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Cargo Preference and Flag Discrimination in International Shipping— Actions and Reactions

JAMES R. PATTON, JR.*

F. THOMAS SCHORNHORST**

The major maritime nations of the world are viewing with apprehension and alarm the merchant fleets being launched by developing countries on the flood tide of nationalism. The United States Maritime Administration reported that in 1964 there were 82 independent nations that maintained merchant marines consisting of from one to 2,656 ocean-going ships of 1,000 gross tons and over.¹

A combination of factors culminate in a nation's desire to establish its own merchant marine, chief among which are national defense, prestige, protection against foreign discrimination, and improvement of balance of payments.² However, the large capital outlay required for vessel construction or for the purchase of second hand ships, and the potential for heavy losses in a highly competitive industry³ lead to the adoption of protection and

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1. Maritime Administration, U.S. Dep't of Commerce, Subsidies to Shipping by Eleven Countries, issued as Joint Economic Committee, Economic Policies and Practices Paper No. 6, 88th Cong., 2d Sess. 3 (Comm. Print 1964) [hereinafter cited as Subsidies to Shipping by Eleven Countries].

2. *Ibid.*

3. Unlike other industries which involve large capital expenditures, shipping produces only one product—service—and this intangible item must be sold in one of the most competitive of all markets. Because a ship is subject to constant overhead, the operator must seek to keep it continually employed. The more a ship is at sea moving cargo and the less it is in port loading and discharging cargo, the larger will be the return to the

promotional measures designed to steer cargoes to national flag vessels.⁴

Most concerned, and most likely to be affected adversely by this trend, are the maritime interests of European countries, such as Norway, Denmark, Netherlands, Sweden, United Kingdom, and Greece—those countries that traditionally have borne a major portion of the world's ocean trade. Although the United States is sensitive to discrimination against its merchant fleet, its orientation is more parochial, the primary concern being the maintenance and increase of the United States flag share of its own export and import trade. Conversely, European merchant fleets have depended much on world, rather than national, trade to sustain their operation.

According to one ominous prediction, the ultimate effect of various national cargo preference and flag quota systems will be the "Balkanization of world shipping trade."⁵ But discounting the rhetoric of the advocate, the dangers of flag discrimination in the international shipping industry are apparent even to more objective observers:

The adoption of a flag quota by any nation would necessarily lead to a decline of international shipping, retaliation by other maritime states, and possibly a full scale trade war. Moreover, once the principle of a discriminatory flag quota, however limited in its application, is accepted, it may be extended to imports and/or exports of any cargo, or to other services such as cruise travel and the transportation of passengers, and it could be raised to any per cent, even one hundred per cent of the state's trade in that cargo. Other maritime states would likely retaliate with quotas of their own and trade relations would disintegrate.⁶

Developing countries adopting flag quotas and other cargo preference de-

operator on his investment. There are few fixed assets that deteriorate as rapidly and at so high a cost as an idle ship.

Ibid.

4. It is becoming increasingly difficult for some United States operators to obtain an equitable share in the cargoes moving between the United States and certain other nations. One of the important factors is the nationalistic attitude of citizens of certain foreign nations in the routing of cargo as shown by their strong preference for merchant vessels flying their flag.

Letter from Donald W. Alexander, Maritime Administrator, to Senator Warren J. Magnuson, Chairman of the Senate Commerce Committee, March 7, 1962, on file at the Maritime Administration.

[T]he matter of flag discrimination . . . possibly constitutes the biggest single threat to the overall objective of the Ministers' Resolution, namely, to secure a "free flow of shipping services between nations."

European Shipowners, Memorandum on European Ministers' March 1963 Resolution, in *Hearings Before the Subcommittee on Merchant Marine of the House Committee on Merchant Marine and Fisheries*, 88th Cong., 2d Sess., ser. 88-24, at 47 (1964) [hereinafter cited as *1964 House Hearings*].

5. Statement on Cargo Preference from A.P. Moller, managing owner of Maersk Shipping Interests to Maritime Education Committee, in *Hearings Before the Joint Economic Committee, Discriminatory Ocean Freight Rates and the Balance of Payments*, 88th Cong., 1st and 2d Sess., pt. 5, at 1245 (1963-1964). [Hereinafter cited as *1963-1964 Joint Hearings*].

6. Inter-American Bar Ass'n, Report of the Committee on the Law of the Flag and Labor Relations in International Shipping, p. 3, delivered at the annual convention of the Inter-American Bar Ass'n, May, 1965 [hereinafter cited as Report on Law of the Flag and Labor Relations].

vices for their national flag vessels contend they are merely following the lead of the United States, which has a well-established and internationally accepted preference system covering government-controlled cargoes. The established maritime nations criticize the United States for setting a bad example that encourages imitation by the smaller, less developed countries. In each case, the United States counters that the tonnage covered by its cargo preference laws is very small—about seven per cent of total United States ocean-borne trade⁷—and covers only those cargoes financed by the United States government. Certain countries, say the apologists, have done more than merely imitate these policies; they have extended national flag preference to all cargo that can be influenced by the particular government through devices such as foreign exchange controls, import licenses, and even flag quotas unrelated to government participation.

The divergent attitudes of the well-established maritime nations and the newly developing countries toward the multiplication of national flags in the international shipping industry were indicated at a 1964 meeting of the United Nations Conference on Trade and Development. The recommendations proposed by the developing countries were significant in terms of candor if not logic.

Stress was placed upon the proposition that national merchant fleets were earners as well as conservators of foreign exchange. The dependence of developing countries upon established maritime powers for shipping services was deplored. A number of proposals for assistance were listed that, in short, urged countries with established merchant marines to finance more competition in an industry infamous for cutthroat practices and stabilized largely by international price-fixing cartels called "conferences."⁸ Further, it was recommended that national merchant marines be insulated from competition through Government-sponsored cargo preference measures, and that developed countries resist the temptation to impose retaliatory measures.⁹

The draft recommendation submitted by Sweden¹⁰ and supported by the major maritime powers took an understandably cautious tack, urging that impediments to free competition between shipowners be discouraged because

7. Maritime Administration, U.S. Dep't of Commerce, *Contribution of Federal Aid Programs to the Oceanborne Foreign Trade of the United States: 1959-62*, p. 4 (1964) [hereinafter cited as *Contribution of Federal Aid to Trade*]. See text at note 43 *infra*.

8. Sub-Comm. No. 5, House Comm. on the Judiciary, 87th Cong., 2d Sess., *Antitrust Investigations on the Ocean Freight Industry* 385-86 (Comm. Print 1962) [hereinafter cited as *Celler Report*]. The reference is to the groups of steamship lines which operate liners, *i.e.*, cargo ships traveling over fixed routes, taking almost any kind of cargo and sailing on regular schedule. See Note, 78 Harv. L. Rev. 635 (1965).

9. 1964 *House Hearings* 322.

10. Reprinted in *id.* at 324-25.

of the dangers inherent in supporting non-competitive merchant fleets by artificial means.¹¹ The "Common Measure of Understanding on Shipping Questions," reached on May 22, 1964, was cast in rather neutral terms, but stressed that "the question of development of merchant marines by developing countries should be decided by such countries on the basis of sound economic criteria."¹²

Although the United States supported the view expressed in the Swedish draft, it is in fact wedged somewhere in the middle of the controversy. First, the United States must defend its own statutory cargo preference system against attack.¹³ Second, it has actively protected the United States flag merchant fleet from foreign discrimination by retaliatory countermeasures.

The purpose of the following discussion is to compare the cargo preference system of the United States with similar laws and policies of other countries and to examine the retaliatory mechanisms employed (especially by the United States) to combat flag discriminations. Although the solution to these problems may lie in the abolition of cargo preferences in international commercial shipping,¹⁴ a pragmatic view of the present system suggests a need for compromise instead of polemics. We feel that the formation of regional merchant marines by developing countries would help establish an economically sound, competitive industry independent of discriminatory devices. Absent such steps, however, developing countries can still employ promotional features with small risk of trade disruption and retaliation by competing maritime nations.

Cargo Preference Laws of Established Maritime Powers

United States Cargo Preference Laws

An examination of the evolution of cargo preference laws of the United States is beyond the scope of this discussion,¹⁵ but a summary of these laws and regulations is necessary to appreciate the extent to which foreign governments have copied or expanded the policies expressed therein. Throughout this discussion, it will be helpful to keep in mind the congressional attitude toward merchant marine promotion in the United States:

Obviously, so long as it is assumed that maintenance of a large American merchant fleet manned by American seamen is essential (a) for purposes of national defense and (b) for insuring the carriage of American goods in our

11. *Id.* at 325.

12. *Id.* at 319.

13. See Contribution of Federal Aid to Trade 4; Dep't of State Memorandum Submitted to the President's Maritime Advisory Committee, Aug. 1965, in *Hearings Before the Senate Foreign Relations Committee on the Shipping Restrictions on Grain Sales to Eastern Europe*, 89th Cong., 1st Sess. 43 (1965).

14. See, e.g., 1963-1964 *Joint Hearings* 1245; Report on Law of the Flag and Labor Relations.

15. See generally Olson, *Cargo Preference and the American Merchant Marine*, 25 *Law & Contemp. Prob.* 82 (1960).

foreign commerce, Government promotion and support of our merchant marine will be a prime desideratum of our national shipping policy.¹⁶

Public Resolution No. 17. Public Resolution No. 17, as amended,¹⁷ states "the sense of Congress" to be that exports of agricultural or other products fostered by government loans be carried exclusively in vessels of United States registry unless it is determined by the Maritime Administration that such vessels are not available in sufficient numbers, or in sufficient tonnage capacity, or on necessary sailing schedule, or at reasonable rates.

