

Memorandum

D

NOV. 5 1974

B-135075-a.m., Feb. 14, 1975

TO : General Counsel

FROM : Associate Director, ID - J. E. Milgate

RECEIVED
GAS... FILES

1974 NOV 5 4 24

SUBJECT: Legality of Using Trust Funds to Supplement Appropriation Limitation on the Inter-American Foundation (Code 48672)

During fiscal year 1974, the Inter-American Foundation (a U.S. Government Corporation), obligated funds in excess of the program limitation established in its appropriation act by utilizing money obtained from the Social Progress Trust Fund, which is administered for the U.S. by the Inter-American Development Bank (an international organization). Each year the Congress places a limitation on the amount available to carry out the Foundation's authorized program. We need to know whether the Trust Fund money utilized by the Foundation was a part of the Foundation's program that was subject to the limitation.

The Foreign Assistance Act of 1969 established the Inter-American Social Development Institute, now called the Inter-American Foundation. Financing was provided through the transfer of \$50 million previously appropriated for the Agency for International Development. Each year the Congress has established a limitation on the amount it believes is necessary to carry out the Foundation's authorized programs. The limitation was \$10 million for fiscal year 1971, \$10 million in fiscal year 1972, and \$5 million in 1973.

For fiscal year 1974, the Foundation asked the Congress for \$15 million. However, the Congress authorized the Foundation to make such expenditures within the limits of funds available to it and in accordance with the law as may be necessary in carrying out its authorized programs during the current fiscal year, provided that not to exceed \$10,000,000 shall be available to carry out the authorized programs during the current fiscal year. (Pub. L. No. 93-240, Stat. 1051.) The Foundation actually obligated a combined total of \$15.7 million -- \$5.7 million in excess of the congressional limitation. All the excess consisted of obligations of funds obtained from the Social Progress Trust Fund.

The Trust Fund monies were acquired as a result of the Foreign Assistance Act of 1973 (Pub. L. No. 93-189, Stat. 734) which contains a provision directing the President or his delegate to seek a revision of the Social Progress Trust Fund Agreement to provide for the periodic transfer of a portion of the repayments of the Trust Fund to the Inter-American Foundation. The Foundation and the Bank signed an agreement on December 20, 1973, granting the Foundation up to \$5 million in local currencies from the Trust Fund in fiscal year 1974 and up to \$25 million in the three subsequent fiscal years. (See attachment 1.)

The Bank President told the Foundation that the Bank would have no objection to the auditors of the U.S. Government treating funds made available under the agreement in the same manner as monies appropriated by the Congress for the Foundation. (See attachment 2.)

The Social Progress Trust Fund was established under an agreement between the U.S. Government and the Inter-American Development Bank (see attachment 3.) There have been two amendments to the agreement (see attachments 4 and 5). The Bank administers the Fund to carry out the program authorized under the Latin American Development Act of 1961 (22 U.S.C. 1942 and 1943 (1970)).

The hearings on Foreign Assistance and Related Agencies Appropriations for 1975, before a subcommittee of the Committee on Appropriations, House of Representatives, contain several references to the Foundation's use of the Trust Fund. For examples, see pp. 181, 182, 225, 226, 232, 241, 244, 245, 246, 250, 251, 252, 270, 442, and 443. Similar discussions were not possible during the fiscal year 1974 hearings, however, because the Foreign Assistance Act of 1973 had not yet been passed.

The Foundation's General Counsel, on September 12, 1974, issued an opinion on the authority for expenditure of Social Progress Trust Fund monies above and beyond spending limits set by Congress. He concluded that the Trust Fund's money was not subject to the congressional spending limitation (see attachment 6).

We question the validity of the Foundation's main arguments stated on page 1 of attachment 6 on the following grounds.

- A. The Government Corporation Control Act requires that each corporation submit its proposed program to the Congress for review and approval. Accordingly, the Congress clearly has the right to establish annual limitations on the size of all government corporation programs, and has been doing it regularly.

