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BRAZILIAN INTERNATIONAL SHIPPING POLICY

CARLOS OSWALDO SARAIVA*

The first step taken by the Brazilian Government to protect and develop its merchant fleet dates back to April 22, 1959, with the issuance of SUMOC¹ Instruction No. 181. At that time some goods were imported into Brazil at a low rate of exchange called the "subsidized dollar rate." In addition there existed the official and the free exchange rates, the latter being considerably higher than the former.

To stimulate carriage of imported goods in Brazilian ships SUMOC Instruction 181 granted coverage through the official exchange rate for goods imported FOB only. Payment of the respective freight and marine insurance had to be made either in *cruzeiros* or through the free dollar market. Further, it provided that subsidized imports had to be carried aboard Brazilian flagships except where (1) importation had been financed by foreign official entities and it was necessary to meet the reciprocity requirements of the domestic legislation of the countries to which such entities belonged. (This provision was apparently drafted having in mind U.S. Public Resolution 17 of 1934 and Public Law 664 of 1954), and (2) there was no space available aboard Brazilian ships to transport such cargoes.

Subsequent to SUMOC Instruction 181, the Brazilian Government passed Decree 47.225 dated November 12, 1959, whose Article 3 reads as follows:

The carriage of imported goods enjoying any benefits or Governmental favors, as well as of goods purchased under partial or total financing granted by official credit organizations, shall be compulsorily effected with due observance of the reciprocity principle, aboard Brazilian flagships, except in cases where Brazilian carriers previously inform the Merchant Marine Commission and the com-

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petent agency in charge of foreign trade of the impossibility to perform such transportation.

It should be noted, that the principle of reciprocity was once more kept intact.

On October 20, 1960, SUMOC issued Instruction 202 providing that Brazilian products (except those in bulk) exported to the United States and Canada be carried by members of the Brazil-United States-Canada Freight Conference. Where the carriage of products was regulated by some specific agreement or pact concluded between the lines affiliated to said Conference, which pact had been approved by the Brazilian authorities, the carriage of goods was to abide by such agreements provided that at least a Brazilian carrier was a party to them.

The enforcement of SUMOC Instruction 202 brought about the NOPAL litigation before the U.S. Federal Maritime Commission (FMC). In view of the terms of SUMOC 202, NOPAL (a Norwegian carrier) began negotiations to join a pooling agreement within the Brazil-United States-Canada Conference. No agreement was reached because Lloyd Brasileiro would not accept a smaller freight allocation than NOPAL, even though the latter claimed that it already carried a higher percentage of cargo (specially coffee) than Lloyd. Nevertheless NOPAL adhered to the pool (since there was no other alternative for remaining in the trade), and subsequently challenged it before the FMC, which disapproved the agreement on the grounds of flag discrimination.

Almost two years later, on May 21, 1962, the Brazilian Merchant Marine Commission (CMM) passed Resolution 2216, prescribing that goods imported from the United States, either enjoying Government favors or under total or partial official financing (as mentioned in Decree 47.225 of 1959) had to be carried aboard Brazilian ships or, if none were available, aboard U.S. flag vessels. A third country flag ship could only carry the goods where neither a Brazilian nor an American vessel was able to transport them.

Subsequently, CMM issued Resolution 2640, dated August 4, 1964, whereby it approved Recommendation 5/64 of the Coordinating Council of Foreign Shipping. This recommendation, after stating that the Brazilian Government could not allow instability and disorder to dominate the carriage of its main export, proposed that CMM supervise the allocation of coffee shipments among the Conference members within the scope of SUMOC Instruction 202. It further recommended that (1) no clearance should be given to any coffee shipment without previous designation of

the carrying vessel by CMM; (2) priority for carrying coffee should be granted to ships flying the flags of the exporting and importing countries; and (3) Lloyd was to be allotted up to 40% of the coffee shipped to ports along the Eastern seaboard of the United States and in the Gulf.