The major impact of P.R. 17 is directed to shipments financed by the Export-Import Bank of Washington (Eximbank).¹⁸ Eximbank includes in its credit agreements a requirement that cargo shipments be made in United States flag vessels unless the requirement is waived by the Maritime Administration.¹⁹ In certain circumstances, notwithstanding the availability of United States flag vessels, vessels of the recipient nation may be authorized to share in the transport of up to fifty per cent of the Eximbank-financed tonnage under "general waivers" of P.R. 17, which are usually good for the life of a particular credit. General waivers are granted only when the Maritime Administration is satisfied that "parity of treatment" is extended to United States vessels in the trade of the foreign nation. In making this determination, the Administration takes into account

the treatment accorded U.S. flag vessels in the trade with the recipient nation, particularly whether U.S. flag vessels have parity of opportunity vis-a-vis national flag or other foreign flag vessels to solicit and participate in movements controlled in the foreign nation; parity in the application of consular invoice fees, port charges and facilities; also parity of exchange treatment including the privilege of converting freight collections to dollars as needed.²⁰

If a general waiver is authorized, it applies "only to vessels of recipient

16. Celler Report 25. The specific purpose of the United States cargo preference laws was outlined in President Kennedy's Presidential Directive, Regarding Cargo Preference, April 1962, in S. Rep. No. 2286, 87th Cong., 2d Sess. 42 (1962):

These statutes . . . are designed to insure that U.S. Government-generated cargoes move in substantial volume on American-flag vessels. This policy, which is directed to Government-generated cargoes and which does not control commercial movements of export-import cargoes, is an important factor in maintaining the merchant fleet necessary to meet our national goals and is in accordance with the general practice of other maritime nations who move the vast majority of their government shipments in vessels of their own flag.

17. 48 Stat. 500 (1934), 15 U.S.C. § 616a (1964) [hereinafter cited as P.R. 17].

18. 12 C.F.R. § 402.3(a) (1963).

19. The eligibility requirements for waivers are outlined in Maritime Administration, U.S. Dep't of Commerce, Statement of Policy on Public Resolution 17, July 24, 1959, reprinted in *Alcoa S.S. Co. v. Cia. Anonima Venezolana de Navegacion*, 7 F.M.C. 345, 373 (1962), *aff'd sub nom. Alcoa S.S. Co. v. FMC*, 321 F.2d 756 (D.C. Cir. 1963).

20. *Id.* at 374.

nation registry to the extent of their capacity to carry the cargo, based on normal flow of the traffic from interior through ports of shipment and not in excess of fifty per cent of the total movement under the credit."²¹ Third flag vessels (*i.e.*, of a country other than the United States or the recipient) are barred from competing for Eximbank cargoes unless United States flag vessels are not available at reasonable rates.

Public Law 664—The Cargo Preference Act. The Cargo Preference Act of 1954²² amended section 901 of the Merchant Marine Act of 1936,²³ codified various preferences specified in existing law,²⁴ and extended their application to other areas of government involvement.²⁵ This law requires that whenever the United States purchases, donates, or finances any equipment, materials, or commodities, or guarantees the convertibility of foreign currencies in any of these transactions, the appropriate federal agency must assure that, if ocean transportation is required, at least fifty per cent of the gross tonnage of such cargo moves aboard privately owned United States flag commercial vessels "to the extent such vessels are available at fair and reasonable rates. . . ."²⁶ The statute is applicable principally to shipments financed by loans or grants of the Agency for International Development (AID) and to shipments of surplus agricultural commodities and strategic ores and minerals.²⁷

AID regulations governing commodity loan transactions²⁸ implement the

21. *Ibid.* The record of tonnage distribution between the United States and foreign vessels may be based on (1) manifest weight in the case of bulk cargoes such as coal and grain, (2) ocean freight revenue in the case of machinery, equipment and miscellaneous general cargo on liner vessels, and (3) such other unit as may be found suitable in exceptional circumstances. *Ibid.*

22. 68 Stat. 832 (1954), as amended, 46 U.S.C. § 1241(b) (1964).

23. 49 Stat. 2015.

24. See Olson, *supra* note 15, at 84 n.15, for a listing of foreign aid statutes embodying a cargo preference rule.

25. H.R. Rep. No. 80, 84th Cong., 1st Sess. 3 (1955).

26. 68 Stat. 832 (1954), as amended, 46 U.S.C. § 1241(b) (1964). In his April 1962, directive President Kennedy stressed:

That the purpose of the Cargo Preference Act is to insure that, subject to all provisions of law, U.S. Government-generated cargoes move in privately owned U.S.-flag commercial vessels whenever such vessels are available at fair and reasonable rates. Section 901(b) requires that at least 50 percent of Government cargoes move on U.S.-flag vessels. *This requirement is a minimum, and it shall be the objective of each agency to ship a maximum amount of such cargoes on U.S.-flag vessels.*

S. Rep. No. 2286, 87th Cong., 2d Sess. 44 (1962). [Emphasis added.]

27. See the Agricultural Trade Development and Assistance Act of 1954 (generally referred to as Pub. L. 480), 68 Stat. 455 (1954), as amended, 7 U.S.C. §§ 1701-09, 1721-24 (1964) (Titles I, II); 68 Stat. 459 (1954), as amended, 7 U.S.C. §§ 1692-97 (1964) (Title III); 73 Stat. 610 (1959), as amended, 7 U.S.C. §§ 1731-36 (1964) (Title IV). For an abbreviated description of the coverage of the separate titles of this act see Contribution of Federal Aid to Trade, app. 2, at 15.

28. During fiscal 1963 loan shipments exceeded grant shipments for the first time in the history of the United States foreign aid program. "The changing emphasis of the AID program from grant to loan was clearly marked by the 'falling off' of grant shipments from the U.S. from the FY 1962 total of 4.7 million tons to FY 1963's 2.2 million tons. This change was most evident in the liner category which fell from 3.46 million tons to 1.44 million tons. The 'loss' was taken up by loans . . ." AID, Cargo Preference Report, AID Financed Shipments 2 (1963).

Cargo Preference Act and repeat the fifty per cent rule expressed in the statute.²⁹ The act requires AID to "take such steps as may be necessary and practicable" to assure that the fifty per cent rule is carried out. AID in turn places upon the borrower or grantee country the responsibility of assuring compliance with the cargo preference requirements.³⁰ A borrower or grantee may receive a waiver of these requirements if AID is satisfied that a United States flag vessel is not available, or not available at fair and reasonable rates, for a particular shipment.³¹ The waiver enables the shipper to employ a foreign flag vessel, but AID will not finance the shipping costs as it would in the case of a United States flag vessel.³²

The fact that AID will not finance delivery services aboard foreign flag vessels has resulted in the use of United States flag vessels considerably in excess of the minimum fifty per cent requirement.³³ If a particular trade is undertonnaged with the United States flag vessels, AID may grant to the recipient country a complete waiver of the requirements of the Cargo Preference Act. In such cases the aid recipient must use its own foreign exchange reserves to finance ocean transportation unless there are available carriers that will accept freight charges in local currency.

Department of Defense Shipments. The first cargo preference statute of the United States provided that ocean transportation of Army and Navy "coal, provisions, fodder, or supplies" must be on United States vessels.³⁴ This statute survives—albeit in modernized form.³⁵

29. 22 C.F.R. § 201.15(a) (Supp. 1965). The requirement applies separately for any dry bulk carrier shipments (tramps), dry cargo liner shipments, and tanker shipments from the United States, Europe and Africa, Near East and South Asia, Latin America and Canada, and the Far East.

30. Compliance is to be achieved during each United States fiscal year "as well as each quarterly period thereof." 22 C.F.R. § 201.15(a) (Supp. 1965).

31. *Ibid.* Senator Douglas's Joint Economic Committee has taken AID to task for having failed to make any statutory determination whether U.S.-flag liner rates are fair and reasonable in light of what the Committee found to be the inflationary effect of the United States cargo preference laws. Joint Economic Comm., *Discriminatory Ocean Freight Rates and the Balance of Payments*, S. Rep. No. 1, 89th Cong., 1st Sess. 36 (1965) [hereinafter cited as Douglas Report]. See AID's response in *Hearings Before the Subcommittee on Federal Procurement and Regulation of the Joint Economic Committee*, 89th Cong., 1st Sess. 79-90 (1965).

32. 22 C.F.R. § 201.15(c) (Supp. 1965).

33. AID, *supra* note 28, at 4.

34. 33 Stat. 518 (1904).

35. 70A Stat. 146 (1956), 10 U.S.C. § 2631 (1964), which states,

Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons.

Exclusive use of United States flag vessels is required for shipping "supplies owned by the Government and in the possession of a Military Department, or of a contractor, or subcontractor of any tier of a Military Department" and that are for use of a military department.³⁶ With respect to "supplies for the use of the United States which are contracted for and require subsequent delivery to a Military Department but are not owned by the Government at the time of shipment," private United States vessels (if available at fair and reasonable rates) must be employed to transport at least fifty per cent of the aggregate gross tonnage per annum (computed separately for dry bulk carriers, dry cargo liners, and tankers).³⁷

Impact of Cargo Preference Laws on United States Shipping

The Maritime Administration reported in 1964 that operators of United States flag vessels depend upon cargoes subject to preference rules for a major portion of their revenues.³⁸ In this the shipping industry concurs.³⁹

In 1962, federal aid programs (excluding Eximbank financed movements and military assistance) represented only about seven per cent of the total volume (import and export) of the United States ocean-borne trade.⁴⁰ Out of this seven per cent of total import and export volume, however, government-sponsored aid⁴¹ comprised approximately forty-six per cent of the total cargoes carried outbound and inbound by all United States flag ships in 1962.⁴² If defense shipments were included, the percentage would rise to fifty-five per cent, and the portion of total United States ocean-borne trade carried by United States flag vessels would be about nine per cent.⁴³

The Maritime Administration reports that, during the calendar year 1963, 57.8 per cent of the export cargoes sponsored by AID, Department of Agriculture, and the Inter-American Development Bank moved aboard United States

36. Armed Services Procurement Regs. ¶ 1-1402(i)(A)(ii) (1963).

37. Armed Services Procurement Regs. ¶ 1-1402(i)(B) (1963). See S. Rep. No. 871, 88th Cong., 2d Sess. 7 (1964). Another form of statutory cargo preference is found in 76 Stat. 1074 (1962), 46 U.S.C. § 1122b(a) (1964):

The Secretary of Commerce shall encourage and promote the development and use of mobile trade fairs which are designed to show and sell the products of United States business and agriculture at foreign ports and at other commercial centers throughout the world where the operator or operators of the mobile trade fairs exclusively use United States flag vessels and aircraft in the transportation of their exhibits.

