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Journal of Transportation Law, Logistics & Policy
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1. All articles should be submitted in Microsoft Word. Please do not PDF the file.

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3. Pages should be single-spaced, in Times New Roman font, no smaller than 11 points. Double space between paragraphs. Page numbers should be placed at the bottom of each page. The first line of each paragraph should be indented .5 inches. Case citations should be italicized.

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WADING INTO WETLANDS LAW: RECENT CLEAN WATER ACT ACTIONS AND DECISIONS WITH POTENTIAL IMPLICATIONS FOR TRANSPORTATION PROJECTS

*Cynthia L. Taub**

I. INTRODUCTION

There has been a significant uptick in activity with regard to the Clean Water Act (CWA) recently, with several important regulatory changes and appellate cases, including one from the U.S. Supreme Court. Many of these actions and decisions will impact transportation projects, particularly transportation projects that require permits under Section 404 of the Act for impacts to wetlands and waterways. This article provides an overview of the recent legal and regulatory activity under the Act, with an eye toward potential impacts for transportation projects.

II. RECENT REGULATORY CHANGES

A. New Rule Regarding Definition of "Waters of the United States" Protected Under the Clean Water Act Leads to Significant Litigation

In 2015, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) published a final rule regarding the definition of "waters of the United States" (WOTUS rule) protected under the CWA. 80 Fed. Reg. 37054 (June 29, 2015). By clarifying the definitions of jurisdictional waters, the rule has implications for entities applying for permits under the CWA that hinge on the meaning of "waters of the United States," particularly Section 404 permits for discharge of dredged or fill material and wetlands impacts.

The rule is intended to clarify CWA jurisdiction with respect to the significant nexus standard developed by the Supreme Court, under which only water bodies with a "significant nexus" to navigable waterways fall under the CWA's regulatory authority. *See United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006). But what "significant nexus" means has been debated and litigated for years, and EPA officials conceded that regulatory revisions were needed to provide greater clarity.

While some view the new rule as broadening the scope of CWA jurisdiction, EPA claims that the rule does not protect any types of waters that are not already covered by the CWA or add any new permitting requirements. Instead, EPA maintains that the rule attempts to ameliorate "confusion and uncertainty" that has resulted from the existing case-specific approach to identifying jurisdictional waters by adding specific definitions and bright-line limits to aid in identifying waters subject to CWA permitting requirements. 79 Fed. Reg. 22188 (proposed April 21, 2014). In fact, the preamble to the final rule states that "fewer waters will be defined as 'waters of the United States' under the rule than under the existing regulations."[1] The preamble states that the rule narrows the scope of jurisdictional waters, in part by adding exclusions for waters that reflect the current regulatory practice and by adding a specific definition for jurisdictional tributaries.[2] The rule designates certain categories of waters as jurisdictional or non-jurisdictional in all instances, while others are subject to the case-specific significant nexus test.

EPA engaged in a significant media campaign regarding the rulemaking, emphasizing the importance of protecting the nation's waters while also countering attacks that the new rule was an expansion of CWA jurisdiction. A Government Accountability Office (GAO) report released in December

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1 80 Fed. Reg. 37054 (June 29, 2015).
2 *Id.*

2015 found that EPA's campaign promoting the Waters of the U.S. rule violated legal provisions barring federal agencies from engaging in congressional and grassroots lobbying.[3] In particular, GAO concluded that the Agency's use of the campaign constituted "covert propaganda"[4] because the campaign encouraged users to redistribute messages in support of the rule without identifying EPA as the source of those messages.

The new rule has been controversial since it was proposed in 2014, with opposition voiced by agricultural groups, industry groups and state and local governments. In addition, several bills aimed at stopping the rule from taking effect have been introduced in Congress. In a letter to EPA Administrator Gina McCarthy in May of 2014, Senators Jeff Flake and John McCain wrote that EPA's then-proposed rule "dramatically expands federal jurisdiction and will likely yield only the next step in an unnecessarily iterative process and create significant regulatory uncertainty."[5] The Senate passed a resolution in November 2015 aimed at repealing the rule, and in January 2016, the House also voted to block the rule. President Obama vetoed this resolution, and the Senate was unable to override the veto. On June 15, 2016, the House Oversight Chairman moved to hold the White House in contempt due to its alleged failure to provide WOTUS rulemaking-related documents subpoenaed by the House Committee.[6]

Once it became final in 2015, the WOTUS rule was immediately challenged by dozens of states, trade associations, individual companies, and environmental groups in lawsuits around the country. One complaint calls the rule "an opaque and unwieldy regulation that leaves the identification of jurisdictional waters so vague and uncertain that Plaintiffs and their members

3 GAO Letter to Sen. Inhofe (Dec. 14, 2015), *available at:* http://www.gao.gov/assets/680/674163.pdf.
4 *Id.*
5 United States Senate Letter to Gina McCarthy (May 6, 2014), *available at:* http://www.flake.senate.gov/public/_cache/files/cfa9f203-bf57-43f1-9a92-274cefe8b9d3/05-06-14-flake-mccain-letter-on-waters-of-the-us.pdf.
6 Resolution Recommending that House of Representatives find Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, in Contempt of Congress for Refusal to Comply with a Subpoena Duly Issued by the Committee on Oversight and Government Reform (June 15, 2016), *available at:* https://oversight.house.gov/wp-content/uploads/2016/06/Shelanski-Contempt.pdf.

cannot determine whether and when the most basic activities undertaken on their land will subject them to drastic criminal and civil penalties under the CWA."[7] A number of these lawsuits have been consolidated in the Sixth Circuit Court of Appeals. *Murray Energy Corp. v. EPA*, No. 15-3751 (6th Cir. July 28, 2015). In October 2015, the Sixth Circuit stayed the rule nationwide. The court stated that "the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being."[8] On February 22, 2016, the Sixth Circuit held that U.S. Courts of Appeals had jurisdiction over the petition for review of WOTUS Rule, rather than district courts. The case now proceeds toward merits briefing.[9]

Following the Sixth Circuit's February 2016 decision regarding its jurisdiction over WOTUS rule challenges, United States District Courts across the country began dismissing challenges to the rule on jurisdictional grounds. However, a United States District Court in North Dakota had not, as of this writing, reversed its 2015 ruling that it has jurisdiction over a challenge to the rule. District Judge Erickson granted the request of 13 states to enjoin the effectiveness of the rule on August 27, 2015, the day before the rule became effective.[10] The states argued that because the rule defines certain intrastate waters as jurisdictional, it infringes upon the states' authority as owners and regulators of the waters. In its order granting the preliminary injunction, Judge Erickson concluded that the states are likely to succeed on the merits, including the argument that EPA overstepped its authority by extending jurisdiction to waters that do not have a significant nexus to downstream

7 Complaint for Declaratory and Injunctive Relief at 3, *Am. Farm Bureau Fed'n v. EPA*, No.:15-cv-00165 (S.D. Tex. July 2, 2015), ECF 1.
8 Order of Stay, *Ohio v. U.S. Army Corps of Eng'rs*, No. 15-3799 (6th Cir. Oct. 9, 2015).
9 Separately, in the Eleventh Circuit, another group of states attempted to convince the court to ignore the Sixth Circuit's ruling and send their challenges back to district court. In February 2016, the Eleventh Circuit stayed *State of Georgia v. U.S. Environmental Protection Agency*, pending a decision by the Sixth Circuit on the issue of jurisdiction. After the Sixth Circuit's decision finding jurisdiction, the state of Georgia requested that the Eleventh Circuit renew its review, arguing that the Sixth Circuit's decision granting jurisdiction conflicted with existing Eleventh Circuit precedent. On August 16, 2016, the Eleventh Circuit issued a decision staying the case "pending a decision of the Sixth Circuit or further developments." *Georgia v. McCarthy*, No. 15-14035-EE (11th Cir. Aug. 16, 2016).
10 The 13 states are: Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming.

navigable waters. On March 3, 2016, federal defendants filed a motion to dismiss based on the Sixth Circuit's decision that jurisdiction over the WOTUS rule properly rests in that circuit. In their March 24 Response in Opposition, the states challenging the rule argue that Judge Erickson's original decision regarding jurisdiction was correct, and that the Sixth Circuit's decision to the contrary does not require the District Court to change its prior, settled decision. As of the writing of this article, a ruling had not yet been issued by Judge Erickson, and therefore his August 2015 order finding jurisdiction still stands.

The litigation regarding the WOTUS rule is expected to take years to resolve. Whether the WOTUS rule ultimately withstands judicial review is an important issue for transportation developers and planners. While EPA has downplayed the breadth of the rule, some see the rule as a significant expansion of federal jurisdiction under the CWA. The American Road & Transportation Builders Association (ARTBA) has joined in the challenge to the rule, noting that the rule expands CWA jurisdiction "to the point where virtually any roadside ditch with standing water could be subject to regulation."[11] There is also concern that the rule will lengthen the transportation project review process, and "force project sponsors and the private sector to incur new administrative and legal costs."[12]

Although the US Supreme Court subsequently granted certiorari, the litigation regarding the WOTUS rule was likely mooted by President Trump's February 28, 2017 Executive Order (EO). EO 13778 (February 28, 2017). The EO directs EPA and the Corps to rescind or revise the rule. The EO also requires the agencies to notify the US Attorney General (AG) so that the AG can inform the courts with any pending cases regarding the WOTUS rule. It is expected that the government will move for the cases to be dismissed as moot now that the President has required the rule to be reconsidered.

11 Nick Goldstein, *ARTBA Takes EPA to Court Over "Waters of the United States" Rule*, Transportation Builder, http://www.artba.org/news/transportation-buildermarch-april2016/artba-takes-epa-to-court-over-waters-of-the-united-states-rule/.
12 *Id.*

B. 2016 Proposed Rule to Reissue Nationwide Permits

Another important CWA rulemaking proceeding is currently pending before the Corps regarding the "nationwide permit" program. Nationwide permits or NWPs are issued under Section 404(e) of the Clean Water Act, which authorizes the Corps to issue "general permits" for categories of activities involving discharges of dredged or fill material into waters of the United States, provided that the discharges will cause only minimal adverse environmental effects. The purpose of the NWPs is to provide a simplified and expedited permitting process for categories projects with minimal impacts to waterways. The Corps describes the goal of the program as providing "timely authorizations for the regulated public" and to "reduce administrative burdens on the Corps and the regulated public by efficiently authorizing activities that have minimal adverse environmental effects."[13]

On June 1, 2016, the Corps issued a Federal Register notice proposing to reissue and modify NWPs that are currently set to expire on March 18, 2017. 81 Fed. Reg. 35186. The Corps' 2016 proposal includes the reissuance of all 50 NWPs, including those that are applicable to construction activities associated with major infrastructure projects, such as railroads, pipelines, and transmission lines. The proposal includes the reissuance of Nationwide Permit 14 (NWP 14), which is a general permit that applies to linear transportation projects such as rail lines. The reissuance of NWP 14 is vital to the transportation industries, which relies on the stream-lined permitting process to reduce permitting costs and delays.

The Corps' June 2016 notice sought comments on several general conditions to the NWPs. One of the key issues raised is whether the current ½ acre limit for construction activities undertaken pursuant to NWP 14 (as well as other NWPs) should be revised. This is an important issue for transportation projects, given that a lower limit could narrow the NWP's

13 81 Fed. Reg. 35186, 35190 (June 1, 2016).

applicability and thus increase the number of transportation projects that will need to undergo the more prolonged individual permit process.

