

**MEMORANDUM OF UNDERSTANDING AMONG THE UNITED STATES  
DEPARTMENT OF AGRICULTURE, THE UNITED STATES DEPARTMENT  
OF TRANSPORTATION, AND THE UNITED STATES AGENCY FOR  
INTERNATIONAL DEVELOPMENT  
REGARDING PROCEDURES FOR DETERMINING VESSEL SERVICE  
CATEGORIES FOR PURPOSES OF THE CARGO PREFERENCE ACT**

**A. Background**

The Cargo Preference Act of 1954 (CPA), as amended, requires that federal agencies take "necessary and practicable" steps to ensure that privately-owned U.S.-flag vessels transport at least 50 percent of the gross tonnage of cargo sponsored under the food assistance programs specified below, "(computed separately for dry bulk carriers, dry cargo liners, and tankers) . . . to the extent such vessels are available at fair and reasonable rates for commercial vessels of the United States, in a manner that will ensure a fair and reasonable participation of commercial vessels of the United States in those cargoes by geographic areas." 46 USC § 55305(b). An additional 25 percent of gross tonnage is to be transported in accordance with the requirements of 46 USC § 55314.

The United States Agency for International Development (USAID) and the United States Department of Agriculture (USDA) provide food aid commodities to meet humanitarian food needs in the developing world under food assistance programs as specified below. USAID and USDA either contract directly with, or provide guidance to other entities for purposes of reimbursement regarding the transportation of such food aid through a competitive bidding system among private ocean carriers. The award of transportation contracts to ocean carriers is subject to the requirements of the Cargo Preference Act. This MOU covers the following food assistance programs: Titles I, II, and III programs of the Food for Peace Act, the Food for Progress program of the Food Security Act of 1985, the McGovern-Dole International Food for Education and Child Nutrition program of the Farm Security and Rural Investment Act of 2002, the Section 416(b) program of the Agricultural Act of 1949, and the Bill Emerson Humanitarian Trust of the Bill Emerson Humanitarian Trust Act.

The Maritime Administration (MARAD), an operating administration of the Department of Transportation, is responsible for prescribing regulations and guidance governing the implementation of the CPA by other Government agencies, such as USAID and USDA. 46 USC § 55305(d); 49 CFR § 1.66(e).

USAID, USDA and the Maritime Administration are currently involved in litigation that challenges the proper interpretation and implementation of the Cargo Preference Act by these agencies for the Title II program under the Food

for Peace Act (Title II), including *Maersk Line Ltd v. Vilsack*, U.S.D.C. (E.D. Va) 1:09cv747. As the parties acknowledged in a July 10, 2009 settlement of the *Maersk* litigation, the Government agencies involved in that litigation were unable to provide a unified Government position with respect to the proper implementation of a 2002 Department of Justice interpretation of the CPA.

This document serves to clarify the position of the United States with respect to the requirements of the CPA, and describes the procedures that ensure that food aid commodities continue to be shipped throughout the developing world on United States registered ocean vessels. This document, therefore, represents the unified Government position on the proper method for implementing the Department of Justice's 2002 CPA determination. Accordingly, pursuant to the final paragraph of the July 10, 2009 *Maersk* settlement, the United States now has a unified legal position, and the procedures detailed in the *Maersk* Settlement will be superseded with the procedures discussed herein as of October 1, 2009.

**B. Department of Justice Interpretation of the Cargo Preference Act**

In 2002, the Department of Justice, in connection with the resolution of earlier cargo preference litigation determined the litigation position of the United States with respect to, among other things, the proper manner for classifying vessels in accordance with the CPA. In the 2002 litigation, a dispute arose as to the proper interpretation of the terms "dry bulk carrier" and "dry cargo liner" as those terms are used in the CPA. The Department of Justice concluded that the CPA's requirement that at least 75 percent of agricultural commodities be shipped by U.S. flag vessels "computed separately for dry bulk carriers, dry cargo liners and tankers" mandates that the U.S. vessels be divided into those three categories and further, that the 75 percent minimum be computed separately for each category of vessel.

