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Report to Congressional Requesters

February 1994

STATE DEPARTMENT

Problems in Compiling List of Countries Restricting Longshore Activities

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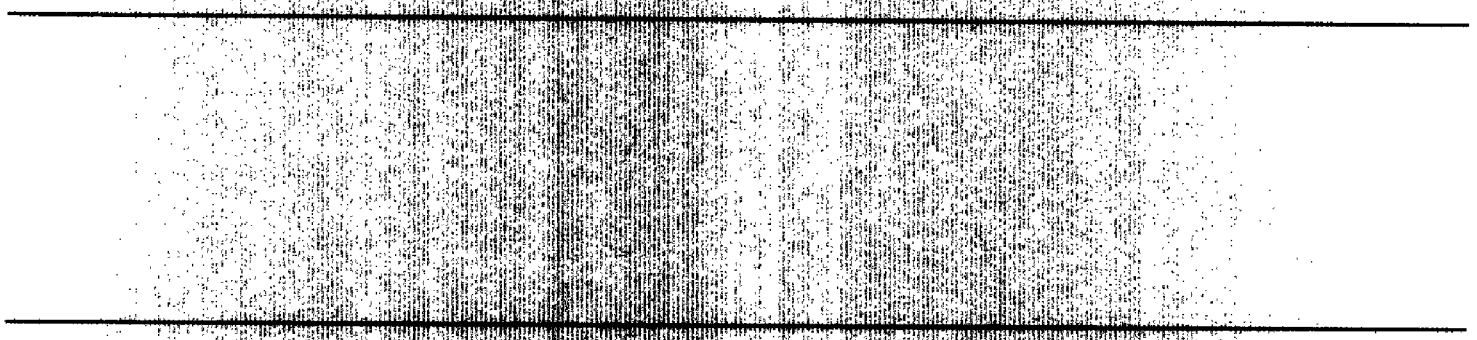

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National Security and
International Affairs Division

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February 3, 1994

The Honorable Lee H. Hamilton
Chairman, Committee on Foreign Affairs
House of Representatives

The Honorable Olympia J. Snowe
Ranking Republican Member
Subcommittee on International Operations
Committee on Foreign Affairs
House of Representatives

Section 258 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1288, as amended, places limitations on the performance of longshore work by alien crewmembers.[1] Subsection 258(d) provides a reciprocity exception to the limitations and requires the State Department to compile and annually maintain a list of countries ineligible for the exception because they restrict crewmembers aboard U.S. vessels from performing longshore activities in their ports. In response to your request, we have reviewed State's criteria and methodology for compiling the list.

Background

Historically, U.S. immigration laws generally allowed the crewmembers of foreign-owned and -registered ships to perform certain work aboard their vessels while in U.S. ports or coastal waters. However, the legislation, as amended in 1990, places limitations on the type of work these alien crewmembers may perform. Specifically, alien crewmembers are now prohibited from performing what the legislation defines as longshore work either aboard their vessels or dockside. Longshore work is defined in the legislation to include any activity relating to the loading or unloading of cargo, the operation of cargo-related equipment, and the handling of mooring lines. The intent of the law is to provide greater protection for U.S. workers from the loss of job opportunities that may otherwise result from alien crewmembers performing longshore work.

The legislation permits an exception to the restriction to provide for reciprocity between the United States and countries that do not prohibit crewmembers aboard U.S. vessels from engaging in longshore activities in their ports. In order to implement the reciprocity exception, the Secretary of State is required to compile and annually maintain a list of countries that prohibit—by law, by regulation, or in practice—crewmembers aboard

[1]This section was added by section 203 of the Immigration Act of 1990 (P.L. 101-649).

U.S. ships from performing specific types of longshore activities. Crewmembers aboard ships registered in or owned by nationals of countries on the list would be similarly restricted from performing longshore work in U.S. waters.

Results in Brief

In December 1991, State published a list of 50 countries that restrict longshore work by crewmembers aboard U.S. vessels. Although State revised the list in 1992, adding 13 countries, the revised list was not published until December 13, 1993. In general, State's criteria and methodology have tended to limit the number of countries placed on the list.

State determined that only countries with specific laws, regulations, or government-imposed or -approved practices that restrict longshore work would be placed on the list. Thus, countries with restrictive practices that were not government sanctioned, such as collective bargaining agreements between private parties, are not on State's list. State also excluded from the list countries (1) that did not enforce their restrictions on longshore work or (2) where there were government-approved restrictive practices in place, but where no U.S. ships had called during the past year.

