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ON BEHALF OF USA MARITIME

BEFORE THE

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TRANSPORTATION & INFRASTRUCTURE COMMITTEE

COAST GUARD & MARITIME TRANSPORTATION SUBCOMMITTEE

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Introduction

Chairman Carbajal, Ranking Member Gibbs, and members of the Committee – Thank you for the opportunity to appear before you today to discuss the state of the U.S.-flag international fleet and in particular the Cargo Preference laws of the United States. My name is Eric Ebeling and I am testifying today on behalf of USA Maritime, a coalition consisting of American-flag vessel owners and operators, trade associations, and maritime labor. USA Maritime is committed to ensuring the U.S. merchant marine will always be available to support our warfighters, enhance our economy through trade, and provide great jobs to thousands of Americans across the country.

As President and CEO of American Roll-On Roll-Off Carrier (ARC), it is my honor to lead an incredibly talented team of men and women at the largest U.S.-flag Ro-Ro operator. ARC has long been a participant in the Voluntary Intermodal Sealift Agreement (VISA) and Maritime Security Program (MSP) and we are committed to investing in the U.S.-flag fleet and U.S. merchant marine to support our armed forces around the world. We have re-flagged seven large Ro-Ro vessels into U.S. registry since 2016, including most recently M/V ARC COMMITMENT in December 2021 and M/V ARC DEFENDER in January 2022.

The U.S.-flag fleet operating in international trade primarily consists of the militarily useful and commercially viable MSP fleet of 60 ships and attendant global networks, as well as a handful of vessels operating in international trade outside the MSP fleet. Without the ships, networks and mariners provided by the MSP fleet, it would cost the government tens of billions of dollars to attempt to try to replicate the capabilities provided. The U.S.-flag fleet in international trade is at a crossroads, with declining cargoes resulting in a shrinking fleet and a shortage of qualified mariners. These factors in turn impact national defense readiness in terms of sealift and logistics support available to support the needs of the Department of Defense (DoD), but also impact the nation's ability to pursue generous overseas economic and agricultural assistance programs.

Overview of Cargo Preference Laws

Cargo preference is the reservation by law for transportation on U.S.-flag vessels of all, or a portion of all, ocean-borne cargo which moves in international trade either as a direct result of the Federal Government's involvement, or indirectly because of the financial sponsorship of a federal program or guarantee provided by the Federal Government. It is relevant and appropriate at the outset to emphasize that these are *laws*, not policy recommendations or suggestions. A further note for clarity: USA Maritime is anxious to see the recommendations from the forthcoming Government Accountability Office (GAO) study on the cargo preference laws that is in part the impetus for this hearing. While the study was not made available to USA Maritime in advance, and we are not able to address its specific findings or recommendations in this written testimony, we are hopeful and expectant that the GAO study will demonstrate similar robust support for, and clear enforcement of, the cargo preference laws. The following overview and recommendations are therefore independent of the GAO study.

The U.S. cargo preference laws are part of the overall statutory program to support the privately-owned and operated U.S.-flag fleet and merchant marine. Cargo preference requires that U.S. Government-financed cargoes be shipped on U.S.-flag vessels, provided that such vessels are

available at fair and reasonable rates. Preference cargoes are the key incentive for U.S.-flag operators in international trade to remain under U.S. registry and provide a vital cargo base to help offset regulatory, tax, crewing cost, and other cost advantages of operating a foreign-flag ship. The primary U.S. cargo preference laws are set forth in the Military Transportation Act of 1904 [Public Law 58-198, approved 28 April 1904 (33 Stat. 5187), as amended (10 U.S.C. 2631)], often also referenced as the Cargo Preference Act of 1904; Public Resolution 17 [73rd Congress, approved 26 March 1934 (48 Stat. 500), as amended (46 App. U.S.C. 1241-1]; and the Cargo Preference Act of 1954 [Public Law 83-664, approved 26 August 1954, (68 Stat. 832) as amended (46 U.S.C. 55305)].

