Differing Views of Competition: Antitrust Review of International Airline Alliances

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In recent years, the aviation industry has experienced a
dramatic increase in the demand for international travel. Traffic
between the United States and Europe alone rose from 28.2 mil-
lion passengers in 1992 to 42.4 million in 1998. Most countries
have only one or two airlines that fly international routes, mak-
ing it impractical, if not impossible, for each airline to attempt to
offer its customers service to all markets. This limited service
capability is at odds with the increased globalization of business
and commerce, which requires more travel options for greater
numbers of people.

Airlines have responded to this increased demand by estab-
lishing international airline alliances ("IAAs" or "alliances") as
quickly, and with as many partners, as possible. A goal of these
alliances is to circumvent national restrictions on foreign own-
ership of airline companies by undertaking what is nearly equiva-
 lent to a merger: airlines in alliances coordinate frequent flyer
programs, baggage handling, marketing, and ticketing. Recently,
allied airlines have begun to coordinate pricing and scheduling—
two areas where airlines had previously declined to cooperate for
fear of exposing themselves to antitrust litigation.

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1 David Field, Air Alliances Lead to Lower Fares: Study, Chi Sun-Times 65 (Dec 28,
1999).
2 The United States, which has several carriers that fly internationally, is a notable
exception.
3 Department of Transportation, International Aviation Developments: Global De-
regulation Takes Off 5 (1999) ("[N]o airline, however strong, is able to efficiently provide
service with its own aircraft and crew to every destination its customers require.").
4 See Department of Transportation, Statement of United States International Air
Transportation Policy, 60 Fed Reg 21841 (1995) ("Growing economic interdependence
among nations—the 'globalization' of the world economy—has expanded demand for con-
venient, reliable and affordable international air service.").
5 See Part I A.
6 See, for example, Application, Joint Application of Northwest Airlines, Inc and
KLM Royal Dutch Airlines, Docket OST-95-579-1, 5 (Sept 9, 1992). All documents with
OST docket numbers cited in this Comment are available online at
International airline alliances routinely apply to the Department of Transportation ("DOT") for immunity from antitrust litigation, which DOT has the sole authority to confer or withhold. In determining whether to grant antitrust immunity to an IAA, DOT considers several broadly defined factors such as the "public interest" and "foreign policy." DOT also relies on the Department of Justice ("DOJ") to complement DOT's qualitative approach with a more quantitative analysis of the proposed alliance, akin to the analysis DOJ conducts for domestic airline mergers. DOT, however, occasionally grants this immunity even when DOJ determines that the proposed alliance presents potential anticompetitive concerns.

On approving an alliance, DOT generally directs the alliance's members to re-submit their application for review five years after the grant of immunity. This Comment suggests that DOT's decisions to override DOJ's recommendations unnecessarily result in the potential for anticompetitive harm to certain consumers, specifically time-sensitive passengers requiring nonstop service between two cities. Transferring complete authority for the initial antitrust review of IAAs from DOT to DOJ would obviate this problem; however, this solution would also raise the possibility that DOJ, which does not take into account the same foreign policy concerns as DOT, might deny antitrust immunity to IAAs that do offer significant public benefits. Further, there is little need for a complete transfer, since the analyses of DOT and DOJ often complement each other. As an intermediate solution to ensure that IAAs benefit the maximum number of consumers, DOJ should


Not all airline alliances apply for antitrust immunity; for example, some alliances only request approval of a code-sharing agreement. For a discussion of code-sharing, see text accompanying notes 24–25. However, this Comment will focus primarily on those alliances that do request such immunity.

49 USC § 41308(b) (1994) ("[T]he Secretary of Transportation . . . may exempt a person affected by [an] order [promulgated by DOT] from the antitrust laws.").

49 USC § 41309(b) (1994).

49 USC § 41309(b)(1)(A).

11 See text accompanying notes 59–69.

12 See Part III.

13 See, for example, Department of Transportation, Final Order, Joint Application of United Air Lines, Inc and Deutsche Lufthansa, AG, Docket OST-96-1116-26, 1 (May 20, 1996) ("We direct United and Lufthansa to resubmit the Expansion Agreement five years from the issuance of this Order.").

14 For the relationship between "public benefits" and "foreign policy considerations," see text accompanying note 39.
assume primary responsibility for the five-year antitrust review, but not for the initial antitrust review.

Part I of this Comment examines the background of IAAs and the reasons they request antitrust immunity. Part II identifies the common baseline DOT and DOJ use to conduct their antitrust analyses. Part III explores in greater detail the two agencies' differing approaches, highlighting cases where DOT has disregarded DOJ's recommendations. Part IV argues that the current process of IAA antitrust review potentially results in harm to consumers, in part because alliances are inherently anticompetitive, and in part because DOT is subject to capture by airlines seeking antitrust immunity for their alliances. Finally, Part V recommends that DOJ assume responsibility for the five-year review of IAAs in order to ensure that the perceived benefits of granting antitrust immunity do not come at the expense of harming time-sensitive consumers in specific city-pair markets.15

I. THE EMERGENCE OF INTERNATIONAL AIRLINE ALLIANCES

Although international airline alliances emerged relatively recently, they have expanded rapidly in size and scope since their inception. Since DOT granted antitrust immunity in 1993 to the Northwest/KLM alliance—the first IAA to be granted such immunity—three other major alliances have formed:16 the Star alliance, headed by United and Lufthansa; the “oneworld” alliance, headed by American Airlines and British Airways;17 and the Atlantic Excellence Alliance formed by Delta, Swissair, Sabena, and Austrian Airlines.18 Most of these airlines' applications for ant-

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15 A city-pair market refers to the passengers flying between a pair of cities (for example, passengers flying between New York and Frankfurt).
16 John Stone, Delta, Air France Start Global Alliance, Tour and Travel News 22 (July 12, 1999).
17 Although American Airlines and British Airways have applied to DOT for antitrust immunity, they have not yet received it. DOT dismissed without prejudice their application on the ground that the United States and the United Kingdom had not successfully negotiated a liberalized bilateral aviation (or open skies) agreement. Department of Transportation, Order Terminating Proceedings, Joint Application of American Airlines, Inc and British Airways, PLC, Docket OST-97-2058-446, 2 (July 30, 1999) (“We now understand that the United Kingdom has not made sufficient progress ... to permit the continuation of productive negotiation of such an Open-Skies agreement. In these circumstances it is clear that the fundamental predicate for processing the captioned applications no longer exists.”). See Part II C 2 for a discussion of open skies agreements.
18 In October of 1999, Delta announced the impending dissolution of this alliance in favor of one with Air France. See Sabena Ends Brussels Flight, Cin Post 6B (Feb 24, 2000). However, as the new Delta/Air France alliance has not yet applied for antitrust immunity, this Comment will focus on the Delta/Swissair/Sabena/Austrian Airlines alliance, which did apply for and receive antitrust immunity.
trust immunity concern air traffic on routes between the United States and Europe.

A. Reasons for Forming International Airline Alliances

Most nations have significant restrictions on foreign ownership of airlines. In the United States, for example, an airline carrying domestic traffic must be a U.S. citizen, and foreign-owned airlines cannot participate in the domestic market. If Lufthansa, a German carrier, were to purchase United, a U.S. carrier, United would cease to be a U.S. airline for purposes of domestic ownership restrictions and would have to give up domestic traffic. To qualify as a U.S. citizen, an airline must be either (1) a partnership in which all the partners are U.S. citizens or (2) a U.S. corporation in which U.S. citizens own at least 75 percent of the voting stock. These rules limit foreign ownership of a U.S. airline to 25 percent. The European Union imposes similar restrictions on foreign ownership of airlines, capping such ownership at 49.9 percent. Since most countries restrict foreign ownership of airlines, a merger between foreign and domestic airlines is an unattractive option.

As a result, many airlines choose to form international airline alliances. Airlines that are alliance partners are “able to integrate their systems and use code-sharing which allows all marketing, ticketing, and baggage handling procedures to be run as if by one airline.” For example, because the United States requires domestic ownership of airlines that offer domestic service, a passenger traveling from Frankfurt to San Francisco might fly Lufthansa to Chicago, but would then have to change carriers to United to complete the journey. Code-sharing enables alliance partners to give each customer a more seamless travel experience: a passenger receives frequent flyer miles for the whole trip on his or her chosen account; the passenger’s baggage goes directly from the embarkation point to the destination, even if the

19 49 USC Appendix § 1301 (1994).
20 See 49 USC Appendix § 1508(b) (1992).
22 Much of the data and regulations in this Comment relate to Europe, as the oldest and strongest partners in international airline alliances are U.S. and European carriers.
23 See Council Regulation (EEC) No 2407/92 on Licensing of Air Carriers, 1992 OJ (L 240) 1, 2 (“[T]he undertaking shall be owned and shall continue to be owned directly or through majority ownership by member states and/or nationals of member states.”).
passenger changes planes; and the two carriers coordinate ticketing. Allied airlines can also offer more travel options through code-sharing, because customers of one airline are able to book travel to any destination served by both the airline and its code-share partners.  

