# Alliances, Immunity, and the Future of Aviation

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*Seventeen years after the U.S. Department of Transportation (DOT) granted antitrust immunity (ATI) to an innovative KLM-Northwest joint venture, ATI has become one of the most controversial issues in current aviation law and policy. This article reviews the history of ATI and its statutory foundation and attempts to place airline alliances in a more contemporary perspective. Criticism of the alliance/ATI development appears to be predicated on a misunderstanding of both the role of alliances as an essential element in the liberalization of international air services and the importance of ATI as a factor in that success. The article suggests that the criticism of DOT's handling of alliances and ATI fails to understand the evolution of the international air transportation networks and puts at risk a major aviation policy success story. DOT's approach to international airline alliances and ATI, the article concludes, has been prescient and insightful, has benefited both the industry and its customers, and should not be disturbed.*[1]

In 1992, the United States and the Netherlands entered into the world's first Open Skies agreement,[2] predicated on a new DOT policy initiative.[3] The agreement eliminated most of the regulatory constraints on entry, capacity, and pricing that had characterized bilateral air transport agreements since the first U.S.-U.K. Bermuda accord in 1946.[4] The Carter administration had launched the quest for more liberal bilateral aviation arrangements in 1977. Fifteen years later, by eliminating all regulatory constraints on carriers' access to all gateway cities, the Open Skies model took liberalization to an entirely new level.

Shortly after the agreement was concluded, Northwest and KLM, already partners in a marketing and operational joint venture, filed a petition with DOT seeking immunity from the antitrust laws for all joint activities undertaken within the framework of their alliance.[5] They sought to integrate their services more completely and to operate as though they were a single carrier. In January 1993, DOT approved the agreement and granted the requested antitrust exemption.[6]

The U.S.-Netherlands Open Skies agreement, and the order granting ATI that followed shortly thereafter, established the template for a major transformation of international aviation. DOT had hoped it would do just that. As it made clear in its order approving and immunizing the KLM-Northwest alliance: "The United States signed the Open Skies Accord with the Netherlands not only to liberalize aviation services with the Netherlands, but also to encourage other EC members to enter into an open skies regime with the United States."[7]

In the years since, DOT's expectation has been vindicated. Liberalized regimes and Open Skies agreements have become increasingly ubiquitous—not just for air services to and from the United States, but worldwide. To date, the United States has entered into 94 Open Skies agreements,[8] many of which have been followed by grants of ATI to alliances operating in the newly liberalized bilateral markets.[9] The confluence of Open Skies agreements, alliances, and ATI has spawned a fundamental reinvention of the global air transport industry.

Today, however, a newly intensified debate about the effect of airline alliances and ATI on competition threatens to endanger the progress that the United States and its many Open Skies partners have made in fostering a more efficient and competitive global aviation system. The outcome will have profound implications for the future of commercial aviation.

Evidence of the challenge abounds:

- Legislative proposals passed in 2009 by the U.S. House of Representatives would sunset existing ATI grants to airline alliances and require the establishment of new criteria for the review of future applications, while tightening further the requirements for U.S. citizen control of U.S. airline operations.[10]
- In a 55-page objection to DOT's tentative decision in the recent "Star II" proceeding,[11] in which DOT approved, inter alia, the addition of Continental Airlines to a previously immunized alliance, the Department of Justice suggested that the benefits of inter-alliance competition had not been established.[12]
- In October 2009, Senators Herb Kohl and Orrin G. Hatch, chairman and ranking member, respectively, of the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights,

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informed Secretary of Transportation Ray LaHood that the Subcommittee would examine "whether the DOT is the appropriate agency to have final authority over the grant of antitrust immunity for international airline alliances, or whether legislation should be drafted to give greater authority to the Justice Department."[13]

These developments appear to reflect an attitude approaching outright hostility, at least in some quarters of the U.S. government, toward the airline industry and its efforts to find a coherent and contemporary operating model.

