

(ORAL ARGUMENT NOT YET SCHEDULED)

No. 12-5294

**In the
United States Court of Appeals
for the District of Columbia Circuit**

AIR TRANSPORT ASSOCIATION OF AMERICA, INC.,
Plaintiff-Appellee,

DELTA AIR LINES, INC.,
Plaintiff-Appellant,

v.

EXPORT-IMPORT BANK OF THE UNITED STATES, *et al.*,
Defendants-Appellees,

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Intervenor-Appellant.

On Appeal from the U.S. District Court for the District of Columbia
No. 1:11-cv-02024-JEB (Hon. James E. Boasberg)

**BRIEF FOR THE NATIONAL ASSOCIATION OF
MANUFACTURERS AS *AMICUS CURIAE*
IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

All parties and intervenors appearing in this court and before the district court are listed in the Brief of Defendants-Appellees.

B. Rulings Under Review

References to the ruling at issue appear in the Brief of Defendants-Appellees.

C. Related Cases

The National Association of Manufacturers adopts the statement of related cases presented in the Brief for Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

The National Association of Manufacturers (“NAM”) is a non-profit trade association representing the interests of U.S. manufacturers in all industrial sectors. It has no parent corporation, and no publicly held company has a ten-percent or greater ownership interest in the NAM.

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GLOSSARY OF ABBREVIATIONS

Act	Export-Import Bank Act of 1945, as amended
ALPA	Air Line Pilots Association, International
Bank	Export-Import Bank of the United States
Bank Act	Export-Import Bank Act of 1945, as amended
Ex-Im Bank	Export-Import Bank of the United States
GAO	Government Accountability Office
GDP	Gross Domestic Product
ITIF	Information Technology & Innovation Foundation
J.A.	Joint Appendix
OECD	Organization for Economic Cooperation and Development
NAM	National Association of Manufacturers

INTEREST OF *AMICUS CURIAE*¹

The National Association of Manufacturers (“NAM”) is the preeminent association of U.S. manufacturers and the Nation’s largest industrial trade association. Its membership includes more than 12,000 manufacturing companies, and it represents the interests of small and large manufacturers in every industrial sector and in all 50 States. The NAM is the national voice of the manufacturing community and the leading advocate for policies that help U.S. manufacturers create jobs, promote economic growth, and stay competitive.

As the foremost representative of U.S. manufacturing interests nationwide, the NAM has a comprehensive understanding of the vital role played by the Export-Import Bank of the United States (“Ex-Im Bank” or the “Bank”) and brings a unique perspective to the issues raised in this appeal. Export financing assistance from Ex-Im Bank provides direct support for hundreds of thousands of jobs across the United States, including at thousands of manufacturing firms of all sizes, many of which are members of the NAM. These manufacturers compete globally with foreign producers that often receive aggressive export financing from their home countries, and Ex-Im Bank’s statutory mission is to help level the competitive field for U.S. producers and thereby sustain American jobs.

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, and its counsel contributed funds toward the preparation or submission of this brief.

In this *amicus* brief, the NAM will explain how it is essential to the functioning of Ex-Im Bank, and why it is fully consistent with the Bank's statutory charter, that the Bank applies streamlined procedures in approving applications for export financing assistance. The Bank's efficient decision-making procedures are designed to enable U.S. exporters to respond effectively and in a timely fashion to the export support available to their foreign competitors. If, contrary to the intent of Congress, the Bank is shackled with additional burdensome review requirements as urged by appellants, U.S. exporters will lose competitive parity in the global marketplace and many thousands of American manufacturing jobs will inevitably be sacrificed. For that reason, the NAM offers this brief in support of affirmance of the district court's judgment.

The NAM is authorized by its board of directors to participate as *amicus* in this case, and all parties have consented to the filing of this brief.

STATUTES AND REGULATIONS

Pertinent statutes are contained in the Brief for Defendants-Appellees.

SUMMARY OF ARGUMENT

Just as Congress intended, Ex-Im Bank supports hundreds of thousands of export-related jobs in the United States through financing assistance that helps to put U.S. producers on a par with foreign competitors. The Bank cannot perform this function effectively if it is prevented from applying an efficient, streamlined

approach in processing the great majority of financing commitments it considers, of which the loan guarantees at issue here are a typical example.