Moreover, the Department of Justice concluded that the service offered determined a vessel's classification as a "dry bulk carrier" or "dry cargo liner."

In its conclusion, the Department of Justice stated that:

In defining the terms "dry bulk carrier" and "dry cargo liner", the government believes that at the time of the adoption of this provision of the [CPA] these terms did not refer to the type of vessel but rather to the service of the vessel. "Dry bulk carrier" refers to irregular service while "dry cargo liner" refers to regularly scheduled service.

The Department of Justice's 2002 conclusions continue in effect and provide the background principles governing the terms of the procedures described herein.

**C. Determining Vessel Service Category**

Prior to October 1, 2009, all vessel owners or operators, including owners or operators of foreign flag vessels, may self-designate their service type as either a dry bulk carrier or dry cargo liner by vessel, and report this designation to MARAD in writing. The current treatment of tankers is not affected by this MOU, and no self-designation is required or expected for tankers.

The owner or operator should include justification of such designation based upon the criteria listed in points a. through e. below, and the general character of the vessel's service - that is, irregular or regularly scheduled. On or before October 7, 2009, MARAD will publish these self-designations in the Federal Register for public comment. Interested parties may comment on these proposed self-designations within 10 calendar days of publication.

If MARAD disagrees with an owner's or operator's initial self-designation, it will notify the owner or operator within 15 calendar days of the close of the public comment period. That notification will include MARAD's initial determination of vessel type category. Unless MARAD disagrees with an owner's or operator's initial self-designation in writing within 15 calendar days of the close of the public comment period, these self-designations will stay in effect until vessel owners or operators submit a request for re-designation.

Vessel owners or operators may appeal to the Maritime Administrator within 10 calendar days of receiving the initial determination. MARAD will issue a final determination of designation within 30 calendar days of receiving the appeal, after consultation with the Department of State, USAID, and the Department of Agriculture.

If MARAD disagrees with an owner's or operator's initial self-designation, vessels will be treated in accordance with MARAD's initial determination through the appeal period starting from the time of the determination. However, if a solicitation and/or bid award occurs between the time in which self-designations are received by MARAD but prior to MARAD's written notification of initial determination, such solicitations will be based on the self-designation.

Subject to the procedures described above, MARAD will compile these self-designations into a list of vessels by category type, for the purpose of indicating which vessels are eligible for preference to carry cargo subject to 46 USC §§ 55305 and 55314. For vessels which MARAD does not receive a written self-designation by October 1, 2009, MARAD will determine a vessel-type designation based on the criteria listed in points a through e below.

If a new vessel is brought online after October 1, 2009, the vessel owner or operator may voluntarily make an initial self-designation of the vessel's service

category, following the same procedure as vessels which have been self-designated prior to October 1, 2009.

Commencing October 1, 2009, vessel owners or operators may request re-designations from MARAD on a quarterly basis. Re-designation of any individual vessel can occur no more than twice per calendar year.

All requests for re-designation should be made in writing. The vessel owner or operator should include justification of such requests for re-designation based upon the criteria listed in points a through e below, and the general character of the vessel's service, that is, irregular or regularly scheduled.

In accordance with the Department of Justice's 2002 interpretation of the CPA, in determining whether a vessel may be appropriately categorized as a "dry bulk carrier" or "dry cargo liner," MARAD will evaluate the vessel's service. In evaluating the service of a particular vessel, MARAD will consider the following criteria:

- a. The advertisement of service;
- b. Regularity of service;
- c. Offering of service to specific routes, and planned schedules;
- d. Characteristics of service other than vessel design;
- e. Historical performance in recent months.

Until MARAD makes a subsequent determination with regard to a vessel owner's or operator's request for vessel re-designation, the prior vessel category will remain in place and be used by the vessel's owner or operator, USAID, USDA, and MARAD for CPA purposes. All requests for re-designation will be published in the Federal Register for public comment. Interested parties may comment on these proposed vessel re-designations within 10 calendar days of publication.

