Cabotage Laws: a Colonial Anachronism

Héctor I. Santos Santos*

Introduction

The word "cabotage" is derived from the French word "caboter" which means to sail coastwise or "by the capes". There are two forms of cabotage in the United States. The first refers to the natural cabotage, and an example of this type of cabotage is sea route between Miami-New York, which lies within the United States coastline. The second form of cabotage can be found on routes between New York-Puerto Rico, Miami-Puerto Rico and Los Angeles-Hawaii. In the case of Puerto Rico and Hawaii, offshore lines were made to look like an extension of the natural boundaries of the United States and then such areas were included under the jurisdiction of cabotage.

Inclusion of Puerto Rico and Hawaii in the cabotage provisions of the United States has its roots in history. The British also used the cabotage laws to protect their shipping between the United Kingdom and India. The Dutch did the same with Indonesia. In the 19th century, the British and Dutch forms of cabotage were considered a major source of protection and a practice that made both the British and Dutch merchant marines very powerful. Since neither India nor Indonesia are colonies anymore, inevitably the British and Dutch cabotage no longer exists.

The United States cabotage laws limit the maritime transportation of goods between American ports, its possessions and territories. These laws were enacted since the beginning of the American nation and were fundamental for its development as a world power. A study of this legislation and its historical context will help us understand better the motives and justification for its enactment. To accomplish this study it is necessary to review this topic without the passions that always arise when we discuss the Puerto Rican political status.

This subject has generated a considerable debate during the last year, both in Puerto Rico and in the United States, due to a strong claim from the economic and governmental sectors that are requesting changes or significative reforms to the maritime industry and to the restrictions that

* Third year law student and member of Cuerpo de Investigadores, Redactores y Correctores de la *Revista de Derecho Puertorriqueño* de la Facultad de Derecho de la Pontificia Universidad Católica de Puerto Rico.

such laws impose. At the same time there has been a consensus between the political, economic and social sectors in Puerto Rico that support the elimination of this legislation.

In this article we propose to analyze the two basic foundations for these laws that have contributed and justified their existence. These are the commercial welfare and the national defense of the United States. To be able to comprehend if Puerto Rico should be excluded from this legislation, we must examine the purpose for the cabotage laws, if that purpose has been accomplished, the continued justification for these laws, the need for change in this policy and how the courts and the federal agencies have interpreted and applied them. We should also examine the cabotage laws of other countries, the trends in the global markets and finally which should be the policy of the government of Puerto Rico in this matter.

Background

In order to understand the purpose of the United States maritime cabotage laws it is necessary to give a brief legislative history of such laws. The United States became a maritime power even before becoming a nation. The British Colonies in America were the world´s leading shipbuilders', due primarily to the proximity of suitable timber to mayor port cities.[1] After the Revolutionary War, the United States Maritime industry prospered as a result of its lower costs, and the status of its vessels as neutral ships during the late eighteenth and early nineteenth century European Wars.[2] From the early days of the history of the American nation, the proposition that an adequate domestic merchant marine is essential to the defense and commercial welfare of the United States became a basic element of American national policy. As noted by the D.C. Circuit Court:

> [i]t has long been recognized that an adequate merchant marine, with U.S. flag ships and trained American sailors, is vital to both the national defense and the commercial welfare of our country. We require a sound merchant marine to protect foreign trade and to provide support for the armed forces in times of war or national emergency. We also require a modern, efficient

[1] Hutchins, *The American Maritime Industries and Public Policy*, 1789-1914, 130-157 (1941); Bryant, *The Sea and the States* 44 (1947).
[2] Zeis*, American Shipping Policy* 4-5, n.5 (1938).

> shipbuilding industry capable of providing military vessels in times of stress. . . .[3]

Congress' first intervention on behalf of the United States Merchant Marine was in the form of cabotage laws. After passage of the Constitution of 1789, the First Congress promptly exercised the sovereign powers of the nation to protect the United States merchant marine fleet from foreign flag competition in its domestic maritime trade. The third law passed by the new Congress imposed a tax on foreign vessels operating in domestic trade.[4]

In 1817, Congress expressly prohibited foreign vessels from operating in the coastwise trade.[5] From 1817 to 1866, the United States maritime cabotage laws prohibited the transportation of merchandise "from one port of the United States to another port of the United States in a vessel belonging wholly or in part to a subject of any foreign power."[6] In 1893, Congress amended the cabotage laws prohibiting foreign flag transportation between two United States ports directly or indirectly "via a foreign port", thus eliminating the possibility of using Canadian ports as merchandise relief.[7]

During the Spanish American War, the United States could only gather sixty nine-commercial vessels of American flags, relying in great part on foreign vessels. In 1903, a British line was granted a contract to carry the military cargo between the United States and the Philippines.[8] Congress reacted to this problem by enacting the Cargo Preference Act of 1904.[9] This act provides that only vessels of or belonging to the United States may be used for the ocean transportation of cargo bought for the military. This act has transformed the Department of Defense in the

