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DECISION

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

FILE: B-194528 DATE: March 3, 1980

MATTER OF: Applicability of Cargo Preference Act of 1954 to cash transfer program

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General Accounting Office disagrees with Maritime Administration view that Cargo Preference Act of 1954 applies to cash transfer program for Israel managed by Agency for International Development.

The Assistant Secretary for Maritime Affairs of the United States Department of Commerce requests that we concur in an opinion issued by the General Counsel of the Maritime Administration (MarAd). The General Counsel has concluded that § 901(b)(1) of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1241(b)(1) (1976) (Cargo Preference Act), applies to cash grants and cash transfer programs of the Agency for International Development (AID).

In § 10(a) of the International Security Assistance Act of 1978, codified at 22 U.S.C.A. § 2346a (b)(2) (1979) (cash transfer program), Congress authorized that, "The total amount of funds allocated for Israel under this chapter for the fiscal year 1979 may be made available as a cash transfer * * *" provided that, in exercising that authority, "* * *the President shall ensure that the level of cash transfers made to Israel does not cause an adverse impact on the total amount of nonmilitary exports from the United States to Israel." Furthermore, the statute provides that, "not less than two-thirds of the assistance furnished to Israel . . . for the fiscal year 1979 shall be provided on a grant basis." 22 U.S.C.A. § 2346a(b)(3) (1979). The other third is distributed as loans.

The cash transfer program represents a change in the method of distributing foreign aid to Israel. From 1972 to 1978, assistance was distributed to Israel under the Commodity Import Program (CIP). See

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22 U.S.C. § 2346a (1979). Under CIP, the United States reimbursed the Government of Israel for the foreign exchange monies used to purchase nonmilitary United States commodities. Commercial documents were submitted to AID as evidence of purchases. The assistance was distributed as CIP loans and CIP grants. AID applied the Cargo Preference Act to the CIP because the money was tied to commodity purchases. And we note that AID screened transactions to ensure compliance with cargo preference requirements since the grant and loan agreements contained a requirement subjecting them to the Cargo Preference Act. U.S. Economic Assistance For Israel, ID-78-31, B-125029, August 18, 1978 (Israeli Report).

From 1976 to 1979, AID also distributed some aid on a nonreimbursable cash grant basis. Israeli Report, supra. The cash grant is essentially a form of unrestricted aid which was limited in the case of Israel by a formal agreement that it be expended on purchases of nonmilitary commodities used within the pre-1967 boundaries of Israel. AID paid the Israeli Government quarterly, and Israel was not required to account for funds expended or to spend the aid in the United States. The Cargo Preference Act was not applied to cash grant purchases since it was evidently not conditioned on commodity purchases.

In 1977, Congress was advised that the Israeli Government was having difficulty making timely use of CIP funds, because the release of the aid was inhibited by documentation and managerial difficulties. As an interim measure, Congress responded by authorizing the transfer of a portion of the CIP funds ($150 million in fiscal year 1976) to a cash grant program. The grant money was substantially increased by Congress in fiscal year 1977 to not less than $300 million, and was maintained at that funding level the following year. Israeli Report, supra.

In 1978, the cash transfer program was enacted for aid to Israel. It replaced both the CIP and cash grant programs. The program involved periodic disbursements of

funds, two thirds cash grant and one third loan (the ratio of type of aid is unchanged from CIP), requiring an unspecified form of Israeli certification that a certain level of United States nonmilitary products was imported by Israel. By use of cash transfers, the need to document each purchase of goods made by Israel to obtain reimbursement was obviated. Instead, the United States required satisfactory assurances from the Israeli Government that civil imports from the United States would be at least equal to the level of United States assistance and that the competitive position of American exporters would not be adversely affected. See 1978 U.S. Code Cong. & Ad. News 1833, 1850; 22 U.S.C.A. § 2346a(b)(2).

We understand that there are practical difficulties in applying the Cargo Preference Act to the cash transfer program; specifically, that the cash transferred is not tied to cargo flow upon transfer; that the money can be spent anywhere; that it is not limited to purchases in the United States; that it is in a practical sense not traceable, and that there is no paperwork to insure compliance with the Cargo Preference Act.

Although we do not casually dismiss the practical difficulties of applying the Cargo Preference Act to the cash transfer program, the question before us is a legal one, not administrative; it is whether the Cargo Preference Act covers the cash transfer program for Israel. And we cannot support MarAd's view that it does.

Consistent with our prior case law on the subject, we are limiting this decision to the cash transfer program for Israel. 22 U.S.C.A. § 2346a(b)(2). We prefer to resolve questions concerning cargo preference laws on a specific case by case basis. See, for example, 55 Comp. Gen. 1097 (1976).