The Corps also sought comment on the proposed NWPs in light of the rule defining "waters of the United States" discussed above. Specifically, the Corps sought views on how that waters of the U.S. rule might affect: (i) the applicability of the NWPs; (ii) the efficiency of the proposed NWPs; (iii) general conditions contained in the NWPs; and (iv) definitions that would help ensure that activities result in minimal adverse effects. It is important to note that, to the extent that the waters of the U.S. rule extended CWA jurisdiction over additional bodies of water and areas of construction activities that previously required no CWA approval may now require the use of a NWP. Also, activities that previously qualified for NWPs may no longer qualify if the acreage limits are now exceeded.

The Corps also proposed to modify language under the NWP to clarify the appropriate geographic area for assessing cumulative effects relative to activities occurring under a NWP. The Corps indicated that the broader cumulative effects analysis is satisfied by the Corps at the time that it promulgates the NWP. Accordingly, district engineers need only assess the cumulative adverse environmental effects of the NWPs at the appropriate district, watershed, or ecoregion, and they need not assess cumulative effects on a comprehensive basis.

This proposed revision is intended to address arguments raised by some environmental groups concerning the need for the Corps to take a broader look at cumulative effects occurring from multiple uses of NWPs for linear projects. The Corps' NWP program has come under attack by environmental groups, who see the program as allowing the Corps to "short-cut" the environmental review and permitting process. See e.g., Sierra Club v. Bostick, No. 14-6099 (10th Cir. 2015); Sierra Club v. U.S. Army Corps of Eng'rs, No. 14-5205 (D.C. Cir. 2015). For example, in 2015, the U.S. Court of Appeals for the D.C. Circuit rejected a challenge to the Corps decision to authorize a 600-mile domestic oil pipeline based on NWP 12. Sierra Club v.

U.S. Army Corps of Eng'rs, No. 14-5205 (D.C. Cir. 2015). The D.C. Circuit agreed with the U.S. government that the Corps satisfies NEPA requirements at the time it promulgates an NWP, and that a specific NEPA analysis need not be undertaken each time the Corps authorizes the use of an NWP. In addition, the D.C. Circuit upheld the Corps' use of thousands of NWP verifications for the overall 600-mile linear project.

With regard to NWP 14 specifically, the Corps is proposing to add a note regarding when projects can use a combination of individual permits (IPs) and NWPs. The preamble to the proposal appears to suggest that a segment of a larger linear project can only be authorized separately under NWPs from the rest of the project (under an IP) if it has independent utility. Under current Corps practice, it is not uncommon for the Corps to process a linear project under a combination of individual and nationwide permits. The Corps' regulations provide that a larger project can be processed under a combination of nationwide permits and individual permits "if the portions of the project qualifying for NWP authorization would have independent utility and are able to function or meet their purpose independent of the total project." 33 C.F.R. § 330.6(d). However, the Corps has previously clarified that the independent utility requirement does not apply to linear projects, so that each water crossing need not have independent utility within the overall line. 77 Fed. Reg. 10184, 10262-63 (Feb. 21, 2012) (noting that the Corps added ''non-linear'' in the first sentence of the definition of "independent utility" to reflect the independent utility test only applies to single and complete nonlinear projects). This is in large part due to the Corps' general policy of reviewing each water crossing along a linear project's route as a separate "federal action." Significantly, in the proposed NWP rule, the Corps is apparently taking the position that a segment of a larger linear project can only be authorized separately under NWPs from the rest of the project (under an IP) if it has independent utility. This could limit the opportunity for future transportation projects to be permitted under a combination of IPs and NWPs,

and could impact some pending projects. Some commenters have sought clarification from the Corps on this issue.[14]

The comment period closed on August 1, 2016, despite requests for extensions. Over 500 comments were filed on the proposed rule, including comments from individuals, industry associations, and environmental groups.[15] It remains to be seen what further changes, if any, the Corps will make to the NWPs in the final rule based on the comments received. Although the Corps sought comment on several fundamental issues, including whether the current ½ acre limit for construction activities undertaken pursuant to NWP 14 (as well as other NWPs) should be revised, it seems unlikely the Corps would be able to make such a fundamental change to an NWP without reissuing the proposal for public comment. However, the current NWPs[16] expire on March 18, 2017, so the Corps must issue the new NWPs by that date. Given that deadline, it is unlikely that the Corps will have time for another round of public comment on a significantly revised proposal. It is therefore expected that the final 2017 NWPs will be substantially similar to the June 1, 2016 proposal.

III. SIGNIFICANT RECENT CLEAN WATER ACT DECISIONS

A. U.S. v. Hawkes: the U.S. Supreme Court Confirms Reviewability of Clean Water Act Jurisdictional Determinations

On May 31, 2016, the U.S. Supreme Court decided that a Corps' determination that a property containing waters subject to Clean Water Act jurisdiction is final agency action subject to review under the Administrative Procedure Act. *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, No. 15-290, 578 U.S. _____ (2016). Chief Justice Roberts authored the opinion of the Court, in which Justices Kennedy, Thomas, Breyer, Alito, Sotomayor, and Kagan joined. Justice Kennedy filed a concurring opinion, in which Justices

14 *See, e.g.*, American Petroleum Institute (API), Comment Letter on Proposed Rule on Proposal to Reissue and Modify Nationwide Permits (June 1, 2016), https://www.regulations.gov/document?D=COE-2015-0017-0441.
15 https://www.regulations.gov/docket?D=COE-2015-0017.
16 77 Fed. Reg. 10184 (Feb. 21, 2012).

Thomas and Alito joined. Justices Kagan and Ginsburg also both filed separate concurring opinions.

In 2012, the Corps issued a jurisdictional determination that a property in Minnesota contained waters of the United States, which meant that Hawkes Co., Inc. had to obtain a permit under Section 404 of the CWA in order to conduct peat mining operations on the property. Hawkes challenged the jurisdictional determination in court. The government argued a jurisdictional determination is not final agency action subject to judicial review. The Eighth Circuit ultimately found that jurisdictional determinations were subject to judicial review.

The Supreme Court affirmed that the Corps' jurisdictional determination meets the Supreme Court's test for final agency action set forth in *Bennett v. Spear*, 520 U.S. 154 (1997) – including that it determines rights or obligations or gives rise to legal consequences. The Court noted that EPA and the Corps treat the jurisdictional determination as binding, citing an interagency memorandum of agreement.

The government contended that applicants have adequate alternatives without judicial review: they can either discharge fill material without a permit, risking enforcement, or apply for a permit and seek judicial review if the permit is denied. The Supreme Court found that neither alternative is adequate:

> As we have long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of serious criminal and civil penalties. If respondents discharged fill material without a permit, in the mistaken belief that their property did not contain jurisdictional waters, they would expose themselves to civil

> penalties of up to $37,500 for each day17 they violated the Act, to say nothing of potential criminal liability. Respondents need not assume such risks while waiting for EPA to drop the hammer in order to have their day in court. (Internal citations and quotations omitted.).[18]

The Court also found requiring a landowner to apply for a permit and then seek judicial review in the event of an unfavorable decision was not an adequate alternative, noting that the permitting process can be "arduous, expensive, and long."[19]

The Court's decision is of particular significance, given the on-going litigation over the scope of protected waters under the CWA discussed above. Although the Sixth Circuit has not reached the merits in that case, the expansive scope of the CWA did not go unnoticed in the *Hawkes* case. Justice Kennedy noted in his concurrence that "the reach and systematic consequences of the Clean Water Act remain a cause for concern."[20] The practical effect of the Supreme Court's decision is that transportation project developers can now seek judicial review of whether the Corps properly determined that a property is within the "reach" of the CWA, potentially avoiding a lengthy and costly 404 permit proceeding.

A. Mingo Logan Coal Co. v. EPA: D.C. Circuit Affirms EPA's Authority to Retroactively Veto a Section 404 Permit

Under the Clean Water, the Corps has primary authority to issue permits for discharges of dredged or fill material at specified sites into waters of the

17 In fact, the stakes have risen. EPA published its interim final rule on July 1, 2016 to adjust the civil monetary penalty amounts for statutes administered by the agency, including the CWA. The maximum penalty for CWA violations is increasing from $37,500 to $51,570 (per violation). This applies to civil penalties for violations that occurred after November 2, 2015 and assessed on or after August 1, 2016. 81 Fed. Reg. 43091, 43095 (July 1, 2016).
18 *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, No. 15-290, 578 U.S. _____, slip op. at 8-9 (2016).
19 *Id.*
20 *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, No. 15-290, 578 U.S. _____, slip op. at 1 (2016) (Kennedy, A., concurring).

United States. CWA § 404(a). However, under CWA Section 404(c), EPA has "veto" authority to prohibit or restrict the specification of a site for the discharge of dredged or fill material if it finds an "unacceptable adverse effect" on aquatic resources. In effect, section 404(c) gives EPA the power to "veto" a proposed 404(c) permit decision by the Corps. In the past, EPA has exercised this authority sparingly -- although the Corps issues approximately 68,000 404 permits a year, EPA has used its 404(c) veto authority only about 15 times since 1972.[21] However, recent actions indicate EPA may be seeking to expand its Section 404(c) role. Most notably, the D.C. Circuit issued a decision in 2016 upholding EPA's authority to retroactively nullify a Corps permit *several years after it was issued.*

On July 19, 2016, the D.C. Circuit upheld EPA's retroactive veto of Mingo Logan Coal's Clean Water Act Section 404 permit for the Spruce 1 Mine in West Virginia. *Mingo Logan Coal Co. v. EPA*, No. 14-5305 (D.C. Cir. July 19, 2016). The 2016 decision followed an earlier D.C. Circuit decision that EPA has statutory authority under CWA § 404(c) to withdraw permit specifications allowing discharges of fill materials years after the permit has been issued. *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608 (D.C. Cir. 2013). The Supreme Court denied certiorari on 2013 decision. The District Court upheld EPA's decision to revoke the permit in September 2014. The case was then appealed again to the D.C. Circuit. The issue before the Court on this second appeal was whether EPA's revocation of Mingo Logan's permit was arbitrary and capricious in violation of the Administrative Procedure Act (APA).

By way of background, this decision is part of the protracted litigation stemming from EPA's decision to revoke Mingo Logan Coal Company's 404 permit for the Spruce 1 Coal Mine in West Virginia. The litigation began in 2011 when EPA withdrew Mingo Logan's permit *four years after* it was originally issued by the Corps. Mingo Logan brought suit claiming that EPA did not have authority under CWA § 404(c) to withdraw the permit after it had been issued, and alternatively that EPA's action was in violation of the

21 *See* https://www.epa.gov/cwa-404/chronology-404c-actions.

APA. In 2013, the D.C. Circuit Court held that EPA has post-permit withdrawal authority under § 404(c) and remanded to the D.C. District Court to resolve the APA claim. The Supreme Court denied certiorari on the statutory authority issue. In 2014, the D.C. District Court issued an order on remand upholding the EPA's decision to revoke the permit under the APA. Mingo Logan appealed the order to the D.C. Circuit.

On appeal, arguments centered on what standard EPA should be held to in invoking its post-permit veto authority under § 404(c) of the CWA. The D.C. circuit panel included Judges Henderson (nominated by George H.W. Bush), Kavanaugh (nominated by George W. Bush), and Srinivasan (nominated by Barack Obama).