On February 17, 1966, the Brazilian Government issued Decree 57.835, making compulsory the carriage aboard Government controlled shipping and railroad lines of goods belonging to Government agencies, para-Government institutions, and private entities enjoying Government benefits of an exchange, tax, or financial nature. This decree was later amended by Law 5434 of May 14, 1968, which authorized Brazilian private lines to carry said goods provided that Lloyd was granted priority.

Next, came Decree 60.739, enacted on May 23, 1967, which dealt with the waiver of cargoes that, in principle, had to be compulsorily carried aboard Brazilian flag vessels. According to Article 1 of this decree any goods, which under current legislation had to be carried to or from Brazil aboard Brazilian flag ships, "may be the object of a waiver in favor of ships flying the flag of the exporting or importing country, up to 50% of their total, provided that the laws of the selling or purchasing country extend at least equal treatment to Brazilian flag vessels." Further, Article 2 established that "in case of absolute lack of Brazilian flag ships" to carry these goods, their share of the cargo could be waived in favor of vessels of the exporting or importing countries. Only where neither Brazilian ships, nor vessels of the exporting or importing countries were available could CMM issue a waiver in favor of third country flagships.

On May 30, 1967, CMM passed Resolution 2995 establishing that Brazilian carriers and vessels of exporting or importing countries should have preference in the handling of cargo between Brazil and foreign nations. The resolution in question provided that: (1) pursuant to Brazilian shipping policy, Brazilian carriers as well as carriers from exporting and importing countries should have an equal share in the handling of such cargoes; and (2) as far as third flag carriers were concerned, a determined percentage of the cargo to be moved by them should be reserved.

On June 13, 1967, representatives of CMM and the U.S. Maritime Administration held a meeting in Washington, D.C., which culminated in the signing of a "Memorandum of Understanding" by Paulo Strauss, on behalf of the Brazilian Government, and Maitland S. Pennington of the U.S. Maritime Administration. The purpose of the meeting was to discuss the repercussions of Brazilian Decree 60.739 and U.S. Public Resolution 17 on the Brazil-United States route. The parties finally agreed that: as long as Decree 60.739 remained in effect, Brazil would grant waivers in

favor of U.S. flagships to carry up to 50% of the Brazilian Government controlled cargo. The U.S. Maritime Administration agreed to reciprocate by issuing waivers under Public Resolution 17 to Brazilian vessels for the transportation of up to 50% of all Eximbank generated cargo. In both cases the 50% participation was to be ascertained on the basis of the tonnage and freight receipts of the cargo involved. Since the Memorandum provided only for waivers under Public Resolution 17 (Eximbank cargoes), and no other U.S. Government controlled cargoes, Brazil then repudiated it in October 1967.

To enforce Resolution 2995, Lloyd Brasileiro called a meeting with United States-Canada Conference members, to be held in Rio de Janeiro on June 26, 1967, for the purpose of negotiating a coffee pooling agreement. Since the participants were unable to reach an understanding on the percentages to be allocated to the member lines (Lloyd remained adamant in not allowing less than 80% of the available traffic to be split between vessels of the exporting and importing countries), the Brazilian carriers (Lloyd and Netumar) quit the Conference and were followed shortly by the other lines.

A new Freight Conference known as the Inter-American Freight Conference (IAFC), was formed in July, 1967. Its by-laws were approved by CMM through Resolution 3022 of August 1, 1967. On the same date, CMM issued Resolution 3023 directing all Brazilian exports bound for the United States and Canada to be carried by IAFC member lines, with exclusion of bulk products and any other goods requiring specialized transportation not provided for by the Conference carriers. The resolution contemplated the execution of pooling agreements by the members, to be compulsorily submitted to the approval of CMM with the understanding that the agreements would not become effective unless a Brazilian carrier was a party to them. As a matter of fact, Resolution 3023 was nothing more than a repetition of SUMOC 202, benefiting the members of the IAFC in lieu of the former Brazil-United States-Canada Conference.

Subsequently, Resolution 3131 of CMM dated November 10, 1967, prescribed that the carriers of the exporting and importing countries should carry a minimum of 65% of the international cargo, this percentage to increase up to 80% in not less than 10 years. Regarding the ceiling of 35% on the amount of cargo that could be shipped aboard third flag lines, this would dwindle down to 20% in the same period. In the following year, on March 7, CMM through Resolution 3205, compelled all Freight Conferences operating in Brazilian ports to submit to it within 40 days, for re-examination and approval, their current by-laws, pooling agreements and freight-rate schedules.

