Coercive Diplomacy in the Skies

By Marcelo L. Garcia and Roncevert G. Almond

The world is experiencing a gradual yet decisive shift toward a new paradigm in international relations—one that is based on muscular sovereignty and assertive nationalism. International trade is increasingly subject to geopolitics. In the realm of international air transport, this shift has come in the form of coercive diplomacy involving civil aviation. From conflicts in the Crimean peninsula to the Taiwan Strait, this growing state practice has been referred to as the “weaponization of airspace.” At issue is whether such actions are consistent with state obligations under the Convention on International Civil Aviation (Chicago Convention).

In some cases, coercive diplomacy has taken the form of abrupt airspace closures and the unilateral withdrawal of traffic and other commercial rights for designated airlines. In other cases, measures have aimed at seizing control of another state’s airspace as a means to assert sovereignty over a disputed territory. In these instances, aspects of civil aviation are not used to promote cooperation and comity between states, but as geopolitical tools that create new hazards.

Alliances and Antitrust Immunity: Why Domestic Airline Competition Matters

By Diana L. Moss

The debate over competition in the U.S. airline industry in recent years has focused largely on developments in domestic airline markets, ranging from mergers, access to airports (e.g., slots), alleged anticompetitive coordination on airline capacity and ancillary fees, and concerns over deteriorating quality of air service. Airline competition in international markets, however, also raises concerns and merits scrutiny. Chief among these concerns is the U.S. Department of Transportation’s (DOT’s) policy of granting immunity from U.S. antitrust laws (ATI) for coordination on schedules and fares by members of the three large international airline alliances: Star Alliance, oneworld, and SkyTeam. A second issue of concern is barriers to entry by foreign carriers on international routes serving U.S. destinations. U.S. legacy carriers have opposed such entry while simultaneously expanding their stakes in foreign carriers, perhaps to gain control over decisions to enter U.S. markets.

These developments highlight the growing nexus between international and domestic passenger airline competition issues. The implications of ATI are serious.
Greetings as we close out the first quarter of 2019. It was a rocky start, with a government shutdown that had adverse impacts on everyone, but certainly on aviation on many levels. While a second shutdown was averted, the damage from the first will take a long time to heal. We had a successful Washington Update Conference in February, made more challenging by the government shutdown, but the planning committee worked hard and was able to field great panels and speakers, as always.

The Forum is still going strong. We are preparing for further budget cuts from the ABA, which could strain our finances. Nonetheless, we have great sponsors and a superb leadership team, so we expect to be able to continue providing the content, networking, and other good works of the Forum for the foreseeable future. The website is improving steadily, and we expect that the committees will be able to utilize their web pages to better communicate and provide content and information to Forum members. We are already busy planning the Space Law Symposium and Drone Law Conference, each of which will be held in Washington, D.C., in June, and the Annual Conference in Seattle in September. There’s always something going on.

Forum leadership is also embarking on a strategic plan to identify goals and how we can achieve them over the next several years. Almost everything is on the table from the way we govern and fund ourselves to the content we provide our members. If you have questions, thoughts, or ideas, we’d love to hear them. Please contact me or Jennifer Trock, the Chair-Elect and the leader of our strategic plan initiative.

We hope you enjoy another fine edition of The Air & Space Lawyer. This issue is the last for our Editor-in-Chief of the past eight-plus years, David Heffernan. David has been a great leader and steward of the publication and we will miss him and thank him for all he has done for the Forum. We also thank outgoing Managing Editor Brent Connor for his assistance over the years. We are pleased to announce that the new Editor-in-Chief will be David Berg, now retired but formerly with A4A. David will be assisted by Kathy Yodice of the Law Offices of Yodice Associates as Managing Editor. We are confident that Dave and Kathy will continue a long tradition of excellence in our publications and look forward to working with them. If any of our readers have suggestions for the publication or wish to write articles, let Dave and Kathy (or me) know. We’ll get you involved.

Don’t forget—get involved, attend conferences, join committees, write articles—it’s all there for you. And above all, have fun!

Andrea J. Brantner
Chair, Forum on Air & Space Law
Our first cover article in this issue, by Marcelo Garcia and Ronce Almond, examines an increasing tendency by governments to “weaponize airspace” as part of “coercive diplomacy” strategies. Such strategies may involve abrupt airspace closures, the seizure of control of another state’s airspace, or the unilateral withdrawal of traffic rights. Examples of such “coercive diplomacy,” the authors contend, include Chinese actions in the Taiwan Strait, Russia’s intervention in the Crimean peninsula, and the recent airspace blockade against Qatar. (Mr. Garcia is Manager, Regulatory and Corporate Affairs at Qatar Airways, but he and Mr. Almond write on their own behalf.) These actions may relate to regional disputes driven by non-aviation-related agendas, but the authors argue that they violate the Chicago Convention and undermine the international civil aviation framework. They suggest that ICAO’s lethargic dispute settlement procedures require reform, including revision of the Chicago Convention to authorize provisional measures to enjoin state actions that violate the Convention.

Our second cover article is by Diana Moss, President of the American Antitrust Institute. Ms. Moss examines antitrust-immunized airline alliances, which, she argues, have “serious implications for U.S. consumers,” including a negative effect on competition in domestic and international markets. She argues that the U.S. Department of Transportation’s (DOT’s) awards of antitrust immunity (ATI) should be made subject to sunset provisions whereby airline participants would have to periodically demonstrate that their immunized alliances have benefited consumers before the DOT would renew a grant of ATI. She also suggests that the DOT should not grant ATI unless nonaligned carriers are able to enter a relevant market and compete with immunized alliances. In addition, she rejects the argument that immunized alliances require ATI to compete with each other in an “alliance market.”

Our third article, by Jordan Labkon of Vedder Price and Barry Moss, CEO of Avocet Risk Management, examines the impact on aviation finance of CORSIA, which is ICAO’s multilateral carbon offsetting scheme, designed to reduce the impact of aviation emissions. CORSIA went into effect on January 1, 2019, and is expected to affect over 700 aircraft operators around the world. The authors recognize that CORSIA has attracted widespread international support, but also highlight concerns in the aviation finance community about its potential impact on aircraft owners and lessors. In particular, they focus on risks and uncertainties about how (and how differently) CORSIA’s requirements will be applied to, and enforced against, aircraft owners and operators by different countries.

This issue is my last as Editor-in-Chief of The Air & Space Lawyer. It has been my great privilege and pleasure to contribute to The Air & Space Lawyer over the past nine years. I extend heartfelt thanks to John Palmer and Melissa Vasich, who have provided outstanding support and editorial craftsmanship as our publication’s ABA Staff Editor during my tenure. I also thank Managing Editor Brent Connor and a wonderful group of colleagues on the editorial board. The Forum and The Air & Space Lawyer are fortunate to have secured an excellent new editorial team, led by incoming Editor-in-Chief David Berg and Managing Editor Kathy Yodice. Many of you know Dave from his years of service as Senior Vice President and General Counsel of Airlines for America and a longtime leader (and former Chair) of the Forum. Kathy, who is Managing Partner at the Law Offices of Yodice Associates and a former attorney at the FAA, has been a great contributor to the publication for many years as an assistant editor. Congratulations and best wishes to Dave and Kathy. I also welcome the appointment of two new assistant editors, Roy Goldberg and Scott Wilson. Please see page 19 of this issue for more information about Roy and Scott. I hope to continue to contribute to The Air & Space Lawyer in the future and encourage you to do the same. Please contact Dave (airberg600@gmail.com) and Kathy (kathy.yodice@yodice.com) with your ideas for, and comments on, the publication.

