CARGO PREFERENCE AND THE AMERICAN MERCHANT MARINE*

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INTRODUCTION

After World War II, it became clear that...

... without some form of assurance of participation by United States-flag vessels in the transportation of relief and aid cargoes... the shipping of the recipient and other maritime nations with lower operating costs would be able to underbid American-flag vessels and eventually transport much, if not all, of these cargoes to the irreparable detriment of the American merchant marine.

Indeed, from 1948 to 1954, "... foreign ships... handled about sixty-five per cent of United States aid cargoes."

For the American merchant fleet, these cargoes have aggregated almost half of their dry cargo export carryings since 1948. Without important government help, "... our tramp fleet would be driven from the seas almost immediately."

Apart from the old age and nonavailability of certain types of ships, inability to meet foreign competitors’ costs is the major reason why American-flag vessels are unable to compete.

* An earlier form of this article was written during the spring semester, 1958, for the course in International and Maritime Law at the School of Law, University of California, Berkeley. The opinions expressed herein are solely those of the writer.
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2 Hearings on S. 2384 Before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess. 59 (1956) [hereinafter cited as 1956 Senate Hearings].
3 Three other congressional committee hearings are repeatedly referred to in this article and will be cited as indicated: (a) Hearings on S. 3233 Before the Subcommittee on Water Transportation of the Senate Committee on Interstate and Foreign Commerce, 83d Cong., 2d Sess. (1954) [hereinafter cited as 1954 Senate Hearings]; (b) Hearings on S. 3233 Before the House Committee on Merchant Marine and Fisheries, 83d Cong., 2d Sess. (1954) [hereinafter cited as 1954 House Hearing]; (c) Hearings on Administration of Cargo Preference Act (50-50 Law) Before the House Committee on Merchant Marine and Fisheries, 84th Cong., 1st Sess. (1955) [hereinafter cited as 1955 Admin. Hearings].
4 For a general discussion of United States foreign aid and development programs, see Morray, Aid Without Tears: Opportunism in Foreign Development Policy, 46 Calif. L. Rev. 665 (1958).
5 1956 Senate Hearings 131.
6 The bulk of American-flag vessels is over ten years old. "Only about 16 per cent of our dry cargo fleet, which numbers 722 ships of 7.3 million deadweight tons, was built after the war." Shipping Outlook, March 1958, p. 4.
7 Only 12% of vessels equipped for refrigeration fly the American flag. FMB & Maritime Administration Ann. Rep. 60 (1957).
8 In 1957, total monthly vessel operating expenses of American-flag ships (not including depreciation) was estimated at $39,758, while Liberian-flag vessels had costs of about $19,325. Hearings on Study of Vessel Transfer, Trade-in, and Reserve Fleet Policies Before the House Committee on
With increasing foreign competition, our ships have carried a declining share of increasing cargo volume. In 1956, all U.S.-flag ships—in both liner and tramp service—carried only 21 per cent of total commercial dry cargo tonnage. This compares with 41 per cent in 1957.7

I

CARGO-PREFERENCE LEGISLATION: PAST AND PRESENT

For over fifty years, Congress has given preferences to American-flag vessels in carrying government cargoes. In 1904, it was provided that ocean transportation of Army and Navy "... coal, provisions, fodder, or supplies ..." should be on American-flag vessels.8 This principle has been extended to federal officer and employee travel, and to transportation of personal effects9 and automobiles.10

In the early years after 1904, there were few government cargoes to prefer,11 but in 1934, the Government sought to encourage agricultural exports by foreign loans. Congress then declared its intent that the products involved12

... shall be carried exclusively in vessels of the United States, unless ... the United States Maritime Commission, after investigation, shall certify ... that vessels of the United States are not available. ...

Every basic shipping act since 1920 has stated the principle that the American merchant marine should carry a substantial portion of the United States foreign


7 Shipping Outlook, March 1958, p. 5.
8 33 Stat. 518 (1904), 10 U.S.C. § 2631 (Supp. V, 1958). A bitter experience of the Spanish-American War, when we relied on foreign colliers to fuel our Navy, is said to have resulted in the 1904 congressional mandate. 1936 Senate Hearings 111. Cf. H.R. Rep. No. 80, at 3: "... including officers or employees of the United States. ..."
11 In 1914, War and Navy Department interest in ocean transportation, other than for supplies, was mainly concerned with navigation obstruction and harbor line regulation, port collector co-operation, vessel inspection, and neutrality enforcement. Heubner, Extent of Regulation of Ocean and Inland Water Transportation by the Federal Government, 55 Annals 17, 23 (1914).
trade. The goal has frequently been interpreted to mean fifty per cent, and since 1948, at least ten foreign aid statutes provide for cargo preference in these terms. When to the 8,000,000 gross tons shipped in 1949-54 under the Mutual Defense Assistance Act of 1949, Congress added appropriations of $7,000,000,000 for the export of surplus agricultural commodities under the Agricultural Trade Development and Assistance Act of 1954, it can be seen that cargo preference is of vital importance to the entire American shipping industry and is even a matter of life or death to some of its segments.

In spite of these impressive statutory provisions, however, important areas developed to which the requirement did not apply: stockpile materials, surplus agricultural commodities, guaranties by the United States Government of the convertibility of foreign currency, and the "... procedures by which a high percentage of exports ... and offshore purchases ... by the United States, have been routed in foreign vessels...." To require the application of fifty-fifty requirements to these areas, as well as to make cargo-preference provisions permanent rather than being tied to individual foreign aid bills, Congress enacted the Cargo Preference Act of 1954.

14 1956 Senate Hearings 111; 1954 Senate Hearings 96. See union criticism. Id. at 124.
16 Not all the statutes read alike; see administrative difficulties of the FOA in 1955 Admin. Hearings 44.
17 1954 Senate Hearings 70.
20 1956 Senate Hearings 131.
22 Since 1950, sizable mutual defense support programs have involved purchases in one foreign nation for delivery to another. Cargo-preference requirements did not apply to this situation. 1954 House Hearings 92, 99. See the Defense Department Directive allowing this in 1954 Senate Hearings 68.
23 Where the Government sold surplus agricultural commodities for foreign currencies in accordance with § 550 of the Mutual Security Act of 1951, 65 Stat. 373, 22 U.S.C. § 1509 (1952), the 50-50 provision was applied, but apparently not when the Government sold surplus grain to Spain independent from foreign aid legislation. See 1954 House Hearings 93.
24 See 1954 Senate Hearings 49.
26 For a study viewing the Cargo Preference Act as a temporary measure and urging direct solutions (e.g., subsidization) to shipping industry problems, see National Planning Association, Special Senate Committee to Study the Foreign Aid Program, 85th Cong., 1st Sess., The Foreign Aid Program and the United States Economy (No. 9) xi (Comm. Print 1957).
CARGO PREFERENCE

Every government agency, on varying grounds, opposed the bill; but by 1956, most had changed position, and 1957 marked the complete capitulation of the Department of State, strongest opponent of cargo preference. The Department of Agriculture, apparently unaware of the storm soon to engulf it when the surplus agricultural commodities export program got underway, was in 1954 uninterested in cargo preference.

