Michigan Law Review

Volume 112 | Issue 8

2014

Tarrification of the Coastwise Trade Laws

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COMMENT

Tariffication of the Coastwise Trade Laws

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The coastwise trade laws prohibit foreign vessels and mariners from transporting goods or passengers between American ports. These anticompetitive laws punish American producers and consumers yet barely sustain a dwindling merchant marine. Every attempt to repeal the laws encounters insurmountable political resistance. Reformers of the coastwise trade laws, then, should instead try to convert the prohibition on foreign involvement into a tariff.

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Introduction

"Americans put a sort of heroism into their manner of doing commerce."[1]

America's maritime shipping industry amazed Alexis de Tocqueville when he visited the young country in the 1830s. American ships dominated the market, both at home and abroad. The Frenchman attributed America's "maritime genius" to the fact that its merchant marine could "cross the seas most cheaply," not because of any inherent material advantage but rather because of its mariners' competitive spirit.[2]

Tocqueville would scarcely recognize the industry today. The registries of Panama and Liberia easily eclipse that of America in number of ships and tonnage capacity,[3] while South Korea and China lead in shipbuilding, as Asia

* J.D. Candidate, May 2014, University of Michigan Law School. I thank Rachel Braver, Maggie Mettler, and my parents for their encouragement, along with my fellow *Michigan Law Review* editors for their underappreciated work in bringing this to publication.

1. Alexis de Tocqueville, 1 Democracy in America pt. 2, ch. 10, at 387 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835).

2. *See id.* at 385–87.

3. Elizabeth R. DeSombre, Flagging Standards 71–72 (2006).

has become the industry's epicenter.[4] America's international maritime trade is now "largely the domain of foreign ships"[5] flying what labor unions pejoratively call "flags of convenience";[6] the country's coastwise trade[7] is at the mercy of a monopoly that Congress grants American ships, shipyards, ship owners, and sailors against foreign competition. Outcompeted in international maritime shipping, the American industry survives in the coastwise trade not because of its maritime genius but instead because Congress keeps the foreign geniuses out.

This Comment focuses on the coastwise trade monopoly. Two laws—the Jones Act and the Passenger Services Act[8]—reserve the coastwise transportation of goods and passengers, respectively, for American-built ships owned by Americans employing American crews and documented under American laws. The idea is to protect the merchant marine[9] and its capacity to serve as a "naval and military auxiliary in time of war or national emergency."[10] Supporters buttress this argument with concerns about the preservation of American jobs,[11] but the merchant marine has sharply declined despite its monopoly on coastwise trade. Moreover, the monopoly forces American producers and consumers requiring maritime transportation between U.S. ports to bear the near-triple costs of operating American-flagged vessels.[12]

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4. *See* Joanne Chiu & Kyong-Ae Choi, *For Shipping Sector, More Defaults Likely*, WALL ST. J., Mar. 5, 2012, at B2, *available at* http://online.wsj.com/news/articles/SB10001424052970203986604577256882637252906.

5. Ariel Kaminer, *New Hope for Turnaround at Troubled Service Academy*, N.Y. TIMES, Aug. 31, 2012, at A21, *available at* http://www.nytimes.com/2012/08/31/education/at-troubled-merchant-marine-academy-hope-for-a-turnaround.html.

6. For instance, a ship owned and operated by an American citizen, but registered in Liberia due to its lax shipping regulations and minimal registration costs, would be said to fly a "flag of convenience." *E.g.*, *Flags of Convenience Campaign*, INT'L TRANSP. WORKERS' FED'N, http://www.itfglobal.org/flags-convenience/index.cfm (last visited Feb. 16, 2014).

7. "[T]ransportation of merchandise by water, or by land and water, between points in the United States . . . either directly or via a foreign port . . . ." 46 U.S.C. § 55102(b) (2006).

8. Merchant Marine Act of 1920 § 27 (Jones Act), 46 U.S.C. § 55102; Passenger Services Act of 1886 § 8, 46 U.S.C. § 55103.

