BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

In the Matter of the Petitions of	)	
The United States Travel Agent Registry	)	
	)	**OST-2000-6821**
and	)	
American Society of Travel Agents	)	

ANSWER OF LUFTHANSA GERMAN AIRLINES

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Dated: March 17, 2000

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Pursuant to the Notices issued by the Department in this docket and 14 C.F.R. § 302.405, Lufthansa German Airlines ("Lufthansa") hereby answers the "Emergency Petition for Rulemaking" filed by the United States Travel Agent Registry ("USTAR") on 24 January 2000 ("USTAR Petition")[1] and the letter submitted by the American Society of Travel Agents ("ASTA") on 16 February 2000 ("ASTA Letter").[2]

[1] The USTAR Petition can be divided into two discrete parts. The first part (Sections 3-5 of the Petition) consists of allegations relating to Lufthansa's collection of a German airport security fee. The second part (Sections 6 -10 of the Petition) and the ASTA Letter raise broader issues about the use of "Q surcharges," including fuel surcharges, by various carriers in the United States. As Lufthansa does not impose any Q surcharges in its operations to/from the United States, see Declaration of Michael Klenk at ¶20 (attached hereto as Exhibit A) [hereinafter, "Klenk Declaration"], this Answer addresses only the allegations and issues raised in the first part of USTAR's Petition. Lufthansa reserves its right to address issues raised in the second part of USTAR's Petition and the ASTA Letter in subsequent pleadings as necessary.

[2] By notice dated January 28, 2000, the Department decided to treat the USTAR Petition as a formal complaint. Unlike a typical complaint, the Petition does not have numbered paragraphs of allegations. We attempt herein to address what appear to be the specific allegations against Lufthansa. Lufthansa denies all allegations contained in the USTAR Petition and ASTA Letter except as specifically admitted herein.

I. INTRODUCTION AND SUMMARY

Sections 3 - 5 of USTAR's Petition consist of an array of vituperative allegations against Lufthansa, ranging from fraud to price-fixing. The allegations are wholly unsupported with fact or law, belied by the probative evidence, premised on a plainly erroneous understanding of relevant law -- and not new. USTAR's allegations are based entirely on the statements of Mr. Albrecht Feibel, one of the 652 German Members of Parliament and a professional travel agent, who has repeatedly attacked Lufthansa, particularly since the carrier decided to cap travel agent commissions in Germany.[3] Mr. Feibel's most recent political salvo against Lufthansa consists of unsupported accusations that the carrier failed to comply with German law concerning German airport security charges. Apparently seeking to export his battle to other fora, Mr. Feibel's charges are quoted at length in USTAR's Petition and in an almost identical pleading filed with the Canadian Transportation Agency.[4]

Given their origin, it is not surprising that many of the issues raised in USTAR's Petition and its pleas for far-reaching extraterritorial relief are outside the Department's jurisdiction. Others are moot. In fact, the Petition raises only a single issue with respect to Lufthansa that is even arguably properly before the Department: whether Lufthansa committed an "unfair or deceptive practice" in violation of 49 U.S.C. § 41712. Neither of USTAR's two principal allegations offers any basis for finding that Lufthansa committed an "unfair or deceptive

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[3] See Section III(B)(1)(b) infra.

[4] On the same day that Mr. Bishins, President and CEO of USTAR filed its Petition with the Department, he filed an almost-identical complaint on behalf of an entity identified as the Canadian Standard Travel Agent Registry ("CSTAR") with the Canadian Transportation Agency (CTA).

practice." Lufthansa's practice of retaining a portion of the German airport security fees that Lufthansa charged to its passengers (hereinafter the "Airport Security Charge" or "ASC") to compensate the carrier for its costs in collecting, accounting for and remitting costs, was -- contrary to USTAR's first allegation -- consistent with both U.S. and German law. Just as carriers can properly retain a portion of U.S. Passenger Facilities Charges to compensate for their handling costs, so too could Lufthansa retain a cost recovery component from the ASC without engaging in any "unfair or deceptive practice" under Section 41712. USTAR's second allegation -- that, through the medium of the International Air Transport Association ("IATA"), Lufthansa attempted to force all airlines serving German Airports to charge illegal ASCs -- is totally unsupported and inconsistent with all available evidence. In short, USTAR's Petition fails to adduce any basis upon which the Department should or could institute an enforcement proceeding against Lufthansa.

In any event, this Department should decline USTAR's invitation to involve itself in this matter that fundamentally concerns a foreign dispute over foreign laws. USTAR's Petition seeks the Department to rule on what is clearly a dispute between German travel agents and carriers in Germany over whether the carriers' implementation of certain German Government-imposed charges was consistent with German law. The Department neither has the expertise in German law to adjudicate this matter nor an interest in the adjudication that is comparable to that of Germany. Further, a U.S. ruling that controverted German law and policy could create tension and the danger of inconsistent rules. Pursuant to the doctrine of forum non conveniens and the principles that underlie it, the Department should dismiss USTAR's complaint.

II. FACTS

The USTAR Petition consists primarily of vague and conclusory allegations of misconduct. It is difficult to discern any specific allegations of underlying facts concerning Lufthansa and the ASC. To the extent one can, the allegations grossly distort and misstate the facts, and Lufthansa denies them. In an effort to clarify the record, Lufthansa sets forth below a brief summary of (i) German law governing the ASC, (ii) Lufthansa's imposition of the ASC, and (iii) Lufthansa's communications to IATA regarding the ASC.

A. German law

1. Background. The German Federal Air Transport Act assigns airport security functions[5] to state government ("Länder") air traffic agencies ("Luftfahrtbehörden").[6] At the request of the Länder, the German Parliament authorized third parties to be charged for the costs incurred in connection with airport security functions. Specifically, Parliament amended Section 32 of the Federal Air Transport Act to authorize the Federal Ministry of Transport ("Bundesministerium für Verkehr" or "BMV") to "enact legal regulations . . . with respect to the costs (fees and expenditures) . . . for official functions, especially [airport security] examinations

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[5] These security responsibilities are set forth in Section 29c of the Federal Air Transport Act ("Luftverkehrsgesetz"). They broadly include "protecting air traffic against threats to its safety," and specifically include passenger security checks, baggage security checks, x-raying postal shipments, etc.

