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BLACKJACK AT THIRTY THOUSAND FEET: AMERICA'S ATTEMPT TO ENFORCE ITS BAN ON IN-FLIGHT GAMBLING EXTRATERRITORIALLY

INTRODUCTION

In an attempt to raise revenue and provide an entertainment option for passengers, a number of international airlines servicing the United States want to introduce in-flight gambling. This feature would allow passengers eighteen years or older to use credit cards to play blackjack, roulette, and poker from video screens affixed to their seats. The United States represents forty percent of the world's air travel market and in-flight gambling would produce extra revenue the airlines desperately need. Unfortunately, U.S. law bans in-flight gambling.

The law that bans the operation of any type of gambling device on board an air carrier or foreign air carrier is entitled "Gambling restrictions."¹ In response to this law, a group of ten international airlines, known as the International Airline Coalition on the Rule of Law, is presently lobbying Congress to repeal its application.² In challenging the federal law, the airlines claim that the United States' attempt to impose its national law extraterritorially is contrary to international law and treaties.

This Comment examines the United States' ban on in-flight gambling on foreign air carriers servicing the United States. It argues that the Convention on International Civil Aviation ("Chicago Convention"), grants the United States the authority and the jurisdiction to impose such a law, arguments advanced by legal scholars to the contrary notwithstanding. However, in the interests of global harmony and to ensure that the international civil aviation industry will continue to thrive as it has in the past, this Comment argues that the United States should repeal its ban on in-flight gambling.

In analyzing this issue, this Comment first looks at the statute imposing the ban and its legislative history. Next, this Comment examines the position of each party on this issue: first, the position of the United States and the reasons for enacting this law, then, the position of the international airlines and their primary arguments and interests. The discussion then explores the provisions of the Chicago Convention, which granted the United States jurisdiction to impose its ban on in-flight gambling. Finally, this Comment will argue that while the United States has both the authority and the jurisdiction to ban in-

1. Federal Aviation Act, 49 U.S.C. § 41311 (1994).

2. See Sim Wai Chew, *Singapore Airlines Among Airline Group Working Against U.S. Ban on In-Flight Gambling*, SINGAPORE STRAIT TIMES, Aug. 5, 1996, at 3.

flight gambling on international flights, Congress should repeal its ban, at least with regard to foreign air carriers.

I. LEGISLATIVE HISTORY

In examining this issue one needs first to look at the controlling statute and its legislative history. Prior to 1994, there were no restrictions against gambling on international flights. That period of relative freedom ended when Senator Slade Gorton, R-Washington, amended the then-current law.

The Gorton Amendment added the following language to the gambling restrictions law: "a foreign air carrier may not install, transport, or operate, or permit the use of any gambling device on board an aircraft in foreign air transportation."³ Thus, by prohibiting the transport of gambling devices on flights originating from, terminating in, or flying over the United States, the Gorton Amendment effectively banned in-flight gambling both by United States airlines and foreign air carriers, even while those flights are outside of U.S. jurisdiction.⁴

By amending the law to include foreign-carrier flights to or from the United States, Congress attempted to level the playing field among international airlines. The intent was to avoid placing United States domestic airlines at a competitive disadvantage in providing international passenger service.⁵ Prior to the Gorton Amendment, U.S. air carriers were prohibited from offering in-flight gambling, but because of an "unintended loophole" in the law, foreign air carriers were not so encumbered.⁶

The year prior to the Gorton Amendment, U.S. air carriers had asked Congress to permit them to offer gambling. However, uncertainty surrounding gaming on an air carrier prevented Congress from doing so.⁷ The Gorton Amendment required that, within one year of its enactment, the Secretary of Transportation would complete a study of:

- (1) the aviation safety effects of gambling applications on electronic interactive video systems on board aircraft for passenger use, including an evaluation of the effect of such systems on the navigational and other electronic equipment of the aircraft, on the passengers and crew of the aircraft, and on issues relating to the method of payment;

3. 49 U.S.C. § 41311. Section 205 was added to Section 41311 of Title 49 of the United States Code.

4. Gambling is prohibited on international flights of United States carriers and on commercial flights within United States airspace under previously enacted legislation, popularly known as the Gambling Devices Transportation Act (also known as the Johnson Act), *codified in* 15 U.S.C. § 1171 (1982).