9. The "merchant marine" refers to a fleet of vessels owned by U.S. civilians that is tasked with carrying waterborne commerce and serving naval and military purposes when needed. 46 U.S.C. § 50101(a)(1)–(3) (2006).

10. *Id.* § 50101(a)(2).

11. *E.g.*, John Bussey, *Oil and the Ghost of 1920*, WALL ST. J., Sept. 14, 2012, at B1, *available at* http://online.wsj.com/news/articles/SB10000872396390444433504577649891243975440 (quoting the CEO of a shipowners' trade association who claims that the Jones Act supports 74,000 maritime jobs in the United States).

12. American-flagged vessels incur an average daily operating cost of $20,053, whereas the average daily operating cost of a foreign-flagged vessel is $7,454. U.S. DEP'T OF TRANSP. MAR. ADMIN., COMPARISON OF U.S. AND FOREIGN-FLAG OPERATING COSTS 4 (2011), *available at* http://www.marad.dot.gov/documents/Comparison_of_US_and_Foreign_Flag_Operating_Costs.pdf.

Quite simply, the coastwise trade laws impede U.S. growth[13] and impose substantial costs on the American economy for the benefit of a politically favored interest group. Powerful domestic industries with clever lawyers can work around the laws,[14] while foreign mariners making an honest living in the U.S.–foreign trade can serve only one American port per voyage. Yet the political will for wholesale repeal of American coastwise trade laws does not exist,[15] and international trade law is riddled with exceptions and grandfather clauses that shield the coastwise trade laws from trade liberalization.

This Comment argues that Congress, rather than pursuing an elusive repeal, should reform the coastwise trade laws by enacting a tariff that foreign-owned, -operated, or -built vessels would have to pay before being allowed to engage in the coastwise trade. Such reform would introduce foreign competition at a pace that would accommodate the special interests who oppose repeal. Part I explains how congressional efforts to promote and maintain the U.S. merchant marine through a monopoly on coastwise trade have both failed in their original purpose and damaged American economic interests. Part II evaluates the plausibility of repeal and proposes tariffication as a viable reform.

I. Coastwise Trade and the Merchant Marine

The United States ostensibly restricts its coastwise trade in order to reserve a captive market for its merchant marine.[16] This Part explains the effects of this policy. Section I.A explores the coastwise trade laws' economic, legal, and environmental costs. Section I.B focuses on the supposed beneficiary of the coastwise trade laws—the merchant marine—and argues that its decline, in spite of its monopoly on coastwise trade, justifies reforming the laws.

A. *The Coastwise Trade Laws and Their Cost*

In the United States, the coastwise trade is closed to foreigners. Federal law allows only vessels owned by U.S. citizens to be issued a "certificate of documentation"[17]—that is, to fly the U.S. flag. Engaging in coastwise trade requires a coastwise endorsement—a qualification on the certificate of documentation, akin to a motorcycle designation on a driver's license—which is

13. *See id.*

14. *See infra* note 30 and accompanying text.

15. *See infra* Section II.A.

16. This rationale was first codified in the Merchant Marine Act of 1920, ch. 250, 41 Stat. 988.

17. 46 U.S.C. § 12103(a)–(b) (2006). Although a foreigner *may* participate in a partnership or corporation that owns an American-flagged vessel, the citizen-ownership requirement is designed so that a foreigner could not exert actual control over the vessel through such an entity. *See id.* § 12103(b)(3)–(4); *see also id.* § 50501 (containing heightened requirements for collective ownership of vessels in coastwise trade).

available only to vessels that are eligible for the certificate[18] *and* built in the United States.[19] As currently codified,[20] twin provisions in the coastwise trade laws prohibit the transportation of merchandise and passengers except aboard vessels holding these endorsements.[21]

