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**THE BUMPERS AND LAUTENBERG
AMENDMENTS
TO A.I.D. LEGISLATION**

December 1990

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December, 1990

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ACRONYMS AND ABBREVIATIONS

AFR/MDI	Africa Bureau, Office of Market Development and Investment
A.I.D.	Agency for International Development
FAA	Foreign Assistance Act
FY	Fiscal Year
GC	General Counsel
HR	House Report
ICI	Intermediate Credit Institution
IQC	Indefinite Quantity Contract
OPIC	Overseas Private Investment Corporation
PD	Policy Determination
PPC	Bureau for Program and Policy Coordination, A.I.D.
TR&D	Tropical Research and Development, Inc.
U.S.	United States
USAID	United States Agency for International Development

PROJECT DESCRIPTION

The primary objective of this project is to develop and produce assessments of domestic and regional demand for specific agricultural products in selected African countries. To carry out this demand assessment objective, we wanted to create a method for assessing production and market potential of the products under review. The method would indicate levels of demand and potential future changes in demand levels. It would indicate potential for increased production of target commodities based on potentially available unused resources, including land, labor, and/or technical inputs. In addition, it would provide a gross indication of production and marketing costs. To the extent feasible, the project would also test the means for determining potential comparative advantage based on indicated gross production and marketing costs. It should also review existing and potential government subsidies, trade barriers, and other governmental and administrative regulations and programs. A specific focus of the assessments is to determine the feasibility of identifying all of the key constraints to private sector entree into the production or marketing system in order to expand the production of the target commodities.

Background

There are a number of agricultural commodities and agri-business related processed products which are capable of being produced in selected African countries. The initiation or expansion of production of such commodities can be beneficial for the developing African country in terms of increasing income and employment in agriculture. However, there is very little data available to establish effective demand patterns upon which to base potential agri-business development activities and for determining the potential for the production of these products in African countries.

In addition, some of these potential demand commodities need to be analyzed in terms of their potential for expansion or improvement without direct production assistance from A.I.D. Instead, A.I.D. would provide assistance for market analyses, technical advice to existing production operations, and/or assistance to African intermediate financial institutions which are currently financing such products.

The Bureau for Africa's Market Development and Investment Office (AFR/MDI) initiated this project to meet its need to identify investment opportunities in its target countries, opportunities that would appeal to U.S. investors. MDI is working to bring the private sector into the struggle to enhance rural living standards in developing African countries by attracting private sector resources to investments that will raise levels of rural employment, agricultural production, and standards of living. In exchange for the capital and technical expertise, the private sector will invest; it expects the investment to be profitable. MDI, therefore, requires a means to identify potentially profitable investment opportunities to offer to the private sector.

Given resource constraints, the methodology must be quick and require a minimal manpower expenditure. This, in turn, mandates that the methodology must rely extensively on secondary data and interviews with local commodity and marketing experts.

The output of the methodology is not expected to yield precise levels of demand and profitability, but rather magnitudes and directions that will be useful in directing further, more in-depth, marketing research.

Method

The first stage in the process involved a review and verification of data collected in Washington. We were given 270 raw and processed or semi-processed agricultural commodities to consider. Our first task was to narrow this list to between 30 and 40 locally produced commodities which, upon examination of the most basic production and trade data, show potential unsatisfied demand. Because of the inherent resource constraints, this was a necessary step. During the course of our investigations we became aware of promising commodities omitted in the initial culling process and we considered those as well.

The second stage entailed a more detailed investigation of the commodities selected in the first stage. We then investigated production and trade histories of the commodities in an attempt to ascertain why production has apparently failed to meet potential demand and what would be required to increase production. This information was obtained from existing commodity studies, food balance sheets, and demand projections, and, most importantly, from interviews with knowledgeable local observers. While the study is aimed principally at ascertaining local demand, we also considered factors relating to foreign trade. We recognize that African countries are not autarchic economies and that foreign competition and foreign demand is an important factor in determining the feasibility of profitable production increases. At this stage, we narrowed our list to those commodities which continue to manifest a strong possibility for profitable production increases.

The third stage entailed a closer examination of cost factors involved in increased production and a closer look at marketing and institutional constraints. Here, we attempted to estimate the magnitude of potential profitability, the resources needed to realize that level of profitability, the feasibility of success given existing marketing and institutional constraints, and the potential for overcoming those constraints. The information was acquired from local experts including production researchers, marketing boards, wholesalers, cooperatives, and large producers.

Basically, the questions addressed by this survey are:

- Is there a demand for increase production of the target commodity?
- What is the magnitude of that demand?
- What is required to increase production?
- Can increased production be marketed profitably, how can that be accomplished, and what is the potential magnitude of that profitability?

A secondary objective of this project was to determine a quick and relatively inexpensive method to obtain accurate, albeit perhaps not extremely detailed, answers to these questions. We were working under the assumption that the information we required exists and does not need to be derived from long-term intensive and expensive basic research.

Organization

In the discussion which follows, we have organized the review of each commodity discussed in the same format. First is a discussion of production history, followed by a demand assessment review. Next, we look at increased production potential. Fourth is production and marketing costs and constraints. Finally, there is a section on investment possibilities and profitability assessments. Although this format is repetitive, it does provide a comparative framework for the reports.

Output

The outputs of this project are three reports. First, and most importantly, are the two country reports, one each on Kenya and Botswana. This, the third report, is an interpretative assessment of the Bumpers and Lautenberg amendments to A.I.D. legislation, especially the impact such legislation might have on the development and export of specific commodities.

INTERPRETIVE SUMMARY OF THE BUMPERS AND LAUTENBERG AMENDMENTS¹

I. **Limitations on A.I.D.'s Agricultural Development Activities.**

Bumpers Amendment. 1986.

A.I.D. PD 15 - Assistance to Support Agricultural
Export Development. 1986

A.I.D. PD 71 - A.I.D. Financing of Palm Oil, Citrus, and
Sugar Projects and Related Products. 1978

A. Applicable Agricultural Commodities:

Any U.S. agricultural product which is exported. In addition, these specific commodities: Palm oil, citrus, and sugar.

B. Intent and Application of the Limitations:

1. Bumpers and Congress:

Any A.I.D. project or activity specifically and principally designed to increase agricultural exports of an A.I.D. assisted country; can reasonably be expected to cause substantial injury to U.S. exporters; and are deemed to be in direct competition with U.S. agricultural exports.

2. A.I.D.:

A.I.D. does not intend to support production of agricultural commodities that are likely to have a significant impact on competing U.S. exports.

C. A.I.D. Implementation

Proposed new products will be reviewed to determine if a project will likely have a significant impact on U.S. agricultural exports to third countries. The review will consider:

¹ This is an interpretive assessment based on the attached paper on Bumpers and Lautenberg Amendments and A.I.D. policies.

- export potential to the commodity,
- production level likely to result,
- likely export markets,
- volume of U.S. exports in this commodity and similar ones, and
- U.S. share of world or regional market which could reasonably be expected to be affected by increased exports of the commodity.

Proposed new projects which will likely have a significant impact on U.S. agricultural exports to third countries will not be approved at the new project development stage. If a determination cannot be made at this stage, a Project Implementation Document (PID) may be developed and will be reviewed in AID/Washington.

Under PD 71 for palm oil, citrus, and sugar:

"Missions are not prohibited from developing project ideas in which these commodities are involved. A.I.D. should only finance such projects when their development rationale is strong and their likely impact on US producers is low."

II. **Limitations on A.I.D.'s Export Development Activities for Textiles and Related Products.**

Lautenberg Amendment. 1986
A.I.D General Counsel (GC) Opinion of 1987

A. Applicable Commodities:

textiles
apparel
footwear
handbags
luggage
flat goods (such as wallets)
work gloves
leather wearing apparel

B. Intent and application of the limitations:

1. Lautenberg and Congress
No A.I.D. funds (from the FY 1987 Appropriations) shall be obligated or expended -

- a. "to procure directly feasibility studies or fm studies for, or project profiles of potential investment in, the manufacture, for export" of the specified commodities, or
 - b. to "assist...in the establishment of facilities specifically designed for, "manufacture of the specified commodities for export."
2. A.I.D.: Although there is no official A.I.D. policy on this Amendment, the following seems to apply:
- a. The Amendment does not prohibit use of foreign assistance funds to engage in such activities "indirectly."
 - b. The Amendment does not prohibit use of foreign assistance funds to engage in such activities as:
 - technical assistance to improve productivity and product
 - quality of exports, even of the eight commodities.
 - advice on how to market the exports.
 - credit projects that provide funds to intermediate credit institutions (Few) for lending to private enterprises involved with the export of the eight commodities so long as A.I.D. does not directly approve such lending.
 - trade promotion activities that assist firms that desire to export.
 - c. A.I.D. may finance the prohibited activities for the specified commodities if they are produced for export to third countries to which the United States is not currently exporting statistically significant quantities of the same or similar commodity.
 - d. A.I.D. may finance activities related to the eight commodities if there is no direct competition with U.S. export products. (i.e., between two identical or similar products.)

COMMENT: The intent of Congress should be an important consideration for A.I.D.. It should consider the principle that its activities should in no way be designed to

avoid Congress's intent with regard to the prohibited activities, through the use of intermediaries. If such intermediaries engage directly in the prohibited activities and A.I.D. has direct control over either the actions of the intermediary or the A.I.D. funds that it may be using, A.I.D. should prohibit such use of these funds. On the other hand, and for reasons other than to evade the Congressional intent, an intermediary, which decides at a later date to engage in exporting to countries in direct competition with the U.S., may do so only as long as A.I.D. funds are not used directly and if A.I.D. has direct control over such funds.

ASSESSMENT OF THE BUMPERS AND THE LAUTENBERG AMENDMENTS

I. GENERAL

A. U.S. Congress established the policy of the United States concerning official bilateral and multilateral economic development assistance in agriculture in two key pieces of legislation:

1. The Agricultural Trade Development and Assistance Act of 1954 (Public Law 480):

to increase the consumption of U.S. agricultural commodities in foreign countries and to improve the foreign relations of the United States.

2. The Foreign Assistance Act (FAA) of 1961:

to promote the foreign policy, security, and general welfare of the United States by assisting other countries in their efforts toward economic development and both internal and external security. Section 102 of the FAA provides that U.S. development assistance be used to increase agricultural productivity per unit of land through small-farm, labor-intensive agriculture.

B. These two Acts have been amended or had specific legislative restrictions applied to them. During the 1980s, there was a great amount of domestic political pressure to add restrictions to A.I.D.'s legislation as a result of slumping domestic and export demand for agricultural commodities and other items such as textiles.

II. The "BUMPERS AMENDMENT"

A. The most serious restrictive legislation came from Senator Dale Bumpers of Arkansas. He offered an amendment to the FF 1986 Supplemental Appropriations Bill (HR 4515), which ultimately became Section 209 of Public Law 99-349 on July 2, 1986. The Senate Appropriations Committee also accepted the "Bumpers Amendment" as an amendment to the FF 1987 Foreign Assistance Appropriations Act before the full committee on September 15, 1986, without a vote.

The amendment states:

"None of the funds appropriated by this or any other Act to carry out Chapter 1 or Part I of the Foreign Assistance Act of 1961 shall be available for any testing or breeding feasibility study, variety improvement or introduction, consultancy, publication, conference, or training in connection with the growth or production in a foreign country of an agricultural commodity for export which would compete with a similar commodity grown or produced in the United States: Provided, that this section shall not prohibit (1) activities designed to increase food security in developing countries where such activities will not have a significant impact on the export of agricultural commodities of the United States; or (2) research activities intended primarily to benefit American producers." (PL 99-349; Section 209).

In simple terms, this amendment prohibits the use of Foreign Assistance funds for any activity that helps a foreign country to produce for export any agricultural commodity similar to one produced for export in the U.S.

The Conference Report (House Report 99-649) clarified the scope of Section 209 by indicating that the language in the Section should only be applied to:

(1) projects or activities that are specifically and principally designed to increase agricultural exports in developing countries that can reasonably be expected to cause substantial injury to United States exporters;

(2) the production of such agricultural commodities for export that are deemed to be in direct competition with U.S. agricultural exports. (emphasis supplied).

