Recent U.S. Regulation Of Foreign Airline Practices—Impermissibly Unilateral Or Not?

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Since at least 1994—with the enactment of legislation prohibiting gambling on foreign airline flights to or from the United States[1]—the United States has adopted a variety of aviation-related measures directly affecting foreign airlines in ways that, for some observers, raise a common issue: whether the domestic exercise of U.S. legislative and regulatory power over foreign airlines is consistent with U.S. obligations under international agreements and international law. Put differently, the question with respect to a particular U.S. statute or rule is whether it is impermissibly unilateral.[2]

It is timely to revisit this issue in the context of the following four recent measures (to be discussed later in this article), the first three of which are directly related to September 11:

- Advance passenger and crew manifests—requiring foreign airlines to transmit to U.S. Customs personal data on incoming passengers and crew before (for crew) or shortly after (for passengers) takeoff from a foreign airport;

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[1] 49 U.S.C. § 41311.

[2] While we could, and sometimes do, use the adjective "extraterritorial," in general we prefer "unilateral" since the latter strikes us as less legalistic and less judgmental, i.e., it more easily permits for the possibility that a particular measure can be unilateral but not impermissibly so; that is, it might still be consistent with international law.

- Cockpit doors—possible future Federal Aviation Administration requirement that foreign airlines reinforce their cockpit doors and adopt certain cockpit security procedures;
- Transportation Security Agency (TSA) rule on security fees—apparently prohibiting foreign airlines (as well as U.S. airlines) from collecting non-government-imposed security fees for non-U.S. enplanements; and
- Department of Transportation proposed rule on disability-complaint reporting—requiring foreign airlines to submit to DOT reports of disability complaints.

Mode of Analysis

To claim that a particular measure is impermissibly unilateral, two questions must be answered in the affirmative. First: Is the measure in fact unilateral? And, second: If so, is the measure inconsistent with international legal principles and norms?

To answer the first question, one must examine the pertinent bilateral (or multilateral) air services agreement, as well as other international agreements such as the Chicago Convention. If upon such examination, it is determined that a state (the "affected state") has not agreed that another state (the "prescribing state") can regulate the affected state's airlines in a particular way as a condition to the affected state's airline serving the prescribing state, the measure adopted or proposed by the prescribing state would be unilateral (but not necessarily impermissible).

The U.S. State Department put it well, but perhaps incompletely, in 1996 when its position on a bill to extend the smoking ban to foreign airlines (on flights to/from the United States) was transmitted, through DOT, to Congress. The State Department said that legislating such a requirement "may be inconsistent with provisions in a number of our bilateral aviation agreements. Bilateral agreements typically give each side's carriers the right to operate to the other country subject to certain enumerated conditions. It is the State Department's view that health concerns are not one of those considerations. Consequently, if the United States were to impose this requirement

on foreign air carriers, it could be deemed a violation of the bilateral agreement and the United States could be subject to binding arbitration under the bilateral agreement. It is also State Department's view that under international law a bilateral partner could invoke a bilateral agreement violation as a basis to rightfully take proportional countermeasures against U.S. carriers."[3]

This position could be literally read as an end to the inquiry regarding impermissible unilateralism. That is, if a law or regulation is not embraced within a bilateral or other agreement, it is impermissible (under international law) and can give rise to a request for consultations and ultimately to redress in the form of countermeasures or otherwise. However, we do not think that the inquiry should stop at an affirmative answer to the first question of whether the measure is unilateral, and we speculate that the State Department would not end the inquiry there either. Rather, we think a second question needs to be asked, which is: Despite being unilateral, is the measure nonetheless consistent with the principles and norms of customary and general international law?

Before applying the two-part test just described to the four U.S. measures noted at the outset of this article, we will illustrate the test with reference to four pieces of legislation enacted before September 11. These measures, as they relate to foreign airlines, are two provisions of AIR-21 legislation (enacted in 2000), one prohibiting smoking on foreign airline flights to/from the United

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[3] *The Airliner Cabin Air Quality Act of 1995: Hearing on H.R. 969 Before the House Subcomm. on Aviation of the Comm. on Transp. and Infrastructure,* 104th Cong., 2d Sess., at 110 (1996) [hereinafter *Hearing*] (DOT Position on U.S. Law Banning Smoking on International Flights).

