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## International Transportation Law

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**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

## **International Transportation Law**

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International transportation encompasses a variety of modes of transport and industries, including passenger and cargo transportation by air, ocean, motor, and rail. This report highlights some of the 2017 legal developments that will affect global trends in international transportation in coming years. Ocean shipping had developments regarding competition and new guidelines for cybersecurity threat management. Aviation saw major updates to the management of aircraft control and unmanned aircraft systems. This was also a big year for change regarding free-trade agreements. Recent in-bond process changes have implications for multi-modal transportation of cargo. Lastly, transportation technology and regulation has continued to be an area of advancement.

### **I. Ocean Shipping**

This year has seen the implementation of significant change throughout the ocean shipping industry. The international shipping market experienced a consolidation of the world's top carriers into only three shipping alliances.<sup>1</sup> With this reshuffling, competition regulation has been a large focus of 2017. Ocean shipping has also not been insulated from updated technologies which has resulted in the release of the International Maritime Organization (IMO) Cybersecurity Guidelines.<sup>2</sup>

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1. *Understanding the 3 New Ocean Carrier Shipping Alliances*, AM. EXPORT LINES (May 8, 2017), <https://www.shipit.com/archives/2017/05/08/understanding-the-3-new-ocean-carrier-shipping-alliances/>.

2. Int'l Mar. Org. Mar. Safety Comm. Res. MSC.428(98), U.N. Doc. MSC 98/23/Add.1, annex 10, at 1 (June 16, 2017).

**PUBLISHED IN COOPERATION WITH  
SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

298 THE YEAR IN REVIEW

[VOL. 52]

A. COMPETITION REGULATION IN OCEAN SHIPPING

The regulation of international ocean shipping competition in the United States was also clarified in 2017. In January 2017, the United States Court of Appeals for the Third Circuit affirmed a lower court decision holding that the Shipping Act<sup>3</sup> bars direct and indirect purchasers of ocean common carrier services from pursuing a private cause of action alleging a violation of the federal and state antitrust, consumer protection, and unjust enrichment laws.<sup>4</sup> The claims arose in the context of unfiled agreements by the ocean carriers in which the carriers agreed to coordinate prices and services and allocated routes and customers.<sup>5</sup> Although the action arose from antitrust investigations in the U.S. and overseas that had resulted in both convictions and plea agreement settlements (including additional criminal filings through 2017),<sup>6</sup> the Third Circuit held that private causes of actions for such claims were preempted by the Shipping Act in relation to the international transportation of vehicles; and it further held that any private claims related to any alleged harm should be brought under the Shipping Act before the Federal Maritime Commission (FMC).<sup>7</sup>

In the spirit of President Trump's Executive Order seeking to encourage regulatory efficiency<sup>8</sup>, the FMC, an independent agency not subject to the Order, engaged in several actions to modernize its regulations and enhance ocean shipping. In the spring, the FMC adopted new regulations streamlining the regulation and filing of service contracts and NVOCC Service Arrangements entered into between ocean carriers, Non-Vessel-Operating Common Carriers (NVOCCs), and their shipper customers.<sup>9</sup> Near the end of the year, the FMC issued a notice of proposed rulemaking setting forth proposed changes to how NVOCCs enter into contracts and offer market rates exempt from tariff publishing requirements.<sup>10</sup>

In between, the FMC authorized THE Alliance Agreement to establish a contingency fund which could be drawn from if a member ocean carrier

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3. 46 U.S.C.A. § 40101 (West 2006).

4. *In re Vehicle Carrier Servs. Antitrust Litig.*, 846 F.3d 71, 85-86 (3rd Cir. 2017).

5. *Id.* at 82.

6. *See, e.g.*, *United States v. Hoegh Autoliners AS*, Criminal No. GLR-17-0505 (D. Md. Sept. 29, 2017); Press Release, Department of Justice, Antitrust Division, Norwegian Company Agrees to Plead Guilty to Price Fixing on Ocean Shipping Services for Cars and Trucks; Fifth Ocean Shipping Company Accepts Responsibility, Agrees to Pay \$21 million Criminal Fine (Sept. 27, 2017), <https://www.justice.gov/opa/pr/norwegian-company-agrees-plead-guilty-price-fixing-ocean-shipping-services-cars-and-trucks>.

7. *In re Vehicle Carrier*, 846 F.3d at 85-86.

8. Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017); Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017).

9. Amendments to Regulations Governing Service Contracts and NVOCC Service Arrangements, 82 Fed. Reg. 16,288 (Apr. 4, 2017).

10. Amendments to Regulations Governing NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements, 82 Fed. Reg. 56,781 (proposed Nov. 30, 2017).

**PUBLISHED IN COOPERATION WITH  
 SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2018]

TRANSPORTATION LAW 299

experienced financial distress.<sup>11</sup> THE Alliance Agreement, an agreement between five ocean carriers to share vessels and work cooperatively, was filed with the FMC pursuant to the Shipping Act.<sup>12</sup> The adoption of the contingency fund as part of the agreement arose from the adverse experiences both ocean carriers and their shipper customers experienced as a result of the 2016 Korean bankruptcy of Hanjin Shipping.<sup>13</sup> This may become a required template for future carrier agreements subject to FMC regulation should it prove beneficial in creating a stable operating environment.