[6] Luftverkehrsgesetz, §§ 29c and 31(2), ¶19. At a few airports, the relevant Luftfahrtbehörden are part of the federal, not state, government. This distinction is not relevant here.

and inspections."[7] In 1990, the BMV did so by adding airport security searches to the list of official functions performed by air traffic agencies that are compensable. Specifically, it added a new Item 23 to Title VII of the appendix to its Air Traffic Administration Cost Regulations ("Cost Regulations")[8] which provides in relevant part:

> 23. Searches of passengers and carried objects or their inspection in any other way (§ 29c, ¶2 of the Air Transport Act)
>
> - per passenger [DM] 4.00 to 20.00
>
> a) Airlines and aircraft license holders are required to notify the responsible aviation authorities of the number of searched and inspected passengers according to [Section 29c of the Air Transport Act]

Item 23 permits the Luftfahrtbehörden to impose a per passenger charge for airport security searches.[9] It does not specify how these charges are to be collected, but leaves to each state government the decision whether to collect the fees from passengers itself[10] or through the carrier transporting the passengers.

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[7] Luftverkehrsgesetz, § 32(1), ¶13.

[8] Kostenverordnung der Luftfahrtverwaltung. These Cost Regulations (i) provide generally that "air traffic agencies . . . may impose charges (fees and expenditures) for official functions in air traffic administration," § 1, and (ii) attach, as an appendix, a list of official air traffic administration functions for which the agencies may assess charges and the range of acceptable charges for each. The range of acceptable charges for security searches shown above (i.e., DM 4 - 20) is the range currently in effect.

[9] The 1990 Amendment explicitly provides that there will be a "per passenger charge" for "searches of passengers and carried objects or their inspection in any other way." Kostenverordnung, App., Title VII, Item 23.

[10] The Länder could, for example, have required each departing passenger to queue up and pay an Airport Security Charge at a Länder collection booth at the airport. Such systems are employed in various countries with respect to the payment of similar government-imposed charges and taxes.

In practice, each state government has opted to have carriers perform the task of collecting the charge.[11] The federal Parliament and BMV anticipated this might be the result. Indeed, to facilitate collection through carriers, both the Federal Air Transport Act and the Cost Regulations authorize the Luftfahrtbehörden to require carriers to report the number of passengers transported from an airport.[12]

2. ASC Charges. Both the Federal Air Transport Act and the Cost Regulations take a broad view of the costs that may be compensated for or recovered from ASC revenues. Both, for example, define "costs" to include "fees and expenditures."[13] Section 32 of Federal Air Transport Act even contemplated that "the importance, economic value and other advantages for the debtor of the costs may be also taken into account" when establishing the charges.[14]

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[11] Bundesverwaltungsgericht 4C11.92, 3 March 1994 [hereinafter, "Decision of Federal Administrative Court"] (because it would be "extremely costly to charge individual travelers . . . the airlines were made responsible").

[12] See Section 32(1), ¶13 of Air Transport Act ("The regulation may require the payor to declare the number of affected passengers as well as the manner and extent to which accompanying items were transported"); Item 23 ("Airlines and aircraft license holders are required to notify the responsible aviation authorities of the number of searched and inspected passengers according to [Section 29c of the Air Transport Act]"). In practice, all state governments have exercised this authority to compel air carriers to report, generally on a monthly basis, the number of passengers processed.

[13] Section 32(4) of Federal Air Transport Law; Cost Regulations, § 1(1). The Cost Regulations do not specify how the ASCs are to be collected (i.e., directly by the Luftfahrtbehörden or through carriers) and accordingly do not distinguish between collection costs incurred by the Luftfahrtbehörden and those incurred by the carriers.

[14] Luftverkehrsgesetz, § 32.

Case law and fundamental principles of German civil law further demonstrate that, in addition to the costs incurred in actually performing security checks, costs incurred in collecting the charges -- whether incurred directly by the Luftfahrtbehörden or by the carriers on their behalf -- are compensable and may be reflected in the ASC collected from passengers.

The German Federal Administrative Court addressed this issue in an 1994 decision upholding Item 23 of the Cost Regulations against a constitutional challenge brought by Lufthansa. Lufthansa had argued in that case *inter alia*[15] that (i) Item 23 was invalid because it did not specify who should bear ultimate responsibility for the costs and (ii) if carriers were held to be the final cost-bearer, the law would constitute an illegal tax on carriers. Rejecting Lufthansa's arguments, the Court concluded that it was not Parliament's intention to create such a tax.[16] Rather, the Court stated, it is clear -- and was clear to the German legislature when it enacted the law -- that air travelers, not air carriers, would bear the costs: "[I]t was to be expected -- and has in fact happened -- that the airlines would pass their costs on to the traveler. The legislature immediately recognized that this economic cycle [would occur]."[17]

German civil law further supports this conclusion. Section 426 of the German Civil Code ("Bürgerliches Gesetzbuch" or "BGB") suggests that the passenger, as a "co-debtor" of the

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[15] See Decision of Federal Administrative Court. The bulk of the opinion addresses German constitutional and administrative legal issues not here relevant.

[16] Id. at 10-11 ("the legislature created neither an actual nor hidden tax").

[17] Id. at 18. Were it not for the carriers acting as conduits, of course, the Länder would themselves bear even greater collection costs which they would pass on to passengers as part of the security fee.

charge, is responsible for "making up the difference" incurred by the carrier.[18] Similarly, German civil law provides that an entity acting for or providing a service to another entity -- as does the carrier in collecting the ASC -- may recover its expenses.[19]

B. Lufthansa Has Implemented the ASC As Permitted by German Law.

In imposing, collecting and remitting security charges, Lufthansa has followed German law described above.[20] From 1990 to date, it has charged all its passengers traveling through a German airport an ASC.[21] For Lufthansa tickets issued in the United States, the ASC amount is generally aggregated with other applicable taxes, fees and charges to arrive at a single total amount for taxes, fees and charges which is stated in the ticket "Tax box" and denoted by the two letter code "XT."[22] In the portion of the ticket providing detailed "fare calculation"

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[18] Section 426, Para 2 of BGB reprinted in The German Civil Code (Simon L. Goren trans. 1994) [hereinafter "BGB"] ("If one joint debtor satisfies the creditor and can demand that the other debtors make up the difference, the claim of the creditor against the other debtors is transferred to him.")

[19] Section 670, BGB ("If, for the purpose of the execution of the mandate, the mandatary incurs any outlay which he may regard as necessary under the circumstances, the mandator is bound to reimburse him."); Section 683, BGB ("If the undertaking of the management of the matter is in accordance with the interest and the actual or presumptive wishes of the principal, the manager may demand reimbursement of his outlays as a mandatary. . . . [T]his claim belongs to the manager even if the undertaking of the management of the matter is contrary to the wishes of the principal.")

[20] See Klenk Declaration at ¶¶ 13-14.

