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## AIR TRANSPORTATION TAXATION: THE CASE FOR REFORM

CHARLES E. SMITH\*

**T**HE U.S. AIRLINE industry no longer receives the public esteem it once enjoyed.<sup>1</sup> Although air carriers share the blame for some of the battering their reputations have received, they cannot be faulted for the litany of government-imposed user fees and taxes that irk many passengers. Currently, the federal government permits various agencies to levy nine disparate taxes and user fees on air travelers.<sup>2</sup> These charges can add more than \$75 to a roundtrip domestic journey.<sup>3</sup> On international trips, which are also subject to foreign governments' taxes and fees, the amount added to the base fare can soar to over \$350.<sup>4</sup> What can be done to rein in these charges?

This article examines the taxes and user fees added by the U.S. government to airline tickets for travel to, from, and within the United States. First, the article considers the roots of these various charges. Second, it outlines the current tax schedule. Third, it highlights the faults of one particular fee as an example of how the current regulatory scheme disserves both air carriers and the flying public. Fourth, it looks at mechanisms for

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<sup>1</sup> See, e.g., Roger Yu, *Airlines Score Lower than IRS in Customer Satisfaction*, USA TODAY, May 15, 2007, at 5B (noting that according to the University of Michigan's American Customer Satisfaction Index, the airline industry scored 63 out of 100, while the Internal Revenue Service scored 65).

<sup>2</sup> See Appendix for a complete breakdown of U.S. air transportation taxes.

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

<sup>4</sup> See, e.g., *Taxes and Fees*, DELTA, [http://www.delta.com/planning\\_reservations/plan\\_flight/online\\_reservations/fares\\_ticketing\\_rules/taxes\\_fees/index.jsp](http://www.delta.com/planning_reservations/plan_flight/online_reservations/fares_ticketing_rules/taxes_fees/index.jsp) (last visited Oct. 22, 2010) (noting that foreign fees and taxes may total up to \$299).

ameliorating the situation. Possible solutions include the enforcement of provisions in the Chicago Convention and bilateral air service agreements, as well as the implementation of numerous recommendations repeatedly made by the Government Accountability Office (GAO).

## I. AVIATION IS AN EASY TARGET FOR TAXATION

In the United States, the taxation of airline tickets began with the Revenue Act of 1941.<sup>5</sup> Since then federal taxes on aviation have spiraled out of control. According to Joseph Leonard, former AirTran chief executive officer, airline passengers pay the highest rate of federal taxation—even higher than consumers of liquor and cigarettes.<sup>6</sup>

Taxation of air transportation has rapidly increased mainly because it is a soft target.<sup>7</sup> First, these charges are easy to collect, in part because only a handful of companies need remit them.<sup>8</sup> Second, the voting public is not cognizant of the amount of taxes it pays when traveling by air, particularly since many of those charges must be included in the advertised ticket price.<sup>9</sup> Voters thus have little incentive to complain to politicians, even when taxes add as much as 20% to a domestic ticket.<sup>10</sup> Moreover, airline passengers lack a general advocate. The only group lobbying on behalf of airline passengers has thus far limited its efforts to the passage of an airline passenger

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<sup>5</sup> KENNETH J. BUTTON, *THE TAXATION OF AIR TRANSPORTATION*, app. A (2005), <http://www.gmupolicy.net/transport2003/airlinetaxation.pdf>.

<sup>6</sup> Anthony Ryan, *How Airline Security Fees in a Post September 11, 2001 Environment Are Spiraling Out of Control*, 29 *TRANSP. L.J.* 253, 260 (2002) (citing AirTran Airways: Hearing Before the Subcomm. on Aviation of the H. Comm. on Transp. and Infrastructure (Sept. 24, 2002)).

<sup>7</sup> See BUTTON, *supra* note 5, at 7.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Government-Imposed Taxes/Fees on Commercial Air Travel*, AIR TRANSP. ASS'N, <http://www.airlines.org/Economics/Taxes/Pages/GovTaxesandFeesonAirlineTravel.aspx> (last visited Oct. 22, 2010). Compare air transportation with financial transactions, which are a "hard target" because taxes on bank deposits and withdrawals are immediately seen by consumers and must be remitted by hundreds or thousands of companies. As a result, financial transaction taxes rarely meet with success. See, e.g., Mary Anastasia O'Grady, *Tax-Happy Brazil Hits the Wall*, WALL ST. J., Jan 28, 2008, at A14 (discussing the end of Brazil's national financial transactions tax); Press Release, Australian Bankers' Ass'n, 30-Day Countdown Until Bank Tax Abolished (May 31, 2001), available at <http://www.bankers.asn.au/default.aspx?ArticleID=124> (discussing the end of Australia's Bank Accounts Debits Tax).

bill of rights.<sup>11</sup> It remains to be seen if the passage of such legislation will prod the group to expand its goals to include lobbying against excessive taxes and fees. These factors have resulted in a plethora of government charges levied on air transportation.

In some instances, airlines have successfully challenged the legality of a tax or fee.<sup>12</sup> For example, in 1970, the Evansville-Vanderburgh Airport Authority enacted an ordinance mandating that airlines collect and remit, less administrative costs, a one-dollar fee per passenger.<sup>13</sup> The fee would go into a fund dedicated to paying for “the construction, improvement, equipment, and maintenance of [the] Airport and its facilities for the continued use and future enjoyment by all users thereof.”<sup>14</sup> Delta Air Lines (Delta) and other carriers claimed that the fee violated the Commerce Clause by constituting an unreasonable burden on interstate commerce.<sup>15</sup> The Supreme Court disagreed.<sup>16</sup> The majority upheld airport-imposed passenger charges “so long as the toll [was] based on some fair approximation of use or privilege for use . . . and [was] neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred.”<sup>17</sup>

Although the airlines lost their court battle over airport-imposed passenger charges, they ultimately succeeded in the legislative arena. In response to the ruling in *Evansville*, Congress enacted section seven of the Airport Development Acceleration Act of 1973, commonly referred to as the Anti-Head Tax Act.<sup>18</sup> The Anti-Head Tax Act prohibits states, including subdivisions like airport authorities, from levying or collecting “a tax, fee, head charge, or other charge” on: (1) an individual traveling in air commerce; (2) the transportation of an individual traveling in air commerce; (3) the sale of air transportation; or (4) the

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<sup>11</sup> While the Coalition for an Airline Passengers Bill of Rights recently changed its name to Flyers Rights, it did not expand its agenda. *About Us*, FLYERS RIGHTS, <http://flyersrights.org/about/php> (last visited Oct. 22, 2010).

<sup>12</sup> See, e.g., *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 709 (1972); *Nw. Airlines, Inc. v. Joint City-County Airport Bd.*, 463 P.2d 470, 472 (Mont. 1970).

<sup>13</sup> *Evansville*, 405 U.S. at 709.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 721–22.

<sup>17</sup> *Id.* at 716–17.

<sup>18</sup> Pub. L. No. 93-44, 87 Stat. 90 (1973) (codified at 49 U.S.C. § 40116(b) (2006)).

gross receipts from that air commerce or transportation.<sup>19</sup> Congress, embracing the arguments espoused by Delta, passed this law because it feared that the *Evansville* holding might lead to a proliferation of local taxes on airline passengers.<sup>20</sup> Thus, airlines have proven successful in preventing states and airport authorities from adding to the existing federal aviation taxation scheme.<sup>21</sup>

Although beyond the scope of this article, the taxes and fees levied by foreign governments are similarly high. Some countries levy a form of “departure tax” imposed on all passengers departing the country.<sup>22</sup> For example, the United Kingdom levies an Air Passenger Duty of up to 80 GBP per passenger,<sup>23</sup> and Brazil levies a Departure Tariff of up to U.S. \$36 per passenger.<sup>24</sup> Others have followed the U.S. model of imposing a variety of taxes and fees for various purposes.<sup>25</sup> For example, airline tickets purchased in Canada are subject to four separate taxes and fees.<sup>26</sup> First, Canada imposes a NAV Canada Surcharge of CAD \$7.50 to \$20 one-way, based on the distance flown, to pay for air traffic control services.<sup>27</sup> Second, Canada collects an Air Travellers Security Charge of CAD \$5 to \$8 one-way to pay for

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<sup>19</sup> *Id.* § 113.

<sup>20</sup> S. REP. NO. 93-12, at 4 (1973) (describing Congress’s intent to “ensure . . . that local ‘head’ taxes will not be permitted to inhibit the flow of interstate commerce”); *id.* at 13 (“The head tax . . . cuts against the grain of the traditional American right to travel among the States . . .”); H.R. REP. NO. 93-157, at 4–5 (1973).

<sup>21</sup> Airlines continue to pay user fees to airport authorities. Such fees are reasonable if based on a fair approximation of use of airport facilities, not excessive in relation to the benefits conferred, and not discriminatory against interstate commerce. *Nw. Airlines v. County of Kent*, Mich. 510 U.S. 355, 369 (1994). Per an amendment to the Federal Aviation Administration Authorization Act of 1994, the Secretary of Transportation now possesses the authority to determine reasonableness. 49 U.S.C. § 47129(a)(1) (2006). Airport fees, of course, may ultimately be passed on to consumers in the form of higher fares, but because they are levied not on passengers but instead on airlines, they are beyond the scope of this article.

<sup>22</sup> *See, e.g., Air Passenger Duty*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/air-passenger-duty/index.htm> (last visited Oct. 22, 2010).

<sup>23</sup> *Id.*

<sup>24</sup> Portaria No. 955/DGAC, de 15 de Dezembro de 1997, DIÁRIO OFFICIAL DA UNIÃO [D.O.U.] de 17.12.1997 (Brazil).

<sup>25</sup> *See, e.g., Taxes and Surcharges on Airline Tickets*, LIBRARY OF PARLIAMENT, <http://www2.parl.gc.ca/content/lop/researchpublications/prb0572-e.htm> (last visited Oct. 22, 2010).

