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New Drone Regulations in Brazil  

Ana Luisa Castro Cunha Derenusson and Roberta Fagundes Leal Andreoli  
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On May 2, 2017, the Brazilian Agency of Civil Aviation ("ANAC") approved the Regulamento Brasileiro de Aviação Civil Especial - RBAC - E No. 94 ("Regulation") for the use of unmanned aerial vehicles ("UAV’s").

Taking into account the level of complexity and risk involving the operation and such equipment, until the publication of the Regulation that occurred on May 3, 2017, ANAC, the civil society, public bodies, associations and interested companies widely discussed the issue, including by means of the public hearing - AP nº 13/2015 as well as, workshops.

Therefore, as of July 3, 2017, the requirements of: i) classification; ii) minimum age for piloting; iii) registration; (iv) flight record; license, aeronautical medical qualification and certification; v) insurance; and vi) transportation of cargo of the Regulation must be applied to the
UAVs, of recreational use, (named as aeromodelo) and for corporate, commercial or experimental use (named RPA - Remotely Piloted Aircraft), which complement the existing rules of the Department of Airspace Control - DECEA and the National Telecommunications Agency - ANATEL. The rules setting places for landing, minimum distance of people should also be observed.

The penalties to be applied by ANAC, as a result of non-compliance with the Regulation, are set forth in the Brazilian Aeronautical Code (Law no. 7.565/86), the Criminal Code, the Criminal Offense Code and ANAC Resolution n. 25/2008. The other regulatory agencies (DECEA, ANATEL and Ministry of Defence) may also apply sanctions that are under their scope.

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CETA: WHAT IT MEANS FOR TRANSPORTATION

Jessica Horwitz, Bennett Jones LLP

The Canada-European Union Comprehensive Economic and Trade Agreement (CETA) is scheduled to come into provisional application this summer. The CETA represents the best market access either Canada or the EU has ever given to any trading partner across all covered categories. The agreement presents a tremendous growth opportunity for Canadian and EU businesses, and paves the way for increased economic integration between these economies.

The CETA is expected to serve as a template for the "TTIP" negotiations between the EU and the United States, as well as in other future free trade negotiations involving the EU or Canada. There is also the possibility for cross-cumulation (i.e. shared eligibility for preferential treatment) between CETA, NAFTA and TTIP. The features of the agreement should therefore be of interest to lawyers and businesses in the U.S. and beyond.

Overview of CETA

Referred to as a "next generation" free trade agreement, the CETA takes a comprehensive view to the economic relationship going beyond mere tariff reduction. In addition to eliminating nearly all tariffs on goods, the CETA also promises enhanced market access in other areas, such as services, procurement, and investment. It also has provisions that seek to cut red tape and standardize rules, which will reduce the friction of doing business internationally.

That said, the agreement falls short of achieving perfect regulatory cooperation. The CETA's rules of origin, although they are more flexible than those in many existing free trade agreements, are rigorous and must be met before goods and services can be eligible for preferential treatment. Businesses should therefore analyze the costs and benefits of the potential opportunities
that the CETA offers and remain vigilant about compliance. Some political and legal implementation challenges also remain before the agreement will come fully into force, although the vast majority of the agreement's provisions are expected to come into provisional application in July 2017.

**Notable Features**

The following are some examples of CETA features that may be of interest to transportation lawyers:

- **Trade in Goods** – The agreement is expected to be beneficial for shippers due to increased trade traffic in goods and demand for transportation services. In Canada, the Ports of Montreal and Halifax have been promoting the agreement, as well as some Great Lakes shipping companies. Tariff reduction will also offer benefits for aerospace exporters; Canada is the second largest supplier of aerospace products to the EU after the US.