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[3] Independent U.S. Tank Owners Committee v. Lewis, 690 F. 2d 908, 911 (D.C. Cir.1982): *see also* Marine Carriers Corporation v. Fowler, 429 F.2d 702, 708 (2nd. Cir. 1970).
[4] Chapter 2, § 5 of the Act of July 4, 1789, 1 Stat. 27 (1848).
[5] Chapter 31, § 4 of the Act of March 1, 1817, 3 Stat. 351 (1850).
[6] *Id.*
[7] This language was added to the cabotage laws even before the Court of Appeals printed its decision in the 250 Kegs of Nails case, Chapter 117 of the Act of February 15, 1893 (27 Stat. 455). It was adopted without revision when the Jones Act was passed in 1920, and remains unchanged to date.
[8] Frank J. Costello, *Trends and Developments in U.S. Cargo Preferences Laws*, 36 Fed. B. News J. 365 (1989).
[9] 10 U.S.C. § 2631 (1956) (1904 Act).

greatest customer of the merchant marine. However, as we will discuss later, this disposition had to be obviated during the Persian Gulf War.

In 1900, due to a strong protectionist movement in Congress the Foraker Act was enacted, by which it was extended to Puerto Rico the federal dispositions relating to maritime transportation. Specifically, it was determined that Puerto Rico would be subjected to the cabotage laws of the United States. It provided that "the cabotage between the United States and Puerto Rico will be regulated according to the dispositions of law applicable to such traffic between any two of the great coastal territories of the United States."[10]

Later on, in 1920, Senator Wesley L. Jones (R-Wa) sponsored the Merchant Marine Act of 1920,[11] better known as the Jones Act. According to Ernest Gruening, Governor by then of the territory of Alaska, the purpose of Senator Jones in proposing the Jones Act was:

> [t]o subject Alaska to steamship service owned in the city of Seattle. Senator Jones no doubt assumed, and correctly, that this would be most helpful to some of his constituents there, as indeed it proved to be, but at the expense, the heavy expense, from that time on, of our voteless citizens of Alaska.[12]

The Jones Act is the result of political favoritism and intrigue. In his book titled “Alaska”, James Michener explained that The Merchant Marine Act of 1920 was rushed through Congress in 1920 with little debate on a voice vote, and signed by an ailing President Wilson after only cursory discussion in the Cabinet. In arguing for the Act, Senator Jones declared, "I want it to drive foreign shipping from our ports."[13] The Act itself was crafted in order to prevent these foreign vessels, not from competing with American ships, but with the rail monopoly that then ran from Seattle to the colony of Alaska.

Senator Jones' bill had the unfortunate and predictable impact of destroying American maritime competitiveness. Today, fully 97 percent of all cargo by water to and from American ports and foreign ports sail on foreign flag vessels. Less than 15 percent of all domestic goods are

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[10] Chapter 191, § 9 of the Act of April 12, 1900, 31 Stat. 77 (Also known as the Foraker Act).
[11] 46 U.S.C. § 883 (1988), (Act of 1920).
[12] Ernest Gruening, "Let us now end American Colonialism", excerpted from his memoirs, The Battle for ALASKA Statehood, (1955).
[13] James Michener, *Alaska*, 59 (1988).

transported by water; the rest is entirely transported by inland barge, almost entirely bulk commodities, for a total takes of less than three percent of the transportation bill. The Jones Act has resulted not in the eradication of foreign fleets, but in artificial shipping supply shortages in the American coastal and intercoastal merchant marine trades and the loss of thousands of American jobs. America´s deepwater ports and shippers lost literally millions of tons of cargo and tens of thousands of jobs that should be fueling economic growth into the 21st century. The Act which was intended to shift cargo from water to rail, has done exactly that.[14]

The most relevant part of the Jones Act to our discussion is section 27 of the Act, which provides:

> [t]hat no merchandise shall be transported by water, or by land and water, on penalty of forfeiture of the merchandise . . . ., 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, in any other vessel than a vessel built in and documented under the laws of the United States, and owned by persons who are citizens of the United States. . . .[15]

As we can see, the Act prohibits the direct or indirect transportation between a foreign port, of cargo, "between points in the United States" which are subject to the cabotage laws, in vessels that are not: (1) built in the United States (2) documented under the laws of the United States, and (3) owned by citizens of the United States. Cargo shipped in contravention of the Act is subject to forfeiture. Any consignor, seller, owner, importer, consignee, agent or other persons transporting or causing the merchandise to be transported in violation of the Jones Act may be penalized.