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

<sup>27</sup> Civil Air Navigation Services Commercialization Act, S.C. 1996, c. 20 (Can.).

security costs.<sup>28</sup> Third, Canada's Goods and Services Tax (GST) applies to the price of airline tickets purchased in Canada.<sup>29</sup> Finally, airports at which a passenger embarks or connects are permitted to impose an Airport Improvement Fee of up to CAD \$40.<sup>30</sup> The International Air Transport Association (IATA) publishes a list of taxes and fees imposed worldwide, updated quarterly.<sup>31</sup>

Recently, a group of developing countries led by the Maldives began lobbying for a global aviation tax to pay for projects to slow climate change in the developing world.<sup>32</sup> The so-called International Air Passenger Adaptation Levy would add \$6 to \$62 to the cost of international airline tickets.<sup>33</sup> Should that multilateral tax proposal gain traction, it could set a precedent for a future wave of new taxes on international aviation levied not by individual states but by multilateral organizations or small groups of states.

## II. THE CURRENT TAX SCHEME IS OVERWHELMING

Even casting aside fees levied by foreign governments, deciphering the taxes and user fees levied on air transportation by the U.S. government is a daunting task.<sup>34</sup> As many as nine government-imposed charges are listed on passenger receipts.<sup>35</sup> This section details the various taxes and user fees, including their statutory bases and purposes.

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<sup>28</sup> Air Travellers Security Charge Act, S.C. 2002, c. 9 (Can.).

<sup>29</sup> See generally *How GST/HST Works*, CAN. REVENUE AGENCY, <http://www.cra-arc.gc.ca/tx/bsnss/tpcs/gst-tps/gnrl/hw-eng.html> (last visited Oct. 22, 2010).

<sup>30</sup> *Travellers to Pay More for Departure Taxes at Canadian Airports*, CBC NEWS (Oct. 5, 2007), <http://www.cbc.ca/consumer/story/2007/10/05/departure-taxes.html>.

<sup>31</sup> *IATA List of Ticket and Airport Taxes and Fees*, IATA, [http://www.iata.org/ps/financial\\_services/pages/tax-list.aspx](http://www.iata.org/ps/financial_services/pages/tax-list.aspx) (last visited Oct. 22, 2010) (IATA charges \$1,500 for the list).

<sup>32</sup> *Other News—11/03/2009*, AIR TRANSPORT WORLD DAILY NEWS (Nov. 4, 2009), <http://atwonline.com/aeropolitics-regulation/news/other-news-11032009-0309>.

<sup>33</sup> *Id.*

<sup>34</sup> The task is further complicated by the industry practice of assigning two-letter codes to identify the various charges, thus making it difficult for passengers to distinguish between fees added by air carriers and those assessed by governments.

<sup>35</sup> See Appendix for a complete breakdown of U.S. air transportation taxes.

## A. PASSENGER FACILITY CHARGES

Only one of the taxes or government fees collected by airlines is not destined for federal coffers<sup>36</sup>—Passenger Facility Charges (PFC) are remitted to airports.<sup>37</sup> Any U.S. airport may submit an application to the Department of Transportation (DOT) requesting the authority to impose a PFC on passengers who board a flight at that airport.<sup>38</sup> DOT may then grant the authority to impose a PFC ranging from \$1.00 to \$4.50 per passenger.<sup>39</sup> Should the passenger make multiple stops during the same itinerary, only the first two airports may collect a PFC.<sup>40</sup> Only passengers on flights within Hawaii or Alaska on aircraft carrying fewer than sixty passengers and non-revenue passengers are exempt.<sup>41</sup> As of August 2010, ninety-eight of the busiest one hundred airports charged the maximum \$4.50 PFC.<sup>42</sup> Total collections have remained above an astounding \$2.5 billion since 2006.<sup>43</sup>

In order for DOT to approve an airport's request to impose a PFC, the airport's project must fit the statutory definition of an "eligible airport-related project."<sup>44</sup> This definition includes airport development and planning, terminal development, airport noise capability planning, noise compatibility measures, passen-

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<sup>36</sup> In contrast to many other countries, most U.S. airports are owned and operated by local governments. See generally 8A AM. JUR. 2D *Aviation* § 88 (2010).

<sup>37</sup> 49 U.S.C. § 40117(i), (j) (2006). Section 40117(j) reiterates that states and their political subdivisions may not levy any charge apart from a DOT-approved PFC on airline passengers embarking or disembarking within their jurisdiction.

<sup>38</sup> *Id.* § 40117(c).

<sup>39</sup> *Id.* § 40117(b). The American Association of Airport Executives has proposed increasing the maximum fee and then allowing automatic adjustments for inflation. Roger Yu, *Airports Want Passenger Fee Charge Increased*, USA TODAY, Nov. 30, 2009, available at [http://www.usatoday.com/travel/flights/2009-11-30-airwar30\\_ST\\_N.htm](http://www.usatoday.com/travel/flights/2009-11-30-airwar30_ST_N.htm). Airlines have opposed any increase. See, e.g., Letter from James May, Chief Executive Officer, ATA, to Nancy Pelosi, Speaker of the U.S. House of Representatives and John A. Boehner, Minority Leader of the U.S. House of Representatives (May 18, 2009), available at [http://airlines.org/publicpolicy/ATAletters/pages/letter\\_5\\_18\\_09.aspx](http://airlines.org/publicpolicy/ATAletters/pages/letter_5_18_09.aspx).

<sup>40</sup> 49 U.S.C. § 40117(e)(2)(A).

<sup>41</sup> *Id.* § 40117(e)(2)(C)–(E). Non-revenue passengers include fliers traveling on frequent flyer awards in addition to airline employees and their companions traveling on a space-available basis or on airline business. See *id.* § 40117(e)(2)(C).

<sup>42</sup> *Passenger Facility Charges (PFC)*, AIR TRANSP. ASS'N, [http://www.airlines.org/Economics/Taxes/Pages/PassengerFacilityCharges\(PFC\).aspx](http://www.airlines.org/Economics/Taxes/Pages/PassengerFacilityCharges(PFC).aspx) (last visited Oct. 22, 2010).

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

<sup>44</sup> 49 U.S.C. § 40117(a)(3), (b)(4).

ger terminal construction, conversion of ground support equipment and airport vehicles to low-emission technology, and debt service.<sup>45</sup> Courts have held that DOT has significant leeway to determine whether a project qualifies as an “eligible airport-related project.”<sup>46</sup> In fact, courts have recently upheld PFC financing of construction projects at off-airport locations, most notably the construction of public transportation links between cities and airports.<sup>47</sup> Furthermore, DOT need not conduct a cost-benefit analysis or apply any formal test or checklist before certifying a project’s eligibility for PFC funding.<sup>48</sup> As a result of the low standard for approving PFC requests, DOT has rejected only five airport authorities’ proposals.<sup>49</sup>

#### B. EXCISE TAX, THE FEDERAL SEGMENT FEE, AND THE TRAVEL FACILITIES FEE

The federal government levies an excise tax on domestic flights.<sup>50</sup> Flights to and from Canadian and Mexican cities less than 225 miles from the U.S. border are also subject to the tax.<sup>51</sup> The tax rate has fluctuated over the years.<sup>52</sup> Since 1999, however, this tax has rested at 7.5% of the fare.<sup>53</sup> The taxes collected accrue to the Airport and Airway Trust Fund, which provides grants to airports for planning-and-development project costs (in addition to the amount airports receive from imposing a PFC).<sup>54</sup> The aviation excise tax as a percentage of total

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<sup>45</sup> *Id.* § 40117(b)(4), (d)(1)–(2).

<sup>46</sup> *See, e.g.,* *Se. Queens Concerned Neighbors, Inc. v. Fed. Aviation Admin.*, 229 F.3d 387, 393 (2d Cir. 2000).

<sup>47</sup> *Id.* at 389, 396 (holding that DOT did not abuse its discretion in allowing airports controlled by the Port Authority of New York and New Jersey to collect a PFC in order to finance a light rail line connecting John F. Kennedy International Airport to the Jamaica Transit Station).

<sup>48</sup> *See id.* at 393.

<sup>49</sup> *Passenger Facility Charges (PFC)*, *supra* note 42 (noting rejected proposals from Austin, Texas; Naples, Florida; Orlando, Florida; Peoria, Illinois; and St. Augustine, Florida).

<sup>50</sup> 26 U.S.C. § 4261(a) (2006).

<sup>51</sup> The Tax Reform Act of 1986 added these itineraries to those subject to the excise tax. Rev. Rul. 87-133 (1987), 1987-2 C.B. 261.

<sup>52</sup> The tax rate has remained between five and ten percent since its inception. *See, e.g.,* Tax Rate Extension Act of 1959, Pub. L. No. 86-75, § 4, 73 Stat. 157, 158 (1959) (reducing the tax from ten to five percent effective July 1, 1960); Pub. L. No. 105-34, § 1031, 111 Stat. 929, 931–32 (1997) (establishing a three-year phase-in period for the current rate).

<sup>53</sup> 26 U.S.C. § 4261(a).

<sup>54</sup> *See* ALEXANDER WELLS & SETH YOUNG, AIRPORT PLANNING & MANAGEMENT 18, 31, 216 (4th ed. 2000).



federal excise tax receipts has skyrocketed from 3.3% in 1971 to a peak of 14.4% in 1999.<sup>55</sup> It has since settled at around 13% of federal excise tax revenues.<sup>56</sup>

During the period of economic regulation of the airline industry, this tax had similar impacts on all U.S. carriers. The Airline Deregulation Act, signed into law in 1978, changed this dynamic.<sup>57</sup> Suddenly a host of low-cost carriers entered the market.<sup>58</sup> These airlines typically offered only one class of service and fares lower than those of the legacy airlines.<sup>59</sup> As a result of their lower average fares, excise taxes collected by low-cost carriers trailed the receipts of legacy carriers.<sup>60</sup> Legacy carriers claimed this resulted in their paying a disproportionate share of the costs of running the national aviation system.<sup>61</sup> Discount carriers, notably Southwest Airlines, responded that the legacy carriers' analysis was flawed because it ignored the fact that the legacy carriers' hub-and-spoke networks required passengers to make connections at hubs.<sup>62</sup> Low-cost carriers, on the other hand, generally operated point-to-point networks consisting primarily of non-stop flights.<sup>63</sup> Connecting flights created more of a burden on the national air system than non-stops; thus, legacy carriers should pay more of the costs associated with running the national aviation system.<sup>64</sup>

To correct this imbalance, the legacy carriers argued for a "user fee" based on the amount of miles flown and/or the num-

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<sup>55</sup> BUTTON, *supra* note 5, at 7.