On the other hand, the shipping industry, shipowners, shipbuilders, maritime unions, and the United States Chamber of Commerce unanimously supported the bill. So did the domestic fertilizer industry, which felt that cargo preference would discontinue the previous foreign aid policy of purchasing large quantities of fertilizer from foreign producers.

Besides government agencies, the only private organizations opposed to cargo preference were the cotton shippers. They offered lukewarm objections to the imposition of "... arbitrary methods of doing business ...," but admitted only a slight effect on them.

II

CARGOES SUBJECT TO PREFERENCE

The Act applies whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such equipment, materials, or commodities...
While the Act "... has no application to purely commercial transactions . . ."\(^{36}\) "... cargoes touched anywhere along the line by the hand of government ..."\(^{37}\) may be brought within the fifty-fifty provision.

Whether the statute was intended to supersede previous legislation without specific repeal thereof is not clear. The Senate Report merely said the 1954 bill "... incorporated into permanent legislation . . ." the basic policy previously proclaimed,\(^{38}\) which the 1904 statute\(^{39}\) affirmed.\(^{40}\) However, the Department of Defense regulations\(^{41}\) allow transportation in foreign bottoms when American-flag vessels are not available at fair and reasonable rates—a position which is contrary to the express provisions of the 1904 statute. Furthermore, the customary interpretation of fifty per cent\(^{42}\) in the old cargo-preference statutes suggests the conclusion that the fifty-per-cent requirement is so firmly imbedded in our shipping policy, as administered, that no one thinks of 100 per cent. Thus, not only the former foreign aid fifty-per-cent cargo-preference provisions, but also the former 100-per-cent provisions may have been repealed \textit{sub silentio}.

A. Government Supplies

The Department of Defense, the largest shipper of government supplies, categorizes its supplies into two types for purposes of cargo-preference legislation: Government-owned supplies in its possession or that of a contractor; and supplies, including those for foreign aid, contracted for but not owned by the Government at the time of shipment.\(^{43}\) Supplies of the first type, when for the use of the military departments, are subject to the 100 per-cent American-flag preference, unless American-flag vessels are not available at fair and reasonable rates.\(^{44}\)

Enforcement of these Defense Department regulations is provided by requiring insertion of one of three clauses in "... any contract which may involve ocean transportation. . . ."\(^{45}\) If the contract involves Government-owned property "... in the possession of the contractor or any of its sub-contractors (including any contract under which title to property may pass to the Government prior to shipment) . . .",\(^{46}\) a clause is to be inserted in the contract "... requiring the shipment . . . only as directed by the contracting officer, who shall be guided by this regulation and applicable Departmental procedures . . ."\(^{47}\)—i.e., only by American-flag vessels in


\(^{37}\) Thorsten V. Kalijarvi, Deputy Assistant Secretary of State for Economic Affairs in 1954 Senate Hearings 10.


\(^{41}\) 32 C.F.R. § 1.300 (Supp. 1958).

\(^{42}\) 1954 Senate Hearings 101.

\(^{43}\) 32 C.F.R. § 1.309(b) (Supp. 1958).

\(^{44}\) Id. § 1.309(b) (a).

\(^{45}\) Id. § 1.309(d).

\(^{46}\) \textit{ibid}. This is the first type discussed in text to note 43 supra.

\(^{47}\) \textit{ibid}. Offshore Procurement Agreements with foreign countries have a similar provision allowing
the circumstances discussed above. When the supplies are contracted for, but not Government-owned, at time of shipment (the second type described), a clause is to be inserted in the contract allowing the contractor to choose his own method of transportation, but requiring him to furnish to the Contracting Officer one copy of the applicable ocean shipping document indicating for each shipment made under this contract the name and nationality of the vessel and the measurement tonnage . . . shipped on such vessel.

These reports allow the Department of Defense, through internal reporting systems, to evaluate compliance with the cargo-preference requirements. If the need should develop "... for increased utilization of private American vessels, the Office of Secretary of Defense shall issue appropriate instructions to the Military Departments." Upon receipt, the procuring activity is required to insert in appropriate contracts a clause providing:

... after the date of award of this contract, the contractor shall employ privately owned United States-flag commercial vessels, and no others, in the transportation by sea of any supplies to be furnished hereunder.

This clause may also be inserted in any contract when the head of the procuring activity determines it is "... necessary to assure proper implementation . . ." of the prescribed policy.

Once a clause is in the contract, it affects the internal system of reports, prepared by components of the Department of Defense, of the vessel's name and flag and the tonnage shipped. When American-flag vessels are "... not available for timely shipment at fair and reasonable rates for such vessels . . .," the contracting officer may authorize shipment in foreign-flag vessels, or designate available American bottoms. If foreign-flag vessels are authorized, the contract price is to be equitably adjusted to reflect the difference in shipping costs. If the contracting officer refuses to authorize shipment in foreign ships, but designates "available" American-flag vessels which may not be "... available for timely shipment at fair and reasonable rates for such vessels . . .," the contracting officer to determine method of shipment. Agreement Between the United States of America and Spain, July 30, 1954, para. 2(a)(ii), [1954] 5 U.S.T. & O.L.A. 2328, T.I.A.S. No. 3094 (effective Oct. 24, 1954); Agreement Between the United States of America and the Federal Republic of Germany, April 4, 1954, para. 2(a)(ii), [1957] 8 U.S.T. & O.L.A. 497, T.I.A.S. No. 3804 (effective Feb. 7, 1957), are examples.

48 See text to note 44 supra. The regulation implies the property to be shipped in American bottoms need not be the property furnished under the particular contract containing the clause. See 32 C.F.R. § 1.309(d)(1) (Supp. 1958).

49 Id. § 1.309(d)(2). Apparently any shipping document indicating tonnage shipped, name, and nationality of vessel satisfies the requirement.

50 Id. § 1.309(e)(2).

51 Id. § 1.309(d)(2)(ii)(a).

52 Id. § 1.309(d)(2)(ii)(b). The reporting system seems the same as that discussed in text to note 49 supra, although there are minor differences in wording.