The 1904 Act requires that 100% of all military cargoes purchased for or owned by U.S. military departments be shipped exclusively on vessels of the United States or belonging to the United States. The structure of the 1904 Act applies to all supplies for which the military has contracted, including supplies to which it does not have title at the time of shipment. Congress' overriding purpose is to protect and promote a sufficient merchant marine capable of providing sealift in time of war or national emergency. In general, well over 90% of all overseas military equipment is shipped by sea because of the cost efficiency of moving it by sea versus air as well as the scale and scope of such cargoes.

Public Resolution 17 (1934) requires that all cargoes generated by the U.S. Export-Import (Ex-Im) Bank be shipped on U.S.-flag vessels unless a waiver is granted by the Maritime Administration, and the Cargo Preference Act of 1954 requires that at least 50% of civilian agency cargoes be transported on U.S.-flag vessels to the extent those vessels are available at fair and reasonable rates. Every Department or Agency is required to administer its programs in compliance with the 1954 Act's 50% requirement and is further subject to regulations issued by the Secretary of Transportation. This 50% shipment requirement may only be waived under the specific terms of the statute by the "President, the Secretary of Defense, or Congress (by concurrent resolution or otherwise) … temporarily … by declaring the existence of an emergency justifying the waiver". To USA Maritime's knowledge, no such waiver has ever been issued with respect to the 1954 Act.

U.S. cargo preference laws are crucial to the continued existence of the active, commercially viable, privately-owned U.S.-flag commercial shipping fleet- the most cost-effective sealift capability available to the U.S. Government. Proper enforcement by the Maritime Administration and vigilant adherence by the Department of Defense, Export-Import Bank, and all civilian departments and agencies is critically important not only to the American international fleet, but also to the survival of the U.S. merchant marine, who provide the loyal, well-trained crews for such vessels. Although less than 2% of the nation's waterborne trade moves on U.S.-flag ships, the cargo preference laws ensure that the oceans are not completely dominated by foreign-flag ships whose interests may not align with those of the United States.

The existence of a U.S.-flag fleet ensures that the Unites States can implement any national security policy necessary without having to rely on the fleets of foreign nations. The U.S.-flag fleet is vital to U.S. national security, providing essential sealift in peacetime and wartime, and the ships that carry these cargoes provide important jobs for American seafarers who are available in time of national emergency to crew the sizeable fleet of reserve government vessels.

By guaranteeing the availability of certain cargoes to U.S.-flag ships, the U.S. cargo preference laws help ensure that the vessels and attendant intermodal systems, terminals, commercial IT systems, trained crews, and vessel service industries continue to exist.

Military Cargoes

U.S.-flag commercial shipping is critical for the global movement of U.S. forces and sustainment, and it generally holds that when the U.S. Military is most active, the cargo base is larger and therefore the U.S.-flag fleet sizes up accordingly. The most enduring and effective legislation supporting the U.S.-flag fleet has often come in the wake of the nation's wars. This includes the 1904 Military Transportation Act in the wake of the Spanish-American War; the 1920 Merchant Marine Act after World War I; the 1954 Cargo Preference Act following World War II and the Korean War; and the 1996 Maritime Security Act post-Gulf War. The lack of any significant new maritime legislation after Afghanistan and Iraq is telling. Not coincidentally, the U.S.-flag fleet fell from a recent high of 107 ships in international trade in 2010-2011 to a recent low of 77 ships in 2016 due to major decreases in defense, agricultural and other preference cargoes, a failure of the MSP stipend to keep pace adequately with rising costs generally, and a widening discrepancy between U.S.-flag operating and foreign-flag costs.

The MSP fleet has stabilized over the past several years due to an increase in the MSP stipend that took effect in FY17. In December 2019, Congress wisely reauthorized MSP through 2035, which provides much needed longer-term stability as carriers invest in new assets and their networks for the long term. Having only just stabilized over the past several years, the U.S.-flag fleet has faced imploding government cargo markets during the pandemic, impacting carriers' ability to maintain service, and in turn negatively impacting U.S.-flag fleet and mariner readiness and by extension DoD readiness. As the Commander of U.S. Transportation Command (TRANSCOM) General Jacqueline Van Ovost noted in a December 2021 speech, "(a)s a seafaring nation, our country has been, and is, and will continue to be reliant on the strength of the maritime industry and the many mariners" also pointing to the importance of the U.S.-flag fleet and merchant marine as "America's economic lifeline during peacetime."

