

# BENEDICT'S MARITIME BULLETIN

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## THE SOUTH CHINA SEA: CHINA'S MARE NOSTRUM?

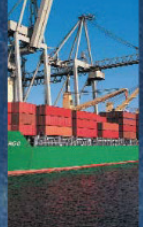
By Mino Daryanani\*

The South China Sea (SCS) comprising an area from the Karimata and Malacca Straits to the Strait of Taiwan is amongst the world's most important maritime trade routes. The SCS connects the Indian Ocean to the Pacific Ocean via three narrow Straits: *Malacca, Lombok and Sunda*. It is the fifth largest body of water in the world, accounting for almost five trillion dollars of maritime trade and a third of global maritime traffic. Crude oil forms the largest part of the maritime trade passing through the Indo-Pacific. The SCS route is a crucial sea lane of communication (SLOC). Oil tankers and ships heading towards East Asia travel the shortest route through these three Straits. The deep waters of the South China Basin, between the disputed **Spratly** and **Paracel** Islands, are the most direct shipping lane between Northeast Asia's industrial hubs and Europe via the Middle East. The region is also important for its significant and abundant resources.

The SCS region consists of five countries in addition to China and Taiwan: Brunei, Indonesia, Malaysia, the Philippines and Vietnam. All the countries claim overlapping Exclusive Economic Zones (EEZ) and maritime rights within the region. The **Spratly** and **Paracel** groups of islands lie beyond China's 200 nautical mile EEZ' parts fall within the maritime jurisdictions of Malaysia, Vietnam and the Philippines. China regards the SCS as its dominion. China's creation of seven man-made islands in the SCS, besides further militarizing the region (detailed below), alters geography to bolster and fortify its untenable claims of sovereignty.

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## MANAGING EDITOR'S INTRODUCTORY NOTE

Our first offering in this edition is another scholarly article by Minoo Daryanani, a maritime lawyer from IMO IMLI, Malta currently based in Kolkata, India. Minoo has submitted articles in our last few editions and here reviews the increasingly expansive movements by China with respect to the South China Sea, Taiwan, its strategy to unite dozens of economies of Eurasia and East Africa through a series of infrastructure investments, and responses thereto.

Our next article is by Joseph B. Staph on the Richardson Rule based on the decision of the United States Supreme Court in *Richardson v. Harmon*, 222 U.S. 96, 116 (1911). This decision impliedly supports the conclusion that the Limitation Act may provide an independent basis of admiralty jurisdiction. Joseph analyzes the decisions addressing this Rule and its relationship to the Admiralty Extension Act, and concludes that the Richardson Rule provides that the Limitation Act does confer an independent basis of admiralty jurisdiction over claims for non-maritime torts.

We follow with our usual column "Window on Washington" by Bryant Gardner, reviewing the House and Senate Coast Guard and Maritime Administration Authorization Acts containing provisions likely to be impactful upon the maritime industry. After a detailed review of the major provisions in each act, he concludes that certain of the provisions will likely make it into the final law, but that other provisions may not make it into law this year, or ever. He counsels that "Concerned stakeholders are well-advised to watch closely the development of this maritime legislation impacting their interests."

Our next article is by James J. Levantino discussing a proposed new international registry based in the U.S. Virgin Islands. Under this plan, foreign-built, foreign-owned, foreign-controlled, and foreign-manned vessels would be entitled to sail the seas under a United States flag. James reviews the legal and constitutional impediments to the implementation of this registry and concludes that "the Plan is incompatible with the federal laws granting certain limited powers to the government of the Virgin Islands. The Plan is a baseless and unprecedented attack on the Constitution of the United States and the powers of the federal government."

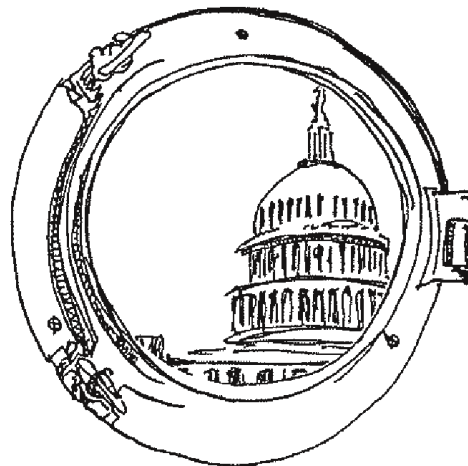
We conclude with the Recent Development case summaries. We are grateful to all those who take the time and effort to bring us these summaries of developments in maritime law.

