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Eximbank as a Public Enterprise: The Role of Congress and the Executive Branch

*Jordan Jay Hillman**

Eximbank, a wholly-owned government corporation with the status of an independent agency, operates under the charter of the Export-Import Bank of 1945, as amended. In this article, which forms a part of his broader study of the Bank, Professor Hillman examines the influence of Congress and the Executive Branch on Eximbank's policies and decisions. He analyzes the development of the statutory provisions governing capitalization, operating (especially lending) standards and organizational structure, as well as budget status and annual program authority. He then takes up the influence of the executive branch, as exercised through the President's power to appoint principal officers and board members to serve at his pleasure, the OMB budget function and the "coordinating" authority of the National Advisory Council on International Monetary and Financial Policies.

* Professor of Law, Northwestern University School of Law, and Professor, Northwestern University Transportation Center. This article is adapted from Chapter III, *Eximbank in an Era of Competitive Export Financing (I): The Role of Congress and the Executive Branch*, as it appears in the recent publication, *THE EXPORT-IMPORT BANK AT WORK: PROMOTIONAL FINANCING IN THE PUBLIC SECTOR*, by Jordan Jay Hillman (Greenwood Press, Westport, CT, 1982). It is reprinted by permission of the publisher, Greenwood Press, a division of Congressional Information Service, Inc. The research project resulting in the entire publication and article was supported by a grant from the Alfred P. Sloan Foundation, New York, New York, on the subject of government sponsored enterprises.

PREFACE

The Export-Import Bank of the United States ("Eximbank" or "Bank"), as we know it today, exists as an "independent agency" of the United States whose operations are conducted under the statutory charter of the Export-Import Bank Act of 1945, as amended ("Export-Import Bank Act" or "Act").¹ Its origins precede World War II, however, and trace back to the creation by Executive Orders in 1934 of two separate Export-Import Banks of Washington.² Their creation was under the authority of the National Industrial Recovery Act, intended as a centerpiece of President Roosevelt's New Deal package of economic recovery legislation.³

The first of these Banks was intended to provide export financing to the emergent Soviet market, a market in which high risk and a lack of convertible currency constituted strong impediments to private sector financing. The second was originally intended for the single purpose of financing Cuban silver purchases for coinage. The two Banks were soon combined and, with encouragement from United States exporters, the single remaining Bank was expanded into a generalized agency for export financing to all world markets.

From 1934 to 1939, the Bank operated in support of United States trade expansion. During World War II, however, there was a shift in its operations in order to support the United States war effort. It provided loans needed by United States allies for their own essential purposes and for the development and United States import of strategic war materials. From 1945 to 1954, the Bank, under its new statutory charter, served largely as an instrument of foreign aid, providing vital reconstruction loans for war devastated economies. Since 1955, with the ultimate resurgence of those economies, the Bank's mission has shifted increasingly back to the support of trade.

The most significant component of the Bank's financial support programs today is the extension of loans, with the Bank generally assuming risks that commercial institutions are unwilling to undertake. Characteristically, the loans are at concessional interest rates and for long maturities. Such loans are not generally available from commercial lenders. Further, the Bank assumes certain risks in order to draw private sector funds to export financing. Eximbank often participates

¹ 12 U.S.C. § 635 (1976 & Supp. V 1981). The 1945 Act is at 59 Stat. 526 (1945).

² Exec. Order No. 6581 (1934); Exec. Order No. 6638 (1934).

³ National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933). This act was held unconstitutional in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). However, section 8 of Act of Jan. 31, 1935, Pub. L. No. 74-1, 49 Stat. 1, 4, continued both banks until June 16, 1937.

in particular loan transactions with commercial banks by funding longer maturities and by "blending" higher commercial rates with its lower concessional rates. The Bank also draws private sector funds to export financing through loan guarantees and insurance.

Throughout its history, in varying degrees of relative importance, the rationale for the Bank's role has been twofold: (1) the perceived failure of private sector financial markets, for whatever reasons, to meet the financing needs of export trade; and (2) non-market competitive distortions, especially those thought to result from foreign government-subsidized export financing programs. In recent years the second rationale has assumed the greater importance. Nevertheless, particularly as to the export of heavy, costly capital goods requiring large capital aggregations (e.g., nuclear and other power plants) and lengthy repayment periods (especially to less developed countries), the first rationale is still widely viewed as an independent *raison d'être*.

As a prototypical public enterprise, if such prototypes can really be identified, the Bank has historically sought to balance its promotion of the presumed or actual welfare benefits of export expansion with the maintenance of its own financial self-sufficiency. In the wake of escalating borrowing rates and the pressure on lending rates from competing foreign government lending agencies, its financial solvency has eroded in recent years. With growing attacks from opposite quarters on its competitive effectiveness and on the actual utility of its programs, the question of how well the Bank allocates its resources in the interest of welfare enhancement has taken on new importance. Putting aside for present purposes the thorny issues of the opportunity costs associated with its non-market allocation of resources, there remains this critical question: To what extent does Eximbank succeed in limiting its intervention and support to minimum subsidy levels? "Minimum subsidy levels" is here taken to mean the minimum support required for the completion of market- or welfare-justified export transactions which would otherwise be lost because of (i) defects in domestic export financing markets, or (ii) nonmarket barriers, especially competitive foreign government-subsidized financing.

Any assessment of the quality of Eximbank's performance must begin with an understanding of how its policies and decisions are mandated or influenced by external governmental authority. In the case of Eximbank, that authority, for all practical purposes, consists of Congress and the executive branch. There appear to be no reported cases involving judicial intervention into the Bank's exercise of decisional discretion with regard to its extension or refusal of financial support for individual, or classes of, transactions.

This article, then, examines the working relationship between Eximbank, Congress and the executive branch with a view toward developing a basis for assessing Eximbank's performance.

A. THE ROLE OF CONGRESS IN SHAPING THE CHARACTER OF EXIMBANK'S PERFORMANCE

Introduction

It must be expected that the degree of economic objectivity infused into Eximbank's policies, programs and decisions will be affected by the types of informal influences inevitably generated through ongoing relationships between any government agency and Congress, its Committees and its members. The more prominent and formal mechanism for imposing Congressional influence on the Bank, however, is found in the operating standards of its statutory charter and the measure of freedom or constraint imposed by the amount of resources available for allocation.

Reference has already been made to the 1945 Act as the origin of the Bank's statutory charter. That Act, by establishing the Bank as a statutory entity, subjected its structure and mission to a far fuller measure of Congressional scrutiny than had previously been the case. It also placed on-going statutory limits on the Bank's overall lending and other program authority. Numerous modifications to the initial Act were effected through amendatory legislation enacted between 1947 and 1968. The Bank's current operations in an era of competitive foreign government-subsidized export financing have been most affected, however, by four amendatory acts passed between 1971 and 1978. These were: the Export Expansion Finance Act of 1971;⁴ the Export-Import Bank Act Amendments of 1974;⁵ an Act [of 1977] to Extend and

⁴ Pub. L. No. 92-126, 85 Stat. 345. The hearings which form part of the legislative history of the Act are *Amend the Export-Import Bank Act of 1945: Hearings on S. 4268 Before the Subcomm. on International Finance of the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. (1970) [hereinafter cited as *S. 4268 Hearings*]; *Amend the Export-Import Bank of 1945: Hearings on S. 19 and S. 581 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs*, 91st Cong., 2d Sess. (1971); and *Export Expansion Finance Act of 1971: Hearings on H.R. 8181 Before the Subcomm. on International Trade of the House Comm. on Banking and Currency*, 92d Cong., 1st Sess. (1971). Reports related to the Act are S. REP. NO. 1462, 91st Cong., 2d Sess. (1970); S. REP. NO. 51, 92d Cong., 1st Sess. (1971); H.R. REP. NO. 303, 92d Cong., 1st Sess., reprinted in 1971 U.S. CODE CONG. & AD. NEWS 1417; and H.R. REP. NO. 435, 92d Cong., 1st Sess. (1971). Relevant floor proceedings are found at 117 CONG. REC. 28,892, 29,787-88, 29,794 (1971). The House-Senate Conference Report, CONF. REP. 435, 92d Cong., 1st Sess. (1971), is reprinted in 1971 U.S. CODE CONG. & AD. NEWS 1432.

⁵ Pub. L. No. 93-646, 88 Stat. 2333 (1975). Hearings which preceded the amendments of 1974 are *Export-Import Bank of the U.S.: Hearings on S. 1890 Before the Subcomm. on International Finance of the Sen. Committee on Banking, Housing and Urban Affairs*, 93d Cong., 1st Sess.

Amend the Export-Import Act of 1945;⁶ and the Export-Import Bank Act Amendments of 1978.⁷

1. Statutory Program Authority

The main recurrent issues in the periodic amendatory legislation involve the renewal term for the Bank and the amount of the Bank's statutory program authority. With regard to the first of these issues, under the 1978 Act the Bank is authorized to carry out its statutory functions through September 30, 1983, although its further existence

(1973); *The Role of the Export-Import Bank and Export Controls in U.S. International Economic Policy: Hearings on S. 1890 and S. 3282 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong., 2d Sess. (1974); *International Economic Policy: Hearings on H.R. Res. 774 and 1059, and H.R. 13, 838-40 Before the Subcomm. on International Trade of the House Comm. on Banking and Currency*, 93d Cong., 2d Sess. (1974). The reports on the 1974 amendments are S. REP. NO. 1097, 93d Cong., 2d Sess. (1974); H.R. REP. NO. 1261, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 8116. Conference reports are H.R. REP. NO. 15,977, 93d Cong., 2d Sess. (1974); H.R. REP. NO. 1439, 93d Cong., 2d Sess. (1974); H.R. REP. NO. 1582, 93d Cong., 2d Sess. (1974); H.R. REP. NO. 1633, 93d Cong., 2d Sess. (1974); S. REP. NO. 1335, 93d Cong., 2d Sess. (1974); and CONF. REP. NO. 1633, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 8127. Floor Proceedings are found at 120 CONG. REC. S. 3917, H.R. 15,977 (1974).

⁶ Pub. L. No. 95-143, 91 Stat. 1210. Hearings on the 1977 amendments are *To Extend and Amend the Export-Import Bank Act of 1945: Hearings on H.R. 5501 Before the Subcomm. on International Trade, Investment, and Monetary Policy of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. (1977). Related hearings include *American Role in East-West Trade: Oversight Hearings Before the Sen. Comm. on Commerce, Science and Transportation*, 94th Cong., 1st & 2d Sess. (1975-76); and *Oversight Hearings on the Export-Import Bank: Oversight Hearings Before the Subcomm. on International Trade, Investment and Monetary Policy of the House Comm. on Banking, Finance and Urban Affairs*, 94th Cong., 2d Sess. (1976). Reports on the 1977 amendments are S. REP. NO. 279, 95th Cong., 1st Sess. (1977); and H.R. REP. NO. 235, 95th Cong., 1st Sess., reprinted in 1977 U.S. CODE CONG. & AD. NEWS 3126. The conference report is H. CONF. REP. NO. 627, 95th Cong., 1st Sess., reprinted in 1977 U.S. CODE CONG. & AD. NEWS 3142. Floor proceedings on the 1977 amendments appear at 123 CONG. REC. H.R. 6415 (1977).

⁷ Pub. L. No. 95-630, tit. XIX, 92 Stat. 3641, 3724. Hearings on the 1978 amendments are *Export Policy, Part 4: Export-Import Bank Authorization and Related Issues: Hearings on S.2520 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 95th Cong., 2d Sess. (1978); *Export-Import Act Amendments of 1978: Hearings on S. 3077 Before the Senate Comm. on the Environment and Public Works*, 95th Cong., 2d Sess. (1978); *To Amend and Extend the Export-Import Bank Act of 1945: Hearings on H.R. 11384 Before the Subcomm. on International Trade, Investment and Monetary Policy of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 2d Sess. (1978); *Export-Import Bank and Trade With China: Hearings on H.R. 8196 Before the Subcomm. on International Trade, Investment and Monetary Policy of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 2d Sess. (1978); *Export-Import Bank and Trade with South Africa: Hearings on H.R. 9746 Before the Subcomm. on International Trade, Investment and Monetary Policy of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 2d Sess. (1978). Reports on the 1978 Amendments are S. REP. NO. 844, 95th Cong., 2d Sess. (1978); S. REP. NO. 1039, 95th Cong., 2d Sess. (1978); H.R. REP. NO. 1115, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & AD. NEWS 9380. Floor proceedings related to the 1978 Amendments are found at 124 CONG. REC. H.R. 13,157, S. 3077 (1978).

for the purpose of an orderly liquidation may continue as required beyond that date.⁸

The Bank's current total program authority, also addressed in the 1978 Act, consists of an aggregate of not in excess of \$40 billion in loans, guarantees and insurance outstanding at any one time. There are no absolute, categorical sublimits within this total as among loans, guarantees and insurance. There is, however, a very practical constraint on the issuance of guarantees and insurance in excess of a stipulated statutory amount. Currently, the Bank's authority to charge only 25% of outstanding guarantees and insurance against the \$40 billion overall limit is limited to \$25 billion. Any guarantees and insurance in excess of \$25 billion at any one time must be charged in full. Total outstanding guarantees and insurance have remained well below these levels. As of the close of Fiscal Year 1980, only \$11.749 billion was outstanding, reflecting an increase from \$9.548 billion at the close of Fiscal Year 1979.⁹

In theory, it is possible under the statutory ceiling for the Bank to have outstanding a total of \$58.75 billion in loans, guarantees and insurance. This maximum would reflect outstanding loans of \$33.75 billion and guarantees and insurance of \$25 billion, which latter amount would constitute only a \$6.25 billion charge against the \$40 billion limit. As against this possibility, the Bank at the close of Fiscal Year 1980 had an unused program authority of \$15.650 billion, reflecting used authority of \$21.413 billion in loans and the \$11.749 billion in guarantees and insurance charged at 25%.¹⁰

In comparison with these current ceilings, at the beginning of Fiscal Year 1969 the Bank's total program authority limit was \$13.5 billion, with a sub-limit of \$3.5 billion on the outstanding guarantees and insurance which could be charged against the total limit at 25%. During the same period Fiscal Years 1969-1980, the annual appropriation for program authority increased from \$2.552 billion, of which direct loans were limited to \$2.065 billion, to \$5.873 billion, of which direct loans were limited to \$4.001 billion.¹¹

⁸ 12 U.S.C. § 635f (Supp. V 1981). The Bank is also authorized to incur valid and binding obligations which mature beyond the expiration date of its program authority.