53 Whether this rate difference is the same as allowed in similar circumstances by the commodity surplus sales agreements negotiated by the Department of State, discussed in text to note 76 infra, is not clear.
rates for such vessels . . .,“ the contractor, in effect, suffers a loss to the extent the rates are unfair or his costs are raised by the delay. This unfortunate result clearly is not required by the Cargo Preference Act, which, by its terms, does not apply when rates are unfair.55

The Defense Department regulations provide that “. . . additional provisions concerning vessels to be used may be inserted in accordance with Departmental procedures.”56 Accordingly, Navy procurement directives permit additional provisions allowing the contracting officer to determine, where possible in large shipments, when and how compliance with the fifty per cent requirement is to be achieved.67 None of these Defense Department regulations, however, applies to “. . . shipments of classified supplies where the classification prohibits the use of nongovernment vessels.”58 Furthermore, use of government vessels is encouraged to meet essential military requirements involving “. . . special transportation services which cannot be performed by the privately owned and operated merchant fleet . . .”59—e.g., peacetime troop transport, which soon may be taken over by private American shipowners.60

B. Foreign Aid

With the exception of “offshore procurement,” . . . the [Act] in this respect is no more than a codification of the many previous specific clauses incorporated in foreign-aid programs starting with . . . the original Economic Cooperation Act of 1948.61

The Act applies where62 . . . American aid is furnished “without provisions for reimbursement.” This . . . would embrace . . . aid cargoes which, although technically “sold” by our Government, are, in reality, given away for a purely nominal or token sales price.

This reimbursement provision was intended “to exclude from the coverage of the bill instances where this Government acts simply as agent, on a reimbursable basis, for the foreign nation.”63

Before the Cargo Preference Act of 1954, there were many instances64...

55 See discussion of unfair rates in text to note 116 infra. The internal report required of the Military Sea Transportation Service by 32 C.F.R. § 1.309(a)(1)(ii) (Supp. 1958) is another example of where the flexibility of the Cargo Preference Act has been ignored. The report includes in the foreign half shipments made in foreign bottoms when American-flag vessels were physically available, but unreasonably priced, although the Act would not apply in this situation. The result is a requirement of a matching American-flag shipment.

56 Id. § 1.309(d)(2)(i).


58 32 C.F.R. § 1.309(c)(2)(v) (Supp. 1958). Apparently "classification" relates to security classification, not other types—e.g., proprietary information of contractors.


60 Merchant Marine Bulletin of the American Legion, March 1958, p. 4. This would strengthen “. . . our dangerously reduced commercial liner fleet . . .” Ibid.

61 1954 House Hearings 92.

62 Ibid.

63 Ibid.

64 1954 House Hearings 92.
... where, for example, fertilizer and other economic-aid commodities are purchased from a European country for delivery to the Far East on a "laid-down cost basis" under which American-flag ships have been effectively "frozen out" because of the lower rates quoted by low-cost foreign competitors.

The Foreign Operations Administration was frequently thought to be the main agency shipping offshore procurement cargoes in foreign bottoms. But the new Act applies whether cargoes are procured "... within or without the United States ...," and the current regulations of the International Cooperation Administration, FOA's successor, seem to prohibit the former practice.65

Responsibility for enforcement of the applicable fifty-fifty provisions is placed on the co-operating countries by the ICA regulations: if the fifty-fifty requirement is not met, by geographic areas66 for any three-month period,67 the country concerned has to refund ICA reimbursements for commodities, insurance, and freight, "... as the Director in his discretion shall consider necessary to effect a compliance by the co-operating country with the foregoing requirement for that period of time."68 Such an enforcement procedure has received congressional disapproval.69

Cargo-preference requirements of offshore procurement apply, of course, to government supplies as well as to foreign aid.

C. Surplus Agricultural Commodities

Agricultural exports which hit new highs during the Korean conflict fell off rapidly beginning late in 1952. Surpluses built up to alarming proportions. In Congress, emphasis centered on measures to overcome the farm surplus situation and stimulate the exportation of agricultural commodities. These measures involved the sale of price support stocks to commercial firms, donations for relief use, and the inclusion of sales for foreign currencies in the Mutual Security program. . . . In 1954, the 83d Congress continued substantial authorizations for this purpose and established an additional program of sales for foreign currencies under Title I of the Agricultural Trade Development and Assistance Act (Public Law 480).70

In the first five years of the program, agreements totaling $5,000,000,000 were signed with foreign countries, including over $400,000,000 for ocean freight to be paid by the Department of Agriculture.71

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65 22 C.F.R. § 201.6(h) (1958). If the ICA-financed cargo were transported to a country other than the co-operating country for its use there, the regulation is not applicable by its terms. Ibid. Such a situation nearly occurred when surplus grain was sold to Spain for pesetas for resale to Switzerland. 1954 Senate Hearings 100. If the grain had been transported to the repurchasing country, instead of to Spain, American-flag vessels need not have been used, according to the regulation.
66 See discussion of geographic areas in text to note 168, infra.
67 The statute itself is not strait-jacketed to short time periods.
68 22 C.F.R. § 201.6(h)(1) (1958). Just how a money payment to ICA can effect compliance for a time period gone past is not made clear.
Early in the program, the defeat of an attempted amendment to the original bill to provide for change of title in certain transactions at destination rather than port of origin\textsuperscript{72} was interpreted by the Department of Agriculture as meaning "... the House had not intended that the 50-50 legislation should apply to section 1 of Public Law 480."
\textsuperscript{73} But the Attorney General ruled\textsuperscript{74} that the surplus sales\textsuperscript{75} of publicly- and privately-owned stocks under the Agricultural Trade Development and Assistance Act amounted to a "guarantee of convertibility of foreign currencies" within the meaning of the Cargo Preference Act, although there was neither a "guaranteed" nor a "conversion" in the strictest meaning of the words.

The Department of State, which negotiates surplus agricultural commodity agreements with foreign countries\textsuperscript{76} has said the Cargo Preference Act has hampered the surplus disposal program in only a few countries.\textsuperscript{77} On the other hand, the Department of Agriculture says the fifty-fifty provision has added at least $12,000,000 to the cost of the farm program, including $3,000,000 for rate differentials.\textsuperscript{78} An effort

Credit Corporation payments for ocean freight differential are limited to 50% of the gross tonnage shipped, although American-flag vessels may actually carry more. Comp. Gen. Dec. B-136530, (1959).

\textsuperscript{72} See 100 Cong. Rec. 7926-31 (1954).

\textsuperscript{73} 1955 Admin. Hearings 145.


\textsuperscript{75} For planned uses of foreign currencies totaling $3,700,000,000 under agreements under the Agricultural Trade Development and Assistance Act signed through June 30, 1959, see H.R. Doc. No. 206, at 54.


\textsuperscript{77} 1956 Senate Hearings 16. The countries are the United Kingdom, Norway, Sweden, and Denmark, which carried 8, 12, 3, and 1%, respectively, of total United States foreign trade (excluding military) in 1953 and 1954. Id. at 17. These nations refuse to negotiate title I agreements avowedly because of the 50-50 provision, which, the Department of Agriculture estimates, has cut export agreements by up to $100,000,000 worth of farm products. Id. at 75.