- B. The Foundation is not acting in the capacity of agent for the Inter-American Development Bank. On the contrary, the Bank was acting in its capacity of agent for the U.S. when it transferred Trust Fund monies to the Foundation. The agreement covering the transfer of funds consisted of the principal (the U.S. Government) authorizing its agent (the Bank) to return Trust Fund monies to the U.S. Government (the Foundation) under conditions which relieved the Bank of responsibility for the transferred funds, and accordingly, the Foundation has now become the U.S. Government agency responsible for administering the returned funds.
- C. Although the transferred funds are now being used for the second time, the funds continue to be owned by the U.S. government and the Foundation is using those funds to conduct its program, as authorized by the Congress. The annual program limitations set by the Congress on corporate activities are not restricted to funds appropriated by the Congress for the year being limited.
- D. The alleged concurrence by OMB is irrelevant. OMB lacks the authority to decide whether Congress has the right to place limitations on the Foundation.

Please advise us on (1) whether the Foundation is accountable to the Congress or to the Inter-American Development Bank for the Trust Fund money made available for its use, and (2) whether the Foundation violated the law in using the Trust Fund during 1974 by exceeding its program limitation. We would appreciate an early reply so that we can process our report to the Congress on examination of the Foundation's financial statements for fiscal year 1974.

Attachments

1. SPTF Agreement, dated 12/20/73
2. Bank President's letter of 12/20/73
3. SPTF Agreement-1961
4. SPTF Amendment-1964
5. SPTF Amendment-1966
6. Foundation Counsel's opinion
7. GAO report-1972
8. GAO report-1973

161 470
146 937

FEB 14 1975

Indorsement

Director, ID

Returned. The Inter-American Foundation (hereafter "Foundation") operates under section 401 of the Act approved December 30, 1969 (the "Inter-American Foundation Act"), Pub. L. No. 91-175, 83 Stat. 821, as amended, 22 U.S.C. § 290f (1970 and Supp. III, 1973). The Foundation is an agency of the United States and a body corporate subject to the provisions of the Government Corporation Control Act. See sections 401(a) and (t) of Pub. L. No. 91-175. Section 401(s) provided as the basic source for financing the Foundation's operations an amount not to exceed \$50 million in foreign assistance funds for fiscal years 1970 and 1971, to remain available to the Foundation until expended.

Under sections 102 and 103 of the Government Corporation Control Act, as amended, 31 U.S.C. §§ 847, 848 (1970), the Foundation is required to prepare annually, for submission to the Office of Management and Budget and transmittal to the Congress as part of the President's budget, a business-type budget setting forth its budgetary program for each fiscal year. Section 104 of the Government Corporation Control Act, as amended, 31 U.S.C. § 849 (1970), provides in part:

"The Budget programs transmitted by the President to the Congress shall be considered and legislation shall be enacted making necessary appropriations, as may be authorized by law, making available for expenditure for operating and administrative expenses such corporate funds or other financial resources or limiting the use thereof as the Congress may determine * * *."

Title I of the Foreign Assistance and Related Programs Appropriation Act, 1974, approved January 2, 1974, Pub. L. No. 93-240, 87 Stat. 1049, 1051-52, provided as follows with respect to the Foundation:

"The Inter-American Foundation is authorized to make such expenditures within the limits of funds available to it and in accordance with the law, and to make such contracts and commitments without regard to fiscal year limitations as provided by section 104 of the Government Corporation Control Act, as amended (31 U.S.C. 849), as may be necessary in carrying out its authorized programs during the current fiscal year: Provided, That not to exceed \$10,000,000 shall be available to carry out the authorized programs during the current fiscal year."

The above-quoted provision is unquestionably valid as an exercise of the authority contained in section 104 of the Government Corporation Control Act. Thus the only real issue is whether the \$10 million limitation contained therein encompasses amounts made available to the Foundation for fiscal year 1974 from the Social Progress Trust Fund (SPTF). For the reasons stated hereinafter, we believe that it does.

Initially we note that the appropriation act provision is by its terms comprehensive, referring to "such expenditures within the limits of funds available to" the Foundation "as may be necessary in carrying out its authorized programs," and limiting to \$10 million the amount which "shall be available to carry out the authorized programs" of the Foundation during fiscal year 1974. There appears to be no question but that the SPTF amounts were in fact used during fiscal year 1974 to carry out the Foundation's authorized programs. See discussion infra.

