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International Relations: DOT's Measured Responses Are Fair But Pull No Punches

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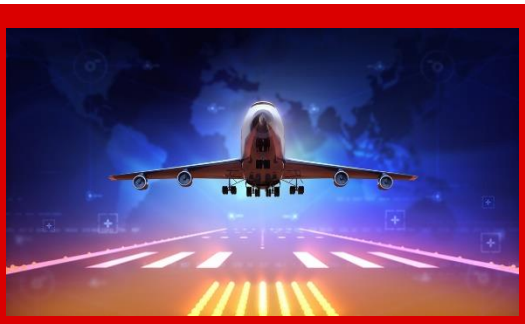
2020 has been widely understood to be the worst year in the history of commercial aviation due to the COVID-19 epidemic and its devastating impact on airlines and related industries.[1] As a result, many countries have taken drastic measures (generally public health-related) to stop or limit commercial air traffic. For the past two years, and notwithstanding the financial crisis facing the airline industry for the better part of 2020, the U.S. Department of Transportation (DOT) has aggressively – but fairly – protected and defended U.S. interests through aeropolitical means. U.S. aviation policy is firmly rooted in open skies, and thus the free market.[2] While DOT may be tempted to impose protections to protect U.S. industry and jobs, especially during the current crisis, DOT's actions to date have been limited to safeguarding the bilateral rights of U.S. air carriers in international air service markets. DOT's responses to countries limiting such rights have been measured and proportional, whether dealing with open skies partners or not, and in most instances were only imposed after a failure of (sometimes extended) negotiations. This article briefly reviews some of DOT's recent orders.

Russia

On May 23, 2018, DOT issued an order requiring Russian carriers to file schedules pursuant to 14 CFR Part 213 "so that we may determine whether the operation of such services, or any part thereof, may be contrary to applicable law or adversely affect the public interest."[3] DOT's order was issued in response to Russia's failure to permit U.S. carriers to overfly the country as



The firm's practice encompasses virtually every aspect of aviation law, including advising domestic and foreign airlines on defense of federal agency enforcement actions including DOT, FAA, TSA, and CBP.

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provided for in the U.S. – Russia bilateral, which is not an open skies agreement. More specifically, Russia deviated from an established comity and reciprocity regime and forced U.S. all-cargo operations to utilize a more easterly route in Russian airspace. To date DOT has taken no further action, and Russian carriers continue to file schedules under the DOT order.

European Union

On February 21, 2019, DOT proposed to terminate wet lease approvals for EU-based lessors in response to a yearlong EU inaction to resolve disparate treatment of U.S. lessors.[4] Although the EU is an open skies partner with the U.S., after entry into force of the EU-U.S. air transport agreement, EU Regulation (EC) No. 1008/2008 (EC 1008/2008) limited the duration of U.S. carrier wet lease arrangements, and prompted U.S. carrier protests. The United States government responded by taking reciprocal countermeasures, tentatively limiting its approval of EU-to-EU wet lease approvals to two seven–month periods. (DOT had previously approved some of these arrangements for indefinite periods.)[5]

On August 27, 2019, however, DOT issued an order vacating its tentative decision.[6] DOT cited subsequent developments, including reaching agreement with the EU on a stand-alone agreement on wet leasing which was subsequently applied on a provisional basis. In this instance, it appears the initial DOT order served its intended purpose. It accelerated the dormant coordination process of the standalone agreement while ensuring that U.S. aviation interests were protected.

India

On April 19, 2019, DOT issued two orders in response to the Government of India's refusal to permit U.S. carriers to exercise their bilateral right to perform their own ground handling (to "self-handle") at Indian airports.[7] Such self-handling provisions are standard in U.S. open skies agreements. Citing a 2016 aviation security order prohibiting non-Indian carriers from self-handling and Indian Ministry of Civil Aviation regulations which both prohibited foreign carrier ground-handling and the exercise of certain airline managerial functions, DOT required Air India to report its ground handling arrangements at U.S. airports. DOT also required Indian carriers to file schedules under 14 CFR Part 213 of DOT's regulations[8] and tentatively decided to prohibit Indian carriers from self-handling at U.S. airports.

On July 30, 2019, citing the Indian government's continued failure to permit U.S. carriers from self-handling, DOT issued a Final Order prohibiting Indian carriers from self-handling at U.S. airports.[9]

On June 22, 2020, DOT issued an order requiring Air India (the only foreign air carrier of India still holding DOT authority to conduct operations to/from the U.S. with its own aircraft and crew) to obtain prior approval for third and fourth freedom charters, a requirement otherwise unnecessary under the U.S. – India open skies agreement and Air India's DOT authority.[10] DOT's action was based on Air India's practice of conducting COVID-19

"evacuation" (repatriation) flights originating in both the U.S. and India, some of which (originating in India) involved sales to the general public. The Government of India refused to permit Delta to perform repatriation charters in a similar manner.