\textsuperscript{78} If the country has a weak currency and no merchant fleet of any size, transportation, whether in American or foreign bottoms, is paid in dollars by the United States. The importing country reimburses in its currency, but only up to the cost of foreign-flag vessels. The difference is the "rate differential." See 7 C.F.R. §§ 11.4(d)(10) and 11.12(b) (Supp. 1958); 1955 Admin. Hearings 12. Transportation on importing country-flag vessels is not financed by the United States. 7 C.F.R. § 11.12(c) (Supp. 1958). The United States may relieve itself of this cost or the recipient nation may be relieved of a dollar drain by sale to it of ships from the reserve fleet. Hearings Before the Senate Committee on Interstate and Foreign Commerce on Sale of Ships From Reserve Fleet, 85th Cong., 1st Sess. 361, 368 (1957).

Of the Surplus Agricultural Commodity Agreements cited in note 76 supra, those with Spain and
to exempt transactions under the Agricultural Trade Development and Assistance Act from cargo-preference requirements was made in 1956; hearings were held by the Senate Merchant Marine and Fisheries Subcommittee, but the bill was never reported out.

Seemingly, the few ways to avoid the Cargo Preference Act in transactions under the Agricultural Trade Development and Assistance Act require considerable effort. One method, administrative determination of exemption from cargo-preference requirements, such as the 1956 sale of surplus tobacco to England in return for new housing at American military bases there, is apparently available only in extraordinary cases. In limited situations where no American-flag vessels will be available—e.g., nonavailability of refrigerator ships to carry fresh meat to Scandinavia—the Department of Agriculture has indicated it will be willing to make a separate commodity transaction instead of a package deal, but not unless it is absolutely certain American bottoms will be unavailable. Finally, a “switch” transaction, where a third country furnishes dollars for the purchasing country, may avoid the Cargo Preference Act.

The experience of the Pacific coast apple industry illustrates the administrative rigidity that has characterized the application of the basically flexible statute. Required refrigerator tonnage off the west coast for sales to Europe was virtually nonexistent, even though there was “reefer” tonnage available on the east coast. Despite these difficulties, the importance of time, and the fact that the Government suffers no loss in these sales, the Department of Agriculture persisted in applying the Cargo Preference Act on a commodity-by-commodity basis, although neither the statute nor the regulations require it. Furthermore, the apple sellers could not rely on the possibility of commodity waivers, as that “. . . would be offset in shipments of some other commodity. [They] would be tied to whatever complications and delays the

Yugoslavia provide for United States absorption of the rate differential. Under the agreement with Turkey, it absorbs the total freight bill when the selling price (cargo, insurance, and freight) is lower than the domestic price. Italy is unconditionally required to pay all freight costs, but no mention is made of transportation in the agreement with Finland.


1956 Senate Hearings.


Id. at 215.

1956 Senate Hearings 29.

Id. at 73. The GSA does the same. 1955 Admin. Hearings 77.
latter might encounter in negotiations between governments." The December-Christmas 1954 trade in Britain was lost that way, even though there was never any question that the waiver was in order. The same situation held true for fruit generally. In 1956, surplus sales of fresh fruits and fruit products were exempted from cargo-preference requirements. The Senate report noted the possibility of a similar problem in animal products, but left any action to the executive branch.

Contrasting with the strictness with which the Cargo Preference Act was applied to the fruit industry prior to their 1956 exemption is the Opinion of the General Counsel, Department of Agriculture, that sales of nonfat dry milk by the Department to foreign governments and agencies of the United Nations for welfare distribution to refugees in Palestine and Israel were not subject to the fifty-fifty provision. The Government paid one to two cents per pound to put the milk alongside the transporting vessel in United States ports, where "title and possession" changed to the purchaser, who paid three to four cents per pound in dollars for the milk for restricted use, which was less than the cost of unrestricted milk. This, said the General Counsel, was "reimbursement," making the Cargo Preference Act inapplicable.

Regardless of the merits of cargo preference, it must be admitted this opinion departs from the tendency, even among its foes, to apply the Act where a cargo is "touched anywhere along the line by the hand of government." Where it stresses governmental benefit in disposing of products at the highest price obtainable, the opinion ignores the command of the statute that it applies "... whenever the United States shall ... advance funds ... in connection with the furnishing of ..." any commodities within or without the United States. Furthermore, the opinion does not accord with the intent of the Attorney General's opinion regarding sales under the Agricultural Trade Development and Assistance Act, where a seemingly more difficult argument was easily hurdled. Finally, it ignores legislative history that the reimbursement exception to the Act's coverage was intended to take care of situations where the Government only acted as "agent," rather than selling the product itself.

To the same effect, however, is the announcement of the Department of Agriculture that the Cargo Preference Act is not applicable when it extends credit to American exporters, whether they purchase commodities from the Department or not, or whether the exporter's or the importer's line of credit obtains the bank obligation

80 1956 Senate Hearings 29.
81 Id. at 28.
83 41 Ops. ATT'y GEN. No. 34 (1954). See text to note 74 supra.
84 S. REP. No. 1584, at 2; 1954 House Hearings 92.
which assures the Department of payment.\textsuperscript{95} Purely commercial transactions are, of course, not touched by the fifty-fifty requirement;\textsuperscript{96} nor, does it "affect in any way the convertibility of United States dollar investments abroad."\textsuperscript{97}

D. Government Loans

Government loans in foreign trade are made through the Export-Import Bank of Washington to "[b]orrowers [who] may be financial institutions abroad or overseas importers who can obtain the guaranty of such an institution."\textsuperscript{88} The Bank's regulations provide that exports fostered by United States Government loans shall be carried exclusively in American-flag vessels, unless the Maritime Administration waives the requirement.\textsuperscript{89} Such waivers may be obtained . . . for up to the full amount of an export if U.S. vessels are not available and, where U.S. vessels are available, for up to one-half of the export provided such portion is carried on vessels of the importing country.\textsuperscript{100}

Besides its own banking operations, the Export-Import Bank conducts special lending operations for other agencies. It lends for the Office of Defense Mobilization under the Defense Production Act of 1950,\textsuperscript{101} and it performs several functions for the ICA: credits under the Mutual Security Act of 1954, emergency wheat loans, the §50,000,000 credit to the European Steel and Coal Community under the Mutual Security Act of 1951, and ICA investment guaranties (currency transfer and loss by war or confiscation).\textsuperscript{102} As noted above,\textsuperscript{103} the last is not covered by cargo preference,\textsuperscript{104} nor is the Bank's insuring of consigned cotton bales against war risks and expropriation.\textsuperscript{105} However, the ICA regulations\textsuperscript{106} apparently subject the remaining operations to cargo preference.