David Heffernan
Editor-in-Chief

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The airline industry has generally welcomed the International Civil Aviation Organization’s (ICAO’s) new carbon offsetting scheme, which went into effect on January 1, 2019. However, the scheme’s Standards and Recommended Practices (SARPs) impose an immediate compliance obligation on international airlines and raise a number of potential risks for aircraft financiers and lessors.

In June 2016, the 39th Assembly of ICAO agreed to adopt a global market-based measure to control aviation carbon dioxide (CO2) emissions. This scheme is referred to as the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA). On June 27, 2018, ICAO’s Council adopted the first edition of Annex 16, Volume IV, which details the international SARPs for CORSIA. Ultimately, over 700 aircraft operators worldwide will be required to comply with various aspects of the scheme.

This article first describes the requirements of CORSIA and discusses the process of incorporating those requirements into the national laws of ICAO member states. Next, the article examines risks and challenges for aircraft owners and lessors posed by CORSIA, and particularly the risks associated with individual national government enforcement of CORSIA. The article concludes that while CORSIA commands widespread support, the scheme presents significant risks and uncertainties that have not yet been resolved.

CORSIA’s Requirements

Effective January 1, 2019, all operators not otherwise exempt from CORSIA with annual emissions exceeding 10,000 metric tons of CO2 are required to record and report emissions data for their international flights on a yearly basis. Operators also must submit an emissions monitoring plan by February 28, 2019. Annual emissions reports and emissions monitoring plans must be submitted by an operator to its ICAO contracting state regulator even if the contracting state has opted not to participate in the voluntary phases of CORSIA. The reported data will form the baseline for calculating compliance requirements during the voluntary and compulsory phases of the scheme (see fig. 1).

Under the monitoring, reporting, and verification (MRV) phase (2019–2020), all aircraft operators must submit an emissions monitoring plan no later than February 28, 2019, and report their 2019 and 2020 emissions to their ICAO state regulator by May 31, 2020, and May 31, 2021, respectively.

Incorporation of SARPs into National Law

ICAO expected most of its 192 member states to implement the SARPs into their respective national laws without modification. CORSIA contracting states were given until October 22, 2018, to file disapproval of the SARPs and were also required to file any differences to ICAO in transcribing the SARPs into their national laws by December 1, 2018. On November 21, 2018, the European Union (EU) Council instructed EU member states to file differences to ICAO concerning the lack of time available to transcribe the SARPs into EU law and also advising that certain differences currently exist between EU Directive 2003/87/EC and detailed rules adopted by the EU Commission, on the one hand, and CORSIA, on the other hand, particularly with respect to MRV requirements and offsetting requirements. The EU’s position created widespread concern that the SARPs will not be universally adopted, transcribed, or fully implemented by each contracting state. This could potentially result in a patchwork of different sub-rules,
Risks for Aircraft Owners and Lessors

CORSIA raises a number of potential and unforeseen credit, political, and reputational risks, not only for operators but also for aircraft owners and lessors. ICAO has yet to determine the types of carbon offset units that will be eligible under the scheme and whether grandfathering of existing offsets will be permissible. Any restriction concerning the type or vintage of eligible offsets may increase the cost of compliance and thus create an economic burden for many operators under CORSIA. The expected bottom-line impact of CORSIA compliance for airlines has attracted the attention of international credit rating agencies such as Moody’s, which has stated that “growing carbon offset costs have the potential to become significant relative to operating profit,” estimating that “carbon costs have the potential to lower operating income by between 4% and 15% by 2025, and by between 7% and 35% by 2030, all else being equal.”

CORSIA compliance will present aircraft owners with several commercial and legal risks and challenges. One such challenge is to identify who will be responsible for compliance under the scheme where the operator of a flight has not been identified. The first line of inquiry is the ICAO designator, followed by the aircraft registration mark and holder of an aircraft operator certificate (AOC). If the ICAO designator and AOC holder cannot be readily established, CORSIA compliance will then fall to the aircraft owner identified in the aircraft registration documentation. Should an operator fail to submit an emissions monitoring plan and annual emissions reports, its CORSIA contracting state may not be able to identify the operator of an aircraft’s international flight activity or, consequently, the party responsible for its emissions from such activity. Therefore, in such circumstances, CORSIA compliance obligations would automatically be attributed to the aircraft owner. Any such risk may become compounded for aircraft lessors and investors in asset-backed finance portfolio transactions.

Enforcement of CORSIA

ICAO lacks legal authority to enforce the CORSIA SARPs. This creates a risk that local governments and regulators may hold an aircraft owner responsible for CORSIA noncompliance. Each individual contracting state is responsible for transcribing CORSIA into its domestic law. While it remains unclear how (if at all) and when each contracting state will do so, states could pass laws allowing relevant government entities to impose a lien on, and seize and potentially sell, an aircraft pending cancellation of sufficient emissions offsets for the operator’s entire fleet—notwithstanding the rights of the aircraft owner or mortgagee. Such a law could be similar to the Eurocontrol fleet lien and applicable regulations in certain jurisdictions under the EU Emissions Trading Scheme (EU ETS). In addition, legal and financial consequences may arise should an operator fail to cancel a sufficient quantity of eligible emissions offset units to cover its existing obligations following an insolvency declaration.

Furthermore, current lease and loan documentation practices need to be reconsidered in light of the differences between compliance under the EU ETS and CORSIA. The EU ETS is subject to an annual reporting and emissions allowance surrender cycle. In contrast, while CORSIA will have an annual emissions reporting cycle, cancellation of emissions unit offsets, effective 2020, will be subject to a three-year compliance cycle. This longer cycle is likely to cause aircraft owners to accumulate much greater credit risk exposure. Requiring an operator, as a condition precedent under a lease or loan agreement, to deliver a CORSIA “letter of authority” permitting the relevant regulator to disclose the operator’s emissions obligations as a means for a lessor or mortgagee to monitor this credit exposure will likely have little if any value. It is presently unknown to what extent, if any, contracting state regulators will honor such letters of authority, as CORSIA allows aircraft operators to request regulators to keep commercially sensitive emissions data confidential. Moreover, until the three-year compliance cycle expires, the CORSIA regulator will not be able to confirm the level of an operator’s compliance and financial liability, by which time the damage (and potential exposure for the lessor or mortgagee) may be irreversible. Also, the price of eligible emissions units under CORSIA (measuring the cost of compliance) will not be known until the time of purchase by the operator, unless an operator hedges its CORSIA exposure through a forward contract with a carbon broker.

Should the EU decide to transcribe CORSIA as an annex to the EU ETS, then the existing enforcement measures for noncompliance, which is a statutory penalty of EUR 100 per ton of CO2, plus additional local fees, penalties, and the rights of aircraft seizure, detention, and sale may apply. Meanwhile, the United Kingdom is scheduled to exit the EU ETS in March 2019 and is currently considering its options, including whether to seek to negotiate with the EU to opt back into the EU ETS, or alternatively set up its own ETS or U.K. aviation carbon offset scheme for domestic and intra-European Economic Area (EEA) flights. The United Kingdom remains fully committed to CORSIA for international flights outside the EEA. Meanwhile, the uncertainties surrounding CORSIA could create challenges in disclosing climate change-related risks, trends, or factors in publicly listed leasing and finance company annual financial reports and offering memoranda for securitization transactions that require a credit rating.

