Welcome

The Section of International Law (“SIL”) of the American Bar Association reconstituted the International Transportation Committee (the “Committee”) in 2004. The work of Committee members addresses a wide range of international transportation issues affecting the transportation of goods by air, sea, road, rail or intermodal service. This Committee newsletter provides an update of activities and current events concerning Committee membership.

UPCOMING EVENTS

July 30- August 4, 2009
Annual ABA Meeting in Chicago

October 27 – October 31, 2009
Fall SIL Meeting in Miami Beach

April 13 – April 17, 2010
Spring SIL Meeting in New York

Introduction to the ITC Newsletter

Welcome to the inaugural issue of ITC News, the newsletter of the ABA International Transportation Committee. This newsletter is intended to assist Committee members stay up-to-date on current international transportation issues, Committee activities and general American Bar Association events relevant to international transportation law. ITC News also provides a forum for Committee members to discuss international transportation ideas and opinions. If you are interested in contributing an article regarding aspects of international transportation law or have relevant news that you would like to share with fellow Committee members, please contact the Committee Co-Chairs, Catherine Pawluch or Mark J. Andrews via email. Their contact information appears on the last page of this newsletter. Copies of this and subsequent newsletters are available via email to all Committee members and may be retrieved from the Committee’s Internet site accessible at http://www.abanet.org/.

Committee Activities this Season

The ABA International Transportation Committee welcomes its members to the Committee’s 2008-2009 season and to all of the activities the Committee is planning for the coming year. In selecting activities for this season, the Committee has attempted to increase involvement by Committee members and address topics that are relevant to today’s practice involving international transportation. Several completed activities or activities currently in the works include the following:

• At the Section’s Spring Meeting in Washington, D.C. this past April, the Committee co-sponsored a successful program on the Cape Town Treaty (concerning international registration and deregistration of aircraft) in conjunction with the International Commercial Transactions, Franchising and Distribution Committee.

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Current Topic #1:

NAFTA TRUCKING:
Current Status, Issues, Facts and a Solution

by
Kenneth E. Siegel
Mark J. Andrews

By now, it is well known that Mexico acted on March 19, 2009 to impose retaliatory duties totaling US$2.4 billion on a range of imports from the U.S., as permitted by a binational NAFTA panel when the U.S. failed to implement its NAFTA commitments on cross-border trucking. Now that sensational headlines about drug cartels, swine flu and other cross-border issues are receding from the front pages, a working group at the U.S. Department of Transportation ("U.S.DOT") is quietly starting to pick up the pieces before one of the largest trade disputes in the recent history of U.S.-Mexican relations escalates further.

Specifically, U.S.DOT’s Federal Motor Carrier Safety Administration (“FMCSA”) recently held a public session of its Motor Carrier Safety Advisory Committee (“MCSAC”) to assist the agency in developing and implementing a new cross-border trucking program between the United States and Mexico. The MCSAC is made up of representatives of shippers, for-hire trucking companies, independent contractors, motor coaches, state highway enforcement organizations, other highway and safety experts, and various self-proclaimed safety advocacy groups. The session was held on May 20, 2009 in Washington, DC.

The authors respectfully suggest that any solution developed by MCSAC and implemented by FMCSA should take into account the full background of the dispute, and must carefully distinguish myths from the truth about cross-border trucking under NAFTA.

BACKGROUND: MYTHS AND TRUTH

On March 11, 2009, the President signed into law the Omnibus Appropriations Act, 2009, Pub.L. No. 111-8, 123 Stat. 524. This legislation had the effect of immediately shutting down, within the U.S., a U.S.DOT Demonstration Project (“Project”) under which a handful of U.S. and Mexican carriers that had passed strict safety and operational requirements were permitted to transport international, non-hazardous freight between interior points in the two countries. Contrary to the allegations of anti-Mexican parties (including organized labor, owner-operators, other groups claiming to be safety advocates, and certain Congressional leaders), the limited results of the Project and other U.S.DOT data clearly establish that Mexican-domiciled motor carriers not only posed no threat to U.S. highway safety but had posted a better safety record than their U.S. counterparts. The anti-Mexican parties’ attack on the safety of Mexican-domiciled trucks is based on a series of myths about the application of U.S. law, the operations of the Mexican trucking industry and the implementation of the Project. The authors submit that most of these claims are either fallacious or premised on problems that have been or are being remedied, and are based more on the prejudices of the attacker than on facts or rational thinking. For example:

- The Myth: That U.S.DOT improperly gave Mexican drivers in the Project a waiver of provisions of U.S. law requiring a driver of a commercial motor vehicle (“CMV”) to have a Commercial Driver’s License (“CDL”) issued by a U.S. State, and that the Mexican CDL may be easily obtained through illegal methods.

The Truth: The validity of a U.S.-Mexico memorandum of understanding (“MOU”) recognizing Mexican CDLs has been acknowledged by the U.S. Supreme Court in Dep’t of Transportation v. Public


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1 The authors are attorneys with Strasburger & Price, LLP in Washington, DC. Ken Siegel has over thirty-five years of experience in the areas of transportation and logistics law. He is a former Vice President–Law and Deputy General Counsel of the American Trucking Associations, Inc. Mark Andrews is a past president of the Transportation Lawyers Association, and currently co-chairs the International Transportation Committee within the American Bar Association’s Section of International Law. Ken and Mark may be reached via e-mail at: kenneth.siegel@strasburger.com and mark.andrews@strasburger.com.


Citizen, 541 U.S. 752 (2004), and none of the anti-Mexican groups ever cite to actual incidents of CDLs being sold in Mexico. In comparison, there have been several major scandals here in the U.S. involving the sale of CDLs, or fraudulent issuance of the training certifications required to obtain CDLs, by various U.S. state officials and contractors.

• The Myth: That there is no enforcement of highway safety rules and regulations in Mexico with respect to drivers, carriers or equipment, and that Mexican trucks do not meet U.S. safety standards.

The Truth: There are many vehicle, company and driver safety and operational rules that differ among the NAFTA countries, including differences in permissible sizes of the vehicles, configurations of equipment, cargo weights, brake requirements, use of speed governors, hours of service, drug testing, training, and record keeping. What the highway safety rules are inside Mexico and whether the rules are enforced inside Mexico, however, are irrelevant as to whether Mexican carriers, trucks, and drivers pose a safety hazard in the U.S. What is important is that the carriers, equipment and drivers domiciled in one country must meet the requirements of the host country in order to be permitted to operate in the host country.

- Mexico, unlike Canada, does have drug testing requirements for its CDL drivers.
- Participants in the Project were required to comply with U.S. drug testing requirements and had to use U.S. certified labs for determining test results.
- Mexican CMV drivers in the Project had to maintain a record of service or log book on which was recorded the driver’s on-duty, driving, and rest time for the seven day period immediately prior to the time the driver entered the U.S. and, of course, had to maintain the log while in the U.S.

• The Myth: That U.S. enforcement services have no access to data banks on Mexican drivers; that Mexican data banks are inadequately maintained; and that the Mexican state governments do not report all violations to the country’s federal CDL databases.

The Truth: The Mexican database on drivers is fully operational and except for occasional technical problems that are not unique to Mexico, it is available to U.S. enforcement services. The accident and carrier databases contain recent data, and access problems are in the process of being resolved. By comparison, the U.S.DOT has had to threaten several U.S. States with loss of federal highway funds as a result of a State's failure to comply with various federal requirements regarding the reporting of CDL violations. In 2005, Congress even found it necessary to strengthen the compliance requirements on the States in the highway reauthorization legislation known as SAFETEA-LU (Pub.L. No. 109-59, 119 Stat. 1144).

ELEMENTS OF A SOLUTION

Contrary to the claims of the anti-Mexican forces, all U.S. driver, vehicle and carrier rules and regulations are applicable to Mexican drivers, vehicles and carriers when they are operating in this country. The actual problem at hand is how to resolve the perceived safety concerns of certain Congressional interests without offending the sensibilities of the Mexican government and trucking industry or the terms of NAFTA. The authors recommend consideration of a legislative solution based on the following:

1. Enactment of a clarifying provision to the effect that all foreign carriers, CMVs and their drivers must comply with applicable U.S. safety laws and regulations when operating a CMV in this country.