\textsuperscript{86}U.S. DEP'T OF AGRICULTURE, EXPORT CREDIT PROGRAMS FOR FINANCING DOLLAR SALES OF U.S. AGRICULTURAL COMMODITIES (1957).
\textsuperscript{88}1954 Senate Hearings 11. The Cargo Preference Act "... has no application to purely commercial transactions where a broker or exporter sells to a firm abroad without the participation of the United States Government." H.R. REP. No. 2329, at 2.
\textsuperscript{101}1954 House Hearings 97. See generally, INTERNATIONAL COOPERATION ADMINISTRATION, INVESTMENT GUARANTY HANDBOOK (1957).
\textsuperscript{100}Export-Import Bank of Washington, Report to Congress for the Period July-December 1956, at 5 (1957). In June 1958, the Bank began to make loans in foreign currencies accumulating under the surplus-disposal program to American firms for foreign expansion and development and to foreign firms to expand markets abroad for American agricultural products. In the following year, the Bank acted on a foreign currency equivalent of §56,000,000. Export-Import Bank of Washington, Report to Congress for 12 Months Ending June 30, 1959, pt. 1, at 197 (1959). Probably the 50-50 provisions should apply to these loans too, as they will probably be viewed as further foreign aid. See 1956 Senate Hearings 125. Contra, the 1951 Defense Department Directive on Mutual Defense Shipments in 1954 Senate Hearings 67.
\textsuperscript{97}12 C.F.R. § 402.3(a) (Supp. 1958).
\textsuperscript{98}1954 Senate Hearings 10.
\textsuperscript{101}See text to note 97 supra.
\textsuperscript{102}See the example of investment guaranties in 1954 Senate Hearings 49.
\textsuperscript{103}See EXPORT-IMPORT BANK OF WASHINGTON, REPORT TO CONGRESS FOR THE PERIOD JULY-DECEMBER 1957, at vi (1958).
\textsuperscript{104}ICA Reg. 1, 22 C.F.R. § 201 (Supp. 1958).
E. Miscellaneous

Even though there seems to be no regulation or policy statement on the subject, returns of Mutual Defense Assistance Act of 1949 equipment, for example from the United Kingdom,107 would be subject to cargo preference,108 since the United Kingdom makes delivery alongside the ship at the port of origin. Similarly, transportation to Italy of surplus Defense Department property for sale there109 would be subject to the same requirement. The opposite result should obtain when transportation follows purchase, absent stipulations in the contract of sale.110

Student exchange programs for which the Government provides funds, including transportation,111 would seem to be not subject to cargo preference.112 Furthermore, the 1954 Act expressly exempts from its requirements cargoes carried in the three ships of the Panama Canal Company, a government corporation, which primarily serves the needs of the Panama Canal and its workers.113

F. Waiver

In the event of war or national emergency, Congress, the President, or the Secretary of Defense may waive the fifty-fifty requirement. The House Report indicates waiver is authorized for "... extraordinary situations..."114 The statute's drafters explained further that it did not require "... declaration of a national emergency... The discretion to waive can be exercised immediately whenever the national interest so requires."115 Other agencies may secure the waiver, but it is not known whether this authority has ever been exercised.

III

DETERMINATION OF NONAVAILABILITY OF AMERICAN-FLAG VESSELS

The Cargo Preference Act only applies "... to the extent United States-flag commercial vessels are available at fair and reasonable rates for [such] vessels..."116

110 Apart from enforcement difficulties of such stipulations and general undesirability from a selling standpoint, reasoning akin to that of the Department of Agriculture, see text to note 94 supra, would make cargo preference inapplicable here on the ground that the Government is reimbursed.
114 Ibid.
115 1954 House Hearings 94.
This formula was introduced to avoid setting ceilings on rates or allowing American shipowners a free hand in rate-setting. But the phrase has been the statute's most troublesome to apply.

A. Responsibility for the Determination

The Secretary of Commerce pointed out during committee hearings that the bill is not clear as to who is to determine, for purposes of the 50 per cent minimum participation provision, whether United States-flag commercial vessels are available and whether their rates are reasonable.

This uncertainty and a lack of coordination among agencies seeking ships has resulted in at least one debacle. In early 1955, the FOA and the Department of Agriculture were both conducting huge programs for the sale of surplus grain to Yugoslavia. Freight rates on American vessels paid by the Department of Agriculture in February 1955 were up ninety-seven per cent over rates obtainable the previous October. Meanwhile the Maritime Administration, operating without data on these programs, permitted the transfer of nearly one-half the total American-flag tramp fleet, then consisting of about 130 Liberty dry-cargo vessels, to foreign flags, thus intensifying the bottleneck. The confusion resulted in increased costs to the Federal Treasury, as well as [restricting] the benefits which reasonably can be expected to flow from the Cargo Preference Act.

At least two federal agencies have government-wide shipping responsibilities. The Federal Property and Administrative Services Act of 1949 established the General Services Administration and provided that the Administrator should pre-
scribe policies and methods of procurement, including transportation and traffic management. On the other hand, the Cargo Preference Act is an amendment to the Merchant Marine Act of 1936, for which the Maritime Administration has "... broad responsibilities." In reconciling these seemingly conflicting responsibilities, the House Committee on Merchant Marine and Fisheries in 1955 recommended that the GSA centralize transportation and traffic management in one agency, while the Maritime Administration should exercise general surveillance and make periodic reports to Congress covering operation of the Cargo Preference Act. Thus the stage is set for a maze of different methods of determining whether an American-flag vessel is available at a fair and reasonable rate.

B. Methods of Determination

The difficulty of determining fair and reasonable rates for American-flag commercial vessels is shown by comparing the testimony of administrators who have made their "... own computations on the basis of cost of operation and then checked them with the Maritime Administration to determine whether or not the rates were reasonable ..." with that of the administrator who said his agency had made no "... determination or ... finding as to what are fair and reasonable rates because, frankly, I don't know what a fair and reasonable rate is."128