In addition to the benefits of code-sharing, alliance partners can realize even greater efficiencies and profits if they are able to coordinate pricing and schedules. If mergers between foreign and U.S. airlines were feasible, agreeing on prices and schedules would be permitted because it would involve nothing more than coordination between a parent and its subsidiary. National restrictions on foreign ownership of airlines, however, prevent U.S. and foreign airlines from entering a parent-subsidiary relationship. The law treats alliance partners as competitors, and horizontal price-fixing between competitors is per se illegal under § 1 of the Sherman Act. Assuming that the firms sharing pricing information have a sufficiently large share of the market, they would be able to set supracompetitive prices as if they were a single monopolist, thereby gaining monopoly rents and harming consumers. As DOT recognized in one case, "Since the Joint Applicants are proposing to end their price competition in certain mar-

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25 Most airlines operate with a hub-and-spoke system, which "permit[s] them to combine traffic flows from many routes (the 'spokes') at a central point (the 'hub') and transport [passengers] to another point either directly or through a hub in another region." 60 Fed Reg at 21842 (cited in note 4). Thus, a passenger flying from Duluth, Minnesota (a spoke) to Frankfurt would likely fly to Chicago (a hub), and then to Germany. The hub-and-spoke arrangement is much more efficient and cost-effective than providing nonstop service from Duluth to Frankfurt. Id.

26 Department of Transportation, Order to Show Cause, Joint Application of United Air Lines, Inc and Deutsche Lufthansa, AG, Docket OST-96-1116-20, 19 (May 9, 1996).

27 See Copperweld Corp v Independence Tube Corp, 467 US 752, 771 (1984) ("[T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act."). DOJ will extend protection from the antitrust laws to a company that owns 50 percent or more of another company; that is, the parent does not have to own the subsidiary wholly. Department of Justice, Antitrust Division, Antitrust Enforcement Guidelines for International Operations, Case 9, 4 Trade Reg Rep (CCH) ¶ 13,109.88.

28 See, for example, Broadcast Music, Inc v Columbia Broadcasting System, Inc, 441 US 1, 8 (1979) ("[A]greements among competitors to fix prices on their individual goods or services are among those concerted activities that the Court has held to be within the per se [illegal] category.").

29 See Brooke Group, Ltd v Brown and Williamson Tobacco Corp, 509 US 209, 227 (1993) ("[F]irms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level.").
kets, they could be exposed to liability under the antitrust laws if we did not grant immunity."

B. Antitrust Immunity for International Airline Alliances

DOJ reviews airline mergers.\textsuperscript{31} Prior to January 1, 1989, DOT exercised that responsibility,\textsuperscript{32} but Congress subsequently transferred the authority to DOJ.\textsuperscript{33} DOT, however, retained what became a crucial area of responsibility with regard to international airline alliances: the sole authority to grant antitrust immunity to parties to a "cooperative arrangement," which includes an IAA.\textsuperscript{34} Obtaining antitrust immunity is essential to an IAA's viability. Without this immunity, alliances would have to elect either not to coordinate pricing and scheduling, thereby losing significant gains in revenue and efficiency,\textsuperscript{35} or to coordinate pricing and scheduling at the risk of subjecting themselves to liability under the antitrust laws.

DOT will approve a cooperative arrangement as long as the arrangement is "not adverse to the public interest"\textsuperscript{36} and does not "substantially reduc[e] or eliminat[e] competition."\textsuperscript{37} Even if the alliance agreement is potentially anticompetitive, DOT nonetheless maintains the broad authority to approve an agreement it deems "necessary to meet a serious transportation need or to achieve important public benefits (including international comity and foreign policy considerations)."\textsuperscript{38}

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\textsuperscript{31} 15 USC § 25 (1994).
\textsuperscript{32} 49 USC Appendix § 1378 (1988) (authorizing DOT to approve mergers of air carriers).
\textsuperscript{33} See 49 USC Appendix § 1551(a)(7) (1988) (sunsetting DOT's merger review authority). A more complete discussion of the implications of this transfer follows, particularly in Part III.
\textsuperscript{34} 49 USC §§ 41308 (1994) and 41309 (1994) (establishing procedure for requesting antitrust exemption).
\textsuperscript{35} DOT has not explicitly stated that an alliance is a "cooperative arrangement." Nonetheless, since airlines in alliances share pricing and scheduling information, sell seats on each other's flights, and share airport facilities, alliances are obviously "cooperative arrangements ... between the [U.S.] air carrier [and] a foreign carrier." 49 USC § 41309(a). Indeed, an IAA must count as a cooperative arrangement in order for DOT's grant of immunity to comply with the statute.
\textsuperscript{36} See text accompanying notes 193–95.
\textsuperscript{37} 49 USC § 41309(b).
\textsuperscript{38} Id at § 41309(b)(1).
\textsuperscript{39} Id at 41309(b)(1)(A). For an example of DOT approving a potentially anticompetitive agreement, see text accompanying notes 147–58.
Beyond merely approving agreements, DOT also can exercise its discretion to “exempt a person affected by the order [approving a cooperative arrangement] from the antitrust laws,” provided that “the exemption is required by the public interest.” DOT “initially confer[s] with DOJ, given [DOJ’s] experience in the enforcement of the antitrust laws” when determining a proposed alliance’s “potential impact on competition in all relevant markets.” Ultimately, though, DOT has the sole authority “to determine whether the application [by an international airline alliance] meets the statutory prerequisites for the grant of antitrust immunity.”

II. SIMILARITIES AND DIFFERENCES IN ANTITRUST ANALYSES BY DOT AND DOJ

In conducting their respective antitrust reviews, both DOT and DOJ use standard tools of antitrust analysis such as market concentration statistics to evaluate whether an IAA will have anticompetitive effects. However, while DOJ primarily relies on a numerical analysis like the one it uses to analyze domestic airline mergers, DOT supplements its analysis by taking into account foreign policy-related factors, such as its goal of achieving a more liberalized global aviation regime.

A. General Principles of Antitrust Analysis

A key element both DOT and DOJ consider in their antitrust analyses is whether the proposed alliance would cause consumer prices to rise. In order to determine whether an alliance would be able to increase prices, the two agencies inquire whether the

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40 49 USC § 41308(b)-(c) (referring to a cooperative arrangement that meets the requirements of 49 USC § 41309).
42 Order to Show Cause, United-Lufthansa, Docket OST-96-1116-20 at 19 (cited in note 26).
43 Id.
44 See Comments of the Department of Justice on Order to Show Cause, Joint Application of Delta Air Lines, Inc, Swissair, Ltd, Sabena, SA, and Austrian Airlines, AG, Docket OST-95-618-39, 4 (May 28, 1996) (“The central issue is whether the proposed transaction is likely to result in increased prices to consumers.”). See also Approval, United-SAS, Docket OST-96-1411-15 at 12 (cited in note 30) (“[T]he Department [must] consider whether the Alliance Agreements will substantially reduce competition by eliminating actual or potential competition . . . so that [the alliance partners] would be able to effect supra-competitive pricing.”).
alliance partners would be able to exert market power, which is the "power to raise prices significantly above the competitive level without losing all of one's business." In this inquiry, although IAAs technically are not mergers, DOT and DOJ nonetheless treat them as mergers for purposes of antitrust review. Under the Merger Guidelines promulgated by DOJ and the Federal Trade Commission, a finding that the merger of two firms would give them market power blocks the merger.

Determining the relevant market and whether potential violators could exercise market power in that market are essential elements of the antitrust inquiry in a merger case. A relevant market is "the smallest grouping of sales for which the elasticity of demand and supply are sufficiently low that a firm with 100% of that grouping could profitably reduce output and increase price substantially above marginal cost." For example, consider a passenger who must fly nonstop from San Francisco to Paris, and assume that this service option is only available on one airline, Carrier A. Carrier A could charge a supracompetitive price because the passenger cannot substitute service alternatives that might charge a lower price in response to Carrier A's price; in other words, the passenger has low elasticity of demand. Usually supracompetitive prices will encourage entry by other firms similarly wishing to realize greater profits, ultimately driving prices back down to the competitive level. However, there may be high barriers to entry in a relevant market; airlines may require significant amounts of time and money to develop sufficient

45 Approval, United-SAS, Docket OST-96-1411-15 at 12 (cited in note 30).
46 Valley Liquors, Inc v Renfield Importers, Ltd, 678 F2d 742, 745 (7th Cir 1982).
47 Comments of the Department of Justice on Order to Show Cause, Delta-Swissair-Sabena-Austrian, Docket OST-95-618-39 at 4 (cited in note 44) ("The Department of Justice concurs with DOT's conclusion that the appropriate framework for assessing the competitive effect of these agreements is merger analysis.").
48 Department of Justice Antitrust Division and Federal Trade Commission, 1992 Horizontal Merger Guidelines, 57 Fed Reg 41552, 41553 (1992) ("[M]ergers should not be permitted to create or enhance market power or to facilitate its exercise.").
49 See Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice § 3.1 at 80 (West 1994) ("[M]arket power and market definition analysis is essential in merger cases.").
50 Id § 3.2 at 83. "Under perfect competition ... price equals marginal cost." Id § 3.1a at 80.
51 Id § 3.2 at 84 (describing entry by competitors seeking to charge attractively high prices).
52 "For antitrust purposes, a barrier to entry is some factor in a market that permits firms already in the market to earn monopoly profits, while deterring outsiders from coming in." Id § 1.6 at 39.
resources to enter the market, or there may be a restriction on the number of gates that a particular airline is allowed to own at a given airport. In consequence, there would be low elasticity of supply by competitors. The combination of low elasticity of passenger demand and low elasticity of airline supply may result in establishing a relevant market for an antitrust inquiry.

