

THE U.S. COASTWISE TRADE AND CABOTAGE LAWS

AN OVERVIEW

By

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The American coastwise trade and cabotage laws have a well-earned reputation for being a regulatory thicket. This is a result of over two centuries of expanding, incremental protectionism, punctuated with numerous exceptions to remedy anomalies and to favor particular interests. Despite that, there are some general themes. In this paper we will review the principal concepts and themes, sample some rules that apply in common situations, and identify some activities in which non-citizen activity is either clearly permitted or forbidden. Some points of law are referred to without being discussed in detail as a means of aiding in issue-spotting. It should be noted at the outset that the statutes are complicated and subtle, agency interpretations can adapt and change just like the common law, and sometimes an innocuous term carries meaning provided by a history of agency practice.¹ This paper is a summary overview of a nuanced subject on which a book could be written. In each instance careful analysis and verification of the existence of current agency interpretations is recommended, and in all but the clearest cases obtaining an agency ruling is prudent.

As a matter of nomenclature, the "Jones Act" was the Merchant Marine Act, 1920, that revamped the U.S. shipping laws governing cabotage, ship mortgages, seamen's personal injury

¹ Coast Guard ruling letters are unpublished and must be requested under the Freedom of Information Act. Ruling letters published by the Bureau of Customs and Border Protection are available back to 1990 on the agency's website, in a word-searchable format, at <http://rulings.customs.gov>. Commercial services have internet accessible ruling libraries that extend back further than 1990, and the agency has precedents available in Washington, D.C.

claims, and more in the immediate aftermath of World War I. In common parlance, in the cabotage context the “Jones Act” has usually come to mean the cabotage laws in general, except for the fisheries laws.

I. CATEGORIES OF REGULATION

Three broad areas are encompassed in this field:

Foreign Transfers. The transfer of vessels, mortgages of and interests in or possession of them, or control over them are regulated by the Maritime Administration, applying what (until a recent recodification of the maritime statutes) was referred to as the Shipping Act, 1916. This agency is commonly referred to as “MarAd.” This regulatory regime is in addition to other statutes and regulations of general applicability concerning foreign exports, that regulate such things as acquisitions of companies, or substantial business assets, that license exports of vessels and property (including software) on vessels, and that regulate transactions with restricted foreign persons or countries, and the like. With respect to acquisitions, it should be borne in mind that when a vessel is owned by a single purpose entity, a simple vessel sale is an acquisition of all or substantially all of a company’s assets, and will probably be an acquisition for export control purposes as regulated under the National Security Act of 2007.²

Vessel Documentation. Determining the eligibility of shipowners and vessels for documentation under U.S. flag, and issuing documentation to them, is regulated by the Coast Guard, which performs this function at the National Vessel Documentation Center in Falling Waters, West Virginia. Cabotage is the regulation of whom, and what vessels, may engage in particular marine activities. The determination of who, and what vessels, are entitled to engage in particular activities is the province of the Coast Guard, which makes those determinations as part of the vessel documentation function. Thus, a qualified owner may document a vessel and have issued to it a trade endorsement for the coastwise trade, fisheries, recreational use, or the registry (a catch-all endorsement that vessels will have to engage in the foreign trade).

Particular Vessel Activities. Whether a particular activity is or is not in the coastwise trade is within the jurisdiction of the Bureau of Customs and Border Protection (“Customs”). Customs will refer people to the Coast Guard to determine whether they or their vessels may engage in the coastwise trade. Customs will answer a question such as whether a domestic vessel that lacks a coastwise trade endorsement, or a foreign vessel, may carry cargo from New York to Los Angeles, or whether a foreign crane barge may hoist an item within the United States. The Maritime Administration can also play a parallel role. For example, the Maritime Administration has a regulation that approves many charters of U.S. flag vessels to non-citizens without the need of seeking specific agency approval. This blanket regulatory approval does not apply to bareboat charters of vessels that will engage in the coastwise trade. Thus, the Maritime Administration will, in proper cases, and determine whether the contract in question is a bareboat charter, and whether the charterer is a U.S. citizen. Also, in the coastwise trade and the fisheries, where there is a seventy-five percent U.S. control requirement, a shipowner’s equity structure and financing or contractual arrangements can vest control in a non-citizen that will both adversely affect the vessel’s documentation, as regulated by the Coast Guard, or that can

² See, 50 U.S.C. §2170.

impermissibly transfer control over a vessel to a non-citizen. Such a determination is within the jurisdiction of the Maritime Administration.

The National Marine Fisheries Service regulates fishing and related activities under the Magnuson-Stevens Fishery Conservation Management Act.³ The Act asserts U.S. jurisdiction over fishing, attempting to catch fishery resources, as well as related activity in the portion of the 200 mile Exclusive Economic Zone outside of state boundaries, on the Continental Shelf, and over all anadromous species (such as salmon) that spawn in U.S. waters, throughout their migratory paths on the high seas except when in foreign countries.⁴ There can be overlapping state and federal regulatory jurisdiction.

The exploitation of mineral and other resources within the Exclusive Economic Zone and on the Continental Shelf is regulated under a statutes that are beyond the scope of this paper.

II. COASTWISE TRADE, FISHERIES AND COASTWISE POINTS

What is the coastwise trade? What is engaging in the fisheries? These are essential threshold questions, for unless one is contemplating engaging in the coastwise trade or the fisheries, an activity that is conducted by a vessel is not encompassed by the coastwise trade or fisheries laws. In brief, the threshold questions are what activities bring these laws into play, and what, generally, constitutes engaging in the fisheries; and what is a coastwise point? There is no statutory definition of coastwise trade. Instead, a multitude of specific statutes pose their own interpretive issues.