38. Contribution of Federal Aid to Trade 2.

39. Journal of Commerce, Dec. 31, 1964, p. 9, col. 7: "[I]t is pointed out by industry members that over half of the freight carried in American flag vessels, including berth liners, is Government generated aid cargo . . ." See also Committee of American Steamship Lines, U.S. Cargo Preference, Should the United States Government or Foreign Interests Control the Routing of United States Government Generated Cargo? 16-21 (1965).

40. In 1959 the ratio was 4.6%. Contribution of Federal Aid to Trade 4-5. According to Federal Maritime Commission Chairman Harlee the ratio was down to 6% in 1964-1965. Journal of Commerce, Sept. 3, 1965, p. 11, col. 1.

41. Included are movements for the account of the Dep't of Agriculture, AID, Bureau of Public Roads, and the General Services Administration. Excluded are movements financed by the Export-Import Bank. Contribution of Federal Aid to Trade 5, at table 1 n.2.

42. *Id.* at 4. This figure includes tonnages carried in liners, tramps, and tankers. In 1959 the ratio was 25%. *Id.* at 2.

43. *Id.* at 4.

flag vessels.⁴⁴ As to exports financed or administered by AID alone, the total United States flag portion was seventy-five per cent in 1963⁴⁵ and seventy-seven per cent in 1964.⁴⁶

Without government aid and defense shipping programs, the United States flag tramp and tanker operators could not stay in business. In 1962, government aid and defense cargoes comprised ninety-six per cent of the total exports carried by United States flag ships in tramp trades and seventy-four per cent of the total exports carried by the United States flag tankers.⁴⁷

Cargo Preference Laws of Other Major Maritime Countries

The laws of the United States requiring use of United States flag vessels in various foreign aid programs and other government-sponsored activities are unique as are the programs to which they are attached. Other major maritime countries that do not have the massive foreign aid commitments of the United States (and whose merchant marines operate at comparatively lower costs) do not generally restrict by law the carriage of government-sponsored or financed cargoes. In a Maritime Administration summary of shipping subsidies by other major maritime countries, only France was reported to have a statutory cargo preference, which required two-thirds of France's crude oil imports to be carried in French ships or via charter parties approved by the government.⁴⁸ The need for cargo preference laws in other major maritime countries is less

44. Letter from Nicholas Johnson, Maritime Administrator, to Senator Warren G. Magnuson, Sept. 25, 1963, on file at the Maritime Administration.

45. *Ibid.* See generally AID, *supra* note 28, for a breakdown of AID and Pub. L. 480 shipments for fiscal 1963. The percentages are well in excess of the required minimum. In fiscal 1963 United States liners refused 276,000 tons of AID cargoes which presumably moved aboard foreign flag vessels. *Id.* at table 1 n.4.

46. Office of Material Resources, Resources Transp. Div., AID, Cargo Preference Report 2 (1964).

47. Contribution of Federal Aid to Trade 4-5. United States Flag liners, which in many cases received operating subsidies, relied on aid cargoes for about half of their liftings during 1962. *Ibid.*

48. Subsidies to Shipping by Eleven Countries 5, 9. Countries reported on were Denmark, Federal Republic of Germany, France, Greece, Italy, Japan, Netherlands, Norway, Sweden, United Kingdom, and the United States. *But see* Committee of American Steamship Lines, *supra* note 39, at 3-4:

Nations with maritime-centered economies, including but not limited to insular powers such as Great Britain and Japan, must espouse the open sea lane as a trading image before the world and restrain themselves from restrictive legislation. However, they possess an even more powerful weapon in the nationalistic influence which emanates from an economy directly wedded to world shipping. In such countries the strength of the nation, the livelihood of the people, the health of industrial enterprise, and even the preservation of basic institutions is interwoven with the urgent need to support expansive maritime interests.

acute because of the relatively large percentage of their foreign trade carried by national flag ships as compared to the United States.⁴⁹

In communist countries, a state agency replaces the private importer and exporter. Control of cargo routing is maintained by exporting c.i.f. or c. & f., and importing f.o.b. This enables the state to designate the carrier; naturally, vessels of the communist bloc are preferred.

Criticism of United States Cargo Preference

The major maritime countries are the most vociferous opponents of United States cargo preference; the Maritime Administration, however, stresses that in 1962 foreign flag ships were able to compete for ninety-six per cent of the tonnage that moved in the import and export trade of the United States and that they actually carried over ninety per cent.⁵⁰ Foreign shipping interests nevertheless object strongly to the United States cargo preference laws, arguing that such policies set a bad example that ultimately may destroy free competition in international shipping.⁵¹

A report recently submitted to the Inter-American Bar Association suggests that any restrictive flag quota violates Article XI of the General Agreement

49. It is also interesting to note the percentage of the total United States ocean-borne trade (import and export) carried by these foreign flag ships:

Flag of Vessel	Per cent of own country's ocean-borne foreign trade (import and export)		Per cent of U. S. ocean- borne foreign trade (import and export)	
			1962	1964
Denmark	23	(1963)	1.8	1.5
France	59	(1962)	Not reported	1.2
West Germany	37	(1962)	3.3	3.3
Greece	47	(1963)	6.8	4.9
Italy	33	(1962)	3.8	4.7
Japan	46	(1962)	2.9	3.1
Netherlands	16	(1963)	3.1	2.3
Norway	43*	(1962)	16.0	16.6
Sweden	33	(1963)	2.5	2.6
United Kingdom	52**	(1962)	7.3	7.2
United States			8.9	8.3

*Excludes Swedish iron ore exported through Narvik. The ratio was 28% including ore shipment.

**Net tonnage of vessels with cargo.

This chart is compiled from Subsidies to Shipping by Eleven Countries 9; Contribution of Federal Aid to Trade 4; and Maritime Administration, U.S. Dep't of Commerce, Participation of Merchant Ships, By Flag of Registry, in the Commercial Oceanborne Foreign Trade of the United States, By Type of Service, Aug. 19, 1965, p. 1.

It should be noted that the percentages of total cargoes carried by American flag vessels take into account all vessel categories—liner, tramp, and tanker. If cargo in the liner category is considered separately, the statistics would indicate that approximately 30% of such cargo moves on United States flag ocean liners. See Contributions of Federal Aid to Trade 4. See also Committee of American Steamship Lines, Facts About Our American Merchant Marine 28 (1964). As noted above, about half of that 30% is United States Government sponsored or financed. The industry prefers to state the United States flag liner portions as 37% based on revenues rather than tonnage. See *e.g.*, Committee of American Steamship Lines, *supra* note 39, at 21.

50. Contribution of Federal Aid to Trade 4.

51. 1963-1964 Joint Hearings, pt. 5, at 1247-48.

on Tariffs and Trade (GATT),⁵² as well as the spirit of many bilateral treaties of friendship, commerce, and navigation.⁵³

Rumblings within the United States Congress and the Administration indicate that statutory cargo preference is due for critical analysis. In his State of the Union Message delivered to Congress on January 4, 1965, President Johnson promised a "new policy for the merchant marine."⁵⁴ An Interagency Maritime Task Force was established to study the problems of United States merchant shipping and to recommend modifications of existing government-supported maritime programs. The Task Force report was "leaked" to the press in September 1965, before being submitted to the President's Maritime Advisory Committee. It called for a complete overhaul of United States policy, including major revisions of labor policies, operating and construction subsidies, and the gradual elimination of cargo preference with respect to liners as well as bulk carriers.⁵⁵ Bitter opposition to the recommendations developed among United States flag operators and leaders of maritime labor. The leak of the "unofficial" report may well have been an Administration trial balloon to gauge public response before committing itself to a definite program. If so, the balloon exploded. The Maritime Advisory Committee, composed of non-government representatives of shipping management and labor and the general public, refused to accept the recommendations and announced it would submit its own proposals to the President.⁵⁶

The Joint Economic Committee, headed by Senator Paul Douglas, likewise has criticized United States cargo preference, but for its administration rather than its underlying policies. The Committee suggested that the harmful infla-

52. Report on Law of the Flag and Labor Relations 9. Art. XI of GATT, 61 Stat. pt. 5, A32-A33 (1947), T.I.A.S. No. 1700, reads in part:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

53. Report on the Law of the Flag and Labor Relations 11.

54. 111 Cong. Rec. 29 (daily ed. Jan. 4, 1965). For example, cargoes generated by the United States cargo preference laws represent the only form of government subsidy received by operators of United States flag bulk carriers. In this respect the Maritime Administrator has termed cargo preference a "miserable failure" due to the lack of provisions for replacement of obsolescent tonnage and the cost to the United States of \$80 million a year in payment of non-competitive bulk freight rates. Address by Nicholas Johnson to National Security Commission of the American Legion, in Washington, D.C., March 30, 1965. The industry takes a different view: "That cargo preference has not succeeded further in developing a competitive fleet stems not from the laws but from failures in their administration." Statement by Max Harrison, President of the American Maritime Ass'n, *Journal of Commerce*, Oct. 13, 1965, p. 4A, col. 5.

55. Interagency Maritime Task Force, *The Merchant Marine in National Defense and Trade—A Policy and a Program*, Oct. 4, 1965.

56. *Wall Street Journal*, Oct. 11, 1965, p. 8, col. 3.

tionary effects of higher freight rates seemingly generated by the cargo preference laws may outweigh the benefits to the American merchant marine and balance of payments.⁵⁷

It is unlikely that Congress will in the foreseeable future repeal any of the cargo preference laws regarded as "this eminently fair '50 per cent for you, 50 per cent for me' policy" by the highly persuasive shipping industry lobby⁵⁸ and by maritime labor groups.

Retaliatory Devices Employed Against Flag Discrimination

Closely related to the concept of governmental promotion are the various means of protecting a national merchant marine from foreign discrimination. Here again the United States has assumed the leading role with a variation on the "big stick" policy. Below are described the means of combating discrimination in international shipping. Specific instances of United States use of these weapons are outlined in the next major section.