[21] See Klenk Declaration at ¶ 13. As described therein, in some years the charges imposed by the Luftfahrtbehörden have varied. Id. at ¶ 7. For ease of administration and consistent with the Resolution of the Senate of the Federal Parliament of June 30, 1989 - Document No. 173/89 ("the fee shall . . . preferably be consistent throughout Germany")), the BMV has allowed carriers to charge passengers a single flat ASC based on an average of the different state charges. Id. As described below, as of January 1, 2000, Lufthansa's policy has changed; it now imposes ASCs that correspond precisely to the amount remitted to the specific relevant Luftfahrtbehörde. Id. ¶19.

[22] See Klenk Declaration at ¶ 13. On tickets issued in the United States (and other countries which impose their own taxes, fees and charges), there is often not enough room to disclose each charge separately in its own "Tax

information for ticket agents and airline staff (in case the ticket needs to be reissued) and in CRS systems, the specific amount of the ASC is listed, denoted by the two-letter "DE" code.[23]

Consistent with German law, Lufthansa has imposed a lumpsum ASC that includes the per passenger amounts required to be remitted to the Luftfahrtbehörden, an amount to cover the costs incurred by the carrier in collecting, accounting for and remitting the fees, and, with respect to domestic passengers, an amount to cover Value Added Tax.[24] As these various amounts have changed, the ASC has been adjusted from time-to-time.[25] Most recently, with the complete installation of a new information technology system that can perform the ASC-related functions as ancillary to their other functions, Lufthansa's ASCs include no cost-recovery amount; the ASCs currently charged to Lufthansa passengers reflect only the amounts remitted to the Luftfahrtbehörden and, with respect to domestic passengers, any applicable VAT.[26]

Box." In this situation, IATA Resolution 720a ("Passenger Ticket and Baggage Check -- Issuance and Honouring Procedures") dictates that the ASC amount be aggregated with other applicable taxes, fees and charges and listed in the ticket's "Tax Box" under the "XT" code. See IATA Resolution 720a ("If there are not enough 'Tax' boxes on the ticket to accommodate all tax, fee and charge entries, combine as many amounts as necessary into one amount. . . . Enter that amount in one 'Tax' box preceded or followed by the code 'XT.'")

[23] See Klenk Declaration at ¶ 13.

[24] See Klenk Declaration at ¶¶ 12, 14. The German Value Added Tax Act (Umsatzsteuergesetz) requires that VAT be paid on the consideration of products delivered and services rendered within Germany. Accordingly, VAT only applies to the ASC imposed on domestic flights within Germany. The proceeds of the VAT collected by Lufthansa are remitted in toto to the relevant state tax authorities.

[25] See Klenk Declaration at ¶ 14. As described therein, in 1999, each international passenger was charged DM 7.50, and each domestic passenger charged 8.50, for each flight from a German airport. As of the beginning of this year, the ASC was adjusted to correspond to the exact amount charged by the relevant airport authority plus any applicable VAT. See Klenk Declaration at ¶ 19. Accordingly the ASC charged to passengers now varies based on the passenger's itinerary.

[26] See id.

The BMV has been informed that air carriers are exercising their right to retain a portion of the ASC collected to compensate them for collecting, accounting for and remitting the fee.[27] It has, moreover, been apprised of precise per passenger ASC amounts charged by Lufthansa and the precise amounts remitted to the Länder.[28] Indeed, every ticket issued by Lufthansa for transportation from a point in Germany for the past ten years has plainly stated the ASC amount.[29] In no case has the BMV disapproved or taken any action against the ASC imposed.[30] Neither the BMV nor any court has ever suggested it is contrary to German law to include a cost recovery component in the ASC charged to passengers. To the contrary -- as indicated in a February 2 letter from the BMV to Mr. Feibel (attached hereto as Exhibit B) -- the BMV has clearly recognized that carriers "have a claim to compensation against the passengers."[31]

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[27] See id. at ¶ 18.

[28] See id. at ¶ 17.

[29] See id. at ¶ 13.

[30] See id. at ¶ 17.

[31] In response to the question posed by Mr. Feibel,

> In the knowledge of the Federal Government, is it true that Deutsche Lufthansa and other airlines have collected, in the time from July 1, 1990 to December 31, 1999, air security charges pursuant to § 29c of the [German] Air Traffic Law in conjunction with . . . No. 23 of the Fee Schedule to the Cost Regulations of the [German] Aviation Administration, that these amounts were described as a "tax" on the price quotations printed on the ticket, and that these amounts designated as a "tax" contain an additional differential amount charged by the airlines without legal basis which is not encompassed by the above-mentioned provisions of law and was not transferred by the airlines to the government authorities?

the BMV responded unambiguously:

> The passengers and airlines are co-debtors of the air security charge. For reasons of economic administration, the state looks to the airlines for collection of this fee, issuing notifications of charges that are paid by the airlines. The airlines, therefore, have a claim to compensation against the passengers in accordance with § 426 para 2 [BGB].

Further, consistent with German law, Lufthansa has (i) informed each relevant state government of the number of passengers processed at its airports, (ii) remitted to each Luftfahrtbehörde the amount due it (i.e., the relevant per passenger charge multiplied by the number of passengers); and (iii) remitted to tax authorities any VAT payment due.[32]

C. Communications with IATA.

When the BMV regulations implementing the security charge were first enacted in 1990, Lufthansa informed IATA's Passenger Services Conference staff, who in turn informed all signatories to the Multilateral Interline Traffic Agreement ("MITA").[33] Thereafter, consistent with Section 2.3 of the MITA[34] and IATA's Passenger Services Conference Resolutions Manual,[35] Lufthansa has notified the Passenger Services Conference when there has been a change in the amount of the ASC applicable to its passengers. Lufthansa understands that the

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See Letter from Mr. Lothar Ibrügger to Mr. Albrecht Feibel, dated February 2, 2000 (attached as Exhibit B) (emphasis added). The BMV has never dictated that the ASCs must be collected through the carriers, and it has never specified what the carriers' cost recovery amount may be. Accordingly, the issue is governed by German private law, which permits the carrier to collect an amount that is related to the services rendered and is generally reasonable. Sections 670 and 683, BGB.

[32] See id. at ¶ 16.

[33] See Declaration of Ursula Schneider de Moreno at ¶ 4 (attached as Exhibit C) [hereinafter, "Moreno Declaration"].

[34] See Resolution 780 (Form of Interline Tariff Agreement -- Passenger) § 2.3 ("Each party shall furnish to each other party the tariffs and other information necessary for the sale, as contemplated hereunder, of the transportation services currently being offered by it.").

[35] See IATA Resolution 728, Section 4.2 ("Special Fees and Charges Codes") (contemplating that members will advise IATA about amendments to charges).

