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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

FOR RELEASE ON DELIVERY
Expected at 10:00 am
Tuesday, April 2, 1974

STATEMENT OF

ELMER B. STAATS

COMPTROLLER GENERAL OF THE

UNITED STATES

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL FINANCE

OF THE

COMMITTEE ON BANKING, HOUSING

AND URBAN AFFAIRS

UNITED STATES SENATE

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you today to discuss our recent legal opinion concerning "national interest" determinations made by the President under section 2(b)(2) of the Export-Import Bank Act, as amended.

Section 2(b)(2), 12 U.S.C. 635(b)(2), prohibits financing by the Export-Import Bank (Eximbank) in connection with the purchase or lease of any product directly by a Communist country (as defined in section 620(f) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2370(f)), or in connection

with the purchase or lease of a product to be used in, or sold or leased to, a Communist country. These prohibitions are, however, subject to waiver by the President "in the case of any transaction [underscoring supplied] which the President determines would be in the national interest if he reports that determination to the Senate and House of Representatives within thirty days after making the same."

On March 8, 1974, we issued an opinion to Senator Richard S Schweiker in which we concluded that the waiver provision of section 2(b)(2) may be properly exercised only as to individual transactions which the President determines to be in the national interest. Accordingly we expressed the view that a blanket determination signed by the President on October 18, 1972, that it is in the national interest for Eximbank "to guarantee, insure, extend credit and participate in the extension of credit in connection with the purchase or lease of any product or service by, for use in, or for sale or lease to the Union of Soviet Socialist Republics," leaving it to the Bank to pass upon individual transactions, did not satisfy the waiver provision. We believe that if the Congress had intended the President to delegate this authority, it would have so provided.

Subsequently, the Bank suspended execution of new credit agreements and approval of new applications involving countries subject to prior blanket Presidential determinations pending "clarification" of our opinion. The countries

involved were the Soviet Union, Yugoslavia, Romania and Poland.

On March 15, Eximbank's General Counsel submitted a memorandum to the Board of Directors which concluded that the Bank had acted lawfully in extending credits, guarantees and insurance pursuant to blanket Presidential determinations. However, the suspension of new transactions continued. On March 21, the Attorney General issued an opinion to the President, in response to a request by the Counsel to the President, which also concluded that blanket determinations satisfy the waiver provision of section 2(b)(2). Upon issuance of the Attorney General's opinion, Eximbank resumed processing of new transactions involving the four countries.

Our opinion as to the proper construction of section 2(b)(2) was based upon the plain meaning of statutory language itself, reinforced by the relevant legislative history, including statements both during the debates and in appropriate committee reports. The opinions by the Attorney General and the Bank's General Counsel submit that the language and legislative history of section 2(b)(2) are ambiguous. However, their primary contention is that the practice of blanket Presidential determinations by country reported to the Congress, together with reports

of transactions by the Bank, has continued for a number of years without objection and is therefore controlling.

We adhere to our original position that the statutory language and legislative history clearly require separate Presidential determinations for each transaction. We carefully and fully considered the past practice under section 2(b)(2) and predecessor statutes prior to rendering our opinion. It is, of course, true that past practice and the absence of objection thereto are relevant factors in statutory construction. At the same time, they are nothing more than factors to be considered which cannot of themselves either alter a statute or render it immune from challenge.

A detailed response to the legal arguments advanced in the opinions of the Attorney General and the Bank, including a detailed presentation of the relevant legislative history, is attached to my statement (attachment 1). I will, of course, be pleased to respond to any questions you may have concerning these matters. However, I would like to offer several comments concerning what I consider to be the more general aspects of this controversy.

First, I should point out that our opinion to Senator Schweiker is advisory only, since our Office under the Government Corporation Control Act has no

authority to take exception to transactions undertaken by a Government corporation such as Eximbank. I think this point is particularly important in connection with concern which has been expressed over the possible effect of our opinion on transactions or commitments which the Bank has undertaken in the past and which have not been fully completed. Presumably, the Bank will continue to rely upon the opinions of the Attorney General and its General Counsel at least pending possible congressional resolution of this matter. There is no way for us to initiate action to obtain a court review of the Attorney General's opinion.

Secondly, the question as to the proper application of waiver authority under section 2(b)(2) has been referred to as a procedural "technicality." This may be true in the sense that our construction of the statute in no way lessens the power of the President to authorize Eximbank financing involving Communist countries. The problem which we perceive could be easily remedied in the future simply by submission of proposed transactions to the President for his determination as has been done in numerous other programs in the past. However, apart from this, I believe there are most important principles involved.

Eximbank financing in connection with Communist countries was a matter of substantial interest and concern on the part of the Congress from the time the restriction was first

enacted in a 1964 appropriation act. The same concern was manifested in 1968 when the restriction was added to the Bank's charter and, at the same time, expanded to include indirect transactions involving Communist countries.

The approach adopted in each version of the statutory restriction overcame considerable sentiment in favor of a flat prohibition or provision for congressional veto power over Presidential waivers. The end result of this process is a basic prohibition against Eximbank financing involving Communist countries subject to an "escape clause." Thus the fundamental thrust of section 2(b)(2) is to establish as Federal policy that such financing is generally not in the national interest, although this general policy may be outweighed by special circumstances involved in particular transactions. Section 2(b)(2) is in this regard similar to numerous other statutory provisions, particular in matters involving foreign relations, which subject prohibitions to Presidential waiver or implementation by fact-finding.

