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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

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September 18, 1981

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The Honorable Walter B. Jones
Chairman, Committee on Merchant
Marine & Fisheries
House of Representatives

Dear Mr. Chairman:

This responds to your request that we determine whether the cargo preference statutes apply to the sale by the Commodity Credit Corporation (CCC) of 100,000 metric tons of butter to the New Zealand Dairy Board (NZDB) under a contract signed August 5, 1981. The NZDB is described in the contract as a quasi-governmental agency of the Government of New Zealand. Of concern is the term of the contract which provides for payment 180 days from the date of the CCC invoice, and the absence of a contract requirement that shipment be made on United States flag vessels. The resolution of the questions raised depends on (1) whether the sale properly is considered a commercial transaction and (2) whether the 180 day payment period is a loan or an extension of credit.

To assist us in the preparation of our response, we requested comments from the Department of Agriculture (Agriculture) and the Maritime Administration (MarAd). Based on the information presented, we believe the cargo preference statutes do not apply to the sale.

The Statutes

The principal cargo preference statute (the Act), 46 U.S.C. S 1241(b) (1976), provides in part that:

"Whenever the United States shall * * * furnish to or for the account of any foreign nation without provision for reimbursement any equipment, materials, or commodities, * * * or shall advance funds or credits * * * in connection with the furnishing of such equipment, materials, or commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of * * * such equipment, materials or commodities * * * which may be transported

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on ocean vessels shall be transported on privately owned United States-flag commercial vessels * * *."

In addition, Public Resolution 17 (the Resolution), 46 U.S.C. 1241-1 (1976), states in part:

"It is the sense of Congress that in any loans made by the Reconstruction Finance Corporation or any other instrumentality of the Government to foster the exporting of agricultural or other products, provision shall be made that such products shall be carried exclusively in vessels of the United States * * *."

Applicability of the Act

You suggest that the Act applies because the agreed price is far below the world market price for butter and also far below the support prices paid by the Government when it acquired the butter. Implicit in your suggestion is that this is not a commercial transaction because the United States is furnishing a commodity to New Zealand without provision for full reimbursement, and therefore the transaction is one encompassed by the Act. You also suggest that the 180 day payment provision is an extension of credit which would itself bring the sale within the purview of the Act.

The legislative history of the Act supports its broad application to foreign aid programs which involve the use of American funds to finance the purchase of commodities. Applicability of Cargo Preference Act of 1954 to cash transfer program, 59 Comp. Gen. 279, 281 (1980). However, the Act was not intended to apply to strictly commercial transactions, even in cases where credit is extended. See 42 Op. Att'y. Gen. 203 (1963).

Agriculture contends that the sale in question was a commercial transaction made upon the best terms and conditions obtainable under the circumstances. According to Agriculture, CCC had obtained the butter as a result of Agriculture's purchase of dairy products to support milk prices, see 7 U.S.C. § 1446(c)(Supp.I 1977), and sought to dispose of the butter pursuant to its authority under the CCC Charter Act, 15 U.S.C. § 714-714 (1976). According to CCC, the purpose of the sale was not to assist a foreign nation but to benefit itself. In this respect, the CCC

claims it was incurring large costs to store the butter, as well as substantial interest costs on funds borrowed from the Treasury. CCC sought to alleviate this burden by selling the butter.

According to Agriculture, a domestic sale would not have benefited CCC, because its butter could not be sold domestically at less than the support price without disrupting the market. Moreover, a domestic sale would have been likely to result in the Government's acquiring an equivalent quantity of butter under its support program. Therefore, CCC's only option was the world market.

The conditions of the world market, according to Agriculture, had a significant impact on the low price CCC obtained for its butter relative to the world market price. Agriculture explains:

"Foreign markets for U.S. butter are extremely limited because it differs in composition from European butter. Specifically, U.S. butter contains salt and a minimum of 80 percent butterfat, whereas European butter contains no salt and 82 percent butterfat. Moreover, CCC cannot sell its butter at a competitive price for unrestricted use abroad since such a sale would disrupt established markets of our trading partners. Under the General Agreement on Tariffs and Trade (GATT), signatories, including the United States, are prohibited from obtaining substantial increases in their shares of foreign markets when the export is subsidized (i.e., the sales price is less than the acquisition or support price). Since CCC would have to sell well below its support price to be competitive and, in most cases, the historical share of U.S. butter sales in foreign markets is zero, CCC is very limited in its ability to sell butter on the international market. The New Zealand Dairy Board intends to convert most of the purchased butter into oil, thereby enabling the commodity to be stored for long periods of time and entered into the market without disruption."