Conference staff have, in turn, notified all the other MITA members of each such change via telex. Attached as Exhibit D is an example of such a telex. It states in relevant part:

> Pursuant to Article 2.3 of the IATA MITA (Passenger), Lufthansa requests circulation of the following information to MITA members:
>
> "Re: German Security Tax for Common Lump Sums.
>
> With first travel date on/after 01 November 1997 and first ticketing date on/after 30 October 1997, Lufthansa amends the German Security Charges for common lump sums as follows: The Charge for domestic travel will be amended from DEM 9,00 to DEM 8,50. The Charge for international travel will be amended from DEM 8,00 to DEM 7,50. . . . "
>
> . . . If any other member wishes to apply it for their services ticketed by other members, they should advise their interline partners and CRS suppliers accordingly.

Such communications -- notifying all MITA members of charges to be included on tickets issued for transportation on one member -- are both routine and fundamental to the IATA system.[36] They permit carriers to write tickets for a fellow MITA member, on an interline or GSA basis, that accurately include all relevant charges.

Lufthansa understands that, in addition to informing all MITA members of the change in ASC, the Passenger Services Conference staff also informed IATA's Ticket Tax Box Service ("TTBS") of the correct ASC to be charged on all Lufthansa tickets.[37] Lufthansa is unaware of

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[36] See Moreno Declaration at ¶ 7.

[37] See id. at ¶ 9. The telex attached at Exhibit D notes, for example, that "the IATA Ticket Tax Box Service (TTBS) database will list the above mentioned security tax annotated for Lufthansa."

any instance in which its own staff communicated directly with anyone at the TTBS concerning the ASC imposed by Lufthansa.[38]

As the above telex clearly indicates, the notification regarding the change in ASC was made with respect to Lufthansa's services only. Other carriers were instructed that "if any other member wishes to apply [the ASC] for their services ticketed by other members, they should advise their interline partners and CRS suppliers accordingly." Lufthansa understands (from information contained in CRS systems and communicated through the MITA) that, over the past ten years, some carriers have imposed ASCs identical to those imposed by Lufthansa, while others have imposed ASCs that differed from those imposed by Lufthansa.[39]

III. ARGUMENT

The USTAR Petition raises vague and conclusory allegations about the way Lufthansa collects security fees at German airports; it seeks similarly vague but potentially far-reaching relief in the form of monetary damages or restitution and injunctive relief. Most of the issues and pleas for relief raised by USTAR are entirely outside the Department's jurisdiction or are moot. To the extent they arguably are not, USTAR fails to provide a basis on which the Department could or should proceed.

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[38] Moreno Declaration at ¶ 10.

[39] Klenk Declaration at ¶ 15.

USTAR cites only one statute that clearly falls within the Department's jurisdiction to enforce: Section 41712 of the federal aviation laws, prohibiting "unfair or deceptive practices."[40] USTAR lacks standing to file a petition under Section 41712 and that section provides no authority for DOT to order the relief USTAR seeks. Moreover, USTAR does not specify why it believes Lufthansa's actions constituted an "unfair or deceptive practice" under Section 41712, much less offer an adequate factual and legal basis on which DOT could proceed with an enforcement complaint. Even a generous reading of the Petition suggests only two possible theories: (1) Lufthansa committed an unfair or deceptive practice when it collected, under the "DE" code,[41] ASCs that included an amount retained by the carrier to compensate it for its collection costs, allegedly in violation of German law, or (2) Lufthansa committed an unfair and deceptive practice by allegedly forcing all other airlines serving German airports to charge ASCs equal to Lufthansa's.[42] Neither theory has any merit. The first theory fails both as a matter of law and fact. There is no U.S. policy or precedent suggesting that a carrier retaining a portion of

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[40] 49 U.S.C. § 41712.

[41] As noted in Section II(B) and note 22 supra, Lufthansa tickets in the United States in fact did not include any separate amount under the "DE code" in the ticket "Tax box." Rather, consistent with IATA practice approved by the Department, Lufthansa aggregated all taxes, fees and charges into a single tax box denoted "XT."

[42] A third theory -- that Lufthansa committed an unfair or deceptive practice when it stated the ASC on tickets separately from the fare -- is so clearly inconsistent with U.S. law that it is not even a remote possibility. The Department's clearly stated enforcement policy permits carriers to state separately "any charges that are imposed or approved by the government on a per-passenger basis, such as customs, immigration or agriculture inspection ticket surcharges, international departure taxes and security and passenger facility ticket surcharges." Order 97-7-24 (emphasis added). See also Orders 96-1-13, 93-4-40 and 92-10-41. The German security charge is imposed by the German Government on a per passenger basis (see Section II(A)(1) supra (Cost Regulations explicitly impose security fees on "per passenger" basis)) and clearly falls under the category of a "security . . . surcharge."

We would note, however, that it is this issue -- whether the ASC should be included in the fare and commissionable to travel agents -- that likely motivates USTAR's Petition (and has certainly motivated Mr. Feibel's attacks on Lufthansa in Germany). Mr. Feibel has taken issue with Lufthansa's refusal to pay commissions on Government-imposed fees. There is clearly no basis for this position under U.S. law.

the proceeds of a government per passenger charge to compensate the carrier for its collection costs is unfair or deceptive; indeed, U.S. law clearly permits carriers to do so. Further, Lufthansa's actions plainly did not violate German law. The second theory fails because USTAR adduces absolutely no evidence to support it; indeed, all available evidence disproves it.

Even if USTAR had offered an adequate basis on which DOT could proceed to address the issues surrounding Germany's ASC, the Department should decline to do so. Under the doctrine of forum non conveniens and the principles it reflects, the Department should leave for resolution in Germany this complaint which is, in essence, a dispute between German travel agents and carriers in Germany about the collection of German airport security fees under German law.

A. Many of USTAR's Apparent Legal Arguments and Pleas for Relief are Beyond the Department's Jurisdiction or are Moot.

As a preliminary matter, many of USTAR's legal arguments (as best they can be discerned) and pleas for relief are beyond the Department's jurisdiction or are moot.