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Conclusion
Given the plethora of potential risks and uncertainties under CORSIA, it is important that aircraft owners and financiers understand the basic functions of the scheme, monitor the evolving landscape of requirements and consequences of noncompliance, and consider implementation of risk mitigation measures in lease and loan documentation. While there is considerable momentum for commencing and implementing CORSIA as a global system for reducing aviation emissions, the scheme still presents many uncertainties and risks, but few clear solutions.

Endnotes
3. CORSIA uses the term “aeroplane operator.”
4. Operators subject to CORSIA’s technical exemptions are those (1) with annual emissions of less than 10,000 t/CO2, (2) operating humanitarian medical and firefighting flights, (3) operating military and state flights (presidential, customs, police, etc.), and (4) operating helicopters. Annex 16, Volume IV, supra note 2, at II-2-1.
5. According to the U.K. Department of Transport, 10,000 metric tons of CO2 is approximately equivalent to 4 million liters (1 million gallons) of JET-A aviation fuel.
6. ICAO uses the terms “contracting state” and “member state” interchangeably.
7. An “emissions monitoring plan” is a collaborative tool between the state and the aircraft operator that identifies the most appropriate means and methods for CO2 emissions monitoring on an operator-specific basis, and facilitates the reporting of required information to the state.
8. The first edition of ICAO’s SARPs (Annex 16, Volume IV) was adopted on June 27, 2018. Those parts of the SARPs that were not disapproved by more than half of all contracting states on or before October 22, 2018, became effective on that date and became applicable on January 1, 2019.
10. CORSIA uses the term “aeroplane owner.” The scheme only applies to fixed-wing aircraft and excludes rotor-wing aircraft.
11. For example, it is unclear whether carbon reduction emissions offset units created under the United Nations’ Clean Development Mechanism will be eligible for offset credit under CORSIA.
13. This is a three-letter call sign, but not all operators have such a call sign. See Annex 16, Volume IV, supra note 2, at II-1-2.
14. See id.
15. For example, under the U.K. Greenhouse Gas Emissions Trading Regulations, the U.K. Civil Aviation Authority has the right of seizure, detention, and sale of aircraft in the event of persistent EU ETS aviation noncompliance. However, liens are not applicable where an aircraft is owned by a lessor and liens are not transferable to a new operator of an aircraft that is subject to penalties (i.e., “follow the metal”).
16. The first CORSIA emissions credits are scheduled to be canceled on January 31, 2025.
18. This depends on whether the EU agrees that CORSIA meets the aims and criteria outlined in the declaration made at the European Civil Aviation Conference in Bratislava in September 2016. These include, among other things, that implementation is not delayed and the scheme applies to all states (unless exempted as specifically prescribed under CORSIA), that a review mechanism exists to ensure that environmental ambitions are increased over time and the global objectives of the Paris Agreement are taken into account, that special circumstances and capabilities of individual countries are taken into account, and that all operators on the same route are treated equally to avoid discrimination and market distortion. Declaration of Directors General of Civil Aviation of EU Member States and Other Member States of the European Civil Aviation Conference: Adhering to the Global Market-Based Measure (GMBM) Scheme from the Start (Sept. 3, 2016), https://www.icao.int/environmental-protection/Documents/2016-BRATISLAVA_DECLARATION.pdf.
19. EU Directive 2008/101/EC includes provision of an excess emissions penalty of EUR 100, which applies to each ton of carbon dioxide equivalent emitted for which the aircraft operator has not surrendered allowances. Payment of the excess emissions penalty does not release the operator or aircraft operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year. A similar penalty regime could also apply for CORSIA.
20. The United Kingdom will require aircraft operators reporting to the U.K. regulator to continue to comply with the EU ETS for the 2019 emissions compliance year.
22. Credit risk arising from CORSIA should be a factor in future rating agency modeling.
Coercive Diplomacy

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to commercial aviation and threaten peace and security in the skies above. These measures breach the letter and spirit of the Chicago Convention, which sets forth core principles governing international air transport. Compounding the problem, the dispute resolution framework under the Chicago Convention is not equipped to mitigate the immediate safety and economic threats resulting from this new form of warfare.

This article reviews the dynamics of this troublesome trend in aviation. First, we briefly examine how the Chicago Convention stands in opposition to the use of airspace and civil aviation as means for coercive diplomacy. We then review how the airspace blockade against Qatar, as part of an ongoing dispute initiated by regional powers and their allies in 2017, conflicts with state obligations under the Chicago Convention. We close with a recommendation to strengthen the dispute settlement process of the International Civil Aviation Organization (ICAO) to include provisional measures designed to immediately contain the harm from these airspace conflicts and, thus, further their eventual resolution.

The Chicago Convention and Coercive Diplomacy

The Chicago Convention governs international aviation and sets forth principles for the safe and orderly development of the aviation industry. The treaty is administered by ICAO, a specialized United Nations agency based in Montreal, Canada. ICAO consists of an Assembly, a Council, a Secretariat, and other subsidiary bodies. Pursuant to the Chicago Convention, ICAO prescribes rules relevant to the use of international airspace. For example, via the Council’s quasi-legislative powers, ICAO adopts Standards and Recommended Practices (SARPs), which serve as Annexes to the Chicago Convention. All contracting states are under a legal obligation to implement standards under the Convention.

The coercive use of civil aviation violates various fundamental principles enshrined in the Chicago Convention. This includes the treaty’s objective “to avoid friction and to promote that cooperation between nations and peoples” and the principle that “[e]ach contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention.” Some of ICAO’s primary objectives include ensuring the safe and orderly growth of international civil aviation; encouraging the development of airways facilitating air transport; ensuring that the rights of contracting states are fully respected and that every contracting state has a fair opportunity to operate international airlines; and promoting safety of flight in international air navigation. In this regard, Assembly Resolution A39-15 has urged contracting states “to make every effort to fulfill their obligations, arising from the Convention and Assembly resolutions.” Significantly, treaty obligations continue even if states have cut ties. The Vienna Convention on the Law of Treaties stipulates that the severance of diplomatic relations between states does not invalidate their treaty obligations.

At the same time, territorial sovereignty remains a foundation block of international relations. The Chicago Convention codifies the fundamental principle that every state has “complete and exclusive sovereignty” over the airspace above its territory. This reflects customary international law regarding sovereignty of national airspace, as first articulated in the 1919 Convention Relating to the Regulation of Aerial Navigation (Paris Convention) and later codified in the United Nations Charter. Beyond national boundaries, above the high seas, all states enjoy the freedom of overflight, but the Chicago Convention still applies. Civil operations in international airspace are governed by “Rules of the Air” established by ICAO. Contracting states are required to also apply these rules to the “highest practicable degree” within their respective national airspace.

Additionally, the Chicago Convention recognizes the unique threat civil aviation can pose to national security. The treaty regime preserves the “freedom of action” of states to respond to national emergencies and conditions of war upon the provision of notice to the ICAO Council. The Chicago Convention also enables contracting states, for reasons of military necessity or public safety, to “restrict or prohibit uniformly the aircraft of other States from flying over certain areas of its territory, provided that no distinction in this respect is made between the aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the aircraft of other contracting States likewise engaged.”