**B. INTERNATIONAL MARITIME ORGANIZATION’S CYBERSECURITY  
 GUIDELINES**

The Maritime Safety Committee for the International Maritime Organization (IMO) passed a resolution to prompt incorporation of cyber-risk management in existing safety management systems per the International Safety Management (ISM) Code.<sup>14</sup> Resolution MSC.428(98) recognized “the urgent need to raise awareness on cyber-risk threats and vulnerabilities to support safe and secure shipping.”<sup>15</sup> But the industry as a whole has been given until 2021 to address this concern.<sup>16</sup>

In addition to the resolution, security guidelines were also approved.<sup>17</sup> Areas of special concern were as follows: “[b]ridge systems”; “[c]argo handling and management systems”; “[p]ropulsion and machinery management and power control systems”; “[a]ccess control systems”; “[p]assenger servicing and management systems”; “[p]assenger facing public networks”; “[a]dministrative and crew welfare systems”; “and [c]ommunication systems.”<sup>18</sup> But this list was not intended to be exhaustive of the areas susceptible to cyber risk.<sup>19</sup> Furthermore, the guidelines pointed out that the “distinction between information technology” systems “and operational technology systems should be considered” appropriately.<sup>20</sup> The guidelines further suggested the application of “functional elements that

11. Press Release, FMC, THE Alliance Authorized to Establish Contingency Fund (Sept. 14, 2017), [https://www.fmc.gov/NR17-17/?CategoryId=1&F\\_All=CY](https://www.fmc.gov/NR17-17/?CategoryId=1&F_All=CY); FMC Agreement No. 012439-001 (Aug. 7, 2017).

12. *Id.*

13. Edwin Lopez, *THE Alliance clarifies rules for contingency fund’s use*, SUPPLY CHAIN DIVE (Aug. 14, 2017), <https://www.supplychaindive.com/news/THE-Alliance-bankruptcy-protection-clause-FMC/449187/>.

14. Int’l Mar. Org. Mar. Safety Comm. Res. MSC.428(98), U.N. Doc. MSC 98/23/Add.1, annex 10, at 1 (June 16, 2017).

15. *Id.*

16. *Id.*

17. Int’l Mar. Org. Mar. Safety Comm., Guidelines on Maritime Cyber Risk Management, U.N. Doc. MSC-FAL.1/Circ.3, annex, at 1 (July 5, 2017).

18. *Id.*

19. *Id.*

20. *Id.* at 2.

**PUBLISHED IN COOPERATION WITH  
 SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

300 THE YEAR IN REVIEW

[VOL. 52]

support effective cyber-risk management.”<sup>21</sup> The elements listed were as follows: “Identify,” “Protect,” “Detect,” “Respond,” and “Recover.”<sup>22</sup>

The guidelines emphasized the intention to create broad principles for the industry<sup>23</sup> and suggested that the application of said principles may be effective for ships with limited cyber-related systems.<sup>24</sup> But the guidelines stressed the need to seek additional resources for ships with complex cyber-related systems.<sup>25</sup> The industry has until 2021 to ensure that cyber-related risk management is incorporated in their operational plans.<sup>26</sup>

## II. Aviation

Aviation had its own developments in 2017. This year marked the transfer of air traffic control services to the newly formed not-for-profit ATC Corporation.<sup>27</sup> In addition, a new three-year unmanned aircraft system integration pilot program was announced.<sup>28</sup> These changes should shape key parts of the aviation infrastructure for years to come.

### A. AVIATION INNOVATION, REFORM, & REAUTHORIZATION ACT

On February 3, 2016, the Aviation Innovation, Reform, & Reauthorization Act (H.R. 4441) (AIRR Act)<sup>29</sup> was introduced. The AIRR Act establishes an independent, not-for-profit corporation (ATC Corporation) to provide and modernize U.S. air traffic control (ATC) services.<sup>30</sup> Under this Act, the ATC Corporation would take over ATC services from the Federal Aviation Administration (FAA) and operate without government funding.<sup>31</sup> Safety oversight<sup>32</sup> and regulatory authority<sup>33</sup> would remain with the FAA.<sup>34</sup> A board of directors would manage the ATC Corporation and represent aviation system users and the public interest.<sup>35</sup>

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21. *Id.* at 3.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Int'l Mar. Org. Mar. Safety Comm. Res. MSC.428(98), U.N. Doc. MSC 98/23/Add.1, annex 10, at 1 (June 16, 2017).

27. Aviation Innovation, Reform, & Reauthorization Act, H.R. 4441, 114th Cong. (2016) [hereinafter AIRR Act].

28. Memorandum on Unmanned Aircraft Systems Integration Pilot Program, 82 Fed. Reg. 50301 (Oct. 25, 2017).

29. AIRR Act, *supra* note 27.

30. *Id.*

31. *Id.* §§ 90301, 90302.

32. *Id.* § 90501.

33. *Id.*

34. *See id.* § 90506 (limiting the ATC Corporation's enforcement role to reporting of safety violations to the FAA).

35. *Id.* § 90306. Congress may pass a joint resolution, subject to the President's signature of veto, and disapprove any charge and fee schedule set by the ATC Corporation.

**PUBLISHED IN COOPERATION WITH  
 SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2018]

TRANSPORTATION LAW 301

The legislation gives the ATC Corporation authority to “assess and collect charges and fees from” operators using ATC services provided by the ATC Corporation in U.S. airspace.<sup>36</sup> The FAA, upon a written complaint, should also determine whether any charge or fee put forward by the ATC Corporation is reasonable.<sup>37</sup> In short, the ATC Corporation would execute its delegated functions and provide ATC services under the legislation. Such authority, however, would be within the confines of the regulatory framework defined by Congress and supervised by the FAA.