The streamlined process followed by the Bank, which is reflected in the Economic Impact Procedures applied in this case, is well within the Bank's statutory authorities under the Export-Import Bank Act of 1945, as amended (codified at 12 U.S.C. § 635 *et seq.*). The Act gives the Bank broad discretion to determine when and how to consider the potential economic effects of a transaction, particularly where such effects would be indirect or attenuated, and it puts clear priority on sustaining employment in those industries that produce the exports supported by the Bank. Moreover, in those provisions of the Act that impose restrictions on the Bank's financing decisions, Congress put special emphasis on transactions that may increase the foreign production of goods or commodities, as distinct from services like airline passenger service. In authorizing the challenged loan guarantees, the Bank acted reasonably on the basis of its own extensive experience with the economic consequences of previous airplane financing approvals.

ARGUMENT

I. REQUIRING A BURDENSOME REVIEW PROCESS FOR EXPORT FINANCING COMMITMENTS WOULD SERIOUSLY IMPEDE THE MISSION OF THE EXPORT-IMPORT BANK

Appellants contend that before Ex-Im Bank may approve particular financing assistance for the export of U.S.-manufactured goods (such as the loan guarantees for the sale of airplanes to Air India at issue in this case), the Bank must first conduct a detailed individualized economic analysis of the potential indirect effects that might result for U.S. competitors operating in downstream markets where the foreign customer may provide services using the exported goods (such as the markets for international airline passenger service identified by appellants). Imposing such a requirement would fundamentally thwart the ability of Ex-Im Bank to fulfill its statutory functions.

A. Ex-Im Bank Provides Vital Assistance for U.S. Job Creators Through Export Financing Commitments Like Those at Issue Here

Ex-Im Bank is not a regulatory agency; it is a bank, empowered by its statutory charter to offer credit assistance when and as necessary to enable U.S. producers to export their goods and services to foreign buyers. *See* 12 U.S.C. § 635(a)(1). The assistance of the Bank is intended by Congress to help level the playing field for U.S. exporters vis-à-vis foreign competitors that receive export support from their home countries: Congress has directed the Bank to provide

export assistance “at rates and on terms and other conditions which are fully competitive with” the assistance available from foreign governments for the financing of exports from the principal countries whose exporters compete with the U.S. exporters that benefit from the Bank’s assistance. *Id.* § 635(b)(1)(A). The Bank offers assistance where competitive credit terms are unavailable from private lenders.² It does so, moreover, at no cost to U.S. taxpayers, since its operations are funded entirely by the collection of fees.³

Congress looks forward to a time when it is no longer necessary to provide government support for U.S. exporters. Thus, the Bank is directed to cooperate with the export credit agencies of foreign governments to “seek to minimize competition in government-supported export financing” and “to reach international

² The Bank provides export support where there are market gaps—for example, during periods when liquidity is tight because of general economic conditions; to customers who might not be able to afford the credit at market terms; and to customers who wish to purchase goods that cost more than the available capital markets have the liquidity to support. *See* Ex-Im Bank, 2012 Annual Report 1, 4, 42 (Nov. 14, 2012) (“2012 Annual Report”), *available at* www.exim.gov/about/library/reports/annualreports/2012/files/exim_2012annual-report.pdf. Despite its focus on filling market gaps, the Bank’s default rate on credit assistance is far less than one percent. *See* Letter from Alice P. Albright, Chief Operating Officer, Ex-Im Bank, to Osvaldo L. Gratacós, Inspector General, Ex-Im Bank 4 (Nov. 30, 2012), *available at* <http://www.exim.gov/oig/upload/12Sept-SARC-Web-Post.pdf>.

³ *See* 2012 Annual Report at 48. After paying operating and program costs, Ex-Im Bank contributed \$1.6 billion to the U.S. Treasury during the past five years. *Id.* at 4. A substantial portion of the fees collected by the Bank in that period came from export transactions involving commercial airplanes.

agreements to reduce government subsidized export financing.” 12 U.S.C.

§ 635(b)(1)(A).⁴ At present, however, Congress has determined that the mission of Ex-Im Bank is more important than ever. Every few years, Congress reviews the operations and transactions of the Bank and the necessity for export credit in light of the actions of foreign governments, and in May of this year, Congress voted to reauthorize the Bank and increase its lending authority. *See* Export-Import Bank Reauthorization Act of 2012, Pub. L. No. 112-122, 126 Stat. 350 (May 30, 2012).