In view of the innumerable laws, decrees and resolutions regulating the matter, the Brazilian Government decided to consolidate them into a single law. For this purpose, Decree Law 666 was enacted on July 2, 1969. Article 1 assigned to the National Superintendency of Merchant Marine, SUNAMAM (the successor of CMM), the task of regulating and controlling the participation of the Brazilian fleet in the international traffic, through the issuance of "resolutions." Article 2 paragraph 1 made obligatory the carriage aboard Brazilian flagships of goods imported by Federal, State and Municipal Agencies, as well as by para-governmental entities and mixed-economy corporations. The same provision also defined as Government controlled cargo, for the purpose of the decree-law, any imports or exports of goods enjoying Government preference or whose purchase or sale was made possible under financing by organizations controlled by the Brazilian Government even if the funds were of foreign origin and simply "repassed" by such Brazilian organs. However, Article 2 expressly stated that the reciprocity principle would continue to be observed in the allocation of international cargo.

Article 3 of Decree-Law 666 reproduces the same rule, contained in the previous legislation, with respect to waivers of Government controlled cargo to be issued in favor of carriers of the exporting or importing country up to 50% of its total amount, or ultimately to third flag lines, in case of unavailability of space aboard national vessels.

Sixteen days later, on July 18, 1969, Brazil passed Decree-Law 687, amending Decree-Law 666. The main modification related to the exclusion of exports from the definition of Government controlled cargo as stated in the original text of paragraph 1 of Article 2 of Decree-Law 666. Instead of making the carriage aboard Brazilian ships of exported products enjoying Governmental benefits absolutely compulsory, Decree-Law 687 transformed such a requirement into a blanket authorization granted to SUNAMAM to bring exported goods under the scope of government controlled cargo, whenever needed, even where those goods did not enjoy Government preference.

The text of Article 2, paragraph 1 of Decree-Law 666, as amended by Decree-Law 687 reads as follows:

Paragraph 1: — The National Superintendency of Merchant Marine — SUNAMAM — is hereby authorized, upon approval of the National Council of Foreign Trade — CONCEX — to extend the obligation prescribed in this article to national exported goods.

This amendment to Decree-Law 666 was apparently dictated by the necessity of removing any obstacles that might hamper the Brazilian drive

to promote exports and improve its trade balance, a policy which has achieved excellent results lately. On the other hand the governmental agencies concerned (SUNAMAM and CONCEX) were given sufficient authority to include under the category of government controlled cargo any exported items, whether or not they enjoyed Government favors.

In March, 1970, Brazilian and United States Government representatives agreed on a "Memorandum of Consultation" destined to put an end to the state of unrest in the Brazil-United States-Brazil traffic. The Memorandum provided mainly that (1) both Governments would enter into an agreement establishing equal access of their national lines to government controlled cargoes, except the ones that the Brazilian Government decided to waive to third flag lines; (2) the Brazilian Government would release by waiver a sizeable amount of freight to the third flag carriers in the southbound trade, provided that such lines entered into revenue pools in the northbound traffic acceptable to the American and Brazilian lines; (3) revenue pools, determining shares for all lines carrying coffee and cocoa in the Brazil-United States trade, would be negotiated by the Conference members; and (4) both Governments would take action to stop rebating in the northbound trade.²

Returning to imports, the expression "goods imported through Government favors," mentioned in Decree-Law 666 was more precisely defined by Communiqué 316 of the Department of Foreign Trade (CACEX) of the Bank of Brazil, dated September 30, 1970. In addition to goods purchased by public or para-Government agencies, Communiqué 316 ruled that imports would be brought under the scope of Decree-Law 666, whenever they came into the country under any of the following schemes:

- a) Without exchange coverage, classified as foreign capital investment by the Central Bank (mostly equipment for industries);
- b) through financing in foreign currency directly granted by foreign official entities;
- c) with exchange coverage of foreign origin made available to importers through Brazilian Federal Agencies (one typical example would be imports financed by USAID program loans);
- d) enjoying tax reductions or exemptions granted by the proper public agencies.

