

# Articles

## The Trans-Pacific Partnership and Its Effect on International Aviation

by John D. Goetz & Sarah L. Thompson\*

As the ink dries on the recently-signed Trans-Pacific Partnership (TPP or Agreement), predictions abound on the impact the Agreement will have on the world economy. One industry that certainly will be impacted by the TPP is aviation. Even though the Agreement does not attempt to address air services, the effects of the Agreement on global aviation will nevertheless be substantial. Ultimately, the trade Agreement will open doors for airlines and manufacturers, leading to new routes, more passengers, and a bigger product market. Additionally, the Agreement promises expanded means for aviation companies to protect their investments. This paper provides an overview of the TPP and a glimpse at how it will benefit airlines and manufacturers of aircraft component parts.

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\* John D. Goetz and Sarah L. Thompson are attorneys with the worldwide law firm of Jones Day, resident in the Pittsburgh office. Mr. Goetz is a recognized authority in transportation litigation, and he leads Jones Day's Airlines and Aviation Industry Practice. Ms. Thompson has experience in commercial litigation and regulatory matters. The views and opinions expressed in this article are the personal views or opinions of the authors; they do not necessarily reflect the views or opinions of the firm with which they are associated. The authors gratefully acknowledge the assistance of David A. Ledet and Zachary B. McConnell during the initial drafting of this paper.

## I. *The Trans-Pacific Partnership*

The Trans-Pacific Partnership, the most ambitious trade agreement of its time,<sup>1</sup> was reached on October 5, 2015<sup>2</sup> and signed on February 4, 2016.<sup>3</sup> After a lengthy period of negotiations, 12 countries signed the Agreement – Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. Like many free trade agreements, the TPP aims to increase trade between member countries by reducing tariff and non-tariff barriers while establishing objective, consistent ground rules for multi-national trade. However, the TPP is exceptional in a number of ways.

The Agreement is unique because of its size. Collectively, the participating countries represent an annual gross domestic product (GDP) of nearly \$28 trillion, or 40 percent of the world's GDP.<sup>4</sup> According to the U.S. Trade Representative, the TPP countries are collectively the largest goods and services export market of the United States.<sup>5</sup>

The Agreement is also remarkable because of its content. The TPP establishes the highest standards of any trade agreement in U.S. history, surpassing the rules-based commitments established in the World Trade Organization (WTO).<sup>6</sup> Additionally, the Agreement aims to liberalize trade in nearly all goods and services, putting it among the most comprehensive trade deals to date.

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<sup>1</sup> Vice President Biden on U.S. and Global Economy, C-SPAN (Apr. 5, 2013, 12:54 PM), <http://www.c-span.org/video/?c4414245/tpp-new-world-order>.

<sup>2</sup> Jackie Calmes, *Trans-Pacific Partnership Trade Deal Is Reached*, NY-TIMES.COM (Oct. 5, 2015), <http://www.nytimes.com/2015/10/06/business/trans-pacific-partnership-trade-deal-is-reached.html>.

<sup>3</sup> Rebecca Howard, *Trans-Pacific Partnership Trade Deal Signed, but Years of Negotiations Still to Come*, REUTERS (Feb. 4, 2016, 2:49 AM), <http://www.reuters.com/article/us-trade-tpp-idUSKCN0VD08S>.

<sup>4</sup> Michael Shear, *Issues and Obstacles in a Pacific Trade Deal*, N.Y. TIMES, June 16, 2015, at A18.

<sup>5</sup> Laura Fraedrich & Chase D. Kaniecki, *Fast-Track Negotiating Authority May Spur Free Trade Agreements*, JONES DAY (July 2015), <http://www.jonesday.com/fast-track-negotiating-authority-may-spur-free-trade-agreements-07-01-2015/>.

<sup>6</sup> IAN F. FERGUSSON ET AL., CONG. RESEARCH SERV., R42694, THE TRANS-PACIFIC PARTNERSHIP (TPP): NEGOTIATIONS AND ISSUES FOR CONGRESS 29 (2015).

The Trans-Pacific Partnership is the “cornerstone”<sup>7</sup> of President Obama’s pivot to Asia, and it is a top legislative priority of his second term. The Administration contends that the Agreement will “boost U.S. economic growth and support the creation and retention of high-quality American jobs by increasing exports,”<sup>8</sup> while at the same time establishing the U.S. as a leader “in writing the rules of the road for a critical region in flux.”<sup>9</sup> From a strategic perspective, the TPP is also intended to help counter China’s growing global presence.<sup>10</sup>

The TPP will open new doors for U.S. businesses. The Agreement will improve market access to countries without pre-TPP U.S. free trade agreements – Brunei, Japan, Malaysia, New Zealand, and Vietnam – where exports faced exceptionally high tariffs.<sup>11</sup> Vietnam, for example, maintains tariffs of 70 percent on U.S. cars and machinery, and U.S. beef exports face a 38.5 percent tariff in Japan.<sup>12</sup> In Malaysia, cars produced in the U.S. have been subject to a 30 percent tariff, but cars made in Japan and other Asian nations are tariff-free. Overall, “the heart of the deal” is an effort to phase out tariffs and other export barriers for more than 11,000 categories of commodities.<sup>13</sup> The improved access and increased cooperation with TPP countries will have a particularly strong impact on aviation, as addressed below.

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<sup>7</sup> *The Trans-Pacific Partnership: Leveling the Playing Field for American Workers & American Businesses*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/tpp> (last visited July 8, 2015).

<sup>8</sup> *Overview of the Trans-Pacific Partnership*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/tpp/overview-of-the-TPP> (last visited July 8, 2015).

<sup>9</sup> Ambassador Michael Froman, U.S. Trade Representative, *The Strategic Logic of Trade*, Remarks at the Council on Foreign Relations (June 16, 2014), <https://ustr.gov/about-us/policy-offices/press-office/speeches/transcripts/2014/June/Remarks-USTR-Froman-at-Council-Foreign-Relations-Strategic-Logic-of-Trade>.

<sup>10</sup> FERGUSSON, *supra* note 6, at 5.

<sup>11</sup> *Free Trade Agreements*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements> (last visited July 6, 2015).

<sup>12</sup> Michael Grunwald, *What’s Actually In Obama’s Secret Trade Deal?*, POLITICO (June 1, 2015, 8:07 AM), <http://www.politico.com/agenda/story/2015/06/the-overlooked-burden-of-overseas-tariffs-000059>.