When analyzing an alliance's application for antitrust immunity, DOT typically examines four distinct markets as potentially relevant: the continental, country, city-pair, and gateway markets. In the case of the United/Lufthansa alliance, for example, the relevant markets were the United States–Europe, United States–Germany, and fourteen city-pair markets, particularly Chicago-Frankfurt and Washington-Frankfurt. To date DOT and DOJ have most closely scrutinized city-pair markets; neither agency has expressed any anticompetitive concern about continental or country markets.

Despite the Departments’ common focus on determining whether an alliance might allow its members to exert market power, DOT generally defers to DOJ's specific economic analysis of the relevant markets. DOT tends to evaluate the applications of IAAs for antitrust immunity from a more qualitative perspective in light of its larger policy goals.

B. DOJ's Quantitative Approach

DOJ analyzes international airline alliances in the same way it analyzes traditional mergers. Under DOJ's analysis, "[A] merger is unlikely to create or enhance market power or to facili-

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53 See, for example, Fruehauf v FTC, 603 F2d 345, 357 (2d Cir 1979) (suggesting that high entry barriers established by $10–20 million cost of entry).
54 See text accompanying note 50.
55 Although DOJ probably conducts most of the detailed economic analysis, this Comment will focus on DOT, since DOT is the agency with the final decision-making authority. Where appropriate, this Comment will separately examine the role of DOJ.
56 See, for example, Approval, United-SAS, Docket OST-96-1411-15 at 13 (cited in note 30). There are two kinds of gateway markets: behind-gateway and beyond-gateway. Behind- and beyond-gateway service refers to service to cities on either side of one of the city pairs. For example, if a customer were flying from Paris to Cleveland, and Paris-New York were the relevant city-pair market, then Cleveland would be a beyond-gateway city. This Comment will not address behind- and beyond-gateway service because DOT has determined that IAAs have a pro-competitive effect on such service and DOT has not closely analyzed those markets. Id at 16–17.
57 Order to Show Cause, United-Lufthansa, Docket OST-96-1116-20 at 21, 23 (cited in note 26) (listing the relevant markets).
58 For further discussion, see Parts II B and II C below.
59 See text accompanying note 47.
tate its exercise unless [the merger] significantly increases concentration and results in a concentrated market." DOJ uses the Herfindahl-Hirschman Index ("HHI"), which sums the squares of the individual market shares of all the firms included in the market, to determine whether a given market is concentrated. Based on the HHI, DOJ determines whether or not the proposed merger would have anticompetitive effects. In addition, DOJ considers whether the post-merger environment is conducive to entry by other firms. If entry by other firms is likely, a merger "raises no antitrust concern and ordinarily requires no further analysis." Thus, while DOJ's approach is not exclusively quantitative, its analysis does not encompass the same kind of foreign policy concerns that DOT employs in its analysis.

Because "international" mergers of foreign and domestic airlines are prohibited, DOJ's analysis of domestic airline mergers serves as a useful reference point in considering DOJ's analysis of IAAs. In December of 1998, DOJ filed suit against Northwest Airlines and Continental Airlines to require Northwest to divest itself of its majority voting interest in Continental. DOJ objected to the merger for two key reasons. First, DOJ predicted that in seven city-pair markets, the combined post-merger market share of Northwest and Continental would be between 83 and 100 percent. Second, DOJ feared that entry by a non-hub carrier into those city-pair markets was unlikely because Northwest and Continental were two hub carriers in those markets, and any carrier wishing to build a competing hub in any of those cities would have been deterred by the "considerable time and investment" required.

60 Department of Justice and Federal Trade Commission, Merger Guidelines, 57 Fed Reg at 41554 (cited in note 48).
61 See id at 41557 ("As an aid to the interpretation of market data, the Agency will use the Herfindahl-Hirschman Index... of market concentration.").
62 According to the Guidelines, DOJ will consider challenging a merger if the post-merger HHI is between 1000 and 1800 and the merger produces an increase in the HHI of more than 100 points, or if the post-merger HHI is above 1800 and the merger produces an increase in the HHI of more than 50 points. See id at 41558.
63 Specifically, DOJ attempts to determine whether entry of other firms into the market would be "timely, likely, and sufficient in its magnitude, character and scope to deter or counteract" possible anticompetitive behavior. Id at 41561.
64 Department of Justice and Federal Trade Commission, Merger Guidelines, 57 Fed Reg at 41561 (cited in note 48).
65 See text accompanying notes 19–23.
67 Id at 11.
68 Id at 10–11.
tors similar to the foreign policy priorities that DOT considers when it analyzes the competitive effects of IAAs. 69

C. DOT's Qualitative Approach and Open Skies Agreements

In contrast to how DOJ analyzes airline mergers, DOT considers a variety of factors in addition to market concentration. During this more qualitative antitrust review, DOT chiefly: 1) evaluates the public benefits resulting from an IAA and 2) considers whether a foreign alliance partner's government has signed a liberalized bilateral aviation agreement with the United States.

1. Public benefits.

When it had authority to conduct antitrust review of domestic mergers, 70 DOT employed "what it call[ed] a 'functional analysis' of competition." 71 Under this approach, DOT tended to eschew market "concentration statistics" 72 and "abstract economic analysis of airline conduct" 73 in favor of "examining the 'structure, history and probable future' of the airline industry." 74 This analysis "tend[ed] to be very fact-specific" and focused on the circumstances of the "particular transaction." 75 Thus, DOT took into account the totality of the circumstances, including policy considerations, when examining an agreement and determining whether to grant antitrust immunity. Of course, such a "totality of the circumstances" standard provides an agency wide latitude in determining the appropriate outcome.

DOT now uses a similar approach when evaluating IAAs. Such an approach is consistent with DOT's statutory authority: DOT has broad discretion to approve an agreement it deems "necessary to meet a serious transportation need or to achieve important public benefits (including international comity and foreign policy considerations)." 76 According to DOT, increased lev-

69 See Part II C.
70 See text accompanying notes 32–33.
71 NWA-Republic Acquisition Case, Order No. 86-7-81 at 7 (July 31, 1986); Texas AirEastern Acquisition Case, Order No. 86-7-21 at 9 (July 9, 1986).
73 Id.
76 49 USC § 41309(b)(1)(A).
els of service\textsuperscript{77} and lower fares\textsuperscript{78} are the public benefits that typically result when it grants antitrust immunity to IAAs.\textsuperscript{79} DOT's policy is to grant antitrust immunity "if the parties to such an agreement would not otherwise go forward without it, and . . . [if] that grant of antitrust immunity is required by the public interest."\textsuperscript{80} Although DOT analyzes alliances on a case-by-case basis,\textsuperscript{81} the history of DOT analysis suggests a default presumption in favor of alliances.

DOT maintains that IAAs have resulted in significant consumer benefits.\textsuperscript{82} Between 1996 and 1998, overall fares between the United States and countries whose airlines are in alliances dropped 13.7 percent, while fares between the United States and countries whose airlines are not in alliances decreased only 2.7 percent.\textsuperscript{83} In addition, DOT claims that alliances facilitate route coordination and scheduling, which increase consumers' service options and destinations.\textsuperscript{84} DOT believes that competition among "a variety of service forms [such as] global networks [resulting in part from IAAs] . . . will enhance consumer benefits through efficient operations and low fares."\textsuperscript{85} Consequently, DOT's "international aviation strategy should provide opportunities for all of these forms of service so that we realize the benefits from maximum competition among them."\textsuperscript{86}

\textsuperscript{77} See, for example, Order to Show Cause, American-Canadian, Docket OST-95-792-26 at 17 (cited in note 41) (judging the proposed alliance to be procompetitive because it would bring service to 20,000 city-pair markets and over 9 million passengers); Department of Transportation, Final Order, Joint Application of Delta Air Lines, Inc, Swissair, Ltd, Sabena, SA, and Austrian Airlines, AG, Docket OST-95-618-47, 10 (June 17, 1996) (approving the Delta/Swissair/Sabena/Austrian Airlines alliance in part because the alliance would bring service to 32,000 city-pair markets and 21.4 million passengers).

\textsuperscript{78} Department of Transportation, \textit{International Aviation Developments} at 2 (cited in note 3).

\textsuperscript{79} Id.

\textsuperscript{80} Department of Transportation, Order to Show Cause, Joint Application of Delta Air Lines, Inc, Swissair, Ltd, Sabena, SA, and Austrian Airlines, AG, Docket OST-95-618-38, 17 (May 20, 1996).

\textsuperscript{81} Department of Transportation, \textit{International Aviation Developments} at 1 (cited in note 3) ("Each alliance must be examined on a case-by-case basis.").

\textsuperscript{82} See id at 6 ("The overwhelming balance of evidence demonstrates that international deregulation resulting from open skies agreements has greatly expanded the well-being of consumers. The evidence also shows that broad-based immunized alliances have been an important component of open skies related developments.").

\textsuperscript{83} Field, \textit{Air Alliances}, Chi Sun-Times at 65 (cited in note 1).


\textsuperscript{85} 60 Fed Reg at 21843 (cited in note 4).

\textsuperscript{86} Id.
2. Open skies agreements.

The "cornerstone" of DOT's international aviation strategy is the open skies agreement ("OSA"). An open skies agreement is the model agreement the United States uses as a starting point in bilateral aviation rights negotiations. A nation that signs an OSA agrees to lift restrictions on how many airlines can operate between that nation and the United States, on how frequently the airlines serve the two markets, and on how much the airlines can charge for the service. DOT generally conditions an alliance's antitrust immunity on the existence of an OSA with the foreign airline's home nation: "Under [DOT's] established policy and practice, [it] will not grant approval and antitrust immunity [to an alliance] . . . without an Open-Skies agreement.