### Importance of strategic alliances

Strategic alliances are not unique to the airline industry. They are but one form of partnering among business enterprises on a continuum of transaction types, ranging from passive investment by one company in another to a complete merger of two business entities.[14] Increasingly popular in today's rapidly evolving marketplace, alliances allow enterprises to respond more efficiently to changes in the commercial environment without incurring the costs, delays, complications, or permanent commitments associated with a full merger. The size and character of today's global marketplace pose challenges that require companies of all sizes to enhance their reach and competitiveness through carefully structured partnerships.[15] As a general proposition, alliances generate important competitive benefits. Put simply, if a combination of resources from different enterprises is necessary to compete effectively in a market, then allowing the combination to take the most efficient form effectively lowers the barriers to entry into that market.

In international aviation, alliances generate an additional and unique benefit not found in other sectors: airline alliances have been a vital contributor to the liberalization of worldwide air transport. They are helping to break down barriers to competitive entry that even Open Skies agreements leave unaddressed. For example, an Open Skies agreement between two countries does not allow airlines from either country to establish a system of domestic feeder flights in the other country. A well-crafted alliance agreement, however, can permit an airline to enjoy the benefits of such a system without violating the domestic law of the other country. Similarly, no Open Skies agreement guarantees that an airline of one country will be able to find enough traffic to make flights to the other country economically viable, particularly if flights beyond that other country are restricted by the policies of third countries.[16] Alliance participation allows an airline to create a network that enables it to fill up seats throughout its system with traffic to a variety of destinations, even where the "last segment" operations to some of those destinations must be on other airlines.

Alliances also have helped airlines address the most conspicuous of the residual nationality-based impediments to rational industry structure and performance—the laws in most countries that make ownership and control by citizens a prerequisite to eligibility for an airline license.[17] Those laws effectively prohibit cross-border mergers and acquisitions and even some forms of cooperation—transactions that have enabled the globalization of so many other industries. By facilitating the sharing of resources, including capital and possibly equity, without a change of control, airline alliances have engendered many of the competitive benefits of rationalization that would be available in a more conventional legal and diplomatic environment.

Thus, by allowing airline partners to sell their services freely on each other's equipment and coordinate their service offerings, alliances have allowed much of the industry to replicate the advantages enjoyed by the efficient global networks in many other sectors (e.g., telecommunications, shipping, financial services). They also have facilitated a new and robust form of global competition. In sum, given the restrictions that continue to impede efficiency and competition in international air transport even after the spread of liberal air services agreements, the emergence of alliances—and particularly immunized alliances—arguably has represented the most important development in the industry since the introduction of jet aircraft.

### Origins of DOT's jurisdiction over international alliances

Congress, when it deregulated the U.S. airline industry and abolished the Civil Aeronautics Board (CAB), preserved and transferred to DOT the CAB's discretionary authority to exempt certain forms of airline conduct from the operation of the antitrust laws.[18] Although DOT's authority relating to *domestic* airline mergers, acquisitions, and agreements was terminated on January 1, 1989, DOT's authority to approve and immunize agreements relating to *international* aviation was left wholly intact.[19] This outcome was consistent with a DOT recommendation to Congress and wholly supported by the Department of Justice.[20] The congressional decision to maintain the CAB's antitrust exemption authority for agreements relating to international aviation, and to keep it at DOT, was predicated on a recognition that competition in international aviation is closely related to, and often a product of, the bilateral negotiating process.[21] If the U.S. government was to attempt through diplomacy to move its aviation trading partners coherently toward a more market-based and pro-competitive regime, it was essential that the antitrust exemption authority be vested in the agency primarily responsible for the development of U.S. international aviation policy. Some 94 Open Skies agreements later, the wisdom of that assessment is undeniable.

## Alliances and public benefits: The emerging jurisprudence

If DOT finds that a proposed agreement between airlines would substantially reduce or eliminate competition, DOT can approve the agreement only if it "is necessary to meet a serious transportation need or to achieve important public benefits" and if there is no less anticompetitive alternative.[22] DOT is required to exempt from the antitrust laws any agreement approved on those grounds to the extent necessary to allow the transaction to proceed.[23]

Where DOT finds that an agreement is not adverse to the public interest and does not violate the statute—i.e., that it does not substantially reduce or eliminate competition—DOT is required to approve it. A grant of ATI is permitted in such a case only if it is "*required* by the public interest," however, and then only "to the extent necessary to allow the person to proceed with the transaction specifically approved by the order and with any transaction necessarily contemplated by the order."[24]

