

The Long Arm of the DOT: The Regulation of Foreign Air Carriers Beyond US Borders

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The European Union's plan to include foreign air carriers in its Emissions Trading Scheme (ETS) attracted considerable opposition based upon the ground of extraterritoriality, but it certainly was not the first effort to regulate air transportation beyond national borders. Notably, the United States – one of the most vigorous opponents of the application of ETS to its own air carriers – has a long history of imposing extraterritorial requirements on carriers from other nations. Although many of these proposals previously have been analyzed on an ad hoc basis, there has not been a comprehensive overview of them and their implications. This article contends that, post-deregulation, such proposals have become more common, even while the consequences of extraterritorial regulation may not have been fully considered. In recent years, Congress and Department of Transportation (DOT) often have proposed extraterritorial aviation obligations; the Federal Aviation Administration (FAA), by contrast, has been more restrained in its approach, although it also has proposed requirements that would reach beyond US borders. In some cases, statutes and regulations have been limited or withdrawn based on extraterritorial concerns, but in others, they have been adopted despite objections from foreign carriers and governments. As a consequence, the United States is now potentially vulnerable to accusations of inconsistency in its opposition to foreign proposals that would have the effect of regulating US-flag carriers.

'To boost the British economy, I'd tax all foreigners living abroad.'
– Monty Python's *Flying Circus*

1 INTRODUCTION

In 2008, the European Union (EU) announced that its Emissions Trading Scheme (ETS) would be expanded to include air transportation, effective in phases starting on 1 January 2012. Numerous objections were raised by the airline industry. One of the most significant complaints was that the scheme was extraterritorial, because

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foreign carriers would be required to pay for carbon allowances for all segments of flights to and from the EU – and not just the portions in EU airspace.¹

Although a legal challenge was brought against ETS by three US airlines and a trade association, with support from other parties such as the International Air Transport Association (IATA), in 2011 the European Court of Justice held that ETS did not amount to a violation of international law.² As a result, the dispute shifted to the political arena. When it became clear that the US intended to enact legislation that would prohibit US carriers from participating in ETS,³ the EU backed down, nominally ‘stopping the clock’ on ETS’s applicability to flights beyond EU borders for one year to enable the International Civil Aviation Organization (ICAO) to discuss global efforts to reduce emissions from aircraft.⁴

But even while the US has vociferously objected to the extraterritorial reach of ETS, the US has imposed numerous extraterritorial requirements on foreign carriers, by statute and regulation.⁵ In some cases, these restrictions have a nominal or actual basis in safety or security concerns. But in many cases, they could be construed to be intended to further the commercial interests of US carriers outside of US airspace – essentially, the same type of criticism that has been levelled at ETS.⁶ While this inconsistency would not be a legal impediment to the

¹ Considerable scholarly attention already has been given to the dispute. See, e.g. Brian F. Havel and John Q. Mulligan, ‘*The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the European Union Validating the Inclusion of Non-EU Airlines in the Emissions Trading Schemes*’, 37 *Air & Space L.* 3 (2012); Brian F. Havel and Gabriel S. Sanchez, ‘*Toward an International Aviation Emissions Agreement*’, 36 *Harvard Environ. L. Rev.* 351 (2012).

² Case C-366/10, *Air Transportation Association of America v. Secretary of State for Energy and Climate Change*, 2010 O.J. C-260/12 (22 Dec. 2011), referred by High Court of Justice, Queen’s Bench Division (Administrative Conn).

³ European Union Emissions Trading Scheme Prohibition Act, Pub. L. 112-200. The law as ultimately adopted authorizes but does not require the Secretary of Transportation to prohibit US carriers from participating in ETS.

⁴ See, e.g. Stopping the clock of ETS and aviation emissions following last week’s International Civil Aviation Organization Council (12 Nov. 2012), http://europa.eu/rapid/press-release_MEMO-12-854_en.htm; Proposal for a Decision of the European Parliament and of the Council (22 Nov. 2012), http://ec.europa.eu/clima/policies/transport/aviation/docs/com_2012_697_en.pdf.

⁵ Conversely, the current ETS controversy has echoes of a prior dispute between the US and EU, even though it did not strictly concern extraterritoriality. In 1999, the EU adopted aircraft noise requirements (EC Regulation 925/1999) which were based on the identity of an aircraft rather than its actual noise emissions – and thus would have the effect of prohibiting US carriers from operating many “hushkitted” aircraft to/from the EU. The US filed a formal complaint with ICAO, alleging that the scheme violated the Chicago Convention; the Council issued an initial procedural ruling in favor of the US. See Decision of the ICAO Council on the Preliminary Objections in the Matter ‘United States and 15 European States (2000)’ (16 Nov. 2000). See generally, Sean D. Murphy, ‘*Admissibility of U.S.-E.U. “Hushkits” Dispute Before the ICAO*’, 95 *Am. J. of Intl. Law* 410 (2001); Troy A. Rolf, ‘*International Aircraft Noise Certification*’, 65 *J. Air L. & Com.* 383 (2000). Subsequently, the EU modified its regulations. See Directive 2002/30/EC (26 Mar. 2002).

⁶ At a 6 Jun. 2012 hearing on the bill (S. 1956) that would become Pub. L. 112-200, Annie Petsonk, a lawyer speaking for the Environmental Defense Fund, responded to criticisms of the extraterritoriality

US adopting anti-ETS measures, it could undermine a US claim to the ‘high ground’ in future negotiations regarding ETS and other international matters.⁷

Indeed, despite the numerous extraterritorial requirements that the US has imposed on foreign carriers, these restrictions typically have attracted scholarly attention only on a case-by-case basis.⁸ As a result, the breadth and depth of the extraterritorial requirements that Congress and DOT historically have imposed or attempted to impose upon foreign carriers may not have received as much attention as is warranted – a deficiency that this article seeks to correct.

Moreover, although this article does not seek to develop a theory on the extent to which the US legitimately can regulate foreign carrier conduct beyond US borders,⁹ it should be noted that the piecemeal development of extraterritorial requirements has meant that the US itself has never been required to delineate its authority.¹⁰ But if it is to most effectively criticize ETS, it should be incumbent upon the US to now do so – at a minimum, by ensuring that new regulations with extraterritorial effect are accompanied by a detailed explanation of their legality.¹¹

of ETS by noting that: ‘In the aviation field alone, the history of U.S. unilateral extraterritorial legislation is substantial.’ See http://commerce.senate.gov/public/?a=Files.Serve&File_id=50cd0734-7038-45cb-9cb0-df5f835e8cd9.

⁷ See, e.g. Nigel Purvis and Samuel Grausz, ‘*Air Supremacy: The Surprisingly Important Dogfight over Climate Pollution from International Aviation*,’ German Marshall Fund of the United States Climate and Energy Program Policy Brief (Oct. 2012) (‘[t]he United States, in fact, is known globally as being more willing to regulate foreigners for actions outside its territory than any other country in the world. What Europe is doing on aviation pollution is well within the practice pioneered by the United States. Perhaps turnabout is fair play, as the old expression goes’).

⁸ A notable but dated exception is William Karas and Carol Gosain, ‘*Recent U.S. Regulation of Foreign Airline Practices: Impermissibly Unilateral or Not?*’ 16 Air & Space L. 4 (Spring 2002).

⁹ A significant theoretical discussion can be found in International Airline Coalition on the Rule of Law, ‘Position Paper regarding Principles of International Air Law Governing the Exercise of National Jurisdiction to Control Conduct Aboard Civil Aircraft,’ docket DOT-OST-1995-225 (31 May 1995). See also Karas and Gosain, *supra* n. 8, at 4 (‘[t]o claim that a particular measure is impermissibly unilateral, two questions must be answered in the affirmative. First: Is the measure in fact unilateral? Second: If so, is the measure inconsistent with international legal principles and norms?’); Beatriz Helena Rodriguez Perez, ‘*International Civil Aviation and Discretionary Powers of Aeronautical Authorities*,’ Thesis, Institute of Air and Space Law, McGill University, at 27 (Dec. 1987) (‘is it reasonable to regulate foreign aircraft flying into the territory of a State and carrying passengers and cargo? ... The different factors which have to be considered go beyond the links of territory, nationality or protection’).

¹⁰ In contrast, in other contexts, the US has been required to delineate the limits of its extraterritorial reach. Notably, in 2013 the Supreme Court rejected extraterritorial application of the so-called Alien Tort Statute (28 U.S.C. § 1350). See *Kiobel v. Royal Dutch Petroleum Co.*, docket no. 10-1491 (Slip op., 17 Apr. 2013).

¹¹ Nor is the regulation of foreign carriers the only aviation-related extraterritoriality issue that can and has arisen. Other issues, beyond the scope of this article, include the limits of US criminal jurisdiction; the limits of US antitrust jurisdiction; the extent of US jurisdiction over its own flag carriers beyond its borders; the interpretation of rights and restrictions established by bilateral and multilateral air services agreements; and the limits of the International Air Transportation Fair Competitive Practices Act (IATFPCA; 49 U.S.C. § 41310).

Broadly speaking, in the background of any extraterritorial regulation lurks the Chicago Convention,¹² which was adopted in 1944 to establish a framework for international aviation, and which founded the ICAO. Although not necessarily the only international law standard by which such proposals should be judged, it certainly – and deservedly – receives the greatest attention. Commentators typically take the position that the Chicago Convention – consistent with customary international law – provides ‘that an aircraft is not required to abide by the conditions of foreign laws while outside of the foreign State’s airspace’.¹³ But, regrettably, the treaty text is not quite so explicit.

For example, Article 1 of the Chicago Convention provides that States shall have complete and exclusive sovereignty only over airspace above their territory, and Article 12 provides that over the high seas only rules established pursuant to the treaty shall apply – but Article 6 adds that international air services may be operated over or into a State’s territory only in accordance with the terms of the permission granted by that State. Likewise, Article 33 generally provides that certificates of airworthiness issued by one State shall be recognized by other States, and Article 37 encourages uniformity in regulations and standards – but Article 11 provides that a State may have laws and regulations regarding the admission or departure of aircraft, so long as they are applied without distinction as to nationality.¹⁴ Thus, the stage is set for disputes over the extent to which extraterritorial requirements may be imposed on foreign carriers. In the case of the US, such disputes date back to at least the 1960s.

2 THE CAB AND EXTRATERRITORIALITY DURING THE REGULATED ERA

For more than forty years, the Civil Aeronautics Board (CAB) was the primary regulator of air transportation in – and to/from – the US. It does not appear that the CAB ever was called upon to provide a comprehensive explanation of the outer limits of its authority over foreign carriers. But extraterritoriality was a side issue in at least a half-dozen proceedings in the late 1960s and early 1970s. The results of these proceedings varied. In some cases, requirements were imposed upon foreign carriers, but the CAB implicitly or explicitly denied that the

¹² Convention on International Civil Aviation, 61 Stat. 1180, 15 U.N.T.S. 296 (7 Dec. 1944).

¹³ See, e.g. Christopher M. Carron, ‘*Getting Lucky While a Mile High: Challenging the U.S. Extraterritorial Ban on In-Flight Gambling*,’ 12 Gaming L. Rev. & Econ. 220, 223 (2008).

¹⁴ Likewise, President Roosevelt’s opening message to the conference urged it to proceed ‘with full recognition of the sovereignty and juridical equality of all nations ... so that the air may be used by humanity, to serve humanity’ – thus encouraging but – like the end product – not mandating the adoption of global standards. See Dennis S. Morris, ‘*The History and Future of the Chicago Convention*,’ 12 Air & Space L. 1, 16 (Winter 1998).

requirements were, in fact, extraterritorial. In other cases, the CAB declined to regulate foreign carriers, but as a matter of discretion/comity rather than legal necessity. Generally, the agency established a marker suggesting that the US had a long arm to regulate 'foreign air transportation'.¹⁵

2.1 THE DENUNCIATION OF THE WARSAW CONVENTION

On 15 November 1965, the US gave six months' notice of its intent to denounce the Warsaw Convention.¹⁶ The US believed that its liability limits for passengers (United States Dollars (USD) 8300) were too low, and the denunciation was made in expectation that it would force the negotiation of a more generous agreement.¹⁷ In its notice, the US stated that: 'the United States wishes to make clear that the action to denounce the Warsaw Convention is taken solely because of the convention's low limits of liability for injury or death to passengers, and in no way represents a departure from the longstanding commitment of the United States to the tradition of international cooperation in matters relating to civil aviation'.¹⁸

Efforts to negotiate a new treaty were unsuccessful, contrary to US expectations. Other countries did not simply yield to the demands of the US delegation.¹⁹ But at the last minute, the CAB announced a voluntary agreement (the so-called Montreal Agreement) by which carriers that transported more than 90% of international passengers to/from the US would raise their liability to USD 75,000, based upon which the US withdrew its denunciation.²⁰ The US stated that: 'By acceptance of the plan the United States and all of the other participating countries have assured the continuation of the uniform system of law

¹⁵ 49 U.S.C. § 40102(a)(23).

¹⁶ Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, 137 L.N.T.S. 11 (12 Oct. 1929).

¹⁷ 'The United States and the Warsaw Convention,' 54 Department of State Bulletin 580, 581 (11 Apr. 1966) ('[i]f our action has given impetus to a prompt and serious reconsideration of the problem of the Warsaw Convention, then we are very pleased').

¹⁸ 'U.S. Gives Denunciation of Warsaw Convention,' 53 Department of State Bulletin 923, 924 (6 Dec. 1965), reprinted at 5 I.L.M. 122 (1966). See also 'Agreement Adopted by Traffic Conferences 1, 2, and 3 of the International Air Transport Association Relating to Carrier Liability,' CAB Order E-22997 (15 Dec. 1965).

¹⁹ The leader of the delegation later noted that the US had 'instructions not to reduce its principal demand' and was apparently surprised that many other delegations 'thought either that the United States would back down or that in any event self-respecting sovereign States should not yield to American pressure.' Andreas F. Lowenfeld and Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harvard L. Rev. 497, 567 (1967).

²⁰ 'Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol,' 44 C.A.B. 819, CAB Order E-23680 (13 May 1966), reprinted at 31 Fed. Reg. 7302 (19 May 1966).

governing airlines, shippers, and passengers and have demonstrated again the viability of the system of international cooperation in civil aviation and in international law.²¹

But the official US account of the circumstances under which the Montreal Agreement was achieved bears scrutiny.²² Foreign carriers no doubt were under pressure to reach an agreement, because they otherwise would face the specter of unlimited liability for flights to the US.²³ Indeed, even prior to denunciation, concerns had been expressed that the US should not bring pressure to bear in such a manner.²⁴ While such pressure might not, in itself, be considered extraterritorial, the agreement did not solely concern liability. Signatories also agreed to provide notice of the enhanced liability limitations when issuing tickets, with no US point-of-sale requirement – an early, if not the first, example of the CAB effectively requiring foreign carriers to engage in specific conduct beyond US borders.²⁵ And although it was initially described as voluntary, CAB practice made adherence to the agreement mandatory. ‘Since the effective date of the Montreal Agreement, the Board has included a condition in foreign air carrier permits requiring that such carriers become and remain parties to the Agreement.’²⁶

Subsequently, the CAB went a step further and by regulation specifically required foreign carriers to become a party to the agreement and thus include a notice about the Warsaw Convention’s baggage liability on tickets, with no US point-of-sale restriction.²⁷ Technically, this obligation could be avoided if a carrier did not avail itself of the Warsaw Convention – as for death/injury liability – but as

²¹ ‘U.S. To Continue Adherence to Warsaw Convention,’ 54 Department of State Bulletin 955 (13 Jun. 1966), reprinted at 5 I.L.M. 767 (1966).

²² Sources in addition to State Department records and Lowenfeld’s account, see *supra* n. 19, include: R. Bruce Keiner, Jr., ‘The 1966 Carrier Agreements: The United States Retains the Warsaw Convention’, 7 Va. J. Intl. L. 140 (1966); Lee S. Kreindler, ‘The Denunciation of the Warsaw Convention’, 31 J. Air L. & Com. 291 (1965).

²³ After negotiation efforts failed, the chairman of the US delegation, Andreas F. Lowenfeld, stated that: ‘[l]imitations on liability, whether statutory at the place of the accident or by contract in the ticket, will almost certainly be disregarded on the ground that they are contrary to public policy. But you may be sure that foreign carriers will receive full justice in the United States.’ ‘The United States and the Warsaw Convention,’ 54 Department of State Bulletin 580, 588 (11 Apr. 1966).

²⁴ See, e.g. Jose A. Cabranes, ‘Limitations of Liability in International Air Law: The Warsaw and Rome Conventions Reconsidered’, 15 J. Intl. Comp. L.Q. 660, 661 (1966) (noting ‘imputations, expressed in part by the air transport industry, that such a step, however lawful under the Convention, would constitute a breach in the United States’ commitment to the public order of the world community generally, and to the international aviation community specifically’).

²⁵ 44 C.A.B. at 819. Previously, the CAB had required foreign carriers to provide notice with no US point-of-sale limitation – but only if they availed themselves of the Warsaw Convention liability limits. ‘Limitation of Liability for Death or Injury of Passengers Under Warsaw Convention,’ 28 Fed. Reg. 11775 (5 Nov. 1963).

²⁶ ‘U.S. and Foreign Air Carriers: Waiver of Warsaw Convention Liability Limits and Defenses,’ 47 Fed. Reg. 25019, 25019 (9 Jun. 1982). See also ‘Reforming the Liability Provisions of the Warsaw Convention: Does the IATA Intercarrier Agreement Eliminate the Need to Amend the Convention?’, 5 Fordham Intl. L.J. 1768, 1785 (1996). The requirement subsequently was formally codified at 14 C.F.R. § 203.5. See ‘Waiver of Warsaw Convention Liability Limits and Defenses,’ 48 Fed. Reg. 8042 (25 Feb. 1983).

²⁷ ‘Notice of Baggage Liability Limitations,’ 36 Fed. Reg. 17034 (27 Aug. 1971).

a practical matter, it was a formal extraterritorial requirement. Lufthansa argued in court that the requirement was impermissible, but the D.C. Circuit held that the agency had acted within its jurisdiction; the CAB had been delegated authority to regulate ‘foreign air transportation’, and Congress ‘may regulate conduct of noncitizens’, even if that conduct takes place in a foreign country, if the consequences of the conduct are felt within the United States.²⁸

2.2 THE REGULATION OF BLIND SECTOR TRAFFIC

In 1967, the CAB proposed to prohibit the commingling of ‘blind sector’ traffic on a flight operating in foreign air transportation, absent CAB authorization. The CAB explained that the term ‘blind sector’ referred to traffic that is carried solely between two foreign points, one or both of which was not part of a carrier’s US authority; for example: ‘carriage on an authorized Europe–New York flight of Europe–Canada or Europe–Mexico (beyond New York) traffic, where no [local] traffic is carried between New York and Canada or Mexico.’²⁹

Foreign carriers objected that because the blind sector traffic was not itself moving in foreign air transportation, the CAB’s proposal was extraterritorial and exceeded its jurisdiction. The CAB disagreed and adopted regulations despite their objections, explaining that:

The Board does not seek by this regulation to control any operations between foreign points, to the extent that such operations are conducted independently of an operation in foreign air transportation (i.e., for the carriage of traffic to and from the United States). But where operations between two foreign points are conducted in the course of a flight operating to and from the United States, there can be little question that the international principle of exclusive sovereignty over the air space above a nation’s territory permits regulation of all aspects of that flight, including deviation from the authorized route for the purpose of carriage of unauthorized traffic which is not itself moving to or from the United States.³⁰

This appears to have been the CAB’s first explicit discussion of extraterritoriality (the matter having been only implicit in the Warsaw Convention denunciation) – and, in a template for the future, the CAB acknowledged the issue but denied that its actions were in fact extraterritorial.

²⁸ *Deutsche Lufthansa Aktiengesellschaft v. CAB*, 479 F.3d 912, 917 n. 9 (D.C.Cir. 1973). The court also held that the enhanced liability limitations were not in conflict with the terms of the Warsaw Convention.

²⁹ ‘Foreign Air Carriers: Commingling of Blind Sector Traffic,’ 32 Fed. Reg. 11480, 11481 (9 Aug. 1967).

³⁰ ‘Commingling of Blind Sector Traffic by Foreign Air Carriers,’ 33 Fed. Reg. 692, 693 (19 Jan. 1968) (n. omitted). The regulations were codified at 14 C.F.R. Part 216, and remain in effect.