The waiver authority contained in statutory provisions of this nature, including section 2(b)(2) recognizes the desirability of according the President a degree of flexibility and discretion in matters of foreign relations. In fact, the substantive waiver authority granted is essentially unlimited. At the same time, the clear purpose

of vesting such discretion in the President is to insure full consideration of all policy implications at the highest level of the executive branch. Thus we do not agree with the Attorney General's apparent conclusion that section 2(b)(2) is no more than a disclosure provision.

Viewed from this perspective, we believe the past practice under section 2(b)(2) involves more than a "procedural technicality." Blanket determinations by country serve to undercut rather than implement the purposes of section 2(b)(2), as we understand them. Such determinations obviously do not reflect an exercise of Presidential discretion to the effect that he considers the general policy against financing with respect to a Communist country to be counterbalanced by factors relating to a particular proposal or transaction. Rather, the President is saying that the basic policy established in section 2(b)(2) is not viable as applied to certain countries. We cannot agree that the waiver discretion accorded to the President goes this far. This would have been tantamount to vesting in the President authority to delegate his powers. We believe that if the Congress had intended the waiver clause to operate in this manner, it would have provided so expressly.

Finally, I would emphasize that our opinion in this matter is not concerned with the policy question of whether Eximbank financing should be available to the Soviet Union or

any other Communist country. It could be argued that the general policy against such financing stated in section 2(b)(2) is anachronistic in view of current circumstances and/or inconsistent with congressional policy stated in the Export Administration Act of 1969 of encouraging trade with all countries with which we have diplomatic or trading relations (50 U.S.C. App. 2402). These are, of course, basic policy issues to be determined by the Congress.

The approach reflected in our opinion is simply that unless or until the Congress sees fit to amend section 2(b)(2), the policy stated therein and the terms of this statutory provision must be accorded their full and natural effect. In our view, the practice of making by-country determinations is not sufficient in this regard.

Mr. Chairman, this concludes my prepared statement. I will be happy to answer any questions.

GENERAL ACCOUNTING OFFICE RESPONSE TO OPINIONS OF THE ATTORNEY GENERAL AND OF THE GENERAL COUNSEL OF EXIMBANK CONCERNING NATIONAL INTEREST DETERMINATIONS UNDER SECTION 2(b)(2) OF THE EXPORT-IMPORT BANK ACT

Section 2(b)(2) of the Export-Import Bank Act of 1945, as amended, 12 U.S.C. 635(b)(2), provides:

> "(2) The Bank in the exercise of its functions shall not guarantee, insure, or extend credit, or participate in any extension of credit--
>
> > "(A) in connection with the purchase or lease of any product by a Communist country (as defined in section 2370(f) of Title 22), or agency or national thereof, or
> >
> > "(B) in connection with the purchase or lease of any product by any other foreign country, or agency, or national thereof, if the product to be purchased or leased by such other country, agency, or national is, to the knowledge of the Bank, principally for use in, or sale or lease to, a Communist country (as so defined),
>
> "except that the prohibitions contained in this paragraph shall not apply in the case of any transaction which the President determines would be in the national interest if he reports that determination to the Senate and House of Representatives within thirty days after making the same."

By letter dated March 8, 1974, to Senator Richard S. Schweiker, we expressed the opinion that the prohibitions set forth in section 2(b)(2) may be properly waived only when, and to the extent that, the President makes determinations of national interest with reference to particular transactions. Accordingly, we expressed the view that a blanket Presidential determination of national interest applicable to Eximbank financing involving a Communist country--thus not made upon consideration of any particular transaction--does not satisfy the waiver provision. Our conclusions were based upon the language of the statute as well as the relevant legislative history. The General Counsel of Eximbank and the Attorney General have each issued opinions which conlude that blanket Presidential determinations by country meet the requirements of section 2(b)(2).[1/] These two opinions, which are generally similar, dispute

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1/ The General Counsel's opinion was expressed in a memorandum dated March 15, 1974, to the Bank's Board of Directors. The Attorney General's opinion was rendered on March 21, 1974, to the President, in response to a request of the Counsel to the President.

our reading of the statutory language and legislative history. However, they place primary reliance upon the fact that the practice of making "by country" Presidential determinations has continued for a number of years without objection.

THE STATUTORY LANGUAGE

As noted previously, section 2(b)(2) provides that the prohibitions contained therein shall not apply "in the case of any transaction which the President determines would be in the national interest if he reports that determination " to the Congress. We believe that this language by its terms clearly requires that Presidential determinations address particular transactions. The basic fact--not contested by either the Attorney General or the General Counsel--is that a "by country" determination has nothing to do with "any transaction." In other words, the President simply cannot be said to have made a determination for a "transaction," as that term is used in the statutory language.

In our judgment, neither the Attorney General nor the General Counsel come to grips with the statutory language. The Attorney General merely observes that the language "permits more than one possible interpretation," without elaboration. The General Counsel states that the language "does not specify whether the Presidential Determinations foreseen thereunder must be made for each transaction or whether they may be made on a country basis." With all due respect, we do not know how the Congress could have made the language any clearer in this regard.

At no point does either of these opinions even attempt to relate the conclusion expressed therein to the statutory language. That is, there is no indication as to what the Attorney General and the General Counsel understand the language to mean, particularly in terms of the use of the word "transaction." Nor do these opinions address the fact that if the Congress had designed the waiver provision for use on a country basis, it would presumably have used the term "any country" rather than "any transaction." We recognize that virtually any language may permit more than one possible interpretation. However, we do not perceive any reasonable interpretation which would support the approach taken by the Attorney General and the General Counsel.