⁹ 1980 EXPORT-IMPORT BANK ANN. REP. 18.

¹⁰ *Id.* at 16.

¹¹ Act of Oct. 17, 1968, Pub. L. No. 90-581, tit. III, 82 Stat. 1137, 1143-44; Act of Aug. 29, 1980, Pub. L. No. 96-334, 94 Stat. 1061; H.R. REP. NO. 1191, 96th Cong., 2d Sess. (1980) (Comm. on Appropriations, H.R.J. Res. 589).

2. Statutory Operating Standards, Mandates and Constraints

Concomitant with the gradual expansion in the amount of Eximbank's program authority (in current dollars) during this period, Congress has expressed a growing interest in the relationships between the Bank's central mission of export expansion and other significant national policy goals. Throughout this process, as the legislative hearings amply demonstrate, the Bank's broad constituency and its respective components have not wavered in the vigor and determination of their support of its program expansion. But even the most organized and effective constituencies must endure the inevitability of political accommodation to countervailing goals and interests. The ultimate passage of the major acts of 1971, 1974, 1977 and 1978 involved that process.¹²

In general, the issues with which Congress dealt in connection with the modification of the Bank's charter can be classified as follows: (a) the Bank's basic operating standards, as they relate to the intended balance to be struck in the allocation of resources between the goals of export expansion and entrepreneurial financial responsibility and efficiency; (b) the relevance of external countervailing goals which might be impaired by export expansion, relating largely to foreign policy and domestic economic considerations; (c) the identification of particular interest groups or product sectors on whose behalf the Bank should undertake special promotional efforts; and (d) the establishment of procedures to expand general Congressional oversight and Presidential responsibility.

To some degree, each of the acts represents a refinement of Congressional policy with regard to each of these elements. More specifically, the 1971 Act reflected an aggressively expansionist approach by Congress to the Bank's central mission, while the 1974 Act was in the nature of a pendular response.¹³ The growing Congressional concern throughout the period was with the intensification of foreign government-subsidized export financing in competition with Eximbank's programs. What follows is a description of Eximbank's current statutory charter reflecting the amendments enacted from Fiscal Years 1969-1980, as organized under the four classifications described above.

¹² See *supra* notes 4-7 and accompanying text.

¹³ See Comment, *The Export-Import Bank Amendments of 1974*, 25 COLUM. J. TRANSNAT'L L. 75 (1976).

a. Basic Operating Standards

(i) Policy Goals

Certain long-established standards remain intact under the currently effective Export-Import Bank Act of 1945, as amended. The central concern of the Bank, as initially set out in its "objects and purposes," continues to be "to aid in financing and to facilitate exports and imports."¹⁴ Given the inclusion of "to facilitate" as a separate and independent object and purpose, rather than as the ultimate aim of its financing aid, it is certainly open to the Bank and its constituencies to contend that the Act contemplates a supportive, promotional role; one that is to go beyond bare bones financing alone.

The basic and original policy declaration of the Act also embraces a welfare assumption which in itself lends support to an activist role for the Bank. The broad, unqualified policy is "to foster expansion of exports" because of their presumed consequential and undifferentiated contribution "to the promotion and maintenance of high levels of employment and real income and to the increased development of the productive resources of the United States."¹⁵

(ii) Asset Management and Sources

An important feature of the Bank's operations lies in its formal authority for the independent management of its separate assets. On the one hand, it has received no actual appropriation of funds from Congress beyond the government's initial subscription of \$1 billion of capital stock; on the other, it is authorized to utilize its own net earnings, or retained income, in its operations, subject to the limits of overall statutory program authority and annual budget authority, or "appropriations." Specifically, the Act authorizes the Bank "to use all of its assets . . . in the exercise of its functions."¹⁶ The only statutory limitation on the use of assets attributable to capital stock and net earnings is the requirement of the payment of dividends on the capital stock from net earnings "after reasonable provision for possible losses."¹⁷

Although the Bank is not obligated to pay dividends on its equity at the government's current cost of funds, the Act now requires that the Treasury's interest charges on Bank borrowings be based on the government's *current borrowing costs* for United States "marketable obli-

¹⁴ 12 U.S.C. § 635(a)(1) (1976).

¹⁵ 12 U.S.C. § 635(b)(1)(A) (1976).

¹⁶ 12 U.S.C. § 635(a)(1) (1976).

¹⁷ *Id.*

gations . . . of comparable maturity.”¹⁸ Similarly, Eximbank’s borrowings from the Federal Financing Bank (as in the case of all other federal agency borrowers) are at rates determined by the Secretary of the Treasury based on “current average yield on outstanding marketable obligations . . . of comparable maturity,” either of the United States or of the Federal Financing Bank itself.¹⁹

(iii) Interest Rates on Loans

In contrast to its borrowings based on the current *yields* on marketable obligations of comparable maturity, the Bank is authorized to lend at Board-determined rates which take into consideration “the average cost of money to the Bank as well as the Bank’s mandate to support United States exports at rates and on terms which are competitive with exports of other countries.”²⁰ This present standard, incorporated into the Act as part of the 1974 amendments, was preceded by the 1971 directive requiring that the Bank, more generally as to all “rates . . . terms and conditions” of its financial support, be competitive with the government-supported export financing programs of other countries.²¹ The 1974 amendment relating to the Bank’s interest rates supplements, but leaves intact, these 1971 provisions.²² The 1974 interest rate provision was adopted in the House as an amendment to a floor amendment which, without express reference to the continuing 1971 mandate, would have required interest rates on loans at no less than one per cent below the weekly determined average “prime commercial rate” of the five largest commercial banks.²³ In contrast, the essence of the adopted substitute amendment is to negate any obligation of the Bank to base its current lending rates either on prevailing commercial rates or its own current borrowing rates and to confirm the continuing relevance of the 1971 mandate with respect to lending rates.

¹⁸ 12 U.S.C. § 635d (1976). This provision was enacted as part of the 1974 amendments in the same legislative environment, discussed *infra* at text accompanying note 114, which restored the Bank to budget status. It replaced the provision by which Treasury was to determine the Bank’s borrowing rate through “taking into consideration the *current average rate*” of such obligations. J. HILLMAN, *THE EXPORT-IMPORT BANK AT WORK: PROMOTIONAL FINANCING IN THE PUBLIC SECTOR* ch. I (1982).

¹⁹ 12 U.S.C. § 2285(b) (1976).

²⁰ 12 U.S.C. § 635(b)(1)(B) (1976).

²¹ Export Expansion Finance Act of 1971, *supra* note 4, § (b)(6), 85 Stat. at 346.

²² 12 U.S.C. § 635(b)(1)(A) (1976).

²³ 120 CONG. REC. 29,682-84 (1974). The amendment’s proponents objected to the fact that home loans were at 9 or 10%, while Bank loans to foreign governments, “including the Soviet Union,” were at 7%. In the Senate it was proposed to require the Bank to lend “at a rate not less than the prevailing market rate on loans of comparable maturity.” *Id.* at 31,929. For further discussion, see *infra* note 124.

While directing the Bank to balance competitive need against its average, rather than its current, cost of money, the 1974 standard governing interest charges fails to define the "money" to which the provision applies. Essentially, the ambiguity involves the inclusion or exclusion of the Bank's cost of equity-derived capital (capital stock and earned surplus). The inclusion of total equity capital, on which the Bank has customarily paid annual dividends of less than two percent, could substantially lower the floor on the Bank's interest charges, even where foreign competition was not a factor.²⁴ For whatever light the sponsor's intent may shed on the intent of Congress itself, it appears through his explanatory comments that "average cost of money" was intended to cover "average cost of borrowed money."

There is a further issue involved in the interpretation of the interest rate standard which is of particular relevance in defining the statutory basis for concessional financing. That is the question of whether the 1971 directive is intended to require: (i) financing programs which are generally competitive with the prevailing levels of foreign financing programs, or (ii) financing packages responsive to foreign government-supported export financing competition as it may have an impact on particular export transactions. At least two House members, with the apparent concurrence of its sponsor, construed the 1974 proposal (as enacted) as encouraging case by case assessments of the actual presence of competition requiring concessional rates.²⁵ Even where the Bank is prepared to make such assessments, however, the effective statutory ceiling on its loans *in the absence* of competition is "average" rather than current costs of money (whether or not as calculated with sole reference to "borrowed" funds). Most notably absent from the brief House debate was any discussion of why the Bank's *current* cost of money, or, indeed, prevailing analogous market rates, should not provide the basis for the Bank's interest charges where the need for credit arose from domestic capital market deficiencies and where foreign subsidized competitive financing was not a factor.

The basic intent of the 1974 interest rate amendment was to introduce some measure of cost-based discipline on the Bank in its extension of loans at below-market concessional interest rates. By using "average" rather than current costs and by limiting costs to those incurred by the Bank rather than the government, the force of the discipline was greatly diluted. Indeed, the proposal might well have been presented by a promotionally oriented Bank director as an eminently

²⁴ See discussion *supra* note 18.

²⁵ 120 CONG. REC. 29,683-84 (1974).

acceptable substitute for any real constraints on below cost interest rates not necessitated by foreign competition. In fact, it was.²⁶

(iv) The Bank's "Supplemental" Financing Role

The current Act continues the long-established standards governing the Bank's extension of financial support: (i) that "in exercise of its functions" the Bank should "supplement and encourage, and not compete with, private capital;" and (ii) that "so far as possible consistent with carrying out the purposes [to aid in financing and to facilitate exports]," loans shall be for "specific purposes" and shall, in the Board's judgment, "offer reasonable assurance of repayment."²⁷

Although these standards have guided the Bank since its earliest operations, two factors might be emphasized in the present context. First, while the Bank is to supplement and not compete with private capital, it is also directed to "encourage" the allocation of private capital to export markets without regard to the general availability of private capital for alternative domestic uses. There are no statutory operating standards to limit the Bank in carrying out its assigned role of encouraging the diversion of private capital from the uses to which it might otherwise be allocated. However, the quantitative limits on its total program authority may operate to impose such constraints on guarantees or participating loans. Second, Eximbank's basic character as a commercially modeled Bank is established in the "reasonable assurance of repayment" requirement. As noted above, however, that requirement is to be accommodated in some imprecise degree to the Act's basic statutory purpose not only to aid in financing, but also to facilitate exports.

(v) The Bank's Role in Responding to Foreign Government-Subsidized Financing

The previously noted *mandate* of 1971 to provide financial support "competitive with the Government-supported rates, terms and other conditions" available to competing exporters of other major exporting countries constitutes a major influence on the Bank's decisional standards. We have seen that as to interest rates the force of the mandate was somewhat deflected by the 1974 establishment of the semblance of a cost-related standard. Even less clear in its implications is the in-

²⁶ *Id.* at 29,684 (1974).

²⁷ 12 U.S.C. § 635(b)(1)(B) (1976 & Supp. V 1981). The sole exception to this repayment standard is found in the 1968 amendments establishing the so-called Export Expansion Facility, 12 U.S.C. §§ 635j-n (1976 & Supp. V 1981). See J. HILLMAN, *supra* note 18, ch. II n.65 and accompanying text.

tended impact of a 1978 amendment which, without reference to the continuing 1971 mandate, *authorizes* the Bank to provide its various forms of financial support "at rates, terms and other conditions" which, "in the opinion" of the Bank's Board, are "competitive with those provided by the government-supported export credit instrumentalities of other nations."²⁸ One apparent distinction between the scope of the 1971 mandate and the 1978 authorization lies in the limitation of the former to comparisons with "principal countries whose exporters compete with United States exporters."²⁹ In the practical circumstances confronting the Bank, however, this distinction seems meaningless.³⁰ Further, leaving the standard to be determined "in the opinion" of the Board could support an argument for total Bank discretion in reaching its judgments of necessity.

This 1978 "authorization" for the Bank was linked to an authorization and request for the President "to begin negotiations at the ministerial level to end predatory export financing programs and other forms of export subsidies."³¹ This provision once again supplemented, but did not totally displace, the continuing 1974 directive to the Bank to seek "to minimize competition in government-supported export financing and . . . to reach international agreements to reduce government subsidized export financing."³²

(vi) Promotion-Related Allocation Standards

The Export-Import Bank Act, as amended, also imposes certain promotion-type operating standards on the Bank. These are targeted toward specific sectors of the economy.³³ Related to some of these du-

²⁸ 12 U.S.C. § 635a-1(b) (Supp. V 1981).

²⁹ Export Expansion Finance Act of 1971, *supra* note 4, § (b)(6), 85 Stat. at 346.

³⁰ The Senate Committee's report would suggest that the proponents of this "authorization" were unmindful of the existing directive. S. REP. NO. 844, *supra* note 7, at 11. In the earlier 1974 floor proceedings Senator Stevenson had implied in the context of the debate that a merely permissive provision, by ridding the Bank of the mandate, would permit greater flexibility in dealing with "adverse impact" problems. 120 CONG. REC. 31,938 (1974) (statement of Senator Stevenson). He explained that in the pending bill the word "direct" would be deleted and made permissive. Instead, under the 1978 amendments, both the directive and the authorization exist formally as equally controlling operating standards.

³¹ 12 U.S.C. § 635a-1(a) (Supp. V 1981).

³² 12 U.S.C. § 635(b)(1)(A) (1976 & Supp. V 1981). In response to the distress at Eastern Airlines' large purchase of the European Airbus on concessional terms through foreign government subsidized financing, the 1978 amendments incorporated the present provisions of 12 U.S.C. § 635a-3 (Supp. V 1981). The amendment seeks to discourage such further "raids" on the United States markets of domestic producers by procedures under which Eximbank may offer concessional rates to United States buyers to offset the blandishments of foreign "non-competitive financing" in aid of foreign exports to the United States.

³³ See *infra* notes 67-70 and accompanying text.

ties are further obligations in the nature of operating standards more directly affecting the actual allocation of resources. Thus, under the 1971 amendments the Bank is rather nebulously directed to "accord equal opportunity to export agents and managers, independent export firms, and small commercial banks in the formulation and implementation of its programs."³⁴ With specific regard to ensuring the availability of "adequate financing" for the export of agricultural commodities, the Bank was further directed in 1978 to "supplement and not compete with" the "programs of the Commodity Credit Corporation."³⁵ In this respect, the Bank is required to balance any recommendations of the Secretary of Agriculture *against* the financing of particular agricultural exports with "the importance of agricultural commodity exports to the United States export market and the nation's balance of trade."³⁶

b. Countervailing Goals Affecting Eximbank's Support of Export Expansion

The inclusion in the Act of external countervailing goals as restraints on Eximbank's support of export expansion became prominent during the Viet Nam War era.³⁷ These goals were generally divided into the categories of domestic economic goals and foreign policy goals, with the latter embracing both economic and non-economic considerations. In the case of foreign policy, however, issues involving the allocation of political authority between the executive and legislative branches were occasionally as prominent as those involving welfare substance.

