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The Export-Import Bank of the United States and South Africa: The Effects of the Evans Amendment

Anthony N. Vance

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THE EXPORT-IMPORT BANK OF THE UNITED STATES AND SOUTH AFRICA: THE EFFECTS OF THE EVANS AMENDMENT

*Anthony N. Vance** †

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† The opinions expressed in this Article are solely those of the author and do not necessarily reflect those of the United States Agency for International Development or any other agency or department of the United States Government.

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I. INTRODUCTION

In the fall of 1978, the United States Congress expressed its growing concern over the Republic of South Africa's policy of apartheid and the escalating racial violence in South Africa over that policy¹ by amending the Export-Import Bank Act of 1945² to restrict financial support given by the Export-Import Bank of the United States ("Bank" or "Eximbank") to purchasers of United States exports in South Africa.³ Since the signing of the Evans Amendment, the Bank has not been involved in any transactions in South Africa.⁴

Despite the controversial nature of the South African apartheid policy⁵ and the politically divisive efforts of the United States Congress to fashion an appropriate national response, little effort has been directed toward analyzing the effects of the Evans Amendment. After reviewing the political background and legislative history of the Amendment,⁶ this Article will summarize the effects of the Amendment on Eximbank activity in South Africa, examine the reasons for these effects, analyze the degree to which American exporters and South African purchasers have borne the cost of the Amendment, and draw conclusions regarding the efficacy of the Evans Amendment in its stated objectives.

1. For details of the events of 1976 and 1977, see *infra* text accompanying notes 51-62.

2. 12 U.S.C. §§ 635-635n (1982) (commonly referred to as the Evans Amendment).

3. For a discussion of the content of the Evans Amendment, see *infra* text accompanying notes 144-51.

4. See *infra* notes 157-58 and accompanying text.

5. Apartheid is a policy of segregation and political and economic discrimination against non-Europeans in South Africa.

6. The background analysis focuses almost exclusively on the legislative progress of the Evans Amendment through the United States House of Representatives, principally because the final version of the Amendment was substantially similar to the amendment as passed in the House. See H.R. 6415, 95th Cong., 1st Sess., 123 CONG. REC. 13,235-36 (1977).

II. THE EXIMBANK AND SOUTH AFRICA

A. Functions of the Eximbank

The Export-Import Bank of the United States was created in 1934,⁷ and was established as an independent agency of the United States Government in 1945.⁸ The Eximbank provides assistance to United States exporters through a variety of loan, guarantee, and insurance programs.⁹ The theoretical basis for the Bank's existence was the recognition that the private sector is often unwilling to finance sales to purchasers abroad, even though similar sales are financed to domestic purchasers. The private sector's unwillingness to finance foreign purchasers stems from several factors, including a plethora of political risks in nations around the world and the potential difficulty in obtaining repayment from foreign purchasers. The role of the Eximbank, particularly with regard to its guarantee and insurance programs, is to assume these risks.

The assumption of risk by the Bank enables the private sector to extend credit at competitive rates, whereas, without the Bank's assistance, the cost of credit extended by the private sector would be prohibitively high. Thus, when a foreign purchaser receives a guarantee from the Eximbank for the purchase of goods from a United States exporter, a United States commercial bank is able to extend credit to the foreign buyer without the risk of default. If the foreign purchaser defaults on its obligations, the Eximbank assumes the repayment obligations to the commercial bank as

7. Exec. Order No. 6581, Feb. 2, 1934.

8. Act of July 31, 1945, Pub. L. No. 79-173, 59 Stat. 526 (codified as amended at 12 U.S.C. § 65).

9. During the ten year period from 1968 to 1977, the Eximbank assisted in the sale of approximately 11.7% of all United States exports. Because the Bank ostensibly offers its services only when the private sector is unwilling to independently finance export transactions, many export transactions would not have been realized without the Eximbank's assistance. Figures for the transactions supported by the Eximbank were taken from the EXPORT-IMPORT BANK OF THE UNITED STATES, 1980 ANNUAL REPORT 10-11, 1976 ANNUAL REPORT 16-17, 1971 ANNUAL REPORT 28 [Annual Reports hereinafter cited as EXIMBANK [year] ANNUAL REPORT]. Figures for total U.S. exports were taken from the 1974-80 DIRECTION OF TRADE STATISTICS Y.B. 380 (1981) [hereinafter cited as 1974-80 TRADE STAT. Y.B.]; 11 DIRECTION OF TRADE ANN. 1969-75 230 (1976) [hereinafter cited as TRADE ANN.]; DIRECTION OF TRADE ANN. 1966-70 106 (1971) [hereinafter cited as TRADE ANN. 1966-70] all of which are publications of the International Monetary Fund.

well as the responsibility to collect the indebtedness from the foreign purchaser. United States banks, therefore, can justify charging a lower interest rate to foreign buyers than what would be required without the guarantee. An Eximbank guarantee costs the foreign purchaser an average of one-quarter of one percent of the amount guaranteed.¹⁰ If the actual savings in interest expense on the loan are greater than one-quarter of one percent, the Eximbank guarantee will enable the purchaser to incur lower total financing costs. In effect, an Eximbank guarantee often works as a subsidy to the foreign purchaser. The United States exporter also benefits from the grant of an Eximbank guarantee by receiving payment directly from a commercial bank and avoiding the political and commercial risks inherent in international sales transactions.

Since its inception, the Bank has supported over \$100 billion in export sales, has returned over \$1 billion in dividends to the United States Treasury,¹¹ and has required no appropriations from the United States Congress. Although it was initially authorized to exchange all of its capital stock in return for \$1 billion from the United States Treasury,¹² the Eximbank has annually drawn approximately fifty percent of its funds from Federal Financing Bank loans, twenty-nine percent from Treasury loans, and nineteen percent from the repayment of various outstanding loans.¹³ The Bank's ability to obtain funds at favorable interest rates, typically available only to government agencies, places it at a cost advantage relative to private commercial institutions because the Bank is able to offer loans, loan guarantees, and insurance policies at rates lower than those available in the private sector. In fact, the reduced interest rates, fees, and premiums are often low enough to facilitate export transactions that otherwise would not have taken place. Another role of the Eximbank that has become more important in recent years has been the Bank's maintenance of the price competitiveness of United States ex-

10. This estimate was arrived at by dividing the Eximbank's revenues from insurance premiums and guarantee fees in fiscal year 1980 (\$30 million) by its total guarantee and insurance commitments as of September 30, 1980 (\$11,749 million) EXIMBANK 1980 ANNUAL REPORT, *supra* note 9, at 14, 16.

11. EXPORT-IMPORT BANK OF THE UNITED STATES, FOR YOUR INFORMATION FROM THE OFFICE OF PUBLIC AFFAIRS (Oct. 1981) (circular available from Eximbank).

12. See J. HILLMAN, THE EXPORT-IMPORT BANK AT WORK 15 (1982).

13. EXIMBANK 1980 ANNUAL REPORT, *supra* note 9, at 15.

ports in the face of severe competition from the generous financing policies of governmental agencies in Japan, the United Kingdom, France, and other major trading nations.¹⁴

B. Apartheid and South African Trade

It would be difficult for an article of this scope to fully describe the historical, political, social, and economic aspects of the international debate and discord regarding South Africa. The center of the controversy, however, is clearly apartheid; the South African Government's set of discriminatory racial policies that are designed to ensure separation of the races. South African law broadly compels racial discrimination and strict racial segregation,¹⁵ while severely restricting political dissent.¹⁶

The cornerstone of the Government's policy of apartheid is the creation of ten separate and "independent" homelands for South Africa's blacks. Thirteen percent of the nation's land has been

14. Cf. HILLMAN, *supra* note 12, at 10-11 (indicating Congressional concern with European sellers' influx into South African markets as a result of government subsidies).

15. South African law severely limits the political rights of nonwhites; for example, by completely disenfranchising blacks and by enfranchising coloreds only to a limited extent. A compulsory system of racial registration requires nonwhites to carry and produce identity documents on demand by law enforcement officers. Moreover, blacks cannot be members of trade unions, and strict segregation and discrimination in all forms of public accommodations and employment are required by law. *See generally infra* appendix 1. The Government has yet to establish with certainty the position of the 740,000 Asians and 2.4 million coloreds in South Africa's society, although coloreds currently are treated separately from each other as well as from blacks and whites. D. MYERS III, K. PROPP, D. HAUCK, & D. LIFF, *U.S. BUSINESS IN SOUTH AFRICA 2* (1980), [hereinafter cited as MYERS].

16. South African law bans black political organizations and grants police the power to disperse public gatherings of two or more. Criminal and civil penalties are effectively employed to enforce censorship of media reports concerning prison brutality and mistreatment, and of any opposition to Government policies. Law enforcement officers also have broad powers to indefinitely detain those suspected of "terrorism" (defined very broadly) without trial, and to gather information by surveillance, mail interception, and telephone wiretapping.

Criminal procedural law in South Africa has also been reformed to lessen restrictions on law enforcement officers. For example, prosecutors are no longer required to establish an evidentiary basis for a guilty plea, and when a confession is determined to be inadmissible, any facts found as a consequence of that confession are still admissible. *See generally infra* appendix 1.

allocated for the independent homelands of the nation's 18.6 million blacks who comprise more than seventy percent of the nation's total population.¹⁷ The remaining land has been reserved for the 4.3 million whites who make up only seventeen percent of the population.¹⁸ Moreover, the independent homelands account for less than five percent of South Africa's agricultural production and contain few of the nation's mineral resources.¹⁹ While South Africa's blacks are granted the rights of citizens in the independent homelands, they are denied any political rights in the areas designated for the whites.²⁰ The laws and customs of those areas designated for whites severely restrict not only where blacks can live and where blacks can move, but how blacks are educated, and what occupations blacks may pursue.²¹ Since roughly two-thirds of the black population lives in areas designated for whites, this denial of equal rights has had a severe impact on the black citizens of South Africa.²²

As a result of the Government's apartheid policies, the per capita income for whites in South Africa has been roughly seventeen times the per capita income for blacks,²³ and the Government spends twenty to twenty-five times the amount per capita on the education of whites as it does on the education of blacks.²⁴ The severe restrictions on the political and social activity of blacks and the vigorous enforcement of those restrictions by the authorities have also resulted in South Africa having one of the world's highest per capita prison populations: in 1970 and 1971, 2.2 percent of South Africa's population was imprisoned, roughly thirty times the incarceration rate of the United Kingdom.²⁵

During the ten years prior to 1978, United States exports accounted for approximately seventeen percent of South African imports,²⁶ a figure surpassed only by exports from the United

17. MYERS, *supra* note 15, at 1.

18. *Id.*

19. *Id.*

20. *Id.* at 1-2.

21. *Id.* at 3. *See supra* note 15.

22. MYERS, *supra* note 15, at 3.

23. J. FRIEDMAN, BASIC FACTS ON THE REPUBLIC OF SOUTH AFRICA AND THE POLICY OF APARTHEID 19-20 (1978).

24. *Id.* at 35.

25. *Id.* at 48.

26. *See* 1974-80 TRADE STAT. Y.B. *supra* note 9, at 339, 380; TRADE ANN. 1969-75, *supra* note 9, at 207, 230; TRADE ANN. 1966-70, *supra* note 9, at 106,

Kingdom and West Germany.²⁷ The fourth, fifth, and sixth largest exporters to South Africa—Japan, France, and Italy—cumulatively accounted for approximately twenty-one percent of South African imports.²⁸ With the exception of the United Kingdom, however, the importance to the exporting country of its exports to South Africa has been relatively small.²⁹ The exports of the United States, West Germany, Japan, France, and Italy to South Africa during this period never exceeded 1.6 percent of each country's respective total exports.³⁰

Thus, exports to South Africa have not been nearly as significant to South Africa's major trading partners, including the United States, as they have been to South Africa. This imbalance suggests that the world's major trading nations could exercise considerable leverage to force South Africa to achieve social reform, without subjecting themselves to the risk of serious economic loss. The perceived imbalance, however, omits one factor that could mitigate the possibility of exercising significant leverage against South Africa: the major trading nations, including the United States, rely heavily upon South Africa as a source for certain strategic minerals.³¹

During the ten years prior to 1978, the Eximbank assisted in the sale of more than \$903 million in exports to South Africa, representing approximately 10.8 percent of all United States ex-

173.

27. United Kingdom exports accounted for 19.8% of South African imports; West German exports accounted for 17.3%. See 1974-80 TRADE STAT. Y.B., *supra* note 9, at 168, 377; TRADE ANN. 1969-75, *supra* note 9, at 117, 228; TRADE ANN. 1966-70, *supra* note 9, at 109, 124.

28. Japanese exports accounted for 11.2% of South African imports; French exports 5.7%; and Italian exports 4.4%. See 1974-80 TRADE ANN. 1969-75, *supra* note 9, at 113, 144, 148, TRADE ANN. 1966-70, *supra* note 9, at 121, 127, 145.

29. British exports to South Africa in 1971 represented 4.3% of that country's total exports. TRADE ANN. 1969-75, *supra* note 9, at 228.

30. United States exports to South Africa peaked at 1.4% of total exports in 1971. TRADE ANN. 1969-75, *supra* note 9, at 230. West German exports to South Africa reached 1.6% of total West German exports in 1974. 1974-80 TRADE STAT. Y.B., *supra* note 9, at 168. Japanese exports to South Africa reached 1.7% of total Japanese exports in 1974. 1974-80 *Id.* at 226. French exports to South Africa reached 1.0% of total French exports in 1970. TRADE ANN. 1969-75, *supra* note 9, at 113. Italian exports to South Africa reached 1.3% of total Italian exports in 1974. 1974-80 TRADE STAT. Y.B., *supra* note 9, at 218.

31. For comments on economic leverage and South African production of strategic minerals, see *Hearing, infra* note 36, at 127-28 & Table VII (statement of Andrew G. Racz).

ports to South Africa during that period.³² This percentage was comparable to the Bank's world-wide level of assistance as a percentage of total United States exports during the same period.³³ Actual guarantee and insurance authorizations by the Bank (no direct loans were made during the period) totaled more than \$570 million, approximately 6.8 percent of the full contract value of United States exports.³⁴ Since it is the policy of the Bank to act as a co-guarantor in its world-wide activity, the Bank's authorizations to South Africa have constituted, on the average, sixty-three percent of the full contract value of the exports supported.³⁵

C. Eximbank Policies and South Africa

The Evans Amendment was not the first attempt by the United States to use the Eximbank to express opposition to South Africa's apartheid policies. In 1964 the Johnson Administration prohibited the Eximbank from making direct loans available for export trade with South Africa,³⁶ and the direct loan prohibition has remained in effect. The Johnson Administration in 1964 also restricted the Eximbank's insurance and guarantee terms to periods of not more than five years,³⁷ a restriction that effectively ex-

32. Figures are based on data sent to the author from the Export-Import Bank of the United States in February 1982, pursuant to a request made under the Freedom of Information Act [hereinafter cited as Eximbank Data]. The Eximbank Data contains a record of the seller, the purchaser, the date, the transaction amount, the authorization amount, and a description of the product sold for each transaction that the Eximbank has supported with South African purchasers. (For 27 transactions occurring before 1971 and totalling \$26,102,000 the name of the United States exporter is not listed).

33. During this period the Bank assisted 11.7% of total United States exports. See *supra* note 9.

34. See Eximbank Data, *supra* note 32.

35. This Article will focus on Eximbank authorization values rather than full contract values. A rough estimate of full contract value can generally be obtained by multiplying the authorization amount by 1.6. *Id.*

36. *Export-Import Bank and Trade with South Africa: Hearing 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. 1 (1978) [hereinafter cited as *Hearing*]. Prior to 1964, however, the Eximbank had made only one loan for exports to South Africa. In 1952 the Bank loaned \$19.6 million to the Electricity Supply Company of South Africa, a parastatal organization, for the purchase of a power facility. The only other authorization to South Africa of any kind prior to 1964 was for insurance coverage in the amount of \$36,300 in 1963. See Eximbank Data, *supra* note 32.

37. See *Hearing*, *supra* note 36, at 1.

cluded Eximbank assistance for large South African projects with long repayment terms. In 1971 the Nixon Administration extended the terms of the guarantee and insurance programs to ten years and opened the Bank's discount loan guarantee program to South African trade.³⁸ Although the prohibition on direct loans remained intact, the effect of the Nixon Administration's actions was dramatic: total Eximbank authorizations in South Africa jumped from \$7.36 million in 1970, to \$78.6 million in 1971, to \$121.9 million in 1972, and to a record high of \$142.1 million in 1975.³⁹ In 1970 Eximbank authorizations represented 1.3 percent of all United States exports to South Africa; in 1971 they represented 12.6 percent; in 1972 they represented 20.2 percent; and in 1975 they represented 10.9 percent.⁴⁰ Prior to 1970, Eximbank authorizations represented more than one percent of United States exports to South Africa in only two instances.

38. *Id.* at 1-2.

