Restraints on Foreign Investment in the Merchant Marine—An Asset or Liability to United States Interests

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RESTRAINTS ON FOREIGN INVESTMENT IN THE MERCHANT MARINE—AN ASSET OR LIABILITY TO UNITED STATES INTERESTS?

David Morris Phillips†

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INTRODUCTION

Foreign investment in the United States has accelerated during the 1970's. One omission from this investment activity, however, has been the maritime industries, especially the merchant marine. Yet the maritime industries in general and the merchant marine in particular are capital intensive. In addition, the merchant marine and ship construction in the United States have been declining relative to other nations for some time. The absence of foreign investment, a significant source of funds, in a declining industry gives cause for reflection.

Foreign investment could take, and in other circumstances has taken, a variety of forms. In its most pristine form, foreign investment encompasses the branch operations of a foreign national or firm in the United States. Foreign investment also includes indirect commercial activity such as establishing domestic corporations, purchasing equity or debt securities in existing American corporations, or becoming a partner in domestic partnerships. Most such forms of direct and indirect foreign investment in the merchant marine are restricted by law.

2. See notes 120-22 infra and accompanying text.
3. For statistical purposes the government divides foreign investment into two categories, direct and portfolio. Doing business as an alien in the United States or establishing a domestic subsidiary would be classified as foreign direct investment. On the other hand, purchasing the debt securities of an existing domestic corporation (unless the alien already owned a certain percentage of the stock of that corporation) would be classified as foreign portfolio investment. Whether the purchase of stock in an existing domestic corporation is classified as direct or portfolio investment depends upon the percentage of stock held by the alien after the purchase: if 10% or more, the investment is classified as direct; otherwise, it is termed portfolio. This classification system is intended to differentiate between control and noncontrol situations. For a more extended discussion of this system and the problems associated with it, see Phillips, supra note 1, at 847-49.
Section 27 of the Merchant Marine Act of 1920, commonly called the Jones Act, restricts the transportation of cargo between two points in the United States to vessels "built in and documented under the laws of the United States and owned by . . . citizens of the United States." Not only may aliens not engage in the domestic cargo trade directly, but also their investment in United States corporations involved in such trade is sharply limited. The Jones Act refers to section 2 of the Shipping Act for the definition of corporate citizenship. As applied to the domestic trade, that definition requires that 75 percent of the corporation's stock be held by United States citizens. Thus section 27 of the Jones Act incorporates the historical concept of cabotage—the practice of reserving the trade along a nation's coastal and internal waters to vessels registered under the flag of that nation. American law has extended the cabotage restrictions to other areas as well. Section 9 and 37 of the Shipping Act require administrative approval for the transfer of United States flag vessels or

   (a) Within the meaning of this chapter no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof, but in the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum.
   (b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.
   (c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to 75 per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if 75 per centum of the voting power in such corporation is not vested in citizens of the United States; or (c) if, through any contract or understanding, it is so arranged that more than 25 per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.
7. Id. § 888.
8. Id. § 802(a), (c). See also notes 137-53 infra and accompanying text.
vessels owned by American citizens to noncitizens.\textsuperscript{9} The Shipping Act
definition of corporate citizenship for purposes other than domestic
trade, including vessel transfers, requires that at least 50 percent of the
stock be held by United States citizens.\textsuperscript{10}

The Registry Acts,\textsuperscript{11} which specify the qualifications for documenta-
tion as a United States flag vessel, do not even permit aliens to register
their vessels under the United States flag to operate in the foreign trade,
but corporations with foreign stockholders, even those wholly owned by
aliens, theoretically may. Nonetheless, although less obvious and direct
in their application than the limitations respecting the domestic trade,
effective restraints on foreign investment in United States corporations
engaged in the foreign trade do exist. Section 37 of the Shipping Act
requires administrative approval for the purchase of a controlling interest
in a United States foreign trade carrier during time of war or national
emergency.\textsuperscript{12} Further, foreign control over the carrier corporation, if

\begin{enumerate}
\item \textsuperscript{10} \textit{See} 46 U.S.C. § 802(a), (c) (1970). Although it is not clear from subsection (a) of § 2
that “controlling interest” means 50% ownership, that meaning becomes evident in light of
subsection (b) which speaks of a “majority of the stock.” However, ownership of lesser
percentages of stock by aliens can constitute a “controlling interest.” Therefore, a corpora-
tion does not automatically qualify for citizenship simply by meeting the 50% test. \textit{See}
notes 148-51 infra and accompanying text.
\item \textsuperscript{11} 46 U.S.C. §§ 11-63 (1970) (derived from Act of December 31, 1792, ch. 1, 1 Stat. 288
(1792)).
\item \textsuperscript{12} \textit{Id.} § 835. Subsection (e) requires, on penalty of forfeiture, the prior approval of the
Secretary of Commerce before making:
any agreement or . . . any understanding whereby there is vested in or for the benefit
of any person not a citizen of the United States, the controlling interest or a majority
of the voting power in a corporation which is organized under the laws of the United
States, or of any State, Territory, District, or possession thereof, and which owns
any vessel.
The phrase “any vessel” must be read in the context of § 37 as a whole, the primary import
of which is to require similar prior approval:
\begin{enumerate}
\item To transfer to or place under any foreign registry or flag any vessel owned in
whole or in part by any person a citizen of the United States or by a corporation
organized under the laws of the United States, or of any State, Territory, District, or
possession thereof; or
\item To sell, mortgage, lease, charter, deliver, or in any manner transfer . . . to
any person not a citizen of the United States, (1) any such vessel or any interest
therein, or (2) any vessel documented under the laws of the United States, or any
interest therein.
\end{enumerate}
\textit{Id.} § 37 Thus the purpose of subsection (e) of § 835 is to ensure that that which cannot be
effected directly (control over the vessel), cannot be effected indirectly through control
over the corporation owning the vessel. Subsection (e) applies to transfers of control of
carrier corporations engaged in the domestic or foreign trade. However, because more
stringent proscriptions against foreign participation in the domestic trade exist, \textit{see} notes 5
\textit{supra}, 124-57 infra and accompanying text, subsection (e) by itself constitutes a more
significant bar to transfers of control of foreign trade carriers. Pursuant to recently enacted
legislation, the powers of the Secretary of Commerce under § 37, including those
enumerated in subsection (e), will terminate on September 14, 1978. \textit{See} notes 164-66 infra
and accompanying text.
achieved, must necessarily be attenuated since section 2 of the Shipping Act provides that the chief executive officer and the chairman of the board of a United States carrier must be American citizens and that "no more of its directors than a minority of the number necessary to constitute a quorum" can be aliens. Perhaps most importantly, carriers that operate in the foreign trade under the United States flag do so because of certain artificial inducements, principally construction and operating subsidies and cargo preferences. Under the Merchant Marine Act of 1936 these subsidies are available only to United States corporations which qualify under the Shipping Act's definition of corporate citizenship.

13. 46 U.S.C. § 802(a) (1970). The Registry Acts similarly provide that "the President or other chief executive officer and the chairman of the board of directors [of the domestically organized corporation] shall be citizens of the United States." Id. § 11.

14. These subsidies are designed to defray the additional costs borne by American foreign trade carriers in comparison with foreign flag carriers that arise from contracting for the construction of the vessel within the United States and from operating under the United States flag. Id. §§ 1151-83. Construction differential subsidies are available for ship purchasers who are United States citizens or for shipyards located in the United States in order "to aid in the construction of a new vessel to be used in the foreign commerce of the United States." Id. § 1151(a). The amount of the subsidy is determined by comparing construction costs in the United States with those in foreign countries. The new vessel must "be suitable for use by the United States for national defense or military purposes in time of war or national emergency," and the Secretary of Commerce, with the approval of the Secretary of the Navy, may require that certain features, designed for national defense purposes and paid for by the United States, be incorporated into the vessel. Id. § 1151(a)-(b). Such construction differential subsidies may be granted, and the vessels built pursuant to such subsidies may be sold, to citizens of the United States who possess "the ability, experience, financial resources, and other qualifications necessary for the operation and maintenance" of the new vessel. Id. §§ 1151(a)(2), 1152(a). The vessels must be documented and must remain documented under the laws of the United States for at least twenty-five years. Id. § 1153.

A similar program for operating differential subsidies exists to provide financial aid to United States citizens operating vessels documented under the laws of the United States in "an essential service in the foreign commerce of the United States." Id. § 1171(a). An essential service is defined as those routes from ports in the United States to foreign ports that the Secretary of Commerce determines to be essential to the development, maintenance, and expansion of foreign commerce. Id. § 1121(a). This subsidy serves to defray the additional operating expenses incurred solely because the vessel is documented under the laws of the United States. Higher wages and insurance costs comprise the major part of the differential. Other costs that may be included in the subsidy are subsistence costs of officers and crew on passenger vessels, maintenance costs, and repair costs not covered by insurance. The subsidy is not available if the vessel engages in domestic trade, although a minor exception is allowed for vessels primarily engaged in foreign trade that stop in more than one American port during the course of a voyage. Id. § 1175(a). Persons receiving operating differential subsidies are forbidden to own or operate, directly or indirectly, any foreign flag vessel that competes with American vessels engaged in any essential service, id. § 1222(a), or any vessel operating in the domestic trade, id. § 1223(a). For a further discussion of the subsidies, see notes 181-88 infra and accompanying text.

15. See notes 35-39, 72-74 infra and accompanying text.

Thus foreign investment in foreign trade carriers is discouraged by the unavailability of the rights and opportunities which make such investment attractive.

The obvious objective of the legislative restraints on foreign investment is to foster a United States merchant marine. The fleet is artificially protected against foreign competition by denying foreign operators the right to compete in the domestic trade, subsidized to insure that foreign competition will not obliterate it in the foreign trade, and kept intact by prohibiting any deletion from its operators or vessels without administrative approval. In fact, the only appreciable gap in the restraints pertains to foreign investment in the form of debt, which under certain circumstances is encouraged in order to foster the merchant marine.17 Strangely,

17. The infusion of large amounts of capital in the form of debt ordinarily presupposes the availability of collateral to secure the debt. The plant or other facilities of a company engaged in ship repair and construction are its most valuable assets available to serve as collateral. In the case of a water carrier, whose use and therefore need for capital frequently relates to the purchase and operation of expensive vessels, the vessels themselves are the most likely collateral available to secure the debt. The difference in the type of collateral available to these two industries is the source of conflicting policies reflected in the Shipping Act, 46 U.S.C. §§ 801-42 (1970), and the Ship Mortgage Act of 1920, 46 U.S.C. §§ 911-84 (1970).

Sections 9 and 37 of the Shipping Act prohibit, without prior approval of the Secretary of Commerce, the mortgage of an American vessel to an alien. Id. §§ 808, 835. Section 37, in addition, requires similar approval for the mortgage of a vessel construction plant or facility to an alien. Id. § 835(c). These provisions complement the limitations on other transfers requiring Maritime Administration approval and ensure that those transactions that do require approval cannot be accomplished indirectly without such approval.

Loans to finance the purchase of ships traditionally suffered from the lack of a reliable security device. The vessel itself was not wholly satisfactory because, among other reasons, a mortgage under common law was subordinate to any maritime liens which might attach to the vessel. Chemical Bank N.Y. Trust Co. v. Steamship Westhampton, 358 F.2d 574, 580 (4th Cir. 1965), cert. denied, 385 U.S. 921 (1966). One of the purposes of the Ship Mortgage Act of 1920 was to alleviate this problem and facilitate the massive transfer of government vessels to private ownership after World War I in order to create a viable United States merchant fleet. The Act created a procedure whereby the mortgagor can record his mortgage, 46 U.S.C. § 921 (1970), and thus secure a preferred mortgage having priority over the claims of other creditors, including those holding maritime liens, id. § 922. Consistent with the provisions of sections 9 and 37 of the Shipping Act, the Mortgage Act limited this preferred status to mortgagees who were citizens of the United States. Id. § 922(a)(5). By itself, this requirement would have greatly constricted the market for financing, thereby undermining the primary purpose of the Mortgage Act to secure such financing. Therefore, the Mortgage Act also provides that "[t]he term 'mortgagee,' in the case of a mortgage involving a trust deed and a bond issue thereunder, means the trustee designated in such deed." Id. § 911(5). This definition permits the issuance of a mortgage to a United States trustee, without regard to the citizenship of the bondholders whose debt is secured by the mortgage and trust instruments.

Chemical Bank N.Y. Trust Co. v. Steamship Westhampton, 358 F.2d 574 (4th Cir. 1965), cert. denied, 385 U.S. 921 (1966), held that an indenture did not create a preferred mortgage under the Ship Mortgage Act where the trustee was a United States citizen and the bondholder an alien, because the issuance of a bond to an alien required approval under sections 9 and 37 of the Shipping Act as the transfer of an "interest" in a vessel. In response
the insight that injecting foreign funds into the merchant marine might be more consistent with its growth than its demise seems to have been confined to debt capital.

Although the subject of foreign investment in the United States has produced a plethora of debate, with particular focus on the desirability or necessity of limiting investment in some areas, that debate has largely omitted a reconsideration of the present American laws which circumscribe foreign investment in certain industries. Reconsideration of the restraints on foreign investment in the merchant marine is long overdue. This Article seeks to articulate the major issues relevant to any such review, and to respond tentatively to those issues.

Given that the goal of the restrictive legislation is to protect the merchant marine, we should consider why that fleet is necessary in the first place, whether its growth has been successfully cultivated, and, most importantly, how the foreign investment restraints relate to the growth of the fleet. Although a United States merchant marine still engenders substantial support, the interests it implicates today differ significantly from those which it was thought to serve in the aftermath of World War I, when the maritime restraints crystallized into their present form. Whereas at that time we sought to promote a merchant marine in order to supplement the Navy in times of emergency and to expand foreign trade, our primary concerns today are jobs for United States seamen and effective regulation over vessels in United States waters for safety, environmental protection, and similar purposes. The full panoply of restraints on foreign investment does not serve these present interests.

The full panoply of restraints on foreign investment does not serve these present interests.

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18. For example, § 1 of the Jones Act, enacted in 1920, states:

It is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States.


