International Transportation Law

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I. Developments in Aviation Law

A. The Cape Town Treaty Comes Into Force

The Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment adopted on November 16, 2001, at a diplomatic conference held in Cape Town, South Africa (Cape Town), will enter into force on March 1, 2006, following Malaysia's deposit of the eighth necessary instrument of ratification/accession on November 2, 2006.[1] The Cape Town Convention creates a new international registry for security interests in certain aircraft and engines, as well as a new system for filing and perfecting those interests.

Generally speaking, Cape Town adopts the U.S. asset-based financing and assignment of payment rights concepts reflected in the U.S. Uniform Commercial Code as the international standard in this area and extends such concepts into areas of the world with inadequate bodies of commercial law that would otherwise present prohibitive risk and credit challenges.[2] Cape Town will be applicable to all aircraft that are type-certificated to transport at least eight persons (including crew), all helicopters certificated to transport at least

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1. *See* UNIDROIT News and Events, Cape Town Convention and Aircraft Protocol—Entry into Force, http://www.unidroit.org/english/news/main.htm (last visited Mar. 15, 2006). The United States became the fifth country to fully adopt Cape Town in August of 2004 and has already taken steps to initiate the required changes to the applicable Federal Aviation Administration regulations. The other six countries to have adopted Cape Town are: Ethiopia, Ireland, Oman, Nigeria, Pakistan, and Panama, which are joined by twenty-eight other signatories including Canada, Italy, and Turkey. *See* International Civil Aviation Organization, Convention on International Interests in Mobile Equipment, Nov. 16, 2004, *available at* http://www.unidroit.org/english/implement/i-2001-aircraftprotocol.pdf.

2. *See* Memorandum, *Hearing on the Cape Town Treaty and Markup Before the H. Subcomm. on Aviation*, 108th Cong. (Apr. 29, 2004), *available at* http://www.house.gov/transportation/aviation/04-29-04/04-29-04memo.html.

five persons (including crew) and aircraft engines having at least 550 horsepower or equivalent,[3] if at the time of the underlying transaction the aircraft is registered in a Contracting State or if the debtor is situated in a Contracting State.[4] Cape Town will cover all international interests in aircraft objects.[5] The International Registry database in which all Cape Town filings will be searchable is to be established in Ireland.[6] Nothing in the Convention or the related regulations that will become effective upon Cape Town's coming into force will affect previously filed registrations, recordations or the existing rights arising therefrom. While the implementation of Cape Town has been supported by the relevant government agencies and the aerospace manufacturing sector, aircraft operators remain cautious about the economic burdens that may be associated with compliance.

B. United States and EU Refuse to Settle WTO Dispute Over Aircraft Subsidies

Despite having reached a settlement agreement to end aircraft subsidies on January 11, 2005, the United States and the European Commission remain embroiled in a fight over this issue that has persisted for over two decades.[7] The most recent stage of this controversy began when both sides filed competing complaints with the World Trade Organization on October 6, 2004, after failing to reach an agreement to replace the 1992 U.S.-European Union Agreement on Large Civil Aircraft (the 1992 Agreement). Each side alleges that the other continues to provide illegal aircraft subsidies to their rival aircraft manufacturers—Boeing in the United States and Airbus in Europe. While still under the guise of negotiating a settlement to end the subsidies, the European Commission appeared to shift its focus in March 2005 to reducing subsidies rather than eliminating them[8] because it was revealed that at least four European governments had agreed, at least in principle, to provide launch aid subsidies to Airbus.[9] The European Commission, on the other hand, contends that the U.S. government and the governments of various states where Boeing's production facilities and headquarters are located continue to transfer economic incentives to the aircraft manufacturer through various financial incentives and other advantages, which include, but are not limited to: tax breaks, bond financing, lease arrangements, and research funding.[10] On October 17, 2005, the World Trade Organization established the three-member panels that

3. *See* Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, art. I, Nov. 16, 2001, *available at* www.unidroit.org/English/conventions/mobile-equipment/aircraftprotocol.pdf.

4. *See id.*, art. IV.

5. *See id.*

6. *See* UNIDRIOT, Annual Report 2004, Report 2004-C.D. (84), 9 (2005), *available at* http://www.unidroit.org/english/publications/proceedings/2005/cd/cd84-02-e.pdf.

7. *See* Press Release, Office of the United States Trade Representative, United States Takes Next Step in Airbus WTO Litigation (May 30, 2005), *available at* http://ustr.gov/Document_Library/Press_Releases/2005/May/United_States_Takes_Next_Step_in_Airbus_WTO_Litigation.html.

8. *Id.*

9. *See* Request for the Establishment of a Panel by the United States, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/2 (June 3, 2005), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm.

10. *See* Request for the Establishment of a Panel by the European Communities, *United States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS317/2 (June 3, 2005), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds317_e.htm.

will rule on each of the competing complaints.[11] Although the parties remain free to settle the disputes, the cases could take years to resolve if they progress into full-blown litigation.