On September 3, 2020, DOT issued an order[11] proposing to permit Indian carriers to self-handle at U.S. airports. DOT's order mentioned "recent positive developments" in discussions with the Government of India. As of the date of this article DOT has not finalized its order.

China

On May 22, 2020, in the middle of the public health emergency, DOT issued an order requiring Chinese carriers to file schedules under 14 CFR Part 213 (Phase 1, see n. 3 below). The U.S. and China do not have an open skies relationship. By way of background, U.S. – China air service began to decrease in late January, with American, Delta, and United reducing their scheduled combination service by the beginning of February, while Chinese carriers also reduced their operations. By the end of March the Chinese authorities issued a notice (i) providing that Chinese carriers could operate one weekly scheduled passenger flight on one U.S.—China route, and (ii) setting March 12, 2020 as the benchmark date for a maximum limit of passenger capacity that carriers could use to maintain service in a given market until further notice. The problem for U.S. carriers was that they had suspended service by March 12th, while Chinese carriers had maintained some service. As a result, U.S. carriers were effectively foreclosed from resuming operations (contrary to the bilateral) while Chinese carriers were able to maintain minimal operations.

After two U.S. carriers unsuccessfully applied to the Chinese authorities to resume operations, and after the U.S. Government repeatedly raised its concerns with the Chinese authorities to no avail, DOT acted and required Chinese carriers operating combination service to file schedules under Phase 1.

On June 3, 2020 DOT issued an order disapproving the submitted schedules (Phase 2) and proposing to reduce Chinese scheduled service to zero effective June 16, 2020 as continued Chinese inaction had not provided U.S. carriers a "fair and equal opportunity to compete."[12] In its order, DOT emphasized that "[o]ur overriding goal is not the perpetuation of this situation, but rather an improved environment wherein the carriers of both parties will be able to exercise fully their bilateral rights." Two days later DOT issued another order modifying its June 3 order to permit, in the aggregate, two weekly round-trip scheduled passenger flights after the Government of China changed course and allowed U.S. carriers to operate one weekly passenger flight each effective June 8th).[13] While DOT recognized this Chinese action, it also noted "we are troubled by China's continued unilateral dictation of the terms of the US-China scheduled passenger air transportation market without respect for the rights of US carriers under the Agreement."

On June 15, 2020, DOT increased the available flights for Chinese carriers to four per week to match expanded rights permitted by the Chinese authorities.[14] DOT doubled these rights to eight weekly flights on August 18, 2020 on the same grounds ("this

represents positive progress and an important first step toward restoring a fair and equal opportunity for U.S. carriers to compete in the U.S.-China passenger market").[15]

* * *

The above examples show that DOT has been, and will remain, a vigorous defender of U.S. aeropolitical interests. While U.S. treaty partners may be tempted to limit or restrict U.S. carrier operations for a host of reasons, DOT has proven itself unwilling to permit such actions to go unanswered.

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[1] See, e.g., https://www.iata.org/en/pressroom/pr/2020-06-09-01/. "[A]irlines are expected to lose $84.3 billion in 2020 for a net profit margin of -20.1%. Revenues will fall 50% to $419 billion from $838 billion in 2019."

[2] See, e.g., https://www.state.gov/civil-air-transport-agreements ("America's Open Skies policy has gone hand-in-hand with U.S. airline globalization. By allowing U.S. air carriers unlimited market access to our partners' markets as well as rights to fly to points in between and beyond, Open Skies agreements provide maximum operational flexibility worldwide for U.S. airlines.")

[3] Order 2018-5-36. This initial step is Phase 1 under DOT's authority to respond to anticompetitive/ discriminatory practices by foreign governments or airlines against U.S. carriers pursuant to 49 U.S.C. 41310, the International Air Transportation Fair Competitive Practices Act (IATFCPA) of 1974, as amended. Under Phase 2, DOT will issue an order disapproving all or part of the schedules on the basis that they are contrary to the public interest or applicable law. See https://www.transportation.gov/policy/aviation-policy/iatfcpa-complaints.

[4] Order 2019-2-17.

[5] Despite lengthy negotiations with the EU, starting in 2012, and negotiating a standalone agreement regarding time limitations for the subject wet leases, the EU failed to address what DOT saw as a competitive disadvantage for U.S. carriers. As a result of EU inaction, DOT proposed to (i) terminate any EU-to-EU wet lease arrangement that had exceeded 14 months duration as well as any such arrangement that had previously been approved for an indefinite duration; and (ii) announced the duration of future approvals for new applications would be limited to no more than 14 months.

[6] Order 2019-8-20.

[7] Orders 2019-4-15 and 2019-4-16 (April 19, 2019).

[8] Part 213 provides a mechanism for DOT to disapprove schedules once filed; the filing requirement is the first step in this process and is intended to serve as a warning of potential future adverse DOT action.

[9] Order 2019-7-9.

[10] Order 2020-6-13.

[11] Order 2020-9-1.

[12] Order 2020-6-1.

[13] Order 2020-6-3.

[14] Order 2020-6-6.

[15] Order 2020-8-6.