These "unabashedly protectionist"[22] provisions are quite costly. The U.S. International Trade Commission estimated in 1999 that the Jones Act alone, which pertains only to the shipment of goods, reduced real national income by $1.32 billion.[23] This is an old problem whose effects have been felt by many domestic industries over the years. For example, the Pacific Northwest timber industry of the early 1960s found itself priced out of the East Coast market by its Western Canadian counterpart, which could employ foreign-flagged vessels for shipping.[24] Midwestern grain farmers were priced out of the same market in the 1990s.[25] Today, our coastwise trade laws benefit Canada by incentivizing cruise lines to bus passengers from Seattle to Vancouver before embarking on cruises to Alaska.[26]

Shippers have long contrived such work-arounds. In 1893, Congress inserted into the coastwise trade statutes the language restricting foreign vessels from transporting goods "via any foreign port."[27] This was an attempt to close a loophole created by a pending Ninth Circuit decision, which ultimately held that a shipment of goods from New York to California by way of Belgium was outside the scope of the coastwise trade laws then in force.[28] This reactionary prohibition, however, has failed to prevent the exploitation of loopholes in the coastwise trade laws. Professor McGeorge, supporting his

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18. Vessels less than five net tons and certain barges, if eligible for documentation, need not *actually* be documented to receive coastwise endorsements. *Id.* § 12102(a)–(c).

19. There are a few exceptions to this requirement: vessels captured in war by U.S. citizens, forfeited for breach of U.S. law, or wrecked in U.S. waters and repaired in a U.S. shipyard. *Id.* § 12112.

20. Title 46 of the U.S. Code was overhauled in 2006. Act of Oct. 6, 2006, Pub. L. No. 109–304, 120 Stat. 1485. As a result, recent citations to shipping statutes, including those in this Comment, differ substantially from older citations to the same statutes.

21. Merchant Marine Act of 1920 § 27 (Jones Act), 46 U.S.C. § 55102; Passenger Services Act of 1886 § 8, 46 U.S.C. § 55103; *see also* Lawrence W. Kaye, *Governmental Regulation: Cabotage Regulations*, *in* 10 BENEDICT ON ADMIRALTY § 2.02, at 2-2 (7th ed., Matthew Bender 2011) ("Together, these two laws serve to exclude foreign ships from entering the U.S. coastwise trade.").

22. Marine Carriers Corp. v. Fowler, 429 F.2d 702, 708 (2d Cir. 1970).

23. U.S. INT'L TRADE COMM'N, THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS: SECOND UPDATE 1999, at 98 (1999), *available at* http://www.usitc.gov/publications/332/pub3201.pdf.

24. *Foreign Trade: Keeping up with the Jones Act*, TIME, Oct. 26, 1962, at 93, *available at* http://www.time.com/time/magazine/article/0,9171,874561,00.html.

25. *See infra* text accompanying note 51.

26. Kaye, *supra* note 21, at 2-2.

27. Act of Feb. 15, 1893, ch. 117, 27 Stat. 455 (current version at 46 U.S.C. § 55102(b) (2006)); *accord* 46 U.S.C. § 55103(a) (regarding passenger transport).

28. United States v. 250 Kegs of Nails, 61 F. 410, 413 (9th Cir. 1894).

conclusion that the prevailing interpretation of the Jones Act bears no reasonable relation to its original purpose,[29] highlights how some—but only some—industries are able to evade the coastwise trade laws by processing shipped merchandise in a foreign port. Oil companies, for example, can ship Alaskan crude to the East Coast via less expensive foreign vessels so long as the oil passes through an offshore refinery.[30] A purveyor of Alaskan snow crab, however, will have no such luck: even if he sends the crab to Korea for extensive processing before shipping it back to the United States, the coastwise trade laws will apply to him because of how U.S. Customs interprets the word "different."[31] When the legal consequences of such arbitrary and seemingly inconsistent interpretations are so severe,[32] it's worth considering reforms that reduce the cost of being on the wrong side of these unpredictable interpretations.

Environmentalists have cause for concern as well. The coastwise trade laws discourage the use of maritime transport for cargo and passengers, thereby pushing them onto overcrowded roads and railways.[33] This harms the environment, since maritime shipping is the most energy-efficient mode of transportation.[34] To the extent the coastwise trade laws curtail its use and shippers turn instead to rail and especially trucking, each ton of cargo results in more pollution per mile moved.