**B. NEW THREE-YEAR UNMANNED AIRCRAFT SYSTEMS  
 INTEGRATION PILOT PROGRAM**

On October 25, 2017, the White House announced a new three-year Unmanned Aircraft Systems (UAS) Integration Pilot Program (Program).<sup>38</sup> The Program allows private sector entities to partner with “state, local, and tribal governments” to promote the integration of UAS operations into the National Airspace System (NAS) and safely expand innovative UAS operations.<sup>39</sup> In particular, such partnerships can propose new models of UAS integration in relevant jurisdictions for low-altitude operations—i.e., UAS operations taking place below “200 feet” or, in some cases, “up to 400 feet above ground level.”<sup>40</sup> The FAA must establish the Program within ninety days, after which the Department of Transportation has 180 days to enter into a minimum of five agreements with state, local, and tribal governments to participate in the Program.<sup>41</sup> As such, collaboration among federal and state regulators in relation to UAS regulation is encouraged. Questions regarding the balancing of local and national interests in integrating UAS into NAS are unlikely to be answered this year, although the Drone Innovation Act of 2017<sup>42</sup> in the Senate and the Drone Federalism Act of 2017 in the House seek to vest some authority over UAS regulation with the state and local governments.<sup>43</sup>

**III. Developments in Free Trade Agreements**

Free Trade Agreements (FTAs) in North America saw a turbulent year in 2017 with the re-opening of NAFTA negotiations, withdrawal of the U.S. from the Trans-Pacific Partnership, implementation of the Canada-EU Comprehensive Economic and Trade Agreement, and the collapse of

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36. *Id.* § 90311.

37. *Id.* Any charge or fee is reasonable if it is consistent with the ATC Corporation’s fee authority and otherwise consistent with the public interest.

38. Memorandum on Unmanned Aircraft Systems Integration Pilot Program, 82 Fed. Reg. 50,301 (Oct. 25, 2017).

39. *Id.*

40. *Id.* § 3(a)(i).

41. *Id.* § 3(c)-(d).

42. Drone Innovation Act of 2017, H.R. 2930, 115th Cong. (2017).

43. Drone Federalism Act of 2017, S. 1272, 115th Cong. (2017).

**PUBLISHED IN COOPERATION WITH  
 SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

302 THE YEAR IN REVIEW

[VOL. 52]

negotiations for the U.S.-EU Transatlantic Trade and Investment Partnership. This section reviews developments of note to the transportation community resulting out of FTA changes this year with a focus on North America.

**A. NORTH AMERICAN FREE TRADE AGREEMENT**

There were five rounds of NAFTA re-negotiations held in 2017, with the next full round scheduled to take place in Montreal in January 2018.<sup>44</sup> Progress on agreement has been slow, with only two chapters closed to date (addressing small and medium enterprises and competition/antitrust).<sup>45</sup> Talks are focusing on the technical front and less-controversial chapters at present.<sup>46</sup> Some areas that were expected to be low-hanging fruit are proving difficult due largely to the unconventional and highly protectionist stance taken by the United States.<sup>47</sup>

Businesses in North America, particularly the transportation sector, are watching the re-negotiations closely. Supply chains in North America are vertically integrated, with many products crossing borders several times during the manufacturing process. This multiplies the impact of higher tariffs which could present an existential threat to some sectors. Corporate strategies regarding warehousing, transportation, procurement, and compliance will be disrupted by changes to rules of origin. Elimination of NAFTA could also increase shipping costs, particularly for companies in Canada and Mexico because most of North America's major shipping and logistics hubs are in the United States.

One topic has emerged as controversial in the transportation sector. NAFTA Articles 1202 (national treatment for cross-border services) and 1203 (most-favored-nation treatment for cross-border services) permit long-

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44. Brett Fortnam, *Lighthizer bemoans a lack of progress on NAFTA, urges Canada and Mexico to engage in 'rebalancing'*, INSIDE U.S. TRADE (Nov. 21, 2017), <https://insidetrade.com/daily-news/lighthizer-bemoans-lack-progress-nafta-urges-canada-and-mexico-engage-rebalancing>.

45. Press Release, Office of the U.S. Trade Representative, Trilateral Statement on the Conclusion of the Third Round of NAFTA Negotiations (Sept. 27, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/september/trilateral-statement-conclusion-1>; Press Release, Office of the U.S. Trade Representative, Trilateral Statement on the Conclusion of the Fourth Round of NAFTA Negotiations (Oct. 17, 2017) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/october/trilateral-statement-conclusion>.

46. Dave Graham, *Next round of NAFTA talks could reach deal on some chapters: Mexico minister*, IPOLITICS (Nov. 27, 2017), <https://ipolitics.ca/2017/11/27/next-round-nafta-talks-reach-deal-chapters-mexico-minister/>. Some of the less-controversial chapters include telecommunications, e-commerce, technical barriers to trade, sanitary and phytosanitary measures and customs and trade facilitation.

47. The U.S. negotiation objectives are set out in a statement published by the U.S. Trade Representative: Office of the United States Trade Representative, Summary of Objectives for the NAFTA Renegotiation (Jul. 17, 2017), <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf>. ["USTR NAFTA Objectives"].