39. See Eximbank Data, *supra* note 32.

40. See *supra* notes 26 and 39 and accompanying text.

TABLE 1⁴¹EXIMBANK AUTHORIZATIONS TO PURCHASERS IN SOUTH AFRICA

| <u>Year</u> | <u>Number of Transactions</u> | <u>Total Authorizations</u> | <u>Authorizations as a % of U.S. Exports</u> |
|-------------------|-------------------------------|-----------------------------|--|
| 1978 | 6 | \$ 15,106,000 | 1.39 |
| 1977 | 41 | 23,268,746 | 2.18 |
| 1976 | 56 | 35,967,941 | 2.66 |
| 1975 | 54 | 142,127,452 | 10.90 |
| 1974 | 36 | 78,593,700 | 6.38 |
| 1973 | 62 | 61,789,024 | 8.28 |
| 1972 | 74 | 121,879,350 | 20.20 |
| 1971 | 28 | 78,625,486 | 12.60 |
| 1970 | 13 | 7,362,060 | 1.30 |
| 1969 | 16 | 4,240,520 | 0.84 |
| 1968 | 7 | 1,438,300 | 0.32 |
| 1967 | 3 | 11,758,400 | 2.75 |
| 1966 | 9 | 3,883,112 | 0.97 |
| 1965 | 2 | 162,700 | — |
| 1964 | 4 | 497,194 | — |
| 1963 ^a | 1 | 36,300 | — |
| 1962 ^b | 1 | 19,600,000 | — |
| 1952-78 | 413 | \$606,336,285 | |

^a no transactions between 1952 and 1963

^b no transactions before 1952

In 1977 the Eximbank, on its own initiative, adopted a policy of limiting its new authorizations in South Africa to terms of no more than three and one-half years.⁴² The House of Representatives authorized the Bank to adopt this new policy in 1977 by amending the Export-Import Bank Act of 1945.⁴³ The amendment provided that before authorizing any loan or guarantee, the Board of Directors of the Eximbank shall "take into account, in consultation with the Secretary of State, the observance of and respect for human rights in the country to receive the exports supported by a loan or financial guarantee and the effect such exports may have on human rights in such country."⁴⁴ Because the Bank was merely required to consider human rights concerns along with the effect of the export on United States employment, on the competitiveness of United States industry, and on the

41. See Eximbank Data, *supra* note 32.

42. See Hearing, *supra* note 36, at 2.

43. See Act of Oct. 26, 1977, Pub. L. No. 95-143, 91 Stat. 1210.

44. *Id.*

availability of materials in short supply,⁴⁵ it retained considerable flexibility in its authorization decisions and some congressmen doubted whether the amendment would have any effect.⁴⁶ Nevertheless, during the one year that the amendment was in effect,⁴⁷ it was used to restrict Eximbank activity in four countries, including South Africa.⁴⁸ In addition to its concern with the human rights policy of the South African Government, it appears that the Bank determined the internal unrest in South Africa⁴⁹ precluded adequate assurance of repayment on any financing with a term of more than three and one-half years.⁵⁰

Indeed, the years 1976 and 1977 were among the most turbulent years in the history of South Africa during this century. The same events that caused the Eximbank to reassess the political risks in South Africa spurred some members of the United States Congress to search for ways in which the United States Government could more effectively express its condemnation of the racial policies of the South African Government.

III. THE EVANS AMENDMENT

A. Events in South Africa

Prior to 1976, the 1960 Sharpeville Massacre was the worst single incident of racial violence under the South African National Party Government which was installed in 1948. In March of that year 67 blacks were killed and 187 were wounded in the black township of Sharpeville when police opened fire on several hundred blacks who had been involved in a nonviolent demonstration against "pass laws."⁵¹ In June of 1976 racial violence in the black township of Soweto left 176 dead (including only two whites), 1128 injured, and 894 arrested or detained.⁵² The rioting appar-

45. See 123 CONG. REC. 13,238 (1977) (statement of Rep. Stanton).

46. See *e.g.*, *id.* at 13,239 (statement of Rep. Badillo).

47. The amendment was effective from October 1977 until November 1978 when it was deleted from the Act. See *infra* note 144 and accompanying text.

48. The other three countries were Uganda, Chile, and Uruguay. See 124 CONG. REC. 16,060 (1978) (statement of Rep. Pease).

49. See *infra* text accompanying notes 51-62.

50. See *Hearing, supra* note 36, at 2.

51. *South Africa: The Telltale Wounds*, NEWSWEEK, May 16, 1960, at 52. A "pass law" is a South African law requiring nonwhites to carry race classification documents at all times. There is no similar requirement for whites.

52. *South Africa: The Fire This Time*, NEWSWEEK, July 4, 1976, at 89.

ently was a spontaneous outburst against racial injustice in South Africa triggered by the imposition of a requirement that black high school students take some of their courses in Afrikaans, the language of white South Africans that symbolizes racial oppression to blacks in that country.⁵³ Sporadic violence continued throughout South Africa during 1976 with the death toll reaching approximately 600 for the two months of rioting.⁵⁴

Unrest continued into 1977 with the most notable events occurring in June on the first anniversary of the Soweto riots. On that day, rioting in the black townships of Kabah and Kwanobuhle in Cape Province resulted in the death of nine people, seven by police gunfire.⁵⁵ In response, the Government of South Africa sought to stem a growing sense of concern among white South Africans and to intensify its pressure against leaders of the black community. To accomplish these goals, the Government arrested numerous black leaders, including Steven Biko, leader of the Black Consciousness Movement and one of the foremost advocates of nonviolent change in South Africa.⁵⁶ Biko was arrested on September 6, 1977, and died in detention six days later. He was the forty-sixth apartheid opponent to die mysteriously in detention over a fifteen-year period.⁵⁷ The Government initially reported that Biko had starved himself to death in a hunger strike, but an inquest revealed that portions of his skull had been crushed by four blows to the head.⁵⁸ News of the suspicious circumstances surrounding Biko's death spread through the international news media,⁵⁹ but it was not until the morning of Biko's funeral⁶⁰ that white South Africans learned for the first time through the Johannesburg *Sunday Express* that Biko had died from brain damage and not from a hunger strike.⁶¹

Sharp media criticism of the Government's attempted cover-up continued until October 19, 1977, when the Government cracked down on its critics by shutting down two black newspapers, ban-

53. *Id.*

54. *South Africa: Time for Terror?* NEWSWEEK, June 27, 1977, at 40.

55. *Id.*

56. *See* D. WOODS, BIKO, 36 (1978).

57. *Id.* at 6-7.

58. *Id.* at 261.

59. *See, e.g.,* *A Tragic Turn to Terrorism*, NEWSWEEK, Oct. 10, 1977, at 50.

60. Approximately 15,000 South African blacks, 30 whites, plus diplomats from the United States and other nations attended Biko's funeral. *Id.*

61. *Id.*

ning eighteen civil rights organizations, and arresting scores of black and white opponents of apartheid. Those arrested included Percy Qoboza, black editor of *The World*, the largest black newspaper in the country; Donald Woods, the white editor of *The East London Daily Dispatch*; five prominent black and white churchmen; and dozens of black community leaders.⁶²

B. Reaction of the United States Congress

On October 25, 1977, Representative Andrew Maguire of New Jersey introduced H.R. 9746, an amendment to Section 2(b) of the Export-Import Bank Act of 1945. The proposed amendment provided that the Bank would be prohibited from making any loan or participating in any extension of credit to the Republic of South Africa.⁶³ The bill was modified considerably before it eventually passed both houses of Congress as the Evans Amendment. Although Representative Maguire set the legislative process in motion, an examination of the factors that led him to introduce H.R. 9746 reveals the policy considerations behind the Evans Amendment.

The most important factor motivating Representative Maguire to introduce H.R. 9746 was the death of Steven Biko.⁶⁴ Maguire had visited South Africa as a student in 1962 and was exposed to a wide spectrum of views on the Government's racial policies by talking with a large number of South Africans while there.⁶⁵ While at the United Nations in the late 1960s, Maguire worked on ways of limiting aircraft sales to South Africa because of their potential internal military applications.⁶⁶

After hearing of Biko's death, Representative Maguire assembled approximately fifteen congressmen to call on the South African ambassador to the United States in Washington and urge the South African Government to allow a full inquiry by international human rights agencies into Biko's death.⁶⁷ This group of congressmen organized itself as the Ad Hoc Monitoring Group on

62. *The Big Crackdown*, NEWSWEEK, Oct. 31, 1977, at 57.

63. H.R. 9746, 95th Cong., 1st Sess., 123 CONG. REC. 35,079 (1977).

64. Interview with former Congressman Andrew Maguire of New Jersey (Mar. 12, 1982) [hereinafter cited as Maguire interview].

65. *Id.*

66. *Id.*

67. *Id.*

South Africa.⁶⁸

In addition to making a personal appeal to the South African ambassador to the United States, Maguire favored some kind of legislative initiative⁶⁹ and supported the Collins Resolution's⁷⁰ strong denunciation of human rights violations in South Africa. The Collins Resolution urged "the President to take *effective measures* against the Republic of South Africa in order to register the deep concern of the American people about the continued violation of human rights in that country."⁷¹ On October 31, 1977, the resolution passed the House by an overwhelming majority vote of 347 to 54.⁷² Although it urged "effective measures" by the President, the Collins Resolution neither contained any specific recommendations for executive action nor promised any further congressional action.

Representative Maguire sought to prompt further congressional action with the introduction of H.R. 9746. During the floor debate in the House on the Collins Resolution, he mentioned that H.R.

68. *Id.*

69. *Id.*

70. H.R. Con. Res. 388, 95th Cong., 1st Sess., 123 CONG. REC. 35,965 (1977).

71. The full text of the resolution provides:

Whereas the circumstances surrounding the death of Steve Biko on September 12, 1977, while he was being detained by the Government of the Republic of South Africa, have aroused deep concern [sic] among Americans and within the world community; and

Whereas the Government of the Republic of South Africa on October 19, 1977, took a series of repressive measures against black and white opponents of its apartheid policy, including the closing of newspapers, the outlawing of peaceful religious and social groups, and the detention and "banning" of South African citizens; and

Whereas these repressive measures represent a serious violation of the rights of the persons and organizations affected and will further isolate the Government of the Republic of South Africa as a member of the international community; and

Whereas the United States holds such actions to be unacceptable: Now, therefore, be it

Resolved by the House of Representatives (the Senate concurring), That the Congress strongly denounces the above acts committed by the Government of the Republic of South Africa which suppress the expression of political thought and violate the rights of the individual, and urges the President to take effective measures against the Republic of South Africa in order to register the deep concern of the American people about the continued violation of human rights in that country.

Id. (emphasis added).

72. *See id.* at 35,981.

9746 was designed to terminate Eximbank activity in South Africa. Maguire's proposal that the Eximbank be used as an instrument of United States policy towards South Africa was not a novel idea. As early as February 2, 1977, the termination of Eximbank activity in South Africa was included in the Congressional Record's list of twenty-two policy options that had been proposed in an attempt to force the South African Government to modify its system of apartheid.⁷³ Representative Maguire viewed H.R. 9746 as the first step toward this goal and voiced his support for a "staged policy" strategy that would apply pressure on the Government of South Africa for social change through a series of increasingly stringent steps.⁷⁴ The idea of employing a staged policy strategy towards South Africa had originally been introduced by former United States Ambassador to the United Nations, Arthur Goldberg, during Maguire's years at the United Nations in the late 1960s.⁷⁵

A key element in the development of a staged policy strategy is to select a policy option that has a reasonable chance of gaining congressional approval. Because Congress had never passed any legislation aimed specifically at applying pressure on South Africa to change its racial policies prior to the Collins Resolution, Representative Maguire anticipated that it would be difficult to pass legislation designed to have a substantive impact on South Africa. In fact, Maguire did not expect that H.R. 9746 would ever be enacted into law, even after the Bill had undergone considerable alteration in committee and on the floor of the House.⁷⁶ This expectation appeared to be justified as similar bills sponsored by New York Representatives Stephen J. Solarz and Charles B. Rangel failed even to reach the floor of the House. The bills sponsored by Solarz and Rangel sought to (1) reduce or eliminate the foreign tax credit allowed to United States corporations unless those corporations followed fair employment principles;⁷⁷ (2) direct the President to issue regulations prohibiting further United States investment in South Africa until the President determined that the Government of South Africa had made substantial progress

73. See *id.* at 35,973 (statement of Rep. Maguire).

74. See *id.* at 35,967.

75. Maguire interview, *supra* note 64.

76. *Id.*

77. See H.R. 12321, 95th Cong., 2d Sess., 124 CONG. REC. H11,103 (introduced Apr. 24, 1978, by Rep. Rangel).

toward ending discrimination and achieving full participation of all the people of South Africa in the country's social, political, and economic life,⁷⁸ and (3) amend the Export Administration Act to prohibit investors who engaged in unfair employment practices in South Africa from receiving export licenses, entering into federal contracts, receiving tax credits, or using Eximbank services.⁷⁹ Representative Maguire confined the scope of his bill solely to the activities of the Eximbank in order to make it appear more moderate to Congress, and thus, give it a better chance of passage.⁸⁰

An important element in the ultimate passage of the Evans Amendment was the behind-the-scenes role played by the Carter Administration. The Administration had undertaken unprecedented activity in Namibia⁸¹ and was hoping for independent congressional initiative on other issues relating to South Africa.⁸² Under existing law, the Administration had the authority to terminate Eximbank activity in South Africa,⁸³ but independent congressional action would enable the Administration to assert in its negotiations with the South African Government that United States opposition to apartheid was a broadly based sentiment felt throughout the United States, rather than a concern peculiar to the Carter Administration. The Administration, therefore, could intimate that it might be advantageous for the South Africans to seize the opportunity to seriously negotiate with the Administration rather than risk having Congress impose further restrictions on relations between South Africa and the United States.⁸⁴ Thus, although the Carter Administration provided no ostensible support for H.R. 9746, and very quietly stated its opposition to the Bill on the ground that it would remove a valuable bargaining

78. H.R. 13,273, 95th Cong., 2d Sess., 124 CONG. REC. H18,822 (introduced June 23, 1978 by Reps. Diggs, Nix, and Mitchell).

79. H.R. 12463, 95th Cong., 2d Sess., 124 CONG. REC. H12,009-10 (introduced May 1, 1978); H.R. 12464, 95th Cong., 2d Sess., 124 CONG. REC. H12001-03 (introduced May 1, 1978); *see also* 124 CONG. REC. H12,001 (daily ed. May 1, 1978) (statement by Rep. Solarz explaining the purpose of H.R. 12464).

80. Maguire interview, *supra* note 64.

81. *Id.*

82. *Id.*

83. *See* 12 U.S.C. § 635(b)(9) (1982).

84. *See* 124 CONG. REC. 16,071 (daily ed. June 2, 1978) (statement of Rep. Tsongas). Representative Tsongas argued for a "unified" United States Government approach toward South African policy.

chip from the Administration's hands,⁸⁵ Maguire claims that he received vital assistance from the Administration through United Nations Ambassadors Andrew Young and Donald McHenry.⁸⁶

H.R. 9746 received additional support from an article appearing in the January 1978 issue of *Foreign Affairs* entitled "South Africa: What Is To Be Done"⁸⁷ in which the strategy of a staged policy or "graduated actions" was clearly articulated.⁸⁸ Maguire claims that this article was helpful in obtaining initial administration and congressional support.⁸⁹

C. The Committee Process

H.R. 9746 did not survive very long as an unconditional prohibition on Eximbank activity in South Africa. During hearings before the Subcommittee on International Trade, Investment, and Monetary Policy on February 9, 1978, H.R. 9746 was incorporated into the general authorization bill of the Eximbank⁹⁰ in the following amended form:

In no event shall the Bank guarantee, insure, or extend credit or participate in any extension of credit to the Republic of South Africa unless and until the President determines that significant progress toward majority rule has been made in the Republic of South Africa and transmits to the congress a statement describing and explaining the determination.⁹¹

The bill's principal supporter on the subcommittee, Representative Paul Tsongas of Massachusetts, realized that the Bill would not pass the subcommittee in the form of an unconditional prohibition on Eximbank activity in South Africa. Representative

85. 124 CONG. REC. H16,072 (daily ed. June 2, 1978) (Statement of Rep. Stanton).

86. Maguire interview, *supra* note 64.

87. Ferguson & Cotter, *South Africa: What is to Be Done?* 56 FOREIGN AFF. 253 (1978). C. Clyde Ferguson, Professor of Law at the Harvard Law School until his death in December 1983, served as U.S. Ambassador to Uganda from 1970 to 1972. He was Deputy Assistant Secretary of State for African Affairs in 1972 and 1973, and U.S. Ambassador to the U.N. Economic and Social Council from 1973 to 1975. William R. Cotter was President of the African-American Institute. He also has served as Assistant Attorney General of Northern Nigeria, 1962-63, and as a White House Fellow, 1965-66.

88. *Id.* at 274.

89. Maguire interview, *supra* note 64.

90. H.R. 12157, 95th Cong., 2d Sess., 124 CONG. REC. 15,942 (1978).

91. *Id.*

Tsongas, however, pushed it through the subcommittee with the above conditional language attached and managed to foil all attempts to further dilute the restrictions imposed by the Bill.⁹² The Bill in this amended form passed the subcommittee by a 10-5 vote.

The amendment to H.R. 9746 encountered greater resistance in the full Committee on Banking, Finance, and Urban Affairs. Representative Tsongas reluctantly acceded to another change, substituting the phrase "elimination of apartheid" for "majority rule."⁹³ By the time the amendment to the Eximbank statute reached the floor of the House on June 1, 1978, it had been changed twice, each amendment making South African qualification for Eximbank assistance less difficult. Nevertheless, the Amendment still required a Presidential determination that significant progress toward the elimination of apartheid had been made. The definitional standard of the phrase "significant progress," however, will surely vary according to the human rights policies of future Administrations. Under President Carter, who strongly supported human rights, the standard would likely have been stringent; subsequent presidents with less strident concerns about human rights may set less burdensome standards.

The most important aspect of the Amendment as of June 1, 1978, was that it still tied both public *and* private access to Eximbank assistance to the conduct of the South African Government. By the end of the first day of the floor debate, however, it was apparent that the language of the Bill was too strong to attract a majority of votes in the House.⁹⁴ A substitute amendment was introduced by Representative Thomas B. Evans of Delaware on June 2, and was approved by a voice vote with only slight modifications on the same day.⁹⁵ The original Evans Amendment only required private purchasers under subsection (c) to endorse certain fair employment principles. No reference was made to the necessity of implementing these principles. Proponents of stronger language argued that requiring private purchasers to merely endorse fair employment practices, without more, would be meaningless and would allow the South African private sector

92. Maguire interview, *supra* note 64.

93. See 124 CONG. REC. 16,059 (1978) (statement of Rep. Tsongas).

94. See *id.* at 15,937-42.

95. See *id.* at 16,057.

purchasers to continue business as usual.⁹⁶ The floor debate quickly produced a compromise in which a reference to implementation was included in the Amendment.⁹⁷ Even though the compromise was proposed and agreed to quickly and easily, its implications were far-reaching. Because the compromise required implementation to be considered, the State Department was brought more deeply into the certification process, and thereby, into conflict with South African law.⁹⁸

The most significant difference between the Evans Amendment and Representative Maguire's bill was that under the Evans Amendment, access to Eximbank assistance for private purchasers in South Africa was no longer linked to the conduct of the South African Government. The Evans Amendment enabled private purchasers to be measured against a specific set of fair employment practice standards to determine their eligibility for Eximbank assistance. Because South African companies apparently could implement the fair employment practices themselves, eligibility for Eximbank support was placed in their own hands.