C. DOT Proposes a New Foreign Control Standard for U.S. Airlines

On November 2, 2005, the U.S. Department of Transportation (DOT) announced a rulemaking proposal that would change the way the Department interprets actual control of an air carrier for purposes of determining U.S. citizenship under the definition in section 40102(a)(15) of title 49 of the U.S. Code.[12] The new foreign control rule would allow non-U.S. investors from countries with Open Skies aviation agreements to control the economic activities (such as day-to-day operations, market entry strategy, and aircraft purchases) of U.S. air carriers, as long as the foreigner's homeland provides reciprocal rights to Americans.

Section 40102(a)(15), as amended by Vision 100,[13] requires that U.S. air carriers are under the actual control of U.S. citizens and also that the carrier are incorporated in the United States, that the carrier's president and two-thirds of the board of directors are U.S. citizens, and that U.S. citizens own no less than 75 percent of its voting stock. The actual control requirement was part of CAB and DOT administrative precedent[14] and was codified in 2003 following issuance of a letter from DOT's Office of Inspector General related to the hotly contested *DHL Citizenship* case.[15]

The proposed rule would reduce substantially "the significance . . . of foreign influence over many purely economic decisions" for qualified non U.S.-citizens.[16] For example, an air carrier would be permitted to have qualified foreigners in charge of day-to-day operations, to head a committee on market entry strategy, and to have influence over aircraft purchases. Control by U.S. citizens would continue to be required in areas where significant government regulation and oversight remains. Foreign citizens from countries without Open Skies agreements would remain subject to the more strict traditional control analysis.

The public comment period runs until January 6, 2006. On November 18, 2005, over sixty congressmen wrote to U.S. Secretary of Transportation Norman Y. Mineta opposing the DOT's loosening of the actual control requirement, voicing concern that the Department is making these changes through policy rather than through statutory revisions. Other critics of the proposal include labor unions and several airlines.

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11. *See* Constitution Of The Panel Established At The Request Of The European Communities, *United States—Measures Affecting Trade In Large Civil Aircraft*, WT/DS317/4 (Oct. 25, 2005), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds317_e.htm; Constitution Of The Panel Established At The Request Of The United States, *European Union—Measures Affecting Trade In Large Civil Aircraft*, WT/DS/316/4 (Oct. 25, 2005), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm.

12. Actual Control of U.S. Air Carriers, 70 Fed. Reg. 67,389 (Nov. 7, 2005) (to be codified at 14 C.F.R. §§ 204, 399) [hereinafter Actual Control of U.S. Air Carriers].

13. *See* 117 Stat. 2490 (codified as 49 U.S.C. § 40101 (2003)).

14. Under a series of administrative cases dating back to 1940, CAB and DOT determined "actual control" by examining several factors related to control of an air carrier airline, including: equity ownership; supermajority or disproportionate voting rights of shareholders; negative control and veto power over major decisions; family and business relationships between owners and foreigners; significant contracts with foreigners; credit and debt instruments; and buy-out clauses. Actual Control of U.S. Air Carriers, *supra* note 12, at 67,390 (citing Letter from Dept. of Transportation Inspector General (Mar. 4, 2003)).

15. *In the Matter of DHL Airways, Inc.*, DOT Docket No. OST-2002-13089 (2002).

16. Actual Control of U.S. Air Carriers, *supra* note 12, n.9.

D. Open Skies Makes Progress in 2005

In November 2005, the United States reached an Open Skies aviation agreement with Canada and a tentative Open Skies deal with European negotiators that would liberalize the trans-Atlantic aviation market. The U.S.-Canada Accord, which becomes effective in September 2006, will make Canada the seventy-third Open Skies partner of the United States. The new U.S.-Canada agreement amends a 1995 agreement that eliminated most restrictions on air service between the two countries but provided virtually no rights for airlines to operate within the other country and severely restricted express cargo services between the two countries. These restrictions will be removed when Open Skies takes effect next year.

Also, in late 2005, U.S. and European negotiators resumed long-stalled talks and reached a tentative agreement to allow their airlines to fly unrestricted routes across the Atlantic. The tentative agreement must be approved by the European Union's (EU's) Transport Council of Ministers, which represents all twenty-five member states of the EU. A comprehensive Open Skies agreement will depend on the United States' agreeing to lift ownership caps that limit foreign investment in U.S. airlines.[17] Although U.S. negotiators said DOT's proposed foreign control rule discussed above was not linked to the U.S.-EU negotiations, the proposal was announced on the eve of those talks and DOT's Under Secretary for Policy briefed the EU delegation on the proposal.