Coastwise Trade:

- Carriage of cargo
- Carriage of passengers
- Towing
- Vessel escort (a special case)
- Oil spill cleanup
- Dredging
- Salvage (a special case)

Fisheries:

- Catching, taking, planting, cultivating, harvesting, or attempting to do so, and actions in support of such activities
- Landing fish or fish products in the United States, wherever caught
- Processing, storing, and transporting (except in foreign commerce)

³ 16 U.S.C. §1801 *et. seq.* There is also a host of other fishery and natural resource regulations.

⁴ 16 U.S.C. §1802(15), 1811, and 1821(a).

For the purpose of vessel documentation, “fish” includes fish, shellfish, marine animals, pearls, shells, and marine vegetation. For the rest of this paper, we will refer to all of these as “fish.”⁵

Note that fish tendering – such as transporting fish as cargo – can be both coastwise trade and fisheries if the carriage is by vessel over a route that would constitute engaging in the coastwise trade. When a catcher vessel carries its own cargo of fish that it harvested, this is considered fishing and not coastwise trade.

Coastwise Points

For an activity to constitute coastwise trade, the activity must occur at or between coastwise points. These are:

- Points within the three nautical mile territorial sea around the United States. A vessel afloat within this zone is itself a coastwise point, so that, for example, lightering within this zone will constitute coastwise trade.
- 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 [*sic*] for, developing, or producing resources therefrom” are also coastwise points (and for various jurisdictional purposes the laws of the adjacent state applies to them).⁶ There are a variety of laws that apply to economic activity within the Exclusive Economic Zone or on the Outer Continental Shelf, which are laws of general applicability and not considered coastwise, fisheries, or cabotage laws, and which need to be consulted before engaging in such activities.
- The dumping of valueless material such as dredge spoils or garbage within the Exclusive Economic Zone is considered to be coastwise trade.⁷ This is anomalous because lightering cargo from shore to a freighter floating in the Exclusive Economic Zone outside the three-mile territorial limit is not coastwise trade. This part of the statutory scheme was adopted to protect the dredging and garbage disposal industries.
- There is a special statute applying the coastwise trade laws to the transport and incineration on the high seas of hazardous waste.⁸
- When the point in question is a U.S. territory or possession, there may be exemptions, or special rules that may apply.⁹ Because rail service does not yet exist for the Yukon River area, the coastwise trade statute for the carriage of cargo does not apply with respect to the transportation of cargo on the Yukon River.¹⁰

⁵ 46 U.S.C. §108. The nouns used in the various definitions of fishing, fisheries, fishing vessels, fish processing vessels, and fish tendering vessels vary somewhat from statute to statute. For the purpose of licensing and regulating “fishing,” the Magnuson-Stevens Fishery Conservation Management Act has a slightly different definition than the vessel documentation definition of engaging in the “fisheries.” 16 U.S.C. §1802(15).

⁶ 43 U.S.C. §1333(a).

⁷ 46 U.S.C. §55110.

⁸ 46 U.S.C. § 55105.

⁹ *E.g.*, 46 U.S.C. §§55101(b) and 55104.

¹⁰ 46 U.S.C. §55119.

The terminology of “coastwise point” is not used in the analysis of fishing, which is not a coastwise trade concept.

Eligible Vessels. As a general rule, to engage in the coastwise trade (but not salvage) a vessel must have been built in the United States.¹¹ Likewise, if a coastwise eligible vessel is later rebuilt, to retain its coastwise eligibility it must be rebuilt in the United States.¹² If it measures more than 200 gross tons under the international tonnage system, it must not have been sold to a foreign and must never have been placed under foreign registry.¹³ There are a number of particular statutory exceptions to this general rule,¹⁴ including, as discussed below, for salvage and tug escort (but not towing) vessels. The rule that applies to the fishing industry is generally the same, except that for most fishing industry vessels the prohibition on being sold or registered abroad and returning to U.S. flag does not apply.¹⁵ There are special rules that apply in some areas of the Western Pacific Ocean and U.S. territories or possessions there,¹⁶ and to vessels measuring less than five net tons.¹⁷ Also, as the fishing industry laws have become gradually more restrictive over the years, there are a number of vessels that were “grandfathered” under prior law as more restrictive statutes were adopted.

Eligible Owners. To take a corporate owner as an example, to document a vessel under U.S. flag, it must be owned by a corporation formed in the United States, which has U.S. citizens as its chief executive officer (by whatever title that person holds in fact), the chairman of the board of directors, and a supermajority of its board of directors under a statutory formula.¹⁸ Even if the stock is foreign-owned, the vessel may be documented under U.S. flag with a registry endorsement, that entitles it to engage in the foreign trade. This is casually referred to as a “documentation citizen.” U.S. stock ownership and control requirements apply for the coastwise trade and fisheries.¹⁹ To continue the example, to document a vessel in the coastwise trade a corporation must have seventy-five percent of its stock and controlling interest held by U.S. citizens.²⁰ If the seventy-five percent shareholder is itself a corporation, as a general rule, this second-tier corporation may have up to seventy-five percent of its shares held by non-citizens. That being said, if presented to them, the agencies will examine this type of structure on a substance over form basis to determine whether there has been a *de facto* transfer of an excessive percentage of control over the entity. By contrast, to document a fishing industry vessel, the “75 percent of the interest in the entity” must be “owned and controlled” by U.S. citizens “at each

¹¹ 46 U.S.C. §12112(a)(2)(A).

¹² 46 U.S.C. §12132(b).

¹³ 46 U.S.C. §12132(a).

¹⁴ For example, there are exceptions for condemned prizes of war, vessels forfeited to the U.S. government, or wrecked on U.S. coasts and rebuilt in the United States if the rebuilding is of sufficient cost, *see*, 46 U.S.C. §§12107 and 12112(a)(2)(B). There is a special rule for certain LNG carriers operating between Puerto Rico and other points in the United States, 46 U.S.C. §12120. Every year, the Coast Guard Authorization Act includes provisions that provide special legislative exemptions to particular vessels.