2.3 THE REGULATION OF CHARTER OPERATIONS

The CAB's pronouncement in regard to blind sector traffic did not herald an unlimited expansion of its authority. Notably, in the years that followed, the CAB imposed certain extraterritorial requirements in connection with the wide-ranging regulatory scheme for charter flights that existed at the time, but declined to adopt certain other requirements.

In 1969, the CAB required foreign air carriers to maintain for six months records of the names and addresses of passengers on pro rata charter flights. Although this was not the first recordkeeping requirement imposed on foreign carriers for charter flights,³¹ Sabena and KLM objected that it was an attempt to exercise extraterritorial jurisdiction over transactions taking place outside the US. The CAB responded that it was empowered 'to regulate activities in foreign air transportation which bear on the public interest and this rule clearly falls within that mandate'.³²

In contrast, in 1970 the CAB adopted a rule making US and foreign carriers responsible for amounts collected by agents in payment for charter flights.³³ Subsequently, the agency clarified that the rule was only applicable to US-originating charters.³⁴ Although the CAB did not concede that it lacked jurisdiction over foreign-originating charters, it stated that a limitation was consistent with its policy of refraining from exercising jurisdiction over inbound operations by foreign indirect air carriers,³⁵ as well as certain operations by foreign tour operators.³⁶ 'We believe that requiring carriers to assume responsibility for

³¹ 'Names and Addresses of Passengers on Pro Rata Charter Flights in Foreign Air Transportation,' 33 Fed. Reg. 14548, 14548 (23 Sep. 1968) (noting requirements already applicable to off-route and on-route charters originating or terminating in the US).

³² 'Names and Addresses of Passengers on Pro Rata Charter Flights in Foreign Air Transportation,' 34 Fed. Reg. 6772, 6773 (23 Apr. 1969).

³³ 'Responsibility of Air Carriers for Amounts Collected by Travel Agents in Payment for Charter Flights,' 35 Fed. Reg. 7295 (9 May 1970).

³⁴ 'Responsibility of Air Carriers for Amount Collected by Travel Agents in Payment for Charter Flights – Limitation of Rule to U.S.-Originated Charters,' 35 Fed. Reg. 13573 (26 Aug. 1970). See *infra* n. 61.

³⁵ See *infra* n. 61.

³⁶ 35 Fed. Reg. at 13573. See also CAB Order E-22978 (7 Dec. 1965) (declining jurisdiction over program of fourteen charter flights arranged by foreign tour operator); *Pan American World Airways, Inc. v. CAB*, 392 F.2d 483, 489 (D.C.Cir. 1968) (upholding CAB decision to decline jurisdiction over foreign tour operator, which explained that 'our control would be directed mainly to the quality of the service provided by foreign tour operators to foreign originating tour groups – a matter which concerns primarily the foreign governmental authorities'); 'Inclusive Tour Charters to Foreign Tour Operators by Supplemental Air Carriers', 34 Fed. Reg. 432 (11 Jan. 1969) (generally declining jurisdiction over foreign tour operators for charters operated by US supplemental carriers); 'Extension of Charter Regulations', 36 Fed. Reg. 2486, 2487 (5 Feb. 1971) (in docket establishing uniform regulations for charters, the CAB responded to extraterritoriality objections by noting that certain rules already applied to foreign-originating charters, adding that '[t]he Board has no jurisdiction over the users of air transportation but only those who provide the transportation').

payments by foreign national charterers to travel agents is a matter which is properly the concern of foreign governments and for them to regulate.³⁷

2.4 DENIED BOARDING COMPENSATION

When the CAB initially adopted denied boarding compensation regulations in 1967, foreign carriers were not included, but the CAB anticipated that: (i) the requirements could provide a competitive advantage to US carriers, and (ii) that there would be competitive pressure for foreign carriers to offer similar compensation.³⁸ Six years later, the CAB found that its predictions had been optimistic and that 'travellers who choose to patronize foreign air carriers on flights having a nexus with the United States' were disadvantaged, and proposed to expand the regulations to foreign carriers.³⁹ The CAB denied that the requirements were extraterritorial, noting that its prior decision to exclude foreign carriers 'rested on policy grounds and tacitly assumed jurisdiction'.⁴⁰

At the same time, the CAB stated that it would exclude from the scope of the rules passengers inbound to the US via a foreign carrier who did not receive confirmations in the US ('i.e., all elements of the contract of carriage occur outside the United States'), in the interest of comity.⁴¹ Additionally, the CAB subsequently clarified that the rule only applies to flights to or from a point in the US; for example 'passengers who hold an Athens-Rome-New York ticket consisting of an Athens-Rome flight coupon and a Rome-New York flight coupon are within the rule's protection only for the latter portion of their flight'.⁴² The CAB also concluded that later modifications to the rules (e.g., requiring the solicitation of volunteers) should apply to foreign carriers: '[T]he arguments now raised in opposition to applying our oversales regulations to international operations are essentially the same as those raised and rejected when Part 250 was first given extraterritorial effect.'⁴³

³⁷ 35 Fed. Reg. at 13573. Public charter programs currently are regulated by 14 C.F.R. Part 380; it similarly waives jurisdiction over foreign charter operators that offer programs originating in a foreign country, but DOT 'reserves the right to exercise its jurisdiction over any foreign Public Charter operator at any time it finds that such action is in the public interest'. 14 C.F.R. § 380.3(c).

³⁸ 'Denied Boarding Compensation Tariffs,' 32 Fed. Reg. 11938, 11940 (18 Aug. 1967).

³⁹ 'Foreign Air Carriers: Priority Rules, Denied Boarding Compensation, and Reports of Unaccommodated Passengers,' 38 Fed. Reg. 15083, 15084 (8 Jun. 1973).

⁴⁰ 'Limitation Inclusion of Foreign Air Carriers,' 39 Fed. Reg. 38087, 38088 n. 7 (29 Oct. 1974).

⁴¹ *Id.* at 38089.

⁴² 'Denied-Boarding Compensation: Interpretive Amendment and Partial Stay,' 40 Fed. Reg. 4409, 4409 (30 Jan. 1975).

⁴³ 'Comprehensive Amendment,' 43 Fed. Reg. 24277, 24281 (5 Jun. 1978).

Additionally, at the same time the CAB proposed to modify its requirements for the oral confirmation of reservations to encompass foreign carriers.⁴⁴ The CAB previously had adopted a regulation that prohibited US carriers from providing an oral confirmation of a reservation before a passenger received a ticket, unless a tariff filing specially allowed such a procedure; the requirement was intended to ensure that passengers were not misled about their eligibility for denied boarding compensation, which was available only if a reservation had been confirmed.⁴⁵ BOAC asserted extraterritoriality as an objection, to the extent the regulation would apply to oral reservations made outside the US, but the CAB denied that the rule created any international issues because ‘all that is required is that the foreign air carriers conform their reservations practices to the tariff rules that they choose to file with the Board’.⁴⁶

2.5 THE FINAL REGULATED WORD

The final word on extraterritoriality prior to deregulation came from the courts. Although it was not the first time that a court had weighed in on the CAB’s jurisdiction,⁴⁷ it was the first time that extraterritoriality had been the central issue. The CAB had rejected certain tariffs filed by British Airways for to-US cargo, but the UK Civil Aviation Authority had instructed BA to charge those rates. ‘In essence, British Airways urges that it had been afforded a “Hobson’s choice” of either violating the directive of the British C.A.A. or charging rates not approved or sanctioned by the C.A.B.’⁴⁸

The court held that BA should have followed the instructions of the CAB and not the CAA: ‘the authority of the C.A.B. to issue directives in respect of conduct of foreign nations in a foreign country, where such conduct impinges upon commerce to or from the United States, is well recognized’.⁴⁹ However, in evaluating what weight should be given to the CAA’s instructions, the court also considered it significant that BA at that time also was an instrument of the UK government: ‘The effect, vaguely schizophrenic, is that of looking at oneself in the

⁴⁴ ‘Foreign Air Carriers: Statement on Oral Confirmed Reservations,’ 38 Fed. Reg. 19415 (20 Jul. 1973).

⁴⁵ 14 C.F.R. § 399.83, which remains in effect.

⁴⁶ ‘Oral Confirmed Reservations to Include Foreign Air Carriers,’ 39 Fed. Reg. 38095, 39086 (29 Oct. 1974). Additionally, although its reasoning was not specified, in 1971 the CAB announced that price stabilization orders it had issued were not applicable to foreign air carriers, based on guidance provided by the Cost of Living Council. ‘United States and Foreign Air Carriers: Order Stabilizing Fares, Rates, and Charges,’ 36 Fed. Reg. 20908 (30 Oct. 1971). CAB Order 71-8-78 (17 Aug. 1971), as amended by CAB Order 71-9-51 (13 Sep. 1971) had been issued pursuant to Executive Order 11615 (15 Aug. 1971).

⁴⁷ See *supra* nn. 28 and 36.

⁴⁸ *CAB v. British Airways Board*, 433 F. Supp. 1379, 1385 (S.D.N.Y. 1977).

⁴⁹ *Id.* at 1385.

mirror and sternly telling oneself what to do.⁵⁰ Left unaddressed is whether the same outcome would have been reached if the carrier had not been a State-owned entity – or if the same logic would be applied in a deregulated world in which tariff disputes had become a relic.

3 EXTRATERRITORIALITY AT THE DAWN OF DEREGULATION

The Airline Deregulation Act (ADA) was enacted in 1978,⁵¹ but it did not immediately eliminate the CAB. Many regulatory requirements – primarily for domestic operations – would be phased-out over a multi-year period, with the remaining functions of the agency being transferred to DOT effective 1 January 1985. As part of this transition, the CAB periodically was called upon to determine what rules would apply to air transportation post-deregulation. Significantly, the CAB – albeit sometimes hesitantly – was cautious about imposing or continuing extraterritorial regulations. Indeed, in some cases the deregulation of international operations arguably was more complete than the deregulation of domestic operations.

3.1 DENIED BOARDING COMPENSATION

Although the ADA did not require any changes to the CAB's position regarding the extraterritorial scope of its regulations, it did appear to have an immediate effect so far as denied boarding compensation was concerned. Shortly before deregulation, the CAB had reaffirmed its position that the regulation applied to most inbound passengers transported by foreign carriers, in a proceeding that expanded the requirements despite renewed extraterritoriality-based objections.⁵² Three days after the ADA was signed by President Carter, the CAB – which noted that many foreign carriers had failed to comply with the new requirements – 'doubled down' and adopted an additional requirement: namely, that carriers which did not fully comply with the revised regulations must include a notice to that effect in advertising in the US and along with tickets issued in the US.⁵³

But the 'corrective advertising' requirement never entered into effect. It initially was stayed, after five foreign carriers filed an appeal challenging the CAB's jurisdiction.⁵⁴ Various foreign governments also noted objections, both to the new

⁵⁰ *Id.* at 1387–88.

⁵¹ Pub. L. 95–504.

⁵² See *supra* n. 43.

⁵³ 'Advertising Disclosure of Noncompliance with Oversale Rules,' 43 Fed. Reg. 50164 (27 Oct. 1978).

⁵⁴ 'Advertising Disclosure of Noncompliance with Oversale Rules: Stay Order,' 43 Fed. Reg. 53028 (15 Nov. 1978); 'Advertising Disclosure of Noncompliance with Oversale Rules: Postponement of Effective Date,' 43 Fed. Reg. 57243 (7 Dec. 1978).

requirement and the underlying rules.⁵⁵ Shortly thereafter, the CAB stated that ‘in the interest of maintaining good reciprocal relations within the international community’ it would not only withdraw the new requirements, but generally allow foreign carriers for inbound flights to follow the oversales regulations of the country in which the flight originated – essentially, undoing the 1974 amendments to the regulation.⁵⁶

The CAB adamantly denied that its decision was a concession that it could not regulate foreign carriers:

This amendment to our rules should not be interpreted as agreement that the Board’s jurisdiction does not extend to cover the sales and services of foreign carriers doing business in the United States. It is done in recognition that international comity among nations requires some latitude in the measures used to achieve our goal of giving consumers the best information, and passengers the best protection possible under the circumstances.⁵⁷

But whatever the CAB’s reasoning, it effectively conceded that it had gone too far; i.e., it should not impose requirements effective upon foreign carriers beyond US borders without regard to the consequences. From the perspective of extraterritoriality, deregulation was off to a good start.⁵⁸

3.2 FOREIGN INDIRECT AIR CARRIERS

As part of the deregulatory process, in 1979 the CAB adopted new regulations for foreign air freight forwarders/indirect cargo carriers.⁵⁹ Previously, formal proceedings officially were required for them to obtain authority; but empowered by the ADA to grant a sweeping exemption, the CAB provided for a simplified registration process – similar to that already implemented for US air freight forwarders/indirect cargo carriers. The CAB further concluded that even these

⁵⁵ ‘Disclosure by Foreign Carriers,’ 44 Fed. Reg. 2165, 2166 (10 Jan. 1979).

⁵⁶ *Id.* See also Gregory S. Sherman, ‘CAB Regulation of Airline Reservation Oversales: An Analysis of Economic Regulation 1050’, 44 J. Air L. & Com. 773, 795–797 (1979); Robert Reed Gray, ‘An Assessment of Deregulation and its Effect on the International Air Transportation Community,’ MIT Flight Transportation Laboratory Report no. R80-5, at 4 (Jun. 1980).

⁵⁷ 44 Fed. Reg. at 2167. See also *CAB v. Deutsche Lufthansa Aktiengesellschaft*, 15 Avi. ¶ 17,528 (D.C.Cir. 1979) (upholding CAB subpoena; ‘[t]he bumpings under investigation were not wholly foreign transactions, since what CAB is investigating are possible violations of regulations that are applicable only in the case of a contractual relationship formed by a ticket sale or confirmation within the United States’).

⁵⁸ Subsequently, the CAB would provide that US carriers for inbound flights also could follow the oversales regulations of the country in which the flight originated, putting US and foreign carriers on equal footing. ‘Oversales,’ 47 Fed. Reg. 52980 (24 Nov. 1982). Ironically, the EU later revised its oversales requirements – see EC Regulation 261/2004 – to apply to all carriers for outbound flights, but also to apply to inbound flights operated by EU carriers.

⁵⁹ ‘Final Rule to Liberalize Regulation of Foreign Indirect Cargo Carriers,’ 44 Fed. Reg. 69633 (4 Dec. 1979).

limited requirements should not apply to shipments arranged from points outside the US to points inside the US by foreign forwarders.⁶⁰ Although no rationale was stated, the CAB apparently relied on a prior ad hoc decision not to investigate the regulation of foreign air freight forwarders; the agency had recognized 'the impossibility of enforcing extraterritorial regulations and the fear of retaliation by foreign governments'.⁶¹

3.3 TARIFF REQUIREMENTS

In 1979, the CAB also proposed to require both US and foreign carriers to cancel tariff provisions which stated that their agents and employees may not modify any provision of their contract of carriage or tariff, on the grounds that it was unjust and if followed would prevent carriers from dealing flexibly with customer complaints.⁶² Subsequently, the CAB did order the cancellation of the provision for domestic tariffs, but not for international tariffs, citing possible complications involving bilateral agreements that included double disapproval or cancellation provisions.⁶³ As a result, the CAB did not need to address legal objections that the proposal was extraterritorial, to the extent it would limit the authority of agents and employees outside the US; and although the CAB suggested that it would revisit the issue for international tariffs, in fact it never did.

Domestic tariff filing requirements were abolished by the ADA effective 1 January 1983; as a result, the CAB adopted new regulations requiring carriers to provide passengers notice of their contracts of carriage along with domestic tickets.⁶⁴ But, as initially formulated, the rules would have required a notice warning passengers about incorporated terms to be provided even if the ticket was sold outside the US by a non-US carrier. After the Air Transport Association (ATA) and IATA raised objections, the CAB agreed to suspend the requirement, acknowledging that few tickets for domestic-only air transportation were sold outside the US.⁶⁵ Subsequently, the CAB amended the rule to allow the notice to be provided only upon check-in if a domestic ticket was sold outside the US by a foreign carrier – but on the condition that the fare be fully refundable if the

⁶⁰ 'Proposed Rule to Liberalize Regulation of Foreign Indirect Cargo Carriers,' 44 Fed. Reg. 30694, 30695 (29 May 1979). See also 14 C.F.R. § 297.2.

⁶¹ 'International Airfreight Forwarder Investigation,' 27 C.A.B. 658, 721 (6 Nov. 1958). See also 'International Air Freight Forwarders,' 20 Fed. Reg. 5256, 5257 (7 May 1955) (disclaiming jurisdiction, but not denying jurisdiction).

⁶² CAB Order 79-2-106 (15 Feb. 1979).

⁶³ 'Air Carrier Rules Governing the Application of Tariffs,' 45 Fed. Reg. 9043 (11 Feb. 1980).

⁶⁴ 'Notice of Terms of Contract of Carriage,' 47 Fed. Reg. 52128 (19 Nov. 1982). See also 14 C.F.R. Part 253.

⁶⁵ 'Terms of Contract of Carriage,' 48 Fed. Reg. 2967 (24 Jan. 1983).

passenger then refused transportation.⁶⁶ As in prior cases, the CAB did not concede that the rule had been beyond its authority, but noted that ‘it would be in the best interest of international comity not to impose unreasonably high costs and burdens on the airlines for extraterritorial application of a requirement for domestic travel’.⁶⁷

3.4 IATA IMMUNITY

Shortly before the ADA was enacted, the CAB opened a proceeding to reevaluate the antitrust immunity it had granted to IATA traffic conferences since shortly after World War II.⁶⁸ ‘The response should not have been surprising but it seemed to unsettle the CAB.’⁶⁹ The CAB ultimately concluded that the immunity in most respects should be maintained in the interests of international comity and reciprocity, even though it considered the activities of the traffic conferences to be anticompetitive.⁷⁰ The CAB asserted that the traffic conference system could be wound down without major disruptions, but ‘the comments of governments, both those conveyed directly at the consultations, and those transmitted through the Department of State, have made it clear that most nations are far less convinced than we are that free competition in international aviation is workable, although many appear to endorse increased competition as a desirable goal’.⁷¹

Although the CAB backed down, the proceeding did not settle the state of the applicable law. For example, in the review process, IATA argued that the termination of the immunity would amount to a violation of international law because the traffic conference system ‘had become, by virtue of its universal approval and operation since 1946, part of customary international law’.⁷² The CAB countered that nothing in the Chicago Convention required rate

⁶⁶ ‘Terms of Contract of Carriage,’ 48 Fed. Reg. 29707 (28 Jun. 1983).

⁶⁷ ‘Terms of Contract of Carriage,’ 48 Fed. Reg. 54589, 54590 (6 Dec. 1983).

⁶⁸ CAB Order 78-6-78 (9 Jun. 1978).

⁶⁹ Paul H. Karlsson, ‘*Competition Law and Extra-Territorial Enforcement: Offense or Defense?*’ 5 *Caribbean Dialogue* 33, 37 (1999). ‘More than 50 nations filed diplomatic protests with the US State Department and not one could find a positive thing to say.’ *Id.* ‘Subsequently, the Board set up three overseas meetings where foreign governments could make oral presentations and the Board got bloodied at every one of them.’ Gray, *supra* n. 56, at 6. ‘An indication of the success of that strategy is that the Asian leg of the trip was canceled when the Philippines refused to allow the delegation entry into that country.’ Karlsson, at 37. See also Burt W. Rein and Bruce L. McDonald, ‘*The “Legislative Hearing” on IATA Traffic Conferences – Creative Procedure in a High Stakes Setting*’, *Essays in Air Law*, at 242, 246-47 (Arnold Kean, ed., 1982).

⁷⁰ ‘IATA Traffic Conferences: Board Review,’ 89 C.A.B. 468, CAB Order 81-5-27 (6 May 1981). See also DOT Order 85-5-32 (10 May 1985).

⁷¹ CAB Order 81-5-27, at 20.

⁷² CAB Order 80-4-113, at 36 (15 Apr. 1980).

coordination, and that ‘there is a clear distinction between recognizing IATA tariff conferences as an “acceptable or legitimate” means of setting fares, and recognizing them as “required”’.⁷³

Strictly speaking, this proceeding did not concern extraterritoriality, since the CAB did not propose to impose its own standards on foreign carriers – although some of the comments filed with the agency apparently suggested that the withdrawal of immunity would have much the same effect. Ultimately, the CAB’s decision was typical of those rendered in its later days – i.e. although it did not concede that it lacked authority to act, it took into account the importance of international harmony, especially when other governments had expressed specific concerns. But that approach would not prove to be an enduring characteristic of deregulation.