The ultimate goal of the Bank is to create and sustain American jobs: “The Bank’s objective in authorizing loans, guarantees, insurance, and credits shall be to contribute to maintaining or increasing employment of United States workers.” 12 U.S.C. § 635(a)(1). Export assistance is key to job growth in the United States because the domestic market for manufactured goods is not growing as fast as the productivity of our manufacturers. The real demand for manufactured goods in the United States has grown less than three percent per year, while annual manufacturing productivity increases have averaged nearly four percent, and

⁴ For example, with regard to the terms and conditions of government-supported credit assistance for the export of commercial airplanes, the United States is a party to the Aircraft Sector Understanding, an international agreement among members of the Organization for Economic Cooperation and Development.

therefore U.S. manufacturers must find faster-growing markets in foreign countries to sustain job growth at home.⁵

The Bank has had notable success in achieving the central goal of job creation, and its efficient operation is therefore critical to the continued strength and vitality of U.S. manufacturing. Through its credit assistance, the Bank supports hundreds of thousands of American jobs at small and large companies across all sectors of the U.S. economy. In fiscal year 2011, Ex-Im Bank provided assistance for more than \$40 billion in export sales from more than 3,600 U.S. companies and thereby helped to create or sustain approximately 290,000 export-related American jobs.⁶ In the fiscal year just ended, the Bank provided a record \$35.8 billion in export financing and provided assistance for nearly \$50 billion in export sales, supporting an estimated 255,000 U.S. jobs, and over the past five years the Bank has helped to finance more than \$170 billion in total U.S. exports.⁷ The transaction at issue in the present appeal, which involves the sale for export of Boeing wide-body airplanes manufactured in the United States, including Boeing

⁵ See Letter from the NAM to House Leadership on Ex-Im Bank (Dec. 7, 2011). The materials from industry cited herein are available on the NAM Web site at www.nam.org/Issues/Trade/Ex-Im-Bank.aspx?p= (under the heading “Related Resources”).

⁶ See Letter from 326 Businesses and Groups to Congressional Leaders Supporting Ex-Im (Mar. 28, 2012) (available on the NAM Web site as indicated above).

⁷ See 2012 Annual Report at 4, 6.

787 Dreamliners, exemplifies the job-creating and job-sustaining role played by Ex-Im Bank.

Ex-Im Bank financing does not just benefit large companies; it is critical for small and medium-sized businesses, as well. More than 87 percent of the Bank's export financing transactions are for small businesses.⁸ In fiscal year 2012, Ex-Im Bank provided more than \$6 billion in direct financing and insurance for 3,313 small businesses in the U.S., nearly double the amount provided in fiscal year 2008, and 17 percent of total dollar value of Ex-Im Bank authorizations.⁹ Also during the most recent fiscal year, 650 small businesses received Ex-Im Bank assistance for the first time, and the Bank approved assistance to 685 small and medium-sized U.S. businesses owned by minorities or women, a new record that represents a 17-percent increase over fiscal year 2011.¹⁰ Of course, the export financing authorizations that the Bank has approved for larger companies, such as the commitments for the sale of Boeing Dreamliners to Air India, also confer substantial benefits on small and medium-sized firms that are suppliers to the primary producer.¹¹

⁸ See Industry Coalition Letter to Congress (Feb. 14, 2012) (available on the NAM Web site as indicated above); 2012 Annual Report at 14.

⁹ 2012 Annual Report at 4, 14.

¹⁰ *Id.* at 14-15.