The enforcement of the new Brazilian shipping policy has naturally caused some impact abroad. However, the reaction in the traditionally maritime nations was by and large limited to diplomatic protests.

Brazil-United States Traffic

In the United States, the Brazil-United States traffic was the object of considerable discussion, mainly administrative, within the sphere of FMC.

Northbound Trade

After IAFC was formed, the European lines were unable to move cargo northbound, since, due to CMM Resolution 3023, operation on that route was restricted to members of the new Conference only. Thereupon, in August, 1967, the IAFC members signed two pooling agreements covering the carriage of coffee and cocoa (agreements no. 9649-A and 9649-C), and submitted them for the approval of the FMC. The European lines, which could not join the pools, filed a complaint with the FMC, and further brought a suit against the parties to said agreements in the U.S. District Court for the Southern District of New York, for violation of the American anti-trust laws. Afterwards, the European carriers began negotiations with CMM for the purpose of being allowed to resume lifting cargo northbound. As a precondition to admission to the IAFC, they agreed to withdraw both the complaints before the FMC and the judicial anti-trust suit. The ban against the European lines was removed upon their joining IAFC, which was done through the signing of an amended IAFC agreement in November 1967, approved by FMC for a period of eighteen months.

In the meantime, however, CMM issued Resolution 3131 (actually an implementation of Resolution 2995), establishing the percentages of the flag lines in the Brazilian import-export trades. As shown previously, the non-national lines were limited to 35% of the traffic to be reduced to 20% at the end of a ten year period. The texts of the pooling agreements being then negotiated were therefore worded in such a way as to comply with Resolution 3131. These pools were actually three, relating to carriage of the following cargoes from Brazil to Atlantic ports of the United States: (1) general cargo — FMC No. 9682; (2) coffee — FMC No. 9683, and (3) cocoa — FMC No. 9684.

Since, pursuant to Resolution 3131, the Conference members had only 15 days from the date of its official publication to act on such agreements, the parties were pressed to sign the pools in question.

When these agreements were subsequently brought before the FMC for approval, the European lines alleged that they only signed them on the understanding that they would be granted similar percentages on the

southbound route, and that Lloyd, in the capacity of representative of CMM, did not make any efforts to materialize such southbound guarantees. Since the southbound guarantees were not incorporated into the agreements being examined by the Commission, the European carriers charged that the northbound agreements were unfair and unjustly discriminatory to them, and therefore requested their disapproval.

Examiner Robinson, of the FMC, in his initial decision dated June 23, 1969, accepted the allegations of the Europeans in that the agreements were not complete, and consequently not ready for submission to the Commission, since "it would appear that the Southbound agreement, now in possession of the Brazilian authorities, is the document which reflects the final thinking of the parties."

Among the various conclusions reached in the Robinson decision, the following appear to be the most important: (1) the third flag lines were practically forced to sign the pools in order to remain in the trade; (2) the percentages allocated under the pools were not based on the past performances of the lines and consequently carriers with poor records would have their positions highly enhanced by these agreements; (3) without the southbound guarantees, the third-flag carriers would face serious difficulties in the future and might even have to quit before the ten year life of the northbound pools; (4) the needs of importers and shippers were given little consideration when the percentage quotas were established and therefore service might be hampered, also because of reduction in sailings.

Finally, the Examiner found the northbound coffee and cocoa pools to be "unjustly discriminatory and unfair as between carriers, would operate to the detriment of the commerce of the United States and would be contrary to the public interest." Although recognizing that Brazil "has the undoubted right to foster its merchant marine and to improve its economy," the decision disapproved both agreements.³

However, on February 20, 1970, Examiner Robinson issued a Supplementary Decision whereby he indicated that he would approve the coffee pool, provided that some changes were made. These changes would be essentially two. Shortening of the initial life of the pool, from ten to three years, so that for each of the three years the percentages for the lines would be those set forth in the agreement for the 10th year, i.e., 80% to be shared equally by the national lines, and the 20% balance to the third flag carriers. A pool with such a short life would represent a test to the non-national carriers, and would quickly show if they were financially able to remain in the trade without the southbound guarantees.