19. See notes 75-119 infra and accompanying text. Advertisements recently placed in major newspapers by the U.S. Maritime Committee to Turn the Tide, described as a "management coalition of shipbuilders, ship operators and marine supportive industries," demonstrates this shift in the policies supporting the merchant marine. Although lip service is paid to the traditional justification for a merchant marine—"U.S. Flag Tankers Strengthen Our National Defense"—the advertisement emphasizes that "Controls Placed on U.S. Flag Tankers Help Protect Our Environment," and that "U.S. Flag Tankers Help
I

THE MERCHANT MARINE AND NATIONAL INTERESTS

The interests likely to be involved in any decision affecting foreign investment include: economic efficiency, the availability of capital, treaty and policy commitments in favor of the free flow of funds, foreign control over American political decisions, lack of a community of interests, and national security.\(^{20}\) Of the interests most relevant in the context of the merchant marine, national security is the one most frequently invoked as the primary objective of the maritime restrictions.\(^{21}\) Specifically, the various geographic and product market restraints as well as the transfer limitations are said to promote a merchant marine which can supplement United States naval forces in time of war, and keep the United States economically strong at all times by maintaining a steady flow of exports and imports.\(^{22}\) At least two assumptions underlie this belief: the utility of civilian craft for military or quasi-military purposes, and the inability or unreliability of foreign flag vessels to carry America’s imports and exports. Both assumptions merit careful scrutiny.

A. UTILITY AS NAVAL VESSELS

History has demonstrated the utility of the merchant marine as a supplement to United States Navy vessels during war and national emergencies. During the Revolutionary War, the Continental Navy was created almost entirely from the American merchant marine.\(^{23}\) The lack of an adequate merchant marine was viewed as a detriment during the

Put Americans Back to Work and Boost Our Economy." The statistics in the advertisement emphasize these latter concerns:

Foreign oil tankers move a great deal of U.S. capital overseas. U.S. Flag ships return 71¼ from every dollar they receive to our economy. Liberian oil tankers comprise 30.2% of the world’s tanker tonnage, but 69% of all tanker tonnage lost last year was Liberian. U.S. flag oil tankers are built to rigid safety specifications and are subject to regular U.S. Coast Guard inspections. Safety standards are strictly enforced for manning and operating U.S. ships.


20. Phillips, supra note 1, at 853-76.


22. See note 18 supra. The Postwar Planning Committee, established by the United States Maritime Commission to examine changes in American shipping due to World War II, described six contributions to the national defense made by a strong merchant marine: (1) an influence for the preservation of peace; (2) an increased ability either to remain neutral in war or to act from strength during a war; (3) a wartime auxiliary to the armed forces; (4) the ability to carry the attack to the enemy and keep the war on foreign soil, protecting United States citizens and industries from the "ravages of attack"; (5) the ability to assist allies and friendly neutrals; and (6) the ability to maintain the flow of essential imports. Postwar Planning Comm., THE POSTWAR OUTLOOK FOR AMERICAN SHIPPING 4 (1946).

Spanish American War when the United States needed ships to carry forces to Cuba. Conversion of merchant marine vessels into military vessels continued through World War I and provided one of the key assumptions underlying section 27 of the Jones Act.

The military function of the merchant marine in more recent conflicts relates to the support functions it can provide for the Navy and its carriage of essential civilian goods. During World War II the vast majority of the United States dry cargo fleet of 3,500 vessels was employed to transport military and civilian goods; only 15 percent of the fleet was placed in actual custody of the armed services. Today that support function continues. All military shipping is now coordinated by the Military Sealift Command. Although the Military Sealift Command has a nucleus fleet of its own, that fleet as of July 1976 numbered only sixty-seven vessels, of which fifty-nine were active. The United States also maintains a National Defense Reserve Fleet which in theory could carry a substantial portion of any necessary cargo in time of war or national emergency. This fleet is composed of World War II vessels that were not sold pursuant to the Merchant Ship Sales Act of 1946, and all vessels in it are at least thirty years old. In June 1976, the Commander of

24. L. BEMAN, SHIP SUBSIDIES 27 (1923).
26. Id. at 25. Although Lawrence also mentions the potential conversion of merchant vessels into naval vessels, he stresses the support functions and the importance of the merchant marine as a training and proving ground for maritime personnel and equipment.
27. Id.
28. G. JANTSCHER, BREAD UPON THE WATERS: FEDERAL AIDS TO THE MARITIME INDUSTRIES 80 (1975). Before 1970, the Military Sealift Command went under the name of the Military Sea Transportation Service (MSTS). Id. MSTS was formed in 1949 shortly after the Department of Defense was created. S. LAWRENCE, supra note 25, at 196. However, military operation and ownership of merchant vessels dates back to 1898; MSTS was merely a continuation and consolidation of earlier merchant ship programs. Id. at 459. The Military Sealift Command is designed to provide immediate sealift capability for the armed forces overseas, to develop plans for necessary expansion during times of war or national emergency, and to provide sea transportation for Department of Defense cargo and personnel. Ramage, The Military Sea Transportation Service, NAVAL WAR C. REV., May 1969, at 5.
29. Letter from Larry C. Manning, Legislative Public Affairs Officer, Military Sealift Command to Author (Aug. 5, 1976) (on file at the offices of the Cornell International Law Journal). The nucleus fleet is composed of government owned vessels most of which are operated by civilian crews under civil service employment. The remaining vessels are manned by Navy crews or by seamen employed by private contractors who operate on a cost-plus-fixed-fee basis. G. JANTSCHER, supra note 28, at 82. Since 1954 the size of the nucleus fleet has been limited pursuant to an agreement between the Secretaries of Commerce and Defense. In effect, the agreement constituted a renunciation of any intent to operate a government owned fleet capable of depriving the merchant marine of a sizeable share of United States defense cargoes. Id. at 83. As of May 1, 1974, 76, or over 13%, of the 569 active privately owned vessels under the United States flag were on charter to the Military Sealift Command. Kilgour, The Double-Subsidy Issue in Shipping, 6 J. MAR. L. & COM. 395, 403 (1975).
the Military Sealift Command concluded that the National Defense Reserve Fleet "now contains less than 130 potentially useful cargo ships." Consequently, government vessels carry only a small percentage of the cargo coordinated by the Military Sealift Command. Between fiscal years 1952 and 1972, the percentage of dry cargo shipped by the Military Sealift Command on privately owned vessels never fell below 60.7 percent and averaged 79.2 percent. Although privately owned vessels carried only 25.1 percent of the total military petroleum shipments in 1957 and only 36.6 percent in 1952, the average between 1952 and 1972 was 67.1 percent. Privately owned United States flag vessels thus carry the bulk of military cargo.

However, the fact that the Military Sealift Command relies heavily on United States flag carriers does not demonstrate that foreign flag carriers either could not or would not carry United States military cargo. The Command uses foreign flag vessels only rarely, in large part because United States law gives American flag vessels a preference. The Military Transportation Act of 1904 provides that military cargo may be transported by sea only on vessels belonging to the United States or registered under the United States flag unless the President finds the charges on those vessels to be "excessive or otherwise unreasonable." Section 901(b) of the Merchant Marine Act of 1936 requires that at least 50 percent of the gross tonnage of certain goods be carried on privately owned United States flag commercial vessels, if those vessels are available at "fair and reasonable rates." These commodities include: (1) goods procured by the United States for its own account; (2) goods furnished to foreign nations for which the United States has either advanced funds or credits or guaranteed the convertibility of foreign currencies; and (3)

33. Statistics derived from G. Jantscher, supra note 28, at 84, Table 7-3. The figures are nearly identical for the key years of the Vietnamese conflict, fiscal 1965 through 1974. Privately owned commercial ships carried 76% of all military cargo worldwide and 68% of all bulk petroleum products. Letter from Larry C. Manning, supra note 29.
34. The Military Sealift Command does not formally maintain statistics on the usage of foreign flag vessels. G. Jantscher, supra note 28, at 86. The statistics that are available show that foreign flag vessels did not carry more than one percent of the volume of Military Sealift Command dry cargo shipments carried by liners in the years 1964, 1966, 1968, and 1969. Id. at 87. These statistics, however, do not include shipments originating outside the United States, and the one percent figure is based on a comparison with shipments on liners instead of total dry cargo shipments.
36. 46 U.S.C. § 1241(b) (1970). The cargo preference requirements of section 901(b) may be waived by Congress or temporarily waived by the President or Secretary of Defense during a time of emergency. No temporary waiver has ever been declared. G. Jantscher, supra note 28, at 80.
goods the United States grants to foreign nations.  

Significantly, the standards used in determining whether rates are fair and reasonable are the rates of other commercial vessels documented under the United States flag, rather than foreign flag vessels. In addition to the Military Transportation Act and section 901, the choice of vessel for the carriage of military goods is further distorted by a 1954 agreement between the Secretaries of Commerce and Defense that prescribes the priorities for the use of vessels when the Military Sealift Command's nucleus fleet cannot satisfy military shipping needs. The Command must first make maximum use of American liner services, followed by charters of privately-owned United States flag vessels, vessels reactivated from the National Defense Reserve Fleet, and finally, foreign flag vessels.

The statutes and secretarial agreement make it difficult to distinguish between problem and solution. Initially a merchant marine is fostered because of the alleged military need; however, once existing, the merchant marine itself becomes the problem and the solution becomes man-

37. 46 U.S.C. § 1241(b) (1970). Section 901(b) applies not only to goods furnished directly to foreign nations but also to goods furnished to foreign nationals as part of statutory programs designed in part to assist the economy of the particular nation. 42 Op. Att'y Gen. No. 14, at 12 (1963). For example, sales of surplus agricultural commodities to foreign nationals pursuant to Title IV of the Agricultural Trade Development and Assistance Act of 1954, 7 U.S.C. §§ 1731-36 (1970), are made under conditions more favorable to the foreign purchaser than would be the case in purely private transactions. Consequently, § 901(b) applies to the transportation of surplus commodities to the foreign buyer. For a complete list of the government agencies subject to § 901(b), see 46 C.F.R. § 381.2(c) (1976). Congress has provided several exceptions. E.g., 22 U.S.C. § 2353 (1970) (transportation between foreign countries of commodities or defense articles purchased with foreign currency derived from activities pursuant to the Foreign Assistance Act of 1954 or the Agricultural Trade Development and Assistance Act of 1954).


39. G. Jantscher, supra note 28, at 83. Although this agreement would literally prohibit the use of foreign flag vessels if serviceable vessels remained in the National Defense Reserve Fleet, the Military Sealift Command has used foreign flag vessels even though the Fleet has not been fully activated since World War II. Id. at 83 n.22.

Another source of the cargo preference is Public Resolution No. 17, passed by Congress in the mid-1930's. H.R.J. Res. 207, 73d Cong., 2d Sess., 48 Stat. 500 (1934). In that resolution Congress declared that all loans made by federal instrumentalities to foster the export of agricultural or other products should provide that the exports should be carried exclusively on United States flag vessels unless the Shipping Board Bureau determines that such vessels are "not available in sufficient numbers, or in sufficient tonnage capacity, or on necessary sailing schedule, or at reasonable rates." Id. In 1934 the Attorney General interpreted the resolution as a nonmandatory rule of guidance to be applied only where "feasible." 37 Op. Att'y Gen. 546, 548 (1934). In a subsequent opinion in 1965 the Attorney General interpreted the resolution as not preventing the Maritime Administration from permitting 50% of the goods to be transported on flag vessels of the recipient nation in exchange for that nation's adopting reciprocal nondiscriminatory practices. 42 Op. Att'y Gen. No. 20, at 2 (1965). The resolution affects only exports financed by the Export-Import Bank of the United States. G. Jantscher, supra note 28, at 78. However, those exports are significant; between 1964 and 1969 over 1 million long tons of exports financed by the Bank were carried on United States flag vessels. Id. at 98.
datory military use of such ships. Recognition of whether the need is military transportation or sufficient cargo to satisfy a hungry merchant marine would not be crucial if such cargo preferences did not carry a price, but they obviously do. One authority has estimated that of the $8.6 billion spent by the Military Sealift Command from 1952 to 1972 to procure shipping space on privately owned vessels, some $3 to $5 billion represented additional cost to the government because of the cargo preferences. 40

It is, of course, difficult to quantify costs and benefits since the value of the merchant marine relates not just to the carriage of routine military shipments, but also to transport in times of emergency. Even with respect to emergencies, however, other factors diminish the military role of the merchant marine which the maritime restraints assume. First, the enactment of the Shipping Act in 1916 and the Jones Act in 1920 predated not only the feasibility of air transport, but the probable desirability of that form of transportation because of its speed. 41 For example, during the 1973 Arab-Israeli War, emergency supplies to both sides were transported primarily by air, not sea. 42 Second, foreign flag vessels owned by United States citizens are subject to requisition during times of emergency under section 902 of the Merchant Marine Act of 1936, 43 and other foreign flag vessels lying idle in United States waters, regardless of ownership, may be requisitioned under the Emergency Foreign Vessels Acquisition Act of 1954. 44 The Department of Defense considers some of the American

40. Id. at 87-89, 145 app.
41. The Civil Reserve Air Fleet (CRAF) was created for the purpose of providing emergency air transport. The CRAF fleet consists of civilian aircraft owned by United States air carriers and designated by them, in an agreement with the Department of Defense, as available for military transportation during emergencies. See generally Cooke, The Civil Reserve Fleet, A.F. JAG L. REV., May-June 1968, at 6. As of July 1, 1975, the number of aircraft in CRAF numbered 332. DEPARTMENT OF TRANSPORTATION, OFFICE OF EMERGENCY TRANSPORTATION, CIVIL RESERVE AIR FLEET (CRAF) ALLOCATION (1975). Interestingly, the dynamics between the government and the private sector that operates with respect to water cargo carriage also pertain to air cargo carriage. Once CRAF exists, there is enormous pressure on the Military Airlift Command (MAC)—the air counterpart of the Military Sealift Command—to utilize the services of the private carriers who have pledged aircraft to CRAF. Thus the private carriers greeted MAC's acquisition of a large fleet of C-5A cargo planes with some misgivings. Schemmer, MAC's Private Airline, ARMED FORCES J., Sept. 21, 1970, at 26.
42. See, e.g., NEWSWEEK, Oct. 29, 1973, at 50.
43. 46 U.S.C. § 1242(a) (1970). This section authorizes the requisition or purchase of "any vessel or other watercraft owned by citizens of the United States, or under construction within the United States," as well as the requisition or charter of such vessels if governmental ownership is not required. Id. The authority granted by § 902 may be exercised whenever the President proclaims "that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President." Id.
44. 50 U.S.C. § 196 (1970). The law authorizes the President:
to purchase, or to requisition, or . . . to charter or requisition the use of, or to take
owned foreign flag vessels to be part of the "effective United States control" fleet, which, as the term implies, connotes foreign flag vessels which could be brought under United States control when needed.\textsuperscript{45}

The effectiveness of United States control over these vessels has been debated. Doubts about that effectiveness have been expressed on the grounds that the basis of the right of the United States to control the vessels—the citizenship of the owners—conflicts with the traditional right of the country of registry to control its vessels,\textsuperscript{46} and that the owners may not be able to force their alien crewmen to comply with American directives.\textsuperscript{47} Both concerns seem inflated. Many if not most of the vessels

over the title to or the possession of . . . any merchant vessel not owned by citizens of the United States, which is lying idle in waters within the jurisdiction of the United States . . . which the President finds to be necessary to the national defense.