<sup>13</sup> Trans-Pacific Partnership art. 2.4, Oct. 5, 2015, Office of the U.S. Trade Representative [hereinafter TPP], <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

## II. *Existing Legal Framework Governing International Aviation*

In assessing the impact of the TPP on aviation, it is important to review the existing framework governing international air services. Currently, international air service is conducted and governed by individually negotiated air services agreements between sovereigns. These agreements are usually bilateral between two countries. However, some air services agreements are multi-party, like the Multilateral Agreement on the Liberalization of International Air Transport (MALIAT) between the United States, Brunei, Chile, New Zealand, and Singapore.<sup>14</sup>

The majority of United States air services agreements are “Open Skies” agreements, which expand the number and scope of international passenger and cargo flights by eliminating government interference in commercial airline decisions about routes, capacity, and pricing.<sup>15</sup> Open Skies agreements generally allow each party nation to authorize airlines of other party nations to operate in its territory, allow party nations’ air service providers to take advantage of commercial opportunities (establish offices, maintain staff, etc.) in the other parties’ territories, and allow air service providers to set their own schedules and pricing based on commercial considerations.<sup>16</sup>

The U.S. currently maintains 118 Open Skies agreements, including agreements with TPP countries Australia, Brunei, Canada, Chile, Japan, Malaysia, New Zealand, Peru, and Singapore.<sup>17</sup> The U.S. has bilateral air transport agreements with

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<sup>14</sup> Multilateral Agreement on the Liberalization of International Air Transport, *opened for signature* May 1, 2001, 2215 U.N.T.S. 33, *reprinted in* 3 Av. L. Rep. (CCH) ¶ 26,018, at 21,121 (Nov. 15, 2000) [hereinafter MALIAT], <http://www.maliat.govt.nz/agreement/englishtext.pdf>.

<sup>15</sup> *Open Skies Partnerships: Expanding the Benefits of Freer Commercial Aviation*, U.S. DEP’T OF STATE, <http://www.state.gov/r/pa/pl/159347.htm> (last visited Oct. 4, 2015).

<sup>16</sup> See, e.g., *Current Model Open Skies Agreement Text*, U.S. DEP’T OF TRANSP., <http://www.state.gov/e/eb/rls/othr/ata/114866.htm> (last visited Oct. 6, 2015); Multilateral Agreement on the Liberalization of International Air Transportation with Brunei, May 1, 2001, <http://www.state.gov/e/eb/rls/othr/ata/b/bx/114305.htm>; Air Transport Agreement Between the Government of the United States of America and the Government of Australia, Mar. 31, 2008, <http://www.state.gov/documents/organization/168386.pdf>.

<sup>17</sup> *Open Skies Agreements Currently Being Applied*, U.S. DEP’T OF TRANSP., <http://www.transportation.gov/policy/aviation-policy/open-skies-agreements-being-applied> (last visited Aug. 17, 2015).

TPP members Mexico and Vietnam, although these agreements are more restrictive, placing controls on the number of routes and points of service in each country.<sup>18</sup>

### III. *Important TPP Provisions For Aviation*

Two provisions of the TPP are relevant to aviation and air service: Chapter 10, Cross-Border Trade in Services, and Chapter 9, Investment.

#### A. *Chapter 10: Cross-Border Trade in Services*

Chapter 10 of the TPP seeks to ensure that foreign service providers have access to TPP member-nations and are treated equally and fairly when operating in those states.<sup>19</sup> The Chapter includes protections for service providers, including national treatment (Article 10.3), most favored nation treatment (Article 10.4), open access to markets (Article 10.5), fair application of domestic regulations (Article 10.8), rules regarding licensing and authorization standards (Article 10.9), as well as provisions related to cross-border transfers of funds (Article 10.12).

Because air travel is a traded service (as opposed to a traded good), Chapter 10 would appear to be particularly applicable to airlines. However, the Article 10.2(5) includes the following carve-out for most aviation services:

*This Chapter shall not apply to air services, including domestic and international air transportation services, whether scheduled or non-scheduled,*

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<sup>18</sup> *U.S.-Mexico Initialed Air Transport Agreement on Nov. 21, 2014*, U.S. DEP'T OF TRANSP., <http://www.state.gov/e/eb/rls/othr/ata/m/mx/234716.htm> (last visited Oct. 6, 2015); *Air Transport Agreements Between the U.S. and Vietnam*, U.S. DEP'T OF TRANSP., <http://www.state.gov/e/eb/rls/othr/ata/v/vm/index.htm> (last visited Oct. 6, 2015). The United States and Mexico recently reached an air services agreement that will further liberalize air travel between the countries, however it does not rise to the level of an Open Skies agreement. Susan Carey & Laurence Iliff, *U.S. and Mexico Agree to Liberal Air-Service Treaty*, WSJ.COM (Dec. 18, 2015, 6:53 PM), <http://www.wsj.com/articles/u-s-and-mexico-agree-to-liberal-air-service-treaty-1450461412>.

<sup>19</sup> TPP, *supra* note 13, art. 10.3 (National Treatment), 10.4 (Most-Favored-Nation Treatment); 10.5 (Market Access); 10.6 (Local Presence); 10.8 (Domestic Regulation); 10.9 (Recognition) 10.11 (Transparency); 10.12 (Payments and Transfers).

or to related services in support of air services,  
*other than the following:*

- (a) aircraft repair and maintenance services during which an aircraft is withdrawn from service, excluding so-called line maintenance;
- (b) selling and marketing of air transport services;
- (c) computer reservation system services;
- (d) specialty air services;
- (e) airport operation services; and
- (f) ground handling services.<sup>20</sup>

Accordingly, the aviation-related services regulated under the TPP include aviation support services, like maintenance of airport infrastructure (airport operation services), certain services provided at airports including baggage handling and fueling the aircraft (ground handling services), and specialty air services like aerial firefighting, spraying, and mapping.<sup>21</sup>

Article 10.2(6) goes on to state that “[i]n the event of any inconsistency between this Chapter and a bilateral, plurilateral or multilateral air services agreement to which two or more Parties are party, the air services agreement shall prevail in determining the rights and obligations of those Parties that are party to that air services agreement.”<sup>22</sup> Article 10.2(7) further states, “[i]f two or more Parties have the same obligations under this Agreement and a bilateral, plurilateral or multilateral air services agreement, those Parties may invoke the dispute settlement procedures of this Agreement only after any dispute settlement procedures in the other agreement have been exhausted.”

Therefore, the TPP’s drafters do not intend to supersede the terms of existing air services agreements. First, the Agreement exempts air services from the scope of Chapter 10 (Article 10.2(5)). Second, the Agreement explicitly defers to the terms of air services agreements in the event of conflict between air services and the TPP (Article 10.2(6)). Third, the Agreement allows TPP party nations with aviation disputes to access TPP dispute resolution only after they exhaust dispute resolution in air services agreements (Article 10.2(7)). Accordingly, the drafters clearly intend to defer to the existing air services agreements to

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<sup>20</sup> *Id.* art. 10.2(5) (emphasis added).

<sup>21</sup> *Id.* art. 10.1.

<sup>22</sup> *Id.* art. 10.2(6).

regulate international air travel. This is consistent with other treaties, as air service is generally excluded from U.S. trade agreements.<sup>23</sup>

While the TPP may not directly regulate air services, the drafters nevertheless have indicated that they support liberalization of air services. In Article 10.13 (Other Matters), the Agreement reads, “[t]he Parties recognise the importance of air services in facilitating the expansion of trade and enhancing economic growth. Each Party may consider working with other Parties in appropriate fora toward liberalising air services, such as through agreements allowing air carriers to have flexibility to decide on their routing and frequencies.”<sup>24</sup> Therefore, further liberalization of services could well result from the implementation of the TPP and the resulting cooperation between TPP states.