1. The Department's Enforcement Jurisdiction Does Not Extend to German Law or U.S. Antitrust Laws. Section 4 of the USTAR Petition principally addresses issues of German law. It consists almost entirely of translated portions of a press release from one German Member of Parliament and distorted phrases from a letter from the Parliamentary

Secretary of the German BMV, which allegedly support USTAR's claim that Lufthansa "has illegally collected amounts well above the lawfully authorized security fee at German airports."[43] Section 5 of the Petition principally accuses Lufthansa of violating "Section 1 of U.S. anti-trust laws" and asks the Department to "take any action appropriate against Lufthansa and IATA, including possible anti-trust action, for their part in the German airport fee situation."[44]

By statute, the Department's jurisdiction is limited to the enforcement of U.S. aviation laws. Section 46101(a) of Title 49 of the U.S. Code prescribes that:

> (1) A person may file a complaint in writing with the Secretary of Transportation . . . about a person violating this part or a requirement prescribed pursuant to this part. (2) On the initiative of the Secretary of Transportation . . . , the Secretary may conduct an investigation, if a reasonable ground appears to the Secretary . . . for the investigation, about (A) a person violating this part or a requirement prescribed under this part; or (B) any question that may arise under this part.[45]

The reference to "this part" means Part A ("Air Commerce and Safety") of Subtitle VII ("Aviation Programs") of Title 49 ("Transportation"). The Department's enforcement jurisdiction does not extend to the German Federal Air Transport Law. Nor is the Department charged with enforcing U.S. antitrust laws.[46] Accordingly, to the extent that USTAR's Petition asks the Department to take action based on such laws, it must be dismissed.

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[43] USTAR Petition at 4.

[44] USTAR Petition at 17.

[45] 49 U.S.C. § 46101 (1999) (emphasis added).

[46] To be sure, the U.S. antitrust laws have influenced the Department's interpretation of Section 41712. However, principal jurisdiction to address allegations of price-fixing such as those made by USTAR does not rest with the Department, and in the past, such matters have been addressed by the Department of Justice, not DOT.
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2. The Department's Jurisdiction Does Not Extend to Activities and Carriers Without a Nexus to the United States. The Petition appears to challenge the imposition of all ASCs in Germany, without regard to whether the passengers traveled to or from the United States or whether the tickets were issued in the United States.[47] The Department's jurisdiction is clearly limited to activities with an appropriate nexus to the United States.[48] To the extent the Petition seeks redress for actions lacking the necessary U.S. nexus, it must be dismissed.

3. The Department is Not Authorized to Award Damages or Order Restitution. USTAR's Petition asks that the Department "require that carriers make full and immediate restitution to any consumers overcharged in the past by any illegal amount included in the German airport security charge."[49] It cites no authority for the proposition that the Department has the power to award damages or compel restitution to a complainant, much less to an unspecified group of third parties. In fact, none exists. Section 41712 provides explicitly that if the Department were to find any "unfair or deceptive practice," the appropriate remedy would be

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[47] See, e.g., USTAR Petition at 17 (asking that the Department enjoin "all carriers serving Germany, and those issuing tickets on their behalf" and require restitution "to any consumers overcharged . . . in the German airport security charge").

[48] See, e.g., EEOC v. Arabian American Oil Co., 499 U.S. 244, 248, 259 (1991) (noting that 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,'" and finding that Title VII does not apply extraterritorially to regulate actions of U.S. employers who employ U.S. citizens abroad); Restatement (Third) of Foreign Relations § 402 (1986) (setting forth bases of prescriptive jurisdiction).

[49] USTAR Petition at 17.

"to order the air carrier, foreign air carrier or ticket agent to stop the practice or method."[50] Neither Section 41712 nor any other federal statute authorizes the Department to award damages or order restitution.[51] Nor is Lufthansa aware of any case holding that the Department possesses such authority.[52] We are unaware of any instance in the past in which the Department has ordered restitution, even to the complainant, much less to non-parties. In the absence of any such authority, the Petition's plea for damages or restitution must be dismissed.

4. USTAR's Request for Injunctive Relief is Moot. USTAR's Petition also asks the Department to order "all carriers serving Germany, and those issuing tickets on their behalf, to roll back the German airport security charges to their correct and legal levels."[53] The Petition does not state exactly what it believes the "correct and legal levels" for the German ASC are, to which they should be "rolled back," or at what point they ceased to be "correct and legal." However, other assertions in its Petition suggest that USTAR objects principally to the inclusion in the ASC of an amount to compensate the carrier for the costs of collecting, accounting for and remitting the security charge to state authorities.

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[50] 49 U.S.C. § 41712.

[51] See Rappaport v. OTS, 59 F.3d 212, 218-19 (D.C. Cir. 1995) (an agency may not award monetary damages unless expressly authorized to do so by the relevant statute).

[52] See Musson Theatrical v. Federal Express Corp., 89 F.3d 1244, 1250-51 (6th Cir. 1996) ("DOT cannot award a complaining party 'damages'"); Pinehurst Airlines, Inc. v. Resort Air Services, Inc., 476 F. Supp. 543 (M.D.N.C. 1979) ("it is undeniable that [DOT's] remedial powers are limited to cease and desist orders which can only proscribe future violations. See 49 U.S.C. § 1482 [subsequently recodified as Section 41712]"); Northside Realty Assoc., Inc. v. United States, 605 F.2d 1348, 1356 (5th Cir. 1979) (compensatory damages could not be awarded to nonparties).

[53] USTAR Petition at 16.

Leaving aside the issues of whether the inclusion of such an administrative cost recovery component is permitted under German law (as explained below, it is) and whether the Department should even attempt to resolve that issue (as explained below, it should not), USTAR's objection is now moot. Y2K-related concerns, the change to a Euro-based accounting system and other developments have required Lufthansa to introduce new information technology systems.[54] These systems are capable of performing the ASC accounting and collection functions as ancillary to their other functions. With the completion of this system, Lufthansa decided to eliminate any cost recovery amount.[55] Effective January 1, 2000, Lufthansa imposes ASCs that correspond precisely to the amount remitted to the relevant Luftfahrtbehörde. USTAR's plea for injunctive relief against Lufthansa is thus moot and should be dismissed.[56]

B. Lufthansa's Actions with Respect to the ASC Do Not Violate 49 USC §41712.

The only possible basis for USTAR's Petition is Section 41712 of the federal aviation laws. That section provides:

> On the initiative of the Secretary of Transportation or the complaint of an air carrier, foreign air carrier, or ticket agent, and if the Secretary considers it is in the public interest, the Secretary may investigate and decide whether an air carrier, foreign air

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[54] See Klenk Declaration at ¶19.

[55] See id.

[56] See Magnuson v. City of Hickory Hills, 933 F.2d 562, 656 (7th Cir. 1991) (case was moot because defendant had stopped disputed action and noting that there was no evidence of repeat activities or that plaintiffs suffered from residual ill effect); New Jersey Turnpike Authority v. Jersey Central Power & Light, 772 F.2d 25, 34 (3d Cir. 1985) (case was moot because challenged activities had ended, even though that those activities (transporting nuclear waste across public highway) were not permitted by law); Order 82-7-42 (terminating case considering various IATA resolutions on grounds of mootness because resolutions were no longer in effect).