\textit{Id.}

Another law granting similar powers provides that the President, in time of war, acting through the Secretary of the Army, "may take possession and assume control of all or part of any system of transportation to transport troops, war material, and equipment, or for other purposes related to the emergency." 10 U.S.C. § 4742 (1970). The predecessor of this law, Act of August 29, 1916, Pub. L. No. 64-242, 39 Stat. 619, 645 (1916), was used during the Korean War and World War II to take possession of railroads. Exec. Order No. 1041, 3 C.F.R. 322 (1949-1953 Compilation); Exec. Order No. 9412, 3 C.F.R. 291 (1943-1948 Compilation); Exec. Order No. 9108, 3 C.F.R. 1127 (1938-1943 Compilation). There is no apparent reason, however, to limit the law's grant of authority to the taking possession of railroads or land transportation systems. Moreover, this law is worded more broadly than § 902 of the Merchant Marine Act of 1936, encompassing "any system of transportation," and it could potentially provide authority to take possession of foreign-owned transportation systems, including foreign flag vessels, if physical control over those systems were possible.

45. U.S. MARITIME ADMINISTRATION, EFFECTIVE UNITED STATES CONTROL OF MERCHANT SHIPS 4 (1970). The Department of Defense has cited the following grounds for its belief that the effective control fleet can be brought under actual United States control: "Contracts with the Maritime Administration or assurances provided the United States Government by the shipowners," the World War II precedents of the assimilation into the American war effort of Panamanian and Honduran vessels owned by United States citizens, as well as the "absence of operational control restrictions in the laws of Panama, Honduras and Liberia, the limited shipping requirements on the part of these nations, and the probability that they will remain neutral in the event of war." Letter from Roswell L. Gilpatric, Deputy Secretary of Defense, to Senator Warren Magnuson (Nov. 17, 1961) quoted in \textit{id.}

46. \textit{See B. Boczek, Flags of Convenience} 195 (1962); \textit{R. Rienow, The Test of the Nationality of a Merchant Vessel} 7, 100-04, 185-86 (1937). European shipowners in 1939 apparently escaped the requisition of their vessels by changing to Panamanian registry. \textit{B. Boczek, supra} at 198.

47. Private maritime interests in the United States have asserted that "any fleet under foreign registry and manned by foreign crews is less reliable than U.S. flag vessels manned by U.S. citizens." G. Jantscher, \textit{supra} note 28, at 130. Maritime unions and other private interests are not alone in this concern. Navy personnel have expressed doubts as to the potential reliability of the alien crews on these vessels. They question both the willingness of the crews to submit to United States jurisdiction initially, and the amenability of the crews to orders once the vessels are requisitioned. \textit{E.g.,} McCleave, \textit{The National Defense Requirement for a U.S. Flag Merchant Marine}, \textit{Naunal War C. Rev.}, June 1969, at 64, 74. Admiral Moorer, Chairman of the Joint Chiefs of Staff and former Chief of Naval Operations, has stated that foreign flag vessels involve political risks and are not as dependable as the United States Merchant Marine. J. Barker & R. Brandwein, \textit{The United States Merchant Marine in National Perspective} 59 (1970).
in the United States control fleet are covered by contracts between the owners and the United States which permit the United States to charter the vessels on demand. These contracts are recognized under a treaty with Panama, and each contract involving a Liberian-documented vessel is concurred in by the Liberian government. While most of the vessels do have foreign crews, many of the crews consist wholly or partially of NATO nationals. Moreover, although emergency planning should leave room for a margin for error, one Maritime Administration official involved with such planning opines that because "[n]early all of the Liberian and Panamanian flag ships are bulk carriers, which are essential for support of the national economy but not useful for direct support of national defense operations, [the continued operation] of the ships under neutral flags in wartime obviously might have advantages, and the desirability of requisitioning would have to be evaluated . . . ."

In sum, it might be erroneous to conclude that present data and emergency contingency planning demonstrate that a continued United States merchant marine is not necessitated by its military or quasi-military function. They do indicate, however, that the role of the merchant marine in any future conflict would differ significantly from its role during the immediate aftermath of World War I as the exclusive means of overseas transport.

B. THE FOREIGN TRADE

Not long after the post World War I decade in which the Shipping Act and Jones Act were passed, the focus of the merchant marine shifted from national defense to foreign trade, the second national security ground allegedly necessitating a protected merchant marine. In 1929 the National Industrial Conference Board argued in favor of expanding the United States merchant fleet on four grounds, all related to the foreign trade: (1) it would be dangerous for the United States, as an industrial power competing for raw materials and the sale of manufactured products, to become overdependent on foreign flag vessels since foreign ship owners would not be interested in protecting America's commercial relations; (2) reliance on foreign vessels would increase the dangers of discriminatory treatment, loss of valuable trade information to competitors,

49. Id.
50. Id.
52. Letter from Frank B. Case, supra note 48.
and loss of ships if needed by the home country; (3) a merchant marine would protect the United States from unreasonable foreign rates; and (4) a merchant marine would develop new markets for United States exports. These national preference arguments fail to take into account the fact that a good number of foreign flag vessels are owned by United States citizens. It is also questionable whether prior experience supported these fears, but even assuming it did, the relevant issue today is whether the merchant marine is currently needed to expand foreign trade.

Three relationships may be hypothesized between a United States merchant marine and foreign trade. The first, on which the foreign investment restraints are premised, is that there is a positive correlation between the two. If so, one would expect that increased utilization of the merchant marine would be accompanied by greater trade. The second possible correlation is negative. American exports may in fact decline to the extent they are carried on United States flag vessels. A third possibility, of course, is the absence of any correlation between the two. Certain facts bear on these hypotheses, even if they do not conclusively prove or negate any of them. Table 1 sets forth the size or value of waterborne exports and imports and the percentage of those goods which were carried by United States flag vessels for certain years since 1900.

In light of these statistics, which depict a declining percentage of export carriage aboard United States flag vessels, one would expect the total export trade to have decreased if a positive relationship exists between the merchant marine and foreign trade. United States exports, however, have skyrocketed. Recent figures support the trends depicted in Table 1. For example, during 1974 exports amounted to $98.5 billion, an increase of $27.2 billion over 1973. Yet vessels under the United States flag carried only 5.8 percent of those 1974 exports which were waterborne compared with 6.0 percent in 1973. Exports for 1975 and 1976 increased

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53. NATIONAL INDUSTRIAL CONFERENCE BOARD, THE AMERICAN MERCHANT MARINE PROBLEM 56 (1929).
55. Between 1900 and 1910, American ships carried only about 10% of the United States foreign trade, and most of that 10% involved trade with Cuba, Canada, and Mexico. During World War I, many of the foreign ships upon which the United States foreign trade depended stopped carrying imports (resulting in shortages of commodities such as coffee, tea, sugar, and rubber) and exports (causing cotton, tobacco, machinery, and automobiles to pile up in warehouses). A. DENISON, supra note 23, at 129-33. On the other hand, statements to the effect that a weak merchant marine would result in the loss of valuable trade information and new markets seem exaggerated.
58. BUREAU OF THE CENSUS, supra note 56, at 597.
### Table 1. Waterborne imports and exports of the United States

<table>
<thead>
<tr>
<th>Year</th>
<th>total trade</th>
<th>% U.S. flag</th>
<th>total imports</th>
<th>% on U.S. flag</th>
<th>total exports</th>
<th>% on U.S. flag</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>millions of short tons&lt;sup&gt;a&lt;/sup&gt;</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1973</td>
<td>715</td>
<td>6.4</td>
<td>441</td>
<td>6.9</td>
<td>274</td>
<td>6.0</td>
</tr>
<tr>
<td>1970</td>
<td>539</td>
<td>5.6</td>
<td>299</td>
<td>5.1</td>
<td>240</td>
<td>6.3</td>
</tr>
<tr>
<td>1965</td>
<td>427</td>
<td>8.1</td>
<td>256</td>
<td>6.1</td>
<td>172</td>
<td>11.1</td>
</tr>
<tr>
<td>1960</td>
<td>323</td>
<td>12.3</td>
<td>199</td>
<td>9.9</td>
<td>124</td>
<td>16.3</td>
</tr>
<tr>
<td>1955</td>
<td>254</td>
<td>23.5</td>
<td>141</td>
<td>26.5</td>
<td>113</td>
<td>19.6</td>
</tr>
<tr>
<td>1950</td>
<td>159</td>
<td>39.3</td>
<td>97</td>
<td>43.7</td>
<td>63</td>
<td>32.5</td>
</tr>
<tr>
<td></td>
<td>thousands of long tons&lt;sup&gt;b&lt;/sup&gt;</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1955</td>
<td>199.9</td>
<td>23.6</td>
<td>117.5</td>
<td>26.8</td>
<td>82.4</td>
<td>19.0</td>
</tr>
<tr>
<td>1950</td>
<td>117.2</td>
<td>42.6</td>
<td>81.9</td>
<td>45.3</td>
<td>35.3</td>
<td>36.3</td>
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<tr>
<td>1945</td>
<td>90.2</td>
<td>68.4</td>
<td>35.2</td>
<td>79.7</td>
<td>55.0</td>
<td>61.2</td>
</tr>
<tr>
<td>1943</td>
<td>70.3</td>
<td>63.5</td>
<td>27.7</td>
<td>79.8</td>
<td>42.6</td>
<td>53.0</td>
</tr>
<tr>
<td>1940</td>
<td>76.0</td>
<td>30.5</td>
<td>36.1</td>
<td>40.7</td>
<td>39.8</td>
<td>21.4</td>
</tr>
<tr>
<td>1935</td>
<td>60.9</td>
<td>32.4</td>
<td>30.4</td>
<td>41.6</td>
<td>30.5</td>
<td>23.2</td>
</tr>
<tr>
<td>1930</td>
<td>81.7</td>
<td>37.8</td>
<td>41.3</td>
<td>47.2</td>
<td>40.4</td>
<td>28.0</td>
</tr>
<tr>
<td>1925</td>
<td>80.6</td>
<td>36.6</td>
<td>37.7</td>
<td>43.8</td>
<td>42.9</td>
<td>30.2</td>
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<tr>
<td></td>
<td>millions of dollars&lt;sup&gt;c&lt;/sup&gt;</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1935</td>
<td>3,786</td>
<td>1,813</td>
<td>35.8</td>
<td>1,973</td>
<td>35.7</td>
<td></td>
</tr>
<tr>
<td>1930</td>
<td>3,803</td>
<td>2,635</td>
<td>34.1</td>
<td>3,168</td>
<td>35.3</td>
<td></td>
</tr>
<tr>
<td>1925</td>
<td>7,940</td>
<td>3,716</td>
<td>31.0</td>
<td>4,224</td>
<td>34.9</td>
<td></td>
</tr>
<tr>
<td>1920</td>
<td>11,983</td>
<td>4,731</td>
<td>42.0</td>
<td>7,252</td>
<td>43.6</td>
<td></td>
</tr>
<tr>
<td>1918</td>
<td>7,803</td>
<td>2,577</td>
<td>27.8</td>
<td>5,226</td>
<td>18.9</td>
<td></td>
</tr>
<tr>
<td>1915</td>
<td>3,992</td>
<td>1,526</td>
<td>18.4</td>
<td>2,466</td>
<td>11.8</td>
<td></td>
</tr>
<tr>
<td>1910</td>
<td>2,983</td>
<td>1,467</td>
<td>10.0</td>
<td>1,516</td>
<td>7.5</td>
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<tr>
<td>1905</td>
<td>2,394</td>
<td>1,039</td>
<td>15.5</td>
<td>1,355</td>
<td>9.6</td>
<td></td>
</tr>
<tr>
<td>1900</td>
<td>2,090</td>
<td>806</td>
<td>12.9</td>
<td>1,284</td>
<td>7.1</td>
<td></td>
</tr>
</tbody>
</table>

<sup>a</sup> This table is drawn from three governmental sources, each of which used other governmental data in preparing the statistics. No measure of foreign trade could be found that was used consistently from 1900 to the present. The overlap in years in the table should give a rough indication of how the change in measure affects the trends depicted by the data.

<sup>b</sup> Statistics derived from Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States: 1975, at 597 (1975). This portion of the table excludes commodities classified as "Special Category" for security reasons, Department of Defense exports that were grant-aid shipments, and import shipments after 1955 that were under 2000 pounds shipping weight.

<sup>c</sup> Statistics derived from Maritime Administration, U.S. Dep't of Commerce, The Handbook of Merchant Shipping Statistics Through 1958, at 163-65 (1959). This portion of the table excludes military cargoes and cargoes carried on the Great Lakes. 1950 and 1955 figures exclude "Special Category" cargoes. 1943 and 1945 figures include all cargoes carried by vessels under United States control, not merely United States flag vessels. Thus, even these wartime figures of carriage aboard United States vessels are exaggerated.

<sup>d</sup> Statistics derived from Bureau of the Census, U.S. Dep't of Commerce, Historical Statistics of the United States, Colonial Times to 1957, at 452 (1960). This portion of the table includes all waterborne imports and exports on the Great Lakes, and the data for the years 1900 to 1915 are computed on years ending on June 30th.
to $107.1 billion and $114.8 billion, respectively;\textsuperscript{59} nevertheless, carriage aboard United States flag vessels accounted for only 5.4 percent\textsuperscript{60} and 5.9 percent\textsuperscript{61} of the total for these two years. Similarly, the percentage of total imports transported on American ships has decreased in recent years. United States flag vessels carried only 7.6 percent\textsuperscript{62} of 1974 imports of $100.3 million,\textsuperscript{63} 5.4 percent\textsuperscript{64} of 1975 imports of $96.1 million,\textsuperscript{65} and 4.7 percent\textsuperscript{66} of 1976 imports of $120.7 million. Arguably and ironically, the increasing foreign trade and the decline in the amount of that trade carried aboard United States vessels may indicate a negative correlation between the two.\textsuperscript{68} In much trade, especially foreign trade, transportation constitutes one of the highest transaction costs involved; the more that cost decreases, the more the cost of the total product should decrease and demand for the product should increase. Given the higher cost of transporting goods aboard United States flag vessels compared to foreign ships,\textsuperscript{69} the level of American exports and imports can be expected to be inversely related to their carriage aboard United States flag vessels.