B. A.I.D. POLICY

1. PD 15 ASSISTANCE TO SUPPORT AGRICULTURAL EXPORT DEVELOPMENT

(See Attachment #1)

In response to the "Bumpers Amendment", A.I.D. issued a Policy Determination (PD 15), on September 13, 1986. The Policy Determination declared that:

(a). "Although A.I.D. encourages international trade as one important element of the development process.....A.I.D. does not intend to support production of agricultural commodities for export that are likely to have a significant impact on competing U.S. exports." (emphasis supplied)

(b). "The goal of A.I.D. agricultural development assistance is to help developing countries achieve food self-reliance..."

COMMENT: Food self-reliance can result from a combination of domestic production and importation of food on commercial terms paid with foreign exchange earnings. The foreign exchange, in most cases, would be earned through export of agricultural products. Comparative advantage should govern the decision of which commodities to produce, and to export. Within this concept of food self-reliance is the unstated assumption that such trade could also involve the purchase of U.S. agricultural export commodities.

(c). "AID/Washington will regard the agricultural export dimension of all projects as an important policy issue...."

When new projects are being proposed in Missions (USAIDs) or in AID/W, a review will determine whether or not the proposed project will likely have a significant impact on U.S. agriculture exports to third countries. The review will consider the following:

- export potential of the commodity,
- production level likely to result,
- likely export markets,
- volume of U.S. exports in this commodity and similar ones, and
- U.S. share of world or regional market which could reasonably be expected to be affected by increased exports of the commodity.

2. PD 71 A.I.D. FINANCING OF PALM OIL, CITRUS, AND SUGAR PROJECTS AND RELATED PRODUCTS.

(See Attachment #2).

In response to restrictive legislation in the Overseas Private Investment Corporation (OPIC) authorization bill and other laws, A.I.D. issued a Policy Determination (PD 71), on May 12, 1978. The Policy Determination declared that:

"Because of the potential injury to US producers of similar products, A.I.D. will ...examine at the earliest possible stage proposed projects involving production, processing or marketing of sugar, palm oil, or citrus for export." The review generally includes the same factors as PD 15. (See par. 1.(c) above.)

"Missions are not prohibited from developing project ideas in which these commodities are involved. Rather, they should be aware that their potential impact on US producers is a matter of concern..." "A.I.D. should, therefore, only finance such projects when their development rationale is strong and their likely impact on US producers is low."

III. THE "LAUTENBERG AMENDMENT"

A. Senator Frank Lautenberg of New Jersey offered an amendment to the Senate Appropriations Committee during the second session of the 99th Congress, for the FF 1987 Appropriations Act (HR 5339). The propose of this amendment was to restrict the use of certain A.I.D. funds in regard to specific activities with particular commodities. The amendment (Section 559 of PL 99-591) stated:

"None of the funds provided in this Act to the Agency for International Development, other than funds made available to carry out Caribbean Basin Initiative programs under the Tariff Schedules of the United States, 19 U.S.C. 1202, Schedule 8, Part 1, Subpart B, Item 807.00, shall be obligated or expended:

1) To procure directly feasibility studies or fm studies for, or project profiles of potential investment in, the manufacture for export to the United States or to third country markets in direct competition with U.S. exports, of import-sensitive articles as defined by Section 503(C) (1) (A) & (E) of the Tariff Act of 1930 (19 U.S.C.2463(C) (1) (A) &(E).

2) To assist directly in the establishment of facilities specifically designed for the manufacture for export to the United States of import-sensitive articles as defined in Section 503(C) (1) (A)&(E) of the Tariff Act of 1930 (19 U.S.C.2463(C)(1)(A)&(E)."¹

There are eight import-sensitive commodities referred to in the Trade Act of 1974:

textiles
apparel
footwear
handbags
luggage
flat goods (such as wallets)
work gloves
leather wearing apparel

This amendment is directed at export items in direct competition with U.S. manufactures for export. The intent was not to restrict A.I.D. support for the manufacture of articles or commodities primarily for the recipient country's domestic market or for intra-regional trade with countries not including the United States, when such trade is not in direct competition with U.S. exports.

¹Section 559 refers in error to Section 503 of the Tariff Act of 1930" (46 Stat. 590) rather than to Section 503 of the Trade Act of 1974 (PL 93-618).

B. A.I.D. Deliberations

1. The Agency identified three issues concerning the impact of the "Lautenberg Amendment".
 - (a) Whether Agency restrictions should be limited to activities explicitly identified in the amendment, or should be expanded to include particular types of A.I.D.--funded commercial activities supporting the manufacture, marketing, and export of the eight commodities targeted in the amendment and placing them in U.S. or third country markets in competition with U.S. exports?

The general opinion expressed by different Bureaus of the Agency was that the legislation applies only to the four activities--procurement of feasibility studies, fm studies, and project profiles, and the establishment of facilities specifically for the manufacture of items for export--and does not preclude several types of Agency activities:

- technical assistance to private enterprise designed to improve productivity and product quality of exports, even of the eight commodities,
 - advice on how to market the exports,
 - credit projects that provide funds to intermediate credit institutions (Few) for lending to private enterprises involved with the export of the eight commodities, nor
 - trade promotion projects that assist firms that desire to export.
- (a) The second issue was whether the directness of A.I.D.'s assistance be measured by intent or by traceability? This issue focused on Intermediate Credit Institutions (Few) and how to track A.I.D. funds through the Few.
 - (b) The third issue was whether the policy guidance be applied only to new funds (FF 1987) or should it be expanded to cover prior funds? (The language of the "Lautenberg Amendment" applies to funds provided in the FF 1987 Foreign Assistance Act only.)

After considerable debate over the amendment and recommendations narrowed to three options, the matter went to the Administrator². The Agency never established a policy determination with regard to the "Lautenberg Amendment". Despite all the discussion, no official agency-wide guidance is available to offices and bureaus of the Agency.

² See Attachment #3

2. A.I.D. GC Opinion (See Attachment #4)

The only guidance that is available was in an Information Memorandum For the Administrator from Howard M. Fry, GC of January 6, 1987. The following are important excerpts:

"The Amendment does not explicitly prohibit other export-related activities, such as development of new export markets, which do not directly involve the procurement of investment studies or the establishment of export manufacturing facilities." p.11.

"As a matter of law...the Lautenberg Amendment prohibits use of foreign assistance funds only (1) to 'procure...feasibility studies or fm studies for, or project profiles of potential investment in, the manufacture of the specified commodities for export.'" (emphasis supplied) (p.11)

"A.I.D....may support the manufacture for export of the specified commodities by developing countries to any third countries, so long as such exports are not in 'direct competition with United States exports'." (p.13)

"The competition with United States exports language represents a significant exclusion from the Lautenberg Amendment's prohibition. It can reasonably be construed to allow U.S. support for exports of textiles, apparel, and the other specified commodities to third countries to which the United States is not currently exporting statistically significant quantities of the same or similar commodity." (p.13)

"The statutory prohibition with respect to third country exports is narrowed even further by its limitation to 'exports in direct competition with United States exports'. (emphasis added) Although the statute does not define the meaning of "direct" in this context, the term "direct competition" can reasonably be understood to mean competition between two identical or similar products." (p.13)

"Implementation of the Lautenberg Amendment's "direct competition" exclusion will require careful product-by-product comparison of developing country products with those of the United States, as well as an analysis of U.S. commodity trading patterns in foreign markets where A.I.D.-supported exports may be sold." (p.13)

"The Lautenberg Amendment prohibits use of foreign assistance funds to procure 'directly' certain studies or project profiles relating to the manufacture for export of specified commodities, or to assist 'directly' in the establishment of facilities specifically designed for the manufacture for export of those commodities. By implication, the Amendment does not prohibit use of foreign assistance funds to engage in such activities "indirectly." (p.14)

"A.I.D. currently provides much of its support for export development activities through intermediate financial and credit institutions which function in a manner similar to that of banks or venture capital firms." (p.14)

"It would be inconsistent with this intent [of the Amendment] for A.I.D. to avoid the statute's effect by utilizing intermediaries purposefully in order to channel funds to textile export manufacturing projects, or to allow intermediaries to use U.S. foreign assistance funds to finance such projects when A.I.D. retains approval authority over nearly all types of projects funded by the intermediary." (p.15)

"Therefore...financing provided to intermediate financial institutions is exempt from Lautenberg Amendment restrictions unless: (1) A.I.D.'s intent is to avoid the statute's effect by proposefully channeling aid through such institutions, or (2) A.I.D. retains authority to approve or disapprove all or substantially all categories of projects funded by the intermediary." (p.15)

ATTACHMENT 1

Policy Determination -- 15

Assistance to Support Agricultural Export Development

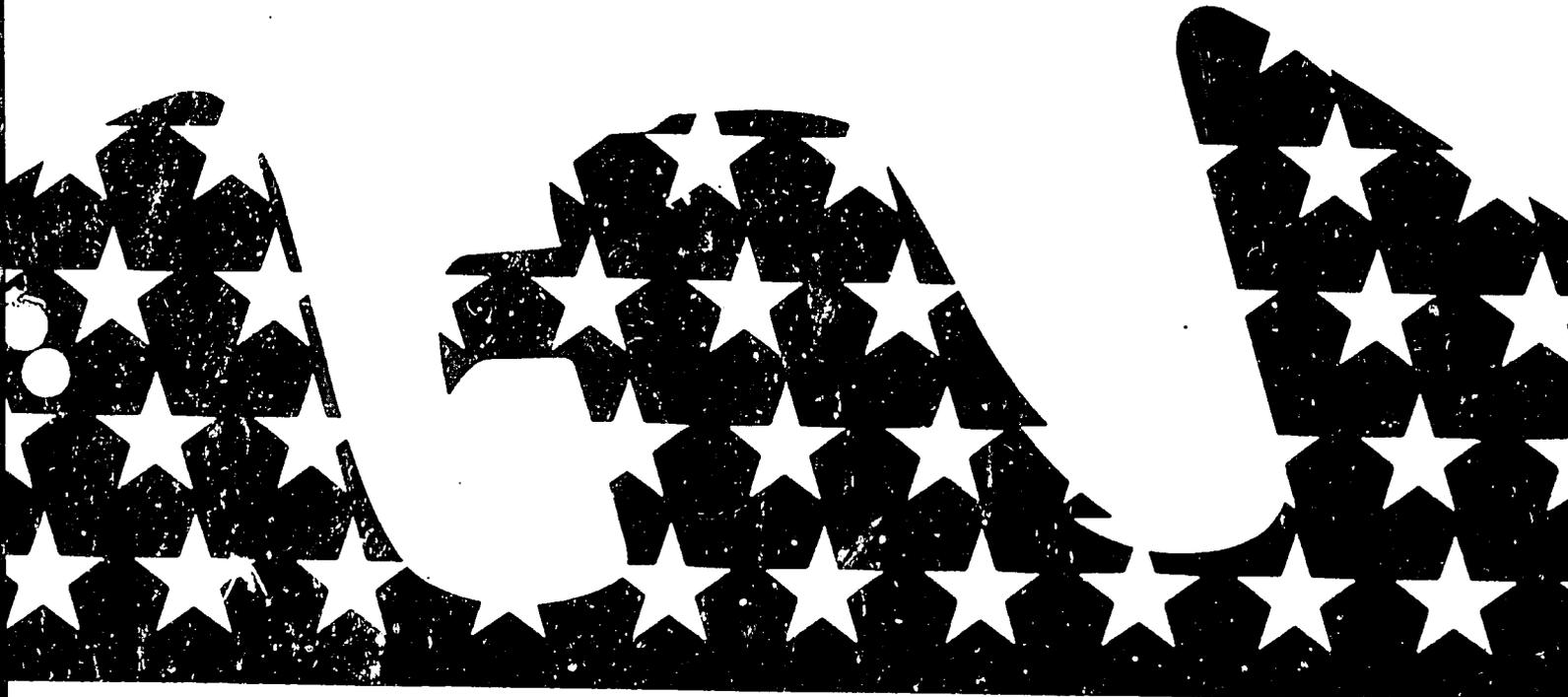
POLICY DETERMINATION

Agency for International Development

PD-15

September 13, 1986

ASSISTANCE TO SUPPORT AGRICULTURAL EXPORT DEVELOPMENT



)
) PN-AAV-460

AGENCY FOR INTERNATIONAL DEVELOPMENT
WASHINGTON, D.C. 20523

THE ADMINISTRATOR

PD-15
September 13, 1986

A.I.D.