2. Implementation of NAFTA on a reciprocal basis, with a guarantee to carriers participating in a new demonstration project that the operating certificates issued by each government shall remain in force so long as such carrier complies with all applicable regulations, even if the respective demonstration projects are terminated.

3. Mutual access by both countries to each other’s databases containing information on CDL holders and motor carriers participating in cross-border operations.

4. A requirement for Mexican drivers and motor carriers to provide proof to U.S. authorities that they have complied with U.S. drug and alcohol testing requirements or equivalent rules.

5. A requirement that Mexican drivers (like French-speaking drivers from Canada under current rules) must be able to converse in English sufficiently to understand safety signage and direction from enforcement officials or other first responders.
6. A requirement that Mexican drivers must have an English version of a U.S.DOT log book, or an electronic equivalent which is accessible to enforcement personnel, covering the required seven or eight day period immediately prior to the driver's entry into U.S., and must maintain this log book while in the U.S.

7. Permission for each other’s safety inspectors to perform safety audits and inspections of applicants domiciled in the other country at the applicant’s facilities in its country of domicile. Audits and inspections conducted by each agency should be equivalent to those performed by it on its domestic carriers.

8. A requirement that a Mexican CMV entering the U.S. must have a current sticker evidencing a safety inspection under U.S.DOT rules.

9. Requirements for Mexican motor carriers to:
   a. Use FMCSA’s existing “MX” application form when applying to operate in the U.S. beyond border areas, and comply with all other U.S. licensing requirements (e.g. insurance, service of process agents, new entrant audits).
   b. Obtain FMCSA safety ratings for their U.S. operations on the same enforcement basis and criteria as U.S. carriers.
   c. Pay the applicable Unified Carrier Registration fee and all other fees and taxes required of motor carriers, or participate in applicable multistate apportionment agreements.

In closing, the authors submit that it is time for the U.S. to live up to its international obligations with regard to trucking services across its southern border. If the new U.S.DOT working group crafts a solution based on the above elements, it will be well on its way to honoring the NAFTA obligations of the U.S. to provide “national treatment” to Mexican trucking firms seeking to offer international transportation services between their country and the U.S.

The opinions expressed in this article are the authors’ own, and do not necessarily reflect the views of Strasburger & Price, LLP, of the American Bar Association, of any of its sections or committees, or of any of the other organizations mentioned in this biographical paragraph.

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Current Topic #2:

Logistics and Transport in Brazil

by

Ana Luisa Derenusson

The Brazilian logistics and transport sector is one of the most promising economic areas for foreign and domestic investment in the country. Recent research shows that, in the past few years, the infrastructure of the logistics and transport sector in Brazil has been developed and the players who act in that sector have reaped great profits. The projection for the years to come is for an even greater increase of logistics and transportation activities in Brazil, as they are considered essential for the country and will play an important role in making Brazil a strong factor in world trade.

Brazil is a country which has continental dimensions. In view of this fact, the creation of an efficient transport network has been fundamental for the development of domestic and international commerce in the country. The players, such as logistics companies, cargo agents and freight forwarders, use a diverse transport network which encompasses all modes for cargo transportation, including highways, railways, air routes, inland waterways, coastwise and ocean shipping.

Currently, the most developed network for cargo transportation in Brazil is the highway, which accounts for approximately 58% of the total transport market. Historically, the Brazilian highway network has always received considerable investment from the government, as

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1 The author, Ana Luisa Derenusson, wishes to acknowledge the assistance of her colleagues Regina Lynch, Ruth Lunardelli Costa and Marina Mendonça in preparing this survey of Brazilian logistics. Regina Lynch and Ana Luisa Derenusson are both Partners and Ruth Lunardelli Costa and Marina Mendonça are both Associates in the São Paulo office of the Brazilian law firm, Xavier, Bernardes, Bragança, Sociedade de Advogados (www.xbb.com.br). The authors have extensive experience in advising on asset-based finance transactions, with a particular emphasis on aircraft finance, regulatory aspects and logistics. Xavier, Bernardes, Bragança, Sociedade de Advogados has also offices in the cities of Rio de Janeiro and Brasília.
the roads were the cheapest way to connect the country’s economic centers with interior locations that were difficult to access otherwise. The development of a widespread highway network led the logistics companies and the cargo agents to use that structure as their first option for cargo transportation.