The ordinary and natural effect of the statutory language is to require that Presidential determinations address transactions. We believe the language speaks for itself, and does not require further discussion.

THE LEGISLATIVE HISTORY

Initially, we submit that in view of the discussion herein, the real issue at this point is whether the legislative history serves to contradict the ordinary and natural effect of the statutory language

itself. In this regard, we believe that the legislative history not only does not contradict our construction of the statutory language, but directly supports such construction.

1964 LEGISLATION

As noted in our letter to Senator Schweiker, section 2(b)(2) of the Export-Import Bank Act is based upon similar language which was first enacted in the Foreign Aid and Related Agencies Appropriation Act, 1964. The relevant legislative history of the 1964 act is set forth in our letter to Senator Schweiker. Accordingly we respond here to issues concerning this legislative history raised by the General Counsel and the Attorney General.

The General Counsel maintains that certain references which we cited, and which directly reinforce our interpretation of the statutory language (principally the remarks of Senator Mundt and Congressman Rhodes), are not dispositive. Rather, he relies upon several statements in the debates to the effect that the Congress should afford flexibility to the President and not "tie his hands" in an area of foreign relations. The Attorney General takes generally the same approach, together with the observation that Senator Mundt's statement is entitled to less weight because it was submitted in writing.

We agree that a common purpose indicated in the debates was to give the President flexibility. However, these statements of purpose are wholly irrelevant to the present issue of how the waiver authority was designed to operate. At no point during the debate was this matter subject to controversy. Rather, the issue debated--and the issue to which the cited comments relate--was whether there should be a waiver provision at all. The substantive discretion accorded to the President by the waiver provision is essentially unlimited since no standards were imposed in connection with his determinations of national interest. However, there is nothing in the legislative history, including the statements cited by the General Counsel and the Attorney General, which suggests an intent to provide flexibility in terms of the manner in which the President was to make his determinations.

The only references in the debates to the manner in which determinations were to be made are the statements cited in our letter. As indicated above, these statements directly reinforce our construction of the law and were not questioned. 2/

2/ With reference to the Attorney General's observation that no opportunity existed to refute Senator Mundt's statement, the same is not true in the House. Congressman Rhodes' statement was made in person and during a colloquy. His position was not challenged.

1968 LEGISLATION

Section 2(b)(2) was added to the Export-Import Bank Act by the act approved March 13, 1968, Pub. L. 90-267, and has remained unchanged since that time.

Neither the General Counsel nor the Attorney General address in detail the legislative history of the 1968 Act. Their discussion is limited to brief excerpts from statements by Senator Tower and a question and answer submitted for the hearing record. These references are themselves indirect and ambiguous in terms of the present issue, and are contradicted elsewhere. The General Counsel relies upon the following written question and answer printed in a Hearing before the Subcommittee on International Finance of the Senate Banking and Currency Committee, 90th Cong., 1st sess., on S. 1155 (Export-Import Bank Act Amendments of 1967), at 49:

> "Senator TOWER. It is true, is it not, that the only possibility of Communist country use of Export-Import Bank credit must be determined as a policy by the President of the United States and then he must advise the Congress of such determination 30 days following the determination?
>
> "Mr. LINDER. Yes. As stipulated in the Foreign Assistance and Related Agencies Appropriation Act, the President must make a determination that it is in the national interest for the Bank to assist in financing exports to a Communist country and to report such determination to the Congress within 30 days."

At page 21 of the same hearing, the following exchange with respect to Eximbank financing involving Communist countries appears:

> "Senator TOWER. But, the President is still required to make a determination that each transaction is in the national interest.
>
> "Mr. LINDER. Yes; that is correct. * * *."

It is also notable that Senator Tower several years later again indicated his understanding that Presidential determinations are to be made on a transaction-by-transaction basis. See discussion of the 1971 legislation infra.

Apart from the foregoing inconsistencies in the authorities relied upon, both opinions completely ignore the references in the Senate committee and conference committee reports on the 1968 legislation referred to in our March 8 letter to Senator Schweiker which directly support the transaction-by-transaction construction. A number of other aspects

of the legislative history with respect to Public Law 90-267 are instructive in terms of the present issue and, in our opinion, merit detailed presentation.

The bill eventually enacted as Public Law 90-267 adding section 2(b)(2) to the Export-Import Bank Act of 1945 was S. 1155, 90th Cong. The bill as reported by the Senate Committee on Banking and Currency (S. Rept. No. 493, 90th Cong., 1st sess.), contained three provisions of particular interest.

First, it included language similar to that of the prior appropriation acts relative to Eximbank financing involving Communist countries, although this language took the form of a statement of congressional policy. Secondly, the bill included within the same provision language concerning financing involving products to be used in or sold to Communist countries. The latter language was inspired by a proposed loan to the Fiat Company of Italy for purchase of tools to be used in an automotive plant to be built in the Soviet Union.

This combined provision in the reported version of the bill, proposed as paragraph (2) to section 2(b) of the Export-Import Bank Act, read as follows:

> "(2) It is further the policy of the Congress that the Bank in the exercise of its functions should not guarantee, insure, or extend credit, or participate in an extension of credit (A) in connection with the purchase of any product by a Communist country (as defined in section 620(f) of the Foreign Assistance Act of 1961, as amended), or agency or national thereof, or (B) in connection with the purchase of any product by any other foreign country, or agency, or national thereof, if the product to be purchased by such other country, agency, or national is, to the knowledge of the Bank, principally for use in, or sale to, a Communist country (as so defined): Provided, That whenever the President determines that such guarantees, insurance, extension of credits, or participation in credits, would be in the national interest and reports such determination (within thirty days after making the same) to the Senate and House of Representatives, such guarantees, insurance, or extension of credits may be made, or participated in, by the Bank notwithstanding the policy herein stated."