POLICY DETERMINATION

Assistance to Support Agricultural Export Development

A. Introduction

The goal of A.I.D. agricultural development assistance is to help the developing countries achieve food self-reliance, which represents a balanced approach to addressing the problem of hunger. Food self-reliance involves supporting (1) the production of agricultural commodities that are economically viable to produce, (2) more efficient food distribution, (3) expanded purchasing power, and (4) international trade.

Although A.I.D. encourages international trade as one important element of the development process, the Agency is concerned about potential injury to U.S. agricultural exports. A.I.D. does not intend to support production of agricultural commodities for export that are likely to have a significant impact on competing U.S. exports.

B. A.I.D. Policy

A.I.D. assistance fosters the food security objectives of developing countries. Long-run food security, as defined in A.I.D.'s "Food and Agricultural Development" Policy Paper (May 1982), is the ability of a country to assure a nutritionally adequate food supply to its population on a continuing basis. This can result from a combination of domestic production and importation of food on commercial terms paid with foreign exchange earnings. Comparative advantage provides the conceptual underpinning governing the decision of which commodities to produce, whether for domestic consumption or for export.

Food security defined in this way is consistent with a strategy of food self-reliance, rather than a strategy of food self-sufficiency. Food self-reliance recognizes that a country's food supply can be assured not only through increased domestic food production and more efficient food distribution, but also through expanded purchasing power and international trade, including intra-regional trade.

PD-15
September 13, 1986

- volume of U.S. exports of the commodity in question and similar commodities;
- U.S. share of the world or regional market that could reasonably be expected to be affected by increased exports of the commodity.



M. Peter McPherson
Administrator



Date

ATTACHMENT 2

Policy Determination -- 71

A.I.D. Financing of Palm Oil, Citrus, and Sugar Projects and Related Products

POLICY DETERMINATION

INTERNATIONAL DEVELOPMENT
COOPERATION AGENCY
AGENCY FOR INTERNATIONAL DEVELOPMENT

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May 12, 1978

PD-71

POLICY DETERMINATION: AID Financing of Palm Oil,
Citrus and Sugar Projects and Related Products

1. Because of the potential injury to US producers of similar products, AID/W will as a matter of general policy examine at the earliest possible stage proposed projects involving production, processing or marketing of sugar, palm oil, or citrus for export. Approval to proceed with project development in these cases must be made by the appropriate Regional Assistant Administrator with the concurrence of AA/PPC and AA/IIA following review by PPC/PDPR/EDD in cooperation with IIA/EA/IEA. These divisions will examine potential injury to US producers on the basis of data supplied by the Mission on the export potential of the project, likely export markets, magnitude of production resulting from the project, and the recipient country's relative share of the world market and/or US import market; and on information available in Washington about the condition of the US industry.
2. Commodities financed under non-project assistance and activities financed by subsequently generated local currencies would be given a similar review with participation by SER/COM when the Mission is aware that the commodities will contribute to establishing or expanding production, processing or marketing of these products for export. However, we do not envisage changing existing procedures governing non-project assistance to require Missions to trace all final uses of imported commodities.
3. Missions are not prohibited from developing project ideas in which these commodities are involved. Rather, they should be aware that their potential impact on US producers is a matter of concern which has resulted in restrictive legislation in the OPIC authorization bill and in the replenishment authorization for the International Financial Institutions. AID should, therefore, only finance such projects when their development rationale is strong and their likely impact on US producers is low.

RH Nooter

Robert H. Nooter
Acting Administrator

5/12/78

Date

ATTACHMENT 3

PPC Memoranda

ACTION MEMORANDUM FOR THE ADMINISTRATOR

FROM: AA/PPC, Richard E. Bissell

SUBJECT: Policy Guidance on Lautenberg Amendment

1. PROBLEM: To determine the scope of A.I.D. policy guidance on the Lautenberg Amendment.

2. BACKGROUND: The Lautenberg Amendment has been the subject of much discussion over the past several months (Attachment A) GC issued its legal opinion on the Lautenberg Amendment in January 1987 (Attachment B). The legal opinion relied upon a narrow interpretation of the amendment, and limits the prohibitions that must be imposed upon A.I.D. to the specific activities identified in the legislation.

However, GC also noted that "As a matter of policy . . . A.I.D. could decide to restrict the use of foreign assistance funds by intermediate financial institutions . . . for certain export activities." We agree with GC's suggestion, and encourage the adoption of restrictions on A.I.D. activities that go beyond those stated in the amendment. We believe that a more restrictive approach is necessary to:

- codify Agency practice of not supporting, to any great extent, exports of the eight import-sensitive commodities identified in the legislation (with the exception of 807 products in the CBI, which are exempted from the Lautenberg restrictions)*;
- avoid Congressional perceptions that A.I.D. (a) may be using the letter of the law to skirt the intent of the law, and (b) is not sensitive to Congressional concerns about A.I.D.'s support of LDC export activities; and
- forestall new Congressionally-directed constraints on A.I.D. export promotion activities that might arise during the 100th Congress, and protect our export promotion efforts in A.I.D.-recipient countries.

* The import-sensitive commodities identified are textiles, apparel, footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel.

The Regional Bureaus and other Central Bureaus support GC's interpretation of the Lautenberg Amendment. They believe that, as a matter of principle, A.I.D. should not construe the amendment beyond the point that we legally have to, even if there appears to be certain loopholes in this approach that may contradict Congressional intent. They believe that any constraints placed on A.I.D.'s export activities, beyond those specified in the Lautenberg Amendment:

- would seriously and negatively impact A.I.D.'s private enterprise initiative, especially those activities that provide credit through IFIs and, in the case of PRE, direct loans to private enterprises; and
- should be placed on A.I.D. by the Congress, and not from within A.I.D. itself.

What is at stake is our long-term efforts to support export-led economic growth. All bureaus agree on the goal. Differences arise over how we treat this particular legislative milestone, and how our response may influence the field and Congress in coming years.

I have met and discussed the amendment with the senior staff to determine its impact on A.I.D. The major points of difference between what would be permitted by the legal opinion and what might be restricted as a matter of policy are discussed below.

Issue 1. Scope of activities covered in Agency policy: Should our restrictions be limited to the activities explicitly identified in the Lautenberg Amendment, or be expanded to include particular types of A.I.D.-funded commercial activities that would support the manufacture, marketing, and export of the eight commodities targeted in the amendment and place them into U.S. markets or into third country markets in competition with U.S. exports?

The GC legal opinion concludes that the legislation applies only to the four activities identified in the amendment (procurement of feasibility studies, prefeasibility studies, and project profiles, and the establishment of facilities specifically designed for the manufacture of textiles). The Regional Bureaus and PRE urge that A.I.D.'s policy apply only to these four activities.

Several obvious areas of Agency support for the eight commodities would not be covered by this approach. For example, A.I.D. would still be permitted to undertake such activities as:

- technical assistance to private enterprises designed to improve productivity and product quality of exports of

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- the eight commodities, or advice on how to market the exports;
- credit projects that onlend funds through an IFI to private enterprises involved in the production for export of the eight commodities as long as the purpose of the loan to the IFI is to develop institutional capabilities, not to specifically support the export of the eight commodities; and
 - trade promotion projects that assist firms desiring to export the eight commodities.

Operating within the confines of GC's interpretation of the Lautenberg Amendment may present problems for A.I.D. Under GC's interpretation, for example, a Mission could not directly help an entrepreneur to establish a new textile manufacturing facility, but could provide assistance to a textile manufacturer/exporter who desires to, expand his manufacturing and exporting operations.

As demonstrated above, there are many types of project interventions that may purposely or unintentionally lead to exports of the identified commodities. PPC believes, however, that the problems that would arise from our knowledgeable or inadvertent support of these interventions would be minimized by relying upon a policy approach that combines the legislation's four restricted activities with other restrictions on A.I.D. assistance that supports the export of the eight commodities.

Issue 2. Intent v. Traceability and "Direct" Assistance:
Should the "directness" of A.I.D.'s assistance be measured by intent or by traceability?

With respect to intermediate credit institutions (ICIs), the GC legal opinion interprets direct assistance by the intent or purpose of the assistance, rather than the channel used to transmit the assistance. GC concludes that, as a matter of law, an ICI project is "indirect" assistance and, therefore, exempt from Lautenberg unless A.I.D. (a) intends to support exports of the import-sensitive commodities through the ICI or (b) retains authority to approve or disapprove all or substantially all categories of ICI subloans or investments. The Regional Bureaus and PRE urge that A.I.D. policy apply to no ICI projects other than the few that may fall within the narrow exceptions set forth in the GC opinion.

Most of A.I.D.'s support for the eight commodities would not be covered under the "intent" approach proposed, as we deal infrequently with firms on a direct basis. The technical assistance, credit, and trade promotion project approaches

noted earlier are all implemented through intermediaries, although the funding for these projects is often traceable and attributable to A.I.D. Under the GC opinion, A.I.D. would also be able to support the Sri Lanka woven labels project that led to enactment of the Lautenberg Amendment since this activity was funded indirectly by A.I.D. through a government ministry to Coopers & Lybrand.

PPC is concerned that Congress may not accept the distinction between A.I.D.'s stated intent of improving institutional capabilities in many projects (especially those involving IFIs) and the end result of increased LDC exports of the eight commodities to U.S. markets or to third country markets in competition with U.S. products. Therefore, PPC believes that assistance should be covered by our policy guidance as long as the assistance remains attributable and traceable to A.I.D., even through successive, intervening steps.

There are several ways by which such a restriction could be implemented. For example, A.I.D. could use explicit contract authority or special covenants to restrict the use of its funds from supporting the manufacture or export of the eight commodities. On the other hand, A.I.D. could institute special pre-approval procedures for particular types of commercial activities rather than to prohibit them altogether, because pre-approval authority would enable A.I.D. to take advantage of the provision in the Lautenberg Amendment allowing support for exports to third countries not in "direct competition with U.S. exports." A contract could be amended to "request A.I.D.'s prior approval of any subloan or investment related to the production for export of textiles, apparel, footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel." Similar restrictions are commonly employed with respect to citrus assistance in most LAC projects.

Issue 3. 1987 v. Pre-1987 Projects: Should the policy guidance be applied to only new (FY 1987) projects or be expanded to cover ongoing (pre-FY 1987) projects. The Lautenberg Amendment applies only to funds provided in the FY 1987 Foreign Assistance Appropriations Act. GC, the Regional Bureaus, and PRE endorse this position and do not believe that pre-FY 1987 ongoing project agreements should be amended.

PPC believes that any new starts (such as a new subloan) under an ongoing project might be interpreted by the Congress as an FY 1987 activity, although it may be funded with prior-year funds. We should not expect Members of Congress to draw fine distinctions between the use of FY 1987 appropriated funds and the use of prior-year funds during FY 1987.

There are various options in this area. For example, rather than require all ongoing projects to be amended, ongoing projects could be amended or modified only when adding FY 1987 funds to the project. The contract authority and pre-approval procedures noted in the previous discussion could be employed here as well.

3. OTHER APPROACHES. It was suggested by C/AID that PPC amend the Trade Development Policy Paper to include language stating generally that "It is A.I.D.'s policy not to assist in the export of products or commodities which would cause substantial injury to U.S. producers." LEG believes that this type of statement would be useful on the Hill if it were incorporated into an official policy statement. Other senior staff members expressed the view that it would be unnecessarily confusing to amend the Trade Development Policy Paper each time a limited statutory change is enacted. We agree with this position. We also believe that such a statement would have little utility (for example, the Agency has never defined "substantial injury") and would be unenforceable.

4. OPTIONS. We would like your guidance on these issues in order to develop a policy implementing the Lautenberg Amendment that will be communicated to the field. You may wish to convene a senior staff meeting to discuss the issues presented above and the options presented below.

Option 1: Narrow prohibitions. A.I.D. should rely solely on (a) the GC legal opinion (distributed to all Missions), which limits the scope of our policy to direct assistance for the activities identified in the Lautenberg Amendment with FY 1987 funds, and (b) the Trade Development Policy Paper (section VI.C.4.).