DOT seems to regard OSAs as an excellent safeguard against an alliance's possibly anticompetitive effects, because OSAs eliminate barriers to potential competition. Once a bilateral OSA is in place, an unlimited number of the signatory nations' carriers may serve the two countries to the extent that they wish, charging whatever fares they wish. Such entry encourages "more competitive service" since the "price and quality of . . . airline service will be disciplined by market forces." DOT views another country's signing an OSA as evidence of a genuine commitment to a liberalized, market-driven bilateral relationship with the

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88 Not all bilateral aviation negotiations result in an open skies agreement; some aviation rights treaties are extremely restrictive. Executing an open skies agreement with the foreign country is simply the initial goal of the United States in the negotiations.


90 See, for example, Approval, United-SAS, Docket OST-96-1411-15 at 3 (cited in note 30) ("The predicate for our approval and grant of antitrust immunity for the United-SAS alliance is the existence of expansive, new aviation agreements between the United States and Denmark, Norway, and Sweden.").


92 See, for example, Order to Show Cause, Delta-Swissair-Sabena-Austrian, Docket OST-95-618-38 at 22 (cited in note 80) (finding that possible anticompetitive effects in certain city-pair markets were outweighed by the OSAs signed with Switzerland, Belgium, and Austria, due to the "open-entry nature of the markets in an open-skies regime" and the significant opportunity for "potential entry" by other carriers).

93 Approval, United-SAS, Docket OST-96-1411-15 at 3 (cited in note 30).
United States. Consequently, while DOT will not grant antitrust immunity without an open skies agreement, DOT considers granting antitrust immunity a quid pro quo for an OSA.

Alliance partners urge that grants of immunity should naturally follow the successful conclusion of OSAs between the United States and other countries, on the ground that foreign governments expect immunity for their airlines as a reward for the OSAs. By this reasoning, DOTs failure to immunize might well discourage other foreign governments from negotiating Open Skies accords with the United States. Because achieving a liberal global aviation environment through OSAs is one of DOT's fundamental foreign policy goals, such arguments carry significant weight with the Department.

That DOT responds to such arguments confirms that it supplements DOJ's numerical assessment of the proposed IAAs with larger, policy-oriented considerations. Given the two agencies' differing procedures, it is easy to see how their analyses might variously complement or conflict with each other.

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94 See Order to Show Cause, Delta-Swissair-Sabena-Austrian, Docket OST-95-618-38 at 3 (cited in note 80) ("The applicants' national authorities undertook the groundbreaking step of joining the United States in open skies aviation relations. They . . . [thus] have chosen open market competition in aviation over a tightly constrained, highly restricted and regulated, operating environment.").

95 See Order Terminating Proceedings, American-British Airways, Docket OST-97-2058-446 at 2 (cited in note 17) ("[O]ur policy [is one] of requiring an Open-Skies agreement as an essential predicate to any decision approving and granting antitrust immunity to an alliance.").


97 See, for example, Application, Joint Application of Delta Air Lines, Inc, Swissair Ltd, Sabena SA, and Austrian Airlines, AG, Docket OST-95-618-1, 6-8 (Sept 8, 1995) (arguing that immunity will advance U.S. international aviation policy); Application, Northwest-KLM, Docket OST-95-579-1 at 15 (cited in note 6) ("[T]he United States has undertaken 'to give sympathetic consideration to the concept of commercial cooperation . . .' between airlines of [the Netherlands and the United States], 'provided that such agreements . . . are in conformity with applicable antitrust and competition laws.'").

98 Approval, United-SAS, Docket OST-96-1411-15 at 7 (cited in note 30).

99 Office of the Assistant Secretary for Aviation and International Affairs, Department of Transportation, <http://ostpweb.dot.gov/aviation/> (visited Aug 24, 2000) (listing "liberalizing international air services" as the first of "three primary goals" of the Office of Aviation and International Affairs).

100 See Approval, United-SAS, Docket OST-96-1411-15 at 10 (cited in note 30) (approving the application).
III. DOJ's Recommendations to DOT: Complements and Conflicts

Under ideal circumstances, the differing approaches of DOJ and DOT complement each other, ensuring that antitrust approval of an IAA takes into account both empirical economic analysis of relevant markets and broader considerations of international policy. In practice, however, because DOT has final statutory authority to grant or withhold antitrust immunity, in some cases DOT has rejected DOJ's economic analysis despite clear potential that the approved alliance could harm consumers. Three cases exemplify how DOJ's and DOT's differing approaches can complement, yet also conflict with, each other.

A. Complement: The United/Lufthansa Alliance

The United/Lufthansa alliance is a useful case study because its application for antitrust immunity followed a track through the approval process similar to that of most subsequent alliance applications. When evaluating an alliance for antitrust immunity, DOT employs a thorough notice-and-comment procedure. For IAAs, the notice-and-comment period is the period during which DOT gives notice of an IAA's application for antitrust immunity and then allows any interested parties to comment on that application, as well as on DOT's orders and on other parties' filings.

To begin the approval process, United and Lufthansa applied to DOT in 1996 to expand their pre-existing alliance agreement—an agreement that did not cover such areas as price and schedule coordination. To facilitate DOT's antitrust analysis, United included in its application a great deal of proprietary information regarding "market shares, competition, competitors, 

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101 See, for example, Department of Transportation, Order Scheduling Notice, Determination on Various Motions, and Other Matters under 14 CFR 302.39, Joint Application of American Airlines, Inc and British Airways, PLC, Docket OST-97-2058-113, 19 (Sept 5, 1997).

102 For a description of the notice-and-comment procedure conducted by administrative agencies, see 5 USC § 553(b)–(c) (1994); see also Kenneth C. Davis and Richard J. Pierce, Jr., Administrative Law Treatise, § 7.1 at 287–89 (Little, Brown 3d ed 1994).

103 See Application, Joint Application of United Air Lines, Inc and Deutsche Lufthansa, AG, Docket OST-96-1116-1, 1–3 (summarizing application).

104 Id at 4 (proposing to integrate scheduling and route planning). The expansion of the earlier alliance was possible because the United States and Germany had recently executed an open skies agreement. The role that these agreements plays in DOT's analysis will be discussed throughout Part III.
markets, [and] potential for traffic growth or expansion into geographic markets.\textsuperscript{105} Consequently, United requested\textsuperscript{106} and received\textsuperscript{107} confidential treatment of the material, which, if made public, presumably would have given United’s competitors valuable insights into its business strategies.

As is usual under DOT procedures,\textsuperscript{108} all interested parties could then comment on the United/Lufthansa application. TWA, a competing carrier, asserted that the combined market share for United and Lufthansa in select markets would not survive scrutiny under the standard merger analysis applied to IAAs.\textsuperscript{109} The City and County of Denver, where United maintains a hub, expressed support for the proposed alliance in the hope that the alliance would provide Denver with nonstop service to Frankfurt, a major European hub.\textsuperscript{110} United and Lufthansa then jointly responded to the comments on their application.\textsuperscript{111}

Pursuant to its role as technical adviser, DOJ consulted privately with United and Lufthansa.\textsuperscript{112} After examining the proposed alliance, DOJ determined that competition might be reduced in the Chicago-Frankfurt and Washington-Frankfurt markets and raised that possibility with United and Lufthansa.\textsuperscript{113} To alleviate DOJ’s concern,\textsuperscript{114} the carriers agreed to “exclude coordi-
nation of specified activities relating to certain types of fares and capacity for U.S. point-of-sale local passengers flying nonstop between Chicago and Frankfurt and between Washington, D.C. and Frankfurt. Such an arrangement is referred to as a "carveout" of the specified route from the overall alliance agreement. Most such carveouts, including those established for the United/Lufthansa alliance, "apply only to nonstop passengers who purchase full-fare tickets in the United States; the joint development of corporate, group, promotional, and discounted fares still is sanctioned and accepted."

The applicants did not object to DOJ's recommendations, so DOT adopted them wholesale. DOT then issued an order to show cause reflecting the parties' arrangement with DOJ. This order had two main purposes: 1) to announce DOT's tentative approval of the proposed alliance and grant of antitrust immunity to that alliance based on certain enumerated conditions, including the DOJ's proposed carveouts; and 2) to afford all other interested, non-applicant parties an opportunity to voice any further concerns based on those recommended conditions (that is, to show cause why DOT should not approve the agreement as conditioned). DOT's order allowed interested parties to express their opinions again before DOT issued a final order that approved the alliance and granted antitrust immunity.

In its final order, DOT considered but rejected concerns that interested parties opposing the alliance raised in response to the order to show cause. The final order granted the alliance antitrust immunity except for the carveouts in the Chicago-Frankfurt and Washington-Frankfurt markets. The final order also provided that DOT would review these exceptions eighteen months later.