B. *The Harm to the Merchant Marine and National Defense*

The coastwise trade laws constitute only one chapter in a subtitle of the U.S. Code dedicated to the merchant marine,[35] which characterizes the

29. Robert L. McGeorge, *United States Coastwise Trading Restrictions: A Comparison of Recent Customs Service Rulings with the Legislative Purpose of the Jones Act and the Demands of a Global Economy*, 11 Nw. J. Int'l L. & Bus. 62, 63 (1990).

30. *See* Am. Mar. Ass'n v. Blumenthal, 590 F.2d 1156, 1162, 1165 (D.C. Cir. 1978) (holding that the act of refining crude oil offshore physically alters the product being shipped and thus breaks the "continuity of the voyage" for the purposes of the Jones Act), *cited in* McGeorge, *supra* note 29, at 67–71.

31. John E. Elkins, U.S. Customs Serv., *Applicability of 46 U.S.C. App. 883 to Transportation of Crab Parts from Alaska to South Korea Where They Are Processed and then Transported to California*, U.S. Customs & Border Protection 8–10 (Aug. 12, 1988), http://rulings.cbp.gov/hq/1988/109504.doc, *cited in* McGeorge, *supra* note 29, at 73–74, 74 nn.50–51.

32. *See* 46 U.S.C. § 55102(c) (providing for the forfeiture of goods shipped in violation of the Jones Act).

33. *See* Sean D. Kennedy, Comment, *Short Sea Shipping in the United States—The New Marine Highways*, 33 Tul. Mar. L.J. 203, 205 (2008) (citing statistics pointing to congestion and lack of capacity on American roads and rails).

34. *E.g.*, Jean-Paul Rodrigue et al., The Geography of Transport Systems 263 (2d ed. 2009). *But see* Brad Walker, Nicollet Island Coalition, Big Price—Little Benefit 15–16 (2010), *available at* http://www.iwla.org/index.php?ht=a/GetDocumentAction/i/2079 (questioning claims that the use of barges on inland waterways is more efficient than the use of railways).

35. 46 U.S.C. subtit. V.

coastwise trade monopoly as a "promotional program."[36] How has this program fared in promoting the merchant marine? The American merchant marine traces its origins to colonial times and has been an important player throughout U.S. naval history.[37] Much to Congress's dismay, the number of privately owned vessels flagged under U.S. laws has fallen dramatically since its peak in the years after World War II.[38] The market for imports to and exports from the United States has resoundingly rejected the U.S. merchant fleet, which carried less than 2 percent of the waterborne portion of that trade as of 2009.[39]

In the captive market of the coastwise trade, there also appears to be a downward trend, although it is less severe. The Maritime Administration published a series of studies in the mid-2000s that documented a steady decline in U.S. domestic ocean trade, measured in metric ton-miles.[40] In 2005, the secretary of Homeland Security twice waived the operation of the Jones Act, during the respective aftermaths of Hurricanes Katrina and Rita.[41] This move, which was "probably unprecedented,"[42] reflected the secretary's view that the waivers would "facilitate the transportation of oil and refined petroleum products in and from portions of the United States [devastated]

36. *Id.* pt. D.

37. Victor G. Hanson & John V. Berry, *The Diminution of the Merchant Marine: A National Security Risk*, 74 U. Det. Mercy L. Rev. 465, 467–71 (1997).

38. *Compare* Timothy Semenoro, Comment, *The State of Our Seafaring Nation: What Course Has Congress Laid for the U.S. Maritime Industry?*, 25 Tul. Mar. L.J. 355, 365 (2000) (citing an increase in the size of the privately held U.S. fleet from 644 in 1947 to 1,265 in 1952), *with Continuing Examination of U.S.-Flagged Vessels in U.S. Foreign Trade: Hearing Before the Subcomm. on Coast Guard & Mar. Transp. of the H. Comm. on Transp. & Infrastructure*, 111th Cong. 4 (2010) [hereinafter *Continuing Examination of U.S.-Flagged Vessels*] (statement of Rep. Frank A. LoBiondo, Member, Subcomm. on Coast Guard & Mar. Transp.) (restating Maritime Administration finding that there were 94 U.S.-flagged ships in foreign commerce as of 2010).