The Jones Act upheld the application of the federal legislation relating to navigation and maritime transportation. To that end it establishes that:

> [a]ll United States laws for the protection and improvement of the navigable waters in the United States and for the conservation of the interests of the navigation and commerce, will be applicable to this island and waters and its adjacent islands and waters, except in that in which they could be locally inapplicable. . . .[16]

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[14] Jones Act Reform Coalition, *Position Statement* (visited August 29, 1997) http:// www. Jarc. ari.net.
[15] 46 U.S.C. § 883 (1988) (Act of 1920).
[16] *Id.*

Section 58 of the Jones Act did not repeal any other laws which would not be in conflict with its dispositions, including the laws relating to tariffs, customs and import rights in Puerto Rico included in the Foraker Act.[17] Subsequently, Public Law 600 of 1950 established that the maritime traffic between Puerto Rico and the United States would be regulated in accordance with the dispositions of the applicable laws of the coastal districts that form the United States.[18] At the same time, this law maintained sections 8 and 58 of the Jones Act.

Analysis

Congress has exercised its power to regulate the maritime affairs in the United States, its possessions and territories. It has the authority to regulate admiralty and maritime affairs, this power extending to all navigable waters of the United States. Besides, Congress can also regulate maritime affairs through the commerce clause. This is why the courts have sustained that the powers of the states to legislate in maritime affairs is very limited, due to the effects it could have over interstate and international commerce.[19] For these reasons, any initiative to exclude Puerto Rico from the cabotage laws of the United States has to come from Congress. Consequently, the House of Representatives of the Commonwealth of Puerto Rico approved on February 14, 1994 Concurrent Resolution number 35 " asking the United States Congress for the exclusion of Puerto Rico from the application of the cabotage federal legislation."[20] This resolution was presented on March 6, 1996 by Congressmen Luis Gutiérrez from Chicago, Nydia Velázquez and José Serrano from New York, before the United States Congress as the "Puerto Rico Fair Trade Act of 1996", by which they requested "to exclude voyages to or from Puerto Rico from laws applicable to coastwise trade".[21]

Even though this bill had the support of the three political parties in the Puerto Rico House of Representatives and the broad support of important sectors of our economy, such as the Industrial Association of

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[17] *Id.*
[18] 48 U.S.C § 744 (Act of 1950).
[19] SERRANO GEYLS, Derecho Constitucional de Estados Unidos y Puerto (1986).
[20] H. Conc. R. 35, February 14, 1994.
[21] H.R. 3020, 104th Cong., 2d sess.s. 2 (1996).

Puerto Rico, the Chamber of Commerce and the Importers Association, it did not have the support of the Government of Puerto Rico. For this reason and the strong opposition to the bill in Congress, it was not considered.

During the summer of 1997 Jones Act reform bills have again been introduced in the United States House and Senate. These are moderate but crucial reforms proposed and supported by a greater number of Congressmen and Senators. In the Senate the bill was introduced as the "Freedom to Ship Act" (S.1138) and was cosponsored by such important and influential Senators as Helms, Hagel, Roberts, Brownback and Burns.

In the House, the bill was introduced in June 1997 as "The Coastal Shipping Competition Act" (H.R. 1991) and quickly gained the support of over a dozen cosponsors, led by Rep. Nick Smith of Michigan. In a press release of July 18, 1997, Rep. Smith pointed out that he introduced legislation (H.R. 1991) to:

> [b]ring competition to the moribund, noncompetitive coastwise shipping industry. A mayor cause of the industry´s decline is the Federal Jones Act. The Jones Act limits all shipping in the U.S. and non-contiguous trade (i.e.) Alaska, Hawaii, Puerto Rico and Guam) to vessels built, owned and registered in the United States. This legislation (H.R. 1991) allows foreign competition (on a reciprocal basis) in the United States coastwise trades while requiring that foreign ships hire United States crews, thus lowering shipping cost and creating United States jobs.[22]

Thus, the shift from previous legislation requesting the elimination of the Jones Act is now to reform the Jones Act, a more moderate approach that guarantees the approval of the legislation. Among the reasons why the Jones Act needs to be reformed are the following:

1. Stagnation of Coastwise Transportation. Domestic waterborne shipping market share continues to decline down to only 14% of tonnage shipped in the United States in 1995 compared to 46% for trucking, 26% for rail and 15% for the pipeline. Overall United States shipping tonnage has increased 1.67 times since 1965, coastwise shipping has increased only 1.3 times. During the same period, air tonnage has increased 7.5 times, truck tonnage increased 2.06 times and pipeline tonnage has increased 1.9 times.[23]

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[22] Press released by Rep. Smith, July 18, 1997.

[23] *Full Speed Ahead*, published by the Maritime Cabotage Task Force which opposes Jones Act Reforms.