### **B. Chapter 9: Investments; TPP’s Impact on Aviation-Related Disputes**

The TPP also may offer airlines and aviation-related companies a means of dispute resolution relating to investments they make in fellow TPP nations. Specifically, Chapter 9 establishes substantive protections and dispute resolution provisions for investors of a party. “Investor” is defined broadly: (i) a party; (ii) a national; or (iii) an enterprise of a party that attempts to make, is making, or has made an investment in the territory of another party.<sup>25</sup> The protections and dispute resolution of Chapter 9 apply to a party’s covered investments, investments made in the territory of another TPP party existing at the time that the Agreement enters into force, or expanded, acquired, or established thereafter.<sup>26</sup> The protections offered to investors of a party, set out in Chapter 9, Section A of the Agreement, relate to national

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<sup>23</sup> *Air Service Agreements*, U.S. DEP’T OF TRANSP., <http://www.transportation.gov/policy/aviation-policy/international-relations/air-service-agreements> (last visited July 9, 2015). Even when included, the scope of air services covered by bilateral and multilateral Free Trade Agreements (FTAs) is limited to: (i) aircraft repair and maintenance; and (ii) specialty air services. *Id.* Specialty air services includes things such as mapping, surveying, and firefighting, among others. U.S. DEP’T OF TRANSP., OFFICE OF INT’L AVIATION, SPECIALTY AIR SERVICES INFORMATION PACKET 1 (1997).

<sup>24</sup> TPP, *supra* note 13, art. 10.13.

<sup>25</sup> *Id.* art. 9.1.

<sup>26</sup> *Id.*

treatment, most-favored nation treatment, minimum standards of treatment, expropriation and compensation, and free transfers of funds related to the investments, among other protections.<sup>27</sup> Generally, the provisions seek to insure that measures adopted or maintained by TPP governments are applied fairly and equally to foreign investors.

Airlines and aviation industry companies should qualify as “investors” under this Chapter, even though air services are not regulated by the TPP. The purpose of Chapter 9 is to protect and encourage investments, i.e., *all* investments. The TPP defines investment broadly to include “every asset that an investor owns or controls, directly or indirectly, that has the attributes of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”<sup>28</sup> When an airline operates in a foreign country, it expends capital to secure permits, pay fees, secure facilities and personnel such as check-in counter space, customer services, baggage handling, offices and employees, and establishes other contract interests.<sup>29</sup> These investments should qualify airlines as “investors” for the Chapter’s protections and dispute resolution procedures.<sup>30</sup>

Several reasons support this conclusion. First, this interpretation is consistent with the language of the Agreement. The broad definition of “investor” under Chapter 9 plainly includes aviation. If the drafters of the Agreement had intended to exclude this industry from investor protections and dispute settlement, they could have easily done so by including a carve-out similar to the one in Chapter 10.<sup>31</sup> However, no such exclusion is included.

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<sup>27</sup> *Id.* ch. 9, sec. A, art. 9.18.

<sup>28</sup> *Id.* art. 9.1.

<sup>29</sup> Andrew B. Steinberg & Charles T. Kotuby, Jr., *Bilateral Investment Treaties and International Air Transportation: A New Tool for Global Airlines to Redress Market Barriers*, 76 J. AIR L. & COM. 457, 474 (2011) (discussing the investments that airlines make when operating in foreign countries).

<sup>30</sup> *See id.* at 471.

<sup>31</sup> In fact, the drafters *did* carve out certain industries from Chapter 9. For instance, the drafters state that Chapter 9 “[s]hall not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 11 (Financial Services).” TPP, *supra* note 13, art. 9.1. Certain industries are excluded from Chapter 9’s definition of “investment agreement” and the drafters write in a footnote that “[f]or the avoidance of doubt, this subparagraph does not cover correctional services, healthcare services, education services, childcare services, welfare services or other



Next, it is important to note that Chapter 9 seeks to enforce rights guaranteed *in that Chapter*, not merely under other parts of the Agreement.<sup>32</sup> The rights that are protected and enforced under Chapter 9 come from a party's status as an *investor* and not from its rights derived from other Chapters. Simply because most aviation services are excluded from Chapter 10 does not mean that these companies do not have rights to enforce related to "investments" they have made in TPP countries.

Further, we have found no indication that a tribunal has ever *excluded* an aviation investor from a similarly worded treaty.<sup>33</sup> Accordingly, this should hold true for the TPP, which is the most expansive trade treaty in history. Finally, this interpretation is consistent with the purposes of Chapter 9's investor protections and the TPP at large. Chapter 9 encourages investment by offering protections to foreign investors. It would be strange to allow countries to discriminate against airlines that make investments (sometime sizeable) in countries simply because air transportation happens to be covered by other treaties. To promote free trade, there is every reason to believe the TPP drafters wanted to encourage *all* investment in a country, including investment relating to supporting air services, as these air services are an essential tool of free trade.

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similar social services." *Id.* No similar language was included to indicate that airlines and aviation investors should be excluded from ISDS.

<sup>32</sup> "If an investment dispute has not been resolved within six months of the receipt by the respondent of a written request for consultations pursuant to Article 9.17.2 (Consultation and Negotiation):

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim:

(i) that the respondent has breached:

(A) an obligation under Section A;

(B) an investment authorisation; or

(C) an investment agreement . . . ."

TPP, *supra* note 13, art. 9.18. "A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article." *Id.* art. 9.6(3).

<sup>33</sup> See Steinberg & Kotuby, *supra* note 29, at 471 (noting that aviation investors should be able to utilize ISDS provisions in Bilateral Investment Treaties (BIT) and that at least some BITs contain carve-outs for certain aviation services). The North American Free Trade Agreement (NAFTA) has a similar carve-out for air services. See NAFTA art. 1201, 32 I.L.M. 605 (1993). No ISDS claims have been brought against the U.S. by any airline or aviation company under NAFTA. However, there is no reason to think that such a suit would be against the terms of that Agreement.

### C. *Investor-State Dispute Settlement*

Chapter 9, Section B, entitled “Investor-State Dispute Settlement” (ISDS), sets out a dispute resolution mechanism allowing investors of a party to bring claims in arbitration directly against party nations.<sup>34</sup> An investor may bring a party to arbitration relating to: (i) a party’s breach of the investor protections set out in Chapter 9, Section A; (ii) an investment authorization (an authorization that the foreign investment authority of a party grants to a covered investment or an investor of another party); or (iii) an investment agreement.<sup>35</sup> The mere fact that a government’s action is inconsistent with an investor’s expectations (for profit, as an example) is not enough to constitute a breach of the Agreement’s investor protections.<sup>36</sup> Further, the ISDS provisions do not intend to limit a state’s ability to consistently and fairly enforce domestic regulations “to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.”<sup>37</sup>

Before commencing the arbitration procedure, attempts to settle investment disputes must be made through negotiation and consultation.<sup>38</sup> If an investment dispute cannot be resolved after six months of negotiation, then Article 9.18 of the Agreement allows for an investor on its own behalf or on behalf of an enterprise to bring a party nation to arbitration.<sup>39</sup>

The Agreement outlines a number of procedural rules for adjudicating ISDS disputes. A claim under ISDS will be decided under the International Centre for Settlement of Investment Disputes (ICSID) Convention or Additional Facility Rules, United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, or another arbitral institution/rules agreed on by the parties.<sup>40</sup> When an investor opts to pursue ISDS arbitration, the investor must waive its right to bring a parallel proceeding in another forum for the same alleged breach.<sup>41</sup>

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<sup>34</sup> TPP, *supra* note 13, ch. 9, sec. B.