¹¹ See *id.* In approving export financing, the Bank may condition its financing on limiting the use of foreign suppliers. See Ex-Im Bank, Report to

As these statistics suggest, the loan guarantees that appellants are challenging in this case are indicative of the core mission and operation of the Bank. They are not at all unusual or isolated examples among the authorizations approved by Ex-Im Bank. They are similar to many transactions financed by the Bank, and the streamlined review and approval process followed here involved the same procedures applied by the Bank to the great majority of financing applications it receives. Indeed, appellants themselves point out that the Bank has applied its Economic Impact Procedures to exempt more than 90 percent of applications from a detailed economic analysis on the basis of the challenged “exportable goods” screen. *See* Appellants Br. 30. The exempted transactions did not undergo a detailed economic analysis because the Bank determined that none was likely to produce a direct adverse impact on the U.S. economy.¹²

B. Streamlined Review Procedures Are Essential to the Effective Functioning of the Bank

Ex-Im Bank’s reliance on a streamlined review process is fundamental to the Bank’s ability to respond effectively and nimbly to the export credit financing provided by foreign governments. For that reason, the Bank’s ability to apply the

Congress on Export Credit Competition 91-92 (June 2012) (“2011 Bank Competitiveness Report”), *available at* www.exim.gov/about/library/reports/competitivenessreports/upload/2011_Competitiveness_Report-1.pdf.

¹² *See* 2011 Bank Competitiveness Report at 88-89.

Economic Impact Procedures challenged by appellants is also integral to its job-creating mission.

Foreign export credit agencies around the world have become more active and aggressive in recent years in supporting the foreign competitors of U.S. manufacturers. Nations that have ramped up their official export support include Brazil, Canada, China, France, Germany, India, Italy, Japan, and the United Kingdom.¹³ The Government Accountability Office estimates that between 2006 and 2010, the dollar volume of medium- and long-term official export credits provided by China and Brazil more than doubled and Indian support nearly doubled, while Russia established its own export credit agency and laid plans to follow suit.¹⁴ As the official export support of other countries has grown dramatically, the United States has not kept pace. Measured as a percentage of GDP, U.S. official export support ranked below seven other countries in 2010, including France, Germany, and India, each of which provided more than seven times the U.S. percentage.¹⁵ By some reports, the export credit agency of Canada

¹³ *See id.* at 8, 17.

¹⁴ GAO, U.S. Export-Import Bank, Actions Needed to Promote Competitiveness and International Cooperation 38 (Feb. 2012); 2011 Bank Competitiveness Report at 117.

¹⁵ *See* Medium and Long Term Official Export Credit Volumes, 2010 – ITIF, *available at* www.nam.org/Issues/Trade/Ex-Im-Bank.aspx?p= (under the heading “Related Resources”).

has extended three times as much export financing as Ex-Im Bank; Japan more than five times; and China an estimated eleven times.¹⁶

Foreign governments have also become more generous in the credit terms they offer. Several export credit agencies have begun offering “unregulated” export financing outside the scope of any international agreement. These financing arrangements are not subject to the competitive terms and conditions contained, for example, in the export credit understandings of the Organization for Economic Cooperation and Development (“OECD”).¹⁷

The Bank has moved forcefully, where possible, to counteract these foreign developments. For example, in 2011 China offered Pakistan financing to purchase 150 locomotives from a Chinese firm on terms that were more favorable than would have been permissible under the OECD arrangements. Ex-Im Bank announced it would match China’s proposal, and this action enabled General Electric to be in a position to compete effectively for a \$477 million contract for the export to Pakistan of locomotives built in Pennsylvania.¹⁸

¹⁶ See Industry Coalition Letter to Congress (Feb. 14, 2012) (available on the NAM Web site as indicated above).

¹⁷ See 2011 Bank Competitiveness Report at 117.

¹⁸ See Sudeep Reddy, *Ex-Im Bank Backs GE Deal in Pakistan*, Wall St. J. (Jan. 12, 2011), available at <http://online.wsj.com/article/SB40001424052748704515904576076144043327686.html>.

Ex-Im Bank, however, labors under certain structural disadvantages in offering countervailing assistance. Foreign credit agencies can provide financing assistance with fewer conditions attached than Ex-Im Bank. For example, Ex-Im Bank is unique in stipulating that manufactured goods exported with financing from the Bank must be carried on U.S. flag vessels when shipped by sea, unless a waiver from the Secretary of Transportation is obtained. The Bank estimates that this requirement can double or triple shipping costs for U.S. firms and lead to weeks of delay.¹⁹ Congress has also placed a cap on Ex-Im Bank's overall lending authority, and in many cases, the competing foreign export credit agency is not subject to a cap or has a much higher lending limit. Thus, in the past year, as the Bank approached its lending cap, some foreign purchasers turned away from the Bank, and therefore away from the U.S. manufacturers it assists, because of uncertainty about whether Ex-Im Bank support would remain available.²⁰

The one most important strength the Bank currently possesses in this intensely competitive environment is its ability to move swiftly in considering and approving applications for assistance from U.S. exporters. In fiscal year 2012, the Bank processed 90 percent of all financing applications within 30 days of

¹⁹ See 2011 Bank Competitiveness Report at 97.