2. United States fleet is shrinking. The United States Merchant Fleet continues to shrink. By imposing heavy burdens on users of coastwise transportation, the Jones Act has contributed significantly to this decline. The active, privately owned and operated United States flagged merchant fleet lost 18 ships during FY 96 and is down to 305 deep sea ships (note: only 121 of these are self-propelled "Jones Act" vessels of more than 1,000 tons).[24]

3. United States jobs are being lost. Seagoing licensed and unlicenced jobs fell during fiscal year 1996 from 11,560 to 9,303. Officers' jobs fell from 3,789 to 3,049 during FY 96 (note: only 5,700 jobs are left in the deepwater Jones Act trade).[25]

4. Consumers harmed by the Jones Act. The Jones Act constitutes a consumer tax (the equivalent of no less than a half cent tax on every dollar of goods and services, or one cent per gallon of gasoline), the benefits of which go to a handful of monopolistic shipping companies. While the Jones Act generates $635.6 million in profits annually for the cabotage sector, this is at a welfare cost to consumers of between $4.2 and 10.4 billion annually in 1988 dollars.[26]

5. Negative effects on agriculture. Modernizing the Jones Act has been cited by the United States Chamber of Commerce and numerous other groups as a top priority for the 105th Congress. According to the Chamber, for instance, the future of United States agriculture depends upon market access in both the United States and overseas. Because of the Jones Act, agricultural importers in the United States find that purchasing commodities from abroad is cheaper than purchasing them here. Further, more because of the Jones Act, other nations are more willing to impose their own restrictions on United States agricultural goods. The current United States fleet suitable for transportation of agricultural goods is only about 125 ships.[27]

6. Impairing United States national defense. By destroying the shipping industry, the Jones Act has harmed United States national defense. During the Gulf War, this Act was suspended by President Bush

[24] *American Maritime Officer*, Feb. 97, 1.
[25] *Id.*
[26] U.S. International Trade Commission Report, 1991.
[27] Chamber of Commerce Press Release.

at the advice of Defense Secretary Cheney who considered it an impediment to the movement of critical military resources.

The Coastal Shipping Competition Act (CSCA) would have the following effects on current law:

-Allow foreign-owned and built vessels, otherwise qualified to compete in the United States only if they are flagged in a nation that extends the same privileges to United States vessels;

-Require employment only of United States workers and apply United States labor laws on foreign ships regularly engaging in United States coastwise trade;

-Continue to apply United States safety and environmental laws to foreign ships engaging in the United States coastwise trade;

-Continue to restrict all shallow-water inland shipping to United States controlled and built vessels;

-Create a limited and much needed "spot" market for United States commodity shipping by allowing non-documented foreign bulk carrying vessels to participate in no more than six coastwise trips per year;

-Allow United States incorporated foreign vessels to participate in coastal towing and inland dredging operations with American crews (on a reciprocal basis);

-Allow foreign owned and built passenger vessels to operate under the United States flag with American crews (on a reciprocal basis);

-Allow United States incorporated, foreign flag vessels to operate in pass-by container trades (on a reciprocal basis); and -Allow United States flagged vessels engaging in the United States coastwise trade to utilize a simplified administrative procedure to resolve cases similar to workman´s compensation. Current United States law provides for a jury trial in federal or state court for injured seamen in cases of maritime torts (i.e. accidents). The rationale for the change is that sailors are allowed to sue in court for on the job injuries. Nearly every other worker in the United States, by comparison, is subject to some form of workman´s compensation (a less costly, quicker method of resolving disputes). Although workers can generally only get limited damages, they are usually guaranteed they will receive them. Carrier liability insurance costs are substantial due to the Jones Act. By establishing a workman´s compensation type system for seamen, these can be reduced. By limiting this option to United States flag vessels, the legislation encourages

vessels to fly the United States flag.[28] Thus, the emphasis of this legislation is to bring competition to the coastwise shipping industry.

To be able to understand if Puerto Rico should be excluded from the application of these cabotage laws, we must examine these types of laws in other countries. We should also examine the purpose of the Jones Act, if this purpose has been attained, the need to change this policy, how the federal agencies and the courts have applied these dispositions, the trends in the global markets and which should be the policy of the government of Puerto Rico throughout this discussion.

Under international law, a coastal country can exclude foreign vessels from engaging in commerce in close proximity to its coasts. In *Marine Carriers Corporation vs. Fowler*,[29] the Second Circuit expressed that "like all maritime nations of the world, the United States treats its coastwise shipping trade as a jealously guarded preserve".[30] A decade ago, nineteen nations had law requirements that expressly reserved the coastal commerce to vessels of national flags.[31] Japan and Denmark also have "de facto" cabotage restrictions.[32] However, the global tendency is toward the elimination of these restrictions. The European Economic Community has established a common maritime policy that will make the cabotage restrictions more flexible between its nation members. Furthermore, Germany and England signed a treaty in October of 1985 that confers reciprocal access to their vessels between their coasts.[33]

