

number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional appropriations committees were apprised of its apparent impact upon the survival of the snail darter. We conclude however, that the explicit provisions of the Endangered Species Act require precisely that result."

Indeed, it does appear curious. Although Chief Justice Burger may have delivered an object lesson Congress, he failed to note that the courts have the obligation to apply *the Constitution* to such legislation, and that the Constitution clearly embodies a commitment to the health and welfare of the *human* population as the paramount duty of Congress.

Justices Powell and Rehnquist, in two separate dissents, while not reaching the underlying constitutional question, objected to the Burger opinion's extreme nominalism, noting that a statute should not be construed so as to give an absurd result when any other reading is possible, and that the court may exercise its equity jurisdiction to reconcile apparently conflicting private claims and public interest.

recognized as particularly dangerous by

environmentalists who knew, as a representative of the Sierra Club told Congress, that any qualification of the act "could be construed to be a declaration of congressional policy that other agency purposes are necessarily more important than protection of endangered species . . ." The Constitution establishes that beyond question, although the Supreme Court has left the issue in doubt.

Price-Anderson

In the Price-Anderson Act case, the Court was finally able to lean upon definitively stated congressional legislation to formulate its policy. Southern environmentalists had challenged the Price-Anderson Act of 1957 which provided a federal insurance umbrella and liability limitation in the case of nuclear power plant accidents. The environmentalists had stated that they were aware, as was the lower court judge who ruled in their favor, that overturning Price-Anderson would mean the end of the nuclear industry. The Supreme Court ruled unanimously that the act should stand, that it "bears a rational relationship to Congress' concern for stimulating the involvement of private enterprise in the production of electric energy through the use of atomic power."

— Felice Merritt

Eximbank Recharter Passed By Senate Subcommittee

Stevenson adds weak 'by-pass' of Jackson-Vanik amendment

The Senate Banking Committee's subcommittee on International Finance, headed by Adlai E. Stevenson of Illinois, has passed favorably on legislation to recharter the Export-Import Bank and to raise its credit facility from the present \$25 billion to the Administration's

TRADE

requested \$40 billion. The amendments attached to the bill, primarily by Senators Stevenson and Percy, reflect the nature and depth of the fight raging in Congress, and within the Administration and different executive departments, over whether to repeal the Jackson-Vanik amendment to the 1974 Trade Act.

The Jackson-Vanik amendment has curtailed Eximbank credits for trade with "communist" countries because of their so-called emigration restrictions. The fight against it is aimed at ending the restrictions on nuclear and nuclear-related technology transfers and in general all restrictions which have lessened the ability of the United States to participate in East-West trade arrangements.

The general consensus within the American business

community is that unless the Eximbank's operating guidelines are liberalized especially vis-à-vis trade with the East block, the U.S. will be shut out of expanding trade opportunities which the other Western industrial nations are pursuing at full throttle. A recent issue of Chase Manhattan Bank's *International Finance* newsletter reports that despite U.S. efforts to impose limitations on East bloc and Soviet credit lines by the OECD, several European nations and Japan have increased their credit lines. Italy recently replenished an exhausted credit line to the Soviet Union with \$900 million of additional credit, while France, Britain, and Japan are now extending credits at interest rates below the minimum established by the OECD Export Credits Group in April of this year.

But the U.S. Eximbank as constituted by the new charter, even with the expansion of credit, and Senator Stevenson's attempts to liberalize trade with the East Bloc, cannot take advantage of expanding trade opportunities. A major problem is that Stevenson's amendments set up eligibility which could more severely brake an overall expansion of trade, depending on how Congress and the President choose to interpret or enforce his criteria. Secondly, the bill now contains an amendment by Senator Percy

which, if passed by the full Congress, will cripple U.S. nuclear or nuclear technology exports while favoring "solar" or other nonnuclear "renewable resources."

The Stevenson-Percy Amendments

Stevenson's "Country Eligibility" Amendment.