4 CONGRESS ENACTS EXTRATERRITORIAL STATUTES

Deregulation was in many ways a misnomer; although it eliminated most domestic pricing and routing restrictions, the residual authority transferred to DOT included extensive powers, such as over consumer protection issues.⁷⁴ Moreover, international operations continued to be regulated by a web of bilateral air services agreements, in addition to the Warsaw Convention and other treaties.

One of the requirements carried over from the CAB to DOT was that it ‘act consistently with obligations of the United States Government under an international agreement’ and ‘consider applicable laws and requirements of a foreign country’.⁷⁵ Much as did the CAB in its dying days, DOT appears to have taken this mandate seriously on the rare occasion that an extraterritoriality issue arose in the immediate aftermath of deregulation.

In particular, extraterritoriality was an issue in a DOT proceeding which proposed to revise the terms on which authority was granted to foreign carriers, many of which were still instrumentalities of foreign governments.⁷⁶ DOT specifically required the waiver of sovereign immunity for all operations, whether or not they comprised ‘foreign air transportation’; i.e., the standard condition then in effect arguably would not require a waiver for a flight between two foreign points, on which US citizens might be passengers and have claims for injuries

⁷³ *Id.* at 36. DOT much later would terminate the immunity for traffic conferences in the US-Australia and US-Europe markets. See DOT Order 2007-3-23 (30 Mar. 2007).

⁷⁴ See, e.g. 49 U.S.C. § 41712.

⁷⁵ 49 U.S.C. § 40105(b).

⁷⁶ DOT also stated that it would continue the CAB practice, for joint service agreements that involved a US carrier and a foreign carrier, of disclaiming jurisdiction over the foreign carrier as a matter of comity – but maintain ‘direct and comprehensive jurisdiction over the U.S. carrier operations involved.’ DOT Order 86-10-59 (27 Oct. 1986), citing CAB Order 83-7-56 (14 Jul. 1983).

under the Warsaw Convention.⁷⁷ DOT took the position that the proposal was consistent with US practice (including the Foreign Sovereign Immunities Act⁷⁸) and international law generally, as well as the global aviation regime: '[t]his carefully negotiated international scheme would be entirely frustrated if foreign airlines could avoid liability by claiming foreign sovereign immunity.'⁷⁹ Various foreign carriers, as well as IATA, raised objections – such as that the proposed language swept far too broadly – and DOT listened. Although a waiver still was required, the revision was narrowed to only require a waiver for 'international air transportation' and claims under an international agreement that were cognizable in the US.⁸⁰

After approximately a decade of dormancy, extraterritoriality again became an issue for air transportation based on requirements enacted by Congress. In particular, in 1994 Congress adopted restrictions on gambling that were applicable to foreign carriers; and in 2000 Congress adopted restrictions on smoking that were applicable to foreign carriers. In both cases, more attention was given to the alleged societal evils at issue than the extraterritorial scope of the statutes – but in both cases, the industry did endeavor to warn Congress of their questionable legality, and dubious precedent.

4.1 GAMBLING RESTRICTIONS

In 1994, Congress adopted a ban on in-flight gambling on scheduled flights, by both US and foreign carriers – the so-called Gorton Amendment, named after the Senator who introduced it as an amendment to an FAA reauthorization bill.⁸¹ The legislation was adopted out of a concern that foreign carriers intended to offer in-flight gambling⁸² – and that existing laws would prohibit only US carriers from

⁷⁷ DOT Order 86-1-38 (21 Jan. 1986). DOT stated that a waiver of sovereign immunity had been a standard condition of foreign carrier authority since 1951. See 'El Al Israel Airlines Limited, Service to the Netherlands, Belgium, Luxembourg, and Turkey,' 48 C.A.B. 962, CAB Order E-5933 (6 Nov. 1951) ('[a]s a matter of policy, we have decided that proper protection of shippers and the traveling public require that insofar as practicable a foreign air carrier shall not enjoy immunity from suit any more than does a domestic air carrier').

⁷⁸ 28 U.S.C. § 1602, et seq.

⁷⁹ DOT Order 86-1-38, at 4 (21 Jan. 1986).

⁸⁰ DOT Order 87-8-8 (31 Jul. 1987).

⁸¹ Federal Aviation Administration Authorization Act of 1994, Pub. L. 103-305, § 205, codified at 49 U.S.C. § 41311.

⁸² Statement of Richard B. Hirst, Senior Vice President and General Counsel, Northwest Airlines, Aviation Competition and Safety Issues, Hearing Before the Senate Subcommittee on Aviation of the Committee on Commerce, Science, and Transportation, 103rd Congress, 1st Session, at 22 (8 Nov. 1993).

offering such services, thus putting them at a competitive disadvantage.⁸³ From a business perspective, it is understandable that Congress would want a level playing field among US and foreign carriers. But ironically, US carriers had sought to level the playing field not by imposing a prohibition on foreign carriers but by obtaining permission to offer gambling themselves.⁸⁴ Previously, Congress had made a similar change to permit gambling on US-flag cruise ships.⁸⁵ However, Congress ultimately inverted this request. Instead it banned all carriers – US and foreign – not only from offering gambling but from even having gambling devices installed or transported aboard aircraft that served the US,⁸⁶ with virtually no legislative consideration of whether it had the authority to do so.⁸⁷

To its credit, Congress requested that DOT produce a report on the implications of the Gorton Amendment.⁸⁸ Although DOT was not specifically directed to consider the extraterritorial implications of the bill, the limited legislative history does indicate that Congress was aware that it had acted without a full understanding of the underlying safety and competition issues, and that based on the report ‘at some future time a different rule might be appropriate’.⁸⁹ In the process of drafting the report, DOT solicited public comments⁹⁰ – many of which specifically argued that the prohibition was impermissibly extraterritorial. Most notably, a coalition of eleven foreign carriers – styled as the International Airline Coalition on the Rule of Law – submitted a position paper which set forth a detailed argument that the Gorton Amendment was inconsistent with

⁸³ The Johnson Act, 15 U.S.C. § 1171, et seq., generally prohibits the transportation of gaming devices in interstate and foreign commerce, including within the ‘special maritime and territorial jurisdiction of the United States,’ which is defined to include US aircraft ‘in flight over the high seas.’ See 15 U.S.C. § 1175 and 18 U.S.C. § 7.

⁸⁴ Statement of Richard B. Hirst, *supra* n. 82, at 22.

⁸⁵ 15 U.S.C. § 1175(b)(1)(A).

⁸⁶ Federal Aviation Administration Authorization Act of 1994, Pub. L. 103-305, § 205.

⁸⁷ 140 Cong. Rec. S6664 (9 Jun. 1994) (Senator Gorton).

⁸⁸ *Id.*

⁸⁹ *Id.* At the hearing, Hirst warned that ‘that sort of broad reach ... would create bilateral treaty problems, and ultimately, potentially, diplomatic problems, between the United States and foreign governments whose flights we were trying to affect.’ Aviation Competition and Safety Issues, Hearing Before the Senate Subcommittee on Aviation of the Committee on Commerce, Science, and Transportation, 103rd Congress, 1st Session, at 46 (8 Nov. 1993). But no such discussion was heard in floor actions on the amendment and bill. See 140 Cong. Rec. S6664 (9 Jun. 1994); 140 Cong. Rec. S10954 (8 Aug. 1994).

⁹⁰ ‘Study of Gambling on Commercial Aircraft,’ 60 Fed. Reg. 21845 (3 May 1995).

international law,⁹¹ a position with which nineteen embassies agreed in a joint diplomatic note.⁹² As a bedrock principle, the coalition argued that:

established principles of international law do not allow a nation to prohibit or control activities involving, among other things, the comfort, convenience, or entertainment of airline passengers that take place outside its domestic commerce and territorial airspace on board civil aircraft registered in another nation.⁹³

The position paper supported this conclusion with a step-by-step analysis of international law, both customary and treaty-based – and not limited to the Chicago Convention. For example, the coalition acknowledged that the Tokyo Convention⁹⁴ allowed a State, in the event of a serious crime, to exercise jurisdiction over conduct on an aircraft registered in another State, but was limited to ‘offences against penal law’ or which jeopardize ‘the safety of the aircraft or of persons or property therein’ or ‘good order and discipline on board’, and that gambling did not meet any of these standards.⁹⁵ To date, no more detailed analysis of extraterritoriality in the context of air transportation has been assembled. And its warning that ‘the assertion of extra-territorial jurisdiction by the US over on-board activities outside the US on foreign aircraft opens a Pandora’s Box’⁹⁶ does appear to have been vindicated by subsequent developments, such as the ETS dispute.

Yet the coalition apparently had little influence upon DOT, which issued its report in the following year.⁹⁷ The report primarily considered the safety implications of in-flight gambling (both from an electronic perspective, and a passenger behavior perspective), as well as an economic analysis of the competitive implications for US carriers if only foreign carriers were allowed to offer in-flight gambling. Based upon its analysis, DOT recommended only that it monitor developments outside the US, and that the law remain unchanged.⁹⁸ But the report gave little attention to the legality of the prohibition, and did not

⁹¹ ‘Position Paper regarding Principles of International Air Law,’ see *supra* n. 9. The members of the coalition were Air France, Air New Zealand, All Nippon Airways, Iberia, Japan Airlines, Japan Air System, Lufthansa, Qantas, Singapore Airlines, Swissair, and Viasa. Foreign carriers that filed separate comments included British Airways, Qantas, and Virgin Atlantic; comments to the same effect also were filed by InterGame and TWA.

⁹² The joint diplomatic note – a copy of which was attached to the position paper – was submitted to the State Department on 19 Aug. 1994 by the embassies of Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom, and the European Commission.

⁹³ ‘Position Paper regarding Principles of International Air Law,’ see *supra* n. 9, at 1.

⁹⁴ Convention on Offences and Certain Other Acts Committed On Board Aircraft, 20 U.S.T. 2941, T.I.A.S. 6768, 704 U.N.T.S. 219 (14 Sep. 1963).

⁹⁵ ‘Position Paper regarding Principles of International Air Law,’ see *supra* n. 9, at 18–19.

⁹⁶ *Id.* at 30.

⁹⁷ Video Gambling in Foreign Air Transportation (Mar. 1996).

⁹⁸ *Id.* at 2, 52.

consider if its repeal should be recommended based on its incompatibility with international law.⁹⁹ Notably, it acknowledged the formal diplomatic protest previously submitted to the State Department,¹⁰⁰ but stated only that a change in the law ‘could be expected to eliminate this concern’.¹⁰¹ No evident consideration was given to whether the protest was, in fact, valid. DOT may have had few incentives to engage on the legal issues, since doing so could have required it to constrain its own future rulemaking authority – or possibly reconsider actions that it had taken in the past.¹⁰²

The Gorton Amendment has attracted more scholarly attention than any other extraterritorial DOT regulation – perhaps because the motives for its enactment have been documented to be at least partially commercial, as well as the practical difficulty of avoiding the ban because its prohibitions encompass the installation and transportation of gambling devices, not just their use.¹⁰³ There has been almost universal agreement among commentators that the Gorton Amendment violates international law.¹⁰⁴ But no foreign carrier has sought to mount a legal challenge to its validity. This is likely due to both the legal hurdles that would need to be overcome – as well as the possibility that a carrier could be fined or even forfeit its authority to serve the US if it violated the Gorton Amendment to enable a challenge, but the challenge ultimately failed.¹⁰⁵

⁹⁹ Darren A. Prum, ‘Flight Check: Are Air Carriers Any Closer to Providing Gambling on International Flights that Land or Depart from the United States?’ 74 J. Air L. & Com. 71, 89 (2009).

¹⁰⁰ See *supra* n. 92.

¹⁰¹ Video Gambling in Foreign Air Transportation, *supra* n. 97, at 6.

¹⁰² Although the US never officially responded to the diplomatic note – see Brian W. Foont, ‘American Prohibitions Against Gambling in International Aviation: An Analysis of the Gorton Amendment Under the Law of the United States and International Law’, 65 J. Air L. & Com. 409, 415 (2000) – the Chair of the House Committee on Transportation and Infrastructure reportedly did, responding that ‘the authority to decide to prohibit or allow a foreign airline to serve the United States includes the lesser authority to allow service, subject to conditions as to how the service will be operated.’ ‘Position Paper Regarding Principles of International Air Law Governing the Exercise of National Jurisdiction to Control Conduct Aboard Civil Aircraft,’ docket DOT-OST-1995-225, at 22 (May 31, 1995), quoting Letter from Representative Norman Y. Mineta to R.J. van Houtum, Charge d’Affaires, Royal Netherlands Embassy (26 Oct. 1994). Mineta would later serve as Secretary of Transportation (2001-06).

¹⁰³ Brian C. O’Donnell, ‘Gambling to be Competitive: The Gorton Amendment and International Law,’ 16 Dick. J. Int. L. 251, 260 (1997); Foont, *supra* n. 102, at 415.

¹⁰⁴ See, e.g. Jesse Witt, ‘Aces & Boats: As the Popularity of Cruise Ship Gambling Soars, Why Do the Airlines Remain Grounded?’ 28 Transp. L.J. 353 (2001); Nelson Rose, ‘Casinos on Cruise Ships, Why Not on Airplanes?’ 10 Gaming L. Rev. 519 (2006). The one exception – a law student comment – took the position that opponents of the ban had read the Chicago Convention too narrowly, but nevertheless concluded that the ban should be repealed, to prevent reciprocal actions by other nations. See Steven Grover, ‘Blackjack at Thirty Thousand Feet: America’s Attempt to Enforce Its Ban on In-Flight Gaming Extraterritorially,’ 4 Tex. Wesleyan L. Rev. 231 (1998).

¹⁰⁵ Brian C. O’Donnell, ‘Gambling to be Competitive: The Gorton Amendment and International Law’, 16 Dick. J. Int. L. 251, 261 (1997), citing James McKillop, ‘A fly wee flutter’ The Herald (Glasgow) (12 Apr. 1996) (‘British Airways is bowing to the United States attitude towards this vice. Legally, BA could do it, but so important are the American routes the airline would not dare take the gamble of upsetting

For the Gorton Amendment to be challenged in a US court, a foreign carrier likely would need to operate a gaming system on flights to/from the US; subject itself to an agency enforcement action; and appeal DOT's decision.¹⁰⁶ But courts typically favor Congress in the event of a conflict between a statute and a prior-in-time treaty, or a conflict between a statute and a principle of international law.¹⁰⁷ There also would be a risk of a 'split decision' – i.e., if a court were to find that the prohibition was impermissible to the extent that it prohibited their use over the high seas, but not to the extent that their installation and transportation was prohibited in US territory. Such a ruling would nominally enable foreign carriers to operate aircraft with gaming systems installed to/from the US, but would require them to be 'sealed' against usage upon arrival – a practice allowed for physical devices on cruise ships, but for which novel procedures would need to be developed for electronic gambling devices, and which might not be cost-effective.¹⁰⁸

Likewise, a challenge in an international forum also might not be successful. The World Trade Organization (WTO) has been suggested as a possible venue,¹⁰⁹ but most aviation-related services are not within the scope of the WTO.¹¹⁰ The US typically has not agreed to submit disputes to the International Court of Justice – and in any case, such a process would require a foreign government rather

authorities there'). Also unclear is if a US state – despite the federal preemption codified at 49 U.S.C. § 41713(b) – might attempt to apply its own anti-gambling statutes to gaming systems aboard a foreign aircraft that landed therein. See, e.g. N.Y. Penal Law § 225.30.

¹⁰⁶ 49 U.S.C. § 46110. See also Andrew W. McCune and Alexis Andrews, 'The Legality of Inflight Gaming: It's Up in the Air', 2 Gaming L. Rev. 361, 369–370 (1998). Also untested is the scope of the prohibition. The statute prohibits 'mechanical' and 'electronic' gambling devices, but apparently does not prohibit live table games or scratch cards. See Carron, *supra* n. 13, at 227. Moreover, a recent federal court decision concluded that poker was a game of skill and not a game of chance, and therefore did not comprise 'gambling' for the purpose of another statute. See *US v. DiCristina*, 886 F. Supp. 2d 164 (E.D.N.Y. 2012). See also Matthew Sinowestski, 'Is It Time Congress Revisits the Laws Restricting Gambling at 35,000 Feet?' 37 Transp. L.J. 143, 146 (2010) (listing states that have deemed poker to be a game of skill).

¹⁰⁷ Prum, *supra* n. 99, at 91; Carron, *supra* n. 13, at 222–223; Foont, *supra* n. 102, at 423; McCune and Andrews, *supra* n. 106, at 370–371. Some commentators have suggested that later-in-time bilateral and multilateral air services agreements could trump the Gorton Amendment. See Carron, at 223; Foont, at 423–424. But it is not clear at this time that a US court would consider such agreements – executive agreements not ratified by Congress, primarily intended to establish route rights for carriers – to override a federal statute, irrespective of the timing. See In re Air Cargo Shipping Services Antitrust Litigation, Report and Recommendation, E.D.N.Y. docket no. 06-MDL-1775, at 50–52 (22 Sep. 2010, adopted 1 Nov. 2010) (denying motion to dismiss Sherman Act antitrust claims based on subsequent air services agreements).

¹⁰⁸ Carron, *supra* n. 13, at 227; McCune and Andrews, *supra* n. 106, at 370.

¹⁰⁹ Prum, *supra* n. 99, at 93–94; Carron, *supra* n. 13, at 225–226.

¹¹⁰ The Annex on Air Transport Services to the General Agreement on Trade in Services (GATS) provides that only limited elements of air transportation are covered; specifically excluded are 'services directly related to the exercise of traffic rights,' see *Id.* at § 2(b). Although the phrase is not defined, it likely would be interpreted to encompass in-flight amenities, and thus a prohibition on in-flight gambling would be outside the jurisdiction of the WTO.

than a foreign carrier to take the lead role.¹¹¹ Despite the 1994 diplomatic note, foreign governments have not shown any apparent appetite to further push the issue – at least, by direct means. As the coalition, among others, had warned, the response could (and in fact has) come in the form of similar measures directed against the US in other contexts – ‘setting a precedent that the United States deems itself free to change the rules at its will cannot help but be met, sooner or later, with comparable actions’.¹¹²

4.2 SMOKING RESTRICTIONS

Prohibitions on smoking aboard aircraft operated by US carriers were first adopted in 1973,¹¹³ but not until 2000 were they extended to foreign carriers. At that time, Congress amended the underlying statute to specifically prohibit smoking on flights to/from the US – including on flights operated by foreign carriers.¹¹⁴ Based on the statute, DOT¹¹⁵ – as well as the FAA¹¹⁶ – amended implementing regulations. Neither agency addressed the extraterritorial implications of the new requirements – presumably because the new requirements had been mandated by Congress.¹¹⁷

But extraterritoriality-based objections previously had been raised before Congress. At a hearing on a prior version of the bill before the House Aviation Subcommittee, a representative of a coalition of foreign carriers testified that:

Established principles of international law do not allow a nation to prohibit or control activities involving, among other things, passenger accommodations and amenities that take place outside its domestic commerce and territorial airspace on board aircraft registered in other nations. ...

International law is crystal clear: that when an aircraft flying an international route is outside a particular State’s territorial jurisdiction, only the State of the aircraft’s nationality is competent to permit, regulate, or prohibit smoking, the serving of particular foods, alcoholic beverage consumption, gambling, the content of audio and visual programming, particular modes of dress, and the like.¹¹⁸

¹¹¹ Prum, *supra* n. 99, at 93; Carron, *supra* n. 13, at 224–225; McCune and Andrews, *supra* n. 106, at 372.

¹¹² Foont, *supra* n. 102, at 424. See also Prum, *supra* n. 99, at 95–96; Carron, *supra* n. 13, at 226.

¹¹³ ‘Provision of Designated ‘No-Smoking’ Areas Aboard Aircraft Operated By Certificated Air Carriers,’ 38 Fed. Reg. 12207 (10 May 1973).

¹¹⁴ Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. 106-181, § 708, codified at 49 U.S.C. § 41706(b).

¹¹⁵ 14 C.F.R. Part 252.

¹¹⁶ 14 C.F.R. § 121.317, § 129.29, and § 135.127.

¹¹⁷ ‘Smoking Aboard Aircraft,’ 65 Fed. Reg. 36772 (9 Jun. 2000); ‘Prohibition of Smoking on Scheduled Passenger Flights,’ 65 Fed. Reg. 36776 (9 Jun. 2000).

