

CABOTAGE REGULATIONS AND THE CHALLENGES OF OUTER CONTINENTAL SHELF DEVELOPMENT IN THE UNITED STATES

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I. INTRODUCTION

Marine cabotage regulations restrict transportation along the inland and coastal waters of a nation. The focus of this paper is on the marine cabotage of the United States. The Passenger Vessel Services Act of 1886; the Dredging Act of 1906; the Jones Act (Merchant Marine Act) of 1920; and the Towing Statute of 1940 collectively constitute the marine cabotage regulations of the United States. There are also government loan assistance and loan guarantee programs, as well as government cargo lifting programs to aid domestic ship owners and shipyards. These statutes and programs fulfill Congress's goal to restrict participation in the coastwise trade to American vessels and to boost domestic shipyards and the domestic shipping trade. The Jones Act of 1920, the focus of this paper, is the fulcrum of the cabotage regulations in the United States, and the lens through which the courts have interpreted other cabotage statutes.

Other statutes and programs related to them will not be discussed in detail.¹

In Part Two, we look at the meaning, historical background, and the reasons adduced for having the cabotage regulations: national security and development of the domestic shipbuilding and shipping trade. Without a clear understanding of these concepts, the Jones Act and other cabotage regulations would make no sense to the reader going forward. Part Two also looks at the agencies tasked with enforcing the Jones Act and other marine cabotage regulations.

To participate in the coastwise trade of the United States, the Jones Act requires a “vessel” to be “constructed” (repaired or rebuilt if needed) in the United States, “owned by United States’ citizens,” and “crewed by United States citizens.”² Failure to meet these requirements results in denial of the coastwise trade permit, forfeiture of any “merchandise” carried by the vessel, or forfeiture of the errant vessel itself.³ Part Three analyzes these requirements using the statutory, case law, and regulatory frameworks. Part Three also looks at the application of the Jones Act to the Outer Continental Shelf.

Part Four looks at domestic legislation and attempts to repeal the Jones Act, as well as the efforts made to sustain it. Because the coastwise trade affects almost every facets of a nation’s life, the Jones Act is a very attractive political issue on all sides of the political divide. There have been strong domestic and international attempts to amend, relax or repeal the Jones Act. These have been met with equally stiff and unrelenting

1. The Passenger Vessel Services Act prohibits a vessel that is not built and registered in the United States from transporting passengers between coastwise points of the United States, either directly or via a foreign port. 46 U.S.C. § 55103 (2006). The Dredging Act permits only qualified U.S. vessels to conduct “dredging” activities “in the navigable waters of the United States.” 46 U.S.C. § 55109 (2006). The Towing Statute allows only U.S. vessels to engage in towage between coastwise points of the United States. The only exception is a vessel in distress, which may be towed by a foreign vessel. 46 U.S.C. §§ 55111, 55118 (2006). Any vessel to be used under the Strategic Petroleum Reserve Program must also be “Jones Act compliant” unless it secured a waiver. 10 C.F.R. app. § 625 (2011). These regulations and subsidies are outside the scope of this paper.

2. 46 U.S.C.A §§ 12112, 12103 (2006).

3. 46 U.S.C.A. § 12151 (2006).

resistance, aided by supportive administrations and America's top military leaders. To date, the forces that support the Act have prevailed, and the Jones Act lives on.

Part Five looks at the Jones Act in the aftermath of the Deepwater Horizon blowout (the Macondo disaster). The disaster led to the deaths of 11 people and left 27 others injured. Many were awed by the colossal damage to the environment, property, and businesses along the Gulf Coast, and blamed the Obama Administration for the delay in the cleanup efforts. The delay reignited the political powder keg surrounding the Jones Act. Senator John McCain and a host of other critics saw the Jones Act as the obstruction to a quick cleanup and renewed efforts and calls to repeal the Act.⁴ The bipartisan Commission on the Deepwater Horizon Oil Spill concluded the Jones Act was not to blame for any delay in the cleanup efforts.⁵ The bill to repeal the Act, using the delay as a reason, failed in Congress.⁶ Supporters of the Jones Act presented a bill aimed at bolstering the Jones Act restrictions in regards to the Outer Continental Shelf.⁷ It too was unsuccessful.

Part Six takes a cursory look at the Arctic as the next big stage in the battle for oil and gas, and how lessons from Macondo could be of benefit in the Arctic. Part Seven makes recommendations regarding the Jones Act moving forward. Ultimately, it is recommended that the U.S. build requirement

4. Joseph Bonney, *McCain Seeks Jones Act Repeal*, J. OF COM. (June 25, 2010, 8:56 PM), <http://www.joc.com/government-regulation/mccain-seeks-jones-act-repeal>.

5. NAT'L COM. ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING* 142–43 (2011).

6. See S. 3525: Open America's Water Act, 111th Congress, <http://www.govtrack.us/congress/bill.xpd?bill=s11-3525> (last visited Feb. 14 2012) (showing that the bill never left the Congressional Committee to which it was assigned).

7. See Consolidated Land, Energy, and Aquatic Resources Act of 2010, H.R. 3534, 111th Cong. §§ 1, 204–06 (2010); see also Svend Brandt-Erichsen & Adam Orford, *House Enacts Amendments to Oil Pollution Act, Outer Continental Shelf Lands Act; Measure Awaits Senate Action*, MARTENLAW.COM (Aug. 2, 2010), <http://www.martenlaw.com/newsletter/20100802-house-enacts-amendments> (explaining the effects of the Clear Act on The Outer Continental Shelf Lands Act); see generally Constantine Papavizas & Gerald A. Morrissey III, *Does the Jones Act Apply to Offshore Alternative Energy Projects?*, 34 TUL. MAR. L.J. 377, 378–79 (2010) (explaining the common place use of "Jones Act").

contained in the Jones Act should be sustained for economic and strategic reasons. At the same time, it is recommended that the citizen-ownership provision should be relaxed for practical reasons. An extension of the Jones Act to the OSCLA and the U.S. part of the Arctic is recommended, as the only way to counter the injurious and vessel dumping practices of some nations. It is recommended that the U.S. should ratify the United Nations Law Of the Sea immediately. Finally, it is recommended that the country should fund the icebreaker oil spill response vessels that could be used in case there is an oil spill in the Arctic.

II. MEANING AND HISTORICAL BACKGROUND OF CABOTAGE IN THE UNITED STATES

Judge Kaufman captured the mentality surrounding cabotage regulations in clear terms when he said:

Like all maritime nations of the world, the United States treats its coastwise shipping trade as a jealously guarded preserve. In order to participate in this trade, a vessel's credentials must be thoroughly American. The ship must have been built in an American shipyard and be owned by American citizens. Moreover, it must not have trifled with its American Heritage.⁸

The focus of Part Two is to trace how the United States arrived at making the coastwise business a "guarded preserve."

A. *What is "Cabotage"?*

The word "cabotage" originates from the French word "caboter".⁹ It means coasting-trade or navigating and trading along the coast between the ports thereof.¹⁰ A coastwise transportation takes place when merchandise or persons are loaded onto a vessel at one location and unloaded at another location.¹¹ The coastwise laws encompass both locations,

8. *Marine Carriers Corp. v. Fowler*, 429 F.2d 702, 703 (1970).

9. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 258 (4th ed. 2000).

10. BLACK'S LAW DICTIONARY 215 (8th ed. 2004).

11. 46 U.S.C. app. § 877 (1988); 9 C.F.R. § 4.80b (1979).

regardless of the origin or ultimate destination of the persons or merchandise.¹² Thus, cabotage regimes are laws regulating the transportation of persons and merchandise from one point to another along the coastal waters of a nation. Worldwide, there are approximately 50 cabotage laws, that dictate the pace of domestic waterborne commerce.¹³ The United States is not an exception.

B. Why Cabotage?

Shipping affects geographic distribution, economic activity and access to materials and markets. A viable merchant marine also remains an indispensable military asset. These factors make shipping a very attractive economic, strategic, and political topic. History abounds of nations doing all they can to protect their domestic shipping commerce against foreign incursions. The British showed an early awareness of the need to have a strong merchant marine with British subjects as crews. King Alfred rewarded English mariners who took three sea trips in their own vessels, in an attempt to encourage merchant shipping.¹⁴ Richard II decreed a statute that restricted British subjects to transporting their merchandise on the sea by English ships only.¹⁵ Henry VII prohibited importation of certain commodities by British subjects, other than in a ship owned by British subjects and manned in greater part by them.¹⁶ During the time of Henry VIII, large landholders were required to plant a certain amount of flax, used mostly for shipbuilding.¹⁷ In 1651, England passed the Navigation Acts, which totally closed the coasting trade to foreigners and permitted importation of merchandise into England or any of its colonies only goods carried on British Ships. As an exception, European goods were allowed only if carried from ships

12. 46 U.S.C. app. § 877 (1988); 9 C.F.R. § 4.80b (1979).

13. The Jones Act and Other U.S. Cabotage Laws, LCASHIPS.COM, <http://www.lcaships.com/hpja96.html> (last visited Feb 2, 2011).

14. GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 751 (1957) (quoting LAWRENCE A. HARPER, *THE ENGLISH NAVIGATION LAWS* 19 (1939)).

15. 5 Rich. 2, c. 3 (1381).

16. GILMORE & BLACK, *supra* note 14, at 751–52 (citing 4 Hen. 7, c. 10 (1487)).

17. *Id.* at 752 (citing 24 Hen. 8, c. 4 (1532–33)).

belonging to the country of origin.¹⁸ The Navigation Acts remained in operation until 1849. It was the cornerstone of building and maintaining a strong colonial merchant marine that dominated the world.¹⁹

III. THE ORIGIN OF CABOTAGE IN THE UNITED STATES: THE 1789 TAX LAWS

Starting with the First Congress, the United States government has focused on giving the United States maritime industry preferential treatment. On July 4, 1789, the first tax levied by Congress imposed protective tax on different items, with items arriving on American ships charged at a lower rate compared to those arriving on foreign ships. Titled 'An Act Imposing Duties on Tonnage', Section 1 of the Act provides that:

On all ships or vessels built within the said States, and belonging wholly to a citizen or citizens thereof; or not built within the said States, but . . . belong wholly to a citizen or citizens thereof, at the rate of 6¢ per ton. On all ships or vessels hereafter built in the United States, belonging wholly, or in part, to subjects of foreign powers, at the rate of 30¢ per ton. On all other ships or vessels, at the rate of 50¢ per ton.²⁰

The provision above referred to vessels entering the United States and bringing in merchandise from overseas. The statute specifically provides for higher tonnage duties on foreign-built and foreign-owned ships and vessels that wished to engage in coastwise business.²¹

Congress was not alone in seeking protection for the coastwise trade of the United States. In his second State of the Union Address on December 8, 1790, President George Washington referred to both national security and the need for a reliable domestic maritime industry while urging Congress to pass laws for the protection of both. He wrote:

The disturbed situation of Europe, and particularly the

18. *Id.* (citing Act of Oct., 8, 1651 (F. & R. II, 559)).