<sup>56</sup> *Id.*

<sup>57</sup> Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 1, 92 Stat. 1705, 1705 (1978). The Civil Aeronautics Board, which had previously regulated where airlines could fly and what fares they could charge, ceased to exist on January 1, 1985. R. Dale Grinder, Departmental Historian, *USDOT: A Brief History*, <http://dotlibrary.dot.gov/Historian/history.htm> (last visited Oct. 22, 2010).

<sup>58</sup> See generally BARBARA PETERSON & JAMES GLAB, *RAPID DESCENT: DEREGULATION AND SHAKEOUT IN THE AIRLINES* 12 (Simon & Schuster 1994); T.A. HEPPENHEIMER, *TURBULENT SKIES: THE HISTORY OF COMMERCIAL AVIATION* 319 (Wiley 1998).

<sup>59</sup> See TOM NORWOOD, *DEREGULATION KNOCKOUTS: ROUND ONE* (Airways Int'l 1996) (cataloging carriers that ceased flying during the first decade of deregulation).

<sup>60</sup> Asra Q. Nomani, *Major Airlines Push for New Ticket Tax*, *WALL ST. J.*, June 13, 1996, at A2.

<sup>61</sup> The seven legacy carriers of the time claimed to account for 73% of commercial air traffic while paying 82% of the taxes. *Id.*

<sup>62</sup> Scott McCartney, *GAO Says Fees Would Favor Big Airlines*, *WALL ST. J.*, Dec. 9, 1996, at A3.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

ber of takeoffs and landings involved in an itinerary.<sup>65</sup> Adding a tax to each segment and mile flown, regardless of the fare, would help close the gap between the percentage of excise taxes collected by legacy carriers and the percentage of air traffic for which they were responsible.<sup>66</sup>

After an intense debate, Congress ultimately reached a compromise.<sup>67</sup> By October 1999, the rate at which tickets were subject to the excise tax was decreased to 7.5%, where it remains today.<sup>68</sup> At the same time, bowing to demands of the legacy carriers, Congress added a Federal Segment Fee.<sup>69</sup> For each segment, defined as “one takeoff and one landing,”<sup>70</sup> passengers would be charged an additional \$1.00.<sup>71</sup> That amount would increase according to a set schedule until reaching \$3.00 per segment in 2002.<sup>72</sup> Adjusted annually for inflation, the Federal Segment Fee increased to \$3.70 in 2010.<sup>73</sup>

In addition, the government levies special segment fees on flights from Alaska and Hawaii.<sup>74</sup> The nebulously named Travel Facilities Tax originally added \$6 to each domestic flight segment departing from the nation’s two newest states.<sup>75</sup> This replaces the \$3.70 Federal Segment Fee for segments from Alaska or Hawaii.<sup>76</sup> In 2010, the Travel Facilities Tax increased to \$8.10.<sup>77</sup>

### C. INTERNATIONAL TRANSPORTATION TAX

Instead of the Federal Segment Fee and Travel Facilities Tax, international journeys beginning or ending in the United States

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<sup>65</sup> *Id.*

<sup>66</sup> *See* Nomani, *supra* note 60.

<sup>67</sup> Every major airline’s chief executive officer attended the first House Ways and Means Committee meeting on the subject, thousands of airline employees signed petitions, and American Airlines went so far as to offer two free positive-space tickets to Hawaii to any employee who participated in a rally at the Capitol—over 1,000 did. Gregg Hitt, *Airlines Taxi into Position Around Capitol Hill as Lawmakers Make Decisions on Ticket Taxes*, WALL ST. J., July 9, 1997, at A16.

<sup>68</sup> 26 U.S.C. § 4261(e)(5) (2006).

<sup>69</sup> *See id.* § 4261(b)(1).

<sup>70</sup> *Id.* § 4261(b)(2).

<sup>71</sup> *Id.* § 4261(b)(1).

<sup>72</sup> *Id.*

<sup>73</sup> Rev. Proc. 2008-66 § 3.32, 2008-2 C.B. 1107 (I.R.S. Form 570).

<sup>74</sup> 26 U.S.C. § 4261(c)(3).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Rev. Proc. 2008-66 § 3.32, 2008-2 C.B. 1107 (I.R.S. Form 570).

are charged a flat tax of \$16.10.<sup>78</sup> The purpose of the International Transportation Tax is the same as that of the Federal Segment Fee and Travel Facilities Tax discussed above.

#### D. SEPTEMBER 11TH SECURITY FEE

In response to the terrorist attacks on September 11, 2001, the federal government overhauled aviation security. Cockpit doors were reinforced.<sup>79</sup> Minimum-wage contract employees hired by the airlines to staff security checkpoints were replaced with better-educated and higher-earning federal employees.<sup>80</sup> Checked baggage began to receive the same scrutiny as carry-on luggage.<sup>81</sup> Federal Air Marshals began to staff more flights.<sup>82</sup> These and other new security directives dramatically increased the cost of keeping the national air system safe.<sup>83</sup> For example, new baggage screening requirements were projected to cost the federal government \$1.2 to \$2.0 billion annually.<sup>84</sup>

The U.S. airlines' precarious financial position, and the similar woes felt by the country's airports, made it impossible for the aviation industry to pay for the increased costs.<sup>85</sup> As a result, Congress passed legislation authorizing DOT to impose a uni-

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<sup>78</sup> 26 U.S.C. § 4261(c)(1); Rev. Proc. 2008-66 § 3.32, 2008-2 C.B. 1107 (I.R.S. Form 570).

<sup>79</sup> E.g., Eric Lichtblau, *Security Report on U.S. Aviation Warns of Holes*, N.Y. TIMES, Mar. 14, 2005, at A1.

<sup>80</sup> E.g., Lizette Alvarez, *Senate Votes to Federalize Job of Airport Screening*, N.Y. TIMES, Oct. 12, 2001, at B11.

<sup>81</sup> E.g., Matthew Wald, *Airport Managers Say Deadline for Screening All Checked Bags Can't Be Met*, N.Y. TIMES, Nov. 13, 2002, at A19.

<sup>82</sup> E.g., Eric Lichtblau, *Americans Order Foreign Airlines to Use Marshalls*, N.Y. TIMES, Dec. 30, 2003, at A1.

<sup>83</sup> For example, security screeners employed by private firms earned minimum wage while federalized screeners earn around \$35,000 per year. Compare David Firestone, *Rules Will Allow Airport Screeners to Remain in Jobs*, N.Y. TIMES, Dec. 30, 2001, at A1, with David Firestone, *Top Credentials Sought for Airport Security Jobs*, N.Y. TIMES, Jan. 13, 2002, at 18. Similarly, new machines to scan checked luggage, which prior to September 11, 2001, was rarely searched, can cost more than \$1 million each. Matthew Wald, *Tough Issues on Baggage Screening Remain*, N.Y. TIMES, Nov. 5, 2002, at A15.

<sup>84</sup> Alvarez, *supra* note 80.

<sup>85</sup> Following the 9/11 attacks, the federal government established the Air Transportation Stabilization Board to provide \$5 billion in direct subsidies to U.S. carriers as well as \$10 billion in loan guarantees. Greg Hitt & Martha Branigan, *Airline Bailout May Become Boon for U.S.*, WALL ST. J., Oct. 9, 2001, at A2. For more on the Air Transportation Stabilization Board, see the Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 102, 115 Stat. 230, 231 (2002).

form fee on all commercial air passengers.<sup>86</sup> The new fee would pay for nine specific security-related costs: (1) salaries for federalized airport security screening personnel and their managers;<sup>87</sup> (2) screening equipment and training;<sup>88</sup> (3) background investigations of employees;<sup>89</sup> (4) the Federal Air Marshal Program;<sup>90</sup> (5) research and development of new aviation security methods and equipment;<sup>91</sup> (6) deployment of federal, state, and local law enforcement officers at airports;<sup>92</sup> (7) the Federal Safety Managers Program;<sup>93</sup> (8) security-related capital improvement projects at airports;<sup>94</sup> and (9) anti-terrorism training for pilots and flight attendants.<sup>95</sup>

Congress gave DOT and the Department of Homeland Security (DHS) broad leeway to set a fee schedule as long as those fees were “reasonably related to the Transportation Security Administration’s costs of providing services rendered.”<sup>96</sup> Congress limited the Departments’ discretion by placing an upper limit on the September 11th Security Fee. Passengers face a maximum fee of \$2.50 per enplanement at a U.S. airport but pay a maximum of \$5.00 per one-way trip, regardless of the number of airports visited.<sup>97</sup>

#### E. CUSTOMS USER FEE

In order to finance services provided at airports by the Bureau of Customs and Border Protection (CBP), most international passengers are charged a user fee.<sup>98</sup> That fee has fluctuated

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<sup>86</sup> 49 U.S.C. § 44940 (2006) (referring to the Security Service Fee, later renamed the September 11th Security Fee). The Transportation Security Administration remained part of the Department of Transportation until the creation of the Department of Homeland Security in 2002. Homeland Security Act of 2002, Pub. L. No. 107-296, § 403, 116 Stat. 217-7, 217-8.

<sup>87</sup> 49 U.S.C. § 44940(a)(1)(A); *see also id.* § 44901.

<sup>88</sup> *Id.* § 44940(a)(1)(B).

