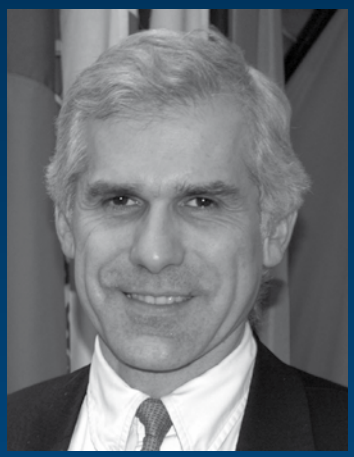
OECD WORK ON EXPORT CREDITS: A LEGAL AND INSTITUTIONAL LABORATORY



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A Gentlemen's agreement

Not long after I joined the Legal Office of the OECD, in 1995, I was invited by Janet West (then Head of OECD's Export Credits Division) to attend a meeting of the Redrafting of the Arrangement Group (RAG). The RAG was in charge of the revision of an international legal instrument that was completely unknown to me, the "Arrangement on Officially Supported Export Credits" (hereafter the Arrangement), and I was most welcome to come and get acquainted with this part of my new portfolio.

As a young and dedicated public international lawyer, I decided to prepare myself well and started to read with care the Arrangement, but the more I read the less I understood – not only because I was not at all familiar with the substantive issues at stake but, more importantly, because I could not figure out the legal status and nature of the document I was reading.

The document was presented as a "Gentlemen's agreement" but looked, in a number of respects, like a legally binding treaty. It contained a "best endevours" clause but also provided for derogations to its provisions. It was not considered an OECD legal instrument but had been negotiated within the OECD and supported by a secretariat composed of OECD staff.

I was quite excited about my findings and arrived in the meeting room with clear ideas and concrete proposals on how we should work in order to improve the legal coherence of this unusual legal

instrument. My enthusiasm was, however, soon chilled by the reaction of the then Chairman of the RAG (Bob Crick, a fellow contributor to this publication) who, after a few interventions on my side, looked at me and said (by memory) "Dear young fellow, thank you very much for your interventions but this Arrangement has been functioning perfectly well since its establishment in 1978…". While at the time I felt annoyed and even unhappy by his comment, I have to admit that if I had been the Chairman of the RAG I would have reacted exactly in the same manner. The reality is that the Arrangement is a *sui generis* document which delivers what its participants expect and there are not many international documents that meet this test!

More broadly one can say that in terms of cost-benefit, the OECD work on export credits is one of the best bargains for OECD members and even beyond. It is pioneering work in a number of respects but first and foremost, with respect to the substantive area it covers, is the establishment of self-disciplines on export credits almost 20 years before the setting up of the WTO. This was certainly forward looking.

But the OECD export credit work also presents a number of other interesting features, in particular from a legal and institutional angle, and those are the two aspects I would like to cover in the present brief article.

The legal creativity of the OECD work on export credits

Bismarck used to say that "… the war is too important to be left to generals". In looking at the OECD work on export credits we may conclude that the law is too important to be left to lawyers! The fact is that the various instruments developed in the last 30 years, both in the context of the Participants to the Arrangement (the Participants) but also within the OECD Working Party on Export Credit and Credit Guarantees (Export Credit Group – ECG), have been largely developed by practitioners and have resulted in legal instruments which are operationally sound and used by these same practitioners. It also means that the famous "legal coherence" mentioned in my introduction may suffer here and there (even though a lot has been done in the last few years to remedy this), but this does not affect the general direction of the instruments in question.

From a legal point of view all the instruments, be it the ones developed by the ECG or the ones established by the Participants to the Arrangement, have a common feature: they are not legally binding, they are what international lawyers call, after Lord McNair invented these terms, "soft law". What is soft law? There is no universally agreed definition of what exactly these terms are supposed to mean or cover: recommendations, guidance, principles, arrangements, guidelines, action plans are all different tools used in the international community to produce "soft law". While the terms are different they are all intended to define a "non-legally binding instrument", *i.e.* an instrument that does not commit legally those who have subscribed to it. But does this mean, therefore, that the Arrangement or the various OECD Recommendations agreed by the

ECG and adopted by the OECD Council are meaningless pieces of paper? It suffices to see the history of the Arrangement to understand that this is not the case. This "Gentlemen's agreement" has been by and large respected by all its Participants who feel politically, if not legally, bound by it.

Furthermore, it is a fact that the Arrangement has been "hardened" by three different actions:

- A reference to it in the WTO Agreement on Subsidies and Countervailing Measures (ASCM).[1]
- Its inclusion in EU law.[2]
- Its treatment in the WTO panels dealing with the aircraft disputes between Canada and Brazil.[3]

In particular, the inclusion of the Arrangement as item (k) of the Annex to the ASCM has not only made the Arrangement an instrument of reference in a legally binding treaty, but it has also "multilateralised" its scope of application. Any WTO member who acts in the framework of the Arrangement, even without being a formal Participant to it, would be deemed to comply with WTO obligations. In this respect, the Arrangement has become a worldwide standard.