19. *Id.*

20. Act of July 20, 1789, Ch. 3, § 1, 1 Stat. 27 (repealed 1790).

21. *Id.*

critical posture of the great maritime powers, whilst it ought to make us the more thankful for the general peace and security enjoyed by the United States, reminds us at the same time of the circumspection with which it becomes us to preserve these blessings. It requires also that we should not overlook the tendency of a war, and even of preparations for a war, among the nations most concerned in active commerce with this country to abridge the means, and thereby at least enhance the price, of transporting its valuable productions to their markets. I recommend it to your serious reflections how far and in what mode it may be expedient to guard against embarrassments from these contingencies *by such encouragement to our own navigation and agriculture less dependent on foreign bottoms*, which may fail us in the very moments most interesting to both of these great objects. Our fisheries and the transportation of our own produce offer us abundant means for guarding ourselves against this evil.²²

What President Washington referred to were the wars in Europe, which boosted shipping as an industry and benefitted the United States' built vessels due to the its neutrality.²³ What he did not mention, however, were the strategic and economic exigencies of independence from Britain that warranted the need for the United States to urgently develop its own shipbuilding industry and an operative merchant marine industry. The American colonies had access to British ports before the Revolutionary War. Upon independence however, the British shut United States ships out of the British shipping business because of the Navigation Acts.²⁴

Meanwhile, even though the Act of 1789 gave tax preferences to vessels owned and built in the United States and owned by Americans, it did not prohibit foreign ships from

22. George Washington, President, 1790 (no. 2) State of the Union Address, <http://www.presidentialrhetoric.com/historicspeeches/Washington/stateoftheunion.1790.2.html> (last visited Feb. 2, 2011) (emphasis added).

23. *Id.*

24. Larry Sawers, *The Navigation Acts Revisited*, 45 *ECON. HIST. REV.* 262, 272 (1992).

participating in the coastwise trades along the waters of the United States. However, the Act made it economically impracticable for foreign vessels to operate in the coastwise business in the United States.²⁵ The goal then was not to preserve the coastwise trade for American built and owned ships and vessels. Rather, “the discriminatory taxes became important chiefly as weapons for negotiating the removal of similar taxes on American ships in foreign ports.”²⁶

IV. THE JONES ACT OF 1920

The Jones Act, which is the cornerstone of the United States cabotage regulations, was passed as Section 27 of the Merchant Marine Act of 1920.²⁷ Named after its sponsor, Senator Wesley L. Jones, the Act resulted from both the rude shock the United States experienced when the First World War started in Europe and the attempt to assure the domestic shipping industry that the Panama Canal Act of 1912 would not lead to a takeover of their business by foreigners.²⁸

At the beginning of the First World War, the United States had enough vessels to transport its merchandise coastwise but it had to depend on foreign vessels for its international trade.²⁹ The cost of shipping services became prohibitively expensive.³⁰ Countries involved in the war used their vessels for the war effort and those that they did not remained ashore in the foreign countries to protect them from being captured or destroyed by the opposition belligerents.³¹ As technology advanced steel had

25. See Max Winkler, *The Tariff Policy of Creditor Nations: With Especial Reference to the Tariff History of Leading Creditor Nations during the 19th Century*, 141 ANNALS AM. ACAD. POL. & SOC. SCI. 175, 179 (stating the “Tariff Act of 1979 was nonetheless protective in spirit . . .”).

26. GILMORE & BLACK, *supra* note 14, at 755.

27. Mark. D. Aspinwall, *Coastwise Trade Policy in the United States: Does it Make Sense Today?* 18 J. MAR. L. & COM. 243, 247 (1987).

28. *Id.* at 247–48; *but see* Constantine G. Papavizas & Bryant E. Gardner, *Is the Jones Act Redundant?*, 21 U.S.F. MAR. L.J. 95, 106 (2008) (arguing that the history of the Jones Act did not show a reaction to the Panama Canal of 1912 as a motivation.).

29. See SAMUEL A. LAWRENCE, UNITED STATES MERCHANT SHIPPING POLICIES AND POLITICS 38 (1966).

30. *Id.* at 39.

31. ANDREW GIBSON & ARTHUR DONOVAN, THE ABANDONED OCEAN—A HISTORY OF

replaced wood as the core material for shipbuilding, but U.S. shipyards could not build vessels at competitive prices because the steel in the United States was very expensive, in part because of the high tariffs imposed to protect the American steel industry.³²

Having U.S.-flag vessels remained vital for the defense and war efforts of the nation in case of conflict. Before passing the Merchant Marine Act in 1920, the government tried other policies to encourage the shipping industry and develop a reliable merchant marine, leading to a “free ship policy.” Under the Panama Act of 1912, vessels that were less than five years old, regardless of where they were constructed were permitted to be flagged in the United States, but for foreign business only.³³ In August 1914, the five-year requirement was repealed.³⁴ The survey, inspection, and measurement requirements were also suspended.³⁵ The Act of October 6, 1917 permitted vessels built in foreign countries to participate in the coastwise business during World War I with the approval of the U.S. Shipping Board.³⁶

All these measures helped tremendously. The original reason for passing the Jones Act was to dispose of the more than 1,750 ships the government had acquired or built, halt further construction of vessels by the government, and to guarantee the profitable operation of the ships when acquired by the private sector.³⁷ Furthermore, the country realized that it needed to do more in order to have the merchant marine available in case of war. To this end, the “Purpose and Policy” section of the Merchant Marine Act of 1920 stated:

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

UNITED STATES POLICY 104 (2000).

32. PAUL MAXWELL ZEIS, *AMERICAN SHIPPING POLICY* 42 (1938).

33. *Id.* at 66 (citing 37 Stat. 560, 566 sec. 5 (1912)).

34. Act of Aug. 18, 1914, Pub. L. No. 175, 38 Stat. 699 (1914).

35. *Id.*

36. ZEIS, *supra* note 32, at 98.

37. H.R. REP. NO. 66-443, at 2 (1919).

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; and it is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine.³⁸

The Act created a coastwise monopoly to protect and develop the American merchant marine. It required that any “vessel” that transported “merchandise” by water, or a combination of land and water, between “coastwise” points in the United States, must be: (1) built in the United States, (2) owned by U.S. citizens, (3) documented (“flagged”) under the laws of the United States and (4) crewed by United States citizens or immigrant aliens.³⁹

A. *What is “Coastwise” (The Geographical Extent of the Jones Act)?*

The Jones Act delineates the geographical boundary of the cabotage regulations by prohibiting foreign vessels from transporting merchandise “by water, or by land and water, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation.”⁴⁰ The Court’s decision in *U.S. v. 250 Kegs of Nails* led Congress to include the words “either directly or via a foreign port” in order to stop the practice of circumventing the Jones Act by breaking a voyage between two domestic ports into two, using a foreign port at interval, and employing foreign vessels in both legs of the trip.⁴¹

Coastwise regulations cover the coastal waters of the United States, which extend “three nautical miles wide, seaward of the territorial sea baseline.”⁴² In cases where the baseline and

38. 46 App. U.S.C. §883, s. 861 (1981).

39. 46 U.S.C. § 55102 (2006); *See also* LAWRENCE, *supra* note 29, at 126.

40. 46 U.S.C. § 55102 (2006).

41. Robert W. Gruendal, *The Weakening Grip of United States Cabotage Law*, 4 *FORDHAM INT’L L. J.* 389, 399 (1980).

42. Douglas Burnett and Michael Hartman, *The Jones Act—One More Variable in*

coastline differ, as well as all inland navigable waterways, cabotage regulation cover points located in internal waters, landward of the territorial sea baseline.⁴³ Thus, cabotage regulation covers any point within the territorial waters of the United States and is out of bounds to foreign vessel participation.⁴⁴

B. Coastwise Restriction and the Outer Continental Shelf

Ordinarily, the United States is geographically defined as the 48 States in the continental United States, the District of Columbia, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.⁴⁵ Without more, the Jones Act as a federal statute would apply only to submerged lands three miles seaward of and beyond each State's coastline.⁴⁶ The picture that readily comes to mind when mentioning the coastwise points is that of vessels docked at the harbors while merchandise are unloaded onto wharves. The Outer Continental Shelf Lands Act of 1953 (OCSLA), passed by Congress to encourage discovery and development of oil reserves beyond the immediate coastal waters of the nation and into the Outer Continental Shelf, has changed this picture.

OCSLA, as amended, provides that:

The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive

the Offshore Wind Equation, MANAGING RISK, Sept. 13, 2010, at 3.

43. *Id.*

44. *Id.* at 4.

45. 1 U.S.C. § 1 (1947); 8 U.S.C. § 1101(a)(38) (1993).

46. *See generally* Burnett and Hartman, *supra* note 42.

Federal jurisdiction located within a state.⁴⁷

By virtue of the OCSLA, the Jones Act will apply to artificial islands, mobile oil drilling rigs, and drilling platforms, as well as other devices attached to the Outer Continental Shelf for the purpose of resource exploration. In addition, floating, anchored warehouse vessels, when anchored on the Outer Continental Shelf with the intent of supplying drilling rigs, remain coastwise “points” of the United States, because the drilling rig cannot successfully function without the anchored warehouse.⁴⁸ Moreover, mobile oil rigs, when they are secured or submerged unto the seabed of the Outer Continental Shelf, are considered part of coastwise points for the enforcement of the Jones Act.⁴⁹ In short, as long as a device is permanently or temporarily attached to the Outer Continental Shelf, and the device is being used for the development or production of resources from the Outer Continental Shelf, such device is considered a coastwise point, and a foreign-owned or documented vessel cannot transport merchandise to or from the point from another coastwise point without violating the Jones Act.⁵⁰

V. ARE THE CABOTAGE REGULATIONS WORTH IT?

There have been many domestic as well as international attempts to get the Jones Act and other cabotage regulations repealed. This is based on the negative economic effects the opponents see in the regulations. This debate was rejuvenated in the aftermath of the Deepwater Horizon tragedy. This part will look at both the players in the attempts to repeal and the efforts to sustain the cabotage regulations, while also considering the economic and strategic reasons canvassed by either side of the debate.

47. 43 U.S.C. §1333(a); *see* U.S. CUSTOMS AND BORDER PROTECTION, U.S. DEP’T OF HOMELAND SEC., WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: THE PASSENGER VESSEL SERVICES ACT, 11–12 U.S. Customs 2010. [hereinafter U.S. CUSTOMS].

48. U.S. CUSTOMS, *supra* note 47.

49. *Id.*

50. *See* 19 CFR § 4.80(b)(1979); *see generally* U.S. CUSTOMS, *supra* note 47, at 4–5.