- **Trade in Services** – The CETA does not go as far as it could on market access for services, and largely commits the parties to maintain existing levels of market access (although in most cases any subsequent liberalization will be locked in). Most domestic transportation services will still be restricted due to carve outs for existing cabotage rules. Aviation services remain subject to bilateral air transport treaties and providers must continue to be licensed under applicable existing regulation. A number of Canadian jurisdictions and EU member states have also taken specific reservations that place significant limits on market access for the provision of air, marine and rail transportation services, as well as related services such as maintenance and repair for vessels, rail transport equipment and aircraft. The details of the reservations are set out in the Schedules to Annex II.

- **International Maritime Services** - Members must provide equal access to vessels and transport service providers of other member states with respect to: access to ports; use of infrastructure and services of ports such as towage and pilotage; use of maritime auxiliary services as well as the imposition of related fees and charges; access to customs facilities; and the assignment of berths and facilities for loading and unloading. The CETA also provides that transportation service companies be permitted to provide container repositing, private dredging services (and public dredging contracts above CAD $7.8 million in value), and certain feederinteresting services. These commitments have been controversial in some Canadian transportation industry circles. Members also cannot impose measures that restrict the ability of vessels registered in member states from transporting international cargo, or that prevent transport service suppliers from directly contracting with other transport service suppliers for door-to-door or multimodal transport operations. There are, however, exclusions for particular pre-existing exclusive transportation systems in certain regions. The exclusions are set out in the Schedules of Annex II.
• **Government procurement** – The CETA promises enhanced access for investors to bid on government procurement projects, including at the sub-federal level. This means that Canada will have an advantage over US suppliers when bidding on EU contracts, at least until TTIP is concluded. Airport and public transportation infrastructure projects are included, but with limitations. Reservations taken by both Canada and the EU limit access by foreign bidders to essential public utilities, including transportation services and infrastructure, on national security or other grounds. Suppliers will have right to challenge and overturn non-compliant procurements.

• **Investment** – The CETA contains an investment chapter that is designed to encourage investment between Canada and the EU and protect investors from discriminatory treatment. Member states have similarly taken a number of reservations that limit the effect of this chapter in the area of transportation. For example, Canada's limit on foreign ownership of airlines remains in place (although changes to the regulations scheduled in 2018 are expected raise the foreign ownership limit from 25% to 49%).

• **Labour mobility** - Certain categories of business people and skilled professionals will be allowed to work temporarily in other member states without visas or work permits. Temporary entry up to 3 years is allowed for intracompany transferees, and up to 1 year for contractual service providers and independent professionals (including lawyers providing advice on foreign law). These provisions are designed to help transnational businesses operate more effectively and transfer staff across offices.

• **Recognition of professional qualifications** - Chapter 11 of CETA sets out transparent professional licensing and qualification criteria, and includes a procedure to negotiate mutual recognition agreements for professional qualifications in the future. It does not, however, include any substantive binding commitments at present.

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**AN UPDATE ON JUDICIAL AND LEGISLATIVE DRONE ACTIONS IN THE UNITED STATES**

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Cozen O’Connor

Court Case: Taylor v. Huerta
On May 19, 2017, the U.S. Court of Appeals for the District of Columbia Circuit ruled that recreational unmanned aircraft system operators are exempt from the FAA’s rules requiring the registration of small drones. Taylor v. Huerta, No. 15-1495 at 3 (D.C. filed May 19, 2017). The FAA’s small drone regulations required all operators of small drones, including recreational operators and hobbyists, to comply with the FAA’s specialized aircraft registration and identification rules, as well as pay a registration fee. Over 750,000 operators have registered their drones since the rules went into effect in December 2015. The FAA estimates 2.3 million drones will be sold in 2017 for recreational purposes, with another 2.5 million drones sold for commercial use. The lawsuit was brought by recreational drone enthusiast John Taylor, who owns a fleet of approximately 20 quadcopters, hexacopters, and fixed-wing planes. Taylor argued the FAA lacked authority to regulate recreational drones. The court reasoned that section 336 of the FAA Modernization and Reform Act of 2012, specifically exempted “model aircraft,” including recreational drones, from regulation. The court stated that “statutory interpretation does not get much simpler.” Commercial operators are still required to register their drones with the FAA.