Approve _____

Disapprove _____

Date _____

Option 2: Require review in AID/W. Develop policy guidance that (a) prohibits the use of FY 1987 funds from supporting the activities identified in the Lautenberg Amendment, and (b) requires that other types of project interventions that could purposely or inadvertently support LDC exports of the eight commodities to U.S. markets or to third country markets in competition with U.S. products,

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with FY 1987 funds that are traceable or attributable to A.I.D., be reviewed in AID/W and approved by the appropriate regional bureau Assistant Administrator.

Approve _____

Disapprove _____

Date _____

Option 3: Broad prohibitions. Develop policy guidance that (a) prohibits the use of A.I.D. funds from directly or indirectly (traceable and attributable) supporting particular types of project interventions that could purposely or inadvertently support exports of the commodities identified in the Lautenberg Amendment, and (b) applies to both FY 1987 and ongoing projects (pre-FY 1987).

Approve _____

Disapprove _____

Date _____

ACTION MEMORANDUM FOR THE ADMINISTRATOR

FROM: AA/PPC, Richard E. Bissell

SUBJECT: Policy Guidance on Lautenberg Amendment

1. Problem: To determine the focus of the agency's policy guidance on the Lautenberg Amendment.

2. Background: On November 19, PPC distributed draft policy guidance on the Lautenberg Amendment to the Agency for technical comment. Although a couple of offices did approve the draft guidance, most bureaus and offices questioned PPC's broader interpretation of both the legislation and the intent of Congress.

On January 2, I invited the senior staff to attend a January 7 issues meeting so that we could discuss the various positions on the Lautenberg Amendment and the Amendment's impact on A.I.D. We circulated a revised copy of the November 19 draft (Attachment A) and an issues paper at that time. GC distributed its legal opinion on the Lautenberg Amendment on Jan 6 (Attachment B).

The general consensus of the Regional Bureaus and other Central Bureaus was that they preferred to rely on the GC opinion and the Agency's Trade Development Policy Paper (July 1986) for guidance on dealing with politically sensitive export activities such as those covered by the Lautenberg Amendment (Attachment C). Although the other bureaus support GC's narrower interpretation of the Lautenberg Amendment, PPC is not satisfied that the GC legal opinion should be let to stand as the policy guidance on Lautenberg for the Agency. The major points of difference between PPC and the other bureaus are discussed below.

A. Coverage of textile export activities in Agency policy.
The GC opinion relies upon a strict interpretation of the legislation in its legal opinion, and includes that the legislation applies only to "direct" assistance (the term used but not defined in the statute) related to feasibility studies, easibility studies, project profiles, and the establishment acilities specifically

designed for the manufacture of import-sensitive articles. GC believes that the amendment's language is quite clear and, therefore, does not believe that the Senate Appropriations Committee (SAC) report language needs to be given particular credence as part of the legal interpretation. The Regional Bureaus and PRE agree with this approach.

For the purposes of policy, however, PPC takes a different view of the meaning of the Lautenberg Amendment. Our draft policy guidance was based upon what we see as the broad implications of the Lautenberg Amendment and the SAC report accompanying the legislation. PPC believes that the motivation behind the Congress's action was its concern that A.I.D. is funding activities to promote exports to the United States or third country markets of foreign manufactured articles that may harm trade-sensitive U.S. industries. The Committee was specifically concerned about the harm on the U.S. apparel industry as a result of increased textile exports, and specific mention was made of A.I.D.'s funding of project profiles in Sri Lanka. Based upon this, we believe that the SAC language should be considered in A.I.D.'s development of policy.

A major PPC concern with relying upon the GC legal opinion as the guidance on our textile export activities is that several obvious areas of Agency support for textile exports would not be covered. For example, limiting Lautenberg restrictions to the four types of activities specified in the legislation per the GC legal opinion, would still permit the Sri Lanka woven label project, the motivating force behind the amendment, to be undertaken. Similarly, projects that either fund textile production for exports or that market LDC textile exports would be allowed under the GC interpretation as long as the intent of our aid is to develop institutional capabilities.

B. Direct v. Indirect Assistance. GC interprets "direct" assistance by the intent or purpose of the assistance, rather than the channel used to transmit the assistance. The legal opinion is argued that A.I.D.'s intent in many projects, especially those involving IFIs, is to develop institutional capabilities. The GC opinion states that assistance to textile exporters must be specified as a project goal or purpose in order to be covered by the Lautenberg Amendment. Unless such a claim is made, the specific subloans or sub-activities performed under a project are not applicable to the Lautenberg restrictions. The Regional Bureaus and PRE also point out that the draft legislation originally prohibited both direct and indirect assistance and that the Agency was successful in striking the indirect assistance struck from the legislation.

PPC does not feel that this interpretation of direct is sufficient for either the purposes of policy or for explaining our actions to the Congress. We believe that Congress will be more protectionist in the future and will focus its criticism on the end result of A.I.D.'s assistance (the textiles that are exported to U.S. markets or find their way in third country markets in competition with U.S. exports), not on A.I.D.'s stated purpose intent (i.e. institutional development) when providing the assistance. PPC believes that assistance is direct as long as that assistance remains attributable and traceable, even through successive, intervening steps.

C. Other Issues and Approaches. It was suggested by C/AID, Marshall Brown, that PPC amend the Trade Development Policy Paper to include language along the lines of "It is A.I.D.'s policy not to assist in the export of products or commodities which would cause substantial injury to U.S. producers." Kelly Kammerer believes that this type of statement would be useful on the Hill if it were incorporated into some official policy statement. Kammerer did not specify amending the Trade Development Policy Paper. Other senior staff members expressed the view that it would be unnecessarily confusing to amend the Trade Development Policy Paper each time a limited statutory change is enacted. Although we believe that transmittal of such a statement has little utility (for example, the Agency has never defined "substantial injury") and is generally unenforceable, we agree that the policy paper should not be amended. A separate message to the field on trade policy issues, protectionism, and the international economic environment would be a more suitable vehicle to convey our concerns.

3. Options. As demonstrated in the above discussion, there are still several issues on which PPC and the Regional Bureaus and other Central Bureaus disagree. We would like your guidance on these issues.

Option 1: Rely solely on the GC legal opinion (distributed to all Missions) and the Trade Policy Paper to provide guidance on handling the issues raised by the Lautenberg Amendment, and send a separate message to the field on trade policy issues and protectionism.

Approve _____
Disapprove _____
Date _____

Option 2C: Application of the Lautenberg Amendment to Pre-FY 1987 Projects.

1. The policy guidance should apply only to FY 1987 projects.

Approve _____
Disapprove _____
Date _____

2. Agency policy guidance should apply to both FY 1987 and ongoing projects.

Approve _____
Disapprove _____
Date _____

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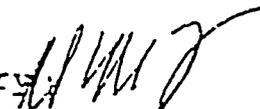
ATTACHMENT 4

General Counsel Opinion

AGENCY FOR INTERNATIONAL DEVELOPMENT
WASHINGTON, D.C. 20523

JAN 6 1987

INFORMATION MEMORANDUM FOR THE ADMINISTRATOR

FROM: GC, Howard M. Fry 

SUBJECT: Analysis of Section 559 of the FY 1987 Foreign Assistance Appropriations Act (the "Lautenberg Amendment")

This memorandum analyzes the meaning and scope of Section 559 of the FY 1987 Foreign Assistance Appropriations Act. Proposed by Senator Lautenberg, Section 559 (the "Lautenberg Amendment") restricts the obligation and expenditure of Economic Support Fund and Development Assistance funds for certain activities directly assisting the manufacture for export from developing countries to the United States of textiles, apparel, footwear and certain other "import-sensitive" articles, as well as the manufacture for export to third countries of those same articles in direct competition with United States exports.

LAUTENBERG AMENDMENT

[On October 18, 1986, President Reagan signed into law the FY 1987 Continuing Resolution (P.L. 99-591),^{1/} which includes the FY 1987 Foreign Assistance and Related Programs Appropriations Act. Section 559 of the FY 1987 Foreign Assistance Appropriations Act originated in the Senate Appropriations Committee during markup of the FY 1987 foreign assistance appropriations bill (S. 2824). The Senate Appropriations Committee accepted statutory language offered by Senator Lautenberg prohibiting certain AID export development activities, as well as report language interpreting this provision. The Lautenberg Amendment remained a part of the appropriations bill approved by the Senate and subsequently by the House-Senate conference.

^{1/} On October 18, the President signed into law a Continuing Resolution (P.L. 99-500) that failed to include several pages of text unrelated to foreign assistance. On October 30, the President signed into law the complete text (P.L. 99-591).

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As enacted into law, Section 559 provides:

"None of the funds provided in . . . [the FY 1987 Foreign Assistance Appropriations] Act to the Agency for International Development, other than funds made available to carry out Caribbean Basin Initiative programs under the Tariff Schedules of the United States, 19 U.S.C. 1202, Schedule 8, Part I, Subpart B, Item 807.00, shall be obligated or expended -

"(1) to procure directly feasibility studies or prefeasibility studies for, or project profiles of potential investment in, the manufacture, for export to the United States or to third country markets in direct competition with United States exports, of import-sensitive articles as defined by section 503(c)(1)(A) and (E) of the . . . [Trade Act of 1974]^{2/} (19 U.S.C. 2463(c)(1)(A) and (E)); or

"(2) to assist directly in the establishment of facilities specifically designed for the manufacture, for export to the United States or to third country markets in direct competition with United States exports, of import-sensitive articles as defined in section 503(c)(1)(A) and (E) of the . . . [Trade Act of 1974] (19 U.S.C. 2463(c)(1)(A) and (E))."

Section 503(c)(1)(A) and (E) of the Trade Act of 1974 refers only to the following "import-sensitive" commodities: textiles, apparel, footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel. The Lautenberg Amendment, therefore, restricts only AID projects supporting the export manufacture of these commodities.

To accompany the statutory language of the Lautenberg Amendment, the Senate Appropriations Committee included the following language in its report (S. Rept. 99-443) on the FY 1987 foreign assistance appropriations bill:

^{2/} As enacted, Section 559 of the FY 1987 Foreign Assistance Appropriations Act refers in error to Section 503 of the "Tariff Act of 1930" (46 Stat. 590) rather than to Section 503 of the "Trade Act of 1974" (P.L. 93-618). The U.S. Code citations, enacted as part of Section 559, make it clear that the reference was intended to be to the Trade Act of 1974, which supplemented and amended the Tariff Act of 1930. This memorandum will refer only to the Trade Act of 1974.

"The Committee has included a new provision because the Committee is concerned that AID is funding activities to promote exports to the United States or third country markets of foreign manufactured articles that may harm trade-sensitive U.S. industry. For example, under an AID funded project in Sri Lanka, private consultants are preparing profiles of potential investment in the manufacture of apparel accessories. In this instance, the foreign industry is receiving U.S. assistance for the specific and primary purpose of increasing exports, largely to the United States. The U.S. apparel industry has suffered serious harm as a result of increased imports. Support for developing countries, must be reconciled with U.S. trade policy. For example, under the generalized system of preferences, duty-free treatment is accorded certain imports from developing nations, but such treatment is not accorded to certain import-sensitive articles. In order to ensure that AID activities remain consistent with domestic trade policy, the Committee has provided that no funds shall be used to conduct feasibility studies, prefeasibility studies, or project profiles, related to the manufacture, for export to the United States or third country markets, of textile and apparel and certain other articles defined as import-sensitive under the generalized system of preferences program. In addition, any other activities designed specifically and primarily to assist in the establishment of a facility for the manufacture for export of such articles would be barred. By this provision, the Committee does not intend to restrict AID support for the manufacture of articles primarily for the recipient country's domestic market or for intraregional trade with countries not including the United States when such trade is not in competition with U.S. exports."

The Joint Explanatory Statement of the Committee of Conference on the Continuing Resolution (the "Statement of Managers") (H. Rept. 99-1005) explains that, with respect to Section 559 of the FY 1987 Foreign Assistance Appropriations Act, "[t]he conferees agree to the Senate provision limiting availability of funding for development of manufactured goods which would compete with import-sensitive U.S. manufactured articles." (Emphasis added.) This brief statement merely refers to the Senate-passed language and does not itself attempt to define the meaning or scope of that provision.