<sup>89</sup> *Id.* § 44940(a)(1)(C).

<sup>90</sup> *Id.* § 44940(a)(1)(D).

<sup>91</sup> *Id.* § 44940(a)(1)(E).

<sup>92</sup> *Id.* §§ 44940(a)(1)(F), 44903.

<sup>93</sup> *Id.* §§ 44940(a)(1)(G), 44903(h).

<sup>94</sup> *Id.* § 44940(a)(1)(H).

<sup>95</sup> *Id.* §§ 44940(a)(1)(I), 44918, 44921.

<sup>96</sup> *Id.* § 44940(b).

<sup>97</sup> *Id.* § 44940(c).

<sup>98</sup> *See* 19 U.S.C. § 58c (2006). These inspections are “designed to prevent passengers from bringing illegal goods—such as narcotics—into the United States.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-1131, FEDERAL USER FEES: KEY ASPECTS OF INTERNATIONAL AIR PASSENGER INSPECTION FEES SHOULD BE ADDRESSED

over time but currently rests at \$5.50 for passengers arriving from countries other than Canada and Mexico.<sup>99</sup> Currently, CBP does not exercise its authority to levy a fee of up to \$1.75 on passengers arriving from Canada, Mexico, and most Caribbean islands.<sup>100</sup> Only Congress possesses the authority to change fee levels; CBP may not issue its own regulations to change the schedule.<sup>101</sup> Airlines collect the user fees and remit them quarterly to the Federal Treasury, which then reimburses CBP for statutorily-allowed expenses.<sup>102</sup>

The Customs User Fee is designed to ensure that customs services are “adequately provided” to airline passengers.<sup>103</sup> An advisory committee, consisting of representatives of airlines and cruise lines subject to the user fee, meets periodically with CBP representatives to discuss fee levels and performance.<sup>104</sup> The House Ways and Means Committee and the Senate Finance Committee provide congressional oversight.<sup>105</sup>

#### F. IMMIGRATION AND NATURALIZATION FEE

Similarly, DHS levies a fee to cover “the immigration inspection of each passenger arriving at a port of entry in the United States, or for the preinspection of a passenger in a place outside of the United States prior to such arrival, aboard a commercial aircraft.”<sup>106</sup> Passengers who do not receive an inspection or preinspection do not pay the fee.<sup>107</sup> The current fee is \$7.00 per

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REGARDLESS OF WHETHER FEES ARE CONSOLIDATED 9 (2007) [hereinafter GAO-07-1131].

<sup>99</sup> From 1986 to 2005, the fee was \$5.00, except for 1994 to 1997, when it was \$6.50. The current fee is in effect through 2014. GAO-07-1131, *supra* note 98, at 13.

<sup>100</sup> 19 U.S.C. § 58(b)(1)(A)(i)(I).

<sup>101</sup> GAO-07-1131, *supra* note 98, at 13, tbl. 1.

<sup>102</sup> *Id.* at 9.

<sup>103</sup> 19 U.S.C. § 58c(e).

<sup>104</sup> *Id.* § 58c(k).

<sup>105</sup> GAO-07-1131, *supra* note 98, at 13.

<sup>106</sup> 8 U.S.C. § 1356(d) (2006). This inspection “is designed to prevent passengers from entering the United States without legal entry and immigration documents.” GAO-07-1131, *supra* note 98, at 9.

<sup>107</sup> 8 U.S.C. § 1356(e)(2). The primary beneficiaries of this exemption were passengers participating in the Transit Without Visa and International-to-International programs. Both programs were suspended indefinitely in 2003. Suspension of Immediate and Continuous Transit Program, 68 Fed. Reg. 46,926, 46,926 (Aug. 7, 2003).

passenger.<sup>108</sup> Only Congress may adjust fee levels.<sup>109</sup> Airlines remit fees to the Federal Treasury quarterly, except in the fourth quarter when receipts are due ten days before the end of the fiscal year.<sup>110</sup> The government then splits the receipts between CBP and Immigration and Customs Enforcement (ICE) according to the costs incurred by each agency.<sup>111</sup>

The Immigration and Naturalization Fees collected by airlines and cruise lines must only be used to fund the immigration inspections of airline and cruise line passengers; they may not be used for inspections performed at land crossings.<sup>112</sup> As with the Customs User Fee, an advisory committee, consisting of airline and cruise line representatives whose passengers are subject to the user fee, meets periodically with DHS representatives to discuss fee levels and performance.<sup>113</sup> The Judiciary and Homeland Security Committees of both houses, the House Ways and Means Committee, and the Senate Finance Committee provide congressional oversight.<sup>114</sup>

#### G. ANIMAL AND PLANT HEALTH INSPECTION SERVICE FEE

Finally, the Animal and Plant Health Inspection Service (APHIS) of the Department of Agriculture (USDA) has the statutory authority to collect a user fee for agricultural inspections of international air passengers upon their arrival into the United States.<sup>115</sup> Unlike the Customs and Immigration user fees, whose schedules are set by statute, the Secretary of Agriculture retains discretion to set the APHIS Fee schedule.<sup>116</sup> The APHIS Fee is levied on all international passengers, as well as passengers moving between U.S. territories, Alaska, or Hawaii and the continental United States, with the exception of passengers moving between the U.S. Virgin Islands and Puerto Rico.<sup>117</sup>

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<sup>108</sup> 8 U.S.C. § 1356(d). The fee was \$5.00 from 1987 to 1993, when it was raised to \$6.00; the last increase occurred in 2002. GAO-07-1131, *supra* note 98, at 14, tbl. 1.

<sup>109</sup> GAO-07-1131, *supra* note 98, at 14, tbl. 1.

<sup>110</sup> *Id.* at 9.

<sup>111</sup> *Id.*

<sup>112</sup> See 8 U.S.C. §§ 1356(g), (q).

<sup>113</sup> *Id.* § 1356(k).

<sup>114</sup> GAO-07-1131, *supra* note 98, at 14, tbl. 1.

<sup>115</sup> See 21 U.S.C. § 136a(a)(1) (2006). These inspections are designed “to seize prohibited materials and intercept foreign agricultural pests.” GAO-07-1131, *supra* note 98, at 10.

<sup>116</sup> GAO-07-1131, *supra* note 98, at 10.

<sup>117</sup> *Id.* at 21, tbl. 3.

On October 1, 2009, pursuant to an interim rule, APHIS increased its fee to \$5.50 per passenger.<sup>118</sup> That plan was subsequently delayed until November 1, 2009.<sup>119</sup> On October 30, 2009, APHIS withdrew its interim rule “based on feedback and comments from stakeholders.”<sup>120</sup> Thus, APHIS currently charges each passenger \$5.00.<sup>121</sup> Nevertheless, APHIS has stated its intention to explore “regulatory alternatives” to increasing that charge.<sup>122</sup>

No stakeholder advisory committee oversees the APHIS Fee; APHIS does not solicit industry feedback on fee levels or performance.<sup>123</sup> The Agriculture Committees of both houses, the House Ways and Means Committee and the Senate Finance Committee, provide congressional oversight.<sup>124</sup>

As will be discussed in the next section, each of these charges has raised the ire of the airline industry, but air carriers have particularly faulted the APHIS Fee. The 2009 proposed APHIS Fee increase exemplifies many of the problems with the current air transportation taxation scheme.

### III. RECENT APHIS FEE INCREASE SYMBOLIZES THE PROBLEMS OF THE CURRENT TAX SCHEME

On September 28, 2009, the USDA published an interim rule and request for comments in the Federal Register announcing its intention to change the regulations governing APHIS Fees for international services.<sup>125</sup> The fee for inspecting most passen-

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<sup>118</sup> User Fees for Agricultural Quarantine and Inspection Services, 74 Fed. Reg. 49,311, 49,315 (Sept. 28, 2009) (to be codified at 7 C.F.R. pt. 354).

<sup>119</sup> Press Release, U.S. Dep’t of Agric., User Fee Increases for Certain Commercial Vehicles and International Air Passengers Delayed (Sept. 30, 2009), available at <http://www.aphis.usda.gov/newsroom/content/2009/09/adjfees.shtml>; see also User Fees for Agricultural Quarantine and Inspection Services, 74 Fed. Reg. 50,915, 50,915 (Oct. 2, 2009) (to be codified at 7 C.F.R. pt. 354).

<sup>120</sup> Press Release, U.S. Dep’t of Agric., USDA Withdraws Interim Rule for Increasing User Fees for Certain Commercial Vehicles and International Air Passengers (Oct. 30, 2009), available at [http://www.aphis.usda.gov/newsroom/content/2009/10/withdraw\\_userfees.shtml](http://www.aphis.usda.gov/newsroom/content/2009/10/withdraw_userfees.shtml); see also User Fees for Agricultural Quarantine and Inspection Services, 74 Fed. Reg. 57,057, 57,057 (Nov. 4, 2009) (to be codified at 7 C.F.R. pt. 354).

<sup>121</sup> 7 C.F.R. § 354.3(f) (2010).

<sup>122</sup> User Fees for Agricultural Quarantine and Inspection Services, 74 Fed. Reg. at 57,057.

<sup>123</sup> GAO-07-1131, *supra* note 98, at 22–23.

<sup>124</sup> *Id.* at 14, tbl. 1.

<sup>125</sup> User Fees for Agricultural Quarantine and Inspection Services, 74 Fed. Reg. 49,311, 49,311 (Sept. 28, 2009) (to be codified at 7 C.F.R. pt. 354).

gers arriving from abroad would increase from \$5.00 to \$5.50, effective October 1, 2009.<sup>126</sup> Although the increase may seem minimal, the circumstances surrounding the change raised significant concerns.<sup>127</sup> Stakeholders were not given a chance to give meaningful comment, nor did the USDA demonstrate adequate evidence showing that fees were commensurate with the costs of providing inspection services.<sup>128</sup>

#### A. THE USDA SHUNNED STAKEHOLDER COMMENTS

Timely notice of proposed changes in fee schedules, or other agency rules, is essential. First, a delay between a rule's announcement and its effective date allows stakeholders to make meaningful comments. These comments may allow an agency to make improvements to its original rule, often by shedding light on new information. Such changes may not only improve the ultimate rule, but may also avoid future litigation. Second, a delay allows stakeholders impacted by the change to make the internal adjustments necessary to accommodate the change.