In its briefs, Mingo Logan asserted that EPA failed to take into account the millions of dollars Mingo Logan invested in reliance on the permit as well as its history of full compliance with the permit. Mingo Logan stressed that the permit had been issued after years of study from federal agencies and Mingo Logan's agreement to undertake mitigation measures. Mingo Logan claimed that EPA's decision to curtail authorized operations at the mine by 88% effectively nullified the permit and rendered its investments worthless.

At the argument, Judge Kavanaugh appeared receptive to Mingo Logan's argument that, given the reliance interests inherent in post-permit revocation, EPA must present substantial new information to justify its post hoc departure from the conclusions reached in the pre-permit process. He also suggested that EPA may have an obligation to consider non-environmental factors, such as the cost to the permit-holder, as an important aspect of the problem that should be evaluated in reasoned agency decision-making consistent with the APA.

Judge Srinivasan suggested that Mingo Logan had waived its argument that EPA failed to take into account its reliance interest in the permit because Mingo Logan did not proffer that argument before the agency in its comments submitted during the revocation process. He suggested that the record before

the agency did not include any evidence of Mingo Logan's reliance interest in the permit and therefore the reliance argument was not properly preserved for the court.

In the opinion issued July 19, 2016, Judges Henderson and Srinivasan concluded that "the EPA did not violate the APA in withdrawing specification of certain disposal areas from the permit; rather, it considered the relevant factors and adequately explained its decision. The EPA's *ex post* withdrawal is a product of its broad veto authority under the CWA, not a procedural defect."[22] The court noted that EPA has broad discretion to veto a permit under CWA Section 404(c) whenever it finds that the permit activities would have an unacceptable adverse effect on aquatic resources. Notably, the court found that Mingo Logan forfeited its reliance claims by failing to present them to EPA or the district court.

In his dissent, Judge Kavanaugh argued that Mingo should not be penalized for failing to pursue the reliance argument because EPA had clearly stated in the administrative proceeding that reliance costs were irrelevant. Judge Kavanaugh's dissent also argued that EPA's failure to consider costs was arbitrary and capricious. He referenced *Michigan v. EPA*, 576 U.S. ___ (2015), where the Supreme Court held that EPA must consider costs under the Clean Air Act when regulating power plant emissions. Judge Kavanaugh also noted that Section 404(c) of the CWA was broad enough to require the agency to consider the full universe of facts and circumstances surrounding its action, including costs, jobs, and other economic impacts.

The D.C. Circuit decision upholding EPA's post-permit veto authority could have significant implications for a range of transportation projects. As discussed above, Section 404 permits are required for any project that impacts waters of the United States, including wetlands. The permit program therefore impacts most development projects, including transportation infrastructure development. Although EPA has used its Section 404(c) veto authority only sparingly in the past, initiating the veto process in only about

22 *Mingo Logan v. EPA*, No. 14-5305, slip op. at 3 (D.C. Cir. July 19, 2016).

15 cases to date, recent actions indicate EPA may be seeking to expand its Section 404(c) role. First, the decision in *Mingo* to retroactively nullify a Corps permit several years after it was issued represents a significant expansion of that authority. Second, EPA initiated a 404(c) action in 2014 regarding the Pebble Mine project in Alaska, even before a 404 permit application has been filed for that project.[23] Together, these actions indicate that EPA is looking to expand its veto authority under the CWA to allow it to act both preemptively before an application is filed, and retroactively, after a final permit has been issued. EPA's assertion of the power to preempt or undo Corps action has the potential to disrupt the finality and certainty of the CWA Section 404 permit process, a process that is critical to a wide range of industries and projects. The D.C. Circuit seemed to recognize the implications of the decision: "we note that post-permit withdrawal under Section 404(c) is a mighty power and its exercise will perhaps inevitably leave a permittee feeling as if the rug has been pulled out from under it."[24] This lack of certainty could chill future investments in vital transportation infrastructure and other development projects that require 404 permits.

B. Delaware Riverkeeper v. Pennsylvania Department of Environmental Protection: Third Circuit Finds Federal Court Jurisdiction over State Water Quality Certifications

In an apparent case of first impression, the Third Circuit ruled in 2016 that federal courts have jurisdiction over state water quality certifications required by the Clean Water Act. Section 401 of the CWA requires that an applicant for a federal license or permit obtain a certification from the state that any discharges from the facility will comply with the Act, including state-established water quality standard requirements. On August 8, 2016, the Third Circuit issued a decision upholding state water quality certifications for a pipeline expansion project connecting gas wells in the Marcellus Shale region of central Pennsylvania to the Transcontinental (Transco) pipeline that

23 *See* Letter of EPA Regional Administrator to Thomas Collier, *et. al.* (Feb. 28, 2014), *available at*: https://www.epa.gov/sites/production/files/2014-02/documents/bristol-bay-15day-letter-2-28-2014.pdf.
24 *Id.* at 36.

runs from South Texas to New York City. *Delaware Riverkeeper Network v. Secretary, Pennsylvania Dep't of Envtl. Prot.*, No. 15-2122 (3d Cir. Aug. 8, 2016), and *New Jersey Conservation Found. v. New Jersey Dep't of Env't*, No. 15-2158 (3d Cir. Aug. 8, 2016). Of particular significance is the court's finding that it had jurisdiction over the state certifications because the agencies were acting "pursuant to federal law" when they were issued.

The appeal involved two consolidated cases: Delaware Riverkeeper Network challenged the Pennsylvania Department of Environmental Protection's (PDEP) water quality certification, and the New Jersey Conservation Foundation challenged the New Jersey Department of Environmental Protection's (NJDEP) certification.

The Third Circuit found that a water quality certification is an integral part of the regulatory scheme of the Clean Water Act, and to deny the appeals court jurisdiction over the states' permitting actions "would frustrate the purpose of Congress' grant of jurisdiction."[25] The court also found that the states' participation in the permitting process for the pipeline constituted a waiver of the states' sovereign immunity.[26]

While the court found jurisdiction, the plaintiffs' claims failed on the merits. The court held that NJDEP afforded adequate public comment on the proposal, performed a sufficient public interest analysis and gave the appropriate consideration to the disturbance of water bodies and endangered species.

The Court's finding of jurisdiction over the water quality certifications issued by the state regulators could have ramifications for infrastructure projects, including transportation projects, as it potentially opens another avenue for plaintiffs to challenge projects in federal court. For instance, in addition to challenging the Corps' final permit decision under the CWA, project opponents could also file challenges to the underlying state water

25 *Mingo Logan*, slip op. at 18.
26 *Id*. at 28.

quality certification(s) in one or more federal courts. Thus, even if the Corps' decision were upheld, projects face another potential vulnerability in federal court if the state water quality certification decision were found to have procedural or substantive errors.

CONCLUSION

While the transportation industry has been justifiably focused on developments under the Clean Air Act over the past several years, EPA and the Corps have taken several important actions under the CWA that also deserve careful attention. Most notably, the WOTUS rule has the potential to expand the reach of the CWA, broadening the projects that require Section 404 permits. In addition, EPA's assertion of broad authority to preempt or undo Corps permitting decisions has the potential to disrupt the finality and certainty of the Section 404 permit process. This lack of certainty could disrupt future development projects that require 404 permits, including transportation projects. Given the politicization of the issues surrounding the CWA, particularly the WOTUS rule, the outcome of the November 2016 elections could substantially impact whether some of these regulatory changes are rolled back by a future administration or Congress. As Justice Kennedy noted in his concurrence in *Hawkes*, "the reach and systematic consequences of the Clean Water Act remain a cause for concern."[27]

27 *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, No. 15-290, 578 U.S. _____, slip op. at 1 (2016) (Kennedy, A., concurring).

WHAT HAS BECOME OF THE ROTTERDAM RULES?

Michael F. Sturley[1]

I. Introduction

During the summer of 2008, the U.N. Commission on International Trade Law (UNCITRAL) completed the negotiation of a new multilateral convention to govern international ocean transport.2 After review by the Legal Committee, the General Assembly on December 11, 2008, formally adopted the U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (popularly known as the "Rotterdam Rules").3 The Convention has been open for signature since September 23, 2009, and the United States was one of the sixteen countries to sign the Convention on the first day in Rotterdam. Twenty-five countries have now signed the Convention. Three of those (including Spain) have already ratified it.

Unfortunately, the United States has not yet made any publicly visible progress toward ratifying the Rotterdam Rules. The U.S. commercial interests that worked for years to negotiate the Convention have long been pushing for ratification, primarily to bring the U.S. legal regime into the

1 Fannie Coplin Regents Chair in Law, University of Texas at Austin; B.A., J.D., Yale; M.A. (Jurisprudence) Oxford. In the course of this paper, I discuss the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (popularly known as the "Rotterdam Rules"). *See infra* note 3 and accompanying text. In the interest of appropriate disclosure, I note that I served as the Senior Adviser on the United States Delegation to Working Group III (Transport Law) of the United Nations Commission on International Trade Law (UNCITRAL), which negotiated the Rotterdam Rules; as a member of the UNCITRAL Secretariat's Expert Group on Transport Law; and as the Rapporteur for the International Sub-Committee on Issues of Transport Law of the Comité Maritime International (CMI) and for the CMI's associated Working Group, which prepared the initial draft for UNCITRAL's consideration. But I write here solely in my academic capacity and the views I express are my own. They do not necessarily represent the views of, and they have not been endorsed or approved by, any of the groups or organizations (or any of the individual members) with which (and with whom) I have served. I delivered an earlier version of this paper at the 23rd Annual Admiralty Symposium of the Louisiana State Bar Association in New Orleans on September 16, 2016.

2 *See* Report of the United Nations Commission on International Trade Law, 41st Session, U.N. GAOR, 63d Sess., Supp. No. 17, Annex I, U.N. Doc. A/63/17 (2008).

3 The original final text of the Convention is annexed to General Assembly Resolution 63/122, U.N. Doc. A/RES/63/122 (11 December 2008). Minor amendments were adopted in January 2013 to correct two editorial mistakes. *See* Correction to the Original Text of the Convention, U.N. Doc. C.N.105.2013.TREATIES-XI-D-8 (Depositary Notification) (Jan. 25, 2013). For a more detailed discussion of the issue, *see* Michael F. Sturley, *Amending the Rotterdam Rules; Technical Corrections to the U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 18 J. INT'L MAR. L. 423 (2012).

twenty-first century,[4] and all of the U.S. commercial interests that would be most directly affected by the Rotterdam Rules are in favor of U.S. ratification. It is thus surprising that we have not seen more visible progress toward that goal.

Some of the explanation can no doubt be attributed to the usual factors that make ratification of any treaty difficult in the best of times. The Senate is notorious for its inertia, for example, particularly on issues that do not generate much public attention. But the single biggest explanation for the current lack of progress is the opposition of the American Association of Port Authorities (AAPA) and some public port authorities — opposition that surfaced while the State Department was preparing the ratification package. This article reviews and evaluates that opposition.

II. The Rotterdam Rules

To understand and evaluate the current status of the ratification debate, it is helpful to have some background information on the Rotterdam Rules to provide context. I will accordingly discuss the process by which the Convention was negotiated and explain a few of the relevant substantive provisions.