Legislation: The “Safe DRONE Act of 2017”

The recently proposed “Safe DRONE Act of 2017”, S. 1410, 115th Cong. (2017), threatens to overturn the D.C. Court’s ruling in Taylor v. Huerta and require recreational drone operators to register their drones with the FAA. On June 22, 2017, a group of bipartisan U.S. senators introduced this legislation intending to “further the development of [UAS] technology through investing in additional research, building a trained workforce, and establishing working groups to address near-term and long-term challenges.” The Safe DRONE Act would require the FAA to publish guidance and establish procedures regarding how to obtain an emergency and expedited Part 107 waiver for the use of UAS to aid in emergency response operations. It also requires the U.S. Government Accountability Office to compile a report on cybersecurity concerns and protections within the UAS industry as well as provide recommendations on how to solve recreational UAS issues while defining Federal jurisdiction and oversight for drone security matters. One of the bill sponsors, U.S. Senator John Hoevan (R-ND), stated, “[t]he UAS industry needs legal and regulatory certainty, both to realize the benefits of this technology and to ensure its safe[,] private[,] and commercial use. . . . Our bipartisan bill supports the integration of UAS into the national airspace and helps continue our nation’s leadership in this emerging industry.”


On May 25, 2017, a bipartisan group of U.S. senators introduced the “Drone Federalism Act of 2017”, S. 1272, 115th Cong. (2017), to “preserve State, local and tribal authorities and private property rights with respect to unmanned aircraft systems.” This bill would require the FAA to define the scope of federal preemption in the area of drone regulation and oversight, limiting it to “the extent necessary to ensure the safety and efficiency of the national airspace system for interstate commerce.” States would not be prohibited by federal preemption from regulating some aspects of drone operations, such as to protect public safety, personal privacy, and
property rights. A similar bill titled the “Drone Innovation Act of 2017”, H.R. 2930, 115th Cong. (2017), was introduced to the U.S. House of Representatives on June 16, 2017. In 2017 to date, 14 states have passed legislation related to drones. In addition, proposed legislation has been introduced in 38 states for consideration during the 2017 legislative season. In 2016, 18 states passed laws and a total of 45 states considered legislation relating to drones. State legislation relating to drones covers a wide range of topics, including limiting local governments’ ability to regulate drones, environmental concerns, and privacy issues.

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https://www.cozen.com

RESOLVING INTERNATIONAL OCEAN SHIPPING DISPUTES:
THE FEDERAL MARITIME COMMISSION’S OFFICE OF CONSUMER AFFAIRS & DISPUTE RESOLUTION SERVICES

Rebecca A. Fenneman
Federal Maritime Commission

The Federal Maritime Commission (“FMC”) is the independent federal agency charged with regulating the commercial ocean common carriage transport of cargo and persons between U.S. and foreign ports. While the FMC is known for its oversight of ocean transportation intermediaries (i.e. ocean freight forwarders and non-vessel operating common carriers), vessel operators, and marine terminal operators, parties are often surprised to learn about the important role that the agency plays with respect to resolving private party disputes. In addition to its civil regulatory enforcement program, the FMC’s authorizing statute, the Shipping Act of 1984 as amended by the Ocean Shipping Reform Act of 1998, 46 U.S.C. §§ 40101-41309 (Shipping Act), allows private parties to bring claims against others before the FMC for reparations for damages resulting from violations of the Shipping Act.

In light of the exigent nature of commercial shipping disputes, coupled with the important relationships that underlie shipping transactions, the FMC long ago established the Office of Consumer Affairs & Dispute Resolution Services (CADRS) to provide confidential mediation and ombuds services to the shipping public. These services are provided pursuant to the Administrative Dispute Resolution Act, 5 U.S.C. § 574 et seq., as well as the FMC’s regulations 46 C.F.R. §§ 502.401-502.411. As such, CADRS neutrals cannot share confidential information and dispute resolution communications with third parties (including other FMC offices). This includes instances where a party may disclose information regarding a prospective Shipping Act violation during the course the mediation or ombuds service.

