COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-223217 June 26, 1986

The Honorable Lee H. Hamilton
Chairman, Subcommittee on Europe
and the Middle East
Committee on Foreign Affairs
House of Representatives

Dear Mr. Chairman:

This is in response to your letter of May 19, 1986, concerning a request we have received to resolve a matter in dispute between the Agency for International Development (AID), and the Maritime Administration (MARAD). The matter concerns MARAD's refusal to approve the charter to the government of Israel of a foreign-built vessel. The vessel, which has been registered as a U.S.-flag vessel for less than 3 years, would be used for carrying grain from the United States to Israel under the Cash Transfer Program administered by AID.

MARAD refuses to approve the charter on the ground that, in receiving aid through the Cash Transfer Program, Israel agreed to follow procedures applicable under the Cargo Preference Act designed to protect U.S. shipping interests, including the requirement that a specified portion of grain purchased under the Program be carried in U.S.-flag vessels. MARAD considers a foreign-built vessel to qualify as a U.S.-flag vessel only if it has been registered under the laws of the United States for at least 3 years, as provided in the Cargo Preference Act. AID, however, contends that the agreement Israel made did not impose the substantive provisions of the Cargo Preference Act, including the 3-year requirement, and thus the vessel in question would qualify under the agreement since it is U.S.-registered, albeit for less than 3 years.

As will be explained below, we lack jurisdiction over MARAD's refusal to approve a charter; therefore, we are unable to resolve this dispute.

During the period from 1972 to 1978, much of the U.S. assistance to Israel was distributed through the Commodity Import Program, under which the United States reimbursed the government of Israel for foreign exchange monies used to

purchase commodities. AID applied the Cargo Preference Act to shipments under this Program. The Cargo Preference Act, 46 U.S.C. App. § 1241 (Supp. I 1983), generally requires that at least 50 percent of the gross tonnage of U.S. Government shipments moving on ocean vessels be transported on "privately owned United States-flag commercial vessels." With certain exceptions not relevant here, a foreign-built vessel does not qualify as a "privately owned United States-flag commercial vesse[l]" under that Act until it has been documented under U.S. laws for 3 years. See 46 U.S.C. App. § 1241(b)(1).

In 1978 the Cash Transfer Program was established for Israel, replacing the prior Commodity Import Program. A disagreement arose between AID, which administers the Cash Transfer Program, and MARAD, which enforces the Cargo Preference Act, as to whether the Cargo Preference Act applied to shipments under the Cash Transfer Program. Because the issue concerned whether certain restrictions were applicable to appropriated funds allocated by AID under the Cash Transfer Program, we considered this dispute under our jurisdiction over the expenditure of appropriated funds. In doing so we held that the Cash Transfer Program was not subject to the Cargo Preference Act. 59 Comp. Gen. 279 (1980).

Our position was upheld in the courts, Council of American-Flag Ship Operators, et al. v. United States, 596 F. Supp. 160 (D.D.C. 1984), aff'd, 728 F.2d 278 (D.C. Cir. 1986); thus, there is no dispute now that the Cargo Preference Act itself does not apply to the Cash Transfer Program. Instead, the current dispute concerns the meaning of a "side letter" agreement made between AID and the Israeli government in 1978 when the Cash Transfer Program began, and which apparently has been renewed annually ever since. This agreement arose because of concerns that the Cash Transfer Program would adversely affect the level of U.S. exports to Israel and the share of such exports carried in U.S.-flag vessels. The original "side letter" from the Israeli Economic Minister to AID, dated August 29, 1978, stated in part:

> "Regarding the carriage of goods imported from the United States, my government will continue to follow present procedures for bulk shipments of grain on dry bulk carriers. As you know, these procedures were worked out with A.I.D. and the Maritime Administration with a view toward assuring a fair share of the market for American carriers."

While some written guidelines have been furnished to us outlining the methods the Israeli government would use, pursuant to this agreement, to solicit space on U.S.-flag vessels, no written guidelines have been furnished to show specifically what percentage of the cash transfer tonnage was to be carried on such vessels or to provide a definition of such vessels. MARAD states that since the inception of the Program, it has interpreted the agreement to refer to a U.S.-flag vessel as defined in the Cargo Preference Act. As noted previously, for a foreign-built vessel to be considered a U.S.-flag vessel under that definition, it must have been registered under the laws of the United States for at least 3 years. AID, however, construes the agreement more narrowly, indicating that the agreement does not incorporate the substantive provisions of the Cargo Preference Act; thus, the 3-year requirement does not apply. According to AID, any foreign-built vessel qualifies for use under the agreement provided that it is U.S.-registered.

Based on its interpretation of the side letter agreement, and exercising the Secretary of Transportation's authority under section 9 of the Shipping Act of 1916, as amended, 46 U.S.C. App. § 808 (Supp. I 1983), MARAD refused to approve the charter of the vessel in question to the Israeli government as a substitute for a vessel meeting the definition of a U.S.-flag vessel in the Cargo Preference Act. Without this approval, the proposed charter is unlawful.

Section 9 of the Shipping Act of 1916, as amended, provides in part:

> "* * * it shall be unlawful, without the approval of the Secretary of Transportation, to sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, or transfer or place under foreign registry or flag, any vessel or any interest therein owned in whole or in part by a citizen of the United States and documented under the laws of the United States, or the last documentation of which was under the laws of the United States.

* * * * *

"Any such vessel, or any interest therein, chartered, sold, transferred, or mortgaged to a person not a citizen of the United States or placed under a foreign registry or flag, or operated, in violation of any provision of this section shall be forfeited to the United States, and whoever violates any provision of this section shall be guilty of a misdemeanor and subject to a fine of not more than $5,000, or to imprisonment for not more than five years, or both."

As indicated above, the Cargo Preference Act does not apply as a matter of law to shipments under the Cash Transfer Program. The question here is whether MARAD can withhold approval of a charter based on its view that the side letter agreement operates to incorporate the Cargo Preference Act requirements into the Program, with particular reference to the type of vessel covered by the agreement. The approval of charters is a matter assigned under the law to MARAD and clearly is not a matter within our jurisdiction. Accordingly, we have no authority to render a determination in this matter.

Sincerely yours,

for Milton J. Socolar

Comptroller General
of the United States