Compliance issues arise when contracting states, under the cover of alleged national security concerns or...
as part of wider political agendas, use aspects of civil aviation, such as discriminatory airspace restrictions, as a form of coercive diplomacy. For example, the selective application of flight restrictions within national airspace to aircraft registered in another state—without any prior notice and in the absence of evidence of military conflict or an imminent threat to public safety—arguably violates the Chicago Convention. The case is even clearer if such restrictions are arbitrarily applied beyond sovereign airspace, such as in portions of international airspace where contracting states exercise limited functional jurisdiction pursuant to the Chicago Convention.

The airspace blockade against Qatar demonstrates the tensions created between Chicago Convention obligations and the use of civil aviation as a means of coercive diplomacy.

Airspace Blockade against Qatar
On June 5, 2017, the Kingdom of Saudi Arabia, the United Arab Emirates, the Kingdom of Bahrain, and the Arab Republic of Egypt decided, abruptly and unilaterally, to sever diplomatic and economic relations with Qatar and deployed a package of aggressive and comprehensive measures, which included barring all Qatar-registered aircraft from landing or departing from their airports, and overflying their airspace. According to a U.S. congressional report, one basis for the air embargo is alleged national security concerns stemming from Qatar’s foreign policy in the region. However, the list of demands issued by the four blockading countries in July 2017 illustrates in unequivocal terms that the dispute extends far beyond aviation and reflects a wider geopolitical agenda. For example, one of the key demands for Qatar was to shut down Al Jazeera and all of its affiliates and order the immediate closing of a Qatar-based Turkish military base under development.

These drastic measures, imposed without warning, have created high levels of airspace congestion in the Gulf region, and continue to jeopardize the safety, security, and regularity of airline operations to and from Qatar. Indeed, the air blockade, substantively and procedurally, runs into serious challenges under the Chicago Convention.

For instance, the flight restrictions against Qatar have at some point extended to the entire flight information regions (FIRs) controlled by the blockading states, and approval conditions have also been imposed on foreign (non-Qatar-registered) aircraft flying to and from the State of Qatar via their respective FIRs. An FIR is an area assigned to an ICAO member state for civilian air traffic control (ATC) purposes under a regional air navigation agreement with ICAO. FIRs exist to facilitate international coordination to ensure safe and efficient air traffic management through the provision of flight information and alerting services. In addition, the recommended geographic scope of FIRs corresponds with the route structure and need for efficient ATC services as opposed to national boundaries and security needs.

Indeed, the responsibility for ATC services in the FIR creates only functional responsibility for activity in the FIR and does not establish sovereignty or security rights. Instead, authority over air navigation services beyond a state’s territorial airspace is limited to technical and operational considerations for the safe and expeditious use of the concerned airspace. The use of an FIR as a tactic in coercive diplomacy contravenes the very purpose and limitations of these airspace zones.

Even if there were a security or other recognized basis for establishing flight restrictions in designated airspace, the Chicago Convention establishes specific notice periods and duties to avoid threats to civil aviation. For example, Annex 11 requires states to coordinate with the appropriate air traffic services authorities when arranging activities that are potentially hazardous to civil aircraft over the high seas. In addition, Annex 15 sets forth specific notice and coordination requirements. In such circumstances, the state with responsibility for the relevant FIR must initiate this notice and coordination process. The coordination must occur early enough to permit timely promulgation of information regarding the activities in accordance with the provisions of Annex 15. Under Annex 15, states must provide at least seven days’ advance notice through a notice to airmen (NOTAM) when establishing prohibited, restricted, or danger areas in airspace. Alternatively, Annex 15 allows for a greater lead-time of at least 28 days regarding the establishment and withdrawal of, and premeditated significant changes to, a danger area. For prohibited, restricted, and danger areas, the type of restriction or nature of hazard and risk of interception in the event of penetration must be indicated in the Aeronautical Information Publication (AIP). Establishing an airspace blockade, particularly involving international airspace within an FIR, without prior notice or coordination runs afoul of ICAO’s procedural safeguards designed to mitigate the risk to and disruption of international civil aviation.

Need for Provisional Measures
As demonstrated by the airspace blockade against Qatar, some states are increasingly using airspace as a tool for coercive diplomacy in the context of regional disputes that are driven by larger, nonaviation agendas. However, the Chicago Convention provides a means of dispute resolution that can be used to address the legality of actions pertaining to civil aviation within the jurisdiction of the treaty.
Pursuant to this dispute settlement process, if any disagreement between two or more contracting states relating to the interpretation or application of the Convention and its Annexes cannot be settled by negotiation, the ICAO Council may decide the matter based on the application of any state concerned in the disagreement. No member of the Council is permitted to vote in the consideration by the Council of any dispute to which it is a party. Appeal from the decision of the Council may be made to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice (ICJ). The decisions of the ICJ and of an arbitral tribunal are final and binding. Legal penalties for noncomplying contracting states include the suspension of voting rights in the ICAO Council and Assembly.

In the case of the airspace blockade, on June 8, 2017, Qatar requested that the ICAO Council convene a special session to consider the actions of Saudi Arabia, the United Arab Emirates, Bahrain, and Egypt. The Council held an extraordinary meeting on July 31, 2017, to consider this request. On October 30, 2017, Qatar submitted two applications and memorials, under Article 84 of the Chicago Convention and Article II, Section 2 of the International Air Services Transit Agreement (IASTA), respectively. In March 2018, Saudi Arabia, the United Arab Emirates, Bahrain, and Egypt filed their counter-memorials and raised preliminary objections, contesting the jurisdiction of ICAO in the matter and in the alternative that the claims raised by Qatar were inadmissible. The Council suspended the proceedings on the merits of Qatar’s claim pending the resolution of the preliminary objections. Following a response to the preliminary objections by Qatar, and a rejoinder by the opposing parties, the Council heard oral arguments in a half-day session on June 26, 2018. The Council adopted its decision on June 29, 2018, rejecting the preliminary objections of Saudi Arabia, the United Arab Emirates, Bahrain, and Egypt. On July 4, 2018, those parties subsequently filed an appeal to the ICJ, pursuant to Article 84 of the Chicago Convention, claiming that the procedures adopted by the ICAO Council in its decision were flawed and that the Council had erred in fact and in law in rejecting the parties’ preliminary objections.

Even as the proceedings continue in this case, there remains a significant shortcoming: the Chicago Convention’s current dispute settlement mechanism, including rules of procedure, does not include the ability for ICAO to require the suspension of coercive measures, such as through an injunction or temporary restraining order, while the merits of the case are being heard and evaluated. The process could be strengthened by amending the Chicago Convention to explicitly empower the Council to mandate provisional measures under special circumstances that are likely to cause irreparable harm, upon a basis similar to a grant of injunctive relief under U.S. law. The penalty for noncompliance with provisional measures can be the same as already provided for under the Chicago Convention: suspension of voting rights in the ICAO Council and Assembly.

In the case of an airspace embargo or civil aviation blockade, the disruption to international air transport and related economic harm is immediate and potentially permanent—even in normal circumstances, commercial aviation is an extraordinarily competitive and turbulent industry. An aggrieved state is not likely to achieve relief from ongoing injury as the Council deliberates. In the entire history of formal dispute resolution at ICAO, the Council has never issued a decision on the merits. This legal gap creates incentives for aggressive first action even if the underlying legal basis is thin or nonexistent under the Chicago Convention. In the long run, without the availability of immediate recourse, international civil aviation may become even more vulnerable to coercive diplomacy or forms of economic warfare. Without an efficient and equitable dispute settlement mechanism, ICAO may lose ground as the central institution within the international civil aviation system.