However, due to a lack of proactive measures for the maintenance of Brazilian roads from both the public authorities and the active private players, and due to continuous cargo transportation by heavy trucks and trailers over that network, road surfaces deteriorated rapidly. In order to recover the highway network, the Brazilian government has granted concessions for management of its most important roads to private entities, which are responsible for the maintenance, preservation and safety of the highways. These concessions have resulted in an increase of investments in the highway mode, leading to the elevation of its quality.

Along with the highway, Brazil has a developed air transport network, which enables the connection of distant locations within a short period of time. In spite of the fact that the airway mode is the most expensive choice for cargo transportation, and that it presents many restrictions with regard to cargo size and weight, this mode is considered the safest and fastest one. For that reason, the airway network is mostly used for the transportation of perishable products, such as food and medicines, animals and plants, as well as valuable goods, including electronic devices and jewelry.

In view of the continuous growth of Brazil in world trade, as well as the intensification of its domestic commercial relationships, the use of single modes for cargo transportation is no longer sufficient. Therefore, coordinated intermodal services are being used to increase speed and efficiency in cargo transportation. In Brazil, the most significant intermodal services combine the highway and airway networks. This combination makes the total cargo transportation cheaper than exclusive use of the air mode, while also providing safety and speed which would not be possible if only the highway network were used.

Although highway and air networks have been the predominant modes for cargo transportation in Brazil, the authorities have decided to invest in the development of two other transportation modes: railroads and the waterway network, which includes inland-waterway and ocean shipping operations. This is a direct result of the expansion of the country’s market share in world trade, caused especially by the increase in the exportation of Brazilian products and technologies.

Until the end of 2006, cargo transportation through the Brazilian railway network was a non-profitable activity. As with the highway network more recently, concessions for management of rail transportation were granted by the public authorities to private entities in the past – but with less favorable results at first. Only a small percentage of the railway system was used by such private entities for cargo transportation, since the use and maintenance of the tracks and trains proved to be very costly and only a small area of the country was covered by railways.

Since 2007, however, this scenario has dramatically changed. In view of the inefficient use of the great capacity for cargo transportation on the railway network, the public authorities started putting pressure on the private entities responsible for the management and exploitation of the railways to expand their services. The immediate impact of this governmental directive was the reactivation of a considerable number of tracks, as the concessionaires started to make more effective use of their railway structures for cargo transport, and to share such networks with other transport agents. What started out as a mandatory measure actually led the railway network to become an advantageous mode in the transport sector.

The Brazilian government now intends to develop and expand the country’s railway network. Three projects of expansion have already been approved by the National Congress: the Transnordestina railroad, located in the northeast of the country; the North-South railway, which will connect the states of São Paulo and Tocantins and Ferronorte, which is located in the inland State of Mato Grosso. While the railway mode currently accounts for 25% of the cargo transportation market in Brazil, the government intends to increase such market share to 32%.

In addition, there is a project to construct a new roadbed for a high-speed passenger train that will connect the cities of Rio de Janeiro, São Paulo and Campinas. This project will be let out for bids during the year 2009, and has already attracted many international players interested in submitting proposals for the construction of the first “Brazilian High-Speed Train.” It is worth mentioning that this project reflects the policy of the Brazilian government to partially relieve excessive air traffic between the Santos Dumont airport in Rio de Janeiro and the Congonhas airport in São Paulo, both of which have been operating over their capacities for quite some time and which have been in the center of an aviation crisis that struck Brazil about two years ago. As another measure to relieve air traffic congestion, the intention is to expand Viracopos airport at the city of Campinas, which for many years was relegated
to cargo and which is now being used by passenger carriers, such as Azul Linhas Aéreas Brasileiras S.A.

With regard to water transportation, the Brazilian government is still developing projects for expansion of the inland-waterway network, as well as for modernization and improvement of port infrastructures for coastwise and ocean shipping.