State's interpretation of the law is more narrow than some proponents of the legislation believe was intended. Regarding State's determination not to consider as restrictive practices those practices that are not government imposed or approved, we found that the legislation is susceptible to varying interpretations but that State's interpretation is legally supportable. However, State's position on nonenforcement and ship calls is not supported by the legislation or the legislative history.

To collect information, State requested that its overseas posts provide information on host countries' laws, regulations, and practices affecting longshore work, but did not specify what information it needed to enable it to fairly apply its criteria for placing countries on the list. For example, State did not ask its overseas posts to report on whether restrictions were enforced or the frequency of port calls by U.S. vessels. Moreover, State did not specify a reporting format. Consequently, overseas posts reported information in varying levels of detail and in differing formats. The information collected was not uniform or comprehensive, making consistent application of the criteria difficult. As a result, some of State's decisions on individual countries appear arbitrary and not fully and clearly

supported. State officials acknowledged difficulties in obtaining the necessary data, determining and applying its criteria, and compiling the list.

Development of the List

The legislation requires the Secretary of State to compile and annually maintain the list of restrictive countries through the notice-and-comment rulemaking procedures of the Administrative Procedures Act. State's Office of Maritime and Land Transport, within the Bureau of Economic and Business Affairs, was responsible for the list. It assigned an officer to work on developing the list on a part-time basis.

In March 1991, State directed its overseas posts to determine, through contact with host government authorities and other sources of information, the laws, regulations, and practices regarding longshore work by crews of U.S. vessels. The Office of Maritime and Land Transport analyzed the information to determine which countries should be placed on the list. In May 1991, a preliminary list of 47 countries, along with a description of their respective restrictions, was published in the Federal Register. After receiving comments and performing further analysis, State published an amended list in December 1991, containing 50 countries.

In order to update the list annually, as required, State directed its overseas posts in October 1992 to report on any changes since 1991. In November 1992, State prepared an updated list. However, due to personnel turnovers and other factors associated with the change of administration at both State and the Office of Management and Budget,[2] the updated list was not published until December 13, 1993. The updated list contains 63 countries (see app. II). State did not ask its overseas posts to provide additional information in 1993; thus, the current list is based on 1992 information.

State's Criteria Limits Number of Countries on List

State's criteria for placing a country on the list was that the country's restrictions on longshore work by crewmembers aboard U.S. ships must be imposed or approved by the government on a national basis (1) by law or regulation, (2) through a collective bargaining agreement directly negotiated by the foreign government with other parties, or (3) through restrictions in private collective bargaining agreements officially imposed or approved by the foreign government. However, countries were not

[2]The Office of Management and Budget reviewed State's list prior to its publication in the Federal Register.

placed on the list if they did not enforce their restrictions or their restrictions were imposed through practices—not laws or regulations—and no U.S. ships had called on their ports within the past year.[3] It was also State's policy to omit countries from the list if the evidence of any restrictions was inconclusive.

While representative industry groups and associations[4] have expressed strong support for State's criteria, longshoremen's unions[5] and some Members of Congress are critical of State's criteria. They argue that the criteria are based upon a faulty interpretation of the law, specifically, State's interpretation of the term "in practice." The legislation states that the list should include all countries that prohibit longshore work by crewmembers aboard U.S. vessels by law, by regulation, or in practice. State interpreted the term "in practice" as referring only to restrictive practices imposed or approved by the foreign government.

State's interpretation of the term "in practice" results in a more narrow application of the law than critics believe was intended. Many countries in which there are restrictive practices did not meet State's criteria and remain eligible for reciprocity. For example, collective bargaining agreements in Barbados, Canada, Ireland, Ecuador, and New Zealand prohibit crewmembers aboard U.S. vessels from performing longshore work. These countries are not on the list, however, because State determined that the agreements were not government sanctioned or imposed. Critics of State's interpretation argue that the intent of the law and the term "in practice" was to encompass all restrictive practices that in fact exist.