Provisional measures may not be a panacea, but they can prove effective, as demonstrated by the current case involving Iran and the United States before the ICJ concerning the reimposition of U.S. sanctions on Iran following the Trump administration’s decision to withdraw from the Joint Comprehensive Plan of Action (JCPOA), otherwise known as the “Iran Nuclear Deal.” Pursuant to ICJ doctrine, provisional measures may be taken only if the applicant satisfies a three-part test: First, there must be a prima facie basis for the court’s jurisdiction. Second, the rights asserted by the applicant must be plausible with a link between such rights and the measures being requested. Third, there must be a real and imminent risk that irreparable prejudice will be caused to the rights at issue in the absence of the provisional measures. On October 3, 2018, the ICJ determined that Iran had met this standard, despite strenuous opposition from the United States, and ordered the United States to ensure that reimposed sanctions exempt, among other items, spare parts, equipment, and associated services (including warranty, maintenance, repair services, and inspections) necessary for the safety of civil aviation. In response, the United States announced that it will withdraw from the bilateral treaty with Iran that provided the basis for the
ICJ's jurisdiction, but begrudgingly acknowledged compliance with the ICJ's provisional measures, including those addressing civil aviation safety.\textsuperscript{70}

Amending the Chicago Convention may prove challenging, but it is not unprecedented—even when complex geopolitical issues are involved. During the Cold War, following the controversial downing of Korean Air Lines Flight 007 by the Soviet Union,\textsuperscript{77} the Chicago Convention was amended to expressly prohibit the use of weapons against civil aircraft in flight and provide specific safeguards for the interception of civil aircraft.\textsuperscript{72} The urgency of this task—of making ICAO's dispute resolution process more effective and efficient—will only increase as geopolitical disputes continue to threaten the existing consensus-driven global civil aviation system. Given its unique position and mandate, ICAO is the best forum for resolving aviation conflicts stemming from these larger disputes, for promoting the safe and orderly development of international civil aviation throughout the world.

Conclusion

In a world in which coercive diplomacy in the skies gains momentum, breaches of the Chicago Convention are and will continue to be justified by some states on the basis of wider geopolitical agendas and without due regard to the safety, security, efficiency, and regulation of civil aviation. In this context, the role of ICAO is fundamental to prevent further escalation of coercive measures and potential cycles of destructive retaliation, as these can extensively or even irrevocably damage the global aviation system developed under the Chicago Convention. More particularly, the ICAO Council should continue to assert its mandate to settle disagreements relating to the interpretation or application of the Chicago Convention. This mandate should be enhanced through reform of the treaty to expressly allow for provisional measures, such as the mandatory suspension of coercive actions targeting civil aviation.

Endnotes


5. See Chicago Convention, supra note 2, at pmbl.

6. See id.

7. See id. at arts. 43–66.

8. Id. at art. 43.

9. See id. at art. 12 (“Over the high seas, the rules in force shall be those established under this Convention.”).

10. Id. at art. 50.

11. Id. at arts. 37, 54(f).

12. Id. at art. 90.

13. Id. at art. 38.

14. Id. at pmbl.

15. Id. at art. 4.

16. Id. at art. 44.


19. Chicago Convention, supra note 2, at art. 1.

20. Convention Relating to the Regulation of Aerial Navigation art. 1, Oct. 13, 1919, 1 L.N.T.S. 173 (“The High contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory.”).


24. Chicago Convention, supra note 2, at arts. 12, 38.

25. Id. at art. 89.

26. Id. at art. 9.


28. See generally Roncevert Almond, Clearing the Air above the East China Sea: The Primary Elements of Aircraft Defense Identification Zones, 7 HARV. NAV'Y SEC. J. 126 (2016) (examining the legal problems with jurisdictional claims to international airspace even on the basis of national security).


the burden of specifying the reasons for such measures and the possible consequences if the request were not granted. The Council could be assisted by an independent technical panel, which could make an assessment and recommendation as to whether provisional measures are necessary to protect the safety, security, and regularity of civil aviation. The Council would make the final determination.

62. For example, under U.S. federal law, a preliminary injunction must meet the following test: (1) the movant has shown a likelihood of success on the merits; (2) there is a likelihood that the movant will suffer irreparable harm in the absence of a preliminary injunction; (3) the balance of equities tips in the movant's favor; and (4) the injunction is in the public interest. Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009).

63. Chicago Convention, supra note 2, at art. 88. In cases of bad faith on the part of contracting states, other remedies may be required.

64. In each of the five cases filed with ICAO, the parties achieved resolution through ICAO's role in conciliation and mediation. See Paul Stephen Dempsey, Public International Air Law 736 (2008). The threat of provisional measures may incentivize countries to engage in conciliation and mediation once formal dispute settlement proceedings have begun.


72. Chicago Convention, supra note 2, at art. 3 bis.
Alliances are agreements among member carriers to cooperate, often in ways that have significant implications for competition and consumers.

for U.S. consumers who travel on nonstop and connecting international alliance itineraries that involve numerous U.S. gateway airports. Many of these gateways have become significantly more concentrated over the past decade as the result of U.S. airline consolidation, raising concerns about foreclosure of competition by smaller, nonaligned carriers, higher fares, and less choice of carriers for consumers. These changes undercut claims that ATI brings substantial benefits to U.S. consumers in “behind-gateway” and “beyond-gateway” markets served by the alliances. Such markets can be defined in a number of ways, including nonstop or connecting airport or city pairs served by the alliances and alliance networks.

Recently, some of the large U.S. network carriers have escalated their efforts to highlight allegedly “robust” competition in U.S. markets. This advocacy comes at a time when a large number of ATI applications are pending at the DOT. These include: American Airlines-Qantas, Delta-WestJet, Hawaiian-Japan Airlines, Delta-Air France KLM-Virgin Atlantic, and American-British Airways-Iberia-Finnair-Aer Lingus. In light of the DOT’s recent rejection of some requests for ATI, it makes sense that U.S. airlines that dominate the three international alliances (Delta, United, and American) would focus on highlighting allegedly competitive conditions in U.S. markets to support their requests for ATI. This article argues that such conditions, which are not as rosy as these airlines claim, are precisely the reason why policy surrounding ATI is ripe for reconsideration. The article provides a brief review of alliance growth over the past 25 years and dominance of U.S. carriers in these alliances, examines the shift in economic evidence regarding the costs and benefits of ATI, and provides empirical analysis that highlights competitive concerns over ATI and its implications for U.S. consumers. The article concludes with policy recommendations.

Growth of International Airline Alliances and Dominance of U.S. Carriers

Three major international airline alliances and a number of smaller alliances serve thousands of global routes. Alliances are agreements among member carriers to cooperate in such areas as scheduling and pricing, often in ways that have significant implications for competition and consumers. These arrangements include, in increasing order of cooperation among carriers, agreements to: (1) interline with carrier partners (i.e., transfer passengers traveling on connecting itineraries), (2) share frequent flyer programs, (3) codeshare, (4) coordinate pricing and schedules, and (5) engage in almost fully integrated revenue and profit-sharing joint venture-type coordination. Alliance carriers have expanded ATI over the last 25 years to permit forms of joint venture-type coordination. There are currently 25 active immunized alliances. Three of the four largest alliances have received ATI in the last decade, which has witnessed dramatic growth in alliance membership and the largest number of U.S. legacy carrier mergers.