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124 See statement of Mr. Louis S. Rothschild, Maritime Administrator, in 1955 Admin. Hearings 84.
126 Id. at 21, 22. On the other hand, the Senate Committee on Interstate and Foreign Commerce says the Maritime Administration should set the rates. Senate Comm. on Interstate and Foreign Commerce, Influence of Cargo Preference Statutes on the Surplus Agricultural Disposal Program. S. Rep. No. 2376, 84th Cong., 2d Sess. 17 (1956) [hereinafter cited as S. Rep. No. 2376].
130 Statement of Mr. Arthur G. Syran, Director, Office of Transportation, FOA, 1955 Admin. Hearings 46. The following testimony of Mr. Syran is also instructive: "This American tramp operator should be supported and I would be unwilling to go into the foreign-flag market, say, exclusively to get vessels... We haven't done that. If the vessel isn't available, that may only be a matter of a week or 10 days... We would go out of our way to use an American tramp... There should be competition between the American-flag operators, but he should be given the preference not only from the point of view of the statute, but as a moral obligation... I don't think it is right for us to announce that we are going to use foreign-flag operators because if an American-flag operator is making a profit there is a bonanza for the foreigner... This is a fantastic price of $11.75 as compared to $7.50." Id. at 55. Figures referred to are shown in note 120 supra.
The formula was adopted on the Senate floor, where a "market" rate provision was deleted in favor of the "fair and reasonable" rate, as it was thought by Senator Butler, the bill's sponsor, and others that the latter formula would be less costly to the taxpayers.\textsuperscript{129}

However, two different interpretations of "fair and reasonable" were adopted by the agencies:\textsuperscript{130}

One view is that a rate may be considered unfair and unreasonable when it exceeds the going market rate. The other view is that a fair and reasonable rate is one which will return to the United States-flag operator a fair profit in addition to his operating costs.

A position similar to the latter interpretation was taken by the Comptroller General, who, supported by the Senate floor debates, declared that "fair and reasonable rates" should not mean\textsuperscript{131}

... going market rates as such for the United States-flag commercial vessels. ... However, it seems apparent that the statute contemplates average "fair and reasonable rates," which may or may not be profitable, or even compensatory, to a high-cost operator.

The current regulations of the agencies responsible for government programs involving ocean freight subject to the Cargo Preference Act indicate this dichotomy has been all but ignored.\textsuperscript{132} To be sure, the GSA has made computations based on cost of operation, but the recent GSA Administrative Order prescribing agency application of the Cargo Preference Act defines fair and reasonable rates as generally the rates established by operators of dry-cargo liners.\textsuperscript{133} In 1951, the Maritime Administration, too, made determinations of "...a fair and reasonable maximum level for privately owned vessels ...",\textsuperscript{134} and its current uniform bareboat charters of Government-owned dry-cargo vessels indicate familiarity with similar computations.\textsuperscript{135} Nevertheless, there is recent indication that fair and reasonable profits are prominently emphasized in rate calculations of the Maritime Administration.\textsuperscript{136}

On the other hand, the Department of Agriculture has never endeavored to consider cost and profit data in making rate determinations, nor has it established

\textsuperscript{129} 100 Cong. Rec. 7784, 7796, 7808 (1954).
\textsuperscript{130} 1955 Admin. Hearings 178.
\textsuperscript{132} Indeed, a recent study concluded the reasonable rate limit is now interpreted to be "... rates compensatory for United States-flag shipping." NATIONAL PLANNING ASSOCIATION, op. cit. supra note 26, at 24.
\textsuperscript{133} GSA Admin. Order No. 232, Supp. No. 1, para. 6g(6) (1958). There is no indication how rates are determined for tankers.
\textsuperscript{134} 1955 Admin. Hearings 91.
\textsuperscript{135} See definitions of "net voyage profit," "fair and reasonable overhead expenses," and "capital necessarily employed" in clause 38 of the uniform bareboat charter, 46 C.F.R. § 221.13 (Supp. 1958). See also id. § 299.82. But see recent indications that reserve fleet charter rates are based on Cargo Preference Act fair-and-reasonable-rate determinations in Hearings Before the House Committee on Merchant Marine and Fisheries on Current Merchant Marine Problems, 85th Cong., 1st Sess. 43 (1957).
\textsuperscript{136} Ibid.
a “fair and reasonable” rate. Instead, information on vessel availability is collected from brokers and foreign embassies, and the Maritime Administration (National Shipping Authority) ceiling is taken as the upper limit of what is fair and reasonable. The current regulations are silent on the point, but reimbursement for ocean transportation of surplus commodity export sales (when procured separately from the commodity) is limited to the prevailing rate for similar freight contracts, or in the case of dry-cargo liner shipments, to the conference rate for such service.

The FOA admitted in 1956 not knowing what a “fair and reasonable” rate was; and so it took vessels at market rate, as long as not “unconscionable.” The current regulation may indicate a separate formula: “... fair and reasonable rates for such a vessel.” Arguably, this may require cost recovery and reasonable profit determination for each vessel, whether a high- or low-cost operation. Probably, however, the term is merely the singular of “such vessels” as used in the statute, which, in view of the FOA opinion that a vessel’s books could not be gone into, presumably means “market” rates to this agency also.

In exempting carriage of government or contractor goods from the 100 per cent American-flag requirement, the Defense Department formula is: “... unless such vessels are not available at fair and reasonable United States-flag rates.” This implies the fair and reasonable rates need not be commercial rates, and thus allows imposition of the National Shipping Authority government-operated rates as a ceiling, if this be desired.

Except possibly for the formula of the Department of Defense, it appears that the federal agencies administering the Cargo Preference Act, despite Comptroller General and House Committee urging, are unwilling and generally unable to base rate determinations on “cost plus reasonable profit” concepts. Rather, the current regulations strongly imply almost complete dependence on market determinations, save only for a helping hand from the Maritime Administration when market rates lose all semblance of fairness and reasonableness. Thus, the current Maritime Ad-

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138 Id. at 18, 19. The practice continued into 1955. See 1956 Senate Hearings 72. The NSA ceiling was established for purposes of movements in Maritime-Administration-operated vessels in 1951, but was adopted by FOA as the maximum it would pay for American-flag vessels. 1955 Admin. Hearings 91.
139 The Department of Agriculture has indicated “... in the event that the United States-flag tramp vessel and the foreign tramp vessel rate are in excess of the Maritime ceiling neither of these tramp vessels would be approved for shipment of commodities on Title I, Public Law 480 [Agricultural Trade Development and Assistance Act] programs.” 1956 Senate Hearings 72.
141 22 C.F.R. § 201.6(a)(2) (1958).
142 1955 Admin. Hearings 52.
144 See note 138 supra. The contract clause required by 32 C.F.R. § 1.309(d)(2)(ii) (Supp. 1958), discussed in text to note 52 supra, employs the commercial-rates test. Note also in that clause the American-flag vessels must be available for timely shipment; otherwise the American-flag requirement is waived. This is the only agency statement adding a timeliness requirement.
ministration rate determinations\textsuperscript{145} are vital in programs subject to the Cargo Preference Act.\textsuperscript{146}

C. Methods of Choosing Foreign-Flag Vessels

Indications of method of choice of foreign-flag vessels are apparently available only from the ICA. There, emphasis is placed on use of ships of foreign aid recipients, as distinguished from the vessels sailing under “flags of convenience,” on the ground that the latter make no genuine contribution to the economy of the country under whose flag they fly.\textsuperscript{147} When vessels of the country receiving aid are unavailable, however, vessels of the “... regular maritime countries ...” United Kingdom, Netherlands, and Scandinavia—are mainly used.\textsuperscript{148} On shipments in foreign-flag vessels, where freight is paid by the ICA under specified conditions,\textsuperscript{149} choice of third-country flags must be from a listing promulgated by the ICA.\textsuperscript{150}

IV

HOW TO COUNT TO ONE-HALF

Whether the foreign nation recipient\textsuperscript{151} or some office in the agency itself\textsuperscript{152} makes the decision whether a given cargo is to be carried by American-flag or foreign-flag vessel, the agency administering the export is responsible for assuring\textsuperscript{153}... that at least 50 per centum of the gross tonnage of such equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers), which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, ... in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas. ...