Longshoremen's unions also question the basis of State's other criteria—nonenforcement and ship calls—which further limit the number of countries on the list. State officials said that support for these criteria is

[3]The nonenforcement of restrictions criterion, according to State, also applies to situations where the government permits crewmembers to perform restricted longshore work if the local longshore workers are compensated for their lost work, as in Cyprus. We also noted in one instance that State interpreted nonenforcement to include a situation where restrictions had never been enforced because there had not been an opportunity to enforce them. Singapore, according to the U.S. Embassy, has a general provision, with the force of law, that requires persons working at the port to be licensed or authorized for that purpose. Such a provision constitutes a restriction on longshore work. Singapore was omitted from the list, however, because the Embassy reported that the provision had never been invoked. No one had requested permission for crewmembers to do longshore work. Thus, according to State, Singapore did not enforce its restrictions.

[4]The United States Members of the International Association of Great Lakes Ports, the American Iron and Steel Institute, and the Shippers for Competitive Ocean Transportation.

[5]The International Longshoremen's Association, AFL-CIO and the International Longshoremen and Warehousemen's Union, AFL-CIO.

implied in both the legislative history and language of the law. A State official explained that the law and its legislative history use the treatment of crewmembers aboard U.S. vessels as a criterion for determining the reciprocity exception. If countries do not enforce restrictions or U.S. vessels do not call on a country, crewmembers aboard U.S. vessels have not been prohibited from performing longshore work. According to State, the 1-year criterion applied to U.S. ship calls parallels the time frame the legislation requires State to consider when evaluating practices in foreign countries. The legislation requires State to consider the practices in effect in a foreign country during the 1-year period preceding the arrival of such country's ship in the United States or its coastal waters.

We found that the legislation is susceptible to differing interpretations regarding the criteria used to determine whether countries should be placed on the list. Regarding the issue of the meaning and scope of the term "in practice," State's interpretation is supportable from a legal standpoint. However, support can also be found for opposing views. A more detailed discussion of the legislation, together with State's and the opposing views, are presented in appendix I.

Concerning State's views on nonenforcement and ship calls, neither the legislation nor the legislative history provides support for these views. Regarding a country's nonenforcement of a restriction, the legislation refers only to the existence of any restrictive law, regulation, or practice. Enforcement or nonenforcement of such a restriction is immaterial.

On similar grounds we also question State's view on ship calls, in that the existence of a covered restrictive practice in a foreign country requires its placement on the list. While a U.S. ship may not have called on a foreign country's port within the past year, the restrictive practice nevertheless still exists that presumably could be enforced when a U.S. ship does call at some future time. Further, although there may be some parallel between the 1-year time frame for U.S. ship calls and the 1-year time frame in evaluating a country's restrictive practice, the express terms of the legislation do not give State latitude to apply a 1-year criterion to U.S. ship calls as a basis for excluding a country from the list.

Weaknesses in Data Collection Complicated Analysis

We reviewed the information provided by the overseas posts and attempted to determine if the data supported State's decisions on whether each country should be on the list. We found that there was great variance in reporting styles and level of detail, and that for some countries the

information was unclear, incomplete, and inconsistent. We found it difficult to analyze the information systematically and, in some cases, to reconcile State's decisions with available evidence.

State also experienced analysis difficulties. For example, on the basis of information reported in 1991, State did not place Bulgaria, Ethiopia, and Ghana on the list. However, after reexamining the same information, State added the countries to the 1993 list. State officials said comments submitted by the unions prompted some of the reexaminations.

Data analysis was complicated for several reasons. First, according to State, some foreign countries' laws and regulations are ambiguous in how they pertain to longshore work, particularly when trying to relate them to specific longshore activities, such as the handling of containers or the rigging of ship's gear, as required for compiling the list. Moreover, what constitutes longshore activities is not universally agreed upon. Difficulties resulting from these factors will continue despite State's efforts to improve its data collection efforts. Second, the questions asked by State were not specific enough to ensure that overseas posts would provide the detailed information required to uniformly apply State's criteria to all countries. Each overseas post answered the broad questions in its own format, making it difficult to analyze and ensure consistent decisions.

Following are some examples of problems we noted during our analysis of reports from the overseas posts. These problems raise serious doubts about whether the State Department could have consistently applied its stated criteria.