A. The Negotiation of the Rotterdam Rules

One of the most important goals of the Rotterdam Rules was to meet the needs of industry, particularly by updating and modernizing the governing legal regime. In the United States, liability for the loss or damage of goods carried by sea is governed primarily by the Carriage of Goods by Sea Act (COGSA),[5] which is the U.S. enactment of a 1924 international convention popularly known as the Hague Rules.[6] Most of the world's major maritime

4 *See generally*, *e.g.*, Michael F. Sturley, *Beyond Liability Disputes: The Larger Impact of the Rotterdam Rules on the Efficiency of the Shipping Industry*, in Η ΛΕΙΤΟΥΡΓΙΑ ΤΗΣ ΝΑΥΤΙΛΙΑΚΗΣ ΕΠΙΧΕΙΡΗΣΗΣ ΣΕ ΠΕΡΙΟΔΟΥΣ ΟΙΚΟΝΟΜΙΚΗΣ ΑΣΤΑΘΕΙΑΣ: 8° ΔΙΕΘΝΕΣ ΣΥΝΕΔΡΙΟ ΝΑΥΤΙΚΟΥ ΔΙΚΑΙΟΥ [SHIPPING IN PERIODS OF ECONOMIC DISTRESS: EIGHTH INTERNATIONAL CONFERENCE OF MARITIME LAW] 123 (Piraeus: Piraeus Bar Association, 2015).
5 Ch. 229, 49 Stat. 1207 (1936), *reprinted in note following* 46 U.S.C. § 30701. A quarter-century ago, COGSA was codified at 46 U.S.C. app. §§ 1300-15. A decade ago, when Congress recodified most of title 46 of the United States Code and enacted the new version as positive law, *see generally* Michael F. Sturley, *Reflections on the Recodification of Title 46*, 2 BENEDICT'S MARITIME BULLETIN 209 (2004), it did not include COGSA in the recodification. *See* Pub. L. No. 109-304, 120 Stat. 1485 (Oct. 6, 2006). COGSA accordingly remains in force as an uncodified statute.
6 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 120 L.N.T.S. 155(Hague Rules), *reprinted in* 6 BENEDICT ON ADMIRALTY doc. 1-1 (7th rev. ed. 2016).

nations have adopted the amendments to the Hague Rules in the Visby Protocol,[7] which produced the Hague-Visby Rules, and a small portion of international maritime trade is subject to a U.N. convention popularly known as the Hamburg Rules,[8] but even those regimes are now out-of-date. And none of the current regimes fully addresses the needs of modern commerce.

From the beginning, UNCITRAL made a point of reaching out to commercial interests to develop a new regime that would meet commercial needs. When the Commission first considered the Transport Law project it directed the Secretariat to consult with non-governmental organizations (NGOs) that act on behalf of various segments of the industry, including the Comité Maritime International (CMI), the International Chamber of Commerce (ICC), the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS), and the International Association of Ports and Harbours (IAPH).[9] Thereafter, representatives from interested NGOs attended every meeting of the CMI's International Sub-Committee, and commercial observers were active participants at every session of the UNCITRAL Working Group.

Although the CMI was the most active NGO, all of the listed organizations participated in the process. The International Association of Ports and Harbours (IAPH) was involved from the very beginning, having been represented at the UNCITRAL Commission meeting at which the project was launched.10 Indeed, the IAPH participant was the late Patrick J. Falvey, who was then the Chairman of the IAPH Legal Counselors, having recently completed his forty-year career at the Port Authority of New York and New Jersey (including almost twenty years as its general counsel). The IAPH

7 Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Rules), Feb. 23, 1968, 1412 U.N.T.S. 128 (the Visby Protocol), *reprinted in* 6 BENEDICT ON ADMIRALTY doc. 1-2 (7th rev. ed. 2016). In many countries, the Hague Rules have been further amended by the Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, 1984 Gr. Brit. T.S. No. 28 (Cmnd. 9197), *reprinted in* 6 BENEDICT ON ADMIRALTY doc. 1-2A (7th rev. ed. 2016).

8 United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3, *reprinted in* 6 BENEDICT ON ADMIRALTY doc. 1-3 (7th rev. ed. 2016).

9 *See Report of the United Nations Commission on International Trade Law on the Work of Its Twenty-Ninth Session,* U.N. GAOR, 51st Sess., Supp. No. 17, ¶ 215, U.N. Doc. A/51/17 (1996)*, reprinted in* 1996 CMI YEARBOOK 355.

10 *See List of Participants*, United Nations Commission on International Trade Law, Twenty-ninth Session 18, U.N. Doc. A/CN.9/XXIX/INF.1 (1996) (identifying Patrick J. Falvey as the IAPH participant).

continued to participate throughout the process,11 including at the Commission session at which the Rotterdam Rules were finalized.[12]

When the UNCITRAL negotiations began, the State Department put together a broad delegation to represent U.S. interests. A lawyer from the Office of the Legal Advisor headed the delegation, which also included two additional government representatives — one from the Department of Transportation's Maritime Administration (MARAD) and one from the Office of Transportation Policy in the State Department's Bureau of Energy, Economic and Business Affairs' Transportation Affairs division. I was included as the delegation's "senior advisor," having expertise on the issues but no regular clients whose interests might color my recommendations. A number of industry representatives wished to be included as "advisors" to represent the interests of their industries, and they were all welcomed into the delegation. Carrier, cargo, and transportation intermediary advisors were particularly active in the process, but no one was denied access. Representatives of the Association of American Railroads (AAR) would have been included in the U.S. delegation, but the AAR obtained observer status from UNCITRAL so that its representatives had an independent seat at the negotiations and could speak on its own behalf (without going through the U.S. delegation).[13] Finally, the Maritime Law Association (MLA) had one or more advisors at every meeting, representing the interests of the maritime industry as a whole. Although the federal government did not fund these industry advisors, they had tremendous influence in the positions that the delegation took during the negotiations. Indeed, with the exception of a very few issues on which the government had independent concerns — *i.e.*, safety and security issues — the U.S. position on any subject was a compromise agreed upon by the affected industries during U.S. delegation meetings.

11 *See*, *e.g.*, *List of Participants*, United Nations Commission on International Trade Law, Thirty-third Session 22, U.N. Doc. A/CN.9/XXXIII/INF.1/Rev.1 (2000) (identifying "Patrick J. Falvey, Former Chairman, IAPH Legal Counselors," and "Hugh H. Welsh, Chairman, IAPH Legal Counselors," as the IAPH participants). Mr. Welsh also represented the Port Authority of New York and New Jersey. *See*, *e.g.*, *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 32 (1994).

12 *See List of Participants*, United Nations Commission on International Trade Law, Forty-first Session 29, U.N. Doc. A/CN.9/XLI/INF.1 (2008) (identifying Frans van Zoelen, "Chairman, Legal Committee," as the IAPH participant).

13 AAR representatives nevertheless attended virtually every U.S. delegation meeting.

Before each UNCITRAL Working Group session, the U.S. delegation met in Washington with an even broader group of industry representatives so that every affected group would have the opportunity to express its views. For example, representatives of the stevedores and terminal operators, the trucking industry, and cargo underwriters did not attend UNCITRAL Working Group sessions but they generally attended the U.S. delegation meetings in Washington to ensure that their interests were considered. To enable all interested parties to have the opportunity to participate in those meetings, an official notice was published in the *Federal Register* before each meeting and the head of the U.S. delegation sent an e-mail message (with the *Federal Register* notice attached) to anyone who was thought to have even an indirect interest in the subject.

A few weeks before the meeting held on April 20, 2004, for example, the head of the U.S. delegation sent the following e-mail message to forty-seven separate recipients, including the Executive Vice President and General Counsel of the American Association of Port Authorities (AAPA):

> Subject: State Department Meeting on New UNCITRAL Transport Convention: Tuesday, April 20, 2004
>
> Attached to this email is a notice that has been submitted to the Federal Register for publication. It announces a public meeting on the new UNCITRAL Transport Convention. All of you have indicated an interest in receiving information about this project. You are all cordially invited to attend. It would be appreciated if you could let me know by email if you intend to attend, so that we can make sure that there are enough seats.
>
> While anyone is welcome to raise any relevant topic, it would help us to make the best use of our time if you would let me know in advance if there is a particular topic that you would like to have included in the agenda.[14]

The attached notice, which was subsequently published in the *Federal*

14 For an additional perspective on this e-mail message, *see* Chester D. Hooper, *Activities in the United States to Ratify the Rotterdam Rules*, 2015 DIR. MAR. 750.

Register on April 9, gave more specific details about the upcoming meeting:

> There will be a public meeting of a Study Group of the Secretary of State's Advisory Committee on Private International Law on Tuesday, April 20, 2004, to consider the draft instrument on the International Transport Law, under negotiation at the United Nations Commission on International Trade Law (UNCITRAL). The meeting will be held from 1:30 p.m. to 5 p.m. in the offices of Holland & Knight, Suite 100, 2099 Pennsylvania Avenue, N.W., Washington, D.C.
>
> The purpose of the Study Group meeting is to assist the Departments of State and Transportation in determining the U.S. views for the next meeting of the UNCITRAL Working Group on this draft instrument, to be held in New York from May 3 to 14, 2004.
>
> The current draft text of the instrument and related documents of Working Group III (Transport Law) are available on the UNCITRAL website, *http://www.uncitral.org*. The Study Group meeting is open to the public up to the capacity of the meeting room. Persons who wish to have their views considered are encouraged to submit written comments in advance of the meeting. Comments should refer to Docket number MARAD-2001-11135. Written comments may be submitted to the Docket Clerk, U.S. DOT Dockets, Room PL-401, Department of Transportation, 400 7th Street, S.W., Washington, DC 20490-0001. You may also send comments electronically via the Internet at *http://dmses.dot.gov/submit/*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., Monday through Friday, except federal holidays. An electronic version of this document, along with all documents entered into this docket, is available on the World Wide Web at *http//dms.dot.gov*. For further information, you may contact Mary Helen Carlson at 202-

776-8420, or by e-mail at *carlsonmh@state.gov*.[15]

Of course, not everyone attended these meetings. Representatives of shippers, carriers, stevedores and terminal operators, transportation intermediaries, and cargo underwriters, for example, recognized that the proposed convention could affect their interests, and therefore attended the meetings. But others concluded that the proposed convention either would not have a significant impact on them or that their interests were already adequately represented by other organizations. The AAPA, for example, stopped coming to the meetings.[16] Its executives apparently believed (correctly, in my opinion) that (1) the proposed convention would not have a significant impact on its members' operations, and (2) to the extent that the convention would affect its members' operations, the stevedores and terminal operators (who were already well represented at the meetings) had the same interests as the ports, and could effectively advocate those views.

B. Particular Aspects of the Rotterdam Rules

The primary purpose of the Rotterdam Rules is to bring the law governing the carriage of goods by sea into the twenty-first century.[17] When the new Convention enters into force, it will provide benefits for the entire industry, including (for example) the facilitation of electronic commerce. It is unnecessary to explain in detail here what the Convention will do, for other sources are readily available.18 But it would be helpful when considering the opposition to the Rotterdam Rules to have a few specific aspects in mind.

15 69 Fed. Reg. 18998 (Apr. 9, 2004).

16 In contrast, the railroads sent representatives to all of the Washington meetings, to every UNCITRAL Working Group session, and to U.S. delegation meetings during the negotiating sessions, even though any effect on the railroads of the proposed convention was not readily apparent. The trucking industry attended some meetings but it was less active, recognizing that its interests — to the extent that the new convention would affect them — were the same as the railroads' interests, and the railroads were already effectively advocating their views.
All of this activity vividly demonstrates that the negotiating process was completely transparent, and even those who would not be directly affected by the final product were welcome to participate fully if they wished to be involved.

17 *See*, *e.g.*, Michael F. Sturley, *Reflections on Fifty Years of Revolutionary and Glacial Change in the Shipping Industry*, 50 EUROPEAN TRANSPORT LAW 357 (2015).