With respect to parties who file formal complaints for reparations, FMC regulations require litigating parties to schedule a conference led by an FMC mediator within fifteen days of the filing
of an answer to a complaint for reparations to allow parties an early opportunity to explore settlement. 46 C.F.R. § 502.64(a) (2). Parties may also opt during their conference to schedule mediation after the discovery period or at any other time during the pendency of the adjudication. 46 C.F.R. § 502.64(b). Mediation conferences may be provided in person, telephonically, or via video conference at the behest of the parties and mediator. There is no limit with respect to the number of mediation sessions available to parties. Continuation or termination of mediation is based upon the agreement of the parties and the mediator. In the event that mediation is successful, the parties execute a written a settlement agreement, which is submitted to the Commission for review. 46 C.F.R. § 502.91(e).

Parties engaged in ongoing complex ocean shipping disputes that may involve Shipping Act or other commercial and legal disagreements may also avoid the need to litigate by requesting mediation services from CADRS’s. Such services are routinely provided by staff via telephone or in person depending on the needs and location of the parties and are provided without charge to the parties. Parties may or may not be represented by legal counsel. Mediators work with parties to craft workable solutions that are memorialized in written settlement agreements. Such settlements achieved prior to filing administrative litigation can be kept confidential are not required to undergo Commission review. Further, in the event that the parties or mediator terminate mediation prior to achieving resolution, parties are free to pursue traditional dispute resolution options such as arbitration or litigation.

In addition to mediation, CADRS staff routinely act as ombudsmen to assist parties resolve real time commercial shipping disputes such as freight and surcharge concerns, the assessment of demurrage and per diem, the imposition of general lien clauses, and tariff and service contract related concerns. CADRS also assists parties pre-dispute by answering general questions regarding commercial practices and FMC programs as well as educating the shipping public regarding regulatory compliance and the availability of CADRS’s services. Generally, ombuds services are provided electronically and via telephone, ensuring real time response to parties located across the globe.

Coupled with its dispute resolution efforts, CADRS works to pro-actively inform the shipping public regarding regulatory compliance and industry trends. CADRS issues trend reports to the highest level of the FMC and, as appropriate, issues public alerts and publications. For example, CADRS has issued alerts regarding unlicensed activity involving shipments of automobiles, as well as difficulties encountered shipping yachts. CADRS contributed an article to a trade publication detailing the problem yacht shipping trends and ways to prevent problems when shipping yachts. Further, CADRS recently produced brochures available to the public in print and online summarizing its ombuds and mediation services generally, as well as a subject matter brochure assisting consumers that are preparing to ship their household goods and personal effects to or from the United States. These brochures are available on the Commission’s website http://www.fmc.gov/news/brochures.aspx
In addition to providing ombuds and mediation services to assist parties resolve cargo-related disputes, CADRS offers assistance to cruise passengers and passenger vessel operators within the FMC’s jurisdiction that encounter service-related disputes. The FMC has limited jurisdiction over passenger vessel operators. Pursuant to Public Law 89-777, *Financial Responsibility for Death or Injury to Passengers and for Nonperformance of Voyage*, cruise lines are required to establish financial responsibility to “meet liability for death or injury to passengers or other individuals on a voyage to or from a port in the United States.” 46 U.S.C. § 44103(a). In addition, cruise lines must also demonstrate to the FMC “financial responsibility to indemnify passengers for nonperformance of the transportation.” 46 U.S.C. § 44102(a).

While the FMC regulates the financial responsibility aspect, there is no federal agency that regulates general commercial cruise-related concerns. The entire commercial relationship between the passenger and the cruise line is governed by the ticket contract. For example, cruise ticket contracts generally allow the passenger vessel operator to cancel or change particular ports of call without penalty. With respect to enforcement, the ticket contract often contains forum selection clauses in locales that may be inconvenient for the passenger. As such, CADRS provides an informal forum for passengers and cruise lines to explore resolution of disputes. In addition to changes of itinerary, other common examples of typical cruise-related disputes involve penalties for passenger cancellations, billing disputes, and other problems encountered upon the cruise itself. Further, despite the lack of technical jurisdiction over these types of matters, CADRS often receives referrals from Congressional staff seeking assistance on behalf of constituent as well as States’ Attorneys General.