These rationales are particularly important in the case of the APHIS Fee, which, unlike other user fees paid by airline passengers, has no advisory committee.<sup>129</sup> An advisory committee composed of stakeholders could have commented on proposed changes during committee meetings before APHIS issued an interim rule. Moreover, the committee's industry members would have been on notice that their internal systems would soon require updates. In fact, impacted stakeholders had reason to believe that the APHIS Fee would not increase until after September 30, 2010, because the last increase provided a fee schedule valid until then.<sup>130</sup>

Airlines received three days' notice of the proposed fee hike. Since the comment period lasted until November 27, 2009, almost two months after the increased fee's original effective date, objections to the increase would not receive consideration until long after airlines had collected thousands of dollars in in-

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<sup>126</sup> *Id.* at 49,315.

<sup>127</sup> *See, e.g.*, GAO-07-1131, *supra* note 98, at 22–23 (discussing stakeholder skepticism fostered by a lack of information and communication regarding the fees).

<sup>128</sup> *See id.*

<sup>129</sup> *See id.* at 22.

<sup>130</sup> *See* User Fees for Agricultural Quarantine and Inspection Services, 71 Fed. Reg. 49,984, 49,984 (Aug. 24, 2006) (to be codified at 7 C.F.R. pt. 354).



creased user fees.<sup>131</sup> Determining after November 27, 2009, that the fee increase was excessive would provide APHIS with a wind-fall. This would not comport with the statutory language authorizing the USDA to “prescribe and collect fees *sufficient to cover the cost* of providing agricultural quarantine and inspection services.”<sup>132</sup> Airlines and travelers might seek refunds in court, costing the USDA and taxpayers significant human and financial resources.<sup>133</sup>

Concerns over the proposed higher fee levels and rushed implementation of the fee hikes without credible justification eventually caused the USDA to backtrack. On September 30, 2009, just two days after the original Federal Register notice, APHIS issued a press release announcing the suspension of the fee increases until November 1, 2009.<sup>134</sup> The new fees would still become effective several weeks before public comments were due.<sup>135</sup> Finally, on October 30, 2009, APHIS withdrew its interim rule.<sup>136</sup>

APHIS took a similar approach with its prior fee increases. On December 9, 2004, APHIS issued an interim rule that included a fee hike effective January 1, 2005.<sup>137</sup> Public comments were due February 7, 2005, over a month after the effective date.<sup>138</sup> At least compared to the 2009 interim rule, the industry was given almost a month—albeit during one of the busiest travel periods—to prepare internal systems for the change. Nevertheless, it was clear that public comments would not be considered before the implementation of the increase.

Likewise, on August 25, 2006, APHIS issued an interim rule that would remove the exemption enjoyed by air passengers originating in Canada.<sup>139</sup> Although the agency gave airlines two

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<sup>131</sup> User Fees for Agricultural Quarantine and Inspection Services, 74 Fed. Reg. at 49,311.

<sup>132</sup> See 21 U.S.C. § 136a(a)(1) (2006) (emphasis added).

<sup>133</sup> Airlines have frequently challenged APHIS in court. See, e.g., *Cont'l Airlines, Inc. v. United States*, 77 Fed. Cl. 482, 484 (2007); *Am. Airlines, Inc. v. United States*, 68 Fed. Cl. 723, 727 (2005). “Passenger rights” advocates may eventually show interest in litigating similar matters.

<sup>134</sup> Press Release, *supra* note 119.

<sup>135</sup> *Id.*

<sup>136</sup> 74 Fed. Reg. 57,057, 57,057 (Nov. 4, 2009).

<sup>137</sup> User Fees for Agricultural Quarantine and Inspection Services, 69 Fed. Reg. 71,660, 71,660 (Dec. 9, 2004) (to be codified at 7 C.F.R. pt. 354).

<sup>138</sup> *Id.*

<sup>139</sup> User Fees for Agricultural Quarantine and Inspection Services, 71 Fed. Reg. 50,320, 50,320 (Aug. 25, 2006) (to be codified at 7 C.F.R. pt. 354).

months to submit comments, the interim rule noted that the change would become effective November 24, 2006, the same day that comments were due.<sup>140</sup> As a result, it seemed unlikely that APHIS intended to consider stakeholder input. In fact, of the more than 150 public submissions during the notice-and-comment period, APHIS never responded to any.<sup>141</sup>

This pattern of last-minute changes in fee schedules, with little time for the industry to comment or make adjustments to internal systems, is unacceptable. Even when the USDA allots time for public comment, the agency seems less than sincere in its desire to receive stakeholder feedback. The APHIS Fee example presents another problem as well.

#### B. DEPARTMENT OF AGRICULTURE FAILED TO DEMONSTRATE A NEED FOR THE CHANGES

In addition to the rushed nature of the latest APHIS interim rule, APHIS made little effort to defend the increase. A lack of rationalization goes against the spirit of a user fee. Whereas a tax is a “mandatory assessment on an individual . . . based on certain characteristics, such as income” and thus need not bear any relationship to the services provided, a user fee differs.<sup>142</sup> A user fee is “imposed on individuals who use certain services provided by the government and is proportional to the use of the service.”<sup>143</sup>

Although the distinction between a user fee and a tax is sometimes difficult to make, the statute authorizing the APHIS Fee makes clear that the fee charged must be commensurate with the services rendered.<sup>144</sup> The leading subsection of the statute notes:

The Secretary of Agriculture may prescribe and collect fees sufficient—(A) to cover the cost of providing agricultural quarantine and inspection services in connection with the arrival at a port in the customs territory of the United States, or the preclearance or preinspection at a site outside the customs territory of the United

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<sup>140</sup> *Id.*

<sup>141</sup> See Regulations.gov, Docket No. APHIS-2006-0096.

<sup>142</sup> Gary Klott, *Tax Watch; A ‘User Fee’: What’s That?*, N.Y. TIMES, Oct. 13, 1987, at D2 (quoting John Pechman, then senior fellow at Brookings Institute); see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-734SP, GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 94 (2005) [hereinafter GAO-05-734SP].

<sup>143</sup> Klott, *supra* note 142; see also GAO-05-734SP, *supra* note 142, at 100.

<sup>144</sup> See 21 U.S.C. § 136a(a)(1) (2006).

States, of an international passenger . . . ; [and] (B) to cover the cost of administering this subsection . . . .<sup>145</sup>

While the “fees sufficient” language appears to set a minimum level for user fees collected, the following section adds an upper bound: “[T]he Secretary shall ensure that the amount of the fees *is commensurate* with the costs of agricultural quarantine and inspection services . . . .”<sup>146</sup> Finally, although this language seems to clearly indicate that the APHIS Fee must be directly tied to the costs of APHIS inspections and administrative overhead, the statute clears any remaining doubts by explaining how the collected funds may be spent. “[F]unds in the . . . User Fee Account shall be available . . . to cover the *costs associated* with the provision of agricultural quarantine and inspection services and . . . administration.”<sup>147</sup> The statute’s three references to a direct correlation between the amount charged to passengers and the cost of performing APHIS inspections make clear that APHIS must demonstrate increased costs before increasing user fees.

APHIS defended the most recent proposed fee increase with three questionable rationales. First, the downturn in international trade and travel has reduced fee collections.<sup>148</sup> Second, it would have been imprudent to furlough or fire existing APHIS inspectors.<sup>149</sup> Third, the events of September 11, 2001, required continued funding at the same level, regardless of fluctuations in trade and travel volumes.<sup>150</sup>

The rationale that higher fees were needed because of the lower number of passengers requiring screening is unconvincing. First and foremost, if a user fee were designed to cover the APHIS inspections budget, fewer inspections should result in a smaller budget. In fact, at the time of the proposed increase, APHIS estimated a severe decline in inspections performed in 2009 compared with 2008.<sup>151</sup> It projected 2.1 million fewer air passengers requiring inspections.<sup>152</sup> This dramatic projected drop in traffic comported with industry estimates.<sup>153</sup>

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.* § 136a(a)(2) (emphasis added).

<sup>147</sup> *Id.* § 136a(a)(5)(B) (emphasis added).

<sup>148</sup> User Fees for Agricultural Quarantine and Inspection Services, 74 Fed. Reg. 49,311, 49,311 (Sept. 28, 2009) (to be codified at 7 C.F.R. pt. 354).

<sup>149</sup> *Id.* at 49,311–12.

<sup>150</sup> *Id.* at 49,311.

<sup>151</sup> *Id.* at 49,313–14.

<sup>152</sup> *Id.* at 49,314 (numbers rounded).

<sup>153</sup> See, e.g., Ann Keeton, *Air Industry Faces Grim Year Ahead*, WALL ST. J., Sept. 16, 2009, at B3.

On the other hand, although APHIS predicted that traffic in 2010 would “bounce back completely,” leading industry analysts disagreed with that contention.<sup>154</sup> IATA, for example, predicted that passenger numbers in 2010 would remain below 2007 levels.<sup>155</sup> Even if APHIS’s assumption that air traffic would rebound proved correct, the cost of providing services to the same number of people in 2010 as in 2008 should not lead to increased costs. Instead, one could infer that the costs in 2010, when adjusted for inflation, would mirror those in 2008. Increasing user fees should not become necessary until after traffic exceeds pre-recession levels.

Moreover, this rationale contradicted the agency’s rationale for issuing an interim rule to increase the APHIS Fee in December 2004. At that time, APHIS explained that an increase was required in order to recover the cost of “*increased* inspection activity.”<sup>156</sup> Five years later, APHIS cited *decreased* inspection activity as similarly warranting a fee hike.<sup>157</sup> These two competing reasons cannot be reconciled. Accepting both would allow APHIS to propose future user fee increases as long as traffic volumes fluctuated; only in the event of stagnant numbers would APHIS lack a rationale for increasing its fees.