We urge our readers who may have summer associates or interns from law schools working for them to encourage them to submit articles for publication in our Future Proctors section.

As always, we hope you find this edition interesting and informative, and ask you to consider contributing an article or note for publication to educate, enlighten, and entertain us.

**Robert J. Zapf**

## WINDOW ON WASHINGTON



### *Coasting Along*

By Bryant E. Gardner\*

Heading into the final days of the 117<sup>th</sup> Congress, the House and Senate have both advanced their Coast Guard and Maritime Administration Authorization Acts containing provisions likely to be impactful upon the maritime industry. As in recent years, these bills will be attached to this year's National Defense Authorization Act for the coming fiscal year, one of the few "must pass" vehicles moving through Congress annually. Although not all of the bills' provisions will pass this year, those that do not often will resurface in coming years, and therefore are worth tracking.

Probably the most controversial provision in either bill is the House proposal to modify the existing offshore manning rules for foreign vessels operating on the U.S. Outer Continental Shelf.<sup>1</sup> The House proposal would restrict such employment to U.S. citizens, permanent U.S. residents, or citizens of the nation of vehicle, vessel, or structure registry, beginning 120 days after passage

of the legislation.<sup>2</sup> Currently, many of these vessels and structures are registered with open registries—such as the Marshall Islands or Panama—and employ skilled technicians citizens from third-party states—e.g., from Europe in particular—for wind farm development and installation, but also for offshore hydrocarbon drilling and exploration. Proponents of the measure have argued that it would open up new opportunities for the training and recruitment of U.S. mariners in highly specialized fields, and improve maritime safety and security by excluding foreign nationals (including Russians) from U.S. waters.

Opponents of the measure, including the International Marine Contractors Association ("IMCA") and the American Clean Power Association ("ACP"), have argued that the proposal is impractical and will bring offshore projects to a halt because there are neither flag-state nor U.S. personnel qualified to undertake the specialized work nor are there any U.S.-flag installation vessels. Moreover, they argue that because specialized installation and offshore vessels move from task to task globally, it is not practical to train-up a flag or installation nation-specific citizen workforce. Accordingly, they project that these vessels will not operate in U.S.

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<sup>1</sup> Don Young Coast Guard Authorization Act of 2022, H.R. 7999, 117<sup>th</sup> Cong., Div. G. (hereinafter the "House Bill") § 518.

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<sup>2</sup> House Bill § 518.

waters, bringing offshore projects in the U.S. to a halt and thereby threatening all of the U.S. mariner jobs available in the supply boat and other coastwise trades associated with the offshore developments. They also argue that the aim of the current exemption regime is to protect U.S. citizens from retaliation when working on a foreign continental shelf, and that the U.S.-flag already struggles to find enough mariners to fill the jobs reserved for U.S. citizens. Lastly, opponents suggest that the better option for increasing U.S. jobs in the installation and construction space is to invest in U.S.-flag, coastwise-qualified vessels.

The House bill includes other provisions aimed at clamping down on foreign participation in U.S. waters. Also included in the House bill is the requirement for a Coast Guard report to Congress detailing the number of vessels operating as oceanographic research vessels pursuant to 46 U.S.C. § 50503, which provides that such vessels shall be deemed not engaged in trade or commerce.<sup>3</sup> Arising out of Jones Act community concerns that the exception has been exploited to avoid coastwise requirements applicable to offshore services applicable to wind farms, the report would detail the total number of foreign-flagged vessels operating as oceanographic research vessels during each of the past 10 fiscal years.<sup>4</sup>