- State did not ask its overseas posts to determine whether countries were enforcing their restrictions or to report on the frequency of U.S. ship calls even though such information was a basis for omitting countries from the list. Consequently, most overseas posts did not report such information. We noted that Cyprus and Singapore, which have restrictions on longshore work, were omitted from the list because State determined that they did not enforce their restrictions. Only one country, Liberia, was identified by State as being omitted on the basis of no U.S. ship calls.[6]
- State did not ask its overseas posts to specifically review countries' labor laws to determine whether foreigners desiring to work in the country must have government permission, such as a work permit. Such a requirement, State determined, would place the country on the list. Although reports

[6]State cited this criteria as the basis for omitting Liberia from the 1991 list. On the basis of subsequent embassy reports, State determined in 1992 that Liberia did not have restrictive laws, regulations, or practices.

from overseas posts in Algeria, Germany, Venezuela, and some other countries discussed labor law requirements, most post reports focused on port laws, regulations, and practices and did not mention whether labor laws were reviewed. We noted that Algeria and Germany were placed on the list because of their work permit requirements. Venezuela, however, was not placed on the list, although the post's 1992 report mentioned that foreigners needed an appropriate visa to work on a temporary basis in Venezuela. State had no explanation for Venezuela's omission from the list.

- U.S. posts in some countries did not report sufficient information to determine whether restrictive practices were government imposed or approved. Although in some cases State sought clarifying information, overseas posts did not always respond to State's request. We noted 13 countries for which we could not determine from the information that State had whether the restrictive practices were government sanctioned. Some of the countries, such as Guatemala, Madagascar, and the Philippines, were placed on the list, but others, such as Iceland, Ireland, Malaysia, and Mexico, were not.
- State's policy was to exclude countries from the list if there was no conclusive evidence of restrictions. For example, Mexico was omitted from the 1991 list, according to State, because the information provided by the U.S. Embassy in Mexico City was inconclusive. The Embassy provided several reports but was unable to provide definitive information to determine if restrictions existed, partially because Mexico was in the process of privatizing its ports and changing the policies and regulations governing them.

State Did Not Obtain Information on Some Countries

State obtained information on only about 60 percent of the countries with seaports. Lloyd's of London reports show that about 170 countries have seaports, but State received information on only 104 of these countries. Without information on the laws, regulations, and practices of the other countries, State had no basis to conclude that there were restrictions; thus, none of the countries were placed on the list.

State provided the following reasons why it obtained no information on some seaport countries:

- U.S. posts in 27 countries did not provide reports in either 1991 or 1992. State explained that 21 of the nonreporting posts were small posts and that because of their limited personnel, special clearance was required before they could be tasked with the reporting requirement. The Office of

Maritime and Land Transport did not seek such clearance for requesting reports on longshore restrictions.

- The United States does not have diplomatic relations with six countries, such as Iran. Information on these countries would be difficult to obtain. Moreover, ships from these countries do not call at U.S. ports.
- The United States does not have posts in seven small, independent countries, such as the Maldive Islands, and therefore, information would be difficult to obtain.
- The United States does not have posts in 24 seaport countries that are territories or possessions of other countries, such as the Cayman Islands (United Kingdom), or are self-ruling countries associated with another country, such as Greenland (Denmark). State Department officials told us they are currently reviewing the treatment of such countries for purposes of compiling the list.

Despite Some Improvements, 1992 Data Collection Remained Flawed

State revised its 1992 information request to include additional information regarding the type of practices and activities that should be reported and more clearly explained its interpretation of the term "in practice" and collective bargaining agreements—both issues that generated the most comments from concerned parties. The revised request, however, did not significantly improve the level of detail reported nor ease the analysis difficulties. State again asked broad questions, did not fully explain its analysis criteria, and did not specify a reporting format.

Furthermore, State received information about fewer countries in 1992 than it received in 1991, 85 in 1992 versus 94 in 1991. Although 10 overseas posts reported for the first time in 1992, 19 posts that reported in 1991 did not report in 1992.

Recommendations

With relatively small changes in how it obtains information and determines which countries to place on the list, State can significantly improve its data collection and decision-making procedures. These actions can help State compile a list that is more complete and supportable. Therefore, we recommend that the Secretary of State improve the methodology used to compile the list of restrictive countries by tasking the Director of the Office of Maritime and Land Transport to (1) clearly and thoroughly state the criteria for determining which countries to place on the list, (2) determine specific data requirements and develop appropriate questions designed to solicit required information, (3) design a

standardized reporting format to facilitate analysis, (4) obtain information on all seaport countries or clearly identify in the Federal Register those countries for which no information was obtained and the reason why, and (5) develop a follow-up procedure to ensure that reports are received from all tasked overseas posts and to obtain any necessary clarification.