The relationship between the cost of an export and the cost of transportation is illustrated by shipments made under the Agricultural Trade

\textsuperscript{59} U.S. DEPT. OF COMMERCE, DOMESTIC AND INTERNATIONAL BUSINESS ADMINISTRATION, OVERSEAS BUSINESS REPORTS 3 (Sept. 1977).
\textsuperscript{61} The calculations are based on data contained in the monthly reports of the BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, U.S. WATERBORNE EXPORTS AND GENERAL IMPORTS, (Trade Area, District, Port, Type Service, and U.S. Flag) (Jan.-Dec. 1976).
\textsuperscript{62} BUREAU OF THE CENSUS, supra note 57, at 22 (Table I-2).
\textsuperscript{63} U.S. DEPT. OF COMMERCE, supra note 59, at 3.
\textsuperscript{64} BUREAU OF THE CENSUS, supra note 60, at 11.
\textsuperscript{65} U.S. DEPT. OF COMMERCE, supra note 59, at 3.
\textsuperscript{66} BUREAU OF THE CENSUS, supra note 61.
\textsuperscript{67} U.S. DEPT. OF COMMERCE, supra note 59, at 3.
\textsuperscript{68} Although the sample is small, a regression of the figures in the first two columns of Table 1 indicates that the correlation between the percentage of American cargo carried on United States flag ships (X) and total trade (Y) is not positive. The correlation for the figures expressed in millions of short tons is negative at the 97% confidence level (Y = 604.1 - 12.69X, t = -2.98, R\textsuperscript{2} adjusted for degrees of freedom = 61.1%). There appears to be no correlation between total trade in millions of long tons and percentage of cargo on United States flag ships (Y = 145.5 - 1.129X, t = -1.09, R\textsuperscript{2} adjusted for degrees of freedom = 2.5%).
\textsuperscript{69} There are a variety of elements that contribute to the higher total cost of transportation on American flag vessels, including the higher costs of initial construction, maintenance and repair, insurance, wages, and subsistence payments. Of these, wages comprise the major component; in 1969, wages represented 84.6% of the total operating differential subsidy. G. JANTSCHER, supra note 28, at 22, Table 3-1. The remaining 15.4% was divided among insurance on the vessel hull and machinery (8.0%), maintenance and repairs (6.3%), and subsistence (1.1%). Id. The competitive disadvantage of United States flag vessels created by higher wages existed before World War I. E. JOHNSON & G. HUEBNER, PRINCIPLES OF OCEAN TRANSPORTATION 454-57 (1918).
Development and Assistance Act of 1954, which probably accounted for one-fifth of all cargoes carried on United States flag vessels engaged in the foreign trade between 1955 and 1970. Like military cargoes, most of these shipments are subject to section 901(b) of the Merchant Marine Act of 1936. Section 901(b) added at least $840.1 million to the cost of the sales part of the Food for Peace Program between 1955 and July 1971. Other foreign aid programs, most of which are administered by the Agency for International Development, are also subject to section 901(b). The additional cost of these programs for the same period resulting from compliance with this section was roughly $600 million.

The application of cargo preference legislation amplifies the problem-solution confusion identified with respect to military cargo. The purported need to expand foreign trade justifies protection of a United States merchant marine; once existing, pressures mount to utilize that merchant marine in the United States foreign trade, even if that trade could be carried by other vessels at less expense. Required usage of the merchant marine raises the cost of importing, which produces higher prices for consumers, and increases the cost of exporting, which hampers sales of American products abroad. Expansion of foreign trade, then, hardly justifies protecting the United States merchant marine. Protection of the merchant marine must be based on other grounds that outweigh these negative economic consequences.

C. JOBS FOR MERCHANT SEAMEN

The most vociferous proponents of the United States merchant marine are the maritime unions. Although their arguments reflect various purported concerns, the primary motivation of the maritime unions, quite obviously, is to protect the jobs of merchant seamen. This interest has

71. Id. at 91.
72. Id. See notes 36-38 supra and accompanying text.
73. G. Jantscher, supra note 28, at 92.
74. Id. at 97.
75. The advocacy of the maritime unions takes various forms. For example, it has been charged that the Carter administration proposal to require greater carriage of imported oil aboard United States flag vessels is “a blatant political payoff” for the maritime union support, financial and otherwise, during the 1976 Presidential campaign. N.Y. Times, Aug. 26, 1977, at 1, col. 5. The maritime unions also vigorously oppose any transfer of a vessel that might result in the vessel’s documentation under another flag. See note 102 infra.
76. See, e.g., Letter to the Editor from J.M. Calhoon, President, Marine Engineers Beneficial Association, N.Y. Times, Aug. 17, 1977, at 30, col. 1 (explaining how foreign flag tankers are used for tax avoidance purposes).
now become the national interest, recognized by both the executive branch and Congress.

The Merchant Seamen Act, passed in 1936, provides that all licensed officers and pilots of American vessels must be citizens of the United States and that, upon departure from a United States port, at least 75 percent of the crew, excluding the licensed officers, must also be citizens of the United States, unless the Commandant of the Coast Guard determines that compliance with the 75 percent citizenship requirement is impossible because of an insufficient number of qualified citizen seamen. The operating subsidy available to United States foreign trade carriers also represents direct congressional recognition of this interest. Although the Merchant Marine Act of 1936 refers to eligible vessels in terms of ships which are "used in an essential service in the foreign commerce of the United States," the subsidy seems more related to American labor than American commerce. First, on cargo vessels that have received a construction or operating subsidy, all crew members must be citizens of the United States. Further, although the subsidy serves to defray many of the additional operating expenses incurred because the vessel is documented under the laws of the United States, higher wages comprise the major part of the differential. The "subsidizable wage costs" are directly and indirectly related to the "collective bargaining costs," which the statute defines as "the annual cost . . . of all items of expense required of the applicant through collective bargaining or other agreement."

The interests of American labor have been recognized in more subtle ways as well. For example, the administrative approval required under sections 9 and 37 of the Shipping Act for the transfer of vessels to aliens is that of the Secretary of Commerce. Within the Department of Commerce, the obligations of the Secretary have been delegated to the Maritime Administration, which evaluates each application for transfer of vessels in excess of 3,000 gross tons to foreign registry or ownership "on its individual merits." The criteria utilized by the Maritime Administration in considering the application to transfer include the "national inter-

78. Id. § 672(a). In addition, an 1884 statute requires the commander of the vessel and all officers having charge of a watch, including pilots, to be citizens. Id. § 221.
79. Id. § 1171(a).
80. Id. § 1132(a).
83. Id. § 1173(c)(1)(A).
84. Id. (emphasis added).
85. Id. §§ 808, 855.
86. 46 C.F.R. § 221.7 app. I (1976).
Notice of each proposed transfer is published in the Federal Register, and interested groups are invited to respond with comments. That response, in part, provides the content of the "national interest." One interested party that invariably responds is the labor union that represents the workers affected by the transfer.88

But, to what extent are jobs for merchant seamen in fact jeopardized by foreign fleets? The employment risks in the domestic and foreign trade seem to differ. If foreign flag vessels were permitted to engage regularly in the domestic trade, nothing would bar the application of American law to the vessels.89 Thus, American wage rates could apply. With no differential in wage rates, there is no apparent reason why foreign seamen would be preferred over their American counterparts. Immigration laws, in fact, might require employment of only United States citizens or resident aliens on vessels engaged in the domestic trade.90

On the other hand, application of American labor laws to vessels engaged in the foreign trade under foreign flags poses more substantial conceptual difficulties.91 Moreover, it is improbable that most foreign

87. Id.
89. The United States Supreme Court has stated a number of times that Congress has the power under the Constitution to apply federal laws governing unions, union organizing, and picketing to the crews of foreign flag vessels, at least while these vessels are in American waters. See, e.g., American Radio Ass'n v. Mobil S.S. Ass'n, 419 U.S. 215 (1974); Windward Shipping (London) Ltd. v. American Radio Ass'n, 415 U.S. 104 (1974); Incre S.S. Co. v. International Maritime Workers Union, 372 U.S. 24 (1963); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 19 (1963). The Court, however, has also held that the National Labor Relations Act and the Labor Management Relations Act were not intended to apply to foreign flag vessels. Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957).
90. For example, 8 U.S.C. § 1182(a) (1970) defines excludable aliens as persons:
seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time... and at the place... and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

As of June 1, 1975, United States flag merchant vessels of 1,000 gross tons and over (excluding vessels operated on inland waterways and the Great Lakes, vessels operated for the Army and Navy, and certain special types of vessels) employed approximately 20,500 seamen. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1976, at 624 (1976). Yet membership in seafaring unions that could man such jobs approximated 82,000. MARITIME ADMINISTRATION, U.S. DEP'T OF COMMERCE, SEAFARING GUIDE & DIRECTORY OF LABOR-MANAGEMENT AFFILIATIONS 3 (1975).
91. If a foreign flag vessel were to regularly engage in the United States domestic trade, both the geographical location of the vessel—within United States territorial waters—and the activity of the vessel—transportation of cargo between two points in the United States—
trade operators would retain their vessels under the United States flag without the subsidies and cargo preferences that accompany the flag. The chief consequence of a transfer of vessels from United States to foreign documentation might well be the substitution of cheaper foreign labor for American labor.

Recognizing, however, that there might be a loss of American jobs, especially in the foreign trade, the question that arises is whether there is anything particular about a seaman’s task which should differentiate his job from those of others. In one respect, this problem—the loss of American jobs to foreign labor—does not differ in substance from the problems created by all other competition involving the export and import of goods. The seaman’s services in delivering the product are economically indistinguishable from the foreign worker’s service in producing the product. In the latter case, the United States with few exceptions has adopted a policy of free trade. If the lower cost of foreign labor results in the production of certain goods at a lower total cost, such goods are admitted free from discrimination. Although subsidies are sometimes provided in these situations, such aid is usually limited to providing benefits to those American workers displaced by the foreign competition.

Yet it may be argued that there are at least two distinguishing characteristics of the seaman’s job. First, the merchant seaman may have skills which can be utilized during wartime, an argument closely allied with the necessity of the merchant marine for military purposes. The need for seamen for defense purposes, however, is minimized by the existence of a standing Navy with ships, guns, aircraft, and specialized personnel. In emergency situations, United States seamen employed in the domestic trade could probably fill gaps in naval services equally as well as seamen employed in the foreign trade—where the jobs are at risk. Moreover, in terms of national defense, there is no reason to distinguish the seaman’s job from many others. We also need transistors in times of war, and the persons who can manufacture them. Should we restrict the import of transistors on the ground that we must retain a group of skilled workers in that field because foreign sources would be unreliable if a war arose? At some point the attenuated interests of national defense with respect to presently unforeseeable emergencies must be balanced against the policy

would justify subjecting it to American regulation despite its foreign registry. See notes 116-19 infra and accompanying text. If, on the other hand, the foreign flag vessel engages in the foreign trade, the propriety of applying American law, on the theory that the vessel affects American interests more than the interests of any other nation, becomes much more suspect. A difficult conflict of laws problem would arise if the other foreign nations which it serves also passed legislation applying their labor laws to the same vessel.


in favor of the free flow of goods and services, on which the United States has based its international economic relations since World War II. Although that policy, if followed blindly, could lead to unwanted consequences, it is based upon the legitimate premise that free trade fosters economic efficiency.

The second difference, it has been argued, is that because of their allegedly superior skill, American seamen are better able to protect the environment. The relationship between the environment and the merchant marine will be examined in the next section of this Article. For now, it is sufficient to note that if in fact American crews are generally considered safer than foreign crews, one would expect that safety factor to have a noticeable impact on insurance rates over a period of time. Therefore, regardless of seamen's wages, employing an American crew would presumably be less costly relative to using foreign crews than it now is.

The loss of seamen's jobs, moreover, could be handled by means other than protecting the merchant marine in the foreign trade. Although the Maritime Administration reports that 69,342 merchant seamen found full or part-time employment aboard United States flag vessels in calendar year 1975, the Bureau of the Census estimates that only 20,500 persons were employed on United States merchant ships weighing over 1,000 gross tons. This latter figure probably exceeds the number regularly employed in the foreign trade. The Maritime Administration also reports that the total operating differential subsidy for fiscal year 1976 was $305.4 million. In other words, the operating differential subsidy alone amounted to over $14,900 for each merchant seaman involved in the foreign trade. Several alternatives, each less expensive than the current protection afforded the merchant marine, are available. For example, the government might offer adjustment assistance to seamen displaced by foreign flag vessels similar to that available to other workers displaced by

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94. See Phillips, supra note 1, at 855.
95. Id. at 855-61.
96. See note 19 supra.
98. BUREAU OF THE CENSUS, supra note 90, at 624. This figure excludes employment on vessels operated on inland waters and the Great Lakes, United States Army and Navy owned and operated vessels, tug boats, and other-special types of vessels.
99. MARITIME ADMINISTRATION, supra note 97, at 69.
100. The operating subsidy compensates for more than the wage differential and should not be confused with the wage differential per seaman, which is a component of the operating differential and is therefore necessarily less. Since wages represent roughly 80% of the total operating differential, the wage differential per seaman is approximately $11,920. See note 69 supra.
import competition.\textsuperscript{101} Assuming that weekly wage benefits averaged $200 and that no unemployment compensation was paid, that adjustment allowance would equal $10,400 annually. A second possibility, of course, is simply to pay the seamen for not working. This alternative is hardly politically feasible, but it does illustrate the tremendous cost the United States incurs to protect the merchant marine in order to assure jobs for merchant seamen.

It is doubtful that the seaman's job can be sufficiently differentiated from those of other workers to justify the high cost of maintaining the anticompetitive restraints. Nevertheless, this concern seems to have been accepted as a proper component of the national interest served by the merchant marine,\textsuperscript{102}—a component which differs from the national security concerns previously identified. Although the merchant marine does not serve to expand the foreign trade and its relationship to military preparedness can be debated, it does supply jobs for United States seamen. In this instance there is a direct correlation between the interest identified and the institution supported.