States,[4] and the other extending the antidiscrimination provisions of the Air Carrier Access Act (Access Act) to foreign airlines;[5] the 1996 so-called Hatch Amendment, which requires foreign airlines to adopt security measures identical to those of U.S. carriers, apparently even at foreign airports;[6] and the gambling statute referred to at the beginning.

All four of these measures are unilateral. No bilateral or other international aviation agreement permits the United States to prescribe and impose on another state's airline U.S. notions regarding smoking, gambling, or disabled-passenger procedures as a condition to that airline's right to operate to or from the United States. Indeed, whenever any of these subjects is addressed in an international agreement, or by a body functioning pursuant to an international agreement (ICAO), the pertinent norms on that subject are established by consensus of the states involved, not by the *diktat* of one of them. Through ICAO, for instance, states have agreed on airline practices concerning the transportation of disabled persons and have established antismoking criteria.[7]

Similarly, the Hatch Amendment is unilateral as well. No international aviation agreement permits a state, in effect, to impose security procedures at airports in another state. Rather, airport security is handled in a territorial manner, meaning that each country decides for itself what security procedures will apply within its territory. Of course, nations often agree on minimum

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[4] 49 U.S.C. § 41706(b) and (c), as added by Section 708 of the AIR-21 legislation (Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106–81, 114 Stat. 61 (2000)).

[5] 49 U.S.C. § 41705(a), as amended by Section 707 of the AIR-21 legislation.

[6] 49 U.S.C. § 44906, as amended by Section 322 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214.

[7] *See* ICAO Annex 9; ICAO Assembly Resolution A29–15.

security procedures to be observed. However, no one can seriously argue (and indeed no one, including in Congress or FAA, has argued) that the security articles in these agreements can be interpreted as consent by a state to allow another state to unilaterally prescribe security procedures in the former state's own territory. Given the massive security failures that have become evident in U.S. security procedures, the Hatch legislation now seems a bit of an embarrassment and an exercise not in enlightened U.S. leadership but in U.S. hubris.[8]

With respect to the second prong of the analysis, i.e., consistency with international legal principles and norms, we think that all four measures fail to pass muster. Even when measured by the criteria established by U.S. international law experts (as opposed to their foreign counterparts) in the Third Restatement of the Foreign Relations Law of the United States (Restatement), sections 402 (Bases of Jurisdiction to Prescribe) and 403 (Limitations on Jurisdiction to Prescribe), each of the four enactments lacks a sufficient jurisdictional basis to be a valid prescription under international law. The U.S. gambling and smoking bans applicable to foreign airlines, as well as the extension of the Access Act to such airlines, plainly violate international law by regulating conduct on a foreign carrier's foreign-registered aircraft not only when such aircraft are in U.S. airspace (permissible as an exercise of U.S. territorial jurisdiction), but also when they are in international airspace (i.e., over the high seas), in the airspace of foreign carriers' home countries, and in the airspace of third countries (impermissible, since the United States has no territorial jurisdiction in

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[8] The FAA proposed rule implementing the Hatch Amendment (see 63 Fed. Reg. 64764 (Nov. 23, 1998)) was due to be finalized by June 2000. Probably due to the vigorous protests of foreign governments and airlines, as well as the FAA's good sense, a final rule has not yet issued. September 11 may have the effect, as a practical matter, of delaying a final rule indefinitely.

such airspace and no other jurisdictional basis that can meet the standards of sections 402 and 403 of the Restatement, for example).[9]

As to the Hatch Amendment, the protective principle of jurisdiction (see Restatement section 402(3)) is the only arguable basis of U.S. jurisdiction to require foreign airlines to adopt security procedures dictated by the United States at airports in their home and in third countries. However, even if such protective jurisdiction exists in these circumstances, its exercise through the Hatch Amendment is clearly unreasonable under each of the eight relevant factors described in Restatement section 403(2). To take the last two factors, clauses (g) and (h), as examples, the state where the airport is located plainly has a greater interest in regulating security procedures at that airport than does any of the states whose airlines serve that airport, including the United States; and there is also a definite likelihood that the airport security regulations of the "airport" state and of the United States will be in conflict.

We turn now to the four more recent measures mentioned at the outset of this article and apply our mode of analysis to those measures.