¹⁵ 46 U.S.C. §12113(a). Certain larger fishing industry vessels may not return to U.S. flag and be issued a fishery endorsement. 46 U.S.C. §12113(d)(2)(A)(ii).

¹⁶ 46 U.S.C. §§12113(c)(3) and 12116.

¹⁷ Customs Ruling Letter HQ 111150 (July 25, 1990). *See*, text *supra* note 32.

¹⁸ 46 U.S.C. §12103(b)(4).

¹⁹ 46 U.S.C. §50501 (coastwise trade); 46 U.S.C. §12113(c)(fisheries).

²⁰ 46 U.S.C. §§50501 and 55102(b)(1).

tier of ownership and in the aggregate.”²¹ Under the coastwise trade laws, the participation of publicly traded companies makes this determination difficult, while in the fishing industry establishing the eligibility of public companies is extremely challenging. One fairly recent exception to the seventy-five percent ownership and control test in the coastwise trade context is a statute that allows a U.S., foreign-owned or controlled leasing company, bank or financial institution to be the passive owner of a coastwise vessel (or beneficiary of an ownership trust that owns a vessel) if the vessel is under a demise charter. Unless government approval is obtained, the charter must be of at least three years in duration. No charterer may be affiliated with the owner or trust beneficiary. The owner of the vessel must be a “documentation citizen” as described above, and other requirements apply by regulation nor statute.²² We have used a corporation as an example. There are special rules that interpret the U.S. ownership and control requirements for other entities and purposes.²³

The Bowaters Statute. A special statute was adopted about fifty years ago partly at the behest of a British firm that acquired a newsprint factory in the Midwest that used its own tug and barge to haul newsprint to its U.S. customers. The statute allows a company engaged primarily in mining or manufacturing in the United States that satisfies a number of U.S. presence criteria to carry its own proprietary cargo for itself and a parent or subsidiary. The size of self-propelled vessels that utilize this statute is limited, and the book value of the vessels owned by the corporation cannot exceed ten percent of the book value of all of the corporation’s assets.²⁴ The statute and regulations (administered by the Coast Guard and the Maritime Administration) have a number of provisions that are designed to prevent the use of this statute to allow wholesale evasions of the coastwise trade laws.²⁵ Despite this, an expansive interpretation of what constitutes manufacturing has meant that numerous foreign-owned fish processing and marine construction companies have availed themselves of this statute.

Eligible Operators. As a practical matter, the same rules apply to operators of vessels as to owners.²⁶ The Maritime Administration has the authority to approve a bareboat charter of a coastwise eligible vessel to a non-citizen for operation in the coastwise trade, but as a matter of policy it will not do so. Charters of fishing vessels to non-citizens or to entities not controlled by U.S. citizens as required for fishing vessel ownership is prohibited.²⁷ Time charters of fish processing vessels or other support vessels are permitted when not engaged in fishing.²⁸

Joint Ventures and General Partnerships. A joint venture or general partnership is not considered to be an entity for the purpose of applying the cabotage laws. This poses a special challenge in the marine construction business, because it is common for construction companies

²¹ 46 U.S.C. § 12113(c)(2). There are some exemptions to the 75 percent test for fishing activity in the Western Pacific.

²² 46 U.S.C. §12119, 46 C.F.R. §68.60.

²³ E.g., 46 U.S.C. §§12103(a), 12113(c), 50501; 46 C.F.R. Part 67, Subpart C; 46 C.F.R. §221.3; 46 C.F.R. Part 355 and 46 C.F.R. §356.3.

²⁴ 46 U.S.C. §12118.

²⁵ 46 U.S.C. §12118(c)(2), 46 C.F.R. Part 68, Subpart A, and 46 C.F.R. §221.13(b).

²⁶ This result in the coastwise trade is reached by a combination of 46 U.S.C. §§56101(a)(1)(A) and 50501(a).

²⁷ 46 U.S.C. §12113(b)(2).

²⁸ 46 C.F.R. §356.39(b). Copies of permitted charters must be reviewed by the Maritime Administration before they are executed.

to form joint ventures for large projects. Suppose the project is the construction of a marine terminal and three construction companies form a customary joint venture to bid on the job. Suppose further that the joint venture plans to bareboat charter tugs and barges for the job, which will engage in coastwise trade to and from and on the job site. May up to a twenty-five percent joint venture interest be held by a foreign construction company? No. Each joint venturer must be eligible in its own right to own and operate a coastwise vessel. When one considers the wide array of vessels, activities, equipment, and cargoes that are involved on a marine construction project, the situation poses significant issues. These often require restructuring operations and obtaining rulings from applicable agencies. It is wise to grapple with these issues months in advance of the deadline for submitting a bid on a project.