39. *Continuing Examination of U.S.-Flagged Vessels*, *supra* note 38, at 1 (statement of Rep. Elijah E. Cummings, Chairman, Subcomm. on Coast Guard & Mar. Transp.).

40. *See* Mar. Admin., U.S. Dep't of Transp., U.S. Domestic Ocean Trades 2002, at 1 (2004), *available at* http://permanent.access.gpo.gov/lps78744/2002/USDO-Trades.pdf (showing a 16% decline from 1998 to 2002); Mar. Admin., U.S. Dep't of Transp., U.S. Domestic Ocean Trades 2003, at 1 (2004), *available at* http://permanent.access.gpo.gov/lps78744/2003/USDO-Trades-03.pdf (showing a 5% decline between 1999 and 2003); Mar. Admin., U.S. Dep't of Transp., U.S. Domestic Ocean Trades 2004, at 1 (2006), *available at* http://permanent.access.gpo.gov/lps78744/2004/USDO-Trades-04.pdf (showing a 1.4% decline between 2000 and 2004).

41. Waiver of Compliance with Navigation and Inspection Laws, 70 Fed. Reg. 53,236 (Sept. 7, 2005); Waiver of Compliance with Navigation and Inspection Laws, 70 Fed. Reg. 57,611 (Oct. 3, 2005); *see also* Act of Dec. 27, 1950, ch. 1155, §§ 1–2, 64 Stat. 1120 (current version at 46 U.S.C. § 501) (authorizing the head of a responsible agency to issue such waivers when necessary in the interest of the national defense). This also happened after Hurricane Sandy in 2012. *Waiver of Compliance with Navigation Laws*, U.S. Dep't of Homeland Sec. (Nov. 2, 2012), http://www.marad.dot.gov/documents/12-5073_DHS_Jones_Act_Waiver_S1_Signed_11.02.12.pdf.

42. Constantine G. Papavizas & Lawrence I. Kiern, *2005–2006 U.S. Maritime Legislative Developments*, 38 J. Mar. L. & Com. 267, 279 (2007).

by the hurricanes" and were "necessary in the interest of national defense."[43] So too, ostensibly, is the merchant marine itself.[44] Yet the laws that the secretary waived in the name of national defense were enacted "[t]o provide for the promotion and maintenance of the American merchant marine,"[45] the very thing meant to provide for the national defense. Congress has demonstrably legislated itself into a conundrum.

The way out is to recognize that the coastwise trade laws simply do not work very well. If the merchant marine, with America at the mercy of its shipping rates, cannot be expected to defend the nation against a hurricane, then the specter of "foreign entities . . . subjecting the United States to economic blackmail"[46] in the absence of competition from the U.S. fleet seems like the least of our worries. It is time to reform the coastwise trade laws.

II. A Path to Reform

Recognizing that a repeal of the coastwise trade laws is unlikely despite the laws' negative consequences, this Comment proposes reform instead. Section II.A contends that past attempts to repeal the coastwise trade laws have failed because they have not sufficiently accommodated the interests of those who benefit from the current regime. Section II.B argues that tariffication—the conversion of the legal prohibition into an economically prohibitive tariff—would protect the beneficiaries of the coastwise trade laws and set the stage for future reform.

A. *Resistance to Repeal*

The coastwise trade laws harm American consumers.[47] Legislators who recognize this have introduced bills to overturn the Jones Act,[48] but unfortunately their efforts have not succeeded.

The Coastal Shipping Competition Act of 1996,[49] sponsored in part by Senator Helms of North Carolina—a coastal state whose constituents might be thought to benefit from the coastwise trade laws—was introduced to "eliminate a harmful anachronism that enables a few waterborne carriers to cling to a monopoly on shipping."[50] The anachronism—the Jones Act—had

43. Waiver of Compliance with Navigation and Inspection Laws, 70 Fed. Reg. at 57,612.

44. 46 U.S.C. § 50101(a) ("It is necessary for the national defense . . . that the United States have a merchant marine.").