The other modification of the agreement would limit overcarriage penalties to a revenue-less-expense formula.

Following the first Robinson decision, as there were no pools in effect (SUNAMAM also refrained from approving the agreements), a true freight war started in the Brazil-United States route. The Brazilian lines apparently succeeded in acquiring such a substantial share of the traffic that they lost interest in remaining parties to the agreements and finally withdrew from them. At the time the agreements were brought before the FMC "en banc", it decided, in September 1970, that they had been repudiated, because of the Lloyd and Netumar withdrawals, and therefore its jurisdiction over them had terminated.

In view of the state of turmoil which prevailed in the Brazil-United States traffic after the first Robinson decision, and due to the absence of valid pooling agreements, SUNAMAM decided to take action on the grounds that Decree-Law 666 was not being observed. Hence the issuance of Resolution 3669 on April 24, 1970 (prior to the final FMC decision). Pursuant to its provisions, the northbound coffee and cocoa shipments were split on a 50-50 basis between Brazilian and American carriers. However, in its item 4, the Resolution invoked Article 3, paragraph 2 of Decree-Law 666 to allow carriage of said products aboard third flag vessels, "whenever necessary to assure a continuous and regular outflow of coffee and cocoa to the United States." Therefore, through Resolution 3669, the Brazilian Government succeeded in putting into force its original project which provided ultimately for the allocation of 40% of the cargo to the national lines of each of the two countries directly involved in the trade, and the remaining 20% to the third flag carriers.

Southbound Trade

After formation of IAFC in June, 1967, no southbound agreement was reached with the third flag lines, although the European carriers insisted that they had been given southbound guarantees by the Brazilians in order to sign the northbound coffee and cocoa pools.

Right after the "Memorandum of Consultation" was agreed upon by representatives of the Brazilian and United States Government in April, 1970, IAFC principals held a meeting to negotiate a pool to be signed by all member lines, and again failed to reach an agreement.

Thereupon, Moore-McCormack, Lloyd and Netumar signed a freight revenue pooling agreement on commercial and government controlled

cargoes carried by those lines, from Atlantic ports of the United States to Brazil. At the same time, a similar agreement was concluded between Delta, Lloyd and Navem (the latter a Brazilian private line which presently has practically abandoned the trade) covering the Gulf-Brazil route. Both agreements were brought before FMC for approval in August, 1970 being numbered 9847 and 9848, respectively.

In spite of oppositions filed by European carriers operating in those routes, the agreements met with prompt approval by the Commission by decision of November 18, 1970.

Even though it recognized that government controlled cargo represented 80-85% of the total cargo moving southbound, FMC found that the coming into force of the agreements in question would not alter significantly the competitive situation in the trade, since at that time the participation of the third flag lines therein was only 15% (including commercial cargo and the portion of the cargo controlled by the Brazilian Government released to them by waiver.)

According to the Commissioners, the main point of the agreements was the "equal-access provision", which simply meant that United States and Brazilian carriers would be able to move cargoes controlled by either one of their Governments without the necessity of obtaining waivers. As such cargoes, by virtue of the legislation of Brazil and the United States, were already largely inaccessible to third flag carriers, these would not be affected by approval of the agreements.

Concerning the clauses of the agreements relating to purely commercial cargo, the decision also did not raise objection. The Commissioners understood that because the pools comprised exclusively those commercial cargoes that were being carried by the signatories, there would be no infringement of the right of the third flag lines to compete on equal terms for transportation of such commodities. Indeed, the Commission was not moved by the allegation of the European Lines that the scope of government controlled cargo might be enlarged to such an extent as to practically eliminate the commercial cargo previously available to them. The FMC thought this conclusion to be unfounded for lack of substantial evidence.