In setting out the current provisions of the Act which operate to impose countervailing goals on export expansion, it is not necessary to include a comprehensive legislative history of the subject in the 1969-1980 period. Such details are immaterial to the central inquiry of this study. In the course of each of the four major legislative enactments during this period there were unsuccessful efforts either to legitimize added countervailing concerns, or to vary the decisional mechanisms through which particular concerns were brought to bear on the Bank.³⁸

³⁴ 12 U.S.C. § 635(b)(1)(B) (1976 & Supp. V 1981).

³⁵ Export-Import Bank Act Amendments of 1978, *supra* note 7, § 1909, 92 Stat. at 3725.

³⁶ 12 U.S.C. § 635(b)(8) (Supp. V 1981). The apparent implication of these provisions, in response to the wishes of agricultural exporters, is that the Bank is more likely to prove a reliable supporter of agricultural exports than the Secretary of Agriculture.

³⁷ See J. HILLMAN, *supra* note 18, ch. II nn.52-64 and accompanying text.

³⁸ The interested reader may pursue these issues further in the legislative materials. For a list of these materials, see *supra* notes 4-7.

In other cases, earlier constraints were repealed or modified.

One major factor involved in the debates on all of these matters, however, whether bearing on domestic or foreign considerations and whether established or newly proposed, was that of foreign competition. Cutting across all proposals for economically or ideologically based constraints on export expansion were the ever present questions raised by opponents of the particular constraint. Could the constraint really make any difference and was it not self-defeating in view of the competitive opportunities available to foreign purchasers denied access to the Bank?³⁹ These claims of the pervasiveness of foreign competition were often countered by the assertion of Eximbank's continuing importance in providing aid, especially to developing countries.⁴⁰ In such cases the traditional, conflicting perceptions were brought into play. Was it Eximbank's central mission to provide aid to developing (or otherwise necessitous) economies or financial support for United States exports?

The history of the period suggests that Congress itself was never able to choose definitively between these historic ingredients. On the one hand, in the interest of export expansion, it sought through program authority and general operating standards to render Eximbank's operations more effective in dealing with the growth of foreign government-subsidized export financing programs. On the other hand, whatever the force of foreign competition, Congress could not divest itself of its historically shaped perspective of Eximbank as a source of aid and favors, the withholding of which would either bring about the desired results or serve to punish. With both perceptions available for rhetorical and substantive support, any given member of Congress could easily rationalize any preferred position in respect to any particular countervailing goal-based constraint on the Bank's operations.⁴¹ If the substantive priorities for Congress as a whole were not always clear,

³⁹ In the course of the 1978 legislative proceedings the point was made in the following contexts: in the House with regard to the export of non-strategic materials to the Soviet Union, 124 CONG. REC. 13,122 (1978) (extension of remarks); by the Bank with regard to the incremental domestic impact of its financing a steel plan for Trinidad and Tobago, *see id.* at 13,044; and similarly, in the House with regard to the sale of textile machinery to Egypt and more generally as to the domestic impacts of capital goods exports, *see id.* at 23,088-89; and in the House with regard to the withdrawal of Bank support for particular countries on grounds of their support of international terrorism, *see id.* at 23,093-94.

⁴⁰ Thus, the continuing developmental aid function of the Bank was asserted in connection with the issue of aircraft exports to Libya, which stood accused of aiding terrorism. *See id.* at 23,094-95.

⁴¹ The dilemma was typically expressed by the House Committee in a 1977 report, H. R. REP. NO. 235, *supra* note 6, at 4, reprinted in 1977 U.S. CODE CONG. & AD. NEWS at 3129: "While the committee believes that the Bank must be concerned with human rights in the countries receiving

a path of accommodation could be found in restrictive procedures which fell short of absolute prohibitions on Eximbank's financial support.

(i) Countervailing Domestic Goals

In 1974, the original 1968 provisions, requiring that the Bank in making loans take into account "possible adverse effects upon the United States economy," were modified.⁴² The scope of the requirement was expanded to include guarantees as well as loans.⁴³ The need to consider "adverse effects" was narrowed to "serious adverse effect."⁴⁴ The types of serious adverse effects to be taken into account were made more specific, being limited to "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."⁴⁵

Related to this earlier provision is the 1978 requirement that the Bank implement appropriate regulations and procedures to assure "full consideration" of the extent to which any loan or guarantee is "likely to have *any* adverse effect on industries, including agriculture, and employment in the United States, either by reducing demand [for domestic goods] or by increasing imports to the United States."⁴⁶ To this end, the Bank is directed to request, and the International Trade Commission to furnish, a report on the relevant impact of the Bank's activities.⁴⁷

Also presumably related to "countervailing" domestic concerns are those provisions of the 1978 amendments relating to the Bank's obligation to provide "adequate financing" for agricultural commodity

exports supported by Eximbank's loans or financial guarantees, nevertheless the committee recognizes that the Bank has been established to facilitate commercial sales by U.S. suppliers abroad."

The Committee added that stricter human rights language would have little impact on human rights in other countries because "[f]oreign importers would turn to European and Japanese suppliers." *Id.* at 5, reprinted in 1977 U.S. CODE CONG. & AD. NEWS at 3129.

⁴² See J. HILLMAN, *supra* note 18, ch. II at text following n.64.

⁴³ Eximbank support in the form of insurance continued to be excluded from the requirement. Loans or guarantees were more likely to be involved with exports of capital goods potentially giving rise to negative domestic impacts.

⁴⁴ Export-Import Bank Act Amendments of 1974, *supra* note 5, § 3, 88 Stat. at 2334.

⁴⁵ 12 U.S.C. § 635(b)(1)(B) (1976 & Supp. V 1981). The Senate Bill in 1974 unsuccessfully revived the previously unsuccessful 1968 proposal to bar all Bank support (including insurance) for exports which might have "serious adverse effects on the competitive position of United States industries," on the availability of materials in short supply and on employment. S. REP. NO. 1097, *supra* note 5, at 7. The provisions finally adopted were those agreed on in Conference.

⁴⁶ 12 U.S.C. § 635a-2 (Supp. V 1981) (emphasis added). The assumption here equates imports with negative welfare consequences. It is protectionist and mercantilistic.

⁴⁷ As of this writing, the International Trade Commission has issued no report.

exports.⁴⁸ For reasons not fully disclosed, the Bank, as previously noted, is directed to "consider" recommendations of the Secretary of Agriculture *against* its financing the export of a "particular agricultural commodity."⁴⁹ In weighing such recommendation it falls to the Bank to "consider the importance of agricultural commodity exports to the United States export market and the nation's balance of trade."⁵⁰ It is not clear why the Bank should be expected to finance such exports against the recommendation of the Secretary of Agriculture. In the absence of any Presidential policy to embargo or limit particular agricultural exports, it might be assumed that the Secretary would prove more promotionally-minded and responsive to his narrower constituency than the Bank, whose resources will never want for claimants. Conversely, during the period of any such Presidential policy, it might be assumed that the Bank would comply either as a matter of legal requirement or prudent deference to Presidential authority.

(ii) Countervailing Foreign Policy Goals

The range of countervailing foreign policy concerns is predictably broader than the basic categories of domestic concerns of which the Act takes cognizance. With increased scope come more gradations in the intensity of various concerns. These are reflected in the greater variety of mechanisms through which foreign policy related constraints on export expansion are implemented.

The method of the outright ban on Eximbank financial support has been examined in relation to the Viet Nam War-spawned provisions relating to exports "of any product, technical data, or other information" to nations "in armed conflict" with the United States, or to other nations providing governmental military assistance to such nations.⁵¹ This was the first absolute bar to Eximbank support; there is currently only one other. Enacted in 1977, this covers the purchase of "any liquid metal fast breeder nuclear reactor or any nuclear fuel reprocessing facility."⁵²

Rather than an outright ban, the most common procedural constraint involves a general prohibition, subject to being lifted through a "national interest," or other determination by the President or execu-

⁴⁸ Export-Import Bank Act Amendments of 1978, *supra* note 7, § 1909, 92 Stat. at 3725. *See also supra* note 36 and accompanying text.

⁴⁹ *See supra* note 36 and accompanying text.

⁵⁰ Export-Import Bank Act Amendments of 1978, *supra* note 7, § 1909, 92 Stat. at 3725.

⁵¹ *See* J. HILLMAN, *supra* note 18, ch. II n.54 and accompanying text. These provisions are now incorporated in 12 U.S.C. § 635b(5) (Supp. V 1981).

⁵² J. HILLMAN, *supra* note 18, ch. II n.54 and accompanying text.

tive branch authority. In some cases notification to Congress is required prior to final action by the Bank.

The prototype for this procedure is found in the 1968 provisions relating to any form of Eximbank financial support of exports directly to, or known to be intended for, any Communist country as defined by law.⁵³ In 1974 the provision was clarified and amended (in the wake of President Nixon's contrary interpretation) to require a separate determination for each individual loan transaction of \$50 million or more, rather than a single determination as to each country.⁵⁴ The previous requirement of notification to Congress within thirty days of any determination was continued.

A 1977 amendment bearing on the maintenance of internationally agreed upon arrangements covering nuclear safeguards involves similar national interest determinations by the President.⁵⁵ The Secretary of State is first required to identify to Congress and the Bank any countries materially in violation of any such agreements. The Bank is thereupon barred from extending any form of financial support for any exports to countries so identified, except to the extent of any Presidential determination that such exports are in the national interest. In this case, twenty-five days notice to Congress is required before final Eximbank approval.

Exports to South Africa are covered by a similar set of constraints enacted in 1978.⁵⁶ These provisions include an open-ended bar to the "support of any export which would contribute to . . . apartheid,"⁵⁷ applicable alike to the South African government or private purchasers. The method for determining whether any particular export is of such character is not defined. All Eximbank support for exports to the South African government is also barred, subject to reinstatement following a Presidential determination, with an explanatory statement to Congress "that significant progress toward the elimination of apartheid has been made."⁵⁸ Finally, support for all exports to private purchasers in South Africa is barred except as the Secretary of State "certifies" that the particular purchaser "has endorsed and has proceeded toward the implementation of" a series of human rights and social welfare goals in various specified areas of concern, concluding with "improving the

⁵³ See *id.* ch. II n.53 and accompanying text. See also 22 U.S.C. § 2370(f) (1976).

⁵⁴ 12 U.S.C. § 635(b)(2) (1976). See also S. REP. NO. 1097, *supra* note 5, at 8; S. REP. NO. 1335, *supra* note 5, at 9. Separate determinations for each transaction are not required on loans under \$50 million.

⁵⁵ 12 U.S.C. § 635(b)(4) (Supp. V 1981).

⁵⁶ 12 U.S.C. § 635(b)(9) (Supp. V 1981).

⁵⁷ Export-Import Bank Act Amendments of 1978, *supra* note 7, § 1915, 92 Stat. at 3727.

⁵⁸ *Id.*

quality of life for employees.”⁵⁹

Through a 1971 amendment, the Act also utilizes the mechanism of Presidential “national interest” determinations as a more general catchall for limiting the scope of the Bank’s discretion in the area of foreign policy concerns. In practice, of course, this statutory technique operates as much to pinpoint Presidential responsibility on sensitive issues as to constrain the Bank. The amendment thus authorizes the President to bar any Bank support for the purchase of “any product, technical data, or other information” by a determination that the transaction would be contrary to the national interest.⁶⁰

In 1978, a blanket compromise was adopted in an effort to fix Presidential responsibility for resolving conflicts between export expansion and a number of countervailing foreign policy and welfare concerns. That amendment forbids the Bank to “deny applications for credit for nonfinancial or noncommercial considerations” except where the President determines that such denial would be in the national interest in terms of advancing United States policy “in such areas as international terrorism, nuclear proliferation, environmental protection and human rights.”⁶¹

The difficulties encountered by Congress in dealing with Eximbank’s support of exports to the U.S.S.R. are reflected in the precision of the accommodation reached between the general desire for export expansion and the general distaste for any Eximbank financing in favor of that country. The subject is treated separately in a paragraph enacted in 1974.⁶²

First, the Bank is prohibited from approving after January 4, 1975, an aggregate combination of loans and guarantees in excess of \$300 million covering all exports to the U.S.S.R. Of this total increment of subsequent support, not more than \$40 million may be used to finance the export of any product or service “which involves research or exploration of fossil fuel energy resources.”⁶³ This particular limit as to “research and exploration” products stands in contrast to an absolute ban on “loans and guarantees” in support of any product or service “for production (including processing and distribution)”⁶⁴ of fossil fuel en-

⁵⁹ *Id.*

⁶⁰ This catch-all “national interest” provision was added to the earlier provisions of what is now 12 U.S.C. 635(b)(5) (Supp. V 1981). See *supra* note 51 and accompanying text; see also Pub. L. No. 91-126, 85 Stat. 345 (1971).

⁶¹ 12 U.S.C. 635e(b)(1)(B) (1976).

⁶² 12 U.S.C. § 635e(b) (1976).

⁶³ *Id.*

⁶⁴ *Id.*

ergy sources.

The \$300 million (but not the \$40 million) aggregate limit of this paragraph may potentially be exceeded by whatever higher limit the President determines to be in the "national interest." In such a case, however, Congress reserves the ultimate decision to itself. All Presidential determinations must be forwarded to Congress with a statement of reasons. The effectiveness of any determination is contingent on the adoption of a concurrent resolution of approval.⁶⁵

Following enactment of these provisions, Eximbank has not in fact supported any exports to the Soviet Union. However, as in the case of various other general export restrictions, the result is not dictated by the Export-Import Bank Act itself. In this case, the use of Eximbank credits in support of Soviet trade is subject to the currently effective ban of the Jackson-Vanik amendment relating to Soviet restrictions on emigration.⁶⁶

c. Eximbank's Promotional Obligations

In addition to the Bank's general "object and purpose . . . to facilitate" exports, Congress has also included more specific promotional functions among the Bank's statutory obligations. A 1974 amendment

⁶⁵ The provisions of this paragraph seem convoluted to the point of internal contradiction. The principal problem arises from: (i) the previously noted absolute ban on loan or guarantee support for products involving "production" of fossil fuel energy resources; and (ii) the requirement that the President, in seeking to exceed the \$300 million overall limit, report to Congress on how much of the proposed increase is to be used on exports for the "production" of such resources. The same contradiction appears to exist in connection with the oversight provisions of 12 U.S.C. § 635(b)(3) (Supp. V 1981). See *infra* note 75 and accompanying text.