Since all U.S. military cargo is required to move on U.S.-flag vessels, policymakers should consider other segments and policies for potential sources of reinvigoration for the U.S.-flag commercial fleet in international trade. One area adjacent to defense cargoes is foreign military sales, which can include shipments involving direct DoD credit sales, sales without such credit guarantees, offset purchases, purchases under co-production agreements, and excess defense articles. Such cargoes may not always entail a U.S.-flag shipping requirement, but could be considered for coverage, and would provide a further base of cargo to ensure the success of the U.S.-flag fleet and merchant marine. In addition, government contracting policies and procedures could prioritize U.S.-flag carriers that invest in owning and operating essential assets and networks in other government contracts involving transportation, logistics and supply chains.

Export-Import Bank Cargoes

Ex-Im Bank, the national export credit agency (ECA) of the United States, seeks to create and maintain U.S. jobs by financing the sales of U.S. exports, primarily to emerging markets

throughout the world, providing loan guarantees, export-credit insurance and direct loans. P.R. 17 of the 73rd Congress requires that all cargoes generated by the U.S. Export-Import Bank be shipped on U.S.-flag vessels unless a waiver is granted by the Maritime Administration. These cargoes not only help support and sustain thousands of well-paying jobs for the U.S.-flag merchant marine, but shipping on U.S.-flag vessels also counts towards the Ex-Im Bank's U.S. content requirement.

As defined by Ex-Im Bank, the following transactions are covered by P.R. 17: direct loans, regardless of term or amount; and guarantees in excess of $20,000,000 (excluding the Ex-Im Bank Exposure Fee) or a repayment period of greater than seven (7) years. In theory, 100% of all covered cargoes generated by Ex-Im Bank are required to move on U.S.-flag bottoms, although waivers are commonplace for the movement of goods on recipient nation's flagged fleets, where applicable.

Ex-Im generated cargoes were major sources of cargo for the U.S.-flag international fleet in the 1990s during the post-Cold War rebuilding efforts in the former Soviet Union, and again for several years following the National Export Initiative of 2010. Soon thereafter, however, after nearly 75 years of relative stability, the Bank lost its charter for several years, and was unable to approve projects above *de minimis* values due to the lack of a Board quorum. The Bank has restabilized in the past several years, although without generating much in the way of meaningful export volumes for U.S.-flag carriers.

Nevertheless, the U.S. shipping community is supportive of the Bank for global economic competitive purposes. There are at least 25 countries that require support from an export credit agency before they will even consider a bid from an international company for a given project, and there are over 80 ECAs offering such financing. Such ECAs collectively exceed the size of the entire World Bank Group and fund more private sector projects in the developing working than any other class of financial institution. The U.S. Export-Import Bank levels the playing field for American companies competing for such international projects. Absent such an ECA, the United States would have effectively unilaterally disarmed from participating in these trades and markets. The U.S.-flag shipping and merchant mariner jobs should be considered just as critical as the industry and manufacturing jobs that are supported by Ex-Im financing.

Civilian Agency Cargoes

Civilian agency is a catch-all term that include such diverse cargoes as USDA and USAID agricultural support and food aid, Federal Transit Administration projects, Department of State personal property and official fleet vehicles, Department of Energy projects, and many other non-military cargoes shipped or sponsored by the various departments and agencies of the U.S. Government. While often not as voluminous as military cargoes, civilian agency cargoes often move on different cycles and to a broader range of geographies than military cargoes, and thus help keep ships and mariners fully employed. These cargoes also move on all U.S.-flag vessel types, including container, roll-on/roll-off, heavy lift, and bulker vessels. A minimum of 50% of such cargoes are required to move on U.S.-flag bottoms, and while some agencies aim for more, others are less scrupulous.