<sup>35</sup> *Id.* art. 9.18(1).

<sup>36</sup> *Id.* art. 9.6(4).

<sup>37</sup> *Id.* art. 9.16.

<sup>38</sup> *Id.* art. 9.18.

<sup>39</sup> *Id.* art. 9.18(1).

<sup>40</sup> *Id.* art. 9.18(4).

<sup>41</sup> *Id.* art. 9.20(2).

The TPP sets out a number of additional rules for arbitration under the Treaty. For example, an ISDS claim must be brought no more than three years and six months from the time the claimant acquired or should have acquired knowledge of an alleged breach.<sup>42</sup> Unless agreed otherwise, the arbitration will be presided over by three arbitrators, the first selected by one party, the second by the other, and the third selected by agreement of the two parties.<sup>43</sup> Under Article 9.24, tribunals are to decide disputes in accordance with the rules of international law. However, the other rules may be applied in relation to investment authorizations and agreements.

Article 9.22 governs the conduct of the arbitration and includes rules on written submissions (including submissions from non-disputing parties), preliminary objections, expedited review of claims without legal merit, procedures for comment on proposed decisions, application of appellate mechanisms, and burden of proof (which lies with the investor to prove the elements of its claim). Article 9.23 attempts to mandate transparency in the arbitral proceedings, including publicly-filed documents and public hearings, and rules related to disclosure of protected information. Other provisions relate to consolidation of claims (Article 9.27) and use of expert reports (Article 9.26). Awards, damages, and enforcement of awards are governed by Article 9.28. Specifically, a tribunal may award monetary damages and interest and/or restitution, as well as costs and attorney fees, consistent with the arbitration rules.

#### **IV. *ISDS: A Remedy for Aviation Disputes?***

ISDS is particularly important for aviation industry investors because aviation is an inherently international industry. Aircraft routinely cross international borders and commercial and political conflicts sometimes arise.<sup>44</sup> In addition, foreign states can wield a great deal of regulatory power over how and when the airlines operate, creating another source of inevitable tension.<sup>45</sup>

ISDS provisions like those contained in the TPP differ from traditional dispute resolution. For example, U.S. air services

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<sup>42</sup> *Id.* art. 9.20.

<sup>43</sup> *Id.* art. 9.21.

<sup>44</sup> PAUL STEPHEN DEMPSEY, PUBLIC INTERNATIONAL AIR LAW 666 (2008).

<sup>45</sup> Steinberg & Kotuby, *supra* note 29, at 460.

agreements typically contain more traditional dispute resolution provisions. The MALIAT agreement between the U.S., Brunei, Chile, New Zealand, and Singapore defines where the parties to the agreement must submit disputes.<sup>46</sup> Additionally, the Air Transport Agreement between the United States and Canada establishes a panel proceeding for dispute resolution.<sup>47</sup> These dispute resolution provisions are state-centric, meaning that the provisions apply only to the parties to the agreement – i.e. the nations that signed on. The provisions resolve disputes that relate specifically to the rights and obligations set out under the specific air services agreements themselves. They are designed to protect states that have been wronged, and to encourage states to enter into these types of agreements by offering them a set procedure for resolving disputes.

Without ISDS, privately-owned commercial airlines realistically have little recourse when disputes arise with other countries. For example, if a government in another country decides to steeply increase fees for an international airline to land at its airport, the airline has few efficient options if it considers the increase unfair.<sup>48</sup> It can bring the claim to local court, but relying on another country's domestic courts to rule in its favor is difficult. It could request that its government resolve the dispute diplomatically or under the terms of an air services agreement, as discussed above. This would likely include requesting that their state's government bring the dispute (i) to the International Civil Aviation Organization (ICAO), or (ii) to an *ad hoc* arbitration, depending on the wording of the specific air services agreement. However, if the state chooses to do nothing, the airline has no recourse under the air services agreement. Even if the state does pursue the issue, the violation may be rectified for the future but the airline may not be compensated for any harm suffered. In the history of international aviation, only six disputes have been submitted to arbitration and only five have been submitted to ICAO for adjudication.<sup>49</sup>

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<sup>46</sup> MALIAT, *supra* note 14, art. 14.

<sup>47</sup> Air Transport Agreement, U.S.-Can., art. 17, Mar. 12, 2007, T.I.A.S. No. 07-312.

<sup>48</sup> The example is taken from Steinberg & Kotuby, *supra* note 29, at 460.

<sup>49</sup> DEMPSEY, *supra* note 44, at 667.

ISDS offers an alternative, better way for investors to pursue claims of unfair treatment and to protect their investments.<sup>50</sup> With ISDS, private airlines and aviation manufacturing companies will be able to bring complaints directly against party nations if a dispute arises.

ISDS offers additional protections to some investors. All the signatories to the TPP already use ISDS provisions in their international treaties. For example, the U.S. has international agreements containing ISDS already in force with six of the eleven other TPP countries – Canada, Chile, Mexico, Peru, Singapore, and Vietnam. The other five countries – Australia, Brunei, Japan, Malaysia, and New Zealand – currently have ISDS agreements in place with other countries.<sup>51</sup> Accordingly, the TPP recognizes, validates, and standardizes the direct dispute resolution mechanism countries already use.

### A. *ISDS: Opening the Floodgates?*

Although the TPP will increase protection for foreign investors in TPP states, the introduction of ISDS likely will not bring a large influx of new claims – contrary to what some critics have predicted. Over the past 25 years, under the 50 agreements the United States has signed that include ISDS provisions, the U.S. has faced only 17 ISDS cases, 13 of these cases were brought to conclusion, and all of these were won by the U.S.<sup>52</sup> However,

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<sup>50</sup> Steinberg & Kotuby, *supra* note 29, at 479. Steinberg & Kotuby's paper suggests that bilateral investment treaties (BITs) be used to pursue these claims, but the U.S. does not currently have BITs with any of the TPP countries. The paper suggests using BITs because they contain ISDS provisions, just like the TPP.

<sup>51</sup> *Investor-State Dispute Settlement (ISDS)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds> (last visited Jan. 6, 2016).