18 *See generally*, *e.g.*, MICHAEL F. STURLEY, TOMOTAKA FUJITA & GERTJAN VAN DER ZIEL, THE ROTTERDAM RULES: THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA (London: Sweet & Maxwell 2010).

1. Door-to-door coverage

Perhaps the most significant innovation of the Rotterdam Rules is the extension of geographic coverage. Like COGSA,[19] the Hague and Hague-Visby Rules are both limited to tackle-to-tackle coverage.[20] The Hamburg Rules extend coverage somewhat, but still apply only on a port-to-port basis.[21] Modern contracts of carriage, however, frequently cover carriage from an inland place of origin to an inland destination. In order to provide a single legal regime to govern that contract, the Rotterdam Rules extend coverage to the entire contractual period on which the parties have agreed, whether it be port-to-port, door-to-door, or some variation thereof.[22] As the Supreme Court has observed in this context, "[c]onfusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning."23

2. Performing parties

Closely related to the Rotterdam Rules' expansion to door-to-door coverage is the explicit recognition of the role played by performing parties.[24] In modern multimodal carriage, carriers routinely sub-contract at least a portion of their obligations. If the carrier that contracts with the shipper is an ocean carrier, for example, it will routinely sub-contract with an inland carrier to move the goods from the place of receipt to the port of loading, or from the port of discharge to the ultimate place of delivery. If the carrier that contracts with the shipper is a "non-vessel operating common carrier" (NVOCC), it will routinely sub-contract with other companies (including inland and ocean carriers) to perform every aspect of the carriage. In the Rotterdam Rules, those sub-contractors are labelled "performing parties,"[25] and if they do their work at sea or in the port area they are "maritime performing parties."[26]

19 *See* COGSA § 1(e)
20 *See* Hague-Visby Rules art. 1(e).
21 *See* Hamburg Rules art. 4(1); *see also* art. 1(6).
22 *See generally*, *e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 18, ¶¶ 4.001-.008.
23 *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 29, 2004 AMC 2705, 2715 (2004).
24 *See generally*, *e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 18, ¶¶ 4.025-.030.
25 Article 1(6)(a) defines a "performing party" as "a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, keeping, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.." *See generally*, *e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 18, ¶¶ 5.144-.155. The word "keeping" was added by the 2013 amendment to the convention. *See supra* note 3.
26 Article 1(7) defines a "maritime performing party" as "a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of

The Rotterdam Rules impose primary responsibility for cargo loss or damage on the carrier that contracts with the shipper, but when a cargo claimant is able to show that a particular maritime performing party was in fact responsible for the loss of or damage to the cargo, article 19(1) gives the claimant a direct claim against that maritime performing party under the terms of the convention.[27] That provision was not revolutionary. Cargo claimants have long sued negligent sub-contractors that damaged their cargo.[28] Article 19(1)'s innovation is to bring the action within the scope of the Convention, rather than leaving claimants with different remedies against different parties for the same loss or damage depending on whether the carrier or the responsible sub-contractor is being held liable.

3. Automatic "Himalaya" protection

When an entity qualifies as a "maritime performing party" under article 1(7), with the result that it might become liable under article 19(1) for damage that it causes to cargo that it is handling on behalf of a carrier, article 4(1) guarantees that it will be entitled as a matter of law to the benefit of all of the carrier's defenses and limitations of liability, regardless of whether it is sued under the Convention or under some other legal theory (such as tort or bailment).[29] Current U.S. law generally gives a carrier's servants, agents, and

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loading of a ship and their departure from the port of discharge of a ship." *See generally*, *e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 18, ¶¶ 5.156-.159.

27 Article 19(1) provides:

> A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:
>
> (a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and
>
> (b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship and either (ii) while it had custody of the goods or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

See generally, *e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 18, ¶¶ 5.163-.195. The 2013 amendment to the convention, *see supra* note 3, corrected a drafting error in paragraph 19(1)(b).

28 *See*, *e.g.*, *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 2004 AMC 2705 (2004); *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 1959 AMC 879 (1959).

29 Article 4(1) provides:

> Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay

sub-contractors the benefit of the carrier's defenses and limitations of liability only by contract — and only if the carrier included an adequate "Himalaya clause" in its bill of lading. Although Himalaya clauses are often effective to protect entities that qualify as maritime performing parties under the Rotterdam Rules,[30] some bills of lading omit the Himalaya clause entirely[31] and some Himalaya clauses are held to be inadequate.

In *Jagenberg, Inc. v. Georgia Ports Authority*,[32] for example, a port authority, acting as the agent for an ocean carrier, damaged a single "package" of the plaintiff's cargo while moving it in the port area.[33] The plaintiff, alleging that the port authority and the ocean carrier had breached their obligations as bailees of the cargo, claimed $750,000 in damages for the package and both defendants moved for partial summary judgment to limit their liability to COGSA § 4(5)'s $500.[34] The port authority's rights depended on the carrier's Himalaya clause, which the court held to be inadequate to protect the port authority.[35] The court therefore granted only the carrier's motion for partial summary judgment[36] and the case proceeded on the basis that the port authority faced full liability for the damage. Under the Rotterdam Rules, the port would automatically have benefitted from the same rights as the carrier.

III. The Sole Opposition to U.S. Ratification

It is surprising that port interests would oppose U.S. ratification of the Rotterdam Rules since — as was apparent over a dozen years ago when the proposed convention was being negotiated — the proposed convention would

in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:

(a) The carrier or a maritime performing party;

(b) The master, crew or any other person that performs services on board the ship; or

(c) Employees of the carrier or a maritime performing party.

30 *See*, *e.g.*, Michael F. Sturley, *Third Party Rights and the Himalaya Clause*, 2A BENEDICT ON ADMIRALTY § 169 (7th rev. ed. 2016).

31 *See*, *e.g.*, *Fortis Corp. Ins., SA v. Viken Ship Management AS*, 597 F.3d 784, 792, 2010 AMC 609 (6th Cir. 2010) (O'Connor, J., sitting by designation).

32 882 F. Supp. 1065, 1995 AMC 2333 (S.D. Ga. 1995).

33 882 F. Supp. at 1068-69.

34 882 F. Supp. at 1069.

35 882 F. Supp. at 1074-76.

36 882 F. Supp. at 1076-79.

have very little impact on the ports.[37] The final text confirms this. Many ports — including two of the most vocal opponents of the Convention — would not be liable under the Rotterdam Rules without their consent because they are entitled to sovereign immunity.[38] Many other ports — including the largest ports in the container trade (the trade that will be most significantly affected by the Rotterdam Rules) — would not be liable under article 19 because they are simply landlords that lease space to the stevedores, terminal operators, and other private parties that conduct the actual operations in the port.[39] Those port authorities would not qualify as "maritime performing parties" under article 1(7) because none of them "performs or undertakes to perform any of the carrier's obligations" under the contract of carriage. That work is left to a landlord port's tenants.

It is even more surprising that port interests would oppose U.S. ratification of the Rotterdam Rules when so many provisions of the Convention would provide greater protection to ports than does current U.S. law. Perhaps the most obvious example is article 4(1), which would guarantee a port (when it qualifies as a "maritime performing party" under article 1(7)) the benefit of all of the carrier's defenses and limitations of liability, regardless of whether it is sued under the Convention or under some other legal theory (such as tort or bailment). Because ports now have only the uncertain contractual protection of Himalaya clauses,[40] the automatic protection of article 4(1) is indeed a valuable benefit.

The ports' objections to U.S. ratification of the Rotterdam Rules remain surprising even when the stated reasons for those objections are considered. Although the ports have generally been vague in explaining why they oppose U.S. ratification of the Rotterdam Rules, one port authority gave the Maritime Administration a detailed memorandum (which I will call here the "Ports' Memorandum") with a list of various objections. In the rest of this section, I will examine those objections in detail. None provides a plausible reason to oppose U.S. ratification. They instead reveal a lack of understanding of the

37 *See supra* text at note 16.
38 *See*, *e.g.*, *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 751 (2002) (finding South Carolina State Ports Authority entitled to sovereign immunity); *Kamani v. Port of Houston Authority*, 702 F.2d 612 (5th Cir. 1983) (finding Port of Houston Authority entitled to sovereign immunity).
39 MARAD reports, for example, that the Port Authority of New York & New Jersey, the Port of Long Beach, and the Port of Los Angeles are all landlord ports.
40 *See supra* notes 30-36 and accompanying text.

Convention, the process by which it was negotiated, and current U.S. law.

A. The Ports' Opportunity to Participate in the Negotiations

The first objection mentioned in the Ports' Memorandum is the supposed "fail[ure] to include the United States port community in the seven year drafting process." As explained above, the American Association of Port Authorities was notified of the negotiations, was given an opportunity to participate in the process, attended at least one meeting, and chose not to participate further.[41] Every meeting of the U.S. delegation was publicized in advance in the *Federal Register* and any interested party — including any port authority — was invited to attend the meetings or to submit comments.[42] Moreover, experienced representatives of the United States port community participated in the negotiations as representatives of the International Association of Ports and Harbours (IAPH).[43]

To the extent that the ports failed to participate in the drafting process, they themselves made the decision to abstain from the negotiations. Of course they were not obligated to participate, and they certainly retain their right to criticize the result of the negotiations in which they chose not to participate. If they had legitimate concerns, it would still be appropriate to address them. But it is simply inaccurate for them to assert that they were in any way excluded from the process.

B. Prior International Treaties

In a somewhat cryptic objection, the ports complain that they "*have never been the subject of international treaties*." It seems odd that ports, whose business (at least to the extent relevant here) is based on international trade, would be espousing isolationist views. The Ports' Memorandum offers no reason for objecting to the source of the legal regime (as opposed to its substantive content). It certainly makes no effort to challenge the advantages of international uniformity,[44] which is a well-recognized benefit of having an international treaty that establishes the same legal standards in different

41 *See supra* notes 9-16 and accompanying text.
42 *See*, *e.g.*, 69 Fed. Reg. 18998 (Apr. 9, 2004).
43 *See supra* notes 10-11 and accompanying text.
44 *See generally*, *e.g.*, Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. MAR. L. & COM. 553 (1995).

countries for multinational transactions.

In any event, the ports' assertion is substantially incorrect. Although it is true that ports *as ports* have never been the subject of an international treaty governing the carriage of goods by sea, that truth will not change under the new Convention. Ports *as ports* are not subject to the Rotterdam Rules; nothing in the Rotterdam Rules regulates ports as such. The Rotterdam Rules would apply to a port only to the extent that it is a "maritime performing party," and a port would not qualify as a performing party unless it "performs or undertakes to perform" some "of the carrier's obligations under the contract of carriage."[45] To the extent that a port is currently performing any of the carrier's obligations, it is already liable to be sued for any loss or damage that it causes to the cargo in its care. And if a port is sued, it will quickly assert the benefits of the carrier's COGSA defenses under a Himalaya clause.[46] Although COGSA appears in the *Statutes at Large* as an Act of Congress, it is well recognized that this particular statute is simply the U.S. enactment of an international treaty known as the Hague Rules.[47] To be sure, Congress modified the treaty language in a handful of places,[48] but each of those modifications was intended to give effect to the international understanding, not to change it.[49] Moreover, a carrier's rights are sometimes defined by another international convention, such as the Hague-Visby Rules,[50] and when that happens a port's derivative rights under a Himalaya clause would also be defined by the international treaty. International treaties have long been a part of the landscape for the international carriage of goods by sea, and to the extent that ports are part of that process — as opposed to being mere landlords[51] — they are (by their own choice) very much subject to those treaties.