For nearly 30 years following the passage of the 1985 Food Security Act, 75% of agricultural cargoes were required to ship U.S.-flag, before the law was changed to 50% about a decade ago. In FY21, USAID shipped only 31% of P.L. 480 "Food for Peace" bulk cargoes on U.S.-flag ships using a variety of administrative waivers currently available to Federal agencies. More recently, concurrent resolutions proposing the total elimination of civilian cargo preference for three years have surfaced in Congress, citing non-existent need arising out of the Ukraine invasion despite the availability and widespread use of such administrative waivers. USA Maritime calls upon Congress to reject the concurrent resolutions that attempt to leverage the war in Ukraine to eliminate civilian cargo preference for three years. The Federal government should not relinquish control over the carriage of U.S.-taxpayer financed food aid cargoes to foreign-flag and foreign crewed ships, and it is precisely for instances such as the present one that we maintain a robust U.S.-flag fleet and merchant marine.

One might reasonably ask why such gamesmanship and non-compliance is allowed to persist. The reason has to do with a combination of lax enforcement mechanisms and unclear or nonexistent consequences for violators, be they commercial entities or government agencies. The Maritime Administration, the agency tasked with administering the cargo preference laws, is not traditionally an enforcement or regulatory agency but rather a promotional agency.

Congress has sought to address this matter multiple times over the decades. The Merchant Marine Act of 1970 provided the Secretary of Commerce (MARAD was then part of the Department of Commerce) with the responsibility and authority to promulgate cargo preference regulations and to monitor the administration of cargo preference legislation. As the legislative history explains, "There is a clear need for a centralized control over the administration of preference cargoes. In the absence of such control, the various agencies charged with administration of cargo preference laws have adopted varying practices and policies, many of which are not American shipping oriented." The 1970 act states that each agency involved in shipments of cargo that come under the Cargo Preference Act of 1954 is responsible for administering the program under regulations issued by the Secretary of Commerce, and the Secretary of Commerce is in turn responsible for reviewing the administration of the total program and for reporting annually to the Congress. These authorities were subsequently delegated by the Department of Transportation to the Maritime Administration.

This shortcoming was also intended to be addressed by Section 3511 of the Duncan Hunter National Defense Authorization Act of 2009 (P.L. 110-417), which provides clarity that DoT, through MARAD, is the lead Federal agency responsible for interpretation and enforcement of the cargo preference laws, including providing for fines and debarment. Unfortunately, although arguably self-executing, MARAD never completed a rule making and the non-compliance has persisted.

If there were any doubt about the intent of the FY09 NDAA language, it was clarified in a letter of October 8, 2009 from Senator Daniel K. Inouye to President Barack Obama:

> *I am writing to personally express my strong support for the enforcement of U.S. cargo preference laws. The U.S.-flag merchant marine fleet is not only important to the efficient flow of commerce, but also, as history has shown, is critical to our national security. Our*

merchant fleet provides our nation with critical, dependable sealift capability at a fraction of the cost and, among other things, is instrumental in supplying U.S. troops stationed abroad, as well as starving people around the globe in times of war, peace, and natural disaster.

One of the most important elements in sustaining our U.S.-flag fleet is its continued ability to carry certain government impelled cargo. For this reason, I authored a statutory provision which was enacted into law as Section 3511 of the Duncan Hunter National Defense Authorization Act of 2009 (P.L. 110-417) to ensure that U.S. cargo preference laws are legally applicable to all shippers. Further, this provision is intended to provide much needed clarity that the Department of Transportation is the lead federal agency responsible for the administration, interpretation, and execution of our cargo preference requirements and guidelines. For too long, interagency disputes between the U.S. Department of Transportation, the U.S. Department of Agriculture, and the United States Agency for International Development have hampered the efficiency of our food aid programs.

It is important to note that Section 3511 does not change the application of existing law but will resolve many of the jurisdictional overlaps that exist with current shipper agencies, and ultimately help fashion a more coherent policy regarding the application of cargo preference laws. As these agencies work toward improving our export-based food aid programs, it is essential that the clear authority of the Department of Transportation over cargo preference laws is maintained, and that any decisions, rules, and regulations are consistent with current law.