The Jones Act is however unique among the international cabotage restrictions. It not only requires the vessels to wave the American flag, but also requires that they be built in American shipyards. Germany and Brazil are the only two other countries that restrict their commerce to domestically built ships.[34] As we can see, the Jones Act has an expensive rippling effect that is the direct result of a protectionist policy from an expansive and growing age of a nation that struggled at one time to obtain global hegemony. The result of this policy has been the imposition by

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[28] H.R. 1991, 105th. Cong., 1st sess. 1 (1997).
[29] 429 F.2d 702 (2d. Cir. 1970).
[30] *Id.* at 703.
[31] Michael S. Cessna, *Coal Top-Offs: A Case History of the Failure of U.S. Maritime Policy*, J. Mar. L & Comm. , pg. 237 (1986).
[32] *Id*.
[33] *Id*.
[34] *Id*.

force of law of the establishment and subsidy of a merchant marine to obtain these purposes.

The Merchant Marine Act of 1920,[35] has the objective of strengthening the national defense and the development of domestic and international commerce by the establishment and maintenance of an American merchant marine capable of transporting most of the American commerce, and equipped to function militarily in war time or national emergencies. This law establishes that the administration, implementation and promulgation of any norms regarding it, must agree with its purposes. However, it should be pointed out, that there is a series of incongruences in the application of the Jones Act that show the failure of the American maritime policy. On October 8, 1982, Canadian Steamship Lines, Inc. (CSL), requested a ruling from the commissioner of customs as to whether a proposed coal top-off service on the East Coast would be consistent with section 27 of the 1920 Merchant Marine Act.[36] Michael S. Cessna concludes:

> [t]he Treasury Department's decision barring CSL from Delaware Bay top-offs illustrates the need for reform of the Jones Act. CSL's proposed top-off service concededly involved a movement of goods in foreign, rather than domestic commerce. Nevertheless, the top-off service was determined to be in contravention of the Jones Act. This determination ignores the legislative intent of Congress in enacting that statute, which was to reserve only the coastwise or "domestic" transportation of merchandise to U.S. built and flagged vessels. . . .[37]

The failure of the Jones Act´s legislative purpose upon the demands of a global economy has been criticized extensively by Robert L. McGeorge, Executive Director of the Center for International Commerce Policy and Law Professor at The University of Nebraska.[38] McGeorge makes clear that the United States Customs Services has ignored the guidelines established in *American Maritime Association vs. Blumenthal*.[39] The Customs Services disparate treatment of the oil and seafood industries (the two industries that have most often sought Jones Act rulings on breakages in the continuity of voyages over the past

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[35] 46 U.S.C. 883 (1988) (Act of 1920).
[36] *Id.*
[37] Cessna, *supra* note 31, at 238.
[38] 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´lL. & Bus. 62 pg. 1 (1990).
[39] 590 F. 2d 1156 (D.C. Cir. 1978).

decade) demonstrate: "first, the divergence between the purpose of the coastwise trading restrictions and the current administrative policies; second, that they are contrary to the purpose of the Jones Act policies; and third, that they are harmful to the American industry upon the reality of a global economy.[40]

Frank J. Costello, who has been involved in the implementation of the cargo preference law, analyzes if the Jones Act has accomplished the objectives of the national defense policy. After discussion and analysis of the Denton Commission Report,[41] he concludes that the cargo preference law and the United States merchant marine are in a precarious situation. Costello indicates that:

> [a]ccording to the Commission there is not enough United States flag vessels to meet the current DOD global war scenario, even with the inclusion of mothballed ships in the Ready Reserve Fleet and the military useful ships of the effective U.S. controlled fleet. By the year 2,000, the minimum requirement for the U.S. flag will be 507 privately-owned vessels, a fleet approximately twenty-five percent larger than the rapidly diminishing existing U.S. flag fleet. . . . [42]

He also warns us that the United States merchant marine consists of merchant seamen as well as ships, and the United States flag fleet is also seriously deficient in numbers of qualified personnel; by the year 2,000, the majority of qualified United States merchant seamen will be sixty five years of age or older.[43]

Rob Quartel, former Commissioner of the Federal Maritime Commission and President of the Jones Act Reform Coalition sustains that the fall of the United States Merchant Fleet provides irrefutable evidence of the Merchant Marine policy failure.[44] By the end of Second World War, the United States had the largest fleet in world history (more than 2,000 vessels). By 1970, however, there were only 893 United States

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[40] McGeorge, *supra* note 38 at 7, 10 and 17.
[41] Fourth Report of the Commission on Merchant Marine and Defense: Recommendations: A Plan for Action (Jan. 20, 1989). (Quoted by Frank J. Costello, *Trends and Developments in U.S. Cargo Preferences Laws*, 36 Fed. B. News + J. 365 (1989)).
[42] Costello, *supra* note 8 at 10.
[43] *Id*. at 8.
[44] Rob Quartel, *America's Welfare Queen Fleet: The Need for Maritime Policy Reform*, Regulation, pgs. 58-66 (Summer 1991).