Since the first international alliance was founded, key features of the three alliances have changed. For example, Star Alliance was formed in 1997 with five founding members: United, Lufthansa, Air Canada, Thai Airways, and SAS. Membership now stands at 27 airlines. SkyTeam, founded in 2000, had four original members: Delta, Air France, Aeromexico, and Korean Air Lines. Nineteen carriers are currently members. Five airlines founded oneworld in 1999: American, British Airways, Canadian, Qantas, and Cathay Pacific. By 2017 the alliance had grown to 13 members. The three international alliances now account for a substantial portion of international traffic—nearly 60 percent in 2017. Star Alliance had the highest alliance market share based on traffic, with 38 percent, followed by SkyTeam with 33 percent, and oneworld with 29 percent.

U.S. carriers have a significant international presence. In 2015, American, Delta, and United together accounted for almost 45 percent of total scheduled international passenger-miles. The major U.S. carriers have developed dominant positions within the international airline alliances through a series of large domestic mergers that combined Delta and Northwest, United and Continental, and American and US Airways. United’s share of Star Alliance traffic increased from 35 percent to almost 60 percent from 2008 to 2016. Likewise, American’s share of oneworld traffic increased from 47 percent to 67 percent over the same period. Delta’s share of SkyTeam traffic, meanwhile, increased from 37 percent to 56 percent. The growth of the U.S. carriers within the alliances has come at the expense of their largest European partners. British Airways’ share in oneworld dropped from 22 percent in 2008 to 12 percent in 2016. Similarly, Lufthansa’s share in Star Alliance declined from 18 percent...
to 6 percent, and Air France KLM’s share in SkyTeam fell from 19 percent to 13 percent.

**DOT’s Approach to ATI**

A grant of ATI protects certain forms of conduct that would otherwise violate the U.S. antitrust laws. These include unilateral (single-firm) conduct and joint (coordinated) conduct that could, if not immunized, adversely affect price, output, and non-price dimensions of competition. ATI for airline alliances is a form of express statutory immunity that the DOT has authority to grant pursuant to 49 U.S.C. sections 41308–41309. The U.S. Supreme Court has repeatedly held that exemptions and immunities are “disfavored” and should be “strictly construed.” The bipartisan Antitrust Modernization Commission (AMC) recommended in 2007 that Congress “should not displace free-market competition [with immunities or exemptions] absent extensive, careful analysis and strong evidence.” The AMC recommended imposing sunset provisions on all immunities enacted by Congress and amending existing immunities and exemptions to include sunset provisions.

The DOT uses a two-step process to review alliance agreements. First, the DOT may approve an agreement that “substantially reduces or eliminates competition” only if it meets a “serious transportation need” or “achieve[s] important public benefits.”

The DOT’s historical approach to granting ATI is best described as “lenient,” perhaps influenced by economic studies of the 1990s that generally showed benefits of ATI. With domestic consolidation and the growth of the alliances, there has arguably been a paradigm shift at the DOT by using ATI to foster “alliance market” competition. Against the backdrop of domestic consolidation and growth in the dominance of the U.S. alliance carriers, the DOT’s approach has led U.S. legacy airlines to all but stop objecting to requests for ATI by rival alliances. Between 1993 and 2007, for example, U.S. legacy carriers opposed rivals’ requests for ATI, filing comments in almost 45 percent of the DOT’s ATI dockets over this period. In contrast, between 2007 and 2017, the decade which saw the spate of large mergers, there were no objections to ATI requests by U.S. legacy carriers. More (not less) competition would stimulate rivals’ objections to others’ ATI requests.

More recently, the DOT has raised a number of competitive concerns associated with immunized alliance agreements. Among these are the significant loss of head-to-head competition on international overlap routes and access by nonalliance carriers to interlining with alliance carriers at alliance gateways. Empirical studies performed since the late 2000s tell a very different story of the effects of ATI than earlier studies. For example, recent studies find that even without ATI, cooperation under alliance agreements can enhance incentives to collude on price on parallel transatlantic routes, resulting in higher fares unless there are offsetting efficiency gains. Operating with ATI would thus raise even more questions about potential anticompetitive effects.

Some economic studies note that competition may be reduced on routes served by substitute, immunized alliance carriers. One study using data from 2005 to 2010 shows that immunized service offered by two alliance partners on a transatlantic route has a “fare effect that is equivalent to the loss of an independent competitor,” with significantly higher fares on routes with fewer independent competitors. Other studies find that while immunized joint ventures increase capacity nonalliance interlining carriers could offer. Third, revenue and profit sharing and closer integration enabled by immunity allegedly allows carriers to compete more effectively against the immunized portions of other alliances that serve similar international routes.

**Competitive Concerns Raised by Alliance Immunity**

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between alliance partners’ hub airports by 3–5 percent, this expansion comes at the expense of services elsewhere in the network. And analysis shows that when an alliance member competes with a nonalliance interlining carrier, foreclosure of the latter at alliance hubs increases disparities in market share and potentially lowers interlining traffic. Moreover, ATI does not lead to alliance fares for passengers below those sold under nonimmunized arrangements.

The U.S. Department of Justice (DOJ) filed seven formal comments in ATI proceedings between 1996 and 2008. In the Aloha-Hawaiian ATI case, for example, the DOJ recommended against ATI that would have allowed the parties to form a joint venture to coordinate capacity on interisland routes. In the American-British Airways-Iberia-Finnair-Royal Jordanian Airlines ATI case, the DOJ identified a likely 15 percent fare increase on affected transatlantic routes, found no public benefits, and recommended that the DOT deny the application. The DOJ also recommended denying ATI in the Alitalia-Czech-Delta-KLM-Northwest-Air France case. The DOJ noted in the American-British Airways case that fares are higher on immunized nonstop routes. The agency also rejected claims that alliance carriers’ market power is diluted by increases in capacity and traffic and that ATI lowers fares for alliance interlining based on evidence that unimmunized alliance carriers are capable of managing pricing and inventory in order to compete with nonalliance interlining.

The DOJ has also recommended slot divestitures or route carve-out remedies to the DOT in cases where ATI would harm competition and consumers. Between 1993 and 2009, the DOT required route carve-outs in eight cases. Since the late 2000s, however, slot divestitures appear to have augmented or replaced carve-outs to encourage new entry. The DOT first required slot divestitures in the 2008 oneworld transatlantic case, and in 2016 required divestiture of slots at Mexico City (MEX) and New York’s John F. Kennedy International Airport (JFK) to out-of-market low-cost carriers in the Delta and Aeromexico case. In a few more recent cases, the DOT has denied ATI. In the 2013 Air France KLM-Air Tahiti Nui-Delta-Alitalia case, the agency denied immunity for a trunk route between Paris and Los Angeles, citing a reduction in the number of competitors and enhanced incentives to restrict capacity. In 2016, the DOT tentatively denied ATI to American and Qantas for routes operated between Australia/New Zealand and the United States. The agency rejected public benefits claims, noting that the viability of new routes was not dependent on ATI and that few passengers would benefit from an extended network.