E. Court Upholds DOT Authority to Regulate Independent CRSs

On November 22, 2005, the United States Court of Appeals for the District of Columbia ruled that DOT has jurisdiction under the federal aviation statutes to enforce its prohibitions on unfair and deceptive practices against computer reservation systems (CRSs).[18] The case arose when Sabre, Inc., a CRS that currently is not owned by an air carrier or foreign air carrier, challenged DOT's assertion in a final rule sunsetting the agency's CRS rules that all CRSs remain subject to the DOT authority under section 411 of the Federal Aviation Act, as amended,[19] because such CRSs are deemed statutory "ticket agent[s]." The D.C. Circuit held that Sabre had standing to bring its petition and that the pre-enforcement case was ripe to hear, even though no DOT rules currently constrain Sabre's business activity and no relevant enforcement actions against any independent CRS are pending. Nevertheless, the court rejected Sabre's challenge to DOT's interpretation of its authority under section 411 on the merits.[20]

F. Status of DVT Litigation

Passengers have recently filed numerous lawsuits against airlines and aircraft manufacturers as a result of incidents of Deep Vein Thrombosis (DVT) on extended flights. DVT occurs when blood clots form, usually in the lower extremities, and eventually cause a stroke

17. *See* Martial Tardy, *EU Wants Clarification on U.S. Ownership Rule Changes*, Aviation Daily, Dec. 6, 2005, at 1.

18. Sabre, Inc. v. Dept. of Transp., 429 F.3d 1113 (D.C. Cir. 2005).

19. 49 U.S.C. § 41712(a) (2006).

20. *Sabre, Inc.*, 429 F.3d at 1117-1125.

or a pulmonary embolism. The claims most closely being watched have been filed in courts in the United States, the United Kingdom, and Australia.[21]

Article 17 of the Warsaw Convention,[22] governing injuries that occur on international flights, provides that a carrier is liable for damages caused to a person by an accident on board the aircraft. The seminal case interpreting article 17 is *Air France v. Saks.*[23] In *Saks*, the U.S. Supreme Court ruled that for purposes of article 17, an "accident" is "an unexpected or unusual event or happening that is external to the passenger."[24] The Court further clarified that an injury that "indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft" is not an accident.[25]

The Supreme Court expanded the *Saks* definition of accident in *Olympic Airways v. Husain*, holding that an accident under article 17 could also include an airline's failure to act.[26] While this expansion of the concept could potentially impact DVT litigation, it has yet to do so. Since the *Husain* decision, both the Fifth and Ninth Circuits have relied on the *Saks* definition of accident in ruling that development of DVT on a flight does not constitute an accident under article 17.[27]

Internationally, the *Saks* decision has also been widely relied upon in DVT claims. The High Court of Australia ruled in *Povey v. Qantas Airways*[28] that an air carrier's failure to warn about the risk of DVT, even if proved, does not constitute an accident under article 17. This was a test case and the outcome was determinative for approximately 500 other DVT cases brought against airlines in Australia. Group litigation is still underway in the United Kingdom. The High Court of Australia found that the occurrence of DVT on an airline did not constitute an accident under the Warsaw convention, and an appeal from this decision was dismissed by the Court of Appeals.[29] British Airways funded an appeal to the House of Lords which was heard October 19-20, 2005, and a decision is expected shortly.

In the United States, many of the DVT claims were consolidated into a multidistrict litigation (MDL) in June 2004. The MDL includes claims against many air carriers, as well as Boeing, an aircraft manufacturer. Many of the claims against Boeing have been dismissed. All MDL claims against airlines involving travel only within the United States were dismissed. The court ruled that the extensive federal regulatory framework regarding the aviation industry preempted claims based solely on state law. Defendants have brought motions to dismiss remaining passenger claims premised on article 17. The MDL court has not yet ruled on this motion.

21. While claims have also been filed in Canada, France, and Germany, the majority of claims are brought in the United States, the United Kingdom, and Australia. Cases heard in Canada, France, and Germany have had the same outcome as those in the United States, the United Kingdom, and Australia.

22. Convention and Additional Protocol between the United States of America and Other Powers Relating to International Air Transportation (Warsaw Convention), 49 Stat. 3000, Oct. 12, 1929, (*reprinted in* 49 U.S.C. § 40105 (2005)).

23. Air France v. Saks, 470 U.S. 392 (1985).

24. *Id.* at 405.

25. *Id.* at 406.

26. Olympic Airways v. Husain, 540 U.S. 644, 645 (2004).

27. *See* Blansett v. Continental Airlines, Inc., 379 F.3d 177 (5th Cir. 2004), *cert. denied*, 543 U.S. 1022 (2004); Rodriguez v. Ansett Australia, Ltd., 383 F.3d 914 (9th Cir. 2004).