We also recommend that the Secretary of State add to the list those countries with restrictions on longshore work that were omitted on the basis that no U.S. ships had called on their ports within the previous year or that they did not enforce their restrictions.

Matters for Congressional Consideration

If the Congress does not believe a country's restrictive practices on longshore activities should refer only to those that are approved or sanctioned by the host country government, as State has determined, then it may wish to amend section 258 of the Immigration and Nationality Act of 1952, as amended, to indicate that all practices—government approved or not—that have the effect of restricting longshore activities by U.S. crewmembers require that the country be included on the State Department's list of restrictive countries.

Views of Program Officials

Officials in the Office of Maritime and Land Transport believe that State has carried out its responsibilities under this legislation in a reasonable and responsible manner. They noted that many foreign crewmembers who had been engaged in longshore activities prior to the 1990 legislation can no longer participate in longshore work, which is now reserved for U.S. workers. They also noted that many of the United States' major trading partners are among the 63 countries on the list, including Japan, Korea, Germany, and France. Moreover, they noted that many of the countries for which State did not obtain longshore information do not have vessels that call at U.S. ports.

Regarding its interpretation of the legislation, State intends to reexamine standards for the reciprocity exception as it updates the list. State plans to seek public comment on the issue in a forthcoming notice to be published in the Federal Register.

The officials said that State recognizes the importance of developing more comprehensive data collection procedures and intends to utilize suggestions in the report in future updates to the list. They agreed with our

recommendations to improve how State obtains information and determines which countries to place on the list.

Scope and Methodology

We reviewed the language and legislative history of section 258 and correspondence from longshore labor unions, the State Department, and Members of Congress—both proponents and critics of State's implementation of subsection 258(d)—to obtain their respective views and arguments. We interviewed officials from the Department of State's Office of Maritime and Land Transport to review the criteria and methodology for compiling the list and met with longshore labor union officials to discuss their concerns. We also reviewed documentation used by State to decide whether to place a country on the list. We did not attempt to evaluate the impact of the reciprocity exception, as it is being implemented, on longshore work in the United States.

We conducted our review between September and December 1993 in accordance with generally accepted government auditing standards. As you requested, we did not obtain formal agency comments on this report. However, we discussed the contents of the report with officials in State's Office of Maritime and Land Transport and have incorporated their comments as appropriate.

Unless you publicly announce this report's contents earlier, we plan no further distribution until 30 days after its issue date. At that time, we will send copies to interested congressional committees and the Secretary of State. We will also make copies available to others on request.

Please call me on (202) 512-4128 if you or your staff have any questions concerning this report. Major contributors to this report are listed in appendix III.

Joseph E. Kelley
Director-in-Charge
International Affairs Issues

Contents

Interpretation of Section 258 of the Immigration and Nationality Act of 1952, as Amended

Background

Historically, U.S. immigration laws have generally allowed alien crewmembers, as a special class of nonimmigrant aliens, to perform certain work aboard ships located in U.S. ports or coastal waters.[1] A crewmember is a person performing work required for the normal operation and service of a vessel.

This changed in 1990 when the Congress enacted section 203 of the Immigration Act of 1990. Section 203 added a new section, section 258, to the Immigration and Nationality Act of 1952, 8 U.S.C. 1288, as amended, which restricts alien crewmembers from performing longshore work in U.S. ports or coastal waters. The purpose of the legislation is to protect U.S. longshore workers from the loss of job opportunities that may otherwise result from alien crewmembers performing longshore tasks.

The legislation establishes three exceptions to the restriction: (1) for activities regulated by the Secretary of Transportation for safety purposes and environmental protection, (2) for well-established "prevailing practices" related to particular longshore activities in particular ports, and (3) for reciprocal treatment from another country.

The "reciprocity exception" contained in the legislation states:

"Subject to the determination of the Secretary of State pursuant to paragraph (2), the Attorney General shall permit an alien crewman to perform an activity constituting longshore work if

"(A) the vessel is registered in a country that by law, regulation, or in practice does not prohibit such activity by crewmembers aboard United States vessels and

"(B) nationals of a country (or countries) which by law, regulation, or in practice does not prohibit such activity by crewmembers aboard United States vessels hold a majority of the ownership interest in the vessel.