Proponents of the Evans Amendment suggested that the self-implementing aspect of the Amendment was a way to encourage the South African private sector to eliminate apartheid, and thereby, influence a change in the policies of the South African Government. More important to some of its proponents, the Evans Amendment kept the Eximbank in South Africa. The proponents of the Amendment apparently thought it highly likely that private purchasers would be able to meet the certification requirements of subsection (c), while compliance by the South African Government with the standards contained in the Maguire bill seemed very unlikely.⁹⁹

Critics of the Evans Amendment viewed it as an erosion of most of the positive attributes of H.R. 9746. First, far from being a blanket prohibition on financial assistance designed to induce both public and private parties to press for governmental reform, the Evans Amendment granted the private sector access to Eximbank assistance regardless of the conduct of the South African Government.¹⁰⁰ These critics argued that the Amendment pro-

96. *See, e.g., id.* at 16,062 (statement of Rep. Holtzman).

97. *See id.* at 16,062-63.

98. *See infra* notes 157-70 and accompanying text.

99. *See* 124 CONG. REC. 16,060-66 (1978).

100. *See id.* at 16,058 (statements of Reps. Evans and Stanton).

vided little incentive to the private sector to press for governmental change.¹⁰¹ Second, the failure to mention "majority rule" in the Amendment left doubt as to whether the Congress was sincerely committed to or even tacitly supported majority rule in South Africa.¹⁰²

On July 27, 1978, the entire Eximbank authorization bill, including the Evans Amendment, passed the House by a 314-47 margin.¹⁰³ Despite the fact that the overwhelming support for passage probably represented support for the extension of the Eximbank's assistance programs throughout the world rather than strong support for the Evans Amendment, South African newspapers interpreted the passage of the Bill as an indication that both the President *and* the Congress of the United States objected to the human rights policies of the South African Government.¹⁰⁴

D. Congressional Debate

Although the Evans Amendment differed significantly from H.R. 9746, congressional debate throughout the entire legislative process consistently focused on the same issues. The debate became confusing when congressmen opposing any legislation affecting the Eximbank's role in South Africa framed their arguments as though the sole purpose of the proposed legislation was the withdrawal of United States investments from South Africa rather than the curtailment of Eximbank activity there. The opposing congressmen presumably saw divestment as the ultimate goal of the legislation's proponents and H.R. 9746 as the first step in achieving that goal. Nevertheless, of the ten issues raised in debate, only half received any significant attention.

One of the more significant issues raised in the congressional debate was whether the South African Government had made any effort toward granting basic human rights to its nonwhite¹⁰⁵ pop-

101. See *id.* at 16,058-61.

102. See *id.* at 16,068-72.

103. See *id.* at 23,116.

104. Representative Maguire was attending a conference in South Africa at the time the legislation passed the House. He stated that the news made front-page headlines in South African newspapers. Maquire interview, *supra* note 64.

105. The author would have preferred to use a term other than "nonwhite" to describe the various peoples of South Africa, since "nonwhite" is, in and of itself, a negative term. The term "black" might have been more appropriate, but its use in place of "nonwhite" would have lead to considerable confusion in trying to describe the current system of racial classifications under apartheid, cer-

ulation. The opponents of the legislation argued that if South Africa had been making significant efforts to bring about change as rapidly as possible, additional pressure through legislation that affected the Eximbank's role in South Africa would be unnecessary, and any attempts by the United States to hasten the pace could trigger a political backlash among white South Africans or even a Marxist revolution by black South Africans. Proponents of the Eximbank amendments argued that the extent of the racial and political repression in South Africa had actually increased in recent years, and if the South African Government was not persuaded to change its policies, the increasing unrest within the black community could lead to a Marxist revolution.

Only two congressmen¹⁰⁶ seemed to believe that South Africa had been making efforts to improve the basic human rights of its nonwhite population. Representative Derwinski of Illinois, however, could offer only the following evidence in support of his belief: "South Africa is making social progress as shown by that nation's adoption of the Western-sponsored Namibia plan, its official endorsement of the 'Sullivan principles,' and the South African Government's announcement that nonwhites would be permitted to register in private schools."¹⁰⁷ Numerous congressmen responded by arguing that the South African Government had failed to make any effort at reform and that the Government actually had enacted even tighter restrictions on political dissent in recent years while leaving intact laws that compelled racial discrimination.¹⁰⁸ The following facts seem to support the latter point of view.¹⁰⁹

As of the summer of 1978, South African laws compelled racial discrimination by prohibiting nonwhites from voting or from serving in the Parliament, by requiring race classification documents or "passbooks" to be carried at all times, by restricting nonwhite ownership of real property in urban areas and other defined areas, by restricting the kinds of occupations or businesses that nonwhites could pursue in white areas, by excluding blacks from the collective bargaining process, and by restricting the right of

tain statistical information, and other data included in the Article.

106. The two were Representative Goldwater and Representative Derwinski.

107. 124 CONG. REC. 16,063 (1978).

108. Representative Mitchell cited a variety of South African laws to point out the Government's failures. *Id.* at 16,061-62.

109. See Appendix 1.

blacks to strike.¹¹⁰ In addition, the Government compelled the exercise of segregation in public buses and other vehicles, railroads, public parks and premises, toilets, schools, hospitals and factory facilities.¹¹¹

South African law also limited political dissent, outlawed communism,¹¹² banned black political organizations, prohibited demonstrations, imposed broad press censorship, allowed indefinite detention without trial, permitted government surveillance of mail and telephone communications, indirectly banned peaceful boycotts, authorized the confiscation of property belonging to suspicious persons during a state of emergency, authorized cabinet ministers to withhold evidence in criminal trials if they considered the evidence to be prejudicial to the public security, authorized the judicial acceptance of guilty pleas in certain criminal cases without requiring any other evidence from the state, and delegated broad powers to lower-level judicial authorities to take actions that previously required higher-level approval, thus increasing the speed with which the Government could react to political dissenters.¹¹³

In addition to the preceding legislation, considerable evidence of excesses in the enforcement of legislation also exists. For example, forty-six blacks, including Steven Biko, died while under police detention between 1963 and 1977.¹¹⁴ Twenty-four of these people died from March 1976 through September 1977,¹¹⁵ and in 1975 and 1976 over 225 nonpolitical detainees died while under police custody.¹¹⁶

The issue of whether meaningful efforts had been made to improve the basic human rights status of the nonwhite population in South Africa was significantly muted as it became increasingly apparent that conditions for nonwhites had not improved and, in fact, had probably worsened largely as a result of actions taken by the South African Government and its agencies. The debate fo-

110. *See id.*

111. *See id.*

112. The South African Government defines communism to include any doctrine that is designed to change the status quo in South Africa.

113. *See* J. JACKSON, *JUSTICE IN SOUTH AFRICA* 26-40 (1980).

114. *See supra* notes 56-57 and accompanying text.

115. D. Woods, *supra* note 56, at 6-7.

116. 123 *Cong. Rec.* 35,966 (1977). Representative Diggs pointed out this fact during the floor debate on the Collins Resolution. He did not, however, compare these figures with statistics from prior years.

cused primarily on determining an appropriate congressional response to the policy of apartheid in South Africa and the role that the Eximbank should play as an instrument of that response.

First, opponents of Eximbank legislation argued that the Eximbank had been created solely for economic reasons and that politicizing the Bank would be a mistake.¹¹⁷ In support of this argument, Representative Kelly of Florida cited a portion of the Export-Import Bank Act of 1945 which provides, in part, that "[t]he objects and purposes of the bank shall be to aid in financing and to facilitate exports and imports and the exchange of commodities between the United States . . . and any foreign country."¹¹⁸ Representative Kelly's point was that the statutory purpose of the Bank was exclusively economic. Others argued, however, that the Bank was already politicized. For several years, transactions with communist countries had been prohibited in the absence of a presidential determination that a particular transaction would be in the national interest.¹¹⁹ In addition, since 1977 the Bank had been directed to consider a nation's observance of and respect for human rights before authorizing loans or guarantees in the country from which the assistance had been requested.¹²⁰

Second, debate focused on whether the proposed legislation would make South Africa the victim of "selective morality."¹²¹ Opponents of the Eximbank legislation argued that countries with human rights records as bad or worse than South Africa's, including communist countries and a few black-ruled African nations, remained eligible for Eximbank financing support even though South Africa was excluded. In support of this argument, Representative Kelly stated:

The bill . . . is so totally hypocritical that it defies description. It provides that South Africa should be precluded from Eximbank transactions while Eximbank carries on business as usual with an array of Communist nations. . . .

Communism is the absolute opposite of civil rights, human rights, dignities, and freedom for all people. And yet the United States is in the process of dealing with Poland, Romania, Yugosla-

117. See, e.g., 124 CONG. REC. 15,943 (1978) (statement of Rep. Kelly).

118. 12 U.S.C. § 635 (1982).

119. See *id.* § 635(b)(2)(B).

120. See *supra* text accompanying note 44.

121. See 124 CONG. REC. 16,063 (1978) (statement of Rep. Derwinski).

via, and . . . Hungary. . . .¹²²

Representative Derwinski, agreeing with Representative Kelly, noted that "Communist governments for the most part deny all of their citizens of almost all their civil and human rights. In the Republic of [South] Africa you have a denial for some of the citizens of some of their civil rights."¹²³

Proponents of the Eximbank legislation responded by arguing that among nations which violate human rights, South Africa was a special case because it was "the only country in the world that has seen fit to codify and to institutionalize racism as a governing way of life."¹²⁴ Representative McKinney analogized discrimination in South Africa to that in Nazi Germany, saying that the House could no longer "sit back, as many did prior to the outbreak of World War II, and watch our country support a nation which treats fellow human beings like animals."¹²⁵

Representative Pease of Ohio argued in favor of using the Eximbank as a vehicle for United States sanctions by pointing out that twenty-six countries had already been excluded from Eximbank assistance. Restrictions on eighteen of these countries had been adopted pursuant to the statutory requirement that the Bank not support transactions with communist countries unless the President found a transaction to be in the national interest.¹²⁶ Restrictions on four of the twenty-six countries had been adopted because the United States had never granted them diplomatic recognition.¹²⁷ The remaining four countries, including South Africa, were subject to restrictions because of their records on human rights.¹²⁸ Three of those countries had been entirely excluded from any Eximbank assistance, although South Africa remained eligible for guarantees lasting no longer than three and one-half years.¹²⁹ This list of countries severely damaged the ar-

122. *Id.* at 15,943.

123. *Id.* at 15,945.

124. *Id.* at 16,061 (remarks of Rep. Pease).

125. *Id.* at 16,061.

126. The eighteen countries were Albania, Bulgaria, the People's Republic of China, Czechoslovakia, East Germany, Estonia, Hungary, Latvia, Lithuania, North Korea, Vietnam, Outer Mongolia, Tibet, Cuba, the Soviet Union, Cambodia, Laos, and the People's Democratic Republic of Yemen. *Id.* at 16,060.

127. The four countries were Rhodesia, Namibia, Transkei, and Bophuthatswana. *Id.*

128. The other three were Uganda, Chile, and Uruguay. *Id.*

129. *Id.* at 16,060, 16,071 (3 ½ year grace period).

gument that South Africa was being made the victim of "selective morality." Nevertheless, Representative Kelly did not retreat from his assertion that *every* communist country should be excluded from Eximbank assistance before any noncommunist country could be excluded.¹³⁰

Third, opponents of the Eximbank legislation claimed that

130. See *id.* at 15,945. Rep. Stephen J. Solarz of New York offered the following insightful analysis into the communist/anticommunist debate in connection with human rights on the floor of the House on October 31, 1977:

Mr. Speaker, I must say that the arguments which we have heard from my friends on the other side of the aisle, who style themselves as champions of human liberty and freedom, have a strangely false and hollow ring. They condemn [the Collins] resolution on the grounds that while it criticizes the repressive activities of the Government of South Africa, it says nothing about the repressive activities of other governments elsewhere on the continent.

Yet when we passed the resolution a few weeks ago condemning the suppression of human rights in Cambodia, I did not hear them getting up and arguing against it on the grounds that it should have included references to the suppression of human rights in the Philippines and in South Korea.

When we passed the resolution a few months ago condemning the repression of human rights in the Soviet Union, I did not hear them argue against it on the grounds that we should have included references to the suppression of human rights in Cyprus.

When we passed resolutions over the last several years condemning the violation of human rights in Cuba, I did not hear them argue against it on the grounds that it did not refer to the suppression of human rights in Uruguay and Paraguay.

Why is it that whenever we have a resolution condemning repression by anti-Communist governments, it is criticized by these gentlemen on the grounds that it does not include references to the suppression of human rights by Communist governments; but whenever we have resolutions condemning the suppression of human freedom in Communist regimes, they say nothing about the fact it fails to refer to the suppression of human rights in anti-Communist governments. [sic]

The fact of the matter is that those of us who sponsor this resolution are concerned about the suppression of human rights in Uganda, Burundi, the Central African Republic, and other repressive regimes in Africa and elsewhere around the world. If those Members who oppose this resolution want a resolution dealing with repression in other countries let us draw it up, and let us work for it, but there is nothing in this resolution which implicitly or explicitly sanctions the suppression of human rights outside South Africa. What this resolution does is to express the concern of the Congress over the suppression of human rights in South Africa, and if a Member is against apartheid, and shares our sense of outrage over the recent events in that country, he ought to vote for this resolution.

123 CONG. REC. 35,922-73 (1977).

black South Africans would be the first to suffer from the withdrawal of United States corporations from South Africa as economic activity slowed and unemployment increased.¹³¹ Proponents of the legislation, however, argued that the legislation was designed to curtail Eximbank assistance in South Africa, not cause divestment. These legislators interpreted the willingness of black South Africans to suffer the threat of prison or death for their continued political activity as an implicit acceptance of any additional suffering that might be caused by ending Eximbank activity in South Africa.¹³²

Opponents of the legislation also asserted that black leaders in South Africa were opposed to restrictions on United States investments in South Africa. These legislators repeated statements made by Chief Buthelezi, the leader of South Africa's five million Zulus, that divestment would be a "sterile exercise,"¹³³ and quoted black newspaper editor Percy Qoboza, who believed that the proposed legislation would "create economic chaos and guarantee a full-scale bloody racial confrontation."¹³⁴ Proponents of the legislation suggested that Mr. Qoboza and Chief Buthelezi had made their comments with the knowledge that the South African Government would incarcerate them if they made any provocative statements. In addition, proponents argued that other people and groups knowledgeable of black opinion in South Africa such as Donald Woods, Amnesty International, and the American Committee on Africa, would contradict the assertion that black South Africans opposed divestment.¹³⁵

Fourth, the legislators debated whether United States business in general was playing a positive or negative role in South Africa. Some congressmen believed that United States companies, which had endorsed and implemented the Sullivan Code of fair employment principles, provided a positive example for South African corporations.¹³⁶ A Senate Report on South Africa published in January 1978, known as the Clark Report, came to virtually the same conclusion, stating that United States corporations in South

131. *See, e.g.*, 124 CONG. REC. at 16,063 (1978) (statement of Rep. Derwinski).

132. *See id.* at 16,062 (statement of Rep. Downey).

133. *Id.* at 16,058 (statement by Rep. Evans quoting Chief Buthelezi).

134. *Id.* (quoting Percy Qoboza).

135. *See id.* at 16,071 (statement of Rep. Maguire).

136. *See id.* at 16,063 (statement of Rep. Fenwick).

Africa were moving "in the direction of a socially responsible . . . role,"¹³⁷ but had not reached the point at which their current role could be characterized as socially responsible. Furthermore, the Clark Report asserted that the net effect of United States investment in South Africa had been "to strengthen the economic and military self-sufficiency of South Africa's apartheid regime."¹³⁸

It is important to note, however, that the purpose of the Eximbank legislation was not to divest United States investment in South Africa, but rather to restrict the role of the Eximbank in assisting United States exports to South Africa. The intent of the Evans Amendment was not to change the conduct of United States corporations in South Africa. In fact, virtually all of the purchasers benefiting from Eximbank assistance had been South African-based firms, not subsidiaries of United States corporations.¹³⁹ Thus, an issue largely overlooked during the congressional debate was whether South African corporations could possibly be forced to play a constructive role in implementing fair employment practices when those fair employment practices would violate both discriminatory employment laws¹⁴⁰ and deeply ingrained traditions of discrimination.

Fifth, the debate on the floor of the House raised the issue of the effect on United States businesses if South African purchasers found alternative suppliers in Europe and Japan, where governmental financing support to purchasers in South Africa was still available. Opponents of the legislation were concerned that if South African purchasers could find alternate sources of financing in other countries, the termination of Eximbank activity in South Africa would hurt only United States industry and employment.

Sixth, the debate focused limited attention on four ancillary issues, including South Africa's role as an ally to the United States in World War I, World War II, and the Korean War, and the United States vulnerability to a retaliatory embargo on strategic metals available only in South Africa and the Soviet Union. The congressional debates did not delve into these issues in any detail. The short time spent discussing these issues implies that South Africa's role as a war ally was not a mitigating factor in the

137. S. REP. No. 779, 95th Cong., 1st Sess. 13.

138. *Id.*

139. Subsidiaries or branches of United States corporations have made less than 2% of the dollar volume of purchases. See Eximbank Data, *supra* note 32.

140. See *supra* text accompanying note 108.

United States opposition to apartheid and there apparently was little concern that passage of legislation prohibiting Eximbank assistance in South Africa would produce a retaliatory response from the South African Government.

A few members of Congress were concerned that trade sanctions placed on South Africa might negatively affect neighboring nations that traded with South Africa and a portion of whose citizens work in South Africa.¹⁴¹ Congressional debate did not really cover this issue, presumably because the termination of Eximbank activity was not expected to have a significant effect on neighboring nations.

The fourth ancillary issue, raised by Representative Tsongas, was the legislation's possible effect on the broad strategic interests of the United States in Africa. Representative Tsongas was hopeful that African cooperation in the United States efforts to eradicate Cuban intervention in Ethiopia, Angola, and other African countries would be associated with an aggressive United States policy toward South African reform by governments of other African nations. He pointed out that when President Carter went to Nigeria to discuss the Cuban intervention, the Nigerians wanted instead to discuss the racial problems of South Africa.¹⁴² Representative Tsongas believed that sensitivity to the views of Nigeria¹⁴³ and other African countries should be an important foundation for United States foreign policy in Africa.