In analyzing the Lautenberg Amendment, this memorandum will consider (1) which "import-sensitive" export commodities the Amendment affects; (2) the types of export-related activities which AID may not support; (3) the scope of the statute's exclusion for certain Caribbean Basin Initiative projects; (4) the effect of the statutory language limiting the restriction to those exports to third countries which are "in direct competition with United States exports"; and (5) the meaning of the term "directly" as used in the statute to modify the manner in which assistance is provided in support of export activities.

DISCUSSION

A. Export Commodities Affected by Lautenberg Amendment

Section 559 restricts the obligation or expenditure of foreign assistance funds to assist developing countries in the manufacture for export of "import-sensitive articles as defined by section 503(c)(1)(A) and (E) of the . . . [Trade Act of 1974] (19 U.S.C. 2463(c)(1)(A) and (E))."

The Trade Act of 1974 (P.L. 93-618) established a Generalized System of Preferences (GSP) program providing duty-free tariff treatment for many products imported from developing countries designated to receive benefits under the program. ^{3/} Section 503(a) of the Act directs the President to issue periodically a list of articles which may be considered for duty-free treatment under GSP. Section 503(c)(1), however, prohibits inclusion on this list of certain "import-sensitive" categories of articles.

Specifically, Section 503(c)(1)(A) prohibits inclusion on the GSP list of "textile and apparel articles which are subject to textile agreements." Section 503(c)(1)(E) prohibits inclusion of "footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel which were not eligible articles for purposes of . . . [GSP] on April 1, 1984." The Lautenberg Amendment incorporates by reference the categories of products identified in Section 503(c)(1)(A) and (E), as those categories are defined for the purposes of GSP. The Senate Appropriations Committee report states explicitly that the Amendment's prohibition applies to articles "defined as import-sensitive" under GSP. The Lautenberg Amendment, therefore, restricts only AID financing of developing country exports of certain textiles, apparel, footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel, as those commodities are defined for purposes of GSP.

^{3/} The provisions of the Trade Act of 1974 which establish GSP are codified at 19 U.S.C. 2461-65.

1. Textile and apparel articles "subject to textile agreements": The Trade Act of 1974 does not define which "textile and apparel articles . . . are subject to textile agreements" within the meaning of Section 503(c)(1)(A). An interpretation of this phrase, therefore, must begin with the plain meaning of the words "textile agreements." See United States v. American Trucking Association, Inc., 310 U.S. 534, 543 (1940) (courts follow "plain meaning" of statutory words when such words are "sufficient in and of themselves to determine the purpose of the legislation," unless plain meaning leads to "absurd," "futile," or "unreasonable" results).

The starting point for consideration of the meaning of "textile agreements" is the Arrangement Regarding International Trade in Textiles, generally known as the Multifibre Arrangement (MFA), 25 U.S.T. 1001, T.I.A.S. 7840, 39 Fed. Reg. 13308 (1973). First implemented in 1974 and modified upon renewal three times since 1974 (most recently in August 1986), the MFA is the principal international agreement governing the regulation of international trade in textiles and textile products, such as apparel.

The MFA establishes basic standards and procedures for the imposition of quantitative restraints on textile trade among signatory nations. Applying MFA guidelines, signatory nations enter into bilateral agreements setting quotas on textile trade. The MFA, therefore, establishes broad exceptions to the free trade principles contained in the General Agreement on Tariffs and Trade (GATT). The United States and every other major textile trading nation, except Taiwan, is a party to the MFA. Attachment A to this memorandum includes a list of each nation that was a party to the previous MFA, which expired on July 31, 1986, as well as of each nation that as of October 10, 1986, had joined as a party to the 1986 Protocol extending the MFA.

The U.S. Court of International Trade recently held that the MFA is a "textile agreement" within the meaning of Section 503(c)(1)(A). Luggage and Leather Goods Manufacturers of America, Inc., v. United States, 588 F.Supp. 1413, 1425 (Ct. Int'l Trade 1984). The court explicitly rejected the contention advanced by the Office of the U.S. Trade Representative (USTR) that the term "textile agreements" in Section 503(c)(1)(A) refers only to the bilateral agreements entered into between the United States and textile exporting nations setting import quotas on textile products subject to the MFA. Id. The court concluded that "Congress has made a legislative judgment that all 'textile and apparel articles which are subject to textile agreements' are . . . 'import sensitive' articles" for the purposes of Section 503(c)(1)(A). Id. at 1426.

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The MFA, therefore, is a principal source of meaning for the term "textile and apparel articles" as used in Section 503(c)(1)(A). Article 12(1) of the MFA defines the term "textiles" for the purpose of the MFA to mean:

tops, yarns, piece-goods, made-up articles, garments and other textile manufactured products (being products which derive their chief characteristics from their textile components) of cotton, wool, man-made fibres, or blend thereof, in which any or all of those fibres in combination represent either the chief value of the fibres or 50 per cent or more by weight (or 17 per cent or more by weight of wool) of the product." 4/

Paragraph 24(i) of the most recent Protocol extending and modifying the MFA, agreed to by MFA member nations on July 31, 1986, adds to the above categories of "textiles" the following materials:

". . . . textiles made of vegetable fibres, blends of vegetable fibres with fibres specified in [MFA] Article 12, and blends containing silk, which are directly competitive with textiles made of fibres specified in Article 12 . . . in which any or all of those fibres in combination represent either the chief value of the fibres or 50 per cent or more by weight of the products" 5/

4/ This definition employs several terms not widely understood outside the textile industry. For example, in the textile industry a "top" is the "continuous sliver form of long, choice woolen fibers which are to be manufactured ultimately into worsted yarn." A Dictionary of Textile Terms by Dan River (13th ed. 1980) at 124. "Yarn" is "an assemblage of fibers or filaments, either natural or man-made, twisted together to form a continuous strand which can be used for weaving, knitting, plaiting, braiding, or the manufacture of lace, or otherwise made into a textile material." Id. at 125. A "made-up article" is an "item consisting of more than one class of fabric." Webster's Third New International Dictionary of the English Language Unabridged (1961 ed.). "Piece-goods" are "cloth fabrics that are sold from the bolt at retail in lengths specified by the customer." Id.

5/ There are at least 16 different vegetable fibers, but the fibers of principal importance for the MFA are cotton and ramie. Ramie, popularly known as "China grass," is grown primarily in the People's Republic of China.

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However, Paragraph 24(iii) of the 1986 Protocol excludes from the expanded definition of "textiles" subject to trade agreements under the MFA the following categories:
". . . historically traded textiles which were internationally traded in commercially significant quantities prior to 1982, such as bags, sacks, carpetbacking, cordage, luggage, mats, mattings and carpets typically made from fibres such as jute, coir, sisal, abaca, maguey and henequen."

It is simpler to understand that, within the meaning of the MFA, the term "textiles" includes most items containing the prescribed minimum value or quantity of MFA fibers: wool, man-made fibers (i.e., synthetics), cotton and most other vegetable fibers. Therefore, the term "textiles" includes virtually every form of apparel, as well as miscellaneous categories of items such as bedspreads, blankets, tapestries, curtain material, carpeting, and simple threads. The MFA does not apply to "non-textile" items comprised of MFA fibers (such as cotton guitar string or nylon fishing line), or to apparel and other "textile" items not comprised of MFA fibers (such as paper clothes and rubber gloves). Attachment B to this memorandum is a comprehensive list of current MFA textile and apparel categories compiled by the Office of Textiles and Apparel in the U.S. Department of Commerce. Very few items popularly understood as "textiles" or "apparel" are excluded from this list.

The term "textile and apparel articles which are subject to textile agreements" in Section 503(c)(1)(A) could also include textile and apparel items not covered by the MFA but included in a particular bilateral agreement between the United States and a foreign country. This interpretation would not be inconsistent with the court's decision in Luggage and Leather Goods Manufacturers of America, Inc., v. United States, supra, which holds that the MFA is one (but not necessarily the only) "textile agreement" within the meaning of Section 503(c)(1)(A).

The United States has entered into bilateral agreements under the MFA with 36 foreign countries. However, current U.S. bilateral agreements set no import quotas on items other than those subject to the MFA as modified and renewed in 1986. Each bilateral agreement establishes import quotas according to the textile categories listed in Attachment B of this memorandum. As a practical matter, therefore, the term "textile and apparel articles . . . subject to textile agreements" in Section 503(c)(1)(A) is consistent with the current MFA definition.

2. Special Exclusion for Hand-Made, Cottage Industry Textiles: The MFA excludes a broad category of hand-made textile goods from bilateral trade restrictions. Because the Lautenberg Amendment cites the textile and apparel definitions used in GSP and thereby incorporates the terms of the MFA, the MFA's textile handicraft exclusion also applies to Lautenberg Amendment restrictions on U.S. foreign assistance.

MFA Article 12(3) provides that the MFA:

shall not apply to developing country exports of handloom fabrics of the cottage industry, or hand-made cottage industry products made of such handloom fabrics, or to traditional folklore handicraft textiles products, provided that such products are properly certified under arrangements established between the importing and exporting participating countries concerned."

The essential requirement in this provision is that a textile product be "hand-made." The United States has construed this term strictly to require that each step in the fabrication process be conducted by hand. According to this interpretation, a textile product that is made by an individual using a treadle sewing machine, rather than exclusively by hand, would not qualify for exclusion under this provision.

To qualify for the MFA handicraft exclusion, a product must also be in a category that has been "certified" by special agreement between importing and exporting countries. Certification of a handicraft product for import to the United States occurs upon completion of a formal exchange of letters between the United States and the exporting country. The United States requires the exporting country to sign a formula statement, without modification or deviation. This formula interprets the meaning of certain terms in Article 12(3) of the MFA. The exporting country must certify that:

". . . for the purposes of the GSP, certified hand-loomed and folklore products are defined as hand-loomed (i.e., not made on a power-driven loom) fabrics which are the product of a cottage industry, hand-made (i.e., handcut), hand-sewn (i.e., not made on a treadle machine or any other type of sewing machine) products of a cottage industry made from such hand-loomed fabrics, or traditional folklore textile products which have been made entirely by hand from such hand-loomed fabrics."

The United States to date has entered into certification agreements with the following nine countries: Uruguay, Peru, Botswana, Thailand, Korea, Macau, Pakistan, Malta and Romania. Negotiations are currently underway that may also lead to certification of Guatemala, Mauritius, Morocco and Tunisia.

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For the purposes of GSP, the effect of certification is to qualify a product, as defined in the certification, for tariff-free treatment under any one of five U.S. tariff categories applying to hand-made, cottage industry textiles. The GSP certification will now also exempt from the restrictions of the Lautenberg Amendment those AID projects supporting export of hand-made textile products from certifying countries.

A special situation arises in the case of U.S. assistance to Bolivia, where AID is presently financing the Handicraft Export Development Project (Project Number 511-0583). This project provides training, production and export marketing services to Bolivian artisans producing handicraft knitwear items. The handicraft items to be produced and exported under this project appear to be certifiable under the standard GSP formula. Bolivia, however, has not undertaken the certification procedure.

Bolivia is not a major textile exporting nation and is not a party to the MFA. Because U.S. textile imports from Bolivia have not posed a major threat to the U.S. textile industry, Bolivia and the United States have never entered into a bilateral textile quota agreement. The quantities of handicraft items Bolivia has exported to the United States in the past may also have been too small to justify certification for GSP tariff advantages.

Because there is presently no "arrangement" or agreement of any kind between Bolivia and the United States governing trade in textiles, it is possible to read MFA Article 12(3) to exempt Bolivia from the certification procedure ordinarily required in order to qualify handicraft articles for GSP tariff advantages. However, this interpretation is highly debatable. A sounder approach would be to encourage Bolivia promptly to seek GSP certification, thereby ensuring the exemption of AID's Handicraft Export Development Project from the Lautenberg Amendment, while also gaining GSP tariff advantages for Bolivia's textile handicraft exports. Certification need not be complex or time-consuming, because it occurs immediately upon the requisite exchange of letters. 6/

6/ The Bolivia Handicraft Export Development Project may also be exempt from Lautenberg Amendment restrictions because it does not involve either of the two types of activities prohibited by the Amendment: procurement of feasibility studies or establishment of export manufacturing facilities. See discussion on page 11 infra. If the project is exempt on this ground, no GSP certification by Bolivia will be required in order to allow AID to continue funding the project.