"The Secretary of State shall . . . compile and annually maintain a list, of longshore work by particular activity, or countries where performance of such a particular activity by crewmembers aboard United States vessels is prohibited by law, regulation, or in practice in the country . . . .

"For purposes of this subsection, the term 'in practice' refers to an activity normally performed in such country during the one-year period preceding the arrival of such vessel into the United States or coastal waters thereof."

[1]Section 101(a)(15)(D)(i) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1101(a)(15)(D)(i).

State Department Interpretation

Pursuant to subsection 258(d), in May 1991 the State Department issued an interim rule containing a list of foreign countries where the performance of particular types of longshore work is prohibited by law, by regulation, or in practice.[2] A foreign country's inclusion on this list meant that the reciprocity exception would not be available to the extent of such restrictions, and therefore, alien crewmembers on vessels registered in or owned by nationals of that country would not be allowed to perform comparable longshore work in the United States. Conversely, foreign countries that were not listed would be eligible for a reciprocity exception, and alien crewmembers on board their vessels[3] would be allowed to perform longshore work in the United States.

In December 1991, State issued its explanation regarding the scope of the reciprocity exception.[4] The Department stated:

"The Department is listing those countries where restrictions on longshore activities by crewmembers of U.S. ships are imposed or approved by the foreign government on a national basis:

— By law or regulation,
— Through a collective bargaining agreement directly negotiated by the foreign government with other parties, or
— Through restrictions in private collective bargaining agreements imposed or approved by the foreign government."

Thus, State views the reciprocity exception as not applying to those situations where the foreign government imposed or approved restrictions, by means of a law, regulation, or "in practice" through the operation of a collective bargaining agreement. That is, even if restrictive practices exist, the Department takes the view that the exception will still be available if the foreign government has not played an active role in imposing such restrictions.

In support of its position, State pointed to the language in the legislation, the related conference report, and a colloquy between Senators Edward

[2]56 Fed. Reg. 24,338 (1991).

[3]The vessels must be registered in and owned by nationals of such countries.

[4]56 Fed. Reg. 66,970-973 (1991). The list containing restrictive foreign countries is now codified in 22 C.F.R. Part 89 (1993).

Kennedy and Brock Adams. The conference report made the following statement regarding the reciprocity exception:[5]

"The section provides three exceptions to its definition of longshore work: for cargo regulated by the Secretary for safety purposes and environmental protection; for well-established prevailing practices of using alien crewmen to perform particular longshore activities in particular ports; and for international reciprocity between the United States and countries that do not prohibit crewmen from performing particular longshore activities aboard U.S. vessels in their respective ports."

[Text omitted.]

"The exception for reciprocity requires a foreign vessel to be registered in a country, and owned by nationals of a country, each of which does not prohibit by law, regulation, or general practice crewmen from performing longshore activities aboard U.S. vessels in its ports. The provision would require the Secretary of State to survey foreign laws and practices to compile annually and, after a notice and comment, it would maintain a list by particular activity of countries where performance of such a particular activity of longshore work is prohibited by law, regulation, or in practice."

The pertinent parts of the colloquy between Senators Adams and Kennedy, discussing the reciprocity exception, are as follows:[6]

"Mr. ADAMS . . . I want to confirm the conference committee's agreement on the degree of protection this provision provides for U.S. longshoremen. It is my understanding that another country's prohibition in practice of U.S. or other foreign crewmen performing longshore work is to consist of any effective restriction imposed or sanctioned by the other country's government. Such a restriction could take the form of a collective bargaining agreement protecting longshore work for domestic longshoremen or an industry contract or agreement that effectively imposes any restriction on U.S. crewmen performing longshore work in that country. Any such prohibition by the other country on any particular longshore activity would be listed by the Secretary of State for the purpose of limiting the rights of alien crewmen to perform longshore work in U.S. ports.

"Mr. KENNEDY. The Senator is correct. A prohibition in practice could include any type of restriction you described. The list of countries imposing such prohibitions, compiled by the Secretary of State, is to record every such prohibition wherever it may be found, so that vessels owned and registered in other countries will only be allowed to have their crew do longshore work in the United States to the actual extent that those countries allow U.S. crewmen to do exactly the same work in those countries."