The Committee report, at pages 3-4, explained this combined provision as follows:

"The purpose of S. 1155 as introduced was principally to take care of two pressing problems confronting the Export-Import Bank; namely, the extension of its life beyond June 30, 1968, and an increase in the limitation on the amount of loans, guarantees, and insurance which the Bank may have outstanding at any one time. This is still the major purpose of the bill as amended by your committee. Considerable interest, however, has been expressed in the Bank financing exports to Eastern European countries, and this interest was reflected during the hearings on the bill.

"Since 1964, the foreign assistance and related agencies appropriation acts each year have contained a provision which precludes the Bank from participating in extensions of credit to any Communist country (as defined in sec. 620(f) of the Foreign Assistance Act of 1961, as amended), except when the President determines that it would be in the national interest for the Bank to do so and reports each such determination to the House of Representatives and the Senate within 30 days thereafter. This provision, however, does not apply to an export purchased or shipped to a non-Communist country which, in turn, sells the product to a Communist country. Thus, if machine tools were purchased by an Italian purchaser for installation by the purchaser in a plant in the Soviet Union for the manufacturer of small automobiles, the President would not be obligated by the appropriations act to find it to be in the national interest for the Bank to participate in the transaction. Your committee believes that the Bank should not engage in such transactions unless the President finds them to be in the national interest just as in the case of transactions directly with Communist countries. At the same time, your committee believes that the Congress should vest in the President the discretionary authority to permit the Bank to engage in transactions directly or indirectly with Communist countries when he finds it to be in the national interest.

"Accordingly, the committee has adopted an amendment giving the President such authority. It points out, however, that the committee's provision goes beyond the existing provision of the appropriations act in two respects. First, as indicated, it would require a determination of national interest by the President in the case of indirect as well as direct transaction with Communist countries. Second, the provision becomes a part of the Bank's statutory charter and does not need to be adopted each year by the Congress as is the case with the appropriation act." (Underscoring supplied.)

The third matter of interest in the bill as reported was inclusion of language similar to that discussed above concerning Eximbank financing in connection with credit sales of defense articles to less-developed countries. This practice, carried out by the Department of Defense and Eximbank, was referred to as the "country X" program. In this regard the reported version of the bill included a proposed paragraph (3) to section 2(b) of the act as follows:

> "(3) It is further the policy of the Congress that the Bank in the exercise of its functions shall not guarantee, insure, or extend credit, or participate in an extension of credit in connection with any credit sale of defense articles and defense services by the Government of the United States under the Foreign Assistance Act of 1961, as amended, or by United States exporters, the repayment of which is guaranteed under section 503(e) and section 509(b) of said Foreign Assistance Act: Provided, That whenever the President determines that such guarantees, insurance, extension of credits, or participation in credits, would be in the national interest and report such determination (within thirty days after making the same) to the Senate and House of Representatives, such guarantees, insurance, or extension of credits may be made, or participated in, by the Bank notwithstanding the policy herein stated: Provided further, That in no event shall the Bank have outstanding at any time, military export credits guaranteed under section 503(e) and section 509(b) of the Foreign Assistance Act of 1961, as amended, in excess of 7-1/2 per centum of limitation imposed by section 7 of this Act."

Concerning this provision, the Committee Report stated in part, at page 6:

> "* * * the committee recognizes the problems involved in the sale of military equipment to smaller and less developed nations. The committee feels that the Eximbank should participate in financing such sales only after the most careful and prudent study at the highest level of government, taking into consideration the impact of such sales upon international security and upon the economic development of the nation involved. Accordingly, the committee recommends that congressional policy be expressly stated against such financing to less developed countries unless the President determines it to be in the national interest and so reports to the Congress.
>
> "The committee expects such reports to be made on all transactions and to include the name of each country and the dollar amount and general type of equipment involved in each transaction."

The language applicable to Presidential waiver of each of the three restrictive provisions discussed above is the same. In fact, the same waiver clause applies to transactions directly involving Communist countries and indirect transactions with such countries. Also, it is clear that in the case of each type of restriction, the waiver authority was intended to be exercised only on the basis of individual transactions.

The Committee report, quoted above, expressly and specifically states this intent in the case of "country X" transactions. With respect to the waiver of the two East-West financing restrictions, the Committee's intent is also clear. As noted previously, the Committee report refers to this waiver provision as requiring "a determination of national interest by the President in the case of indirect as well as direct transactions with Communist countries." Moreover, it must be recognized that the restriction against indirect transactions was included in contemplation of one particular transaction - the Fiat auto plant in the Soviet Union. Finally, Senator Muskie reiterated the limited nature of this waiver authority during debate on the bill as follows, 113 Cong. Rec. 22115 (August 9, 1967):

> "Mr. President, there have been a number of explanations as to what the proposition before us is. As a representative of the committee which reported the bill to the floor, let me give the committee's explanation.
>
> "This bill is not a grant of authorization with respect to East-West trade. It is not an East-West trade bill. It does not in any way enlarge the authority of the Eximbank of any agency of the Government to engage in East-West trade, so called.
>
> "The bill is a restriction upon the authority of the Eximbank to become involved in transactions which may, as their ultimate destination, result in the transfer of American goods to Communist third countries.
>
> "The restriction which is contained in the bill is the restriction which was authorized by the distinguished Senator from Texas [Mr. TOWER], the ranking Republican member of the subcommittee, and the distinguished Senator from Iowa [Mr. HICKENLOOPER].
>
> "So we are not talking about authorization for East-West trade: we are not talking about an enlargement of authority to engage in East-West trade. We are talking about a bill which restricts present authority."