A. *Domestic Attempts to Repeal the Jones Act*

Supporters of cabotage regulation cite two key reasons for the need to have the Jones Act. First is to have a sufficient, trained and ready marine and shipbuilding base that can protect the nation's defense and economic interests.⁵¹ The second reason is to boost domestic commerce through the protection of shipping, shipbuilding, and general maritime business.⁵² Among the ranks of opponents to the Jones Act are free traders, travel and tourism agencies, agricultural interests, port authorities, port cities, businesses and entrepreneurs, foreign cruise interests, and moderate republicans.⁵³

1. *Economic Defects of the Jones Act*

Critics of the Jones Act argue that there is no reasonable economic basis to sustain the Jones Act. They point to the high cost of building, rebuilding, or repairing vessels in the United States compared with other nations.⁵⁴ They argue this comparatively high cost has led to a decline in shipbuilding in the nation because high cost means less demand.⁵⁵ This, the opponents argue, has led to a boom in railroad use and investment in and preference for pipelines instead of vessels.⁵⁶ Also, some industries prefer to import certain products from

51. See *Industry Profile/Jones Act—Domestic Shipping*, TRANSP. INST. (2009), <http://www.trans-inst.org/jones-act.html>.

52. See *id.*

53. Kathleen Magee, *U.S. Cabotage Laws: Protective or Damaging?*, MONTEREY INSTITUTE OF INTERNATIONAL STUDIES, available at http://www.commercialdiplomacy.org/ma_projects/magee2.htm (last visited Jan. 10, 2011).

54. See *Industry Profile/Jones Act—Domestic Shipping*, *supra* note 51.

55. Theodore Prince, *Spotlight Focuses Again on the Jones Act*, J. OF COMMERCE, Mar. 16, 2000, at 7.

56. See Nicolas E. Piggott, *Economic Impact of a Repeal of the Jones Act for North Carolina Soybean Producers*, NC STATE ECONOMIST, Sept. 2001, at 1–2 (noting farmers claiming that the only competitive “grain by water” supply is from foreign cargoes and that most of their supply comes via rail transportation); Matt Kermode, *The Oil Patch: Pipelines and Negotiation Benchmarks*, CALGARY BUS. BLOG, <http://www.calgarybusinessblog.com/articles/the-oil-patch-pipelines.html> (last visited Feb. 27, 2012) (“The primary reason for the preference for pipelines is that they are generally the most cost effective mode of transportation. All other modes of transportation require shipping the containment vessel, which adds to the cost.”).

abroad instead of paying the prohibitive cost of domestic products engendered by the high cost of domestic coastwise shipping.⁵⁷ Some regions of the United States claim that the Jones Act has a greater negative effect upon them than other regions and have called for the repeal of the Jones Act, or in the alternative, amendments that will make the Act inapplicable in their territories.⁵⁸

It costs significantly more to build vessels in the United States than in foreign countries. A Congressional Budget Office report showed that “prices of cargo ships built in Japan or Korea range as low as one-third of the prices of the same ships built in U.S. yards.”⁵⁹ The cost of operating United States-owned vessels is also higher than that of foreign flag vessels, because of other expenses that are higher in the United States than for foreign vessels, especially crew costs.⁶⁰ Moreover, most vessels built in the U.S. are powered by steam turbines, which make them great for military operations because they can move faster than diesel-powered vessels.⁶¹ But, that same factor makes them fuel guzzlers, further increasing their operating costs.⁶² A few examples from cases dealing with “rebuilt” vessels demonstrate this problem. For instance, in *American Hawaii Cruises v. Skinner* the owners saved \$25 million by having part of the rebuilding done in Finland, instead of the United States.⁶³

These high costs of building and operating a vessel in the U.S. translate into higher cost in chartering vessels in the coastwise trade by American businesses. As was said in *American Maritime Association v. Blumenthal*, an American-flag vessel capable of carrying 35,000 to 45,000 tons of cargo would

57. See PROMAR INT’L, SOUTHEAST US FEEDSTUFF IMPORTS: CASUAL FACTORS AND RECOMMENDED RESPONSE, AMERICAN SOYBEAN ASSOCIATION 11 (2003).

58. See Malia Zimmerman, *Businesses Hit Hard by Costly Jones Act Regulations*, GRASSROOT INSTITUTE OF HAWAII (Mar. 2010), available at <http://grassrootinstitute.org/research/businesses-hit-hard-by-costly-jones-act-regulations>.

59. Cong. Budget Office, *U.S. Shipping and Shipbuilding: Trends and Policy Choices* xx, (Aug. 1984).

60. *Id.* at 23–24.

61. *Id.* at 28.

62. *Id.*

63. See *Am. Hawaii Cruises v. Skinner*, 713 F. Supp. 452, 455 (D.C. Cir. 1989).

charge \$6.16 per long ton, compared with \$3.69 per long ton for a foreign-flag vessel.⁶⁴ A larger American-flag crude carrier capable of carrying 200,000 to 300,000 tons of cargo would charge \$24.90 per ton, while a foreign-flag vessel would charge \$5.85 per ton for the same cargo.⁶⁵ Thus, the cost to charter a United States-flag vessel can double or even quadruple that of a foreign flag-vessel; and the charter cost of a United States-flag vessel keeps going up as that of foreign-flag vessel goes down.⁶⁶ This high charter rate for United States-flag vessel invariably means high cost for goods shipped by domestic vessels, especially in the coastwise business.⁶⁷ This has affected certain sections of the economy very deeply. Those who ship their products in bulk, for example the scrap metal and road salt shippers, complain that it is easier to buy or sell from or in foreign nations because the shipping cost is cheaper.⁶⁸

Some regions of the United States also feel a greater impact due to cabotage regulations than other regions. People of Hawaii, Alaska, and Puerto Rico for example, feel they are unfairly subsidizing the Jones Act while feeling the pain of the cabotage laws. A 2008 analysis by the U.S. Department of Agriculture shows there is an average of 30% increase in food cost between the United States Mainland and Hawaii.⁶⁹ Also, a 1988 General Accounting Office (GAO) publication shows that an average Hawaiian family pays between \$1,921 and \$4,821 more than its mainland counterpart.⁷⁰ Some have blamed this differential on the Jones Act.⁷¹ Representative Gene Ward of

64. See *Am. Maritime Ass'n v. Blumenthal*, 590 F.2d 1156, 1159 n.12 (D.C. Cir. 1979).

65. *Id.*

66. See *id.*

67. See, e.g., Zimmerman, *supra* note 58 (discussing the high cost of doing business in Hawaii).

68. *The Impact of U.S. Coastwise Trade Laws on the Transportation System in the United States: Hearing Before the Subcomm. on Coast Guard and Mar. Transp., Comm. on Transp. and Infrastructure*, 104th Cong. (1996).

69. See *Official USDA Alaska and Hawaii Thrifty Food Plans: Cost of Food at Home*, USDA (2008), available at <http://www.cnpp.usda.gov/usdafoodcost-home.htm>.

70. See United States General Accounting Office, *The Jones Act, Impact on Alaska Transportation and U.S. Military Sealift Capability*, RCED-98-96R (1988).

71. See e.g. Daniel Brackins, *The Negative Effects of the Jones Act on the Economy*

Hawaii claimed that Hawaii residents subsidize the Jones Act by about \$1 billion per year because of the high price of goods due to the Act.⁷² He then asserted that this amounts to about \$3,000 per household in the State.⁷³

Critics of the Act also point to the U.S. International Trade Commission report, which estimates that the Jones Act costs the United States economy between \$3.6 billion and \$9.8 billion per year, in 1991.⁷⁴ The 1999 update of the report showed a repeal of the Jones Act would lead to about 20 percent reduction in the cost of shipping.⁷⁵ In 2002, the International Trade Commission stated that there would be an annual positive economic gain of approximately \$656 million, should the worldwide rates apply to the United States.⁷⁶ Critics of the Jones Act use these reports to show that the Jones Act has a negative effect on the economy.⁷⁷

2. *Attack On the “National Defense” Reason for the Jones Act*

Opponents of the Jones Act have also attacked the national defense reason often cited for keeping the Jones Act and other cabotage regulations. First, they point to the fact that instead of improving the global status of the United States in shipbuilding, the Jones Act and other cabotage regulations have led to a loss of shipbuilding requests and loss of jobs by trained merchant mariners.⁷⁸ Critics regard the cabotage regulations as making American shipyards uncompetitive in the global sphere despite

of Hawaii, HAWAII LIBERTY CHRONICLES, Jan. 29, 2009, available at <http://www.hawaii-liberty-chronicles.com/?p=2180>.

72. See Gene Ward, *View Point: To Fix Economy, Junk the Jones Act*, HONOLULU STAR-BULLETIN, Dec. 5, 1997, available at <http://archives.starbulletin.com/97/12/05/editorial/viewpointf.html>.

73. *Id.*

74. U.S. International Trade Commission, *The Economic Effects of Significant U.S. Import Restraints*, USITC Pub. 2422, Investigation No. 332-262 (Sept. 1991).

75. U.S. INT'L TRADE COMM'N, THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS 98 (2d Update, 1999).

76. U.S. INT'L TRADE COMM'N, THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS xviii (3d Update, 2002).

77. See, e.g., Zimmerman, *supra* note 58.

78. INDUS. COLL. OF THE ARMED FORCES SHIPBUILDING SEMINAR, INDUSTRY STUDY REPORT: SHIPBUILDING 17-19 (2005), available at <http://www.ndu.edu/icaif/programs/academic/industry/reports/2005/pdf/icaif-is-report-shipbuilding-2005.pdf>.

government efforts. Even ardent supporters of the regulations acknowledge this argument. In his testimony before the Subcommittee on Coast Guard and Maritime Transportation, Maritime Administrator David T. Matsuda said, “[t]he state of the U.S. Flag fleet in foreign trade has decreased over time, from 980 ships in 1947 to just 115 today . . . U.S. flag operations [are] more expensive than foreign operations. Investors who are considering the costs and benefits among the various vessel registry alternatives can find better opportunities using international and open registries.”⁷⁹

The criticism has historical backing. In 1920, The American merchant fleet was 22.2 percent of the world’s gross tonnage.⁸⁰ One of the reasons for the passing of the Jones Act was to dispose of excess government-owned ships.⁸¹ Today, American shipyards account for only 1 percent of international commercial tonnage construction.⁸² Critics believe that competition from foreign vessels will drive prices down as well as improve the competitive ability of the shipyards and their employees and make for the ready merchant marine the United States desires.

Finally, critics of the Jones Act believe that mandating vessels be built in the United States and owned by its citizens to prosecute war is nonsensical. It has been suggested that when war beckons, the United States could commandeer vessels registered under its flag, regardless of where it was built or nationality of the owners, as such is permitted under international law.⁸³ Further, contemporary military theories regard aircraft and not ships as the most vital component of the armed forces in the modern era, especially in flying combatants and their gear and ammunition.⁸⁴ In addition, the nature of

79. *State of the United States’ Merchant Fleet in Foreign Commerce: Hearing Before the H. Subcomm. on Coast Guard and Mar. Transp.*, 111th Cong. 1–2 (2010) (statement of David T. Matsuda, Mar. Adm’r, Dep’t of Transp.).