The relevant authorities wish to expand the Tietê-Paraná waterway, in order for that inland waterway to extend almost to the Port of Santos, which is the most important port in South America. In addition, they intend to improve the Tapajós-Teles Pires waterway, which will connect Mato Grosso in the center of Brazil with the port of SantarÉns located in the extreme north of the country. This inland waterway will be strategic for the exportation of agricultural products grown in central Brazil. It can be reasonably expected that with the development of such projects, the market share of the inland-waterway mode may increase from 13% to approximately 29%.

In connection with the coastwise and ocean shipping networks, the infrastructure of the Brazilian ports is being improved by the government and, also, by private entities. The urgent necessity for improvement of the Brazilian ports is a result of the considerable increase in the exportation of the nation’s products to a number of countries around the world. In this regard, studies of the logistics and transport sector in Brazil show that maritime transport in the country has achieved higher profits in the years 2007 and 2008 than in the past. As ports represent the primary gateways for Brazilian exports and imports, they constitute an essential instrument for claiming Brazil’s place as a relevant player in world trade.

Besides the expansion and the improvement of all modes of cargo transportation in Brazil, another positive indicator for the logistics and transport sector in the country is the increased numbers of logistics agents, freight forwarders, transport corporations and similar entities that are listed in the stock market. This fact, combined with the continuous strengthening of corporate governance laws in Brazil, is appealing to foreign investors because it provides a safer and more transparent investment environment.

Overall, the logistics and transport sector in Brazil is an excellent instrument for the consolidation of the country’s position in world trade. The government is aware of this fact, as several measures are being taken in order to stimulate investments in this sector. One can only expect the results of these actions to be healthy for the Brazilian economy.

Committee Activities:

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- Beginning with this edition of ITC News, the Committee’s steering group has decided to provide a periodic newsletter to its members to improve Committee-wide communication and share relevant news.
- The Committee plans to schedule a webcast this summer concerning the pending Convention on Contracts for the International Transportation of Goods Wholly or Partly by Sea (the “Rotterdam Rules”).
- This summer, the Committee will appoint an editor or co-editors for the Committee’s contribution to the 2009 Year in Review edition of The International Lawyer to be published in the summer of 2010.
- At the annual meeting of the full ABA in Chicago this summer, the Committee and the International Antitrust Committee will co-sponsor a program entitled “Open Skies and Airline Consolidation – What Will Become of the Global Airline Industry?”
- And finally, the Committee has prepared a program entitled “Piracy: An International Problem in Search of a Solution” to be presented at the Section’s 2009 Fall Meeting in Miami Beach, Florida.

Please check the Committee Internet site to view updated event information. If you have ideas for additional programs or activities, please contact the Committee steering group.

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Steering Group Members

Leadership of the Committee is carried on by a steering group. Membership on the steering group is open to all members of the Committee. The current members of the steering group are:

Co-Chairs:

- Catherine Pawluch
  *Gowling Lafleur Henderson LLP, Toronto, ON*
  catherine.pawluch@gowlings.com

- Mark J. Andrews
  *Strasburger & Price, LLP, Washington, D.C.*
  mark.andrews@strasburger.com

Vice Chairs:

- Leendert Creyf
  *Bird & Bird LLP, Brussels, Belgium*
  leendert.creyf@twobirds.com

- Lorraine B. Halloway
  *Crowell & Moring LLP, Washington, D.C.*
  lhalloway@crowell.com

Newsletter Editor:

- Matthias M. Edrich
  *Peck, Shaffer & Williams LLP, Denver, CO*
  medrich@peckshaffer.com

Upcoming Events

- **July 30 – August 4, 2009**: Annual ABA meeting in Chicago, Illinois. The Section of International Law will be hosting a series of CLE programs and networking events for its members.

- **October 27 – October 31, 2009**: Fall ABA Section of International Law meeting in Miami Beach, Florida. ITC will present its program “Piracy: An International Problem in Search of a Solution.” Be sure to register early!

- **April 13 – April 17, 2010**: Spring ABA Section of International Law meeting in New York, New York.