\section{D. Environmental and Safety Concerns}

Support for the United States merchant marine has recently grown as a result of the environmental damage inflicted by foreign flag vessels on United States shores and territorial seas. The environmental problem is allegedly indicative of the purported lack of regulatory control exercised over foreign flag vessels in general. The Maritime Administrator has commented: "The fact is, you can't expect small countries who gather a great deal of their revenue from registering foreign ships... to exercise stringent control of those ships. They want that revenue. They want those fees. If Panama exercises strict control, the ships will run to Liberia. If

\begin{itemize}
\item \textsuperscript{101} See 19 U.S.C. §§ 2271-98 (Supp. V 1975). The adjustment assistance includes, among other things: an adjustment allowance, generally equal to 70% of the worker's average weekly wage, available for one year, \textit{id.} §§ 2292, 2293; job search allowances, \textit{id.} § 2297; and relocation allowances, \textit{id.} § 2298.
\item \textsuperscript{102} In light of the high cost involved for everyone but the seamen, the merchant marine will likely receive less sympathetic recognition if it is justified explicitly on the basis of this interest. For example, the Carter administration recently proposed legislation that would have required 9.5% of imported oil to be carried on United States flag vessels. \textit{N.Y. Times}, Aug. 26, 1977, at 1, col. 5. If enacted, that legislation would have purportedly added an additional $240 million, \textit{id.} (General Accounting Office estimates), to an additional $610 million annually to the cost of oil paid by American consumers, \textit{N.Y. Times}, Sept. 12, 1977, at 1, col. 1 (the General Accounting Office revised its earlier estimate in order to take into consideration price increases in domestically produced oil in response to changes in the world market). The legislation was defeated in the House of Representatives after disclosure of the additional cost of the legislation to American consumers and charges that advocacy of the legislation was due to campaign contributions from the maritime unions. \textit{N.Y. Times}, Oct. 31, 1977, at 27, col. 2.
\end{itemize}
the Liberians do it, they go to Malaysia." Thus the competitive marketplace of nations seeking franchise tax revenues frustrates effective maritime regulation. In that marketplace lowest cost assumes the form of minimal regulation.

Both the strength of United States regulation in comparison with foreign control—particularly Liberian and Panamanian control—and the hazards resulting from lack of effective regulation have been documented. In 1975 and 1976, oil spills, mostly from foreign flag vessels, amounted to 188,000 tons and 200,000 tons respectively. Both the Sansinena, which split in two in the Los Angeles Harbor in 1975, and the Argo Merchant, which caused a gigantic spill off the East Coast in 1976, were Liberian vessels. The Sansinena incident might have been avoided by a relatively inexpensive gas inerting system, and the Argo Merchant mishap by a moderately priced radio navigation device designed for long-range position fixing at sea. The absence of meaningful regulation by foreign nations has a particularly great impact on the United States since we have no deep-water ports. Although foreign fleets often include modern oil tankers and other vessels equipped with the latest safety features, the ships that commonly visit United States waters are smaller and older and, therefore, far more likely to be involved in mishaps causing environmental damage and human loss. The United States, in contrast to many other nations, has promulgated extensive regulations dealing with the safety and navigation of all of its flag vessels.

But the fact that environmental damage is rising and that United States regulation is more stringent than most, if not all, foreign regulation does not necessarily establish the need for a United States merchant marine. It might be argued that the United States could exercise stricter safety and other regulatory controls over foreign flag vessels which enter United States waters or impose greater liability on the persons involved in the

106. Id. at col. 6.
107. Ulman, supra note 104, at col. 5.
108. Wall St. J., March 21, 1977, at 5, col. 1. The new regulations to be adopted by the Carter administration apply to vessels of more than 20,000 deadweight tons entering United States ports. Regulations covering this broad range of vessels, rather than only the larger classes of ships, are considered necessary because most vessels entering United States ports, due to the absence of deep-water facilities, are relatively small.
109. See generally 46 C.F.R. §§ 1 to 196.85-1 (1976). For example, Subchapter D (Tank Vessels) of the Coast Guard's regulations includes special construction requirements and other provisions for carrying certain flammable or dangerous cargoes in bulk, id. § 40 (1970); Subchapter F (Marine Engineering) includes requirements for various boilers, id. §§ 52, 53, piping systems, id. § 56, and periodic tests and inspections, id. § 61; Subchapter I (Cargo and Miscellaneous Vessels) requires certain life-saving and fire-protection equipment, id. §§ 94, 95.
vessels' operations, including the stockholders and customers of the transported commodity. Other possible approaches that address the environmental concern include international and private party action.

Because foreign vessels carrying cargo to or from American ports would seem to be involved in more than "innocent passage," application of American law to such vessels would be consistent with international law. However, the legal right of the United States to exercise regulatory control over these foreign flag vessels and its effective ability to do so are different matters. Even if the Coast Guard were able to recognize the approach of every foreign ship and inspect such ships for every safety feature required by its regulations, this mode of enforcement would be prohibitively expensive. Initial and periodic inspections of vessels documented in the United States possibly offer a more feasible means of ensuring compliance. As to inducing compliance with safety standards by imposing liability on persons other than the corporate owner, numerous problems arise: how can we identify the stockholders; is it equitable to pass legislation imposing liability without proof of knowledge as to the lack of certain safety features; and if not, would requiring such proof minimize the deterrent effect of the law? If problems of proof necessary to establish liability make its imposition infrequent or unlikely, insurance against such liability might well be affordable regardless of the identity of the insured. Without substantial deterrent effect, imposition of liability does not address all environmental concerns because, by definition, these concerns extend beyond the problem of after-the-fact monetary compensation for damage that has occurred. For the same reason, private efforts such as TOVALOP and CRISTAL, two private com-


111. The 1958 convention declares that coastal nations may make and enforce laws denying fishing rights to foreign vessels in the territorial sea and that violation of those laws makes passage of the fishing vessels non-innocent. Id. art. 14, § 5. In addition, there is the generally recognized right of coastal nations to make and enforce, as against foreign vessels in their territorial waters, laws governing security, customs duties, fiscal regulation, and sanitation and health matters. Nations also have the right to exclude foreign vessels from the trade along their coast. See, e.g., United States v. California, 332 U.S. 19, 35 (1947); I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 204 (2d ed. 1973).

112. Ulman, supra note 104.

113. TOVALOP stands for Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution, to which owners of 99% of the non-Communist world tonnage are parties. Each tanker owner party to TOVALOP has agreed either to remove spills from its tankers or to reimburse a national government or its agent for costs reasonably incurred in removing such spills, if the spills are negligently caused and threaten to damage coastlines. See generally, Becker, A Short Cruise on the Good Ships TOVALOP and CRISTAL, 5 J. MAR. L. & COM. 609 (1974).

114. CRISTAL stands for Contract Regarding an Interim Supplement to Tanker Liability
Compensation schemes for meeting claims arising from oil spillage, or international conventions relating to liability for spillage\textsuperscript{115} cannot serve as functional substitutes for before-the-fact regulatory control. International regulatory control might be the ideal answer, but it is difficult to imagine such control as incorporating little more than the lowest common denominator of its signatories.

The environmental concern, moreover, raises the more fundamental issue of which nation's law should govern a particular vessel. "Flags of convenience," as Liberian and Panamanian registration are frequently termed, are selected not because of any substantial connection with the nation of documentation, such as regular operation within its territorial waters, but in order to be subject to minimal regulation and secure maximum tax benefits.\textsuperscript{116} Consequently, in addition to implicating environmental and safety concerns, unjustified foreign flag documentation frustrates United States tax policy. Not only may a vessel escape United States taxation on its operations, but foreign documentation may facilitate transfer pricing arrangements whereby income from other operations properly taxable by the United States is converted into an expense owing to, and thus income earned by, the nontaxable transportation operations conducted under foreign flags. In light of the lack of nexus between the flag nation and the ownership or operations of the vessel, foreign documentation of vessels controlled by United States citizens must be based simply upon the principle that the owners of vessels are free to select a

\textsuperscript{115} For Oil Pollution, to which over 90% of the world's oil companies receiving cargoes of crude and fuel oil are parties. Each company party to CRISTAL has agreed to contribute to a fund maintained by the Oil Companies Institute for Marine Pollution Compensation Limited. Payments are made out of the fund to reimburse clean-up expenses incurred by tanker owners and to compensate persons sustaining damage from tanker oil spills who would otherwise be inadequately compensated. See generally Becker, supra note 113.

\textsuperscript{116} The motivation for and process of documentation in Liberia are described in a series of three articles by J. Kifner in the following issues of the New York Times: Feb. 13, 1977, at 1, col. 5; Feb. 14, 1977, at 14, col. 1; Feb. 15, 1977, at 10, col. 3. Kifner describes how the Liberian fleet was originally established by American businessmen with the aid of Edward R. Stettinius, Jr., a former Secretary of State, and how it is still controlled from offices at 103 Park Avenue in New York City. A call to those offices "can connect a caller to: Captain Alister Crombie, Deputy Commissioner for Maritime Affairs" of Liberia; the executive director of a 62 member association of owners of vessels registered in Liberia; an admiralty lawyer who is chief adviser to the Liberian Maritime Bureau and Liberia's most important representative at international shipping conferences; and an individual who plays the dual role of "senior deputy commissioner for maritime affairs . . . [and] senior vice president of the International Bank of Washington, which owns the International Trust of Liberia, which in turn operates the maritime system." N.Y. Times, Feb. 14, 1977, at 14, col. 6. As Kifner reports, none of these persons is Liberian. Kifner describes the benefits of Liberian documentation as including a guarantee of anonymity for shareholders and lower crew wages.
flag ship of their choice. When, however, the investment decision affects public interests such as environmental protection, freedom of choice can hardly serve as a justification for undermining those interests. It may be argued that the fact that American law does not prohibit United States citizens from establishing Panamanian or Liberian business enterprises to document vessels under those flags evidences a public policy or indifference as to having such vessels within our merchant marine. That argument, however, fails to distinguish between the lawfulness of particular conduct—and Panamanian or Liberian registration is lawful—and the conformity of that conduct with public policy. Analogously, American law commonly does give investors a choice of policies in certain substantive fields—choice of business form and the content of that form—and increasingly allows contracting parties to choose a particular source of law to be applied in interpreting their contracts, but in both cases the law permits such freedom of choice largely because and only when there is no reason to deny choice.

In sum, perhaps the most compelling reason for a United States merchant marine is that it fosters American regulation of the ownership and operation of vessels that affect United States interests more than the interests of any other nation. Those interests are obviously greater in the domestic trade than in the foreign trade. It is, therefore, in the domestic trade that inclusion of vessels in the merchant marine is most desirable and appropriate. In contrast, including vessels operating in the United States foreign trade in the merchant marine seems less normative.

117. For example, a group of ten or less persons operating a business may decide to operate as, inter alia, a partnership, a limited partnership, a corporation, or a Subchapter S corporation with a different combination of law (tax and otherwise) applicable to each form. Compare, for example, the law applicable to partnerships (see generally the Uniform Partnership Act and Internal Revenue Code of 1954, §§ 701-61) with the law governing Subchapter S corporations (see generally a state corporation statute, such as the Delaware General Corporate Law and Internal Revenue Code of 1954, §§ 1371-79).

118. For example, the Restatement (Second) of Conflict of Laws, § 332a, (Tent. Draft No. 6, 1960) provides: "The validity of a contract is determined by the local law of the state chosen by the parties for this purpose, unless (a) the choice of law was obtained by unfair means or was the result of mistake, or (b) the contract has no substantial relationship with the chosen state and there is no other reasonable basis for the parties' choice, or (c) application of the chosen law would be contrary to a fundamental policy of the state which would be the state of the governing law in the absence of an effective choice by the parties."

If the question of documentation were simply a contract matter and if the Restatement were controlling law, both subsections (b) and (c) would preclude Liberian or Panamanian registry. Documentation, in fact, generally implicates the state and, therefore, public policy much more than a private contract would.

119. Troubling questions remain with respect to the foreign trade, such as whether inclusion would be voluntary or mandatory, and if the latter, whether mandatory inclusion would extend only to vessels owned directly or indirectly by United States citizens or also to those owned by aliens. The next part of this Article considers some of these questions. See text accompanying note 189 infra.
Moreover, absent the requirement that all vessels operating in the United States foreign trade be part of the merchant marine regardless of ownership—an unlikely prospect—some foreign flag vessels will always operate in the United States foreign trade. Thus, like other suggested approaches to environmental concerns, inclusion in the merchant marine can never be the exclusive solution to safeguarding all United States regulatory interests. Nevertheless, if regulation attending United States documentation most practicably safeguards United States interests, especially environmental and safety interests, and if the United States merchant marine includes an appreciable number of vessels, inclusion in the fleet will at least advance those interests.

II

RELATIONSHIP OF THE INVESTMENT RESTRAINTS TO THE CASE FOR THE MERCHANT MARINE

The political reality that our merchant marine is protected from competition despite resultant economic inefficiencies indicates that it still furthers certain interests. The primary interests which a United States merchant marine is intended to serve, however, have subtly shifted from national defense and foreign trade to jobs for United States seamen and environmental and safety regulation. Were no interests still served by a United States merchant marine, the issue of investment restraints could be simply addressed: because the ultimate objective of the restraints—growth of a merchant marine—would be outdated, the restraints would be unnecessary. However, given that a continued merchant marine does further certain objectives, two questions arise. First, has the statutory scheme in fact fostered a United States merchant marine? And second, in what way do the investment restraints relate to the present interests which justify a merchant marine?