**PUBLISHED IN COOPERATION WITH  
 SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2018]

TRANSPORTATION LAW 303

haul trucks from Mexico to operate within the United States.<sup>48</sup> Previously, Mexican trucks could not enter the United States except to transfer their cargo to a U.S. carrier in the 25-mile wide “commercial zone” along the border.<sup>49</sup> These provisions were included in the original NAFTA text<sup>50</sup> but only came into effect in 2011 because of delays caused by safety and security-related concerns, along with opposition by U.S. trucking labor unions.<sup>51</sup> In February 2017, after the NAFTA re-negotiations were announced, Rep. Peter DeFazio (D-Ore) proposed in a resolution to the U.S. House of Representatives that the future NAFTA should not require “access to United States roads for vehicles domiciled in other countries.”<sup>52</sup> It is possible given this pressure that the U.S. could reopen the Mexican trucking access issue in re-negotiations or even open discussion regarding Canadian carriers. The USTR has also proposed “Buy America” requirements on transportation services, which would further restrict access to Canadian and Mexican carriers.<sup>53</sup>

On the positive side, the NAFTA re-negotiations may result in certain welcome changes for the trucking industry. For example, in its July 2017 statement of NAFTA re-negotiation priorities, the USTR proposed to add provisions to NAFTA that “[p]rovide for automation of import, export, and transit processes”; harmonize “data requirements”; and reduce customs forms and formalities.<sup>54</sup> The U.S. is also interested in providing for the “electronic payment of duties, taxes, [and] fees.”<sup>55</sup> The statement also notes that the U.S. plans to support “use of risk management systems for customs control and post-clearance audit procedures to ensure compliance with customs and related laws.”<sup>56</sup> This likely refers to advanced screening programs such as the Free and Secure Trade program (FAST) between Canada and the U.S., under which qualified drivers are subject to less

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48. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993), annex I at pages I-U-19 and 20.

49. Jim Forsyth, *Years after NAFTA, first long-haul Mexican truck enters U.S.*, REUTERS (Oct. 21, 2011), <https://www.reuters.com/article/us-trucking-nafta/years-after-nafta-first-long-haul-mexican-truck-enters-u-s-idUSTRE79K75P20111021>.

50. The U.S. originally took a reservation in Annex I to cover this issue, but that reservation expired in 1995. See North American Free Trade Agreement, Can.-Mex.-U.S., Dec 17, 1992, 32 I.L.M. 289 (1993), Annex I at pages I-U-19 and 20.

51. See Forsyth, *supra* note 51. In 2015, the International Brotherhood of Teamsters even sued the Department of Transportation over the Mexican trucking program, which they argued was implemented based on insufficient data. Kara Deniz, *Teamsters Take Action to Protect Highway Safety, Stop Mexican Trucks*, TEAMSTERS (Mar. 10, 2015).

52. William B. Cassidy, *Mexican trucking past US border in crosshairs*, JOC.COM (Feb. 13, 2017), [https://www.joc.com/trucking-logistics/truckload-freight/politics-economics-collide-us-mexico-truck-crossings\\_20170213.html](https://www.joc.com/trucking-logistics/truckload-freight/politics-economics-collide-us-mexico-truck-crossings_20170213.html).

53. USTR NAFTA Objectives, *supra* note 49, at 16.

54. USTR NAFTA Objectives, *supra* note 49, at 6.

55. *Id.*

56. *Id.*

**PUBLISHED IN COOPERATION WITH  
 SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

304 THE YEAR IN REVIEW

[VOL. 52]

stringent security screenings at the border.<sup>57</sup> Such streamlined processes will reduce costs for cross-border carriers.

**B. TRANS-PACIFIC PARTNERSHIP**

One of U.S. President Donald Trump's first official actions after taking office in January 2017 was to formally withdraw the United States from the Trans-Pacific Partnership (TPP).<sup>58</sup> The free trade agreement among twelve Asia-Pacific states had been finalized and signed by the Obama administration on February 4, 2016,<sup>59</sup> and would have created the world's largest free trade area covering 40 percent of world economic output.<sup>60</sup> Under the original entry into force provisions, the agreement could not come into effect without U.S. ratification, which was necessary to reach the required ratification threshold of at least six signatories representing 85 percent of collective GDP.<sup>61</sup>

Despite fears that the pact was dead without U.S. involvement, in 2017, the remaining eleven TPP signatories, "Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore[,] and Vietnam," reached an agreement to move the pact forward without the United States.<sup>62</sup> The deal has been renamed the "Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)."<sup>63</sup>

The revised treaty still has not been finalized or signed. Most of the original TPP text is unchanged, and all of the parties' commitments relating to trade in goods, services, procurement, and investment remain intact.<sup>64</sup> But twenty TPP articles are "suspended" in the CPTPP, meaning that the

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57. *FAST: Free and Secure Trade for Commercial Vehicles*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/travel/trusted-traveler-programs/fast> (last updated July 21, 2017).

58. Office of the White House Press Secretary, Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement (Jan. 23, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific>.

59. *Timeline of Discussions*, GOV'T OF CAN., [http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/timeline\\_negotiations-chronologie\\_negociations.aspx?lang=eng](http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/timeline_negotiations-chronologie_negociations.aspx?lang=eng) (last visited Dec. 7, 2017).

60. Bill Curry, *The ABCs of TPP*, THE GLOBE AND MAIL, Oct. 5, 2015 (updated Nov. 12, 2017), <https://www.theglobeandmail.com/report-on-business/international-business/what-is-tpp-understanding-the-new-pacific-tradedeal/article26648948/>.

61. Trans-Pacific Partnership, Austl.-Brunei-Can.-Chile-Japan-Malay.-Mex.-N.Z.-Peru.-Sing.-U.S.-Viet., at Ch. 30, Feb. 4, 2016, <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng>. [hereinafter TTP].

62. *Trans-Pacific Partnership Joint Ministerial Statement*, GOV'T OF CAN., <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/statement-declaration.aspx?lang=eng> (last updated Feb. 28, 2018) [hereinafter CPTPP Joint Statement].