Agriculture also maintains that it gained several attractive features in the bargain which offset the relatively low price. CCC was able to dispose of a significant

amount of butter (100,000 metric tons) and some of the oldest butter (40 months from the manufacture date) in a single transaction. In addition, Agriculture explains that the price was negotiated upon the basis of delivery F.O.B. the buyer's conveyance at the Government's warehouses rather than on the more usual methods of delivery which require the Government to bear the costs of transporting the butter to United States ports.

On the basis of the information presented, we cannot conclude that the sale was not a commercial transaction made under the best terms available. The Attorney General has ruled that foreign sales by Agriculture are not covered by the Act where the sales are not designed to aid the importing country but rather are made to dispose of inventories on the best terms available. 42 Op. Att'y Gen. 203, supra. This is so even if the foreign importer is an organization of a foreign nation which controls the trade of the commodity involved. 42 Op. Att'y Gen. at 212-214. Thus, even though this sale involved financial terms which appear favorable to the buyer, we do not believe this sale is covered by the Act.

Applicability of the Resolution

You maintain that the Resolution applies because the contract provision for payment 180 days after delivery to NZBD constitutes an interest-free loan for six months, and by its terms the Resolution applies to the shipping of products for which loans are made by an instrumentality of the United States.

We are not aware of any authority defining the scope of the term "loan" in the Resolution. The Attorney General has defined the term "loan," in ordinary commercial usage, as a contract by which one delivers a sum of money to another, and the latter agrees to return at a future date a sum equal to that borrowed, with or without interest. According to the Attorney General the right to defer payments for goods sold is not a loan but a credit. 42 Op. Att'y Gen. 229, 231 (1963).

Although the legislative history of the Resolution is sparse, we believe it supports the view that the term "loan" was not intended to include deferred payments consistent with commercial practice made in the ordinary course of trade. The floor discussion in both the House of Representatives and the Senate reflect concern with loans

made by the Reconstruction Finance Corporation, as opposed to credit extended by the seller, to encourage or enable a foreign nation to import United States products. Explaining the effect of this measure, Congressman Bland stated: "All it requires is that if loans are made, the products purchased shall go in American ships." 77 Cong. Rec. 6163 (1933). Similarly, Senator Vandenberg explained that "if Reconstruction Finance Corporation moneys are used in the promotion of foreign trade by way of foreign loans, the commodities involved so far as possible shall be shipped in American bottoms." 78 Cong. Rec. 3398 (1934). The Reconstruction Finance Corporation was a financing institution, not a seller. Thus, although MarAd argues that the term "loan" should be construed broadly enough to encompass this transaction we believe the Resolution refers only to an actual loan as that term has been defined by the Attorney General; it does not encompass credit or the right to defer payment for a finite period in a commercial transaction.

MarAd also argues that cargo preference provisions should be included in the contract because the payment terms are a departure from the commercial practice in such sales and from Agriculture's own practice of requiring payment within 10 days after the invoice date and because there are "indications that NZDB could market this butter at \$1.00 per pound in Europe." MarAd believes these features "constitute substantial elements of foreign assistance to NZDB."

We do not agree with MarAd's position.

For example, MarAd has not shown that a sale of the tonnages involved in this transaction (including unspecified amounts of butter which has been manufactured as long as 40 months ago) could be readily accomplished on the European market for \$1.00 per pound. Nor has MarAd shown or estimated what the ultimate cost to NZDB might be when all factors are cost considered--land transportation costs in the United States, ocean transportation costs, handling, administrative expenses, overhead, etc. That the NZDB might ultimately realize a profit if the butter could in fact be resold as butter, would not, in our opinion, convert the sale to a foreign assistance transaction. In any event, the contract does not permit the resale of the butter in its present form but rather requires its conversion to butteroil.

Considering the magnitude of the sale, the parties' understanding that the butter would be converted to butter-oil before it is marketed, and the United States' position in foreign commerce for this commodity, we have no basis to conclude that Agriculture's representations as to the commercial nature of the transaction were erroneous.

Sincerely yours,

A handwritten signature in cursive script, reading "Milton J. Fowler". The signature is written in dark ink and is positioned above the typed name.

Acting Comptroller General
of the United States