Retaliatory Devices Used by the United States

Initially, relief from alleged discrimination against the United States flag vessels is sought through diplomatic negotiation. If the discriminating government participates in Eximbank credits, however, general waivers of P.R. 17 may be denied pending restoration of "parity of treatment" to United States flag vessels. Failing a solution at the conference table, and if denial of P.R. 17 waivers has no remedial effect, the United States, through the Federal Maritime Commission (FMC), may resort to a power granted by section 19(1)(b) of the Merchant Marine Act of 1920, whereby the FMC is authorized

To make rules and regulations affecting shipping in the foreign trade not in conflict with law in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally, and which arise out of or result from foreign laws, rules, or regulations or from other competitive methods or practices employed by owners, operators, agents or masters of vessels of a foreign country. . . .⁵⁹

The FMC and its predecessors have issued offsetting regulations pursuant to the statute only twice since the date of its enactment.⁶⁰

In 1960, the Federal Maritime Board (now Commission) first adopted gen-

57. Douglas Report 33.

58. Committee of American Steamship Lines, *supra* note 49, at 28. See also the Committee of American Steamship Lines's latest and most comprehensive defense of cargo preference, *supra* note 39.

59. 41 Stat. 995 (1920), as amended, 46 U.S.C. § 876(1)(b) (1964). See also § 26 of the Shipping Act of 1916, 39 Stat. 737, as amended, 46 U.S.C. § 825 (1964), which requires the FMC to investigate and report to the President any foreign discrimination against United States vessels. If the President cannot reach a solution via diplomatic action, he is to advise Congress "if deemed important in the public interest, in order that proper action may be taken thereon."

60. See text at notes 114-20 *infra* for a complete discussion.

eral regulations dealing with foreign government discrimination against United States vessels.⁶¹ To the extent discriminatory fees and charges are imposed on United States flag vessels by a foreign government, the United States will impose offsetting fees and charges on the vessels favored by the discriminating foreign government.⁶² Also, if "other discriminatory practices" exist against United States flag vessels, appropriate offsetting regulations will be imposed.⁶³

As one of the results of the 1964 shakeup catalyzed by Senator Paul Douglas and the Joint Economic Committee, the FMC has promised an active role in ferreting out and eliminating foreign discriminations against American flag ships.⁶⁴ The FMC's new found boldness derives from four years of congressional investigation and criticism that concluded that the predecessors of the present Commission had not discharged their statutory responsibilities.⁶⁵ The "new" Commission is trying very hard to remove this stigma and is assuming a militant pose for the benefit of its critics.

A detailed statement approved by the Commission on March 9, 1964, announced the establishment of an Office of International Affairs charged with keeping an eye on foreign discriminations.⁶⁶ The Commission listed various forms of discrimination that might call for remedial action pursuant to section 19(1)(b) of the Merchant Marine Act of 1920:

- (1) Lower port dues and charges for national flag vessels;
- (2) Preference in berthing given to national flag ships;
- (3) Ship taxes remitted or reduced for national flag ships;
- (4) Steamship lines must employ special brokers for entering and clearing ships—national-flag carriers exempt;⁶⁷
- (5) Government

61. 46 C.F.R. §§ 506.1-506.3 (Supp. 1965).

62. 46 C.F.R. § 506.2 (Supp. 1965).

63. 46 C.F.R. § 506.3 (Supp. 1965).

64. This agency is . . . energetically engaged in the removal of foreign discriminations against our merchant marine which have the effect of reducing its revenues, thereby reducing the dollars earned by these companies which would otherwise contribute to a favorable balance-of-payments position.

Letter from FMC Chairman Harllee to President Johnson, May 20, 1964, on file at the Federal Maritime Commission.

65. Douglas Report 20. "For a period of almost 45 years, lethargy and indifference have characterized its attitude, laxity and inefficiency its procedures, and frustration and ineffectiveness its administration of the regulatory features of the shipping acts." Celler Report 359-60.

66. FMC, The Program of the Federal Maritime Commission—Priorities and Objectives, in 1964 House Hearings 730, 753.

67. This is a reference to a requirement in French ports dating from 1610 requiring vessels other than those of French registry to employ *courtiers maritime* (maritime brokers or agents) for entrance, clearance, translation of documents, and other associated services. Use of such brokers is not compulsory with French ships. United States ship operators have objected to the practice as unnecessary and expensive. It is also felt that the use of these brokers could aid competitors in gaining confidential shipping information. The United States Government has objected rather mildly to this practice. Senate Comm. on Commerce, 87th Cong., 2d Sess., Discriminatory Practices and Laws of Foreign Nations Adversely Affecting

assesses a surcharge against goods when shipped on a foreign-flag ship but not if shipped via national flag; (6) All cargo required to be booked through a Government board or agency—opportunity to favor national-flag carriers; (7) All purchases of certain imports required to be made through a Government agency—such goods then routed via national flag under the guise of “Government cargo”; (8) Special benefits given by Government such as remission of import duties or granting of favorable rate of exchange on condition that shipment is made by national-flag carrier; and (9) A specified percentage of a country’s foreign trade is reserved for carriage by national-flag vessels—implemented by import and export licenses and permits.⁶⁸

As a practical matter, no action is likely to be taken under section 19(1)(b) in response to discrimination unless the Commission receives a complaint from an American flag carrier.

Singled out as the most harmful discriminations are “those which artificially divert cargoes to national-flag carriers and prevent U.S. flag carriers from freely participating in the carriage of goods”⁶⁹—a somewhat paradoxical statement since the effect of the United States cargo preference laws is to artificially divert cargoes to national flag carriers and prevent non-United States flag carriers from freely participating in the carriage of the diverted goods. The point is often stressed that reservation of cargoes to vessels of the United States applies only to non-commercial cargoes that “would not exist except as purchases for account of the United States, or as aid or United States financed cargoes, with ‘financing’ oftentimes approaching the outright gift category.”⁷⁰ However, AID points out in its Cargo Preference Report for fiscal 1963 that loan shipments now represent the largest portion of our foreign assistance program.⁷¹ Moreover, the United States has extended the application of fifty-five cargo preferences to commercial wheat sales to the Soviet Union and other Iron Curtain countries.⁷² This concession was granted by President Kennedy under pressure from maritime labor groups and has been a source of irritation to United States wheat dealers who claim the high cost of shipping wheat via United States flag vessels has precluded them from supplying this market. In October 1965, after two days of hearings, a majority of the members of the Senate Foreign Relations Committee urged President Johnson to remove the restriction.⁷³

United States Flag Shipping (Comm. Print 1962). See also Subsidies to Shipping by Eleven Countries 9 n.10.

68. 1964 House Hearings 753-54.

69. *Id.* at 754.

70. S. Rep. No. 2286, 87th Cong., 2d Sess. 1 (1962).

71. AID, *supra* note 28, at 2. Grant shipments dropped over 50% from fiscal 1962 to 1963. The shift from grant to loan cargo is played down in AID’s report covering fiscal 1964 where in it is observed, “Cargo is cargo from the ship’s point of view.” AID, Cargo Preference Report 1 (1964). It is perhaps becoming increasingly difficult for the United States to defend cargo preference on the “gift” theory.

72. 15 C.F.R. § 373.5(b)(3) (Supp. 1965).

73. Letter from Senate Foreign Relations Committee to President Johnson, Oct. 7, 1965.

European Reaction

In sharp contrast to the United States where regulation of ocean trade has been well established for nearly fifty years, European countries have been reluctant to interfere with international shipping. However, European ship-owners facing the possibility of a constricted market due to the spread of cargo preference and other forms of flag discrimination are now demanding countermeasures in the form of government sanctions against ships of the discriminating nations.⁷⁴ European governments are reluctant to initiate retaliatory action possibly because they fear the effects of such a response on their over-all trade.

Nevertheless, some limited steps have been taken by European governments to control discrimination against their vessels. For example, Germany and Italy restrict use by their nationals of ships of countries that discriminate against German or Italian ships.⁷⁵ A seldom, if ever, used British statute (dating to the nineteenth century) authorizes the Sovereign to retaliate when British ships are subjected to discrimination in foreign ports and to impose countervailing duties against ships of a country that exacts like penalties from British ships.⁷⁶ A recently promulgated French decree authorizes the government to retaliate in answer to discriminatory measures instituted by a nation against the French flag.⁷⁷ Although none of these measures has yet to be enforced effectively, European maritime nations have thereby served notice to developing countries with maritime ambitions that there is a point beyond which flag discrimination will not be tolerated. The United States has already given clear indication of its limited patience with discriminatory cargo preference systems; in doing so, however, it is finding its own preferences increasingly difficult to defend.

Cargo Preference Laws and Policies of Foreign Governments and the Response of the United States

The following examples illustrate devices employed by foreign governments to promote use of their national merchant marines; these devices have been found by the United States to be discriminatory to its shipping interests.

The Brazil Case

Import Trade from the United States. On April 24, 1959, the Brazilian Su-

74. European Shipowners, Memorandum on European Ministers' March 1963 Resolution, in 1964 *House Hearings* 47.

75. Subsidies to Shipping by Eleven Countries 11, 14.

76. Customs Consolidation Act 1853, 16 & 17 Vict. c. 107, §§ 324-25.

77. *Ministres Des Travaux Publics et Des Transports*, Decret No. 65-612 du 22 Juillet 1965, *Journal Officiel* du 28 Juillet 1965, p. 6601.

perintendency of Money and Credit published an instruction (designated SUMOC 181) that stressed the importance of conserving foreign exchange. Pursuant to this instruction, the government subsidized the importation of goods essential to the Brazilian economy by granting preferential exchange rates to its importers.⁷⁸ The Brazilian Government assured cargo to its national flag line by requiring importers utilizing the favorable exchange rates to specify shipment aboard vessels of the national flag. An exception was allowed for shipments subject to United States cargo preference, but there was no provision whereby United States flag carriers could compete for cargoes that were purchased in the United States with Brazilian government foreign exchange subsidies, but were not subject to United States cargo preference laws.

On November 12, 1959, the President of Brazil issued Decree No. 47.225, which required that imports financed or otherwise subject to "government favors" be shipped aboard vessels of the Brazilian flag unless a waiver of that requirement was first secured from the Brazilian Merchant Marine Commission.⁷⁹

At the time of this decree, only two United States flag liner services were operating in the southbound trade from the United States to Brazil: Moore-McCormack Lines, Inc. (Mooremack) from Atlantic ports, and Delta Steamship Lines, Inc. (Delta) from Gulf coast ports. Both lines protested SUMOC 181, alleging artificial diversion of cargo to Lloyd Brasileiro. They objected also to Decree No. 47.225 since a waiver by Lloyd of restricted cargo to be shipped from the United States was not necessarily in favor of a United States flag vessel, but was a general waiver that permitted the shipper or importer to select a vessel of any registry.