The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 expanded federal law, including the Jones Act cabotage rules, to renewable energy projects on the U.S. Outer Continental Shelf.<sup>5</sup> Both the House and Senate legislation would require the Coast Guard to produce a report on any changes in its enforcement of the Jones Act resulting from the jurisdictional amendment, without specifying any due date for the report.<sup>6</sup>

Vessels operating in the waters of the United States must be equipped with automatic identification systems (“AIS”) under existing law<sup>7</sup> The House bill would expand the requirement to vessels of the United States more than 65 feet overall in length while fishing, fish processing, or fish tendering in the navigable waters of the United States or in the United States exclusive economic zone (“EEZ”), which extends 200 nautical miles from the territorial sea baseline. The provision is intended to make it easier to spot unauthorized fishing in the U.S. EEZ. The House bill also includes a provision excluding Russian-owned or -operated vessels from entering or operating in U.S. waters.<sup>8</sup>

The Senate bill would provide new tools to fight illegal fishing and forced-labor human trafficking in seafood catching and processing.<sup>9</sup> The measure would stand up new information-sharing and aggregation among Federal agencies, allow officers to detain shipments of fish, strengthen Homeland Security’s authority to deny port privileges, and require new training for on-board fishing observers, including training to identify indicators of forced labor.

The Capital Construction Fund (“CCF”), administered by the U.S. Maritime Administration,<sup>10</sup> permits U.S. shipowners certain tax advantages for the construction of U.S.-flag vessels in the United States.<sup>11</sup> Although shipowners in the Jones Act and international trades are eligible, as a practical matter the program is only utilized by owners of vessels operating the coastwise trades subject to the Jones Act’s U.S.-build rules, because U.S. yards are cost-prohibitive for operators not otherwise required to build in the U.S. The House bill would expand the CCF to ferries<sup>12</sup> and to passenger vessels

<sup>3</sup> House Bill § 302.

<sup>4</sup> Constantine G. Papavizas, Jones Act Organization Alleges Offshore Wind Survey Violations, Maritime FedWatch (Nov. 15, 2021), <https://www.winston.com/en/maritime-fedwatch/jones-act-organization-alleges-offshore-wind-survey-violations.html>; International Marine Contractors Association, Enforcement of the Jones Act and Vessel Crewing Laws, IMCA Information Note 1590 (Dec. 8, 2021), <https://www.imca-int.com/information-notes/enforcement-of-the-jones-act-and-vessel-crewing-laws/>.

<sup>5</sup> Pub. L. 116-283, § 9503, 134 Stat. 3388, January 1, 2021.

<sup>6</sup> Coast Guard Authorization Act of 2022, S. 4802, 117<sup>th</sup> Cong. (hereinafter the “Senate Bill”) § 522; House Bill § 512.

<sup>7</sup> 46 U.S.C. § 70114.

<sup>8</sup> House Bill § 515.

<sup>9</sup> Senate Bill, Title III, Subtitle E. Recent reports have highlighted the rash of forced labor and human trafficking in the fisheries sector. *See generally*, International Labour Organization, Forced Labor and Human Trafficking in Fisheries, *available at* <https://www.ilo.org/global/topics/forced-labour/policy-areas/fisheries/lang--en/index.htm>.

<sup>10</sup> *See generally* U.S. Maritime Administration, Capital Construction Fund, <https://www.maritime.dot.gov/grants/capital-construction-fund>.

<sup>11</sup> Chapter 535 of Title 46, United States Code.

<sup>12</sup> “Ferry” is defined as a vessel used on a regular schedule to provide transportation not more than 300 miles apart and to transport only passenger or vehicles or railroad cars that are being used or have been used in transporting passengers or goods. 46 U.S.C. § 2101.

with more than 50-passenger capacity.<sup>13</sup> Furthermore, the Senate bill provides relief to passenger vessels carrying in excess of 250 passengers and operating inside the boundary line from requirements to have a physician on board at all times and from compliance with the Heath Care Guidelines for Cruise Ship Medical Facilities established by the American College of Emergency Physicians.<sup>14</sup>

