Comments of the World Shipping Council on the Brazil ANTAQ Terminal Handling Charge Rulemaking

Introduction

The World Shipping Council ("WSC"), in cooperation with its colleagues in Centronave, submits these comments in response to the Agência Nacional de Transportes Aquaviários' ("ANTAQ") Public Subsidy Taking Notice 5/2020 ("Notice") regarding practices associated with the collection of Terminal Handling Charges ("THCs") at Brazilian port facilities.

WSC is a global non-profit trade association that represents the international liner shipping industry on regulatory and policy matters. WSC has 19 ocean carrier members that represent approximately 90 percent of global liner vessel capacity. WSC members have invested hundreds of billions of dollars in ships, port terminals, and related infrastructure to ensure that a wide variety of options continue to exist for safe, dependable and economical international ocean transportation of cargo. A number of WSC's members provide substantial ocean transportation service to importers and exporters in the Brazilian market. More information about WSC and its member companies may be found at www.worldshipping.org.

WSC became aware of the Notice through Centronave, which is providing the ANTAQ with comments on each of the questions raised in the Notice. WSC fully supports the information submitted and positions advanced by Centronave, and provides the below additional observations from both a general shipping industry and international trade perspective.

QUESTIONS ABOUT CHECKING ABUSIVENESS AND PROVING THC'S COMPENSATION NATURE:

Question 1: Identify viable and reliable alternatives for the systematic collection of amounts effectively paid by users to sea carriers (THC) and by sea carriers to port terminals (Box Rate).

As a trade association, it is not for WSC to respond to an inquiry about what is a viable or reliable alternative for a THC collection. In this regard, WSC makes reference to its comments to questions 4 (concerning the compensation nature of the THC) and 5 (concerning the way THC is charged).

Question 2: The expression "by way of reimbursement" in article 3 of Normative Resolution No. 34-ANTAQ could include the incidence of other costs borne by the sea carrier, such as administrative costs, in addition to incentives to obtain efficiency gains in negotiations with the port terminal? Should these costs be passed on to users?

WSC reserves its rights not to answer this question due to a lack of visibility about local issues.

Question 3: What would be the percentage increase in THC if administrative costs are to be passed on to users?

As a trade association, it is not for WSC to respond to an inquiry regarding percentage increase in THC. WSC also reserves its rights not to answer this question due to a lack of visibility about local issues.

Question 4: What is the regulatory policy regarding the collection and reimbursement of THC in other countries? Cite examples.

WSC Comments:

As background, ocean carriers collect THCs to recover from their customers the costs relating to the loading and unloading of containers at the marine terminal, and other related costs borne by carriers associated with receiving, delivering, and discharging cargo at the terminals. THCs have been assessed in virtually all trade lanes in the world for many years with very limited exceptions.

There is a long and well-established history supporting the THC. THCs arose in part from the evolution of containerization in the liner shipping industry. Prior to containerization, the traditional method of charging for cargo handling was for the exporter at origin to effectively deliver cargo alongside the ship. All the charges for moving cargo to and from alongside the ship were for the exporter's account. With the advent of containerization, however, ports and stevedores formulated their own separate charges from the port gate to delivery of the container onto the ship. The responsibility and the cost of container handling shifted as ports began charging carriers directly for these handling services, and carriers' shore side costs began to increase dramatically.

In the 1990s, shippers in various trades expressed to carriers a desire to see more transparency in their ocean freight rates by separating the shore side costs (primarily the terminal costs) from the ocean side costs. *See* "Terminal Handling Charges During and After the Liner Conference Era", Hackett/Raven Trading Limited, October 2009, Para. 30 ("The shipping lines had originally incorporated the stevedoring charges into the sea freight, but the European Shippers Council (ESC) in the late 1980s had requested that charges be disaggregated so as to provide more transparency."). Thus, the THC was created based on customer demand.

By separating shore side costs from the ocean freight rate, ocean carriers are able to quote freight rates to shippers which: (1) are primarily subject to market supply/demand conditions (terminal costs, in contrast, are relatively more stable even as trade conditions fluctuate); (2) are subject to internal costs (i.e., those costs relating to the level of ocean service that fall within carriers' control as compared to shore side and fuel costs are in many cases controlled by third parties); and (3) are not subject to fluctuation of currency (while ocean freight rates are generally payable in US dollars, shore side costs are generally paid in local currency).