[5]H.R. Rep. No. 101-955 at 124-125 (1990).

[6]136 Cong. Rec. S17,115 (daily ed. Oct. 26, 1990) (statements of Sen. Adams and Sen. Kennedy).

On the above grounds the State Department commented:[7]

"The Department agrees with the comment that Congress does not want to grant an exception to crews of countries that do not accord U.S. crews the same treatment. Subsection 258(d)(1), however, only refers to restrictions in which the government has an active role. The conference report uses the same construction. Moreover, the colloquy explicitly refers to restrictions sanctioned or imposed by a country's government. The Department has therefore concluded that a reasonable interpretation of the Act would only apply to restrictions actively imposed or sanctioned by a foreign government."

Regarding restrictive collective bargaining agreements in foreign countries, the Department stated that such agreements

"duly negotiated under a foreign country's labor law should not affect that country's eligibility for reciprocal exemption unless the country's government imposes or sanctions the agreements. The mere existence of agreements restricting longshore activities does not mean that the government supports or requires such restrictions. As in the U.S., the labor laws of many countries guarantee the right of collective bargaining but do not dictate the terms of collective bargaining agreements."[8]

State has also argued that subsection 258(b)(3) recognizes collective bargaining activities as a distinct sphere of activity not subject to the act. That section provides that:

"Nothing in this section shall be construed as broadening, limiting, or otherwise modifying the meaning or scope of longshore work for purposes of any other law, collective bargaining agreement, or international agreement."

The conference report commented as follows:[9]

"This section affects only 8 U.S.C. 1101(a)(15)(D)(i) [part of the immigration laws]. It does not affect labor-management relations, and it does not authorize the Attorney General or the Secretary of State to take any action which would supersede or abrogate any U.S. collective bargaining agreement or any other law or agreement."

State's argument is that because this provision protects the sanctity of privately negotiated collective bargaining agreements in the United States, State would have great difficulty in justifying to other countries that their private collective bargaining agreements are restrictive practices under the

[7]56 Fed. Reg. 66,973 (1991).

[8]Id.

[9]H.R. Rep. No. 101-955 at 124 (1990).

law while U.S. collective bargaining agreements are unaffected. State believes that such an interpretation would not be considered equitable or reciprocal.[10] Representative industry groups and associations have expressed strong support for State's view.[11]

Opposing Views

State's interpretation has created sharp disagreement among affected groups and organizations, generally with industry representatives agreeing with State's position and union representatives in opposition. Various Members of Congress have disagreed with the Department's views, arguing that the term "in practice" in the reciprocity exception includes all forms of restrictive practices, including those maintained by the private sector through the use of collective bargaining agreements. Some of these opposing views are contained in the comments section of the pertinent Federal Register.[12] Following is a representative comment submitted by the labor unions:

"In the view of International Longshoremen's Association and the International Longshoremen and Warehousemen's Union (the longshoremen's unions), the Department's standards for reciprocity exception articulated in the interim final rule are not consistent with the guidelines set by Congress in the Act. The longshoremen's unions hold that the Act has the objective of preserving longshore work in the U.S. for U.S. longshoremen. The unions believe that alien longshoremen are doing such work in U.S. ports while U.S. nationals are not able to perform the same activities in foreign countries."

Specifically, the unions observe that the statute refers to activities prohibited by law, regulation, or practice in the country. The unions believe that this construction applies to any private agreement that prohibits U.S. mariners from carrying out longshore work in a foreign country.

Several Members of Congress, one of whom was the original sponsor of the legislation, also submitted a joint statement calling upon the Department to modify its interpretation:[13]

[10]These statements were made in separate letters dated July 20, 1992, from the Assistant Secretary of State for Legislative Affairs to Senator Kennedy and Congressman DeFazio.

[11]The United States Members of the International Association of Great Lakes Ports, the American Iron and Steel Institute, and the Shippers for Competitive Ocean Transportation.

[12]56 Fed. Reg. 66,971-72 (1991).

[13]56 Fed. Reg. 66,972 (1991).

"The Congressmen advise that subsection 258(d) of the Act only provides a narrow exception from an otherwise broad and deliberate effort to stop foreign mariners from doing longshore work. The Congressmen do not accept the Department's interpretation of the term 'in practice' as it relates to private collective bargaining agreements. They note that Congress neither explicitly stated nor implicitly inferred that a private agreement would have to be imposed or approved by the government in order to disqualify a country from receiving a reciprocal exemption."