80. *SIC 3731: Ship Building and Repairing Market Report*, HIGHBEAM BUSINESS (2012), available at <http://business.highbeam.com/industry-reports/equipment/ship-building-repairing/>.

81. *Id.*

82. *Id.*

83. *Ruling the Waves*, THE ECONOMIST, March 23, 1991, at 81.

84. *Id.*

today's warfare, which involves the use of remote controlled stealth fighters, diminishes the need for a ready merchant marine at the same levels as past conflicts.⁸⁵ Critics then point to the fact that airline cabotage has been relaxed, and argue that the same should be done for maritime cabotage.⁸⁶ Finally, the praises for the Jones Act in recent war efforts is regarded as bogus, because foreign vessels, rather than Jones Act vessels are actually used, as most Jones Act vessels are not fit for war efforts.⁸⁷

3. *Domestic Repeal Efforts*

In May 1996, Senator Jesse Helms introduced the "Coastal Shipping Competition Act."⁸⁸ The Bill aimed at repealing the Jones Act as we now know it and sought to allow a vessel to participate in the coastwise trade as long as it is documented with coastwise endorsement or certification.⁸⁹ The requirements of the Jones Act that the vessel be built in the United States, owned by American citizens, and crewed 75 percent by American citizens or resident Aliens were to be repealed.⁹⁰ Similar requirements were introduced regarding the Passenger Vessel Act, Towing Act, and the Dredging Act.⁹¹ In his introduction, Senator Helms called the Jones Act an "unwise lid" on the United States as "the breadbasket of the world."⁹² The Bill died

85. *See id.*

86. *Id.*

87. James Bovard, *Kamikaze Shipping Rules*, WASH. TIMES, Dec. 13, 1991, at F3.

88. Coastal Shipping Competition Act, S. 1813, 104th Cong. § 4 (1996).

89. *Id.* § 4 (a).

90. *Id.* § 4(b).

91. *Id.* §§ 5-7.7.

92. 97 Cong. Rec. S5589 (daily ed. May 23, 1996) (statement of Sen. Jesse Helms) ("Mr. President, the Jones Act is simply not fair. It's not fair to farmers in the Midwest and it is unfair to countless producers in my own State and in other States. Those who may protest this legislation are likely to claim that it will somehow destroy American shipping. That simply is not so. Moreover, if the status quo is maintained, my farmers will have no choice but to purchase their foreign grain from Canada, Argentina, and other countries—and all of it will be shipped on foreign flagged vessels. According to a December 1995 report by the U.S. International Trade Commission, The economy wide effect of removing the Jones Act is a U.S. economic welfare gain of approximately \$2.8 billion. This figure can also be interpreted as the annual reduction in real national income imposed by the Jones Act. A primary reason for the large gain in welfare is a

in the Senate after being read twice before the Senate Committee on Commerce. It was never voted on.⁹³ A similar bill by Senator Sam Brownback and Senator Jesse Helms in 1998 suffered a similar fate.⁹⁴

4. *International Attempts to Repeal the Jones Act*

Attempts to repeal or amend the provisions of the Jones Act are not limited to domestic ones. The Organization for Economic Cooperation and Development (OECD), World Trade Organization (WTO), and the North America Free Trade Agreement (NAFTA) have yet to succeed in their efforts to repeal, relax, or amend the Act.

a. *OECD*

In 1989, the United States encouraged the Commission of the European Union, Finland, Japan, South Korea, Norway, and Sweden to negotiate at the Organization for Economic Cooperation and Development level, with the aim to curb unfair pricing and dumping practices in shipbuilding.⁹⁵ This culminated in the 1994 Shipbuilding Agreement, termed “Agreement Respecting Normal Competitive Conditions in the Commercial Shipbuilding and Repair Industry.”⁹⁶ The Agreement aimed at restricting direct and indirect government support, and prohibited a comprehensive list of financial, administrative and regulatory support. The list included direct subsidies, loans and loan guarantees, forgiveness of debts, and provision of equity capital not consistent with usual investment practices.⁹⁷

decline of approximately 26% in the price of shipping services formerly restricted by the Jones Act. Mr. President, isn't it ironic that the United States—the breadbasket of the world—has such an unwise and unfair lid on that bread basket? That lid, Mr. President, is the Jones Act.”).

93. Coastal Shipping Competition Act, S. 1813, 104th Cong. § 4 (1996).

94. Freedom to Transport Act of 1998, S. 2390, 105th Cong. (1998).

95. Constantine G. Papavizas, *The OECD Shipbuilding Agreement and its Effects on U.S. Law*, 26 J. MAR. L. & COM. 385, 392 (1995).

96. *Id.* at 385.

97. OCED, Agreement Respecting Normal Competitive Conditions in the Commercial Shipbuilding and Repair Industry Annex I(B) (1994), *available at*

The Agreement also prohibited “official regulations and practices, including domestic-build or repair or domestic content requirements that discriminate in favor of the domestic shipbuilding and repair industry, or regulations having similar effects.”⁹⁸ This prohibition directly impacts the Jones Act. However, to assuage the United States, OECD member nations permitted the United States to maintain the domestic build requirements of the Jones Act, on the condition that the annual deliveries of vessels under the Act not exceed 200,000 gt.⁹⁹ If the United States breaches that condition, OECD member states can impose charges or restrictions on the shipyards that benefit from the bids or contracts that lead to the breach.¹⁰⁰ Further, if a party successfully establishes that another has engaged in “injurious pricing,” the shipbuilder at issue must pay an injurious pricing charge to the injured nation on whose waters the vessel in question has been dumped, within 180 days, or void the sale of the vessel.¹⁰¹

The Agreement created an avenue for members of the OECD to pressure the United States to relax its cabotage laws, at every opportunity available. They regarded it as an opportunity to ensure incursion into the United States coastwise trade. Relaxing the regulations has become a negotiating tool for interested nations against the United States. For instance, Japan accused the United States of taking a “tough stance without being prepared to compromise [on] key issues such as the abolition of the Jones Act.”¹⁰² Ultimately, the United States never signed the 1994 Shipbuilding Agreement.

b. World Trade Organization (WTO)

The United States has also adamantly refused to accede to the pressure of foreign nations at the World Trade Organization

<http://www.oecd.org/dataoecd/2/5/1880215.pdf> [hereinafter “OECD Agreement”].

98. *Id.* at Annex I(C)(2).

99. *See* Papavizas, *supra* note 95, at 396–97.

100. *Id.* at Annex II(B)(2)(e).

101. *Id.* at Annex III (A)(2).

102. Press Review, OECD, Lloyd’s List: Japan Blames US for Jones Act “Obstacles” (Jan. 28, 1992), *available at* [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=SG/PRB/D\(92\)17&doclanguage=bi](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=SG/PRB/D(92)17&doclanguage=bi).

to amend or repeal the Jones Act. The Jones Act violates the terms of GATT as a law discriminating based on “flag of vessels.”¹⁰³ However, the Act was grandfathered under Paragraph 3 of the GATT as a specific mandatory legislation enacted before the United States became a contracting party to the 1947 GATT.¹⁰⁴ The impact of the Jones Act was to be reviewed every two years to determine whether the conditions that created the need for the exemption still existed.¹⁰⁵ The United States has consistently refused to put the Jones Act back on the table for negotiations despite international pressure.

During the eighth WTO Ministerial Conference on “Trade Policy Review of the United States,” the Conference referred to the unyielding position of the United States, saying, “On maritime transport, some Members asked the United States to review the Jones Act, and to table an offer in the context of the ongoing service negotiations.”¹⁰⁶

c. NAFTA

During the NAFTA negotiations, Canada pushed aggressively for the relaxation of the United States cabotage regulations, especially the U.S. citizen ownership provisions of the Jones Act. Canada alternatively pushed for some form of waiver system which would allow the use of Canadian vessels in the event that no suitable United States vessel is available (as Canada does).¹⁰⁷ Nevertheless, the United States did not budge. The U.S.’s unwillingness to negotiate this point has been

103. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat A-11, 55 U.N.T.S. 194, art. V, ¶ 2.

104. General Agreement on Tariffs and Trade (1994), Par. 3(a) (“3. (a) The provisions of Part II of GATT 1994 shall not apply to measures taken by a Member under specific mandatory legislation, enacted by that Member before it became a contracting party to GATT 1947, that prohibits the use, sale lease of foreign-built or foreign-constructed vessels in commercial applications between points in national waters or the waters of an exclusive economic zone”).

105. *Id.* at 3(b).

106. See World Trade Organization, Concluding Remarks by the Chairperson: Trade Policy Review of the United States (March 22–24, 2006).

107. Mary R. Brooks, *The Jones Act Under NAFTA and its Effects on the Canadian Shipbuilding Industry*, ATLANTIC INSTITUTE FOR MARKET STUDIES, 12 (2006), available at <http://www.aims.ca/site/media/aims/BrooksResearch.pdf>.

attributed to its desire to engage in retaliatory action under the Foreign Shipping Practices Act of 1988,¹⁰⁸ rather than open its maritime system to NAFTA's dispute resolution process.¹⁰⁹ While both Canada and Mexico permitted the flag of the other country in its international shipping, the United States excluded maritime transport under Annex II-U-IX of NAFTA.¹¹⁰ Canada and Mexico failed in their attempts to get the United States to relax its cabotage regulations.¹¹¹

B. Efforts to Sustain the Jones Act and Other Cabotage Regulations

Those who want the Jones Act and other cabotage regulations sustained hold a favorable view of these regulations. They believe the Jones Act is in America's best interest.

1. The Economic Benefit Response by Supporters of the Jones Act

The American Maritime Partnership (formerly Maritime Cabotage Task Force) spearheads the effort to sustain the cabotage regulations.¹¹² The maritime sector of the economy believes that the preservation of coastwise trade ensures, directly and indirectly, around 500,000.¹¹³ They claim that over twenty-nine billion dollars in annual income accrues as wages in almost every sector of the American economy.¹¹⁴ They also boast that the more than 40,000 Jones Act vessels are the "the envy of the world."¹¹⁵ To the believers of the cabotage regulations, "Every job in a domestic shipyard results in four additional jobs

108. 46 U.S.C. app. § 1710(a).

109. Mary R. Brooks, *The Jones Act Under NAFTA and Its Effects on the Canadian Shipbuilding Industry*, ATLANTIC INSTITUTE FOR MARKET STUDIES 12 (2006).

110. *Id.*

111. *Id.* at 11.

112. American Maritime Partnership, <http://www.mtcf.com/about.html> (last visited Apr. 7, 2011) (The American Maritime Partnership boasts of 450 or more members of diverse but allied maritime interests).