The basic assumption underlying the legislative scheme is that cabotage and like restraints do in fact foster the merchant marine and related industries such as shipbuilding. Table 2 shows the sizes of the world and United States fleets in certain years, giving figures first for vessels of 1,000 gross tons and over and then for vessels of 100 gross tons and over. As the table illustrates, whereas the worldwide gross tonnage of all vessels in excess of 1,000 gross tons increased approximately fivefold during the forty year period between 1935 and 1974, American tonnage was approximately equal in 1974 to what it had been in 1935. The percentage of world tonnage under the United States flag has dramatically decreased from 22.9 percent in 1935 to 4.6 percent in 1974. Only temporary increases reflecting World War II, the Korean War, and the Vietnamese conflict interrupt this pattern. Moreover, the fleet that does exist
is quite dated. One naval officer reported in 1969 that the average age of
the fleet was twenty-two years and that 80 percent of the fleet dated from
World War II and was obsolete. In 1971, it was estimated that two-

<table>
<thead>
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<th>Year</th>
<th>World</th>
<th>United States</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>number of vessels (in thousands)</td>
<td>number of vessels (in thousands)</td>
</tr>
<tr>
<td>1000 GT and over</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1974</td>
<td>22,449</td>
<td>311,323</td>
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<tr>
<td>1970</td>
<td>19,980</td>
<td>227,490</td>
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<td>1966</td>
<td>18,423</td>
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<td>15,148</td>
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<td>12,798</td>
<td>68,509</td>
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<tr>
<td>1935</td>
<td>63,727</td>
<td></td>
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<td>100 GT and over</td>
<td></td>
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<tr>
<td>1974</td>
<td>58,957</td>
<td>310,934</td>
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<tr>
<td>1970</td>
<td>50,472</td>
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<td>1965</td>
<td>39,628</td>
<td>159,979</td>
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<tr>
<td>1960</td>
<td>34,056</td>
<td>129,339</td>
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<tr>
<td>1955</td>
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<tr>
<td>1950</td>
<td>27,922</td>
<td>83,996</td>
</tr>
</tbody>
</table>


120. Powell, United States Shipping Industry—Problems and Prospects, Naval War C. Rev., Nov. 1969, at 5, 6. See also Ramage, supra note 28, at 8 (estimating that of the 981 vessels in the United States merchant marine fleet as of January 1, 1969, 670 vessels were twenty or more years old).
thirds of the United States merchant marine fleet was twenty-five years old.\textsuperscript{121}

Similarly, the output of United States shipbuilders has been a significant part of world shipbuilding only during war years. In 1945, for example, United States shipyards built 80 percent of the world's production of vessel tonnage, whereas in 1946 that figure fell to 25 percent.\textsuperscript{122} As Table 3 illustrates, that percentage has remained below 5 percent since 1955.

The conclusions to be drawn from these statistics can obviously vary. Witnessing the decline of the United States merchant marine and United States shipbuilding in both absolute terms and relative to other nations, certain advocates in favor of our merchant marine have contended that a greater degree of protection should be afforded the American merchant marine and the shipbuilding industry.\textsuperscript{123} The assumption underlying this argument is that without the present restraints and preferences, the statistics would be even more dismal. Another approach—in my judgment, the more fruitful—is to ask whether any of the restraints designed to protect the maritime industries have in fact contributed to its decline, and if so, whether the interests now served by the merchant marine would be aided or harmed by revising those restraints. Restraints that merit recon-

\begin{table}[h]
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\begin{tabular}{|c|c|c|c|c|}
\hline
year & vessels completed & gross tons (1000 GT) & vessels completed & gross tons (1000 GT) & U.S. completed vessels as % of world total & U.S. tonnage as % of world total \\
\hline
1974 & 2,949 & 33,541 & 233 & 733 & 7.9 & 2.2 \\
1970 & 2,814 & 20,980 & 156 & 375 & 5.5 & 1.8 \\
1965 & 2,202 & 11,763 & 116 & 218 & 5.3 & 1.9 \\
1960 & 2,005 & 8,382 & 49 & 379 & 2.4 & 4.5 \\
1955 & 1,355 & 4,965 & 21 & 100 & 1.5 & 2.0 \\
1950 & 930 & 3,250 & 29 & 393 & 3.1 & 12.1 \\
\hline
\end{tabular}
\caption{Merchant vessels over 100 gross tons completed in the world and the United States\textsuperscript{a}}
\end{table}


consideration are: the restrictions on foreign investment in United States carriers engaged in the domestic trade; the controls on the transfer of vessels to aliens; and the ownership requirements which must be met to be eligible for operating and construction subsidies.

A. INVESTMENT RESTRAINTS IN UNITED STATES DOMESTIC TRADE

Section 27 of the Jones Act,124 sets forth three primary prerequisites for engaging in the domestic cargo trade: the documentation, construction, and ownership requirements. Where a corporation owns the vessel, there is also a management requirement.

The documentation requirement, which prohibits all but United States flag vessels from engaging in domestic trade, is patently anticompetitive. Yet the present interests served by a United States merchant marine do support its retention. A policy in favor of protecting the jobs of American seamen has been recognized, even though compensation could be provided to persons losing jobs because of foreign competition. Further, given that American wage rates would almost certainly apply to vessels regularly operating in our domestic trade, it is difficult to envision any substantial cost savings emanating from the operation of foreign flag vessels in United States waters. Such vessels should also be subject to other policies reflected in our domestic laws; requiring documentation under United States law facilitates conformity to those policies. Finally, at some point it would be specious not to designate as American, a vessel that regularly engages in the United States domestic trade and is subject to United States regulation.

The documentation requirement receives support from the construction requirement as well. Analytically, the construction requirement, which specifies that vessels engaging in the domestic trade must be built in the United States,125 differs from the documentation and ownership

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125. Determining whether the construction requirement has been satisfied may not be easy. For example, various parts of a vessel may have been manufactured in different countries or a vessel may have been originally built in one country but repaired or rebuilt elsewhere. A 1956 amendment to § 27 clarified, in part, some of these problems:

[No vessel of more than five hundred gross tons which has acquired the lawful right to engage in the coastwise trade, by virtue of having been built in or documented under the laws of the United States, and which has later been rebuilt shall have the right thereafter to engage in the coastwise trade, unless the entire rebuilding, including the construction of any major components of the hull or superstructure of the vessel, is effected within the United States, its territories (not including trust territories), or its possessions.

requirements. In itself, the construction requirement neither bars alien investment in the construction industry nor operations by aliens as domestic carriers, although it might negatively affect the possibility of a foreign carrier competing in the domestic trade because of the likelihood that most of its fleet would have been built outside the United States. Some of the same policy arguments, however, that are used consistently if not persuasively to support a United States merchant marine apply more forcefully to vessel construction. Consider defense preparedness, for example. The same shipyard that constructs vessels for the private domestic trade produces vessels for the Navy during a war these facilities could be altered to provide greater military production. Further, as of 1976, a total of 97,154 workers were employed in the domestic ship construction industry. Subsidizing displacement from these jobs could be more difficult than subsidizing loss of jobs for the smaller number of merchant seamen. If the construction requirement does foster certain interests which counsel for its continuation or, at least, for a slow rather than rapid demise, then it seems appropriate to consider amendments to section 27’s other prerequisites in light of that conclusion. Politically it might be more difficult to continue the construction requirement without maintaining the documentation requirement. Could we insist that foreign flag vessels operating in our domestic trade be constructed in the United States? If so, the carrot we would be offering would pale beside the stick retained.

The same interests do not justify the ownership or management requirements. Section 27 requires the individual owner to be a citizen and, by reference to section 2 of the Shipping Act, the corporate owner to be domestically organized and owned, to the extent of 75 percent of the ownership interests, by United States citizens. The same ownership interest requirement applies to partnerships. In addition, the chief executive officer and the chairman of the board of a corporate owner must be United States citizens and the number of alien directors, if any, must be less than a quorum of the board.

126. Section 37 of the Shipping Act, 46 U.S.C. § 835 (1970), does require administrative approval for foreign direct investment in the vessel construction industry. For a description of this provision and a discussion of the problems associated with it, see Phillips, supra note 1, at 901-05.
127. Although a few vessels were constructed in the United States for foreign owners or foreign registry during the 1950's, no ships were build domestically for foreign registry between 1959 and 1970. G. JANTSCHER, supra note 28, at 51.
128. For example, General Dynamics Corporation's Quincy shipbuilding division repairs both commercial and naval vessels. 38, No. 15 STANDARD AND POOR'S CORP., STANDARD CORPORATE DESCRIPTIONS 5678 (Aug. 1977).
129. MARITIME ADMINISTRATION, supra note 97, at 78.
131. Id.
132. Id.
Jobs for seamen, environmental protection, safety, and other regulatory concerns are served by easing the flow of funds into the merchant marine, yet the ownership requirement counteracts that objective. By directly limiting the use of foreign capital and thereby decreasing the supply of funds, the restrictions may raise the cost of the capital which is available. In addition, the investment restraints prohibit the entry of new foreign competitors into the field. To the extent that inability to assume direct control over the operations discourages investment, the management requirement may be criticized on the same ground. In short, the investment restraints might well be prohibiting more vessels from coming under the effective regulation of the United States and decreasing the number of jobs which might be available to American seamen. Nor is there reason to believe that aliens would not invest funds in the domestic trade; in fact, such investment is now considered quite attractive. Even if American investors did not consider the investment desirable, foreign investors might find it attractive. Interestingly, eliminating the citizen ownership and management requirements would substantially obviate the anticompetitive nature of section 27. Foreign investors would not be barred from competing off our shores. Rather they would simply be told

133. Indeed, this appears to be the premise underlying the Ship Mortgage Act. See note 17 supra.

134. It is a common assumption in the business community that a classified board tends to discourage takeover attempts for the same reason—purchase of the controlling block of stock will not result, at least for some time, in actual control. On the other hand, takeovers tend to be more hostile encounters than other investment situations, and management might be more attentive to the wishes of controlling stockholders in non-takeover investment situations, regardless of the difference in citizenship between the directors and the controlling shareholders. Certainly, persons holding a controlling block of stock would be able to assume control no later than the next annual meeting by electing dummy directors of American citizenship. Still, control over the corporation by the foreign investors owning less than 100% of the stock will always be somewhat incomplete because of the duties the directors owe to the other shareholders to manage the corporation for the benefit of all shareholders. Foreign investors who assumed “direct” rather than “indirect” control over the investment by becoming the directors would, of course, be subject to the same duty, but could, in the short run, implement their policies regardless of whether any duties were violated in so doing. Moreover, the foreign investor as director may not be as vulnerable as American directors to suits by stockholders since enforcing a judgment against a foreign director could be quite difficult.


136. Examples of seemingly unprofitable investments by foreign investors include Iran’s investment in Fried. Krupp G.m.b.H., a major West German concern, and Libya’s investment in Fiat, the Italian auto manufacturer. Investment motivation is complex. Domestic and foreign investors may give different weight to various factors. One factor the foreign investor might weigh more heavily than his domestic counterpart in making an investment decision is the prestige of controlling a visible business enterprise in a different, more industrialized country.
that when in America, do as the Americans do—sail your vessels under the United States flag subject to the full regulation of American laws.

To understand the full impact of the investment restraints on economic activity in the United States, one must also bear in mind that aliens who invest in domestic enterprises unrelated to the maritime industries generally must arrange the business so that all water cargo transportation is handled by carriers rather than the business directly. Where the business itself could handle the carriage most efficiently, the cost of transport is increased and the potential profitability of the enterprise decreased. Thus the present restraint might be an indirect impediment to foreign investment in other industries. In 1958 Congress recognized but failed to fully rectify the spill-over effect of the cabotage restraints by adding section 27A to the Jones Act.\textsuperscript{137} Section 27A permits self-carriage of cargo or passengers by certain corporations engaged in manufacturing or the exploitation of natural resources in the United States. But to qualify under section 27A, the corporation must be domestically organized, must be engaged primarily in manufacturing or mineral extraction in the United States, and must purchase or produce in the United States not less than 75 percent of the raw materials used or sold in its operations. In addition, a majority of its officers and 90 percent of its employees must be United States residents and the total book value of the vessels cannot exceed 10 percent of the aggregate book value of its assets. American-built vessels owned by a corporation so qualifying, if nonself-propelled or, if self-propelled and less than 500 gross tons, “shall be entitled to documentation under the laws of the United States, and . . . shall be entitled to engage in the coastwise trade and, together with their owners or masters, shall be entitled to all the other benefits and privileges and shall be subject to the same requirements, penalties, and forfeitures as may be applicable” to vessels documented under other provisions.\textsuperscript{138} Even the breadth of this language is somewhat misleading, however. With respect to carriage between the United States, the statute confines the vessels’ uses to: (1) the transportation of persons or merchandise either for the corporate owner or a parent or subsidiary of the corporate owner; or (2) charter to a common or contract carrier for use in “the domestic noncontiguous trade” if that carrier qualifies as a citizen under the Shipping Act’s definition of citizenship and charters the vessels at prevailing rates.\textsuperscript{139} Yet the utility of the vessels for such operations is limited. The requirement that the vessels be either nonself-propelled or carry under 500 gross tons and the legislative history of section 27A make clear that deep-sea craft


\textsuperscript{139} \textit{Id.}
may not be documented and operated under this section. The Senate Report, prepared by the Senate Committee on Interstate and Foreign Commerce, declared that "the legislation would have been rejected had it applied to deep-sea craft."\textsuperscript{140} The Committee stated, "We are determined that the present requirement of law that our deep-sea fleet engaged in the coastwise and intercoastal trade be owned by citizens of the United States remain unchanged."\textsuperscript{141} Section 27A, therefore, incorporates its own arbitrary limitations and, not coincidentally, has rarely if ever been utilized.

Because most cargo vessels are owned by corporations rather than individuals, the investment limitations applicable to corporate owners of vessels are especially important. Focusing on the problem of corporate ownership reveals three additional indictments against the restraints on investment in the domestic trade as presently drafted: the 75 percent investment limitation is ambiguous and therefore offers inadequate guidance to investors; it probably does no more than incorporate the same standard as the "controlling interest" standard applicable to other situations under the Shipping Act; and if the two standards do make a difference, the difference is misplaced in view of their national security foundation.

Section 2 of the Shipping Act, which defines corporate citizenship, states that the 75 percent ownership requirement is not met:

(a) if the title to 75 per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if 75 per centum of the voting power in such corporation is not vested in citizens of the United States; or (c) if, through any contract or understanding, it is so arranged that more than 25 per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.\textsuperscript{142}

This "clarification" of the 75 percent ownership requirement raises more questions than it answers. Professor Vagts has pointed out that even if foreign interests own 25 percent or less of the common stock, "the 75 percent of the common would certainly owe some fiduciary duties to the 25 percent."\textsuperscript{143} The same concept of a fiduciary duty towards minority stockholders was recently given as one reason for denying relief to an

\textsuperscript{140} S. REP. No. 2145, supra note 137 at 4.

\textsuperscript{141} Id.

\textsuperscript{142} 46 U.S.C. § 802(c) (1970).