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115 Order to Show Cause, United-Lufthansa, OST-96-1116-20 at 15 (cited in note 26) (detailing "the conditions agreed upon by the applicants and the Department of Justice").
116 See, for example, Comments of Department of Justice, Order to Show Cause, Delta-Swissair-Sabena-Austrian, Docket OST-95-618-39 at 2–3 (cited in note 44).
117 Transportation Research Board, *Entry and Competition* at 147 (cited in note 96).
118 Order to Show Cause, United Lufthansa, Docket OST-96-1116-20 at 15 (cited in note 26) ("The carriers have agreed to conditions designed to ameliorate DOJ's concerns . . . . We will adopt those conditions.").
119 See id at 15, 19–20 (cited in note 26) (adopting DOJ's conditions).
120 Order to Show Cause, United-Lufthansa, Docket OST-96-1116-20 at 31–33 (cited in note 26) (summarizing proposed conditions of approval and directing interested partied to show cause why DOT should not move forward).
121 See Final Order, United-Lufthansa, Docket OST-96-1116-26 at 1 (cited in note 13).
122 See generally id at 9–13, 14–15.
after the order became final “to determine whether [the car-
veouts] should be discontinued or modified in light of: current
competitive conditions in [relevant city-pair markets]; the effi-
ciencies to be achieved . . . from further integration . . . ; regula-
tory conditions applicable to competing alliances; or other factors
that the Department may deem appropriate.” DOT did not con-
duct the eighteen-month review of the exception, nor did United
and Lufthansa apply for such a review. However, DOT also di-
rected United and Lufthansa to resubmit their alliance agree-
ment five years from the final order’s issuance for another anti-
trust review.

Here DOT’s and DOJ’s approaches to the United/Lufthansa
application proved complementary. DOT was able to meet its in-
ternational comity goals by extending antitrust immunity to
Germany’s major airline—possibly in recognition of (or as a re-
ward for) Germany’s concluding an open skies agreement with
the United States. Simultaneously, the grant of antitrust im-
munity incorporated DOJ’s recommendations for minimizing the
anticompetitive harm to consumers. Such complementary inter-
agency analyses have not, however, always prevailed.

B. Conflicting Analyses by DOT and DOJ

There also have been cases in which DOJ’s quantitative
analysis did not mesh well with DOT’s qualitative analysis. In
these cases, although DOJ identified potential harm to consum-
ers in certain city-pair markets, DOT nevertheless approved the
cooperative agreement.

1. The Delta/Swissair/Sabena/Austrian Airlines alliance.

In reviewing the Delta/Swissair/Sabena/Austrian Airlines al-
liance, DOJ adopted a very different analysis from that of DOT.
Although the United States had recently concluded OSAs with
Switzerland, Belgium, and Austria, DOJ strenuously recom-

123 Id, Appendix A at 3.
124 Personal interview with Jeff Gaynes, Attorney, Aviation Negotiation Office, De-
partment of Transportation (Jan 26, 2000). [U Chi Legal F does not verify personal inter-
views.]
125 See Final Order, United-Lufthansa, Docket OST-96-1116-26 at 1 (cited in note 13).
126 See Order to Show Cause, United-Lufthansa, Docket OST-96-1116-20 at 18–19
(cited in note 26) (noting that open skies agreement would remove all governmental re-
strictions on entry).
127 See Order to Show Cause, Delta-Swissair-Sabena-Austrian, Docket OST-95-618-38
at 3 (cited in note 80).
mended a carveout of the four relatively concentrated city-pair markets: Zurich–New York, Geneva–New York, Brussels–New York, and Vienna–New York. This carveout, like the one DOJ recommended for the United/Lufthansa alliance, was primarily designed to protect nonstop, time-sensitive passengers (that is, mainly business passengers). Although recently-signed OSAs increased the potential for competition in the four city-pair markets at issue, DOJ argued that entry by other carriers into these markets was in fact unlikely.

Ideally the OSAs between the United States and Switzerland, Belgium, and Austria would have increased competition by facilitating entry by potential competitors to Delta and its alliance partners. However, DOJ reasoned that the OSAs alone would not prove sufficient to prompt new entry: new entry was particularly unlikely because New York was a hub city for Delta. As DOJ noted, airlines operating routes out of their hubs are “able to raise their [price] premium to business travelers on nonstop flights by an average of 20% relative to a non-hub competitor’s price.”

Theory suggests that prices normally return to competitive levels when other carriers, attracted by increased profits from supracompetitive prices, enter the market. However, DOJ found entry in this instance unlikely for two reasons. First, passenger demand was insufficient to prompt such entry. DOJ pointed out that airlines had recently exited, rather than entered, the New York market due to route unprofitability. Second, DOJ found that incumbent airlines such as Delta could adjust supracompetitive prices to competitive levels “more quickly than an entrant can enter,” and that this ability served as a substantial barrier to entry.

128 See Comments of the Department of Justice on Order to Show Cause, Delta-Swissair-Sabena-Austrian, Docket OST-95-618-39 at 3–4, 7–8, 12–13 (cited in note 44) (urging that DOT carve out the New York city pairs, and arguing that nonstop service was a relevant market for time-sensitive travelers).
129 See id at 3–4, 14–18 (questioning DOT’s prediction that market entry will discipline anticompetitive behavior).
131 See text accompanying note 51.
132 Comments of the Department of Justice on Order to Show Cause, Delta-Swissair-Sabena-Austrian, Docket OST-95-618-39 at 17 (cited in note 44).
133 See id.
134 Id at 18.
Despite this detailed analysis, ultimately DOT declined to incorporate DOJ’s suggested carveouts into its grant of antitrust immunity to the alliance. To justify this decision, DOT cited “both [its] economic analysis of the significance of any minor loss of competition and [its] long-term international aviation policy.”

In its economic analysis, DOT suggested that “real potential for entry” exists “as a result of the U.S.-Austria, Belgium, and Switzerland open-skies environments.” DOT also challenged DOJ’s focus on the category of time-sensitive passengers requiring nonstop travel. In effect, DOT substituted its judgment of the competitiveness of the marketplace for that of DOJ, arguing that “concentration figures are not conclusive” when analyzing city-pair markets. However, DOT generally regards city-pair markets as having “usually have high levels of concentration, since most nonstop markets are served by only a few airlines,” which suggests that city-pair markets should be subject to a more rigorous analysis. Additionally, a “key consideration” in DOT’s decision was its expectation that the OSAs would eliminate all prior restrictions on entry, prompting other carriers to enter if the alliance partners engaged in anticompetitive behavior.

Delta, Swissair, Sabena, and Austrian Airlines informed DOT that they would not go forward with the alliance if DOT carved out the New York markets at issue. Consequently, DOT feared “the substantial proconsumer and procompetitive benefits . . . resulting from the Alliance” would be jeopardized. Based on the parties’ assertion that they would abandon the alliance without

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136 Id at 14–15.
137 Id at 13–14 (“[E]ven for the time-sensitive business traveler, connecting service may well constitute a competitive force.”).
138 Id at 14–15 (“[W]e do not fully share the view of DOJ regarding the likelihood of potential competition and new entry from New York.”).
139 Final Order, Delta-Swissair-Sabena-Austrian, Docket OST-95-618-47 at 20 (cited in note 77).
140 Id.
141 Id.
142 See text accompanying note 80.
143 See Answer of Joint Applicants to Comments on Order to Show Cause, Joint Application of Delta Air Lines, Inc., Swissair, Ltd, Sabena, SA, and Austrian Airlines, AG, Docket OST-95-618-44, 6–7 (“[E]xcluding the New York city-pairs would prevent the Alliance.”).
144 Final Order, Delta-Swissair-Sabena-Austrian, Docket OST-95-618-47 at 16 (cited in note 77).
145 For a further discussion of the parties’ assertion, see text accompanying notes 213–15.
antitrust immunity,\textsuperscript{146} and its own economic analysis, DOT granted antitrust immunity to an alliance agreement that contained potential anticompetitive effects in several city-pair markets. In this case, DOJ and DOT disagreed about an IAA's impact on competition, and DOT prevailed.

2. The American Airlines/TACA Group code-sharing agreement.

Another disagreement between DOT and DOJ arose when American Airlines and the airlines of the TACA Group\textsuperscript{147} applied to DOT for approval of their proposed code-sharing agreement.\textsuperscript{148} Anticompetitive effects are less likely to result from a code-share agreement than from an antitrust-immune alliance, since code-share partners cannot coordinate pricing and schedules without exposing themselves to liability under the antitrust laws, which code-share partners are unwilling to do.\textsuperscript{149}

DOJ voiced strong objections to the proposed American Airlines/TACA Group code-share proposal, objections based on DOJ's economic analysis.\textsuperscript{150} The DOJ analysis examined the broad issue of competitive effects rather than the narrow issue of whether the agreement would violate the antitrust laws.\textsuperscript{151} DOJ's principal objection was that American and the TACA carriers were already overlapping competitors on most routes between several Central American cities and Miami, which is the principal gateway hub between the United States and Latin America.\textsuperscript{152} DOJ perceived little potential for the pro-competitive and public interest benefits the applicants claimed would result from the code-share agree-

\textsuperscript{146} For a discussion of the benefits that accrue to members of an alliance that has been granted antitrust immunity, see text accompanying notes 193–95.

\textsuperscript{147} The TACA Group is comprised of six airlines from the countries of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama. See Department of Transportation, Final Order, American Airlines, Inc and the TACA Group Reciprocal Code-Share Services Proceeding, Docket OST-96-1700-134, 1 (May 20, 1998).


\textsuperscript{149} See text accompanying note 6.


\textsuperscript{151} Id at 2.

\textsuperscript{152} Id at 11 (stating that there was “risk of harm to overlapping city-pairs markets” and that the agreement “[did] not offer significant pro-competitive efficiencies”).
ment. Consequently, DOJ urged DOT not to consider "the parties' proferred efficiencies and resulting claims of expanded networks and seamless service." Interestingly, despite DOJ's detailed objections to other aspects of the code-sharing agreement, DOJ diplomatically "t[ook] no position" as to the proper weight to accord OSAs recently executed between the TACA countries and the United States—agreements on which DOT had placed significant weight.