5. See 140 CONG. REC. S6663-S6664 (daily ed. June 9, 1994) (statement of Senator Gorton).

6. See *id.*

7. See *id.*

(2) the competitive implications of permitting foreign air carriers only, but not United States air carriers, to install, transport, and operate gambling applications on electronic interactive video systems on board aircraft in the foreign commerce of the United States on flights over international waters, or in fifth freedom city-pair markets; and

(3) whether gambling should be allowed on international flights, including proposed legislation to effectuate any recommended changes in existing law.⁸

In March 1996, the Department of Transportation presented its report to Congress and recommended that, at that time, there should be no changes to the law prohibiting gambling in foreign transportation.⁹ Instead, foreign airlines would have the opportunity to offer video gambling on flights other than those to or from the United States, and the Department would monitor foreign airlines' implementation of gambling and its development.¹⁰

II. POSITION OF THE UNITED STATES GOVERNMENT

A. *Competitive Consequences*

Congressional intent in amending the law to encompass non-U.S. air carrier flights to or from the United States was to avoid putting U.S. airlines at a competitive disadvantage in providing international air service.¹¹ It is believed that if foreign air carriers could offer gambling to its passengers in flights to or from the United States, they would enjoy a substantial revenue advantage over their U.S. rivals.¹² The Department of Transportation's report found that the absence of video gambling per se on U.S. airline international flights was not likely to have a material effect on U.S.-carrier share of international traffic; however, if in-flight gambling is offered, the report estimated that eighteen percent of international airline passengers would use it.¹³ The restriction against U.S. airlines offering in-flight gambling to their international passengers could, therefore, deprive them of a major revenue source that would be available to their foreign competitors.¹⁴ The report estimated that video gambling would generate average revenues of \$1 million per year per aircraft for the foreign airlines.¹⁵ At that rate, a law permitting foreign airlines to offer in-

8. 49 U.S.C. § 41311.

9. See U.S. DEP'T OF TRANSP., VIDEO GAMBLING IN FOREIGN AIR TRANSPORTATION 2 (1996) (unpublished report submitted by the Department of Transportation to Congress).

10. See *id.*

11. See 140 CONG. REC. S6, 663-64 (daily ed. June 9, 1994) (statement of Senator Gorton).

12. See U.S. DEP'T OF TRANSP., *supra* note 9, at 39.

13. See *id.* at 40.

14. See *id.* at 44.

15. See *id.* at 48.

flight video gambling would result in an additional \$112 million per year in gambling revenue from the United States air market.¹⁶

There was little concern that U.S. airlines would lose many of their international customers to foreign airlines if the foreign airlines were permitted to offer gambling. Nevertheless, the additional revenue available to foreign air carriers could provide them with the flexibility to offer reduced fares to international airline passengers which could have a dramatic impact on the distribution of market share. Moreover, the extra revenues would help them in supporting their operations worldwide.¹⁷ Due to the potential competitive consequences of permitting only foreign air carriers to offer video gambling and given the unwillingness of Congress to permit it on international flights of domestic airlines, the law was amended to avoid putting United States airlines at a competitive disadvantage to its foreign rivals in providing international passenger service.

B. *Socio-Economic Cost of Legalized Gambling*

Predictably, a concern that nearly always arises in connection with discussions of legalized gambling also arose during the discussion over legalized in-flight gambling, namely, the social and economic costs of gambling to the nation.¹⁸

The last twenty years have seen legalized gambling become increasingly popular as it has rapidly spread across the United States.¹⁹ Arguing in favor of legalized gambling, proponents typically point to the potential economic benefits state and local communities would gain from it.²⁰ Opponents counter that employment and revenue benefits do not offset the significant socio-economic costs that arise from legalized gambling, including:

(1) Problem and compulsive gambling, which leads to financial insolvency, decreased worker productivity due to absenteeism, increased white-collar crime to support gambling addiction, and child and spousal abuse in the families of compulsive gamblers.

(2) Increased direct public expenditures, such as those for criminal justice, regulation, and public infrastructure to support gambling operations.

(3) Political corruption by gambling interests.²¹

Additionally, morality is always an issue in these discussions. Despite the continued growth of legalized gambling in the United States

16. *See id.* at 39.

17. *See id.*

18. *See id.* at 13.

19. *See id.* at 10.

20. *See id.* at 12.

21. *Id.*

since 1974, as can be seen by the enactment of this particular law, anti-gambling opponents have had some impact on Congress.