113. *Id.*

114. *Id.*

115. *Id.*

elsewhere in the U.S. economy.”¹¹⁶

Supporters of the regulations point to inconsistencies in the International Trade Commission’s reports relied on by the critics of the Jones Act. The reports state that repealing the Jones Act would have a positive welfare effect on the overall U.S. economy.¹¹⁷ In 1991, the report claimed that the cabotage regulations were costing the nation around \$3.1 billion annually.¹¹⁸ In 1999, the annual positive welfare effect of repealing the Jones Act was going to be only \$656 million.¹¹⁹

However, in 2007, the Commission admitted that it was unable to secure any direct information on the capital cost of U.S.-flag vessels compared to foreign-flag vessels.¹²⁰ Regarding the higher cost differential between operating a U.S.-flag vessel compared to a foreign-flag vessel, the Commission for the first time considered the effect that applying U.S. laws would have on foreign-flag vessels and their charter rates if the cabotage regulations were repealed.¹²¹ Thus, the Commission backed away from its previously consistent report that repealing the Jones Act and other coastwise regulations will have a positive impact on the economy. It concluded that “it is not clear to what extent these laws would affect the costs and operation of foreign vessels in the U.S. market, so the Commission is unable to provide an estimate of the welfare gains that would result from removing these import restraints.”¹²²

In 2009, the International Trade Commission (ITC) did not include the Jones Act and other cabotage regulations as U.S. import restraints that, if removed, may have positive economic

116. *Id.*

117. The Economic Effects of Significant U.S. Import Restraints, Inv. No. 332–325, USITC Pub. 4094, x (Aug. 2009).

118. The Economic Effects of Significant U.S. Import Restraints, Inv. No. 332–325, USITC Pub. 2699, viii (Nov. 1993).

119. The Economic Effects of Significant U.S. Import Restraints, Inv. No. 332–325, USITC Pub. 3519, xviii (Jun. 2002).

120. The Economic Effects of Significant U.S. Import Restraints, Inv. No. 332–325, USITC Pub. 3906, 97–98 (Feb. 2007).

121. *Id.* at 97–98.

122. *Id.* at 99.

effects.¹²³ The ITC's change of direction has been attributed to the criticisms of its reports by the United States General Accounting Office (GAO).¹²⁴ The GAO found that eliminating the long-haul oil shipments from Alaska (because of the increased demand for the oil in the West Coast and the dwindling production of Alaska's North Slope field) could reduce the cost differential between U.S.-flag and foreign-flag by as much as 11 percent.¹²⁵

The GAO also criticized the ITC's failure to include the impact that applying relevant United States laws will have on the operating costs of foreign-flag vessels should they be allowed to ply the coastwise points of the United States.¹²⁶ Unless an exemption applied, "50 percent of the transportation income is treated as income derived from sources in the United States."¹²⁷ Foreign crews engaged in the coastwise trade may have to be paid under the minimum wage laws of the United States.

The National Labor Relations Act may allow such foreign crews to engage in collective bargaining, like their U.S. counterparts. The Bureau of Immigration and Naturalization Services may require foreign-flag vessels that spend most of their time in U.S. waters to obtain visas for their crew. This requirement may force the vessels to hire United States citizens, and the wage would thereby increase. Foreign-flag vessels operating in the U.S. waters may be subject to merchant marine protections under U.S. laws for injury or death of crew members. Obtaining insurance against monetary awards in the U.S. courts will also increase the costs for foreign-flag vessels.¹²⁸ The ITC did not include these exigencies in its reports until 2007 when it said it could not give an estimate of any potential gains from the repeal of the Jones Act.¹²⁹ It did not contest the balance and

123. *See generally id.*

124. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO, MARITIME ISSUES: ASSESSMENT OF THE INTERNATIONAL TRADE COMMISSION'S 1995 ANALYSIS OF THE ECONOMIC IMPACT OF THE JONES ACT (1998) [hereinafter MARITIME ISSUES].

125. *Id.* at 9–10.

126. *Id.* at 10.

127. *Id.* at 11–12.

128. *Id.* at 11–12.

129. U.S. INT'L TRADE COMM'N, THE ECONOMIC EFFECTS OF SIGNIFICANT U.S.

accuracy of the GAO's criticisms.¹³⁰

Because of "fair trade" issues domestic shipyards believe a comparison of shipbuilding costs in the U.S. against foreign nations is unfounded and is like comparing apples to oranges.¹³¹ There is no available comparative estimate of building a vessel. But, there is no doubt that shipbuilding in the United States costs more than shipbuilding in foreign countries. However, that is not the end of the story.

South Korea has been generally criticized for dumping its vessels on the market at very low prices, and engaging in underbidding and other schemes that artificially drive the price low.¹³² These schemes make it hard for the United States' vessels to compete. Not satisfied with dumping vessels, the United States has targeted rigs and platforms.¹³³

In the words of Allen Walker, President of the Shipbuilders Council of America:

Korean Shipyards are underbidding U.S. competition despite the fact that it costs several million dollars to transport rigs and platforms from Korea to the Gulf of Mexico We are finding that one of Korea's major shipyards will bid a contract well below the cost of production while the two other major players in this market segment will bid competitively. The next contract, the second Korean shipyard will bid below the cost of production with the other two bidding competitively. The next contract, the third yard will bid low. Then the pattern starts over.¹³⁴

The intricate involvement of the Korean government in the shipbuilding business and its use of international aid to achieve the goal of becoming the world leader in shipbuilding compound

IMPORT RESTRAINTS 98-99 (2007).

130. MARITIME ISSUES, *supra* note 124, at 13.

131. See JOHN R. FRITELLI, THE JONES ACT: AN OVERVIEW, CONGRESSIONAL RESEARCH SERVICE REPORT RS21566, at 5 (2003).

132. *Id.* at 6.

133. ALLEN WALKER, SOUTH KOREAN SHIPBUILDING PRICING POLICIES: IMPACT ON THE WORLD SHIPBUILDING MARKET, ADDRESS BEFORE THE SHIPBUILDING DECISION '99 1-2 (1999).

134. *Id.*

the issue.¹³⁵ Recognizing that “prices from the South Korean yards had been reduced to down to 40% below production costs, according to EU Commission report,” the European Union has dragged South Korea before the World Trade Organization to face a dispute resolution proceeding regarding the practice.¹³⁶ The EU also engaged in the defensive action of providing financial aid to its shipbuilding industry, as well as ending operating aid in the form of subsidies to shipbuilders.¹³⁷ The EU “was convinced that State aid was in principle a factor that distorted competition and did not necessarily help the industry to improve its competitiveness.”¹³⁸

Thus, the United States is not alone in feeling the economic crunch of South Korea’s anticompetitive practices in the shipbuilding business. Germany and Japan have allegedly engaged in indirect government involvement in the same practice.¹³⁹ Supporters of the Jones Act, question why the United States should allow heavily subsidized vessels to be dumped in its coastwise trade, while allowing such vessels to avoid the operating cost borne by U.S. operators at the same time.

In addition, Jones Act supporters dispute the purported gain that repealing the Jones Act will have on territories like Hawaii. They claim that cabotage regulation opponents did not consider maritime and allied jobs that will be lost to foreigners by repealing regulations.¹⁴⁰ Using the same statistics as the opponents of the Act, supporters show that Hawaii’s overall loss

135. *Id.* at 4.

136. European Resolution of “Shipbuilding” (Sept. 2006), *available at* http://circa.europa.eu/irc/opoce/fact_sheets/info/data/policies/industrial/article_7276_en.htm (last visited Feb. 26 2012).

137. *Id.*

138. *Id.*

139. *See, e.g.*, ENCYCLOPEDIA OF BUSINESS, 2D ED., SHIPBUILDING AND REPAIRING—DESCRIPTION, MARKET PROSPECTS, INDUSTRY HISTORY, *available at* <http://www.referenceforbusiness.com/industries/Transportation-Equipment/Ship-Building-Repair> (visited Apr. 1, 2011) (“Governments subsidies in Japan, Korea, and Germany ranged from 20% to 30% of the cost of the ship, enabling these builders to capture almost all of the commercial shipbuilding business.”).

140. MARITIME ISSUES, *supra* note 124, at 2.

by repealing cabotage regulations could be up to \$1.5 billion,¹⁴¹ estimating the net loss to between \$611 and \$3,563 per household in Hawaii, and a personal income loss of between \$37.50 and \$1,124 resulting from possible decline in the ocean shipping business.¹⁴²

2. *Jones Act Supporters and the National Defense Argument*

Supporters of the Jones Act highlight the national security implication of allowing foreign vessels to dominate coastwise trade. This becomes even more important during wars and emergencies. The Jones Act finds broad support among the nation's presidents, Democrat or Republican. For instance, President Obama has maintained that,

America needs a strong and vibrant U.S.-flag Merchant Marine. That is why you . . . can continue to count on me to support the Jones Act (which also includes the Passenger Vessel Act) and the continued exclusion of maritime services in international trade agreements.¹⁴³

Cabotage restrictions have also found support among the nation's military leaders. Commenting on the importance of the Merchant Marine to the nation's war efforts, General Norton A. Schwartz, the Commander in Chief of the U.S. Transportation Command, stated that one "Jones Act vessel" made up to 25 voyages, 49 port calls, while carrying 12,200 pieces of military gear totaling 81,000 short tons, covered over 2,000,000 square feet.¹⁴⁴ The Commander said, "[t]hose statistics clearly demonstrate the value that the U.S.-flag shipping industry brings to the Defense Transportation system."¹⁴⁵ A former U.S. Maritime Administrator said "without the Jones Act the U.S.-citizen Mariner pool needed for the Department of Defense in times of national emergency or war would simply

141. LAWRENCE W. BOYD, *THE JONES ACT: WHAT DOES IT COST HAWAII?*, available at <http://clear.uhwo.hawaii.edu/jonesact.html> (last visited Apr. 28, 2012).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

disappear.”¹⁴⁶

Additionally, supporters of the regulations quote Adam Smith, the father of laissez-faire economic policy, as supporting cabotage restrictions for national defense reasons when he said, “[t]he defense of Great Britain depends very much upon the number of its sailors and shipping. The act of navigation, therefore, very properly endeavors to give the sailors and shipping of Great Britain the monopoly of the trade of their own country.”¹⁴⁷ This sentiment is carried a step further by those who do not see the Jones Act protectionism as the basis for the high cost of good in the United States. These individuals see the Jones Act as representative of America’s very existence as an independent nation with a high standard of living commensurate with its status.¹⁴⁸ The supporters argue that those who want to repeal the Jones Act must also support the unrestricted influx of alien workers, and the turnover of “every American industry to foreign workers who will work at Third world wage levels, pay no U.S. taxes and capture jobs that are filed by American workers.”¹⁴⁹

Finally, supporters of the Jones Act boast that U.S.-flag vessels “are built and operated to the world’s most demanding safety and environmental standards” in a nation that requires more skill and expertise of its sailors than any other in the world.¹⁵⁰ They argue that contrary to what the opponents say, American vessels can boast of cutting edge technology that cannot be found anywhere else in the world. For instance, Jones Act vessels in the Great Lakes are said to have the largest fleet

146. *Capt. William Schubert, Testimony before U.S. House Committee on Armed Services* (June 13, 2002), available at http://commdocs.house.gov/committees/security/has164220.000/has164220_0.HTM.

147. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 492 (1994).

148. Timothy A. Brown, *The Jones Act Is In the Best Interest of American Citizens*, *THE WASHINGTON TIMES*, Feb. 4, 1997, at A16 (arguing to maintain the Jones Act in order to “protect[] the domestic economy from foreign control, [and] strengthen[] our national security.”)

149. *Id.*

150. GREAT LAKE CARRIERS ASSOCIATION, *JONES ACT: THE FOUNDATION OF U.S. MARITIME POLICY* 13 (2006).

of fast self-unloading vessels in the world.¹⁵¹ It is important to note that while the output of American shipyards cannot rival those of heavily subsidized foreign shipyards, American shipyards continue to build vessels, albeit at a comparatively slower pace.¹⁵²

VI. JONES ACT AND THE DEEPWATER HORIZON OIL SPILL DISASTER

On April 20, 2010, the failure of a blowout preventer allowed a bubble of gas to surge to the Gulf surface, where it ignited and caused the drilling rig, the Deepwater Horizon, to catch fire.¹⁵³ The explosion that followed left 11 crew members dead and 17 others injured.¹⁵⁴ The Deepwater Horizon sank to the Gulf floor. The ensuing result was a massive oil spill, which spewed an estimated 4,900,000 barrels of crude oil before the leak was capped on July 15, 2010.¹⁵⁵ It caused environmental, property and business damage worth billions of dollars.¹⁵⁶

The explosion happened in the area of the Gulf of Mexico known as Mississippi Canyon Block 252 (MC252) at a BP operated prospect site known as Macondo.¹⁵⁷ This location is eleven miles offshore in the Gulf of Mexico. The Deepwater Horizon is a fifth generation mobile offshore drilling unit (MODU) built by Hyundai Heavy Industries of South Korea and

151. *Id.* (These vessels can unload 70,000 tons of iron ore in ten hours or less).

152. *See, e.g.*, U.S OSG TO BUY 10 JONES ACT TANKERS, PLATS OILGRAM PRICE REPORT, 2005, at 12 (The shipbuilding transaction is valued at \$500 million).

153. *See* Naoki Schwartz and Harry R. Webber, *Bubble of Methane Triggered Rig Blast*, 89.3 KPCC (May 8, 2010) <http://www.Scpr.org/news/2010/05/08/14902/bubble-methane-triggered-rig-blast/>.

154. *See* Loren Steffy, *A New Chapter for Deepwater Horizon Survivor*, HOUSTON CHRONICLE (Dec. 23, 2011), <http://www.chron.com/business/steffy/article/Steffy-A-new-chapter-for-Deepwater-Hortizon-2420805.php>.

155. *See* Maureen Hoch, *New Estimate Puts Gulf Oil Leak at 205 Million Gallons*, THE RUNDOWN (Aug. 2, 2010), <http://www.pbs.org/newshour/rundown/2010/08/new-estimate-puts-oil-leak-at-49-million-barrels.html>.

156. *See* Clifford Krauss and Elisabeth Rosenthal, *The Price and Who Pays: Updates From the Gulf*, N.Y. TIMES (May 12, 2012), available at <http://www.nytimes.com/2010/05/13/us/13q-n-a.html?ref=gulfofmexico2010>.

157. *See* OFFSHORE TECHNOLOGY, *Macondo Prospect, Gulf of Mexico, United States of America*, <http://www.offshore-technology.com/projects/macondoprospect/> (last visited Feb. 1, 2012).

flagged in the Marshall Islands.¹⁵⁸

In the aftermath of the catastrophe, emotions ran wild on what caused the delay in the clean-up of the massive oil spill. As balls of oil washed ashore and environmental and property damage soared, accusing fingers were pointed at administrative and regulatory bottlenecks as preventing the immediate foreign help needed to get the clean-up done in a timely manner.¹⁵⁹ Many were convinced that were the Jones Act and other cabotage regulations not standing in the way, the clean-up could have been done quickly by Belgian, Dutch, and other European vessels with capabilities that United States vessels do not have.¹⁶⁰

Thus, the Macondo oil spill disaster created more fodder in the cannon aimed at the Jones Act. According to one writer:

If other nations have the technologies to address the oil spill, then the administration does have the ability to accept their help . . . The Jones Act, which is supposedly about protecting jobs is actually killing jobs. The jobs of fishermen, people working in tourism and others who live along the Gulf Coast and earn a living there are being severely impacted. There are also additional private sector jobs which are NOT being created in the United States since the Jones Act effectively prices U.S. based companies out of the ability to be competitive on the global market. As we strive to develop new technologies for a cleaner environment at sea, the Jones Act continues to hobble our own capabilities, sometimes with devastating results.¹⁶¹

Those who wanted the Jones Act waived during the

158. See U.S. House of Rep. Comm. on Transp. and Infrastructure Hearing on Deepwater Horizon: Oil Spill Prevention and Response Measures and National Resource Impacts, 2 (May 17, 2010) [hereinafter Hearing on Deepwater Horizon].

159. See Stephen Bainbridge, *Obama, Deepwater Horizon, and the Jones Act*, STEPHEN BAINBRIDGE'S J. OF LAW, POLITICS, AND CULTURE (June 6, 2010), <http://www.professorbainbridge.com/professorbainbridge.com/2010/06/obama-deepwater-horizon-and-the-jones-act.html> (last visited Feb. 1, 2012).

160. *Id.*

161. James Dean and Claude Berube, *To Save the Gulf, Send the Jones Act to Davy Jones' Locker*, HERITAGE (June 8, 2010, 5:30 PM), <http://www.blog.heritage.org/2010/06/08/to-save-the-gulf-send-the-jones-act-to-davy-jones-locker/> (last visited Feb. 1, 2012).

Macondo disaster relied on recent precedent set by the Bush Administration's waiver of the Act in response to Hurricane Katrina.¹⁶² While valid arguments, using national security as an excuse for not waiving the Act was senseless, as the nations that offered to help were our NATO allies and partners in international security cooperation.¹⁶³ They wanted the Act waived immediately in the face of the catastrophe, regardless of whether American vessels were available or not. They did not want the issue to stop there, believing that repealing the Act is the best solution.¹⁶⁴

American shipping interests, on the other hand, did not see the need for the waiver of the Jones Act, even as the oil from the spill inched towards the coasts. They claimed they were not against waiving the Act if United States-flag vessels could not be found to do the cleanup.¹⁶⁵ However, they maintained that "there are American vessels that are completely equipped to deal with this situation with no instructions to do anything."¹⁶⁶

President Obama established the bipartisan National Commission on the BP Deepwater Horizon Oil Spill.¹⁶⁷ The Commission was to "consider the root causes of the disaster and offer options on safety and environmental precautions.¹⁶⁸ The Commission considered testimony on the impact of the Jones Act and other cabotage regulations on the cleanup efforts.¹⁶⁹ It found that the Coast Guard and the National Incident Command in charge of the disaster accepted some foreign help while rejecting others. The offers declined were found to be

162. Bainbridge, *supra* note 159.

163. Dean & Berube, *supra* note 161.

164. *Id.*

165. Patrik Jonsson, *Jones Act: Maritime politics strain Gulf oil cleanup*, THE CHRISTIAN SCIENCE MONITOR (June 19, 2010, 10:50 AM), <http://www.csmonitor.com/USA/2010/0619/Jones-Act-Maritime-politics-strain-Gulf-oil-spill-cleanup> (last visited Feb. 1, 2012).

166. *See id.* (quoting Mark Ruge, who works with the Maritime Cabotage Task Force).

167. Exec. Order No. 13543, 75 Fed. Reg. 101 (2010).

168. *Id.*

169. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT: DEEPWATER; THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING (2011).

either too expensive, would have caused more tactical delay, or related to vessels that were “highly inefficient in the Gulf.”¹⁷⁰

Most importantly, the Commission found that those coordinating the cleanup efforts “did not reject foreign ships because of the Jones Act.”¹⁷¹ On the impact of the Jones Act restrictions to the cleanup efforts at the Macondo location, the Commission found that,

These restrictions did not even come into play for the vast majority of the vessels operating at the wellhead, because the Act does not block foreign vessels from loading and then unloading oil more than three miles off the coast. When the Act did apply, the National Incident Commander appears to have granted waivers and exemptions when requested.¹⁷²

From the Commission, the battle over the Jones Act and responses to environmental disasters moved to Congress. On June 23, 2010, Senator John McCain introduced Senate Bill 3525.¹⁷³ Tagged “Open America’s Waters Act,” Section 2 of the bill made clear the purpose was the “Repeal of Jones Act Limitations on Coastwise Trade.”¹⁷⁴ Senator McCain rehashed the prior arguments made against the Jones Act, and then added the failure to waive the Act during the Macondo disaster as another reason the Act should be repealed.¹⁷⁵ The bill was read twice and then referred to the Senate Committee on Commerce, Science and Transportation. However, the Senate never voted on the Bill,¹⁷⁶ but the debate did not end there.

Another angle to the debate was whether the disaster could

170. *Id.*

171. *Id.*

172. *Id.* at 143.

173. Open America’s Waters Act, S. 3525, 111th Cong. (2010).

174. *Id.*

175. Press Release, Senator John McCain, Senator John McCain Introduces Open America’s Water Act (June 25, 2010), *available at* http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=6f6b73f4-a9f3-8433-0472-f3bd97d2fa86.