Flag. Is documentation under U.S. flag required? A vessel must measure at least five net tons in order to be documented. If it is that large, it must be documented in order to engage in the coastwise trade or the fisheries,²⁹ except barges eligible to engage in the coastwise trade need not be documented if they operate in rivers, harbors, lakes (except the Great Lakes), canals and inland waters.³⁰ If a vessel qualifies to engage in the coastwise trade but for its size, it may engage in the coastwise trade if it is owned by a qualified citizen.³¹ The vessel may need to obtain a state watercraft number. A fishing vessel that is too small to be documented may operate in the fisheries and, according to Customs' agency practice, may do so if it is foreign built and owned by a U.S. citizen or resident and in compliance with applicable fishing regulations (which practically may require obtaining a state watercraft number).³²

III. COMMON SITUATIONS

A Carriage of Cargo or "Merchandise"

The threshold question here is whether the carriage involves a move of an item of "merchandise" from one coastwise point to another when any part of the journey by sea or by land and sea occurs by vessel. If so, the movement is coastwise trade. Merchandise is essentially any object, whether valuable or not, whether privately owned or owned by the U.S. Government or by a state government or subdivision thereof, other than the carrying vessel's own equipment and consumable supplies.³³ As a statutory anomaly, the disposal of valueless material in the Exclusive Economic Zone outside the three-mile territorial sea is considered to be coastwise trade, whereas the shipment of valuable merchandise from a coastwise point to, say, a vessel anchored in the Exclusive Economic Zone outside the three-mile limit is not considered to be coastwise trade.³⁴ There are special rules for LASH barges, transporting empty cargo containers, and cargo handling equipment,³⁵ as well as platform jackets and related equipment between coastwise points and installations on the Outer Continental Shelf.³⁶ Spilled oil is

²⁹ 46 U.S.C. §§12102(a) and 12151(4), 46 C.F.R. §§67.7, 323, and 325.

³⁰ 46 U.S.C. §12102(c). The Coast Guard's regulation substitutes the much narrower "internal waters or canals of any State" for the inland waters and canals referred to in the statute.

³¹ 46 C.F.R. §4.80(a)(2).

³² Customs Ruling Letter HQ 111150 (July 25, 1990).

³³ C.S.D. 79-331, 13 Cust. B & Dec. 1496, 1498 (1979).

³⁴ 46 U.S.C. §55110.

³⁵ 46 U.S.C. §§55106 and 55107, 19 C.F.R. §4.93.

³⁶ 46 U.S.C. §55108.

merchandise, which is why there is a special statute that allows foreign oil spill cleanup vessels to be used in the United States when a particular spill overwhelms the available capacity.³⁷

Customs applies a literal rule: the merchandise must be loaded at coastwise point A and offloaded at coastwise point B for coastwise trade to have occurred. In a celebrated case, an oil rig had a draft that was too deep for the rig to be repaired at a shipyard. The rig was loaded onto a foreign submersible barge at coastwise point A. The barge was raised, and towed with the rig on board, to the shipyard at coastwise point B, where it was repaired while it remained on the deck of the barge. When the repairs were completed, the barge returned to coastwise point A, where the barge was submerged and the rig was floated off. Customs approved this operation because the cargo was loaded and unloaded at the same place. This ruling was challenged in court after the operation was completed in order to deny it precedential value. The lower court accepted the logical argument that, in a real sense, the rig was transported to the shipyard as a destination, because the work that was done there was the object of the voyage. In a very realistic sense, it was the true destination of the voyage. The Court of Appeals reversed, deciding that the challenge to the ruling was untimely, but also leaving no doubt that in its view the Customs interpretation was a rational one and that it was reasonable to defer to the agency's determination.³⁸

Multimodal Application. The statute applies to multimodal transportation, if "any part of the transportation" between coastwise points is "by water, or by land and water."³⁹ The movement by ship of a cargo of frozen fish from Anchorage to Seattle is coastwise trade. So too is the movement of the fish by foreign vessel from Anchorage to Vancouver, where the cargo continues its trip overland to Seattle by truck.

Canadian Rail Lines. Suppose the transportation between U.S. points is in part over Canadian rail lines. There is an exception for rail traffic that transits through Canada over "through routes in part over Canadian rail lines and connecting water facilities if the routes are recognized by the Surface Transportation Board and rate tariffs for the route have been filed with the Board."⁴⁰ Now however, most, if not all, rail traffic in the United States is unregulated as to rates. Did that impliedly repeal this exception to the coastwise trade statute? To the contrary, Customs has repeatedly ruled that the exception will apply despite the abolition of the tariff for the commodity in question.⁴¹ There are other very specific statutes that apply to railroads with maritime components of their routes that touch the United States.⁴²

New and Different Product. By contrast, if the cargo – let us say a cargo of steel ingots – moves by foreign vessel from Cleveland to Toronto, and, in Toronto, the ingots are reheated and manufactured into nuts and bolts, is the later shipment of the nuts and bolts to the United States the last part of a coastwise movement of the steel from the U.S. steel mill to another point in the United States? It is not, because, in Toronto, the cargo was turned into a "new and different

³⁷ 46 U.S.C. §55113.

³⁸ *Shipbuilders Council of America v. U.S.*, 868 F.2d 452 (D.C. Cir. 1989).

³⁹ 46 U.S.C. §55102(b).

⁴⁰ 46 U.S.C. §55116.

⁴¹ *E.g.*, Customs Ruling Letter HQ 116185 (March 28, 2005).

⁴² 46 U.S.C. §55117 and 55118.

product.”⁴³ There are a considerable number of agency precedents on what degree of transformation is sufficient to create a new and different product. If it is a new and different product, one or both legs of the transportation may be on foreign flag vessels.

Commingled Cargo. When bulk cargo of U.S. origin is commingled in a tank or grain elevator in a foreign country or on a non-coastwise qualified vessel with foreign origin cargo, how does one segregate the cargo if some of this cargo has moved by vessel and it eventually needs to be transshipped back to the United States? There is agency common law on this topic that in general takes an approach analogous to a “first in-first out” approach. An amount of cargo that is equal to the cargo that was exported from the United States on a non-coastwise vessel must first be sold abroad, and then the remaining cargo can be returned to the United States.⁴⁴ It is wise to obtain specific agency guidance in this area.