3. Footwear, handbags and other articles subject to Lautenberg restrictions: In addition to "textile and apparel articles . . . subject to textile agreements," the Lautenberg Amendment restricts U.S. support for projects directly supporting the export manufacture of "footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel which were not eligible articles for . . . [GSP designation] on April 1, 1984." Section 503(c)(1)(E).

A "flat good" is a small flat item carried on the person, such as a wallet, bank note case or coin purse. The "work gloves" cited in this section are those comprised of leather, rubber or plastic, which are not fibers subject to textile trade agreements under the MFA and therefore not covered by Section 503(c)(1)(A). "Leather" wearing apparel also would not be included among apparel cited in Section 503(c)(1)(A) because leather is not an MFA fiber.

The current language of Section 503(c)(1)(E) was enacted in Section 504(b) of the Trade and Tariff Act of 1984 (P.L. 98-573). As modified by that Act, Section 503(c)(1)(E) excludes from GSP treatment several categories of items previously barred from receiving favored duty treatment under the Caribbean Basin Economic Recovery Act of 1983 (P.L. 98-67) which implements President Reagan's Caribbean Basin Initiative (CBI).

Because of the extreme import sensitivity of the products cited in Section 503(c)(1)(E), the Office of the U.S. Trade Representative (USTR) prior to April 1, 1984 as a matter of policy had never designated any of the listed items as eligible for GSP treatment. The House Ways and Means Committee report (H.Rept. 98-1090) on the Trade and Tariff Act of 1984 states that although the listed items "already are excluded administratively under the [GSP] program, . . . the Committee determined that to prevent their possible designation in the future, a statutory exception was warranted similar to that accorded certain other products."

Because none of the items listed in Section 503(c)(1)(E) had been designated as eligible to receive GSP treatment on April 1, 1984, the final clause of Section 503(c)(1)(E) can be disregarded. The Lautenberg Amendment, therefore, restricts AID support for the manufacture of exports from developing countries of all footwear, handbags, luggage, flat goods, work gloves and leather wearing apparel.

B. Prohibited Types of Export-Related Activities

The Lautenberg Amendment prohibits use of foreign assistance funds to "procure . . . feasibility studies or prefeasibility studies for, or project profiles of potential investment in, the manufacture, for export" of specified commodities, as well as to "assist . . . in the establishment of facilities specifically designed for the manufacture for export" of those commodities. The Amendment does not explicitly prohibit other export-related activities, such as development of new export markets, which do not directly involve the procurement of investment studies or the establishment of export manufacturing facilities.

The Senate Appropriations Committee report reiterates the specific types of export-related activities prohibited by the Amendment. The report states that the Amendment prohibits use of foreign assistance funds to "conduct feasibility studies, prefeasibility studies, or project profiles," or "any other activities designed specifically and primarily to assist in the establishment of a facility," for the manufacture for export of the specified commodities.

The report also expresses the Committee's general concern that AID is funding "activities to promote exports" of articles that may harm trade-sensitive U.S. industry. It states that the purpose of the Lautenberg Amendment is to "ensure that AID activities remain consistent with domestic trade policy," which withholds duty-free treatment from import-sensitive articles. These general statements imply concern about AID support for export-development activities other than the procurement of investment studies or the establishment of export manufacturing facilities, but they do not expand the limited scope of the statutory prohibition.

As a matter of law, therefore, the Lautenberg Amendment prohibits use of foreign assistance funds only (1) to "procure . . . feasibility studies or prefeasibility studies for, or project profiles of potential investment in, the manufacture, for export" of the specified commodities, or (2) to "assist . . . in the establishment of facilities specifically designed for," manufacture of the specified commodities for export.

C. Exemption for Caribbean Basin Initiative Projects Under "Section 807"

For certain export-related development activities, the Lautenberg Amendment prohibits the obligation or expenditure of funds appropriated in the FY 1987 Foreign Assistance Appropriations Act "other than funds made available to carry out Caribbean Basin Initiative programs under the Tariff Schedules of the United States, 19 U.S.C. 1202, Schedule 8, Part I, Subpart B, Item 807.00"

Tariff Schedule Item 807 (the "Section 807 program") allows duty-free treatment for the value of component materials fabricated in the United States but assembled overseas into finished products which are re-imported to the United States. This program primarily benefits industries in nations located near the United States, especially those in the Caribbean and Central America, that assemble apparel products from textile material produced in the United States.

The Lautenberg Amendment exempts from its restrictions all "Caribbean Basin Initiative programs" in support of exports qualifying for reduced-duty treatment under Item 807. Qualifying programs will be those in Central American and Caribbean island nations that are designated as beneficiaries under criteria established in Section 212 of the Caribbean Basin Economic Recovery Act (P.L. 98-67). (Section 212 expressly bars from designation under CBI any communist country and any other country failing to meet specified standards of international behavior.) Attachment C to this memorandum is a list of those countries currently designated by the President as qualifying to receive CBI benefits.

The Lautenberg Amendment, therefore, allows AID to provide direct financial support to export-oriented, "Section 807" textile and apparel assembly programs in most Central American and Caribbean nations.

D. Exports to Third Countries in "Direct Competition" with U.S. Exports

The Lautenberg Amendment restricts AID support for projects aiding the manufacture for export to the United States of the specified commodities, as well as projects aiding the manufacture for export of the same commodities "to third country markets in direct competition with United States exports." The Senate Appropriations Committee report

emphasizes that the Amendment was not intended to restrict AID support for the manufacture of articles primarily for the recipient country's domestic market "or for intraregional trade with countries not including the United States when such trade is not in competition with U.S. exports."

Although the Committee report language would allow AID support for manufacture only of "intraregional" exports by developing countries, the statutory language includes no such regional limitation. As a matter of law, AID may rely on the statutory language. AID, therefore, may support the manufacture for export of the specified commodities by developing countries to any third countries, so long as such exports are not in "direct competition with United States exports."

The "competition with United States exports" language represents a significant exclusion from the Lautenberg Amendment's prohibition. Although the provision is not defined in the statute, it can reasonably be construed to allow U.S. support for exports of textiles, apparel and the other specified commodities to third countries to which the United States is not currently exporting statistically significant quantities of the same or similar commodity.

The statutory prohibition with respect to third country exports is narrowed even further by its limitation to exports "in direct competition with United States exports." (Emphasis added.) Although the statute does not define the meaning of "direct" in this context, the term "direct competition" can reasonably be understood to mean competition between two identical or similar products. The greater the similarity between two products in their fabrication, function, appearance or price, the more likely they will compete "directly" with each other in a given market. 7/

Implementation of the Lautenberg Amendment's "direct competition" exclusion will require careful product-by-product comparison of developing country products with those of the United States, as well as an analysis of U.S. commodity trading patterns in foreign markets where AID-supported exports may be sold.

7/ To consider a practical example, an inexpensive nylon raincoat might compete "directly" with a slightly more expensive cotton raincoat, but it might not compete "directly" with an expensive wool topcoat or an inexpensive cotton poncho.

E. The Prohibition of "Direct" Foreign Assistance

The Lautenberg Amendment prohibits use of foreign assistance funds to procure "directly" certain studies or project profiles relating to the manufacture for export of specified commodities, or to assist "directly" in the establishment of facilities specifically designed for the manufacture for export of those commodities. By implication, the Amendment does not prohibit use of foreign assistance funds to engage in such activities "indirectly."

Consistent with the policy of supporting private enterprise in developing countries, AID currently provides much of its support for export development activities through intermediate financial and credit institutions which function in a manner similar to that of banks or venture capital firms. Subject to general guidelines provided by AID and the terms of contracts negotiated with AID, these institutions use U.S. foreign assistance funds to support the development of private enterprises engaged in business activities that may include the export manufacture of commodities such as textiles and apparel.

The Lautenberg Amendment itself does not define the meaning of the term "directly" in this context. Therefore, AID must consider the term's plain meaning. See United States v. American Trucking Association, Inc., supra, 310 U.S. at 543. In the present context, the term "directly" involves privity of contract and the absence of intermediaries.^{9/} This plain meaning, which would exempt financing provided through intermediate financial institutions from Lautenberg Amendment restrictions, is an essential analytic starting point.

^{8/} A discussion draft of the Amendment, which was circulated informally prior to the Senate Appropriations Committee markup, would have prohibited use of foreign assistance funds either "directly or indirectly" in support of the specified purposes. Prior to markup, however, Senator Lautenberg agreed to delete the reference to financing that "indirectly" supports these purposes.

^{9/} Webster's Third New International Dictionary, supra; defines "directly" to mean "without any intervening agency or instrumentality or determining influence: without any intermediate step."

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The fundamental objective in construing the Lautenberg Amendment, however, is to discern the intent of Congress in passing the provision. It would be inconsistent with this intent for AID to avoid the statute's effect by utilizing intermediaries purposefully in order to channel funds to textile export manufacturing projects, or to allow intermediaries to use U.S. foreign assistance funds to finance such projects when AID retains approval authority over nearly all types of projects funded by the intermediary.

Therefore, as discussed further below, financing provided to intermediate financial institutions is exempt from Lautenberg Amendment restrictions unless: (1) AID's intent is to avoid the statute's effect by purposefully channeling aid through such institutions, or (2) AID retains authority to approve or disapprove all or substantially all categories of projects funded by the intermediary. As discussed below, opinions issued by AID/GC over the past twenty years have laid the foundation for these principles.

1. GC Analyses of Statutory Prohibitions on Aid to Countries: Past GC opinions, developed in various contexts, have applied three principal tests in order to determine whether an aid prohibition applies to assistance provided through intermediaries: the "conduit," "benefit" and "control" tests. 10/

The "conduit" test considers whether the intermediary exercises a sufficiently independent role in managing the aid or is primarily a conduit or channel for assistance to the prohibited recipient. 11/ To determine whether an intermediary is "merely a conduit," the test enquires whether U.S. assistance is "designed" to make the intermediary's programs more effective

10/ These tests were developed in various statutory contexts. Some statutes at issue in past GC opinions expressly prohibited both "direct" and "indirect" assistance to the recipient; other statutes prohibited all assistance, without referring to either "direct" or "indirect" forms of aid; and other statutes, like the Lautenberg Amendment, prohibited only "direct" assistance, impliedly allowing "indirect" assistance. AID/GC has applied a similar analysis in each of these contexts.

11/ Opinion by Stephen B. Ives, Jr., AID General Counsel, dated January 13, 1969.

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or is "funneled directly to the recipient offender." 12/ If the intermediate is "merely a conduit," then aid provided to it is considered direct assistance to the ultimate beneficiary.

The "benefit" test considers whether the benefits of the assistance are "primarily intended" for the intermediary or for the prohibited recipient, and whether in fact the aid primarily benefits the intermediary or the prohibited recipient. Under this analysis, an intermediary cannot "shield" aid from a restriction on end uses if the aid "can be severed from the . . . [intermediary's] program" without significant effect on the overall program's "continued effectiveness." 13/

A third test, which could be called the "control" test, has evolved in several AID/GC opinions. 14/ According to this test, which derives from the conduit test, U.S. foreign assistance to a prohibited purpose is direct if AID exercises substantial control over the intermediary institution, but it

12/ Id. at 3. The analysis also considers whether the intermediary makes a "substantive input into program formulation" so that the aid is "transformed" from its original nature. Id. at 1. If the intermediary does not make sufficient input into program formulation, aid provided to the intermediary is considered direct assistance to ultimate beneficiaries.

13/ Opinion by Stephen B. Ives, Jr., AID General Counsel, dated February 10, 1969, at 6; Opinion by Stephen B. Ives, Jr., dated January 13, 1986, supra, at 1-2. For GC opinions applying the conduit and benefit tests in various contexts, see Opinion by Charles W.T. Stephenson, GC/EA, dated September 6, 1968 (applying the "severability" element of the benefit test to regional vaccination and transportation programs); Opinion by Garber A. Davidson, Jr., GC/LPIA, dated February 6, 1978 (applying both the conduit and benefit tests to three statutes prohibiting "direct" assistance to particular countries); and Opinions by Edward A. Dragon, GC/AFR, dated June 23, 1978, and by Stephen R. Tisa, GC/Asia, dated December 2, 1975 (applying the two tests to AID-funded regional scholarship programs in Africa and Asia).