Pending clarification of Brazil's intention vis-a-vis United States flag vessels, general waivers of P.R. 17 were withheld by the Maritime Administration.⁸⁰ Representatives of the American shipping lines began negotiations with Lloyd and representatives of the Brazilian Government, attempting to persuade Brazil to amend SUMOC 181 to embody an equivalent of the general waiver policy of the United States under P.R. 17.⁸¹ However, the Brazilians concluded SUMOC 181 would not be amended to provide the sort of "reciprocity" desired by the American flag lines (and apparently encouraged

78. The instruction is reprinted in translation in *Initial Decision, River Plate and Brazil Conferences v. Lloyd Brasileiro*, FMC Docket Nos. 921, 928, Exhibit 3B, Aug. 6, 1964, as adopted by the FMC, May 25, 1965 [hereinafter cited as *Initial Decision*].

79. See *Initial Decision* at 7. For purposes of this decree, ships chartered by Brazilian firms in accordance with the provisions of the decree were to be considered ships of the Brazilian flag. The same was true of SUMOC 181.

80. *Initial Decision* at 7.

81. In a letter to Chairman Stakem of the FMB (now FMC) dated June 18, 1959, filed as Exhibit B in FMC Docket Nos. 921, 928, officers of Mooremack and Delta who had been negotiating with the Brazilian Government and Lloyd reported:

It is further understood and tentatively agreed that the Brazilian Government will amend SUMOC Instruction 181 to provide that all Brazilian subsidized cargoes shall be transported in Brazilian flag vessels, except that waiver will be granted (by the Brazilian Government) to vessels of the flag of the participating nations, enabling such vessels to participate in up to 50 percent of such movements.

by the Department of State). Moreover, the Brazilians perceived no bargain in the suggestion that they parallel P.R. 17 since they controlled or influenced far more cargo through their exchange subsidy program than they stood to lose as a result of not being eligible for the carriage of Eximbank cargoes.

Failing a governmental solution, Lloyd and Mooremack negotiated a pooling agreement to relieve the alleged discriminatory effect of SUMOC 181 and its related decrees. Delta participated in the negotiations, but could not come to terms with Lloyd. On October 15, 1960, Lloyd and Mooremack executed the agreement and submitted it to the Federal Maritime Board for approval pursuant to section 15 of the Shipping Act of 1916.⁸²

Generally, the agreement covered the pooling of revenue on

All cargoes that [Lloyd and Mooremack] carry imported into Brazil and transported [by the parties on owned or chartered vessels from any port or point on the Atlantic Coast of the United States from Maine to Key West inclusive, and destined to any port or point in Brazil], whether controlled and subsidized, or commercial cargoes.⁸³

The carriers also pledged themselves to do everything possible through appropriate channels of their governments (1) to assure that Mooremack carried those cargoes that could not be carried by Lloyd and (2) to assure that Lloyd carried those cargoes that could not be carried by Mooremack.⁸⁴

On May 21, 1962, nineteen months after the execution of the Lloyd-Mooremack pooling agreement, the Brazilian Merchant Marine Commission issued Resolution No. 2216, which established a priority system for carriage to Brazil of commodities from the United States. Shipment was to be made aboard Brazilian flag vessels if available. If none were available, then shipment was to be made aboard a United States flag vessel; only in cases where there was

82. 39 Stat. 733, as amended, 46 U.S.C. § 814 (1964). Section 15 of the Shipping Act provides machinery for legalizing anticompetitive agreements between carriers which agreements would ordinarily be illegal under the antitrust laws of the United States. See *Isbrandtsen Co. v. United States*, 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954). Pursuant to § 15, a common carrier by water must file immediately with the FMC a copy of every agreement with another carrier which provides, *inter alia*, for the fixing or regulation of transportation rates or fares; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses or traffic; or in any manner providing for an exclusive, preferential, or cooperative working agreement. If, after notice and hearing, the FMC finds the agreement to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, the agreement will be disapproved by the Commission. However, if the agreement is not objectionable on any of the aforementioned grounds, it must be approved by the Commission. Only after express approval may the matters agreed upon be implemented. 46 C.F.R. § 522.4 (Supp. 1965).

83. Agreement No. 8545 art. 2, in Initial Decision at 4.

84. Agreement No. 8545 art. 5, in Initial Decision at 5.

neither a Brazilian nor an American vessel available could shipment be made aboard a ship of a third nationality.⁸⁵

The revised policy of the Brazilian Government was not the equivalent of the United States Maritime Administration's interpretation of P.R. 17; the latter allows the recipient nation's vessels to carry up to fifty per cent of the cargoes financed by Eximbank.⁸⁶ The Brazilian concession was not entirely satisfactory to the United States; but coupled with the Lloyd-Mooremack pooling agreement, the Maritime Administration and the Department of State were willing to accept the compromise pending future objections by United States flag carriers.⁸⁷ Delta, although not a party to the pooling agreement, received the benefit of any waiver of cargo by Lloyd to United States flag vessels at United States Gulf ports.

Competing "third flag" shipping lines with ships registered elsewhere than the United States or Brazil (and members of the River Plate and Brazil Conferences to which both Lloyd and Mooremack belong) did not take such a philosophical view of the pooling agreement and brought action against the two "national flag" carriers before the FMC.⁸⁸ Among other things, the third flag carriers argued that the pooling agreement was designed to drive them from the trade by depriving them of cargo—particularly since the agreement covered not only government-controlled cargo, but also commercial cargo that would be jointly solicited by the national flag lines. The complainants did not quarrel with the right of nations to control the routing of noncommercial cargo.

The Commission found that the provisions of the pooling agreement calling for joint solicitation of commercial cargo by Lloyd and Mooremack (which cargo comprised about sixty-five per cent of the total trade) rendered the agreement subject to disapproval.⁸⁹ It was indicated, however, that if commercial

85. Initial Decision at 7.

86. The unreserved 50% of AID or Pub. L. 480 cargoes may be transported on a vessel of any registry (except Sino-Soviet bloc), and in cases where United States flag vessels are not available for reserved cargoes, waivers may be obtained to transport such cargo via foreign flag. In such instances, AID will usually prefer to issue such a waiver in favor of the recipient country's vessels. Olson, *Cargo Preference and the American Merchant Marine*, 25 *Law & Contemp. Prob.* 82, 99 (1960). Neither the Cargo Preference Act, 68 Stat. 832 (1954), as amended, 46 U.S.C. § 1241(b) (1964), nor AID regulations require "parity of treatment" for United States flag vessels before granting waivers for shipment via foreign flag vessels.

87. The Maritime Administration reported to Congress that

[T]here has been a complete revamping of Lloyd Brasileiro recently. In the light thereof and the fact that the pooling agreement, if approved, would, in the opinion of the United States operator represent a solution to the shipping problem no further action would seem to be required at this time.

Letter from Donald W. Alexander, Maritime Administrator, to Senator Warren G. Magnuson, March 7, 1962 (enclosure).

88. *River Plate and Brazil Conferences v. Lloyd Brasileiro*, FMC Docket No. 921. The proceedings were consolidated with FMC Docket No. 928 which had been instituted by the FMC to examine Agreement No. 8545. Delta S.S. Lines, Inc., the Board of Commissioners of the Port of New Orleans, and the Mississippi Valley Association intervened to protest the diversion of cargo from Gulf to Atlantic ports which, they alleged, would be the consequence of the Lloyd-Mooremack pool.

89. Initial Decision at 16.

cargo were eliminated from the scope of the agreement, it would be approved by the Commission. With respect to the admission of "third flag" carriers to the pool, it was observed candidly: "Third flag carriers cannot be of the same value to Lloyd as can Mooremack under the policies of Public Resolution No. 17."⁹⁰

Export Trade to the United States—The Coffee Pool. Prior to 1959, rate cutting and secret rebates characterized the coffee trade between Brazil and the United States. The conference serving the trade devised a pooling agreement⁹¹ to stabilize the situation. Generally, the agreement allotted certain percentages of the trade to the pool members, required certain minimum sailing schedules, and provided that, to the extent a participant carried more than its allotted share of coffee, it would make certain payments to the "pool" that would then be paid to any participants who undercarried their share during the applicable period. Not all conference members were represented in the pool—particularly Northern Pan-America Line (Nopal), which eschewed the pool because of the low percentage allocation it was offered relative to its past liftings.

Carriers participating in the coffee trade were generally regarded by the conference as either "national flag" or "third flag" carriers. A carrier was considered "national flag" if it flew the flag of the country of origin or destination of the coffee (Brazil or the United States), or if the carrier was a government-owned line of a South American country within the conference trading limits (Brazil, Uruguay, or Argentina). Nopal operates Norwegian flag vessels and was therefore considered a "third flag" carrier.⁹²

After Nopal's refusal to join the first pool, it continued lifting coffee at Brazilian ports. On October 13, 1960, the Brazilian Superintendency of Money and Credit issued a decree designated SUMOC 202 that restricted to members of the conference and to signatories of accords or agreements within the conference, the shipping of Brazilian export products destined for the United States or Canada.⁹³ In short, Nopal would be banned from the Brazilian coffee trade unless it joined the pool. Nopal began negotiations with pool members over terms of entry. Lloyd Brasileiro refused to accept a lesser allocation than Nopal even

90. *Id.* at 19.

91. See Northern Pan-American Line v. Moore-McCormack Lines, Inc., FMC Docket No. 1096, July 20, 1964. Actually these were separate pools for carriers serving United States Atlantic ports and United States Gulf ports. The controversy centered around the Gulf pool, but members of the Atlantic pool intervened.

92. Nopal was the only "third flag" line in the Gulf pool, and "third flag" members of the Atlantic pool were Brodin Line (Swedish), Columbus Line (West German), Ivaran Lines (Norwegian), Holland Pan-American Line (Dutch), and Norton Line (Swedish).