Ultimately, DOT concluded:

[U]nless there are adverse competitive impacts that cannot be mitigated so as to promote the consumer benefits to be gained by open skies, total rejection of cooperative arrangements provided for under an open skies regime has the potential to frustrate, if not cancel, the overall benefits available through an open-skies regime.

DOT therefore rejected DOJ's analysis and approved the code-share agreement.

DOT's analysis of the Northwest/KLM alliance provides a further example of DOT's willingness to reject a traditional economic antitrust analysis. DOT conceded that the alliance "could reduce competition [on flights] between Amsterdam ... and Detroit and Minneapolis-St. Paul" but stated that "the possible loss of competition in the two city-pair markets appeared to be outweighed by the Agreement's competitive benefits." DOT implied that the recently executed OSA with the Netherlands was sufficient to mitigate any anticompetitive results.
DOT consistently focuses on a variety of factors in addition to—or in spite of—market concentration figures. DOT has granted antitrust immunity to IAAs even where there exists the clear potential for harm to passengers in relevant city-pair markets. While DOT has broad statutory discretion in matters of international comity and foreign policy, DOT's willingness to reject the economic analysis of DOJ in favor of DOT's own judgment is troubling, particularly in light of DOJ's technical expertise and experience with antitrust analysis.

IV. THE CURRENT IAA REGIME POTENTIALLY RESULTS IN ANTICOMPETITIVE CONDITIONS FOR CONSUMERS

DOT believes that antitrust-immunized IAAs result in significant consumer benefits. In December of 1999, DOT declared that "immunized alliance[s] . . . are providing improved, more competitive services in literally thousands of markets . . . [and p]roviding consumers the benefits of substantially lower prices." According to DOT, IAAs are procompetitive because they allow member airlines to coordinate schedules and pricing, thus enabling those member airlines to provide service to a greater number of city-pair markets than those airlines could otherwise provide. However, while immunized alliances may confer these and other aggregate benefits on U.S. consumers, it is equally possible that IAAs have anticompetitive effects that harm consumers in specific city-pair markets.

A. IAAs Are Inherently Anticompetitive

Airlines that are members of IAAs share pricing and coordinate scheduling, exposing themselves to antitrust suits. It is for this very reason that these airlines apply to DOT for antitrust immunity. Such immunity is important, since DOJ has concluded that each proposed alliance could lead to a loss of competi-
tion in certain city-pair markets. For example, Chicago and Frankfurt are hubs for United and Lufthansa, respectively, giving United and Lufthansa a significant competitive advantage relative to other carriers operating in these two markets. After United and Lufthansa formed an alliance, the number of carriers offering nonstop Chicago-Frankfurt service dropped from three to two, effectively reducing the possibilities for competing service and price competition. DOT, acting on DOJ’s recommendations, has conditioned antitrust approval on carveouts of specific routes for nonstop, time-sensitive passengers (the relevant product market definition for IAAs). Connecting service (for example, a Chicago–New York–Frankfurt route) is not a reasonable substitute for time-sensitive travelers, because connecting service requires more flying time. Therefore, a competitor’s reduction in the price of connecting service would not prevent an alliance from charging supracompetitive prices on nonstop routes.

DOT itself acknowledges the possibility that granting antitrust immunity to IAAs may lessen competition by exposing consumers to supracompetitive prices. With regard to the Northwest/KLM alliance, DOT foresaw harm to competition in the Detroit-Amsterdam and Minneapolis-St. Paul–Amsterdam city-pair markets, but DOT nonetheless concluded that the alliance’s overall benefits outweighed the possible loss of competition in these specific markets. In sum, DOT has granted IAAs antitrust immunity despite clear evidence that doing so might expose.

169 See, for example, Comments of the Department of Justice on Order to Show Cause, Delta-Swissair-Sabena-Austrian, Docket OST-95-618-39 at 3 (cited in note 44) (“Final immunity could reduce the level of competition that exists today.”).

170 See <http://www.ual.com/site/primary/0,10017,1020,00.html> (visited Aug 24, 2000) (showing United’s routes); Answer of Trans World Airways, Inc, Joint Application of United Air Lines, Inc, and Deutsche Lufthansa, AG, Docket OST-96-1116-9, 11 (Apr 3, 1996) (“[Alt Frankfurt... Lufthansa is the only non-U.S. hub carrier.”).

171 An airline’s hub airport has greater infrastructure, such as more gates and more in-airport resources including passenger lounges, ticketing desks, and boarding areas; hub airports also have greater flight frequency. Thus, an airline’s hub airport presents a barrier to entry to other carriers for nonstop, as opposed to connecting, service.

172 Order to Show Cause, United-Lufthansa, Docket OST-96-1116-20 at 24 (cited in note 26).

173 See text accompanying note 113.

174 Comments of the Department of Justice on Order to Show Cause, Delta-Swissair-Sabena-Austrian, OST-95-618-39 at 7–13 (cited in note 44). “[T]ime sensitive travelers do not find one-stop carriers an attractive option.” Id at 12.

175 See Final Order, Northwest-KLM, Docket OST-95-579-34 at 10 (cited in note 160) (“We found . . . that the Agreement could reduce competition between Amsterdam . . . and Detroit and Minneapolis-St. Paul.”).

176 See id (“We concluded, however, that the possible loss of competition in the two city-pair markets appeared to be outweighed by the Agreement’s competitive benefits.”).
time-sensitive travelers in certain city-pair markets to supracompetitive prices.

B. DOT Is Susceptible to Agency Capture

So far DOT has granted antitrust immunity to three major transatlantic alliances: United/Lufthansa/SAS under the umbrella of the Star Alliance,\textsuperscript{177} the Northwest/KLM alliance,\textsuperscript{178} and the Atlantic Excellence alliance.\textsuperscript{179} In two of these three cases, DOT has granted antitrust immunity despite the possible anticompetitive results in certain city-pair markets.\textsuperscript{180} DOT's decisions are particularly striking in light of the fact that DOT acknowledges that it "initially confer[s] with [DOJ], given its experience in the enforcement of the antitrust laws."\textsuperscript{181}

DOT's record of antitrust review and enforcement suggests that the agency underestimates the threat of concentration in the airline industry. After deregulating the airline industry, Congress, in 1984, transferred responsibility for monitoring and regulating the industry's economic structure, including review of possible antitrust violations, from the Civil Aeronautics Board to DOT.\textsuperscript{182} Under DOT's "stewardship, the [domestic] aviation industry [became] substantially more consolidated."\textsuperscript{183} Although DOJ was slated to oversee mergers and other domestic aviation-related antitrust issues beginning in 1989,\textsuperscript{184} Senator Metzenbaum of Ohio was so dissatisfied with DOT's performance that he introduced a bill to accelerate the transfer to the fall of 1987.\textsuperscript{185} It is telling that both DOT and DOJ favored the transfer.\textsuperscript{186} Given DOT's own misgivings regarding its ability to conduct antitrust

\textsuperscript{177} Approval, United-SAS, Docket OST-96-1411-15 at 1, 23 (cited in note 30). This Order granted antitrust immunity to the United-SAS alliance, and also allowed United, Lufthansa, and SAS to coordinate as a larger alliance.

\textsuperscript{178} Final Order, Northwest-KLM, Docket OST-95-579-34 at 1 (cited in note 160).

\textsuperscript{179} Final Order, Delta-Swissair-Sabena-Austrian, Docket OST-95-618-47 at 1 (cited in note 77).

\textsuperscript{180} Order to Show Cause, United-Lufthansa, Docket OST-96-1116-20 at 19 (cited in note 26).

\textsuperscript{181} See Part IV A.


\textsuperscript{183} Bliss and Lewis, 34 Fed B News & J at 293 (cited in note 72).

\textsuperscript{184} 49 USC Appendix § 1551(a)(7) (eliminating DOT's carveout of authority over airline mergers).


\textsuperscript{186} See Bliss and Lewis, 34 Fed B News & J at 293 (cited in note 72).
review successfully, DOT's willingness to ignore DOJ's technical analysis is surprising.

One possible explanation for DOT's underestimation of anti-competitive effects lies in theories of agency behavior. If DOT is heavily influenced by the airlines it regulates, then its policy choices are more readily understood. Public choice theorists refer to this phenomenon as agency capture. "An agency is captured when it favors the concerns of the industry it regulates, which is well-represented ... over the interests of the general public, which is often unrepresented." Public choice theory posits that agencies are most vulnerable to capture by "organized, concentrated constituencies." The four domestic airlines that belong to IAAs—American, Delta, Northwest, and United—account for 68.7 percent of the total operating revenues of the top fifteen airlines, and 58.5 percent of the passenger volume of the top fourteen airlines. The airlines that participate in IAAs comprise a concentrated constituency.