14/ See, e.g., Opinion by Charles L. Gladson, AID General Counsel, dated March 21, 1975; Opinion by Garber A. Davidson, supra, at 8-10.

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is indirect if AID does not exercise such control. This test considers various factors in assessing the degree of control by AID over intermediaries. 15/

2. The Underlying Issue of Intent: For reasons discussed below, the conduit, benefit and control tests are not directly applicable in this context. However, they provide guidance in construing the Lautenberg Amendment, because they address the relevant ultimate issue of intent.

The circumstances that gave rise to the three tests differ in at least two major respects from circumstances in the present case.

First, previous GC opinions considered issues of direct and indirect assistance in the context of a statutory prohibition on aid to a particular country rather than a prohibition on aid to a particular activity (such as the manufacture of certain commodities for export).

Second, and more significantly, past GC opinions considered these issues in the context of assistance provided through a private voluntary organization (PVO) or regional organization, rather than through an intermediate financial institution.

15/ These factors are: (1) the "degree of control and monitoring to be exercised by AID" over the intermediary; (2) the "specificity with which project activities are defined in the grant"; (3) the degree of the intermediary's "capacity to manage its own affairs"; (4) the degree of the intermediary's "fund-raising capacity"; (5) the extent to which the intermediary "conducts activities that are not AID-funded"; (6) the proportion of total funds for the prohibited activity contributed by AID; (7) the "similarity of the proposed program to other programs conducted independently" by the intermediary; (8) the extent to which the intermediary will "rely on its own relationships" with the recipient to conduct its program, rather than relying on AID; and (9) the extent to which the intermediary "assumes practical as well as legal responsibility for the success of the project." Opinion by Charles L. Gladson, supra, at 1-2.

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The service function of the typical PVO or regional program bears little resemblance to the private commercial activities of most intermediate financial institutions supported by AID. For example, the activities of most PVOs and regional programs are relatively specific and are predetermined to a considerable degree at the time AID agrees to provide financial support to the intermediary.

In contrast, AID-supported intermediate financial institutions aim to develop private commercial enterprises, usually without concern for the particular type of commercial activity in which such enterprises engage. At the time AID enters into a financial agreement with an intermediary, both AID and the intermediary typically do not know who the ultimate beneficiaries of the assistance will be. In fact, where the intermediate financial institution project is aimed at support of the private sector, prior knowledge of the ultimate beneficiary normally would be inconsistent with AID's private sector objective, which is to develop financial institutions capable of independently assessing market opportunities and encouraging innovative business ventures.

A central question underlying the conduit, benefit and control tests, therefore, is AID's intent in providing assistance to the intermediary. If in supporting an intermediary AID intends to support a specific and identifiable ultimate beneficiary or class of beneficiaries, the assistance received by such beneficiaries through the intermediary generally will be direct. However, if AID intends to support the intermediary's institutional development and the general development of private enterprise in the recipient country, without aiming to support identifiable ultimate beneficiaries, assistance received by the beneficiaries generally will be indirect. 16/

16/ The issue of AID's intent in funding intermediaries has been implicit in most past GC opinions, but it has been addressed explicitly in several leading opinions. For example, the GC opinion that formulated the conduit test considers the "purposes" of the assistance and concludes that U.S. assistance is indirect where it is "designed" to make the intermediary's programs more effective. Opinion by Stephen Ivas dated January 13, 1969, supra, at 2, 3. (Footnote cont'd next page.)

AID's intent in agreeing to support an intermediate financial institution can be discerned from the statements of purpose in project papers and the project agreement signed by AID and the intermediary.

Faithful application of the above intent principle should preclude evasion of Lautenberg Amendment restrictions by the channeling through intermediate financial institutions of funds intended for textile and apparel export manufacturing projects.

16/ (Cont'd from previous page.) The opinion which formulated the "benefits" test states that U.S. assistance is direct where it is "primarily intended" for the benefit of the ultimate beneficiary. Opinion by Stephen Ives dated February 10, 1969, supra, at 6 (emphasis added). A more recent opinion takes into account the "primary purpose" of assistance and the identity of the "primary intended beneficiary." Opinion by Stephen R. Tisa, supra, at 10, 13.

A separate line of GC opinions emphasizes the importance of intent in determining the legality of AID programs subject to statutory constraints. These opinions have construed the scope of restrictions on the use of economic assistance funds for military purposes. See, e.g., Premier Auto, Comptroller Gen. Dec. B-167196, September 18, 1969 (unpub.) (applying the "specific-general" rule of appropriations law). AID had implemented the Premier Auto decision through a handbook rule prohibiting use of economic assistance funds for projects which had the "primary purpose" of meeting the recipient country's military requirements. In applying this rule, AID/GC emphasized that the "basic test is the primary purpose of the assistance." Memorandum from John E. Mullen, GC/NE, dated May 24, 1979, at 5. (Emphasis added.) Various GC opinions have concluded that even where foreign assistance funds may be used to provide goods or services to a foreign military agency, the assistance will not be prohibited if the "primary purpose" of the assistance is to assist in economic development and the aid serves no significant military purpose. See, e.g., id. at 3; Information Memorandum from Brian Miller, GC/NE, dated November 6, 1984; Memorandum from James R. Phippard, LEG, dated June 6, 1978.

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3. Retention of Approval Authority: Although the complex formulas of the conduit, benefit and control tests do not apply in the present context, an additional fundamental principle of these tests remains viable: "direct" assistance must be understood to include funds provided to intermediaries over which AID retains a high degree of authority in the selection of ultimate beneficiaries. In view of the long history of AID's interpretation of the term "directly" in the context of foreign assistance, it cannot be assumed that Congress in passing the Lautenberg Amendment intended to forbid AID funding of textile export projects in which no intermediary is used, but intended to allow such funding through an intermediary even though AID retains authority to approve most categories of an intermediary's projects. In either case, AID would make the final decision to permit the funding of a textile export project.

Therefore, assistance to an intermediary must be viewed as direct, regardless of AID's specific intent in providing the assistance, when AID by agreement with the intermediary retains authority to approve or disapprove all, or substantially all, categories of that intermediary's subloans or investments. AID as a matter of law must apply Lautenberg Amendment restrictions to its financing of activities by such an intermediary. However, if AID's agreement with the intermediary allows AID only to exercise authority over the selection of certain designated ultimate activities or beneficiaries, assistance to ultimate beneficiaries will be indirect if it also passes the intent test discussed above.

The starting point for this analysis must be the presumption, stated above, that (by definition) assistance provided directly by AID to an intermediary is indirect assistance to ultimate beneficiaries. This presumption, however, will be overcome if AID's relationship with the intermediary fails to pass either the intent or approval authority tests discussed above.

In summary, for the purpose of the Lautenberg Amendment, assistance provided to an intermediate financial institution will be presumed to be indirect assistance to ultimate recipients. This presumption, however, will be overcome and the assistance will be considered direct if: (1) in providing the assistance AID intends to support identifiable beneficiaries or specific types of activities (such as textile and apparel export manufacturing projects) likely to be funded by the intermediary, or (2) in its agreement with the intermediary AID retains authority to approve or disapprove all or substantially all categories of subloans or investments.

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3. Applying the Principles to a Particular Case: The factors discussed above may be applied to AID's support for the activities of one intermediate financial institution, the Corporacion Privada de Inversiones de Centroamerica, S.A. ("Private Investment Corporation" or "PIC"). PIC is a "private sector investment finance institution" that provides "medium and long term financing, equity investments, and other financial services not traditionally available to private sector enterprises in Costa Rica." 17/

As in the case of most intermediate financial institutions, PIC's business purpose is stated in general terms. According to the PIC-AID contract, PIC is designed to "act as a merchant bank, or catalyst, in the development of projects which will lead to hard currency exports," and to "strengthen the private sector's capacity to undertake new productive investment." All of PIC's investments are intended to be "export oriented." 18/ At the time the financing agreement was reached with AID, no further details were available concerning the specific export activities which PIC would support.

PIC receives AID financing in the form of loans and grants provided under the terms of a contract with AID. Over the anticipated four-year term of the project, AID agrees to contribute up to \$21 million in loan and grant funds. PIC agrees to provide a minimum of \$10 million in matching funds from other sources. 19/ PIC is privately owned and is managed by an independent Board of Directors and Managing Director, although AID retains the right to appoint a non-voting representative to the Board of Directors and to approve appointment of the Managing Director. 20/

17/ Loan and Grant Agreement between Corporacion Privada de Inversiones de Centroamerica, S.A., and the United States of America Acting Through the Agency for International Development, dated August 31, 1984 ("PIC-AID Contract"), Article 2, Section 2.1.

18/ Id. Annex I at I.

19/ Id. Annex I at 2, 4.

20/ Id. Article 6(1) and (m).

In a series of "special covenants" in the AID-PIC Contract, PIC consents to several specific prohibitions and a pre-approval procedure for particular types of commercial activities. For example, it agrees not to finance "activities which in any way involve the manufacture or sale of military, paramilitary or police equipment," ^{21/} and it agrees to "[r]equest AID's prior approval of any subloan or investment related to the production or export of citrus, palm oil, sugar, coffee or bananas." ^{22/} This last requirement aims in part to implement AID policy established in Policy Determination 71, which requires pre-approval before AID funds are used to support the export of citrus, palm oil and sugar. However, the above are the only prohibitions or pre-approval requirements included in the AID-PIC Contract. PIC is obliged by contract with AID to receive AID's approval of only a small minority of potential sub-loans and investments..

Analysis of AID's funding of PIC begins with the presumption that assistance provided to PIC's ultimate beneficiaries will be indirect. This presumption will be overcome only if AID's assistance to PIC fails to pass either the intent or approval authority tests summarized on page 20 of this memorandum.

Application of the intent test supports the presumption that AID provides only indirect assistance to PIC's beneficiaries. AID's principal objective in providing financial support to PIC is to assist PIC's institutional development and its general mission of stimulating private enterprise through exports. AID does not, for example, have the specific objective of supporting the manufacture for export of particular commodities, such as textiles or apparel.

Application of the approval authority test likewise supports the presumption that assistance provided through PIC is indirect. The AID-PIC Contract prohibits PIC from supporting certain types of export activities and requires PIC to receive AID's approval before agreeing to certain categories of loans, but AID retains authority to approve only a small minority of the potential loans to be issued by PIC.

It follows from this analysis that U.S. foreign assistance provided to PIC for export activities is indirect rather than direct. As a matter of law, therefore, the Lautenberg Amendment would not apply to U.S. foreign assistance funds provided to PIC.

^{21/} Id. Article 6(p).

^{22/} Id. Article 6(n).

As a matter of policy, however, AID could decide to restrict the use of foreign assistance funds by intermediate financial institutions such as PIC for certain export activities. AID's financing of PIC need not be significantly disrupted by the imposition of Lautenberg Amendment restrictions. AID could use explicit contract authority 23/ to restrict the use of its funds to support textile, apparel, and other proscribed export activities. A simple amendment to Article 6(n) of the Contract could require PIC to "[r]equest AID's prior approval of any subloan or investment related to the production or export of citrus, palm oil, sugar, coffee, . . . bananas, textiles, apparel, footwear, handbags, luggage, flat goods, work gloves and leather wearing apparel." (Emphasis indicates new language.) AID could choose to require pre-approval of these projects rather than to prohibit them altogether, because pre-approval authority would enable AID to take advantage of the provision in the Lautenberg Amendment allowing support for exports to third countries not in "direct competition with U.S. exports."

AID's intent and approval rights will differ in various cases. Lautenberg Amendment restrictions, therefore, may apply as a matter of law to some intermediate financial institutions funded by AID. The relationship between AID and such intermediaries will need to be analyzed in light of the principles discussed in this memorandum.

23/ Id. Annex II, Article D, Section D.3.