Additionally, APHIS cited the “enhanced level of inspection and related support services . . . since September 11, 2001,” as a reason for the changes.<sup>158</sup> APHIS had already cited increased costs related to post-9/11 enhancements in its 2006 interim rule.<sup>159</sup> The 2009 interim rule failed to enumerate specific 9/11-related changes that resulted in new expenses incurred since 2006.<sup>160</sup> Absent such changes, merely referencing the tragedy of 9/11 should not result in unbounded freedom to increase user fees.

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<sup>154</sup> User Fees for Agricultural Quarantine and Inspection Services, 74 Fed. Reg. 49,311, 49,314 (Sept. 28, 2009) (to be codified at 7 C.F.R. pt. 354).

<sup>155</sup> INT’L AIR TRANSP. ASS’N, FINANCIAL FORECAST (Sept. 2009), *available at* [http://iata.org/whatwedo/economics/Documents/industry\\_outlook\\_Sep09.pdf](http://iata.org/whatwedo/economics/Documents/industry_outlook_Sep09.pdf).

<sup>156</sup> *See* User Fees for Agricultural Quarantine and Inspection Services, 69 Fed. Reg. 71,660, 71,660 (Dec. 9, 2004) (to be codified at 7 C.F.R. pt. 354) (emphasis added).

<sup>157</sup> User Fees for Agricultural Quarantine and Inspection Services, 74 Fed. Reg. at 49,311.

<sup>158</sup> *Id.*

<sup>159</sup> *See* User Fees for Agricultural Quarantine and Inspection Services, 71 Fed. Reg. 49,984, 49,984 (Aug. 24, 2006).

<sup>160</sup> *See* User Fees for Agricultural Quarantine and Inspection Services, 74 Fed. Reg. at 49,311–12.

Finally, APHIS preemptively attacked one argument against an increase, noting, "We do not consider it advisable to cut back on existing personnel as a cost-saving measure because of the time required (two to three years) to train agricultural inspectors."<sup>161</sup> This rationale fails in two important ways. First, retaining employees based on the assumption that air traffic will rebound quickly is wasteful. In response to the same collapse in air travel, for example, airlines shed thousands of flight attendant, pilot, and management positions.<sup>162</sup> Second, the USDA could also copy the airline industry by considering a system that would allow for furloughs, rather than layoffs. Furloughed APHIS inspectors could be recalled back to work as international air traffic rebounds. This would mitigate the need to train new inspectors. The airline industry frequently furloughs pilots during periods of reduced travel, and then calls them back as traffic returns.<sup>163</sup> Like agricultural inspectors, pilots require significant training.<sup>164</sup> Moreover, if needed, APHIS could reduce the unnecessary components of inspectors' training, as much of it is likely nonessential, or make more training on the job rather than through formal instruction.<sup>165</sup>

The USDA's reasons for increasing the APHIS Fee simply did not pass muster. Although the airline industry welcomed APHIS's withdrawal of the interim rule,<sup>166</sup> the two problems cited with the latest fee increase proposal (failure to allow sufficient time to receive and meaningfully respond to industry feedback and failure to demonstrate that fees remain commensurate with costs) have plagued previous interim rules as well. They

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<sup>161</sup> *Id.* at 49,312.

<sup>162</sup> See, e.g., Julie Johnsson, *United to Trim More Flight Attendants, 600 Positions Targeted, Carrier Seeks Volunteers to Take Unpaid Leaves*, CHI. TRIB., June 23, 2009, at C19; Terry Maxon, *American Shedding 921 Flight Attendant Positions*, DALLAS MORNING NEWS, Sept. 2, 2009, at 1D; Dominic Walsh, *BA to Cut Long-Haul Cabin Crew Without Union Approval*, THE TIMES (LONDON), Oct. 7, 2009, at 44.

<sup>163</sup> See, e.g., Terry Maxon, *American Won't Furlough Flight Attendants, to Recall More Pilots*, DALLAS MORNING NEWS, Jan. 29, 2009, at 5D.

<sup>164</sup> See 14 C.F.R. § 61.127-29 (2010); 74 Fed. Reg. at 49,312.

<sup>165</sup> When American Airlines faced a flight attendant strike in November 1993, the Federal Aviation Administration reduced the required amount of cabin crew training from nineteen days to just eight days. Terry Maxon, *American Gets Waiver to Cut Training Time If Attendants Strike*, DALLAS MORNING NEWS, Nov. 4, 1993, at 2D. Although an agricultural inspector's job may require more training than that of a flight attendant, this example provides insight into the high percentage of training in any industry that may be beneficial, yet nonessential. See *id.*

<sup>166</sup> See Andrew Compart, *U.S. Withdraws Fee Hike for Agricultural Inspections, for Now*, AVIATION DAILY, Nov. 3, 2009, at 3.

will no doubt persist in the future. A mechanism to harness the ever-expanding cornucopia of APHIS and other fees must be found.

#### IV. CONTROLLING TAXES AND FEES

Policy makers must find a method to control the current tax and fee scheme for air transportation. Air travel helps to promote numerous public and economic policy goals.<sup>167</sup> It facilitates social cohesion as Americans can work, study, or retire almost anywhere while still remaining able to easily visit relatives and friends in other locations.<sup>168</sup> It maintains a flexible labor market by facilitating the flow of immigrants and temporary migrants into (and out of) the country, as well as the flow of Americans throughout the nation.<sup>169</sup> And in addition to making possible many types of trade in services, it is responsible for shipping thirty to forty percent of world trade by value.<sup>170</sup> If allowed to rise unchecked, taxation of air transportation could eventually reach levels that would push passengers to stay home, thus harming these and other desirable societal goals.

Moreover, commercial aviation has significantly and advantageously impacted the economic development of numerous regions.<sup>171</sup> Long after the construction of a new terminal, runway, or entire airport is completed—themselves temporary boons to local economies—aviation continues to contribute positively to local and regional economies.<sup>172</sup> Aviation employs large numbers of people at various skill levels. This contributes greatly to local employment rates, tax bases, and disposable incomes. In addition, aviation stimulates economies by guaranteeing that firms have convenient access to much-needed air service.<sup>173</sup> Major cities often possess airline hubs, thus providing nonstop flights to the world's financial, industrial, and political capitals. Secondary cities have the same access thanks to the hub-and-spoke system that connects secondary cities (spokes) to major cities (hubs) from which passengers can then connect almost anywhere. Aviation often accelerates local economic growth or

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<sup>167</sup> BUTTON, *supra* note 5, at i.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 7–9.

<sup>170</sup> *Id.* at 7–8.

<sup>171</sup> *Id.* at 9–10.

<sup>172</sup> *See id.*

<sup>173</sup> *See id.* at 9.

makes it self-sustaining.<sup>174</sup> For example, commercial aviation has received much of the credit for the transformation of Florida from an agricultural economy to a diverse one with a robust tourism sector.<sup>175</sup> Aviation's ability to power local economies, however, decreases as taxes make air travel less affordable.<sup>176</sup>

In order to ensure that aviation continues to further public policy goals and to avoid negative downstream effects, policy makers must implement a mechanism to control aviation taxes. The GAO has provided one model: the unification of customs, immigration, and APHIS user fees. In addition, portions of the Chicago Convention and bilateral air service agreements should be interpreted so as to constrain the taxes and fees that the United States may levy on international air transportation.

#### A. UNIFICATION OF MOST FEES WOULD BENEFIT STAKEHOLDERS

In a 2007 report to several members of the U.S. House of Representatives, the GAO found numerous faults with the current structure of aviation user fees.<sup>177</sup> These faults closely parallel those found in the 2009 APHIS interim rule discussed above. In particular, the GAO recommended that CBP, ICE, and APHIS provide key information to stakeholders, form a single advisory committee, consolidate reporting requirements, and eliminate key differences between the three user fees.<sup>178</sup> The implementation of these recommendations would effectively "harmonize" the three existing user fees.

First and foremost, the GAO recommended that agencies increase transparency and provide stakeholders with the information necessary to fully evaluate the current user fees.<sup>179</sup> Airlines, in particular, complain that without knowledge of the staffing levels of customs, immigration, and agricultural inspectors, it is impossible to verify the agencies' cost estimates or to provide meaningful feedback regarding fee adjustments.<sup>180</sup> The agencies have responded that such information is "law-enforcement

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<sup>174</sup> See *id.* at 9–10.

<sup>175</sup> See *id.* at 13.

<sup>176</sup> See *id.* at 18.

<sup>177</sup> GAO-07-1131, *supra* note 98, at 35 (the report did not consider the excise tax, segment fees, and passenger facility charges levied on tickets).

<sup>178</sup> See *id.* at 36.

<sup>179</sup> See *id.*

<sup>180</sup> *Id.* at 24; see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-321, FEDERAL USER FEES: SUBSTANTIVE REVIEWS NEEDED TO ALIGN PORT-RELATED FEES WITH THE PROGRAMS THEY SUPPORT 31 (2008) [hereinafter GAO-08-321].

sensitive” and, if disclosed, would present a risk to homeland security.<sup>181</sup> Even if staffing levels were sensitive, they could be shared with designated airline employees who, having received appropriate clearances, already represent their employers at advisory committee meetings and participate in discussions regarding other sensitive matters like the Federal Air Marshal Program.

Moreover, now that customs, immigration, and agricultural inspectors receive cross-training, the three types of inspectors often conduct one another’s duties.<sup>182</sup> This complicates the agencies’ attempts to determine the exact cost of each type of inspection and thereby how much of the fee to collect (in the cases of ICE and CBP) or how much to charge users (in the case of APHIS). In fact, GAO found that “neither CBP nor ICE know whether the fees collected are recovering the full cost of immigration inspection activities or whether the fees are properly divided between them.”<sup>183</sup> If the agencies themselves cannot make this determination, other stakeholders certainly lack the ability to do so. A single, unified fee for all three services would ease this problem. The total cost of the inspections could be more readily divided by the number of passengers, thus establishing an estimate for an appropriate user fee. Since the three inspections were themselves unified in 2003,<sup>184</sup> unifying the user fee is an appropriate next step.