Akin to its preventative efforts regarding cargo trends and concerns, CADRS has undertaken efforts to educate the cruising public regarding emerging trends as well as steps that consumers can take to avoid challenges with their cruise vacations. CADRS coordinates with other Commission offices to issue public alerts when major cruise disruptions occur. Further, CADRS recently developed a brochure to assist passengers planning a cruise vacation. The brochure highlights common concerns covered by cruise ticket contracts and provides a preparation checklist as well as contact information where passengers can obtain assistance once aboard a cruise. The brochure is also available on the FMC’s website.

Finally, it bears repeating that there is no charge to the parties for CADRS’s services nor is there a minimum or maximum threshold for obtaining CADRS’s ombuds or mediation services. As such, parties who may ordinarily be discouraged from filing litigation even in small claims court due to the amount in controversy, coupled with the prohibitive litigation costs, may be able to avail mutually-agreed upon relief through the use of CADRS. Conversely, parties involved in large complex matters may find the use of CADRS helpful to effectively narrow the issues in dispute and facilitate communication with an opposing party, if not resolve the dispute in its entirety. It is also important to note that parties may choose to be represented by counsel during the provision of mediation or ombuds services or may appear *pro se*. Because CADRS cannot
provide legal advice or representation, parties are encouraged to consult with counsel regarding their rights and responsibilities as questions and concerns arise.

For additional information regarding CADRS services or to request assistance, please contact (202) 523-5807 or (866) 448-9586 (toll free) or email complaints@fmc.gov.

Rebecca A. Fenneman is the Director of the FMC’s Office of Consumer Affairs & Dispute Resolution Services. The opinions and views expressed in this article are her own and do not reflect those of the Federal government or the Federal Maritime Commission, nor are they binding on the FMC. This article is intended to provide general guidance and does not constitute legal advice or guidance.

**A PRIMER ON CUSTOMS' GLOBAL ENTRY PROGRAM**

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The U.S. Department of Homeland Security, and particularly its U.S. Customs and Border Protection (CBP), have a "Trusted Traveler" program entitled "Global Entry". See www.GlobalEntry.gov. There are now over 2 million members in the Global Entry program.

Unfortunately, the reality for many applicants to Global Entry is that their applications are denied, or current members have their membership revoked by CBP for one reason or another. This article will describe eligibility requirements for membership in Global Entry, the benefits of membership in Global Entry, how to apply for membership, and, importantly, how to challenge any denial of, or revocation of, membership with CBP.

Global Entry is a CBP program that allows expedited clearance for pre-approved, low-risk travelers upon arrival in the United States. At airports, program members proceed to Global Entry kiosks, present their machine-readable passport or U.S. permanent resident card, place their fingerprints on the scanner for fingerprint verification and complete a customs declaration. The kiosk issues the traveler a transaction receipt and directs the traveler to baggage claim and the exit.

Global entry members are eligible to participate in TSAPre. U.S. citizens and U.S. lawful permanent residents enrolled in NEXUS or SENTRI are also eligible to participate in TSAPre, as well as Canadian citizens who are members of NEXUS. A Global Entry member or eligible NEXUS or SENTRI member may enter his or her membership number (PASS ID) in the "Known Traveler Number" field when booking airline reservations. Better yet, enter your PASS ID into your frequent flyer profile with the airline. The membership number enables Transportation Security Administration’s (TSA) Secure Flight System to verify that you are a legitimate CBP Trusted Traveler and eligible to participate in TSAPre.
Global Entry is CBP's most popular Trusted Traveler program. But not everyone is eligible. U.S. citizens, U.S. lawful permanent residents, and citizens of the following countries are eligible for Global Entry membership: Colombia, the United Kingdom, Germany, Panama, Singapore, South Korea, and Mexico. Canadian citizens and residents are eligible for Global Entry benefits through membership in the NEXUS program. Applicants under the age of 18 must have parental or a legal guardian's consent to participate in the program.