¹¹⁸ Testimony of William Karas, Partner, Steptoe and Johnson LLP, on behalf of the International Airline Coalition on the Rule of Law, The Airliner Cabin Air Quality Act of 1995, Hearing on H.R. 969 Before the House Subcommittee on Aviation of the Committee on Transportation and Infrastructure,

The Subcommittee asked DOT to respond; the agency subsequently submitted a brief statement asserting that it did have authority to do so, but relied only on statutes that generally authorized the Department to take actions necessary to carry out aviation statutes and to amend the certificates held by foreign carriers if doing so was in the public interest.¹¹⁹ DOT seemingly did not make any effort to specifically reconcile those statutes against principles of international law – although it conceded that efforts to achieve smoking restrictions would best be achieved through bilateral and multilateral negotiations, as well as that ‘protracted disputes over issues of international ... might only delay the full implementation of smoke-free aircraft on international flights’.¹²⁰

Little effort was made at the hearing to refute the coalition’s analysis. Congressman Oberstar – the senior Democrat on the Committee – briefly noted that the US did impose security- and safety-based obligations on foreign carriers, such as for traffic collision avoidance systems, but did not address how those rationales were applicable in the context of smoking – or the limits on the FAA’s authority to impose extraterritorial requirements.¹²¹ Indeed, a panelist conceded that the motivations for the ban were not just health-based, but also commercial.¹²²

Nevertheless, Congress subsequently adopted a statute that prohibited smoking on most foreign carrier flights to/from the US. It was an improvement over the Gorton Amendment in that it included a procedure to address foreign law

104th Congress, 2nd Session, at 14 (16 Jul. 1996). The members of the coalition were identified as Air New Zealand, All Nippon Airways, British Airways, Japan Airlines, Japan Air System, KLM, Lufthansa, Qantas, Singapore Airlines, Swissair, and TAP Air Portugal. The coalition also provided the subcommittee with a modified version of the position paper that it had drafted in opposition to the Gorton Amendment. See *supra* n. 92.

¹¹⁹ Response to Questions of Frank E. Krusei, Assistant Secretary for Transportation Policy, The Airliner Cabin Air Quality Act of 1995, Hearing on H.R. 969 Before the House Subcommittee on Aviation of the Committee on Transportation and Infrastructure, 104th Congress, 2nd Session, at 110 (16 Jul. 1996), citing 49 U.S.C. § 40113(a) and 49 U.S.C. § 41304(a).

¹²⁰ Response to Questions of Frank E. Krusei, *supra* n. 119, at 110. DOT also noted that the State Department was concerned that a statutory ban would be inconsistent with certain bilateral air services agreements.

¹²¹ The Airliner Cabin Air Quality Act of 1995, Hearing on H.R. 969 Before the House Subcommittee on Aviation of the Committee on Transportation and Infrastructure, 104th Congress, 2nd Session, at 17 (16 Jul. 1996). Contrast Steven A. Mirmina, ‘Aviation Safety and Security – Legal Developments’, 63 J. Air L. & Com. 547, 558–59 (1998) (asserting, after the hearing but prior to adoption of statute, that it would ‘violate[] some basic provisions of international air law’; ‘on an international route, any aircraft that is outside the territorial jurisdiction of a state may only be regulated by the state that owns or operates it’). For general discussion of the FAA’s authority, see *infra* section 6.

¹²² Statement of Patricia A. Friend, International President, Association of Flight Attendants, The Airliner Cabin Air Quality Act of 1995, Hearing on H.R. 969 Before the House Subcommittee on Aviation of the Committee on Transportation and Infrastructure, 104th Congress, 2nd Session, at 63 (16 Jul. 1996) (‘some carriers argue that until their foreign competitors no longer offer smoking flights, they cannot compete in those markets without offering smoking sections on their flights. H.R. 969 would solve this problem by banning smoking on all flights, foreign and domestic, that fly into and out of the United States’).

conflicts – perhaps an effort to mitigate the extraterritoriality concerns that had been voiced.¹²³ In particular, if a foreign government objected, the statute allowed DOT to waive the applicability of the prohibition to carriers from that country – but only ‘at such time as an alternative prohibition [is] negotiated ... and becomes effective’.¹²⁴ But the statute provided no inkling of what form such an ‘alternative’ prohibition should take – and no clarification was forthcoming, because no foreign government appears to ever have requested such a waiver. Whether the lack of interest in the waiver process was because other countries already had or were in the process of imposing similar smoking bans – or because any such request likely would have been futile – is not immediately obvious.¹²⁵ But in either case, another US assertion of extraterritorial jurisdiction had gone unchallenged.¹²⁶

5 DOT ENACTS EXTRATERRITORIAL REGULATIONS

Perhaps emboldened by the gambling and smoking statutes enacted by Congress, in the late 1990s DOT also began to impose new requirements on foreign carriers that dictated conduct beyond US borders. Often, DOT was not under a statutory requirement to impose extraterritorial requirements, but nevertheless aggressively chose to do so – a departure from CAB practice, which typically took careful consideration of international implications. These developments were of particular concern to foreign air carriers – but also set the stage for other governments to conclude that their aviation rules likewise can and should reach beyond their borders, impacting US carriers.

As a preliminary matter, although there have been no formal efforts to define the outer limits of DOT’s authority, side notes in various orders have suggested

¹²³ The joint explanatory statement in the underlying conference report, H. Rpt. 106-513 (8 Mar. 2000), briefly stated that: ‘Procedures established if foreign government objects to extraterritorial application of U.S. law.’

¹²⁴ 49 U.S.C. § 41706(c)(1). See also 14 C.F.R. § 252.5(b).

¹²⁵ In 1992, a non-binding ICAO resolution urged Member States ‘to take necessary measures as soon as possible to restrict smoking progressively on all international passenger flights with the objective of implementing complete smoking bans by 1 July 1996.’ See *Smoking Restrictions on International Passenger Flights*, Resolution A29-15 (1992), published in ICAO Document 9600, A29-RES http://www.policyaundering.org/archives/ICAO/Resolutions_29th_Session.pdf. The US was a co-sponsor of the resolution. See Testimony of Frank E. Krusei, Assistant Secretary for Transportation Policy, US Department of Transportation, *The Airliner Cabin Air Quality Act of 1995*, Hearing on H.R. 969 Before the House Subcommittee on Aviation of the Committee on Transportation and Infrastructure, 104th Congress, 2nd Session, at 11 (16 Jul. 1996).

¹²⁶ DOT recently proposed to close some of the few remaining loopholes in the regulations (i.e., for charter flights), although the waiver procedure would remain. See ‘Smoking of Electronic Cigarettes on Aircraft,’ 76 Fed. Reg. 57008 (15 Sep. 2011). Congress itself subsequently amended the charter language, but did not modify the waiver procedure. See *FAA Modernization and Reform Act of 2012*, Pub. L. 112-95, § 401.

that DOT considers itself to have jurisdiction over flights between two foreign points even if there is only an attenuated link to the US, such as that more than a ‘*de minimus* amount of traffic ... [has] an origin or destination in the United States’.¹²⁷ While not necessarily dispositive, this interpretation of ‘foreign air transportation’ appears to have created and/or reflected a regulatory environment in which DOT perceives few limits to its authority – and over time, the agency appears to have become ever less receptive to challenges to its authority and concerns about extraterritoriality.

5.1 PASSENGER MANIFEST AND FAMILY ASSISTANCE REQUIREMENTS

In 1990, Congress directed DOT to require US carriers to collect information from passengers – such as names, passport numbers, and the name and telephone number of a contact – and be able to provide such information to the State Department in the event of an ‘aviation disaster’.¹²⁸ The statutory requirements did not specifically extend to foreign carriers, but directed DOT to consider whether similar requirements should be extended to them;¹²⁹ a number of foreign carriers submitted comments arguing that they should not do so, for reasons including extraterritoriality:

Extension of the ... requirements to JAL, for example, would require that it collect information in Japan, from passengers who are mostly non-U.S. citizens, for the use of the U.S. Department of State. Japan, however, constitutionally guarantees the right of privacy and this right protects from mandatory disclosure precisely the type of personal information that JAL would have to collect. ... As a result, the extension of any data collection requirement to JAL would place it in the untenable position of being forced to choose between a U.S. requirement and the demands of its own sovereign. The doctrine of comity – long recognized by U.S. law – was developed precisely to avoid the possibility of such conflicting demands.¹³⁰

¹²⁷ See, e.g. DOT Order 2002-5-25, at 5 (2 Jun. 2002); Notice of Action Taken, docket DOT-OST-1998-3760 (1 Mar. 2002). See also DOT Order 97-9-6 (5 Sep. 1997) (asserting jurisdiction over Air Canada-SAS code-share agreement that would route passengers between Canada and Scandinavia via points in the US); DOT Order 2002-11-11 (22 Nov. 2002) (dismissing complaint alleging Part 382 violations on a British Airways connecting flight between Cork and London without addressing jurisdictional issues); DOT Order 2005-10-9, at 8 (13 Oct. 2005) (conceding that interline connecting service beyond a foreign gateway was not within DOT’s jurisdiction, but nevertheless ‘expect[ing] Lan to take the necessary steps to ensure that their passengers can easily identify the operating carrier for any connecting service’).

¹²⁸ Aviation Security Improvement Act of 1990, Pub. L. 101-604, § 203, codified at 49 U.S.C. § 44909.

¹²⁹ ‘Aviation Security: Passenger Manifest Information,’ 56 Fed. Reg. 3810, 3810 (31 Jan. 1991).

¹³⁰ Comments of Japan Airlines, Aviation Security: Passenger Manifest Information, docket DOT-OST-1995-950, at 2 (19 Feb. 1991) (n. omitted). Other parties that filed comments included Aerocancun, Air Condor, Air India, Air Jamaica, Balair, British Airways, Condor, Royal Air Maroc, Swissair, the Asociación Internacional de Transporte Aéreo Latinomaericano, the Orient Airlines Association, and the Embassy of the Philippines (on behalf of Philippine Airlines).

Despite this initial opposition, in 1996 DOT did propose to impose requirements on both US carriers and foreign carriers. The agency noted that one justification for the inclusion of foreign carriers was to prevent the disparate treatment of passengers; but DOT also noted that Congress in subsequent statutes specifically had prohibited it from adopting manifest requirements which only applied to US carriers.¹³¹ Additionally, DOT scaled back the requirements in an effort to address the extraterritoriality concerns, including by: (i) limiting the collection obligation to US citizens and permanent residents, (ii) limiting the obligation to flight segments to/from the US, and (iii) providing for a waiver if a carrier or foreign government notified DOT of a conflict with foreign law.¹³²

The concessions proposed by DOT did not satisfy many foreign carriers, and numerous comments were filed in opposition – far exceeding the number previously filed. In a joint diplomatic note, twenty embassies took the position that:

It is contrary to the universally-accepted international legal principle of territoriality under which one state may not mandate that a particular course of conduct take place in the territory of another state on pain of criminal and civil penalties – particularly as regards conduct of persons not nationals of the first state. Thus, the US Government has no jurisdiction to require non-US air carriers to collect information and take other actions in the territory of other sovereign states. In particular, the US Government does not have the authority to require non-US carriers to take actions in their home countries that are not required by the domestic laws of those countries or by the treaties and international agreements to which those countries are party. The proposal, if adopted, would infringe on the sovereignty of the home countries of the non-US carriers affected.¹³³

Or, as Lauda expressed its concerns:

If the U.S. ignores these fundamental principles of international law, it could no longer justifiably object to other countries' attempts to dictate various requirements to U.S. carriers, e.g., security requirements they are to observe within the United States, the type of food they can serve on flights to that country, or what type of clothing passengers could wear.¹³⁴

¹³¹ 'Passenger Manifest Information,' 61 Fed. Reg. 47692, 47698 (10 Sep. 1996), citing Department of Transportation and Related Agencies Appropriations Act of 1996, Pub. L. 104-50, § 319.

¹³² *Id.*

¹³³ The signatories were Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom and the European Commission.

¹³⁴ Comments of Lauda Air, Aviation Security: Passenger Manifest Information, docket DOT-OST-1995-950, at 2 (12 Nov. 1996). Other parties that filed comments included Aerolíneas Argentinas, Air Canada, Air New Zealand, Air Pacific, All Nippon Airways, British Airways, Japan Airlines, Laker Airways, Lufthansa, Qantas, SAS, Swissair, Turkish Airlines, Varig, the Arab Air Carriers Organization, the European Civil Aviation Conference, IATA, ICAO and the Orient Airlines Association.

Nevertheless, in 1998 DOT adopted a final rule, which continued to encompass foreign carriers – noting that in the meantime, a foreign carrier was unable to provide prompt, complete, and accurate manifest information following an accident in Guam.¹³⁵ DOT did make some additional reductions to the scope of the requirements without explicitly acknowledging the rationale therefor. Notably, foreign carriers that operated only aircraft designed for sixty seats or less were exempted, and the requirement to collect passport numbers also was deleted.¹³⁶ Additionally, DOT clarified that a contact name and telephone number should be solicited, but was not mandatory; carriers should not pressure passengers or imply that it was a government requirement.¹³⁷ The agency added that the opportunity to request a conflict-of-law waiver remained, but should not be necessary in light of the changes.¹³⁸

Also, while the agency's review of the comments was in progress, Congress required that US carriers¹³⁹ – and subsequently foreign carriers¹⁴⁰ – adopt 'family assistance plans' setting out procedures to assist relatives of passengers in the event of an 'aviation disaster'. Because the requirements were dictated by Congress, no specific forum was provided for public comment, and thus there was no specific opportunity to raise objections grounded in extraterritoriality; but when DOT adopted the manifest requirement, as an aside it discussed the family assistance requirement for foreign carriers, noting that:

The new requirements have been carefully drafted to apply to accidents that occur within the United States jurisdiction. The existing requirements for U.S. air carriers were adjusted for the foreign air carriers to be consistent with our international obligations. For example, foreign air carriers may provide substitute measures for certain provisions of the Act, such as compensation to an organization designated by the NTSB for services and direct assistance provided to families as a result of the aviation disaster.¹⁴¹

DOT also exempted foreign carriers that operated only aircraft designed for sixty seats or less, even though the underlying statute facially applied to all foreign carriers. As for the manifest rules, the end product was limited in scope – perhaps implicitly conceding that DOT's authority had limitations.¹⁴²

¹³⁵ 'Passenger Manifest Information,' 63 Fed. Reg. 8258, 8261 (18 Feb. 1998) (specifically noting that after the crash of Korean Air flight 801 on 6 Aug. 1997, 'there were significant delays in providing information to concerned families at Seoul's Kimpo Airport, in both responding to callers and notifying the families').

¹³⁶ *Id.* at 8272-73.

¹³⁷ *Id.* at 8273.

¹³⁸ *Id.* at 8275. In fact, no waiver applications were filed in the docket established for foreign carriers to submit information about their procedures, DOT-OST-1998-3305.

¹³⁹ Aviation Disaster Family Assistance Act of 1996, Pub. L. 104-264, codified at 49 U.S.C. § 41113.

¹⁴⁰ Foreign Air Carrier Family Support Act of 1997, Pub. L. 105-148, codified at 49 U.S.C. § 41313.

¹⁴¹ 63 Fed. Reg. at 8262.

¹⁴² DOT Order 98-1-31 (3 Feb. 1998).

5.2 THE WARSAW CONVENTION REVISITED

In 1993, IATA submitted an application to DOT for antitrust immunity for intercarrier discussions concerning the limits and conditions of passenger liability established by the passage of the Warsaw Convention, and in particular to update the 'interim' liability regime for flights to/from the US established by the CAB in the 1960s;¹⁴³ DOT subsequently blessed such discussion authority, noting the failure of ongoing efforts to update the treaty itself.¹⁴⁴ After several extensions,¹⁴⁵ IATA and ATA submitted a set of draft agreements to DOT in 1996 (an intercarrier agreement and two implementing agreements). The agreements provided that carriers under most circumstances would waive the liability limits for death and injury to passengers, and the defense of non-negligence, for claims up to 100,000 Special Drawing Rights (SDR; at the time, approximately USD 145,000).¹⁴⁶ In an order to show cause, DOT proposed to approve the use of the intercarrier agreement for flights to/from the US – but with conditions.

Notably, DOT stated that certain potentially optional elements of the agreement be made mandatory for flights to/from the US, including that: (i) damages be determined by the law of a passenger's domicile, (ii) the 100,000 SDR strict liability provision be applied throughout itineraries to/from the US (including interline operations), (iii) the Warsaw Convention liability waiver apply on a systemwide basis, (iv) the ticketing carrier ensure that interline partners were parties to the agreement or apply the same liability standards, and (v) the courts of a passenger's domicile/permanent residence have jurisdiction over claims – a so-called fifth jurisdiction, adding to the four fora made available by the Warsaw Convention.¹⁴⁷

DOT's proposal to layer additional terms on top of the intercarrier agreement negotiated by IATA attracted considerable opposition – much of it premised on its extraterritorial nature. For example, IATA noted that the Warsaw Convention specifically provided only for the filing of suits in the specified four fora, and that any agreement altering its jurisdiction was 'null and void';¹⁴⁸ thus the provision

¹⁴³ See *supra* section 2.1.

¹⁴⁴ DOT Order 95-2-44 (22 Feb. 1995), citing 49 U.S.C. §§ 41308, 41309.

¹⁴⁵ DOT Order 95-7-15 (19 Jul. 1995); DOT Order 95-12-14 (11 Dec. 1995); DOT Order 96-1-25 (23 Jan. 1996); and DOT Order 96-3-46 (21 Mar. 1996).

¹⁴⁶ DOT Order 96-10-7 (7 Oct. 1996). For a summary of the intercarrier discussions, see, e.g. Andrea L. Buff, 'Reforming the Liability Provisions of the Warsaw Convention: Does the IATA Intercarrier Agreement Eliminate the Need to Amend the Convention?' 5 *Fordham Intl. L.J.* 1768, 1813–1814 (1996).

¹⁴⁷ DOT Order 96-10-7. The four fora are the country of the carrier's domicile; the country of a carrier's place of business; the country where the contract for air travel was made; or the country of destination. See Article 28.

¹⁴⁸ See Article 32.

proposed by DOT was unenforceable, unless the treaty was disregarded.¹⁴⁹ IATA also reminded DOT that a statute underlying its authority ‘prohibit[ed] the Department from infringing on any US obligations under international agreements, regardless of whether the Secretary determines such infringement to be in the public interest’.¹⁵⁰ One carrier described DOT’s proposal as:

[S]eek[ing] to extend United States policy extraterritorially without authority and in violation of international law ... The proposed action of the DOT is an unlawful attempt to sidestep the legal obligations to which the United States agreed when it ratified the Warsaw Convention, and to impose its will and policies on the carriers of the world.¹⁵¹

Subsequently, DOT deferred action on most of its proposals – but continued to insist on certain modifications, most notably that damages be calculated based on the law of the domicile mandatory for flights to/from the US.¹⁵² DOT acknowledged that there were ‘fundamental questions of the scope of the Department’s authority to impose permit and other authority conditions’,¹⁵³ and stated that by narrowing the conditions, there would be no basis for carriers not to implement the intercarrier agreement: ‘[t]his will leave time for the serious consideration that the comments and other pleadings require.’¹⁵⁴

However, IATA sought reconsideration of the law of the domicile requirement, noting that numerous carriers simply would not adhere to the intercarrier agreement if doing so would require that compensatory damages for flights to/from the US would be calculated under US law.¹⁵⁵ Ultimately the agency backed down, in the interests of the immediate implementation of the

¹⁴⁹ Objections of IATA, at 2 (24 Oct. 1996). Other parties that filed comments in dockets DOT-OST-1995-232 and DOT-OST-1996-1607 included Air Europa, Finnair, Gulf Air, Korean Air Lines, Lufthansa, Pakistan International, Royal Jordanian, Swissair, the Association of European Airlines, IATA and the Orient Airlines Association. A joint diplomatic note also was submitted by the embassies of Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom and the European Commission.

¹⁵⁰ Objections of IATA, at 19 (24 Oct. 1996), citing 49 U.S.C. § 40105.

¹⁵¹ Comments and Objections of Kuwait Airways, at 3 (24 Oct. 1996). Although atypically blunt, these comments were not unique. See, e.g. Motion to File Late Comments by Paul Stephen Dempsey, at 16 (30 Oct. 1996) (‘[o]n several occasions, the U.S. government has insisted that the world community “Jump,” and expected an answer only of “How high?”’). Kuwait Airways’ comments also argued that the 1960s agreement was no precedent: ‘It simply was not worth fighting about, since the carriers were agreeable. Neither in a ‘legal’ or any other sense can the carriers['] inaction in 1966 and thereafter confer upon the DOT the authority to act and impose new rules.’ *Id.* at 6.

¹⁵² DOT Order 96-11-6 (12 Nov. 1996). DOT also continued to require certain modifications that had not attracted significant objections, such as that the 100,000 Special Drawing Rights (SDR) strict liability provision be applied to flights to/from the US, despite agreement language which would have allowed governments to authorize waivers of the strict liability provision on a route-by-route basis.