Given your strong support for the U.S. maritime industry and your recognition of the importance of our nation's cargo preference laws, I would appreciate your assistance with the full implementation and enforcement of Section 3511. I look forward to working with you in support of our nation's merchant marine fleet.

More recently, on January 25, 2021, the Biden Administration issued Executive Order 14005 to strengthen the oversight of and enforcement over cargo preference requirements, including creating a "Made in America Office" (MIAO). The guidance echoed previous efforts by stating that MIAO "will work with relevant agencies to review how best to ensure agency compliance with cargo preference requirements in order to maximize the utilization of U.S.-flag vessels in excess of any applicable statutory minimum, to the greatest extent practicable".

Recommendations

Whether by legislation or executive order, 100% of all government-owned or financed cargoes should be required to move on U.S.-flag ships. It is a rather simple equation: without cargo, carriers will not invest in ships, and without ships, there will not be jobs for merchant mariners. Without those merchant mariners, the Government-owned reserve sealift fleet cannot be crewed. Given declining government cargoes over the past decade, the impacts of the Covid-19 pandemic, and the already critical shortage of maritime labor available to crew the U.S.-flag commercial and government sealift fleets, this would provide a critical boost to U.S.-flag

shipping and the American merchant marine. In a letter addressed to this Committee dated May 15, 2020, signed by then-Commander of TRANSCOM General Stephen Lyons called for requiring "100 percent of all government-impelled cargoes to be transported on U.S. flagged vessels". USA Maritime strongly endorses the recommendation.

Congress should ensure that the Department of Transportation and Maritime Administration are directed and fully resourced to finally enforce the cargo preference laws, including through the implementation of the FY09 NDAA enforcement language. In addition to its MIAO effort, the Administration could also reissue or reinvigorate the April 1962 Directive by President John F. Kennedy, a response to the "worldwide economic and defense burdens facing the United States", that directed all executive branch agencies to fully comply "with the purpose of our various cargo preference laws", to help meet the geopolitical and strategic great power competition challenges of today just as we did during the Cold War.

Similarly, another way to expand the available cargo base for the U.S.-flag fleet is to allow for NATO member countries to meet their 2% defense spending commitment by shipping military or commercial cargo on U.S.-flag vessels. In a time of increased geopolitical risk in Europe due to the Russian invasion of Ukraine, the NATO alliance is perhaps more relevant than at any time since the end of the Cold War. Allowing NATO member nations to meet their spending commitments by supporting the U.S.-flag fleet would be a tangible way for the allies to support the essential asymmetric advantage that is the U.S.-flag sealift fleet.

Lastly, Congress and the Administration should consider shipping policies that encourage shippers of all kinds, whether beneficial cargo owners, freight forwarders, non-vessel operating common carriers (NVOCCs) or otherwise, to prioritize U.S.-flag shipping as part of their global supply chains. Less than 2% of the nation's commerce moves on U.S-flag ships, a figure that has more than halved in the last 50 years. It is right and proper that government-financed or generated cargoes are set aside for U.S.-flag carriers as part of the overall statutory framework, but more could be done, including prioritizing asset-owning/operating companies in government contracts. As for non-government cargoes, an incentive such as a tax credit for shippers to utilize U.S.-flag carriers could provide an additional source of cargo for U.S.-flag ships while providing an ancillary benefit to cargo shippers seeking to access the American market.

Conclusion

General Darren McDew, then-Commander of U.S. Transportation Command, noted in an October 2017 speech, "We don't know when, but someday the nation is going to come calling. When she does, she will need us, she will need our ships, she will need our mariners… if we do nothing now, the strength of the maritime fleet that brought the nation to war throughout history… that strength will not be here. It's already in decline." Alongside the Maritime Security Program, the cargo preference laws of the United States constitute the most important historical policy plank to ensure that this crown jewel capability continues to be available to TRANSCOM and DoD, and the nation writ large. Thank you for the opportunity to offer my views on the critical factors pertinent to the cargo preference laws and maintaining a strong U.S.-flag international fleet. I look forward to your questions.