The work carried out in the ECG, while being more classical and taking the form of OECD Recommendations, cannot be underestimated either. The Recommendation on export credit and bribery is the benchmark for the evaluation carried out by the OECD Working Group on Bribery in International Business Transactions; here again one can see that the border between soft law and harder instruments is not as wide as one could imagine.

It is the case that because instruments in the export credit field are not legally binding they can more easily be reviewed, modified, amended and strengthened. Thus, the first instrument on export credit and bribery was a mere Action Statement issued by the ECG in 2000.[4] This Statement was enhanced once before being converted into a full-fledged OECD Recommendation. Indeed, similar stages led to the OECD Recommendation on export credits and the environment. These are perfect examples of the merits of a gradual approach and one that ensures that there is ownership of the instrument once it is developed. The bottom-up approach of the OECD and the fact that OECD members take OECD legal instruments, even non-legally binding ones, quite seriously means that soft law developed in the OECD context is more effective than one developed by a number of other international institutions.

The institutional setting of the OECD work on export credits: A way for the future?

Maybe the less well-known point and specificity to understand, as an outsider, is the articulation and the relationship between the Participants to the Arrangement and the ECG. The forum of the Participants is not considered to be an OECD body as it groups the countries and institutions that participate in the Arrangement; this means that the forum is not legally bound by the OECD rules of procedure on issues such as participation of non-members, classification of documents or elections of the bureau. It also means that, formally speaking, the European Commission may represent all the EU Member States as one Participant. This particular setting gives the Participants certain latitude; while they usually work following the OECD procedural framework they can always depart from it and the Participants can also approach countries which are not in the Arrangement in a more informal and, one may argue, more effective way. Thus, Brazil joined a few years ago the sector understanding on aircraft without becoming a Participant to the overall Arrangement. As a sort of permanent conference of the parties, the Participants to the Arrangement may also decide to revise the Arrangement or parts of it at anytime and within the calendar that they deem most appropriate. It is through this pragmatic approach that the Arrangement remains a legal instrument connected with the reality of a rapidly evolving sector. However, the Arrangement would not have been able to respond by itself to the challenges faced by export credits if its work had not been complemented by the ECG. Contrary to the Participants, the ECG is an OECD body in which European Union members participate with their own vote and voice. The ECG has a peculiar place in the OECD hierarchy as, while being established by the Trade Committee, it reports directly to the OECD Council[5]. Thanks to its broader mandate, the ECG has been able to tackle issues that would have been difficult to handle in the context of the Arrangement, such as export credits and environment or export credits and bribery. The ECG also allows the Export Credit Agencies (ECAs) of the OECD members to share experiences and learn from each other, including from implementation of agreed Recommendations and guidelines (such as those established for sustainable lending to low-income countries).

Insofar as the relationship between the two bodies is concerned, it is one of full complementarity which is facilitated by the fact that countries are usually represented in the two bodies by the same people, as well as by virtue of an atypical institutional setting in which both bodies are served by the same secretariat composed of OECD staff.

The role of the OECD secretariat both as an institutional memory and a go-between, as well as honest broker, cannot be underestimated. In this context it is crucial to have a single secretariat which serves two institutionally and substantively different, but at the same time highly interlinked and interdependent, instruments and bodies. In fact, if looked at from a broader perspective, one could argue that this particular configuration could be a template of what the OECD should aspire to become.

My conclusion

The OECD work on export credits is a perfect illustration of the added value of the OECD in the international context. It is a cutting edge issue, highly technical and at the same time extremely concrete and politically sensitive. The OECD has built an expertise that everybody recognises and seeks to put this to the benefit of a better, and stronger, global governance.

Both in terms of legal instruments and of institutional setting, the OECD work on export credits could be seen as a sort of laboratory for the future of the OECD: open to major players, whether OECD members or not, both serving its membership but also able to bring its skills and technical expertise into a wider context and agenda, offering a high quality of service thanks to a motivated and qualified secretariat, managing to fulfill its ambitious 50th anniversary motto of promoting "better policies for better lives".

Notes

1. *www.wto.org/english/docs_e/legal_e/24-scm_03_e.htm.*
2. *ec.europa.eu/trade/creating-opportunities/trade-topics/export-credits/.*
3. *www.worldtradelaw.net/reports/wtoab/brazil-aircraft(ab)(21.5).pdf* and *www.worldtradelaw.net/reports/wtoab/canada-aircraft(ab)(21.5).pdf.*
4. *www.transparency.org/global_priorities/public_contracting/instruments/export_credit_agencies* for a full history.
5. Point 5 of the ECG mandate "… when the reports of the Working Party call for action by the Organisation as such, they shall be forwarded *in toto* to the council, with any comments the Trade Committee may wish to make".