The Cargo Preference Act, 46 U.S.C. § 1241(b)(1) (1976) states that:

> "(1) 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 * * *."
> [emphasis added]

MarAd argues that the Cargo Preference Act applies to the cash transfer program for Israel [as well as to other cash transfer and grant programs]. It supports its position by examination of the statute itself, the legislative history of the Cargo Preference Act and an Attorney General's opinion which, it argues, states that where, as here, the foreign aid program furthers substantial foreign assistance objectives, the Cargo Preference law applies.

AID takes the contrary position that the Cargo Preference Act is inapplicable to AID cash grant or transfer programs. It argues that the legislative history which MarAd uses to support its contention of applicability is taken out of context, that the cash transfers are not subject to the language of the statute since the cash transfers are not conditioned on purchases of commodities and are made without reference to the type of purchase, and that the untied nature of cash transfers authorized by Congress demonstrates that the transfers were not to be encumbered by the Cargo Preference Act.

The Cargo Preference Act was enacted to assure that at least 50 percent of Government-sponsored cargoes transported on ocean vessels would be moved on privately-owned United States-flag ships. Congress believes that this requirement is necessary to the maintenance of an adequate merchant fleet. 55 Comp. Gen. 1097 (1976); S. Report No. 1584, 83d Cong., 2nd Sess. 1 (1954); 100 Cong. Rec. 4158, 4159 (1954); 39 Comp. Gen. 758, 760 (1960). In a Presidential Directive in 1962, President Kennedy stated that, "The statutes . . . are designed to insure that U.S. Government-generated cargoes move in substantial volume on American-flag vessels." S. Report No. 2286, 87th Cong., 2d Sess. 43, 44 (1962).

The legislative history of the Cargo Preference Act supports a broad application of the Act to foreign aid programs which involve the use of American money to finance the purchase of commodities. The Senate Report on the Cargo Preference Act stated that the Act is applicable, "to programs financed in any way by Federal Funds." S. Rep. No. 1584, 83d Cong., 2d Sess. 5 (1954). In discussing the Act's scope, a House Committee Report on the Administration of the Cargo Preference Act stated that Congress intended by this Act to express:

> "our shipping policy in the clearest and most unequivocal terms for application in all cases where normal channels of international trade are disrupted by virtue of United States Government-controlled programs financed by Federal funds in whatever form they might take." H.R. Rep. No. 80, 84th Cong., 2d Sess., 2 (1955).

We also note that the 1954 Cargo Preference law was enacted to codify and broaden existing law, not to derogate from it. 41 Op. Atty. Gen. 192, 196 (1954); 42 Op. Atty. Gen. 203 (1963).

Although we recognize the broad parameters of the Act, we do not believe the Act covers this specific program. The language of the Cargo Preference Act states that, "Whenever the United States

. . . shall advance funds . . . in connection with the furnishing of . . . equipment, materials, or commodities . . .," the cargo preference applies. We agree with AID that the cash transfers are not advanced in connection with the furnishing of equipment, materials or commodities.

As AID points out the cash transfer program in form is substantially unrestricted aid and the funds are released to Israel without requiring that purchases be made in the United States with this money. Under the CIP in which AID did incorporate cargo preference, the funds were directly linked to commodity purchases made in the United States by Israel but no similar relationship between the funds advanced and Israel's nonmilitary purchases in the United States exists under the cash transfer program.

We note that congressional action was based on the recognition that Israel would maintain previous purchasing levels and that the Act providing for cash transfers states that the President shall ensure that there is no adverse impact on our exports to Israel because of the shift to cash transfers. See 1978 U.S. Code Cong. & Ad. News 1833, 1850; 22 U.S.C.A. § 2346a (b)(2). And the Israeli Government has made assurances that the United States should expect no change in the pattern or volume of trade between the two countries as a result of the change in procedures. See, International Security Assistance Programs, Hearings on S. 2846 before the Subcomm. on Foreign Assistance of the Senate Comm. on Foreign Relations, 95th Cong., 2nd Sess. 21 (1978) (statement of Mr. Joseph C. Wheeler).

But the requirement that Israel maintain purchasing levels in the United States does not, in itself, require a finding that cargo preference should apply to such purchases since the purchases may not necessarily be made with cash transfer funds. Cargo Preference most often had been applied to shipments financed with United States funds. See, for example, B-155185, November 17, 1969; 41 Op. Atty. Gen. 192, supra; 42 Op. Atty. Gen., supra. Here, we are asked

to support application of cargo preference to shipments of nonmilitary exports which cannot be identified as purchases made by Israel with American funds. We believe that such an interpretation is not supported by the language of the Act, the legislative history of the Act, or required by our prior opinions concerning the Act.

In these circumstances, we believe that the cash transfer program for Israel is not covered by the Cargo Preference Act. We therefore cannot support MarAd's legal position that the Cargo Preference Act is applicable to the cash transfer program for Israel.

Milton J. Socolar

For the Comptroller General
of the United States