<sup>52</sup> *Id.* However, an ISDS claim was recently filed against the United States in 2016 by the TransCanada Corporation, a Canadian energy company. TransCanada claims that the Obama administration's failure to approve the Keystone XL pipeline violates U.S. obligations under NAFTA and that it incurred \$15 billion in damages as a result. Some commentators have predicted this may be the U.S.'s first loss in an ISDS case. Todd Tucker, *TransCanada is Suing the U.S. over Obama's Rejection of the Keystone XL Pipeline. The U.S. Might Lose*, WASH. POST, Jan. 8, 2016, <https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/08/trans-canada-is-suing-the-u-s-over-obamas-rejection-of-the-keystone-xl-pipeline-the-u-s-might-lose/>.

other results have been more mixed. At the end of 2013, there were 568 ISDS cases known to have been resolved.<sup>53</sup> Of those, 43 percent were resolved in favor of the state, while 31 percent were decided for the investor and 26 percent settled.<sup>54</sup>

Any investor seeking to challenge a government under ISDS will face lengthy and complex proceedings and uncertain outcomes. In other words, the threat of ISDS “opening the flood-gates” of litigation against countries or others seems overblown. The ISDS procedures are detailed, costly, and time-consuming to pursue.

## V. *Indirect Effects of the Trans-Pacific Partnership on Air Travel*

The TPP will inevitably compel various indirect effects that will profoundly impact global aviation. Increased international air traffic, greater consumer choices, and more robust competition will most certainly occur. These indirect effects are likely to be substantial given the industry’s unique role in erasing geopolitical borders and catalyzing economic growth.<sup>55</sup> Additionally, because the U.S. currently maintains air services agreements with all TPP members, with the majority being Open Skies agreements, aviation industries in these countries will be able to respond to meet demand. The TPP’s impact on aviation will be especially pronounced given that the U.S. is “the largest passenger market in the world, the leading source of tourists, and maintains the largest fleet of aircraft on the planet.”<sup>56</sup> Additionally, about half of the world’s air traffic growth over the next two decades will come from the Asia-Pacific region.<sup>57</sup>

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<sup>53</sup> U.N. CONFERENCE ON TRADE AND DEVELOPMENT, INTERNATIONAL INVESTMENT AGREEMENT ISSUES NOTE NO. 1, RECENT DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) 7 (2014), [http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf). Because some cases remain confidential, the number of cases is likely somewhat higher.

<sup>54</sup> *Id.*

<sup>55</sup> Steinberg & Kotuby, *supra* note 29, at 467.

<sup>56</sup> DEMPSEY, *supra* note 44, at 532.

<sup>57</sup> Tommy Ruslim, *ASEAN Aerospace Market Profile*, CAN. TRADE COMM’R SERV., <https://web.archive.org/web/20141126205147/http://www.tradecommissioner.gc.ca/eng/document.jsp?did=145535> (last updated Nov. 13, 2014).

**A. *Increased International Air Service Due to More Trade and Investment***

The TPP will increase demand for air services which will result from more trade. As TPP countries trade, cooperate, and invest in each other, there will be a greater need to move people across borders. In fact, the Agreement creates specific rules to facilitate and expedite temporary entry of business persons into party nations.<sup>58</sup> The Agreement also will lead to increased foreign investment and overall growth in service industries, including travel and tourism.<sup>59</sup>

Airlines have, and will undoubtedly continue to add, routes to meet increased demand for travel resulting from the TPP. Air Canada has added an Asia-Pacific route in anticipation of increased trade resulting from the TPP. Air Canada CEO Calin Rovinescu explained his decision to add a Vancouver-Brisbane route, stating “[t]he new route increases our presence in the Asia-Pacific market at a time when trade and travel in the region and between North America is growing, with a further boost expected from the Trans-Pacific Partnership.”<sup>60</sup>

Existing Open Skies agreements will ensure that the demand for new Asia-Pacific routes is easily met. For example, Brunei, Japan, Malaysia, and New Zealand have Open Skies agreements with the U.S. but no free trade agreement. The TPP will demand and result in a dramatic increase in movement of goods and people. Because Open Skies agreements limit or eliminate governmental interference over routes, commercial airlines will be able to respond to this increased movement of goods and services.

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<sup>58</sup> TPP, *supra* note 13, ch. 12.

<sup>59</sup> Nyshka Chandran, *Winners and Losers in the World's Biggest Trade Deal*, CNBC (July 28, 2015, 7:04 PM), <http://www.cnbc.com/2015/07/28/winners-and-losers-in-the-worlds-biggest-trade-deal.html> (noting that the TPP will lead to increased access to investment in Japanese service industries).

<sup>60</sup> *Air Canada Adds Brisbane to its Expanding International Network*, CNW NEWSWIRE (July 8, 2015, 10:04 AM), <http://www.newswire.ca/en/story/1567787/air-canada-adds-brisbane-to-its-expanding-international-network>.

### **B. *Cheaper Fares Due to Increased Competition and More Convenient Routes***

As demand for air service increases, competition will intensify, leading to a variety of benefits to consumers and airlines. More competition leads to greater responsiveness to consumer demands, more flight options, fewer delays, and cheaper fares.<sup>61</sup> Competition is already set to increase on U.S.–Australia routes, as Qantas and American Airlines seek permission to form an alliance to provide service from Sydney to Los Angeles.<sup>62</sup> While the price of adding a new route can be expensive – up to \$150 million in some cases – that has not deterred Qantas and American, which state in their application to the Australian Competition and Consumer Commission that their alliance will create a “new competitive dynamic” that will result in strong responses from their competitors.<sup>63</sup> In turn, they contend, this will lead to better quality services and competitive pricing.

Similarly, in March 2016, United Airlines and Air New Zealand announced a joint venture and revenue-sharing agreement and a new non-stop route from San Francisco to Auckland. The companies anticipate the partnership will offer more convenient flight choices to customers.<sup>64</sup> A robust TPP will result in more alliances, more routes, and more competition, all of which will reduce fares.

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<sup>61</sup> See generally MARK SMYTH & BRIAN PEARCE, IATA ECONOMICS (BRIEFING NO. 9), AIR TRAVEL DEMAND (2008), [https://www.iata.org/whatwedo/Documents/economics/air\\_travel\\_demand.pdf](https://www.iata.org/whatwedo/Documents/economics/air_travel_demand.pdf).

<sup>62</sup> Jamie Freed, *Qantas and American Airlines Alliance Receives Tick from ACCC*, SYDNEY MORNING HERALD, Nov. 27, 2015, <http://www.smh.com.au/business/aviation/qantas-and-american-airlines-alliance-receives-tick-from-accc-20151126-gl9ds9.html> (noting that the deal has received approval from the New Zealand and Australian regulators, but that the United States has yet to rule).

<sup>63</sup> Matt O’Sullivan, *Qantas Braces for ‘Swift Response’ from Rivals on Australia-US Routes*, THE AGE, June 15, 2015, <http://www.theage.com.au/business/aviation/qantas-braces-for-swift-response-from-rivals-on-australia-us-routes-20150614-ghmm8q.html>.