Advance Passenger and Crew Manifests

On November 19, 2001, President Bush signed into law one of the more far-reaching post–September 11 congressional security measures—the Aviation and Transportation Security Act

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[9] *See Hearing, supra* note 3, at 66–98 (Statement of William Karas on Behalf of the 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,* May 31, 1995, submitted by the International Airline Coalition on the Rule of Law in DOT Docket No. 50315 in connection with the congressionally mandated DOT Study of Gambling on Board Commercial Aircraft.

(ATSA). ATSA requires, among other things, U.S. and foreign carriers operating to the United States to electronically transmit passenger and crew manifests to U.S. Customs before landing in the United States.[10] On December 31, 2001, U.S. Customs issued an interim rule effective immediately to implement the advance passenger/crew manifest requirement.[11] Like the statute, the rule mandates that carriers convey the following information on each passenger or crew member: full name, date of birth, citizenship, gender, passport number and country of issuance of passport if required for travel, and U.S. visa number or resident alien card number, if applicable. The rule also requires carriers to state the foreign airport at which each passenger's air transportation to the United States began, the U.S. airport where each passenger and crew member destined for the United States will undergo Customs and Immigration formalities, and the foreign airport of final destination for each passenger and crew member transiting the United States.

Even before September 11, Customs collected much of the same advance information on incoming passengers through its voluntary Advance Passenger Information System (APIS) program. Most major foreign carriers participated in APIS, allowing Customs to receive advance information on about 87 percent of non-precleared passengers entering the United States at the time ATSA was enacted. Foreign carriers that were among the APIS participants apparently did not have a significant problem complying with the mandatory advance manifest requirements.

Although ATSA gave airlines 60 days to comply, in late November Customs Commissioner Robert C. Bonner notified those airlines not already participating voluntarily in Customs' APIS program that Customs was, in effect, significantly shortening the compliance period. Commissioner

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[10] Section 115 of ATSA, Pub. L. No. 107–71, 115 Stat. 597 (2001), adding paragraph (c) to 49 U.S.C. § 44909.

[11] *See* 66 Fed. Reg. 67482 (Dec. 31, 2001); 19 C.F.R. § 122.49a.

Bonner reportedly advised 58 foreign airlines that if they failed to comply with the advance manifest requirement 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. While some airlines may have initially resisted compliance with the advance manifest requirement, none openly objected to it and Customs reports that all of the airlines are now on board.

Applying the first prong of the analysis, the advance manifest requirement is arguably not unilateral because the standard "Application of Laws" provision in U.S. bilateral aviation agreements (implementing Article 13 of the Chicago Convention) states: "While entering, within, or leaving the territory of one Party, its laws and regulations relating to the admission to or departure from its territory of passengers, crew or cargo on aircraft (including regulations relating to entry, clearance, aviation security, immigration, passports, customs and quarantine or, in the case of mail, postal regulations) shall be complied with by, or on behalf of, such passengers, crew or cargo of the other Party's airlines." The advance manifest requirement can fairly be said to be within the contemplation of the provision quoted above, particularly in light of the circumstances underlying its adoption and the strong need for Customs to have advance crew and passenger information to ensure the safety of life and property within the United States.

Even if one were to deem the advance manifest requirement as being unilateral on the theory that it does not fall within the four corners of the standard provision quoted above, it can nonetheless fairly be characterized as a reasonable and self-protective measure that is not inconsistent with international legal principles since the United States has protective jurisdiction (described in Restatement section 402(3)), the exercise of which is not invalidated by section 403. The advance passenger manifest legislation and regulation seem to be a proportional response to the September 11 tragedy. Given the screening and intelligence shortcomings that failed to prevent

that tragedy, it certainly seems reasonable enough for the United States, as the victim of that assault, to exercise heightened vigilance by finding out who is entering the United States, along with other information on incoming passengers.

Cockpit Doors

On January 15, 2002, FAA promulgated rules requiring domestic airlines to strengthen cockpit doors and to limit access to the cockpit.[12] These rules do not currently apply to foreign airlines. However, the FAA has said that it will apply them (and anticipated future rulemakings further promoting cockpit security) to foreign airlines if foreign governments, either individually or through ICAO, do not adopt by April 2002 and implement by April 2003 comparable cockpit security standards. The FAA has been working with ICAO and non-U.S. governmental aviation authorities to develop such standards.