176. See S. 3525: America’s Waters Act, <http://www.govtrack.us/congress/bill.xpd?bill=s111-3525>. Thanks to Mr. Andrew Rademaker, Staff Assistant to the House Committee on Transport and Infrastructure for his assistance on research on this part of the thesis.

have been prevented if the Deepwater Horizon was flagged in the United States. Under the United Nations Convention on the Law of the Sea (UNCLOS), the flag state exercises administrative, technical, and social matters jurisdiction over ships flying its flag.¹⁷⁷

Coast Guard inspections of foreign-flagged MODUs last between four and eight hours and are less than rigorous.¹⁷⁸ Inspections of U.S.-flagged MODUs, on the other hand, can take a few weeks.¹⁷⁹ For instance, the Coast Guard does not mandate the inspection of the dynamic positioning systems, which enable a MODU to be held steady in the water by means of computer-controlled thrusters.¹⁸⁰ What the Coast Guard does on foreign vessels is to “verify more thorough inspections by non-governmental certification societies.”¹⁸¹

Overall however, it appears that the inspection conducted on foreign-flagged vessels is not materially different from those conducted on U.S.-flagged vessels.¹⁸² It was established that ABS, which is a classification society recognized by the Republic of Marshall Island (where the Deepwater Horizon was flagged), conducted a survey on the drilling unit in February 2006.¹⁸³ The Coast Guard had issued a memo in which it recognized that the inspection standards set by the Republic of Marshall is sufficient and equivalent to the United States’ safety standards for operating in the Outer Continental Shelf.¹⁸⁴ An annual (interim) survey was reportedly done on the unit on February 2010, and it was scheduled for a full survey in 2011.¹⁸⁵

The Presidential Commission did not find the country of flagging of the Deepwater Horizon as the cause of the Macondo disaster. What it saw as the fundamental problem was the

177. U.N. Convention on the Law of the Sea, art. 94, Oct. 12, 1982, 1833 U.N.T.S. 57.

178. See Hearing on Deepwater Horizon, *supra* note 158, at 31.

179. *Id.*

180. *Id.* at 25, 31.

181. *Id.* at 31.

182. *Id.* n.97.

183. *Id.* at 28–29.

184. *Id.* at 28.

185. *Id.* at 29.

culture of complacency and inefficiency by the agencies responsible for the safety and operational regulations of offshore resources (especially the MMS), as well as their tendency to defer to the industry they are supposed to regulate.¹⁸⁶ The disaster only exposed “these bureaucratic inadequacies and shortcomings.”¹⁸⁷ Nevertheless, that did not stop the pro-Jones Act camp in their attempt to sustain and extend the Act beyond its present purview.¹⁸⁸ They were buoyed by the testimony of Admiral Thad Allen (the National Incident Commander who coordinated the response to the Macondo disaster) who stated that “in reality, the Jones Act had no impact on Response Operations.”¹⁸⁹ He emphasized that an expedited process was used to grant waivers to seven vessels involved in the operations, in case their activity would implicate the Jones Act.¹⁹⁰

Thus, an attempt was made to extend the Jones Act to the Exclusive Economic Zones of the United States. House Bill 5629 was sponsored by Rep. James Oberstar and 16 co-sponsors; it was tagged “Oil Spill Accountability and Environmental Protection Act of 2010.”¹⁹¹ Section 11 of the Bill aimed to “[l]imit the exploration, development, or production of resources in, on, above, or below the E.E.Z. to vessels owned by U.S. citizens” starting on July 1, 2011.¹⁹² The Bill did not make it past the Committee level, as it was never voted on by either the House or the Senate.¹⁹³

186. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING* 255 (2011).

187. *Id.*

188. See H.R. 5629, 111th Cong. §§ 10, 11 (2010) (proposing an extension of the Jones Act to all resource exploration and production activity in the E. E. Z. effective Apr. 19, 2010, the day prior to the Deepwater Horizon disaster).

189. *Written Testimony of Admiral Thad W. Allen U.S. Coast Guard (Retired): Before the House Subcommittee on the Coast Guard and Infrastructure*, 111th Cong. 11 (2010) [hereinafter *Written Testimony of Admiral Thad W. Allen*].

190. *Id.*

191. H.R. 5629, *supra* note 202, §§ 10, 11.

192. *Id.*

193. See Govtrack.us, <http://www.govtrack.us/congress/bill.xpd?bill=h111-5629> (last visited Jan. 29, 2012).

Therefore, in the aftermath of the Macondo disaster, the Jones Act remained intact, its effect neither diminishing nor extending further than it was before the disaster. It is clear however, that both sides of the divide will not relent in trying to modify, amend or repeal the act on one side, or extend it to areas it did not apply before now. Only the future will tell who wins that battle.

VII. FROM MACONDO: LESSON FOR THE ARCTIC

Working with a team of international experts and organizations, the United States Geological Survey (USGS) has estimated that the Arctic Circle contains 90 billion barrels of oil, 1,670 trillion cubic feet of natural gas, and 44 billion barrels of natural gas liquids.¹⁹⁴ This makes up about 22 percent of the undiscovered, technically recoverable resources in the world.¹⁹⁵ More than half of the estimated resources occur in three geologic areas, including offshore federal waters of Alaska.¹⁹⁶

The good news is that the United States is entitled to a big chunk of these resources, along with Canada, Russia, Norway and Denmark.¹⁹⁷ The bad news is two-fold. First is the refusal of the United States to ratify the United Nations Convention on the Law of the Sea (UNCLOS). The Convention governs the geographical boundary of each Arctic nation.¹⁹⁸ To stake a claim to its part of the Arctic, the United States must submit its claims to the Commission on the Limits of the Continental Shelf, the United Nations body in charge of the Arctic affairs.¹⁹⁹ Other Arctic nations have ratified the Convention.²⁰⁰

194. U.S. Geological Survey, *90 Billion Barrels of Oil, 1,670 Trillion Cubic Feet of Natural Gas Assessed in the Arctic*, http://www.usgs.gov/newsroom/article.asp?ID=1980&from=rss_home. (last visited Jan. 29, 2012).

195. *Id.*

196. *Id.*

197. United Nations Convention on the Law of the Sea, Art. 137, Dec. 10, 1982, 21 I.L.M. 1261.

198. *Id.* art. 76.

199. *Id.*

200. The United Nations Convention on the Law of the Sea of 10 December 1982: Chronological Lists of Ratifications of, Accessions and Successions to the Convention and Related Agreements as of 03 June 2011, [http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%](http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea)

President Reagan recognized that the provisions of the UNCLOS balanced “the interest of all states.”²⁰¹ Yet, he refused to ratify the Convention based on Part XI of the Convention (relating to seabed mining), which required the sharing of income made beyond the 200 mile E.E.Z. of an Arctic nation and the transfer of technology used in exploring the seabed to other nations.²⁰² Other than that provision, the United States has since complied with the UNCLOS.²⁰³

It has baffled many observers as to why the United States continues to drag its feet in ratifying the Convention. During his testimony relating to the Macondo disaster, Admiral Thad Allen told the House Subcommittee on Coast Guard and Infrastructure,

The United States should move immediately to ratify the Law of the Sea Treaty. This Treaty is the de facto governing structure for the Arctic and should underpin any domestic and international planning for the spill response. We have waited long enough and the Treaty should be ratified without delay.²⁰⁴

While the United States drags its feet, Russia has aggressively staked its claims to some part of the Arctic seabed in a manner comparable to the United States planting its flag on the moon.²⁰⁵ The Arctic Commission rejected Russia’s claim to 460,000 square miles of the Arctic Ocean’s bottom resources for lack of technical data in 2002.²⁰⁶ Russia has since resubmitted its claim.²⁰⁷ Should Russia succeed in its petition before the

²⁰Convention%20on%20the%20Law%20of%20the%20Sea (last visited Jan. 29, 2012).

²⁰¹ United States Ocean Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10, 1983).

²⁰² Convention on the Law of the Sea, 18 WEEKLY COMP. PRES. DOC. 887 (July 9, 1982).

²¹⁷ Citizens for Global Solutions, *The United States and the Law of the Sea*, http://globalsolutions.org/files/public/documents/LOS_Factsheet.pdf (last visited Jan. 29, 2012).

²¹⁸ *Written Testimony of Admiral Thad W. Allen*, *supra* note 189.

²⁰⁵ Senator Lisa Murkowski, Speech before the U.S. Maritime Administration Arctic Transp. Conference (June 5, 2008).

²⁰⁶ *Id.*

²⁰⁷ Comm’n on the Limits of the Continental Shelf, *Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the Baselines: Submission to the Commission by the Russian Federation*, http://www.un.org/depts/los/clcs_new/

United States awakens from its slumber on the issue, Russia and other nations may succeed in depleting the Arctic resources to some extent without recourse.²⁰⁸

Although the United States cannot stop other nations from maximizing their exploitation of the resources, it can take solace in current developments in international trans-boundary oil and gas exploitation. First, in the absence of a boundary agreement, the mere granting of exploitation license by Russia or any Arctic nation will not lead to recognition of its ownership of the area concerned.²⁰⁹ Also, since other Arctic nations are parties to UNCLOS, they are bound by the duties of cooperation and mutual restraint, which must take into account the interest of the United States.²¹⁰ In addition, under the Charter of Economic Rights and Duties of States, the United States' economic interest must not be jeopardized.²¹¹ Finally, the creation of Joint Development Zones (and not the rule of capture)²¹² is the "rule" in modern international oil and gas exploration and development, including among disagreeing nations.²¹³ Even nations that have not ratified the UNCLOS enter Joint

submissions_files/submission_rus.htm (last visited Feb. 4, 2012).

208. See generally Marta Kolcz-Ryan, *An Arctic Race: How The United States' Failure to Ratify The Law of The Sea Convention Could Adversely Affect Its Interests in the Arctic*, 35 DAYTON L.R. 149, 165–168 (2009) (arguing that the United States has no better alternative to signing the UNCLOS).

209. See *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, 2002 I.C.J. 303 (Oct. 10) (“[O]il concessions and oil wells are not themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between parties may they be taken into account.”).

210. See UNCLOS art. 74, para. 3 and art. 83, para. 3.

211. See G.A. Res. 3283 (XXIX), U.N. GAOR, 29th Sess., U.N. Doc. A/RES/3283(XXIX), at 6, art. 3 (Dec. 12, 1974) (“In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others”).

212. *Coastal Oil & Gas v. Garza Energy Trust*, 268 S.W.3d 1, 13 (Tex. 2008). The “Rule of capture” allows an owner of land overlying a reservoir to drain the resources to the detriment of his neighbor. Texas Living Waters Project, *Texas Groundwater and the Rule of Capture*, http://www.texaswatermatters.org/water_planning_committee.htm (last visited Apr. 28, 2012).

213. See Dominic Roughton, *The Rights (and Wrongs) of Capture: International Law and the Implications of the Guyana/Suriname Arbitration* 8–11 (June 17, 2008).

Development Agreements, sometimes referring to the duties of cooperation and restraint in the Convention.²¹⁴

It must be noted other nations will cater to their own interests and those of their citizens first. Ratifying the UNCLOS would also save the United States the cost of relying on others. After all, the nation was a key factor behind the Convention.²¹⁵

Even when the U.S. finally ratifies the UNCLOS, it will be far from ready to combat any oil spill in the Arctic. According to Admiral Allen,

There is currently inadequate infrastructure to support extensive response and recovery operations on the North Slope . . . The only vessels in the U.S. fleet capable of operating in those environments in all ice conditions are Coast Guard icebreakers. The current condition of the Coast Guard icebreaker fleet should be of great concern to the senior leaders of this Nation. Two of the three vessels are currently inoperable and key decisions regarding future icebreaking needs continue to be delayed . . . Serious discussion must begin immediately regarding the imminent loss of capability as two of these vessels have reached the end of their service lives.²¹⁶

Admiral Allen is not alone in his concern about the lackadaisical attitude of the U.S. government towards the Arctic.