<sup>64</sup> United Airlines, *United Airlines and Air New Zealand Expand Cooperation to Form Joint Venture Partnership*, PR NEWswire (Mar. 10, 2016, 12:00 PM), <http://www.prnewswire.com/news-releases/united-airlines-and-air-new-zealand-expand-cooperation-to-form-joint-venture-partnership-300234185.html>.



### C. *Air Cargo Will Increase with Trade*

Trade growth will translate into higher demand for air cargo services. Noting that “slack trade growth” was partially responsible for weak growth following the global economic downturn, Boeing’s July 2015 forecast predicted steady and growing air cargo traffic through 2016, something likely to be bolstered by the TPP’s passage.<sup>65</sup>

## VI. *The Trans-Pacific Partnership’s Effect on Aviation Manufacturing*

The TPP will substantially impact U.S. aircraft manufacturing. Aircraft and aircraft parts rank in the top three U.S. exports to eight of the eleven countries which have signed the Agreement.<sup>66</sup> Singapore, for example, imported on average more than \$5.7 billion in aerospace parts from the United States between 2005 and 2014.<sup>67</sup> In 2015, U.S. aerospace companies exported approximately \$48 billion in aviation products to customers in the Asia-Pacific region.<sup>68</sup> These exports will continue to rise given the staggering development of the aviation market in Asia.

The International Air Transport Association (IATA) reported record increases in demand and capacity among Asian-Pacific air carriers in 2015.<sup>69</sup> The Canadian Trade Commissioner Service has predicted that total air traffic for the Asia-Pacific region will grow 6.7 percent per year over the next 20 years.<sup>70</sup> Consequently, countries in the region will require approximately one-third of all new aircraft produced worldwide to keep up with demand.<sup>71</sup>

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<sup>65</sup> *World Air Cargo Forecast*, BOEING.COM, <http://www.boeing.com/commercial/market/cargo-forecast/> (last visited July 9, 2015).

<sup>66</sup> BROCK R. WILLIAMS, CONG. RESEARCH SERV., R42344, TRANS-PACIFIC PARTNERSHIP (TPP) COUNTRIES: COMPARATIVE TRADE AND ECONOMIC ANALYSIS 16 (2013).

<sup>67</sup> *U.S. Officials See Aerospace Boost from TPP Trade Deal*, REUTERS (Feb. 14, 2016, 11:14 PM), <http://www.reuters.com/article/singapore-airshow-trade-idUSL2N15U03K>.

<sup>68</sup> Marcus Jadotte, *The Trans-Pacific Partnership – Benefits in the Pacific Rim*, AVIATION WK., Feb. 16, 2016, <http://aviationweek.com/singapore-airshow-2016/trans-pacific-partnership-benefits-pacific-rim>.

<sup>69</sup> Press Release, IATA, Demand for Air Travel in 2015 Surges to Strongest Result in Five Years (Feb. 2, 2016), <http://www.iata.org/pressroom/pr/Pages/2016-02-04-01.aspx>.

<sup>70</sup> Ruslim, *supra* note 57.

<sup>71</sup> *Id.*

U.S. government officials have recognized the TPP's significance for the aviation manufacturing sector. In February 2016, Marcus Jadotte, Assistant Secretary of Commerce for the U.S. Department of Commerce International Trade Administration (ITA), told aviation industry leaders that the TPP would increase economic activity and trade for the Asia-Pacific region, which in turn would increase demand for aviation products.<sup>72</sup> Additionally, Secretary of State John Kerry's remarks at Boeing's Renton, Washington factory on May 19, 2015 highlighted the benefits of reducing tariff and non-tariff barriers to trade and the imposition of high labor and environmental standards.<sup>73</sup> Secretary Kerry focused on the inevitability of globalization, arguing that free trade is the only way to ensure a competitive marketplace.<sup>74</sup>

U.S. airplane manufacturers have uniformly supported the TPP.<sup>75</sup> On April 17, 2015, Boeing's Chairman and then-CEO Jim McNerney urged the U.S. Congress to approve "fast-track" legislation that would give the United States a "stronger hand" as it strives to conclude and implement the TPP.<sup>76</sup> Fast-track approval of domestic legislation implementing the TPP's reduction in tariff and non-tariff barriers is now a reality, with President Obama's signing into law Trade Promotion Authority on June 29,

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<sup>72</sup> *U.S. Officials See Aerospace Boost from TPP Trade Deal*, *supra* note 67.

<sup>73</sup> John Kerry, Sec'y of State, Remarks at Boeing Renton Factory on "The World Wants What America Makes" 1 (May 19, 2015) (transcript available at <http://translations.state.gov/st/english/texttrans/2015/05/20150519315756.html#axzz3boYSVeNO>).

<sup>74</sup> *Id.* at 7 ("Globalization has no reverse gear, my friends.").

<sup>75</sup> Support for the TPP is not unanimous across the aviation industry. For instance, the Association of Flight Attendants and the International Association of Machinists and Aerospace Workers oppose the Agreement. *Fight Against Fast Track – Stop Trans-Pacific Partnership (TPP)*, ASS'N OF FLIGHT ATTENDANTS-CWA, AFL-CIO, <http://www.afacwa.org/stop-tpp> (last visited Dec. 2, 2015); Christopher Harress, *Trans-Pacific Partnership: US Aerospace Companies Hope For Increased Trade While Labor Unions Predict Lost Jobs*, INT'L BUS. TIMES (Oct. 16, 2015, 3:31 PM), <http://www.ibtimes.com/trans-pacific-partnership-us-aerospace-companies-hope-increased-trade-while-labor-2129324>.

<sup>76</sup> Press Release, The Boeing Co., Boeing Chairman and CEO Supports Trade Legislation Approval (Apr. 17, 2015), <http://boeing.mediaroom.com/15-04-17-Boeing-Chairman-and-CEO-Supports-Trade-Legislation-Approval> ("With TPA, the United States will have a stronger hand as it strives to conclude three large pending trade agreements: the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), and the Trade in Services Agreement (TISA).").

2015.<sup>77</sup> Under this Authority, Congress must consider the required implementing bills for the TPP under expedited (fast-track) procedures.<sup>78</sup> Bills may come to the House and Senate floor without action by the leadership, without extensive debate, and can receive a guaranteed up-or-down vote with no amendments.<sup>79</sup> Entire Congressional consideration could take no longer than 90 days, a sharp departure from the normal legislative process. Accordingly, this Authority ensures that the President and Congress speak with one voice in international trade treaties, and that Congress will act on implementing bills timely and without amending them.

In support of this Trade Promotion Authority and the TPP, Boeing's McNerney noted the TPP "offer[s] significant opportunities for American companies and workers to win new business in foreign markets, boost U.S. economic growth and support well-paying jobs here at home."<sup>80</sup> Boeing predicts it will do significant business in TPP countries, forecasting that the 12 TPP nations will order 11,640 aircraft (valued at around \$1.5 trillion) over the next 20 years.<sup>81</sup> Lockheed Martin, one of Boeing's competitors, also believes the Agreement will expand economic opportunities

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<sup>77</sup> Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA-2015), Pub. L. No. 114-26, 129 Stat. 319 (2015).