Second, the GAO recommended that the fee-collecting agencies collaborate when discussing fees with stakeholders.<sup>185</sup> Presently, advisory committees ensure a minimal level of stakeholder feedback for the Customs User Fee and the Immigration and Naturalization Fee.<sup>186</sup> There is no equivalent committee for the APHIS Fee.<sup>187</sup> Even in the two existing advisory committees, ICE and APHIS do not participate, and airline participation is muted due to the aforementioned lack of information and lack of a mechanism that requires government agencies to share information.<sup>188</sup>

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<sup>181</sup> GAO-07-1131, *supra* note 98, at 24.

<sup>182</sup> *See id.* at 7–8.

<sup>183</sup> *Id.* at 5.

<sup>184</sup> *See id.* at 7–8.

<sup>185</sup> *Id.* at 36.

<sup>186</sup> *See id.* at 22–24.

<sup>187</sup> *See id.*

<sup>188</sup> *See id.* at 23.



Assuming its members can obtain key data, a single advisory committee for all three user fees would most effectively address the GAO's concern that stakeholders currently lack the means necessary to contribute meaningfully to the user fee dialogue. This would bring the fee-charging agencies and the impacted industries to the same table on a regular basis. A single advisory committee would also be best positioned to submit a unified report to the eight congressional committees that oversee the fees. Presently, the committees may be unaware of how fees work in conflict or in concert with each other.<sup>189</sup>

Third, the GAO recommended that the agencies harmonize their reporting requirements.<sup>190</sup> Even if the three fees remain separate, airlines could report the same data for each fee, and airlines could make transfers to the Federal Treasury at the same time, it would be easier for stakeholders and agencies to obtain "a comprehensive picture of the user fees supporting the passenger inspection process."<sup>191</sup>

Fourth, the GAO recommended the elimination of key differences in the applicability of the three user fees.<sup>192</sup> The three fees apply differently to passengers arriving from Alaska, Hawaii, Canada, Mexico, U.S. territories, and certain Caribbean islands.<sup>193</sup> These differences complicate the oversight and audit process.<sup>194</sup>

The implementation of the GAO recommendations would streamline three of the user fees applied to air transportation. Their implementation would lead to increased and better-informed industry feedback. A more productive two-way dialogue between agencies and stakeholders would not only increase mutual trust but would exert more effective pressure to charge fees that are presumably lower than or, at the least, commensurate with the costs of the services provided. Even absent changes to the other taxes and fees applied to airline tickets, harmonization of these three user fees would reduce the ever-increasing tax burden facing airline passengers—clearly a step in the right direction.

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<sup>189</sup> *Id.* at 5.

<sup>190</sup> *Id.* at 36.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 37.

<sup>193</sup> *Id.* at 21.

<sup>194</sup> *Id.* at 20.

B. THE CHICAGO CONVENTION DOES NOT PROHIBIT AVIATION FEES AND TAXES

The Chicago Convention fails to prohibit aviation taxes and user fees.<sup>195</sup> Article 15 regulates “[a]irport and similar charges.”<sup>196</sup> The bulk of Article 15, however, addresses only impermissible price discrimination between national and foreign carriers.<sup>197</sup> The last sentence, however, provides further guidance regarding charges that are not discriminatory. It notes, “No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of . . . entry into or exit from its territory of any aircraft of a contracting State or persons . . . thereon.”<sup>198</sup> It is a well known—but publicly ignored—fact that several foreign governments may violate this sentence by charging air passengers a fee merely for the privilege of entering or exiting the country. Chile, for example, charges an “Entry Fee” of \$131.<sup>199</sup> While this fee is imposed in the guise of reciprocity for the charge that Chilean citizens must pay in order to obtain a U.S. visa interview, Chile imposes it upon entry without issuing a visa or conducting an interview.<sup>200</sup> Argentina recently began to levy a similar fee.<sup>201</sup> It prudently called the charge an “Entry Request Fee,” thus implying that U.S. citizens are not paying merely for the privilege of entering the country, but instead for the ability to request admission (analogous to a visa interview fee).<sup>202</sup>

In the United States, however, the statutory bases for the various charges detail a list of purposes beyond mere “entry or exit.”<sup>203</sup> Fees collected pay for specific services such as infrastructure improvements, aviation security, and border inspec-

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<sup>195</sup> Convention on International Civil Aviation, art. 15, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295.

<sup>196</sup> *Id.* art. 15.

<sup>197</sup> *See, e.g.,* *Aerovias Interamericanas de Panama, S.A. v. Bd. of County Comm’rs*, 197 F. Supp. 230, 241–44 (D. Fla. 1961) (holding that a five percent surcharge levied on certain Latin American airlines operating at Miami International Airport violated Article 15 of the Chicago Convention).

<sup>198</sup> Convention on International Civil Aviation, *supra* note 195, art. 15 (emphasis added).

<sup>199</sup> *Fast Facts About Traveling to Chile*, EMBASSY OF CHILE IN WASHINGTON, D.C., <http://www.chile-usa.org/fastfacts.htm> (last visited Oct. 22, 2010).

<sup>200</sup> *Id.*

<sup>201</sup> Madhu Unnikrishnan, *Argentina to Begin Charging Reciprocal Entry Tax*, AVIATION DAILY, Oct. 20, 2008, at 2.

<sup>202</sup> *Entry Request Fee*, GOV’T OF ARG., <http://www.argentina.gov.ar/argentina/portal/paginas.dhtml?pagina=345> (last visited Oct. 22, 2010).

<sup>203</sup> *See supra*, Part III.

tions.<sup>204</sup> The Chicago Convention does not require that user fees paid by passengers satisfy any test of reasonableness or that they be commensurate with the costs of the services provided.<sup>205</sup> Thus, as long as each charge has a defined purpose, it is unlikely to run afoul of the Convention. Even absent a clear statutory purpose, a legal challenge under Article 15 could result in Congress merely adding the requisite purpose to the authorizing statute in order to avoid a court overturning the tax or fee.

### C. SOME TAXES AND FEES MAY VIOLATE BILATERAL AIR SERVICE AGREEMENTS

In addition, bilateral air service agreements serve as a check on aviation fees and taxes. The U.S. Model Open Skies Agreement devotes Article 10 to user charges, defined as “a charge imposed on airlines for the provision of airport, airport environmental, air navigation, or aviation security facilities or services including related services and facilities.”<sup>206</sup> Although a strict reading of that definition would not encompass taxes and fees levied on individual passengers instead of airlines, a broader reading could include them. Airlines are tasked with collecting the taxes and fees from their passengers.<sup>207</sup> In addition, the statutory purposes of the user fees and taxes closely align with those enumerated in Article 10.

Within Article 10, section 1 requires that user charges be “just, reasonable, not unjustly discriminatory, and equitably apportioned among categories of users.”<sup>208</sup> Section 2 requires that the user charges “reflect, but shall not exceed, the full cost . . . of providing the appropriate [services].”<sup>209</sup> The language of these two sections comports with the language of the federal statutes authorizing user charges that are “reasonably related to,” “in connection with,” or “commensurate with” the services provided.<sup>210</sup> Should the taxes and fees levied on air transportation fail to comport with Article 10, international air carriers may ask their home governments to seek consultations or dispute resolu-

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<sup>204</sup> *Id.*

<sup>205</sup> Convention on International Civil Aviation, *supra* note 195, art. 15.

<sup>206</sup> U.S. Department of State, Model Open Skies Agreement art. I(11) (2008), available at <http://www.state.gov/documents/organization/114970.pdf>.

<sup>207</sup> *See, e.g.*, 49 U.S.C. § 44940(e) (2006).

<sup>208</sup> Model Open Skies Agreement, *supra* note 206, art. X(1).

<sup>209</sup> *Id.* art. X(2).

<sup>210</sup> 49 U.S.C. § 44940(b) (the September 11th Security Fee); 19 U.S.C. § 58c(a) (2006) (the Customs User Fee); 21 U.S.C. § 136a(a)(2) (2006) (the APHIS Fee).

tion under Articles 13 and 14 of the home country's bilateral aviation agreement with the United States.

Section 3 of Article 10 requires that airlines be provided "such information as may be necessary to permit an accurate review of the reasonableness of the charges."<sup>211</sup> This comports with the rationales behind the Customs User Fee and Immigration and Naturalization Fee advisory committees.<sup>212</sup> GAO reports have raised several questions regarding the lack of information provided to stakeholders on these two committees, as well as concerns over the lack of any sort of formal dialogue between APHIS and its stakeholders.<sup>213</sup> Airlines currently pay a per-aircraft APHIS Fee, which certainly qualifies as a "user charge" as defined by the Model Open Skies Agreement.<sup>214</sup> Based on the GAO findings, however, airlines may lack "such information . . . necessary to permit an accurate review of the reasonableness of the [APHIS Fee]."<sup>215</sup> Moreover, some stakeholders have asserted that user fee increases may qualify as "significant regulatory actions" subject to a 1993 Executive Order requiring agencies to conduct a comprehensive cost-benefit analysis.<sup>216</sup> As a result, the home states of international air carriers may have good cause to seek remedies under Articles 13 and 14 of their home countries' bilateral aviation agreements with the United States.

Articles 13 and 14 provide two mechanisms for resolving disputes that arise under an air service rights agreement.<sup>217</sup> The first allows one country-party to request consultations with another country-party, who must agree to begin consultations within sixty days.<sup>218</sup> If thirty days of consultations fail to produce a solution, a party may invoke the second dispute resolution mechanism: referring the matter to a decision-making body or to arbitration.<sup>219</sup>

It should be noted, however, that dispute resolution under air service agreements has had mixed results. In one recent case

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<sup>211</sup> Model Open Skies Agreement, *supra* note 206, art. X(3).