Vessel Movements: Cranes and the Like. As a general rule, for coastwise transportation to occur, there must be a movement of merchandise that is accomplished by the movement of a vessel. As noted above in the example of the transportation of an oil rig to a shipyard, Customs asks this question: Was the property loaded at one coastwise point, and was it unloaded at another coastwise point? This method provides an answer to a common question: may a foreign crane barge that is anchored or moored in a stationary position perform crange services? The answer is “yes” if, while the merchandise is hanging from the crane, the merchandise is moved by the motion of the crane or its arm, but not the barge itself. (In this situation, *no* movement of the barge is permitted other than the jostling that occurs from the undulation of the water surface due to waves, or the changing center of gravity of the barge. Otherwise, Customs has said that they recognize *no de minimis* principle with respect to small vessel movements. Similarly, a stationary barge may be used as a storage platform or a dormitory, however, the storage of fish constitutes engaging in the fisheries,⁴⁵ which would bring into play the fisheries eligibility rules discussed below.)

Pile Driving. The simple act of pile driving while the pile driving vessel is anchored or moored is not considered coastwise trade,⁴⁶ but the movement of the pilings to be driven is, even around the job site.

Cable Laying/Pipe Laying. Although in principle it is a considerable anomaly, Customs has long considered cable-laying⁴⁷ and pipe-laying⁴⁸ to be non-coastwise activity, even if the beginning and ending points of the operation are coastwise points. That said, however, there are complications: dredging a trench into which the pipe or cable is laid constitutes dredging under most technologies that are employed (but not all), and as a result, careful analysis of agency precedents is required.⁴⁹

⁴³ 19 C.F.R. §4.80b(a).

⁴⁴ *E.g.*, Customs Ruling Letter HQ 114172 (June 18, 1998).

⁴⁵ 46 U.S.C. §108.

⁴⁶ Customs Ruling Letter HQ 111412, (Nov. 28, 1990).

⁴⁷ Customs Ruling Letter HQ 115333, (April 27, 2003).

⁴⁸ Customs Ruling Letter HQ 115431, (Sept. 4, 2001).

⁴⁹ *See, e.g.*, Customs Ruling Letter HQ 109910, (Jan. 26, 1989).

Merchandise Versus Ship's Gear. In complicated operations in such areas as marine construction, underwater exploration, and oilfield services, there can be gray areas about what constitutes a vessel's equipment rather than merchandise. It is not necessary for ship's gear to be physically attached to the vessel; but rather, it must existentially be a part of the equipment that enables it to function for its intended purpose. There is room for interpretation when the vessel is a flat deck barge that will be used for a period of time on a marine construction site or in oil fields. A reasonable case can be made in principle that any item of equipment that is used on board or by the vessel is perforce its equipment.⁵⁰ In cases such as this, obtaining guidance from the agency is advisable.

Multifunction Vessels. Often, especially in marine construction, a vessel, such as a crane barge, will perform multiple functions. Each function that it performs must be analyzed separately under the cabotage laws. Simply storing items or performing crane hoists while moored is not coastwise trade (although storing fish requires a fishery endorsement). Being moved around a jobsite, and offloading equipment and materials at various locations on the site turns the activity into coastwise trade. Simple crane hoists are analyzed one way, but if a clamshell or suction device is used, the barge would be a dredge if used to remove seabed material. The examples of this are as varied as human activity on the water.

Emergencies. There is no emergency exception to these rules, as discussed further in "Waivers" below.

B. Passengers

The statute could not be more simply stated: "a vessel may not transport passengers between ports or places in the United States to which the coastwise laws apply, either directly or via a foreign port" except on a coastwise qualified vessel.⁵¹ The variety of itineraries makes this a problematical statute in practice, however. For example, what about a foreign flag vessel that takes a passenger on board in New York for a round-the-world cruise, and drops the passenger off in San Francisco many months later? A century ago, the U.S. Attorney General determined that this was not a voyage intended to transport the passenger from New York to San Francisco, but was a round-the-world cruise, and held that the itinerary was permitted.⁵²

To discuss this topic, we need to keep some terms in mind. Customs refers to "embarking" (at the beginning of a voyage), "disembarking" (at the conclusion of a voyage) and "temporarily going ashore" (such as for a day excursion). Customs distinguishes between "nearby" and "distant" foreign ports. A "nearby foreign port" is one in North America, Central America, the Bermuda Islands, or the West Indies (including the Bahama Islands, but not the Leeward Islands of the Netherlands Antilles). All other foreign ports are "distant foreign

⁵⁰ Customs Ruling Letter HQ 112905, (Nov. 3, 1993). In a conversation between the author and a Customs official, the official stated that whether a modular housing unit lashed to an oil rig was vessel's equipment was a question that he would want to consider before responding.

⁵¹ 46 U.S.C. §55103(a).

⁵² 28 O.A.G. 204 (Feb. 26, 1910).

ports.”⁵³ With those definitions in mind, Customs has established some broad rules for the carriage of passengers by regulation and agency practice:

- On a voyage from a coastwise point of embarkation to another coastwise point of disembarkation with no foreign stops, or with a stop at a nearby foreign port, the vessel must be eligible to engage in the coastwise trade. (If a passenger disembarks at the nearby foreign port, there has been no violation, because as to that passenger, it was a foreign voyage from the United States to the nearby foreign port.)
- A foreign vessel may carry a passenger on a voyage from a coastwise point of embarkation to another coastwise point of disembarkation if it touches at a distant foreign port during the voyage, and the passenger in question is on board the vessel when it touches at the distant foreign port.⁵⁴ This is the regulatory implementation of the Attorney General’s opinion referred to above.
- A voyage from one coastwise point back to the same coastwise point (a “voyage to nowhere”) is permitted on a foreign flag vessel if (a) the vessel itself does not touch at any intermediate U.S. port and the passengers do not temporarily leave the vessel at another coastwise point,⁵⁵ (b) the vessel crosses the international boundary of the United States,⁵⁶ and (c) the passengers do not engage in fishing during the voyage.⁵⁷ The fishing rule has been expressed in terms of charter fishing operations. Now that Customs has extended “passenger” status to business entertainment guests (see below), it remains to be seen whether Customs will apply the no-fishing rule to voyages to nowhere with these guests aboard. The logic of the ruling suggests that they might.