<sup>78</sup> TPA-2015 applies to trade agreements entered into (signed) before July 1, 2018, or before July 1, 2021, if the President requests an extension which is subject to a Congressional resolution of disapproval. The date of signing of the TPP falls squarely within this Trade Promotion Authority, allowing for "fast-track" approval by Congress of the Agreement's implementing legislation and changes in U.S. law.

<sup>79</sup> Interestingly, TPA-2015 contains several new negotiating objectives which are consistent with the TPP. For example, the legislation seeks to ensure that state-owned enterprises are not favored with discriminatory purchases or subsidies and that competition is based on commercial considerations in order for U.S. firms to compete on a level playing field. This concept is consistent with core TPP policies. Additionally, while TPA-2015 does not specifically mention ISDS mechanisms, it does state that trade agreements should contain meaningful procedures for resolving investment disputes along with other items to improve the quality of adjudicating investor-government disputes. See IAN F. FERGUSSON & RICHARD S. BETH, CONG. RES. SERV., R43491, TRADE PROMOTION AUTHORITY (TPA): FREQUENTLY ASKED QUESTIONS (2015), <https://fas.org/sgp/crs/misc/R43491.pdf>. ISDS, of course, is an integral part of the TPP. See also *supra* Part III.C.

<sup>80</sup> Press Release, The Boeing Co., *supra* note 76.

<sup>81</sup> Harress, *supra* note 75.

in the Asia-Pacific region.<sup>82</sup> Furthermore, General Electric, one of the top aircraft engine suppliers, supported TPP negotiations, stating that the Agreement “will contribute to economic growth . . . and to further development, transparency[,] and accessibility to these markets.”<sup>83</sup> In January 2016, the National Association of Manufacturers (NAM) indicated its support of the Agreement. NAM President and CEO Jay Timmons stated that the TPP “allows manufacturers to be more competitive in a global economy.”<sup>84</sup>

The growth in U.S. manufacturing can already be seen. In July 2015, Boeing and Vietnam Airlines agreed to a deal wherein Boeing would sell eight 787-10 Dreamliners and eight 777-8X aircraft to the Vietnamese company. U.S. Deputy Commerce Secretary Bruce Andrews linked the sale to the TPP, stating that the one of the benefits of the TPP would be to open key aerospace, manufacturing, and other markets in Vietnam to U.S. firms.<sup>85</sup>

### A. *Reduction of Tariffs*

The TPP prohibits any increase or new tariffs against any parties’ goods and sets out phased tariff reductions covering more than 11,000 commodity categories.<sup>86</sup> To smooth out the process, member countries will cooperate to harmonize tariff elimination.<sup>87</sup>

By phasing out tariffs on manufactured goods, the TPP will make the process of exporting aircraft and aircraft parts more efficient and cost-effective. Planes and parts made in TPP countries will be less costly to move across borders. The movement of

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<sup>82</sup> Press Release, Lockheed Martin, Lockheed Martin Statement on Trans Pacific Partnership Agreement (Oct. 5, 2015), <http://www.lockheedmartin.com/us/news/press-releases/2015/october/trans-pacific-partnership-statement.html>.

<sup>83</sup> Letter from Steve Sargent, Pres. & CEO, GE Austl. and N.Z., to Trans-Pacific P’ship submissions, Dep’t of Foreign Affairs & Trade (Jan. 31, 2012), [http://dfat.gov.au/trade/agreements/tpp/submissions/Documents/tpp\\_sub\\_general\\_electric.pdf](http://dfat.gov.au/trade/agreements/tpp/submissions/Documents/tpp_sub_general_electric.pdf).

<sup>84</sup> Vicki Needham, *Big Endorsement for Obama Trade Deal*, THE HILL (Jan. 4, 2016, 9:19 AM), <http://thehill.com/policy/finance/264631-manufacturers-endorse-tpp>.

<sup>85</sup> Andrea Shalal, *Vietnam Airlines, Boeing to Negotiate About 16 More Airplane Sales*, REUTERS (July 6, 2015, 9:28 PM), <http://www.reuters.com/article/2015/07/07/usa-vietnam-boeing-idUSL1N0ZN01S20150707>.

<sup>86</sup> TPP, *supra* note 13, art. 2.4.

<sup>87</sup> *Id.* Annex 2-D.

aircraft components has become more important for manufacturers, as sections of incomplete aircraft travel between countries during the assembly process. For example, Boeing's newest plane, the Boeing 787 Dreamliner, incorporates parts originating in several different countries, including TPP signatory Japan.<sup>88</sup> The tariff phase-out will make it easier and less costly to continue this manufacturing strategy. Specifically, the United States Department of Commerce ITA reports that 99.9 percent of U.S. transportation equipment exports, a segment that includes commercial aircraft, aircraft engines, and aircraft parts, to TPP markets will enjoy tariff-free access upon implementation of the Agreement.<sup>89</sup>

### **B. *Streamlining Customs Operations and Strengthening Supply Chains***

The TPP chapters addressing customs valuation and trade facilitation will expedite the passage of aircraft and parts over borders, strengthen supply chains, and reduce associated transaction costs. As previously mentioned, U.S. manufacturers build airplanes with parts manufactured all over the world. They must also export products out of the United States and into the buying country, oftentimes traveling through other territories along the way.

Under the Agreement, parties agree to cooperate with other parties "regarding significant customs issues that affect goods traded between the Parties."<sup>90</sup> Commitments cover best practices and risk management, developing the skill of customs personnel, advanced rulings regarding tariff classifications, use of international standards for the release of goods, use of electronic systems, and others.<sup>91</sup> The Agreement also sets out common rules for determining country of origin for customs purposes.<sup>92</sup> By developing clear procedures that emphasize cooperation between

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<sup>88</sup> Sam Ro, *The Boeing 787 Dreamliner Isn't Very 'Made In The USA,'* BUS. INSIDER (Jan. 15, 2013, 9:01 PM), <http://www.businessinsider.com/graphic-boeing-787-dreamliner-suppliers-2013-1>.

<sup>89</sup> U.S. Dep't of Com., *International Trade Administration, Trade Opportunities for the U.S. Transportation Equipment Sector: Trans-Pacific Partnership*, TRADE.GOV (Nov. 2015), <http://www.trade.gov/fta/tpp/industries/transportation.asp>.

<sup>90</sup> TPP, *supra* note 13, art. 5.2.

<sup>91</sup> *Id.* ch. 5.

<sup>92</sup> *Id.* ch. 3.

countries, the TPP will promote commerce – and aviation commerce between participating nations. Aviation industry leaders agree. Boeing spokesman Tim Neale stated that the TPP's customs chapter "will help speed up the movement of components that we source in some of the countries that are parties to the agreement – most notably Japan – where we have some significant suppliers to our 787 and other airplanes."<sup>93</sup>

### ***C. Harmonization of Non-Tariff Barriers of Trade and Competition Policies***

Along with provisions facilitating trade across borders, the TPP will incentivize the end to unfair trade practices that undermine competition in the global marketplace. These provisions also will benefit aircraft and component part manufacturers. The TPP reaffirms the WTO core principle of national treatment,<sup>94</sup> meaning that foreign and locally produced goods should be treated the same after entering the market of a party.<sup>95</sup> Domestic regulation and taxation must be applied equally.