45 Article 1(6)(a). *See supra* note 25 (quoting article 1(6)(a)).
46 *See supra* notes 32-36 and accompanying text.
47 *See*, *e.g.*, *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 301-02, 1959 AMC 879 (1959).
48 *See generally*, *e.g.*, Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. MAR. L. & COM. 1, 53-54 (1991).
49 The most obvious change was in COGSA § 4(5), which enacts article 4(5) of the Hague Rules. Whereas the Hague Rules provide for a package limitation of £100 sterling, COGSA § 4(5) sets the limitation amount at $500. But the Hague Rules explicitly authorized that "amendment." *See* Hague Rules art. 9(2) ("Those contracting states in which the pound sterling is not a monetary unit reserve to themselves the right of translating sums indicated in this convention in terms of pound sterling into terms of their own monetary system in round figures.").
50 *See*, *e.g.*, Michael F. Sturley, *Bill of Lading Provisions Calling for the Application of Legal Regimes Other Than the Carriage of Goods by Sea Act*, 2A BENEDICT ON ADMIRALTY § 46 (7th rev. ed. 2016).
51 *See supra* note 39 and accompanying text.

C. The Ports' Control Over the Conditions and Limits of Their Liability

Turning to specific objections to the substance of the Rotterdam Rules, the Ports' Memorandum argues "that under the Rotterdam Rules, U.S. ports have absolutely no control over the conditions and limits of their own liability." The asserted basis for that argument is that article 80 permits carriers to enter into "volume contracts" with customers[52] "and thereby establish the applicable liability conditions and amounts per customer." The Ports' Memorandum recognizes "that the ports . . . will get the benefit of any lower liability negotiated by a carrier, and not suffer if there is a higher liability assumed by the carrier in the volume contract."53 In other words, the carriers' limited freedom of contract under article 80 can only help the ports. Whatever the carrier does, a port's maximum liability will be established by the Convention's terms. The only uncertainty will be whether it might benefit from the carrier's having made a better bargain (without informing it).[54] The objection, in other words, is that a port might get a windfall without having known in advance that this good fortune was possible.

Even if it were a bad thing to obtain a windfall, the ports' objection reveals a major misunderstanding of current U.S. law.[55] To the extent any basis exists for the objection, the problem is much more serious today. Performing parties such as ports are currently subject to suit in tort (or bailment) for any damage they cause to the cargo but they generally receive the benefit of the carrier's defenses and limitations under a Himalaya clause in the bill of lading. If the Himalaya clause is missing (which sometimes happens[56]) or inadequate (which also happens[57]), the performing party's potential liability is unlimited. In other words, a performing party's protection is entirely in the hands of the carrier that drafts the bill of lading. Although the Ports' Memorandum may be correct in claiming that "it is impossible for ports to know what the terms are for the thousands of

52 *See generally*, *e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 18, ¶¶ 13.049-.059.
53 *Cf. infra* text at note 72.
54 *See*, *e.g.*, Michael F. Sturley, *The Rotterdam Rules and Maritime Performing Parties in the United States*, 79 J. TRANSP. L., LOGISTICS & POLICY 13, 25-28 (2012) [hereinafter *Maritime Performing Parties*].
55 This objection also reveals a minor misunderstanding of the Rotterdam Rules. Under article 80, carriers can conclude "volume contracts" with shippers but only if they comply with strict requirements that protect shippers from carriers' overreaching. *See generally*, *e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 18, ¶¶ 13.039-.068. Informed observers do not expect many volume contracts to address liability terms.
56 *See supra* note 31 and accompanying text.
57 *See supra* notes 32-36 and accompanying text.

confidential volume contracts in effect between each carrier and each of its customers," the Memorandum ignores the fact that it is even more impractical for ports to know the terms of the Himalaya clauses in every bill of lading that each carrier issues to each of its customers. The significant difference is in the consequences. Not knowing the terms of the Himalaya clauses means that a port will not know whether it is subject to no liability,[58] unlimited liability,[59] or some limited liability between those two extremes.[60] Not knowing the terms of a volume contract, on the other hand, means that the port will not know whether its liability is capped at the level of the Rotterdam Rules or whether it may have even less potential liability.

Moreover, the ports' objection reveals an even more fundamental misunderstanding of current U.S. law and practice. In the real world, a carrier's or a performing party's liability is rarely affected by the statutory liability limits. Even under COGSA's 80-year-old $500/package limit, a large majority of maritime shipments today are worth less than the specified limitation amount.[61] The more important limitation is the actual value of the goods.[62] The Rotterdam Rules continue that principle.[63] Neither the carrier nor its maritime performing parties have any effective control over the value of the goods that are shipped, and shippers very rarely declare the actual value of the goods.[64] In most cases, therefore, the effective limit on a maritime performing party's potential liability is entirely in the shipper's hands, and neither ports nor carriers have either knowledge or control over the limits of their own liability.

D. Ports as Attractive Targets for Suits

The Ports' Memorandum's next objection reveals another fundamental

58 *Cf.*, *e.g.*, *Federal Insurance Co. v. Union Pacific Railroad Co.*, 651 F.3d 1175, 2012 AMC 1303 (9th Cir. 2011).
59 *See*, *e.g.*, *Jagenberg, Inc. v. Georgia Ports Authority*, 882 F. Supp. 1065, 1995 AMC 2333 (S.D. Ga. 1995)..
60 *See*, *e.g.*, *Colgate Palmolive Co. v. M/V Atl. Conveyor*, 1997 AMC 1478 (S.D.N.Y. 1996).
61 *See*, *e.g.*, Michael F. Sturley, *Unit Limitation under the Rotterdam Rules and Prior Transport Law Conventions: The Tail That Wags the Dog*, in CURRENT ISSUES IN HONG KONG AND INTERNATIONAL MARITIME LAW 93, 103 & n.78 (Hong Kong Centre for Maritime and Transportation Law, City University of Hong Kong 2015).
62 *See* COGSA § 4(5) (2d paragraph) ("In no event shall the carrier be liable for more than the amount of damage actually sustained.").
63 *See* Article 22(1).
64 *See*, *e.g.*, *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 19, 2004 AMC 2705 (2004) (noting that it "is common in the industry" for shippers not to declare the true value of their shipments) (citing Michael F. Sturley, *Carriage of Goods by Sea*, 31 J. MAR. L. & COM. 241, 244 (2000) (explaining why shippers do not declare the true value of their shipments)).

misunderstanding of the Rotterdam Rules and current U.S. law. The Memorandum predicts that "[p]orts will become the most attractive target for suits involving cargo damage when the cause or place of damage is in doubt."[65] The gravamen of the objection is that volume contracts "usually" include forum selection clauses that may prevent a cargo claimant from suing the carrier where the damage occurred, whereas ports may be sued where they operate. "Thus the port becomes the first target for lawsuits where there may be joint liability."

It is true that volume contracts could include forum selection or arbitration clauses that require suits against a carrier to be brought overseas,66 and those clauses would be enforceable under specified conditions,[67] but requiring suit overseas is very much the exception to the general rule. For the most part, article 66 makes it easier for a cargo claimant to seek redress against the carrier in the most convenient forum — thus making it more likely that the carrier, instead of a port, will be sued (or at least that the port will not be sued alone).[68]

Current law is much more likely to trigger the problem of which the port complains. Under *Sky Reefer*,[69] foreign carriers today can almost always avoid litigation in the United States if they simply include the appropriate clause in their bills of lading (without any of the protections that article 80 of the Rotterdam Rules creates for volume contracts). Thus the Rotterdam Rules would represent a significant improvement for ports that worry about the risk of "becom[ing] the most attractive target" for cargo-damage suits. The Ports' Memorandum has the analysis exactly backwards.

65 This objection also reveals a basic misunderstanding of the Rotterdam Rules. A cargo claimant cannot recover from anyone other than the carrier "when the cause or place of damage is in doubt." The Convention imposes liability on a maritime performing party only if the damage occurred when it was responsible for the goods. Article 19(1)(b)(ii)-(iii); *see supra* note 27 (quoting article 19(1)). And article 4 protects maritime performing parties from liability otherwise than as imposed by article 19.

66 Because volume contracts are a creation of the Rotterdam Rules, no one yet knows whether they will "usually" include forum selection clauses. To the extent that volume contracts resemble the "service contracts" now common in U.S. trades, it is perhaps more likely that forum selection clauses in volume contracts will specify U.S. forums.

67 *See generally*, *e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 18, ¶¶ 12.044-.057, 12.081-.088.

68 *See generally*, *e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 18, ¶¶ 12.022-.041, 12.077-.079.

69 *Vimar Sequros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 1995 AMC 1817 (1995). *See generally*, *e.g.*, Michael F. Sturley, *Forum Selection Clauses*, 8 BENEDICT ON ADMIRALTY § 16.09[A] (7th rev. ed. 2015).

E. The Convention's Alleged Failure to Provide Adequate Guidance

1. Apportionment of liability

A recurring theme in the Ports' Memorandum is that "[c]ontradictions and confusions abound" in the Rotterdam Rules. The first concrete example of that complaint is that "the Rotterdam Rules provide no guidance as to how liability is to be apportioned" when the carrier and a port are sued in a single suit. It is true that the Rotterdam Rules do not specify how to apportion liability. Because the Rotterdam Rules do not attempt to regulate every aspect of the carrier-shipper relationship, they fail to resolve many issues. Of course, it would have been absurd if the Rotterdam Rules had attempted such an ambitious task. Moreover, for eighty years COGSA has similarly failed to address how liability is to be apportioned when a carrier and a performing party are co-defendants. Fortunately, well-established principles of maritime law resolve that issue today and will continue to apply under the Rotterdam Rules.[70]

Unfortunately, the Ports' Memorandum ignores those well-established principles of maritime law. In a subsequent section, it asserts that "[m]any jurisdictions permit a tortfeasor a credit when a co-tortfeasor settles with the plaintiff." It then complains, "if a shipper settles with an at-fault operating port for a modest sum due to limitations under either the Rotterdam formula or a volume contract, an at-fault landlord port would be required to pay a disproportionate part of the loss." This analysis errs on many levels. To begin with, the initial assumption is wrong. Under state law in some states, a non-settling tortfeasor receives a dollar-for-dollar credit, but in *McDermott, Inc. v. AmClyde*,[71] the Supreme Court adopted the proportionate share approach in maritime law for apportionment of liability. The feared problem does not arise in maritime law. Second, the Rotterdam Rules protect maritime performing parties from being sued for more than the amount of the carrier's liability "under either the Rotterdam formula or a volume contract."[72] And finally, to the extent any basis exists for the problem described in the Ports' Memorandum, the problem is far worse under existing law (under which maritime performing parties do not have the benefit of automatic Himalaya

70 *See*, *e.g.*, *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994).
71 511 U.S. 202 (1994).
72 *See supra* notes 29-36 and accompanying text; text at note 53.

protection, for example) than it would be under the Rotterdam Rules.

2. Sovereign immunity

The Ports' Memorandum's second concrete example of "unclear draftsmanship" is the Convention's failure to specify whether it would abrogate the sovereign immunity that "[s]ome US ports presently enjoy… under the Eleventh Amendment of the U.S. Constitution." The Memorandum complains that the "question has not been judicially resolved at this time." Of course, no court could have ruled on a port's entitlement to sovereign immunity under the Rotterdam Rules because the Convention is not yet in force. But courts have ruled on various ports' claims to sovereign immunity in cargo-damage cases under current law, and nothing in the Rotterdam Rules would change those results. I have addressed this issue in detail in an earlier article,[73] and there is no need to repeat my analysis here. The bottom line is that some ports are entitled to sovereign immunity and some ports are not. The result is controlled by legal principles independent of COGSA that will not change under the Rotterdam Rules. Indeed, it is difficult to imagine a plausible legal theory under which a treaty could deny constitutionally protected rights.