93. Report of the Commission, Northern Pan-American Line v. Moore-McCormack Lines, Inc., FMC Docket No. 1096, July 20, 1964, p. 10 (transl.).

though Lloyd could not match Nopal's lifting capacity. Lloyd held the trump card as well as the aces since without Lloyd there could be no deal.

Delta Steamship Company (United States flag) proposed that allocation of percentages be based on "previous experience over a representative number of years, with due weight to pioneering effort" and national interest, meaning that Lloyd, "as an instrument of policy of the Brazilian Government, should receive special consideration on the basis of both national interest as well as its position as the oldest carrier in the trade."⁹⁴

Final "negotiations" resulted in equal allotments to Lloyd and Nopal. Nopal was not satisfied with this allotment, but decided to wait until August 29, 1962, when the agreement expired and the percentages and minimum sailings would "be subject to review and adjustment taking into consideration the service and carryings during the past two (2) year period."⁹⁵ However, the effective period of the agreement was extended (with Nopal's reluctant consent) to February 28, 1963.

When the carrier representatives met in early 1963 to discuss coffee allocations, Nopal proved that its coffee carryings during the period of the agreement exceeded its allotment and that it made payments into the pool. Delta also contributed an excess. Lloyd was the chief beneficiary of those payments since it carried the smallest percentage of the coffee and considerably less than its allotment. Nopal argued the figures clearly entitled them to a larger share; Lloyd remained adamant that it would not accept a lesser allocation than Nopal; Delta suggested the parties retain the same quota as under the previous agreement; Nopal objected and was summarily instructed by pool participants to take it or leave it. Because of SUMOC 202, it had to "take it" in order to remain in the trade. Thereafter, the agreement (No. 9040) was filed with the FMC for approval; Nopal filed a complaint alleging the agreement to be unjustly unfair as between carriers in violation of section 15 of the Shipping Act of 1916. Nopal did not object to the Brazilian government policies, nor oppose the principle of pooling embodied in the agreement, but challenged only what it considered an unreasonably low allocation of the trade.

Other "third flag" carriers who were participants in the Atlantic pool intervened in the proceeding in support of Nopal and petitioned for a declaratory order as to whether the FMC could approve a pool designed to accord "(a) preferred status to certain carriers because their vessels fly the flags of either the importing or exporting nation . . . and (b) in relation to those carriers, prejudiced status to certain other carriers because their vessels fly the flags of other nations. . . ."⁹⁶ The Commission held that it could not.⁹⁷

94. *Id.* at 11.

95. *Id.* at 13.

96. *Id.* at 7. According to one report the *Nopal* litigation was "viewed as a test case to determine the extent to which a U.S. regulatory agency would go to protect third flag carriers in a U.S. trade." *Journal of Commerce*, July 23, 1964, p. 24, col. 5.

97. *Id.* at 21-22.

The Commission found the agreement to be unjustly discriminatory in violation of section 15. Its holding was based on the unfair method of cargo allocations *within* the pool and *not on the absolute monopoly in the coffee trade effected by the combination of SUMOC 202 and the pooling agreement.* The Commission indicated that "if the quotas fixed under the agreement were renegotiated and the agreement were modified in a manner not inconsistent with this opinion, we would give further consideration to the matter of approval."⁹⁸

The Brazilian Government was displeased with the Commission's decision in the *Nopal* case was reported to have and threatened to bar third flag carriers from its coffee trade.⁹⁹ In August 1964, Brazil adopted an official policy favoring the Brazilian flag and United States flag lines in the Brazil-United States coffee trade.¹⁰⁰ This would appear to be a windfall for the United States carriers although the FMC reports that third flag carriers are still active in the trade because of insufficient space available aboard United States and Brazilian bottoms.

In the *Nopal* case, the FMC unanimously held that a pooling agreement that allocates percentages of traffic on the basis of flag or national interest is discriminatory as between carriers within the meaning of section 15. The Commission acknowledged itself "bound by the Shipping Act to scrupulously insure that all carriers regardless of flag are accorded equal treatment under the laws we administer."¹⁰¹ In such context, however, the FMC (within its jurisdiction) is bound only to disapprove agreements between two or more national flag carriers that are designed to exclude third flag carriers from competition and that are executed in the absence of any compelling legislation, regulations, or decrees of the United States and the other parent country.¹⁰² This point is illustrated in *River Plate and Brazil Conferences v. Lloyd Brasileiro*¹⁰³ and in the following discussion of the Venezuela case. Pooling agreements between national flag lines were the subject of both of these cases; the results would be entirely inconsistent with the Commission's declaration in

98. *Id.* at 26.

99. *Journal of Commerce*, July 23, 1964, p. 24, col. 5.

100. Merchant Marine Commission of Brazil, Resolution No. 2640, Aug. 28, 1964.

101. Report of the Commission, *Northern Pan-American Line v. Moore-McCormack Lines, Inc.*, FMC Docket No. 1096, July 20, 1964, p. 21.

102. The language of § 19(1)(b) of the Merchant Marine Act of 1920, 41 Stat. 995, as amended, 46 U.S.C. § 876(1)(b) (1964), appears broad enough to empower the FMC to impose offsetting regulations in a case where, for example, a foreign government policy of restriction of cargo to national flag vessels of the United States and the exporting country is injurious to United States importers and detrimental to the commerce of the United States. But the myriad problems of enforcement and adverse effect on foreign relations renders any such use of § 19(1)(b) extremely unlikely. Section 19(1)(b) will continue to be used sparingly and only in cases of discrimination against United States ships.

103. FMC Docket Nos. 921, 928, May 25, 1965.

the *Nopal* case but for the existence of cargo preference laws on the part of both parent countries.

The Venezuela Case

In 1959 the government of Venezuela decreed that commercial companies under contract to any government agency for public works construction include in their contracts a clause requiring materials to be imported aboard vessels of the nationally-owned shipping line, Cia. Anonima Venezolana de Navegacion (CAVN).¹⁰⁴ About six months later, Venezuela increased its control over import transportation, decreeing certain commodities exempt from payment of import duties;¹⁰⁵ this was referred to generally as "exonerated cargo." The initial decree did not attempt to control the shipping of exonerated cargo; but a year later, another decree imposed upon "exonerated cargo" a requirement that it be shipped via CAVN or its associates as a prerequisite to exoneration.¹⁰⁶

The determination of exonerated cargo was discretionary with the Venezuelan Minister of Development. The application for exonerated cargo required the importer to designate the carrier recommended to transport the commodity. A copy of the application was sent to CAVN to inform it of the prospective shipment and to give it opportunity to determine whether it had space available for the cargo. Such a procedure "encouraged" the use of CAVN vessels by shippers and importers and resulted in shippers booking all cargo on CAVN vessels rather than attempting to distinguish exonerated from non-exonerated commodities.

The Maritime Administration determined that United States flag vessels were not being extended "parity of treatment" in the Venezuelan trade and refused to grant general waivers of P.R. 17 to allow CAVN to carry up to fifty per cent of Venezuelan-bound cargoes financed by Eximbank credits. Notwithstanding the objections of the United States, Venezuela extended its import controls in 1961 by requiring that all freight charges upon Venezuelan imports included in an extensive "List of Importations of the Controlled Market" (*i.e.*, subject to import licensing) be paid in Venezuelan currency.¹⁰⁷ Non-Venezuelan carriers were required to collect such freight charges in Venezuela at an exchange rate fixed by the government; United States flag carriers could exchange only a portion of the charges so paid for United States dollars at a relatively unfavorable exchange rate.

Diplomatic pressure was ineffectual. United States maritime authorities drafted retaliatory regulations pursuant to section 19(1) (b) of the Merchant

104. Venezuelan Governmental Circular No. 166, Sept. 28, 1959. See *Alcoa S.S. Co. v. Cia. Anonima Venezolana de Navegacion*, 7 F.M.C. 345, 376-77 (1962), *aff'd sub nom. Alcoa S.S. Co. v. FMC*, 321 F.2d 756 (D.C. Cir. 1963).

105. Venezuelan Exec. Decree No. 255, March 18, 1960. See *Alcoa*, *supra* note 104, at 376-77.

106. Venezuelan Ministry of Development Decree No. 331, Feb. 9, 1961. See *Alcoa*, 7 F.M.C. 345, 376-77 (1962), *aff'd sub nom. Alcoa S.S. Co. v. FMC*, 321 F.2d 756 (D.C. Cir. 1963).

107. Venezuelan Governmental Decree No. 480, March 17, 1961; Venezuelan Governmental Decree No. 492, April 6, 1961. See *Alcoa*, *supra* note 106, at 376-77.

Marine Act of 1920. These regulations were never published in the Federal Register, but were delivered via diplomatic channels in hopes of reaching an accord. The regulations listed the Federal Maritime Board's findings that the exoneration decrees foreclosed United States flag and other vessels from competing for cargo subject to exoneration and that the currency controls arbitrarily deprived exporters from the United States of control of the routing of the items on the controlled market list.

The threatened sanctions produced quick action culminating in a pooling agreement between CAVN and Grace Line, Inc.—the only United States flag carrier serving the Venezuelan trade from United States Atlantic and Gulf ports. The agreement, in effect, made Grace an "associate" of CAVN, thereby making Grace eligible for carriage of "exonerated" cargo. This, in the eyes of the United States maritime authorities, restored "parity of treatment" to United States flag vessels (Grace being the sole American carrier affected by the decrees) and re-established CAVN's eligibility for P. R. 17 waivers.

When submitted to the FMC for approval, the agreement was challenged by operators of "third flag" vessels on the ground that the Grace-CAVN pool would divert non-exonerated cargo from their vessels as well as the exonerated cargo and cargoes subject to import licensing.¹⁰⁸ [The agreement merely permitted Grace equal access to exonerated cargo and Grace was still subject to exchange controls on import licensed items.] The FMC refuted the complainants' contention, finding that only about twenty-five per cent of the total United States to Venezuela traffic was subject to exoneration and that the third flag carriers could compete for the balance of the trade.¹⁰⁹ According to the Commission, it was "the fact that Grace alone is made an 'associate' that is the crux of the controversy." There was indeed incentive for Grace and CAVN to form an "equal access" pact since CAVN's eligibility to carry Eximbank cargo to Venezuela would be restored. "To this [the 'third flag' carriers] can-

108. *Alcoa S.S. Co. v. Cia. Anonima Venezolana de Navegacion*, 7 F.M.C. 345 (1962), *aff'd sub nom.*, *Alcoa S.S. Co. v. FMC*, 321 F.2d 756 (D.C. Cir. 1963).