ICAO met the FAA's first deadline by adopting, in mid-March 2002, standards requiring reinforced cockpit doors on large aircraft used for international flights and dictating other cockpit security measures. However, the ICAO standards are not effective until November 1, 2003 -- seven months later than the implementation date sought by FAA. FAA has reportedly said that it expects foreign airlines to comply with its April 2003 implementation deadline rather than ICAO's November 2003 deadline, but at the time this article went to press FAA had not formally extended its cockpit security rules to foreign airlines.

If the FAA were eventually to extend the rules to foreign airlines (in the absence of comparable requirements promulgated by ICAO or the state of registry), those rules would arguably be unilateral because there appears to be no provision in an international agreement to which the United States is a party that would clearly allow the United States to impose them. While

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[12] *See* 67 Fed. Reg. 2118, 2123 (Jan. 15, 2002).

such a rule might not pass the first prong of the impermissible unilateralism test, we think it would meet the second prong if a nation with a greater jurisdictional claim to prescribe a cockpit door rule fails to act. The international law justification would fit squarely within the protective principle of jurisdiction discussed above. Simply put, since an aircraft—whether registered in the United States or abroad—can be turned into a lethal weapon because of an unreinforced cockpit door or lax cockpit security procedures, the United States would be justified in extending those rules to foreign airlines in the absence of a viable, more jurisdictional-friendly alternative.

Security Fees

ATSA required DOT to impose a uniform fee on U.S. and foreign carrier passengers for transportation originating at U.S. airports.[13] The fee is intended to enable DOT to recover its costs of providing civil aviation security services pursuant to ATSA. On December 31, 2002, TSA published an interim final rule that requires U.S. and foreign carriers, subject to conditions and additional requirements not relevant here, to begin collecting a $2.50 security service fee from passengers for U.S. enplanements.[14]

Of course, the U.S. government is free to impose fees on passengers for aviation-related services that it provides, such as, in this case, security services at U.S. airports. The problem with the security fee rule lies in this provision: "Direct air carriers and foreign air carriers may not collect security service fees not imposed by this part."[15]

If this sentence is read as prohibiting a foreign carrier from collecting its own security fee via surcharge for non-U.S. enplanements (as we think it must be read, in light of its express

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[13] Section 118 of ATSA, codified at 49 U.S.C. § 44940.

[14] *See* 66 Fed. Reg. 67698 (Dec. 31, 2001).

[15] 49 C.F.R. § 1510.9(d).

language and January 25 and February 8, 2002 DOT letters to ATA and ATPCo, respectively), the prohibition is plainly unilateral. No international aviation agreement allows the United States to preclude the collection of such fees at foreign airports.

While the United States may have taken over the security function at U.S. airports, many airlines are still responsible for escalating security costs at other airports around the world. There is no reason why a U.S. regulation intended to collect money from passengers to pass through to the U.S. government for U.S. enplanements should even purport to regulate surcharges at foreign airports.[16]

No tenet of customary international law saves the otherwise-improper prohibition on non-government-imposed security fees. While compelling safety and security concerns led to the imposition of such fees by the U.S. government, those concerns are not in any way addressed by a prohibition on security surcharges for non-U.S. enplanements.

Disability Complaint Reporting

The AIR-21 legislation that extended to foreign airlines the general prohibition on discrimination against disabled persons in section 41705(a) of the Access Act (discussed above) also added section 41705(c)(3), requiring DOT to "regularly review all complaints received by air carriers alleging discrimination on the basis of disability" and to "report annually to Congress on

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[16] A longstanding DOT advertising policy prevents airlines (including foreign airlines) from separately stating a non-government-imposed surcharge in U.S. advertising and solicitations. *See* 14 C.F.R. § 399.84. For purposes of this article, it is immaterial whether any such security surcharge, now apparently prohibited, should or should not be separately stated in advertising. The security fee rule is not an advertising guideline with effects confined to the United States. It goes farther by flatly prohibiting the collection by foreign airlines of security surcharges.

the results of such review."[17] On February 14, 2002, DOT issued a notice of proposed rulemaking (NPRM) that DOT said was necessary to implement section 41705(c)(3). The proposed rule would require foreign as well as U.S. airlines to submit annual reports in a prescribed format summarizing complaints received that allege inadequate accessibility for disabled persons to aircraft or airport facilities or other discrimination on the basis of disability.[18]

The proposed rule, however, is not supported by the underlying statutory provision, i.e., section 41705(c)(3). Although Congress extended section 41705(a)—the general prohibition on discrimination against disabled passengers—to foreign airlines, in the same AIR-21 legislation (indeed, in the same section), it chose to limit the reach of section 41705(c)(3) to "air carriers" only, i.e., U.S. airlines. Had Congress intended paragraph (c) also to apply to foreign air carriers, it surely would have specifically said so, as it did in its amendment to paragraph (a).