Thereafter Senator Muskie quoted the prohibitory language set forth in the bill, and went on to state:

"Mr. President, this language is followed by the provision that the prohibition may be waived by the President in his judgment if he considers it to be wise in the national interest. This is a restriction on present policy. It is not a positive authorization to us to engage in East-West trade. If we do become involved in transactions which can be described as East-West transactions, we will do so only as an exception to the policy of this bill and only in such instances as the President finds to be in the national interest.

"I think that this description of the bill is essential at this point in the RECORD, so that Senators who read the RECORD may focus upon the real nature of the issue before us. * * *."

The Senate debate on S. 1155, was addressed primarily to restrictions upon the Bank's financing authority. An amendment designed to flatly prohibit the "country X" program was defeated. A number of amendments were also considered with respect to the two East-West financing restrictions. First, the Committee version of these two restrictions was amended to state such restrictions as prohibitions rather than statements of congressional policy. An amendment to delete the Presidential waiver provision--i.e., to make the prohibitions absolute--was rejected. Also rejected was an amendment which would have provided a congressional veto power over Presidential determinations to waive the prohibition. It is interesting to note that opponents of this amendment stressed that it would "hamstring" the President and the Bank and cause delays which might result in the loss of particular opportunities. See, e.g., 113 Cong. Rec. 22393-94 (remarks of Senator Muskie), and 22398 (remarks of Senator Mansfield) (August 11, 1967). These arguments, and in fact the nature of the amendment itself, further indicate the understanding that Presidential determinations would be based upon individual transactions.

The House version of this legislation (H.R. 6649, 90th Cong.), as originally reported on May 11, 1967, (H. Rept. No. 256, 90th Cong., 1st sess.) did not include any of the prohibitions contained in the Senate version. However, prior to floor consideration, the House Banking and Currency Committee adopted an amendment in the nature of a substitute. The substitute version, inter alia, prohibited Bank financing involving nations engaged in armed conflict with the United States or nations which furnished by governmental action assistance to nations engaged in armed conflict with the United States. These prohibitions were made subject to waiver--

"* * * if the appropriate Committees of the Senate and House of Representatives have reported to their respective houses their determination that any transaction would be in the national interest * * *."

The substitute version also included a prohibition against financing of defense exports to less-developed countries except "with respect to any transaction the consummation of which the President determines would be in the national interest and reports such determination" to the Congress. This version specified certain matters to be considered by the President in making any such determination.

Again, it is clear that the foregoing waiver provisions were designed to be exercised on a transaction-by-transaction basis. Thus, with reference to the prohibitons against financing directly or indirectly involving nations engaged in conflict with the United States, Congressman Patman observed that waiver could be accomplished by a congressional determination "that a particular transaction subject to the prohibition would be in the national interest * * *." 114 Cong. Rec. 2300 (February 6, 1968).

Congressman Ashley proposed an amendment, later rejected, to substitute Presidential determinations for congressional determinations. However, he also recognized that determinations would be made on a transaction-by-transaction basis:

> "If my amendment is adopted, the Congress would impose the prohibition, but it would provide for an exception where the President of the United States determines that a particular credit transaction by the Bank is in the interest of our Nation, and reports this to the Congress for congressional action." Id., 2311.

Subsequently the waiver provision was deleted in its entirety, thus leaving a flat prohibition against Eximbank financing involving nations engaged in armed conflict with the United States or nations furnishing by direct governmental action assistance to nations in direct conflict with the United States. This language as amended to delete any waiver authority, restored the language referred to as the "Fino amendment."

The House retained the prohibition against "country X" transactions subject to waiver by Presidential determination. However, as in the Senate history, the debate in the House on the "country X" language makes clear that Presidential determinations to waive the prohibition were to be made on a transaction-by-transaction basis. See, e.g., 114 Cong. Rec., supra, 2298 (remarks of Mr. Patman), 2304 (remarks of Mr. Reuss).

Subsequently, passage of H.R. 6649 was vacated, and the Senate bill, S. 1155, was passed as amended to include the language of the House bill.

The conference version of S. 1155 retained the Fino amendment, prohibiting without provision for waiver, financing involving nations

engaged in conflict with the United States or nations providing governmental assistance thereto. This provision was enacted as section 2(b)(3) of the Export-Import Bank Act. See 12 U.S.C. 635(b)(3) (1970). The conference version also retained the prohibition against "country X" financing, subject to waiver "with respect to any transaction the consummation of which the President determines would be in the national interest and reports such determination (within 30 days after making the same) to the Senate and House of Representatives." This provision was enacted as section 2(b)(4) of the Act, where it remains. 12 U.S.C. 635(b)(4). 3/

In addition, the conference version included the Senate-passed prohibitions against financing involving directly or indirectly Communist countries. This provision is, of course, present section 2(b)(2). The conference report described section 2(b)(2) as follows:

> "The Bank is also prohibited from participating in credit transactions in connection with the purchase or lease of any product by a Communist country (as defined in sec. 620(f) of the Foreign Assistance Act of 1961), or products to be transshipped to any such country, except after a Presidential determination, communicated to Congress within 30 days after it is made, that the transaction would be in the national interest." H. Rept. No. 1103, 90th Cong., 2d sess., 4.