109. The Commission's findings and conclusions on this point are somewhat contradictory in light of the dire situation it found to have existed when United States carriers were not equally eligible with CAVN for exonerated cargo. Although the FMC did find in the *Alcoa* case that "by virtue of [the import licensing procedures and exchange controls] a sizeable amount of shipments [move to Venezuela] on a freight collect basis," 7 F.M.C. at 353, it seemed to brush off the problem stating, "Unless commodities on the import licensing list have been exonerated . . . every carrier may compete for them. There is only a vague suggestion that, since the control of routing tends to be exercised by consignees in Venezuela there will, therefore, be a preference for the Venezuelan line as to this type of cargo." 7 F.M.C. at 754. In its unpublished § 19(x)(b) regulations, the FMC found that the Venezuelan exchange controls "arbitrarily . . . deprive exporters from the United States of control of the routing of any imports [subject to licensing] and . . . transfer[s] such control to Venezuelan importers, without regard to normal freely competitive commercial practices, to the benefit of [CAVN] and to the detriment of other carriers, including United States flag carriers . . ." 7 F.M.C. at 376-77.

not object, because the approval of this agreement has no bearing on their ability to carry Export-Import Bank cargo."¹¹⁰

In affirming the FMC's approval of the Grace-CAVN agreement, the United States Court of Appeals for the District of Columbia noted that the pooling agreement was a by-product of the efforts of the two countries "to favor the movement of a traffic in vessels flying their respective flags."¹¹¹

In effect, the agreement is a "private treaty" whereby foreign ships are given access to United States government-controlled cargo in exchange for making United States ships eligible for carriage of the foreign government-controlled cargo. The FMC and the court reasoned that the objecting third flag carriers were not eligible for the cargo before the pool was formed because of the respective governmental policies; thus, they can have no objection to the pooling of such cargo on the ground that it discriminates against them.¹¹² As with its cargo preference laws, the United States seems to be fostering an undesirable trend in lending its approval to such agreements.¹¹³

The Cases of Ecuador and Uruguay

The two uses of retaliatory regulations authorized by section 19(1)(b) of Merchant Marine Act of 1920 were precipitated by practices of Ecuador and Uruguay.

In 1952, Ecuador levied an *ad valorem* invoice tariff fee of 8.5 per cent on imports aboard Ecuadorian and Colombian flag vessels,¹¹⁴ while charging 9.5

110. *Id.* at 360.

111. *Alcoa S.S. Co. v. FMC*, 321 F.2d 756, 757 (D.C. Cir. 1963).

112. But what if another United States flag carrier wants to participate in the trade but is not admitted to the Grace-CAVN pool? Since such a carrier would not have equal access to exonerated cargo, we would again have a situation wherein United States shipping is being denied parity of treatment in the Venezuelan trade. The pool would have to "open up" to accommodate another competing United States flag carrier. Other United States flag carriers are now active in the Venezuelan trade and are seeking "associate" status along with Grace. Waivers of P.R. 17 have been withheld from Venezuela since mid-1964 pending restoration of "parity of treatment" to all United States flag vessels. Dep't of State Memorandum Submitted to the President's Maritime Advisory Committee, Aug. 1965, in *Hearings Before the Senate Foreign Relations Committee on the Shipping Restrictions on Grain Sales to Eastern Europe*, 89th Cong., 1st Sess. 46 (1965).

113. "Another development which is being watched [by European shipowners] are [*sic*] cargo arrangements between two countries in which their ships divide the two-way commerce in such a way as to preclude any participation by third countries." Ozanne, *Cargo Preferences Hit European Lines*, *Journal of Commerce*, Sept. 2, 1965, p. 23, col. 7.

For an earlier example of an "equal access" arrangement, see *West Coast Line, Inc. v. Grace Line, Inc.*, 3 F.M.B. 586 (1951). In 1950, the Government of Chile inserted in its import licenses the requirement that, as to foreign ports served by the Chilean flag line, 50% of the cargo destined for Chile was to be shipped aboard Chilean vessels. Certain import items were placed on the "free list" (*i.e.*, not subject to import licensing) and shippers of such items were free to select any carrier for those items. This policy (which was not limited to aid cargo) was objectionable to the United States because it prevented United States ships from competing for 50% of the "non-free list" cargo originating in the United States. The only United States flag line serving the Chilean trade, Grace Line, Inc., entered into a pooling agreement with the Chilean flag line, whereby Grace was granted "associate" status and was permitted to participate in the carriage of cargo previously reserved to the Chilean flag. The pooling agreement was approved by the FMB. Ships other than Chilean and United States flags remained ineligible for carriage of 50% of Chile's "non-free list" imports from the United States.

114. The shipping company, La Flota Mercante Grancolombiana, is owned jointly by

per cent on imports carried aboard ships of other registry—including the United States. This, of course, encouraged shippers to use Ecuadorian and Colombian ships. The United States tried unsuccessfully to negotiate a solution and finally imposed offsetting regulations pursuant to section 19(1) (b), calling for an equalizing fee of one per cent of the f.o.b. value of goods bound for Ecuador out of the United States and carried aboard Ecuadorian or Colombian vessels.¹¹⁵ The regulations forced discontinuance of the alleged discrimination prior to their effective date.¹¹⁶

Similarly, in 1963 the government of Uruguay established preferences for imports shipped aboard Uruguayan national ships. Cargo so shipped was subject to a ten per cent surcharge based on c.i.f. value, whereas imports arriving aboard ships of other registry were subject to a twenty per cent surcharge. Certain cargoes that were exempt from the surcharge were relieved of a six per cent tax levied by Uruguay on the "transfer of funds abroad" only if imported aboard Uruguayan ships.

The FMC found that the Uruguayan preferences "artificially divert commercial shipments to Uruguayan national flag vessels, discriminate against vessels of the United States registry, and result in conditions which are detrimental to the free flow of international trade, thereby creating a condition unfavorable to shipping in the foreign trade between the United States and Uruguay."¹¹⁷ When diplomatic pressure produced no results, equalizing charges under section 19(1) (b) were imposed on Uruguayan ships leaving the United States. The device was again most effective, and Uruguay agreed to dispense with the surcharge and tax preference—at least for shipments aboard United States flag vessels.¹¹⁸

In the case of Ecuador, regular notice of administrative rulemaking was published in the Federal Register and hearings were scheduled. With respect to Uruguay, the FMC availed itself of the power granted by section 4(a) of the Administrative Procedure Act¹¹⁹ and announced that "notice and public procedure would be contrary to the public interest because of the detrimental effects to the commerce of the United States now being incurred as a result of the discrimination of the Government of Uruguay."¹²⁰ It is not likely that the Uruguayan surcharges were really any more detrimental to the commerce of

Colombia and Ecuador and, excluding oil exports, Grancolombiana transports about one-third of Colombia's foreign commerce. Wurfel, *Foreign Enterprise in Colombia* 71 (1965).

115. 24 Fed. Reg. 5422-23 (1959).

116. 25 Fed. Reg. 1052 (1960).

117. 29 Fed. Reg. 16195 (1964). See 46 C.F.R. § 506.4 (Supp. 1965).

118. The regulations remain in effect officially but enforcement is suspended pending action on the repeal of the surcharges by the Uruguayan legislature.

119. 60 Stat. 238 (1946), 5 U.S.C. § 1003(a) (1964).

120. 29 Fed. Reg. 16195 (1964).

the United States than were the consular fees charged by Ecuador. Judging by the quick remedial results, the FMC has discovered an effective ultimatum. It can be expected that, if and when the FMC issues section 19(1) (b) regulations in the future, it will do so without giving interested parties an opportunity to delay the effective date of the regulations pending an administrative hearing.

Other Countries

Argentina, Colombia, Ghana, Guatemala, India, Indonesia, Morocco, Peru, Philippines, Spain, Taiwan, and the United Arab Republic have all been subject to United States diplomatic pressure because of discriminatory shipping laws or policies. For the most part, the devices employed by these countries are similar to those discussed above.¹²¹ Although some of these preferential polices relate only to cargoes moving for account of the particular government and its agencies or corporations, others require a certain percentage (up to 100 per cent) of all their imports to be carried by their national flag ships.

In most instances, United States carriers have not complained of discrimination under these laws since they either are not enforced or do not operate to the detriment of United States shipping. None of the policies in this particular group has been found so discriminatory to United States shipping to warrant the use of section 19(1) (b) of the Merchant Marine Act of 1920.¹²² However, P.R. 17 waivers have been withheld or restricted in some cases pending restoration of "parity of treatment" to United States flag vessels in the particular trade.

Some Observations

Development of Regional Operating Companies

The developing countries that heretofore have depended upon the established maritime powers for carriage of their ocean trade, and that have had little or no choice but to pay liner rates fixed by the various international shipping conferences—rates apparently limited only by what the traffic will bear¹²³—understandably are seeking relief. As noted at the beginning of this article, the chronic shortage of foreign exchange experienced by most developing countries coupled with a desire to decrease the landed cost of essential imports incline many to seek (but not always to achieve) alleviation of these problems by establishing their own merchant fleets.

An underdeveloped maritime nation seeking to enter the international shipping trade with only a few inefficient ships not only must face the difficulty of

121. See Senate Comm. on Commerce, 87th Cong., 2d Sess., *Discriminatory Practices and Laws of Foreign Nations Adversely Affecting United States Flag Shipping* (Comm. Print 1962); *Journal of Commerce*, Sept. 13, 1965, p. 25, col. 4; Dep't of State Memorandum, *supra* note 112, at 43-46.

122. 41 Stat. 995, as amended, 46 U.S.C. § 876(1)(b) (1964).

123. Douglas Report 8. See also 1964 *House Hearings* 121.

breaking into the market on a competitive basis, but must anticipate the high costs of manning, maintaining, operating, replacing, and augmenting its merchant fleet. In many cases, the drain of foreign exchange necessary to establish and operate an ocean transportation industry overshadows the possibility of anticipated exchange savings or earnings.¹²⁴ A country with only a few ships in its registry capable of operating internationally could not seriously hope to have any significant impact on its own trade or economy; the smaller and more vulnerable a country's merchant fleet, the more there is pressure from within to protect the national fleet by discriminating in its favor.