E. Statutory Construction

The Evans Amendment added the following section to the Export-Import Bank Act of 1945 (the "Act"):

In no event shall the Bank guarantee, insure, or extend credit or participate in the extension of credit (a) in support of any export which would contribute to enabling the Government of the Republic of South Africa to maintain or enforce apartheid; (b) in support of any export to the Government of the Republic of South Africa or its agencies unless the President determines that significant progress toward the elimination of apartheid has been made and transmits to the Congress a statement describing and explaining

141. 124 CONG. REC. 15,943 (1978) (statement of Rep. Kelly). Lesotho, Malawi, Mozambique, and Swaziland were most seriously considered. *Id.*

142. *Id.* at 16,059-60.

143. Especially because Nigeria is the second biggest exporter of oil to the United States.

that determination; or (c) in support of any export to other purchasers in the Republic of South Africa unless the United States Secretary of State certifies that the purchaser has endorsed and has proceeded toward the implementation of the following principles: nonsegregation of the races in all work facilities; equal and fair employment for all employees; equal pay for equal work for all employees; initiation and development of training programs to prepare nonwhite South Africans for supervisory, administrative, clerical, and technical jobs; increasing the number of nonwhites in management and supervisory positions; a willingness to engage in collective bargaining with labor unions; and improving the quality of life for employees in such areas as housing, transportation, schooling, recreation, and health facilities.¹⁴⁴

Subsection (a) prohibits financing support for any export "which would contribute to enabling the Government of the Republic of South Africa to maintain or enforce apartheid."¹⁴⁵ Presumably, this language was meant to cover exports such as computers or other equipment that the South African Government could use to implement its pass laws or to assist the police in their control of the nonwhite population. This subsection, however, arguably applies to any commercial transaction with South Africa on the premise that such transactions contribute to the economic prosperity of South Africa and, thereby, financially and politically strengthen the position of the South African Government enabling it to maintain and enforce its policy of apartheid. The former interpretation is probably closer to what Congress intended, otherwise it would simply have imposed a blanket ban on all Eximbank financing in South Africa. During the debate on the floor of the House of Representatives, Representative Thomas B. Evans of Delaware, the sponsor of the amendment, elaborated on the purpose of subsection (a):

The intent [of subsection (a)] is to just codify the U.N. embargo that was adopted by the U.N. Assembly and supported by this country in 1977 which prohibited support for such things as military assistance, which is and was rather specific.

So the intent is not at all to prohibit any form of guarantee or credit to those things that are not directly related to the military or the police.¹⁴⁶

144. 12 U.S.C. § 635(b)(9) (1982).

145. *Id.* § 635(b)(9)(a).

146. 124 CONG. REC. 16,067 (1978).

Subsection (b) prohibits the "support of any export to the Government of the Republic of South Africa *or its agencies* unless the President [of the United States] determines that significant progress toward the elimination of apartheid has been made and transmits to the Congress a statement describing and explaining that determination."¹⁴⁷ An issue raised during the floor debate was whether the word "agencies" as used in the Amendment covered quasi-governmental or parastatal corporations such as ISCOR, the government-controlled Iron and Steel Corporation, and ESCOM, the government-owned electric utility. Representative Evans attempted to clarify the meaning of the term by stating that "if there is a quasi-governmental entity involved, it would in my estimation be covered."¹⁴⁸ The prohibitions embodied in subsection (b) may be more significant than Congress envisioned at the time of its passage. Data provided by the Eximbank revealed that the volume of Eximbank-supported exports to South African parastatals was considerably higher than testimony in the congressional hearings indicated.¹⁴⁹

Subsection (c) will receive the bulk of attention in this Article. This provision prohibits exports to private purchasers in "South Africa unless the United States Secretary of State certifies that the purchaser has endorsed and has proceeded toward the implementation of" certain fair employment practices.¹⁵⁰ A purchaser in South Africa wishing to receive financing support from the Eximbank must prove to the United States mission in South Africa that it has established complete nonsegregation of employees and equal opportunities in the areas of pay and advancement. The purchaser must also show that efforts have been made to negotiate with existing labor unions; that training for supervisory and technical jobs has been provided to nonwhites; and that the quality of life has been improved for its employees in the areas of housing, transportation, schooling, recreation, and health facilities.¹⁵¹

In order to perform its certification functions, the State Department designed a questionnaire to be completed by any purchaser located in South Africa that requested Eximbank assis-

147. 12 U.S.C. § 635(b)(9)(B) (emphasis added).

148. 124 CONG. REC. 16,059 (1978).

149. See *infra* text accompanying notes 193-95.

150. 12 U.S.C. § 635(b)(9)(C).

151. *Id.*

tance.¹⁵² The eight-page questionnaire provided the South African purchaser with an opportunity to endorse the employment practices described in subsection (c) and to outline in specific terms the measures it had taken to implement those practices within the last two years. Completed questionnaires were submitted to and evaluated by the United States Embassy in Pretoria. If the application appeared to meet the requirements for certification, the United States Embassy forwarded it to the United States mission for further evaluation, which included, "*inter alia*, on-site visits, employee interviews, and discussions with labor organizations and other interested groups and individuals."¹⁵³ The United States Embassy, using the questionnaire and information garnered from its investigation, prepared a recommendation for the State Department regarding certification. The State Department conducted "its own review of the case in light of the Embassy's report, including appropriate interagency and other consultations, and prepare[d] a final recommendation to the Secretary of State or his delegate."¹⁵⁴

If the Secretary of State rejected the application for certification, "or if the U.S. Embassy notific[e]d the Department that a purchaser [had] not complied with certification requirements, the Export-Import Bank will be so advised by the Department, and the U.S. applicant for Export-Import Bank support in turn will be informed by the bank that it cannot proceed with the application."¹⁵⁵ The United States Embassy transmitted the State Department's final decision to the South African purchaser and the Eximbank at the same time.

When the Secretary of State accepted the application, the South African purchaser was certified for all transactions arising during a twelve-month period beginning on the date the Eximbank was notified of certification. Even though a South African purchaser has been certified, each individual transaction must qualify for Eximbank financing support under the Bank's normal operating procedures. In addition, the State Department's procedures require purchasers to submit annually a new application for certification. The annual certification application is evaluated

152. The questionnaire is reproduced *infra* Appendix 2 [hereinafter cited as State Department Questionnaire].

153. *Id.* Explanation of Certification Process.

154. *Id.*

155. *Id.*

against the purchaser's past record. The continuing certification process is designed to insure that South African purchasers receiving Eximbank assistance maintain a minimum level of fair employment practices and continue to make sustained progress beyond that minimum level.¹⁵⁶

IV. EFFECTS OF THE EVANS AMENDMENT

A. Eximbank Activity in South Africa Since the Evans Amendment

The Bank has not financed a single transaction in South Africa since the Evans Amendment was incorporated into the Export-Import Bank Act in November 1978.¹⁵⁷ The State Department took roughly one year to devise the questionnaire for South African purchasers. Since the questionnaire was developed, however, the State Department has neither approved nor rejected the applications that it received for Eximbank financing support.¹⁵⁸ By January 1982, only four South African companies had applied for Eximbank support. Their applications were forwarded from the United States Embassy in Pretoria to the State Department, but the State Department had refused to act on the applications.¹⁵⁹ As of January 1982, the Embassy in Pretoria had advised another fifteen to twenty potential applicants to hold on to their applications.¹⁶⁰ The reason for the State Department's refusal to process the applications of South African purchasers stems from the passage of the Protection of Businesses Act by the South African Parliament on June 20, 1978.¹⁶¹

The Protection of Businesses Act (the Act) provides that, except with the permission of the Minister of Economic Affairs, "no person shall in compliance with any order, direction or letters of request issued or emanating from outside the Republic, furnish any information as to any business whether carried on in or

156. *Id.*

157. Interview with James Moriarty, Economic Officer of Southern Africa Office, U.S. State Department (Jan. 1982) (Supplemented by interview with Emile Skodon, Mr. Moriarty's replacement (Feb. 15, 1984)).

158. *Id.*

159. *Id.*

160. *Id.*

161. Protection of Businesses Act, No. 99 of 1978, amended by Protection of Businesses Amendments Act, No. 114 of 1979, *infra* Appendix 3.

outside the Republic."¹⁶² Under the Act, the provision of any information about a South African business to a foreign country without prior approval of the Minister of Economic Affairs is a criminal offense. Whether the legislation applies only to governmental requests for information or any request, public or private, is unclear from the language of the Act.

According to Representative Maguire, members of the House of Representatives were not aware of this South African legislation during the debate and voting on the Evans Amendment.¹⁶³ Because the Protection of Businesses Act was passed only eighteen days after the Evans Amendment had been approved by a voice vote on the floor of the House, only a very close monitoring of the legislative process in South Africa could have put members of the House on notice that the reporting requirements of the Evans Amendment might conflict with a proposed South African law. Nevertheless, the South African Parliament passed the Act more than a month before the House approved the entire Eximbank authorization bill, which included the Evans Amendment. Thus, if members of the House had been aware of the Protection of Businesses Act and had identified the potential conflict between the Act and the Evans Amendment, they presumably could have altered the Evans Amendment to avoid the conflict.

Representative Maguire's own impression was that the intent of the Act was to limit the information that South African companies could legally supply to the Sullivan organization, the group responsible for monitoring those South African companies that endorsed the Sullivan principles.¹⁶⁴ In July 1978, the Sullivan organization first asked for semiannual reports from the companies that endorsed the principles of the organization¹⁶⁵ after it had received considerable criticism that those companies were not actually implementing the Sullivan principles, but instead, were using them as public relations tools to escape closer scrutiny.¹⁶⁶ It is entirely possible that the South African Government passed the Protection of Businesses Act in anticipation of stricter reporting

162. *Id.* § 1(1)(b).

163. Maguire interview, *supra* note 64.

164. *Id.*

165. *Dresser Industries and South Africa*, Graduate School of Business, Stanford University, casebook series, 8 (1980) (distributed by HBS Case Services, Harvard Business School, Boston, Mass.)

166. MYERS, *supra* note 15, at 94.

requirements of the Sullivan organization.

It is also possible, however, that the South African Government passed the Act to prevent reporting to the State Department under the Evans Amendment. This argument is particularly plausible for two reasons. First, nationalistic sentiment is more easily aroused when a foreign government requests information from domestic corporations than when a private organization requests information from foreign multinational corporations. Applying this general principle to the South African situation, because the Evans Amendment requires information from South African domestic corporations while the Sullivan reporting requirements only apply to United States corporations with branches or subsidiaries in South Africa, the South African Parliament may have been responding to nationalistic sentiment when it passed the legislation. Indeed, the extraterritorial application of United States law has been a source of discord between the United States Government and the governments of some of its trading partners.¹⁶⁷

Second, an obvious possibility is that the Act was clearly designed to prevent reporting under the Evans Amendment in order to conceal details of the employment conditions for nonwhites in South African corporations and, thereby avoid further criticism and embarrassment to those companies and to the South African Government. Because the Sullivan requirements only apply to United State multinational corporations doing business in South Africa, South African companies did not need any legislation to conceal employment details from the Sullivan organization.

Whatever the reasons for passing the Protection of Businesses Act, its effect was to halt the State Department's certification process. As mentioned above, by the summer of 1982 the State Department had refused to act on any applications for certification or even reveal the identities of the companies that had applied for certification, ostensibly because those companies would become immediately subject to criminal prosecution under the Protection of Businesses Act.¹⁶⁸ The question remains, however, if the State Department refused to release the applicant companies' names in order to protect them from criminal prosecution, why did nineteen to twenty-four South African corporations submit applications for certification under the Evans Amendment in the

167. See *infra* text accompanying notes 221-29.

168. Interview with James Moriarity (Jan. 1982).

first place with full knowledge that submission of such applications could lead to criminal prosecution? This unanswered question raises doubts about the State Department's reason for refusing to act on the certification applications and will be addressed later in the Article.

Nevertheless, the combined overall effect of the Evans Amendment and the Protection of Businesses Act has been the termination of all Eximbank activity in South Africa,¹⁶⁹ a result ironically similar to what would have been achieved if Congress had enacted H.R. 9746. Thus, although the entire legislative process made the continued Eximbank presence in South Africa more and more likely as evidenced by the bill's metamorphosis from an unconditional prohibition to a prohibition conditioned on the South African Government's progress toward majority rule, to a prohibition conditioned on the elimination of apartheid, and, finally, to a prohibition conditioned on the South African purchaser's endorsement and implementation of certain fair employment practices, the final Evans Amendment produced a result that was contrary to what the legislators expected. The total absence of Eximbank activity from South Africa represents a victory for the supporters of H.R. 9746, even if the legislation itself did not. Recent developments, however, may eventually lead to renewed activity of the Eximbank in South Africa, a topic treated later in the Article.¹⁷⁰

B. The Corporate Players

In order to assess accurately the impact of the Evans Amendment on trade between the United States and South Africa, it is helpful to analyze the trade that historically has been supported by the Eximbank. A profile of United States users of Eximbank facilities in South Africa is the first requirement for an accurate assessment.

From the Bank's inception until the passage of the Evans Amendment, at least 125 United States companies have used Eximbank facilities to support the purchase of their exports in South Africa.¹⁷¹ The total dollar amount of authorizations approved by the Bank during this period was \$603.3 million.¹⁷² With the exception of a direct loan for \$19.6 million in 1952, all of

169. Interview with Emile Skodon (Feb. 15, 1984).

170. See *infra* text accompanying and following notes 230-31.

171. See Eximbank Data, *supra* note 32.

172. *Id.*

these authorizations were in the form of guarantees or insurance.¹⁷³ In addition, only eight percent of the Eximbank activity in South Africa took place prior to 1971; eighty percent of the Bank's total dollar volume of authorizations were made during the years 1971 through 1975 inclusive.¹⁷⁴ It is apparent from these figures that the use of the Bank's facilities for exports to South Africa was a fairly recent development with concentrated activity occurring in the early and mid-1970s. As discussed earlier, the increased Eximbank activity was the direct result of the Nixon Administration's decision in 1971 to open the Bank's discount loan guarantee program to South African purchasers and to increase the maximum term of Eximbank assistance for exports to South Africa from five to ten years.¹⁷⁵

Although 125 United States corporations have used the Bank's facilities, the activity among these companies has by no means been evenly distributed. The top five users of Eximbank assistance were Wean United, General Motors, Boeing, Westinghouse, and General Electric.¹⁷⁶ These five corporations accounted for forty-two percent of the Bank's authorizations, with Wean United alone accounting for 10.5 percent of the Bank's total authorizations to South Africa.¹⁷⁷ The top ten, top twenty, and top thirty corporate users of Eximbank financial support respectively accounted for fifty-eight percent, seventy-four percent, and eighty-one percent of the Bank's total authorizations.¹⁷⁸ Thus, although the Eximbank's activity in South Africa involved 125 corporations, the vast majority of authorizations were limited to a very small group. This pattern of concentration is apparently not atypical of Eximbank activity in other nations.¹⁷⁹ Table 2 lists the top thirty exporters, the number of transactions in which each received Eximbank financing support, and the total dollar volume of authorizations.

173. *Id.*

174. *Id.*

175. *See supra* text accompanying notes 38-40.

176. *See Eximbank Data, supra* note 32.

177. *Id.*

178. *Id.*

179. Interview with Steven Glazer, Counsel, Export-Import Bank of the United States (Mar. 29, 1982).

TABLE 2¹⁸⁰

EXIMBANK AUTHORIZATIONS TO SOUTH AFRICA BY UNITED STATES EXPORTER

| <u>Rank</u> | <u>Company</u> | <u>Number of Transactions</u> | <u>Total Authorizations</u> |
|-------------|-----------------------------------|-------------------------------|-----------------------------|
| 1 | Wean United, Inc. | 29 | \$64,176,900 |
| 2 | General Motors | 8 | \$55,786,860 |
| 3 | Boeing Company | 1 | \$49,500,000 |
| 4 | Westinghouse | 18 | \$46,255,000 |
| 5 | General Electric Co. | 4 | \$40,137,000 |
| 6 | Mesta Machine Co. | 8 | \$28,549,900 |
| 7 | Caterpillar | 2 | \$24,950,000 |
| 8 | Turbopower & Marine Systems, Inc. | 1 | \$16,757,479 |
| 9 | Marion Power Shovel Co. | 5 | \$15,058,906 |
| 10 | Unit Rig & Equipment Co. | 2 | \$14,527,400 |
| 11 | Bucyrus-Erie Co. | 3 | \$14,191,900 |
| 12 | Export Credit Corp. | 46 | \$13,883,567 |
| 13 | Herr-Voss Corp. | 4 | \$11,492,500 |
| 14 | United Engineering & Foundry Co. | 2 | \$11,340,000 |
| 15 | International Harvester | 5 | \$ 9,158,400 |
| 16 | Piper Aircraft Corp. | 6 | \$ 7,951,612 |
| 17 | Monarch Machine Tool | 6 | \$ 7,774,142 |
| 18 | Motorola, Inc. | 3 | \$ 6,754,000 |
| 19 | Mack Trucks, Inc. | 5 | \$ 5,884,400 |
| 20 | Cessna | 12 | \$ 5,761,354 |
| 21 | Harnischfeger Corp. | 5 | \$ 5,413,800 |
| 22 | Wabco Trade Co. | 1 | \$ 5,265,000 |
| 23 | Leeds & Northrup Co. | 5 | \$ 4,596,007 |
| 24 | Lilliston Corp. | 3 | \$ 4,420,000 |
| 25 | Tozer Kemsley & Milbourn | 1 | \$ 3,920,000 |
| 26 | National Mine Service Co. | 11 | \$ 3,875,330 |
| 27 | Cincinnati Milacron Co. | 2 | \$ 3,662,900 |
| 28 | Dresser Industries | 5 | \$ 3,561,845 |
| 29 | J.I. Case Co. | 5 | \$ 3,420,700 |
| 30 | Eaton Yale & Towne, Inc. | 2 | \$ 3,383,400 |

Another characteristic of Eximbank financing support in South Africa is the extent to which United States companies have relied on Bank-supported transactions in South Africa as a major element of their business strategy. One way of measuring this level of reliance is to determine the frequency with which each company received Eximbank financing support. The data indicates that only 37 of the 125 companies used the Bank's services more

180. See Eximbank Data, *supra* note 32.

than twice,¹⁸¹ indicating that the typical user either does not trade frequently with South Africa or only occasionally uses the Bank in its South African business.