3/ Section 2(b)(4) of the Export-Import Bank was in effect superseded by section 32 of the Foreign Military Sales Act, 22 U.S.C. 2772, which flatly prohibits Eximbank participation in any extension of credit in connection with any agreement to sell defense articles and defense services entered into with any economically less-developed country after June 30, 1968. Also, it is noted that the precise language of the waiver clause of section 2(b)(4) of the Export-Import Bank Act differs from section 2(b)(2) by referring to "consummation" of transactions. This term was included during House consideration without any explanation as to its significance.

It is particularly notable that while the prohibitions relative to Communist countries were stated in the Senate-passed form, the language concerning waiver of the prohibitions was revised in conference. The Senate language had followed the language of the prior appropriation acts, permitting waiver "whenever the President determines that such guarantees, insurance, extension of credits, or participation in credits, would be in the national interest * * *." The conference version, enacted as section 2(b)(2), provides for waiver "in the case of any transaction which the President determines to be in the national interest." This language change was not explained; however, its only apparent effect was to reemphasize the requirement for transaction-by-transaction determinations.

The conference report was adopted in the Senate without comment here relevant, except for Senator Muskie's statement that the prohibition involving Communist countries was patterned after the prior appropriation act. 114 Cong. Rec. 3836 (February 21, 1968). The House adopted the conference report on February 27, 1968. It is worthy of note here that Congressman Patman described the waiver provision of section 2(b)(2) as requiring a Presidential determination "that such a transaction would be in the national interest * * *." 114 Cong. Rec. 4307.

The legislative history relating to all three provisions discussed above clearly discloses a uniform and consistent intent to provide waiver authority on the basis of transaction-by-transaction determinations.

THE EXPORT EXPANSION FINANCE ACT OF 1971, APPROVED AUGUST 17, 1971, PUB. L. 92-126

As noted previously, section 2(b)(2) of the Export-Import Bank Act has remained unchanged since 1968. However, the General Counsel's opinion places greater emphasis upon a statement in the House report on the Export Expansion Finance Act of 1971 which, apparently referring to section 2(b)(2) of the Export-Import Bank Act, describes Presidential determinations in terms of "a particular transaction or trade with a specific Communist country * * *."

The General Counsel refers to this description as "the most explicit statement of the President's power under Section 2(b)(2)* * *." This statement which obviously is not legislative history of section 2(b)(2), viewed in isolation, does appear to support the General Counsel's interpretation of section 2(b)(2). However, a more complete examination of the legislative history of the Export Expansion Finance Act discloses that this statement is somewhat anomalous.

The Export Expansion Finance Act of 1971, inter alia, amended section 2(b)(3) of the Export-Import Bank Act to read as follows, 12 U.S.C. 635(b)(3) (1971 Supp.):

> "The Bank shall not guarantee, insure, or extend credit, or participate in the extension of credit in connection with (A) the purchase of any product, technical data, or other information by a national or agency of any nation which engages in armed conflict, declared or otherwise, with the Armed Forces of the United States, or (B) the purchase by any nation (or national or agency thereof) of any product, technical data, or other information which is to be used principally by or in any such nation described in clause A. The Bank shall not guarantee, insure, or extend credit, or participate in the extension of credit in connection with the purchase of any product, technical data, or other information by a national or agency of any nation if the President determines that any such transaction would be contrary to the national interest."

The effect of this amendment was to repeal that portion of the "Fino amendment," added in 1968, which prohibited (without waiver authority) Eximbank financing involving nations which furnish governmental assistance to nations engaged in armed conflict with the United States.

The original Fino amendment had as a practical matter rendered the Communist country restrictions of section 2(b)(2) of the Export-Import Bank Act largely moot from 1968 to 1971, since most of the Communist

countries traded with North Vietnam through government action. Accordingly, the proposed modification of the Fino amendment caused renewed attention to section 2(b)(2). The Congress' perception of section 2(b)(2) is the point of primary interest here.

The Export Expansion Finance Act originated in S. 581, 92d Congress. The report on S. 581 by the Senate Committee on Banking, Housing and Urban Affairs observed that the Fino amendment was anachronistic and served merely to divert East-West trade opportunities elsewhere. S. Rept. No. 92-51, 8. In this connection the Report noted that section 3 of the Export Administration Act of 1969, 50 U.S.C. App. 2402, inter alia, established the policy of the United States "to encourage trade with all countries with which we have diplomatic or trade relations except those countries with which such trade has been determined by the President to be against the national interest." The Report also described the effect of modification of the Fino amendment in terms of section 2(b)(2) of the Export-Import Bank Act:

> "The present Export-Import Bank Act contains an absolute prohibition against the extension by the Bank of any credit or guarantee assistance in connection with any exports to the nations of Eastern Europe, regardless of the nature of the exports. The bill removes this absolute prohibition and provides that the President of the United States may permit such Export-Import Bank assistance for any transaction which he determines to be in the national interest. Such a determination must be reported to the Senate and the House of Representatives within 30 days after it is made.
>
> * * * * *
>
> "The full attainment of these positive goals in our relations with Eastern Europe is not possible so long as we absolutely prohibit Export-Import Bank assistance for exports to those countries. By giving the President the authority to permit Export-Import Bank assistance to those transactions which he finds will be in the national interest, we are giving him the flexibility necessary to vigorously pursue increased U.S. exports and at the same time fully protect the security of the nation." S. Rept. No. 92-51, 8-9.