²⁰ See Letter from Thirty Members of Congress to Congressional Leadership (Apr. 26, 2012) (available on the NAM Web site, as indicated above); Letter from the NAM to Congressional Leadership (Feb. 9, 2012) (same).

submission and 98 percent within 100 days.²¹ Since 2008, the Bank has subjected fewer than a dozen applications per year to the detailed economic analysis demanded by appellants here.²² In fiscal year 2012 alone, the Bank approved 3,796 export financing transactions.²³

The Bank must have the flexibility to function in this manner to remain competitive with foreign export credit agencies and to fulfill its statutory mission of promoting job creation and economic growth. U.S. manufacturers cannot compete on a level field with foreign producers if their overseas customers find that applications to foreign credit agencies are processed significantly faster and with greater certainty of approval than applications to the Bank. Even under the current framework, in which the Bank processes nearly all applications within 100 days, foreign agencies can out-compete the Bank by offering easier or more certain financing support. For example, the Bank has struggled to remain competitive in medium-term programs because of the expense and time involved in meeting its application requirements.²⁴ In the context of commercial airplane sales, such as the

²¹ 2012 Annual Report at 6.

²² See 2011 Bank Competitiveness Report at 89 (listing number of applications subject to detailed economic analysis as 10 in 2008, 7 in 2009, 8 in 2010, and 2 in 2011).

²³ 2012 Annual Report at 6.

²⁴ See 2011 Bank Competitiveness Report at 23-24 (“[I]n discussions during the buyer survey for the Benchmarking Study, there was a consistent message across the countries visited that Ex-Im’s medium-term programs are no longer a

sale of Boeing airplanes at issue in the present case, foreign buyers, such as Air India, have the option of buying competing airplanes manufactured by Airbus SAS and financed with export credit support from European governments. *See* J.A. 956-57 (Declaration of Scott Scherer). Thus, the question is not whether a foreign airline like Air India will buy airplanes to compete with other airlines, but whether it will buy them from Boeing or from Airbus. The financing the Bank provides evens the playing field for American manufacturers.

Subjecting even a significant minority of transactions to detailed economic analysis would thwart the Bank's ability to remain competitive. The Bank operates with limited staff and resources, and the dramatic change in its review procedures urged by appellants would impose a disabling burden.²⁵ It is more difficult for Ex-Im Bank to be competitive with foreign export credit agencies on transactions that it subjects to detailed economic analysis, and Ex-Im Bank has found that for applicants involved in such transactions, the "process appears onerous and the

viable option, and procurement decisions are going to foreign competitors backed by more flexible [official export credit agencies]. . . .").

²⁵ For example, in 2011 alone, the Bank authorized financing assistance for 42 significant commercial airplane transactions without a detailed economic analysis, *see* 2011 Bank Competitiveness Report at 42, and under appellants' standard, each of those many transactions would have required an in-depth review proceeding, likely involving an extensive public comment process.

outcome uncertain.”²⁶ In those categories of transactions likely to require detailed economic analysis, the prospect of such an onerous administrative process can be and often is a competitive disqualifier that has a “chilling effect” on potential applicants.²⁷

For those reasons, a reversal of the district court’s judgment in the present case, and the imposition of more detailed review requirements, would seriously undermine the effectiveness of the Bank and throttle its job-promoting potential.

II. THE BANK ACTED REASONABLY AND IN ACCORDANCE WITH ITS STATUTORY CHARTER IN APPROVING THE CHALLENGED LOAN GUARANTEES

A. Congress Gave the Bank Broad Discretion Over When and How to Consider the Potential Indirect Effects of a Transaction in Downstream Markets, Particularly Markets for Services

Consistent with the mission of Ex-Im Bank and the competitive pressures it faces, the plain terms of the Bank Act confer wide discretion on the Bank in determining when and how to consider the potential secondary economic effects of transactions. Furthermore, as appropriately reflected in the Economic Impact Procedures applied by the Bank in the current case, the Act draws a sharp distinction between financing assistance that may enable the provision of services,

²⁶ Ex-Im Bank, Report to Congress on Export Credit Competition 80 (June 2011) (“2010 Bank Competitiveness Report”), *available at* www.exim.gov/about/library/reports/competitivenessreports/upload/2010_Competitiveness_Report-1.pdf.