American management which sought to enjoin a foreign takeover of their company which left American stockholders in the minority. To the court, if the obligations owed to the American minority stockholders were breached, such stockholders would simply have "a well recognized remedy . . . in the form of a shareholders derivative action." In short, that literal statutory proscription cannot be squared with commonly accepted precepts of American corporate law. If, on the other hand, what is meant is not fiduciary duties in a broad common law sense, but something more formal and akin to a trust—"trust" being the noun which precedes the phrase "fiduciary obligation"—either enumeration (a) or enumeration (c), which speaks of "any contract or understanding," is superfluous. Such superfluity seems probable since one can hardly read section 2 without feeling that each clause has been said before; if nothing else, this repetition emphasizes the degree to which any sort of foreign control was meant to be proscribed. But whether the proscribed "fiduciary obligation" is formal or informal, the content of that fiduciary obligation must still be reconciled with the obligations which all stockholders are owed. Thus the only sensible interpretation of that obscure phrase is that no fiduciary obligation is owed toward the foreign interests which exceeds those ordinarily owed to minority stockholders in a similar position.

It is equally unclear whether the supposed distinction between the definition of corporate citizen for purposes of the domestic trade—the 75 percent stockholding requirement—and section 2's definition of corporate citizenship for purposes other than the domestic trade—phrased variously as "the controlling interest therein," "a majority of the stock thereof," and "the majority of the voting power"—is of any real significance. Both definitions would deny corporate citizenship where foreign investors own more than 50 percent of the stock. Both definitions would also seem to preclude corporate citizenship where foreign investors own 25 percent or less of the stock of the corporate carrier but nevertheless control it. That not atypical situation frequently results from the ownership of a large block of stock in an otherwise widely held corporation, but it could also result from the possession of substantial debt-holdings or from other nonequity relationships.

The two tests of corporate citizenship should preclude citizenship

145. Id. But see Phillips, supra note 1, at 873 (noting the probable ineffectiveness of this remedy).
146. See note 6 supra for the complete text of § 2.
147. Professor Vagts seems to concur in this judgment. See Vagts, supra note 143, at 1541.
149. See Phillips, supra note 1, at 849 n.33.
where the foreign investors control the carrier despite owning 25 percent or less of the stock because the essence of both definitions is control, not merely the percentage of the stock owned. Ironically, it is easier to conclude that the less restrictive definition focuses on control regardless of the percentage of stock owned. Section 2(b), which clarifies the definition of the "controlling interest" standard, states that "[t]he controlling interest in a corporation shall not be deemed to be owned by citizens of the United States . . . if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States." 150 Thus to satisfy the definition of corporate citizenship for nondomestic trade purposes, United States citizens must not only own the relevant percentage of stock, but also control the exercise of that stock. If this statutory language is to be given weight, control over the corporation traceable to control over the proxy machinery and other apparatus available to a dominant group, even one comprised of less than majority or 25 percent stockholding, must be considered an exercise of control over interests far in excess of the stated ownership interest. The court in *Meacham Corp. v. United States* 151 so held.

151. 207 F.2d 535 (4th Cir. 1953), cert. dismissed, 348 U.S. 801 (1954). The Meacham case involved an analysis of the interrelationships between at least five corporations. American Overseas Tanker Corporation (Overseas), a United States citizen, had rights to purchase three surplus vessels under United States registry from the United States Maritime Commission, but the provisions of a loan agreement under which Overseas had purchased other vessels prohibited Overseas from doing so. On the other hand, the Chinese Petroleum Corporation (Petroleum), a Nationalist Chinese corporation, was in need of such vessels to transport Persian Gulf oil to Formosa but was unable to purchase them because it was not a United States citizen. To enable Petroleum to utilize the vessels to which Overseas had rights, two other corporations were formed. The principals of Overseas formed the National Tanker Corporation (National) to purchase the vessels. Certain Chinese businessmen who represented the Chinese Trading and Industrial Development Corporation (Trading), on behalf of Petroleum, caused United Tanker Corporation (United) to be organized as a domestic corporation. United was pivotal in the transaction. United loaned National the money to purchase the three vessels; National, which performed no other function, bareboat chartered the vessels to United for 10 years; United chartered the vessels for a shorter period to Trading, which in turn chartered the vessels to Petroleum. The case concerned the claim that the Meacham, one of the three vessels involved, was subject to forfeiture by the United States on the ground that United was not a United States citizen for purposes of § 2 of the Shipping Act, and, therefore, the transfer of the Meacham to United violated § 9 of the Shipping Act. See notes 159-80 infra and accompanying text. In recognition of the corporate citizenship requirement, the attorneys who structured the transaction and caused United to be incorporated provided United with two classes of stock. The equity capital investment by the Chinese businessmen in United, which totaled $2000, was in the form of Class A stock. The holders of Class A stock had no voting rights but were entitled to 90% of the earnings and, upon liquidation, 90% of the assets as well as their initial cash contribution. The voting stock consisted of Class B stock, which was entirely owned by Americans. Although the number of issued and outstanding shares of Class B stock equaled the number of shares of Class A stock, a low par value for Class B stock resulted in a total initial paid-in capital for this class of only $3.00. The Chinese also
Neither the case law nor section 2 fully explains the domestic trade stockholding requirement. Nonetheless, it seems obvious that the domestic trade definition of corporate citizenship bars control exercised through the ownership of any interest, even less than 25 percent of the stock. The Jones Act added the 75 percent stockholding requirement and subsection (c) interpreting that requirement to the Shipping Act in order to strengthen the prior definition of corporate citizenship. That definition's stress on the exercise of control regardless of ownership interest helps clarify the statement in subsection (c) that the 75 percent test is not met "if by any . . . means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States."

In short, like the statutory definition applicable to nondomestic trade situations, control over the management of the corporation by any dominant group through their control of the proxy machinery probably constitutes an exercise of control over interests in excess of their actual holdings. This conclusion is supported by the Jones Act's goals of supplementing naval vessels and expanding foreign trade that relate not only to operational decisions concerning movement and control over vessels in times of emergency, but also to managerial decisions over the business policies of the corporate owner. The management requirement lends additional support to the notion that managerial decisions are to be "American." This notion is incompatible with foreign control exercised in any manner, regardless of the percentage of stock held by aliens.

Any difference between the two definitions must lie where the foreign investors own in excess of 25 percent but not a majority of the stock interest. If the foreign investors control the corporate carrier, the corporation will not qualify for citizenship under the nondomestic trade definition because, as previously stated, that definition concentrates on control. In the same situation, the corporation would not qualify for citizenship to engage in the domestic trade on two grounds: the foreign stockholding exceeds 25 percent, and foreign investors control the corporation. In other words, the domestic trade definition constitutes an irrebuttable

provided the remainder of United's funds which consisted of loans totaling several million dollars and capital which stemmed from Petroleum. The board of directors consisted of three American stockholders; one of the American directors served as president and a second as vice-president. A Chinese alien was elected secretary and treasurer. United's offices adjoined Trading's offices. The Court of Appeals for the Fourth Circuit, per Judge Soper, affirmed the district court decision upholding the forfeiture to the government, based on United's lack of citizenship. The court emphasized that although Americans had "titular control" over the enterprise, that control was exercised "in the interests of their Chinese associates." 207 F.2d at 543.

152. See Vagts, supra note 143, at 1505-06.
presumption that investors owning over 25 percent of the stock control
the corporation, thereby dispensing with the more difficult task of prov-
ing control. The difficulty of proving control when the stockholdings exceed 25 percent seems a rather thin reed to support a stockholding requirement that differs from the requirement applicable in related investment situations. Where foreign investors do not control the corporate carrier despite their ownership of over 25 percent of the stock—a rare situation, likely to arise only if the foreign holdings are diffuse—the definitions do make a difference. The corporation may buy a vessel without administrative approval and is eligible for subsidies, but cannot engage in the domestic trade. But if foreign interests do not control the corporate carrier, why not allow the carrier to engage in the latter as well as purchase vessels and receive subsidies? Two arguments for retaining the extra contraceptive in the United States domestic trade could be made, the first relating to the critical nature of the domestic trade and the second to the nature of the subject matter, vessels on water. Both arguments depend primarily upon the dubious assumption that the principal interest served by the merchant marine is national defense.

To sustain the 75 percent citizen stockholding requirement for the
domestic trade—in contrast to a 50 percent citizen stockholding require-
ment for vessel transfers and other activities, and no citizen stockholding requirement for United States flag carriers in the foreign trade—one must seemingly adopt the premise that the closer the vessel in which an alien has invested operates to American shores, the more the national security is endangered. However, unless the 1920's notion of a naval vessel as a merchant marine vessel with a gun quickly slipped into place is accepted, the argument is specious. In any genuine conflict, the most important internal transport mechanisms will probably be trucking and the railroads. In fact, civil defense emergency planning places as much emphasis on trucking and railroad services as it does on the use of the merchant marine. 154 Yet neither of these transport industries has investment restraints comparable to those applied to the domestic merchant marine.

The second argument relates to the nature of the vessel itself. A vessel is movable and, unlike trucks and railroads, can easily be removed from our shores in time of emergency. Initially this argument overlooks the

existence of the Merchant Seaman Act and other legislation which, even were the investment restraint removed or modified, would require that all officers and 75 percent of the crew be United States citizens.\textsuperscript{155} It is doubtful that such a crew faced with conflicting directives from the nearby United States military and from a distant foreign owner, stockholder, or partner would obey the commands of the latter. In any event, if this is the concern, the ownership percentages are reversed; the greatest degree of United States ownership should be required for operation in the foreign trade and for vessel transfers. The risks of not servicing the United States or disobeying a requisition order are infinitely greater for vessels engaged in the foreign trade, but those vessels need not be owned by a corporation with any stockholders who qualify for United States citizenship to be included in the United States flag fleet.\textsuperscript{156} As to the vessels—the ultimate object of control—the definition of corporate citizenship for vessel transfers is only 50 percent ownership by United States citizens; yet, the act of transfer would seem to present a greater danger than the indirect threat of transfer.

Thus the ownership and management requirements that limit investment in the domestic trade not only lack clarity but also are inconsistent with both past policies and present interests. If the interests a United States merchant marine presently serves were permitted to control inclusion and exclusion from that fleet, vessel owners would be encouraged to document their vessels under the United States flag or, in the least, not be hindered from doing so, with one possible exception—the United States itself should not participate in the deception effected by flags of convenience that allow the nature and operations of vessels to escape the public policies of the nation whose interests in such vessels is greatest. However, because the United States has a legitimate interest in regulating vessels that come into American waters, few vessels are inappropriate foci for the application of American law. Certainly with respect to vessels regularly operating in the United States domestic trade, the requisite connection with the United States exists to subject the nature and operations of the vessels to American law regardless of the citizenship of their owners or managers.\textsuperscript{157}

B. Transfer Restraints

A large percentage of Liberian and Panamanian flag vessels engaged in the United States foreign trade are owned directly or indirectly by United States citizens. The most commonly cited reason for registration in

\textsuperscript{155} See note 78 \textit{supra} and accompanying text.
\textsuperscript{156} See text at note 11 \textit{supra}.
\textsuperscript{157} See note 119 \textit{supra} and accompanying text.
Liberia or Panama rather than the United States is the higher cost of American labor. Any one explanation, however, probably oversimplifies the documentation pattern. For example, the wage differential explanation alone seems insufficient in light of the operating subsidies available to United States flag carriers. Regardless of whether one accepts the lower cost of foreign labor as the predominant reason for documentation elsewhere, the present interests implicated by a United States merchant marine are best served by identifying and reexamining any additional reasons that might contribute to foreign documentation. One such factor is the transfer restraints on the disposition of the vessel.

Sections 9 and 37 of the Shipping Act both require approval by the Secretary of Commerce for the transfer to an alien, or change in registration, of any United States flag vessel owned by an American citizen. The restriction applies to direct transfers, such as outright sales, and to indirect transfers, such as mortgaging. Both sections also limit not only transfer of the entire vessel, but "any interest therein."

Despite these similarities, sections 9 and 37 differ in a number of respects. On the one hand, because section 37 was added to the Shipping Act in 1918 to fill gaps left by section 9, section 37's scope substantially exceeds that of section 9. For example, section 37 bars the transfer of vessels documented under United States law or owned by American citizens regardless of registration, whereas section 9 refers only to vessels documented under United States law. Also section 37, unlike section 9, explicitly applies to transfers of control over corporations owning such vessels. Although it could be argued that section 9 bars such an acquisition of corporate control on the ground that it constitutes an indirect

160. The § 9 prohibition on sales, leases, and charters of vessels documented under the laws of the United States did not eliminate all alien control over such vessels because of the other possible means of acquiring such control, including control of the corporation owning the vessel or financial arrangements with the vessel owner that vest some degree of control in another party. Chemical Bank N.Y. Trust Co. v. Steamship Westhampton, 358 F.2d 574, 583 (4th Cir. 1965), cert. denied, 385 U.S. 921 (1966). Thus the § 37 provisions apply both to the transfer of any interest in a vessel owned by a citizen of the United States wherever documented or in a vessel documented under United States laws irrespective of ownership and to the transfer of control over any corporation owning such vessels. The expanded language was designed to be "so sweeping and comprehensive that no lawyer, however ingenious, would be able to work out any device under this section to keep the letter, while breaking the spirit of the law." 56 Cong. Rec. 8029 (1918).
161. It should be noted that § 9, as enacted in 1916, restricted, during a war or national emergency, the sale, lease, or charter to an alien of any vessel documented under the laws of the United States or owned by any citizen of the United States. Act of Sept. 7, 1916, Pub. L. No. 64-260, § 9, 39 Stat. 728 (1916). When § 37 was enacted, the provisions in § 9 dealing with restrictions during times of war or national emergency were transferred and amplified. Act of July 15, 1918, Pub. L. No. 65-198, § 4, 40 Stat. 900 (1918).
transfer of the vessel owned by the corporation, the court in United States v. Niarchos\(^{163}\) held otherwise.

Section 9 is broader than section 37, however, in perhaps the most significant respect. Section 9 applies at all times, section 37 only in states of war or national emergency. The 1976 National Emergencies Act\(^{164}\) terminated the state of emergency which had existed almost continuously since the Korean War.\(^{165}\) In accordance with section 101(a) of that Act,\(^{166}\) the powers granted the Secretary of Commerce pursuant to section 37 of the Shipping Act will terminate on September 14, 1978. Thereafter the Secretary's administrative powers will be limited to section 9. Thus, approval will still be required to transfer vessels documented under the United States flag to persons who are not American citizens, but not to acquire a controlling interest in a United States foreign trade carrier or to transfer a foreign flag vessel owned by an American citizen.