The above-quoted excerpts from the Committee report suggest the understanding that section 2(b)(2) of the Export-Import Bank Act provides for transaction-by-transaction Presidential waivers. The following comments during Senate debate on S. 581--the only comments addressing this aspect of the bill--further reflect this understanding:

Senator Mondale, 117 Cong. Rec. 9699-9700 (April 5, 1971):

> "In short, Mr. President, it is both good business and good sense at this time for the Congress to remove the absolute prohibition against Export-Import Bank financing or guarantees for exports to Eastern Europe and the Soviet Union. I hasten to point out that by removing this absolute prohibition, we are not making such export credit and guarantees automatically available to Eastern Europe. We still retain the provision which prohibits such export assistance unless the President determines that a particular transaction would be in the national interest. Thus, the bill gives the President the maximum flexibility which he must have in order to pursue the total interests of the United States. I should point out that there are other acts which prohibit the export of strategic goods and materials to Eastern Europe. Thus, the export financing or guarantee that would be made available as a result of the passing of this bill will only be available for the support of exports of peaceful goods and only after the President has determined that the particular transaction will be in the national interest."

Senator Tower, id., 9715-16:

> "Mr. President, S. 581 contains a provision which would amend the Fino amendment to permit Eximbank to support those exports to, or for use in, Eastern European countries which have been licensed or approved by the Office of Export Control in the Department of Commerce only if the President determines, pursuant to the requirement contained in section 2(b)(2) of the Bank's Act--Tower-Hickenlooper amendment--that the transaction would be in the national interest, and he so reports that determination to the Senate and the House of Representatives.
>
> "Thus, the Bank would be prohibited from supporting any U.S. export to, or which would be transshipped through any other country for use by or in, a country with which the United States is engaged in armed conflict. A Presidential determination of national interest would be still required, however, before the Bank could support any export for sale or lease to any Communist country.
>
> "By returning to the President the authority to determine that Export-Import assistance might be given in certain instances not possible under present law, the Congress shall be assuring him the flexibility he must have in order to pursue

an expansionary export program when and only when such expansion would not compromise our national security."

The House version of this legislation (H.R. 8181, 92d Cong.) reported by the Banking and Currency Committee contained the same modification to the Fino Amendment.

The Committee report, H. Rept. No. 92-303, explained this aspect of the bill as follows, at p. 10:

> "H.R. 8181 as reported [amends] Section 2(b)(3) of the Export-Import Bank Act of 1945, as amended, to prohibit Eximbank assistance in export sales to any nation which engages in armed conflict with the United States or to any other nation when the export is to be used principally by or in any nation which engages in armed conflict with the United States; and to prohibit Eximbank assistance in any export sales transaction which the President determines would be contrary to the national interest.
>
> "The principal effect of this amendment is the repeal of legislation enacted in 1968 which bans Eximbank participation in the financing of exports to Communist countries with which we are not in armed conflict. H.R. 8181 as reported removes this absolute prohibition. Such assistance, if the bill is enacted, then would be subject to Presidential determination that a particular transaction or trade with a specific Communist country would be in the national interest."

The reference in the report to Presidential determinations "that a particular transaction or trade with a specific Communist country would be in the national interest" (emphasis supplied) is ambiguous. As the General Counsel's opinion observes, this passage does apparently refer to section 2(b)(2) of the Export-Import Bank Act and suggests the understanding that determinations under section 2(b)(2) may be made on a country basis. However, the Report goes on to state, on the same page:

> "By giving the President the authority to permit Export-Import Bank assistance in those transactions which he finds will be in the national interest, we are giving him the flexibility necessary to vigorously pursue increased U.S. exports and at the same time fully protect the security of the nation." (Emphasis supplied.)

Again, the Report apparently refers to section 2(b)(2), but at this point mentions only the determinations by transaction.

During the House debate on this legislation, modification of the Fino amendment was a matter of considerable controversy. In fact, an amendment

deleting the proposed modification was adopted. The debate in this regard centered upon whether the flat prohibition against trade with Eastern European nations should be retained. Accordingly, the remarks of proponents and opponents were addressed primarily to the desirability of extending Eximbank financing to such countries. The effect of section 2(b)(2) of the Act was not a significant point in such remarks. See generally 117 Cong. Rec. 23921-22, 23926-46 (July 8, 1971).

The House subsequently vacated passage of H.R. 8181, and adopted S. 581 amended to include the House-passed language. The conference report on S. 581 (H. Rept. No. 92-435) restored the Senate-passed modification of the Fino amendment. On August 2, 1971, the Senate agreed to the conference report without debate here relevant.

The House agreed to the conference report on August 5. Restoration of the Fino amendment modification caused renewed controversy in the House. At this point the debate focused upon two restrictions on financing East-West trade. One was the restriction contained in the modified Fino amendment (the last sentence of section 2(b)(3) of the Act as enacted) prohibiting financing to any nation "if the President determines that any such transaction would be contrary to the national interest." For example, Mr. Ford observed, 117 Cong. Rec. 29794:

> "Mr. Speaker, the net result of this conference report and this legislation is that if the President decides that in any case, in any country, the Export-Import Bank should not help or assist that transaction to that country cannot be consummated."