The transfer of SPTF amounts to the Foundation was accomplished pursuant to section 36 of the Foreign Assistance Act of 1973, approved December 17, 1973, Pub. L. No. 93-189, 87 Stat. 734, 22 U.S.C. § 1942 note (Supp. III, 1973), which provides in part:

"(a) The President or his delegate shall seek, as soon as possible, a revision of the Social Progress Trust Fund Agreement (dated June 19, 1961) between the United States and the Inter-American Development Bank. Such revision should provide for the--

"(1) periodic transfer of unencumbered capital resources of such trust fund, and of any future repayments or other accruals otherwise payable to such trust fund, to the Inter-American Foundation, to be administered by the Foundation for purposes of part IV of the Foreign Assistance Act of 1969 (22 U.S.C. 290f and following) * * *."

Congressional consideration of Pub. L. No. 93-189 and the 1974 foreign assistance appropriation act overlapped to a large extent; and it appears that neither piece of legislation was specifically considered in terms of the other for purposes here relevant. We find nothing in section 36 of Pub. L. No. 93-189 or its legislative history which indicates a design to supersede or modify the appropriation act limitation; nor do we believe that such a result arises by implication. Section 36 of Pub. L. No. 93-189 derives originally from the version of this legislation reported by the House Committee on Foreign Affairs. The

22 Use
2151
(2/10/73)

Committee explained this section (section 29 of the reported bill) in part as follows, H. Rept. No. 93-388 (1973), at 68-70:

"The aim of this section is to insure the continuing use of funds authorized for the purposes of the Latin American Development Act of 1960 for social development in the Western Hemisphere.

"Following congressional passage and funding of the Latin American Development Act, the United States in 1961 entered into an agreement with the Inter-American Development Bank (IDB) to administer for the United States a Social Progress Trust Fund (SPTF). In subsequent years the IDB loaned virtually all of the funds provided by Congress for the purposes of the Latin American Development Act. Subsequently, the IDB decided to discontinue substantial use of SPTF and, with U.S. approval, has diverted loan repayments to the IDB's Fund for Special Operations. While this use has permitted maintenance of value of the local currencies repaid under SPTF loan agreements, the volume of local currencies flowing into the IDB is expected to substantially exceed the Bank's needs in the years ahead. * * *

* * * * *

"The committee finds that these funds should be utilized more directly for the social development purposes for which they were originally intended, that they are substantially excess to the needs of the IDB, and that use of the funds directly by the United States, particularly through the Inter-American Foundation, can more effectively accomplish the goal of promoting social development in Latin America and the Caribbean.

* * * * *

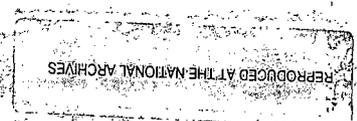
"In seeking revision of the Social Progress Trust Fund Agreement, the committee recognizes the need for an orderly and gradual change in the use of SPTF funds. This section specifies that the transfer and use of funds should be in proportions agreed to by the United States and the IDB. In addition, the committee recognizes the advisability of continuing to have the IDB act as recipient for all SPTF loan repayments.

"The committee, through this section, does not seek to exempt any agency from the normal budget process. It is expected that the Office of Management and Budget will coordinate the use of funds to be transferred by the IDB. The committee intends, however, that funds continue to be used primarily for social development. In 1969, the committee supported establishment of the Inter-American Social Development Institute, now known as the Inter-American Foundation, for just such a purpose. It is the committee's view that, to the extent feasible, the purpose of this section can best be accomplished by transfer of a substantial and gradually increasing proportion of SPTF funds to the Inter-American Foundation to be used for the purposes for which it was established."