> carrier or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation.

The Department has implemented Section 41712's prohibition of "unfair or deceptive practices" through various regulations, including 14 C.F.R. Part 250 (governing oversold flights),[57] 14 C.F.R. Part 399.84 (governing price advertising),[58] and 14 C.F.R. Part 399.88 (governing code share disclosure).[59]

USTAR is not an "air carrier" or "ticket agent." It lacks standing to assert a claim under Section 41712.[60] Moreover, while USTAR purportedly submits its Petition "pursuant to" Section 41712,[61] it nowhere explains how Lufthansa's alleged actions constitute violations of that Section or any regulation issued pursuant to it. The failure to provide any such explanation renders the Petition insufficient, and should excuse Lufthansa of any obligation to respond to it.[62]

As noted above, the Petition at best suggests two possible theories for recovery under Section 41712: (1) Lufthansa committed an unfair or deceptive practice when it collected, under

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57 See, e.g., DOT Order 97-11-14 (violations of Part 250 constitute violations of § 41712).

58 See, e.g., DOT Order 99-6-14 (violations of Part 399.84 constitute violations of § 41712).

59 See, e.g., DOT Order 99-3-1 (violations of Part 399.88 constitute violations of § 41712).

60 See 49 U.S.C. § 41712 (statute specifies that complaint may only be brought under Section 41712 by "air carrier, foreign air carrier, or ticket agent").

61 See USTAR Petition at 3.

62 See 14 C.F.R. §302.404(c) ("Insufficiency of complaint").

the "DE" code,[63] ASCs that included an amount retained by the carrier to compensate it for its collection costs, allegedly in violation of German law,[64] or (2) Lufthansa committed an unfair and deceptive practice by allegedly forcing all other airlines serving German airports to charge ASCs equal to Lufthansa's.[65] Both theories fail. The first is inconsistent with U.S. law and premised on a faulty understanding of German law and the facts. The second is devoid of any factual support whatsoever.

1. Lufthansa's Retention of a Portion of ASC Collections Was Not An "Unfair or Deceptive Practice"

a. Retaining a Portion of Revenues Collected from a Per Passenger Charge to Cover Costs Incurred in Collecting, Accounting for and Remitting those Charges is Not An "Unfair or Deceptive Practice" Under U.S. Law

As described above, until January 1 of this year, Lufthansa retained a portion of the ASC collected from each passenger to compensate it for the costs of collecting, accounting for and remitting security charges to the German state governments. The Department has issued no regulation, policy or order of which Lufthansa is aware suggesting that doing so constitutes an unfair or deceptive practice.

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63 See footnote 41 supra.

64 See USTAR Petition at 6.

65 Id. at 7.

To the contrary, U.S. aviation law clearly permits carriers to retain a portion of the proceeds collected from per passenger charges to compensate them for their collection costs. The legislation and regulations authorizing the imposition of U.S. Passenger Facilities Charges ("PFCs") explicitly contemplate that carriers' collection costs will be compensated from PFC proceeds. Section 40117 of the federal aviation laws states:

> The Secretary shall prescribe regulations . . . [that] ensure that the money, less a uniform amount the Secretary determines reflects the average necessary and reasonable expenses . . . incurred in collecting and handling the fee, is paid promptly to the eligible agency for which they are collected.[66]

The implementing regulations also authorize carriers to retain a portion of the PFC as "necessary and reasonable"[67] compensation for "collecting, handling and remitting the PFCs."[68] They do not require the carrier to specify on the ticket or anywhere else that a portion of the amounts collected will be retained by the carrier to offset its collection costs.

The similarities between U.S. PFCs and German ASCs and in how the two governments have treated the collection costs issue are noteworthy. In both cases, the federal legislature enacted laws enabling federal transportation authorities to authorize per passenger charges compensating local governments for costs they would otherwise bear directly.[69] Both systems contemplate that airlines will be the principal conduit through which the charges are collected,

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66 49 U.S.C. § 40117(i).

67 56 Fed. Reg. 26254, 24269 (May 29, 1991) ("Passenger Facilities Charges: Final Rule").

68 See also 14 C.F.R. § 158.53 ("Collection Compensation").

69 See 49 U.S.C. § 40117; Luftverkehrgesetz § 32(1), ¶13.

require carriers to comply with related reporting responsibilities, hold the carrier ultimately responsible for ensuring the charges are paid, and permit carriers to list the charge on passenger tickets in the tax box.[70] As described, both systems recognize that carriers -- functioning as conduits -- should be able to retain a portion of the proceeds to compensate the carriers for their collection costs. And neither system requires that the fact that a portion of the proceeds are compensating the carrier be noted on the ticket or anywhere else.

The legislation and regulation on PFCs make clear that a carrier does not engage in an "unfair or deceptive practice" under Section 41712 when it retains a portion of proceeds collected from per passenger charges to compensate for collection costs.

b. The ASCs Collected by Lufthansa Were Authorized by and Consistent with German law

There is no merit to USTAR's allegation that Lufthansa's past practice of collecting a cost-recovery component violated some unspecified German law.[71] As detailed in Section II

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[70] See 14 C.F.R. Part 158; Kostenverordnung, App., Title VII, Item 23.

[71] Even assuming the amount of the ASC collected by Lufthansa was not authorized under German law (which, as demonstrated, it was), USTAR's allegation that Lufthansa "defrauded passengers" (USTAR Petition at 6) fails because U.S. law did not require Lufthansa to indicate that the security charge was a governmentally authorized tax or charge, and in practice, Lufthansa made no such assertion on tickets issued in the United States. As explained in Section II(B) above and Mr. Klenk's Declaration, the only sum listed in the "Tax box" on tickets was an aggregate amount of all applicable taxes, fees and charges, listed under the "XT" code. This was consistent with IATA practice and approved by the Department. See note 22 supra. The only place on the ticket that the DE code appears is in the fare calculation box, which provides an explanation of the fare components principally for travel agents. USTAR provides no support for the suggestion that the DE code is "reserved strictly for governmentally mandated and sanctioned amounts" (USTAR Petition at 6), let alone for the proposition that the traveling public would know what the "DE" code signifies. Accordingly, two principal elements of any fraud or misrepresentation claim -- intention to deceive and reliance in fact -- are clearly absent. See, e.g., Prosser and Keaton on the Law of Torts 728 (1984))

above, German law permits the inclusion of a carrier cost recovery component in ASCs collected from passengers:

- Section 32 of Federal Air Transport Law enacted by the German federal parliament and the Cost Regulations issued by the BMV make clear that security charges will cover "fees and expenditures."