C. *Potential Safety Effects*

At the time the Gorton Amendment was enacted, there was concern in Congress about the potential safety effects of video gambling on board an aircraft. Two matters were of particular importance: first, whether the on-board electronic entertainment systems, that would house video gambling, present an increased technical risk for air travel safety;²² second, whether gambling itself presented any increase in behavioral safety risk, "i.e., would it cause a passenger to behave in a manner that might interfere with or disrupt the safety-related duties of the aircraft's flight crew?"²³

In the Department of Transportation's report to Congress in March 1996, the Department found no evidence that the on-board electronic entertainment systems that would house video gambling posed any type of technical risk to other equipment on a commercial aircraft.²⁴ In fact, the entertainment systems that would include a video gambling feature have been certified as safe from a technical standpoint by the Federal Aviation Administration.²⁵ Nevertheless, the Department could not dismiss the potential for increased risk stemming from the behavior of certain passengers while gambling.²⁶

The potential behavioral risks associated with video gambling arise from the possibility of problem passengers increasing the work load of the flight attendants and potentially interfering with their safety-related duties.²⁷ The Association of Flight Attendants has expressed concern over potential behavioral issues specific to video gambling aboard an aircraft, which would include "problem gamblers, passengers wanting to change seats because someone close by is engaged in gambling, handling money for gamblers and access to gambling by minors."²⁸ The Department's study reported that current flight training requirements, along with the kind of gambling device to be used in an aircraft, would probably minimize the potential behavioral risks that the Association of Flight Attendants fear.²⁹ However, because no international airline has had any experience with video gambling, the behavioral risks of it are unknown.³⁰ Therefore, pending better information on the behavioral risks associated with video gambling, the

22. *See id.* at 3.

23. *Id.*

24. *See id.* at 31.

25. *See id.* at 4.

26. *See id.* at 3.

27. *See id.* at 35.

28. *Id.*

29. *See id.*

30. *See id.* at 36.

Department of Transportation was unwilling to authorize on-board gambling.³¹

III. POSITION OF THE INTERNATIONAL AIRLINES

In response to the enactment of the Gorton Amendment, ten major international airlines formed a group known as the International Airline Coalition on the Rule of Law ("Coalition"). The members of the Coalition include Air France, Air New Zealand, All Nippon Airways, KLM Royal Dutch Airlines, Lufthansa, Japan Airlines, Japan Air System, Qantas, Singapore Airlines, and Swissair. The Coalition's purpose is to lobby Congress to repeal its ban on in-flight gambling with regard to foreign registered aircraft.

The Coalition argues that, according to customary international law, relevant conventions, and treaties on the subject, "when an aircraft flying an international route is outside a particular state's territorial jurisdiction, only the state of the aircraft's nationality is competent to permit, regulate or prohibit gambling, or other types of conduct on board the aircraft."³² According to the Coalition, the United States' attempt to ban in-flight gambling by banning the transport of gambling devices on foreign air carriers servicing the United States is an unjustified unilateral assertion of U.S. jurisdiction over otherwise lawful conduct on non-U.S.-registered aircraft while flying outside United States territory.³³ As a result, the Coalition notes "this unprecedented intrusion on the rights and the sovereignty of the aircraft's nationality has caused considerable alarm among non-United States airlines,"³⁴ which has led them to come together to address this problem with the goal of securing a reaffirmation of the fundamental jurisdictional principles of international law.³⁵

In order to promote and uphold the rule of law in the area of international civil aviation, the Coalition has urged Congress to amend its law on in-flight gambling to reflect:

- (1) the law of the nation in which the aircraft is registered governs the conduct of activities such as gambling on board the aircraft while it is in international airspace, and
- (2) the law of the nation in which the foreign aircraft is located applies while the aircraft is in the territory of that nation.³⁶

31. *See id.* at 3.

32. INTERNATIONAL AIRLINE COALITION ON THE RULE OF LAW, POSITION PAPER REGARDING PRINCIPLES OF INTERNATIONAL AIR LAW GOVERNING THE EXERCISE OF NATIONAL JURISDICTION TO CONTROL CONDUCT ABOARD CIVIL AIRCRAFT 1 (Feb. 27, 1995) (unpublished paper, on file with Texas Wesleyan Law Review).

33. *See id.* at 2.

34. *Id.*

35. *See id.* at 2-3.

36. *Id.* at 4.

Therefore, to be consistent with these basic principles of international law, the Coalition argues that the ban on in-flight gambling should be repealed with regard to foreign aircraft. However, the United States may prohibit in-flight gambling on foreign aircraft while they are within United States territory.³⁷ The Coalition does not view its effort to convince Congress to repeal the ban on in-flight gambling as an attempt by non-U.S. airlines to put U.S. airlines at a competitive disadvantage, because, according to international law, the United States can do as it pleases with respect to United States registered aircraft.³⁸ Nevertheless, the Coalition argues that "neither the United States nor any other nation has the power to assert its jurisdiction extra-territorially over conduct [such as] gambling, on board aircraft registered in another nation, despite what reasons it may have for attempting to do so."³⁹