<sup>212</sup> See GAO-07-1131, *supra* note 98, at 22 n.27.

<sup>213</sup> See *id.* at 22; GAO-08-321, *supra* note 180, at 31.

<sup>214</sup> 7 C.F.R. § 354.3(e) (2010).

<sup>215</sup> Model Open Skies Agreement, *supra* note 206, art. X.

<sup>216</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,735 (Sept. 30, 1993).

<sup>217</sup> Model Open Skies Agreement, *supra* note 206, arts. XIII–XIV.

<sup>218</sup> *Id.* art. XIII.

<sup>219</sup> *Id.* art. XIV. The second stage of dispute resolution is governed by the International Air Transportation Fair Competitive Practices Act, 49 U.S.C. § 41310 (2006).

involving Brazil, more fully described below, a veiled threat by U.S. carriers to ask Washington to request consultations with Brasília resulted in a favorable change of Brazilian law.<sup>220</sup> On the other hand, in a recent case involving Argentina, also described below, consultations and later litigation failed to produce a change in the suspect Argentine law.<sup>221</sup>

In 2002, the Brazilian government began to apply a tax known as PIS/COFINS to jet fuel used by U.S. carriers on flights from Brazil to the United States.<sup>222</sup> The U.S.-Brazil air service agreement, however, provided for a mutual exemption from fuel taxes for the airlines of both states.<sup>223</sup> The Air Transport Association (ATA), representing U.S. airlines accounting for more than 90% of all U.S. passenger and cargo traffic, sent a letter to Brazil's Ministry of Finance that noted the apparent violation of the air service agreement.<sup>224</sup> ATA copied the Office of Aviation Negotiations at the U.S. State Department, the Office of International Aviation at the U.S. DOT, the Office of Service Industries at the U.S. Department of Commerce, as well as U.S. Ambassador Clifford Sobel, all of whom would have ultimately played a role in resolving the dispute.<sup>225</sup> Within a year, without the U.S. airlines' having to request formal consultations, the Brazilian government amended its civil code to eliminate the PIS/COFINS tax on jet fuel, saving international air carriers \$100 million annually.<sup>226</sup>

On the other hand, Brazil's neighbor showed less interest in fulfilling its bilateral air service agreement obligations, even after formal consultations and subsequent litigation. In 2002, Argentina ended its peso's peg to the U.S. dollar, effectively devaluing the Argentine currency to thirty-three U.S. cents.<sup>227</sup> To mitigate the impact on the public—most of whom had lost

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<sup>220</sup> Press Release, IATA, Strengthening the Foundations of Brazilian Aviation (Aug. 20, 2009), available at <http://www.iata.org/pressroom/pr/pages/2009-08-20-01.aspx>.

<sup>221</sup> See generally *Aerolineas Argentinas S.A. v. U.S. Dep't of Transp.*, 415 F.3d 1 (D.C. Cir. 2005).

<sup>222</sup> Decreto No. 4.524 (Título IV, Capítulo I, Seção I) de 17 de Dezembro de 2002, DIÁRIO OFFICIAL DA UNIÃO [D.O.U.] de 18.12.2002 (Brazil).

<sup>223</sup> Agreement between Brazil and the United States of America on Air Transport art. IX(1)(b), U.S.-Braz., Mar. 21, 1989, T.I.A.S. 11780.

<sup>224</sup> Letter from David Berg, General Counsel, ATA, to Guido Mantega, Finance Minister of Brazil (Aug. 14, 2008) (on file with author).

<sup>225</sup> *Id.*

<sup>226</sup> Press Release, IATA, *supra* note 220.

<sup>227</sup> See *Aerolineas Argentinas S.A. v. U.S. Dep't of Transp.*, 415 F.3d 1, 3 (D.C. Cir. 2005).

two-thirds of their wealth overnight when their bank accounts were converted from U.S. dollars into Argentine pesos—the Argentine Congress passed legislation requiring payment of government taxes and fees at the old one-to-one exchange rate.<sup>228</sup> Thus, airlines paying user fees and taxes continued to pay the same amounts.<sup>229</sup> President Eduardo Duhalde, however, soon issued an Executive Decree that required all fees levied on airlines at Buenos Aires Ministro Pistarini de Ezeiza International Airport (Ezeiza) be paid in dollars at the new three-to-one exchange rate.<sup>230</sup> With little warning, airlines' bills increased threefold.<sup>231</sup>

Several air carriers challenged the Executive Decree's constitutionality.<sup>232</sup> Only one carrier, Aerolineas Argentinas (Aerolineas), secured an injunction against the enforcement of the Executive Decree, thus allowing it to pay airport charges at the old one-to-one rate.<sup>233</sup> The other airlines to challenge the fee, all foreign carriers, were denied the same relief.<sup>234</sup> As a result, beginning in September 2002, an Argentine airline began paying one-third of the fees paid by foreign carriers for the same airport services.<sup>235</sup> DOT found this policy to unfairly discriminate against U.S. carriers in violation of the Air Transport Services Agreement between the Governments of the United States of America and the Republic of Argentina.<sup>236</sup> As a result, DOT began requiring that Aerolineas pay into an escrow account in the United States the difference between the fees it paid for flights from Ezeiza to the United States and those paid by its U.S. competitors.<sup>237</sup> Failure to pay would require the cessation of Aerolineas service to the United States.<sup>238</sup> Aerolineas ultimately appealed the DOT decision, where its petition for review was ultimately denied.<sup>239</sup>

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<sup>228</sup> *See id.*

<sup>229</sup> *See id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 3–4.

<sup>238</sup> Roy Goldberg, *Airline Challenges to Airport Abuses of Economic Power*, 72 J. AIR L. & COM. 351, 359 (2007).

<sup>239</sup> *Aerolineas Argentinas*, 415 F.3d at 7.

Despite both administrative and judicial determinations that the government of Argentina has violated its air service agreement with the United States, the discriminatory fee schedule remains in place. Aerolineas continues to make payments into an escrow account.<sup>240</sup> As of October 2010, when Aerolineas made its 339th deposit, the escrow account contained U.S. \$9,144,976.01.<sup>241</sup> Given that the airline's former Spanish owner, Grupo Marsans S.A., valued the company at between U.S. \$250 million and \$400 million during Argentina's 2008 nationalization of the company, the escrow account is not small change.<sup>242</sup>

The difference in the outcomes of the Brazilian and Argentine disputes demonstrates that the requirements set out in Article 10 of bilateral air service agreements may be difficult to enforce. Just as the United States sometimes has difficulty securing the compliance of foreign countries, so too might foreign countries have difficulty persuading the U.S. government to alter its aviation tax and user fee structure. The State Department and DOT may not wish to devote their finite resources to the matter. On the other hand, certain countries could use threats of requesting consultations over taxes and user fees as a bargaining chip in future bilateral negotiations. There is no reason why a country could not invoke the arbitration provision and put the United States to the test over whether aviation fees are consistent with Article 10. Countries as diverse as China, Colombia, Israel, and South Africa, to name a few, retain restrictive aviation agreements with the United States. The U.S. government may make changes to the current tax and user fee schemes in order to reach Open Skies agreements with those countries and others.

## V. CONCLUSION

According to a report by the National Commission to Ensure a Strong Competitive Airline Industry, "The air transportation system has become essential to economic progress for the citizens and businesses of the nation."<sup>243</sup> Airline tickets long ago ceased to be luxury goods. As a result, the government must

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<sup>240</sup> E-mail from John Romans, Counsel for Aerolineas Argentinas S.A., to Carl Nelson, Counsel for American Airlines, Inc., et al. (Oct. 5, 2010, 17:57 EST), available at <http://www.regulations.gov/> (find Doc. No. DOT-OST-2003-15092).

<sup>241</sup> *Id.*

<sup>242</sup> Taos Turner, *Airline Grab Gains Ground in Argentina*, WALL ST. J., Nov. 20, 2008, at A10.

<sup>243</sup> BUTTON, *supra* note 5, at 9.

ensure that taxation of air transportation does not reach the “tipping point,” where it begins to negatively impact bookings and thus the greater economy. With nine charges totaling upwards of \$75 currently levied by Washington and even more taxes adding up to \$350 levied by foreign governments on international itineraries, the tipping point may be very near, if it has not already been reached. The 2009 APHIS Fee interim rule serves as an example of how the system has gone awry. To avoid negatively impacting air travel, the U.S. government should streamline the current scheme by implementing GAO recommendations and remaining very wary of possible infractions of the Chicago Convention and bilateral air service rights agreements.



APPENDIX: Table of Aviation Taxes and Fees<sup>244</sup>

TABLE 1

Name	Applicability	Exceptions	Amount
Passenger Facility Charge	Departing passengers	Collected by only the first two airports on each one-way trip  Non-revenue passengers and passengers on small planes within Alaska and Hawaii are exempt	\$1.00 - \$4.50
Excise Tax	Domestic flights  Flights to/from cities within 225 miles of the U.S. border		7.5% of ticket price
Federal Segment Fee	Domestic segments within the Continental United States		\$3.70 per segment
Travel Facilities Tax	Domestic segments from Alaska or Hawaii		\$8.10 per segment
International Transportation Tax	International journeys to/from the United States		\$16.10 per trip
September 11th Security Fee	Domestic segments		\$2.50 - \$5.00 per one-way trip
Customs User Fee	International arrivals to the United States	Passengers arriving from Canada, Mexico, and the Caribbean are exempt	\$5.50 per passenger
Immigration and Naturalization Fee	International arrivals to the United States	Passengers who do not receive an inspection are exempt	\$7.00 per passenger
Animal and Plant Health Inspection Service Fee	International arrivals to the United States  Passengers arriving from Alaska/Hawaii/U.S. Territories into the Continental United States	Passengers traveling between the U.S. Virgin Islands and Puerto Rico are exempt	\$5.00 per passenger

<sup>244</sup> The following information is compiled from the sources discussed above.