- As the German Federal Administrative Court concluded, in enacting the legislation, the Parliament did not intend to create a tax on carriers; to the contrary, it fully recognized that "the airlines would pass their costs on to the traveler."

- German civil law principles clearly provide that entities functioning as conduits, such as carriers with respect to the security charges, have a right to be compensated for their costs.

- In a February 2 letter, the BMV states specifically: the airlines "have a claim to compensation against the passenger."

- The BMV has been apprised of the fact that ASCs included a cost recovery component, as well as specific amounts charged and remitted, and the BMV has never objected to the practice nor suggested to Lufthansa that Lufthansa was in any way violating German law.

As its only support for the proposition that inclusion of a carrier cost recovery component in the ASC does violate some unidentified German law, USTAR cites two documents.

The first is a press release issued by a German Member of Parliament, Mr. Albrecht Feibel. It is cited by USTAR in support of the proposition that "the German Parliament itself has raised concerns about the carrier's flagrant violations of German law."[72] Contrary to USTAR's contentions, Mr. Feibel does not speak for the German Parliament; rather, as noted above, he is one of 652 members of the legislature. He is, by profession, a travel agent.[73] He has spent much time and effort, particularly in the wake of Lufthansa's decision to cap commissions paid to travel agents, attacking Lufthansa on a variety of issues.[74] The translated portions of Mr. Feibel's press release contained in USTAR's Petition consist of wholly unsubstantiated, politically motivated allegations and gross misstatements of fact. It -- like his other denunciations of Lufthansa -- has generated no expression of concern by any other member of parliament (let alone "the German Parliament itself") or the BMV.

The second item cited by USTAR is a BMV response (apparently dated December 1999) to the first of Mr. Feibel's letters concerning Lufthansa's alleged conduct. USTAR's use of this

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[72] USTAR Petition at 4.

[73] See German Federal Parliament's web page <http://www.bundestag.de/mdb14/bio/feibeal0.htm> listing Mr. Feibel's profession as "Managing Partner" of F&T TravelService.

[74] Attached as Exhibit E is just one such communication found on Mr. Feibel's web site (and translation). Directed to fellow travel agents, it accuses Lufthansa of "destroying the middle class [travel agents]" and urges that "we must immediately involve the custodians of competition in Brussels and Germany in our concerns."

letter is deceptive and misleading. By marrying a "creative" use of ellipses -- linking sentences, which are in fact in different paragraphs responding to different questions -- with a faithless translation, USTAR attempts to create the impression that the BMV has taken the position that inclusion of the carriers' costs in the ASC is illegal. In fact, the letter does no such thing. Attached hereto as Exhibit F is a professionally certified translation of the letter.

Properly translated, the portion of the December 1999 BMV letter on which USTAR relies appears to begin with a general statement about some unidentified or hypothetical "surcharges" ("Zuschläge"). In the next sentence, the BMV addresses what is relevant here, namely "collection fees" ("Inkasso-Gebühren"). The BMV notes that these "collection fees" ("Inkasso-Gebühren") are based on the carriers' right to be reimbursed for the costs they incur in collecting the ASC. As the BMV has explicitly recognized, carriers have a right to recover those amounts.[75]

In any event, a brief and somewhat ambiguous note from the BMV responding to a terse and confused question from a member of Parliament (that is itself premised on an incorrect understanding of the facts and doesn't ask the relevant questions) provides no basis on which to resolve an issue of German law. USTAR cites no laws or regulations, and no case law. It offers no meaningful support for the allegation that Lufthansa violated German law.

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[75] See BMV Letter of 2 February 2000 (attached as Exhibit B) (carriers "have a claim for compensation against the passengers").

2. Lufthansa's Communications with IATA Did Not Violate U.S. Antitrust Laws and Were Not An "Unfair or Deceptive Practice"

USTAR's Petition contains detailed accusations that Lufthansa, though IATA (and in particular, IATA's Ticket Tax Box Service) engaged in illegal price-fixing activity with respect to Airport Security Charges. It states, for example:

- "Lufthansa is the IATA member airline which provides official tax and fee information for Germany to the IATA Ticket Tax Box Service."[76]

- Lufthansa "chose to illegally inflate the amounts of these charges when reporting same to IATA TTBS."[77]

- "Lufthansa filed false and illegal reports to the IATA TTBS in an effort to assure that all carriers and CRSs which issued tickets for services on Lufthansa and/or themselves would collect the illegally inflated amounts."[78]

- "[T]hrough IATA, Lufthansa sought to price-fix cost recovery fees across all airlines serving Germany, or issuing tickets on behalf of those which do, while

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[76] USTAR Petition at 7

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[77] USTAR Petition at 7.

[78] USTAR Petition at 7.

knowing fully well that it, Lufthansa, could not otherwise have competitively implemented and received same as an individual carrier."[79]

- Lufthansa "has exerted its power at the International Air Transport Association to force all airlines serving German airports to charge illegal handling fees as well."

These allegations -- and USTAR's conspiracy theory as a whole -- are fabricated from thin air. USTAR's Petition cites nothing -- no affidavits, no documents, no published materials -- to support its elaborate theory that Lufthansa was actively engaged in a price-fixing conspiracy through IATA.

USTAR's failure to adduce any support for its contentions is doubtless attributable to the fact that they are false. Lufthansa is not "the IATA member which provides official tax and fee information for Germany to the IATA Ticket Tax Box Service."[80] Indeed, Lufthansa has no direct relationship with or membership in the TTBS at all.[81] It filed no reports with the TTBS concerning the ASC[82] -- let alone "illegally inflated" or "false and misleading ones." Indeed, Lufthansa has no record of any direct correspondence between itself and the TTBS concerning

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79 USTAR Petition at 7.

80 Moreno Declaration, ¶ 11.

81 Id.

82 Id. at ¶ 10.

ASCs.[83] The only communications concerning ASCs between Lufthansa and any IATA institution were telexes sent pursuant to Section 2.3 of the MITA to IATA's Passenger Services Conference, asking the staff to inform other MITA members of changes in ASC amounts applicable for travel on Lufthansa. As described in Section II(C) above, such communications are commonplace and fundamental to the IATA system. They have been approved by the Department[84] and, in any event, clearly do not constitute "unfair or deceptive practices." Finally, of course, Lufthansa did not exert any alleged power at IATA, or through any other medium, to influence the security charge collection policies of any other carrier. As explicitly noted in the telex attached as Exhibit D, the decision of what charge to impose was left to the discretion of each carrier.[85] And, indeed, other carriers have imposed different charges.[86]

C. The U.S. Department of Transportation is not the Appropriate Forum in Which to Adjudicate USTAR's Allegations Concerning German ASCs.