⁶⁶ 19 U.S.C. § 2432 (1976 & Supp. IV 1980). The provision was included in the Trade Act of 1974, Pub. L. No. 93-618, § 402, 88 Stat. 1978, 2056 (1975). The ban in fact applies to all "non-market economy" countries, but is subject to Presidential waivers, if supported by the stipulated findings. Waivers have thus far been made effective as to Romania, Exec. Order No. 11,854, 3 C.F.R. 156-57 (1975 Compilation), *reprinted in* 19 U.S.C. § 2432 note, at 611 (1976); Hungary, Exec. Order No. 12,051, 3 C.F.R. 173 (1979), *reprinted in* 19 U.S.C. § 3432 note, at 747 (Supp. IV 1980); and Mainland China, Exec. Order No. 12,167, 3 C.F.R. 453 (1980), *reprinted in* 19 U.S.C. § 2432 note, at 747 (Supp. IV 1980). As general background to the issues involving the Soviet Union itself, see 15 WEEKLY COMP. PRES. DOCS. 358-59 (Feb. 27, 1979). Proposals to amend these restrictions were made in the 96th Congress, 1st Session, 1979. See S. 339, 96th Cong., 1st Sess. (1979); H.R. 1908, 96th Cong., 1st Sess. (1979).

Another important example of a statutory bar to Eximbank support imposed from outside the Export-Import Bank Act is found in The Foreign Military Sales Act, Pub. No. 90-629, § 32, 82 Stat. 1320, 1325 (1968). The Bank is prohibited from using any of its funds to participate in any extension of credit for the purchase of defense materials or services by "any economically less developed country." *Id.* This 1968 provision closely tracks in purpose the contradictory amount limitations from the 1968 amendments to the Bank's own Act, now contained in 12 U.S.C. § 635(b)(7) (1976). See J. HILLMAN, *supra* note 18, ch. II n.56 and related text.

expressly required the Bank to give "due recognition" to the national policy on small businesses to further "the interests of small business firms in order to preserve free competitive enterprise."⁶⁷ To that end the Bank must designate an officer with responsibility "for advising small businessmen of the opportunities for small business concerns in the functions of the Bank and for maintaining liaison with the Small Business Administration and other departments and agencies in matters affecting small business concerns."⁶⁸

In 1978, the Bank was directed to "give emphasis to assisting new and small business entrants in the agricultural export market" and to cooperate with other government agencies in developing "a program of education to increase awareness of export opportunities among small agribusinesses and cooperatives."⁶⁹

A third promotional role appears to focus on a particular class of products rather than on the identification of particular exporters. Thus, the Bank is directed by a 1978 amendment, through activities similar to those noted above, to promote export opportunities for goods and services relating to the development and use of "nonnuclear renewable energy resources."⁷⁰

d. Statutory Oversight Procedures

The need for annual program authorizations or "appropriations" and for periodic extensions in the term of, and increases in the amounts of, statutory program authority subjects the Bank's operations to continuing Congressional scrutiny. As a further source of information for the relevant committees in particular, the Act imposes special reporting requirements with regard to various issues which have risen in importance from time to time.

The principal reporting requirement is that of an annual report covering, as to each fiscal year, "a complete and detailed report" of the Bank's operations.⁷¹ That report is required to include descriptions of activities undertaken in furtherance of: (i) the policy to advance "the interests of small business concerns;" (ii) the policy of protecting the international environment from contamination arising from nuclear

⁶⁷ 12 U.S.C. § 635(b)(1)(B) (1976). The national policy on small business is found in 15 U.S.C. § 631(a) (1976).

⁶⁸ It is again noted that this "promotional" role is coupled with an "equal opportunity" allocation standard. See *supra* note 34 and accompanying text.

⁶⁹ 12 U.S.C. § 635(b)(1)(B) (Supp. V 1981).

⁷⁰ 12 U.S.C. § 635(b)(1)(C) (Supp. V 1981). Solar energy exports were singled out for attention. S. REP. NO. 844, *supra* note 7, at 10.

⁷¹ 12 U.S.C. § 635g(a) (1976).

and nonnuclear energy uses; and (iii) the policy of promoting the export of goods and services relating to the use of nonnuclear renewable energy resources.⁷²

The Act also requires a separate annual report covering actions taken in compliance with the previously noted 1971 mandate to provide financial support on terms and conditions competitive with foreign government-supported export financing. The so-called "competitive-ness" report must include a survey of and comparisons with foreign programs, as well as a survey of United States exporters and commercial lenders with regard to their experience in meeting foreign competitive financing. In a minor legislative vagary, the 1974 amendments required the inclusion in this annual "competitiveness" report of a description of loans (not guarantees) and their impact on domestic supplies in respect to "any product or service related to the production, refining or transportation of any type of energy or the development of any energy resource."⁷³ A reporting requirement of this character operates as a kind of "go-slow" constraint on the Bank without constituting a formal bar to such exports, or without imposing a need for prior notification to Congress.

The use of such prior notification has already been noted in connection with Presidential determinations of national interest relating to exports to the U.S.S.R.⁷⁴ The Act also utilizes prior notification as an oversight procedure in relation to the Bank's approval of certain transactions which are not otherwise restricted. Subject to modification should either house be adjourned at the time of notification, loans and guarantees covering the following categories of transactions are subject to prior notification of twenty-five days of continuous session before final approval by the Bank's Board: (i) any transaction requiring any combination of loans and guarantees of \$100 million or more; (ii) any transaction in an amount of \$25 million or more (similarly calculated) for goods or services involving "research, exploration, or production" or fossil fuel energy resources in the U.S.S.R.,⁷⁵ and (iii) any transaction involving goods and services relating to nuclear power or heavy water production.⁷⁶ The Bank and exporters whose transactions are likely to be subject to these requirements have objected on grounds that

⁷² 12 U.S.C. § 635g(b) (Supp. V 1981).

⁷³ 12 U.S.C. § 635(b)(1)(A) (1976).

⁷⁴ See *supra* note 65 and accompanying text.

⁷⁵ As to "production," see *supra* note 65 and accompanying text. The confusion over the intent of the combined provisions with regard to "production" exports remains a moot issue in view of the continuing Jackson-Vanik ban on the Bank's support of any exports to the Soviet Union. See *supra* note 66 and accompanying text.

⁷⁶ These pre-notification provisions are in 12 U.S.C. § 635(b)(3) (1976).

delay and uncertainty create a competitive disadvantage. In response, the 1978 amendments raised the limits, as noted above, from \$60 million to \$100 million. The method of calculating the period of prenotification in relation to adjournments was also liberalized. As explained by the Senate Committee, the original \$60 million threshold had been adopted in 1974 to permit Congressional review of projects which could have "major economic and foreign policy ramifications." As further indicated by the Committee, however, the lifting of the threshold to \$100 million was less a compromise with principle than a nod to inflation.⁷⁷

3. Congressional Influence on Eximbank's Programs through the Annual Appropriations Process

It is entirely natural that substantive authorizing committees of Congress should be widely perceived as generally tilted toward program expansion, while appropriations committees are thought to be more inclined toward program restraint. It falls to the former to exude sensitivity and concern toward constituency needs. It falls to the latter to exercise caution in the allocation of limited resources. The distinctive format of the two types of committee hearings would seem to fulfill this expectation. Before the substantive authorizing committees come an array of constituency representatives, together with program administrators, to educate members on the critical importance, but current inadequacy, of existing programs and of the need for program maintenance and growth. Before the appropriations committees come the program administrators, usually (but not always) shorn of external support, for the purpose of "justifying" the Administration's request for appropriations.

These distinctive patterns of hearings have prevailed for Eximbank, as they have for other federal agencies. A perusal of both types of hearings over the years, however, fails to disclose any persistently marked differences in the reception accorded the Bank and its programs.⁷⁸

⁷⁷ S. REP. NO. 844, *supra* note 7, at 6-7.

⁷⁸ The "authorization" or "substantive" committee hearings include their share of academic critics of programs, constituencies adversely affected in fact or perception and members moved by countervailing concerns. Conversely, a chairman or individual members of the Appropriations Subcommittee may be found among the greatest, uncritical enthusiasts for the Bank's work. Thus, a remarkable change of attitude was evinced by Chairman Passman over the years between the early sixties and late seventies. It was most likely attributable to the shift in the Bank's main focus from aid to trade, and the growth of its supportive constituency. See J. HILLMAN, *supra* note 18, ch. II; see also *supra* note 27 and accompanying text; see also *Foreign Assistance and Related Agencies Appropriations for 1976, Hearings Before the Subcomm. on Foreign Operations and Related*

Whatever troublesome issues may arise from time to time, the Congress has almost without exception supported the Bank at program levels requested in the annual Presidential budget. During the period Fiscal Years 1969-1980 the Congress appropriated to the Bank at least the full amount of program authority requested in the President's budget, with the one exception being in 1976 and the following transition quarter (as the government's fiscal year changed from a year ending June 30 to September 30).⁷⁹ For Fiscal Year 1976 the President had requested \$6.573 billion in total authority, of which not more than \$3.850 billion was to be used for "equipment and services" loans.⁸⁰ The transition quarter requests were \$1.170 billion and \$976 million, respectively. In comparison, the appropriated program authority was reduced to \$5.619 and \$3 billion for the full year and to \$1.437 and \$737 million for the transition quarter.⁸¹ Nevertheless, these recommendations were reported by the House and Senate Appropriations Committees as reflecting the "full budget request."⁸²

What these reductions actually reflect, however, is the initiative of the Administration and of the Bank itself. This occurred in the period between committee hearings and reports, following the replacement as Eximbank's Chairman and President in January 1976 of President Nixon's appointee, William Casey, by President Ford's appointee, Stephen DuBrul. The Bank's operations under Mr. DuBrul were vigorously redirected from promotional goals toward fiscal restraint.⁸³

Agencies of the House Comm. on Appropriations, Part I, 94th Cong., 1st Sess. 287 (1976) [hereinafter cited as *1976 Appropriations Hearings*]. At times the chairman's effusive enthusiasm might have been more than that with which the Bank's President could comfortably concur. The general tone of the Fiscal Year 1976 hearing was set by Chairman Passman's opening characterization of the Bank as "the one Federal agency we can look to make money not only for the American businessman but also for the U.S. Treasury." *Id.* at 292. As Representative Long (Chairman Passman's successor in 1977) correctly observed in beginning his more critical questioning, "The Chairman has made this program look as if it were practicably unassailable," to which Chairman Passman promptly retorted, "that is right." *Id.* at 329. In subsequent years Mr. Long remained a severe critic, but realistic supporter, of the Bank's function and performance. See *infra* note 129.

⁷⁹ The statement is based on comparisons of annual budget requests, as included in the appendix to each fiscal year budget, and the actual annual appropriations and supplemental appropriations of program authority as found in the Foreign Assistance and Related Programs Appropriations Act, Pub. L. No. 94-330, tit. IV, 90 Stat. 771, 779 (1976).

⁸⁰ The balance of "appropriated" program authority essentially covers guarantees, insurance and discount loans.

⁸¹ The Fiscal Year 1976 and transition quarter requests are set out in OFFICE OF MANAGEMENT AND BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1976, app. at 1059. The authorized program authority Foreign Assistance and Related Programs Appropriations Act, *supra* note 79, tit. IV, 90 Stat. at 779.

⁸² H.R. Rep. No. 857, 94th Cong., 2nd Sess. 52 (1976).

⁸³ See J. HILLMAN, *supra* note 18, ch. V nn.37-43 and accompanying text. An expression of concern by the Senate Appropriations Committee for the Bank's weakening financial condition is

These circumstances also reflect the *usual* modern day reality that tightened annual budgetary constraints on the Bank are more likely the product of executive rather than legislative proposals. This reality constitutes an important factor in any assessment of both the Bank's "budget status" issue, twice fought out in Congress during the Nixon Administration, and the role of OMB in the Bank's operations.

4. The Issue of Eximbank's Budget Status

In the 1971 amendments, with full support of the Administration, Eximbank was taken "off-budget." Specifically, "the receipts and disbursements of the Bank" were exempted from "any annual expenditure and net lending (budget outlays) limitations."⁸⁴ In 1974, principally through the efforts of Senator Proxmire and Representative Henry Reuss, the 1971 amendments were repealed. At least in this critical respect, 1971 can be viewed as a high water mark of the deference accorded to Eximbank and its programs by Congress.

In clearest focus, the conferral in 1971 of what was then unique "off-budget" status on Eximbank programs can be seen as an effort to undo the budget-related constraints on Eximbank's support of export expansion resulting from Presidential acceptance of the major recommendations of the 1967 Report of the President's Commission on Budget Concepts.⁸⁵ In regard to Eximbank's financing practices the two main impacts of those recommendations were: (1) the inclusion of its direct borrowings as "public debt" of the United States; and (2) the treatment of its sales of participation certificates as borrowings rather than as sales of assets. With regard to the second of these, had they been characterized as sales of assets, they would have constituted an offset to budget outlays (i.e., lending) with the same effect as a receipt. The following passage from the 1969 Budget Appendix (published in

found in its S. REP. NO. 704, 94th Cong., 1st Sess. 175-77 (1976). It was based in important part on the Comptroller-General's report to the Congress of Oct. 17, 1975, COMPTROLLER GENERAL OF THE UNITED STATES, WEAKENED FINANCIAL CONDITION OF THE EXPORT-IMPORT BANK OF THE UNITED STATES (1975).

⁸⁴ Export Expansion Finance Act of 1971, *supra* note 4 § (b)(1), 85 Stat. at 345.

⁸⁵ See J. HILLMAN, *supra* note 18, ch. II, n.46 and accompanying text. As to Presidential acceptance, see OFFICE OF MANAGEMENT AND BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1969, at 39-40. Although this initial Eximbank experiment with off-budget status was in itself brief, it was followed by other more lasting legislative decisions to confer such status on a variety of programs. A discussion and description of current off-budget agencies and programs is contained in OFFICE OF MANAGEMENT AND BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1982, at 320-28; app., pt. IV (Off-Budget Federal Entities). See also SENATE COMM. ON THE BUDGET, 95TH CONG., 1ST SESS., OFF-BUDGET AGENCIES AND GOVERNMENT-SPONSORED CORPORATIONS (Comm. Print 1977).