Another way of measuring the level of reliance on the Eximbank is to determine the time span over which companies received authorizations. Of the 125 companies, only 25 sought financing support from the Bank for a transaction more than two years after any prior transaction with the Bank.¹⁸² Most users, therefore, either used the Bank's services only once or financed a number of South African transactions in a short period of time. Again, the figures imply either that business with South Africa is an infrequent occurrence for most of the 125 companies or that the use of Eximbank financing support is relied upon only very infrequently for South African transactions.

Whichever of the two implications is correct, both suggest that most United States corporations conducting business in South Africa did not strongly rely on continued Eximbank activity, even though a few, such as Wean United, used the Bank's facilities as a major part of their South African business strategy. It is difficult to argue, however, that continued access to Eximbank financing was a major underpinning of the business strategy for most United States corporations in South Africa.

The second requirement for accurately assessing the effect of the Evans Amendment is to profile the South African purchasers who were beneficiaries of the Eximbank financing support. In many ways the profile of the purchasers resembles that of the exporters. Approximately 135 purchasers used the Bank's facilities between the time the Bank first entered South Africa and the passage of the Evans Amendment.¹⁸³ The proportionate activity among these South African companies, however, was even less equally distributed than the activity among the United States exporters.

181. *Id.*

182. *Id.*

183. *Id.*

TABLE 3¹⁸⁴EXIMBANK AUTHORIZATIONS TO SOUTH AFRICA BY PURCHASER

| <u>Rank</u> | <u>Purchaser(s)</u> | <u>Number of Transactions</u> | <u>Total Authorizations</u> | <u>Authorizations as % of Total</u> |
|-------------|------------------------|-------------------------------|-----------------------------|-------------------------------------|
| 1 | ISCOR | 88 | \$235,333,402 | 38.8 |
| 2 | South African Railways | 3 | \$109,750,000 | 18.1 |
| 3 | Barlow Rand, Ltd. | 6 | \$ 51,464,000 | 8.5 |
| 4 | ESCOM | 15 | \$ 46,688,672 | 7.7 |
| 5 | Purchasers of aircraft | 47 | \$ 26,823,037 | 4.4 |
| 6 | Mining Sector | 30 | \$ 24,760,523 | 4.1 |
| Totals | | 189 | \$494,819,634 | 81.6 |

As illustrated in table 3, the greatest user of Eximbank financing support was the Iron and Steel Corporation of South Africa (ISCOR), which accounted for authorizations totalling \$235.3 million or a staggering 38.8 percent of all Eximbank authorizations in South Africa.¹⁸⁵ ISCOR's transactions included all the Bank-supported transactions of Wean United, ninety-five percent of the Bank-supported transactions of Westinghouse, seventy-one percent of the Bank-supported transactions of General Electric, and one hundred percent of the transactions of Mesta Machine Company, the sixth largest recipient of support among United States exporters.¹⁸⁶ The second largest user of Eximbank financing support was South African Railways, which accounted for authorizations totalling \$109.7 million or 18.1 percent of all authorizations, including eighty-seven percent of all General Motors' Bank-supported transactions in South Africa.¹⁸⁷ South African Railway's total also included a \$49.5 million guarantee covering the sale of a jumbo jet, the one Bank-supported transaction that the Boeing Company made in South Africa.¹⁸⁸ The Electricity Supply Company of South Africa (ESCOM) ranks as the fourth largest user of Eximbank financing support with authorizations totalling \$46.7 million or 7.7 percent of all the Bank's South African authorizations, including a \$19.6 million direct loan, the only one ever

184. *Id.*185. *Id.*186. *Id.*187. *Id.*188. *Id.*

made to South Africa.¹⁸⁹ Together these three purchasers accounted for \$391.7 million or 64.6 percent of all Eximbank authorizations in South Africa. Not only does this figure represent an extraordinarily high concentration of Eximbank activity in a few purchasers, it also represents an equally high concentration of activity in purchasers that are parastatal corporations.

ISCOR is a government-controlled corporation that produces approximately seventy-three percent of South Africa's iron and steel.¹⁹⁰ ESCOM is also a parastatal corporation that supplies approximately eighty percent of South Africa's electrical energy needs.¹⁹¹ South African Railways, which also operates South African Airways, is the country's main supplier of rail and air transportation.¹⁹² These three parastatal corporations each represent strategic sectors of the South African economy that have been promoted by the South African Government in its attempts to accelerate the country's economic development. The success of these parastatals is also vital to South Africa's goal of attaining self-sufficiency, a goal designed to enable South Africa to insulate itself from possible economic sanctions stemming from its racial policies. Whether the Eximbank, as an agency of the United States Government, should have allowed nearly two-thirds of its financing services in South Africa to be used in the furtherance of that goal is highly questionable. Under the Evans Amendment, Eximbank transactions with parastatal corporations are barred under subsection (b) regardless of their employment practices.

If Congress had chosen to make fair employment practices the criterion for determining eligibility for Eximbank financing support instead of evaluating the governmental progress toward the elimination of apartheid, these parastatals probably would still be among the organizations least likely to qualify. As government-controlled corporations, the parastatals could be expected to implement the Government's discriminatory employment laws as rigidly as, if not more rigidly than, private corporations. The historical role of the Eximbank in South Africa can be questioned not only because of the assistance the Bank has provided to the South African Government for developing strategic industries

189. *Id.*

190. *Hearing, supra* note 36, at 64 (statement of Edgar Lockwood, Executive Director, Washington Office on Africa).

191. *Id.*

192. Interview with James G. Cook, Boeing Co. (Mar. 29, 1982).

that the Government considered vital to the attainment of self-sufficiency, and thus, maintenance of the apartheid policies, but also with respect to the employment practices within those industries.

In the subcommittee hearing on H.R. 9746, testimony clearly showed that members of Congress knew that the Eximbank was providing financial support to South African parastatal corporations, but the magnitude of the support, especially with regard to purchases by ISCOR, was greatly underestimated. Testimony before the subcommittee indicated that during the years 1971 through 1976, Eximbank authorizations to ISCOR totalled \$76 million.¹⁹³ The actual level of authorizations during this period was nearly three times that amount.¹⁹⁴ The testimony also grossly understated the role of the parastatal corporations in the South African economy. It is reasonably safe to assume, therefore, that opponents of the blanket ban on Eximbank activity in South Africa proposed by H.R. 9746 believed that subsection (c) of the Evans Amendment would enable the bulk of Eximbank activity to continue through private sector purchasers who met the subsection's fair employment standards. In reality, however, private sector purchasers historically represented only 35.4 percent of Eximbank activity in South Africa—less than ISCOR alone.¹⁹⁵ In addition, the fair employment standards of subsection (c) posed unexpected legal difficulties for South African purchasers.

The largest user of Eximbank financing support among private sector purchasers was Barlow Rand, Ltd., a major industrial company in South Africa. Barlow Rand benefited from guarantees totalling \$51.5 million or 8.5 percent of all Eximbank authorizations, thus placing it third overall among purchasers.¹⁹⁶ Barlow Rand's purchases consisted entirely of walking draglines and earth-moving equipment. Other than Barlow Rand, the Eximbank did not support any dominant private sector purchasers of exports.

A further categorization of purchasers in the private industrial sector is illuminating. Sales of light civilian aircraft and aircraft equipment were made to a total of twenty South African purchasers. Authorizations supporting these sales totalled \$26.8 million or

193. *Hearing, supra* note 36, at 64 (statement of Edgar Lockwood).

194. *See supra* text accompanying note 185.

195. *See Eximbank Data, supra* note 32.

196. *Id.*

4.4 percent of all authorizations.¹⁹⁷ Civilian aircraft sales aroused special interest in the congressional subcommittee hearing because of concerns about their potential police and military applications.¹⁹⁸ Nothing in the names of the twenty purchasers indicated that they were government-controlled agencies, nor is the author aware of any connections between these purchasers and the police or military. Nevertheless, the two greatest purchasers of civilian aircraft were Placo Aircraft, Ltd., with Eximbank financing support totalling more than \$6.1 million for five transactions, and United Air Service, with financing support totalling more than \$5.5 million for ten transactions.¹⁹⁹ The major United States exporters in aircraft transactions were Piper Aircraft Corporation, the Cessna Aircraft Company, and Rockwell International, with guarantees totalling more than \$7.6 million, \$5.7 million, and \$2.2 million, respectively.²⁰⁰

The mining industry is another significant South African industrial sector that has benefited from Eximbank activity. Nine companies in the mining industry made purchases with authorizations totalling \$24.8 million, or 4.1 percent of all authorizations.²⁰¹ The relatively limited Eximbank activity in this sector is somewhat surprising, considering the tremendous importance of the mining industry in the South African economy. The major United States exporters to the mining sector were International Harvester, the National Mine Service Company, the Harnischfeger Company, the Joy Manufacturing Company and Dresser Industries which received authorizations totalling more than \$5.2 million, \$3.8 million, \$3.6 million, \$2.6 million, and \$1.5 million, respectively.²⁰²

The Eximbank was considerably less active in the computer sector where total authorizations were less than \$8.6 million,²⁰³ \$6.3 million of which was already included in the total authorizations made to ESCOM.²⁰⁴ The exporters were Leeds & Northrup Company and Honeywell, with authorizations totaling more than \$4.5 million and \$1.7 million, respectively.²⁰⁵ Major purchasers in-

197. *Id.*

198. *See Hearing, supra* note 36, at 64 (statement of Edgar Lockwood).

199. *See Eximbank Data, supra* note 32.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

cluded a Burroughs subsidiary in South Africa and a pharmaceutical company, each receiving guarantees totalling roughly \$1 million.²⁰⁶ Sales of computers and computer equipment were of special interest in the congressional subcommittee hearings because of their potential applications to police information processing, particularly in connection with the influx control laws of South Africa's apartheid system. Critics have questioned whether adequate safeguards can be established to insure that computer exports are not used by the South African police force.²⁰⁷

In summary, the activity of the Eximbank in South Africa can be characterized as highly concentrated on a few exporters and purchasers, and directed towards essential industrial sectors of the South African economy. In addition, parastatal corporations have been the dominant South African purchasers. Because the number of participants has been so limited, determining the actual effects of the Evans Amendment on individual companies lends itself to a survey analysis. The next section chronicles the survey analysis undertaken by the author.

C. The Impact On United States Exporters

The author assembled a profile of the users of Eximbank financing support in South Africa, and conducted a survey of the thirty²⁰⁸ United States exporters with the highest dollar value of exports to South Africa. The purpose of the survey was to determine what effects, if any, the passage of the Evans Amendment had on United States exporters doing business in South Africa. The thirty companies surveyed have represented eighty-one percent of the Bank's business in South Africa and, thus, in the aggregate, provide data from which generalizations can be drawn.

The questionnaire²⁰⁹ contained three parts. The first two parts

206. *Id.*

207. *See MYERS, supra* note 15, at 2.

208. Actually, 29 of the top 30 exporters were surveyed. The Wabco Trade Co. (Westinghouse Air and Brake Company Trade Co.) was omitted from the survey because its response presumably would have been the same as that of Westinghouse.

209. The questionnaire is not particularly sophisticated nor elaborate, but the author felt that additional questions might jeopardize the response rate. The actual survey questionnaire that was sent to the United States exporters read as follows:

were designed to determine if the Eximbank withdrawal actually affected each company's volume of exports to South African purchasers. The third part attempted to determine if the Evans Amendment caused any change in corporate employment practices in South Africa.

Thirteen of the thirty companies responded to the survey. Of the thirteen responding, General Motors and Westinghouse stated that, as a matter of policy, they would not disclose the kind of data requested in the survey. An officer of Motorola, whose three Bank-supported transactions were authorized in 1973, stated

QUESTIONNAIRE ON THE EFFECTS OF THE
EVANS AMENDMENT

1. Before the Evans Amendment was passed (November, 1978), did your company plan to seek financing support from Eximbank for any transactions in South Africa during 1979, 1980, 1981, or 1982 or none of these years? (Circle the appropriate response.)

If you circled one or more of the years above, in which of the following ways has the Amendment altered your company's plans? (Circle the appropriate response or responses.)

A. We applied but the application has not been acted upon because our purchaser in South Africa has not yet received approval from the U.S. State Department.

B. We have found alternative sources for loan guarantees or credit insurance and have gone ahead with our planned transactions using these sources.

C. We have been forced to forego some business opportunities because alternative means of acquiring loan guarantees or insurance were either unavailable or too expensive.

D. We decided to go through with transactions without loan guarantees or insurance.

E. Other. (Please explain.)

If you circled B above, please state the source(s) by type that your company has used for alternative financing support (e.g. commercial bank, insurance company, etc.). If you circled C above, can you give an estimate of the cost to your company in lost business in terms of gross revenues.

2. Do you know of any instances in which your company has been placed at a significant competitive disadvantage because foreign governmental agencies supply your non-U.S. competitors with low-cost financing support in South Africa without restrictions similar to the Evans Amendment? If yes, please explain.

3. Did the Evans Amendment influence any decisions on the part of your company to maintain, change, or upgrade the employment conditions for nonwhite workers employed by your company in South Africa or employed by a purchaser in South Africa of exports from your company? If yes, please explain.

that, to the best of his knowledge, Motorola had never sought financial support from the Eximbank for any transactions in South Africa. The following ten companies actually returned a completed questionnaire or equivalent information: Wean United, the Boeing Company, the Mesta Machine Company, Bucyrus-Erie, the Export Credit Corporation, the Piper Aircraft Corporation, Mack Trucks, the Harnischfeger Corporation, Cincinnati Milacron, and a company ("Company A") that requested anonymity. Company A and the first three companies listed, Wean United, the Boeing Company, and the Mesta Machine Company, were among the top ten users of the Eximbank in South Africa; the second four were among the top twenty. Harnischfeger ranked twenty-first and Cincinnati Milacron ranked twenty-seventh. Although it would be difficult to claim conclusive results from a survey of the ten responding companies, the data does provide reliable indications of the patterns developing in South Africa because the nine²¹⁰ companies surveyed accounted for more than \$193 million or thirty-two percent of all Eximbank authorizations made in South Africa.

Piper Aircraft and Cincinnati Milacron reflected the typical United States exporter's pattern of occasional use of Eximbank financing support.²¹¹ Both companies stated that before the passage of the Evans Amendment, they had no plans to seek financing support from the Bank between 1979 and 1982 inclusive. The other eight companies stated that they had planned to use the Bank's services for transactions in South Africa before the Evans Amendment was adopted.

The most striking fact about the responses of the eight companies that had planned operations in South Africa with Bank support was that only one, the Export Credit Corporation, the United States subsidiary of a British firm, claimed that it had lost business opportunities because alternative means of acquiring loan guarantees or insurance were either unavailable or too expensive. The Export Credit Corporation estimated that it had lost \$10 million in gross revenues from foregone business opportunities. Company A indicated in a separate letter that business interruptions due to changes in sources of financing between it and Barlow Rand had been the result of Barlow Rand's ability to receive credit support from government agencies of other nations in

210. Company A's totals had to be excluded to preserve their anonymity.

211. See *supra* text accompanying note 181.

which competing products were produced. Company A did not specify the amount of business lost or the specific products involved.

Seven of the eight companies, including the Export Credit Corporation and Company A, stated that they had found alternative sources for loan guarantees or credit insurance and had proceeded with planned transactions using these sources. The eighth, Mesta Machine Company, stated that it had decided to go through with planned transactions in South Africa without loan guarantees or insurance. In addition, Piper Aircraft stated that even if it had planned to use Eximbank financing support between 1979 and 1982, it would have proceeded with its transactions without loan guarantees or insurance.

The responses of the seven companies that utilized alternate financing indicated that most of the new financing appeared to be primarily local South African sources. Boeing stated that since the passage of the Evans Amendment, it had exported four model 747 and thirteen model 737 aircrafts to South African Airways through financing arranged by South African Airways. Wean United stated without further elaboration that its new source of financing had been local. Mack Trucks and Company A both said that their purchasers had arranged financing through South African banks. Bucyrus-Erie stated that its purchasers had obtained funds through alternative sources, but did not specify the type or locality of the new sources. Harnischfeger reported that its purchasers had arranged for alternative financing support either from South African or international banks. The Export Credit Corporation said that it had obtained third-country insurance to support its South African transactions from the Export Credits Guarantee Department (ECGD), the British counterpart to the Eximbank.²¹²

In the aggregate, the responses of the ten companies suggest two general conclusions. First, the level of United States exports to South Africa by companies formerly using the Eximbank's services has been largely unaffected by the Evans Amendment. Second, Eximbank assistance in South Africa has merely duplicated the financing services already available in South Africa and has even, in some cases, supported transactions that would have

212. The ECGD is also an executive agency of the British Government. Information obtained from the office of Wendell H. Jones, Vice President, Export Credit Corp., New York, N.Y.

taken place without any guarantees or insurance. Because the Bank was created to promote transactions that in its absence would not take place, its presence in South Africa may have been highly questionable and perhaps *ultra vires*.²¹³

Assuming that the data obtained from the survey is reliable for the purposes of generalization and that the conclusions drawn from the data are reasonable, the moral arguments for terminating Eximbank activity because of the Government's apartheid policies in South Africa can be coupled with the economic argument that the Bank's services are largely nonessential. The position that the Bank should support transactions that would occur without its services appears to be totally without support. Moreover, the support of such transactions would run contrary to the Bank's charter.²¹⁴ It would be even more difficult to argue that the Bank should support and, in effect, subsidize these transactions when strong moral arguments oppose any support that would further the apartheid policy of the South African Government.

In the second part of the questionnaire, most companies expressed an awareness or concern over the possible adverse effects on their businesses of foreign governmental financing support to foreign competitors. None of the companies, however, admitted to a specific instance in which the unavailability of Eximbank support had placed it at a significant competitive disadvantage. One company, Bucyrus-Erie, went so far as to state that the type of equipment²¹⁵ for which it had received Eximbank financing support in the past is manufactured exclusively in the United States. Mack Trucks and Mesta Machine Company expressed a suspicion that they had lost business to foreign competitors because of the more attractive financing terms that are available to those com-

213. Of course, the results obtained from a sampling of approximately one-third of the recipients of the Bank's total assistance to South Africa could be misleading, and a survey of the remaining recipients could provide significantly different results. Also, the duplication of financial services that the Bank seemed to provide in South Africa may have become available only in recent years. The alternative financing schemes currently available in South Africa were not as prevalent a few years ago, and may have been created solely in response to the withdrawal of Eximbank support.