Regarding the State Department's reliance on the colloquy between Senators Adams and Kennedy, both these Senators have disagreed with State's interpretation. In a joint letter to the Secretary of State dated June 3, 1992, the senators questioned the State Department's regulations, commenting that State misinterpreted their remarks. The Senators said that in speaking of practices "imposed or sanctioned" by foreign governments, their "intent was to preclude from the reciprocity exemption those practices which may exist despite a foreign government's best efforts to eliminate them."

Senators Adams and Kennedy further stated that where "a foreign government takes no effective action to preclude its ports from barring American crewmen from longshore work, we believe the Department should conclude that such government has sanctioned this practice." Finally, the Senators emphasized that in their colloquy, they noted that collective bargaining agreements and other contracts that may limit the longshore activities of U.S. crewmen in a foreign port should cause a country to appear on the State Department's list.

Finally, in a jointly signed letter dated June 16, 1992, to the Secretary of State, 27 Members of Congress expressed the opinion that the State Department's regulations do not fully comply with the letter, spirit, or expressed intent of the new law. The Members questioned State's interpretation of the "in practice" clause and pointed out that many foreign countries have private traditional practices or industry agreements that have the effect of prohibiting U.S. crewmen from performing longshore work, but are not on the State Department's list. The Members stated that this situation will result in a loss of employment opportunities for U.S. labor.

GAO Comments

We found that subsection 258(d), based on its language and legislative history, is susceptible to differing interpretations. Both the State

Department and its opponents therefore can point to various legislative references as providing support for their views.

Specifically, the State Department's interpretation of the reciprocity exception—that the exception is not available only in those cases where a foreign country has actively imposed or approved restrictions on longshore work by U.S. crewmen by law, by regulation, or in practice through the operation of a collective bargaining agreement—is legally supportable. The language of subsection 258(d)(1), the conference report, and the colloquy, which refer to restrictions imposed by a foreign country, provide the support for the Department's views.

On the other hand, the language and legislative history provide support for the opposing view that the exception should not be available when restrictions are imposed in a foreign country through a privately negotiated collective bargaining agreement. Of particular importance is the language in the law referring to restrictive practices in a foreign country and the statutory definition of the term "in practice" that refers to an activity that is normally performed in a foreign country. However, the courts have typically accorded deference to an executive agency's interpretation of a statute that it is charged with administering.

State Department's List of Countries With Restrictive Laws, Regulations, or Practices (as of December 13, 1993)

The following list identifies 63 countries where, according to the State Department, longshore work by crewmembers aboard U.S. vessels is prohibited by law, by regulation, or in practice with respect to particular activities. Crewmembers aboard ships registered in or owned by nationals of these countries are similarly restricted from performing longshore work in U.S. ports or coastal waters. The list published in the Federal Register identifies the particular restricted activities for each country.

1. Algeria
2. Argentina
3. Australia
4. Belgium
5. Belize
6. Brazil
7. Bulgaria[a]
8. Burma
9. Chile
10. China, Peoples Republic of
11. Colombia
12. Congo
13. Costa Rica
14. Cote d'Ivoire
15. Dominica[a]
16. Egypt
17. El Salvador
18. Ethiopia[a]
19. France
20. Germany
21. Ghana[a]
22. Guatemala
23. Guinea
24. Honduras
25. India
26. Indonesia
27. Israel
28. Italy
29. Jamaica
30. Japan
31. Jordan[a]
32. Kenya
33. Korea[a]
34. Kuwait[a]
35. Madagascar
36. Mauritania
37. Mauritius[a]
38. Morocco
39. Mozambique
40. Namibia
41. Nicaragua[a]
42. Oman
43. Pakistan
44. Philippines
45. Portugal
46. Qatar[a]
47. Romania
48. St. Lucia
49. St. Vincent and the Grenadines[a]
50. Saudi Arabia[a]
51. Sierra Leone
52. South Africa
53. Spain
54. Sri Lanka
55. Sudan[a]
56. Taiwan
57. Thailand
58. Togo
59. Trinidad and Tobago
60. Tunisia
61. Turkey
62. Uruguay
63. Yemen

[a]Countries not on the 1991 list.

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