January 1968) relating to the Bank summarizes the consequences for budget calculations resulting from this second change:

Under the new unified budget concept, participation certificate sales by the Bank are treated as a means of financing budget expenditures rather than as a receipt-offset to expenditures. Net participation certificate sales are estimated at \$865.1 million in 1968 and \$608 million in 1969. As a result of the new concept, expenditures are estimated to exceed receipts by \$572.6 million in 1968 and \$550.6 million in 1969. Under the old administrative budget concept, receipts would exceed expenditures by \$292.5 million in 1968 and \$57.4 in 1969.⁸⁶

During the final year of the Johnson Administration, \$570 million in participation certificates were actually sold, despite the loss of any "favorable" budgetary effects. This then ended the program, as it involved the sale of "participation" interests in a "pool" of Bank receivables. Nevertheless, the continuing ingenuity of executive branch lawyers and accountants was not to be suppressed.

In addition to its larger-scale practice of selling interests in a pool of receivables, the Bank had also sold smaller amounts of beneficial interests in particular loan transactions. These were characterized by the Comptroller General in 1969 as follows: "The buyers of these instruments are not free to dispose of them except as permitted by the bank *which also assumes fully the risk of loss.*"⁸⁷ Prior to Fiscal Year 1969 the Comptroller General had not taken special note of these latter transactions. Instead, his comments on Eximbank's financial statements had been limited to the considerably larger use of the participation certificates relating to pooled loans.⁸⁸

Not wishing to abandon openly the fiscal conservatism evinced by President Johnson's acceptance of his Budget Commission's recommendations, but wishing to support added export financing with minimal budget impact, Eximbank at the outset of the Nixon Administration devised an adaptive response. In part, it appears to have arisen from the Comptroller General's failure during the Johnson years to single out the smaller amounts of individual loan sales for comment. The Bank thus sought to distinguish such sales from those of "pooled" loan interests by an arguably material difference between the two transactions. As has been noted, the participation certificates tech-

⁸⁶ OFFICE OF MANAGEMENT AND BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1969 APPENDIX 935 (1968).

⁸⁷ 1969 EXPORT-IMPORT BANK ANN. REP. 22 (emphasis added).

⁸⁸ See *Notes to the Financial Statements* in the Export-Import Bank Annual Reports, 1962-1968. In his 1969 audit letter to Eximbank, the Comptroller General, commenting for the first time on the sales of Certificates of Beneficial Interest, noted that "[t]hese types of transactions were not significant in the previous year." 1969 EXPORT-IMPORT BANK ANN. REP. 22.

nically conferred no more right in the underlying pool of loans than that of having the loan interest and repayments dedicated to servicing the certificates of participation.⁸⁹ In contrast, the individual loan transactions involved the transfer of full beneficial interest, with the Bank serving as collection agency.

Armed with a rationale that might allow such sales of individual loans to be treated as bona fide sales of assets under Budget Commission standards, the Bank increased its sales from \$90 million in 1968 to \$378 and \$406 million, respectively, in 1969 and 1970.⁹⁰

At this point, however, the Comptroller General, who himself as a member had endorsed the recommendations and principles of the Budget Commission, obliterated the distinction on the basis of the Bank's ultimate liability to the purchasers of beneficial interests in the event of default by the primary obligor. Accordingly, in his view, the transactions were borrowings rather than asset sales, presumably with all of the budget consequences the executive branch had sought to avoid.⁹¹ While his formal comments on the Bank's financial statements were limited to the impact of these adjustments on the Bank's stated assets and liabilities, they also served to put the Comptroller General at odds with the Administration as regards the impact of the Bank's operations on annual budget deficit calculations. Were the Comptroller General's view to prevail, the continuing expansion of the Bank's operations would prove contrary to the Administration's urgent desire for reductions in reported budget deficits.

Quite apart from the matter of reported budget deficits was the problem of OMB-administered cutbacks on funds previously appropriated in order to comply with mandated expenditure ceilings.

As was noted in the 1972 Budget:

Another form of central control that has been employed in budget execution is a statutory Government-wide limitation imposed by the Congress on outlays. To effectively operate within such an overall limitation, the Office of Management and Budget: (1) establishes outlay ceilings for

⁸⁹ See J. HILLMAN, *supra* note 18, ch. II n.36 and accompanying text.

⁹⁰ 1969 EXPORT-IMPORT BANK ANN. REP. 19; 1970 EXPORT-IMPORT BANK ANN. REP. 27. These transactions are shown in the Budget Appendices as receipts and as offsets to outlays and budget deficits.

⁹¹ However, the rationale stated by the Comptroller General does not seem applicable to the totals shown in the Bank's annual reports. See *supra* note 87 and accompanying text. Thus, in Fiscal Year 1969 only \$366 million of the total of \$378 million are shown in the budget as "with recourse." OFFICE OF MANAGEMENT AND BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1971, app. at 887. The corresponding figures for the \$406 million total for Fiscal Year 1970 are \$325 million with recourse and \$81 million without. OFFICE OF MANAGEMENT AND BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1972, app. at 903.

individual agencies which are not to be exceeded; and (2) requires each agency to prepare and maintain a financial plan to monitor outlays, and to control obligations so as to permit effective adherence to the outlay ceiling imposed. In this situation also, "reserves" may be established to control the use of available funds within the prescribed limits.⁹²

In addition to this possibility of executive branch reductions in program authority from previously approved levels, all appropriated funds are subject to "apportionment" by Presidential authority exercised through OMB. The purpose here is mainly to establish central control over the timing of the outflow of federal funds in the course of a budget year.⁹³ Most commonly, and in the case of Eximbank, quarterly apportionments are made beyond which quarterly spending or lending obligations may not be incurred. One important aim is to prevent excessive program activity early in the fiscal year leading later in the year to pressures, or an actual need, for supplemental program authority and appropriations. In periods of program expansion, the apportionment system can act as a constraint. At the same time it places responsibility for such constraint squarely on the executive branch, which in fact might prefer the expansion were it not for the budget impact and the need to request a supplemental appropriation.

In any case, the principal proponent and defender in the 1970-71 hearings of Eximbank's off-budget status was its Chairman and President, Henry Kearns, supported by other executive branch agencies and the exporting community. Without ever addressing the manner in which off-budget status would contribute to an expansion of the Bank's program, or any possible objections to off-budget status, the executive branch agencies took their stand in the name of export expansion.⁹⁴ It fell to Chairman Kearns to pinpoint the impact of existing budgetary

⁹² OFFICE OF MANAGEMENT AND BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1972, at 518. Thus, for Fiscal Year 1969, Congress placed a \$180 billion expenditure and net lending limit on its previous budget estimates of \$186 billion. Revenue Expenditure and Control Act of 1968, Pub. L. No. 90-364, § 202, 82 Stat. 251, 271.

⁹³ For a brief discussion of the process, contemporaneous with the period under discussion, see OFFICE OF MANAGEMENT AND BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1972, at 517-18. The applicable statutory authority derives largely from the 1950 Appropriations Act, Ch. 896, § 1211, 64 Stat. 595, 765 (codified at 31 U.S.C. § 665 (1976)).

⁹⁴ *S. 4268 Hearings*, *supra* note 4, at 3-21. The executive branch departments were, of course, as one in their ultimate support of the Administration's position. But their enthusiasm varied with their perspective. (Commerce—"strongly favors;" State—"favors;" OMB—"would support;" Council of Economic Advisors—"has no objection;" Treasury—"will not oppose;" Eximbank—"urges early enactment.") In contrast, the Federal Reserve Board, not a part of the executive branch, recommended against enactment, which it found "would constitute a breach in the new concept of a unified budget." *Id.* at 3-8. The restrained views of the Secretary of the Treasury probably reflected in part the discomfort emanating from the fact of what was at the time his recent membership on the President's Commission on Budget Concepts.

principles on the Bank's program.⁹⁵ In essence, it was his view that under the "generally accepted accounting procedures" of treating loans as an exchange of assets (cash for receivables), Eximbank's operations would have shown profits of \$104 million and \$110 million in 1969 and 1970, respectively. Nevertheless, under the prevailing budgetary practice of treating net loan disbursements as "outlays," the Bank's "negative impact on the budget totals" amounted to \$246 and \$219 million in those years.

He noted that an "important factor" in holding down the budget deficit was the "substantial sale of assets." His problem with these transactions, in which the document issued was now designated a Certificate of Beneficial Interest (CBI), was not over any openly aired differences the executive branch might have with the Comptroller General in respect of their actual character as asset sales. Indeed, these differences were not mentioned. The problem was, instead, their basic lack of marketability.⁹⁶

The CBI sales were variously described as "overly complicated" and "most inefficient." Their unfamiliarity to investors were said to cause required sales to be made on "sacrifice terms." The end result was diminished sales at higher interest rates. The obvious solution to all this, it was contended, was to substitute direct borrowing for asset sales through the issuance of Eximbank debentures at lower interest rates and in whatever amounts were required. Only when freed from the psychological constraints of contributing to an overall budget deficit could the Bank, through use of debentures rather than asset sales, more readily and cheaply raise necessary funds for program expansion without concern for the purely technical budgetary impact.

Chairman Kearns was then pressed to distinguish Eximbank's need for off-budget status with that of other agencies such as "Commodity Credit, Farmers Home Administration, REA, FHA, veterans housing, SBA, and so on," all of which were included in the unified budget. Conceding "an element of difference" from the Budget Commission's recommendations, his distinction was nothing short of the contention that Eximbank's programs served a unique governmental function requiring differential budget status. He derived this conclusion from the Bank's role as "the only institution within the U.S. Gov-

⁹⁵ *Id.* at 12.

⁹⁶ A discussion of the current role and budget impact of loan sales is contained in OFFICE OF MANAGEMENT AND BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1982, at 153-58 (Special Analysis F). While ordinarily treated as "borrowings," in a few cases under special legislation the sale of loans are treated as asset sales with the budget consequences of reducing total budget outlays.

ernment" set up to meet "the urgent need for balance-of-payments income."⁹⁷

The principal opponent of Eximbank's off-budget status was Comptroller General Staats, supported by the Federal Reserve Board. He noted that, if enacted, the proposal "would constitute the first departure from the budget policy adopted by President Johnson and continued to date by President Nixon."⁹⁸ With apparent agreement by the executive branch, he also emphasized that selective or across-the-board application of the Budget Commission's recommendations was currently a matter of Presidential discretion.⁹⁹ In this sense, he saw as one important aspect of the issue the question of whether Congress or the President should confer the proposed unique budget status on the Bank, with such consequences as removing it "from the effect of any overall expenditure limitation imposed by the Congress last year."¹⁰⁰ The Comptroller General recalled the virtual unanimity on the Budget Commission "about the importance of having the net concept of the loans included within the expenditure figure."¹⁰¹ While accepting the accounting distinction between a direct expenditure and a repayable loan and the need for showing the categories separately, he argued the importance of including net loans as budget outlays. The need was for "judging program priorities" from the point of view of "commitment of resources."¹⁰² That is to say, his conception of the budget was not as an income statement alone, but as a tool for planning the allocation of all resources commanded by the government. In those terms, he found little sense in excluding a single function from the totality of budgetary processes which can be brought to bear on the establishment of priorities.

Congressional proponents of the proposal argued with reason that off-budget status would in no way deprive Congress of information pertaining to the actual fiscal impact of the Bank's operations. Thus, as required in any case by the Government Corporation Control Act, the President would be expressly required to send Congress an annual budget covering any deficit impact of the Bank's programs in the same

⁹⁷ *S. 4268 Hearings, supra* note 4, at 16. No effort was made to distinguish Eximbank's loans from other lending programs in terms of such possible factors as rate of program expansion, maturities, relative amounts and loss experience.

⁹⁸ *Id.* at 22.

⁹⁹ *Id.* at 24. Chairman Kearns did not contest this view of the President's authority. He simply insisted the step would not be taken without Congressional concurrence. *See id.* at 16-17.

¹⁰⁰ *Id.* at 26. As to his "overall expenditure limitation" reference, see Revenue Expenditure and Control Act of 1968, Pub. L. No. 90-364, § 202, 82 Stat. 251, 271.

¹⁰¹ *S. 4268 Hearings, supra* note 4, at 29.

¹⁰² *Id.*

detail as if its operations were included in the budget.¹⁰³ As reported by the Committees, and as enacted, the proposal required the President to delineate specifically the "net lending . . . which would be included in the budget"¹⁰⁴ but for the Bank's off-budget status. Moreover, the proponents argued, the Bank would continue to be limited annually in its operations by the amount of appropriated program authority, and overall by the statutory ceilings of the Export-Import Bank Act.

Opponents of the proposal decried the establishment of a uniquely favored status for Eximbank's lending programs among all the various lending programs of at least arguably equal social value. With a limited supply of credit in the economy, concern was expressed for any consequential decrease "in the amount of credit available for our domestic needs."¹⁰⁵

There were three questions of central importance in the entire controversy. First, whether there was anything truly distinctive in Eximbank's function which warranted its unique off-budget status among all government-owned lending agencies. Second, whether and in what respects off-budget status would actually contribute to added program expansion. Third, if off-budget status would demonstrably or plausibly foster program expansion and thus presumably generate commensurate welfare benefits, whether such status should be established by Congress or the President.

Whatever the substantively correct answer to the first question might be, the legislative proceedings were devoid of any evidence to establish Eximbank's mission as one of overriding importance. Invocations of the essentiality of improvements in the nation's balance of payments figured prominently in the debate. But the matter of priorities and opportunity costs were predictably ignored by the majority in the context of Committee hearings dealing only with the Bank's programs. The actual realization of net social benefits uniquely available through the Bank's program expansion was widely accepted as a simple article of faith.¹⁰⁶ In substance, the entire undertaking to confer off-budget

¹⁰³ S. REP. NO. 51, *supra* note 4, at 3-5.

¹⁰⁴ *Id.* at 5.

¹⁰⁵ *Id.* at 16.

¹⁰⁶ A discordant note over the "additionality" issue, which was to grow in importance during the following decade, was sounded by FRB in its "budget status" views. FRB Chairman Burns concurred in the desirability of expanding exports "to help improve our balance of payments." His problem was that "not all . . . loans result in *additional* export sales." *S. 4268 Hearings, supra* note 4, at 6 (emphasis in original). He then explained:

This is especially true when the Bank finances the sale for U.S. goods for which there is little or no competition in world markets. Frequently the Bank's loans are substitutes for other financing . . . to the extent that the Bank's credit is used to substitute for offshore financing of our exports, our balance of payments will suffer.