This issue is of great importance to the Coalition airlines because they are known worldwide for, and take pride in, "the comfort, convenience and entertainment they provide to their passengers."⁴⁰ They also do not want to see the current civilized aviation regime develop into a "free for all system in which every nation will begin to regulate what type of passenger service can be offered while an aircraft is flying to or from a nation even while outside the territory of that nation."⁴¹

Despite what many congressional opponents of gambling may think, the Coalition argues that it is not advocating gambling as opposed to non-gambling.⁴² Instead, it purports to be lobbying only for the repeal of one particular law, only with regard to foreign air carriers, and only as an effort to bring the United States into compliance with customary jurisdictional rules as it had been for many decades prior to the enactment of its gambling devices ban.⁴³ The Coalition points out that since the dawn of aviation the United States has been a leader in the development of international law principles that govern and support the harmonious global civil aviation regime.⁴⁴ The Coalition called on the United States to show once again its leadership in this area "by adhering to the rule of law on the extra-territorial jurisdictional limits on states to determine what may or may not take place on the aircraft and airlines of other states."⁴⁵

37. *See id.*

38. *See id.* at 4-5.

39. *Id.* at 5.

40. *Id.*

41. *Id.*

42. *See id.* at 6.

43. *See id.*

44. *See id.*

45. *Id.*

IV. ANALYSIS OF THE INTERNATIONAL AIRLINE
COALITION'S ARGUMENT

A. *The Chicago Convention*

The Chicago Convention was enacted on December 7, 1944.⁴⁶ "It is the fundamental [international treaty] governing the rights and obligations of States regarding international *civil* aviation."⁴⁷ Presently, the United States and over 180 other states are members of the Chicago Convention.⁴⁸ The major provision of the Chicago Convention, Article 1, states, "The contracting states recognize that every State has complete and exclusive sovereignty over the airspace above its territory."⁴⁹ Accordingly, the United States and each member state of the Chicago Convention have the power to regulate all persons and things within its borders and airspace above its territory.⁵⁰ In addition, Articles 11 and 12 of the Convention contain principles consistent with the premise in Article 1.⁵¹

These major provisions of the Chicago Convention lend support to the idea that the United States has jurisdiction to enforce a gambling devices ban on foreign aircraft flights to or from the United States. However, advocates for repealing the ban have read Article 1 of the Chicago Convention very narrowly.⁵² They have concluded that while an aircraft is *outside* United States territory and over the high seas, the

46. See Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 80, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

47. Ludwig Weber, Chicago Convention 11 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 54 (1989).

48. See I.H.PH. DIEDERICKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 10 (5th ed. 1993).

49. Convention on International Civil Aviation, *supra* note 46, at art. 1.

50. See GEORG SCHWARZENBERGER & E.D. BROWN, A MANUAL OF INTERNATIONAL LAW 74 (6th ed. 1976).

51. Article 11 provides:

Subject to the provision of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or within the territory of that State.

Convention on International Civil Aviation, *supra* note 46, at art. 11.

With regard to the rules of the air Article 12 provides:

Each contracting State undertakes to adopt measures to insure that every aircraft flying or maneuvering within its territory and every aircraft carrying its national mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuvering of aircraft there in force. . . . Over the high seas, the rule in force shall be those established under this Convention.

Id. at art. 12.

52. See BRIAN C. O'DONNELL, *Gambling to be Competitive: The Gorton Amendment and International Law*, 16 DICK. J. INT'L L. 251, 263 (1997).

United States does not have the right to impose its in-flight gambling ban on a foreign-registered air carrier.⁵³

According to the Coalition, under customary international principles of law, while a foreign-aircraft is outside a state's *territorial* jurisdiction the aircraft's state of registry has *quasi-jurisdiction* to regulate what may or may not occur on that airplane.⁵⁴ This general rule of international civil aviation is codified in Article 17 of the Chicago Convention which states that "aircraft have the nationality of the State in which they are registered."⁵⁵

Whether there is any basis under customary international law for this position is questionable. With regard to this particular issue, however, it is clearly unsound. In essence, the Coalition has noted the United States' efforts to exercise its valid authority under Article 1 of the Convention has the incidental result of limiting their otherwise legal activity outside U.S. jurisdiction. This, they argue, is a violation of international law. Such an argument ignores the "limitations of rights states can impose upon each other, limitations which find their origin in the principle of sovereignty of the state over the airspace above its territory expressed in Article 1 of the [Chicago] Convention."⁵⁶ Because the United States has sovereignty over its territory and airspace, it has the inherent power to impose limitations on foreign aircraft flights to or from the United States. Those limitations can include the number of passengers that can be carried on a given flight, or whether in-flight gambling may take place on those flights to or from the United States.⁵⁷ The members of the Coalition need not adhere to the law unless they voluntarily choose to do so, in order that they may land in or take off from the United States or its territories.