Stevenson has promoted this amendment as a means to bypass and supersede the Jackson-Vanik Amendment for all "communist" countries *except* the Soviet Union. Stevenson's amendment would institute a new procedure for credits: The President would submit a list of countries to Congress which he considered to be eligible for Eximbank credits and the list would include both Most Favored Nations and non-Most Favored Nations. The Congress would not be allowed to amend the list or alter it in any way and would have to approve or disapprove of the list as a whole, within 60 days from the date the list is proposed to Congress.

"The purpose of the amendment is to provide a flexible, but systematic basis for determining which countries ought to be eligible to receive Bank-supported exports in the light of a comprehensive set of criteria intended to insure that such eligibility is consistent with the national interest," a Stevenson report motivating the amendment said. "The amendment would constitute an alternative to determining eligibility in the Congress in an ad hoc fashion, country-by-country, issue-by-issue. . . . The amendment deletes from the Export-Import Bank Act provisions which require national interest determinations only for communist countries and require the Bank to review human rights considerations export-by-export as well as country-by-country . . . The amendment supersedes the emigration requirements of provisions of the Trade Act of 1974 concerning Bank support for exports to all non-market economies except the Union of Soviet Socialist Republics . . . The amendment does not affect in any way the applicability of the Trade Act of 1974 in determining the eligibility of non-market countries for Most-Favored-Nations treatment."

That is, Congress would no longer be able to decide, as it presently does under Jackson-Vanik, to extend or not extend credit on the basis of vague criteria of "human rights" or "emigration of minorities" in each country. Congress would have to vote on a list of countries which have been predetermined (based upon a statement to that effect submitted by the President on each country) to meet to a greater or lesser degree a set of criteria established by the Eximbank legislation.

Since even most MFN countries now eligible for credit could only meet these criteria to a limited degree, Stevenson presumably thinks that Congress would be forced to forego stringent application of these criteria and would have to weigh each country *relative* to other countries on the list and not, as he states, on a country-by-country basis or issue-by-issue basis.

The "Country Eligibility" requirements are clarified as follows: Sec. 4 (d) (2) specifies that no foreign country may be considered eligible for credit or credit guarantees through the Eximbank unless the president determines that inclusion of such country in the list is in the national interest.

Following this, Section 4 continues by delineating the

"criteria" by which a country is included on the list. The President must take into account:

1. The country's relationship to the United States and its relationship to countries friendly and hostile to the U.S.;
2. The country's internal stability and creditworthiness, and its policies and actions with respect to peaceful settlement of international and internal disputes;
3. Its policies toward nuclear proliferation and environmental protection;
4. Its policies on human rights, including the right to emigrate and such other factors as he (the President) deems appropriate.

The second part of Section 4 and other subsections exclude the Soviet Union's eligibility based on the above criteria alone and specify that "the emigration provisions of the Trade Act of 1974 as they apply to the USSR are unaffected by the amendment." These sections also permit the President to issue an Executive Order removing any country on the list once the list has been in effect and -or terminating the effectiveness of the list as a whole if "he determines such action to be in the national interest." However, such an Executive Order, together with a report setting for the reasons for the order, must be promptly transmitted to the House and Senate for review. The President can also add a country to the list on the same basis.

The "Catch 22" aspects of Stevenson's amendment are clear. An official at the Eximbank, for example, expressed deep dissatisfaction with this new procedure because although Congress may be induced by this method to allow extension of credits or credit guarantees to some "communist" countries now excluded because of the Jackson-Vanik amendment, Congress could equally well reject the entire list by objecting to a single country's inclusion on the list! "It could create more problems than it is supposed to solve," said this official. Congress' refusal to drop "human rights," "nuclear proliferation," "environmental protection" and other such provisions can easily lead to the same logjams produced by Jackson-Vanik—and certainly will hinder the Eximbank's ability to allow the U.S. to come in as an equal partner with other allies in the area of, especially, East-West trade, an objective which Stevenson's amendment is explicitly aimed to accomplish.