Id. at 6.

status on the Bank was conceived and implemented through the acceptance of export expansion as a kind of *summa bonum*. To base off-budget status on an assumed priority of welfare value would seem to constitute the ultimate in political rationalization.¹⁰⁷

Accepting the assumption *arguendo*, however, we then address the second question. How would such status contribute to an expansion of Eximbank's programs? Here the central reality is one of politics and psychology rather than fiscal substance. In the first instance, the elimination of net lending outlays as a source of added, published budget deficits may initially encourage a promotionally-minded Administration to deal more generously with the Bank's request for program authority, and in turn for Congress to honor the President's request. Second, when forced to cut back in the use of previously approved funds to conform to overall expenditure and net lending limits, the Administration should be less inclined to do so with funds not subject to such limits. Finally, in administering its apportionment responsibilities, it is entirely conceivable, under circumstances of limited resources in relation to demand, that the OMB of a promotionally oriented President will be less restrictive and more willing to run the risk of a supplemental appropriation having no budget impact. With such an inclination, OMB would be sustained by a reasonable belief that for the same reason Congress would be more receptive to the request. Whether or not any or all of these possibilities would ever come to pass, they exist, *a priori*, as credible grounds for anticipating greater opportunities for program expansion through off-budget status.

Finally, if off-budget status is to be granted, should it be done on authority of the President or the Congress? In 1970-71, President Nixon was eager to achieve the potential program expansion consequences of the Bank's off-budget status. At the same time, he was reluctant to accept responsibility for a departure from established budgetary principles. This prompted the effort to persuade Congress to assume the responsibility. Given the potential impact of the decision on the establishment of national priorities, and the flood of requests for similar treatment that might follow, it does seem fitting for Congress to assume ultimate responsibility for the deed, if it is to be done at all.

¹⁰⁷ In terms of reflecting the overall impact of the borrowing and lending activities of government sponsored enterprises on resource allocation, the presence of a major categorical distinction in budget treatment should be noted. The programs of those entities in which all government capital has been retired are not now included in the budget and were not in 1971. One important example is Fannie Mae. See generally *S. 4268 Hearings*, *supra* note 4, at 24, and references at *supra* note 85.

Once it was done in 1971, the predictable consequences followed. As the result of continuing budgetary pressures, the President had, in his January 1971 budget submission, originally requested Fiscal Year 1972 Eximbank program authority in a total amount of \$3.633 billion.¹⁰⁸ This represented a reduction of more than \$400 million from the \$4.075 billion requested and appropriated in Fiscal Year 1971.¹⁰⁹ On November 16, 1971, following the final enactment on August 17 of the 1971 amendments establishing the Bank's off-budget status, President Nixon submitted a Fiscal Year 1972 budget amendment to increase total program authority by \$3.691 billion to \$7.324 billion.¹¹⁰ Of this total increase, \$3 billion was requested to initiate a short-term discount loan program. This program had long been resisted by earlier Bank administrations which had considered insurance and guarantees sufficient to induce private commercial banks to finance export loans for less than one year. To the extent of any perceived need, it had been the Bank's view that limited program authority would nonetheless be directed more usefully to other forms of support, including medium-term discount loans.¹¹¹

In the climate following the conferral of off-budget status on the Bank, the President's request was submitted to a highly receptive Congress. In a statement recommending the full amount of requested supplemental appropriations, the House Appropriations Committee consciously set out the rationale in favor of the increased program authority, while less consciously stating the principal arguments against it:

According to the Eximbank, there is presently a great need for a program which can assure U.S. commercial banks that adequate back-up liquidity for short-term financing of U.S. exports will be available in times of money shortages. Apparently, the absence of such a facility is hampering our Nation's exporters who rely on short-term financing as an essential part of their export sales package.¹¹²

The clear intent was to utilize the increased authority to encourage, through the promise of liquidity, the initial allocation of larger amounts of private capital to export financing. Thereafter, in times of money shortages, that capital could be replaced by Eximbank with other funds drawn off directly or indirectly by it from private markets.

¹⁰⁸ OFFICE OF MANAGEMENT AND BUDGET, *THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1972*, app. at 906.

¹⁰⁹ *Id.*; see also Foreign Resistance and Related Programs Appropriation Act, 1971, Pub. L. No. 619, tit. IV, 84 Stat. 1856, 1861 (1970).

¹¹⁰ H.R. REP. NO. 175, 92d Cong., 1st Sess. 1-2 (1972).

¹¹¹ See J. HILLMAN, *supra* note 18, at ch. II n.80 and accompanying text.

¹¹² HOUSE COMM. ON APPROPRIATIONS, FOREIGN ASSISTANCE AND RELATED PROGRAMS APPROPRIATION BILL, 1972, H.R. REP. NO. 711, 92d Cong., 1st Sess. 36 (1971).

This episode thus typifies the manner in which the theoretical priority accorded to Eximbank through off-budget status would be converted into a controlling allocative priority in private money markets.

The 1974 amendments, which became law in January 1975, restored the Bank to budget status following the close of Fiscal Year 1976. The delay of a full fiscal year beyond the current year reflected the intensity of the controversy during which: (i) the House rejected its Committee's recommendation, adopted by a seventeen to fifteen vote, for the Bank's restoration to budget status; (ii) the Senate rejected its Committee's recommendation, reflecting an eight to seven vote, that off-budget status be maintained; and (iii) a third conference report was required, in which the House finally receded to the Senate on the basis of a compromise delaying the effective date of the Bank's restoration to budget status, following the Senate's refusal to support its Conferees' initial recession to the House.¹¹³ The matter was thereupon "settled" in the sense that Eximbank has remained "on budget" through the present.¹¹⁴

5. Congress and the Idea of "Additionality"

Interviews with directors and many senior officers of the Bank disclose a common view that the Export-Import Bank Act imposes no particular obligation of "additionality" on the Bank in its financial support of exports. In other words, the Bank itself has traditionally felt no duty under law to ensure that its loans are actually necessary to generate *additional* export sales. Undue concern for the principle of additionality is widely viewed as a deterrent to the Bank's carrying out its affirmative duty to "facilitate" exports and its mandate to provide forms and amounts of support competitive with the export financing programs of other governments. While the "reasonable assurance of repayment" standard is accepted and pursued as a standard of banking professionalism, its affirmative thrust is to justify loans primarily in terms of repayment prospects rather than in terms of their actual necessity for the completion of transactions (as the first measure of additionality would require).¹¹⁵

As noted, the duty not to compete with private capital, read by

¹¹³ See H.R. REP. NO. 15,977, *supra* note 5.

¹¹⁴ The matter of Eximbank's budget has never been put entirely to rest. More recent issues and proposals are considered in J. HILLMAN, *supra* note 18, ch. VI.

¹¹⁵ The essence of "additionality," discussed *supra* in note 106, as a total standard of efficient resource allocation requires identifying not only the need for *any* Bank participation, but the effort to identify the least amount of resources required to neutralize such particular impediments to an export transaction as fall within the Bank's proper cognizance.

itself, provides a standard of additionality. Its significance and enforcement is beclouded, however, by the related duty to supplement and encourage private capital. The result has been the growth of cooperative and mutually supportive programs rather than the rigorous insistence by private sector financial institutions on the Bank's adherence to the non-competitive mandate.

In fairness to the Bank and its personnel in emphasizing the statutory purpose to facilitate exports, one must agree that the mixed signals emanating from the Act can fairly be read to give greater encouragement to promotion than to restraint and skepticism in the formulation and administration of its financial programs. But this is not to suggest that the concept of additionality has not on occasion occupied the attention of Congress.

In particular, the legislative proceedings of 1974 occurred in the context of a growing concern over the Bank's blanket and growing use of concessional financing without regard to its necessity in particular export transactions. It was a period following a dramatic increase in the level of the Bank's programs under dedicated promotional efforts of Henry Kearns.¹¹⁶ Its uniform lending rate of six percent had been maintained not only through the later Johnson years, beginning August 31, 1966, but throughout the Nixon Administration up to February 4, 1974, when it was raised to seven percent. In the interim, the general level of interest rates had risen and the Bank was issuing large amounts of its own debentures at interest costs in excess of its lending rates.¹¹⁷ As the final substance of the 1974 amendments would suggest, it was a time for Congress to reflect with more than customary deliberation on the intended economic function of the Bank. Those deliberations did not lead to amendments directly affecting the general operating standards of the Act, other than what might flow from the restoration of budget status and the reporting requirements on larger transactions. The matter of operating standards was considered, however.

As reported by its Banking Committee, the Senate Bill would have

¹¹⁶ From Fiscal Years 1969 through 1973 the following increase in annual gross authorizations had occurred (billions); Regular Loans—\$1.11 to 2.41; Discount Loans—\$0.185 to 1.64; Total Loans—\$1.295 to 4.05; Total Guarantees and Insurance—\$1.22 to 4.46; and Total Authorizations—\$2.52 to 8.51. 1973 EXPORT-IMPORT BANK ANN. REP. 19.

¹¹⁷ During Fiscal Year 1973, as compared with its 6% lending rate, the Bank sold \$400 million of its debentures at an effective interest cost of 6.3%; \$143 million at 5.81% and \$300 million at 6.49%. Maturities ranged from 5 to 6¼ years. 1973 EXPORT-IMPORT BANK ANN. REP. 24. During Fiscal Year 1967, the first period in which the 6% lending rate was in effect, the Bank sold \$900 million of its certificates of participation at rates ranging from 4.8% to 5.125% for varying terms. 1967 EXPORT-IMPORT BANK ANN. REP. 9. See also J. HILLMAN, *supra* note 18, ch. II n.84 and accompanying text.

added to existing standards the requirement that Bank financing be provided "only to the extent that sufficient private financing is unavailable."¹¹⁸ The intent was to "amplify" the existing requirement that the Bank "should supplement and encourage, and not compete with, private capital" to make clear "that Congress intends private capital to play the major role in export financing and that Export-Import Bank assistance should be provided only where, and to the extent, necessary to permit an export sale to occur."¹¹⁹ In general, the Bank's resources were to be allocated to those transactions where its assistance was "essential," such as where private financing was not available or was available only on terms which would preclude the transaction. Even in these cases, the Bank's assistance was to be limited to "such amounts as may be necessary to make up for the private financing deficiency."¹²⁰

As to the extension of credits, the committee was critical of the Bank's formulaic practice of "providing half the necessary loan funds in each export financing package."¹²¹ The committee declared its expectation that, in accord with more recently adopted practices, the Bank would continue the policy of "varying financing arrangements to fit the circumstances of each transaction."¹²²

The adoption of the committee's proposal, if construed in accordance with its expressions of intent, could have clarified one major ambiguity of the Act: whether the mandate to meet foreign competitive financing was to apply to the Bank's general support levels or to each transaction. At the same time the proposal was noteworthy for its failure to address the two issues of: (i) differential pricing, and (ii) the restriction of the Bank's role to the neutralization of *non-market* competitive factors.

Consistent with the committee's general tenets of efficient resource allocation would be a pricing distinction between credits extended because of: (i) domestic capital market inadequacies arising from risk perceptions, length of required maturities, principal amount or fixed interest needs over longer terms, or (ii) foreign competition. The committee did not address the issue of whether concessional rates could ever be justified except in the context of competitive pressures on a particular transaction.

Even if the committee had intended this distinction in the use of concessional rates, it nevertheless managed to avoid any consideration

¹¹⁸ S. REP. NO. 1097, *supra* note 5, at 5.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 5-6.

¹²² *Id.* at 6.

of the character of the competition which Eximbank financing was intended to overcome. Was the Bank intended to operate as a source of financing subsidies directed to offsetting any competitive disadvantages encountered by United States exporters, whether of production costs and product price, product quality, producer's reliability and distance from markets? If so, was its function to channel its support to the least efficient producers with the aim of providing whatever subsidies were required to maintain their presence in foreign markets? Or was the concept of "competition" intended to cover no more than that explicitly included in the Bank's statutory mandate relating to "government-supported rates and terms" for export financing? It is possible, as is so often the case, that the ambiguity represented the necessary basis for agreement within the committee. In any case, that same ambiguity proved insufficient to induce the House Conferees to accept the Senate committee's modest proposal, as adopted in the Senate, or the Senate to insist on this provision.

Without the formality of a proposed amendment to the Act's operating standards, in the climate of 1974 the House Banking Committee was nevertheless led to deliver a homily to the Bank on the subject of additionality. Its essence was this:

The Bank should avoid extending direct credit when United States suppliers have a competitive advantage so great that concessionary rates and terms are unnecessary to obtain a sale. When the credit of the Bank is necessary, the Bank should adjust its rates and terms so that they are as close as possible to market rates and terms within the framework of competitive requirements.¹²³

What this passage seems to suggest is that the Bank should avoid bestowing the gift of concessional rates when the export could be completed without them.¹²⁴ Further, where Bank credit is necessary "to

¹²³ H. REP. NO. 1261, *supra* note 5, at 4.

¹²⁴ A far more sweeping proposal to eliminate all concessional pricing was put before the Senate as an amendment to the committee-reported bill. 120 CONG. REC. 31,929-41 (1974). As to all of its loans, the Bank would have been required to charge interest rates "not less than the prevailing market rate on loans of comparable maturity, as determined by the Secretary of the Treasury as of the last day of the month [preceding the loan]." *Id.* at 31,929. This proposal would have negated the existing directive that the Bank remain competitive with foreign government subsidized export financing. On this basis it was attacked as having the effect of abolishing the Bank. *Id.* at 31,938.

The proposal was not prompted, however, by any broad tenet of economic policy. The stated underlying concern was that of adverse domestic impact. More particularly, the focus was the competitively beneficial subsidies conferred on the foreign international airline purchasers of United States made commercial aircraft as compared to the substantially higher domestic interest rates paid by Pan-American. It was asserted that Pan-American was paying 12% while Eximbank was extending 6% loans to its competitor airlines of "France, Japan and Saudi Arabia." *Id.* at 31,934. The motion was eventually tabled following spirited debate.

obtain a sale," apparently whether for reasons of competition or domestic capital market inadequacies, the amount of concessional help should not exceed the actual requirements. Here the possibility of a differential pricing system is implied, under which concessional rates and terms would be allowed only as a response to compelling competition. Even if this intent can be derived from the committee's statement, however, the question of what character of competition was to be met remains as much unanswered here as in the case of the Senate's proposal.