Also, Article 6 of the Chicago Convention provides that "no scheduled international air service may be operated over or *into* the territory of a contracting State, *except* with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization."⁵⁸ Accordingly, the United States and each member of the Convention have the right under Article 6 to impose such limitations as it deems fit on "scheduled" foreign aircraft flights to or from its borders.⁵⁹ So, the letter of the law is explicit. According to Article 6, the United States does have the inherent authority to impose its ban on in-flight gambling devices on foreign aircraft flights to, from, or over the United States.

53. *See id.*

54. *See* INTERNATIONAL AIRLINE COALITION ON THE RULE OF LAW, *supra* note 32, at 1.

55. Convention on International Civil Aviation, *supra* note 46, at art. 17.

56. DIEDERICKS-VERSCHOOR, *supra* note 48, at 12.

57. *See id.*

58. Convention on International Civil Aviation, *supra* note 46, at art. 6.

59. *See* DIEDERICKS-VERSCHOOR, *supra* note 48, at 15.

In addition to the argument that the state of registry has jurisdiction over an aircraft while it is outside a country's territory, some commentators argue that, while over the high seas, the concept of freedom of the seas under Article 87 of the UN Convention on the Law of the Sea ("UN Convention") also includes the freedom to fly over the high seas.⁶⁰ Although the Chicago Convention does not address the issue of sovereignty over the high seas, this is irrelevant with regard to this particular issue. Some legal scholars of international law have compared an aircraft to a ship and have characterized it as having attributes similar to a ship.⁶¹ While accurate in some contexts, the analogy of airliner to ship is not valid in this particular context. Even though air law has much in common with maritime law, the strict provisions of the Chicago Convention preempt the idea of "flags of convenience" in aviation.⁶² Instead, because of the express provisions in Articles 1 and 6 of the Chicago Convention, the United States has the authority to enact such limitations as it deems appropriate. Those include the authority to ban in-flight gambling on scheduled foreign-aircraft flights to, from, or over the United States.

B. Specific Circumstances When a Country May Exercise Its Jurisdiction Over an Aircraft Outside Its Territorial Airspace

Apart from a country's express authority to regulate scheduled international civil aircraft flights from their country, derived from Articles 1 and 6 of the Chicago Convention, there are specific circumstances in which the United States and other countries have had the limited jurisdictional power to control foreign aircraft beyond the scope of their territory. These specific instances provide additional support for U.S. efforts to enforce its gambling devices ban extraterritorially.

60. In relevant part, Article 87 provides:

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States;

(a) freedom of navigation;

(b) freedom of overflight;

....

2. These freedoms shall be exercised by all States, with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this convention with respect to activities in the area.

United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 87, 21 I.L.M. 1261.

61. See GERALD VON GLAHN, *LAW AMONG NATIONS* 345 (3d ed. 1976).

62. See DIEDERICKS-VERSCHOOR, *supra* note 48, at 12.

1. Contiguous Zone

Under customary international law, the United States or any other coastal state may exercise "in a zone contiguous to its territorial sea, such control as is necessary to prevent and punish the infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea."⁶³ The idea of the contiguous zone is addressed by the UN Convention;⁶⁴ however, it may not extend beyond twenty-four nautical miles.⁶⁵ Although the concept of contiguous zone is generally discussed in the context of the seizure of ships, the activities of aircraft in the airspace bordering the territorial sea of a country may also affect that state's interest; therefore, such activities give rise to preventative action.⁶⁶ Accordingly, the United States or any other coastal state has the right to exercise control over an aircraft that violates its laws or regulations within its contiguous zone.⁶⁷

2. Air Defense Identification Zones

A major claim to aerial jurisdiction has been the establishment by a number of states, including the United States, of air defense identification zones ("ADIZ"). Since 1950, in pursuit of objectives such as security, many states have extended limited aspects of their sovereignty to the high seas.⁶⁸ An ADIZ in some cases can extend several hundred miles seaward.⁶⁹ The United States government by means of regulations has established an ADIZ off both the Atlantic and Pacific coasts of North America.⁷⁰ The zones are designed so as to permit the positive identification of an aircraft approaching the shores of the United States while they are over the ocean.⁷¹ The regulations achieve this by requiring all aircraft to radio their identification to American aeronautical facilities prior to entering the ADIZ.⁷² Once inside the zone, the aircraft must follow the specified procedures of flight plan and instructions of the air traffic authorities.⁷³ Failure to do so may lead to sanctions ranging from aerial interception by military aircraft to an escorted forced landing at a U.S. airfield.⁷⁴

63. Kay Hailbronner, *Freedom of the Air and the Convention of Law of the Sea*, 77 AM. J. INT'L L. 490, 513-14 (1983).

64. See United Nations Convention on the Law of the Sea, *supra* note 60, at art. 33.

65. See *id.*

66. See Hailbronner, *supra* note 63, at 514.

67. See *id.*

68. See Elizabeth Cuadra, *Air Identification Zones: Creeping Jurisdiction in the Airspace*, 18 VA. J. INT'L L. 485 (1978).