The Alliances and U.S. Consumers: Domestic Consolidation, High Concentration, and Limited Market Entry

The competitive implications of immunized alliances are particularly important for U.S. consumers, especially in light of the sweeping domestic consolidation among the largest U.S. network airlines over the last decade. This consolidation has affected U.S. alliance carriers’ market shares on routes and at alliance hubs and smaller U.S. airports. Consequently, concentration among the “big three” immunized alliances on transatlantic routes, which are some of the busiest in the world, remains extremely high. Entry on such routes is difficult, as exemplified by the Norwegian Air International (NAI) case (discussed below), yet remains one of the only ways in which to inject competition and benefit consumers.

A second reason to consider the effects of domestic consolidation on ATI policy is that alliance routes utilize gateways (hubs) in the United States to service nonstop itineraries and connecting (i.e., one-stop) itineraries to route U.S. passengers to behind- and beyond-gateway markets. High concentration at those hubs limits choice for consumers and increases the risk of foreclosing rivals from interlining to deliver passengers to their ultimate destination. The analysis in this section highlights major statistics that support each of these concerns.

High-Traffic Transatlantic Routes Are Intensely Concentrated, Limiting Entry by Smaller, Nonaligned Carriers

Transatlantic traffic between Europe and the United States accounted in 2015 for the highest proportion of total global traffic (about 11 percent), as measured by global passenger-kilometers. Immune alliance carriers have maintained high market shares on these transatlantic routes. Long-haul routes are difficult for smaller, nonaligned airlines to enter because they require infrastructure and other capabilities that are often outside the scope of smaller carriers’ resources and business models. An examination of market shares for the busiest immunized Europe–U.S. routes served by oneworld (American and British Airways) and SkyTeam (Delta and Air France KLM) before and after consolidation of the major U.S. carriers (i.e., 2007 and 2016) reveals the key role of market entry. These routes include: (1) Paris (CDG) to New York (JFK), Los Angeles (LAX), and San Francisco (SFO); and (2) London Heathrow (LHR) to Dallas Forth Worth (DFW), JFK, LAX, and SFO.

On the majority of routes, only relatively small changes in combined alliance carrier (nonstop) shares...
occurred between 2007 and 2016. For example, the combined share of Delta and Air France on the CDG–JFK and CDG–LAX routes remained at around 80 percent over the period. The combined share of American and British Airways remained at 100 percent on the LHR–DFW route. American-British Airways' share dropped from 67 percent to 62 percent on the LHR–JFK route, but increased somewhat on the LHR–LAX (51 percent to 59 percent) and LHR–SFO (40 percent to 45 percent) routes. With the exception of the CDG–SFO route, where United's entry likely forced Delta-Air France’s share down from 100 percent to 75 percent, the major source of new or expanded entry on routes dominated by the immunized alliances is smaller, nonaligned carriers. By 2016, NAI had entered the CDG–JFK and CDG–LAX markets and stolen shares from alliance carriers. But these shares were small (3–4 percent). Virgin Atlantic, which was already in the market in 2007, expanded modestly on the LHR–JFK and LHR–SFO routes (about 3 percent) but not enough in the latter case to counter growth in market share by the alliance carriers.48

While entry or expansion of smaller carriers is likely to dilute highly concentrated route markets and introduce pricing discipline, those carriers face significant challenges to enter these markets and sustain service. NAI’s entry into U.S. markets was a protracted process.49 Its application for a foreign air carrier permit under the U.S.-European Union Air Transport Agreement remained pending before the DOT for over two years amid controversy over whether the airline’s labor practices complied with the Agreement’s requirements. U.S. airlines and their unions opposed the application, but the DOT finally approved the application in 2016.50 In a similar vein, the three U.S. legacy carriers opposed certain services operated by Emirates, Etihad Airways, and Qatar Airways and any planned expansion of those services on the basis that those carriers benefit from alleged state subsidies.51

Thus, the immunized alliance carriers have used political strategies to obstruct new competitive entry by foreign airlines into alliance-dominated U.S. routes.52

**U.S. Alliance Gateways Are Highly Concentrated, Limiting Choice Behind and Beyond the Gateway**

The claimed benefits from immunized, complementary end-to-end alliance networks depends on competitive conditions at U.S. alliance gateways where consumers connect to behind- and beyond-gateway markets. The wave of consolidation over the last decade in the United States has increased concentration at many airports that are the point of connection for alliance traffic. This is particularly true of smaller and medium-sized airports in the United States.

The table below shows market concentration53 at selected airports of the 22 U.S. alliance domestic connecting airports for Europe–U.S. traffic for the three immunized alliances in 2007 and in 2016.54 Results show that concentration increased at over 60 percent of connecting airports on one-stop transatlantic itineraries between 2007 and 2016. Increases in concentration at selected airports were as high as 84 percent at Phoenix (PHX), 63 percent at Philadelphia (PHL), 53 percent at Seattle (SEA), and 49 percent at San Diego (SAN). Decreases in airport concentration were significant at Houston (IAH) (–31 percent) and Minneapolis-St. Paul (MSP) (–31 percent) (not shown). But such decreases were outstripped by increases in concentration at other airports. And 50 percent of airports that showed increases in concentration over the period were highly concentrated in 2016. The DOJ/Federal Trade Commission (FTC) Horizontal Merger Guidelines recognize that highly concentrated markets are much more conducive to anti-competitive outcomes through the enhanced likelihood that market participants will exercise market power, either alone or in coordination with rivals.55

High concentration at U.S. alliance gateways means less competition from other carriers and less choice for consumers. For example, the Dallas Ft. Worth airport supported oneworld’s application for ATI in 2010, stating that ATI would “benefit DFW and its travelers because the London–DFW route will develop into a ‘pipeline’ route with improved services.”56 The reality is far different. Not only did oneworld maintain a monopoly on the LHR–DFW route in 2016, as it did in 2007, but ATI has not produced any discernable increases in behind/beyond-gateway benefits. For example, the number of airports served from DFW by American flights was 75 in 2007 and increased only to 78 in 2016.57 PHX, a connecting airport also used by oneworld, saw the highest increase in concentration (80 percent) and 20 percent fewer carriers operating between 2007 and 2016.58 And the number of cities served did not change at all over the period. Similar analyses can be done for other airports that serve as connecting hubs for alliance traffic.

Much like the effects that highly concentrated immunized transatlantic routes have on discouraging entry, high concentration at alliance connecting airports also raises entry barriers and increases the risk that smaller nonaligned carriers (e.g., low-cost carriers) will be foreclosed from interlining at alliance hubs. And in cases where there is competition on connecting alliance itineraries, high hub concentration increases incentives for carriers to coordinate instead of compete. These concerns undercut arguments that
immunity promotes benefits for consumers in behind- and beyond-gateway markets in the United States.

**Policy Implications for ATI**

The foregoing analysis raises troubling questions about the competitive implications of granting ATI for airline alliances, with serious implications for U.S. consumers. U.S. policies regarding airline alliances should not exist in an international vacuum. Domestic consolidation has affected the role and dominance of U.S. network carriers in their respective alliances on domestic nonstop routes and the behind- and beyond-gateway markets, which are directly connected to the international routes these carriers and their immunized alliance partners serve. Thus, ATI has a profound impact on competition and consumer welfare in international and domestic markets. Below are suggestions and policy recommendations that emerge from this discussion. Specifically, the DOT should:

- Frame an ATI policy that more proactively responds to changes in competition conditions in U.S. markets by subjecting grants of ATI to sunset provisions;
- Look skeptical at arguments that ATI creates benefits for consumers in behind-gateway and beyond-gateway markets and require carriers to demonstrate that ATI has benefited consumers;
- Conduct periodic (five-year) reviews of grants of ATI, consistent with the time limitation the DOT imposed, for the first time, on the duration of its grant of ATI to the Delta-Aeromexico alliance;
- Make ease of entry by nonalliance carriers a primary consideration in reviewing existing and prospective grants of ATI; and
- Reject arguments that alliances require ATI because they need to compete in the “alliance market.”