Actually, the decision took the position that the third flag lines would not have their business hampered by the agreements, but "rather it is the Brazilian laws and decrees and the United States preference laws which limit the operations of the third flag lines." In any case, if the pessimistic predictions of the European carriers ever materialized so as to make their positions manifestly unbearable, the Commission could always resort to

Section 15 of the Shipping Act, 1916, under which it was granted the right to re-examine any agreement "whether or not previously approved by it," and therefore reverse its former findings.

Upon affirming that the southbound agreements were not violative of the Shipping Act and would contribute substantially to stability in that trade, FMC approved them for a period of three years as requested.

Unsatisfied with this decision, NOPAL (the Norwegian line) filed a petition for reconsideration of the approval, which was based essentially on the grounds that political factors had led the Commission to change its former policy of advocating free trade, in order to approve the southbound pools. NOPAL argued quite clearly that in issuing such a decision FMC indulged in international politics, which is not the Commission's field, rather than limiting itself to statutory considerations. By an order on February 26, 1971 FMC denied said petition for reconsideration, even though it agreed to impose additional reporting requirements on the national lines and on NOPAL as well.

Some comments appear to be in order after a comparison between the northbound coffee and cocoa agreements and the southbound pools.

In both routes the third flag lines had their participation curtailed to a small percentage of the cargo. However, in the coffee and cocoa trade the agreements themselves established the percentage quotas of the third flag carriers which were given no margin of action to enhance their positions in the traffic. On the other hand, the southbound agreements had their application restricted to the Brazilian and American lines, and consequently did not attempt to set any quotas to the non-national carriers. In addition, they were concerned only with government controlled and commercial cargoes which were being moved by the carriers of both the United States and Brazil, allowing, at least in theory, the third flag lines to compete freely for all other commercial cargo.

It is quite clear from the FMC decision that the fact that the meaning of government controlled cargo would encompass about 85% of the overall southbound cargo (leaving therefore just 15% to the access of the non-national lines) did not cause the Commission to refrain from approving the agreements, because such a result was not brought about by the pools, but rather by the laws of Brazil and of the United States. One may assume therefore that had the coffee and cocoa pools been circumscribed in regulating only the participation of that cargo to be moved by United States and Brazilian carriers, as provided by the southbound agreement, instead of assigning specific percentages to all lines in the trade, the FMC would most likely have approved them.

What seems to be most relevant is that the coffee and cocoa pools, if drafted along the lines of the southbound agreements, would have achieved the same result intended by the ones actually submitted to FMC.

As a matter of fact, previous Brazilian legislation on the subject was already in effect by that time, providing for allocation of definite percentages to the carriers in the Brazilian export and import trades (Resolution 3131 of SUNAMAM, dated November 10, 1967 is one leading example of this kind of legislation.) In view of this, most of the coffee and cocoa shipments ought to be moved in Brazilian and American ships which would be tantamount to treating them as government controlled cargoes.

The third flag carriers, not being parties to the pools, would likewise be restricted to a small portion of the coffee and cocoa traffic, i.e., to that established by Brazilian laws and resolutions. Consequently, it can be concluded that a minor change in the language of the coffee and cocoa agreements would very possibly have made them promptly acceptable to FMC, thus avoiding the instability in that trade which ensued after the first Robinson decision.⁴

Brazil-Europe Traffic

Due to the action of CMM and its successor SUNAMAM, the by-laws of most of the conferences were revised and pooling agreements entered into between Brazilian and European carriers, bringing about higher percentages of cargo to Brazilian vessels.

One example worth mentioning concerns the Brazil-Scandinavia traffic. Lloyd Brasileiro, although admitted to the Brazil-Europe conference in 1924, was not allowed to operate on the Scandinavian route for almost fifty years. This restriction was removed only after decisive action by the Brazilian Government. In the import trade, it was only recently that Brazilian ships were permitted to carry Scandinavian paper into Brazil. Today, two Brazilian lines — Lloyd Brasileiro and Aliança — operate on the Nordic route.

Just a few years ago, in October 1967, Brazil succeeded in reaching an acceptable agreement covering the traffic with Scandinavia. Pursuant to this agreement, the two above mentioned Brazilian carriers plus four Scandinavian lines were to handle the north and southbound cargo in such a way that the Brazilian vessels would be apportioned a sizeable share of that traffic, a fact which represented a considerable progress in relation to the previous situation in that trade. On October 9, 1969, a

pool was signed (approved by SUNAMAM Resolution 3548 on the 16th of the same month,) which is still effective today, apportioning the cargo on the Scandinavian routes as follows.