While references to the public interest appear in both the test for approval ("not adverse to the public interest") and the test for granting ATI ("required by the public interest"), the latter test is substantially more daunting. As DOT wrote in its seminal *KLM/Northwest* decision: "The Department has always recognized that the public interest standard in [49 U.S.C. § 41308] is a much more stringent standard than [49 U.S.C. § 41309's] public interest standard."[25] DOT also has recognized consistently that, "[b]ecause the antitrust laws represent a fundamental national economic policy, one that serves consumers and travelers well, . . . immunity from the antitrust laws should be the exception, not the rule."[26]

Nevertheless, because the prospect of enjoying the benefits of that exception became so attractive to carriers following the KLM/Northwest decision, and because DOT had made it clear that an Open Skies agreement was an essential prerequisite to consideration of a request for ATI, foreign government interest in Open Skies relationships with the United States began to increase dramatically. The result was a rapid increase in international aviation liberalization, in the number of alliance ATI applications submitted to DOT, and in the frequency of ATI awards.

It was essential, during a time of such ferment, that DOT assess the real-world consequences for competition and consumers. DOT's first formal assessments of immunized alliances and their effect on international aviation markets were issued in 1999 and 2000, after seven years' experience with immunized alliances in Open Skies markets. Based wholly on an empirical analysis, DOT's conclusions regarding the role and impact of airline alliances were reported in two detailed reports: "Global Deregulation Takes Off" (December 1999) and "Transatlantic Deregulation: The Alliance Effect" (October 2000).[27]

The 1999 report told a remarkable story. It found that, operating within the framework of new Open Skies agreements, immunized alliances were stimulating demand, accelerating system growth, and producing more attractive service and price offerings. The report highlighted important consequences not just for the users of air transportation, but also for local and national economies through increased air service. It concluded that global deregulation and alliance development were still at an embryonic stage and predicted the continued expansion of alliances in the future, together with the emergence of new ways of competing as alliances continued to expand and overlap each other.

The 2000 report, which was similarly quantitative in its approach, concluded that "the pro-consumer changes identified in our first report dramatically accelerated during 1999."[28] Importantly, DOT found that "[a]lliance-based networks are the principal driving force behind transatlantic price reductions and traffic gains. The 'Alliance Network Effect' will therefore play a key role in the evolving international aviation economic and competitive environment."[29]

The case for international alliances was a powerful one, but the "fundamental national economic policy" reflected in the antitrust laws required that any grant of ATI be predicated on a transparent and sensible set of criteria.

### *Approving agreements under 49 U.S.C. § 41309*

DOT's analysis of whether to approve an alliance agreement is typically based on the Clayton Act[30] test, long used to predict the competitive effects of mergers. The issue is whether the alliance would be likely to substantially reduce competition such that the applicants would be able to exercise market power—i.e., to profitably charge supracompetitive prices or reduce service or quality below competitive levels in any relevant market. This entails a determination of whether the alliance would significantly increase concentration, whether the alliance would raise concern about potential anticompetitive effects in light of other factors, and whether entry into the market would be timely, likely, and sufficient to either deter or counteract a proposed alliance's potential for harm.

DOT's jurisprudence during the past decade treats an Open Skies agreement and its guarantee of open market access as sufficient in most cases to prevent partners in an alliance from reducing or eliminating competition or exercising market power. Where an Open Skies agreement exists, DOT typically finds that it can approve a proposed alliance agreement under 49 U.S.C. § 41309 on the ground that it is not adverse to the public interest.

*Granting ATI*

The second element of a DOT alliance decision—whether to award ATI to an approved alliance under the more stringent test of 49 U.S.C. § 41308 ("required by the public interest")—is now predicated on the applicants' ability to demonstrate that the alliance will deliver public benefits of sufficient quality and magnitude to justify the exemption.