69. See *id.*

70. See Ivan L. Head, *ADIZ, International Law and Contiguous Airspace*, 2 HARV. L. CLUB BULL. 28, 29 (1960).

71. See *id.*

72. See *id.*

73. See *id.*

74. See Cuadra, *supra* note 68.

The use of ADIZs has been justified on the basis of comparison to the concept of the contiguous zone or to the doctrine of necessity.⁷⁵ The early identification and control of foreign aircraft have been declared necessary “to prevent surprise attacks or infringements upon essential security interests and to ensure the safety of international traffic.”⁷⁶

3. The Tokyo Convention

The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft (“Tokyo Convention”)⁷⁷ is another multilateral convention that allows a nation, in very limited situations, to exercise jurisdiction over a foreign-registered aircraft. The Tokyo Convention primarily deals with crimes committed aboard an aircraft. Although it is stated in Article 1(2) of the Tokyo Convention that it applies to such offenses or acts committed on board an aircraft registered in the contracting state,⁷⁸ the Convention goes on to state an exception to this general rule. According to Article 4 of the Tokyo Convention, such interference is permitted by a contracting state which is not the state of registry “if the offense has an effect on the territory; is committed by or against a national or permanent resident of such state; or is against the security of the state.”⁷⁹ Therefore, “above the high seas, this constitutes an exception to the general rule that an aircraft is subject to the exclusive jurisdiction of its State of registration.”⁸⁰

In addition, according to Article 1(b) of the Tokyo Convention, a country has the right to exercise control over a foreign registered aircraft when “acts which, whether or not they are offenses, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.”⁸¹ As the behavioral risks that could possibly arise are unknown at this time, there is the possibility that in-flight gambling could lead to aberrant behavior by passengers using the system that could jeopardize the safety of the passengers and the aircraft. Therefore, Article 1(b) of the Tokyo Convention provides additional justification for the United States to enforce its gambling ban extraterritorially.

75. See Hailbronner, *supra* note 63, at 516.

76. *Id.*

77. Convention on Offenses and Certain Other Acts Committed On Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 219, 20 U.S.T. 2941.

78. *See id.* at art. 1.

79. *Id.* at art. 4.

80. NICHOLAS GRIEF, PUBLIC INTERNATIONAL LAW IN AIRSPACE ABOVE THE SEAS 61 (1994).

81. Convention on Offenses and Certain Other Acts Committed On Board Aircraft, *supra* note 77, at art. 1(b).

4. Special Aircraft Jurisdiction of the United States

In addition to the specific circumstances previously listed, the United States may exercise jurisdiction over a foreign registered aircraft while in transit to the United States under the United States law that deals with the "Special Aircraft Jurisdiction of the United States."⁸² United States courts have also upheld the notion of special aircraft jurisdiction of the United States. In *Chumney v. Nixon*,⁸³ an action was brought by a passenger on a charter flight from Rio de Janeiro to Memphis, Tennessee, against certain passengers for recovery for a physical assault committed against him during the flight.⁸⁴ Although the district court dismissed the action, the Court of Appeals ruled that not only was a U.S. criminal statute within the special aircraft jurisdiction of the United States, but also the intent of Congress was that "federal law appl[y] to American and other aircraft while such aircraft are en route from an airport in the United States or are returning from a foreign country directly to an airport in the United States."⁸⁵

Another case defining the special aircraft jurisdiction of the United States is *United States v. Georgescu*,⁸⁶ which dealt with a criminal sexual assault by a Romanian national on a nine-year-old girl over the mid-Atlantic ocean on a Scandinavian Airlines flight to New York.⁸⁷ Despite the defendant's claim of lack of U.S. jurisdiction, the district court ruled that it did have jurisdiction to hear the case because it was the intent of Congress that the criminal statutes at hand, "Aggravated sexual abuse"⁸⁸ and "Special Aircraft Jurisdiction of the United States,"⁸⁹ were designed "to extend jurisdiction to include crimes committed in non-U.S. airspace aboard foreign aircraft that land in or depart from the United States."⁹⁰ In its ruling, the district court also stated that "even if Congress's criminalization of defendant's acts and its exercise of jurisdiction were counter to international law, this would not lessen the validity of the statute."⁹¹ In fact, although courts should make an attempt to interpret domestic law consistently with international customs and obligations "in the event of irreconcilable conflict, the courts are bound to apply domestic law if it was passed

82. Under 49 U.S.C. § 46501 (1994), the United States has "special aircraft jurisdiction" over a foreign aircraft outside the United States if the airplane's next scheduled or last place of departure was the United States and an individual on that plane commits an offense as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft.