Southbound Traffic

50% to the two Brazilian carriers, and the other half to the Scandinavian line flying the flag of the exporting country. For instance, on the Denmark-Brazil route the traffic is shared on an equal basis between Lloyd Brasileiro and Aliança on one side, and the Danish line, DFDS, on the other. Similar arrangements were made with shipping lines of Norway, Sweden and Finland, dealing with the export trade from each of these countries to Brazil.

Northbound Traffic

An eight-year schedule was established according to which the two Brazilian lines jointly were granted 15% of the trade in 1970, this percentage to increase by 2.5% every year (except between 1973 and 1974), until it reached 32.5% for 1978. Conversely, each Scandinavian line, in operation on one of the sub-routes terminating in the country of its nationality, was assigned decreasing percentage quotas, that is, from 85% in 1970 down to 67.5% in 1978.

Undoubtedly, due to the implementation of its recent shipping legislation, Brazil substantially developed its merchant fleet, which in 1967 amounted to 1,304,808 gross tons (Lloyd's Register of Shipping data,) being ranked at that time as the 16th fleet in the world. On July 1970, according to the "Fairplay International Shipping Journal" issue of November of the same year, the Brazilian merchant fleet totalled 1,722,000 gross tons. The most recent data, from SUNAMAM, indicates that, on December 12, 1970, Brazil had 371 seaworthy vessels corresponding to 2,233,552 gross tons, plus 1,176,900 gross tons under construction in foreign and domestic shipyards.

As stated above, by and large the maritime nations have so far expressed their opposition to the new Brazilian shipping policy only through diplomatic channels. They have also refrained from subjecting Brazilian products to their anti-flag discrimination laws. The Scandinavian countries, which for obvious reasons are most displeased with the steps taken lately by the Brazilian Maritime Authorities, have not yet initiated any retaliation against Brazilian products and there is no indication that

they will, through the enforcement of their laws which levy additional duties on imports from countries practicing the so-called flag discrimination. As an example, mention is made of Section 2(3) of the Danish Customs Law of January 28, 1959, as amended by a decree of January 7, 1965, which imposes a supplementary tax of up to 75% ad valorem on goods imported from countries that discriminate against Danish ships. A similar provision, although prescribing higher duties than the Danish legislation, is found in Section 2 of the Norwegian Customs Tariff.

In fairness, it should be pointed out that the current shipping policy enforced by the Brazilian Government is not without precedent. In other countries of the world, including some major maritime nations, cargo preference legislation compels the carriage of a considerable amount of goods aboard national flag ships.⁵

In the United States, Public Resolution 17 of 1934, requires that at least 50% of the exports financed by the Eximbank be moved aboard American vessels. Resolution 17 even applies to goods acquired under loans made by non-United States entities if these are merely guaranteed by the Eximbank. On August 26, 1954, the President of the United States signed Public Law 83-644 which calls for a minimum of 50% of government generated cargo to be shipped in American vessels. The scope of government generated cargo is broad enough to cover not only commodities donated under United States Aid Programs, but also those whose purchase by foreign nations or institutions is financed or guaranteed by United States Public Agencies, including goods bought under Title I of Public Law 83-480, dealing with the sale of surplus agricultural products. Furthermore, shipments of commodities financed or donated by international organizations, such as the Inter-American Development Bank and the United Nations, are brought within the purview of American cargo preference laws, whenever the available funds can be traced to United States origin. Insofar as the Inter-American Development Bank is concerned, this requirement applies to its funds which are supplied by the United States through the Social Progress Trust Fund.⁶ As to foreign assistance programs under the aegis of the United States Agency for International Development, more than 50% of the AID shipments are moved aboard American flagships because, according to its policy, AID refuses to finance ocean transportation charges when shipment is made on non-United States flag vessels.⁷