Within 15 calendar days of the close of the comment period, MARAD will provide, in writing, a determination of a vessel's re-designation. Requests for re-designation become effective upon MARAD's written determination of a vessel's re-designation.

Vessel owners or operators may appeal MARAD's determination of a request for re-designation in writing within 10 calendar days of receiving the determination. If there is an appeal, MARAD will issue a final written determination of re-designation within 30 calendar days of receiving the appeal, after consultation with the Department of State, USAID, and the Department of Agriculture.

If any deadline listed in this section falls on a Saturday, Sunday, or legal holiday, the period in question will run until the end of the next day that is not a Saturday, Sunday or legal holiday.

1. Prohibition of Dual Service

For purposes of the Maritime Administration list, owners or operators of a vessel that engages in service that may be characterized as meeting more than one of the three vessel service categories must choose one category that reflects the predominant character of the vessel's service as measured by tonnage carried, routes served, number of voyages, the criteria above, or some other measurable criteria supporting the designation excluding vessel design.

2. Vessel List by Type

In accordance with the parameters above, a current list of vessels by type will be published quarterly on MARAD's website, and will be amended periodically as administrative changes are made. No changes will be made to this list, other than by the procedures provided under Sections C and D of this Memorandum of Understanding.

**D. Administrative Changes**

The Maritime Administration will, on its own initiative or at the request of a vessel owner or operator, undertake to make administrative changes to the list of vessels published on its website. Such administrative changes may include the self-designations and designation determinations as described above, and the following: (1) the change of the name of a current vessel; (2) the change of ownership of a current vessel solely to reflect the new owner of the vessel; (3) a typographical error; and (4) the deletion of a vessel due to change of flag or scrapping.

**E. Utilization of the Maritime Administration List of Vessels for Cargo Preference Compliance**

For purposes of determining compliance with the 75 percent requirement described above, each of the affected agencies (that is, the Maritime Administration, USAID, and USDA) will record contracts awarded under the food assistance programs specified above based solely upon the vessel service category for the vessel upon which the cargo is carried, for both foreign flag and U.S.-flag vessels, as shown on the Maritime Administration list, without regard to the nature of the cargo carried. The contract award date will be the basis of measurement for compliance purposes. Bills of lading quantities will be used to validate the compliance percentages.

**F. Utilization of the Shipping Agency Statistical Data for Cargo Preference Compliance**

For purposes of communicating statistical data for preference cargo tonnage shipped by USAID and USDA, MARAD, USAID, and USDA hereby agree that, at the inception of this agreement, each will post to their respective websites data from shipping agency calculations. These calculations will be based solely upon the vessel service category for the vessel upon which the cargo is carried, (for both foreign flag and U.S.-flag vessels) as shown on the Maritime Administration list without regard to the nature of the cargo carried. The contract award date will be the basis of measurement for compliance purposes. Bills of lading quantities will be used to validate the compliance percentages. MARAD will monitor and verify the data and agrees to post on their website the same data in the same format as the shipping agencies. Reconciliations and adjustments will be resolved in advance of publication through interagency consultation, which, if necessary, may include the Office of Management and Budget.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

This MOU may be executed in two or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.



\_\_\_\_\_  
David T. Matsuda  
Acting Administrator  
Maritime Administration  
U.S. Department of Transportation

DATE: September 4, 2009

\_\_\_\_\_  
Ambassador James Michel  
Counselor to the Agency  
U.S. Agency for International  
Development Administration

DATE: \_\_\_\_\_

\_\_\_\_\_  
Michael V. Michener  
Administrator  
Foreign Agricultural Service  
U.S. Department of Agriculture

DATE: \_\_\_\_\_

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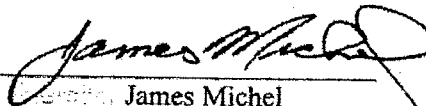
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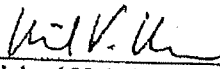
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U.S. Department of Agriculture

DATE: 9/4/2009