45. Merchant Marine Act of 1920, Pub. L. No. 66-261, 41 Stat. 988.

46. Hanson & Berry, *supra* note 37, at 485.

47. *See supra* Section I.A.

48. Although the coastwise trade laws encompass both the Jones Act and the Passenger Services Act, the Jones Act receives much more attention. This may be due to the difference in penalty. *See infra* text accompanying notes 76–78.

49. H.R. 4006, 104th Cong. (1996); S. 1813, 104th Cong. (1996).

50. 142 Cong. Rec. 12,431 (1996). The bill would have repealed the U.S.-flagging and -build requirements for ships engaged in noninland coastwise trade on the condition that the secretary of transportation determine that the foreign ship's country of origin grant "reciprocal privileges" to American ships engaged in that country's coastwise trade. Constantine G.

driven the price of domestic grain shipments so high that North Carolina poultry and pork farmers found themselves turning to foreign sources for feed grain instead of buying it from the Midwest.[51] The bill gained very little support, however, and did not make it to the floor of either chamber of Congress.[52] Subsequent attempts to repeal or amend certain parts of the Jones Act likewise failed to gain traction, while a resolution supporting the Jones Act attracted a House majority as *sponsors*.[53] Resistance to a Jones Act repeal seemed insurmountable.

The issuance of Jones Act waivers during the 2005 hurricane season[54] might have signaled a new appetite for repeal. Another Gulf of Mexico disaster five years later, the Deepwater Horizon oil spill, again prompted calls for a waiver and claims that the Jones Act prevented a rapid maritime response.[55] Addressing these charges, Senator McCain introduced the Open America's Waters Act,[56] which would have "fully repeal[ed] the Jones Act."[57] It too died in committee,[58] suggesting the continued impossibility of a full repeal.

The coastwise trade laws are classic examples of legislation that serves a concentrated group of politically motivated beneficiaries while thwarting an economically competitive but politically weak group of business interests.[59] The costs are widely dispersed among consumers, who likely vote their consciences on more visible issues. This is why each of the past five presidents has spoken in support of the Jones Act[60]: it's politically safe to do so. As desirable as repeal may be, any effort to mitigate the coastwise trade laws'

Papavizas & Bryant E. Gardner, *Is the Jones Act Redundant?*, 21 U.S.F. MAR. L.J. 95, 111 & nn.119–20 (2008–2009).

51. 142 CONG. REC. 12,431 (1996).

52. Papavizas & Gardner, *supra* note 50, at 111 & n.121.

53. *Id.* at 111–12; H.R. Con. Res. 65, 105th Cong. (1997); *see also* United States Noncontiguous Shipping Open Market Act of 2003, H.R. 2845, 108th Cong. (2003). This bill died in committee. *United States Noncontiguous Shipping Open Market Act of 2003*, GOVTRACK, http://www.govtrack.us/congress/bills/108/hr2845 (last visited Feb. 16, 2014).

54. *Supra* notes 41–43 and accompanying text.

55. *E.g.*, Editorial, *The President Does a Jones Act*, WALL ST. J., June 19, 2010, at A12, *available at* http://online.wsj.com/article/SB10001424052748704324304575306881766723718.html#articleTabs%3Darticle. For example, skimming equipment flown in from the Netherlands had to be attached to American ships assisting in the cleanup effort because there was no waiver of the Jones Act's restrictions on the involvement of foreign-built ships.

56. S. 3525, 111th Cong. (2010).

57. 156 CONG. REC. S5,322 (daily ed. June 23, 2010) (statement of Sen. John McCain).

58. *Open America's Waters Act*, GOVTRACK, http://www.govtrack.us/congress/bills/111/s3525 (last visited Feb. 16, 2014).