²⁷ See 2011 Bank Competitiveness Report at 90.

such as airline passenger service, and assistance that would result in the increased foreign production of goods or commodities in direct competition with U.S. producers.

Sections 635(a) and 635(b). The broad statements in the Bank Act setting forth the policy goal of promoting U.S. jobs focus primarily on those jobs that will be directly created or sustained through the export opportunities supported by the Bank's financing assistance. Thus, section 635(a)(1) establishes the Bank's mandate to facilitate the export of American goods and services "*and in so doing to contribute to the employment of United States workers.*" 12 U.S.C. § 635(a)(1) (emphasis added). Similarly, section 635(b)(1)(A) declares that it is the intent of the Act to foster the expansion of U.S. exports, "*thereby contributing to the promotion and maintenance of high levels of employment and real income, a commitment to reinvestment and job creation, and the increased development of the productive resources of the United States.*" *Id.* § 635(b)(1)(A) (emphasis added).

The phrasing of these core provisions ("in so doing" and "thereby contributing") clearly shows that Congress's policy objective of promoting U.S. employment is concerned first and foremost with jobs directly linked to the export transaction, such as jobs in those sectors that produce the relevant goods and services supported by the Bank's financing assistance.

This reading of the Act is reinforced by the very language in section 635(b)(1)(B) on which appellants so heavily rely. Section 635(b)(1)(B) requires that in authorizing loans and guarantees, the Bank will take into account “any serious adverse effect” that its assistance will have on the competitive position of U.S. industry and U.S. employment, and in so doing “*shall give particular emphasis to the objective of strengthening the competitive position of United States exporters and thereby of expanding total United States exports.*” *Id.*

§ 635(b)(1)(B) (emphasis added). Again, the stress placed on expanding employment by strengthening the competitive position of U.S. *exporters* implies that the Act is most concerned with the creation and maintenance of jobs in those industries directly affected by the export assistance of the Bank, particularly the sectors responsible for producing the exported goods or services supported by the Bank.

These provisions permit the Bank ample discretion to follow the streamlined review and approval process reflected in the Economic Impact Procedures. The Bank has wide scope to determine that broad categories of transactions will not result in any “serious adverse effect” within the meaning of the statute—for example, because the potential implications of the transactions in secondary or downstream markets are too indirect, attenuated, or speculative in comparison to the direct and definite employment benefits generated through producing the

exported goods or services. Nothing in these provisions mandates that Ex-Im Bank undertake a detailed case-by-case economic impact analysis of potential indirect competitive effects in downstream markets, such as markets for services provided through the use of the exported goods.²⁸

In the present case, the purported effects alleged by appellants, even if they occurred, would be purely indirect and attenuated at best: They would only occur, if at all, in downstream markets for airline passenger service on routes between the United States and India that may or may not be served with the Boeing airplanes to be purchased with financing assistance from Ex-Im Bank. Such downstream effects would depend upon the independent business decisions of Air India concerning how and where to deploy the airplanes it acquires from Boeing, and they would depend further on the likelihood that Air India would choose to buy Airbus planes if Ex-Im Bank financing to buy Boeing planes was delayed or unavailable.

²⁸ Indeed, in connection with congressional reauthorization of the Bank earlier this year, appellant Air Line Pilots Association (“ALPA”) specifically urged an amendment to the Bank Act that would require such detailed case-by-case analysis. *See* Letter from Capt. Lee Moak, President, ALPA, to Senators (Mar. 12, 2012), *available at* http://www.alpa.org/portals/alpa/pressroom/pressreleases/2012/ExIm_3-12-2012_President%20Moak_Senate.pdf. But Congress rejected that proposal. Congress did add a notice-and-comment procedure for proposed transactions greater than a certain size, but it chose not to require individualized economic analysis of each transaction.