No evidence indicates that these airlines have coordinated to lobby jointly for a regime of IAAs with antitrust immunity. Nonetheless, airlines realize that the increased globalization of air travel requires offering expanded service options to their customers and that IAAs offer the best method for realizing this goal. IAAs are most efficient and produce greater profits when

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190 Department of Transportation, International Aviation Developments at 4 (cited in note 3) ("In order to compete profitably by satisfying the increasingly global needs of customers, airlines must offer passengers as many destinations around the globe as possible.").
191 Id at 1, 4–5. Alliances, code-sharing and other cooperative arrangements have "provided a way for carriers to mitigate the limitations of the bilateral system." Id at 1. The "bilateral system" refers to the current regime of international aviation rights, in which each country has concluded a separate agreement with each other country into which its carriers fly. So, hypothetically, a passenger wishing to fly from Chicago to Brussels, and then later to Paris, would find the process much more burdensome if the United States' bilateral agreement with Belgium did not allow U.S. airlines to pick up passengers in Belgium and fly them to France; the passenger would have to book a completely separate set of reservations on another airline to complete the Brussels-Paris part of the journey. This problem is obviated if France and Belgium have a bilateral agreement that does allow such traffic, and then the U.S. airline is a partner in an IAA with a French or Belgian airline. An IAA allows the U.S. airline and its European partner, through code-sharing, to offer this traveler the service option he or she desires. See Part I A.
their constituent airlines are able to coordinate pricing and scheduling without fear of antitrust liability. Accordingly, while an airline may contest a competitor’s application for antitrust immunity in an individual case, taken as a whole, all airlines involved in alliances approach DOT with similar objectives and similar arguments in support of those objectives when seeking antitrust immunity.192

IAAs produce enormous revenues for their members, who “sell seats on each other’s flights and split the revenue, instead of operating flights that compete against a partner’s.”193 One year after implementation, the Northwest/KLM alliance “produced between $125 million and $175 million in revenues for Northwest (about one-third of its transatlantic passenger revenues).”194 United Airlines claims that revenues from the Star alliance contribute up to ten percent of United’s net earnings.195

Because IAAs cause significant economic benefits to inure to airlines, airlines have great incentives to pressure DOT to grant antitrust immunity to these alliances. For its part, DOT has proven quite receptive to the claims airlines put forth in their applications for antitrust immunity. DOT has an established policy of “den[yng] antitrust immunity ... unless there is a strong showing on the record that antitrust immunity is required in the public interest, and that the parties will not proceed with the [agreement] without the antitrust immunity.”196 Not surprisingly, in every single application for antitrust immunity, the parties have asserted that the alliance will bring considerable public benefits197 and that they will not consummate the alliance without a grant of antitrust immunity.198 And in every case, DOT has

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192 See text accompanying notes 197–98.
193 Field, Air Alliances, Chi Sun-Times at 65 (cited in note 1).
195 See Rey Chapman, En Route to Sustained Profitability, Shares Magazine 108 (Dec 1, 1999).
197 See Application, Northwest-KLM, Docket OST-95-579-1 at 15 (cited in note 6); Application, Delta-Swissair-Sabena-Austrian, Docket OST-95-618-1 at 14 (cited in note 97); Application, United-Lufthansa, Docket OST-96-1116-1 at 14 (cited in note 103); Application, Joint Application of United Air Lines, Inc and Scandinavian Airlines System, Docket OST-96-1411-1, 14 (May 28, 1996).
198 See Department of Transportation, Order to Show Cause, Joint Application of Northwest Airlines, Inc and KLM Royal Dutch Airlines, Docket OST-95-579-24, 19 (Nov 16, 1992); Application, Delta-Swissair-Sabena-Austrian, Docket OST-95-618-1 at 42 (cited in note 97); Application, United-Lufthansa, Docket OST-96-1116-1 at 34 (cited in note 103); Application, United-SAS, Docket OST-96-1411-1 at 40 (cited in note 197).
accepted those arguments. The airlines' claim that they will not proceed without antitrust immunity is clearly self-interested, and DOT's consistent acceptance of that claim—particularly in light of DOJ's objections to specific alliances on anticompetitive grounds—suggests that DOT is a captured agency.

Although the coordination of pricing and scheduling by IAAs can lead to efficiencies, which are generally procompetitive, the ability of alliance partners in a specific city-pair market to exercise market power over time-sensitive, nonstop travelers and set supracompetitive prices threatens competition. Therefore, unbiased scrutiny of IAAs by impartial agencies is important to secure a maximally competitive market in international air travel, particularly in the submarket for time-sensitive, nonstop travelers.

Airline passengers, the consumers affected by loss of competition in certain markets, are a large and diffuse group. They therefore suffer from a collective action problem, which exacerbates DOT's susceptibility to capture. Many consumers are unlikely to recognize the potential anticompetitive implications of a grant of antitrust immunity to IAAs. Those that do are likely to conclude that the costs of an organized response exceed the benefits (such as a carveout of a given city-pair market) to be gained thereby. Consequently, during the notice-and-comment period, support for granting antitrust immunity is vocal, while DOT hears few voices opposing it, especially from the time-sensitive passengers, the most directly affected class.

While the notice-and-comment process is technically open to the public, in practice the primary participants are the airlines

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199 See Final Order, Northwest-KLM, Docket OST-95-579-34 at 12 (cited in note 160); Final Order, Delta-Swissair-Sabena-Austrian, Docket OST-95-618-47 at 16–17 (cited in note 77); Final Order, United-Lufthansa, Docket OST-96-1116-26 at 8–9 (cited in note 13); Approval, United-SAS, Docket OST-96-1411-15 at 17–18 (cited in note 30).
200 Arizona v Maricopa County Medical Society, 457 US 332, 365 (1992) (Powell dissenting) (noting that a joint selling arrangement may “mak[e] possible a new product by reaping otherwise unattainable efficiencies.”).
201 See text accompanying note 169.
202 See text accompanying note 1.
203 See William N. Eskridge, Jr., Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 Va L Rev 275, 286 (1998) (“The free rider problem is most acute for large groups in which individual stakes will usually be very small, for there the tendency to rely on others to carry the ball will be quite substantial.”).
204 Opposition to granting antitrust immunity to an IAA is typically from other airlines—competitors of the U.S. alliance member in question. The records do not reflect individual or organized consumers expressing concerns about possible anticompetitive effects.
and DOJ.\textsuperscript{205} The hotly-contested application by American Airlines and British Airways for antitrust immunity proved an exception; it prompted participation by the Air Line Pilots Association,\textsuperscript{206} U.S. Senators,\textsuperscript{207} and a local legislator from Rockland County, New York.\textsuperscript{208} "[R]elatively closed processes, less visible to some groups or to the general public than to other groups, are more easily captured by the interests that can readily monitor these processes."\textsuperscript{209} The notice-and-comment procedure for antitrust review of IAAs is complex and often highly technical. In addition, DOT shields information regarding pricing, profitability of routes, and market shares from public view due to airlines' understandable reluctance to divulge such proprietary information.\textsuperscript{210} It is unlikely that individual consumers will monitor the process with sufficient regularity and expertise to determine the likelihood of any potential anticompetitive harms.

As a further obstacle to unified consumer advocacy, each IAA presents unique potential harms to consumers in specific city-pair markets. For example, while one IAA affects consumers in Chicago, another will affect consumers in New York. This dispersed effect makes formation of a national "watchdog" agency difficult, while the relatively rapid review period makes the formation of local monitoring groups impractical.\textsuperscript{211} In contrast, the airlines monitor the review process constantly and are intimately familiar with DOT's policy goals, procedures, and principal actors. Consequently, the airlines are ideally situated to influence the process and use it to their advantage.

\textsuperscript{205} A major exception to this rule is the proposed American Airlines/British Airways alliance, which has so far prompted numerous groups other than DOJ and airlines to file with DOT. See <http://dms.dot.gov/search/> (visited Aug 24, 2000) (enter "2058" in the "Docket Number" field to pull up titles of all filings in the American-British Airways proceeding).

\textsuperscript{206} Comments of Air Line Pilots Association on the Joint Application of American Airlines and British Airways, Docket OST-97-2058-21, 1 (Jan 31, 1997).

\textsuperscript{207} Ex Parte Letter from Senators Rick Santorum and Arlen Specter, Joint Application of American Airlines, Inc and British Airways, PLC, Docket-OST 97-2058-31, 1 (Feb 3, 1997) (urging that DOT not approve the proposed alliance until the United Kingdom signs an OSA with the United States).

\textsuperscript{208} See Ryan S. Karben, The Legislature of Rockland County—Letter in Support, Joint Application of American Airlines, Inc and British Airways, PLC, Docket OST 97-2058-180, 1 (May 1, 1998) ("I urge you to approve the alliance.").

\textsuperscript{209} Zelinsky, 102 Yale L J at 1173 (cited in note 188).

\textsuperscript{210} See text accompanying notes 105–07.

\textsuperscript{211} In the case of the United/Lufthansa alliance, the review period was only eighty-one days. See Application, United-Lufthansa, Docket OST-96-1116-1 at 1 (cited in note 103) (applying for antitrust immunity on February 29, 1996); Final Order, United-Lufthansa, Docket OST-96-1116-26 at 1 (cited in note 13) (granting antitrust immunity on May 20, 1996).
Arguably, theories about agency capture are moot if IAAs have produced unequivocal benefits for consumers. The past several years have witnessed significant changes in international airline travel. Most importantly, DOT contends that consumers are enjoying lower fares and have access to a much greater variety of travel options. These results seem inarguably positive.

However, DOT's conclusions do not necessarily follow from the data. While IAAs may provide benefits in the aggregate, such benefits should not automatically eclipse any possible anticompetitive effects on consumers in specific city-pair markets. Carveouts afford a means of ensuring that meritorious IAAs receive antitrust immunity while simultaneously protecting consumers who might otherwise be harmed. The carriers routinely claim that their alliances will not proceed without antitrust immunity. However, the eighteen-month carveout review allows carriers to demonstrate that their alliance is not in fact anticompetitive. If their data and arguments are sufficiently compelling, then DOT will extinguish the carveout and confer immunity on the city-pair market. DOT's willingness to place such significant weight on carriers' assertions that they will not proceed without antitrust immunity further suggests agency capture.