63. *Id.*

64. Trans-Pacific Partnership Joint Ministerial Statement, annex II, List of Suspended Provisions, GOV'T OF CAN., <http://international.gc.ca/trade-commerce/trade-agreements->

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2018]

TRANSPORTATION LAW 305

provisions will not be implemented until the parties agree by mutual consent.<sup>65</sup> There are also a number of items that have been flagged for follow-up negotiations including state-owned enterprises, certain investment chapter non-conforming measures of Brunei in the coal industry, the compensation clause in the dispute settlement chapter, and cultural exemptions.<sup>66</sup>

Chapter Ten on cross-border trade in services commits members to give service providers of other members equal access as given to domestic service providers.<sup>67</sup> But most transportation service sectors are excluded from this requirement.<sup>68</sup> Air services are carved out of the chapter in favor of existing bilateral air-transport agreements between member states,<sup>69</sup> and most member states took reservations excluding various transportation sectors from application of the agreement, such as rail and maritime transport services, airport and ocean port services, and cabotage.<sup>70</sup>

Two items related to express delivery services were also suspended under the CPTPP.<sup>71</sup> In the trade facilitation chapter, the article addressing expedited customs processes for express shipments “provide[s] that, under normal circumstances, no customs duties will be assessed on express shipments valued at or below a fixed amount.”<sup>72</sup> But the requirement that parties periodically review this amount was suspended.<sup>73</sup> Two paragraphs were also suspended from Annex 10-B regarding express delivery services: paragraph four of the annex committed the parties to maintain existing levels of market access “for express delivery services.”<sup>74</sup> Paragraph five stated that “[n]o party shall allow a supplier of services covered by a postal monopoly to cross-subsidize its own or any other competitive supplier’s express delivery services with revenues derived from monopoly postal services.”

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accords-commerciaux/agr-acc/cptpp-ptpgp/annex2-annexe2.aspx?lang=eng (last updated Nov. 10, 2017) [hereinafter CPTPP List of Suspended Provisions].

65. *Id.* Most of the suspensions are in the Intellectual Property chapter of provisions that were originally included at the insistence of the United States. See *TPP-11 Nations Reach Ministerial Agreement on ‘Core Elements’ at APEC Summit*, INSIDE U.S. TRADE (Nov. 11, 2017), <https://insidetrade.com/trade/tpp-11-nations-reach-ministerial-agreement-core-elements-apec-summit>.

66. CPTPP List of Suspended Provisions, *supra* note 66.

67. TPP, *supra* note 63, at Ch. 10, art. 10.3.

68. *Id.* at arts. 10.2(5)-(6).

69. *Id.*,

70. See *id.* annex II Schedules.

71. *Id.* Annex 10-B(1), ¶ 4-5, & Art. 5.7(1)(f); Comprehensive and Progressive Agreement for Trans-Pacific Partnership, at Annex I (Mar. 8, 2018) (re-affirmance of the TPP signed Feb. 4, 2016, at Auckland, with suspensions) (“CPTPP”).

72. TPP, *supra* note 69, art. 5.7(1)(f).

73. CPTPP, *supra* note 66; Trans Pacific Partnership, Austl.-Brunei-Can.-Chile-Japan-Malay.-Mex.-N.Z.-Peru.-Sing.-U.S.-Viet., Feb. 4, 2016 (not in force) [“TPP”], at Chapter 10, art. 10.3. Full text available at: <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng>.

74. CPTPP, *supra* note 66, Annex; TPP, *supra* note 69, Annex 10-B(1), ¶ 4.

**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

306 THE YEAR IN REVIEW

[VOL. 52]

Regardless of the exclusion of most transportation sectors from the general free trade provisions, the CPTPP should be expected to have a substantial indirect impact on transportation service providers through a ripple effect. The increase in trade in goods and services will result in increased demand for passenger and cargo transportation, which will in turn increase demand for aircrafts, vessels, and their parts.

**C. CANADA-EU COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT**

The Canada-European Union Comprehensive Economic and Trade Agreement (CETA) came into provisional application on September 21, 2017.<sup>75</sup> The CETA represents the best market access either Canada or the EU has ever given to any trading partner across all covered categories and presents a tremendous growth opportunity for Canadian and EU businesses.

In the transportation sector, the agreement is expected to benefit shippers by increasing trade traffic in goods and demand for transportation services. Tariff reduction will also offer benefits for aerospace exporters; Canada is the second largest supplier of aerospace products to the EU after the U.S.<sup>76</sup>

Market access for services is one of the areas in which the CETA does not go as far as it could. It largely commits the parties to maintain existing levels of market access, although, in most cases any subsequent liberalization will be locked in.<sup>77</sup> Restrictions will continue to exist on most domestic transportation services because there are carve-outs to preserve existing cabotage rules.<sup>78</sup> Aviation services remain subject to bilateral air transport treaties and providers must continue to be licensed under applicable existing regulations.<sup>79</sup> 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 aircrafts.<sup>80</sup>

For international maritime services, the CETA grants equal access to vessels and transport service providers 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

75. *Customs Notice 17-30*, CAN. BORDER SERVS. AGENCY (Sept. 14, 2017), <https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn17-30-eng.html>.

76. *Opportunities and Benefits of CETA for Canada's Aerospace Exporters*, GOV'T OF CAN., <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/business-entreprise/sectors-secteurs/aero.aspx?lang=eng> (last updated Sept. 19, 2017).

77. Comprehensive Economic and Trade Agreement, Can.-EU, art. 9.5, Oct. 30, 2016, [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf) [hereinafter CETA].

78. *See id.* (EU Reservations at page 1311 of consolidated text; Reservations II-C-14 of Canada at 1209 of consolidated text).