**Endnotes**


### Changes in Concentration at Selected U.S. Alliance Connecting Airports (2007–2016)

<table>
<thead>
<tr>
<th>Airport</th>
<th>HHI in 2007</th>
<th>HHI in 2016</th>
<th>Percentage Increase in HHI</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atlanta (ATL)</td>
<td>4,454</td>
<td>5,633</td>
<td>26%</td>
</tr>
<tr>
<td>Boston (BOS)</td>
<td>1,391</td>
<td>1,892</td>
<td>36%</td>
</tr>
<tr>
<td>Charlotte (CLT)</td>
<td>5,681</td>
<td>7,598</td>
<td>34%</td>
</tr>
<tr>
<td>Las Vegas (LAS)</td>
<td>1,251</td>
<td>1,807</td>
<td>44%</td>
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<tr>
<td>Philadelphia (PHL)</td>
<td>2,272</td>
<td>3,700</td>
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</tr>
<tr>
<td>Phoenix (PHX)</td>
<td>1,715</td>
<td>3,153</td>
<td>84%</td>
</tr>
<tr>
<td>San Diego (SAN)</td>
<td>1,144</td>
<td>1,705</td>
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<tr>
<td>San Jose (SJC)</td>
<td>1,387</td>
<td>1,997</td>
<td>44%</td>
</tr>
<tr>
<td>Seattle (SEA)</td>
<td>1,643</td>
<td>2,515</td>
<td>53%</td>
</tr>
</tbody>
</table>

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11. Press Release, IATA, More Than 7% Increase in Air Travel Compared to Last Year (Oct. 9, 2017), http://www.iata.org/pressroom/pr/Pages/2017-10-09-01.aspx (shares based on total alliance passenger-kilometers scheduled).


16. Antitrust Modernization Comm’n, Report and Recommendations 334 (2007), http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf. The AMC went on to explain that the courts should “construe all immunities and exemptions from the antitrust laws narrowly.” Id. at 337.

17. Id.

18. 49 U.S.C. § 41309(b)(1). The showing must also demonstrate that a need or benefits cannot be met or achieved by reasonably available alternatives that are materially less anticompetitive. Public benefits include international comity and foreign policy considerations. Id.


23. Other alleged benefits include streamlined ticketing and baggage handling and consolidated frequent flyer benefits across alliance carriers.


29. W. Tom Whalen, A Panel Data Analysis of
31. At the same time, productive efficiencies (as measured by load factors) are 0.5–5.0 percent lower for joint venture routes as compared to those where alliance partners operate with ATI. See Volodymyr Biloktach & Kai Hüscherlath, Balancing Competition and Cooperation: Evidence from Transatlantic Airline Markets (ZEW Ctr. for European Econ. Research, Discussion Paper No. 15-059, 2015), http://ftp.zew.de/pub/zew-docs/dp/dp15059.pdf.
38. Id. at 16–17, 32–33.
44. Id. at 2, 19–21. American and Qantas subsequently withdrew their application but later refiled their request for ATI with the DOT, which remains pending. American-Qantas ATI Application, supra note 4.
47. See supra note 14.
53. Based on the Herfindahl-Hirschman Index (HHI).
57. See supra note 54 (based on seat data).
58. The analysis compared cities served by American and US Airways in 2007 to those served by American in 2016. This was necessary to create consistency due to the American-US Airways merger in 2013.
Meet the New Editor

Roy Goldberg is a partner in the Washington, D.C., office of Stinson Leonard Street LLP. Roy represents airlines, trade associations, and other aviation entities in dealing with airports and federal, state, and local governments, to enable clients to conduct their operations free of unfairly burdensome regulations, fees, taxes, and charges, and other unwelcome interference with aviation and commercial operations. Roy focuses on ensuring that airports that receive federal funds comply with their “grant assurances,” and has filed complaints with the FAA and in the federal courts of appeals to challenge airport conduct. In 2016, Roy assisted the City of Ontario, California, in obtaining transfer of the ownership of Ontario International Airport from Los Angeles. Roy previously represented seven airlines in their successful effort to reduce by hundreds of millions of dollars the rates and charges imposed by Los Angeles International Airport for use of its terminals. He also represented airlines in successful challenges to user fees imposed by the FAA for air traffic control, the Transportation Security Administration for airport security screening, the State of Hawaii for cargo inspection fees, and the Township of Tincum, Pennsylvania, for use of runways at Philadelphia International Airport. Roy also has represented major airlines in negotiating airport leases and litigated many cases involving antitrust issues and patents in the airport and airline industry. Roy enjoys spending time with his daughter, who is working on her burgeoning medical career (especially going on ski trips), and his son, who is a musical theater major at Muhlenberg, and attributes his love of airports, airlines, and aviation to his father taking him to the observation deck at the old Kansas City municipal airport to watch 727s land against the backdrop of the KC skyline.

Meet the New Editor

F. Scott Wilson is the principal in Uplands Consulting LLC, where he provides transactional and restructuring services in the aircraft financing sector as well as pro bono legal services to nonprofit companies in southern New England. Before that he served from 1994 to 2017 as the Associate General Counsel – Finance & Leasing with the Pratt & Whitney Division of United Technologies Corporation (UTC), where he was also the Vice President and General Counsel of UT Finance Corp. and Pratt & Whitney Engine Leasing LLC, all based in Hartford, Connecticut. In those capacities he supervised all legal aspects across the broad range of aircraft and engine sales, financing, and leasing issues. From 1996 to 2015 he also advised the Corporation with respect to UTC’s diverse aerospace business activities in Russia. He was also Pratt & Whitney’s chief aviation bankruptcy lawyer and served on creditor committees in the bankruptcy cases of United Airlines, Delta Air Lines, Republic Airways, TWA, Eclipse Aviation, and Hawker Beechcraft, among others. Scott continues in his role as Pratt & Whitney's delegate to the Aviation Working Group (AWG) and was intimately involved with the development of the Cape Town Convention since its inception, especially including matters relating to aircraft engines and the international registry. He was on the board of the AWG from 2008 to 2014 and was the AWG's delegate to the International Registry Advisory Board and predecessor organizations from 2001 to 2017. He also held positions in the legal departments at British Aerospace Inc. (1985–1994) and the U.S. Department of the Navy (1981–1985). Scott holds an MA in public policy from Trinity College, a JD from Cleveland State University, and a BA in political science from The College of Wooster. Scott is the son of a Naval aviator. He and his wife, Holly, also a lawyer, divide their time between Hartford and Nantucket. They are the proud parents of two children, a son who is a computer security specialist in the D.C. area and a daughter who is a teacher, coach, and associate dean at a boarding school in New Jersey.
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June 18, 2019 | Washington, DC

Annual Meeting
September 12–13, 2019 | Seattle, WA