¹⁵³ *Id.* at 6.

¹⁵⁴ *Id.*

¹⁵⁵ ‘IATA Petition for Reconsideration of Order 96-11-6,’ Agreement Relating to Liability Limitations of the Warsaw Convention, dockets DOT-OST-1995-232 and DOT-OST-1996-1607 (20 Dec. 1996).

intercarrier agreement, and removed this provision as a condition.¹⁵⁶ Thus, at the end of the process, little about the intercarrier agreement had been changed – but DOT again had taken an aggressive posture on extraterritoriality, and shown a willingness to back down only when confronted with overwhelming criticism.¹⁵⁷

5.3 AIR CARRIER ACCESS ACT REGULATIONS

The Air Carrier Access Act (ACAA),¹⁵⁸ as initially adopted in 1986 – and the revised implementing regulations subsequently adopted in 1990¹⁵⁹ – applied only to US carriers, which limited efforts by DOT to impose standards on foreign carriers' treatment of passengers with disabilities.¹⁶⁰ However, in 2000 Congress amended the law to also apply to foreign carriers.¹⁶¹ In the following years, DOT initiated several different rulemaking proceedings to revise the implementing regulations to also apply to foreign carriers, in addition to other revisions. A 2003 amendment required both US and foreign carriers to submit annual reports of disabilities-related complaints that they had received.¹⁶² But not until 2008 did DOT adopt a comprehensive set of new rules (for both US and foreign carriers), consolidating proposals that had been put forward in three separate dockets.¹⁶³

¹⁵⁶ DOT Order 97-1-2 (8 Jan. 1997).

¹⁵⁷ DOT had suggested that further consideration would be given to the modification of the intercarrier agreement; DOT Order 97-1-2 as supplemented by DOT Order 98-8-28 (24 Aug. 1998) immunized further discussions. But no further proposals were submitted to DOT. However, the 'fifth jurisdiction' would be included in the Montreal Convention (formally the Convention for the Unification of Certain Rules for International Carriage by Air, 28 May 1999, T.I.A.S. 13038, 2242 U.N.T.S. 350), which entered into effect in 2003 and which largely – but not entirely – has supplanted the Warsaw Convention. Subsequently, DOT approved a new intercarrier agreement, revised to incorporate the liability standards of the Montreal Convention, as well as EU requirements such as EC Regulation 261/2004. See DOT Order 2006-6-4 (8 Jun. 2006) and DOT Order 2006-10-14 (31 Oct. 2006).

¹⁵⁸ 49 U.S.C. § 41705.

¹⁵⁹ 14 C.F.R. Part 382.

¹⁶⁰ In the 1990 final rule, DOT rejected proposals that it seeks to regulate foreign travel agents and airports, or that it regulate foreign carriers via the terms of leases at Federally-assisted airports. See 'Nondiscrimination on the Basis of Handicap in Air Travel,' 55 Fed. Reg. 8008, 8015–8016 (6 Mar. 1990). However, in three subsequent consent orders, DOT did assert jurisdiction over foreign carriers – each having refused to transport a passenger with a disability – pursuant to 49 U.S.C. § 41310, which prohibits 'unreasonable discrimination' in foreign air transportation. See DOT Order 98-9-23 (23 Sep. 1998); DOT Order 98-12-19 (15 Dec. 1998); DOT Order 2000-8-18 (22 Aug. 2000). The predecessor of Section 41310 (Section 404 of the Federal Aviation Act, 49 U.S.C. App. § 1374) also was the basis for the disabilities regulations adopted by the CAB in 1982, prior to the enactment of the ACAA. See 'Nondiscrimination on the Basis of Handicap,' 47 Fed. Reg. 25936 (16 Jun. 1982). But in two of the DOT enforcement cases, the carrier only agreed to cease and desist from such practices; in the third, a token USD 1000 fine was paid. See also Lawrence Mentz, 'Air Carrier Access Act and Foreign Air Carriers: 'Handicapping' Regulations,' 15 Air & Space L. 8, 8–9 (Fall 2000).

¹⁶¹ Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. 106-181, § 707.

¹⁶² 'Reporting Requirements for Disability-Related Complaints,' 68 Fed. Reg. 40488 (8 Jul. 2003).

¹⁶³ 'Nondiscrimination on the Basis of Disability in Air Travel,' 73 Fed. Reg. 27614 (13 May 2008). In the interim, DOT had stated that the existing provisions of Part 382 would serve 'as guidance in investigating any complaints it receives of non-compliance by foreign carriers with the ACAA.' See

To no surprise, foreign carriers expressed concern about the extraterritorial implications of the proposals. For example, the ACAA amendment that extended the statute to foreign carriers explicitly cross-referenced the statute which requires DOT to ‘act consistently with obligations of the United States Government under an international agreement’ and ‘consider applicable laws and requirements of a foreign country’.¹⁶⁴ As IATA noted, despite these caveats, the proposal ‘prescribe[d] specific arrangements for disabled passengers within foreign countries and set[] standards on how non-US carriers have to treat disabled passengers while their aircraft are within the jurisdiction of other sovereigns’.¹⁶⁵ Other parties also noted that DOT had failed to notify ICAO of its intention to deviate from standards and recommended practices (SARPs) adopted pursuant to the Chicago Convention.¹⁶⁶ Notably, DOT previously had conceded that a motivating force in the rulemaking was that it would be easier and quicker to adopt its own regulations than to seek international agreement through IATA or other negotiations.¹⁶⁷

As ultimately adopted, the regulations did provide that foreign carriers could request a waiver from DOT if a foreign law (not necessarily limited to its homeland) conflicts with a DOT requirement.¹⁶⁸ DOT stated that this provision fulfilled the statutory requirement; i.e. was in keeping ‘with the Department’s obligation and commitment to giving due consideration to foreign law where it

‘Applicability of the Air Carrier Access Act (49 U.S.C. 41705) to Foreign Air Carriers Under A Recent Statutory Revision’ (18 May 2000), http://www.dot.gov/sites/dot.dev/files/docs/2000_0518.pdf. See also DOT Order 2002-11-11 (22 Nov. 2002).

¹⁶⁴ 49 U.S.C. § 40105(b). See also Constance O’Keefe, ‘Disabled Passengers and Disconcerting Rules’ 19 *Air & Space Lawyer* 1, 19 (Spring 2005); David Heffernan, ‘The US Government Prepares to Make Non-US Airlines Subject to New Rules Regarding the Transportation of Disabled Passengers,’ 29 *Air & Space L.* 245, 251 (2004).

¹⁶⁵ Comments of IATA, docket DOT-OST-2004-19482, at 2 (4 Mar. 2005). IATA, as well as British Airways and Virgin Atlantic, submitted comments regarding the extraterritorial scope of the 2003 reporting requirements (docket DOT-OST-2000-11473). The later, more extensive proposals attracted extraterritoriality-based comments from Air Canada, Air France, Air New Zealand, Air Pacific, Air Tahiti Nui, Air Transat, All Nippon Airways, Britannia Airways, Cathay Pacific, Finnair, First Choice, Japan Airlines, Kuwait Airways, Lufthansa, Martinair, Mexicana, Olympic, Pakistan International, Qantas, Saudi Arabian, SN Brussels, TACA, WestJet, and Virgin Atlantic, as well as the Association of Asia Pacific Airlines, the Association of European Airlines, the European Civil Aviation Conference, and IATA, and the governments of Australia, New Zealand, and the United Kingdom.

¹⁶⁶ See, e.g. Comments of Qantas, docket DOT-OST-2004-19482, at 5 (4 Mar. 2005) (noting that SARPs were adopted under the authority of Article 37 and deviation notices required by Article 38; the US had ‘not submitted any notice that its laws and regulations deviate from the ICAO SARPs which would suggest that the United States has accepted, and is complying with ICAO’s standards’).

¹⁶⁷ ‘Nondiscrimination on the Basis of Disability in Air Travel,’ 69 Fed. Reg. 64364, 64376 (4 Nov. 2004) (‘IATA frequently takes a long time to devise standards, and its standards are often advisory rather than mandatory. In any case, it would probably be much more difficult for the Department to enforce IATA materials than to enforce a DOT regulation’). See also Comments of IATA, *supra* n. 165, at 10.

¹⁶⁸ 14 C.F.R. § 382.9.

applies'.¹⁶⁹ DOT also provided that if a waiver request was submitted prior to 10 September 2008 (i.e., four months after the rules were published and eight months before the rules took effect), a foreign carrier would not be required to comply with the applicable DOT provision unless and until DOT denied the waiver application.¹⁷⁰

But the waiver procedure has limitations. As an initial matter, a foreign carrier must show that a direct conflict exists: 'the foreign legal mandate must require legally something that Part 382 prohibits, or prohibit something that Part 382 requires'.¹⁷¹ Additionally, DOT indicated that an application generally should describe how a foreign carrier would achieve compliance through an alternate method or justify why it would be impossible to do so,¹⁷² and has recommended that even if the text of a regulation suggests that a foreign carrier is exempt from an obligation, an explicit waiver still should be requested.¹⁷³ If a carrier did not submit a waiver request for an existing law before the statutory deadline, it must comply with Part 382 until it obtains the waiver – irrespective of any consequences under foreign law.¹⁷⁴ And as a practical matter, numerous applications have been pending for more than four years – or at least DOT has failed to publicize its decisions on them.¹⁷⁵ This creates uncertainty not just for the applicants but passengers and other carriers that might use decisions for

¹⁶⁹ 'Nondiscrimination on the Basis of Disability in Air Travel,' 73 Fed. Reg. 27614, 27616 (13 May 2008). See also *Id.* at 27618 (asserting that Part 382 was consistent with the Chicago Convention, e.g. '[t]he authority of ICAO under Article 37 to issue standards and recommendations does not purport to pre-empt a signatory state's authority to issue rules concerning air commerce to and from its airports').

¹⁷⁰ 14 C.F.R. § 382.9(e). A similar standard applies to an application for a waiver of newly enacted foreign laws.

¹⁷¹ 'Nondiscrimination on the Basis of Disability in Air Travel,' 73 Fed. Reg. 27614, 27616 (13 May 2008).

¹⁷² 14 C.F.R. § 382.9(c)(3).

¹⁷³ 'Nondiscrimination on the Basis of Disability in Air Travel,' 74 Fed. Reg. 11469, 11470 (18 Mar. 2009). For example, 14 C.F.R. § 382.87(a) generally provides that a passenger with a disability may not be excluded from any particular seat, except to comply with FAA or applicable foreign requirements.

¹⁷⁴ 14 C.F.R. § 382.9(e). See also O'Keefe, *supra* n. 164, at 20 ('by requiring that the U.S. standards be observed until such waivers are granted, the DOT again asserts its view of the primacy of U.S. law and its right to apply it extraterritorially').

¹⁷⁵ Twenty-six waiver applications have been docketed from EU carriers (some encompassing more than one carrier). All included a request for an exemption from 14 C.F.R. § 382.17, which prohibits limits on the number of passengers with a disability who may travel on a flight. But DOT has not posted any decisions on these requests in the assigned docket (DOT-OST-2008-0272). Similarly, there has been no action on many other waiver requests from EU and other foreign carriers; notably, most EU applications also sought waivers of § 382.19 (which sets forth circumstances under which transportation may be denied), § 382.25 (which generally prohibits advance notice requirements), § 382.29 (which sets forth circumstances under which a safety assistant may be required), § 382.87 (which sets forth seating requirements), § 382.117 (which sets forth service animal requirements), and § 382.133 (which sets forth requirements for respiration assistance devices).

guidance. To the extent DOT has acted on waiver applications, the results largely have been negative;¹⁷⁶ only two appear to have been granted.¹⁷⁷

Apart from the waiver process, foreign carriers also objected to specific proposals on extraterritoriality grounds. The more specific the objection, the more likely that it was successful. Vague assertions that the 2003-vintage complaint reporting requirement would be extraterritorial and could have negative consequences were not successful.¹⁷⁸ Likewise, certain carriers unsuccessfully argued that non-US citizens should not be entitled to submit disabilities-related complaints to DOT.¹⁷⁹ But in other cases, DOT responded to comments through modifications to the final rule, notably by withdrawing its assertion of direct jurisdiction over foreign carriers for flights between foreign points that carried the code of a US carrier.¹⁸⁰ DOT also clarified that to the extent foreign countries made airports and not carriers primarily responsible for assisting passengers with disabilities in the terminal, there was no conflict with Part 382 – but carriers could look first to the airports to provide assistance, supplementing only as necessary.¹⁸¹ However, DOT modified the final rule to provide that the only type of service

¹⁷⁶ DOT has denied applications premised on the EU having assigned certain responsibilities to airports instead of carriers; DOT concluded that this was not a direct conflict, because carriers could supplement the services provided by the airports. The regulations at issue included § 382.91 (which sets forth requirements for assisting passengers with a disability in moving within the terminal), § 382.95 (which sets forth general requirements for boarding and deplaning assistance), § 382.101 (which sets forth additional requirements for boarding and deplaning assistance), § 382.103 (which sets forth standards for leaving passengers unattended), § 382.141 (which sets forth training standards), § 382.151 (which sets forth Complaint Resolution Official (CRO) requirements), § 382.153 (which sets forth procedures for CROs to respond to complaints), and § 382.155 (which sets forth procedures for responding to other complaints).

¹⁷⁷ DOT has made available approvals of waiver applications filed by Air Jamaica and South African Airways, both of which concerned conflicts between the US requirements for service animals and the requirements of other countries (docket DOT-OST-2008-0272).

¹⁷⁸ 'Reporting Requirements for Disability-Related Complaints,' 68 Fed. Reg. 40488, 40489 (8 Jul. 2003). An objection left unaddressed by DOT was whether it even had authority to require reporting by foreign carriers; the underlying statute prohibited discrimination by both US and foreign carriers, but only required DOT to review complaints submitted to US carriers. See Comments of British Airways, docket DOT-OST-2000-11473, at 1 (May 29, 2002); Karas and Gosain, *supra* n. 8, at 6–7.

¹⁷⁹ 73 Fed. Reg. at 27644 ('the ACAA protects 'individuals with disabilities,' with no limitations on the nationality of those individuals'); 14 C.F.R. § 382.157(b).

¹⁸⁰ See, e.g. Comments of Air France, docket DOT-OST-2005-22298, at 2 (30 Jan. 2006) ('under this proposed rule, Air France would have to respect the obligations imposed in all its flights where the code of an Air France's [sic] U.S. air carrier partner is used'); 73 Fed. Reg. at 27615 ('[i]n response to these comments, the Department has changed the applicable provision of the final rule'). See also 14 C.F.R. § 382.7(c).

¹⁸¹ 73 Fed. Reg. at 27619; 14 C.F.R. § 382.105. The regulation also notes that a carrier may seek a conflict-of-law waiver if it is legally prohibited from supplementing the services provided by the airport. See also *supra* n. 176.

animals that foreign carriers were required to accept were dogs, even though specific objections to requiring the transport of other types of animals ‘were generally not articulated’.¹⁸²

Yet requirements in the final rule still have the potential to directly or indirectly impose significant extraterritorial requirements – or the burden and cost of obtaining a waiver. For example, as above foreign carriers were generally mandated to accept dogs (but not other animals) as service animals, and also generally prohibited from requiring supporting documentation if a passenger could provide a ‘credible verbal assurance’ or other evidence of its status.¹⁸³ But many other countries impose stricter standards that directly conflict with this regulation – i.e. specific documentation is required, or the transport of all animals is prohibited. As noted *supra*, two carriers have obtained a waiver based on their home country’s laws,¹⁸⁴ but eleven similar applications have been pending since 2009 without docketed resolution.¹⁸⁵

An additional issue of concern is the extent to which Part 382 applies to flights between two foreign points, if a flight is operated by a foreign carrier but a passenger is ticketed by a US carrier on a code-share basis. As above, the regulations provide that under such circumstances, the US ticketing carrier – and not the foreign operating carrier – is obliged to ensure that certain Part 382 requirements are met.¹⁸⁶ Left unaddressed are the practical challenges of such a standard – and in recent guidance, DOT has blurred the distinction, suggesting that foreign carriers in fact do have a direct obligation to comply with US

¹⁸² See, e.g. Comments of Lufthansa, docket DOT-OST-2004-19482, at 8 (4 Mar. 2005) (‘[o]ther animals like horses, pigs or monkeys as listed in the NPRM shall not be accepted since they may cause unacceptable risks for cabin safety and health’). See also 73 Fed. Reg. at 27636; 14 C.F.R. § 382.117(f). Subsequently, the regulations implementing the Americans with Disabilities Act – which do not apply to air transportation – were amended to provide that under most circumstances only dogs will be considered to be service animals – see 28 C.F.R. § 36.104 – but the ACAA regulations applicable to US carriers have not been revised.

¹⁸³ 14 C.F.R. § 382.117.

¹⁸⁴ See *supra* n. 177. Interestingly, when the CAB first adopted disabilities regulations for US carriers in 1982, the service dog requirement explicitly applied to flights in foreign air transportation only ‘where such carriage is not prohibited by the laws of the other country.’ See former 14 C.F.R. § 382.14(a).

¹⁸⁵ See docket DOT-OST-2008-0272 (Air New Zealand, Air Pacific, British Airways, Cathay Pacific, Emirates, Ethiopian, Etihad, Flyglobespan, LAN, Malaysia Airlines, TACA, and Virgin Atlantic). DOT also has docketed a letter asserting that it previously rendered a decision on an application by Qantas – but informally has informed the author that this assertion was in error.

¹⁸⁶ 14 C.F.R. § 382.7(c). CAB and DOT precedent indicates that a US carrier that arranges for a foreign carrier to operate flights between two foreign points, as part of a continuous operation to/from the US, can be required to ensure that the foreign carrier meets US requirements – but these precedents primarily concerned safety, not services. See, e.g. ‘Code-share Safety Program Guidelines’ (21 Dec. 2006), http://www.faa.gov/air_traffic/international_aviation/media/code_share_guidelines.pdf; ‘Capitol-Arkia Wet Lease,’ 101 C.A.B. 670, CAB Order 83-4-34 (7 Apr. 1983); ‘Air Florida-BIA Wet Lease,’ 102 C.A.B. 730, CAB Order 83-7-56 (14 Jul. 1983). However, in DOT Order 98-9-22 (23 Sep. 1998), DOT fined a US carrier USD 3000 on the ground that it failed to ensure that a foreign partner complied with Part 382 on a code-share flight. See also *supra* n. 160.

disabilities regulations on flights between two foreign points, contrary to the text of the regulations.¹⁸⁷ DOT did not squarely address the issue of extraterritoriality, which is notable given DOT's stated intent to further expand the applicability of its disabilities regulations for code-share flights between foreign points.¹⁸⁸

Moreover, further overall expansion of the disabilities regulations is anticipated – and the proposals that DOT has made public to date did not appear to give full consideration to extraterritoriality concerns. For example, in 2011 DOT requested comments on new accessibility requirements for carrier websites and airport kiosks.¹⁸⁹ The latter proposal would only apply to kiosks at US airports, but the former may have more wide-ranging implications. Notably, DOT solicited input as to whether the requirements apply to 'all their Web sites regardless of whether they are marketing air transportation mainly to US consumers'.¹⁹⁰ No legal basis was cited for the proposition that DOT could or should regulate foreign carrier conduct beyond US borders – and in a subsequent notice, DOT appeared to concede that the proposal was unsustainable.¹⁹¹

5.4 CONSUMER PROTECTION REGULATIONS

In response to public and Congressional pressure, at the end of 2009 DOT adopted a set of 'enhanc[ed] airline passenger protection'¹⁹² regulations; however, the new requirements only applied to US carriers. Subsequently, DOT proposed to expand the scope of the requirements, as well as to extend most of them to foreign carriers.¹⁹³ For many of the proposals, DOT at the outset indicated that the requirements would only apply within the US; for example, to the extent that

¹⁸⁷ Notably, in a draft revision of its Technical Assistance Manual, DOT repeatedly suggested that foreign carriers 'will be required to carry service animals other than dogs on code-share flights,' even though foreign carriers generally are only required to accept dogs as service animals. See Comments of Air New Zealand, docket DOT-OST-2012-0098, at 1 (3 Oct. 2012). See also 'Nondiscrimination on the Basis of Disability in Air Travel,' 77 Fed. Reg. 39800 (5 Jul. 2012); 14 C.F.R. § 382.117(f).

¹⁸⁸ 'Nondiscrimination on the Basis of Disability in Air Travel,' 74 Fed. Reg. 11469, 11470 (18 Mar. 2009).