83. 615 F.2d 389 (6th Cir. 1980).

84. *See id.* at 390.

85. *Id.* (emphasis added).

86. 723 F. Supp. 912 (E.D.N.Y. 1989).

87. *See id.* at 913.

88. 18 U.S.C. § 2241 (1986).

89. 49 U.S.C. § 46501 (1994).

90. 723 F. Supp. at 915.

91. *Id.* at 921.

more recently.”⁹² Therefore, the United States’ gambling ban could be enforceable under the “Special Aircraft Jurisdiction of the United States.”⁹³ Moreover, since the statute that prohibits in-flight gambling was passed subsequent to the development of traditional notions of international law and treaties, the prohibition on in-flight gambling should be controlling. As a result, in the event of conflict, federal law preempts international law.

V. THE UNITED STATES SHOULD REPEAL ITS BAN ON IN-FLIGHT GAMBLING WITH REGARD TO INTERNATIONAL AIRLINES

A. *Need for Order in International Civil Aviation*

1. Purpose of the Chicago Convention

Since the adoption of the Chicago Convention, the United States and other nations have recognized that, for the international civil aviation industry to run smoothly, there must be a clear legal framework that each contracting state follows. This goal is reflected in the preamble which states:

Whereas the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and people of the world . . . to avoid friction . . . the undersigned governments having agreed on certain principles and arrangements in order that civil aviation may be developed in a safe and orderly manner. . . .⁹⁴

From the preamble comes the fundamental principle underlying the Convention that the member states should deal in “good faith” with one another. Thus, for there to be order and to minimize conflict, it is important that each nation comply with the *spirit* of the Chicago Convention.

If the United States is allowed to impose its gambling ban, then there is nothing to stop other nations from adopting similar laws regulating the conduct on board a United States aircraft. It could lead to unpredictability in the international civil aviation industry, because each nation could begin to regulate what type of passenger service is offered on flights to or from its country. Certainly, if France enacted a law regulating that only wine could be served on flights to or from its country in the interest of political, competitive, and moral concerns, one would surely expect Congress to question whether France had jurisdiction under international law to enforce such a law. The United States’ ban on in-flight gambling with regard to the foreign airlines should be repealed, because it will probably lead to reciprocal actions

92. *Id.*

93. 49 U.S.C. § 46501 (1994).

94. Convention on International Civil Aviation, *supra* note 46.

by other nations disrupting the order and harmony under which the international civil aviation industry has operated for over fifty years.

B. *Socio-Economic Costs Can Be Kept to a Minimum*

Legalized gambling is a controversial issue whenever it is raised, and opponents question the socio-economic costs to society. However, with regard to in-flight gambling, these negative effects can probably be kept to a minimum. In a recent survey conducted by the Department of Transportation, the majority of the people surveyed reacted favorably to the concept of in-flight gambling.⁹⁵ In fact, most of them thought in-flight gambling would be fun, convenient, and enjoyable.⁹⁶

Along with the favorable response to video gambling, the airlines and the manufacturers of the gambling systems have taken a number of preventive measures with regard to the possible behavioral-related concerns opponents of the idea would likely raise. Specifically:

(1) The use of polarized screens should minimize the need to relocate passengers who object to gambling or other entertainment features since the screens can be viewed clearly only by persons sitting directly in front of them. Similarly, all audio is transmitted through individual headphones.

(2) Transactions [will be] handled via credit card, eliminating the need to handle cash. The system delivered to British Airways, for instance, includes this feature, and both VISA and MasterCard have pilot programs for eliminating cash transactions.

(3) [The electronic systems that will] be used will include a selective disabling function, allowing gambling games to be shut down at seats occupied by minors. In addition, [the system will] provide a toll-free connection enabling passengers to direct questions and resolve problems directly with the system vendor instead of the aircraft's flight crew.⁹⁷

One airline also decided to limit the stakes by setting a maximum limit of \$350 per credit card, and single winnings would be limited to \$3,500.⁹⁸ The decision to limit stakes was made because many people in the industry worried that gambling machines could anger passengers particularly if the stakes were high.⁹⁹ Anticipating the reaction to the introduction of on-board video gambling, the airlines took these steps to ensure that the possible negative consequences can be kept to a minimum.