\textsuperscript{145} See FMB & MARITIME ADMINISTRATION ANN. REP. 9 (1958).
\textsuperscript{146} The ECA (predecessor of the FOA and the ICA) estimated the NSA ceiling had saved the Government $90,000,000 in freight rates from March to December 1951 in the coal and grain foreign aid programs alone. 1955 Admin. Hearings 93.
\textsuperscript{147} Id. at 62.
\textsuperscript{148} Id. at 63.
\textsuperscript{149} The foreign nation basically administers the 50-50 requirement under programs of the Depart- ment of Agriculture, 1955 Admin. Hearings 33; and the ICA. 22 C.F.R. § 201.6(a)(1) (1958). See text to note 68 supra.
\textsuperscript{150} The ICA has added the unique requirement that cargo-preference compliance is required for each fiscal quarter. 22 C.F.R. § 201.6(a)(1) (1958).
\textsuperscript{151} While Defense Department regulations make the Commander, Military Sea Transportation Service, or in some cases the contracting officer, see Naval Procurement Directive 1-307c.1, responsible for arranging ocean transportation of government owned supplies, 32 C.F.R. § 1.309(d)(1) (Supp. 1958), shipments involving offshore procurement of foreign aid are individually regulated by the Office of the Secretary of Defense. Id. §§ 1.309(d)(2) (ii) and (e). ICA exports may be administered by either the GSA or the Department of Agriculture. 1955 Admin. Hearings 47.
A. Vessel Classification

The first classification to which the fifty-fifty provision applies is specified in the statute: vessel type. "Tramp ships [...] the dry-bulk carriers described in the [Act] [...]" are slow, irregularly-scheduled vessels which go where a prospective cargo calls. The American tramp fleet contains about seventy vessels and carries about two per cent of our commercial dry-cargo exports.155

Dry-cargo liners operate a "... regularly scheduled service on fixed routes under which rates are published and identical regardless of nationality of ship."156 They constitute about ninety per cent of our freighter fleet,167 and are generally faster than tramps.158

Each class may carry cargoes of the other, and the resulting difficulty of definition is reflected in the regulations. The Department of Agriculture has adopted169 the Maritime Administration's definitions160 distinguishing tramps from liners principally by regularity of schedule; the GSA, on the other hand, differentiates by method of rate determination;161 while the Department of Defense separates them by calling the tramp a carrier of "... shipload lots of homogeneous unmarked cargoes such as grain [...]," while liners carry "... heterogeneous marked cargoes in parcel lots. [...]"162

All agencies seem to define tankers as carriers of full cargoes of a single bulk liquid commodity,163 although both liners and tramps may also carry bulk liquids. But the Comptroller General has ruled that the recent use of tankers in carrying bulk grain cargoes does not result in their being classified as dry-bulk carriers for purposes of Cargo Preference Act computations.164

Government-owned vessels under bareboat charter to private operators are ineligible to receive cargoes under the American-flag half of the statute, as interpreted

154 1954 Senate Hearings 82.
155 1956 Senate Hearings 20. James B. Stuart, President, American Tramp Shipowners Association, has stated that while the matter of schedules is usually cited as the difference between liners and tramps, a more important difference is the matter of setting rates. Most liners operate in conferences which set the same rates for American and foreign ships, while tramps' rates are set, more or less, by supply and demand. Furthermore, tramps do not share in the operating subsidies which enable American liners to meet foreign competition. 1955 Admin. Hearings 189.
157 Ibid. For an excellent discussion of the impact of foreign aid on liner or berth operators, see NATIONAL PLANNING ASSOCIATION, op. cit. supra note 26, at 48.
166 See Shipping Outlook, March 1958, p. 4.
170 1955 Admin. Hearings 183. Until recently, the foreign aid program had little effect on tanker operations. However, the current boom in superized tanker construction has caused the Maritime Administration to allow some foreign-flag operators to return to the American flag. Foisie, 'Too Many Tankers—How 4 Bay Deals Shape Up, San Francisco Chronicle, Aug. 11, 1958, p. 12, col. 1.
by the GSA, \(^{165}\) while the Department of Defense includes these vessels in its definition of "private United States vessels."\(^{166}\) On the other hand, "... 'privately owned' ships, of course, include American ships chartered by their owners to the Government."\(^{167}\)

B. Geographic Area

While the statute does not require a minimum fifty per cent use of American-flag vessels in any given geographic area, the requirement of fair and reasonable American-flag participation by areas has, perhaps naturally, been interpreted to demand fifty-fifty treatment.\(^{168}\)

However, the generality of the words "geographic areas" has caused considerable difficulty in administering fifty-fifty treatment, particularly in the surplus agricultural commodity disposal program, \(^{169}\) where the Department of Agriculture applies the Cargo Preference Act to shipments to each country.\(^{170}\) The Maritime Administration encourages this breakdown, "... where possible..."\(^{171}\) The Department of Defense essentially does the same, in as much as its eighteen areas roughly equate one country with an area.\(^{172}\) To be contrasted are the interpretations of the ICA\(^{173}\) and the GSA,\(^{174}\) which, using identical breakdowns, segregate shipments from the United States from shipments from points outside. The latter shipments are further subdivided so that the fifty-fifty requirement applies separately for shipments from Europe and Africa; the Near East and South Asia; Latin America and Canada; and the Far East.\(^{175}\)


\(^{166}\) 32 C.F.R. § 1.309(a)(5) (Supp. 1958). Under the Mutual Defense Assistance Act of 1949, as interpreted by the Department of Defense, such vessels were ineligible only if manned by government personnel. See Defense Department Directive No. 2110.12 (1951), quoted in 1954 Senate Hearings 67.

\(^{167}\) Statement of American Merchant Marine Institute, Pacific-American Steamship Association, and Association of American Shipowners, in 1954 House Hearings 91. The Department of Defense concurs if on voyage or time charter to the Government, but lists such vessels as government ships if on bareboat charter to the Government. 32 C.F.R. § 1.309(a) (Supp. 1958).