¹⁸⁹ 'Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports,' 76 Fed. Reg. 59307 (26 Sep. 2011).

¹⁹⁰ *Id.* at 71916. Contrast DOT's position in regard to consumer protection requirements applicable to websites; see *infra* n. 199.

¹⁹¹ 'Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports,' 76 Fed. Reg. 71914, 71915-16 (21 Nov. 2011) ('[o]ur intention in the proposal is and continues to be to exempt both U.S. and foreign carriers' Web sites that market air transportation to consumers outside the U.S.'). See also Comments of All Nippon Airways, docket DOT-OST-2012-0177, at 2 (9 Jan. 2012) ('it should be beyond question that DOT neither should nor can regulate sales practices of foreign carriers in their home countries or in third countries').

¹⁹² 'Enhancing Airline Passenger Protections,' 74 Fed. Reg. 68983 (30 Dec. 2009).

¹⁹³ 'Enhancing Airline Passenger Protections,' 75 Fed. Reg. 32318 (8 Jun. 2010).

both US and foreign carriers would be required to formulate response plans for and report data about tarmac delays, only delays at US airports were within the scope of the regulations.¹⁹⁴

But in many other cases, the DOT's proposals as initially formulated appeared to expect compliance beyond US borders. The Notice of Proposed Rulemaking (NPRM) attracted extensive comments from IATA, among other parties:

As written, the NPRM proposes to apply U.S. laws on foreign airlines' operations on foreign soil on such matters as fares, reservations, contingency planning, advertising and customer service. On its face, this is an extraterritorial application of U.S. law on foreign carriers that cannot be justified by the Department's stated broad mandate to ensure safe and adequate transportation and/or to address unfair or deceptive practices by the airlines.¹⁹⁵

In the final rule DOT addressed many – but not all – of these concerns, and narrowed the scope of the regulations.¹⁹⁶

- Foreign carriers for the first time would be required to adopt customer service plans.¹⁹⁷ Foreign carriers objected that many of the plan requirements would apply to sales made outside the US. DOT noted that some of the requirements cross-referenced existing regulations – such as Part 250 (oversales) and Part 382 (disabilities) – that already had been subject to analysis of their extraterritorial effects.¹⁹⁸

¹⁹⁴ See, e.g. 14 C.F.R. § 244.2; 14 C.F.R. § 259.4. Additionally, charter flights that originate outside the US and do not pick up passengers in the US are generally exempt from the new requirements. See 14 C.F.R. § 259.2.

¹⁹⁵ Comments of IATA, Enhancing Airline Passenger Protections, docket DOT-OST-2010-0140, at 4 (23 Sep. 2010). Foreign carriers and other trade associations that also filed comments which expressed concerns about extraterritoriality – in varying levels of detail – included Air Berlin, Air France, Air New Zealand, Air Thaiti Nui, Alitalia, All Nippon Airways, Arik Air, British Airways, Cathay Pacific, Condor, Japan Airlines, Jetstar Airways, KLM, Lufthansa, Qantas, Singapore Airlines, Swiss International Air Lines, TAP Portugal, VivaAerobus, Virgin Atlantic, the Association of Asia Pacific Airlines, the International Air Carrier Association, the Latin American and Caribbean Air Transport Association, and the National Airlines Council of Canada. Additionally, comments also were submitted by the Washington Aviation Assembly, which includes representatives of 35 embassies (Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Indonesia, Ireland, Italy, Japan, Korea, Luxembourg, Malaysia, Malta, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Singapore, Spain, Sweden, Switzerland, Thailand, Turkey, and the United Kingdom).

¹⁹⁶ Three US carriers filed an unsuccessful appeal of some of the new requirements. See *Spirit Airlines, Inc., et al. v. DOT*, 687 F.3d 403 (D.C.Cir. 2012). Although none of the issues raised by the US carriers were grounded in extraterritoriality, IATA filed an amicus curiae brief that raised extraterritoriality as an issue. See Brief of Amicus Curiae IATA in Support of Petitioners and Intervenor, D.C.Cir. docket no. 11-1219 (14 Nov. 2011).

¹⁹⁷ 14 C.F.R. § 259.5.

¹⁹⁸ 'Enhancing Airline Passenger Protections,' 76 Fed. Reg. 23110, 23123 (25 Apr. 2011). See also 14 C.F.R. § 259.5(b)(6); 14 C.F.R. § 259.5(b)(8). See also *supra* sections 2.4, 3.1, and 5.3.

- DOT emphasized that new requirements to provide online disclosures typically would only apply to the extent that a foreign carrier marketed to US consumers.¹⁹⁹ For example, the requirement to inform consumers about how to submit complaints to the carrier²⁰⁰ would not apply to foreign carriers' home websites 'unless those sites market to US consumers'.²⁰¹ Likewise, requirements that information be provided at airports typically would only apply at US airports,²⁰² and changes to DOT's policy on price advertising was 'limited to advertisements published in the United States'.²⁰³
- At the same time, DOT clarified that services on or related to a foreign carrier 'flight' are covered by the new regulations; the term refers to a continuous journey in the same aircraft or with one flight number that began or ended at a US airport. For example, if a foreign carrier's flight 100 was a direct flight from San Francisco to Singapore with a stop in Hong Kong, the customer service plan requirements would apply to both segments for passengers who originated in or were destined for the US.²⁰⁴
- Certain proposals that had attracted objections grounded in extraterritoriality – i.e. that carriers ensure that code-share partners have comparable customer service plans,²⁰⁵ and incorporate their customer service plans into their contracts of carriage²⁰⁶ – were omitted from the final rule.

However, the guidance provided along with the final rule did not resolve all questions regarding the scope of the new requirements beyond US borders. DOT subsequently issued an 'FAQ' – and four revisions thereof – in an effort to provide additional clarification, including about extraterritorial issues:

- DOT declined to provide a specific definition of a website 'marketed to US consumers', but stated that the factors it would consider on a case-by-case basis are: '1) if the website is in English, 2) if tickets are sold in US dollars, 3) if it lists flights to or from the US, 4) whether sales are blocked for customers with US addresses or telephone numbers, and 5) even if a site is in a language other

¹⁹⁹ 'Enhancing Airline Passenger Protections,' 76 Fed. Reg. at 23123.

²⁰⁰ 14 C.F.R. § 259.5(b)(11); 14 C.F.R. § 259.7.

²⁰¹ 'Enhancing Airline Passenger Protections,' 76 Fed. Reg. at 23133.

²⁰² *Id.* at 23123.

²⁰³ *Id.* at 23143.

²⁰⁴ *Id.* at 23123.

²⁰⁵ *Id.* at 23128.

²⁰⁶ *Id.*

than English, if the site is marketed toward a particular segment of the US market (e.g., website in Spanish and geared toward consumers in Miami).²⁰⁷

- DOT also clarified that certain requirements as published inadvertently referred to websites ‘accessible for ticket purchases by the general public in the US’, which suggested that they were applicable to foreign carriers’ home websites;²⁰⁸ until such time as this language is corrected, DOT shall apply these regulations only to websites marketed to US consumers.²⁰⁹
- In informal guidance,²¹⁰ DOT previously had suggested that the requirement to provide information about baggage fees on e-ticket confirmations – based on its literal text – applied to all transactions and was not limited to transactions that occurred in the US.²¹¹ In the FAQ, DOT backed away from this position and stated that as a matter of policy it would apply this regulation only to confirmations provided by websites marketed to US consumers.²¹²
- Additionally, a considerable portion of the FAQ is devoted to explaining the distinctions between DOT’s new regulation that mandates consistent baggage fees/rules on interline itineraries²¹³ and the baggage fee standards previously endorsed by IATA.²¹⁴ Generally, DOT expects the regime of the carrier that markets the first segment of an itinerary to apply throughout; IATA previously recommended that the regime of the ‘Most Significant Carrier’ apply throughout.²¹⁵ But under certain circumstances the DOT rule can have extraterritorial effect; i.e., it can expect that a foreign carrier that is part of an interline itinerary apply a certain baggage regime, even if that carrier does not serve the US and the IATA standards point to a different regime. Under such circumstances, DOT has stated that even though it would not have jurisdiction to bring an enforcement action against that carrier, it could take action against the carrier that issued the

²⁰⁷ ‘Answers to Frequently Asked Questions Concerning the Enforcement of the Second Final Rule on Enhancing Airline Passenger Protections (EAPP #2),’ at 17 (15 Jun. 2012), http://airconsumer.ost.dot.gov/rules/EAPP_2_FAQ.pdf.

²⁰⁸ 14 C.F.R. § 399.85(a) – (b).

²⁰⁹ ‘Answers to Frequently Asked Questions,’ see *supra* n. 207, at 26 and 28.

²¹⁰ DOT held a set of forums in Jul. 2011 to provide informal guidance to the industry about the new regulations; a set of PowerPoint slides based on presentations given at the forums has been made available by DOT at <http://www.dot.gov/airconsumer/April-2011-Amendments> (23 Oct. 2012).

²¹¹ 14 C.F.R. § 399.85(c).

²¹² ‘Answers to Frequently Asked Questions,’ see *supra* n. 207, at 32.

²¹³ 14 C.F.R. § 399.87.

²¹⁴ ‘Answers to Frequently Asked Questions,’ see *supra* n. 207, at 36–38.

²¹⁵ ‘Baggage Provisions Selection Criteria,’ IATA Resolution 302 (10 Oct. 2008). A copy of the resolution was submitted to DOT in docket DOT-OST-2008-0370; DOT subsequently, with conditions, granted antitrust immunity to the resolution, which allowed – but did not mandate – US and foreign carriers to implement it. See DOT Order 2009-9-20 (5 Oct. 2009).

ticket.²¹⁶ Given that this reasoning and assertion appear only in the FAQ – and were never subjected to notice-and-comment rulemaking – their validity appears to be an open question.

Despite these clarifications, uncertainties still remain about the scope of the new requirements.²¹⁷ For example, although in the FAQ DOT acknowledged that its assertion in certain regulations of jurisdiction over any website ‘accessible’ in the US had been in error, it did not withdraw every such assertion.²¹⁸ Nor do the consumer protection regulations – unlike the disabilities regulations – include any procedure for a carrier to request a conflict-of-law waiver.²¹⁹

Moreover, even to the extent that DOT has narrowed the scope of the new regulations, it may not be practical for many foreign carriers to establish separate channels of communication with US consumers and foreign consumers, or other distinctions necessary to avoid applying them to all consumers. For example, if a foreign carrier that serves the US maintains only a single website for all customers, it must meet DOT standards, even when conducting a transaction entirely outside the United States. As a former DOT Assistant Secretary observed soon after the new rules were adopted:

Because most carriers cannot or will not go to the trouble of making granular distinctions in customer service policies based on flight numbers, or point of sale, or the citizenship of their customers, DOT has effectively extended US regulation on customer service to every international airline that serves the American market.²²⁰

Finally, although the new regulations had the (presumably intended) effect of reducing pressure on Congress to impose new consumer protection requirements by statute, a 2012 law that had the primary purpose of reauthorizing FAA

²¹⁶ ‘Answers to Frequently Asked Questions,’ see *supra* n. 207, at 38 ([t]he validating carrier has an interline ticketing agreement with all the carriers on the ticket and we would expect that carrier not to put on the same ticket airlines that will not work with the other carriers on the ticket to ensure the same baggage fee/allowance applies throughout a passenger’s journey’).

²¹⁷ 14 C.F.R. § 259.7(a).

²¹⁸ ‘Enhancing Airline Passenger Protections,’ 76 Fed. Reg. at 23143 (‘the requirement for advertisements to state the total price is limited to advertisements published in the United States, *including via the Internet if accessible in the U.S.*’) (emphasis added). See also Comments of All Nippon Airways, Enhancing Airline Passenger Protections, docket DOT-OST-2010-0140, at 7 (23 Sep. 2010) ([s]ince virtually any web site in the world is ‘accessible’ in the United States, this requirement could be read to apply to virtually all web sites, regardless of whether they are targeted at consumers in the U.S., or whether the carrier even serves the United States’).

²¹⁹ Various parties suggested that the DOT regulations could conflict with foreign requirements – such as EC Regulation 261/2004 – but no specific conflicts appear to have been asserted. See, e.g. Comments of IATA, Enhancing Airline Passenger Protections, docket DOT-OST-2010-0140, at 8, 10, and 15 (23 Sep. 2010).

²²⁰ Andrew B. Steinberg and Jeffrey S. DeVore, ‘U.S. Department of Transportation Sets Airline Customer Service Standards with Stringent New Rules on U.S. and Foreign Carriers’ (May 2011), <http://www.jonesday.com/us-department-of-transportation-sets-airline-customer-service-standards-with-stringent-new-rules-on-us-and-foreign-carriers-05-05-2011/>.

programs did include one new requirement with extraterritorial implications. In particular, most foreign carriers were required to display ‘on the Internet Web site of the carrier’ contact information for the DOT’s Aviation Consumer Protection Division, as well as their own contact information for the submission of complaints.²²¹ Congress arguably intended this statute to have extraterritorial application, because other new requirements specified that they only applied within the US.²²² But in subsequent guidance, DOT stated that for foreign carriers, the information was required to be provided only on ‘websites that are marketed to US consumers’.²²³ This suggests that DOT may recognize some limits to its jurisdiction, even when Congress does not.

6 THE CONTRASTING APPROACH OF THE FAA TO EXTRATERRITORIALITY

The FAA is nominally part of the DOT, but has a specialized and separate role. While DOT is responsible for ‘economic’ regulation, the FAA is responsible for ‘safety’ regulation (and also was responsible for security, pre-9/11).²²⁴ Historically, aviation safety matters have seemed to engender greater international cooperation than ‘economic’ matters – which is not to say that they have been frictionless.²²⁵ Although post-deregulation the FAA has adopted requirements that could be described as extraterritorial, it often (although not always) has been more cautious than DOT before doing so – and typically has sought to specifically justify requirements that were adopted as valid exercises of extraterritorial authority, or alternatively depict them as not being extraterritorial at all.

No discussion of the FAA’s approach to extraterritoriality would be complete without a discussion of *British Caledonian Airways Limited v. Bond*.²²⁶ After the crash of a DC-10 shortly after take-off from Chicago O’Hare International Airport on 25 May 1979, the FAA issued an emergency ruling, which suspended the

²²¹ FAA Modernization and Reform Act of 2012, Pub. L. 112-95, § 415, codified at 49 U.S.C § 42302.

²²² For example, the new 49 U.S.C § 42303 required foreign carriers to provide passengers with a link to DOT information about foreign countries’ use of insecticides, but only for tickets sold in the US.

²²³ Guidance on the FAA Modernization and Reform Act Requirements that US and Foreign Air Carriers Place Consumer Complaint-Related Information on Their Websites and Refer Consumers to the Department’s Website on the Issue of Insecticides in Passenger Aircraft (19 Apr. 2012), http://www.dot.gov/sites/dot.dev/files/docs/Notice_re_air%20carriers_providing%20website_complaint_information_final_4_19_12_1.pdf.

²²⁴ See, e.g. Thomas J. Whalen and Anthony A. Santangelo, ‘United States Regulation of Non-US Airlines Operating to the United States’, 30 Air & Space Law 330, 331 (2005).

²²⁵ For example, Article 83bis (1997) of the Chicago Convention was adopted to allow the transfer of safety regulatory responsibilities among States, recognizing that aircraft registered in one State may be predominantly operated in another. The adoption and implementation of the amendment are examples of international cooperation – but, conversely, the actual ratification process required seventeen years. See also Morris, *supra* n. 14, at 17.

²²⁶ 665 F.2d 1153 (D.C.Cir. 1981).

airworthiness certificates of domestic DC-10 aircraft, and prohibited the operation in US airspace of foreign-registered DC-10 aircraft.²²⁷ Several foreign carriers challenged the ruling. The US Court of Appeals for the District of Columbia Circuit agreed that the FAA's action had been inconsistent with applicable international agreements and thus inconsistent with the US statute that required it to exercise its powers consistently with them. In particular, Article 33 of the Chicago Convention requires that 'the judgment of the country of registry that an aircraft is airworthy must be respected, unless the country of registry is not observing the "minimum standards" set by ICAO; that the FAA had not questioned that the foreign countries at issue met those minimum standards; and that the FAA was required in exercising its powers to 'do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries'.²²⁸ Thus, the FAA has been explicitly on notice that an issue of extraterritoriality must be taken seriously – and in most cases, has acted accordingly.

6.1 DRUG AND ALCOHOL TESTING

In 1988, the FAA established drug-testing requirements for employees of US carriers.²²⁹ Even though the regulations did not apply to foreign carriers, the agency was careful to ensure that the requirements would not engender conflicts with the laws or policies of another country, to the extent that the regulations would apply to employees of US carriers who were located in foreign countries. Initially, the FAA provided that the new regime would not take effect until 1 January 1990 'in any situation where a foreign government contends that compliance with our rule raises questions of compatibility with its domestic laws or policies' and generally stated that 'it is the intention of the US Government to make every effort to resolve potential conflicts with foreign governments in a manner that accommodates their concerns while ensuring the necessary level of safety by those we regulate'.²³⁰

Subsequently, the FAA noted that twelve foreign governments had submitted objections, deleted the affirmative obligation for a diplomatic response, and

²²⁷ 'Special Federal Aviation Regulation No. 40: Operation of Model DC-10 Airplanes in United States Prohibited,' 44 Fed. Reg. 33389 (8 Jun. 1979). In contrast, the recent FAA grounding of the B787 was not purported to have extraterritorial effect. See Emergency Airworthiness Directive (AD) no. 2013-02-51 (16 Jan. 2013).

²²⁸ 49 U.S.C. § 40105(b).

²²⁹ 'Anti-Drug Program for Personnel Engaged in Specified Aviation Activities,' 53 Fed. Reg. 47024 (21 Nov. 1988).

²³⁰ *Id.* at 47050.

extended the compliance deadline outside US territory in order to allow more time for government-to-government discussions.²³¹ But after additional extensions, which asserted that progress was being made,²³² in 1994 the FAA withdrew the testing requirements for employees of US carriers located outside the US, stating that '[a]lthough the FAA has been pursuing multilateral initiatives through the International Civil Aviation Organization (ICAO),'²³³ '[s]ignificant practical and legal concerns surrounding implementation of the antidrug rule outside the territory of the United States remain.'²³⁴ The FAA since has re-emphasized that its regulations do not require drug and alcohol testing outside the US for employees of US carriers.²³⁵

The FAA separately proposed alcohol-testing requirements for employees of US carriers in the late 1980s – and likewise acknowledged that they could have international implications.²³⁶ Although the proposal did not suggest that the new requirements would apply to foreign carriers, at least three foreign carriers submitted objections out of a concern that the agency might seek to do so. Notably, Air Europa stated that it:

shares and supports the Department's objective of ensuring that flight crews are alcohol free when operating aircraft in civil aviation. However, the worthiness of the objective does not justify a unilateral action by one country in violation of the sovereignty of other nations. ... if the Department believes that additional measures are required to preserve an alcohol-free operating environment in international civil aviation, it should attempt to achieve its objective through the internationally accepted multilateral procedures administered by the International Civil Aviation Organization (ICAO). However, it cannot violate the national sovereignty of its foreign aviation partners by unilaterally imposing regulations which purport to have an extra-territorial effect.²³⁷

²³¹ 'Anti-Drug Program for Personnel Engaged in Specified Aviation Activities,' 54 Fed. Reg. 15148, 15150 (14 Apr. 1989).

²³² 'Anti-Drug Program for Personnel Engaged in Specified Aviation Activities,' 54 Fed. Reg. 53282 (27 Dec. 1989); 'Anti-Drug Program for Personnel Engaged in Specified Aviation Activities,' 56 Fed. Reg. 18978 (24 Apr. 1991); 'Anti-Drug Program for Personnel Engaged in Specified Aviation Activities,' 57 Fed. Reg. 31275 (14 Jul. 1992).

²³³ 'Antidrug Program for Personnel Engaged in Specified Aviation Activities,' 59 Fed. Reg. 7412, 7416 (15 Feb. 1994).

²³⁴ 'Antidrug Program for Personnel Engaged in Specified Aviation Activities,' 59 Fed. Reg. 42922, 42927 (19 Aug. 1994).

²³⁵ 'Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities,' 71 Fed. Reg. 1666, 1671 n. 3 (10 Jan. 2006).

²³⁶ 'Alcohol Abuse Program for the Transportation Industry,' 54 Fed. Reg. 46326, 46332 (2 Nov. 1989).