Furthermore, it is not clear that immune IAAs are alone responsible for the increased service options and lower fares of the last several years. IAAs usually receive antitrust immunity at the same time that the United States signs an OSA with a foreign country. The lower fares and increased service options may flow from market entry and competition from other carriers—an effect that is completely independent of antitrust immunity.

DOT tells a plausible cause-and-effect story, but there is another equally plausible explanation for the observed changes in the global aviation industry. Antitrust review of IAAs should ensure that they not only benefit the majority of consumers, but do

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212 See text accompanying notes 83–85.
213 See text accompanying notes 143–45.
214 See, for example, Final Order, United-Lufthansa, Docket OST-96-1116-26, Appendix A at 3 (cited in note 13) ("Within eighteen months from the date that this Order becomes final . . . the Department will review the limitations on antitrust immunity . . . to determine whether they should be discontinued.").
215 See text accompanying notes 143–45.
216 "Increased service options" refers to the expanded routes available to U.S. passengers in recent years, particularly in non-hub cities. There are now more airlines flying a greater variety of international routes, and with greater frequency. See Department of Transportation, International Aviation Developments at 2–4 (cited in note 3).
so without positively harming subsets of consumers in specific
city-pair markets.

V. DOJ SHOULD ASSUME RESPONSIBILITY FOR ANTITRUST REVIEW
OF IAAS WHEN THOSE IAAS ARE RIPE FOR RENEWAL

The current system for antitrust review of IAAs potentially
harms time-sensitive consumers in certain city-pair markets.
More broadly, IAAs may not produce the promised benefits of
lower fares and increased travel options; rather, OSAs alone may
be responsible for those benefits. Based on these uncertainties,
IAAs should be subject to a more rigorous antitrust review.

A. The Transportation Research Board’s Proposal to Transfer
Antitrust Review of IAAs to DOJ

In 1998, Congress requested that the Transportation Re-
search Board (“TRB”) conduct a study “assessing the current
and emerging state of competition in the domestic airline indus-
try and making recommendations for further government action
to promote that competition.” In this report, TRB recommended
that Congress shift initial antitrust review of future IAAs entirely
to DOJ, just as Congress had done previously in the domestic
context. TRB expressed concern that DOT’s current global avia-
tion policy causes anticompetitive results by linking the conclu-
sion of OSAs, on the one hand, to grants of antitrust immunity to
IAAs with signatories’ national airlines, on the other.

TRB’s solution, however, is suboptimal and too drastic. Con-
gress likely conferred authority to grant antitrust immunity to
IAAs upon DOT because its role in crafting U.S. global aviation
policy makes DOT uniquely well situated, in conjunction with
other cabinet-level agencies such as the State Department and

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217 The TRB is a private, nonprofit research unit connected with the National Academy
of Sciences that Congress tasks with studies of DOT policy. See <http://www4.
nationalacademies.org/trb/homepage.nsf/web/about/> (visited Aug 24, 2000). The TRB
receives its funding from state departments of transportation, industry associations, and
DOT. See id.
218 Transportation Research Board, Entry and Competition at vi (cited in note 96).
219 Id at 152.
220 See text accompanying notes 32–33.
221 Transportation Research Board, Entry and Competition at 152 (cited in note 96).
TRB suggests that, during OSA negotiations, DOT “has raised the expectations of foreign
carriers and nations that immunity will be conferred on the IAA” after the OSA is
signed, and that “once accustomed to alliance arrangements, airlines and transportation
policy makers alike might be reluctant to advocate additional necessary market reforms.”
Id at 151–52.
DOJ, to weigh factors like international comity and foreign policy against purely economic antitrust concerns. This is not to say that DOJ is not capable of weighing both policy and economic concerns in its antitrust analysis, especially if it had sole responsibility for antitrust review of IAAs in the first instance. However, for the most part, the current system of DOT relying on DOJ for a different but complementary antitrust analysis of IAAs seems to work well. Rather than transferring all authority for antitrust review to DOJ, a modification in the current system would limit potential anticompetitive results that follow from granting antitrust immunity to a given alliance.

B. Congress Should Transfer Authority for the Five-Year Review from DOT to DOJ

When DOT grants antitrust immunity to an IAA, it directs the member airlines to resubmit the alliance agreement to DOT after five years for further review. A reform that would prompt a more rigorous antitrust review, but would also ensure adequate consideration of the foreign policy factors inherent in IAAs, is for DOJ to assume responsibility for antitrust review of IAAs when the parties thereto resubmit their applications. The TRB recommended this shift also, observing that there would be "significant diplomatic pressure" on DOT to renew IAAs, and therefore that DOJ should assume responsibility for reviewing resubmissions of alliance agreements in order to afford the most careful consideration possible to the IAAs' effects on domestic and international transportation.

There is currently no formal procedure in place for this five-year review. It is likely, however, that under current law the procedure would be similar to the initial antitrust review: that is, DOT would examine a variety of factors related to the alliance and consult with DOJ for an economic analysis. Because DOT

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222 See 49 USC §§ 41308-09 (1994).
223 See, for example, Final Order, United-Lufthansa, Docket OST-96-1116-26 at 1 (cited in note 13) ("We direct United and Lufthansa to resubmit the Expansion Agreement five years from the date of the issuance of this Order.").
224 Transportation Research Board, Entry and Competition at 152 (cited in note 96). Although the TRB made this recommendation, there was essentially no discussion of any reasoning behind it.
225 Interview with Jeff Gaynes (cited in note 124). [U Chi Legal F does not verify personal interviews.] The date for the Northwest/KLM alliance five-year review came and went on January 11, 1998, see Final Order, Northwest-KLM, Docket OST-95-579-34 at 1 (cited in note 160), but DOT has not taken any action to commence review proceedings.
226 Interview with Jeff Gaynes (cited in note 124).
retains the ultimate authority to grant or deny antitrust immunity, applying the same analysis for the five-year review as to the initial application would do nothing to obviate the possibility that an immune alliance would continue to expose consumers in specific city-pair markets to anticompetitive conditions. While it makes sense for DOT to be responsible for the initial review of IAAs given its knowledge of, and experience with, the global aviation regime, there are not equally compelling reasons for DOT to retain its review authority when IAAs must resubmit their applications.

DOT's "foremost international aviation goal... is opening international markets to the forces of competition." DOT does this by granting antitrust immunity to IAAs and executing OSAs with foreign countries. One inducement for foreign countries to sign an OSA with the United States is the possibility, if not the implicit promise, of antitrust immunity for their national carriers. Thus, it appears that granting antitrust immunity to IAAs is an important policy instrument used to achieve its larger policy goal of a maximally liberalized global aviation environment.

By the time alliance partners resubmit their application, however, the international policy and comity concerns have greatly diminished because an OSA is already in place between the United States and the member airline's parent country. The relevant analysis should then focus on quantitative factors rather than international policy goals. Once the focus shifts to a more quantitative analysis, DOJ is the best qualified agency to undertake the five-year review.

One potential difficulty is that DOJ might adopt too rigorous a stance when reviewing the resubmitted application for immunity. DOT's analysis indicates that, on the whole, IAAs provide significant consumer benefits. DOJ therefore should not make recommendations that would chill the formation of alliances, such as requiring burdensome and unnecessary carveouts, or denying the IAA antitrust immunity all together.

This scenario, however, seems profoundly unlikely. In all cases, DOJ has made modest recommendations for carveouts of

227 Department of Transportation, International Aviation Developments at 4 (cited in note 3).
228 See note 221 and accompanying text.
229 "National" is not meant to imply "state-owned," although this may be the case. Rather, this is to point out that the interests of one or maybe two carriers are represented by foreign countries at the bargaining table, rather than a diffuse set of actors.
very specific routes. In addition, these carveouts apply only to those passengers who purchase specifically delineated types of fares. One excellent way to ensure that DOJ adopts the optimal policy is to retain DOT's eighteen-month carveout review period that is currently in place. If alliance partners are able to provide conclusive data that their operations in specific city-pair markets are not anticompetitive (or indeed if DOJ decides on its own initiative to review the carveout and makes a similar finding), then those city-pair markets would be eligible for antitrust immunity and the carveout would cease to exist. Also, it would probably be useful—to say nothing of diplomatic—for DOJ to consult with DOT, as DOT consults with DOJ in the IAA application process. Such consultation would ensure that any lingering foreign policy concerns inform DOJ's analysis.

CONCLUSION

Given the growth of international airline alliances, U.S. policy on these agreements must remain focused on maximizing consumer welfare. Under the current system, DOT's broad discretion to grant IAAs antitrust immunity is calculated to confer the benefits of these alliances, in conjunction with those resulting from open skies agreements, on consumers. However, DOJ has determined that these agreements have anticompetitive effects on the market for time-sensitive, nonstop passengers in certain city-pair markets. DOJ should therefore assume responsibility for the subsequent, though not the initial, review of IAAs. This would ensure that the benefits of the liberalized global aviation regime are available to the maximum number of consumers.

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231 See, for example, DOJ's recommendation that United and Lufthansa carve out the Chicago-Frankfurt and Washington-Frankfurt markets for time-sensitive passengers (see text accompanying note 113), and DOJ's recommendation that Delta, Swissair, Sabena, and Austrian carve out certain routes from the New York market (see text accompanying note 128).

232 See note 123 and accompanying text.