214. The Export-Import Bank Act of 1945, as amended, provides that the Bank should "supplement and encourage, and not compete with private capital." 12 U.S.C. § 635(b)(1)(B) (1982).

215. Walking draglines.

petitors. Mack Trucks recognized that the ECGD offers support to British exporters, but without access to the quoted prices of the British exporters it could not readily gauge the significance of the ECGD support. Harnischfeger also expressed concern about its British competition that received ECGD support. Mesta Machine Company stated without elaboration that Japanese and European financing support had placed it at a significant competitive disadvantage. Finally, although Company A could not identify any specific instances in which the unavailability of Eximbank support had placed it at a significant competitive disadvantage, it did state in a separate letter that its South African customer, Barlow Rand, had made sourcing changes based on Barlow Rand's ability to receive credit support from the governments of other nations in which products competing with those of Company A were produced.

In the aggregate, the responses from the second part of the questionnaire suggest that the continued availability of foreign financing support for foreign competitors had not significantly affected United States companies exporting goods to South Africa since the passage of the Evans Amendment. This conclusion is consistent with the findings of the first part of the survey in which only two companies²¹⁶ stated that they had lost business because of the Evans Amendment.

The third part of the survey was designed to determine whether the Evans Amendment had prompted any United States companies to urge South African purchasers to improve their employment practices. All ten respondents to the survey responded negatively to this question. This result was expected because it would be most unusual for one company to ask another to change its internal policies even when strong moral grounds exist for doing so.

The manner in which South African companies responded to the State Department questionnaire indicates flaws in the United States certification process. Company A indicated that its customer, Barlow Rand, had adopted a code of conduct similar to the Sullivan principles prior to the issuance of the State Department questionnaire. Barlow Rand, however, refused to complete the State Department questionnaire claiming that the questionnaire was an unreasonable burden because it required informa-

216. Possibly only one, if the response from Company A is favorably interpreted.

tion not only on Barlow Rand's Tractor Division to which Company A was selling equipment, but also on each of the several hundred companies that comprise Barlow Rand. The information requested in the questionnaire, therefore, would require several hundred pages to complete. According to Company A, instead of submitting the completed State Department questionnaire, evidence was presented by the Chairman of the Board of Barlow Rand to both the Export-Import Bank and the State Department, along with their Chairman's statement to the many managers within Barlow Rand of the Company's commitment to nondiscrimination. Nonetheless, the State Department insists upon completion of the questionnaire — and that's where the matter still stands.²¹⁷

The State Department questionnaire may have appeared too burdensome for companies with several operating divisions or subsidiaries. The instructions on the questionnaire, however, clearly state that the information supplied from all divisions and subsidiaries should be *consolidated* on one application, not used to complete a separate application for each division or subsidiary.²¹⁸ Nevertheless, collecting and consolidating the information could prove difficult if different divisions or subsidiaries use different operating procedures and standards. Even for companies with only a few operating divisions the questionnaire could be detailed and burdensome. On the other hand, any company that had truthfully and seriously implemented a nondiscriminatory employment policy would theoretically have the information requested in the questionnaire readily available as part of its own self-monitoring and evaluating system regardless of the number of operating divisions and subsidiaries. Companies that refused to complete the questionnaire and submit to an on-site inspection by the United States Embassy may well have been avoiding disclosure of their actual employment practices rather than protesting an unreasonably heavy reporting burden.

Implicit in the State Department's refusal to accept evidence of Barlow Rand's commitment to nondiscrimination is a distrust of corporate self-policing. A similar incident occurred in 1978 when Dresser Industries refused to sign the Sullivan principles because reporting and independent monitoring requirements had been

217. Company A's response to survey.

218. See State Department Questionnaire *infra* Appendix 2, General instructions.

added. The Sullivan organization, like the State Department, refused to retreat from the position that its reporting and monitoring requirements had to be met.²¹⁹

Barlow Rand's disclosure of information regarding its employment practices to the State Department and the Eximbank brings into question the proper scope and enforcement of the South African Protection of Businesses Act. Under the Act, a company must receive permission from the South African Minister of Economic Affairs before supplying any business information in response to a foreign request.²²⁰ If the Minister of Economic Affairs assented to Barlow Rand's disclosure of information about its employment practices, then it is unclear why the State Department placed four applications for certification on hold and instructed the United States Embassy to turn away fifteen to twenty other applicants. The apparent inconsistency in the State Department's perception of how the South African Government will apply the Protection of Businesses Act and the actual application of the Act requires further analysis.

The Minister of Economic Affairs may have found the disclosure requirements of the State Department's questionnaire to be unacceptable because they asked for a more thorough description of employment practices than Barlow Rand would be allowed to offer under the Act. Alternatively, Barlow Rand may never have requested permission from the Minister on the assumption that permission would have been denied. In either case, it is hard to explain why officers of nineteen to twenty-four South African corporations would have knowingly exposed themselves to possible criminal prosecution for violations of the Protection of Businesses Act by applying for State Department certification. One explanation could be that the South African Parliament did not intend the Act to function as a blanket prohibition on the release of information, but instead, to operate as a device that South African corporations could use at their option when releasing information to a foreign party might prove embarrassing. If the "option" explanation is correct, then the State Department's refusal to reveal the identities of the certification applicants must have been motivated by reasons other than a concern that South African corporate officers would be prosecuted. By refusing to release the applicants' names, the State Department may have sought to avoid

219. *Dresser Industries and South Africa*, *supra* note 165, at 11.

220. *See supra* note 162 and accompanying text.

embarrassing the South African Government and possibly creating a diplomatic rift by disclosing the names of corporations that had decided not only to violate South African law, but to do so in order to comply with the extraterritorial application of United States law.

The extraterritorial application of United States law has been a source of friction between the United States and South Africa as well as between the United States and some of its other trading partners. Legislation passed by at least two of these nations in the last five years indicates that the South African response to the Evans Amendment was a predictable reaction to attempts by the United States to extend the application of its laws to other countries. In 1980, both the United Kingdom and France passed legislation designed to block the extraterritorial application of United States antitrust law to British and French nationals and businesses.²²¹ The British legislation, the Protection of Trading Interests Act, empowers the Secretary of State to forbid British citizens, businesses, and non-British citizens located in the United Kingdom from complying with the requirements of foreign courts, tribunals, or authorities to produce commercial documents or information when those requirements (1) infringe on the jurisdiction or otherwise prejudice the sovereignty of the United Kingdom, (2) prejudice "the security of the United Kingdom or . . . the relations of the government of the United Kingdom with the government of any other country," (3) are "made otherwise than for the purposes of civil or criminal proceedings which have been instituted in the overseas country," or (4) compel "a person to state what documents relevant to any such proceedings are or have been in his possession, custody or power or to produce for the purposes of any such proceedings any documents other than particular documents specified in the requirement."²²²

The United Kingdom's Protection of Trading Interests Act is similar to South Africa's Protection of Businesses Act in that it restricts the production of information. Significant differences between the two pieces of legislation, however, make the South Afri-

221. The British statute is the Protection of Trading Interests Act, 1980, ch. II. The French statute is the Relative á la communication des documents et des personnes physiques ou morales économique, commercial ou technique à *Législation* [D.S.L.] 285, translated in Herzog, *The 1980 French Law on Documents and Information*, 75 AM. J. INT'L L. 382 (1981).

222. Protection of Trading Interests Act, 1980, ch. II, § 2(2)-(3).

can law potentially more restrictive. First, the Protection of Businesses Act absolutely prohibits South African companies from furnishing information in response to foreign requests.²²³ Intervention by the Minister of Economic Affairs, however, can create exceptions to the prohibition. The Protection of Trading Interests Act, on the other hand, operates in just the opposite way by generally permitting British companies to furnish information in response to foreign requests, and requiring the intervention of the Secretary of State to prohibit the release of information.²²⁴ Second, while the British law applies only to requests from foreign courts, tribunals, and authorities, the South African law applies to "any order, direction or letters of request issued or emanating from outside the Republic."²²⁵ The South African law, therefore, appears to prohibit the release of information to a broader range of foreign entities. Last, and most significant, the Secretary of State can invoke the British law only under the four broad circumstances enumerated above. The South African law prohibits the furnishing of information under any circumstances with exceptions only to be granted as the Minister of Economic Affairs deems fit. Because the South African law does not provide a set of conditions under which information must be released, it is potentially far more restrictive than the British law.

The French law is similar to the South African law in that it essentially prohibits the release of information in response to foreign requests.²²⁶ In contrast to the British law, no intervention by a French Government cabinet official is required to bar the release of information.²²⁷ The French law is similar to the British law in that its application is limited to requests from foreign public authorities or from persons seeking to use the information as evidence in foreign judicial proceedings.²²⁸ In contrast to the South African law, which applies to all foreign requests for information under any circumstances, the French law applies only when disclosure "would threaten the sovereignty, security, or essential economic interests of France or public order, as defined by

223. Protection of Businesses Act, *supra* note 161, § 1(1).

224. Section 2 of the Act gives the Secretary of State discretion to prohibit compliance.

225. Protection of Businesses Act, *supra* note 161, § 1(1)(b).

226. Law No. 80-538, 1980 D.S.L. 285, arts. 1-1 *bis translated in* Herzog, *supra* note 221, at 382-83.

227. *Id.*

228. *Id.*

government authorities to the extent deemed necessary."²²⁹

The State Department's refusal to process the nineteen to twenty-four applications from South African corporations and decision not to disclose the identities of those corporations may have been motivated by a desire not to embarrass the South African Government. Several recent developments seem to support this interpretation. During the middle of 1982, the State Department and the Government of South Africa agreed upon a revised questionnaire to be used in the certification process.²³⁰ The changes in the revised questionnaire were more cosmetic than substantive, however, and apparently were designed to lower the profile of the United States Government. The revised questionnaire makes it less obvious that by filing the application, South African corporations are subjecting themselves to the extraterritorial application of United States law. For example, the original questionnaire twice expressly referred to a section of the Export-Import Bank Act of 1945. In the revised questionnaire, all references to the Act have been deleted.

A second change, which presumably was made to placate the South African Government, appears in the question that asks whether the company has endorsed certain fair employment practices.²³¹ A reference in the original question to "industrial discriminatory laws" was changed to "discriminatory employment practices." Because the South African Government maintains that its laws under apartheid are nondiscriminatory, the questionnaire was revised to avoid a direct charge of discrimination against the South African Government.

The revised questionnaire contains two other changes that were made either to mask the extraterritorial application of United States law or to assert the sovereignty of the South African Government. First, in Question 25 the words "in making the required certification" were deleted in the revised version. The apparent purpose of the deletion was to make it less obvious to the applicant that by completing the questionnaire it became subject to the extraterritorial application of United States law. Second, the reference to on-site inspections conducted by the United States

229. *Id.* art. 1, translated at 382-83.

230. Interview with Emile Skodon, Economic Officer of Southern Africa Office, U.S. State Department, (Mar. 2, 1983). For a copy of the revised questionnaire, see *infra* Appendix 4.

231. This question appears as Question 12 in the revised questionnaire.

Embassy in the instructions accompanying the questionnaire was changed from "will include . . . on-site visits" to "may find it necessary to verify the information . . . with on-site visits." The deleted language may have offended the South African Government's sense of sovereignty, or the United States Government may have decided that it would no longer require on-site inspections of every applicant's work facilities. If the latter interpretation is correct, the State Department granted a very significant, substantive concession to South African companies.

The substantive changes in the questionnaire generally seem to have been made to lessen the bureaucratic burden on South African companies to collect and categorize business information. For example, Question 18 asked for the number of workers from each racial group that were employed in the different categories of skilled and unskilled labor. The State Department reduced the number of grades or levels of skill from eleven to five, thereby decreasing the complexity and, presumably, the time and effort required to complete the questionnaire. The instructions to the revised questionnaire contain another change that was apparently made to lessen the bureaucratic burden on South African companies. The questionnaire originally provided that "[a]nswers should include consolidated information on all corporate divisions and subsidiaries." The revised questionnaire provides that "[a]nswers should include consolidated information on all corporate divisions. In the course of the certification process, information may be requested concerning any corporate parents or concerning subsidiaries which would benefit directly from the proposed purchase." This revision is very significant for large South African corporations such as Barlow Rand, which under the original questionnaire would have been required to provide information on all corporate divisions *and* subsidiaries. The revised questionnaire only allows the State Department to request information about subsidiaries that would "benefit directly" from the proposed purchase. The meaning of "benefit directly" is not defined in the questionnaire and conceivably could become a source of dispute.

In addition, the original questionnaire required the South African purchaser to indicate whether it had "publicly supported" the fair employment practices delineated in the questionnaire. The revised questionnaire requires the purchaser to indicate whether it had "publicly or otherwise endorsed" the fair employment practices. The change implies that other less overt, and less asser-

tive ways of endorsing fair employment practices may be acceptable to the State Department, and a South African corporation might theoretically be eligible for Eximbank financing support without publicly communicating its endorsement of the fair employment practices. If, in fact, public endorsement is no longer required for certification, the goal of the United States Congress to push the private sector towards widespread reform through the "bandwagon" effect of public announcements will probably fail because the Evans Amendment does not provide any incentives for the private sector to force governmental reforms. On the other hand, the political and social opposition of South African whites to the implementation of fair employment practices could be minimized if the endorsements were made with a low profile.

V. CONCLUSIONS

The Evans Amendment is an example of legislation that had the opposite effect of that which was congressionally intended. The Amendment was designed as a compromise to keep the Eximbank in South Africa, but its effect has been the termination of Eximbank activity in that country.

The United States exporters that expected to be hurt by the termination of Bank activity have apparently been largely unaffected because of the availability of other financing sources, particularly within South Africa. As a result, foreign competitors with uninterrupted financing support from their own governments have failed to make significant inroads into the business of United States exporters in South Africa that were formerly supported by the Eximbank. From 1978 to 1980, United States exports to South Africa rose by 128 percent—²³² a favorable increase when compared to those experienced by the United Kingdom, West Germany, Japan, France, and Italy.²³³

The effect of the Evans Amendment on employment practices in South Africa is as yet undetermined, although it is known that between nineteen and twenty-four companies considered their practices progressive enough to apply for certification under the original State Department questionnaire, with three more compa-

232. 1974-80 TRADE STAT. Y.B., *supra* note 9, at 230.

233. Between 1978 and 1980, the United Kingdom experienced an 82% increase, *id.* at 377; West Germany a 64% increase, *id.* at 168; Japan an 83% increase, *id.* at 226; France a 58% increase, *id.* at 161; and Italy an 88% increase, *id.* at 218.

nies having applied under the revised questionnaire.²³⁴ United States companies, however, have stated that the Amendment did not cause them to urge South African purchasers to change their employment practices.

The Evans Amendment probably has had very little real effect on the policies of the South African Government, particularly with respect to the elimination of apartheid and the attainment of majority rule. The congressional condemnation of apartheid in the form of the Evans Amendment probably had a significant psychological impact on the South African Government, although it remains to be seen whether the Evans Amendment will ultimately be viewed as an isolated instance of legislative initiative or as the first significant step taken by the United States Government in its attempts to persuade the South Africans to adopt majority rule.

In a more global context, the reaction of the South African Government to the Evans Amendment supports the premise that governments will act to block the extraterritorial application of another nation's laws if those laws are regarded as having unfavorable political or economic consequences that outweigh the benefits of compliance. In the instant case, relatively minor changes in the wording of the questionnaire and in the substance of reporting requirements have tipped the balance in favor of compliance. Whether or not South African companies will be willing to abandon their alternate sources of financing and attempt to secure Eximbank financing support remains to be seen. From the middle of 1982 to May of 1984, only three companies filed applications under the revised procedures.²³⁵ Two have been certified by the Secretary of State so that they are now eligible for Eximbank support.²³⁶ However, no authorizations of any type have been made yet.²³⁷ Those South African companies that have found alternative sources of financing support may determine that the political risks involved in utilizing financial support from an agency of the United States Government are too great when

234. Interview with Emile Skodon, Economic Officer of Southern Africa Office, U.S. State Department (Feb. 15, 1984).

235. Interview of Robert Kott, Country Officer for South Africa, Department of State (May 21, 1985).

236. Interview of Alice Mayo, Financial Economist for Africa and Middle East, Export-Import Bank of the U.S. (May 21, 1985).

237. *Id.*

compared to the reliability of their alternative sources. In addition, South African purchasers may determine that the bureaucratic burdens imposed by the United States reporting requirements are too onerous or that the risks of disclosing their actual employment practices and then being subject to United States and international criticism are too great to switch to the Ex-
imbank for their financing support needs.

APPENDIX 1

LAWS COMPELLING RACIAL DISCRIMINATION²³⁸*Republic of South Africa Constitution Act, No. 32 of 1961*

Section 59 of the Act vests overriding sovereignty in Parliament. Sections 34 and 46, defining the qualifications of legislators, restrict these to "white persons."

Electoral Consolidation Act, No. 46 of 1946

Section 3 restricts the franchise to "white persons."

Population Registration Act, No. 30 of 1950

The Act establishes a register of all persons permanently resident in South Africa. Section 1 defines "Bantu" (black), a "white person" and a "coloured person" (one who is not a "white person" or a "Bantu"). Section 4 requires all persons permanently resident in South Africa to be registered, and Section 5 establishes a race classification procedure and certain presumptions. Productions of race documents to peace officers are compulsory under Section 14. Section 19 contains further presumptions, including, in subsection (1), that a person who in appearance is obviously a member of an aboriginal race or tribe of Africa is presumed to be a Bantu (black), unless it is proved that he is not, in fact, or that he is generally accepted as such a member. Race definitions in this Act are incorporated by reference into other legislation. (See examples mentioned below).