A voluntary program, Global Entry is available to travelers who become pre-approved by passing a comprehensive background investigation. There is a computer check against criminal, law enforcement, customs, immigration, agriculture, and terrorist indices to include biometric fingerprint checks, and then a personal interview with a CBP officer. Most applicants receive a formal letter which states, in part: "We are pleased to inform you that your U.S. Customs and Border Protection (CBP), Global Entry program membership has been approved. You may use the program as soon as you receive and activate your new Global Entry card."

Many applicants never receive such a welcoming letter from CBP. An applicant may not be eligible for participation in the Global Entry program if he or she:

1. Provided false or incomplete information on the application;
2. Have been convicted of any criminal offense or have pending criminal charges or outstanding warrants (to include driving under the influence);
3. Has been found in violation of any customs, immigration or agriculture regulations or laws in any country;
4. Is the subject of an ongoing investigation by any federal, state or local law enforcement agency;
5. Is inadmissible to the United States under immigration regulation, including applicants with approved waivers of inadmissibility or parole documentation; or
6. Cannot satisfy CBP of his or her low-risk status

**The Global Entry Application Process**

1. Create a Global Online Enrollment System (GOES) account.
2. Log in to your GOES account and complete the application. A $100 non-refundable fee is required with each completed application.
3. After accepting your completed application and fee, CBP will review your application. If your application is conditionally approved, then your GOES account will instruct you to schedule an interview at a Global Entry Enrollment Center located at most international airports. Each applicant must schedule a separate interview.
4. You will need to bring your valid passport(s) and one other form of identification, such as a driver's license or ID card to the interview. If you are a lawful permanent resident, you must present your machine readable permanent resident card.

In the event an applicant is denied or membership has been revoked from Global Entry or other Trusted Traveler Program, the person should be provided information in writing detailing the reason for this action. Unfortunately, the reality is that the standard statement provided to the applicant merely concludes "You do not meet the program eligibility requirements." For members whose membership is revoked, the standard instruction from CBP is "You have been found to have violated CBP laws, regulations, or other related laws." That's it; nothing else is provided. The only appeal to such a denial or revocation is a written appeal to the CBP Trusted Traveler Ombudsman to request reconsideration.

CBP denial of a Global Entry membership request can be based on a variety of reasons, including: juvenile criminal history, immigration problems, court expunged criminal information, questionable international travel history, shoplifting or assault misdemeanors, or even a violation that occurred 30 or 40 years ago or was committed in another country. The U.S. Department of Homeland Security has extremely extensive data available to it worldwide to determine whether someone is a low-risk international traveler who should be admitted into the Global Entry program. If you believe your data is private, when it comes to the U.S. Department of Homeland Security, think again. Also note that being admitted into Global Entry is a privilege, not a right. As explained in the case of *Roberts v. Napolitano*, 792 F. Supp. 2d 67, 73 (D.D.C. 2011):

*The Global Entry program was authorized by the Intelligence Reform and Terrorism Prevention Act of 2004 (hereinafter "IRTPA"). See 8 U.S.C. § 1365b(k). The IRTPA instructs the Secretary of Homeland Security to "establish an international registered traveler program" in order to "expedite the screening and processing of international travelers, including United States Citizens and residents, who enter and exit the United States." 8 U.S.C. § 1365b(k)(3)(A). The Secretary was further instructed to "initiate a rulemaking to establish the program [and] criteria for participation," and ensure that the program "incudes as many participants as practicable by . . . providing applicants with clear and consistent eligibility guidelines." 8 U.S.C. § 1365b(k)(3)(C), (E).*

The applicant gets one chance to appeal a denial or one chance for a member to challenge revocation of membership in Global Entry. There is no judge, no hearing, no discovery, no face to face meeting, or even a telephone call to the deciding official at CBP. As stated above, CBP has absolute discretion to grant or deny Global Entry membership. Moreover, it does not have to provide any specific reason for denial or revocation of membership.