France is another example of a country fostering its merchant fleet through cargo allocation rules. French legislation requires that 40% of the coal and two thirds of the petroleum imports into France be carried

aboard French flag vessels. In addition, through bilateral agreements with Algeria and Tunisia, as much as two thirds of its trade with these two North African countries are shipped on French flag carriers. It is estimated that approximately 70% of the cargoes shipped on French vessels result from compliance with French cargo-allocation laws and bilateral agreements.⁸

In the Eastern European bloc, Russia has been successful in reserving a considerable portion of its foreign cargoes for shipment on Russian flag vessels. This was made possible through multilateral agreements with the other Eastern European countries within the framework of the Council for Mutual Economic Assistance (COMECON), as well as bilateral agreements with non-socialist countries, particularly when the latter are beneficiaries of Russian foreign assistance programs.⁹

The Brazilian Government strongly denies the accusation that its shipping policy involves discrimination against foreign carriers. The Brazilian authorities argue that their flagships have an undeniable right to carry a sizeable portion of the cargo bound to and originating in Brazilian ports, and that the handling of such a cargo is split equally with lines of the exporting and importing nations, the third flag vessels being always allotted a minor share of the trade. Discrimination would occur were Brazil to give priority to one or some third flag carriers in detriment of third flag vessels of other countries, which is not the case. In addition, Brazil takes the position that a large national merchant fleet, able to carry a major portion of its exports and imports, is essential to the development of the country because it is an important factor towards maintaining an acceptable reserve of foreign currency.

Following the same criterion, the Brazilian Government recently regulated another item listed under the Invisibles heading of its balance of payments, which in the opinion of experts was also causing a major drain of its foreign reserves. Pursuant to Resolution 3-71 of the National Council of Private Insurance, dated January 18, 1971, insurance covering transportation of imported goods must be placed with insurance companies having their offices in Brazil. Item II of the Resolution provides for a waiver of this requisite whenever dictated by economic factors or where the Brazilian market is unable to furnish the proper insurance coverage. The provisions of said Resolution were subsequently reaffirmed by Communiqué 174 of the Exchange Department (GECAM) of the Brazilian Central Bank, dated March 12, 1971.

Finally, the Brazilian authorities believe that a policy, already accepted worldwide and similar to the one being enforced by them on the

shipping field, has been adopted with success in the air industry, where as a rule routes are assigned to airlines of the two interested nations, mainly through bilateral agreements.

NOTES

¹SUMOC (the Superintendency of Currency and Credit) was transformed into the Central Bank of Brazil in 1964.

²FMC has recently concluded an investigation on rebating activities in this trade and reportedly it will publicize its results very shortly.

³The decision did not pass judgment on Agreement No. 9682 (general cargo pool), because it had previously expired under its own terms. It is interesting to mention that in a footnote at the end of his decision, the Examiner stated that the Brazilian Government was able to attain by other means, "the same results intended by the pools, but not necessarily with the blessing of this Commission." Actually, Brazil appears to have done just that, when on April 24, 1970, SUNAMAM issued Resolution 3669, whereby it set up the percentage quotas to be carried by the national and third flag lines.

⁴In arriving at this conclusion, we assumed that the FMC would not differentiate between Brazilian and United States legislation dealing with government-controlled cargo (or preferred cargo, which is the equivalent American term), since the only government-controlled cargoes on the northbound route were those designated as such by the Brazilian Government, while on the southbound route both Brazilian and United States cargo preference laws made a major portion of the traffic inaccessible to the flag lines.

⁵An interesting summary of anti-flag discrimination laws in effect in the United States and many European countries is found in the excellent study by Philip E. Franklin entitled "The Economic Impact of Flag Discrimination in Ocean Transportation," 1968.

⁶"Statement on Cargo Preference", submitted to the Maritime Evaluation Committee by the Covington & Burling law firm of Washington, D.C. on behalf of A. P. Moller, Copenhagen, 1962.

⁷Philip E. Franklin, *op. cit.* page 155.

⁸*Ibid.*, pp. 156, 251 and 328.

⁹Philip E. Franklin, *op. cit.*, pp., 175 and 179 through 182