The benefits of the Limitation of Liability Act of 1851,<sup>15</sup> which allow owners to limit liability to the value of the vessel and freight pending, have long been the subject of impassioned debate, particularly in cases where damages significantly outstrip the limitation value. Both the House and Senate Coast Guard bills include proposed changes to restrict the availability of limitations to small passenger vessels, reducing the likelihood of available recoveries falling short of claims in a mass casualty event.<sup>16</sup> Specifically, the bills would eliminate limitation of liability for “covered small passenger vessels,” which are small passenger vessels of fewer than 100 gross tons, chartered with crew and carrying at least 6 passengers or without crew and carrying at least 12 passengers, but not more than 49 passengers in a domestic overnight voyage or not more than 150 passenger on a voyage that is not a domestic overnight voyage. Additionally, the bills would expand the time for giving notice of personal injury and death claims from 6 months to 1 year, and the time for bringing a civil action from 1 year to 2 years.

The House bill includes a provision that would extend by two years the moratorium on requiring merchant mariners' documents for persons on board solely for purposes of oil-spill response activities, salvage, marine firefighting, or commercial diving business.<sup>17</sup> It would also establish a limited \$50,000 indemnity for liabilities incidental to oil containment or removal, funded from the Oil Spill Liability Trust Fund (“OSLTF”).<sup>18</sup> The Senate bill directs the Coast Guard to revise or issue a policy clarifying the application of subchapter M towing-vessel regulations to oil-spill response vessels, including vessels of opportunity.<sup>19</sup> Moreover, the Senate bill would impose a moratorium on towing-vessel

inspection fees for a towing vessel that has a certificate of inspection issued under subchapter M and that uses the Towing Safety Management System option for compliance with the subchapter.<sup>20</sup> Lastly, the House bill would impose a raft of new safety requirements upon DUKW-type amphibious passenger vessels, following upon the National Transportation Safety Board Recommendation Reports on the Amphibious Passenger Vessel incidents in Table Rock, Missouri and Seattle, Washington related to the safety of DUKWs, popularly marketed as “Duck” boats.<sup>21</sup>

Under current law, the Coast Guard may conduct dockside inspections of fishing vessels every five years, or every two years for vessels operating beyond the three-mile limit, with more than 16 people, or Aleutian fish tenders if requested by the owner. The House bill would authorize the Coast Guard to conduct such inspections as frequently as every two years if requested by the owner *or* if the vessel is at least 50 feet in length, built before July 1, 2013, and 25 years of age or older.<sup>22</sup> The House bill would remove aquaculture workers from the definition of a Jones Act seaman if State workers' compensation remedies are available to such individuals.<sup>23</sup>

Each of the bills includes a subtitle addressing Great Lakes issues. The Senate bill includes provisions to establish standards for icebreaking operation, a Government Accountability (“GAO”) report on the current capabilities of the icebreaking program, and the Coast Guard's plan to implement findings from the GAO report.<sup>24</sup> Additionally, the Senate proposal would authorize \$350 million to acquire a Great Lakes icebreaker at least as capable as the MACKINAW,<sup>25</sup> establish a database to monitor icebreaking operations on the Great Lakes, a snowmobile acquisition plan

<sup>13</sup> House Bill §§ 308 & 309.

<sup>14</sup> Senate Bill § 502; 46 U.S.C. § 3509.

<sup>15</sup> Codified as amended at Chapter 305 of Title 46, United States Code.

<sup>16</sup> Senate Bill § 505; House Bill § 306.

<sup>17</sup> House Bill § 301.

<sup>18</sup> House Bill § 508.

<sup>19</sup> Senate Bill § 331.

<sup>20</sup> Senate Bill § 506.

<sup>21</sup> House Bill § 305. National Transportation Safety Board, Sinking of Amphibious Passenger Vessel STRETCH DUCK 7 Table Rock Lake, Near Branson, Missouri, July 19, 2018, NTSB/MAR-20/01 (April 28, 2020); National Transportation Safety Board, Amphibious Passenger Vessel DUCK 6 Lane Crossover Collision with Motorcoach on State Route 99, Aurora Bridge, Seattle Washington, September 24, 2015, NTSB/HAR-16/02 (Nov. 5, 2016).

<sup>22</sup> House Bill § 304.

<sup>23</sup> House Bill § 504.