Further, the Agreement seeks to eliminate unnecessary technical barriers to trade (TBTs),<sup>96</sup> which are non-tariff standards and regulations that discriminate against imports. TBTs include domestic product safety and other technical standards for products, and can impede trade when regulations vary from country to country. Additionally, countries with poor labor and environmental standards undermine foreign markets by incentivizing the migration of trade and investment from countries with more regulation. By harmonizing regulatory standards, the TPP will help promote a more competitive environment for U.S. companies, including airplane and component part manufacturers. As the TPP states, "Parties shall cooperate with each other, where feasible and appropriate, to ensure that international standards, guides and recommendations that are likely to become a basis for technical regulations and conformity assessment procedures do not create unnecessary obstacles to international trade."<sup>97</sup>

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<sup>93</sup> Harress, *supra* note 75.

<sup>94</sup> TPP, *supra* note 13, art. 2.3.

<sup>95</sup> *Principles of the Trading System*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm) (last visited Jan. 10, 2016).

<sup>96</sup> TPP, *supra* note 13, art. 8.2.

<sup>97</sup> *Id.* art. 8.5(3).

The TPP builds on terms already in place for WTO members. All TPP participants are members of the WTO and must adhere to a special Agreement on Technical Barriers of Trade (TBT Agreement). The TBT Agreement establishes rules guaranteeing that standards, technical regulations, and conforming assessment procedures are applied in a non-discriminatory manner and are not more trade restrictive than necessary. In addition, the TBT Agreement promotes transparency and gives other WTO members a central point of inquiry to request information on standards and regulations. The TPP builds on these benefits by offering opportunities for partner countries to receive notice and provide comments on proposed standards and regulations of other member countries.<sup>98</sup>

Moreover, the TPP attempts to hold all member countries to higher standards of worker rights and protection of the environment. The November 2011 framework of the deal discusses the addition of a potential chapter on competition policy to “promote a competitive business environment, protect consumers, and ensure a level playing field for TPP companies,” which include aircraft and component part manufacturers.<sup>99</sup> To achieve this “level playing field,” the final version of the TPP contains provisions that bind members to stricter labor standards, such as recognition of the right to collective bargaining, elimination of child labor, and establishment of minimum wage and occupational health and safety standards.<sup>100</sup>

## VII. *Other Issues: China*

Notably missing from the TPP nations is China. Omitting this Asian superpower and the world’s leading trading nation is a mistake in some critics’ views.<sup>101</sup> China does have economic treaties with other Asian nations, including TPP member states Bru-

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<sup>98</sup> *Id.* art. 8.7.

<sup>99</sup> *Outlines of TPP (Enhancing Trade and Investment, Supporting Jobs, Economic Growth and Development: Outlines of the Trans-Pacific Partnership Agreement, Nov. 12, 2011)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/tpp/outlines-of-TPP>.

<sup>100</sup> TPP, *supra* note 13, art. 19.3.

<sup>101</sup> Felipe Caro & Christopher S. Tang, *Leaving China Out of the TPP Is a Terrible Mistake*, FORTUNE.COM (Oct. 6, 2015, 4:33 PM), <http://fortune.com/2015/10/06/leaving-china-out-trans-pacific-partnership-terrible-mistake/>.

nei, Chile, Malaysia, New Zealand, Peru, and Vietnam.<sup>102</sup> China also has the ability to negotiate other free trade agreements, and perhaps a multilateral agreement similar to the TPP.<sup>103</sup> For instance, China is party to the Regional Comprehensive Economic Partnership negotiations (RCEP), which involve ASEAN nations plus China, Japan, Korea, New Zealand, Australia, and India. If China were to join the TPP, projections indicate vast financial gains for both China and the United States.<sup>104</sup> China has expressed some openness to joining the Agreement, but time will tell.<sup>105</sup> China is a major player in aviation and represents one of the fastest growing aviation and transportation markets in the world.<sup>106</sup> In continuing to weigh and evaluate the impact of the TPP on aviation, it will be crucial to follow China's decision to join or abstain.<sup>107</sup>

## Conclusion

After nearly a decade of negotiations culminating in a signed agreement, the TPP still faces a giant hurdle – ratification by lawmaking bodies in the TPP countries.<sup>108</sup> If the Agreement is ratified by the party nations and takes effect, it will bring profound changes to the aviation industry, as doors open to the

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<sup>102</sup> *Id.*

<sup>103</sup> See Peter K. Yu, *How China's Exclusion from the TPP Could Hurt Its Economic Growth*, FORTUNE.COM (Oct. 19, 2015, 11:25 AM), <http://fortune.com/2015/10/19/china-exclusion-tpp-economic-growth/>.

<sup>104</sup> *Id.*

<sup>105</sup> Shannon Tiezzi, *Will China Join the Trans-Pacific Partnership?*, THE DIPLOMAT, Oct. 10, 2014, <http://thediplomat.com/2014/10/will-china-join-the-trans-pacific-partnership/>.

<sup>106</sup> Xiaoni Ren, *China's Secret to a Booming Aviation Industry: Sexism*, FORTUNE.COM (Oct. 12, 2015, 9:34 AM), <http://fortune.com/2015/10/12/china-aviation-industry-sexism/>.

<sup>107</sup> Other nations have also expressed an interest in joining the TPP, including Thailand, South Korea, the Philippines, Taiwan, and Indonesia. Joshua P. Meltzer, *Why China Should Join the Trans-Pacific Partnership*, BROOKINGS (Sept. 21, 2015, 9:00 AM), <http://www.brookings.edu/blogs/order-from-chaos/posts/2015/09/21-us-china-economic-integration-tpp-meltzer>; Chris Brummitt, *Here's Why Indonesia Joining the TPP Is Easier Said Than Done*, BLOOMBERG BUS. (Oct. 28, 2015, 6:00 PM), <http://www.bloomberg.com/news/articles/2015-10-28/here-s-why-indonesia-join-ing-the-tpp-is-easier-said-than-done>.

<sup>108</sup> In order to take effect, the TPP must be ratified by at least six member countries who make up at least 85 percent of the GDP of the 12 TPP nations. Such ratification must occur in a period of two years from the date of signing. Howard, *supra* note 3.



Asia-Pacific market. The Agreement will offer a new form of dispute resolution for TPP nation investors through ISDS. These additional investor protections should include aviation-investors, as this reading is consistent with the language and expansive reach of the Agreement.

The Agreement will also result in new travel routes and more airline passengers, plus an increase in manufacturing to meet the demand. The reduction of tariff and non-tariff barriers will allow airplane and component part manufacturers to meet demand more easily. Overall, the TPP should provide a more level playing field for airlines and manufacturers, as well as a mechanism for private companies to ensure that governments trade fairly and competitively. The future of airlines and the aviation industry within and among the TPP nations promises to be very bright.