With respect to ANTAQ's inquiry regarding how the THC is comprised, it is important to understand that every ocean carrier has a different cost structure, and different contractual relationships with terminals and other vendors, and thus the structure of each carrier's THC will vary. Nonetheless, there is an internationally accepted regulatory practice relating to the composition and

collection of THCs, which WSC believes provides helpful perspective in response to ANTAQ's inquiry. In particular, two of Brazil's key trading partners—China and the United States—have carefully studied THCs over the years, each making the decision not to impose specific regulatory obligations on how the THC is calculated or whether it can be collected.

China has recognized that surcharges generally are assessed by ocean carriers in all major trade lanes in the world, including all areas in North and South Asia. The PRC Ministry of Transportation conducted an investigation into ocean carriers' imposition of terminal handling charges ("THCs") in 2006, and concluded that "it is a practice in the main trading countries (regions) that the liner companies collect terminal handling charges at the port of loading from the consignors and collect terminal handling charges at the port of discharge from the consignees." *See* Notice No. 9 [April 2006]. Rather than inserting itself into the commercial arrangements of the carriers and their customers, the MOT took a more reasoned approach of requiring that charges like the THC should not "disturb fair competition." While not disturbing this long-standing regulatory policy, in recent years the MOT has closely monitored the collection of carrier THCs, while consistently declining to limit or prohibit such charges.

The longstanding legal and regulatory scheme in the United States is also instructive. Under the U.S. Shipping Act, while the U.S. Federal Maritime Commission ("FMC") does not have statutory authority to reject or otherwise prescribe any particular ocean carrier charge, it can take enforcement action against a carrier if there is a complaint made and a finding that any such charge violates one of the prohibited acts set forth in the Shipping Act. For example, the Shipping Act provides that a carrier may not engage in any unfair or unjustly discriminatory practice in the matter of rates and charges. 46 U.S.C. 41104(4)(A) and (5).

Similar to the instant Notice, in March of 1991, the U.S. Federal Maritime Commission ("FMC") issued a Notice of Inquiry ("NOI") to obtain further information from industry stakeholders on the subject of surcharges in order to determine whether such charges were unfair or discriminatory and whether further regulatory action was necessary. In the NOI, the FMC posed a number of questions related to how ocean carrier surcharges were calculated and how they related to overall transportation costs. In particular, the NOI asked specifically how THCs differed from other types of surcharges and what costs and services comprised the THC.

In that proceeding, ocean carriers generally responded that THCs represented:

- An array of shoreside services involved in delivery of cargo and containers from ship's tackle to place of rest;
- THCs are related to costs incurred for handling transfer of cargo and equipment at the terminal;
- THCs relate to the entire range of internal and external costs involved, such as receiving, delivering, loading, and discharging cargo at the terminals, which is not covered by the basic ocean freight.

The FMC accepted that calculations of the THC are "not an exact science," that they do not necessarily bear a "fixed relationship" to total costs or revenues, and they were "not represented as pass-throughs of specific out-of-pocket expenses." Finding no violations of the U.S. Shipping Act in the carriers' imposition of THCs, the FMC accepted that THCs were not limited to port charges, and were intended to compensate the carriers for a host of terminal-related services.

In 1992, a group of shippers filed a complaint with the FMC alleging that several carriers violated the U.S. Shipping Act regarding their THCs. The shippers argued they should not be required to pay for the segment of the transportation for which the THC was created and is assessed, i.e., from ship's tackle to place of rest. Finding no violation under the Shipping Act, the decision adopted by the FMC set forth the agency's understanding of the purpose of the THC:

The THC is a charge assessed to recover part of the carriers' costs related to port and terminal expenses. These costs include such as wharfage, chassis costs, equipment M&R, port assessment, tallying sorting and stacking of cargo, movement of containers from ships' hook to stack, stack shifting, transfer to inspection points, lifting on and off chassis, gate moves, inspections, extra labor, longshoreman's wage assessments, mounting and demounting of clip-on units, electrical power and reefer monitoring. Since 1986 there has been a comparable terminal receiving charge in the outbound trade applicable to all U.S. ports of loading.

QUESTIONS ABOUT CHANGING THE WAY THC IS CHARGED:

Question 1: Do you agree with ANTAQ's proposal to prohibit the collection of THC in the Bill of Lading?

WSC Comments:

WSC does not agree with this proposal. For the reasons expressed in its comments to questions 4 (concerning the compensation nature of the THC) and 5 (concerning the way THC is charged), WSC believes it would be extremely unusual based on international practices, and commercially disruptive if ANTAQ sought to dictate private contract terms between carriers and shippers through regulation.