DOT decisions both granting and denying ATI over the past few years reflect a sophisticated understanding of the way alliances have evolved and how airline networks function. The orders make clear that ATI will be awarded only where the applicants can demonstrate that the public benefits likely to flow from the alliance will be significant—in keeping with the positive effects DOT described in its 1999 and 2000 reports—and that those benefits would not materialize without a grant of ATI.[31] Thus, for example, in its most recent award of ATI as of this writing—to the expanded Star immunized alliance—DOT concluded that the alliance would produce "numerous public benefits," including

- an expanded network serving many new cities;
- new online service, including both new routes and expanded capacity on existing routes;
- enhanced service options such as more routings, reduced travel times, expanded nonstop service in selected markets, new fare products, and integrated corporate contracting and travel agency incentives;
- enhanced competition due to the addition of a major new gateway, the elimination of multiple markups on code-share segments, and more vigorous competition between alliances;
- cost efficiencies;
- strengthened financial positions for the participating carriers; and
- substantial economic benefits to communities.[32]

It would not have been sufficient, however, for the applicants merely to make "theoretical and attenuated" predictions about the likely public benefits of the enlarged alliance.[33] DOT noted that "[t]he applicants explain in detail how they will expand the existing immunized alliance to incorporate the largely complementary services of Continental"—the carrier being added to the Star immunized alliance—by implementing a "metal neutral," highly integrated, revenue-sharing joint venture agreement.[34] DOT explained further why it had concluded that ATI was essential to realizing the alliance's potential benefits:

> The carriers are not likely to achieve the efficiencies and cost savings on their own; an integrated economic benefit sharing arrangement is needed to provide the incentive for the carriers to invest the significant resources necessary to create additional consumer benefits. By sharing risk and optimizing the joint network, the alliance members will likely accelerate the introduction of new capacity, give consumers more travel options and shorter travel times, and reduce fares at the margin, due to the elimination of multiple mark-ups. Antitrust immunity is well suited to enable carriers to achieve merger-like efficiencies and deliver benefits that would not otherwise be possible.[35]

In sum, DOT has reached its conclusions about ATI and public benefits carefully and has validated them repeatedly. DOT knows that anachronistic regulatory constraints continue to impede the international operations of airlines everywhere, and that those constraints compromise the value that aviation delivers to consumers and national economies. Through a carefully calibrated exercise of its long-standing authority to grant exemptions from the antitrust laws, DOT has helped the industry to begin overcoming these impediments and to begin replicating the kind of market that would emerge under more conventional legal and diplomatic arrangements.

## The ATI controversy

Much of the controversy surrounding DOT's handling of alliance agreements is attributable to the conviction among critics that alliances approved by DOT following the negotiation of an Open Skies agreement, if indeed unobjectionable on competition grounds as DOT has found, do not need an antitrust exemption to deliver the public benefits they promise. While acknowledging that DOT is required by the statute to approve an agreement that it finds will not reduce or eliminate competition, the opponents maintain that the statute prohibits DOT from granting an exemption from the antitrust laws in most cases because it is not possible to make the prerequisite finding that the public interest requires it. It is a seriously mistaken view. ATI, in most cases, is an essential prerequisite to realizing the competitive benefits that international strategic airline alliances can engender.

First, alliances have become as complicated as the international regulatory environment in which they operate. The risk that private attorneys general representing a large class of plaintiffs would seek treble damages for some perceived wrong means that, without immunity, the members of an alliance would be deterred from exploiting its potential efficiencies. Accordingly, it is critical that alliance parties have certainty regarding the lawfulness of their agreements.

To make matters worse, antitrust jurisprudence itself is murky in this area. The Department of Justice/Federal Trade Commission "Antitrust Guide for Collaborations Among Competitors" illustrates the challenge confronting alliance participants.[36] The document is nearly 40 pages of single-spaced "guidance" that would require interpretation by a team of antitrust experts working full time in the case of a complex, multiple-party, and multiple-market joint venture. Even then, the likely conclusions would be at

best tentative:

- What conduct is reasonably related to the objectives of the joint venture?
- Is it the least anticompetitive alternative?
- Is there a market analysis of its effects?

No safe harbors exist, just safety zones that themselves are severely hedged. No relevant examples are furnished.[37] In addition, critical questions in this area of antitrust law remain unsettled.[38] The financial consequences of failure in such cases are likely to be enormous. Alliance members can have no confidence in their ability, as defendants in a treble-damages case, to explain to a court after the fact the dynamics of a commercial aviation joint venture and the exigencies of networked operations.