flag ships and by the end of 1990, the fleet had declined to 371 active vessels.[45]

In 1970, United States flag vessels carried twenty four percent of all goods arriving at or leaving United States shores. By the 1990´s, less than four percent of those goods were carried in United States flag ships. Between 1971 and 1989, average monthly maritime employment fell more than thirty percent.[46]

What, then, justifies keeping a merchant marine that is in clear decline? Every law relating to the merchant marine since the Jones Act of 1920; the Merchant Marine Act of 1936, the Merchant Marine Act of 1970; and the Shipping Act of 1984, established that it was necessary for the national interest to keep and promote a United States Merchant Fleet that was capable of carrying out the maritime commerce during peace time, and at the same time, it would be able to serve the military component during war time or national emergency.[47] The main justification for the governmental subsidies to the maritime industry has been the national defense. The logic was that in minor or mayor conflicts the merchant vessels would be necessary to carry military goods and equipment through the maritime way, and deliver critical material at the United States ports. When the Jones Act was redacted, the troops were moved in big vessels and all the movement was made in ships. Today, that reality is different. Under the recommendation of the former Secretary of Defense, Dick Cheney, President George Bush suspended the Jones Act during the Persian Gulf War (the biggest movement of goods and materials since the Korean War) because it was destined to be an impediment to the movement of military resources.

The maritime aspects of the Persian Gulf War clearly demonstrated the importance of a fully integrated, intermodal system of transportation, including a comprehensive maritime branch, but it did not demonstrate the need for a merchant marine, particularly one as inefficiently maintained as the one the United States have today.[48]

As we can see, the national defense justification for the Jones Act was completely destroyed during this conflict. Military goods sent to the Persian Gulf were moved by rail, air, and trucks to ocean ports and a

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[45] *Id*. at 59.
[46] *Id*.
[47] 46 U.S.C. 861 (1984).
[48] Quartel, *supra* note 44 at 62.

variety of ships were used, both United States flag and foreign, with American and foreign crews alike. The most highly valued cargos (the troops) were moved to the Gulf almost entirely by air, as was certain other high value, high force, time sensitive weaponry.

The Persian Gulf War established beyond a shadow of a doubt that the military can efficiently execute its mission even without an American built, American crewed commercial fleet. Ninety one percent of dry cargo was moved on military vessels. United States controlled ships and foreign (largely NATO countries) charter vessels. Only six of the fifty-nine ships specifically subsidized for the purposes of national defense actually moved through the minefields with their all American crews directly into the war zone in the Persian Gulf.[49] This fact is more relevant if we consider that the merchant fleet that carried the military materials to the Persian port was composed of four hundred sixty vessels.

On that occasion, retired merchant seamen had to be called to complete the crew of some vessels. Four of these seamen who were Second World War veterans, (two of them with heart surgery) made up part of the crew.[50]

The deterioration of the United States merchant marine has been the reason for several efforts to reform the Jones Act. Since the Reagan Administration ended the subsidies' program for vessel construction in 1981, there have been many attempts to reform it. This need to change the cabotage laws in the United States is not only due to internal factors as we have seen, but also there exist global market trends and a new world order that make it unavoidable to change these laws.

The actual conditions are very different now than when the cabotage laws were first redacted. The dramatic changes in the international markets include the integration of the European markets, the new political system in East Europe, less markets and more aggressive manufacturers in the Pacific and many Free Trade Agreements. All these events have contributed to mayor changes in the economy and market relations in the maritime sector. The innovation and competition in the logistics of transportation as were demonstrated during the Persian War, have left the United States merchant marine stranded. To that effect Quartel points out

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[49] *Id.*

[50] Bruce J. Heiman & Rolf Marshall, *The Maritime Reform Act of 1992?*, 23 J. OF MAR. L. & COMM. 507 (October, 1992).

the many fundamental economical changes in the structure of maritime transportation:

> [t]he ocean shipping business no longer consists simply of ships on the ocean. Today's industry leaders provide intermodal docks that accommodate trucks and rail, as well as ships, door to door pick up, packaging, and delivery, and electronic tracking, customs documentation, and billing. Furthermore, the ocean leg, which accounts for 70 to 80 percent of the intermodal bill is itself an increasingly fungible market of ocean space and movements. Today the competitive advantage goes to modernly foreign (frequently Asian) fleets manned by smaller, fewer highly paid crews, who ride on cheaper foreign built, foreign financed ships than their American counterparts. The competitive disadvantage of the high cost American flag fleet leaves no future for an industry penalized by both flag and Jones Act restrictions. Policymakers cannot continue to treat the merchant marine as simply an ocean service. It is increasingly an international, intermodal service industry. . . .[51]