<sup>24</sup> Senate Bill, Title II, Subtitle B. Notably, Senator Baldwin (D-WI), hailing from a Great Lakes State, chairs the subcommittee of jurisdiction.

<sup>25</sup> Senate Bill § 104. The House bill, § 104, contains the same requirement.

to facilitate ice rescues, inspection exemptions for unmanned barges on the Great Lakes, and mandate a report on the sufficiency of the Coast Guard's fixed-wing assets serving the Great Lakes. The House measure would also mandate a report on Great Lakes icebreaking, and would expand the functions of the Center of Expertise for Great Lakes Oil Spill Preparedness and Response to include the St. Lawrence River and other river systems.<sup>26</sup>

Recent provisions of law established term limits for Commissioners of the Federal Maritime Commission, the agency responsible for administering the limited antitrust immunity afforded to common carriers in the U.S. international trades. The House proposal would expand their tenure from two to three five-year terms, and permit Commissioners to stay in office up to two years while awaiting a replacement.<sup>27</sup> Moreover, the bill requires a national, interagency plan to reduce or eliminate cargo backlogs.<sup>28</sup>

Both the House and Senate bills<sup>29</sup> include an extensive new framework aimed at addressing sexual assault and sexual harassment on U.S.-flag vessels, the subject of long-running debate on the Hill.<sup>30</sup> The measures would require denial or revocation of a merchant mariner's documents for more serious convictions, and authorize denial, suspension, or revocation of the credentials for less-serious offenses. Additionally, vessel operators would be required to formulate sexual assault and prevention policies and practices, post notices of them conspicuously, and include them within their Safety Management Systems ("SMS"). In the debate leading up to the legislation, many U.S.-flag operators have raised concerns that the inclusion of sexual assault and

sexual harassment within the SMS may cause U.S.-flag vessels to be inordinately detained by foreign-port state control unaccustomed to seeing sexual assault and harassment within the SMS. The legislation requires reporting of sexual harassment, protection for whistleblowers, and shield measures designed to protect victims. Additionally, operators would be required to install video monitoring in areas outside berthing spaces,<sup>31</sup> which footage would be available for use in limited proceedings only. Operators would also be required to impose new controls on masters key access and logging. The legislation creates a Jones Act cause of action for injuries resulting from sexual assault or sexual harassment and extends the statute of limitations out to five years for such actions, currently three years. Lastly, the legislation requires the Coast Guard to undertake a hard look at the use of alcohol by crew members on commercial vessels.

Provisions in both bills, such as the sexual assault and prevention provisions, the review of coastwise enforcement activities under expanded windfarm jurisdiction for the Outer Continental Shelf, and the authorization of \$350 million for a new Great Lakes icebreaker,<sup>32</sup> will likely make it into final law. Other provisions, including the controversial manning provision restricting billets offshore to U.S. or flag-state citizens only, may not make it into law this year, or ever. However, each of these provisions overcame significant obstacles to arrive in the final bills, and likely has a constituency behind it. Concerned stakeholders are well-advised to watch closely the development of this maritime legislation impacting their interests.

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<sup>26</sup> House Bill, Title II, Subtitle B.

<sup>27</sup> House Bill § 401.

<sup>28</sup> House Bill § 507.

<sup>29</sup> House Bill, Tit. VI; Senate Bill, Tit. VI.

<sup>30</sup> See generally Bryant E. Gardner, Window on Washington, SASH is Back, 20 Benedict's Maritime Bulletin (2nd Quarter 2022).

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<sup>31</sup> Video surveillance requirements would apply to (a) vessels with overnight accommodations for at least 10 persons on board on a voyage of at least 600 miles crossing seaward of the boundary line, or at least 79 feet in overall length and required to have a load line; (b) documented vessels of at least 500 gross tons; and (c) vessels with overnight accommodations for at least 10 persons operating for no less than 72 hours on water superadjacent to the Outer Continental Shelf.

<sup>32</sup> Of course, authorization does not guarantee appropriation of funds. However, Senator Baldwin (D-WI) also sits on the subcommittee of jurisdiction within the Senate Appropriations Committee.

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