Group Areas Act, No. 36 of 1966

The Act imposes control throughout South Africa over interracial property transactions and interracial changes in occupation. Under the Act, South Africa is being divided geographically into areas in which eventually only persons of the same race will occupy or own land. The entire population is divided into racial groups under Section 12. "Disqualified persons" (defined in Section 1) are prohibited from acquiring or occupying land or premises in areas where they are "disqualified." Disqualification results from membership in a different racial group from that permitted to own or occupy the land or premises in question. Areas are divided into the controlled area, specified areas and group areas. The controlled area (Section 1) covers the entire country

238. As of 1978, the following laws were in effect and were vigorously enforced. This compilation was informally checked by a member of the South African consulate in New York in February 1982. Since the passage of the Evans Amendment, minor changes have been made in a few laws.

except the "reserves" already set aside for exclusive black occupation. Specified areas are areas in transition to group areas, where certain disqualifications are suspended during the transition stage. Group areas represent final racial demarcations. Prohibitory provisions are *Section 13, 14, 15, 20* controlled areas; *Section 17* specified areas; and *Sections 26 and 27* group areas. Pursuant to delegated powers under the Act, proclamations have been issued defining occupation. *Proclamation No. 288, 1973* identifies the partaking of refreshments, attending class, and engaging in certain other activities by disqualified persons as crimes. *Proclamation No. 329, 1957*, effectively prohibits a black from being employed as a "charge-hand, executive professional, technical or administrative employee, manager or supervisor" in a business in a white area.

Reservations of Separate Amenities Act, No. 49 of 1953

The Act provides for race differentiation and discrimination in the reservation of public premises and vehicles. *Section 1* makes it an offense for anyone to enter or use a segregated vehicle or premises designated for a race other than his own, while *Section 3* expressly sanctions inequalities in demarcating separate facilities. *Section 2A*, read with *Section 1* empowers segregation on beaches. The definitions of "public premises" and "public vehicle" in *Section 1* are extremely broad. *Section 4* excludes foreign diplomats and foreigners travelling on official business in South Africa who have obtained certificates from the Secretary of External Affairs that specifically exclude them from the operation of the Act.

Railways and Harbours Control and Management (Consolidation) Act, No. 70 of 1957

Section 7 provides for racial segregation on rail transportation and railroad premises.

Motor Carrier Transportation Act, No. 39 of 1930

Section 13(2)(i)bis permits motor carrier certificates to provide for segregated service.

Industrial Conciliation Act, No. 28 of 1956

This Act sets up the mechanism for collective bargaining. *Section 1* defines "employee" to exclude blacks, and then defines "trade union," to include "employees," and, therefore, precludes blacks from the collective bargaining process. *Section 77* empowers the Minister of Labour to make a determination reserving certain occupations to a particular racial group.

Mines and Works Act, No. 27 of 1956

Section 12(2)(a) (replacing the corresponding provisions of Act 25 of 1926) empowers the authorities to restrict "certificates of competency" for mines to whites and coloureds only, i.e., excluding blacks.

Factories, Machinery and Building Works Act, No. 22 of 1941

Section 51(h)bis provides for enforcing racial separation in factories.

Prohibition of Mixed Marriages Act, No. 55 of 1949

This act prohibits marriages between "Europeans" and "Non-Europeans." Appearance is presumptive of race under *Section 3*. "European" generally means "white" and "non-European" means "non-white" in South Africa.

The Immorality Act, No. 23 of 1957

Section 16 makes sexual relations between races a crime.

Bantu (Urban Areas) Consolidation Act, No. 25 of 1945

The Act tightly regulates blacks in urban areas. *Section 1* defines "Bantu" as similarly defined under the Population Registration Act. *Section 2* provides for separate areas within urban areas for "Bantu occupation." *Section 6* prohibits any black from acquiring any right to own or lease land in urban areas. *Section 9* sets up machinery for enforcing segregation of "Bantus" in such areas: *Subsections (5) and (5) bis* provide penalties for blacks being in non-black areas. *Subsections (6) and (7)* restrict black attendance at schools, churches, hospitals, and social gatherings. *Section 9* prohibits "non-Bantus" from entering segregated Bantu areas. *Section 10* is the notorious provision prohibiting blacks (except under very restrictive exceptions) from being in any urban area for more than 72 hours. *Section 12* prohibits "foreign Bantus" from being in urban areas without permission from the Secretary for Bantu Affairs. *Section 28* provides for the forcible removal of blacks who are in excess of the labor requirements (termed "redundant Bantu") from urban areas. *Section 29* sets up a procedure for detaining and trying "idle or undesirable Bantus." *Section 31* empowers local authorities to impose a curfew on blacks.

Bantu Labour Act, No. 67 of 1964

The Act regulates "contract" black labour, sets up a complex machinery for controlling the movement of blacks who seek work, and sets up labour bureaus for blacks.

Bantu Building Workers Act, No. 27 of 1951

The Act prohibits blacks from performing skilled work in certain areas.

Bantu (Abolition of Passes and Co-ordination of Documents) Act, No. 67 of 1952

The Act provides for the carrying of "reference books" by all blacks, containing *inter alia* particulars of contracts of services or employment. Nonpossession and nonproduction of reference books are crimes. *Section 1* defines "Bantu" the same as in *Section 1* of the Population Registration Act.

Bantu Labour (Settlement of Disputes) Act, No. 48 of 1953

The Act prevents strikes by blacks except under certain limited conditions.

Bantu Education Act, No. 47 of 1953

The Act sets up separate schools for blacks and makes it a crime to conduct a school or class for "Bantus" without official permission.

Extension of University Education Act, No. 45 of 1959

Section 32 prohibits "non-white" students from registering and enrolling at "white universities."

LAWS REPRESSING POLITICAL DISSENT²³⁹

Suppression of Communism Act, No. 44 of 1950

The Act outlaws the Communist Party of South Africa and any organization that furthers the aims of communism. Broadly defined, communism includes "any other doctrine which aims at changing the existing order of things in South Africa."

Section 5 of the General Law Amendment Act 37 of 1963 added two capital offenses to the Suppression of Communism Act: (1) Any past or present resident of South Africa who, while outside South Africa, advocates (a) the intervention of a foreign power or institution in achieving change in South Africa or (b) any of the objects of communism, as defined in the Act, is guilty of a capital offense; (2) Any past or present resident of South Africa who undergoes, incites, or encourages anyone else to undergo any sort of training which could further the achievements of any of the objects of communism or receive information which could be of use in furthering the achievements of any of the objects of communism is also guilty of a capital offense.

The Public Safety Act, No. 3 of 1953

The Act empowers the State President to declare a state of

239. The following list was compiled from J. JACKSON, *Justice in South Africa* 26-49 (1980).

emergency for a period of twelve months and enact such regulations as appear necessary for the public safety. The Act was designed to empower the government to prohibit mass protests organized by the African National Congress and the South African Indians Congress. The penalty for violating the regulations was, as of 1980, a fine not exceeding R1000 (roughly \$1000) or five years imprisonment or both. The Act, as amended, permits the indefinite detention of any persons, subject to parliament receiving the names of detained persons after the lapse of thirty days.

The Criminal Law Amendment Act, No. 8 of 1953

This Act also is designed to counter mass protests. A protest is defined under the Act to occur when two or more persons commit similar offenses at the same time and place. Penalties provided under the Act are a fine not exceeding R600, three years imprisonment, or ten strokes, or any two of the aforementioned penalties. Anyone inciting or in any manner encouraging a protest is liable for a fine of R1000 or five years imprisonment or 10 strokes or any two of the aforementioned penalties. Anyone assisting in a protest campaign is subject to these same penalties.

The Riotous Assemblies Act, No. 17 of 1956

This Act makes it an offense to induce anyone by means of violence, threat, or restraint to do or not to do any act. (Under this section, all pupils associated with the composition, printing, and distribution of pamphlets for the peaceful boycotts of schools were successfully prosecuted.) The Act provides for a fine of up to R10,000, imprisonment of up to five years, or ten strokes, or any two of the aforementioned penalties. These penalties apply to anyone criticizing another who ignores a boycott.

The Prisons Act, No. 8 of 1959

This Act is designed to censor increasing newspaper reports of prison brutality and mistreatment. It prohibits the publishing of any false information concerning prisons with the knowledge that such information is false or without taking reasonable steps to verify such information. The burden of proving that reasonable steps have been taken is on the accused. Because of court decisions relating to what constitutes reasonable steps, the effect of the Act has been to inhibit reporting on prisons and prisoners. It is also an offense to sketch or photograph prisons or prisoners during or just prior to detention. Sketches or photographs of persons who have been executed or who have died in custody are also prohibited. Penalties for violating the Act are a fine of \$200 or imprisonment of one year.

The Unlawful Organization Act, No. 34 of 1960

This Act bans black political organizations and was aimed particularly at the African National Congress (ANC) and the Pan Africanist Congress (PAC). The banning was followed by a series of arrests and political trials which stretched into 1966 and which ended with nearly all the leaders of the ANC and PAC imprisoned. The Act put an end to lawful opposition by these parties. It also spurred the formation of black organizations advocating planned violence against governmental and municipal institutions.

The Publications and Entertainment Act, No. 26 of 1963

This Act prohibits the publication of undesirable material including anything that brings any section of the inhabitants of the Republic into ridicule or contempt, or that harms the relations between any sections of the inhabitants of the Republic. The Act is used to censor any material which tends to show the oppression of the black inhabitants by the whites.

The Civil Defense Act, No. 39 of 1966

The Act empowers the Minister of Defense to declare a state of emergency and to invoke powers in addition to those already provided in other enactments. These new powers include provisions for the takeover of property, the seizure of anything in the possession of suspicious persons, and the conscription and training of persons between the ages of seventeen and sixty-five.

General Law Amendment Act, No. 62 of 1966

Section 22 of this Act permits a commissioned police officer to hold a person in detention for fourteen days incommunicado if he has reason to believe that the person is a terrorist or favors terrorist activities or has committed or intends to commit offenses under the Suppression of Communism Act (Act 44 of 1950). These provisions were invoked during the unrest of 1977-78. They gave security police the time to interrogate persons and obtain confessions without interference from their families or their lawyers.

The Terrorism Act, No. 83 of 1967

This Act defines terrorism as any activity likely to endanger the maintenance of law and order and whose results may promote or cause general dislocation, disturbance or disorder; prejudice to any industry or undertaking; the achievement of any political aim, including the bringing about of any social or economic change, by violent or forcible means; financial loss to any person of the State; hostility between the races in the Republic; obstruc-

tion to any movement of traffic on land, at sea or in the air; or embarrassment to the administration of the affairs of state. *Section 6* provides for indefinite detention without trial.

This Act was used in 1976 to convict nine members of the black consciousness movement following a trial in which the movement's philosophy was at issue. The court extended the definition of terrorism to include rebellious thoughts.

The Public Service Amendment Act, No. 101 of 1969

The Act creates the Bureau of State Security (now known as the Department of National Security). The Department gathers information by surveillance, mail interception, agents, and since further enactments in 1976, telephone surveillance.

Section 29 authorizes the Prime Minister or his nominee, the head of the Department, or any cabinet minister to prohibit the giving of any evidence or the production of any document to any court or statutory body if the evidence or document, in the official's opinion, is prejudicial to the interests of the State or public security.

The Affected Organizations Act, No. 31 of 1974

The Act empowers the State President to declare an organization affected if he is satisfied that it is engaged in politics in cooperation with, or under the influence of, a foreign organization or person. Once an organization is declared affected, it becomes a criminal offense to canvass or bring money into South Africa on behalf of such organization. Penalties for a first offense are a fine not exceeding R10,000 or five years' imprisonment and for a second offense, penalties are a fine not exceeding R20,000 or ten years' imprisonment. This Act effectively restricts foreign organizations from assisting organizations in South Africa seeking to alleviate the oppression of blacks.

Amendment to the Riotous Assemblies Act, No. 30 of 1974

This amendment increases the power of the police to disperse gatherings. The amendment redefined a gathering from a group of twelve or more people to a group of two or more. Earlier provisions required a magistrate to obtain authority from the Minister of Justice to ban a gathering. The amendment, however, delegated this authority to the magistrate for a period of 48 hours. The amendment also withdrew a requirement that the police give warnings before dispersing a crowd by force. Finally, under the amendment, any police officer was empowered to close any place, whether public or private, where he believed a prohibited gathering might take place.

The Internal Security Act, No. 79 of 1976

This Act widens the scope of the Suppression of Communism Act by permitting the Minister of Justice to ban anyone who, in his opinion, "engages in activities which endanger or are calculated to endanger the security of the State or the maintenance of public order." The Act also provides for detention without trial and the formation of a review board to review each detention within two months of imposition. The courts are specifically excluded from reviewing the decision of the review board and the Minister of Justice may disregard the advice of the review board.

The New Criminal Procedure Act, No. 51 of 1977

Section 112 drops the requirement that the police provide evidence to support a criminal defendant's plea of guilty. Thus, no evidence is required to convict a defendant who pleads guilty as a result of coercion or trickery. *Section 217* places the burden of proof on the defendant to prove that a confession made in writing before a magistrate was not made freely and voluntarily. *Section 218* provides that in cases where a confession is found inadmissible, facts found as a consequence of an inadmissible confession are themselves admissible.

The Lower Courts Amendment Act, No. 91 of 1977

This Act expands the jurisdiction of regional magistrates' courts to hear sabotage and terrorism cases. Prior to the Act only the Supreme Court had jurisdiction to hear such cases. The Act was passed in response to the Soweto riots of 1976 and was designed to increase the speed with which convictions could be obtained. By placing these cases in the lower courts the government also removed control of these cases from judges appointed for life terms to magistrates who, as civil servants, depend entirely on the Department of Justice for promotion and salary. The Minister of Justice could therefore exercise greater influence on the outcome of cases.

FORM DS-1800
10-78

DEPARTMENT OF STATE
QUESTIONNAIRE FOR PURCHASERS IN THE
REPUBLIC OF SOUTH AFRICA FOR PURPOSES OF CERTIFICATION
UNDER THE EXPORT-IMPORT BANK ACT OF 1945, AS AMENDED

PURPOSE

This questionnaire requests information necessary for the Department of State to carry out its certification functions under section 2(b)(8)(c) of the Export-Import Bank Act of 1945, as amended.

This section of the act requires the Secretary of State to certify that any purchaser located in South Africa benefiting from Export-Import Bank guarantees or insurance has endorsed and proceeded toward the implementation of the following principles:

- Nonsegregation of the races in all work facilities;
- Equal and fair employment for all employees;
- Equal pay for equal work for all employees;
- Initiation and development of training programs to prepare nonwhite South Africans for supervisory, administrative, clerical, and technical jobs;
- Increasing the number of nonwhites in management and supervisory positions;
- A willingness to engage in collective bargaining with labor unions; and
- Improving the quality of life for employees in areas such as housing, transportation, schooling, recreation, and health facilities.

The purpose of this questionnaire is to give purchasers the opportunity to record their endorsement and describe in specific terms the measures they have taken towards the implementation of these principles.

All purchasers in the Republic of South Africa importing U.S. goods and services for which guarantees or insurance have been requested from the Export-Import Bank, or from Bank-supported programs of the Foreign Credit Insurance Association, must complete this questionnaire and return it to the U.S. Embassy.

Additional questionnaires are available at the Export-Import Bank and at the Department of State in Washington, D.C., and at the U.S. Embassy and U.S. consulates in the Republic of South Africa.

GENERAL INSTRUCTIONS

Answers should include consolidated information on all corporate divisions and subsidiaries. These should be appropriately identified in question number 6.

Where a question requests statistical or other data in a certain form, but is most easily made available by the purchaser in a different form which is substantively equivalent, this may be provided with appropriate explanation. Additional statistical data may be provided, even where not specifically requested, to supplement a response to any question in the form most convenient for the purchaser. All answers to questions referring to "nonwhite employees" should be provided, broken down into the following categories: blacks, coloreds, and Asians. Detailed replies to all questions will facilitate making the required determination.

Purchasers will be contacted and provided with the name of a U.S. Embassy or consulate officer responsible for providing assistance and resolving any special problems in completing this questionnaire.

Please note that the completed questionnaire will be available to the general public, except for portions which the Department of State determines to contain trade secrets or proprietary or confidential business information. Any information which the purchaser believes would fall into this category and which it deems necessary to include in its responses to this questionnaire should be clearly identified as such. The Department of State will make every effort to afford such information appropriate protection from unauthorized disclosure consistent with U.S. law.

Purchasers are responsible for complying with all applicable South African laws in connection with submitting this questionnaire.

EXPLANATION OF CERTIFICATION PROCESS

The self-described performance of the purchaser contained in the questionnaire will be a basis for the Department's certification procedure. The completed questionnaire will be evaluated by the U.S. Mission in South Africa, a process which will include, *inter alia*, on-site visits, employee interviews, and discussions with labor organizations and other interested groups and individuals. In all appropriate cases (e.g., interviews with employees on work premises), the consent of the purchaser will be requested. If it appears necessary, supplemental information may be requested in writing from the purchaser.

In the initial certification decision for a purchaser, the information in the questionnaire, and information developed by the U.S. Mission, will be examined for satisfactory evidence that the purchaser has endorsed the principles contained in the act, and, within the 2 years preceding the date the questionnaire was submitted, has taken reasonable steps toward implementing each of the principles.

Certifications will be reconsidered annually, and the questionnaire and evaluation procedure will be utilized to make each certification decision. Subsequent annual certifications will require the purchaser to demonstrate sustained progress towards implementing the principles, measured against the record of the purchaser's previous submissions, including its implementation plans. Thus, certification under the act should be seen as an evolving process, based on criteria relevant to each purchaser and its lines of business.

The U.S. Embassy, using the questionnaire and other information developed in the certification process, will prepare for the Department of State its recommendation regarding certification. The Department in turn will conduct its own review of the case in light of the Embassy's report, including appropriate interagency and other consultations, and prepare a final recommendation to the Secretary of State or his delegate.

If the Secretary of State declines to certify the purchaser, or if the U.S. Embassy notifies the Department that a purchaser has not complied with certification requirements, the Export-Import Bank will be so advised by the Department, and the U.S. applicant for Export-Import Bank support in turn will be informed by the Bank that it cannot proceed with the application.

Certifications of purchasers will be valid for a 12-month period beginning on the date the Export-Import Bank is notified of certification and for all transactions involving sales to such purchasers for which the Bank is asked to provide guarantees or insurance during this period. The Bank's normal operating procedures will be in effect for all purchasers with valid certifications.