There is no doubt that the United States cabotage laws are burdensome for maritime commerce as well as for the American economy. The protection provided by the Jones Act has severely impacted the United States shipping industry. Lloyds Register compiled figures on the gross registered tons of the fleets of different countries. In 1921, the world fleet was 59 million gross registered tons (GRT). In the same year, the United States flag fleet was 16 million tons, or 27 percent of the world fleet. In 1987, the world fleet was 403 million GRT, and the United States flag fleet was 20 million tons, or just 5 percent of the world fleet. At the same time, Liberia moved from 0 to 43 million GRT, the former Soviet Union from 0.5 million to 25 million GRT, and Greece from 0.5 million to 24 million GRT. Under the Jones Act, 60 shipyards were closed.[52]

As we can see, the impact of the Jones Act on the American shipping industry has been negative. Let us remember that Senator Jones' motivation for its enactment was to prevent foreign vessels from competing not with American ships, but with the rail monopoly that then ran from Seattle to Alaska. The Act which was intended to shift cargo from water to rail, has done exactly that. But at the same time the Act has imposed on the American economy the burden of using higher-cost American capital assets and labor to provide domestic waterborne transportation, with no offsetting gains in service or efficiency. It is

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[51] Quartel, *supra* note 44 at 60 and 61.
[52] Costello, *supra* note 41.

pointed out that this burden is especially heavy for the economies of Hawaii, Alaska, and Puerto Rico, which are highly dependant on ocean transportation. The cost of the Jones Act impinges most directly on the 3.7 million people of Puerto Rico, 1.1 million people of Hawaii, 608 thousand of Alaska and 140 thousand of Guam. Being island economies, these offshore points are heavily dependant on imports, especially from the continental United States. These 5.5 million people bear the largest share of the cost of subsidizing the Jones fleet. Five and a half million people are asked to subsidize 250 million, which is clearly an inequitable way to finance the purported national defense benefits of the Jones Act policy.

If we add to this that the myth of the national defense (justified in these laws) was destroyed with the Persian Gulf operation, we will have to recognize that the elimination or modification of the cabotage laws is urgent. President Clinton ordered in January 1996 a study to determine the impact of the abolishment of these laws.[53]

In Puerto Rico, the effect of the cabotage laws was felt as soon as these entered into effect with the Foraker Act. In 1900, Puerto Rico occupied the twenty seventh place among American merchandise buyers in the world and the fifth place in Latin America. By 1910, after the cabotage laws, Puerto Rico had become the eleventh in the world markets for these products and fourth in Latin America, going up to the sixth and first place respectively in 1936.[54] Actually, Puerto Rico represents the fourth world market for the United States.

On the consumer side, the domestic trades are big. Puerto Rico has the 12th largest container port in the world, and, among American ports, only New York and Seattle handle more container traffic than does San Juan. The Hawaii trade is comparable to the Puerto Rico trade, and Alaskan oil exports, as well as its imports, are very important. For Puerto Rico and Hawaii, there are no studies available on the cost of the Jones Act.

In 1988, the United States General Accounting Office (GAO) prepared a report on the impact of the Jones Act on Alaskan transportation. Another study was conducted on the same subject by the

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[53] Andrea Martínez, *Cambio de señal sobre el cabotaje*, El Nuevo Día, San Juan, February 29, 1996 at 7.

[54] I JOSÉ TRÍAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO 226.

Congressional Budget Office (CBO) in 1984. These two studies clearly indicated: (1) that the Jones Act increased the cost of domestic waterborne transportation, (2) that the United States crew costs have reached levels that typically are 2.5 times those of European crews and more than six times those of third world crews, (3) that the cost of a United States-built ship is about three times the cost of a comparable ship built in a Japanese or Korean shipyard.[55]

In 1994, Puerto Rico Management and Economic Consultants, Inc., realized a study on the impact of repeal of the Jones Act on the economy of Puerto Rico, and among other recommendations, concluded:

> [t]hat when the Jones Acts application to Puerto Rico is evaluated it can be concluded that two-thirds of the excess cost emerges from the high cost of vessels which must be built in the United States under the Jones Act and that one-third of the excess cost for Puerto Rico emerges from the cost of salaries, wages and fringe benefits due to the obligatory use of United States citizen crew members of the vessels.[56]

The study concludes that a repeal of the Jones Act: (1) will allow Puerto Rico´s shipping companies to buy vessels built in Korea, Japan or elsewhere. These vessels can be purchased at capital investments of about one-third of those under the Jones Act; and (2) manpower operating cost of the vessels providing service between the United States and Puerto Rico can be reduced to about 40 percent.[57]

Even though the government of the Commonwealth of Puerto Rico recognizes how beneficial it would be to deregulate the American maritime industry, it "does not support to liberalize and reform in an exclusive way Puerto Rico from the federal cabotage laws."[58] The reason the government offers to assume this position is based on a textual quote from section 1 of the Jones Act in which it is established that these laws are necessary for the national defense. However, as we have discussed before, this myth of the national defense was destroyed during the Persian War to such an extent that even the experts on the maritime industry are exerting pressure for the elimination or modifications of these laws.