It follows that if one or both ends of the voyage are foreign ports (whether nearby or distant), the voyage is not a coastwise voyage. Therefore, a foreign vessel may be used, and its passengers may temporarily leave the vessel at U.S. ports of call.⁵⁸ They may also leave the vessel at one U.S. port, travel overland to another U.S. port where they rejoin the vessel, and then carry on to the final destination with the vessel.⁵⁹ Customs has also approved a voyage from one U.S. port and back to that port, with stops at a nearby foreign port and a second U.S. port, where passengers may temporarily leave the vessel before rejoining it for the return voyage to the place where they originally boarded.⁶⁰

The routing combinations are almost infinite, so it is usually prudent to obtain rulings in all but the clearest cases. Customs is actively reconsidering its approach to some of the passenger routing issues.⁶¹

⁵³ 19 C.F.R. §4.80a(a).

⁵⁴ 19 C.F.R. §4.80a(b)(3).

⁵⁵ Customs Ruling Letter HQ 113379, (March 23, 1995). Some rulings have referred only to passengers temporarily leaving the vessel at an intermediate coastwise point, without stating that the vessel itself may not stop if no passengers leave the vessel, e.g. Customs Ruling Letter HQ 108389, (June 11, 1986), but other rulings, such as the first one cited in this footnote, say that the vessel itself may not touch another coastwise point.

⁵⁶ Customs Ruling Letter HQ 113379, (March 23, 1995).

⁵⁷ Customs Ruling Letter HQ 112171, (May 20, 1992).

⁵⁸ Customs Ruling Letter HQ 116164, (April 8, 2004).

⁵⁹ Customs Ruling Letter HQ 114831, (Oct. 14, 1999).

⁶⁰ Customs Ruling Letter HQ 115106, (Sept. 27, 2000).

⁶¹ 50 Cust. Bull. & Dec. 6 (Dec. 5, 2007).

What is a passenger? A passenger is “any person carried on a vessel who is not connected with the operation of such vessel, her navigation, ownership or business.”⁶² Thus, for example, workmen, technicians or observers who ride with the vessel in order to inspect or repair the vessel are not passengers.⁶³ Customs has ruled that scientists who work on an oceanographic research vessel are not passengers (and their equipment is not cargo),⁶⁴ and that students on floating sailing, seamanship or oceanographic schools are not passengers.⁶⁵ By statute, oceanographic research and sailing instruction are not considered trade or commerce.⁶⁶ There is a plethora of agency rulings considering particular individuals and their status as passengers or not.

A Cautionary Note about Yachts. The use of a yacht for pleasure is not coastwise trade, which is why a foreign yacht can sail in the United States and why a foreign national may bareboat charter a U.S. flag yacht and operate it in the United States for his or her own pleasure, carrying friends and family aboard. By contrast, a time charter of a yacht for the pleasure of the charterer and the charterer’s guests is considered to be the carriage of passengers in the coastwise trade. It follows that, for example, if a Canadian citizen time charters a Canadian yacht and journeys to U.S. waters, the rules referred to above about embarkation and disembarkation will apply, for the yacht is carrying passengers for hire in the United States.

A further complication for yachts is that Customs considers most forms of what people would think of as unpaid business entertainment to be the carriage of a passenger.⁶⁷ The expectation of good will that might accrue to a businessman or professional who carries a potential client or a customer is enough for Customs to consider the guest to be a passenger. Likewise, if a CEO has employees on board who were the salespeople of the month or the like, such persons “are transported on a vessel in connection with some aspect of a vessel owner’s business interests unrelated to the business of the vessel itself” and are thus passengers.⁶⁸ The burden of proof is on the owner to establish that the guest is a *bona fide* guest.⁶⁹ The use of a non-coastwise qualified yacht for fund raisers, for example, is open to question. This means that when a foreign owner of a yacht invites customers and clients aboard for a voyage, and journeys to the United States, the embarkation and disembarkation rules above will apply. When this interpretation of the law was published by Customs in 2002 it caused quite a bit of surprise. How can a U.S. businessman who owns a foreign-built yacht distinguish between his business associates and friends? Conservative practice would indicate that seeking an agency determination would be prudent. That said, your author knows of no enforcement actions that have been taken under this interpretation. The new interpretation is widely honored in the breach. Despite this, if there were an accident that was investigated by the Coast Guard and the status of the guests became apparent, or something gave rise to a Customs inspector’s suspicions at a border, there could be problems.

⁶² 19 C.F.R. §4.50(b).

⁶³ Customs Ruling Letter HQ H007563, (Feb. 28, 2007).

⁶⁴ Customs Ruling Letter HQ 111949, (Dec. 24, 1991).

⁶⁵ Customs Ruling Letter HQ 115361, (June 15, 2001).

⁶⁶ 46 U.S.C. §§50503 and 50504.

⁶⁷ 36 Cust. Bull. & Dec. 50 (June 5, 2002).

⁶⁸ *id.*, at 51.

⁶⁹ *id.*, at 52-3.

C. Towing

Towing vessels between coastwise points in general requires a coastwise eligible tug.⁷⁰ Specifically, since the coastwise trade laws apply to the entire 200 mile Exclusive Economic Zone for the dumping of dredge spoils and other valueless material, tugs that tow disposal barges for these cargoes must be eligible to engage in the coastwise trade.⁷¹ A foreign tug may not "cleanse" the itinerary by towing a barge from coastwise point A to coastwise point B by making a stop in a foreign country.