28. Povey v. Qantas Airways Ltd., (2005) 216 A.L.R. 427 (Austl.).

29. *Id.*

II. Trade Controls in International Forwarding

In 2005, members of the international forwarding and logistics community learned that they must pay greater attention to the ever-thickening web of U.S. regulations on imports, exports and other international business transactions. Although forwarders and other transportation service providers historically had interfaced with import and export regulators on matters such as customs bonds and the filing of export declarations, they tended to believe that compliance with more substantive export controls and trade sanctions was primarily or exclusively the responsibility of their customers. This attitude was challenged on April 28, 2005, by a senior export official at the U.S. Department of Commerce (DoC):

> This year in the enforcement area, there will be an increased focus on shipping companies and freight forwarders. . . . [They] are the last best chance of preventing illegal exports and are critical in protecting our national security. Traditionally the onus has been on the exporter alone to follow regulations and obtain licenses. . . . However, recent cases have made clear that freight forwarders have a responsibility to know the customer and to pay attention to red flags.[30]

The same points were made in individualized letters sent to numerous forwarders by the Director of DoC's Office of Export Enforcement during the autumn of 2005.

The specific reasons forwarders, carriers and other providers of logistics services need to pay closer attention to substantive U.S. foreign trade regulations include the following:

(1) Numerous U.S. federal agencies regulate various types of imports, exports, transactions with sanctioned countries and groups, and such related matters as participation by U.S. companies in international boycotts.
(2) These regulations encompass more than physical imports and exports. There are significant restrictions on disclosure of technology to foreign nationals, and even on domestic transactions with persons covered by U.S. embargo regulations.
(3) The rules also reach more than importers, exporters and other principal actors in international transactions. Anyone who aids, abets, or facilitates a prohibited transaction can be penalized—and that includes carriers and forwarders, without regard to the technical regulatory definitions used in the transportation industry.

Everyone covered by U.S. trade regulations is conclusively presumed to be familiar with lists of "red flags" and "prohibited parties" developed by the various involved agencies. The lists are constantly expanding, and the definition of "knowing participation" in violations is broad. Enforcement efforts and exposures have escalated since the events of September 11, 2001, and ever more forwarders (broadly defined) are paying significant financial penalties. These exposures will grow as increasing numbers of U.S. rail and motor carriers set up logistics and forwarding units to follow customers into the global marketplace, and as foreign-based providers expand into the U.S. market.[31]

30. Peter Lichtenbaum, Acting Under Secretary, U.S. Dept. of Commerce, Speech at the 8th National Forum on Export Controls (Apr. 28, 2005), *available at* http://www.bis.doc.gov/news/2005/USNationalForum.htm.

31. Of course, export controls and related matters are covered in depth by other committees within the Section of International Law and Practice. This high-level overview is intended to provide an alert on these issues to the non-specialist who may encounter them when handling international transportation matters for service providers or their customers.

Export Administration Regulations (EAR) are issued by the Bureau of Industry and Security (BIS) within DoC.[32] The EAR impose intricate regulations and limitations on the export of goods or technology that are capable of "dual use" for military and civilian purposes. The EAR also reach "deemed exports" of technology through disclosure to foreign nationals, even on U.S. soil.[33]

Under 15 C.F.R. section 764.2(e):

> [n]o person may . . . *remove*, . . . *store*, . . . *dispose of, transfer, transport*, . . . *forward, or otherwise service*, in whole or in part, any item exported or to be exported from the United States, or that is otherwise subject to the EAR, with knowledge that a violation of . . . the EAR . . . has occurred, is about to occur, or is intended to occur in connection with the item.[34]

The EAR definition of "knowledge" extends far beyond actual knowledge. It also includes "awareness of a high probability" of a violation, as well as "conscious disregard of facts known" or "willful avoidance of facts."[35]

Almost certainly, the "willful avoidance" prong of the "knowledge" definition can be used against forwarders and carriers who ignore "know your customer" guidance and the list of transactional "red flags" published by BIS.[36] The BIS publication contains a Freight Forwarder Guidance page, which states that a "forwarding or other agent," just like the exporter itself, "should decide whether there are red flags, *inquire about them*, and ensure that suspicious circumstances are not ignored."[37] BIS uses the term forwarder in a broad, nontechnical sense. The EAR do not specifically define that term, although they do define a "forwarding agent" broadly enough to cover "air couriers" and "carriers" who "facilitate" exports.[38] A "forwarding agent" must keep records for five years concerning a universe of export transactions, which is almost as broad as the scope of the EAR themselves.[39] Moreover, regulations prohibit a "false or misleading representation" by any person "[i]n connection with the preparation . . . of any export control document"[40] and an export control document is defined as including, among other things, a "bill of lading issued by any carrier."[41]

BIS is increasingly inclined to wield these regulatory weapons against forwarders of all types. Numerous examples of EAR violations by carriers and forwarders are included in "*Don't Let This Happen to You!*," a collection of recent civil penalty cases posted by BIS at its previously-cited website on enforcement.[42] Carriers are particularly vulnerable to this

32. *See* Export Administration Regulations, 15 C.F.R. §§ 730-58, 762-74 (2006).

33. *See id.* § 734.2(b)(2)(ii) (defining "export" to include disclosure of technology or source code to most foreign nationals, even within the United States).

34. *Id.* § 764.2(e).

35. *See id.* § 772.1.