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[55] GAO Report: *The Jones Act´s Impact on Alaska*, 1988.
[56] Puerto Rico Management and Economic Consultants, Inc., A Study on the Impact of Repeal of the Jones Act on the Economy of Puerto Rico, pg. 69, June 1994.
[57] *Id.*
[58] *Resumen de la Política Pública de la Administración del Gobierno de Puerto Rico Sobre Propuestas de Enmiendas a las Leyes Federales de Cabotaje*, February, 1996, pág. 2.

The government of the Commonwealth of Puerto Rico has the resources to request and lobby in favor of changes to these laws. Guam, (an island of 217 square miles with a population of 150 thousand inhabitants), is another island that is under the cabotage laws that has established a claim before the National Maritime Commission against the two merchant companies that carry merchandise for the United States, having spent more than 10 million dollars in the five years that this suit has been going on. Puerto Rico has more economic resources and political clout before the United States government than day Guam, all of which would allow it to assume a more active role in the fight for the abolition or modification of these laws.

Conclusion

The Jones Act was established to provide a high level of protectionism to the American maritime industry. Its purpose contained two fundamental aspects or justifications: the commercial welfare and the national defense of the United States. Without any doubt, the Jones Act has failed to attain the public policy objectives for which it was established. The American merchant fleet has experimented a dramatic reduction in its size and most of its ships need to be replaced.

We have suggested the incompatibility of a protectionist policy in an age of globalization of the world markets, the lack of competitiveness of the American merchant marine, and its being left behind in the presence of the changing conditions of the maritime markets. The failure of the Jones Act to reach its objectives led President Bush to obviate it during the Gulf War and it is not useful any more for the national defense, argument that is invoked by the Puerto Rican government for not requesting the exclusion of the island from the cabotage laws.

In the statement of motives of the Concurrent Resolution of the House number 35 of February 14, 1994, it is correctly asserted that:

> [i]n the United States, there is a growing awareness that the coasting trade legislation is very inefficient and to a certain extent, obsolete. The benefits derived by the limited maritime sector are comparatively inferior to those that would be derived by the total United States economy, through a new scheme of free competition in maritime transportation. Important sectors of the government of the United States have proposed the elimination or modification of coasting trade laws as part of the efforts to eliminate those

> areas in which there is a waste of resources, bureaucracy and inefficiency. . . .[59]

The agreement obtained among the three political parties in the Puerto Rico House of Representatives and the broad support of important sectors of our economy, like the Industrial Association of Puerto Rico, the Chamber of Commerce and the Importers Association, require and demand that our government support the fight for the Puerto Rico exclusion from the cabotage laws, or its modification. It would not be the first time that Congress excludes a territory from this legislation, since in 1936 Congress excluded the Virgin Islands with the purpose of stimulating that territory´s economy.[60] This should be a top priority for the Puerto Rico Federal Affair Office in Washington, D.C.

Why should we fight for the exclusion of Puerto Rico from these laws and not just reform the Jones Act? Because the reform bills that have been introduced in the United States House and Senate are moderate reforms designed to protect the American maritime industry. Its main purpose is to bring competition to the moribund, noncompetitive coastwise shipping industry. Congress is taking into consideration the best interests of the United States maritime industry, not Puerto Rico´s best interest. Since it will require employment only of United States workers and apply the American labor, safety and environmental laws to foreign ships engaging in the United States coastwise trade, these reforms will continue to harm the Puerto Rican economy. We have demonstrated that one third of the excess cost for Puerto Rico emerges from the cost of salaries, wages and fringe benefits due to the obligatory use of United States citizen crew members of the vessels. Congress can regulate maritime affairs through the commerce clause. Puerto Rico should be given the power to legislate and regulate its maritime affairs and international commerce.

The Foraker Act extended the United States cabotage laws to Puerto Rico. The fact that these laws are still in effect in our country clearly represents one of the many colonial vestiges that we still carry on the dawn of the twenty first century. In a free trade world, of growing globalized market economies, Puerto Rico should be excluded from the scope of application of these cabotage laws. We have shown that the

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[59] H. Conc. R. 35, February 14, 1994.C.

[60] See *American Maritime Association vs. Blumenthal*, 590 F. 2d 1156, 1166-69 (D.C. Cir. 1978).

elimination of these cabotage laws would be in the best interest of both United States and Puerto Rico. Not doing so will mean to keep dragging with an obsolete policy that was established during the last two centuries for a developing American nation struggling to become a world power. There is no doubt that the cabotage laws are absolutely a colonial anachronism.