While a complicated subject beyond the immediate scope of this article,[39] a legitimate and growing concern exists in some quarters that U.S. antitrust laws—and the inherently conservative jurisprudence that has developed under those laws—are not keeping pace with the emergence of newly important joint venture models. Some experts argue that the antitrust laws create an unhealthy chill on the development of strategic alliances and that this chill, in turn, generates anticompetitive effects. Congress itself has recognized the impact that the threat of treble-damage liability can have on joint ventures, including those involving the production of services.[40] In such an environment, DOT's carefully calibrated oversight, informed by its participation in the crafting and conduct of U.S. international aviation policy, provides a more appropriate regulatory framework for alliances than conventional antitrust litigation, with its inherent costs and uncertainties.

Unsurprisingly, airlines seeking a DOT antitrust exemption for alliance participation routinely state in their applications that they will not implement the alliance agreement without ATI. The statement represents an appropriate measure of caution—and in every case is based on the advice of antitrust counsel. DOT is correct to accord it significant weight. Without ATI, alliance members will not undertake to generate the innovative programs, service offerings, and scheduling efficiencies that typically benefit travelers.

DOT's decisions to grant ATI even to alliances that it finds will not substantially reduce or eliminate competition are consistent with the statutory test: Where it is clear that the parties will not proceed with the transaction in the absence of ATI, the exemption is indeed "required by the public interest."[41] The analysis is significantly reinforced by reference to the aviation diplomacy required for the further liberalization of aviation markets—a rationale that DOT is uniquely positioned to acknowledge and evaluate.[42]

## Conclusion

Airlines and regulators have always understood the value of efficient networks. For many decades, antitrust immunity facilitated a single, monopoly network operated by IATA. Today, we enjoy competition among a number of networks operating as immunized alliances. Immunity allows alliance participants—which cannot legally merge—to realize a level of economic integration that provides significant public benefits.

Open Skies, airline alliances, and DOT's savvy administration of its power to confer ATI have been a major public policy success story for consumers, global airline competition, and the airline industry itself. Proposals to tinker with that success should be considered with great care, and proponents of any alternative approach should bear the burden of showing how and why it would serve the public interest better.

## Endnotes

1. The authors take no position on any pending alliance ATI application.

2. Air Transport Agreement Between the United States and the Netherlands, Oct. 14, 1992, T.I.A.S. No. 11976.

3. *In re* Defining "Open Skies," DOT Docket 48130, Order Requesting Comments (Apr. 29, 1992); Final Order (Aug. 5, 1992).

4. Agreement Between the Government of the United States of America and the Government of the United Kingdom Relating to Air Services Between Their Respective Territories, Feb. 11, 1946, *reprinted in* 3 Av. L. Rep. (CCH) ¶ 26,540a, at 23,219.

5. The petition was filed pursuant to §§ 412 and 414 of the Federal Aviation Act of 1958, now codified at 49 U.S.C. §§ 41308 and 41309.

6. Joint Application of Northwest Airlines and KLM Royal Dutch Airlines, DOT Order 93-1-11 (Docket 48342) (Jan. 11, 1993). For a discussion of the statutory test for granting ATI, see text accompanying notes 22–24, *infra*.

7. *Northwest/KLM*, DOT Order 93-1-11, at 12.

8. See list of Open Skies agreements in force on the Department of State's website, at http://www.state.gov/e/eeb/rls/othr/ata/114805.htm.

9. See list of immunized alliances on the Department of Transportation's website at http://ostpxweb.dot.gov/aviation/X-50%20Role_files/immunizedalliances.htm.

10. H.R. 915, 111th Congress, 1st Sess. (passed by House of Representatives on May 21, 2009), §§ 426 (sunsetting all grants of ATI three years after effective date of legislation; developing new criteria for review of future applications) and 801 (providing that an airline shall not be deemed eligible for an air carrier certificate "unless citizens of the United States control all matters pertaining to the business and structure of the air carrier, including operational matters such as marketing, branding, fleet composition, route selection, pricing, and labor relations").

11. Joint Application of Air Canada, The Austrian Group, British Midland Airways Ltd., Continental Airlines, Inc., Deutsche Lufthansa AG, Polskie Linie Lotniecze Lot S.A., Scandinavian Airlines System, Swiss International Air Lines, Ltd., TAP Air Portugal, and United Air Lines, Inc. to Amend Order 2007-2-16 under 49 U.S.C. §§ 41308 and 41309 so as to Approve and Confer Antitrust Immunity, DOT Docket OST-2008-0234 ("Star II").

