days of filing, the ITC must determine whether there is a “reasonable indication” of material injury.</p>	Same.
<p>If the ITC determination is negative, the investigation is terminated; if the determination is affirmative, the investigation continues.</p>	Same.
Preliminary DOC Subsidy Determination.	Preliminary DOC LTFV Determination.
<p>Within 85 days of filing, the DOC must determine whether there is a “reasonable basis to believe or suspect a subsidy is being provided.”</p>	<p>Within 160 days after filing the petition, the DOC must determine whether there is a “reasonable basis to believe or suspect that the merchandise is being sold, or is likely to be sold, at less than fair value (LTFV).”</p>
<p>If the determination is affirmative, the DOC must include an estimated amount of the net subsidy and order the suspension of liquidation of goods subject to the determination</p>	Same.

(goods are admitted into the country but not cleared because the duty and the countervailing duty have not been exacted) and the ITC must begin its final injury investigation..

If the preliminary determination is negative, no suspension of liquidation occurs, but the DOC investigation continues.

Same.

Final DOC Subsidy Determination.

Within 75 days of its preliminary determination, the DOC must issue a final subsidy determination, unless the case involves upstream subsidies, in which case special extended time limits apply.

Final DOC LTFV Determination.

Within 75 days of its preliminary determination, the DOC must issue a final LTFV determination, unless an extension is granted.

If the final subsidy determination is negative, the investigation is terminated, including any suspension of liquidation that may be in effect, and all estimated duties already paid are refunded.

Same.

If the final subsidy determination is affirmative, the DOC orders the suspension of liquidation and the posting of a cash deposit, bond, or other security, and awaits notice of the ITC final injury determination.

Same.

Final ITC Injury Determination.

Within 129 days of a DOC affirmative preliminary determination or 45 days of a DOC affirmative final determination, the ITC must make a final determination of material injury. If the DOC preliminary determination was negative, and the DOC final determination was affirmative, the ITC has until 75 days after the final affirmative determination to make its final injury determination.

Final ITC Injury Determination.

Within 120 days of a DOC affirmative preliminary determination or 45 days of a DOC affirmative final determination, the ITC must make a final determination of material injury. If the DOC preliminary determination was negative, and the DOC final determination was affirmative, the ITC has until 75 days after the final affirmative determination to make its final injury determination.

Both the DOC and the ITC must issue affirmative final determinations

Both the DOC and the ITC must issue affirmative final determinations

in order for a countervailing duty order to be issued. Within 7 days of receipt of an affirmative final ITC determination, the DOC must issue a countervailing duty order which: directs the Customs Service to assess countervailing duties; describes the merchandise involved; and requires the deposit of estimated countervailing duties.

in order for an antidumping duty order to be issued. Within 7 days of receipt of an affirmative final ITC determination, the DOC must issue an antidumping duty order which: directs the Customs Service to assess antidumping duties; describes the merchandise involved; and requires the deposit of estimated antidumping duties.

Table 2. Procedures for a Section 201 “Escape Clause” Investigation (Conducted by the International Trade Commission).

Initiation of an Investigation.

Who can initiate: a trade association, firm, union, or group of workers of an industry, the ITC, the President, the U.S. Trade Representative, the House committee on Ways and Means, or the Senate Committee on Finance.

The ITC conducts an investigation “to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, of the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.”

ITC Injury Determination.

Within 120 days of receiving a petition, the ITC must make its determination. Petitioners are encouraged to submit a plan to promote the positive adjustment of the industry to import competition.

ITC Relief Recommendations.

If the ITC makes an affirmative determination concerning the existence or threat of injury to a domestic industry, it must recommend the action that would address the injury and be the most effective in facilitating efforts by the affected domestic industry to make a positive adjustment. The recommended actions must be either a tariff; a tariff-rate quota; quantitative restrictions; adjustment measures; or a combination of these measures. The ITC must submit its recommendation for relief to the President within 180 days of the petition being filed.

Presidential Actions.

The President can provide emergency import relief within 127 days after a petition has been filed (for non-agricultural goods). Within 60 days of receiving an affirmative ITC determination, the President is required to take action. He can choose among providing import relief, adjustment measures, auctioned quotas, orderly marketing agreements, international negotiations, legislative proposals, or any action within his power. Such action may be taken for up to 8 years.

The President is required to report to congress on his actions. If the action taken by the President differs from that recommended by the ITC, he is required to state the reasons for the difference. If the President decides that there is no appropriate and feasible action to take with respect to a domestic industry, the President is required to state in his report to Congress the reasons for his inaction.

If the President's remedial action differs from those recommended by

the ITC, Congress may adopt a joint resolution of disapproval within 90 legislative days. Within 30 days after enactment of such a resolution, the President must proclaim the relief recommended by the ITC.