79. *Id.* at art. 9.2(2)(e).

80. The details of the reservations are set out in the Schedules to Annex II of the CETA, *supra* note 79.

**PUBLISHED IN COOPERATION WITH  
 SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2018]

TRANSPORTATION LAW 307

charges,” “access to customs facilities,” and “the assignment of berths and facilities for loading and unloading.”<sup>81</sup> The agreement “also provides that transportation service companies be permitted to provide container repositioning, private dredging services (and public dredging contracts above CAD \$7.8 million in value), and certain feeder services.”<sup>82</sup> “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.”<sup>83</sup> But there are “exclusions for particular pre-existing exclusive transportation systems in certain regions.”<sup>84</sup>

Finally, the procurement chapter “promises enhanced access for investors to bid on government projects, including at the sub-federal level.”<sup>85</sup> Canadian bidders will therefore “have an advantage over US suppliers” for EU procurement contracts, until the U.S. concludes its own FTA with the EU.<sup>86</sup> “Airport and public transportation infrastructure projects are included” in the CETA’s government procurement access provisions, “but with limitations.”<sup>87</sup> “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.”<sup>88</sup>

#### IV. Customs Transportation Updates

On November 27, 2017, new in-bond customs transportation regulations went into effect.<sup>89</sup> When goods enter the United States, they are subject to the payment of customs duties.<sup>90</sup> In-Bond Transportation is the movement of these goods in the United States without the appraisal and payment of these duties.<sup>91</sup> Recent concerns over the dependency on paper has spurred this effort to create an automated paperless process that would allow for Customs and Border Patrol (CBP) “to better track in-bond merchandise to improve security and trade compliance, and address certain weaknesses in the in-bond system.”<sup>92</sup> Four areas of adjustment have a significant chance to influence logistical operations and carriers of the in-bond cargo.

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81. CETA, *supra* note 79, at art. 14.2

82. Jessica Horwitz, *CETA: What It Means for Transportation*, INT’L TRANSP. NEWS (ABA Sec. of Int’l L.), Summer 2017, at 3.

83. *Id.*

84. The exclusions are set out in the Schedules of Annex II.

85. *See* CETA, *supra* note 79, at 4.

86. *Id.*

87. CETA, *supra* note 59, Annex 19A-5 and 19B-5.

88. *Id.* at 4.

89. Changes to the In-Bond Process, 82 Fed. Reg. 45,366 (Sept. 28, 2017).

90. *Id.* at 45366.

91. *Id.* at 45367.

92. *Id.*

**PUBLISHED IN COOPERATION WITH  
 SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

308 THE YEAR IN REVIEW

[VOL. 52]

First, the thirty day in-transit time for in-bond cargo has been maintained, but barged cargo in-transit time has been extended to sixty days.<sup>93</sup> Second, a definitional change has been made to Bonded Carrier.<sup>94</sup> A bonded carrier is now defined as a “‘carrier of merchandise whose bond under §113.63 of this title is obligated for the transportation and delivery of merchandise.’”<sup>95</sup> Liability for the in-bond movement rests with the party who has obligated its bond on record.<sup>96</sup> Third, the requirement to notify upon transferring cargo between conveyances has been removed.<sup>97</sup> But the agency requires that the party surrendering the bonded cargo report an arrival, and the subsequent bonded carrier must file a new in-bond application to have the cargo moved in-bond.<sup>98</sup> Lastly, container transportation of in-bond cargo with non-bonded cargo is allowed without a seal “if the in-bond merchandise is corded and sealed, or labeled as in-bond merchandise.”<sup>99</sup> These updates and modernization of the customs process is sure to be a welcomed and continual process in the years to come.

## V. New Technology and Business Model Developments

Progress in the development and implementation of new technology in the transportation industry continued in 2017, with corresponding regulatory and legislative concerns generally lagging behind technological developments. Although the relationship between automated transportation and existing laws drew the attention of regulators for all modes of transportation, how to regulate the testing and deployment of automated ground vehicles drew significant attention of regulators and legislators in 2017, at least in the United States.

### A. AUTONOMOUS VEHICLES

Legal issues involving autonomous vehicles that were being addressed by regulators in 2017 included the definition of an autonomous vehicle; insurance and liability issues related to autonomous vehicles; and the operation of autonomous vehicles on public roads, including vehicle inspection requirements, licensing and registration, operator requirements, requests to study, and vehicle testing requirements. Other issues involved the cybersecurity of automated vehicles and the privacy of collected vehicle data. The commercial operation of autonomous vehicles, including the platooning of commercial trucks on public highways, and the development

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<sup>93.</sup> *Id.*

<sup>94.</sup> *Id.*

<sup>95.</sup> *Id.* at 43568.

<sup>96.</sup> *Id.*

<sup>97.</sup> *Id.*

<sup>98.</sup> *Id.* at 43569.