3. Breaking the liability limits

Perhaps the most significant criticism along these lines is that the Rotterdam Rules do not provide adequate guidance on when it is possible to break the liability limits under article 61. The Ports' Memorandum worries that "there may in fact be no limit to the amount of loss for which a (carrier or) port may be liable." Once again, the ports' objection betrays a misunderstanding of the Rotterdam Rules' relationship to current law. The Hague Rules created the package limitation codified at COGSA § 4(5) to protect carriers from unlimited liability but did not provide any explicit mechanism for breaking that limitation, even in cases of deliberate misconduct. Courts therefore developed judicial doctrines for breaking limitation. The U.S. courts have been particularly inventive in this regard, and thus it is easier to break limitation under COGSA than under any international regime. Judicial

73 *See generally* Sturley, *Maritime Performing Parties*, *supra* note 54, at 28-35.

inventions such as the "fair opportunity"[74] and "deviation"[75] doctrines often permit limitation to be broken in circumstances that have little if anything to do with carrier misconduct. The Hague-Visby Rules addressed the problem by adding a provision (article 4(5)(e)) to permit limitation to be broken only in cases of intentional or reckless carrier misconduct, thus protecting carriers (and other parties, such as ports, who receive the same benefits under a Himalaya clause) more effectively than COGSA or the Hague Rules. The Hamburg Rules strengthened that provision very slightly in article 8. In the Rotterdam Rules, article 61 starts with the language of article 8 of the Hamburg Rules and makes it somewhat more difficult for limitation to be broken. Once again, the risk that the ports fear is much greater under current law; the Rotterdam Rules would give ports much better protection than they currently have today.

IV. Conclusion

It is disappointing that the United States has not yet ratified the Rotterdam Rules. It is more disappointing that the principal reason for our failure to ratify is apparently due to misunderstandings on the part of an industry that will be affected only tangentially by the Convention when it eventually enters into force. Even if the ports' negative analysis of the Rotterdam Rules had been accurate (rather than based on misunderstandings throughout), it would still be so incomplete that it would be of little value. The ports have focused entirely on liability aspects of the regime, which are relevant in those rare cases — fewer than one percent of all shipments — in which something goes terribly wrong and cargo is lost or damaged. Most of the time, everything turns out well and cargo reaches its intended destination in good condition. Although the Rotterdam Rules address liability issues, the Convention covers much more, and the Ports' Memorandum ignores all of the non-liability provisions.

Perhaps most significantly, the new Convention facilitates electronic commerce (as part of the general updating effort to provide a 21st century regime for ocean carriage), which will produce significant cost savings for everyone in the industry. That is a major reason why carriers (represented in

74 *See*, *e.g.*, Michael F. Sturley, *The Fair Opportunity Requirement*, 2A BENEDICT ON ADMIRALTY § 166[c] (7th rev. ed. 2016).
75 *See*, *e.g.*, Michael F. Sturley, *Deviation*, 2A BENEDICT ON ADMIRALTY ch. 12 (7th rev. ed. 2016).

the United States by the World Shipping Council) overwhelmingly support the Rotterdam Rules despite the imposition of somewhat higher liability on carriers. Those savings on every shipment would far outweigh any increase in liability when things go wrong (less than one percent of the time). Similarly, shippers (represented in the United States by the National Industrial Transportation League) overwhelmingly support the Rotterdam Rules, primarily for the non-liability benefits.

It is ironic that the Ports' Memorandum in its concluding paragraphs recognizes that the ports' "economic well-being" depends "on the success of their operators," but does so in a manner suggesting that potential increased burdens on operators provide a basis for opposing the Rotterdam Rules. Although the economic well-being of ports is indeed ultimately tied to the economic well-being of the other participants in the enterprise, the Ports' Memorandum has once again drawn precisely the wrong conclusion from that insight. All of the interests that would be most directly affected by the Rotterdam Rules — including the operators who use the ports' facilities on a daily basis — recognize that the new Convention would be good for the industry as a whole. And the benefits of the Rotterdam Rules for those who use the ports would be good for the ports, too.

THE ROLE OF NVOCCs AND OTIs ON REDUCING THE THREAT OF COUNTERFEITS: A CONTRACTING PERSPECTIVE

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Abstract

Though the Carriage of Goods by Sea Act of 1937, and many subsequent amendments, vastly limit the ocean carrier's liability, especially the transport of containerized cargo, increased scrutiny is being placed on Non Vessel Operating Common Carriers (NVOCCs), and Ocean Transport Intermediaries (OTIs) regarding their roles in the distribution of counterfeit brands. This paper takes a contracting perspective on the issue and suggests that shippers can potentially use a combination of fixed and variable rewards to NVOCCs/OTIs thus creating strong incentives for NVOCCs and OTIs to put in great effort to reduce the likelihood of counterfeit goods being shipped.

Introduction

Freight forwarders and NVOCCs are unwittingly, willfully or negligently involved in the distribution of counterfeit goods in the United States and globally (Rodriguez 2016). Recently, shippers acting in concert with the International Anti-Counterfeiting Coalition (IACC) have filed complaints with the Federal Maritime Commission (FMC).[1] Many of these shippers are small- and medium-sized enterprises and do not have the same brand-protection resources as larger businesses vis-à-vis counterfeiting risks (Kennedy 2016). Thus, they turn to organizations such as IACC and The Center for Anti-Counterfeiting and Product Protection (A-CAPP) at Michigan State University to seek brand protection.

Since the passage of the Ocean Shipping Transportation Act of 1999[2], which largely liberated NVOCCs and customhouse brokers (acting as OTIs), coupled with the 9-11 terror attacks on the U.S. homeland, increasing scrutiny has been placed on NVOCCs and OTIs by brand owners (*i.e.*, shippers) and other anti-counterfeiting and anti-piracy advocates. *Passass and Jones (2007)* found that the potential for the commission of serious crime through import/export activities is high, requiring urgent attention lest other anti-corruption efforts be rendered ineffective. The U.S. Department of Homeland Security reported 23,140 seizures for fiscal year 2014, according to Rodriguez (2016). Those shipments would have been worth an estimated US $1.2 billion if the seized products were genuine.[3] Problematically, once a counterfeiter is discovered and a civil suit is filed against them, the counterfeiter manufacturer

1 "Many of the lACC's trademark and copyright owner members have experienced a large and growing incidence of counterfeit and/or pirated shipments being imported into the U.S. that, upon investigation, are found to have been originated with the assistance of OTIs in the United States." (Rulemaking Docket 13-05, Comments on Ocean Transportation Intermediary Regulation Revisions, August 26, 2013).

2 See Stapleton, Drew HM, and Soumen N. Ghosh. "The Ocean Shipping Reform Act: Practical Implication for both Buyers and Sellers." *Journal of Transportation Law, Logistics and Policy* (1999); and, Stapleton, Drew, "The Dawning of a New Age in Maritime Shipping: The Impact of Deregulation on Global Carriers and Shippers," (1999), 2nd Annual International *Business and Economics Conference Proceedings*, De Pere, WI, USA for an in-depth review of OSRA.

3 By MSRP value, the reported targets of counterfeits seized were watches/jewelry (31 percent), handbags/wallets (28 percent), consumer electronics/parts (13 percent), wearing apparel/accessories (9 percent), pharmaceuticals/personal care (6 percent), footwear (4 percent), computer accessories (2 percent), optical media (2 percent), labels/tags (1 percent), toys (less than 1 percent) and all other commodities (3 percent). These statistics represent just the tip of the iceberg, because most shipments of counterfeit goods go undetected, (Rodriquez 2016).

virtually disappears (Babčanová 2014; Rodriguez 2016), leaving little recourse except to trace the distribution through the OTI or NVOCC's mandated compliance data.

In this backdrop, we ask the question what can shippers do to reduce the likelihood of counterfeit goods on their bottom line? Given that most shippers who are affected tend to be small- or medium-sized enterprises they are unlikely to have the wherewithal to ensure stringent checks of the cargo being shipped. However, the NVOCCs and/or OTIs, given the nature of the business, their expertise, and experience are better placed to ensure that goods are not counterfeits. In this paper we offer a contracting perspective to the problem of detecting counterfeit goods. Specifically, we suggest that shippers can use a combination of a fixed and variable payment scheme to NVOCCs in order to create incentives for them to put in their best effort to eliminate counterfeit products from being shipped.

The role of NVOCCs in propagating counterfeits

Rodriguez (2016) lays out the NVOCCs' unknowing mark in propagating counterfeiting via the following theft scheme:

1. Foreign counterfeiters unlawfully obtain historical shipping/commercial documentation from a legitimate foreign supplier that ships product(s) to a legitimate U.S. importer.
2. The counterfeiters falsify commercial and shipping documentation so that it appears similar to the transactions and product(s) shipped previously. They provide this erroneous information to OTIs in order to book the cargo, and to officials in both the country of origin and at U.S. Customs to effect the shipment of the counterfeit goods into the United States. Complete details for all import shipments have to be reported electronically to U.S. Customs and Border Protection (CBP) on the Automated Manifest System (AMS) by an NVOCC at least 24 hours prior to loading the shipment on a vessel, and an Internal Transaction Number from CBP must be generated before an ocean carrier can accept the cargo for loading. The government database recognizes the familiar patterns of the known manufacturer, commodities to be shipped, and consignee of those commodities, and

gives the green light for loading of the goods. The false information is then fed into the AMS using stolen credentials obtained through identity theft.

3. The goods shipped are, of course, not those described on the commercial and shipping documentation, but are counterfeit goods mis-described to appear to be legitimate, and the consignees to receive the goods are not those included in the bill of lading issued by the NVOCC.
4. In such cases, the U.S. customs broker usually is retained by the foreign-domiciled NVOCC or its U.S. agent, and the OTI is hired by the counterfeiters on condition that it will not have any direct contact with the importer on the documentation since this is not the actual recipient of the shipment. The consignee on the OTI bill of lading has no idea that this shipment and entry are being made in its name, or that its corporate identity has been stolen. The counterfeiter provides the OTI a fraudulent power of attorney (POA). The OTI provides this false POA to the customs broker with instructions not to contact the importer of record. The goods are then picked up by parties not noted on the NVOCC's bill of lading.[4]

Discussion on Potential Consequences

Liability of carriers has long been a concern in business practice and in study.[5] Carrier- liability apprehensions appear to be present across the globe (*e.g.*, Europe - Pechan, L., & Schneider, M. (2010); USA (Kennedy and Wilson (2015), and Kennedy (2016); and, the UK and China - Bian & Veloutsou (2007)). Engels (2010) submits that the EU deems holding intermediaries such as carriers liable for the distribution of counterfeited or pirated brands is logical.

The Carriage of Goods by Sea Act (COGSA) addresses the rights and immunities of the carrier and the ship. COGSA provides "that in any event, a carrier's liability exposure is limited to USD500 per 'package' or 'customary

4 (http://www.huschblackwell.com/~/media/files/businessinsights/businessinsights/2016/01/article/paradigm%20shift%20in%20anti-counterfeiting%20strategies_rodriguez.pdf, last accessed 12-13-16).