36. *Id.* pt. 732, supp. 3; *see generally* U.S. Dep't of Commerce, The Export Enforcement Program, http://www.bis.doc.gov/enforcement (last visited Mar. 15, 2006).

37. Dep't of Commerce, Freight Forwarder Guidance, http://www.bis.doc.gov/enforcement/FreightForwarderGuidance.htm (last visited Mar. 15, 2006) (emphasis added).

38. 15 C.F.R. § 772.1.

39. *Id.* § 762.1(b).

40. *Id.* § 764.2(g)(1)(ii).

41. *Id.* § 772.1.

42. Dep't of Commerce, Don't Let This Happen to You!!!, Feb. 2003, http://www.bis.doc.gov/enforcement/Dontletthishappen2u.pdf; *see also* STRASBURGER AND PRICE, BULLS EYE: FREIGHT FORWARDERS TARGETED BY EXPORT ENFORCEMENT IN 2005 (Jan. 2005), *available at* http://www.strasburger.com/calendar/news/FTC/0501.asp (on file with author).

enforcement blitz, given the government's power to detain and even seize vessels and other conveyances involved in EAR violations.[43]

Export controls are only part of the web of federal foreign trade regulations. BIS also enforces rules that generally ban support of, or cooperation with, the Arab boycott against Israel.[44] And by no means is BIS the only federal trade enforcer. Its military counterpart is the Directorate of Defense Trade Controls, a State Department agency that enforces the International Traffic in Arms Regulations.[45] Within the Treasury Department, the Office of Foreign Asset Controls (OFAC) regulates international and even domestic transactions involving a large and fluid list of Specially Designated Nationals (SDNs). This list contains thousands of individuals and businesses (including some in the United States) that OFAC identifies with countries and groups subject to U.S. economic sanctions.[46] Broadly speaking, U.S. persons *may not transact business of any sort* with SDNs.[47] According to monthly postings of enforcement information available at the OFAC website, carriers and forwarders accounted for almost 20 percent of all companies subjected to civil penalties by OFAC during the first ten months of 1995. Transportation was the second largest industry group penalized by OFAC during that period, trailing only financial institutions. The new complexities of import/export regulation must now be added to the knowledge base of carriers and forwarders as supply chains increasingly go global.

III. Recent Developments in Transport Security Regulation

A. C-TPAT AND FAST

The Bureau of Customs and Border Protection (CBP) within the U.S. Department of Homeland Security (DHS) has revised the guidelines for importers in its program known as the Customs-Trade Partnership against Terrorism (C-TPAT).[48] C-TPAT is a voluntary program open to importers, cross-border rail and highway carriers, customs brokers, ocean freight consolidators and air freight forwarders. Its purpose is to assist manufacturers, importers, and transporters in improving the security of their supply chains and thus improving the security of U.S. borders and the global marketplace.

The C-TPAT qualification process involves several steps.[49] The first is the completion and submission of a Supply Chain Security Profile (the Profile) that establishes the applicant's commitment to ensuring adherence to C-TPAT security criteria. This commitment involves not only surveying the applicant's business partners, including manufacturers, suppliers, vendors and transportation service providers, but also obtaining written certification that the business partners are compliant with C-TPAT criteria.

43. *See, e.g.*, 15 C.F.R. §§ 758.7(d)(4)-(d)(9).

44. *Id.* § 760.

45. *See generally* Int'l Traffic in Arms Regulations, 22 C.F.R. §§ 120-130 (2006).

46. The list is *available at* http://www.treas.gov/offices/enforcement/ofac/sdn.

47. *See generally* Foreign Assets Control Regulations, 31 C.F.R. §§ 500 *et seq.* (2006).

48. *See generally* U.S. Customs and Border Protection, Partnership to Secure the Supply Chain: Customs-Trade Partnership Against Terrorism (C-TPAT), *available at* http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/ (last visited Mar. 15, 2006).

49. U.S. Customs and Border Protection, C-TPAT Partner Application for Importers—Instructions, http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/onlinectpat_app_process/importers/application_importer.xml (last visited Mar. 15, 2006).

The list of criteria is expansive.[50] It includes qualification of the partner in C-TPAT (or, in the case of a foreign partner, a similar government program in its country of domicile); facility security (including entryways, lighting, parking, fencing, and general structural soundness); transportation security (including locks and seals, access, storage, handling, and the physical condition of cargo containers); personnel security (including entry controls, identification cards, background checks, and termination procedures (e.g. changing passwords and locks); and documentation and information technology security.

When the profile is completed, the applicant must submit the application on-line,[51] including the uploaded profile. Selected applications and profiles will be validated by CBP through a company briefing, review of the profile, and one or more on-site visits at both the company and its foreign supply chain partners to evaluate their willingness and actual compliance with the C-TPAT criteria. If the applicant passes the validation, it then enters into an agreement with CBP that contains supply-chain security commitments. Under its current format, the formulation and administration of CBP rules and regulations are free from the strictures of the U.S. Administrative Procedure Act.[52] Participation is voluntary, and the conditions of participating, though adopted in consultation with industry, are unilaterally adopted, imposed and enforced by CBP.