Even with these inherent review restrictions, as a practical matter a person challenging a Global Entry application denial or membership revocation should seriously consider challenging the decision, because the CBP may have taken action without complete information. Appeals of
such decisions can be successful, depending on the reasons for the action and the additional persuasive information that the individual challenging the decision provides to the CBP.

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JUST IN TIME FOR A NAFTA RENEGOTIATION: U.S. APPELLATE COURT UPHOLDS FMCSA DECISION ALLOWING MEXICAN TRUCK OPERATIONS IN THE U.S.

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The never-ending saga of whether Mexican motor carriers are allowed to operate on U.S. roads as agreed in the North American Free Trade Agreement (NAFTA) reached another milestone towards conclusion, shortly before the United States Trade Representative issued its Summary of Objectives for the NAFTA Renegotiation that raised the possibility that the issue might be within the scope of a revised NAFTA treaty.

The story of NAFTA and Mexican-domiciled trucks operating in the United States is a thirty-five-year-long dispute involving the opposition of U.S.-domiciled truckers to Mexican truck operations in the U.S. Although the issue was supposed to be resolved pursuant to provisions of NAFTA, which took effect in 1994, to gradually allow the operation of Mexican carriers throughout the United States, opposing labor unions and truckers have fought the implementation of these provisions both on safety grounds and political grounds, before Congress, the executive branch, and in the courts.

On June 29, 2017, the United States Court of Appeals for the Ninth Circuit dismissed the latest challenge to Mexican truck operations in the U.S. In that decision, International Brotherhood of Teamsters, et al, v. U.S. Department of Transportation, 861 F.3d 944 (9th Cir. 2017), the Ninth Circuit dismissed challenges both to a Federal Motor Carrier Safety Administration’s (FMCSA) pilot program determination that Mexican carriers could operate safely in the United States, as well as an individual challenge to the FMCSA granting of U.S. operating authority to a specific, individual Mexican motor carrier.

The FMCSA pilot program at issue in the Ninth Circuit case had been authorized by Congress only after Mexico had successfully processed a NAFTA arbitration panel challenge to the United States’ failure to implement the original NAFTA Mexico cross-border trucking provisions. In ruling against the U.S., the arbitration panel held that the U.S. could require Mexican carriers to comply with the same regulations that apply to U.S. trucking companies. In response to this ruling the U.S. Congress authorized the FMCSA to grant permits to Mexican carriers...
carriers so long as they complied with U.S. safety requirements. It also authorized the FMCSA permit process.

Once the FMCSA completed its pilot process in January 2015 it issued a report to Congress. The Department of Transportation’s Inspector General concluded that the FMCSA could not draw inferences on the safety of Mexican motor carriers because the thirteen carriers in the pilot program was too small of a sample to be representative of all motor carriers. However, the FMCSA disagreed and concluded that the data could be used to conclude that

Mexico-domiciled motor carriers conducting long-haul operations beyond the commercial zones of the United States operate at a level of safety levels [sic] that is equivalent to, or greater than, the level of safety of U.S. and Canada-domiciled motor carriers operating within the United States.

In challenging the FMCSA’s reliance on the pilot program to allow the operation of Mexican motor carriers in the United States the petitioners argued that the FMCSA used an insufficient sample of carriers to conclude that Mexican carriers can safely operate in the United States. In addition, a U.S. drivers’ association argued that the FMCSA’s findings were not statistically valid, and that the agency had acting unlawfully by allowing drivers for Mexico-domiciled carriers to use Mexico-issued licenses.