DOT seems to be saying in the NPRM that since paragraph (a) was extended to foreign airlines, Congress must have meant that DOT could review disability complaints received not only by U.S. airlines but also by foreign airlines. This interpretation ignores the words of the statute. In the NPRM, DOT seeks to justify a reporting requirement for foreign airlines by stating that "[t]he only practical way the Department can implement the statutory requirement to review disability complaints received by air carriers [meaning U.S. airlines] and report annually to Congress on the results of the review is by requiring carriers [meaning U.S. and non-U.S. airlines] to record and submit disability-related complaint data to the Department." The logic of this statement is less than compelling.

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[17] 49 U.S.C. § 41705(c)(3), as added by Section 707 of the AIR-21 legislation.

[18] *See* 67 Fed. Reg. 6892, 6893 (Feb. 14, 2002); proposed 14 C.F.R. § 382.70.

Perhaps recognizing the intrusive effect of its extension of paragraph (a) to cover foreign airlines, Congress appears to have drawn a line between covering foreign airlines under paragraph (a) of the Access Act, on the one hand, and imposing the additional burden of requiring them to submit all disability-related complaints to DOT, on the other hand. In effect, Congress seems to have decided not to further impinge on the sovereignty of other nations by requiring foreign airlines to report all disability complaints to DOT as if it were a universal agency for such matters. DOT's proposed rule, which requires a great deal of specificity in categorizing complaints, completely ignores the line drawn in the legislation.

Given the conclusion reached earlier that the extension of the Access Act to foreign airlines is impermissibly unilateral, DOT's effort to extend the disability complaint reporting requirement to foreign airlines is embraced within that impermissible unilateralism (under both prongs of the test discussed above).

Conclusion

U.S. legislators and agency policy makers often have failed to restrain themselves from unilaterally imposing U.S. law on foreign airlines in a manner inconsistent with generally accepted international legal principles. This is a serious problem for aggrieved foreign governments and their airlines because there is no effective judicial review of a U.S. statute that simply ignores international agreements or customary international law.[19] Moreover, the foreign aviation community lacks the political muscle to dissuade legislators and policy makers from adopting such impermissibly unilateral laws in the first place. This lack of political influence is particularly

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[19] *See* Restatement §§ 402 cmt. i; 403 cmt. g. Of course, the fact that there may be no remedy under U.S. domestic law for a unilateral U.S. prescription that is impermissible does not mean that the United States does not have international responsibility for its actions. *See id.* § 115 cmt. a, b.

apparent when contrasted with the U.S. airline industry, which often has sought and received congressional and agency assistance to impose on foreign airlines the same perceived burdens that U.S. laws and regulations place on U.S. airlines—often stated as the need to "level the competitive playing field"—without consideration of the international law ramifications of the imposition. Despite these harsh realities, and perhaps because of them, U.S. decision makers on aviation matters should be more sensitive to international legal issues; should seek international consensus, cooperation, and coordination where possible; and should exercise self-restraint instead of resorting to easy unilateral answers when aviation-related concerns arise.

The United States has long been a leader in the formulation of the international law principles that govern and support the global civil aviation regime, and it will unquestionably continue to have a leadership role to play in international aviation matters. We have little doubt that the United States can play this role in a way that promotes harmony, cooperation, and respect among nations. In this regard, U.S. legislators and policy makers would do well to heed the injunction of Henry Kissinger at the close of a recent book: ". . . America's ultimate challenge is to transform its power into moral consensus, promoting its values not by imposition but by their willing acceptance in a world that, for all its seeming resistance, desperately needs enlightened leadership."[20]

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[20] Henry Kissinger, Does America Need a Foreign Policy? Toward a Diplomacy for the 21st Century 288 (Simon & Shuster 2001).