Attachments: a/s

Clearances: GC/LP:RMLester: (Draft)
LEG:KKammerer: (Draft)
DGC:JEMullen: (Draft)

GC/LP:EHonnold:i2/30/86:eh#7777A

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Status of Acceptances of the Protocol Extending
the Arrangement Regarding International Trade
in Textiles
done at Geneva on 22 December 1981
(expired July 31, 1986)

Country	Dates of acceptances	
	By letter/signature "subject to ratification"	Definitive
Argentina	27 April 1982	-
Austria	25 March 1982	24 August 1982 (by instrument of ratification)
Bangladesh	-	16 September 1982 (by signature)
Brazil	9 February 1982	-
Canada	-	12 July 1982 (by instrument of acceptance)
China (People's Republic)	-	18 January 1984 (by letter)
Colombia	-	27 April 1982 (by signature)
Czechoslovakia	-	30 September 1982 (by signature)
Dominican Republic	-	9 February 1984 (by letter)
European Economic Community	-	15 March 1982 (by letter)
Egypt	22 February 1982	-
El Salvador	-	2 July 1982 (by signature)

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Country	Dates of acceptances	
	By letter/signature "subject to ratification"	Definitive
Finland	5 March 1982	23 August 1982 (by instrument of ratification)
Guatemala	-	6 October 1982 (by signature)
Haiti	-	9 August 1983 (by signature)
HONG KONG Hungary (SEE UK)	-	10 February 1982 (by signature)
India	-	31 December 1981 (by signature)
Indonesia	-	19 May 1982 (by signature)
Israel	-	16 September 1982 (by instrument of acceptance)
Jamaica	-	22 June 1982 (by signature)
Japan	-	25 December 1981 (by letter)
Korea, Rep. of	-	12 March 1982 (by signature)
MACAO (SEE Malaysia PORTUGAL)	-	28 April 1982 (by letter)
Maldives	-	19 April 1983 (by letter)
Mexico	-	4 March 1982 (by signature)
Norway	-	1 July 1984 (by letter)

Country	Dates of acceptances	
	By letter/signature "subject to ratification"	Definitive
Pakistan	-	29 December 1981 (by signature)
Panama, Rep. of	-	15 January 1985 (by letter)
Peru	-	5 January 1983 (by letter)
Philippines	-	16 February 1982 (by signature)
Poland	-	10 March 1982 (by signature)
Portugal on behalf of Macao	-	9 June 1982 (by signature)
Romania	-	12 July 1982 (by signature)
Singapore	-	20 April 1982 (by signature)
Sri Lanka	-	29 December 1981 (by signature)
Sweden	-	20 August 1982 (by signature)
Switzerland	3 March 1982	8 November 1982 (by letter)
Thailand	-	15 April 1982 (by letter)
Turkey	-	5 April 1982 (by letter)

Country	Dates of acceptances	
	By letter/signature "subject to ratification"	Definitive
United Kingdom on behalf of Hong Kong	-	21 January 1982 (by letter)
United States	-	29 December 1981 (by letter)
Uruguay	-	13 June 1983 (by signature)
Yugoslavia	18 January 1983	26 September 1983 (by letter)

October 10, 1986

COUNTRIES THAT HAVE SIGNED
THE NEW MFA PROTOCOL *

1. Brazil
2. Finland
3. Hong Kong
4. Indonesia
5. Japan
6. Korea
7. Mexico
8. Sri Lanka
9. Sweden
10. United States
11. Uruguay

* Information supplied by the Department of State,
Bureau of Economic and Business Affairs, Textile Division

Office of Textiles and Apparel
Textile and Apparel Categories, Units, Conversion
Factors and Import/Production Ratios

TEXTILE CATEGORIES

Description	Units	Bye Conversion Factor	Units Per 1,000 lbs	1977 L/P Ratio
Carded	LB	4.6	217.4	1.7
Combed	LB	4.6	217.4	1.7
FABRIC				
Carpas	Y	1.0	1,000.0	—
Velvetina	Y	1.0	1,000.0	—
Cardway	Y	1.0	1,000.0	8.5
Brushing	Y	1.0	1,000.0	42.7
Nonwovens	Y	1.0	1,000.0	21.3
Printed	Y	1.0	1,000.0	17.0
Shirtings	Y	1.0	1,000.0	—
Tullis and netweaves	Y	1.0	1,000.0	8.7
Townyard	Y	1.0	1,000.0	4.3
Duck	Y	1.0	1,000.0	4.4
Other fabrics, n.e.c.	Y	1.0	1,000.0	7.7
APPAREL				
Handkerchiefs	DOZ	1.7	588.2	16.2
Gloves	DOZ	3.5	285.7	79.3
Hosiery	DOZ	4.6	217.4	—
Suit-type coats, M&B	DOZ	36.2	27.6	78.2
Other coats, M&B	DOZ	41.3	24.2	49.4
Coats, M&B	DOZ	41.3	24.2	49.4
Blouses, M&B	DOZ	45.3	22.1	11.3
Shirts, M&B	DOZ	25.8	46.8	36.1
Shirts & blouses, M&B	DOZ	7.2	138.9	34.9
Shirts, not knit	DOZ	24.8	41.7	184.4
Blouses, not knit	DOZ	14.5	69.8	183.9
Shirts	DOZ	17.8	56.2	64.1
Shirts	DOZ	36.2	27.6	146.5
Trousers, M&B	DOZ	17.8	56.2	17.2
Trousers, M&B	DOZ	17.8	56.2	64.1
Brassieres, etc.	DOZ	4.8	208.3	9.8
Dressing gowns	DOZ	51.0	19.6	35.3
Nightwear	DOZ	52.0	19.2	31.9
Underwear	DOZ	11.0	90.9	2.6
Down & leather-filled coats, jackets & vests, M&B	DOZ	41.3	24.2	N/A
Down & leather-filled coats, jackets & vests, M&B	DOZ	41.3	24.2	N/A
Other apparel	DOZ	4.6	217.4	N/A
MAKE-UP & MISCELLANEOUS				
Millwastes	DOZ	1.1	909.1	24.8
Waste	DOZ	6.2	161.3	2.4
Woolen & quills	DOZ	6.9	144.9	N/A
Wool & other pile fabrics	DOZ	6.5	2,000.0	8.0
Other cotton manufactures	DOZ	4.6	217.4	N/A
YARNS				
Wool & yarns	DOZ	2.0	500.0	4.4
FABRIC				
Blends & unrelated	DOZ	1.0	1,000.0	12.7
Textiles & upholstery	DOZ	1.0	1,000.0	—
Other fabrics	DOZ	1.0	1,000.0	—
APPAREL				
Hosiery	DOZ	2.1	476.2	453.6
Suit-type coats, M&B	DOZ	2.0	257.1	1.7
Coats, M&B	DOZ	34.0	77.8	28.3
Coats, M&B	DOZ	34.0	18.5	12.8
Blouses & blouses	DOZ	42.2	28.3	15.5
Blouses, not knit	DOZ	15.0	64.7	9.7
Shirts, not knit	DOZ	34.0	41.7	79.6

TEXTILE CATEGORIES (CONT.)

Description	Units	Bye Conversion Factor	Units Per 1,000 lbs	1977 L/P Ratio
FABRIC				
442 Shirts	DOZ	18.4	55.6	26.7
443 Suits, M&B	DOZ	34.0	18.5	72.7
444 Suits, M&B	DOZ	34.0	18.5	29.8
445 Suits, M&B	DOZ	14.00	67.2	67.8
447 Trousers, M&B	DOZ	14.00	67.2	264.7
448 Trousers, M&B	DOZ	14.0	35.6	28.6
449 Other wool apparel	DOZ	2.0	500.0	12.4
MAKE-UP & MISCELLANEOUS				
444 Floor coverings	SQ YD	8.1	124.0	10.4
449 Other wool manufactures	DOZ	2.0	500.0	54.9
NON-TEXTILE CATEGORIES				
YARNS				
640 Textured	DOZ	3.5	285.7	8.8
641 Card, wool	DOZ	5.2	192.3	3.0
642 Card, non-wool	DOZ	11.4	86.2	8.5
643 Spun wool	DOZ	3.4	294.1	8.6
644 Spun non-wool	DOZ	4.1	243.9	1.5
645 Other yarns	DOZ	3.5	285.7	N/A
FABRIC				
610 Card, wool, not knit	DOZ	1.0	1,000.0	1.2
611 Spun wool, not knit	DOZ	1.0	1,000.0	8.9
612 Card, non-wool, not knit	DOZ	1.0	1,000.0	8.3
613 Spun non-wool, not knit	DOZ	1.0	1,000.0	8.8
614 Other fabrics, not knit	DOZ	1.0	1,000.0	7.9
625 Knit	DOZ	7.8	128.2	6.2
626 Pile & tufted	DOZ	1.0	1,000.0	21.3
627 Specialty	DOZ	7.8	128.2	N/A
APPAREL				
630 Handkerchiefs	DOZ	1.7	588.2	9.7
631 Gloves	DOZ	3.5	285.7	124.7
632 Hosiery	DOZ	4.6	217.4	1.4
633 Suit-type coats, M&B	DOZ	36.2	27.6	15.0
634 Other coats, M&B	DOZ	41.3	24.2	41.8
635 Coats, M&B	DOZ	41.3	24.2	62.8
636 Dresses	DOZ	45.3	22.1	6.3
637 Playmate	DOZ	21.3	46.9	14.4
638 Knit shirts, M&B	DOZ	18.0	55.6	21.2
639 Knit shirts & blouses, M&B	DOZ	15.0	66.7	54.8
640 Shirts	DOZ	24.0	41.7	71.9
641 Blouses	DOZ	14.5	69.8	33.0
642 Shirts	DOZ	17.8	56.2	7.3
643 Suits, M&B	DOZ	34.0	18.5	9.7
644 Suits, M&B	DOZ	34.0	18.5	7.5
645 Suits, M&B	DOZ	36.2	27.6	78.6
646 Trousers, M&B	DOZ	17.8	56.2	133.8
647 Trousers, M&B	DOZ	17.8	56.2	13.8
648 Trousers, M&B	DOZ	17.8	56.2	35.2
649 Brassieres, etc.	DOZ	4.8	208.3	64.4
650 Dressing gowns	DOZ	51.0	19.6	5.7
651 Nightwear	DOZ	52.0	19.2	2.3
652 Underwear	DOZ	16.0	62.5	4.1
653 Down & leather-filled coats, jackets & vests, M&B	DOZ	41.3	24.2	N/A
654 Down & leather-filled coats, jackets & vests, M&B	DOZ	41.3	24.2	N/A
655 Other Apparel	DOZ	7.8	128.2	N/A
MAKE-UP & MISCELLANEOUS				
645 Floor coverings	SQ YD	8.1	124.0	8.4
646 Other furnishings	DOZ	7.8	128.2	N/A
649 Other non-wool yarns	DOZ	7.8	128.2	N/A

670 Flat goods
✓ L/P ratio is for rooms and dressing gowns only.

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<u>Category</u>	<u>Description</u>	<u>Conversion Factor</u>	<u>Units of Measures</u>
842	Skirts	17.8	DZ
843	Suits, M & B	54.0	DZ.
844	Suits, W, G and I	54.0	DZ.
845	Sweaters, Other Vegetable Fiber	36.8	DZ.
846	Sweaters, Silk Blend	36.8	DZ.
847	Trousers, Slacks and Shorts (outer)	17.8	DZ.
850	Dressing Gowns	51.0	DZ.
851	Pajamas & other Nightwear	52.0	DZ.
852	Underwear	13.5	DZ.
858	Neckties	3.6	LB.
859	Other Apparel	6.8	LB.
863	Towels	0.5	NO.
870	Luggage	2.0	LB.
871	Handbags & Flat Goods	2.0	LB.
899	Other Silk blend and Other Vegetable Fiber Manufactures	5.0	LB.
800	Yarn, Thread	4.6	LB.
810	Fabrics	1.0	SYD.
831	Gloves	3.5	DPR.
832	Hosiery	4.6	DPR.
833	Suit-type Coats, M and B	36.2	DZ.
834	Other Coats, M and B	41.3	DZ.
835	Coats, W, G and I	41.3	DZ.
836	Dresses	45.3	DZ.
838	Knit Shirts and Blouses	14.0	DZ.
840	Shirts and Blouses,		

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Countries Designated for Benefits Under the
Caribbean Basin Initiative

Antigua and Barbuda
Aruba
Bahamas
Barbados
Belize
British Virgin Islands
Costa Rica
Dominica
Dominican Republic
El Salvador
Grenada
Guatemala
Haiti
Honduras
Jamaica
Montserrat
Netherlands Antilles
Panama
Puerto Rico, U.S.
St. Christopher-Nevis
St. Lucia
St. Vincent and the Grenadines
Trinidad and Tobago
U.S. Virgin Islands