Question 2: Does the removal of the THC value from the Bill of Lading reduce the customs value and, consequently, the basis for calculating taxes levied on imports by sea?

WSC also reserves its rights not to answer this question due to a lack of visibility about local tax issues.

Question 3: What are the positive impacts of changing the way of charging THC, with the prohibition of its registration in the Bill of Lading?

WSC makes reference to its comments to question 5 (concerning the way THC is charged).

Question 4: What are the negative impacts of changing the way of charging THC, with the prohibition of its registration in the Bill of Lading?

WSC makes reference to its comments to question 5 (concerning the way THC is charged).

Question 5: What is the way of charging THC in other countries? Cite examples.

WSC Comments:

WSC refers generally to its answer to Question 4. To the extent this question also asks whether any countries have limited the ability of only certain parties to charge a THC, i.e., required terminals and ports to charge THC as opposed to ocean carriers, WSC notes that regulatory experience in China and

the U.S. demonstrates that it is extremely unusual for a government to dictate private commercial contract terms as between carriers and shippers, including the THC. In this regard, WSC is not aware of any jurisdiction that requires terminals rather than ocean carriers to collect these charges.

Any requirement that shippers pay THCs directly to the marine terminal operator instead of to the ocean carrier on the theory that THCs involve charges for activities and services provided on or near the terminal would be based on a fundamental mischaracterization of the nature of the THC, which as noted above represents a "bundle" of services offered and cost items incurred by carriers, and are not in most cases limited to port or terminal charges. Such a requirement, if adopted, would result in a number of negative operational and economic consequences, for the following reasons.

First, pricing is in part a function of liability allocation. If importers and exporters buy services directly from marine terminal operators, then ocean carriers will be encouraged to structure their contracts so that their responsibility for cargo delivery and liability ends when the container is hoisted over the ship's rail. This will shift liability to marine terminals and place shippers in the position of having to pursue marine terminal operators for cargo damage claims for damages caused on the terminal. Allocation for responsibility for damage will be complicated where it is unclear where the damage occurred.

Additionally, in many cases the shipper of record is a middleman such as a freight forwarder. In such cases, if forwarders were to pay the THC to the terminal, there is nothing to prevent a shipper/forwarder from charging its customer (the ultimate cargo interest) an amount that is higher than the forwarder has paid the marine terminal operator. In this situation, any requirement that forwarder shippers pay marine terminals directly would: (1) advantage freight forwarders to the disadvantage of carriers, and (2) do nothing to reduce costs charged to cargo interests.

Today, marine terminal operators deal with a relatively small number of customers – the ocean carriers. If shippers paid THCs directly to marine terminal operators instead of to ocean carriers, the number of customers with which marine terminal operators would have to interact would increase exponentially, causing administrative disruptions and adding costs to the transportation system. Marine terminals would seek to recoup these costs, thus increasing costs to shippers. Today ocean carriers already have relationships and invoicing mechanisms in place with their customers. Artificially upending those arrangements, which were created in response to the market preferences of the carriers' customers, would introduce inefficiencies that would increase costs that would have to be recovered from the trade – importers and exporters.

Finally, because the THC today represents a number of costs incurred by the carrier, and shippers negotiate with carriers for the full bundle of transportation services, shippers have the opportunity to negotiate the various parts of that overall transaction. If shippers paid THCs to terminal operators, the shipper would be negotiating for a smaller portion of the transaction and would have less negotiating power. As a matter of logistical necessity, the ocean carrier must decide which terminal or terminals it will call. Shippers paying THCs directly to terminal operators would have no leverage towards such marine terminal operators, who would thus have the market power to raise THC charges. Because the shippers rather than the carriers would pay those charges, carriers would have no incentive or ability to negotiate lower rates for the costs included in the THC. Thus, paying THCs directly to marine terminals would place shippers in a position in which they are dealing with an effective monopoly (i.e., the terminal where their cargo is handled) as opposed to having multiple carriers with which shippers can negotiate for the best overall mix of service and price.

Question 6: What is your opinion about the possibility of ANTAQ regulating the way of charging THC? Explain.

WSC Comments:

For the reasons expressed in its comments to questions 4 (concerning the compensation nature of the THC) and 5 (concerning the way THC is charged), WSC believes it would be extremely unusual based on international practices, and commercially disruptive if ANTAQ sought to dictate private contract terms between carriers and shippers through regulation.

Question 7: Currently, what is the form of proof of payment for THC by sea carriers?

WSC reserves its rights not to answer this question due to a lack of visibility about local legal issues.

# # #