Should the section 9 restraints be retained, especially in light of the fact that section 37 will be inoperative in the near future? Choosing initial United States rather than foreign documentation now carries with it the cost of never knowing whether the ultimate disposition of the vessel will be restricted. The Maritime Administration's regulations,\(^{167}\) which differentiate between vessels under 3,000 gross tons and those in excess of 3,000 tons, offer little guidance. As a general rule, the Maritime Administration approves the transfer of vessels under 3,000 gross tons, "provided the vessel is not needed for reasons of national defense and provided also that the foreign buyer and country of registry are acceptable to the Maritime Administration."\(^{168}\) Such vessels presumptively serve little function in the merchant marine and have little military or quasi-military capability. In contrast, each application for transfer to foreign registry or ownership of vessels in excess of 3,000 gross tons is "evaluated on its individual merits."\(^{169}\) The criteria utilized by the Maritime Administration in considering the application to transfer are spelled out in only slightly greater detail: "(1) The type, size, speed, general condition, and age of the vessel; (2) The acceptability of the foreign buyer and country of

\(^{163}\) 125 F. Supp. 214 (D.D.C. 1954). The court reasoned that Congress would not have enacted § 37, which clearly bars such a transfer of interest, if it had not believed that § 9 did not extend to the indirect transfer of an interest in a vessel through the transfer of control in a corporation. \textit{Id.} at 229.


\(^{166}\) 90 Stat. 1255 (1976).

\(^{167}\) \textit{See generally} 46 C.F.R. §§ 221.4-30 (1976).

\(^{168}\) \textit{Id.} § 221.7 app. III.

\(^{169}\) \textit{Id.} app. I.
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registry; and (3) The need to retain the vessel under U.S. flag or ownership for the purposes of national defense, maintenance of an adequate merchant marine, foreign policy of the United States, and the national interest.170

The interested investor might gain slightly greater insight about transfer policy from administrative practice. Section 41 of the Shipping Act171 allows the Maritime Administration to grant its approval to the transfer subject to certain conditions. If such conditions are imposed, the approval takes the form of a contract between the Maritime Administration and the purchaser.172 One standard condition in such contracts is that the vessel be subject to requisition by the United States on the same basis as if it were owned by a United States citizen,173 but "[i]f the transfer of the vessel is to the flag of a country that is a member of the North Atlantic Treaty Organization (NATO), the Administrator will consider this condition satisfied if the vessel upon request is made available to a NATO country."174 This provision indicates that the foreign buyer and country of registry will generally be more acceptable if the buyer is a national of, and the country of registry is, an ally of the United States. In contrast, another provision bars charters to aliens for carriage of cargoes to certain Communist or Communist-controlled countries without the prior approval of the Maritime Administration; at least some of these countries would therefore be unacceptable as countries of registry or the nation state of the prospective buyer.175

The investor might also find some comfort in the fact that historically very few vessel transfer applications have been refused. Nevertheless, the restraint on alienability requires the vessel owner to submit to an administrative approval process which involves the twin costs of expense and time and which will possibly limit the number of prospective purchasers for the vessel. The perception of these obstacles may be more important than their statistical probability. The Court of Claims in East-

170. Id.
172. Kyle and O'Brien interview, supra note 88. Violation of the conditions on which approval is granted is punishable by fine and/or imprisonment and subjects the vessel or other subject matter involved to forfeiture. 46 U.S.C. § 839 (1970).
174. 46 C.F.R. § 221.7 app. II.A(2) (1976).
175. Id. app. II.A(3)(c). The list of countries under this provision is significantly longer than the list applicable to the transfer of control over corporations owning vessels of less than 65 feet. Compare id. with id. § 221.4(b), (c). Only the former list includes the Soviet Union, a number of eastern European countries under the domination of the Soviet Union, and Communist China. There is no apparent reason for the difference between the two lists.
port Steamship Corp. v. United States, a 1967 case, recognized the "broad discretion" that the Maritime Administration exercises. Thus if the transfer is disapproved, the broad criteria for the administrative determination—national defense, foreign policy, commerce of the United States, needs of the United States merchant marine—make it unlikely that the decision of the Maritime Administration would be reviewable on substantive grounds.

Not only do the vessel transfer restraints seem counterproductive in terms of encouraging documentation under United States law, but their continuation seems incongruous since investment in United States foreign trade carriers without administrative approval will be possible when section 37 becomes inoperative. True, unlike a vessel, if control of a United States corporation is transferred to foreign interests, the situs of the corporation theoretically remains domestic. Nevertheless, a change in registry of the vessels owned by the carrier corporation might also follow because the corporation would no longer be eligible for operating differential subsidies. And, unlike the transfer of a single vessel, transferring the control of a carrier corporation may affect the control of a large number of vessels.

Under certain circumstances, limited transfer restrictions may be justified. The vessel transfer restraints did serve a legitimate purpose after World Wars I and II when the United States government disposed of surplus vessels under section 5 of the Jones Act and the Sale of Surplus War Built Vessels Act of 1946. These statutes gave United States citizens a first right to purchase. The vessel transfer restraints insured that United States citizens after purchasing such vessels would not simply resell them to aliens, thereby indirectly avoiding the purchaser-preference provisions of the statutes. If similar surplus sales are held in the future, prohibitions against indirect transfers of vessels to aliens could be incorporated into the legislation authorizing the sales.

It may similarly be argued that vessels constructed with subsidies should not be transferred to aliens. Construction subsidies, however, are granted only after the recipient of the subsidy agrees to keep the vessel documented under United States law for twenty-five years. Enforcement of those agreements does not require the general transfer restraint applicable to all United States flag vessels.

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176. 372 F.2d 1002 (Ct. Cl. 1967).
177. 41 Stat. 990 (1920).
179. Maritime Administration officials report that one of the chief factors taken into consideration in deciding whether to approve a vessel transfer under sections 9 and 37 of the Shipping Act is whether the vessel was constructed or operated with a federal subsidy. Kyle and O'Brien interview, supra note 88.
C. CONSTRUCTION AND OPERATING SUBSIDIES

The relationship between subsidies, both construction and operating, and the size of the United States merchant marine in the foreign trade is more direct than the possible relationship between the transfer restraints and the documentation of vessels by United States citizens under the flags of other nations. The construction and operating subsidies are essentially bribes to United States citizens to keep their vessels part of the merchant marine. However, it is not as clear as in the case of the transfer restraints that the citizenship requirement should be removed and the subsidies extended to foreign citizens.

The cost of the subsidy program has been well documented. The construction and operating differential subsidies provided to United States carriers engaged in the foreign trade totalled approximately $5.5 billion from 1936, when the subsidy program was initiated, through 1973. Construction differential subsidies amounted to $1,835 million during this period; $1,547 million of that sum was spent between 1958 and 1973. In 1970 the Merchant Marine Act of 1936 was amended to encourage the construction of 300 new ships to replace the obsolete World War II vessels which made up the bulk of the 1970 merchant marine fleet. It is estimated that the construction differential subsidy program for the ten year period following the passage of the 1970 amendments will cost as much as $6 billion. The operating differential subsidies have also been enormous, $3.6 billion from 1936 through 1973. All but $226 million of this sum was expended since the mid-1950's. The present annual cost of the operating subsidies is $300 million.

Despite the cost that would be involved, the extension of these subsidies to aliens or alien-controlled corporations could be rationalized on the theory that the real beneficiaries of the operating subsidy are the American seamen, and of the construction subsidy, the American shipyards. In short, the subsidies can be perceived as export subsidies, needed to maintain a sufficient volume of work for seamen and shipyards so that each will be available for national defense purposes. Of the two, extension of the construction subsidy makes more sense because the national defense justification is strongest in the context of shipyards.

181. G. JANTSCHER, supra note 28, at 138; Kilgour, supra note 29, at 396. References are to fiscal years.
184. G. JANTSCHER, supra note 28, at 43.
185. Id. at 30.
186. Id.
187. See note 99 supra and accompanying text.
188. See note 120 supra and accompanying text.
If the dominant interest today in maintaining a merchant marine is to subject the maximum number of vessels to American regulation, however, that interest is not very well served by a subsidy program which has induced only a small percentage of the owners of vessels engaged in the United States foreign trade to document their ships under United States law. Two alternative approaches are to subject foreign flag vessels coming into American waters to United States regulation or to induce, by means other than subsidies, more United States citizens to document their vessels under the United States flag.

Although the latter approach goes beyond the scope of this Article, the analysis I have suggested might be utilized to determine a practical solution to this problem as well. Clearly vessels engaged primarily in the United States foreign trade and owned directly or indirectly by American citizens, corporate or individual, bear a closer relationship to the United States than any other country. Thus it is appropriate for American policies—especially those related to the merchant marine—to be applied to such vessels, and arguably the easiest and most complete way to do so is to document the vessels under American law. Voluntary inclusion is unrealistic absent artificial inducements such as subsidies and preferences. If voluntary inclusion is unlikely, the United States should confront directly the costs of mandatory documentation under American law.

Initially, definitional problems and enforcement difficulties come to mind. Whereas the present definition of corporate citizenship in section 2 is exclusionary, the definition necessary to effect the suggestion must be inclusive. Section 2's present definition of corporate citizenship is exclusionary because functionally it defines eligibility for certain benefits—for example, subsidies, protected carriage in the domestic trade, and vessel purchase rights. Mandatory documentation would require an inclusive definition, the primary functional thrust of which would be to define appropriate subjects for American regulation. In the case of the present definition, the only parties likely to dispute whether corporate citizenship has been established are likely to be the United States government, on one hand, and a private citizen, either corporate or individual, American or alien, on the other. In contrast, an inclusive definition geared toward mandatory documentation might bring the United States into dispute with foreign governments as well as private citizens since a foreign government might have also defined its citizens to include the particular business enterprise. Moreover, the extent to which vessels owned directly or indirectly by United States citizens are documented under foreign law indicates that the marketplace has already defined American regulation to

189. The possible practical problems with this course are suggested at note 112 supra and accompanying text.
be a burden. Perhaps only experience could tell, but I suspect that subterfuges to evade that burden would almost inevitably exceed the artifices that have been used to procure the benefits of citizenship. For example, if as now the definition of corporate citizenship included the factor of management citizenship, United States citizenship could be easily avoided by electing aliens to be the directors, officers, or other relevant managers. Thus, in contrast to the paucity of cases concerning section 2 of the Shipping Act, an inclusive definition might well produce numerous controversies that would test and possibly distort its margins. In addition to the definitional and enforcement problems, one can argue that mandatory documentation would harm the United States because it would force United States citizens to depart from operating on a lowest cost basis. If we sought to reduce that cost by amending the Merchant Seamen Act to allow greater employment of foreign labor, we would be counteracting the policy of protecting the jobs of United States merchant seamen. Although that may be desirable in the abstract, it is hardly politically feasible.

Mandatory inclusion would at least differ from a restriction on American investment abroad or foreign investment in the United States because the requirement would apply to United States citizens engaged in the United States foreign trade. The definitional problem, although great, has been reduced to manageable proportions in similar burden-imposing contexts such as tax law. Inter-jurisdictional disputes might be rare because the vessel operator could seemingly satisfy two sets of safety regulations by complying with the more stringent. In light of present United States interests, that burden should hardly cause sympathetic concern. And the problem with the lowest cost argument is that it applies to almost all economic regulation, from minimum wages to taxes. Any economic regulation weakens the competitive position of United States producers or suppliers in relation to a foreign enterprise whose operations are not covered by similar laws. Regardless of the merits of the economic argument, moreover, it should be realized that the argument brings us full circle—the United States needs in terms of world commerce now serve to justify exclusion from rather than inclusion in the merchant marine.

CONCLUSION

The maritime restraints imposed by United States law have their historical antecedents. England, Greece, Rome, Venice, and others all attempted to restrain foreign competition. The report of the Board of Trade to the Venetian Senate in 1610 merits quotation:

190. Johannes Hasebroek, an historian of ancient Greece, reports that "a Greek city did not normally permit a foreigner to set foot upon its territory or to sail its seas—unless it
The board of trade is called upon to give its opinion on the proposal submitted by Paulo Santorin for the repeal of the law forbidding any but Venetian citizens to trade from this port to the Levant.

The advantages would be the opening of new firms in the Levant, and the introduction of fresh business into Venice. Such a scheme would in earlier times have carried no weight, but in the present state of affairs it appears to us that it should be adopted. . . . The fact that the Levant trade was reserved for Venetian citizens shows that that trade was considered to belong absolutely to Venice, and that there was no foreign competition. The government reserved for their own citizens the right to trade, and not for all of them, but only for the privileged class. This restriction, however, had the effect of keeping much capital out of the trade, and therefore injured the revenue. Nevertheless, had the trade continued as it was, the present proposal might have been laid aside. But the trade has passed into the hands of foreigners. [sic] and foreign ships now sail straight to and from the Levant without touching Venice, preferring to trade with free ports, where they are favoured by the government. 191

Restrictive legislation, continued without reassessment, tends to destroy its objectives. Review of the maritime restraints must deal with the fact that although the need for a United States merchant marine continues, the reasons for that need have changed dramatically from the 1920's. The change in interests which the merchant marine serves militates, in the minimum, toward removing the restraints on foreign investment in United States carriers involved in the domestic trade. As I have suggested in this Article, this reassessment might lead elsewhere. Full reassessment would also confront the inverse situation—United States citizens who engage in the United States foreign trade with vessels bearing foreign flags. A number of other regulated industries are faced with similar restraints on foreign investment; for instance, the restrictions on foreign investment in United States air transportation are based on the maritime restraints. A reexamination of the maritime restraints might prompt reassessment of the continued necessity for restrictions on foreign investment in these regulated industries as well. Finally, the origin of all of these restraints reflects a perception, right or wrong, of problems the United States would face were foreign investment permitted above certain levels in certain industries in the aftermath of World War I. Failure to grasp the present irrelevance of the restraints is indicative of our avoidance to date of the fundamental issue of what interests are adversely affected in the 1970's by foreign investment. For those who are not mesmerized by economic efficiency as the exclusive determinant of national policy, facing that issue could be rather sobering.

194. Id. at K246.
195. See generally Phillips, supra note 1.