Also perturbed is The National Academy of Sciences, who sees the deplorable state of the nation's icebreakers as having an impact on more than just the natural resources.²¹⁷ In its report, the Academy believes the only option may be for the U.S. to

214. *Id.* at 11 (citing, for example, Cambodia and Thailand signed a memorandum concerning their overlapping maritime claims).

215. See e.g., Horace B. Robertson, Jr., *Passage Through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea*, 20 VA J. INT'L L. 804 (1980) (discussing the background of the United States' role in the Third United Nations Conference on the Law of the Sea).

216. *Testimony of Admiral Thad W. Allen, supra* note 189.

217. Lauren Morello, *OCEANS: National Academy of Sciences Says U.S. Needs Icebreakers and Other Resources to Monitor Melting Arctic*, Apr. 22, 2011, <http://www.eenews.net/climatewire/2011/04/22/6> last visited Feb. 12, 2012).

lease icebreakers from other countries.²¹⁸ The Academy projects the current lukewarm attitude by the federal government will have implications for national security and the nation's competitiveness in the future.²¹⁹ The Academy has proposed that the federal government should "develop a coordinated national strategy," to be updated every five to ten years regarding its capabilities in the Arctic.²²⁰ There can be no such capabilities without icebreakers.

Because of its peculiar geography and abundance of resources underneath the Arctic, any oil spill there may make the Macondo look like child's play. Without the special vessels that Admiral Allen and the Academy of Sciences spoke about, the United States will have to rely on foreign vessels for any spill in its own part of the Arctic. This would be very detrimental to the nation's image, aside from the huge financial and environmental damage that may occur. It is therefore advisable for the United States to fund the cost of building brand new icebreaker oil spill response vessels.

VIII. CONCLUSION AND RECOMMENDATIONS

A. *Both Economic and Strategic Reasons Support the Protection of the Jones Act (With Some Minor Amendments)*

Overall, the Jones Act is beneficial to the United States as a nation. Carefully analyzed, it has immense economic benefits. It provides direct jobs for thousands of Americans working in the shipyards, or as crew on "Jones Act" vessels that ply the coastwise trade. There are also thousands working in the allied industries, whose livelihood depends on vessels and shipyards. The argument that allowing foreign vessels to ply the coastwise trade will translate to more economic benefits does not hold water. On the contrary, repealing the cabotage restrictions will lead to more job losses for Americans. No foreign vessel will deliberately hire United States citizens when they can hire third world countries employees for a fraction of the cost. It will also

218. *Id.*

219. *Id.*

220. *Id.*

mean fewer jobs for local shipyards, as companies take repair jobs to foreign and not American shipyards.

History has taught us that the need to develop the domestic shipbuilding industry, encourage domestic shipping trade, and boost the development of a reliable merchant marine that could be invaluable at a time of war are all commercially and strategically intertwined. We do not fight wars at home anymore in the United States because the enemy will not attack us at our doorstep. We have to travel far and wide to fight the enemy and disrupt their bases, wherever they may be. Having ocean ready vessels to carry arms, supply and logistic needs (if not personnel), is very crucial to these fights, both while coming and going from the warzone. As a veteran, this writer knows firsthand how important it is to the gears of war greased and ready when you wage war.²²¹ A viable and reliable merchant marine makes both possible. To have that ready merchant marine at the nation's disposal, it is imperative to preserve through cabotage regulations the domestic shipbuilding and the domestic coastwise trade.

*B. The United States Build Requirement of the Jones Act
Should be Sustained*

The Jones Act restricts participation in the coastwise business to vessels built in United States shipyards.²²² That requirement should be sustained. There is a serious interest in the country's coastal waters because of money to be made. That is what is galvanizing the push to have the Jones Act relaxed by foreign nations. However, the United States stands at a disadvantage if it should open its coastwise trade to vessels built abroad. There is an enormous fair trade and dumping issues caused by the actions of South Korea, China, and some members of the European Union. These countries' vessels are heavily subsidized by their respective governments.²²³ In the case of

221. The writer served four years in the Judge Advocate General's Corp of the U.S. Army, including a one-year duty of Iraq in support of Operation Iraqi Freedom.

222. *Supra* note 2 and accompanying text.

223. Gabriel Collins and Lt. Cmd. Michael C. Grubb, *A Comprehensive Survey of China's Dynamic Shipbuilding Industry*, CHINA MARITIME STUDIES Vol. 1, 12 (2008); *EU Urges Croatia on Shipbuilding Revamp*, BALKAN INSIGHT, Nov. 7, 2008

South Korea, no one can tell where the government hand starts and stops. It was no joke when that nation's foreign affairs minister said South Korea will dominate the coastwise trade "by the billions" if the Jones Act was repealed.²²⁴

There is simply no way for United States' shipyards to catch up with those that are heavily subsidized by their countries in the near future. The best solution is to preserve the coastwise trade for vessels built in the country. After all, no one has ever doubted the technical savvy of the American shipyards. No one can say they are not building vessels that match or even best those of foreign nations. What the American shipyards cannot do is compete with heavily subsidized foreign shipyards. The preservation of the Jones Act is key because it protects American Shipyards as they try their best to remain afloat and build vessels.

C. The Citizen-Owner Requirement of the Jones Act Should be Relaxed

The Jones Act required a 75 percent ownership by United States citizen for a company to operate a vessel in the coastwise trade.²²⁵ That provision may have made sense in days when the United States inarguably surpassed other nations in terms of individual wealth, and when the wealth of other nations revolved around the United States. However, today there is enormous wealth outside the United States. It would be of great benefit and advantage if the United States could convince other nations to invest their wealth in its coastwise trade. Outside investment in coastwise trade would mean more jobs in the shipyards, more vessels on the coastal waters flying the United

<http://www.balkaninsight.com/en/article/eu-urges-croatia-on-shipbuilding-revamp> (last visited Feb. 12, 2012).

224. Yoo Soh-jung, *Shipbuilding industry saved Korea's rice market from FTA*, KOREA HERALD, Apr. 9, 2007, <http://www.koreaherald.com/pop/NewsPrint.jsp?newsMLId=20070409000035> (quoting Korea's Trade Minister, Kim Hyun-chong as saying "U.S. negotiators incessantly kept on asking us to open our rice market all throughout the final weeks of negotiations, so we asked them to begin with annulling the Jones Act. . . . We countered by arguing that we would be able to dominate the shipbuilding market by billions of dollars if it weren't for the Jones Act.").

225. 46 U.S.C. § 50501(a) (2006).

States' flag, and more revenue generation for the economy. It has been suggested that the 75 percent citizen-owner requirement be reduced to 60 percent. Even with this change, there would still be U.S.-citizen control over the firms and more wealth for the nation. There is no doubt that there is more than enough regulatory and enforcement capacity to detect sham ownership and control. In the end, it is better to get foreign nations to invest their financial wealth into the United States' maritime business, rather than scare them away by requiring the 75 percent citizen-ownership requirement.

D. The Enforcement Framework of the Jones Act Must be Looked Into

It is unfortunate that the United States' maritime regulations, including the cabotage restrictions, are poorly organized and sometimes duplicative. The situation is compounded by having more than one agency address the standard for a single activity by an investor. For example, multiple agencies examine what constitutes rebuilding or reconstructing a vessel in foreign nations.²²⁶ For clarity, only one agency should determine the documentation for domestic and international vessels. Some suggest that the Coast Guard should be that agency.²²⁷ What we have now is a situation in which there are conflicting opinions over that requirement. For instance, under the Jones Act, the coast guard should determine if rebuilds on ships meet the criteria to allow them to keep their coastwise permit, and MARAD will then use that determination in order to determine whether the vessel can obtain federal funding for their certifications.²²⁸ The United States Customs and Border Protection should be left to decide only whether an

226. See *Matson Navigation Co.*, Docket No. A-199 (Dep't of Transp., MARAD, Mar. 18, 2008); *Aquarius Marine Co. v. Pena*, 64 F.3d 82 (2d Cir. 1995) (discussing different opinions from MARAD and Coast Guard on same ship rebuilding questions).

227. Meredith L. Hathorn, Comment, *The Vessel Documentation Act of 1980*, 7 TUL. MAR. L. J. 303, 307 (1982) (outlining the Act's provisions granting the Coast Guard documentary authority).

228. See Rulemaking-75 FR 68019-01: Determination of Foreign Reconstruction or Rebuilding of U.S.-Built Vessels That Participate in the Capital Construction Fund and Cargo Preferences Programs 1-2 (2010).

item is “merchandise” or not, while the Maritime Administration should face the issue of availability of vessels for Cargo Preference and emergency waiver situations. These changes will simplify the system. Investors will know where to go for opinions, courts will have a single standard to contend with, and the waste of time and money on litigation would be reduced.

E. Congress Should Pass Legislation extending the Cabotage regulations to the Outer Continental Shelf

As offshore oil and gas dwindles, the Outer Continental Shelf should be Congress’ focus regarding the Jones Act. What we have now are conflicting decisions by the Courts²²⁹ aided by equally conflicting individual interpretations by non-cooperating agencies²³⁰ as to whether the Jones Act applies to the Outer Continental Shelf of the United States. Congress should address the matter head on. It is recommended that Congress pass legislation extending the Immigration and Nationality Act to the Outer Continental Shelf. The fact remains that the Outer Continental Shelf is where the jobs are in oil and gas, especially as the federal government lifts the moratorium on oil and gas leasing. Americans need the jobs, and as cases have shown, employers will hire imported workers from third world countries for a fraction of what American laws demand. As long as Congress is silent on the issue, this trend will continue. The time to act is now.

F. The United States Should Stop Dragging Its Feet Regarding the Arctic Resources

The United States should ratify the UNCLOS. Relying on other mechanisms will only lead to unwarranted costs. There may be ways to negotiate around the seabed mining provisions on revenue sharing and transfer of technology, but delay solves nothing. It is also high time that the United States funded the

229. Donald T. Kramer, Annotation, *Construction and Application of § 4 of Outer Continental Shelf Lands Act of 1953 (43 U.S.C.A. § 1333), Relating to Laws Applicable to Subsoil and Seabed of Outer Continental Shelf and Artificial Islands and Fixed Structures Erected Thereon*, 163 A.L.R. FED. 1 (2000).

230. See *Aquarius Marine Co. v. Pea*, 64 F.3d 82, 83–86 (2d Cir. 1995) (discussing MARAD and Coast Guards differing interpretations of the word “rebuilt”).

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icebreakers that it will need for oil response in the Arctic. Reliance on other nations will definitely lead to discontent among the very patriotic Americans. It is not a matter of if there will be an oil spill disaster in the Arctic once exploitation begins there, but when. Waiting until another disaster happens will be too tragic. Therefore, the time to prepare is now.