95. See U.S. DEP'T OF TRANSP., *supra* note 9, at 19.

96. See *id.*

97. *Id.* at 37.

98. See Chew, *supra* note 2, at 2.

99. See *id.*

C. *Airlines Desperately Need an Injection of Capital*

As a more practical argument, the current United States ban on in-flight gambling should be repealed because the international airlines could use the additional revenue generated by in-flight gambling. The economic performance of the international airlines over the last two decades can be described as "abysmal."¹⁰⁰ The international airline industry has never been very profitable. From 1977 to 1992, the international airline industry earned a net profit of 0.6 percent in revenue, on gross revenues of over \$2 trillion.¹⁰¹ During the first four years of this decade, losses ranged from \$6.7 billion in 1991 to a loss of \$1.5 billion in 1994.¹⁰² As a result of these losses airlines today carry huge debts.¹⁰³

The international airlines probably can generate substantial revenue by offering in-flight gambling on flights within their own markets. However, because the United States is the largest and most important aviation market in the world,¹⁰⁴ the international airlines could generate even more gambling revenue if they are able to offer it on their flights to or from the United States. Without being able to offer this entertainment option while servicing the U.S. market, the international airlines are forfeiting \$112 million per year in revenue.¹⁰⁵ As a result, the ban hurts the international airlines financially.

Revenue raised by in-flight gambling would not only provide the injection of capital that the airlines need, but could also benefit society by possibly leading to reduced fares and better service. Already a crisis in the international commercial aviation industry is not far away; with the United States' ban, it may come earlier than anticipated.¹⁰⁶

D. *Ban on In-Flight Gambling Is Contrary to Open Skies*

On August 5, 1992, the Department of Transportation announced that it began a new initiative to liberalize and deregulate the international commercial aviation markets by negotiating "Open Skies" agreements with European countries.¹⁰⁷ Open Skies represents a policy toward establishing a less restrictive civil aviation regime, allowing an air carrier unlimited flights between two nations.¹⁰⁸ In September

100. See Andras Vamos-Goldman, *The Stagnation of Economic Regulation Under Public International Air Law: Examining its Contribution to the Woeful State of the Airline Industry*, 23 *TRANSP. L.J.* 425, 440 (1996).

101. See *id.* at 440-41.

102. See *id.* at 441.

103. See *id.*

104. See *id.* at 455.

105. See U.S. DEP'T OF TRANSP., *supra* note 9, at 39.

106. See Vamos-Goldman, *supra* note 99, at 440.

107. See *In re* Defining "Open Skies," Department of Transportation Order No. 92-8-13, 1992 WL 204010, at *1.

108. See Adam L. Schless, *Open Skies: Loosening The Protectionist Grip on International Civil Aviation*, 8 *EMORY INT'L L. REV.* 435, 447 (1994).

1993, the United States signed its first Open Skies agreement with the Netherlands, which allows both American and Dutch air carriers to fly and land in any airport in each country.¹⁰⁹ This agreement signaled a step toward establishing a free market system in international civil aviation.¹¹⁰

However, since the enactment of the United States' ban on in-flight gambling, it seems that the United States has taken a step contrary to its Open Skies policy. In an attempt to put all players in the industry on an equal playing field, Congress amended the law to apply to foreign as well as domestic air carriers. Clearly, this particular law is an act by the protectionist forces in Congress, since the stated purpose behind it is to keep United States airlines from being at a competitive disadvantage to its international rivals. As a result, this law falls contrary to the United States' Open Skies policy to deregulate and liberalize the international aviation industry. The protectionist nature of the in-flight gambling ban seems to be contrary to the United States' commitment to open markets.

CONCLUSION

A number of international airlines servicing the United States would like to offer in-flight gambling to their passengers. They cannot currently do so because the United States bans in-flight gambling devices on flights to or from the United States, even while a foreign aircraft is outside of its airspace. Congress enacted this law because of competitive, safety, and moral concerns. Despite the fact that the Coalition argues that these reasons for enacting this law are unsound, according to the Chicago Convention, the United States does have jurisdiction to enforce a ban on in-flight gambling. However, in the interest of global harmony and to ensure that the international civil aviation industry will continue to thrive as it has in the past, the United States should repeal the application of this law on international airlines while they are outside U.S. territory.

Steven Grover

109. *See id.* at 449.

110. *See id.* at 438.