The impact of C-TPAT qualification is both illusory and real. In terms of public relations, of course, there may be a positive public perception that a company complying with these security requirements is supporting national efforts at border protection. More concrete impacts result from the fact that a company can only qualify for C-TPAT if its entire supply chain also qualifies. When a large manufacturer applies, it in effect forces all components of its supply chain likewise to "volunteer" to participate in C-TPAT if they want to continue to be able to do business with that manufacturer. Consequently, a program that began with just seven "volunteers" has grown in a few years to encompass close to 10,000 participants.

A company that has qualified with C-TPAT will experience fewer audits, inspections and other border delays at the hands of CBP. This is unlikely to be of great benefit in the case of ocean imports, however, since the stacking of containers on an oceangoing vessel (and thus the time needed to unload them) generally has little to do with the C-TPAT or non-C-TPAT status of the cargo owner. For trucking companies and their customers along the U.S./Canada and U.S./Mexico land borders, however, the benefits are somewhat more concrete. Qualification in C-TPAT and its sister program, called Free and Secure Trade (FAST),[53] enables a truck to utilize special lanes to cross these borders and by-pass most customs inspections.[54]

50. U.S. Customs and Border Protection, C-TPAT Importer Security Criteria, http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/criteria_importers/ctpat_importer_criteria.xml (last visited Mar. 15, 2006).

51. U.S. Customs and Border Protection, C-TPAT Security Criteria for Importers Implementation Plan, http://www.cbp.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/security_criteria/criteria_importers/implementation_plan.ctt/criteriaImplementation2.doc(last visited Mar. 15, 2006).

52. 5 U.S.C. §§ 551 *et seq.* (2006).

53. U.S. Customs and Border Protection, Free and Secure Trade Program (FAST), http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/fast/ (last visited Mar. 15, 2006).

54. In Canada, FAST builds on the principles of pre-approval and self-assessment embodied in the Customs Self-Assessment Program (CSA), as well as on increased security measures under the Partners in Protection program (PIP). *See generally* Canada Border Services Agency, The Customs Self Assessment Program, http://www.cbsa-asfc.gc.ca/import/csa/menu-e.html (last visited Mar. 15, 2006).

An importer or trucking company seeking to participate in the FAST program must first qualify for C-TPAT. A distinct difference between the two programs is that while C-TPAT applies only to companies, FAST also applies to individuals, specifically truck drivers. To qualify for the benefits of this program, the importer, carrier, and driver must all be FAST participants. Having cleared that hurdle, FAST participants benefit not only from special lanes at border crossings, but also from a reduced time frame for advance submission of electronic pre-notifications to CBP. The time frame for a FAST qualified shipment is only thirty minutes, as compared to the one-hour requirement for non-FAST qualified shipments.[55] FAST qualification requires security background checks for both carriers and their drivers. The driver application involves a pre-arranged personal interview at a CBP facility located on or near the border. These requirements have caused long delays in the application process.[56]

B. Hazardous Material Driver Background Checks

The USA PATRIOT Act[57] requires all states to perform criminal and immigration background checks on persons applying for a new or renewed hazardous materials endorsement to a commercial driver's license. While this requirement finally became effective in May 2005,[58] its application is limited by its very nature to U.S. drivers (since U.S. states generally do not license non-resident drivers). In August 2005, as part of a massive transportation reauthorization bill known as the Safe, Accountable, Flexible, and Efficient Transportation Equity Act, a Legacy for Users (SAFETEA-LU),[59] the U.S. Congress adopted a requirement that foreign-based truck drivers must obtain comparable background checks before being allowed to transport hazardous materials in the United States.[60] The Transportation Security Administration (TSA) within DHS was given six months to implement the background check requirement, with authority to delay implementation for an additional six months. Congress also directed TSA to determine if the background check procedures under the FAST program, discussed above, would fulfill the Congressional mandate. As of early December 2005, TSA had taken no public action to implement this provision.

IV. Maritime Law Developments

A. The UNCITRAL Draft Convention on Carriage of Goods

In November 2005 the United Nations Commission on International Trade Law (UNCITRAL) Working Group on Transport Law resumed its deliberations on the Draft Carriage of Goods Convention. Its aim is to provide a uniform international regime governing cargo-carriage by sea that would replace the Hague Rules, the Hague-Visby Rules, the Hamburg Rules, and an assortment of domestic statutes, which currently apply to ocean-

55. *See* Customs Relations with Canada and Mexico, 19 C.F.R. § 123 (2006).

56. *See* Free and Secure Trade Program, *supra* note 53.

57. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (codified at 18 U.S.C. § 101 (2001)).

58. *See* Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Driver's License, 69 Fed. Reg. 68,720 (Nov. 24, 2004) (to be codified at 49 C.F.R. § 1572).

59. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users or "SAFETEA-LU," Pub. L. No. 109-59, 119 Stat. 1144 (codified at 23 U.S.C. §101 (2005)).

60. *See id.* § 7105(h).

transport of goods. While the draft seeks to reconcile differences in the present conventions and domestic rules, it also goes beyond previous proposals, extending the geographic scope of regulated carriage and offering uniform rules governing such matters as transport documents and electronic transactions.

In its present form, the UNCITRAL draft would govern contracts in the liner trade but would exclude private carriage in the tramp trade. The UNCITRAL Working Group reasoned that contracts in the liner trade—where shippers have less bargaining power than carriers—are less likely to be negotiated individually, while carriage under charterparty is generally the product of bargaining between equals, and thus may be safely omitted from the proposed convention. Most noteworthy in the draft's novel approach are the provisions relating to multimodal carriage. Where the Hague Rules and the U.S. Carriage of Goods by Sea Act (COGSA) apply only "tackle-to-tackle," the draft envisions a modified "door-to-door" approach for multimodal shipment covered by a thorough bill of lading. So long as one portion of the journey is by sea, the UNCITRAL Convention's rules on liability for damage to cargo would apply as between parties to the contract, irrespective of whether the damage occurred at sea or on land. To reach agreement on the current draft, the UNCITRAL Working Group was obliged to carve out an exception to appease several European delegations, who maintained that the door-to-door approach would conflict with their existing obligations under the European road and rail conventions. The draft provides that, if it could be proven that damage to cargo occurred during transport on land, and an international road or rail convention would apply in the absence of the UNCITRAL convention, then the applicable road or rail convention would continue to apply.

With regard to the liability rules, the draft convention would retain (albeit in somewhat modified form) the list of exceptions to carriers' liability presently enumerated in COGSA, though it would abolish COGSA's "error in navigation" defense. It departs from COGSA also in its treatment of scenarios in which damage to cargo is only partially attributable to the carrier's conduct. While current U.S. domestic law places liability for damage solely on the carrier in such cases, the UNCITRAL draft provides a proportionate fault rule, under which a carrier would be liable only for the portion of the loss attributable to those of its own actions not within the convention's enumerated exceptions. Still to be discussed are the monetary limits on carriers' liability and the proposed special limits on liability for delay. Issues open for discussion for the UNCITRAL Working Group's December 2005 session in Vienna include shippers' obligations and the enforceability of forum selection clauses in the wake of the U.S. Supreme Court's Decision in *Sky Reefer*.[61] The UNCITRAL Working Group hopes to have a final draft complete and ready to submit to the United Nations General Assembly by the end of 2007, at which time it will be open for signature.

B. New Interpretation of the Definition of "Vessel" in U.S. Law

Among all issues in maritime law, none is so basic as the definition of "vessel." The U.S. Supreme Court revisited the definition in 2005 in *Stewart v. Dutra Construction Co.*[62] The case arose out of an accident aboard a harbor-dredge in Boston Harbor, in which a marine engineer was severely injured. At trial the plaintiff had sought relief under the Jones Act

61. Vimar Seguros y Reaseguros, S.A. v. Sky Reefer, 515 U.S. 528 (1995).
62. Stewart v. Dutra Constr. Co., 543 U.S. 481 (2005).

(covering seamen) and, in the alternative, under the Longshore and Harbor Workers' Compensation Act (LHWCA), which applies to land-based maritime employees. For either statute to be applicable, the court would have to find that the dredge was a vessel. The trial court declined to do so, granting the defendant's motion for summary judgment; the First Circuit affirmed. Seizing the opportunity to settle the question of the definition of a vessel in personal injury cases, the Supreme Court granted certiorari; Justice Clarence Thomas delivered the opinion of the court.

Beginning with the premise that, for both the Jones Act and the LHWCA, the definition of vessel is supplied by section 3 of title I of the U.S. Code, Justice Thomas quoted the statutory language: "[t]he word 'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[63] While the statute may be controlling, unfortunately its language in not unambiguous, forcing a court to look to various facts as indicia of whether a particular watercraft is a "means of transportation."[64] The harbor-dredge in question had limited means of self-propulsion, as it was moved short distances by manipulating anchors and cables at regular intervals of several hours. For longer journeys, assistance of a tugboat was required. Nevertheless, the opinion notes, the dredge had "certain characteristics common to seagoing vessels, such as a captain and crew, navigational lights, ballast tanks, and a crew dining area."[65] While making a distinction between watercraft that are only temporarily stationary and those that are moored permanently (thus disqualifying them as vessels), the bulk of the Court's opinion addresses, and overrules, the two-pronged test previously applied in the district and circuit courts—namely, whether the watercraft's primary purpose is navigation and commerce and whether it was in transit at the time of the accident.