The essential purpose of section 36~~x~~ was to have SPTF "reflows" put to direct use by, among other things, applying them as a second authorized source of financing for the Foundation, i.e., in addition to the fiscal years 1970 and 1971 foreign assistance funds originally provided in the Foundation's charter. Thus it is clear from the language of section 36, the above-quoted explanation by the House Committee, and the implementing agreement between the Inter-American Development Bank and the Foundation that the transferred SPTF amounts become, for all practical purposes here relevant, financial resources of the Foundation, to be used in the same manner as its other resources.

As stated previously, the transfer of SPTF funds to the Foundation does not, in our view, affect the 1974 appropriation act provision. The \$10 million expenditure limitation contained in the appropriation act applies, as stated therein, to limit the Foundation's actual use of authorized funds during fiscal year 1974. Accordingly, it is not directly concerned with the particular amount of the Foundation's authorized financial resources as such. In fact, the Foundation had authorized resources well in excess of \$10 million at the time the appropriation provision was considered and prior to enactment of section 36~~x~~ of Pub. L. No. 93-189. Conversely, it seems clear that section 36~~x~~ of Pub. L. No. 93-189, while increasing the Foundation's authorized resources, was not intended to augment particular fiscal year expenditure limitations. Thus the House Committee report, as quoted previously, expressly disclaimed an intent "to exempt any agency from the normal budget process." Since under sections 36(b)~~y~~ and (c)~~y~~ the amount of SPTF funds transferred to the Foundation is discretionary, treating such transfers as outside of the appropriation act limitation would constitute a de facto exemption from the normal budget process applicable to the Foundation.

22 USC
1942(b)
(A)
1973



In addition to the foregoing, we agree generally with your analysis of the four points raised in the September 12, 1974, memorandum by the Foundation's General Counsel to support his conclusion that the SPTF funds are not subject to the expenditure limitation.

With reference to your specific questions, we believe that the Foundation is accountable to the Congress for the use of SPTF funds made available to it (irrespective of any responsibility which it may also have to the Inter-American Development Bank); and that such funds are subject to the Foundation's 1974 expenditure limitation of \$10 million under Pub. L. No. 93-240. We further believe, therefore, that the Foundation violated Pub. L. No. 93-240 by exceeding the expenditure limitation. Since this limitation fixed the amount of budget authority available to the Foundation during fiscal year 1974, it is our opinion that, by exceeding the limitation, the Foundation also violated subsection (a) of the so-called "Antideficiency Act," R.S. § 3679, as amended, 31 U.S.C. § 665 (1970), insofar as it provides:

"No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein * * *."

The Foundation's 1975 fiscal year budget was based on a projected total of \$20 million to be made up of \$10 million from the \$50 million authorized by 22 U.S.C. 290f(s) and the remainder from reflows to the SPTF established pursuant to section 36 of the Foreign Assistance Act of 1973. As presented in your submission, this proposed fiscal year 1975 funding is fully developed in the hearings before a subcommittee of the Committee on Appropriations, House of Representatives, 93d Congress, on the Foreign Assistance and Related Appropriations for 1975, part 1, pp. 181-182, 225-226, 232, 234-236, 250 and 252. The mere presentation of such a budget for fiscal year 1975 did not of course alter the restrictions which applied for fiscal year 1974 and the disclosure in those hearings that in fiscal year 1974 \$5 million of SPTF monies had already augmented the congressionally set 1974 ceiling of \$10 million did not constitute congressional authority or for that matter, committee acquiescence, in funding which exceeded the established fiscal year ceiling. In point of fact, Chairman Passman raised the very issue here considered and made his position on the matter clear by characterizing this funding as a subterfuge. See Hearings id. 226.

We assume that the conclusions expressed herein will be used in your report concerning the Foundation for fiscal year 1974 pursuant to section 106 of the Government Corporation Control Act, 31 U.S.C. § 851. ✓ In view of our conclusion as to an Antideficiency Act violation, we also suggest that this matter be separately referred to the Foundation and to the Office of Management and Budget for a formal report to the President and the Congress pursuant to subsection (1)(2) of that act, 31 U.S.C. § 665(1)(2). ✓ See 35 Comp. Gen. 356 ✓ (1955).

Paul G. Dembling

Paul G. Dembling
General Counsel

Attachments