The Stevenson Amendment to exempt the Export-Import Bank from application of the National Environmental Protection Act of 1969. Committee action on this amendment, according to the Senate committee report on the bill, was prompted by litigation concerning the National Environmental Protection Act (NEPA) and the Eximbank and by "the premature issuance by the Council on Environmental Quality of draft regulations intended to require the Bank and other federal agencies to prepare so-called foreign environmental statements for actions which affect foreign states . . ." Stevenson states that the Council on Environmental Quality has no legal jurisdiction over the Eximbank in this area and that "the mere discussion of the draft regulations appears to have generated great uncertainty in the business community and may have adversely affected U.S.

exports." The amendment provides for Congress to take future action on this subject and admonishes that the question cannot "be settled through interagency bargaining by executive branch bureaucracies."

Percy Amendment on Energy-Related Exports. Senator Charles Percy attached this amendment which would intentionally wreck U.S. nuclear and nuclear-related exports through Eximbank. It is intended to "encourage the Bank to actively promote exports based upon solar and other non-nuclear renewable energy sources." It requires the Bank to name an officer responsible for (1) advising the Bank on ways to promote such exports; (2) disseminating information concerning such export opportunities and (3) acting as a liaison between the Bank and other federal agencies. The Bank would be required to report annually on its activities in support of such exports.

According to Eximbank officials, this amendment would effectively finish off U.S. nuclear exports. Each request for developing a nuclear facility in a foreign country or a request for credits to buy nuclear technology, the Bank would be required to "look at *all* the other alternatives first."

A final amendment would help make Eximbank more competitive with other foreign institutions of the same nature by, first, elevating export credit negotiations to the ministerial level and, secondly, authorizing the bank to provide credits, guarantees, etc. at "competitive rates." That is, this amendment would allow Eximbank officials to negotiate with other governments and their credit institutions regarding establishment of international guidelines on export credits and financing.

The subcommittee also adopted a few provisions which will somewhat limit congressional stalling on the extension of Exim credits. Under the new arrangement, Congress would be permitted only 35 calendar days to decide on a particular credit extension involving \$100 million or more. Present provisions make it mandatory that Congress has 25 continuous legislative days to make such

decisions. When recesses are involved, this provision can drag out the process of credit approvals for many months. The subcommittee also increased from \$60 million to \$100 million the amount which requires notification to and approval by the Congress.

Two amendments were voted down in the course of the subcommittee hearing. One sponsored by Senators Riegle (D-Mich), Proxmire (D-Wisc), Cranston (D-Cal) and Brooke (R-Mass) would have prohibited credits to South Africa. Another amendment sponsored by Senators Tower (R-Tex) and Lugar (R-Ind) requiring Eximbank to "emphasize agricultural exports" was also voted down, since such exports are covered by the Commodity Credit Corporation.

Perspective on Passage

The present status of the Eximbank rechartering legislation in Congress is as follows: In the House, the bill has already reached the floor once, certain amendments voted on, and is expected to be placed on the floor again soon, although no specific date has been set. An amendment to allow credits to the People's Republic of China as a special exemption from the 1974 Trade Act was roundly defeated on the floor. An amendment to prohibit credits to South Africa was also defeated.

Eximbank officials expect that certain other amendments will be brought up when the bill comes to the House floor the second time, including one by Congressman Clarence Long (D-Md) which would prohibit the Eximbank from extending any credits abroad for the development of industries which would "unfairly compete" with "suffering" U.S. industries such as steel. In the Senate, the legislation has been shuttled into the Public Works and Environmental Resources Committee which will approve or disapprove Stevenson's amendment to prohibit the application of NEPA regulations to the bank. After decision on this single amendment, the bill will be sent to the Senate floor — but the prediction is that this will not be until late July or early August.

—Maureen Manning