What the entire episode demonstrates is that even under maximum provocation, Congress has avoided any suggestion that it is not the function of the Bank to use its resources to neutralize competitive disadvantages of United States exporters having little or nothing to do with foreign government-subsidized export financing. Congress has mandated that this specific form of competition be met by the Bank. But that mandate, in itself, need not be read as an implied bar to the Bank's helping exporters through concessional financing to overcome other competitive impediments to exports involving such market factors as price, quality, service or distance. In the absence of statutory clarification, it is understandable that the promotional standards of the Act were often construed to justify such efforts. Indeed, might not the House Committee report be reasonably read to imply that "the Bank *should* extend direct credit (within its resources) when United States suppliers have a competitive disadvantage so great that concessionary rates and terms are necessary to obtain a sale?"

B. THE ROLE OF THE EXECUTIVE BRANCH IN SHAPING THE CHARACTER OF EXIMBANK'S PERFORMANCE

The central reality governing the relationship between the Executive Branch and the Bank derives from the President's authority under the Act to appoint the Bank's President (and Board Chairman), First Vice President (and Board Vice Chairman) and the three other voting directors to serve at his pleasure without fixed terms.¹²⁵ This is not to suggest that the Bank operates primarily as a political arm of the White House in its handling transactions. Within the framework of Congressional oversight, public opinion and the potential complaints of more clearly deserving but disappointed applicants, prudence will normally restrain the President and the Bank from using the Bank's decisional authority simply as a mechanism for distributing Presidential favors.¹²⁶

¹²⁵ See J. HILLMAN, *supra* note 18, ch. I n.63 and related text.

¹²⁶ This is not to say that questions about the Bank's role in Presidential politics never arise.

But this is not to deny the President's pervasive and dominant influence in the establishment of the decisional standards to be followed by the Bank in pursuit of the Administration's broader policy goals, whether rooted in ideology, economics or partisan politics.

The emphasis placed by Presidents Nixon and Carter on Eximbank program expansion was fully honored in the Bank's lending policies under the administrations of Henry Kearns and John Moore, their respective appointees as Eximbank's Chairman and President.¹²⁷ When, by the close of 1973, the Bank's finances had deteriorated to the point of requiring moderation in the level of its financial support, President Nixon brought in William Casey, a problem-solver who nevertheless proved sensitive to the constituency expectations generated during the four and one-half years of the Kearns administration. The brief period of fiscal restraint, program contraction and reduced levels of participation under President Ford's appointee, Stephen DuBrul, was fully consistent with the general character of that Administration's free market economic policies, as articulated and implemented in particular by Secretary of the Treasury William Simon (although appointed by President Nixon in the closing months of his administration).

Once more, at the outset of President Reagan's administration, a period of restraint on the Bank's program authority seemed likely. In his first formal address to the Congress outlining his administration's proposed revisions of President Carter's Fiscal Year 1982 budget requests, President Reagan asked for a one-third reduction in the Bank's loan authority for that year.¹²⁸ Congress, in its wisdom, may or may

The Ansett Airlines case is a recent and noteworthy example. See J. HILLMAN, *supra* note 18, ch. VII.

¹²⁷ President Nixon made no empty promise when he advised the Chairman of the House Ways and Means Committee by letter of May 11, 1970 that "the key aspect of the . . . Bank's new look is cooperation and flexibility" and that "exporters can look forward to continued expansion of Export-Import Bank activities." Letter to the Chairman of the House Committee on Ways and Means on United States Trade Policy, PUB. PAPERS 427, 430 (May 11, 1970). President Carter observed in his "United States Export Policy" statement of September 26, 1978: "I have consistently supported a more effective and aggressive Export-Import Bank." What he considered to be "effective and aggressive" was made clear in his next sentence: "During the past 2 years, my administration has increased Eximbank's loan authorization fivefold—from \$700 million in FY 1977 to \$3.6 billion for FY 1979." United States Export Policy, II PUB. PAPERS 1630, 1632 (Sept. 26, 1978).

¹²⁸ Program for Economic Recovery, 17 WEEKLY COMP. PRES. DOC. 180 (Feb. 18, 1981). As later submitted, however, the revised budget proposed a net reduction in direct and discount loan authority of \$600 million (from \$5 to 4.4 billion) and in loan guarantee authorizations of \$1.2 billion (from \$9.42 to 8.22 billion). OFFICE OF MANAGEMENT AND BUDGET, FISCAL YEAR 1982, THE BUDGET REVISIONS 349 (Apr. 1981) [hereinafter cited as FISCAL YEAR 1982 BUDGET REVISIONS].

not prove responsive.¹²⁹ In any event, Presidential control of Board directors could operate to moderate the Bank's promotional activism to the extent required by the Reagan Administration's ideological perceptions and general economic goals. Those perceptions and goals, as first articulated, were set out in the following OMB "Rationale" in support of the proposed cuts in Eximbank's Fiscal Year 1982 program authority:

President Reagan proposes to reduce or eliminate federal subsidies to business. He believes that American business should be required to compete in the market, unfettered by unnecessary government restrictions but unaided by special government privileges. In particular, he thinks it unfair that taxpayers should be forced to share the interest costs of private, profit-making—and often larger—corporations engaged in export enterprise. The policy of using the Export-Import Bank as a vehicle for meeting foreign export subsidy programs has not been justified by documented offsetting gains in economic efficiency. The Export-Import Bank has grown so rapidly in the past few years, and its lending policies have become so generalized, that the Bank's credit facilities have become widely regarded as virtual entitlement programs. That private businesses should be "entitled" to special taxpayer subsidies is a concept firmly rejected by this administration.

* * *

A far better way to promote U.S. exports is to make the American economy more productive and to reduce domestic inflation. Inefficient, market-distorting programs such as the Eximbank make such overall economic improvements more difficult, and thus, in a larger perspective, can hamper our trade posture.¹³⁰

¹²⁹ The non-predictability of the outcome stems in large part from the politics of the program. Thus, at a further Fiscal Year 1982 appropriations hearing before the House Subcommittee on April 9, 1981, its Democratic Chairman, Clarence Long, explained with remarkable candor why he was probably going to vote to restore the Reagan Administration's proposed Eximbank program cuts, despite his personal convictions to the contrary:

Usually and so often when business comes in, they want competition for everybody but business. For business they want subsidies. A large part of the problem we are in of government spending too much—and if you look at it analytically, objectively, you will find there are vast quantities of business subsidies of all sorts.

I am not saying it is as bad as the welfare thing and so on. It is hard to measure. There is a big element of subsidy here. It seems we have to get away from that sort of thing and tell businessmen they have to compete instead of asking for a damned crutch.

I will probably support this damned thing because I am a politician and know the facts of life. I know you can get this thing through with a hoot and holler. You can get Export-Import through Congress by unanimous consent. Every Congressman practically is heavily dependent on the PACs and they know where the money is coming from around election time. That includes me also.

But to maintain that this makes economic sense I think is just flying in the face of any kind of real thinking. . . .

Foreign Assistance and Related Programs: Hearings Before a Subcomm. of the Comm. on Appropriations, Part 4, 97th Cong., 1st Sess. 103 (1981). To all of which Congressman Long then added: "I am probably going to have to offer an amendment to cut the cuts." *Id.*

¹³⁰ FISCAL YEAR 1982 BUDGET REVISIONS, *supra* note 128, at 350.

The citation of these early Reagan Administration pronouncements at this point carries no normative implications regarding the Bank's work, nor does it imply that these initial views will prove to be final views. It is set out rather as an example of a dramatic Presidential policy departure, which, if actively pursued within the executive branch, cannot fail to redirect the Bank's decisions on whether any support and how much support is appropriate in particular transactions or classes of transactions. If the policy is seriously intended, it will undoubtedly be impressed on and largely shared by the President's Board appointees;¹³¹ it will be reflected in OMB's budget formulations and apportionment practices; and it can be reinforced, if need be, through the Treasury's predominant role in the National Advisory Council on International Monetary and Financial Policies (NAC).

As regards Presidential-Bank relations in general, it would appear that during periods of pronounced promotional activity and program expansion the Bank and the President seek actively to identify with each other.¹³² In contrast, during periods of program transition, contraction or flatness the parties are less inclined to embrace each other in public.¹³³ What seems to be the most notable effort toward formal identification occurred in 1979 under President Carter. In his Reorganization Plan Number 3 of that year, the President designated the holder of the newly created Office of Trade Representative and the Secretary of Commerce as *ex officio* non-voting members of the Bank's Board.¹³⁴ The appointments were made in the context of a transmittal message which declared as the general responsibility of the Trade Representative "to ensure a vigorous and coordinated Government wide export

¹³¹ This point is underscored in the following colloquy between a Senate committee member and a Board member appointed late in 1976 by President Ford, continued by President Carter and seemingly not averse to serving under President Reagan:

Senator Kasten: I understand Mr. Stingel felt quite strongly in favor of increased Eximbank funding last year. Does he support the reduction proposed by the Reagan administration?

Mrs. Kahliff: I cannot answer for Mr. Stingel. Of course Don is very aggressive in promoting exports; we all have been. That is because we were asked to be. If President Reagan asks us not to be aggressive, we have to be responsive to his policies. We will try to do the best we can under conditions as we find them.

Foreign Assistance and Related Programs Appropriations for Fiscal Year 1982: Hearings Before a Subcomm. of the Comm. on Appropriations, 97th Cong., 1st Sess. 384, 410 (1981) (Statement of Margaret W. Kahliff, Director, Export-Import Bank).

¹³² See 1979 EXPORT-IMPORT BANK ANN. REP. 2; 1978 EXPORT-IMPORT BANK ANN. REP. 2; 1973 EXPORT-IMPORT BANK ANN. REP. 11; 1972 EXPORT-IMPORT BANK ANN. REP. cover; 1971 EXPORT-IMPORT BANK ANN. REP. 1; 1970 EXPORT-IMPORT BANK ANN. REP. 1, 15.

¹³³ There are no indications of such "identification" efforts in the Export-Import Bank's 1969 and 1974-77 Annual Reports.

¹³⁴ Reorganization Plan No. 3 of 1979, 3 C.F.R. § 513 (1980), reprinted in 5 U.S.C. app. at 441 (Supp. V 1981).

expansion effort," while the Secretary of Commerce was to assume the principal mission of "fostering the international competitiveness of American industry."¹³⁵

As non-voting Board members, these new appointees or their representatives will, of course, have formal standing to participate in Board discussions. The surface appearance, therefore, was of a Presidential initiative to infuse into Board deliberations the views of the strongest advocates of export expansion within the executive branch. In fact, however, representatives from all NAC component agencies, as well as from OMB, are in regular attendance at Board meetings and the Trade Representative was newly designated as a NAC member as part of the same Reorganization Plan. Nor does it appear that there have ever been any barriers to the free flow of views from NAC members to the Board. The future of this new arrangement in the context of President Reagan's views of the Bank's work seems uncertain. On the one hand, it seems much less likely that the Reagan Administration would have initially undertaken this symbolic gesture of Eximbank activism. On the other, safely within the framework of Administration policies, this essentially empty symbol can be drained entirely of any possible substance and retained for whatever political advantage the acceptance of a *fait accompli* might provide. In either case, executive branch monitoring and supervision will continue to emanate primarily from NAC and OMB.

Following minor membership changes over the years, NAC today consists of the Trade Representative, the Secretaries of the Treasury (Chairman), State, Commerce, the Federal Reserve Board Chairman, Eximbank's President and the Director of the International Development Cooperation Agency (IDCA), whose advisory role is limited to the work of the International Development Banks and other development agencies.¹³⁶

The sole statutory source of NAC's authority to deal with Eximbank's operations remains its directive to "coordinate, by consultation or otherwise, so far as is practicable, the policies and operations" of United States representatives on the International Monetary Fund and the World Bank, Eximbank and all other Government agencies to the extent of their foreign lending, financial, exchange or monetary

¹³⁵ President's message to Congress Transmitting Reorganization Plan No. 3 of 1979, 15 WEEKLY COMP. PRES. DOC. 1729, 1730, 1732 (Sept. 25, 1979).

¹³⁶ 22 U.S.C. § 286b (Supp. IV 1980). Other Executive Orders relevant to NAC's current composition are Exec. Order No. 11,269, 3 C.F.R. 534 (1966-70), *reprinted in* 22 U.S.C. § 286b note, at 305 (1976); and Exec. Order No. 12,164, 3 C.F.R. 444-45 (1980), *reprinted in* 22 U.S.C. § 286b note, at 1289 (Supp. IV 1980).

transactions. In fulfilling this wide range of coordinating responsibilities, NAC principals act primarily through their NAC alternates at the Assistant Secretary level. These alternates are empowered to act on their behalf. In turn, the organization is served by a Staff Committee of professionals drawn from the member agencies. The Staff Committee handles its ordinary work at weekly meetings, together with representatives of other executive departments and agencies whose concerns may be relevant to particular matters before the Staff Committee. These include, in particular, OMB and other non-member Cabinet departments such as Defense and Agriculture.¹³⁷

The particular role served by NAC in relation to Eximbank's work is the result of informal arrangements worked out over the years. The concept of "coordination" would seem to imply that the purpose of NAC intervention in the Bank's operations is limited to whatever impacts such operations might have on other facets of United States international economic, trade, financial and monetary policies. That is to say, NAC, as such, has no standing to interest itself in whatever Eximbank decisional areas might be denominated as purely internal. In practice, of course, there are no certain standards by which the Bank's purely internal policies and decisions can be readily distinguished from those requiring "coordination" due to external impacts. The continuing need ultimately perceived by Congress for some measure of coordination was reflected in the 1954 decision to restore the Bank's President to the NAC.¹³⁸ His membership was established initially following the immediate post-war period during which an even more obvious need existed for coordinating the overlapping reconstruction and development aid missions of Eximbank and the World Bank.

Congress chose to deal with the fuzziness inherent in defining the scope of "coordination" by requiring Eximbank (as well as all other agencies subject to NAC coordination) to keep NAC "fully informed of their activities" and to provide it "with such further information or data in their possession as the council may deem necessary to the appropriate discharge of its responsibilities."¹³⁹ Thus, whatever the technical scope of its ultimate authority over the Bank's policies and decisions, NAC is in a position to request information. As a practical matter, the Bank may refuse in marginal cases only at the risk of generating "no win" disputes requiring Presidential resolution, in which the

¹³⁷ An overview of NAC's operations, of which its Eximbank role is but a small part, is titled *Organization, Functions and Operations*, in 1979 NAT'L ADVISORY COUNCIL ON INT'L MONETARY & FIN. POLICIES ANN. REP. app. A at 81.

¹³⁸ See J. HILLMAN, *supra* note 18, ch. I n.59 and accompanying text.

¹³⁹ 22 U.S.C. § 286b(c) (1976).