To such countries and to their more affluent but underdeveloped neighbors determined to establish their own merchant fleets, the concept of regional as opposed to strictly national merchant marines may afford one of the "sound economic criteria" essential to a merchant fleet.

The combination by friendly nations of ships, capital, and personnel in a single multi-national operating unit could create a legitimately competitive merchant fleet dedicated to the best interests of the region it serves. What might be termed a "multi-flag joint service," properly financed and operated, should be able to offer to area importers and other shippers competitive rates payable in any of the currencies of the participating nations. Ships of the multi-flag joint service could coordinate schedules to avoid competing with one another for cargo in the various ports of call and to maximize use of ship space; uninterrupted service could be maintained during periods of temporary congestion in regional ports with less pressure for surcharges¹²⁵ or unilateral rate increases; tonnage could be added to the service at a controlled rate based on availability of cargo and the needs of the particular region.

Most importantly, these and other advantages can be realized without recourse to artificial cargo quotas or other discriminatory devices. The emphasis

124. A new shipping line seeking to operate independently must also anticipate efforts by the conference lines serving the area to drive it from the trade. Note, 78 Harv. L. Rev. 635, 636-37 (1965).

125. A surcharge is a temporary rate increase on shipments to a particular port ostensibly to offset extraordinary costs of serving that port due to congestion, labor difficulties, civil disturbances, etc. However, surcharges are often threatened or levied not only to offset the increased costs alleged by the carriers, but also as "leverage" devices to induce port authorities to take corrective action. The amount of surcharge is usually stated in terms of a percentage of existing rates or as a fixed amount of money. It is usually difficult to detect any correlation between increased costs alleged by the carriers and the amount of surcharge levied. Compare Report of the Commission, Imposition of Surcharge on Cargo to Manila, FMC Docket No. 1155, Feb. 3, 1965, with Initial Decision, Pakistan v. The India, Pakistan, Ceylon & Burma Outward Freight Conference, FMC Docket No. 1176, Sept. 2, 1964. The latter case was rendered moot by order of the Commission on Sept. 16, 1965, which dismissed the proceeding without a decision because the surcharges complained of were no longer in effect. Thus, the question whether the amount of a surcharge must be reasonably related to the carriers' alleged increased costs has yet to be answered by the FMC.

is properly placed upon making a merchant fleet competitive rather than seeking to assure its success by insulating it from competition.

The concept of regional operating companies has already found favor with several countries: Pakistan, Iran, and Turkey agreed in July 1965 to establish a regional joint service for trade between the member countries.¹²⁶ Eventually, the service is to be extended to the United States trade. There has been no indication whether Pakistan, Iran, and Turkey will employ cargo preferences to support the newly established service.

A bilateral shipping agreement between India and the United Arab Republic was put into effect in January 1965. The agreement generally establishes a joint shipping service to operate between the two countries, but unfortunately reserved cargo to Indian and Egyptian ships on a fifty-fifty basis.¹²⁷ American flag vessels operating in the same trade objected to being closed out and were offered a share of twenty per cent of the India-United Arab Republic traffic, with those two countries each reserving forty per cent shares. This accommodation has not been entirely satisfactory to the United States; the Maritime Administration has placed a partial restriction on P.R. 17 waivers for Indian vessels.¹²⁸

Member nations of the Latin America Free Trade Association (LAFTA) have sponsored a group known as the Association Latin Americana de Armadores (Alamar), representing the shipping companies of Brazil, Colombia, Chile, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela.¹²⁹ This, however, is a group of national flag companies, not a single operating unit as was established by Pakistan, Iran, and Turkey. In response to reports that the governments of Alamar members were considering proposals to declare the intra-LAFTA trade "domestic" and therefore reserved exclusively to Alamar ships, the United States has warned that it would take corrective steps if United States flag vessels were precluded from competing for LAFTA area cargo on the same basis as Alamar members.¹³⁰

Legitimate Promotional Features

It can hardly be suggested that developing countries must eschew any promotion of their national or regional merchant marines. Seafaring nations have for centuries encouraged and supported their merchant fleets. Today, there are few, if any, maritime nations that do not assist their shipping and shipbuilding industries through some combination of government ownership, direct operating subsidies, and indirect encouragement, such as favorable tax rates and depreciation allowances, low interest loans, and reservation of do-

126. Pakistan Times, July 19, 1965, p. 1, col. 7. The new venture has been referred to as the "RCD service"—the initials standing for Regional Cooperation and Development.

127. Interviews With Officials of the Department of State and the Maritime Administration in Washington, D.C., October 1965. Only Indian ships are as yet active in the trade.

128. *Ibid.* P.R. 17 waivers are being granted Indian vessels for only 20% of Eximbank-financed cargo destined for India instead of the usual 50%.

129. Journal of Commerce, Sept. 3, 1965, p. 1, col. 7.

130. *Ibid.* See also Journal of Commerce, Sept. 8, 1965, p. 4, col. 1.

mestic, coastal trade to national flag ships.¹³¹ These features generally are accepted in the world shipping trade as nondiscriminatory means of equalizing competitive disparities, especially in terms of operating costs.¹³² However, the moment cargo preference is applied to international trade, charges and countercharges dart back and forth over the oceans, and the complete breakdown of international shipping invariably is predicted.

Use of national flag vessels by shippers and importers, however, can be legitimately encouraged without official policies compelling such use. To draw a distinction between legitimate promotional features and "Balkanizing" cargo preference, it will be helpful to distinguish between the types of cargo to which such promotion is directed or to which preference is applied: commercial cargo, government-influenced cargo, government-controlled aid shipments, and government-shipped cargo.

Commercial Cargo. Commercial cargo may be defined as cargo moving pursuant to private importer and exporter contracts; it is subject to no restrictions (other than normal import duties) of either the country of origin or the country of destination. Most of the cargo moving in the non-communist world trade comes within this definition. Maritime nations should avoid placing any restrictions on the free movement of such trade. Nations wishing to attract such cargo to their vessels should encourage their shipping lines to offer reliable, efficient, and reasonably priced service rather than reserving by decree any portion of the country's commercial trade to national flag vessels. Use of the national (or regional) merchant marine may be encouraged through a "Ship National Flag" campaign directed at local importers and exporters, emphasizing the savings in foreign exchange realized by use of national flag vessels.

Government-Influenced Cargo. As illustrated above, nations often seek to compel routing of cargo aboard ships of their own flag by requiring certain imports to be licensed; the license then requires that shipment be made aboard one of its national flag vessels. Another device is to make foreign exchange available to importers on the contingency that national flag vessels be used. Although a particular government may have legitimate policy reasons for restricting imports and controlling its balance of payments, the commodities to which such restrictions are directed would, but for the restrictions, be strictly commercial cargo. A government seeking to reserve cargo to its national flag vessels by such devices could apply such "influence" to as much as 100 per cent of its foreign trade. Therefore, discrimination in favor of the national flag line should be avoided.

The outside limit of international toleration of flag preference covering gov-

131. Subsidies to Shipping by Eleven Countries 4.

132. *Ibid.*

ernment-influenced cargo is suggested by the cases of Brazil and Venezuela discussed above. Foreign exchange was made available to importers only for the f.o.b. value of certain licensed imports; freight was made payable in local currency on a collect basis. The use of such a device could be justified only if licensing and exchange control were required for national policy reasons apart from the desire to encourage use of the national merchant fleet. Operators of foreign flag vessels delivering such "influenced" cargo would have to be assured the right to convert local currency to dollars or other hard currency at the regular free market rate of exchange. Standing alone, the licensing and exchange controls would encourage use of national flag vessels, but would not require it.

Government-Controlled Aid Shipments. Most developing nations of the free world participate in foreign assistance programs of the United States. If we accept as reasonable and non-discriminatory the cargo preference rules embodied in P.R. 17 and the Cargo Preference Act, should we not recognize also that the aid-recipient nations may reserve the non-United States flag portion of such cargoes to their own national or regional merchant marines? Can the United States seriously allege discrimination in such a practice where the aid recipient's policy simply mirrors that of the lender?

Certainly the aid-recipient is interested in getting the most tangible benefits from commodity loans it must eventually repay. If foreign exchange can be conserved in the transportation of commodities, more dollars will be available for purchase in the United States of those commodities. Heretofore, aid recipient countries have tended to use United States flag vessels for transportation of aid cargoes in excess of the required fifty per cent. This results from AID's refusal to finance transportation costs when shipment is aboard foreign flag vessels. The recipient elects to pay the higher freight rates for United States flag vessels to keep intact its own foreign exchange reserves.

Assuming that vessels of the aid-recipient are available for transportation of such United States-financed cargoes at rates lower than or even the same as those charged for United States flag vessels, and assuming further that freight costs would be payable in the currency of the aid-recipient, the competitive advantage with respect to non-reserved cargo would seem to be with the national flag vessels without need for government-sponsored cargo preference.

When Eximbank cargoes are shipped, of course, the foreign country is entitled to carry half such cargoes aboard its own vessels if general waivers are allowed by the Maritime Administration.

Government-Shipped Cargo. When a government ships or imports for its own account, it can, as can any individual, specify terms to retain the right to designate the carrier. In this situation, a government could be expected to prefer its own merchant marine over its foreign competitors. Such a practice would seem objectionable only if the character of government cargo is ascribed to what would in substance be commercial cargo.

Conclusions

There is obviously at present no easy and universally acceptable solution to the spreading problems of cargo preference among less developed as well as developed maritime nations. When objectively considered, a government-sponsored preference system that artificially diverts cargo to national flag vessels is a poor foundation upon which to build or maintain a competitive and economically feasible merchant fleet. Moreover, the spread of cargo preference on a country-by-country basis, with its inevitable retaliations and "equal access" deals, will indeed disrupt international trade and increase friction among nations. What is required is a reversal of the present trend toward these restrictive trade practices and a return (gradual if necessary) to what may be considered more normal competition for cargo in the international shipping industry. The United States should assume the lead.