5 See McClain, E. (1891). Hypothetical Cases involving the Liability of Carriers of Goods and of Passengers. *Law Bull. St. U. Iowa*, *1*, 7, for a series of hypothetical liability cases for students of law in the late 19th century, many of which remain contentious.

freight unit'."[6] Interestingly, according to Yang (2014), the Act neither defines what a "package" is nor qualifies what is meant by a "customary freight unit". Many shippers simply write on the bill of lading what is inside the container, thus leaving it to others to construe whether the container qualifies as a COGSA package. Without further specificity, the courts tend to lean toward defining the ocean container as a COGSA package.

Remarkably, the ocean container did not exist when COGSA was passed in the 1930s. Malcolm McLean revolutionized international trade with the invention of the modern intermodal shipping container in the 1950s. Containerization transformed ocean shipping by reducing the number of individual crates to be handled, reducing the instances of trade-offs of cargo, drastically decreasing cost per unit, and transforming an industry from being characterized as one high in labor costs to one characterized as high in capital costs (*i.e.,* investment in containers, and disinvestment in labor), exhibiting the classic economic tradeoff of labor and capital. As a result, carriers invested more in capital in the form of containers, and less in the form of labor. Even though the intermodal container is vastly larger than most individual crated shipments, the $500 limitation held, and holds today. In fact, eight decades after COGSA ratified the Hagues Rules in the United States by the passage of COGSA, the courts continue to struggle with the issue of whether an ocean container qualifies as a "package". Notwithstanding the continued $500-per COGSA package liability-limitation arguments, many NVOCCs are facing increasing scrutiny and charges of vastly greater liability when unwittingly, unknowingly, or willfully engaging in the transportation of counterfeited product shipments via intermodal containers.

The A-CAPP study identified "vicarious and contributory negligence as possible approaches to pursue secondary intellectual property-rights infringement against OTIs and ocean carriers where a party can be held liable

6 Yang (2014) notes Carriage of Goods by Sea Act § 4(5), Ch. 229, 49 Stat. 1207 (1936), reprinted in note following 46 U.S.C. § 30701. The relevant COGSA paragraph reads, "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier."

for damages flowing from trademark, copyright, or patent infringement, even if not infringing on the brand owner's rights," (Rodriquez 2016;: 2). Furthermore, both the Lanham Act[7] and Copyright Act[8] provide for the levying of statutory damages, not simply actual damages.

Statutory damages can be as high as $2 million per counterfeit mark per type of goods or services sold if the courts find that the use of counterfeit or infringement is "willful." Thus, if a counterfeiter or infringer gets caught and has its shipment seized, there is at least some likelihood that the OTI or NVOCC can track the parties with whom it had dealt. According to the legal theories under the Lanham and Copyright acts, the OTI or NVOCC may be liable themselves, because the law allows for pursuit of not only those who offer counterfeited goods or services for sale, but also of those who distribute said goods or services.

Given the role of the NVOCCs and/or OTIs in potentially propagating counterfeits and also in terms of potential damages that they may face, it would be interesting to consider how incentives can be provided to NVOCCs/OTIs to make greater effort in identifying counterfeits early in the process.

A contracting perspective on the relationship between the shipper and the NVOCC

We consider a simple principal-agent model where the shipper (principal) employs an agent (NVOCC) to act on its behalf and ensure that shipper's interests are protected for each shipment undertaken. Grounded in agency theory, the underlying assumption is that given that NVOCCs have more experience and knowledge of the shipping process, they are better placed to ensure that counterfeit goods do not enter the supply chain during the shipping process. The model we employ closely follows the discussion of classic principal-agent models (see. Gibbons, 2005). The shipper employs the agent and reimburses the agent for services rendered. The agent puts in unobserved

7 The Lanham Act of 1946, also known as the Trademark Act (15 U.S.C.A. § 1051 et seq., ch. 540, 60 Stat. 427 [1988 & Supp. V 1993]), is a federal statute that regulates the use of trademarks in commercial activity. See http://legal-dictionary.thefreedictionary.com/Lanham+Act, last accessed 12-13-16.

8 See United States Copyright Office, a department of the Library of Congress' website for complete description of copyright law in the United States: https://www.copyright.gov/title17/ ; last accessed 12-13-16.

effort which in turn translates into reducing the likelihood of counterfeit goods entering the supply chain. The effort that the NVOCC puts in to detect counterfeit goods in the shipment is unobserved and hence the principal has to design a compensation contract which creates incentives for the NVOCC to put in their best effort in order to mitigate potential losses. To make matters intuitive we use a simple model which is a function of four components: The total value of the shipment to the seller (y), the performance metric on which NVOCC's will be paid on by the shipper (p), the action the NVOCC takes to reduce the likelihood of counterfeit goods infiltrating the supply chain (a), and finally, events in the process which are uncontrollable by the shipper/NVOCC (ε/ϕ). To keep the model tractable, we assume that the value of the shipment for the shipper and the NVOC is an additive function of the effort that the NVOCC puts in to detect counterfeits and the random error (i.e.) $y=a+\varepsilon$ and $p = a + \phi$.

Contracts:

Next we discuss what kind of optimal contracts will ensure that the shipper faces a lower threat of receiving counterfeit products. For this purpose, we propose that a simple linear contract can be used where the NVOCC's total payment w is a linear function with a fixed payment α and a variable payment β (which is a function of the agreed-upon performance measure p). More formally, we can write the total payment to the NVOCC as: $w = \alpha + \beta p$. A key element of this linear specification is what is the nature of p? For instance, the shipper can specify a $p \in \big(0, Max(y)\big)$, where, if the shipment happens to be counterfeit, then the NVOCC receives a variable compensation of 0. If the NVOCC exerts effort to ensure that the shipment is indeed not counterfeit, then the shipper could share a part of the total value (y) that is generated with the NVOCC while adjusting the fixed compensation α.

Payoffs:

The shipper's (principal) profit is a function of the value of the goods received less the payment to the NVOCC. Thus we can write the shipper's profit function as $\pi = y - w$. Let us assume that the principal's objective is to maximize the expected value of its profit. The agent receives the total

payment *w* for which it needs to put in costly effort to ensure that counterfeit goods do not enter the supply chain. Let $c(a)$ be the cost associated with the additional effort that the NVOCC needs to put in to ensure that the goods are not counterfeit. The NVOCC's payoff or utility is the difference between the total payment received and the cost of effort: $U = w - c(a)$. We will further assume that the NVOCC's goal is to maximize its expected utility. We will make two further assumptions with respect to the cost function $c(a)$. First, we assume that the $c(a)$ is an increasing function. Thus, if we assume that the NVOCC randomly chooses the number of shipments to investigate further, the larger the chosen sample, the higher the cost. Second, we assume that $c(a)$ is convex. Intuitively it implies that, if the NVOCC needs to increase the number of containers investigated by 5%, the cost of the additional 5% is greater when it engages in checking 40% of the containers, as compared to checking say approximately 20% of the containers.

Timing of Events

Next, we highlight the timing of the contractual setting:

a) The shipper and the NVOCC agree on the compensation contract as defined earlier and decide that the NVOCC will be paid $w = \alpha + \beta p$;
b) The NVOCC chooses an action *a* which is unobserved by the shipper. The action is primarily intended to reduce the likelihood of counterfeit shipments. It can be implemented operationally as the decision to impose random checks on shipment. The greater the frequency of checks, the lower the likelihood of counterfeit goods passing through. While the shipper may be aware that a shipment has been checked, it is unlikely to observe the amount of actual effort that the NVOCC put in to verify the shipment;
c) The action (and noise which is uncontrollable) together determines the shipper's output. We will assume that, at times, it is possible that, despite the agent's best efforts; counterfeit goods may still pass through the system;
d) The final shipment reaches the shipper and the value of the output is observed by both the shipper and the NVOCC;
e) The agent is paid as per the contract.

What will the NVOCC do?

The key question we ask is - what is the level of effort the NVOCC needs to put in? Because the NVOCC's objective is to maximize its objective *U* which is a function of the output and total payment, we can substitute the equations for both output and total payment and formally state the problem as follows:

$$\max_{a} \alpha + \beta a - c(a)$$

Solving this simple problem suggests that the optimal level of effort that the NVOCC puts in should be where $\beta = c'(a)$. This result has important implications for the design of payments to the NVOCC. A simple interpretation suggests that the agent's effort is increasing in the level of variable pay. Thus if a shipper decides to set $\beta = 0.90$, it suggests that the NVOCC will put in extra effort to ensure that the shipment is indeed counterfeit-free. It is in the best interests of the NVOCC as it could potentially be rewarded with a larger payment as compared to a fixed payment. A critical parameter which determines the effectiveness of this contracting mechanism is how to define the performance metric *p*.

Intuitively, $0 \leq \beta \leq 1$, where if β =0, this implies that the NVOCC receives only the fixed wage and hence the variable component is irrelevant. This would be the case where the NVOCC has no incentive to put in additional effort to detect counterfeit goods. On the other extreme, if β =1, then the NVOCC has high incentives to put in additional effort to detect counterfeits as its payoff increases when the value of *p* is high. However, consider the case where *p*=*y*. Under this setting, the NVOCC can extract the entire value of the goods being shipped from the shipper. Given the additional fixed payment associated with the contract, the shipper may actually end up with a loss. Therefore, an interesting implication of this contracting scheme would be how to set the performance metric *p* along with the fixed payment α and the variable payment β. By reducing the variable component, the shipper reduces the incentive for the NVOCC to engage in undertaking costly action to determine counterfeits. On the other hand, a high variable component can potentially be unprofitable for the shipper. Thus, balancing the two elements

is critical in ensuring that effective contracting leads to reduction in counterfeits.

Implications and Conclusion

The implications of the simple model described above suggests that an effective approach to dealing with counterfeit goods could be through efficient contracting between the shipper and an NVOCC. Given that the NVOCC's actions are not observable, the shipper can incentivize the NVOCC to exert greater effort in identifying counterfeits by effectively compensating the NVOCC in terms of the value of the goods shipped. Thus, in the event the value of the goods shipped are counterfeit, the NVOCC ends up without receiving compensation for their work. While the model proposed has intuitive properties, we have only touched upon the very basic and straightforward approach to contracting.

There are several caveats to our simple model. First, we side step the important aspect of risk tolerance on the part of both the shipper and the NVOCCs. If the NVOCCs are risk-averse, the incentive schemes should reflect an additional participation constraint as the NVOCCs may decide that the compensation scheme offered puts too much risk on them and hence they may choose not to work with particular shippers. Thus the optimal choice of β should balance the risk and incentives for the NVOCC. Shippers should be aware of this when setting contracts. Second, we ignore the effect of random chance in our simplified model above. Suppose we find that, in any given time frame, the NVOCC does not take any additional effort in identifying counterfeit goods. However, it just happened that it was a period where the risk of counterfeits was low. In such a situation, a high variable-pay component rewards the NVOCC for no additional effort or pure luck.

While there is a longstanding, though not contentious-free, statutory regime under COGSA limiting carrier liability, NVOCCs are facing increased scrutiny for any role - whether willful, negligent, or unsuspecting - in the proliferation of counterfeit goods imported into the United States by container. Further, there are various stakeholders pushing for much higher liability and vastly stiffer penalties for NVOCCs/OTIs. We offer a contracting perspective on the issue and suggest a solution in which shippers

can use a combination of fixed and variable rewards to NVOCCs/OTIs that creates strong incentives for NVOCCs and OTIs to put in high effort to reduce the likelihood of shipping counterfeit goods.

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