The other restriction discussed was section 2(b)(2). Thus, Mr. Widnall, a leading proponent of the conference report, stated, id., at 29791:

> "Rather than attempting to argue the merits of the Fino amendment, as if it were simply a free-standing prohibition on Eximbank financing exports to Communist countries--which it is not--I would like to take this opportunity to put the matter into perspective.
>
> "Section 2(b)(2) of the Export-Import Bank Act is devoted to setting up guidelines for the operation of the Export-Import Bank. Subsections 2 and 3, taken as a whole, prohibit the Bank from participating in transactions which might adversely effect the foreign policy of the United States in general and our national defense posture in particular.
>
> "Since the determination of foreign policy is largely an executive function, Presidential discretion is presently allowed in the broader provisions while the more specific

provisions are outright prohibitions. In effect, the question before us is not whether the Congress approves financing exports to Communist countries in general, but whether certain defined transactions can be authorized by the President.

"Subsection 2 is a conditional prohibition against Eximbank financing exports either directly to any Communist country * * * or of products that are destined for any Communist country. The exception to this prohibition is that the President may waive it if he determines that a given transaction would be in the national interest and reports that determination to the Senate and the House within 30 days. This provision for Presidential discretion would remain exactly as it is."

In sum, we believe that the 1971 legislative history, taken as a whole, strongly supports the continued understanding that section 2(b)(2) is designed to require waiver only on a transaction-by-transaction basis.

On the basis of the foregoing, we remain of the view that the language and legislative history fail to support the practice of "by country" determinations under section 2(b)(2). However, the Attorney General and the General Counsel rely primarily on the fact that this practice has continued for some time without objection by the Congress or by the General Accounting Office.

It is true that from 1964 to the present, a number of by country determinations have been made by both President Johnson and President Nixon, and that such determinations have been reported to the Congress. Also Eximbank has reported transactions to the Congress, although it appears that such reports are made on a cumulative and periodic--rather than individual--basis. Finally, it is true that the appropriations committees of the Congress have been consistently apprised of this practice.

We would readily agree that the circumstances presented in this matter--a seemingly clear statutory provision consistently reinforced by the legislative history on the one hand, and a consistent administrative practice to the contrary--are highly unusual.[4/] Nevertheless, we believe this conflict must be resolved in favor of the construction called for by the statutory language and legislative history.

It is, of course, true that a contemporaneous and consistent administrative interpretation of a statute is entitled to great weight in considering the true effect of the law. See generally 2A Sutherland Statutory Construction (4th Ed. 1973), §§49.04-.05, 49.07-.08. This is particularly true where the statute has been reenacted and where the legislature has failed to object--although the latter factor is of minimal significance. Id., §§49.09, 49.10. At the same time, the administrative interpretation and practice is only a factor to be considered in the process of statutory construction. Obviously administrative practice cannot change the law. Accordingly, and administrative practice which is "unreasonable and clearly erroneous" is not controlling. Id., §49.04, page 235 and cases cited in note 3.

Judicial precedents, treatises and other sources provide a great variety of general principles to use as a guide in statutory construction. However, each issue must finally be resolved on the basis of the particular circumstances presented. In essence it is our opinion that, considering all of the circumstances here involved, the practice of by country determinations is so plainly inconsistent with section 2(b)(2) and the relevant legislative history that it must be rejected.

4/ Actually the practice was not significant during the period from 1968 to 1971 when the original Fino amendment was in effect.

Beyond this basis conclusion, we would add several observations. First, no reference to the past practice was made in the committee reports and debates on the 1968 legislation. In addition, any presumption of acceptance of past administrative practice which might arise by enactment of section 2(b)(2) in 1968 is rebutted by the fact that the legislative history clearly manifests an intent to require transaction-by-transaction determinations.

Secondly, as noted previously, the fact that objections have not been raised in the past is of minimal significance. The lack of congressional objections would be of much greater significance in a context which called for some specific congressional action in response to transmittal of a Presidential determination. However, the Congress obviously cannot be required to build a record of prior objections to an unlawful practice in order to preserve its right to insist upon full compliance. Such an approach would amount to assertion of waiver or laches against the Congress for which we know of absolutely no support. It is equally obvious that the past actions of the General Accounting Office have no relevance to the legal issues.

Finally, we note that the Attorney General's opinion twice alludes to section 2(b)(2) as essentially a disclosure provision. We cannot agree with this conclusion. If this was the basic purpose involved, the statute would presumably have provided simply for reports of transactions by either the President or the Bank. In fact, there would really be no need for either the prohibitions or waiver provision. The subject of the reporting requirement as stated in the statute is not the transaction but the Presidential determination.

The fundamental thrust of section 2(b)(2) is to state the policy that Eximbank financing involving Communist countries is generally not in the national interest. The waiver authority is provided in recognition of the need to accord the President flexibility (no doubt motivated at least partially in view of his role with respect to foreign relations) so as to determine that the general policy against such financing is outweighed by circumstances relating to particular transactions. At the same time, the placing of waiver authority in the President and the reference to transactions is designed to insure that the statutory policy is reversed only at the highest level of the Executive branch and only after consideration of the particular circumstances presented.

Under the foregoing analysis--which, in our view, is more consistent with the statutory language and legislative history, than that of the Attorney General--the reporting requirement serves essentially as a policing mechanism, rather than simply a device for disclosing transactions. The reporting of transactions by the Bank is, of course, of no significance in this respect. Moreover, blanket Presidential determinations, which have the effect of nullifying the basic prohibitions and policy of the statute by broad strokes, are in our view inconsistent with the purpose as well as the language of the statute.

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For the reasons stated herein, we must respectfully disagree with the conclusions stated by the Attorney General and the General Counsel of Eximbank.