²³⁷ Comments of Air Europa, Alcohol Abuse Prevention Program for the Transportation Industry, FAA docket 46574, at 3-4 (31 Jan. 1990). Similar comments were submitted in the same docket on behalf of Japan Airlines and Swissair, both of which urged that: 'Consistent with fundamental respect for foreign laws and policies, it should remain the province of foreign governments and non-U.S. air carriers to assess the issue of alcohol abuse as it pertains to them and to address that issue in the manner most appropriate to their own needs and circumstances.'

Air Europa's comments were prescient. Although the FAA did not, in the proceeding at issue, actually propose to impose alcohol testing requirements on foreign carriers,²³⁸ shortly thereafter Congress instructed the agency to expand its drug and alcohol testing requirements to foreign carriers²³⁹ – but with the caveat that it should 'establish only requirements applicable to foreign air carriers that are consistent with international obligations of the United States, and... consider applicable laws and regulations of foreign countries'.²⁴⁰ Based on this directive, the FAA solicited comments, recognizing that international implications of such requirements needed to be considered. In particular, the FAA postulated that it had authority to impose such requirements to the extent that the navigation and operation of foreign carriers within US territory was at issue, but conceded that it 'would not propose, for example, to apply its drug and alcohol rules to the performance of safety-sensitive functions by foreign air carrier employees outside the territory of the United States'.²⁴¹ Additionally, the agency stated that '[w]e also recognize the concerns of foreign countries, and are aware of the practical considerations that may arise' and noted that ICAO was considering a resolution that called upon members to strengthen or enforce existing standards to prohibit the use of alcohol or drugs by crew members in international civil aviation.²⁴²

In response to the FAA's call for comments, numerous foreign carriers and governments filed objections, taking the position that any unilateral testing requirements would be beyond the agency's jurisdiction, based both on general principles of international law and the Chicago Convention.²⁴³ The FAA did not specifically respond to these objections, but noted that ICAO subsequently had adopted the aforementioned resolution and was developing guidance materials based upon it. As a result, although the agency initially suggested that it would apply its own guidelines if ICAO failed to do so by 1996, it added that '[t]he FAA remains optimistic that an international solution will be reached'.²⁴⁴ The year 1996 came and went with no further action by the FAA, but in 2000, the agency announced that the rule would be withdrawn. The FAA cited progress at ICAO as the primary reason for the withdrawal, but also conceded that 'significant practical

²³⁸ 'Limitation on Alcohol Use by Transportation Workers,' 59 Fed. Reg. 7302, 7337 (15 Feb. 1994).

²³⁹ 49 U.S.C. § 45102.

²⁴⁰ 49 U.S.C. § 45106(b).

²⁴¹ 'Anti-Drug Program and Alcohol Misuse Prevention Program for Employees of Foreign Air Carriers Engaged in Specified Aviation Activities,' 57 Fed. Reg. 59473, 59475 (15 Dec. 1992). See also 'Limitation on Alcohol Use by Transportation Workers,' 57 Fed. Reg. 59382, 59408 (15 Dec. 1992).

²⁴² 'Anti-Drug Program and Alcohol Misuse Prevention Program for Employees of Foreign Air Carriers Engaged in Specified Aviation Activities,' 57 Fed. Reg. 59473, 59475 (15 Dec. 1992).

²⁴³ 'Antidrug Program and Alcohol Misuse Prevention Program for Employees of Foreign Air Carriers Engaged in Specified Aviation Activities,' 59 Fed. Reg. 7420, 7421 (15 Feb. 1994). See also 'Limitation on Alcohol Use by Transportation Workers,' 59 Fed. Reg. 7302, 7337 (15 Feb. 1994).

²⁴⁴ 'Antidrug Program and Alcohol Misuse Prevention Program for Employees of Foreign Air Carriers Engaged in Specified Aviation Activities,' 59 Fed. Reg. 7420, 7422 (15 Feb. 1994).

and legal concerns' had influenced its conclusion 'that unilateral imposition of testing regulations on foreign carriers is not warranted'.²⁴⁵

6.2 INTERNATIONAL AVIATION SAFETY ASSESSMENTS PROGRAM (IASA)

In 1992, the FAA established a program – which eventually would become known as the International Aviation Safety Assessments (IASA) program – to evaluate whether foreign air safety authorities engaged in adequate oversight of their carriers. If the FAA determined that they did not, no new services by carriers from that country would be allowed, and carriers already serving the US would not be allowed to modify their services.²⁴⁶ Nominally, this program may not be at odds with the Chicago Convention, because the FAA is imposing safety requirements on foreign governments, not carriers,²⁴⁷ with consequences only for flights that enter US airspace; FAA even described the program as having been created so that 'the efficacy of the Convention can be enhanced'.²⁴⁸

But even if it does not officially regulate foreign carriers on an extraterritorial basis, IASA certainly does so in effect – and from the beginning was criticized as such, especially by carriers from affected countries,²⁴⁹ some of which suggested that the program was at least partially motivated by politics and economics.²⁵⁰ '[T]he United States is today seeking to exert itself as the world's policeman in civil aviation safety. ... [N]o other country has taken regulation of a foreign carrier's access – in terms of safety – to such an extreme.'²⁵¹ But the FAA apparently saw no conflict in acting as the enforcer of international standards: 'We are not doing anything arbitrary or unilateral. ... We tell governments: You signed the Chicago Convention, you have obligations.'²⁵²

²⁴⁵ 'Antidrug Program and Alcohol Misuse Prevention Program for Employees of Foreign Air Carriers Engaged in Specified Aviation Activities,' 65 Fed. Reg. 2079, 2080 (13 Jan. 2000).

²⁴⁶ 'Information Concerning FAA Procedures for Examining and Monitoring Foreign Air Carriers,' 57 Fed. Reg. 38342 (24 Aug. 1992).

²⁴⁷ Mark Lee Morrison, 'Navigating the Tumultuous Skies of International Aviation: The Federal Aviation Administration's Response to Non-Compliance with International Safety Standards,' 2 Sw. J. L. & Trade Am. 621, 639 (1995). The limited set of FAA regulations applicable to foreign carriers appear at 14 C.F.R. Part 129. See also Anthony J. Broderick and James Loos, 'Government Aviation Safety Oversight - Trust, but Verify,' 67 J. Air L. & Com. 1035, 1040–1041 (2002).

²⁴⁸ 'Public Disclosure of the Results of Foreign Civil Aviation Authority Assessments,' 59 Fed. Reg. 46332, 46333 (8 Sep. 1994).

²⁴⁹ Morrison, *supra* n. 247, at 638.

²⁵⁰ Shadrach A. Stanleigh, 'Excess Baggage at the F.A.A.: Analyzing the Tension between Open Skies and Safety Policing in U.S. International Civil Aviation Policy,' 23 Brook. J. Intl. L. 965, 984 (1998).

²⁵¹ Broderick and Loos, *supra* n. 247, at 1039; Shadrach A. Stanleigh, 'Excess Baggage at the F.A.A.: Analyzing the Tension between Open Skies and Safety Policing in U.S. International Civil Aviation Policy,' 23 Brook. J. Intl. L. 965, 982–83 (1998).

²⁵² William J. McGee, 'Two Sets of Rules,' Air Transport World, 164 (Jun. 1994) (quoting Anthony J. Broderick, Associate Administrator for Regulation and Certification). See also Morrison, *supra*

Some commentators have concluded that, practically speaking, IASA was a positive development, to the extent that it has required certain countries to upgrade aviation safety.²⁵³ There appears to be some truth to that position; the IASA program has been recognized as a driving force in the creation of a Universal Safety Oversight Audit Programme by ICAO, which evaluates Member States, including the US.²⁵⁴ And once ICAO had established its own program, the FAA amended IASA to promote coordination with ICAO and other relevant sources of information.²⁵⁵ Nonetheless, the underlying reasoning of IASA can be construed to be that the ends justify the means, and the Chicago Convention's recognition of each nation's sovereignty is a problem to be circumvented. Such logic would appear to be at odds with the FAA's more tempered response to extraterritoriality in the context of drug and alcohol testing requirements – yet parallels the EU justification for unilaterally adopting ETS.²⁵⁶ This seeming contradiction regrettably could encourage foreign governments to adopt a similar stance in their dealings with the US regarding safety standards.²⁵⁷

6.3 HAZARDOUS MATERIALS

Part 175 of the federal transportation regulations²⁵⁸ technically is administered by the Pipeline and Hazardous Materials Safety Administration, but responsibility for its enforcement in connection with the transportation of hazmats by aircraft has

n. 247, at 639 (concluding that IASA program was justified by Chicago Convention's assignment of complete and exclusive sovereignty over the airspace above a country's territory).

²⁵³ Roncevert D. Almond, 'Measuring and Building Safe Skies Over Africa,' 41-Summer International Law News 14 (2012).

²⁵⁴ Paul Stephen Dempsey, 'Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety,' 30 N.C. J. Intl. L. and Com. Reg. 1, 35-36 (2004); Broderick and Loos, *supra* n. 247, at 1053. See also 'Confidential Final Audit Report of the Federal Aviation Administration of the United States' (7 to 25 Jun. 1999).

²⁵⁵ 'Changes to the International Aviation Safety Assessment (IASA) Program,' 65 Fed. Reg. 33751 (25 May 2000). Additionally, the model text for bilateral air services agreements negotiated by the State Department and DOT now explicitly provides, in Article 6, that a party's services can be limited if its safety oversight does not meet ICAO's minimum standards. See <http://www.state.gov/e/eb/rls/othr/ata/114866.htm> (12 Jan. 2012).

²⁵⁶ See, e.g. Speech of EU Ambassador Joao Vale de Almeida to the International Aviation Club of Washington (14 Dec. 2011), <http://www.iacwashington.org/Resources/Documents/2011-12-14-IACspeech.pdf> ('ICAO has been grappling with this issue for several years and progress has been slow.... We could not wait any longer. That is why the EU decided ... to take action by including aviation in the EU Emissions Trading System').

²⁵⁷ And some actually may have done so. In the early 1990s, US efforts to impose an 'over-60' prohibition on Icelandair pilots – in reliance on ICAO standards, rather than US standards – allegedly resulted in the Icelandic government threatening to close the US base at Reykjavik; only after State Department intervention did the FAA grant a time-limited waiver to Icelandair. William J. McGee, 'Two Sets of Rules,' Air Transport World, 164 (Jun. 1994). See also Letter from Jacques Astre, Principal Operation Inspector, FAA, to Guomundur Magunsson, Director, Icelandair (8 Nov. 1993) (on file with author).

²⁵⁸ 49 C.F.R. Part 175.

been delegated to FAA.²⁵⁹ This is another subject area for which standards typically have been developed through international cooperation. But a close reading of the history of these regulations finds a suggestion that the notification requirements imposed by the US upon both its own carriers and foreign carriers may have extraterritorial effect.

In particular, in 1993 a new section was added, which for the first time required notices about the requirements of US law and the penalties for non-compliance to be provided to consumers ‘at each facility where cargo is accepted’,²⁶⁰ supplementing a pre-existing requirement that notices be provided to passengers.²⁶¹ ATA was among the parties which submitted comments, and argued that if the regulation was intended ‘to require display of cargo notices in cargo acceptance locations of US air carriers at foreign airports, then for those locations, the requirement to print those notices in English makes little sense’.²⁶² The FAA rejected this contention – observing that notices could be provided in other languages, in addition to English. Implicit in the agency’s response was that ATA’s assumption – that the regulation applied to US carrier cargo facilities abroad – was correct.

But if that is the case, the hazmat notification regulations also would appear to apply to foreign carrier cargo facilities abroad – and to passenger facilities abroad of both US and foreign carriers. Nothing in Part 175 suggests that its requirements are not to be uniformly applied to both US carriers and foreign carriers.²⁶³ Yet despite their extraterritorial nature, no objections appear to have been raised to these requirements. One explanation may be that even though US and international hazmat requirements can differ,²⁶⁴ foreign carriers have found no reason to strenuously object to a requirement that is motivated by safety and for which compliance is relatively straightforward. However, the FAA recently has expanded the scope of the regulations, to require carriers not only to provide

²⁵⁹ See, e.g. ‘Sanction Guidance for Violations of Drug and Alcohol Testing Regulations,’ FAA Order 2150.3B, § 2(2)(a) (1 Oct. 2007); 49 C.F.R. § 1.83(d).

²⁶⁰ 49 C.F.R. § 175.26.

²⁶¹ 49 C.F.R. § 175.25.

²⁶² ‘Transportation of Hazardous Materials: Miscellaneous Amendments,’ 58 Fed. Reg. 50496 (27 Sep. 1993).

²⁶³ See also ‘Air Carrier Hazardous Materials Passenger Notification Requirements: Acceptable Means of Compliance,’ 77 Fed. Reg. 43141 (23 Jul. 2012) (responding to question which presumed that ‘[t]his rule applies to 14 CFR 129 foreign carriers that operate from the U.S.’ but not clarifying limits of rule).

²⁶⁴ See, e.g. ‘Hazardous Materials: Harmonization with the United Nations Recommendations, International Maritime Dangerous Goods Code, and the International Civil Aviation Organization Technical Instructions for the Safe Transport of Dangerous Goods by Air,’ 76 Fed. Reg. 3382 (19 Jan. 2011).

notice to passengers but also to obtain their affirmative consent.²⁶⁵ It remains to be seen if this added burden will motivate foreign carriers to question the limits of FAA's jurisdiction beyond US borders.

6.4 OVERFLIGHT FEES

In 1996, Congress authorized the FAA to collect fees for flights that transit US-controlled airspace, but which neither land in nor depart from the US.²⁶⁶ In adopting a fee schedule for its air traffic services (ATS),²⁶⁷ the FAA emphasized that '[c]harging overflights for ATS is accepted in the international arena', relying on ICAO guidance.²⁶⁸ Several foreign carriers challenged the regulations, arguing that they discriminated against international carriers and violated international aviation agreements – an argument quite similar to, if not exactly identical to, extraterritoriality.²⁶⁹ The US Court of Appeals for the District of Columbia Circuit remanded the matter to the FAA based on a finding that the fees had been calculated improperly, but rejected the international argument. As an initial matter, the court noted that the requirements 'were completely neutral, applying to all overflights regardless of nationality'. Moreover, '[i]t is not discriminatory to impose fees on this group of users for services that they use but for which they have not previously been charged, regardless of whether the group is disproportionately composed of foreign carriers.'²⁷⁰

6.5 FOREIGN CARRIER SECURITY

As for the various safety regulations discussed above, in the context of pre-9/11 security, the FAA did adopt requirements that could be described to have extraterritorial effect – but only after recognition and discussion of their

²⁶⁵ *Id.* Subsequently, the implementation of the new requirement was deferred. See 'Advisory Notice: Notice of Intent to Provide Compliance Date Extension for Air-Passenger Notification of Hazardous Materials Restrictions,' 77 Fed. Reg. 69926 (21 Nov. 2012); 'Hazardous Materials: Harmonization with the United Nations Recommendations, International Maritime Dangerous Goods Code, and the International Civil Aviation Organization Technical Instructions for the Safe Transport of Dangerous Goods by Air', 78 Fed. Reg. 1101, 1109 (7 Jan. 2013).

²⁶⁶ 49 U.S.C. § 45301.

²⁶⁷ 14 C.F.R. Part 187, Appendix B.

²⁶⁸ 'Fees for Air Traffic Services for Certain Flights Through U.S.-Controlled Airspace,' 62 Fed. Reg. 13496 (20 Mar. 1997), citing 'Statements by the Council to Contracting States on Charges for Airports and Air Navigation Services,' Doc. 9082/4 (1992).

²⁶⁹ *Asiana Airlines v. FAA*, 134 F.3d 393 (D.C. Cir. 1998).

²⁷⁰ FAA has asserted that the regulations now in effect, which were modified based on *Asiana* and later litigation, comply with ICAO standards and recommended practices. See 'Update of Overflight Fees,' 75 Fed. Reg. 59661 (28 Sep. 2010).

international implications, and with genuine if perhaps sometimes grudging attention paid to concerns expressed in response by foreign carriers and trade associations.

For example, in 1989, FAA adopted new security requirements for foreign carriers. In particular, FAA required each foreign carrier to submit written security programs for US airports and foreign airports that are the last point of departure to the US, describing 'the procedures, facilities and equipment that [it] will use to ensure the safety of persons and property traveling in air transportation'.²⁷¹ The FAA's proposal had emphasized that the proposal was consistent with international obligations, noting that under the Chicago Convention 'foreign carriers are required to comply with the laws and regulations governing admission or departure from the United States and the operation and navigation of those aircraft while within US territory'.²⁷²

Most of the comments that FAA received did not dispute the above proposition, but a few reportedly did take the position that the Chicago Convention did not allow the US to exercise any jurisdiction over the security of foreign aircraft entering its territory from a foreign airport.²⁷³ The FAA disagreed with that interpretation, noting that it provided that '[e]ach Contracting State shall require operators providing service to or from that State to adopt a security programme'.²⁷⁴ But in response to concerns raised by foreign governments, it did concede that to the extent information was required about security at foreign airports, foreign carriers could refer FAA to the government authorities responsible for those security procedures; FAA re-emphasized that the requirements were 'not intended to undermine the sovereignty of other nations'.²⁷⁵

Subsequently, Congress directed FAA to accept a foreign carrier's security program only if it provided 'similar' protection to the programs required of US

²⁷¹ 'Security Programs for Foreign Air Carriers,' 54 Fed. Reg. 11116 (16 Mar. 1989). When FAA initially adopted security requirements for foreign carriers in the 1970s, it proposed requiring foreign carriers to submit written programs, but ultimately required only that information about the programs be provided upon request. Compare 'Aviation Security: Foreign Air Carriers,' 37 Fed. Reg. 17979 (2 Sep. 1972) and 'Proposed Aviation Security Program Requirements,' 39 Fed. Reg. 3293 (25 Jan. 1974) with 'Foreign Air Carrier Security Programs,' 40 Fed. Reg. 29273 (11 Jul. 1975). FAA acknowledged that there was a 'need for a certain degree of flexibility with respect to procedures required by the United States for foreign air carriers in foreign countries to avoid conflict with applicable security laws and requirements of those countries.' *Id.* at 29274.

²⁷² 'Operations: Foreign Air Carriers and Foreign Operators of U.S.-Registered Aircraft Engaged in Common Carriage,' 53 Fed. Reg. 34874, 34875 (8 Sep. 1988).

²⁷³ 'Security Programs for Foreign Air Carriers,' 54 Fed. Reg. 11116, 11117 (16 Mar. 1989).

²⁷⁴ *Id.* at 11118, quoting ICAO Annex 17, Chapter 5.

²⁷⁵ 'Security Programs for Foreign Air Carriers: Security Measures Implemented by Government Authorities at Foreign Airports: Implementation Policy,' 54 Fed. Reg. 25551, 25551 (15 Jun. 1989).

carriers.²⁷⁶ FAA adopted regulations to implement this requirement, while taking pains to emphasize that it was not extraterritorial. As an initial matter, FAA acknowledged that:

[i]t is not always possible or appropriate to unilaterally impose identical security procedures for US air carriers and foreign air carriers, because the perceived – and often actual – threat directed at the air carriers of various nations differs widely. An attempt to require all air carriers, foreign and domestic, to follow identical procedures could precipitate major economic and political confrontations with little or no increase in passenger security.²⁷⁷

But FAA also took the position that the expansion of its requirements to require similar – but not identical – measures was consistent with the Chicago Convention, because each State had a sovereign right to protect its inhabitants from possible threats from foreign aircraft entering its airspace.²⁷⁸ Nevertheless, FAA also clarified that it intended to exercise its authority judiciously; except in an emergency, it would first consult with the concerned foreign government authorities.²⁷⁹

In 1996, the so-called Hatch Amendment, named after the Senator who introduced it, attempted to impose further requirements on foreign carriers, by requiring foreign carriers ‘to adhere to the identical security measures’ as US carriers.²⁸⁰ The FAA instituted a rulemaking proceeding to adopt implementing regulations – and repeated its mantra that the Chicago Convention permitted the US to impose requirements on foreign carrier flights into and within US territory.²⁸¹ Nevertheless, FAA acknowledged from the outset that objections had been raised; the European Civil Aviation Conference (ECAC) in pre-rulemaking consultations described the statute as an ‘unequivocal imposition of extraterritorial legislation’.²⁸² Once opened to public comments, the docket was inundated

²⁷⁶ Aviation Security Improvement Act of 1990, Pub. L. 101-604.

²⁷⁷ ‘Foreign Air Carrier Security Programs,’ 56 Fed. Reg. 4328, 4329 (4 Feb. 1991).

