United States Department of State
Washington, D.C. 20520

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June 5, 1989

Mr. Donnell Nantkes
Office of General Counsel (LE-1326)
Environmental Protection Agency
Washington, D.C. 20460

RE: Appropriations Act Restrictions on Hiring of Foreign Nationals

Dear Mr. Nantkes:

Further to recent conversations between you and John Arbogast of our Near Eastern and South Asian Affairs legal office, this letter sets forth the views of the Legal Adviser's Office of Treaty Affairs on the above matter. I understand that this issue arose in the context of Environmental Protection Agency requests for information from the Department on U.S. defense relations with India, Kenya, and Cameroon.

The Treasury, Postal Service, and General Government Appropriations Act for FY-89 provides, as it has since 1943, certain exceptions to the general prohibition on use of appropriated funds by U.S. Government agencies employing non-U.S. citizens in the continental United States. Included is the following exception:

> "This section shall not apply to citizens of Ireland, Israel, the Republic of the Philippines, or to nationals of those countries allied with the United States in the current defense effort."

(P.L. 100-440, Sept. 22, 1988, §603, 5 U.S.C. 3101 note; emphasis added.) The phrase "in the current defense effort" replaced the words "in the prosecution of the war" in FY-52. The Republic of the Philippines has been specifically excepted since FY-44. Israel was exempted in FY-79 and Ireland in FY-84.

The Office of Treaty Affairs many years ago assumed the task of determining which countries are "allied with the United States" for the purposes of this statute. This role has been memorialized since 1979 in the Office of Personnel Management's publication BRE-27, "Federal Employment of Non-Citizens."

This exception has been applied only to those countries with which the United States has in force mutual security commitments. The term "security commitment" is generally understood to mean a legal obligation of the United States, expressed in a formal agreement, to take some action in the common defense in the event of an armed attack on the country concerned. All current U.S. security commitments are embodied in treaties, as opposed to executive agreements. Attached at Tab 1 is a Department publication, "United States Collective Defense Arrangements," which lists countries with which the United States has such commitments.

The specific exceptions for the Philippines, Israel, and Ireland in this context are an indication of a narrow construction of this provision by the Congress. The legislative history that we have reviewed supports this narrow interpretation. Congress provided this exception, originally during wartime, to allow foreign nationals to work for the U.S. Government within the United States in defense-related positions. The exemption for Israel in FY-79 was accompanied by an expression of "concern" in the Conference Report about "the growing list of exemptions." (House Report No. 471, Sept. 24, 1979, p. 15).

It has been our view that to depart from the aforementioned "security commitment" standard in making these determinations could be to embark into an area of speculation and subjectivity which would not correspond with the intention of Congress, and might arouse sensitivities with other countries. India is a case in point. While a case could be made that India has a sufficient defense relationship with the United States to meet the current EPA standard (see, e.g., EPA Memorandum No. 300-11, dated July 10, 1985, and October 10, 1979 EPA legal memorandum at Tab 2), it is our view that exception would be taken both here and in India to characterizing that country, inter alia a leader of the Non-Aligned Movement, as "allied with the United States in the current defense effort."

This example, as well as others reflected in the EPA material you provided us, also points out the difficulties in having such determinations made by "the agencies whose appropriations are to be obligated," as suggested by the 1955 GAO opinion (35 Comp. Gen. 216, 218) you cite. While such "reasonable" determinations perhaps "would not be questioned by the General Accounting Office" (id. at 219), such a modus operandi is unworkable from the standpoint of sound, consistent Executive branch policy. This is why the Department of State, in the exercise of its prerogatives in the foreign affairs area and in consultation with OPM, acted to centralize such determinations in the Office of Treaty Affairs.

You may wish to review previous EPA appointments in light of the above, in consultation with OPM as appropriate. This office also stands ready to assist further in any way possible.

Sincerely,

John R. Crook
Assistant Legal Adviser
Office of Treaty Affairs

cc: EPA/OHRM - Ms. Johnson

Enclosures:
Tab 1 - "United States Collective Defense Arrangements"
Tab 2 - EPA Memorandum No. 300-11, dated July 10, 1985; October 10, 1979 EPA legal memorandum