<sup>99.</sup> *Id.*

**PUBLISHED IN COOPERATION WITH  
 SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2018]

TRANSPORTATION LAW 309

of the Internet of Things (IoT) smart infrastructure and connected vehicles, also drew the attention of legislatures and regulators.<sup>100</sup>

At the federal level, the 2016 automated vehicle policy initiatives of the Obama Administration were supplemented by the updated approach of the Trump Administration.<sup>101</sup> On September 12, 2017, the U.S. Department of Transportation announced *A Vision for Safety 2.0*, which provided voluntary guidance to encourage best practices and technical assistance for policymakers in the development and deployment of automated vehicles.<sup>102</sup> The new guidance made changes to and significantly reduced the detailed guidance that had been adopted by the Obama Administration. It also encouraged “states not to codify” into statute any portion of the Guidance,<sup>103</sup> stating that the Trump Administration’s Guidance is “clearer, more streamlined, [and] less burdensome” than the Obama Administration approach. But in November 2017, the General Accounting Office (GAO) issued a report to several Congressional committees stating that the U.S. Department of Transportation should develop a more comprehensive and coordinated approach to the regulation of autonomous vehicles than had to date been adopted by the agency.<sup>104</sup>

Moreover, a number of states considered and enacted legislation governing various aspects of autonomous vehicle operations. Arkansas<sup>105</sup>, California, Colorado<sup>106</sup>, Connecticut<sup>107</sup>, Georgia<sup>108</sup>, Illinois<sup>109</sup>, Nevada<sup>110</sup>, New York<sup>111</sup>, North Carolina<sup>112</sup>, North Dakota<sup>113</sup>, South Carolina<sup>114</sup>,

100. *Autonomous Vehicles, Self-Driving Vehicles Enacted Legislation*, NCSL (Mar. 12, 2018), <http://www.ncsl.org/research/transportation/autonomous-vehicles-self-driving-vehicles-enacted-legislation.aspx> (describes various legislation enacted by states regarding self-driving vehicles).

101. *Automated Driving Systems: A Vision for Safety 2.0*, NHTSA (Sept. 12, 2017), [https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/13069a-ads2.0\\_090617\\_v9a\\_tag.pdf](https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/13069a-ads2.0_090617_v9a_tag.pdf) [hereinafter *Vision 2.0*].

102. *Id.*

103. *Id.*; Press Release, U.S. Department of Transportation, U.S. DOT Releases New Automated Driving Systems Guidance (Sept. 12, 2017), <https://www.transportation.gov/briefing-room/dot7017>. Copies of the Guidance can be found on the National Highway Transportation Safety Administration (NHTSA) website, with a summary comparison of changes between the 2016 Obama Administration Guidance and the 2017 Trump Administration guidance at: *Automated Driving Systems 2.0: A Vision for Safety, What Changed?*, NHTSA, <https://www.nhtsa.gov/manufacturers/automated-driving-systems> (last visited Mar. 24, 2018) [hereinafter *What Changed*].

104. *Automated Vehicles: Comprehensive Plan Could Help DOT Address Challenges*, GAO (Nov. 30, 2017), <http://www.gao.gov/products/GAO-18-132>.

105. H.B. 1754, 91st Gen. Assemb., Reg. Sess. (Ark. 2017).

106. S.B. 17-213, 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2017).

107. S.B. 260, 2017 Leg., Jan. Sess. (Conn. 2017).

108. H.B. 472, 2017—2018 Leg., Reg. Sess. (Ga. 2017); S.B. 219, 2017—2018 Leg., Reg. Sess. (Ga. 2017).

109. H.B. 791, 100th Gen. Assemb., Reg. Sess. (Ill. 2017).

110. A.B. 69, 2017 Leg., 79th Sess. (Nev. 2017).

111. S.B. S2005C, Part FF, 2017—2018 Leg. (N.Y. 2017).

112. H.B. 469, 2017 Leg. (N.C. 2017); H.B. 716, 2017 Leg. (N.C. 2017).

113. H.B. 1202, 65th Leg. Assemb., Reg. Sess. (N.D. 2017).

**PUBLISHED IN COOPERATION WITH  
 SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

310 THE YEAR IN REVIEW

[VOL. 52]

Tennessee<sup>115</sup>, Texas<sup>116</sup>, and Vermont<sup>117</sup> were among the states that enacted laws to regulate the testing and use of autonomous vehicles on public roads. Several of these states also enacted laws regulating the platooning of commercial vehicles—the practice of having several trucks, utilizing connected computer software programs controlled by the lead truck via Wi-Fi and radio, drive closely together to achieve fuel and other economic efficiencies.

**B. TRANSPORTATION NETWORK COMPANIES AND PLATFORM SERVICES**

Legal issues related to the introduction and use of computerized platform services in the transportation industry, especially for Transportation Network Companies (TNCs) such as Uber and Lyft, remained at the forefront of transportation industry legal issues in 2017. As in previous years, Uber’s aggressive business models highlighted many of the legal issues that are being explored as new business models collide with old models.

The most significant legal ruling affecting Uber and other TNCs was the December 20, 2017, Judgment of the European Court of Justice (ECJ) in *Asociacion Profesional Elite Taxi v Uber Systems Spain SL*.<sup>118</sup> In that decision, the ECJ ruled that Uber and similar intermediation services are not simply technology companies offering software applications for use as a platform to provide a method for individual passengers to find rides with “non-professional drivers using their own vehicle[s],” which could be classified as “an information society service” subject to the EU’s Directives on electronic commerce.<sup>119</sup> The Court instead declared that Uber’s services are subject to classification as “a service in the field of transport” within the meaning of EU law.<sup>120</sup>

In rendering its decision, the Court of Justice found that the service and software provided by Uber are “indispensable for both the drivers and the persons who wish to make an urban journey.”<sup>121</sup> The Court also noted that

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114. H.B. 3289, 2017 Leg., 122nd Sess. (S.C. 2017).