²⁷⁸ ‘Foreign Air Carrier Security Programs,’ 56 Fed. Reg. 30122, 30123 (1 Jul. 1991). The requirements previously had been noted to include x-ray, metal detection, and screening personnel standards. See 56 Fed. Reg. at 4329.

²⁷⁹ See *Id.* However, subsequent comments by unidentified FAA officials in a GAO report expressed a seemingly dismissive attitude towards countries that raised sovereignty issues, by stating that ‘rapid progress is possible with carriers from countries that had not developed the sensitivities against the extraterritorial application of U.S. law.’ ‘Aviation Security: Additional Actions Needed to Meet Domestic and International Challenges,’ GAO/RCED-94-98, at 35 (27 Jan. 1994).

²⁸⁰ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 322, codified at 49 U.S.C. § 44906.

²⁸¹ ‘Security Programs of Foreign Air Carriers,’ 63 Fed. Reg. 64764, 64766 (23 Nov. 1998).

²⁸² *Id.*

by objections from foreign carriers,²⁸³ trade associations,²⁸⁴ and foreign governments.²⁸⁵

The FAA never formally responded to the comments. But in letters subsequently sent to Senator Hatch, as well as to John McCain (Chair of the Senate committee with jurisdiction over FAA), DOT Secretary Rodney E. Slater asserted that it had complied with the ‘underlying purpose of Section 322’ – even though it had not interpreted the ‘identical security measures’ requirement literally.²⁸⁶ Initially, Slater noted that such an interpretation could have absurd results – such as requiring El Al to reduce the standards of its unique security program (or require all other US and foreign carriers impractically to implement the same level of vigilance). But retaliation by foreign governments for US overreach – including the imposition of similarly extraterritorial requirements applicable in the US – were also a specific concern:

In addition to their staunch opposition, [foreign] governments have also indicated that they will take actions detrimental to U.S. national interests, including U.S. air carriers.... We expect foreign governments to retaliate against U.S. air carrier international operations by taking actions that include denial of landing rights, cutbacks in slots, and curtailed expansion of service to new airports. Foreign governments and civil aviation authorities also threaten to impose reciprocal requirements at U.S. airports by requiring that airline operations from U.S. airports implement the same security measures required in their country. For example, 100 percent checked baggage screening is a requirement in the United Kingdom and Belgium for airlines operating from those countries.²⁸⁷

In short, FAA’s position was that measures already implemented had taken the agency to the outer limits of its jurisdiction, and it would push no further, even if directed to by Congress.

The quiet death of the Hatch Amendment indicates that no matter what the legal merit of an extraterritoriality argument, political support for that argument can be essential. Even without a public concession to that effect by FAA, it is

²⁸³ The foreign carriers that filed comments in docket FAA-1998-4758 included Air Canada, Air Pacific, Alitalia, Austrian Airlines, British Airways, Caledonian Airways, City Bird, China Airlines, Ethiopian Airlines, Finnair, Japan Airlines, Japan Air System, KLM, Lan Chile, Lauda, Lufthansa, Qantas, Royal Air Maroc, Sabena, SAS, Singapore Airlines, Swissair, and Virgin Atlantic.

²⁸⁴ The trade associations that filed comments in docket FAA-1998-4758 included the Air Transport Association of Canada, Airports Council International, the Asociación Internacional de Transporte Aéreo Latinoamericana, the Association of Asia Pacific Airlines, the Comisión Latinoamericana de Aviación Civil, the ECAC, and IATA.

²⁸⁵ The foreign governments that filed comments in docket FAA-1998-4758 – or which submitted diplomatic notes to the US State Department that were later added to the docket – included Australia, Canada, Denmark, Finland, France, Germany, Hong Kong, Iceland, Ireland, Italy, Japan, the Netherlands, New Zealand, Norway, Saudi Arabia, Singapore, Sweden, Switzerland, and the United Kingdom.

²⁸⁶ Letter from Rodney E. Slater, Secretary of Transportation, to the Honorable John McCain, Chair, Senate Committee on Commerce, Science and Transportation (12 Jun. 2000) (on file with author).

²⁸⁷ *Id.*

difficult to conceive that the widespread condemnation of the proposals by foreign governments was not influential. In addition to the individual submissions, a joint diplomatic note submitted to the US State Department by twenty-two governments declared ‘not acceptable’ the ‘unilateral assertion of extraterritorial FAA authority over security procedures at airports in the Governments’ countries’.²⁸⁸ Additionally, ICAO itself adopted a resolution contradicting FAA’s claim that the proposal was consistent with international law, finding it to ‘infringe basic principles of the Chicago Convention, and run counter to the spirit of multilateralism contained in such Convention’.²⁸⁹

But the unified front mounted against the Hatch Amendment appears to have been a rare occurrence. Post 9/11, security is a greater concern than ever – but much of the discussion now occurs out of the public eye, which makes it difficult to determine to what extent extraterritoriality has been a concern.²⁹⁰ However, to the extent that other countries have publicly objected to post-9/11 security requirements, the foundation for the objections typically has not been extraterritoriality.²⁹¹ Notably, a long-running dispute with the EU over requirements that carriers operating flights to/from the US disclose Passenger Name Record (PNR) data in advance of its arrival in the US was specifically grounded in the resolution of privacy concerns²⁹² – not extraterritoriality, which had been a primary basis for opposition to the 1990s manifest proposal.²⁹³ Experts have commented that the post-9/11 manifest requirement is a reasonable

²⁸⁸ The 22 Mar. 1999 note – which also later was added to docket FAA-1998-4758 – was submitted on behalf of Australia, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Korea, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom, and the European Commission.

²⁸⁹ The resolution was adopted on 5 Feb. 1999 and subsequently submitted as an attachment to ICAO comments in docket FAA-1998-4758.

²⁹⁰ Responsibility for aviation security was transferred to the Transportation Security Administration (TSA) by the Aviation and Transportation Security Act of 2001, Pub. L. 107-71. See also ‘Civil Aviation Security Rules,’ 67 Fed. Reg. 8340 (22 Feb. 2002). Shortly thereafter, the TSA itself was relocated from DOT to the newly created Department of Homeland Security by the Homeland Security Act of 2002, Pub. L. 107-296.

²⁹¹ Another post-9/11 issue is a TSA regulation prohibiting carriers from collecting ‘security service fees not imposed by this part.’ See 49 C.F.R. § 1510.9(d). DOT later clarified that this prohibition did not extend to security fees imposed by foreign governments. See Letter from Paul L. Gretch, Director, Office of International Aviation, to Michael G. Ferrier, President, Airline Tariff Publishing Company, docket DOT-OST-2001-11120 (8 Feb. 2002). But even with that concession, the regulation would appear to extraterritorially prohibit a foreign carrier from imposing its own security surcharge in transactions conducted outside the US, although no carriers have stepped forward to challenge the regulation. See Karas and Gosain, *supra* n. 8, at 7.

²⁹² See, e.g. Kristin Archick, ‘U.S.-E.U. Cooperation Against Terrorism,’ Congressional Research Service Report for Congress, at 9-12 (21 May 2012). The Aviation and Transportation Security Act, Pub. L. 107-71, § 115, codified at 49 U.S.C. § 44909, required US carriers and foreign carriers to provide extensive manifest information to CBP in advance of arrival, including names, gender, and passport numbers. See also Passenger and Crew Manifests Required for Passenger Flights in Foreign Air Transportation to the United States,’ 66 Fed. Reg. 67482 (31 Dec. 2001); 19 C.F.R. § 122.49a.

²⁹³ See *supra* n. 133.

self-protective measure, ‘particularly in light of the circumstances underlying its adoption’.²⁹⁴ But it nonetheless should be noted that the US tested the boundaries of its jurisdiction by practically requiring carriers to comply with the new requirements even before they officially were effective.²⁹⁵

An FAA rulemaking proceeding that was initiated shortly after the terrorist attacks – and thus still solicited public input – was to require enhanced flight deck doors, for both US and foreign carriers.²⁹⁶ The FAA acknowledged that these requirements could have not just operational issues but airworthiness implications. FAA suggested that the new requirement was no different from requiring collision avoidance equipment or radio systems – but at the same time also relied upon ICAO’s action to adopt new requirements for flightdeck doors.²⁹⁷ Yet FAA did not actually synchronize its requirements with ICAO – finding it was ‘unacceptable’ that ICAO’s requirements would not be implemented as quickly as FAA had insisted that they should be.²⁹⁸ No comments were filed that objected to FAA’s reasoning and decision to set a more rapid timetable than ICAO.²⁹⁹ Practically speaking, such an objection likely would have been politically inadvisable given that lax flightdeck security had allowed aircraft to be ‘weaponized’.³⁰⁰ But the seeming precedent is that a State is justified in taking unilateral action upon a matter if it deems ICAO to be acting too slowly and the matter too important for delay.³⁰¹

²⁹⁴ See Karas and Gosain, *supra* n. 8, at 5.

²⁹⁵ See *Id.* ([‘Customs] Commissioner Bonner reportedly advised 58 foreign airlines that if they failed to comply with advance manifest requirements by November 29, 2001, Customs inspectors would intensively examine each passenger and each piece of hand-carried and checked baggage on each incoming flight, causing long delays for passengers’). See also U.S. Customs Begins Intensified Exams of Baggage and People Arriving Aboard Air Carriers That Do Not Provide APIS Data (29 Nov. 2001), <http://cbp.gov/hot-new/pressrel/2001/1129-00.htm> (acknowledging that manifest requirement’s effective date by law was actually 18 Jan. 2002).

²⁹⁶ ‘Security Considerations in the Design of the Flightdeck on Transport Category Airplanes’, 67 Fed. Reg. 2118 (15 Jan. 2002).

²⁹⁷ ‘Security Considerations for the Flightdeck on Foreign Operated Transport Category Airplanes’, 67 Fed. Reg. 42450, 42452 (21 Jun. 2002).

²⁹⁸ *Id.* at 42451. But FAA also decided not to impose its accelerated requirements to overflights, acknowledging that it had ‘no practical means of conducting surveillance of foreign carriers other than on the ground in the United States.’ See ‘Security Considerations for the Flightdeck on Foreign Operated Transport Category Airplanes’, 67 Fed. Reg. 79822, 79823 (30 Dec. 2002).

²⁹⁹ For example, IATA raised only logistical concerns about the timeframe applicable to foreign carriers. See Comments of IATA, Security Considerations for the Flight Deck on Foreign Operated Transport Category Airplanes, docket FAA-2002-12504 (29 Jul. 2002).

³⁰⁰ See Karas and Gosain, *supra* n. 8, at 6.

³⁰¹ See Petsonk, *supra* n. 6 ([‘t]he airlines may argue that a degree of intrusion into national sovereignty is acceptable when security is concerned. It should be kept in mind, however, that global warming is a security issue deserving of no less attention’).

7 TOURISM FEES, THEN AND NOW

An interesting case study in how attitudes towards extraterritoriality have evolved is presented by how federal agencies perceived the permissibility of a tourism fee twenty years ago and today. Strictly speaking, the issues implicated by the fee may not be extraterritorial – i.e. it has been framed as a tax on air transportation, rather than a requirement that foreign carriers engage in conduct beyond US borders. But at the same time, a question that arose twenty years ago was whether it was a permissible tax under the Chicago Convention – and the issue of extraterritoriality and ETS is also largely one of money, since ETS does not ultimately dictate conduct but requires payment for non-conforming emissions.

In 1990, Congress imposed a USD 1 per-alien passenger ‘facilitation fee’ on US carriers and foreign carriers, effective 1 January 1991, ‘[t]o the extent not inconsistent with treaties or international agreements entered into by the United States.’³⁰² Subsequently, the Travel and Tourism Administration (TTA) adopted regulations implementing the fee.³⁰³ Notably, the TTA took the position that because the fee was not imposed on the aliens themselves, no carrier should collect the fee ‘from an alien as a tax or fee or indicate on a ticket or elsewhere that it is doing so’.³⁰⁴ This requirement apparently was a reaction to carriers and agents having the temerity to inform consumers that the fee was included in the ticket price.³⁰⁵ But given that many if not most non-US citizens travelling to the US purchase their tickets outside the US, on its face this requirement was extraterritorial.

Foreign carriers soon made their objections known to TTA – although they appear to have emphasized an argument that the fee itself was inconsistent with the Chicago Convention, rather than questioned how TTA could regulate their advertising practices beyond US borders. After more than 100 objections were submitted, TTA waived the imposition of penalties for fees due for the first quarter of 1991, and suspended collection of the fee for subsequent quarters.³⁰⁶ Soon thereafter, TTA withdrew the regulations altogether, finding that they were inconsistent with the Chicago Convention.³⁰⁷ Specifically, the agency concurred with advice from DOT and the State Department that the fee was inconsistent with Article 15, which prohibits the imposition of charges based solely on the

³⁰² 22 U.S.C. § 2128 (repealed).

³⁰³ 15 C.F.R. Part 1201 (repealed).

³⁰⁴ ‘United States Travel and Tourism Administration Facilitation Fee,’ 56 Fed. Reg. 176, 178 (3 Jan. 1991). See also ‘United States Travel and Tourism Administration Facilitation Fee,’ 56 Fed. Reg. 11116, 11118 (15 Mar. 1991).

³⁰⁵ R.I.R. Abeyratne, ‘Air Transport Tax and its Consequences on Tourism,’ 20 *Annals of Tourism Research* 450, 451 (1993).

³⁰⁶ ‘United States Travel and Tourism Administration Facilitation Fee,’ 56 Fed. Reg. 50313 (4 Oct. 1991).

³⁰⁷ ‘United States Travel and Tourism Administration Facilitation Fee,’ 57 Fed. Reg. 4154 (4 Feb. 1992).

right of entry or exit into a signatory State.³⁰⁸ But whether TTA had overstepped its authority by attempting to dictate advertising practices beyond US borders remained unaddressed.

Two decades later, Congress enacted a new tourism fee – to be collected by Customs and Border Protection (CBP) through its Electronic System for Travel Authorization (ESTA), the registration system for aliens visiting the US from countries for which visas are not required.³⁰⁹ In particular, the agency was directed to collect a USD 10 fee per travel authorization, to be used to promote travel to the US,³¹⁰ plus an additional amount to recover the costs of administering ESTA. CBP subsequently set the total fee at USD 14.³¹¹ Unlike for the fee abolished by TTA (which itself was abolished in 1996),³¹² the 2010 authorizing statute did not require the CBP to consider whether the tourism fee was compatible with international law. Nevertheless, the logic expressed by TTA would appear equally applicable to the USD 10 travel promotion component of the fee. Notably, if an application for travel authorization is denied, the USD 10 component will be refunded; only USD 4 will be retained ‘to cover the operational costs’.³¹³ Yet the new fee has attracted only the mildest of rebukes; the European Union described the requirement merely as being ‘inconsistent with the commitment of the US to facilitate transatlantic mobility’,³¹⁴ and no objections to its extraterritoriality were submitted to CBP.³¹⁵ The implication may be that both the US and EU are less concerned about extraterritorial regulation and legislation than they were twenty years ago.

³⁰⁸ Similar objections previously were made to a user fee imposed by the Animal and Plant Health Service (APHIS), but the agency concluded that Article 15 did not apply, because it was not an airport operator or ‘other competent authority’ subject to the Chicago Convention. See ‘User Fees – Agricultural Quarantine and Inspection Services, Phytosanitary Certificates, Animal Quarantine Services, Veterinary Diagnostics, Export Health Certificates,’ 57 Fed. Reg. 755, 763 (9 Jan. 1992). Reportedly, several foreign carriers sought to reopen the matter after the TTA’s reversal, but were unsuccessful. See Lorraine B. Halloway and R. Colin Keel, ‘*The Spotlight on Federal User Fees*,’ 8 Air & Space L. 10, 12 (Summer 1994).

³⁰⁹ 8 U.S.C. § 1187(h)(3)(B).

³¹⁰ 22 U.S.C. § 2131.

³¹¹ ‘Electronic System for Travel Authorization (ESTA): Travel Promotion Fee and Fee for Use of the System,’ 75 Fed. Reg. 47701 (9 Aug. 2010).

³¹² See, e.g. ‘Removal of CFR Chapter,’ 61 Fed. Reg. 30509 (17 Jun. 1996).

³¹³ 8 C.F.R. § 217.5(h)(1).

³¹⁴ Commissioner Malmström Statement on the Publication of the Interim ESTA Rule (6 Aug. 2010), http://europa.eu/rapid/press-release_MEMO-10-363_en.htm.

³¹⁵ See, e.g. Comments of the European Commission, Electronic System for Travel Authorization (ESTA): Travel Promotion Fee and Fee for Use of the System, docket USCBP-2010-0025 (7 Oct. 2010).

8 CONCLUSION

Congress does not legislate in a vacuum. Even if it legitimately believes that ETS is an invalid exercise of extraterritorial power, and that retaliatory measures are justified, Congress (and, on a regulatory level, DOT) cannot simply ignore the US track record of extraterritorial requirements in the context of air transportation. The EU would not be without justification to perceive itself as a victim, and thus entitled to respond in kind. The better response would be understanding and dialogue, not escalation.

Neither the CAB nor DOT ever adopted an overarching position as to how extraterritorial issues should be addressed – but greater deference does appear to have been given to international comity and reciprocity prior to deregulation. Because DOT is not a global regulatory agency, it would be well advised to tailor its approach to extraterritorial requirements to more closely resemble that of the FAA, which has shown a greater apparent regard for maintaining good relations with international partners, even while acting as an advocate for US safety concerns – reflecting the greater historic international coordination that has existed for safety matters, in contrast to conflicts that often have arisen over ‘economic’ aviation matters.

Unfortunately, DOT may be inclined to orient itself in the opposite direction, based on recent developments in consumer protection and disability regulation. Also of concern are measures proposed by Congress. On 14 February 2012, President Obama signed the FAA Modernization and Reform Act of 2012³¹⁶ – the product of more than four years of debate, during which time federal aviation programs (including those administered by DOT as well as by the FAA) were funded by a series of ‘stopgap’ bills. As finally enacted, the law did not include any major provisions with extraterritorial effect³¹⁷ – but significant extraterritorial requirements had appeared in prior drafts of the bill, including prohibiting the use of cell phones on both US and foreign carriers,³¹⁸ and to requiring drug and alcohol testing at foreign aircraft repair stations certified by the FAA.³¹⁹ Thus, the

³¹⁶ Pub. L. 112-95.

³¹⁷ See *supra* n. 221.

³¹⁸ Section 425(b) of H.R. 915 (110th Cong.) – which was approved by the House of Representatives on May 21, 2009, but not approved by the Senate – would have prohibited the use of cell phones in foreign air transportation operated by both US and foreign carriers although it would have included a procedure for objections by foreign governments, similar to that which appears in 49 U.S.C. § 41706(c)(1). As adopted in 2012, the Act merely directed the FAA to study the use of cell phones in flight (Pub. L. 112-95, § 410).

³¹⁹ Section 303 of H.R. 915 (110th Cong.) would have required safety-sensitive employees of such repair stations to be subject to a testing program equivalent to that applicable to carrier employees in the US, regardless of foreign law. But as adopted in 2012, the Act directed the FAA to work with other countries to develop international standards, and to adopt regulations requiring a testing program for

risk of further extraterritorial requirements being imposed on foreign carriers, with potentially negative consequences, continues to be real.³²⁰

By pushing the boundaries of its authority, the US has created a situation in which as a political (although not necessarily legal) matter, there is a risk that the US objections to ETS may not be seen as wholly credible – colloquially, one might say that extraterritorial ‘chickens have come home to roost’. Ideally, all parties to the dispute should realize that it is not in their long-term interest to engage in extraterritorial regulation of other countries’ air carriers. But for the US to be a trustworthy messenger in the future, it must take into account its own past.

work on US carrier aircraft ‘consistent with the applicable laws of the country in which the repair station is located’ (Pub. L. 112-95, § 308, codified at 49 U.S.C. § 44733(c)).

³²⁰ Conversely, the risk of foreign governments imposing extraterritorial requirements – other than ETS – on US carriers also is real. For example, the French Ministry of Ecology, Sustainable Development, Transport, and Housing has proposed that for air transportation to/from France, carriers be required to make disclosures about carbon dioxide emissions at the time of ticket purchase. See Decree no. 2011-1336, § 12 (24 Oct. 2011), <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000024710173>; Jean-Francois Janin, Information about CO2 Emissions from Transport Services, at 9 (6 Nov. 2012), <http://www.unece.org/fileadmin/DAM/trans/doc/2012/wp24/ECE-TRANS-WP24-2012-Pres12e.pdf>.