In critical respects, these alleged effects are not within Ex-Im Bank's control in approving loan guarantees. Ex-Im Bank simply cannot control the downstream use of exported products by imposing business conditions on the purchasers of those products. Any effort to do so would create an obvious competitive disadvantage for the Bank in responding to foreign export credit agencies and for U.S. exporters vis-à-vis their foreign competitors that receive foreign government export assistance without such conditions (such as Airbus in this case, *see* J.A. 956-57). Any attempt to impose conditions like these would therefore violate the clear requirements of the Bank Act, which mandates that Ex-Im Bank pursue competitive parity with foreign export financing.

Sections 635(e)(1) and 635a-2. The two other provisions of the Act specifically invoked by appellants, sections 635(e)(1) and 635a-2, are fully consistent with this conclusion. Each of these provisions makes clear that in important respects Congress intended to distinguish between effects in markets for the production of goods and commodities and effects in the provision of services.

Section 635(e)(1) provides that the Bank may not approve financing assistance “for establishing or expanding production of any *commodity* for export by any country other than the United States,” if the Bank determines that the “commodity” will be in surplus on world markets or the resulting production capacity will compete with U.S. producers of the same or similar “commodity,”

and if the Bank determines that the extension of financing assistance will cause substantial injury to the U.S. producers of the same, similar, or competing “commodity.” 12 U.S.C. § 635(e)(1) (emphasis added).

This provision may be triggered where the Bank provides financing that will support the foreign production for export of a commodity that competes with U.S. producers. Such a situation could arise, for example, if the Bank were to approve loan guarantees for the sale of capital equipment, such as textile-manufacturing or steel-fabricating equipment, that the foreign buyer will use to produce a finished commodity (such as clothing or steel products) for sale in competition with U.S. producers of the same commodity. By its terms, section 635(e)(1) does not impose heightened restrictions on transactions, such as the present sale of airplanes to Air India, that will result only in the provision of services.

Appellants advance a strained argument that Air India’s supposed offering of additional airline passenger service on routes between India and the United States using Boeing airplanes would constitute the “export” of a “commodity” from a foreign country that will cause substantial injury to the ability of U.S. airlines to offer competing service on those routes. But the provision of airline passenger *service* by Air India clearly is not a “*commodity*.” The plain meaning of “commodity” is a good or an article of commerce, as distinct from a service such as airline passenger service. *See Random House Dictionary* 412 (2d ed. 1987)

(defining “commodity” as “an article of trade or commerce, especially a product *as distinguished from a service*”) (emphasis added); Webster’s Third New International Dictionary 458 (1986) (“commodity” means “an article of commerce” or “a product of agriculture, mining, or sometimes manufacture *as distinguished from services*”) (emphasis added). The best evidence that the term “commodity” as used in the Bank Act is equivalent to “goods” and does not include “services” is found in section 635(a)(1) of the Act itself:

“The objects and purposes of the Bank shall be to aid in financing and to facilitate exports of goods and services, imports, and the exchange of *commodities and services* between the United States or any of its territories or insular possessions and any foreign country or the agencies or nationals of any such country, and in so doing to contribute to the employment of United States workers.” 12 U.S.C. § 635(a)(1) (emphasis added).

This provision leaves no doubt that Congress intended to distinguish

“commodities” from “services” in the Bank Act.²⁹

Similarly, section 635a-2 does not have the force appellants urge because it simply requires the Bank to implement regulations and procedures, including comment procedures, “as may be appropriate” to consider whether proposed

²⁹ Significantly, for purposes of tracking international trade in goods and services, the U.S. Government officially categorizes international passenger fares paid to foreign carriers as a “service,” not as “goods.” See U.S. Census Bureau, Bureau of Economic Analysis, Press Release, *U.S. International Trade in Goods and Services A-4* (Oct. 2012), available at www.census.gov/foreign-trade/Press-Release/current_press_release/ft900.pdf.

assistance will adversely affect industries or employment in the United States “either by reducing demand for goods produced in the United States or by increasing imports to the United States.” 12 U.S.C. § 635a-2. Again, this provision, like section 635(e)(1), is focused on circumstances where the financing assistance provided by Ex-Im Bank will result in the additional production of “goods” for export from a foreign country that may harm competing producers of the same or similar goods in the United States. Section 635a-2’s reference to “increasing imports to the United States” is also best read to mean the import of “goods,” not services, as suggested by appellants. The two phrases used in the same sentence of section 635a-2 (“reducing demand for goods produced in the United States” and “increasing imports to the United States”) logically work together to refer to the same type of harm (and it is certainly permissible for the Bank to interpret them in that way). It would make little sense for Congress in the portion of that sentence dealing with exports produced in the U.S. to limit its concern to the “demand for goods,” but then in the next part of the same sentence to expand its concern to include the import of services to the U.S. Rather, “words . . . are known by their companions,” *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000), and the unspecified term “imports” should be read as qualified by the specific focus on “goods.”