Returning to the facts of the case and citing older case-law, Justice Thomas concludes that "then, as now, dredges served a waterborne transportation function, since in performing their work they carried machinery, equipment, and a crew over water."[66] Thus, despite being stationary at the time of the accident and having only limited means of self-propulsion, the harbor dredge was a vessel for purposes of both the Jones Act and the LHWCA. The case was remanded, and, as expected, the First Circuit ultimately found the harbor-dredge to be a vessel.[67]

For most federal courts that addressed the issue in the ensuing months, the holding in *Stewart* was clear. The Court had extended the definition of vessel. Thus in *Uzdavines v. Weeks Marine, Inc.*,[68] the Second Circuit held that a "bucket-dredge" was a vessel, and in *Bunch v. Canton Marine Towing, Inc.*,[69] the Eighth Circuit held that a cleaning barge moored to the bed of the Missouri River with spud-poles also constituted a vessel, despite the fact that it lacked self-propulsion and had been moved only once in 242 days. A federal district court in Louisiana extended *Stewart* still further, holding that a newly-built oil rig still undergoing sea-trials also qualified as a vessel under the Jones Act.[70] In *Gross v. Tonomo*

63. *Id.* at 489 (citing §§ 1 and 3 of the Revised Statutes of 1873).
64. *Id.*
65. *Id.* at 484.
66. *Id.* at 492.
67. Stewart v. Dutra Construction Co., 418 F.3d 32 (1st Cir. 2005).
68. Uzdavines v. Weeks Marine Inc., 418 F.3d 138 (2d Cir. 2005).
69. Bunch v. Canton Marine Towing Co., 419 F.3d 868 (8th Cir. 2005).
70. Cain v. Transocean Offshore Deep Water Drilling, Inc., 2005 WL 1959147 (W.D. La. 2005).

Marine, Inc.,[71] a federal magistrate found that a barge with a crane constituted a vessel, quoting the Supreme Court's opinion in *Stewart*. The district court subsequently denied the defendant barge-owner's motion for summary judgment.[72]

Nevertheless, *Stewart* may prove over time to be more ambiguous than it appears on first glance. In *Arnold v. Luedtke Engineering*,[73] a federal district court in Michigan held that a floating work-platform positioned adjacent to a sea-wall was not a vessel under the test outlined in *Stewart*. More interesting is the opinion of the Fifth Circuit in *Holmes v. Atlantic Sounding Co., Inc.*,[74] in which the court held that a barge with a floating dormitory on its deck was not a vessel, ironically citing *Stewart* in support of its position. The Fifth Circuit's analysis reveals several features in *Stewart* that may make it difficult to follow in future cases. First, the opinion in *Stewart* concentrates more on refuting the First Circuit's two-pronged test than on clearly outlining a test of its own. By stating its *ratio decidendi* largely in the negative, namely in refuting the requirements that a watercraft be *primarily* used for navigation and transportation and that it be in motion at the time of the accident to qualify as a vessel, the court has left little guidance for the circuits. In *Holmes*, the Fifth Circuit seized upon two elements of the Supreme Court's analysis in *Stewart*. First, *Stewart* asserts that 1 U.S.C. § 3 merely codifies the general maritime law's definition of vessel. Second, *Stewart* emphasizes physical features of the harbor-dredge that were often associated with seagoing vessels. The floating dormitory, the Fifth Circuit said, lacked the "winches, running lights, a radar, a compass, engines, navigational aids, Global Positioning System, lifeboats, or steering equipment such as rudders"[75] that characterize ocean-going vessels. Moreover, "[i]t is incapable of self-propulsion; has no captain, engineer, or deckhand; has no bilge pumps or wing tanks; and has never been offshore."[76] While the harbor-dredge in *Stewart* did move and transport equipment, the floating dormitory in *Holmes* "has never been inspected by . . . the Coast Guard [and] . . . is not intended to transport personnel, equipment, passengers, or cargo. . . ."[77] First by distinguishing the physical features of the floating dormitory from those of the harbor-dredge in *Stewart*, and second by using *Stewart's* admonition that federal statutes merely codified the general maritime law's definition of vessel, the Fifth Circuit was able to fall back on a series of older cases that on casual glance appeared to be overruled by *Stewart*.

Whether *Holmes* will be overturned remains to be seen. To date, the cases that have relied upon *Stewart* have involved personal injury, under either the Jones Act or the LHWCA. Nevertheless, the definition of "vessel" in section 3 of title I applies in other contexts as well, and the opinion in *Stewart* may serve as precedent in cases involving salvage or other maritime liens. It is thus potentially important for domestic and foreign lien-holders alike.

71. Gross v. Tonomo Marine, Inc., 2005 U.S. Dist. LEXIS 17668 (W.D. Pa. 2005).
72. Gross v. Tonomo Marine, Inc., 2005 U.S. Dist. LEXIS 24323 (W.D. Pa. 2005).
73. Arnold v. Luedtke Engineering Co., 357 F. Supp. 2d 1019 (W.D. Mich. 2005).
74. Holmes v. Atlantic Sounding Co., 437 F.3d 441 (5th Cir. 2006).
75. *Id.* at 444.
76. *Id.*
77. *Id.*