115. S.B. 151, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017).

116. H.B. 1791, 85th Leg. (Tex. 2017); S.B. 2205, 85th Leg. (Tex. 2017).

117. H. 494 (Act 38), 2017-2018 Reg. Sess. (Vt. 2017).

118. A copy of the decision is *available at* <http://curia.europa.eu/juris/document/document.jsf?text=&docid=198047&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=308369> and at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62015CJ0434>. *Also see*, Press Release No 136/17, Court of Justice of the European Union, The Service Provided by Uber Connecting Individuals with Non-Professional Drivers is Covered by Services in the Field of Transport (Dec. 20, 2017), [https://curia.europa.eu/jcms/jcms/Jo2\\_16799](https://curia.europa.eu/jcms/jcms/Jo2_16799) [hereinafter ECJ Press Release].

119. *Id.*

120. *Id.*

121. *Id.*

**PUBLISHED IN COOPERATION WITH  
 SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2018]

TRANSPORTATION LAW 311

“Uber exercises decisive influence over the conditions under which the drivers provide their service.”<sup>122</sup>

As a consequence of its ruling, the ECJ held that individual Member States of the European Union can regulate the services provided by Uber and other TNCs.<sup>123</sup> The Court’s ruling is also likely to have eventual regulatory ramifications for interpreting the legal status of other “platform services” and “gig economy” business models in fields beyond transportation.

In London, Uber was denied a renewal of its private hire operator license by Transport for London (TfL) due to “a lack of corporate responsibility in relation to a number of issues which have potential public safety and security implications.”<sup>124</sup> According to TfL, these included Uber’s “approach to reporting serious criminal offences”; “how medical certificates are obtained”; and “how Enhanced Disclosure and Barring Service (DBS) checks are obtained.”<sup>125</sup> TfL also stated that its decision to deny renewal of Uber’s license was based, in part, on Uber’s “approach to explaining the use of Greyball in London,” which is a software algorithm that TfL explained “could be used to block regulatory bodies from gaining full access to the app and prevent officials from undertaking regulatory or law enforcement duties.”<sup>126</sup> Uber’s appeal of the TfL decision was pending in December 2017.

In November 2017, Uber lost an appeal of a 2016 UK employment tribunal, which held that Uber’s drivers should be classified as workers entitled to a minimum wage.<sup>127</sup>

In the United States, Uber was challenged on a variety of fronts with respect to its business practices. In January 2017, it settled a U.S. Federal Trade Commission (FTC) investigation alleging Uber had misled drivers regarding potential earnings by paying a \$20 million fine.<sup>128</sup> Another FTC complaint was settled in August 2017 relating to Uber’s use of its “God View” software.<sup>129</sup> In that complaint, the FTC alleged that Uber

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122. *Id.*

123. *Id.*

124. Press Release, Transport for London, Licensing Decision on Uber London Limited (Sept. 22, 2017), <https://tfl.gov.uk/info-for/media/press-releases/2017/september/licensing-decision-on-uber-london-limited>.

125. *Id.*

126. *Id.*

127. *Uber B.V. v. Mr. Y Aslam*, Appeal No. UKEAT/0056/17/DA, Judgment (United Kingdom Employment Appeals Tribunal, Nov. 10, 2017).

128. *FTC v. Uber Tech., Inc.*, Case No. 3:17-cv-00261-JST (N.D. Cal. Feb. 2, 2017) (Stipulated Order for Permanent Injunction and Monetary Judgment); Press Release, FTC, Uber Agrees to Pay \$20 Million to Settle FTC Charges That It Recruited Prospective Drivers with Exaggerated Earnings Claims (Jan. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/uber-agrees-pay-20-million-settle-ftc-charges-it-recruited>.

129. Federal Trade Commission, *In the Matter of Uber Technologies, Inc., Agreement Containing Consent Order*, File No. 1523054 (August 15, 2017); FTC, *Uber Technologies, Inc; Analysis to Aid Public Comment*, 82 Fed. Reg. 39582 (Aug. 21, 2017) [“Analysis”].

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

312 THE YEAR IN REVIEW

[VOL. 52]

misrepresented to consumers the extent to which it monitored its employees' access to personal information about users and drivers.<sup>130</sup> It also complained that Uber misrepresented to consumers how it secured data about users and drivers.<sup>131</sup> In settling the complaint with the FTC, Uber was prohibited from misrepresenting how it monitors internal access to consumers' personal information and how it protects and secures data.<sup>132</sup> Uber also agreed that it would implement a comprehensive privacy policy that addresses privacy risks related to "new and existing products and services," and that "protect[s] the privacy and confidentiality" of personal data collected by the company.<sup>133</sup> It further agreed that for the next twenty years it would obtain, every two years, an independent third-party audit certifying that it has a privacy program in place that meets or exceeds the requirements of the FTC's order.<sup>134</sup>

In November 2017, Uber announced that it had concealed an October 2016 data breach involving "the theft of personal information from" at least "57 million user accounts and 600,000 US drivers."<sup>135</sup> The delayed report of the hacking of Uber's computer systems resulted in investigations being opened by regulators in various states and countries, including investigations by the Federal Trade Commission, the New York Attorney General, the United Kingdom's Information Commissioner's Office, and the UK National Cyber Security Centre.<sup>136</sup>

In February 2017, Uber's autonomous vehicle unit was sued by Waymo, the self-driving vehicle development subsidiary of Google, for alleged trade secret theft in the development of automated vehicles.<sup>137</sup>

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130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Michael Kan, *Uber Faces Regulatory Scrutiny for Concealing Data Breach*, PC MAGAZINE (Nov. 22, 2017), <https://www.pcmag.com/news/357528/uber-faces-regulatory-scrutiny-for-concealing-data-breach>.

136. *Id.*

137. Waymo LLC v. Uber Tech., Inc., Case No. 3:2017-cv.00939 (N.D. Cal. filed Feb. 23, 2017).

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