Purchasers will be informed by the U.S. Embassy of the Department's final action on certification at the same time the Bank is notified of the decision.

| DEPARTMENT OF STATE QUESTIONNAIRE FOR PURCHASERS IN THE REPUBLIC OF SOUTH AFRICA FOR PURPOSES OF CERTIFICATION UNDER THE EXPORT-IMPORT BANK ACT OF 1945, AS AMENDED | | |
|---|--|--------------------------|
| I. BASIC PURCHASER INFORMATION | | |
| 1. NAME OF PURCHASER | 2. ADDRESS OF HEAD OFFICE | |
| 3. PLACE OF INCORPORATION | | |
| 4. If the purchaser is a subsidiary of another company, provide items 1 - 3 for parent company also. | | |
| 5. To what extent, if any, does the South African Government have an equity interest in the purchaser? | 6. Describe the general lines of business activities of the purchaser. | |
| II. ENDORSEMENT OF PRINCIPLES | | |
| | Yes | No |
| 7. Does the company endorse the following fair employment principles as set forth in section 2(b)(8) (c) of the Export-Import Bank Act of 1945, as amended? | | |
| ● Nonsuppression of the races in all work facilities. | <input type="checkbox"/> | <input type="checkbox"/> |
| ● Equal and fair employment for all employees. | <input type="checkbox"/> | <input type="checkbox"/> |
| ● Equal pay for equal work for all employees. | <input type="checkbox"/> | <input type="checkbox"/> |
| ● Initiation and development of training programs to prepare nonwhite South Africans for supervisory, administrative, clerical, and technical jobs. | <input type="checkbox"/> | <input type="checkbox"/> |
| ● Increasing the number of nonwhites in management and supervisory positions. | <input type="checkbox"/> | <input type="checkbox"/> |
| ● Willingness to engage in collective bargaining with labor unions. | <input type="checkbox"/> | <input type="checkbox"/> |
| ● Improving the quality of life for employees in areas such as housing, transportation, schooling, recreation, and health facilities. | <input type="checkbox"/> | <input type="checkbox"/> |
| How has this endorsement been communicated to all your personnel? Please provide any written evidence of such endorsement (corporate resolutions, company announcements or publications, annual reports, etc.), if available. | | |

III. NONSEGREGATION OF THE RACES IN ALL WORK FACILITIES

8. Describe the measures taken in the past 2 years towards integration of work facilities and describe any plans for future action in this area. This description in particular should fully explain implementation plans with respect to all facilities indicated as "being integrated" in the following question. Integration in this context means equal access by all races to the same facilities.

(This area is left blank for the respondent to provide a detailed description of integration measures and future plans.)

9. Provide the following information:

| | Integrated | Seperate | Being Integrated | N/A |
|---|--------------------------|--------------------------|--------------------------|--------------------------|
| All Facilities | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (If integrated, go on to next question) | | | | |
| Food Service | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Dining Area | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Toilet/Shower Facilities | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Work Areas | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Locker Rooms | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Medical Facilities | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Recreation Areas | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Living Quarters | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

IV. EQUAL AND FAIR EMPLOYMENT FOR ALL EMPLOYEES

10. Describe, with reference to specific measures during the past 2 years, steps the company has taken to advance the goal of equal and fair employment practices, terms and conditions for all employees, and indicate future objectives in this area. In particular, please include a description of general employee benefits; for example, medical, pension, and insurance benefits, and indicate whether such benefit programs are fully integrated and available on an equal basis to white and nonwhite employees; whether costs and coverage are the same for both; the number of white and nonwhite employees who are beneficiaries of such programs; and the relative amounts spent by the purchaser on such programs or benefits for white and nonwhite employees.

11. Has the company established a comprehensive procedure for handling and resolving individual employee complaints on a nondiscriminatory basis? Describe.

12. Has the company publicly supported elimination of industrial discriminatory laws which impede the implementation of equal and fair employment practices, such as job reservations and nonwhite apprenticeship restrictions?

V. EQUAL PAY FOR EQUAL WORK FOR ALL EMPLOYEES

13. Describe how your wage and salary structure gives effect to the objective of equal pay for equal work for all employees. Please indicate any specific steps taken in the past 2 years to advance this objective, and any plans for future action in this area.

14. In particular, for each of the past 2 years, provide specific information on average wages and average wage increases, by grade and race, consistent with the descriptions in question 18, with any necessary explanation of differences in wages or rates of wage increases between races in the same grade.

VI. INCREASING THE NUMBER OF NONWHITES IN MANAGEMENT AND SUPERVISORY POSITIONS; INITIATION AND DEVELOPMENT OF TRAINING PROGRAMS TO PREPARE NONWHITE SOUTH AFRICANS FOR SUPERVISORY, ADMINISTRATIVE, CLERICAL, AND TECHNICAL JOBS

15. What has the company done to promote job advancement for nonwhite employees? Describe the firm's policy in this area, in particular your policy and practice regarding nonwhites in supervisory positions. Please include specific information on the number of nonwhite employees who have moved into job categories formerly limited to whites in each of the past 2 years and describe any future objectives in this area.

16. Describe the training offered to prepare your workers for supervisory, administrative, clerical, and technical employment. For each of the past 2 years, please include information on the kinds of programs offered and indicate whether such programs are offered to all races on an equal basis; the number of participants in each program, by race; and the total amount spent on training, by race.

17. How many people of each race does your company employ?

- Blacks _____
- Whites _____
- Colorads _____
- Asians _____

18. What proportion of each race is in each grade?

| | Blacks | Whites | Colorads | Asians |
|--------------------|--------|--------|----------|--------|
| Senior Management | | | | |
| Middle Management | | | | |
| Lower Management | | | | |
| Senior Clerical | | | | |
| Middle Clerical | | | | |
| Lower Clerical | | | | |
| Higher Skilled | | | | |
| Lower Skilled | | | | |
| Higher Semiskilled | | | | |
| Lower Semiskilled | | | | |
| Unskilled | | | | |

VII. WILLINGNESS TO ENGAGE IN COLLECTIVE BARGAINING WITH LABOR UNIONS

19. Describe company policy with regard to insuring respect of equal trade union rights and opportunities for all employees regardless of race. Is the company willing to engage in collective bargaining with nonwhite labor unions? Does your firm have a set of conditions under which you will recognize and negotiate with nonwhite unions? Has this policy been communicated to all employees?

20. How are your nonwhite employees in fact represented? On whose initiative was the representative institution created?

21. Are wages negotiated with employee representatives from all employee racial groups? If not, how are they determined?

22. Describe the extent of your dealings with nonwhite unions during the past 2 years, including attempts to organize and requests of organizers for access to facilities.

VIII. IMPROVING THE QUALITY OF LIFE FOR EMPLOYEES IN SUCH AREAS
AS HOUSING, TRANSPORTATION, SCHOOLING, RECREATION, AND
HEALTH FACILITIES

23. Describe the measures the purchaser has taken in the past 2 years, and future plans, to improve the quality of life of nonwhite employees, and where applicable, their dependents, outside the work environment in housing, transportation, education, recreation, health facilities, and other areas. Examples might include literacy education programs, scholarships and other educational assistance, financial assistance for housing, special programs for migrant workers, including measures to keep families of migrant workers united, etc. Please include information as to whether all such company benefits or programs are available on an equal basis to white and nonwhite employees; whether costs and coverage are the same for both; the number of beneficiaries, by race, of all such programs; and the amount spent on such programs, by race.

24. In areas where laws and regulations relating to race cause recurrent problems for your employees (such laws, Group Area Act, etc.), what provision do you make to improve the quality of life by counseling and assistance (including legal assistance) in dealing with the authorities?

IX. GENERAL

25. Please be sure to provide any other information which you believe is relevant to making the required certification in your case.

STATUTES OF THE REPUBLIC OF SOUTH AFRICA— TRADE AND INDUSTRY

PROTECTION OF BUSINESSES ACT
NO. 99 OF 1978

[ASSENTED TO 20 JUNE, 1978]

[DATE OF COMMENCEMENT: 4 AUGUST, 1978]

(English text signed by the State President)

as amended by

Protection of Businesses Amendment Act, No. 114 of 1979

ACT

To restrict the enforcement in the Republic of certain foreign judgments, orders, directions, arbitration awards and letters of request; to prohibit the furnishing of information relating to businesses in compliance with foreign orders, directions or letters of request; and to provide for matters connected therewith.

1. Prohibition of enforcement of certain foreign judgments, orders, directions, arbitration awards and letters of request and furnishing of information relating to businesses in compliance with foreign orders, directions or letters of request.—(1) Notwithstanding anything to the contrary contained in any law or other legal rule, and except with the permission of the Minister of Economic Affairs—

- (a) no judgment, order, direction, arbitration award or letters of request delivered, given or issued or emanating from outside the Republic and arising from any act or transaction contemplated in subsection (3), shall be enforced in the Republic;
- (b) no person shall in compliance with any order, direction or letters of request issued or emanating from outside the Republic, furnish any information as to any business whether carried on in or outside the Republic.

(2) The permission contemplated in subsection (1) (b) may—

- (a) be granted either by notice in the *Gazette* or by written authority addressed to a particular person;
- (b) be granted subject to such conditions as the said Minister may deem fit;
- (c) relate only to specified goods or businesses or classes of goods or businesses, or to orders, directions or letters of request issued in or emanating from a specified country;
- (d) if it is granted by notice in the *Gazette*, relate only to specified persons or classes of persons.

(3) In the application of subsection (1) (a) an act or transaction shall be any act or transaction which took place at any time, whether before or after the commencement of this Act, and is connected with the production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic.

[Sub-s. (3) substituted by s. 1 of Act No. 114 of 1979.]

2. Offences and penalties.—Any person who contravenes the provisions of section 1 (1) (b) shall be guilty of an offence and on conviction liable to a fine not exceeding two thousand rand or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(Issue No. 13)

STATUTES OF THE REPUBLIC OF SOUTH AFRICA — TRADE AND INDUSTRY
ss. 3-4 *Protection of Businesses Act, No. 99 of 1978* ss. 3-4

3. Repeal of sections 2 of Act 94 of 1974.—Section 2 of the Second General Law Amendment Act, 1974, is hereby repealed.

4. Short title and commencement.—This Act shall be called the Protection of Businesses Act, 1978, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.

APPENDIX 4

QUESTIONNAIRE FOR PURCHASERS IN THE REPUBLIC
OF SOUTH AFRICA

This questionnaire shall be completed by purchasers in the Republic of South Africa who wish to benefit from programs of the Export-Import Bank of the United States, or from bank-supported programs of the foreign credit insurance corporation. To be eligible for such benefits purchasers must receive certification that they have endorsed and are proceeding toward implementation of the fair employment principles set out in question number seven.

Completion of this questionnaire is the first step in the certification process. The completed questionnaire should be submitted to the United States Embassy or the nearest U.S. consulate in the Republic of South Africa. The Embassy or consulates may find it necessary to verify the information in this questionnaire with visits to the purchaser by their personnel, interviews with the purchaser's employees, discussions with other interested groups, or by other means. The consent of the purchaser will be requested in such cases.

After the initial evaluation is completed, the completed questionnaire and all relevant information will be forwarded to the United States Department of State, which will decide whether to grant the necessary certification. The Export-Import Bank of the United States will then be informed of the final decision on certification. If the certification is issued, the bank's normal operating procedures will apply. If certification is denied, the bank will so inform the purchaser and cease processing the application.

A new application providing additional information may be submitted at any time. Certifications will remain valid for all transactions for one year from the date that the Department of State informs the Export-Import Bank that a certification has been issued. Subsequent certifications will be required so that progress toward implementation of the fair employment principles can be demonstrated.

Purchasers may submit additional information beyond that required in the questionnaire. All answers to questions referring to "non-white" employees should be broken down into answers for blacks, coloreds, and asians. Answers should include consolidated information on all corporate divisions. In the course of the certification process, information may be requested concerning any cor-

porate parents or concerning subsidiaries which would benefit directly from the proposed purchase. The completed questionnaire will be available to the general public, except for portions which the Department of State of the United States determines contain proprietary information. The purchaser should indicate any information which is considered to be proprietary.

Questions about this questionnaire and requests for additional copies should be submitted to the U.S. Embassy or a U.S. consulate in the Republic of South Africa.

I. BASIC PURCHASER INFORMATION

1. Name of Purchaser
2. Address of Head Office
3. Place of Incorporation
4. If the purchaser is a subsidiary of another company please provide items 1-3 above for parent company also. If any subsidiaries of the purchaser would benefit directly from the proposed purchase, please provide items 1-3 for all such subsidiaries.
5. To what extent, if any, does the South African Government have an equity interest in the purchaser?
6. Please describe the general lines of business activities of the purchaser.

II. ENDORSEMENT OF PRINCIPLES

7. Does the company endorse the following fair employment principles?

| | | |
|--|-----|----|
| —Non-segregation of the races in all work facilities. | YES | NO |
| —Equal and fair employment for all employees. | YES | NO |
| —Equal pay for equal work. | YES | NO |
| —Initiation and development of training programs to prepare non-white South Africans for supervisory, administrative, clerical and technical jobs. | YES | NO |
| —Increasing the number of non-whites in management and supervisory positions. | YES | NO |
| —A willingness to engage in collective bargaining with labor unions. | YES | NO |
| —Improving the quality of life for employees in such areas as housing, transportation, schooling, recreation, and health facilities. | YES | NO |

Has this endorsement been communicated to all your personnel? Please provide any written evidence of such endorsement (corporate resolutions, company announcements or publications, annual reports, etc.), if available.

III. NON-SEGREGATION OF THE RACES IN ALL WORK FACILITIES

8. Describe the measures taken in the past 2 years towards integration of work facilities and describe any plans for future action in this area. This description in particular should fully explain implementation plans with respect to all facilities indicated as "being integrated" in the following question. Integration in this context means equal access by all races to the same facilities.

9. Provide the following information:

| | Being | | |
|--|------------|----------|----------------|
| | Integrated | Separate | Integrated N/A |

All facilities

(If integrated, go on to next question)

Food service

Dining area

Toilet/shower facilities

Work areas

Locker rooms

Medical facilities

Recreation areas

Living quarters

IV. EQUAL AND FAIR EMPLOYMENT FOR ALL EMPLOYEES

10. Describe, with reference to specific measures during the past 2 years, steps the company has taken to advance the goal of equal and fair employment practices, terms and conditions for all employees, and indicate future objectives in this area. In particular, please include a description of general employee benefits; for example, medical, pension, and insurance benefits, and indicate whether such benefit programs are fully integrated and available on an equal basis to white and non-white employees; whether costs and coverage are the same for both; the number of white

and non-white employees who are beneficiaries of such programs; and the relative amounts spent by the purchaser on such programs or benefits for white and non-white employees.

11. Has the Company established a comprehensive procedure for handling and resolving individual employee complaints on a non-discriminatory basis? Describe.

12. Has the company publicly or otherwise endorsed the elimination of discriminatory employment practices which are contrary to the principle of equal and fair employment opportunities?

V. EQUAL PAY FOR EQUAL WORK FOR ALL EMPLOYEES

13. Describe how your wage and salary structure gives effect to the objective of equal pay for equal work for all employees. Please indicate any specific steps taken in the past 2 years to advance this objective, and any plans for future action in this area.

14. In particular, for each of the past 2 years, provide specific information on average wages and average wage increases, by grade and race, consistent with the descriptions in question 13, with any necessary explanation of differences in wages or rates of wage increases between races in the same grade.

VI. INCREASING THE NUMBER OF NON-WHITES IN MANAGEMENT AND SUPERVISORY POSITIONS; INITIATION AND DEVELOPMENT OF TRAINING PROGRAMS TO PREPARE NON-WHITE SOUTH AFRICANS FOR SUPERVISORY, ADMINISTRATIVE, CLERICAL, AND TECHNICAL JOBS

15. What has the company done to promote job advancement for non-white employees? Describe the firm's policy in this area, in particular your policy and practice regarding non-whites in supervisory positions. Please include specific information on the number of non-white employees who have moved into job categories formerly limited to whites in each of the past 2 years and describe any future objectives in this area.

16. Describe the training offered to prepare your workers for supervisory, administrative, clerical and technical employment. For each of the past 2 years, please include information on the kinds of programs offered and indicate whether such programs are offered to all races on an equal basis, the number of participants in each program, by race, and the total amount spent on training, by

race.

17. How many people of each race does your company employ?

--Blacks_____

--Whites_____

--Coloreds_____

--Asians_____

18. What proportion of each race is in each grade?

Blacks Whites Coloreds Asians

—Senior Management

—Middle and Lower
Management

—Clerical Workers

—Skilled Labor

—Unskilled Labor

VII. WILLINGNESS TO ENGAGE IN COLLECTIVE BARGAINING WITH LABOR UNIONS

19. Describe company policy with regard to insuring respect of equal trade union rights and opportunities for all employees regardless of race. Is the company willing to engage in collective bargaining with non-white labor unions? Does your firm have a set of conditions under which you will recognize and negotiate with non-white unions? Has this policy been communicated to all employees?

20. How are your non-white employees in fact represented? On whose initiative was the representative institution created?

21. Are wages negotiated with employee representatives from all employee racial groups? If no, how are they determined?

22. Describe the extent of your dealings with non-white unions during the past 2 years, including attempts to organize and requests of organizers for access to facilities.

VIII. IMPROVING THE QUALITY OF LIFE FOR EMPLOYEES IN SUCH AREAS AS HOUSING, TRANSPORTATION, SCHOOLING, RECREATION, AND HEALTH FACILITIES.

23. Describe the measures the purchaser has taken in the past 2 years, and future plans, to improve the quality of life of non-white employees, and where applicable, their dependents, outside the work environment in housing, transportation, education, recreation, health facilities, and other areas. Examples might include

literacy education programs, scholarships and other educational assistance, financial assistance for housing, special programs for migrant workers, including measures to keep families of migrant workers united, etc. Please include information as to whether all such company benefits or programs are available on an equal basis to white and non-white employees; whether costs and coverage are the same for both; the number of beneficiaries, by race, of all such programs; and the amount spent on such programs, by race.

24. In areas where laws and regulations relating to race cause recurrent problems for your employees (pass laws, group areas act, etc.), what provision do you make to improve the quality of life by counseling and assistance (including legal assistance) in dealing with the authorities?

IX. GENERAL

25. Please provide any additional information you believe relevant.