A voyage between two countries is permitted. A triangular route is permitted involving one foreign and two U.S. points, with conditions. For example, a foreign tug and barge with cargo aboard may proceed from Halifax to Boston, where the cargo is offloaded. The flotilla may then proceed to New York, where a return cargo may be loaded bound for Halifax or another foreign destination. Not surprisingly, the barge may not load cargo in Boston that is offloaded in New York. Cargo loaded in Halifax may even be offloaded in Boston and New York so long as no cargo loaded in Boston is offloaded in New York.⁷² The catch is, for the entire route, *the tug may not disconnect from the barge.*⁷³ Disconnecting for even a moment breaks the voyage, and the foreign tug will be deemed to have engaged in domestic towage of a barge from Boston to New York.

There is an exception that allows foreign-built or otherwise coastwise ineligible tugs to assist a vessel in distress.⁷⁴ Vessel escort, as opposed to towing, may be performed by a U.S. flag vessel that is not eligible for the coastwise trade, whether by reason of its ownership and control by non-citizens, but even this may be done by any vessel to escort a vessel in distress.⁷⁵ The non-coastwise eligible escort vessel may not tow the vessel it escorts, except in a distress situation.⁷⁶

D. Dredging

Dredging is coastwise trade.⁷⁷ This is expansively interpreted. Dredge spoils are merchandise, so their transportation must follow the coastwise trade rules.⁷⁸ As noted above in the coastwise points discussion, valueless material including dredge spoils may not be transported anywhere inside the 200 mile Exclusive Economic Zone on foreign vessels. Pumping dredge spoils through a pump on a stationary barge and then through a hose to a disposal area is not coastwise trade because the movement of the spoils is not accomplished by the movement of a vessel.⁷⁹

⁷⁰ 46 U.S.C. §55111(b)(1) and (2).

⁷¹ 46 U.S.C. §55111(b)(3).

⁷² Customs Ruling Letter HQ 226964, (May 17, 1996).

⁷³ Customs Ruling Letter HQ 113092, (Dec. 6, 1994).

⁷⁴ 46 U.S.C. §55111(a).

⁷⁵ 46 U.S.C. §55112.

⁷⁶ 46 U.S.C. §§55111(a) and 55112(c).

⁷⁷ 46 U.S.C. §55109.

⁷⁸ 46 U.S.C. §§55102(a)(2) and 55110.

⁷⁹ Customs Ruling Letter HQ 106913, (Sept. 17, 1984). C.S.D. 81-46 (Aug. 8, 1980).

There is a limited exception for dredging for gold in Alaska.⁸⁰ This may be done by a U.S. flag vessel owned by a documentation citizen (as that concept is discussed under “Eligible Owners” above).

E. Salvage

Strictly speaking, salvage is not coastwise trade, because although a U.S. flag vessel is required to engage in salvage in the United States, a registry endorsement rather than a coastwise trade endorsement on its certificate of documentation is sufficient, meaning that the shipowner can be foreign-owned and controlled.⁸¹ The requirement can be waived if no other vessel is available.⁸² A regulation states that a state numbered motorboat owned by U.S. citizens may also engage in salvage.⁸³

Under a treaty with Great Britain, Canadian vessels may engage in salvage operations and incidental towing in several specified areas in the Great Lakes and St. Lawrence River region, and within thirty miles of the Canada-U.S. border on the Atlantic and Pacific Coasts.⁸⁴ There is a similar treaty with Mexico.⁸⁵

Canadian vessels and wrecking equipment may “give aid to Canadian or other vessels and property wrecked disabled, or in distress in the waters of the United States contiguous to Canada, including (1) the canal and improvement of the waters between Lake Erie and Lake Huron; and (2) the Saint Marys River and canal.”⁸⁶ This right expires when the President determines that Canada has withdrawn a reciprocal right for U.S. vessels.

Since salvage does not require a coastwise trade endorsement, a salvage vessel need not be built in the United States. It may not engage in coastwise trade, however, with the result that a foreign built salvage vessel will find the range of activities it may engage in to be very limiting to its economic viability. For example, it may not engage in towing and it must be cautious about carrying property to the salvage site that would not be used by the salvage vessel. This activity this would risk a finding of engaging in the carriage of merchandise.

⁸⁰ 46 U.S.C. §55109(b).

⁸¹ 46 U.S.C. §80104(a). The application of the statute to an island state, territory or possession is perhaps open to interpretation, as the statute does not apply to Guam, Customs Ruling Letter HQ 115381, (June 15, 2001). In analyzing this, it should not be forgotten that there is a definition of “United States” at 46 U.S.C. §114.

⁸² 46 U.S.C. §80104(b).

⁸³ 19 C.F.R. §4.97(a). This is inconsistent with the literal terms of 46 U.S.C. §80104, even though it is sound in policy.

⁸⁴ 46 U.S.C. §80104(c)(1). Article II of the Treaty between the United States and Great Britain concerning reciprocal rights for United States and Canada in the conveyance of prisoners and wrecking and salvage, May 18, 1908 (35 Stat. 2036). For a ruling concerning the use of a Canadian salvage vessel in the Pacific Northwest, *see*, Customs Ruling Letter HQ 104946, (Jan. 7, 1981).

⁸⁵ 46 U.S.C. §80104(c)(2).

⁸⁶ 46 U.S.C. §80105(a).

F. Miscellaneous Canadian Vessel Provisions

When domestic U.S. vessel service is lacking, the Federal government has the discretion to approve Canadian ferry service between Rochester and Alexandria, New York, and ferry service in Southeast Alaska, and ferry and cargo service to Hyder, Alaska.⁸⁷ The statute is phrased with the words "until" service is established or available, suggesting that, literally, if there ever was service at a time after the statutes were adopted that has since been suspended, there is no remaining authority to allow service to be established.