Bank is pitted against Cabinet members on an issue of disclosure within the executive branch.

In theory, of course, the broad power to obtain relevant information is the power to obtain more information in explanation or justification of the initial information. It is a process which, in the end, could operate to confer substantial influence on NAC over the formulation of Eximbank policies and major decisions. Nevertheless, the Bank has its own distinct responsibilities, operating standards and policy goals, as set out by the President and OMB, as well as by Congress. In short, the working relationships between NAC and the Bank call for cooperation and efforts at consensus rather than confrontation.

As indicated in NAC's 1979 Annual Report, its then current practice called for "review of specific proposed Eximbank transactions, prior to final decision by the Bank's Board of Directors." Such transactions included:

1. proposals involving Bank liability of \$30 million or more;
2. all transactions involving support for nuclear electric-generating exports;
3. transactions in which "reasonable assurance of repayment" is contingent on an external escrow account or other preferred creditor arrangements;
4. transactions in which the Bank proposes to support exports facing foreign official credit competition mixed with official development assistance resulting in repayment terms or interest rates below the prevailing norms;
5. proposals which a majority of NAC members believe to have policy implications important enough to warrant NAC review.¹⁴⁰

Thus, the formal mode of intervention is by prior review. The generality of category five lends itself to NAC prior review of general operating standards bearing on all transactional decisions. This could include interest rates, maturities and participation levels in particular programs, as well as overall programs and forms of support.¹⁴¹

While NAC operates collegially and seeks consensus, most concerns originate within the perspectives and overall responsibilities of

¹⁴⁰ 1979 NAT'L ADVISORY COUNCIL ON INT'L MONETARY & FIN. POLICIES ANN. REP. 58.

¹⁴¹ During 1979, "a number of significant developments affecting Eximbank's policies occurred and many of the consequent Eximbank policy changes were reviewed by the National Advisory Council to assure adequate coordination of U.S. international and monetary and financial policies." Included among the policy matters bearing on pricing and resource allocation that were reviewed by NAC were: (i) the selective matching of the terms and conditions of "mixed credits" established by governments in industrialized countries; (ii) offers of coverage of general purpose lines of credit to meet competition; and (iii) increased interest coverage on export credit insurance from 6 to 8%. (The Bank's basic lending rate was not changed during the fiscal year.) 1979 NAT'L ADVISORY COUNCIL ON INT'L MONETARY & FIN. POLICIES ANN. REP. 58.

particular members. Treasury and the Federal Reserve Board will focus more on the impact of the Bank's lending and borrowing practices on money markets and rates. Any NAC interest in issues of additionality will ordinarily stem from the concerns of these two agencies, although the relevance of additionality principles to the role of NAC has been questioned by the Bank on statutory grounds.¹⁴² What would seem especially pertinent to the role of NAC are the negative balance of payment and capital allocation impacts of unnecessary Bank loans extended at concessional rates, especially in substitution for available foreign financing.

The role of the Department of State is to maintain consistency between Bank practices and foreign policy objectives. To that end, the Department of State may actively solicit or discourage the Bank's support of exports to particular countries, or of particular categories of exports. This customary role was given added substance by President Carter's delegation to the Secretary of State of his authority under the Act to determine when Eximbank loan denials would be in the national interest.¹⁴³ Except as concessional terms may affect a foreign policy objective, the Department of State has no particular institutional concern in the Bank's general resource allocation standards.

In terms of the Bank's general operating standards, the least influential executive branch member of NAC would seem to be Commerce. In periods of promotional activism and program expansion, it has little more than encouragement or possible supportive data to add to the Bank's natural proclivities. In other periods, its own constituency concerns have already been countered by other controlling executive branch policies. However, one significant role largely reserved to Commerce is that relating to the issue of adverse domestic impact. In the Department of Commerce will be found the most direct institutional concern for the potential domestic impacts of any future imports generated by large capital exports (such as entire steel plants) supported by the Bank. It is this role which the Secretary of Commerce may find most congenial, both on NAC and as an *ex officio* Bank Board mem-

¹⁴² The following events were related to the author by a participant in NAC's operations during 1974. The Bank submitted a proposed loan to NAC for prior review. It involved a credit to British Air for the purchase of United States-produced commercial aircraft. Treasury's representative on NAC recommended rejection of the loan on the grounds that its terms were more generous than what was required for the completion of the particular sale. The Bank's President (William Casey) refused to accede on the grounds that Treasury had no authority to impose a standard of "additionality," contrary to the standards of the Act. In that case, the Bank prevailed.

¹⁴³ Exec. Order No. 12166, 3 C.F.R. 452-53 (1980), *reprinted in* 12 U.S.C. § 635 note, at 1332 (Supp. V 1981).

ber, under the announced policies of President Reagan.¹⁴⁴

In their discussions of Eximbank's activities, the Annual Reports of NAC are totally noncritical. If residual, unresolved policy differences exist, they are not evident. The Bank's work is presented in a manner which carries the clear imprint of NAC approval. Prepared by Treasury, the Annual Report in its substance reflects a consensus among NAC members. If any insight is to be derived from these documents it is that of the Bank and NAC as coordinated partners in the implementation of executive branch policies.

The actual significance of NAC, as such, in shaping major Bank decisions is not always apparent from its reports. In its Fiscal Year 1972 report, NAC noted the expansion of the Bank's Discount Loan Facility to include short term paper "following extensive consultations" within NAC.¹⁴⁵ In context, a reasonable inference is that NAC was instrumental at the time in passing on the basic policy as well as in implementing details. In fact, Eximbank's intent to establish the new program constituted the single most important assertion of need in the earlier 1970 and 1971 legislative hearings for off-budget status.¹⁴⁶

In any case, NAC's Annual Reports during the Nixon Administration most effectively demonstrate how the vigorous pursuit of Presidential policies can create a working partnership between NAC and the Bank. Thus, in support of Eximbank program expansion, NAC in its Fiscal Year 1971 report repeated with obvious approval the Administration's and the Bank's arguments on the need for off-budget status. With similar approbation, it described "Administration" policy in these terms: "This Administration has aggressively pushed the use of export credit as a tool for expanding our sales abroad and has been inclined to give the benefit of doubt in weighing the question whether financing is reasonably necessary."¹⁴⁷

The NAC report for Fiscal Year 1973 was a source of still greater candor in setting out with approval the Bank's program objectives under President Nixon. Thus, it explained:

The competitiveness of a product is determined by a number of factors, including speed of delivery, the quality of the good, the availability of

¹⁴⁴ Commerce also serves as a natural prod to the fullest feasible use of the small business promotion provisions of the Act. See *supra* notes 67-68 and accompanying text.

¹⁴⁵ 1972 NAT'L ADVISORY COUNCIL ON INT'L MONETARY & FIN. POLICIES ANN. REP. 26.

¹⁴⁶ The budget status issue also revealed the basic independence of the Federal Reserve Board from executive branch policy determinations, as reflected in the contrary unanimous views of cabinet department members of NAC. See *supra* note 94 and accompanying text.

¹⁴⁷ Again, these "majority" views of the NAC may be compared with Federal Reserve Board's contrary assessment of the Bank's expansionary practice. See *supra* note 94 and accompanying text.

servicing after delivery, and the price. The effective price of a good is a combination of its selling price, the financing arrangements, transportation costs, variation in exchange rates, and any discount that might be available.

* * *

Thus, favorable financing arrangements may outweigh an unfavorable selling price.¹⁴⁸

This particular NAC statement surely falls short of a total policy commitment to the subsidization of inefficient producers. But it could easily have been construed as a green light for Eximbank to maintain a policy of equalizing at least some disadvantages of "selling price" and "transportation costs" through concessional financing. For better or worse in terms of net welfare consequences, acceptance of the idea of a calculated subsidy to overcome *market*-based export impediments could hardly have been made more explicit.

Total candor in its discussions of Bank practices is not the unvarying practice of NAC. This is especially true when it undertakes to serve as the Bank's defender. NAC's annual report for Fiscal Year 1979 provides a case on point. By the close of that period the Bank's program expansion in furtherance of President Carter's announced policies had taken hold.¹⁴⁹ Following a reduction on January 5, 1977, of the Bank's basic interest rates from an 8.25-9.5% range to an 8-9% range, a further reduction to a 7.75-8.75% range was made on October 13, 1977. This remained in effect through Fiscal Years 1978 and 1979 to April 1, 1980, when the level was raised to 8.75-9.25% in the wake of sharp and continuing increases in general interest rate levels and growing criticism of the Bank's interest subsidies.¹⁵⁰

Throughout 1979, while its basic lending rates remained at 7.75-8.75%, the Bank met its medium and long term borrowing needs from FRB, as follows: 10-year maturities—\$330 million at 9.02%; \$403 million at 9.35% and \$517 million at 9.42%; 3.25 year maturity—\$1.283 billion at 9.49%.¹⁵¹

¹⁴⁸ 1973 NAT'L ADVISORY COUNCIL ON INT'L MONETARY & FIN. POLICIES ANN. REP. 35.

¹⁴⁹ Between Fiscal Years 1977 and 1979 the Bank's program authorizations had increased as follows: direct loans—\$700 million to 3.72 billion; total loans—\$1.22 to 4.47 billion; total program authority (loans, guarantees and insurance)—\$5.60 to 9.49 billion. 1979 EXPORT-IMPORT BANK ANN. REP. 14.

¹⁵⁰ Between October, 1977 and April, 1980, the following representative interest rates or yields had risen as follows: bank prime—from 7.5 to 19.77%; government 10 year notes and bonds—from 7.52 to 11.47%; corporate bonds (composite Aaa)—from 8.04 to 12.04%. FED. RES. BOARD BULL., Jan. 1978, at A. 26-A. 27; FED. RES. BOARD BULL., July 1980, at A. 26-A. 27. For further data and a discussion regarding interest rates during Fiscal Years 1969-80, see J. HILLMAN, *supra* note 18, ch. IV.

¹⁵¹ 1979 EXPORT-IMPORT BANK ANN. REP. 26. The Bank's current borrowing rates are actu-

The fact that the Bank's current loans were being made at rates fully 1% below its own current borrowing costs was explained by NAC as follows:

Throughout fiscal year 1979 Eximbank standard interest rates to foreign borrowers were fixed within a range of 7.75 and 8.75 percent per annum depending on maturity, with the higher rates charged for the longer term loans. However, because there was no international agreement at the OECD Export Credits Group discussion to raise interest rate levels, Eximbank on occasion charged less than scale (usual) rates to meet foreign official export credit competition. This was done in more than one-fifth of the loans authorized by the Bank during the period covered by this *Annual Report* of the National Advisory Council, accounting for about 40 percent of the total dollar amount of loans authorized. *In some instances, the interest rate charged was lower than the average cost of funds to the Bank.*

*Eximbank's weighted average interest rate to borrowers during fiscal year 1979 was 8.30 percent. As of September 30, 1979, Eximbank's average interest cost on all outstanding borrowings—largely from the Federal Financing Bank—was 7.99 percent.*¹⁵²

Thus, the relationship between lending rates and borrowing costs was not simply ignored. Instead, the report dissembled. The effort was to create a more positive impression of comparative rates by relating current lending rates to the "average cost of funds" or the "average cost on all outstanding borrowings."

In this effort NAC could take refuge in the statutory interest rate formula combining "average cost of money to the Bank" and competitive needs.¹⁵³ To do so, however, was to dedicate its services to the cause of Eximbank program expansion with no particular concern for factors entering into the financial consequences of its operations based on marginal costs.

The point is made simply to emphasize that NAC and the Bank stand together as instruments of executive branch policy objectives. Whatever may be the nuances and refinements which NAC introduces into the Bank's programs and decisional standards, they are likely to have only a minimal, incremental impact on the balance achieved between promotional activism and efficient resource allocation.

Nevertheless, it is said by authoritative observers that some members of Congress concerned with "activist" tendencies in the Bank are insistent that NAC maintain a critical stance. It is said that the Bank's

ally found in the notes to the Comptroller General's financial statements. See also J. HILLMAN, *supra* note 18, ch. IV.

¹⁵² 1979 NAT'L ADVISORY COUNCIL ON INT'L MONETARY & FIN. POLICIES ANN. REP. 57 (emphasis added).

¹⁵³ See *supra* notes 17-20 and accompanying text.

Chairman John Moore was eager to obtain NAC unanimity on policy matters because of its value in the Bank's Congressional relations. If this is the purpose of Congress, then on basic issues of pricing and resource allocation the most significant support on NAC will come from the concurrence of the Federal Reserve Board, which, alone, is not bound to the implementation of Presidential policies regarding the Bank's program.¹⁵⁴

In the end, of course, the greatest impact on the Bank's use of its resources will arise from the central function and resulting intrusions of OMB. Its role as executive branch allocator of limited resources among competing programs through budget and apportionment controls will inevitably cast it as the official skeptic of the Bank's program needs.¹⁵⁵ The unavoidable, critical and complex character of OMB's role requires a large measure of delegated discretion from the President to compromise among competing goals. In the case of Eximbank, as with any program, should that process yield results which depart too far from Presidential policy objectives, OMB itself may stand to be corrected. In such cases, the competition will be for the President's ear. Whoever prevails in any particular dispute, OMB, and the function it performs, remains the major continuing source of executive branch intrusion into the availability of resources for Eximbank program expansion.¹⁵⁶

¹⁵⁴ See *supra* note 94. But compare the Federal Reserve Board's concurring role in the Ansett case. See J. HILLMAN, *supra* note 18, ch. VII.

¹⁵⁵ See *supra* notes 92-93 and accompanying text.

¹⁵⁶ A "strong" Bank President, confident of his relations with his President, will on occasion air his differences with OMB to any sympathetic subcommittee of Congress who will listen. Such was the case with William Casey. Thus, he openly disputed the "Special Analysis" of his Administration's budget (prepared by OMB) which defined a subsidy from government lending programs as "the difference between the cost of borrowing under the Federal program and that cost in private markets." *1976 Appropriations Hearings*, *supra* note 78, at 329-30. In the same year he appeared before the Banking and Currency Subcommittee whose chairman professed a concern that, in deciding on budget requests, OMB operates as a "shield between an agency and the Congress," so that "what Mr. Casey might ask for is not necessarily what finally comes out in the President's budget." To which Mr. Casey replied, in something less than a defense of what is ostensibly the President's budget, that "[t]he Appropriations Committee is free to increase the authorization." *Briefing on the Export-Import Bank: Hearings Before the Subcomm. on International Trade of the House Comm. on Banking, Currency and Housing*, 94th Cong., 1st Sess. 11 (1975).