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Mr. John A. Hannah
Administrator
Agency for International Development
Department of State
Washington, D. C. 20523

Dear Mr. Hannah:

In a letter of September 3, 1969, Mr. Stephen B. Ives, Jr., General Counsel, inquires whether the Cargo Preference Act, 46 U.S.C. 1241(b), applies to movements of bulk urea from ports in Alaska to bonded warehouse facilities in Japan, at which the bulk material would be bagged and thereafter shipped in U.S.-flag vessels outbound to cooperating-country ports.

Section 1241(b) provides:

"Whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such equipment, materials or commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such equipment, materials, or commodities * * * which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels * * *."

The urea is produced in bulk in Alaska and it is said that it is not commercially practicable to bag the material there. If the material is to move at all from Alaska ports, it is said that it must be moved in

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bulk. It is reported that at present there are no U.S.-flag vessels willing to handle bulk urea from Alaska ports. The material cannot be handled in bulk through ports of cooperating countries and must be bagged at some point prior to arrival at such ports in order to satisfy A.I.D. requirements.

Present A.I.D. regulations will not permit the financing of freight for the carriage of commodities to a cooperating country, or to or from a free port or bonded warehouse, when shipment is on any non-U.S.-flag transportation medium. 22 CFR 201.13(b)(11). A.I.D. is apparently prepared, therefore, to finance the cost of bagged urea from a bonded warehouse facility in Japan, minus foreign-flag freight incurred in moving bulk from Alaska to Japan, plus the cost of U.S.-flag freight for bagged material from Japan to country of destination on board a U.S.-flag vessel. Since there are no U.S.-flag vessels available for carrying bulk urea from Alaska to Japan and certification to that effect can readily be made, question concerning applicability of the Cargo Preference Act is raised from the standpoint of administrative record statistics rather than in terms of resolving any doubts as to requisite authorities.

The Cargo Preference Act applies to the shipment of commodities whose purchase is financed by the United States. The act clearly applies to ocean shipments made by the United States after it has acquired title to the commodities involved. The situation is not so clear-cut, however, in connection with shipments made prior to acquisition of title by the United States. In determining applicability of the Cargo Preference Act to shipments of materials in which the United States does not have an owner's interest, the basic consideration is whether reliance upon the circumstances involved to support nonapplicability would operate as a device to evade the purpose of the act. See 39 Comp. Gen. 758^v (1960) wherein we held that the act could not properly be circumvented through the purchase at destination rather than at point of origin of goods moving by ocean freight.

The argument for nonapplicability of the act in the circumstances herein considered would proceed along the following lines:

1. That it is not commercially feasible to bag urea in Alaska, and Alaskan urea must move in bulk;

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2. That A.I.D. cannot use bulk urea but must have bagged urea;
3. That bagged urea is a commodity different from bulk urea;
4. That purchase F.O.B. Japan is based upon sound commercial motive which should not be viewed in the same context as a simple device to avoid application of the act; and
5. That, therefore, since A.I.D. would have no ownership interest in the bulk urea moving to Japan, there is no basis for applying the act.

The argument is a compelling one, however, we believe it must fail. As we understand it, A.I.D. will solicit at large for offers to sell bagged urea in quantities needed by A.I.D. at various locations. The successful bidder may or may not be the prospective Japanese suppliers who intend to utilize Alaskan sources for bulk urea to be shipped to Japan and bagged there. If the successful bidder is other than the prospective Japanese suppliers and non-Alaskan urea is furnished, its ocean shipment would undoubtedly be covered by the Cargo Preference Act. Whether urea normally moves in commercial channels already bagged, in bulk, or in either form, the Cargo Preference Act may not be avoided through the "simple device" of either the buyer or seller choosing where, urea, the essential item being procured, is to be packaged. Thus, if it were commercially feasible to bag urea in Alaska, its shipment in bulk for packaging in Japan clearly could not properly serve to exclude the bulk shipment from operation of the act.

Nor would it appear that the commercial nonfeasibility of bagging urea in Alaska should affect this conclusion. The conclusion that deliberate choice of where an item is to be packaged does not affect applicability of the act to ocean shipment of the essential commodity involved hinges upon the concept that the place of packaging is incidental rather than determinative of the nature of the commodity purchased or shipped. We appreciate, of course, that a bulk commodity and that same commodity bagged or otherwise packaged are materially different from both a general commercial and transportation standpoint. However, to treat them as materially different for purposes of applying the Cargo Preference Act in a situation such as appears to be involved here would be to render the act subject to easy evasion. While it may be that commercial necessities of the situation dictate Japan as the only logical site for bagging, the operative result so far as the protection of American shipping is concerned is the same whether the urea

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being shipped from Alaska is bagged in Japan through free choice or commercial necessity.

In the final analysis, the situation is that A.I.D. is financing a procurement of urea for use in Asia. Any shipment of that urea after it is identified with the A.I.D. procurement is covered by the Cargo Preference Act irrespective of where it might be placed in bags and for whatever reasons one particular place for bagging might be chosen.

The question presented is answered accordingly.

Sincerely yours,

E. F. Keller

Assistant, Comptroller General
of the United States