IV. FISHING INDUSTRY ACTIVITY

The fisheries laws are not coastwise trade laws as such. There are two broad categories of legal regimes. The vessel documentation laws determine who and what vessels may engage in particular fishing industry activities *under U.S. flag*. The second regulates fishing industry activity and regulates when foreign fishing is permitted within the Exclusive Economic Zone (which is essentially never). We will only briefly summarize these complicated regulatory regimes.

As noted in Part I of this paper, there are special rules about who is eligible to own, operate, and document fishing industry vessels. For vessels under U.S. flag that measure 100 feet in length or greater, the ownership of the vessel and its related control and financing arrangements, and long term operating contracts, must be reviewed and approved by the Maritime Administration for a determination of whether there is impermissible foreign control over the vessel.⁸⁸ The financing of the vessels by foreign lenders is even regulated.⁸⁹ The chartering of fishing vessels to non-citizens is prohibited,⁹⁰ although this does not prohibit time charters of fish processing vessels or other support vessels when not engaged in fishing.⁹¹

Fishing and related activities in the Exclusive Economic Zone beyond state waters is regulated by the National Marine Fisheries Service, under the Magnuson-Stevens Fishery Conservation Management Act which, with its complex regulations,⁹² regulate the amount of each particular species that may be caught in each various areas. The Act asserts jurisdiction over fishing and related activity over the Continental Shelf, and pertaining to anadromous species (such as salmon) that have spawned in the United States, along their entire high seas migratory itinerary, except inside foreign countries.⁹³ There are a wide variety of other statutes that regulate fishing and protect marine mammals and the like. States have regulatory jurisdiction in state waters inside the three-mile territorial limit.

As a general rule, a foreign vessel may not offload in the United States its catch, or the catch of another foreign flag fishing vessel, including such fish that has undergone processing,

⁸⁷ 46 U.S.C. §55121.

⁸⁸ 46 U.S.C. §12113(c).

⁸⁹ 46 U.S.C. §31322(a)(4).

⁹⁰ 46 U.S.C. §12113(b)(2).

⁹¹ 46 C.F.R. §356.39(b). Copies of permitted charters must be reviewed by the Maritime Administration before they are executed.

⁹² 50 C.F.R. Parts 600 through 697.

⁹³ 16 U.S.C. §§1802(15), 1811, and 1821.

however the Halibut Fishing Vessels Convention between Canada and the United States permits some landings by Canadian vessels⁹⁴

V. AGENCY RULING LETTERS

Whenever there is any doubt about one's situation, it is wise to obtain an agency ruling. They are not immune from challenge from interested third parties. Courts tend to give a fair amount of deference to the agencies' determinations.⁹⁵ Also, agencies will sometimes take steps to defend their rulings in court. On rare occasions, Customs will publish a proposal to revoke rulings on a point when it decides to make a change in its ruling practice. In fact, this was how Customs announced its change in policy regarding business entertainment guests on yachts.⁹⁶

VI. WAIVERS

Other than some specific geographic exceptions, such as those discussed above, there are only two grounds for waivers of the coastwise trade laws: national security and the small vessel waiver program.

The coastwise trade laws are waived at the request of the Secretary of Defense under 46 U.S.C. §501. This is rarely invoked. The last time was during the aftermath of Hurricane Katrina, when many tugs and barges were grounded and marine transportation was urgently needed. This was very controversial in the domestic maritime community, because with the frequency with which the government declares national emergencies for fairly routine natural occurrences, there was a concern that this would provide a precedent for frequent use of these waivers.

The second basis for a waiver is the small vessel waiver program administered by the Maritime Administration. Under this program, a coastwise qualified owner of a passenger vessel that is at least three years old that was not rebuilt outside the United States within the previous three years, and that will carry not more than 12 passengers may apply for a waiver to permit it to carry passengers in a particular area.⁹⁷ The Maritime Administration will publish the application in the Federal Register, conduct a field investigation, consider public comments, and grant the waiver if it determines that the domestic shipbuilding industry and passenger operators will not be adversely affected. Dozens of waivers have been granted.

Suppose a passenger who embarks on a foreign flag vessel at a coastwise point has an appendicitis attack, and disembarks on an emergency basis at another coastwise point? There is no emergency exception. Your author has been advised by a Customs official that when passengers cite an emergency reason to leave foreign cruise ships, the cruise lines routinely charge them the statutory \$300 penalty and remit that to Customs. If Customs believes that there was a genuine emergency, on request, the agency will often remit the penalty.

⁹⁴ 46 U.S.C. §55114, 19 C.F.R. §4.96.

⁹⁵ See, note 8, *supra*.

⁹⁶ See, note 67, *supra*.

⁹⁷ 46 U.S.C. §12121.

VII. PENALTIES

The penalties for violating the cabotage, fisheries, and vessel documentation coastwise trade laws are severe. Depending on the violation, they can include fines, forfeiture of the vessel, and forfeiture of the cargo or illegally caught fish. Imprisonment should not be ruled out, although your author is unaware of any incidents of imprisonment.

VIII. A NOTE ON IMPORTATION

There is recognition of a right of free passage in U.S. law. Yachts that intend to sail in U.S. waters can obtain a cruising permit from Customs that allows it to move about the United States with reduced Customs formalities if the yacht is registered in a country that offers a reciprocal privilege to U.S. flag yachts.⁹⁸ Bringing a yacht to the United States and listing it for sale, or offer it in the United States on charter are dutiable imports.⁹⁹ As a general rule, commercial vessels are deemed to be intangible assets for purposes of the U.S. tariff, and are thus non-dutiable.

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⁹⁸ 46 C.F.R. §4.94.

⁹⁹ 19 C.F.R. §4.94a.



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