59. John Kemp, *Jones Act Is Set to Stay*, REUTERS (May 2, 2013, 9:43 AM), http://www.reuters.com/article/2013/05/02/column-kemp-us-shipping-idUSL6N0DJ38A20130502; *cf.* Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397, 404–06 (sketching the dairy industry's successful quest for legislation to eliminate the competitive threat posed by filled milk in the 1920s).

60. *Statements of Support*, AM. MAR. P'SHIP, http://www.americanmaritimepartnership.com/statements.html (last visited Feb. 16, 2014).

consequences must win approval from at least part of the maritime lobby. To attract this support, reform should retain some degree of protectionism.

B. *Tariffication: A First Step*

A template for reform can be drawn from the example of international trade law, which has facilitated a boom in world exports over the past several decades.[61] The coastwise trade laws are a nontariff barrier to trade,[62] resembling the agricultural protectionism that prevailed across the globe when the Agreement on Agriculture[63] was negotiated in 1994. The General Agreement on Tariffs and Trade, in effect since 1947, had eliminated most quantitative restrictions but exempted nontariff barriers on agricultural products.[64] As a result, "[a]gricultural protectionism . . . played hooky from global trade reforms for decades."[65] The Agreement on Agriculture finally addressed the problem of nontariff barriers by forbidding members (such as the United States) to "maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties."[66]

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61. *See* World Trade Org., International Trade Statistics 2011, at 202 (2011), *available at* http://www.wto.org/english/res_e/statis_e/its2011_e/its2011_e.pdf (showing value of world exports in 2010 at approximately 145 times the value of those in 1950).

62. Broadly speaking, any policy other than a tariff that restricts the quantity of a good that is imported or exported into a country. A classic example is the import quota.

63. Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.

64. General Agreement on Tariffs and Trade, art. XI, para. 2(c), Oct. 30, 1947, 61 Stat. A11, A33, 55 U.N.T.S. 194 [hereinafter GATT 1947]. The coastwise trade laws have an interesting relationship with international trade law—the U.S.-build requirement has its very own grandfather clause. General Agreement on Tariffs and Trade 1994 para. 3(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 190, 191 [hereinafter GATT 1994] ("The provisions of . . . GATT 1994 shall not apply to measures taken by a Member . . . before it became a contracting party to GATT 1947, that prohibit[ ] the use, sale or lease of foreign-built or foreign-reconstructed vessels in commercial applications between points in national waters."). This Comment proposes tariffication as a unilateral trade reform but is not unaware of the leverage that a tarrified Jones Act might lend to hitherto unsuccessful negotiations about liberalizing maritime transportation (including coastwise) through international trade law. For more on past efforts in this field, see Benjamin Parameswaran, The Liberalization of Maritime Transport Services 249, 254–56, 277–82 (2004).

65. Jeffrey J. Steinle, Note, *The Problem Child of World Trade: Reform School for Agriculture*, 4 Minn. J. Global Trade 333, 333 (1995).

66. Agreement on Agriculture, *supra* note 63, art. 4.2, at 413. In a footnote, the Agreement specified that the measures "required to be converted into ordinary customs duties" include "quantitative import restrictions" and other nontariff barriers. *Id.* at 413 & n.1. The present perfect tense in Article 4.2, although peculiar, does operate as a mandate. The WTO Appellate Body interpreted this provision simply to signify that tariffication "began *during* the Uruguay Round . . . to be recorded in Members' draft WTO Schedules by the *conclusion* of those negotiations." Appellate Body Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, para. 206, WT/DS207/AB/R (Sept. 23, 2002), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds207_e.htm.

This—the conversion of nontariff barriers into "ordinary customs duties," or tariffs—is tariffication, "perhaps the most significant aspect of the entire Agreement."[67] For every nontariff barrier, a "tariff equivalent" was to be calculated "using the actual difference between internal and external prices,"[68] generally meaning "a representative wholesale price . . . in the domestic market" (the internal price)[69] and the actual or estimated value of the equivalent imported good.[70] The purpose of tariffication was "to enhance transparency and predictability in agricultural trade, establish or strengthen the link between domestic and world markets, and allow for a progressive negotiated reduction of protection in agricultural trade."[71]

Tariffication could work for coastwise trade as well. In its initial stages, reform could be designed effectively to prohibit foreign vessels from engaging in the coastwise trade, thereby preventing a shock to the mariners whose jobs the law currently attempts to protect. The tariff would be gradually reduced over time. While this Comment proposes unilateral reform because of the benefits to the domestic economy,[72] the promise of such a reduction could be used as a bargaining chip in negotiations with other countries that currently protect their own coastwise trade.