In any event, the whole provision is expressly conditioned on the Bank's exercise of broad discretion to craft such procedures as it determines "may be appropriate." The Economic Impact Procedures applied in this case, including the determination to conduct a detailed economic analysis only where the export financing will result in the increased foreign production of an "exportable good,"³⁰ reflected the Bank's appropriate exercise of that judgment. *See Lopez v. Davis*, 531 U.S. 230, 243-44 (2001) (agencies may rely on general categorizations to supplant case-by-case determinations). The Economic Impact Procedures, in other words, constitute the means by which the Bank identifies and focuses its limited analytical resources on those transactions most likely to have a direct adverse economic impact on the U.S. economy, and in that way, they constitute a reasonable application of the Bank's mandate under the Act. *See Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 612 (1991).

³⁰ *See* J.A. 1183 (Ex-Im Bank, Economic Impact Procedures 1 (April 2007)) ("The first stage of the economic impact analysis is to determine if the exports involved in a transaction will result in the [foreign] production of an exportable good. Therefore, only exports of capital goods and services (e.g., manufacturing equipment, licensing agreements) that will result in the foreign production of an exportable good are subject to further economic impact analysis in Stage II of these procedures.").

B. The Bank Was Entitled to Rely on Its Extensive Prior Experience with Similar Airplane Loan Guarantees in Approving the Air India Commitments

Based on substantial prior experience with the authorization of similar export financing arrangements for the sale of commercial airplanes, Ex-Im Bank had determined well in advance of approving the challenged loan guarantees for Air India that such guarantees would not produce the direct and significant adverse effects that mandate a detailed economic analysis under the Bank Act.

As Ex-Im Bank explained to the district court below, before approving the financing commitments at issue here, the Bank on multiple occasions had already reviewed the competitive effects of airplane financing transactions on U.S. airlines, including the precise kinds of effects alleged by appellants in this case. *See* J.A. 1111-13. The Bank examined these claims in depth and previously concluded that they were not substantiated. *See id.*

It was reasonable and fully consistent with the Act for the Bank to rely on these previous studies in deciding to approve the Air India commitments through its streamlined review process, rather than subjecting the application to a further in-depth economic review and public comment proceeding. *See Heckler v. Campbell*, 461 U.S. 458, 467-68 (1983). The Act does not mandate such a course for this or any other particular transaction, with the exception of those few categories of transactions determined by the Bank to result in significant direct

adverse effects for U.S. producers, as laid out in the specific provisions discussed above. *See* S. Rep. No. 99-274 at 8 (1986) (“[T]he Committee recognized the need for [Ex-Im Bank] to respond to exporters’ requests . . . in a timely and confidential fashion and intends that the Bank implement its adverse economic impact analysis procedures in a practical and workable fashion. The [Act therefore] does not require the Bank to conduct further analysis if it views its existing body of knowledge as sufficient.”). Any other conclusion would fundamentally undermine the Bank’s ability to perform its functions and to fulfill its statutory objectives as Congress intended.

CONCLUSION

For the foregoing reasons, *amicus curiae* the National Association of Manufacturers urges the Court to affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), I hereby certify that the foregoing brief complies with the applicable type-volume limitations. This brief was prepared in proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font. The brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1), contains 5,736 words. This certification is made in reliance on the word-count function of the word processing system used to prepare the brief, Microsoft Word 2007.

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January 2, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this, the 2nd of January, 2013, I caused the foregoing Brief for the National Association of Manufacturers as *Amicus Curiae* in Support of Appellees and Affirmance to be filed with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system. I further certify that counsel listed below are registered users of the CM/ECF system and will be served by the system, except for counsel marked with an asterisk, who will receive service by mail.

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