The Ninth Circuit rejected the petitioners’ challenges to the FMCSA’s actions, holding that the Congressional legislation authorizing the FMCSA’s pilot project did not impose any requirements of sample size or statistical validity before the FMCSA could make a decision regarding the safety of Mexican motor carriers. The Court instead found that the Congress had committed to the FMCSA the statutory discretion as to whether the results of the program justified granting long-haul authority to Mexican carriers in the U.S. Since the statute did not create any meaningful standard by which the FMCSA’s actions could be measured, the Court held that it could not review the agency’s actions or the granting of a U.S. operating permit to an individual Mexican carrier. With respect to the argument that drivers of Mexican motor carriers were required to first obtain a U.S. driver’s license, the Ninth Circuit held that an earlier decision of the U.S. Court of Appeals for the District of Columbia Circuit in Int'l Bhd. of Teamsters v. U.S. Dep't of Transp., 724 F.3d 206, 210-11, 406 U.S. App. D.C. 275 (D.C. Cir. 2013 had already ruled against that argument and the Ninth Circuit was bound by that decision.

The Ninth Circuit’s decision provides some additional clarity on the issue of Mexican motor carriers operating in the United States, but it is not the end of the story. Another challenge to the FMCSA’s actions are currently pending before the United States Court of Appeals for the Fifth Circuit. Perhaps more important is the effort by the Trump Administration to reopen and renegotiate provisions of NAFTA. On July 17, 2017, the Office of the U.S. Trade Representative issued its Summary of Objectives for the NAFTA Renegotiation. Included in the list of Trade in Services that the Trump Administration would like to renegotiate are “Specialized sectoral disciplines, including rules to help level the playing field for U.S. delivery services suppliers in
the NAFTA countries.” Watchers of the long-running opposition to Mexican truck operations in the U.S. will be watching the NAFTA renegotiations to see if this negotiating point will be wide enough to allow the opponents of Mexican cross-border trucking to achieve politically the protections that they have so far been denied in the courts.

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**INTERNATIONAL TRANSPORTATION COMMITTEE PROGRAMS AT THE 2017 SPRING AND FALL ABA SIL MEETINGS**

On April 26, 2017 the International Transportation Committee sponsored a well-received program on how new technology and business models, including the Internet of Things (IoT) and computer platform systems are requiring a reevaluation of legal liability and regulatory systems in a number of areas, including transportation regulation, product liability, and insurance coverage. The program, *Disruptive and Emerging Technologies for and Beyond Transportation—Insurance and Liability Issues for the New Era*, highlighted how the liability and insurance issues related to the use of such computer-based products and businesses are presenting new legal challenges, including in the areas of cyber-security and data privacy.

The ITC will also be sponsoring two programs at the ABA SIL Fall 2017 meeting in Miami, Florida. On October 26, 2017, Committee Vice Chair Attilio Costabel has pulled together two programs on doing business in the Americas. The first is *CISG International Sales Convention: Veterans and Newcomers, Cuba, Brazil and CISG Latin America*. The second is *Accessing the Americas: Contracts of Distributorship in the Global Economy of the American Hemisphere*. Both programs will provide in-depth legal knowledge from experts in their field. All Committee members are encouraged to attend!

**ROTATION OF INTERNATIONAL TRANSPORTATION COMMITTEE LEADERSHIP**

With this Newsletter ITC Committee Co-Chairs Ana Luisa Castro Cunha Derenusson and Andrew Danas are rotating into the roles of Senior Advisors and handing the reins of the Committee over to new Co-Chairs Jessica Horwitz and Peter Quinter. Ana and Andy thank all Committee members, ABA officers, and ABA staff that have assisted them in their three years as International Transportation Committee Co-Chairs. They look forward to working with Jessica and Peter during the 2017-2018 Committee Year in helping the ITC navigate the ever-changing and challenging world of international transportation law.

*Please Join The International Transportation Committee’s LinkedIn Group https://www.linkedin.com/groups/8477836 and visit our ABA SIL Webpage at: http://apps.americanbar.org/dch/committee.cfm?com=IC706000*