Such a reform could constrain America's flexibility to some degree. For example, reforming the U.S.-build requirement may jeopardize the requirement's grandfathered status under GATT 1994.[73] The grandfather clause, however, allows amendments to nonconforming provisions, such as the Jones Act, to the extent that they "do[ ] not decrease [their] conformity" with the national-treatment and other provisions of the original GATT.[74] Bringing foreign competition into the coastwise trade would increase our conformity—international trade law only prohibits differential treatment for foreign-built vessels on *internal* taxes and regulations,[75] not on charging a tariff for admission to the domestic market.

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67. Joseph A. McMahon, The WTO Agreement on Agriculture 33 (2006).

68. Negotiating Group on Market Access, *Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme*, Annex 3, § A, para. 2, MTN.GNG/MA/W/24 (Dec. 20, 1993) [hereinafter *Modalities Agreement*], *available at* http://www.wto.org/english/tratop_e/agric_e/1993_ur_modalities_w24_e.pdf.

69. *Id.* para. 6.

70. *Id.* para. 4.

71. Panel Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, para. 7.15, WT/DS207/R (May 3, 2002), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds207_e.htm, *quoted in* McMahon, *supra* note 67, at 35; *see also* Alan V. Deardorff, *Tariffication in Services*, *in* Issues and Options for U.S.–Japan Trade Policies 107, 108 (Robert M. Stern ed., 2002).

72. *See supra* Part I.

73. *See supra* note 64.

74. *See* GATT 1994, *supra* note 64, para. 3(a), at 191 (citing GATT 1947, *supra* note 64, pt. II, at A18–65).

75. *See* GATT 1947, *supra* note 64, art. III, at A18–19 (codifying the principle of national treatment).

A posttariffication Jones Act would, in fact, look much like the current Passenger Services Act. The penalty for transporting merchandise in the coastwise trade without a coastwise endorsement—in other words, for violating the Jones Act—is "seizure by and forfeiture to the Government."[76] The Passenger Services Act, wisely avoiding the constitutional limitations on the forfeiture of persons,[77] sets the penalty for violating its provisions at "$300 for each passenger transported and landed."[78] This is, in effect, a tariff—and, in the spirit of reform, it should be re-characterized as such.

The United States already has a Harmonized Tariff Schedule in place for imported merchandise.[79] Instead of being barred from transporting merchandise in the coastwise trade, foreign vessels could simply be allowed to pay tariffs on the transported merchandise at the most-favored-nation rate, perhaps multiplied by some constant, in order to engage in the coastwise trade. The forfeiture penalty for violating the Jones Act could be replaced with a fine equal to the value of the goods being transported. This would introduce flexibility and transparency into the coastwise trade laws so that legislators could adjust them and foreign shippers could quantify them as a cost of doing business in the new market.

Conclusion

Repealing the coastwise trade laws is virtually impossible, but we should still pursue other solutions. Tariffication gives Congress a way to admit competition to the coastwise trade—benefiting the Americans who use it—while affording the domestic industry time to adapt. America should welcome maritime genius, no matter its origin. Reforming our coastwise trade laws would be a promising start.

76. 46 U.S.C. § 55102(c) (2006). The alternative statutory penalty—the greater of "the value of the merchandise . . . or the actual cost of the transportation"—might be called tariffication by waiver. *Id.* Total forfeiture remains the default penalty, however, and any true tariffication would necessitate removing this penalty.

77. *See, e.g.*, U.S. Const. amend. XIII, § 1.

78. 46 U.S.C. § 55103(b).

79. *See* 19 U.S.C. § 1202 (2012).