\(^{168}\) In view of consistent congressional application of 50-50 treatment in the past decade, any other agency interpretation may be difficult to justify, at least as to broad rules. The congressional language, however, clearly shows an intention to avoid rigidity of application in specific cases. Apparently this has not been successful. See shipowners' comments in 1956 Senate Hearings 130, 138. Indeed, the GSA and the Department of Agriculture apply the statute by vessel type, by area, and by commodity, apparently misconstruing the statutory language, "... 50 percentum of such ... commodities ..." See 1955 Admin. Hearings 77; 1956 Senate Hearings 73.

\(^{169}\) See shipowner association representatives' comments in 1956 Senate Hearings 139.

\(^{170}\) See statement of Earl L. Butz, Assistant Secretary of Agriculture, in id. at 73.


\(^{172}\) 32 C.F.R. §1.309(c) (Supp. 1958). However, cargo preference is not applied to Defense Department intra-area off-shore procurement. Ibid.

\(^{173}\) 32 C.F.R. § 201.6(n)(1) (1958).


\(^{175}\) However, ICA determinations of nonapplicability of the Cargo Preference Act owing to nonavailability of American-flag vessels are made country-by-country, rather than by area. 22 C.F.R. § 201.6(n)(2) (1958). The ICA "may or may not" include such excluded shipments in the American-flag 50%. Ibid. The GSA yields to ICA regulations when the GSA arranges transportation of ICA cargoes. GSA Admin. Order No. 232, Supp. No. 1, para. 6e (1958).
definition of geographic areas beyond individual countries was the sounder interpretation. Other liner and tramp shipowner spokesmen and the Senate Interstate and Foreign Commerce Committee concede this was intended by the statute.

Apparently only the Department of Defense has established areas exempt from the cargo-preference requirements. Basically, these are Arctic and Antarctic areas and "...ports and facilities under security restrictions in otherwise nonexempt areas."

V

IMPACT OF TREATIES ON CARGO PREFERENCE

Several United States treaties provide: "vessels of either Party shall be accorded national treatment and most-favored-nation treatment with respect to the right to carry all cargo that may be carried by vessel to or from the territories of the other Party."

In treaties taking effect (a) prior to enactment of the Cargo Preference Act, the effect of this clause on the Act's administration raises a difficult problem: Are the government agencies administering the Act required to treat German-flag vessels, for example, as American-flag vessels by virtue of the national-treatment provision in the German treaty? Furthermore, must Israeli-flag vessels be treated as are these German-flag vessels, by virtue of the most-favored-nation provision in the Israeli treaty? No conclusive answer is available; certainly the congressional committees were not advised of the problem in the cargo-preference hearings.

When the Cargo Preference Act was passed in 1954, its operation was not affected by the presence of this clause in existing treaties. Thus, unless the German
CARGO PREFERENCE

A treaty applies to cargoes subject to the cargo-preference laws, no difficulty arises. Several possible reasons may be suggested why the German treaty is inapplicable.

First, the treaty itself provides it "... shall not preclude the application by either Party of measures ... necessary to protect its essential security interests." The Cargo Preference Act is premised on the policy of assuring to privately owned United States merchant-flag vessels that "substantial portion of the waterborne export and import foreign commerce," which the Congress has proclaimed in repeated statutes as necessary to maintenance of an adequate merchant fleet.

This necessity is based to an important degree on the role of the American merchant marine as "... an indispensable factor in our whole defense system." To the extent this is so, the Cargo Preference Act would seem a measure excepted by the treaty as a United States step "... necessary to protect its essential security interests."

In the second place, the Senate committee report on the German treaty pointed out that the national and most-favored-nation treatment provisions applied to "... normal commercial and industrial pursuits." In a sense, foreign aid and government cargoes are neither normal nor commercial. This conclusion finds support in the analogous treaty provision giving only most-favored-nation, not national, treatment with respect to awarding of government contracts.

Even if the treaty did require treating German-flag vessels as American-flag vessels for purposes of the Cargo Preference Act, arguably it would be sufficient compliance to treat them as American-flag government, not private, vessels.

VI

CONCLUSION

In 1954, the German Diplomatic Mission in Washington noted that no legislation of this or a similar nature exists in the Federal Republic of Germany in the field of maritime transportation, and American shipping can unequivocally participate in traffic offered for shipment in West German ports.

If this were generally the case, the impact of the Cargo Preference Act in the larger realm of American foreign trade would be insignificant. However, in 1956, Chile

violation of the Israeli treaty, in as much as art. VII, 2 provides: "Each Party reserves the right to limit the extent to which aliens may ... carry on enterprises engaged within its territories in ... water transport ..."

Treaty with Germany, supra art. XXIV, 1(d).


Testimony of Mr. Henry C. Parke, Chairman, Merchant Marine Committee of the National Security Commission of the American Legion, 1956 Senate Hearings 63. See also remarks of Senator Magnuson that the American Merchant Marine "... is literally the fourth arm of defense." Id. at 66.


Treaty with Germany, supra art. XVII, 2.

Quoted in 1954 House Hearings 49.

About 3% of the total exports and imports of the United States in 1953 and 1954 were subject to cargo preference, excluding military. Statement of the Maritime Administration in 1956 Senate Hear-
enacted fifty-fifty cargo-preference legislation extending to all cargoes. This, the Department of State has noted, is

... potentially the most dangerous of the discriminatory practices in the field of ocean shipping. This practice has appeared with alarming frequency as a provision in bilateral trade agreements. Pursued to its logical conclusion, this type of "bilateralism" would cause the degeneration of international economic relations from competition between private commercial interests to competition between governments.

Retaliation is encouraged, raising shipping costs, it is urged, and the Department of State is compromised by our own fifty-fifty laws in attempts to eliminate foreign discriminations.

The Cargo Preference Act has been attacked in a recent economic analysis. On the other hand, the House Committee on Merchant Marine and Fisheries has concluded shipments of surplus agricultural commodities are not delayed by reason of the Cargo Preference Act. Furthermore, survival of the American-flag tramp fleet is dependent on the cargo-preference statutes.

As far as national security is concerned, it has been argued that the chief lesson learned from experiences following Egypt's seizure of the Suez Canal in 1956 was "... that the United States cannot rely even on friendly nations to provide the ocean transportation vital to America's commerce and defense."
The workings of the Cargo Preference Act and related legislation are difficult to attack solely on the basis of a free-trade doctrine. Furthermore, there is no impressive evidence these laws significantly restrict foreign trade. On the other hand, administrative application of the fifty-fifty laws leaves much to be desired toward realizing the benefits of both cargo preference and the programs to which it applies. Since cargo preference increasingly seems a permanent fixture of our maritime scene, it is to be hoped that better methods of coping with it will be devised by the government agencies concerned.