Even if USTAR's allegations regarding German airport security charges reflected a claim with adequate legal and factual support to warrant consideration (which they clearly do not), an enforcement proceeding before the Department would not be the appropriate forum in which to adjudicate the matter. These allegations -- which fundamentally concern questions of German law and policy and which are far more relevant to German citizens than Americans -- are better addressed, if at all, by a German forum. Pursuant to the well-established doctrine of forum non

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83 Id.

84 Order 88-4-51.

85 See Section II(C) above.

86 Klenk Declaration at ¶ 15.

conveniens and the principles that underlie it, the Department should decline to exercise jurisdiction over this matter.

The forum non conveniens doctrine provides that a judicial or quasi-judicial entity (such as the Department)[87] should decline to exercise jurisdiction over a matter if (i) there is an adequate alternative forum that (ii) would be substantially more convenient or appropriate.[88] Here, both criteria are satisfied.

Germany (the BMV or a German court) clearly constitutes an adequate alternative forum. Germany could exercise jurisdiction over all the parties named in the Petition -- i.e., Lufthansa and all the U.S. carriers serving Germany.[89] Indeed, unlike the United States, Germany would be able to exercise jurisdiction over all carriers serving Germany (many or all of which presumably violated German law in USTAR's view). Germany has a well developed, widely respected, independent judicial and administrative system capable of fairly adjudicating complaints.[90]

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[87] See, e.g., Commodity Futures Trading Commission Statement of Policy ("Exercise of Commission Jurisdiction Over Reparation Claims that Involve Extraterritorial Activities by Respondents"), 49 Fed. Reg. 14721, 14722 (1984) (CFTC may "dismiss .. . complaint based on an analysis similar to the doctrine of forum non conveniens"); DOT Order 97-12-35 (declining to address allegedly "unlawful and anticompetitive acts" because there were "other more appropriate fora").

[88] See Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981); Koster v. (American) Lumbermens Mutual Casualty Co., 330 U.S. 518; Gulf Oil v. Gilbert, 330 U.S. 501, 504 (1947). See also Gary B. Born, International Civil Litigation in United States Courts 289 (3d ed. 1996).

[89] See Piper, 330 U.S. at 507 ("ordinarily th[e] adequate alternative forum requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction").

[90] See, e.g., Hull 753 Corp. v. Elbe Flugzeugwerke, 58 F. Supp. 2d 925 (N.D. Ill. 1999) (dismissing claims brought under Illinois Consumer Fraud and Deceptive Practices Act under foreign non conveniens doctrine because German forum was adequate available forum and would be more appropriate); Bybee v. Oper Der Standt Bonn, 899

Germany would also be a more convenient and far more appropriate forum. The Supreme Court has suggested that, in deciding which forum is most convenient and appropriate, one must balance each forum's interest in various "private" and "public" factors.[91] While all of these factors demonstrate that this Department is not the most appropriate forum in this case, three are particularly probative: the need for expertise in German law; the ease of access to sources of proof; and the fact that Germany has a far greater interest than the United States in this matter:

- USTAR's complaint is premised on a single allegation concerning German law -- *i.e.*, that Lufthansa improperly included a cost recovery component in the German ASC it charged its customers. Germany is far better situated to address this issue than the Department which has neither expertise in German law nor any easy way to acquire it.

F. Supp. 1217 (S.D.N.Y. 1995) (ordering dismissal of contract claim pursuant to forum non conveniens doctrine because German forum was adequate available forum and would be more appropriate); Martin v. Vogler, 1993 WL 462853 (N.D. Ill. 1993) (Germany is adequate available forum, even though relief in Germany would be curtailed).

[91] These factors are: (i) relative ease of access to sources of proof; (ii) availability of compulsory process; (iii) possibility to view premises, if relevant, (iv) all other factors that make trial of a case easy, expeditious and inexpensive, (v) the enforceability of the judgment; (vi) the administrative difficulties flowing from court congestion; (vii) the local interest in having localized controversies decided at home; (viii) the interest in having a case decided in a forum that is at home with the governing law; (ix) the avoidance of unnecessary problems in application of a foreign law; and (x) the unfairness of burdening the forum with adjudication. Piper, 454 U.S. at 241 n.6; Gulf Oil, 330 U.S. at 509.

- There are potentially a wide variety of sources of proof -- including expert witnesses, evidence of legislative intent, financial records, etc. -- all of which are located in Germany. By contrast, there is little proof located in the United States that could be used to adjudicate this matter.

- Germany clearly has a far greater interest than the United States in this issue -- which concerns carrier compliance with German law governing German airport security charges, and affects German citizens more than U.S. citizens.

- Finally, if the Department proceeds to address the issues raised and the Canadian Transportation Agency does too,[92] there is a very significant risk of two, if not three, inconsistent outcomes.

IV. SPECIFIC ALLEGATIONS AND AFFIRMATIVE DEFENSES

USTAR's Petition is, for the most part, general and argumentative in nature and does not lend itself to a particularized list of admissions and denials.[93] Except as specifically admitted in this Answer, Lufthansa denies all allegations contained in the Petition. Lufthansa also claims the following affirmative defenses:

1. The Petition fails to state a cause of action upon which relief can be granted.

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[92] See footnote 4 supra.

2. With respect to the allegations made against Lufthansa, the Petition is moot.

3. The Department lacks jurisdiction to hear claims presented and to address issues raised in the Petition.

4. The Department lacks authority to order relief sought in the Petition.

5. USTAR lack standing to bring this Petition.

6. The Petition fails to comply with the procedural requirements governing complaints set forth in Part 302 of the Departments Regulations.

7. The Department is not the appropriate forum to adjudicate the issues raised against Lufthansa in USTAR's Petition.

V. CONCLUSION

Many of the allegations against Lufthansa contained in USTAR's Petition are outside the Department's purview or moot. All of them are unsupported and specious. Contrary to USTAR's charges (copied from a press release issued by a German travel agent who has a long-standing political campaign against Lufthansa in Germany), Lufthansa's actions with respect to the German ASC have been consistent with U.S. and German law. In any event, this is fundamentally a German dispute between German travel agents and carriers in Germany

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[93] See footnote 2 supra.

concerning the collection of German airport fees. The U.S. is not the appropriate forum in which to consider the issues raised.

WHEREFORE, Lufthansa urges the Department to dismiss USTAR's Petition with respect to the allegations against Lufthansa.

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