12. Star II, *supra* note 11, Comments of the Department of Justice on the Show Cause Order (Public Version), at 33–34 ("The Applicants inflate the importance of inter-alliance competition . . . The Applicants also suggest, without evidentiary support, that consumers benefit from competition between alliances, particularly immunized alliances.").

13. Letter from Senators H. Kohl & O. Hatch to R. LaHood, Secretary of Transportation (Oct. 13, 2009).

14. John P. Beavers, *Strategic Alliances: What They Are and Why They Are Popular*, BOARDANDEXECUTIVE.NET (Aug. 2001), www.boardandexecutive.net/strategic/79.asp.

15. *Id.*

16. In an Open Skies agreement, Party A forfeits the right to object to flights by airlines of Party B between the territory of Party A and third countries. But nothing in any Open Skies agreement requires

third countries to accept such flights.

17. U.S. airline citizenship requirements are set forth at 49 U.S.C. § 40102(a)(2) and (15).

18. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978).

19. Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 (1984), § 3.

20. Dep't of Transp., Administration of Aviation Antitrust Functions, Report to Congress Pursuant to Pub. L. 98-443, at 1, 22–25 (May 1987). DOT stated that "its authority to approve and immunize international agreements is an important element in its conduct of U.S. international aviation policy and regulatory oversight." *Id.* at 25. The Introduction noted that the report had been prepared by DOT and that "[t]he Department of Justice (DOJ) concurs in the recommendations contained therein." *Id.* at 1.

21. International reactions to a controversial and long-running CAB case launched in 1978 may have encouraged this delegation of responsibility. The CAB had proposed to stimulate international airline price competition by withdrawing the ATI extended since 1946 to the International Air Transport Association (IATA)'s tariff coordination activities. Agreements adopted by the International Air Transport Association relating to the Traffic Conferences, CAB Docket 32851, Order to Show Cause (June 9, 1978). The CAB proposal triggered a firestorm of criticism from U.S. trading partners everywhere as a highly objectionable exercise in unilateralism. Most other countries' policies not only tolerated IATA's industry price-fixing activities but also often relied on them, as did the United States itself for many years. Because the CAB did not receive statutory authority to suspend or investigate a tariff in foreign air transportation until 1972, the Board's only tool for addressing an issue relating to an airline's fares was its ability to disapprove the IATA agreement pursuant to which those fares were charged. *Id.* at 3. In 1982, after four years of tension in U.S. aviation relations, the United States concluded a novel memorandum of understanding with several European civil aviation authorities meeting under the auspices of the European Civil Aviation Conference. The "U.S.-ECAC MOU" established zones of pricing flexibility within which airlines would be allowed to set fares without government interference. Following the sunset of the CAB, DOT terminated the Show-Cause Proceeding without ordering any major change in IATA's tariff coordination machinery.

22. 49 U.S.C. § 41309(b).

23. *Id.* § 41308(c).

24. *Id.* §§ 41309(b), 41308(b) (emphasis added).

25. Joint Application of Northwest Airlines and KLM Royal Dutch Airlines, DOT Order 93-1-11 (Docket 48342), at 11 (Jan. 11, 1993).

26. Joint Application of Alitalia-Linee Aeree Italiane S.p.A., Czech Airlines, Delta Air Lines, Inc., KLM Royal Dutch Airlines, Northwest Airlines, Inc., and Société Air France for Approval of and Antitrust Immunity for Alliance Agreements under 49 U.S.C. §§ 41308 and 41309, DOT Docket OST-2004-19214 ("SkyTeam I"), Show Cause Order, DOT Order 2005-12-12, at 33.

27. U.S. Dep't of Transp., International Aviation Developments: Global Deregulation Takes Off (Dec. 1999), *available at* http://ostpxweb.dot.gov/aviation/Data/globalderegtake.pdf; U.S. Dep't of Transp., International Aviation Developments: Transatlantic Deregulation: The Alliance Network Effect (Oct. 2000), *available at* http://ostpxweb.dot.gov/aviation/Data/transatlantdereg.pdf ("2000 DOT Report").

28. 2000 DOT Report, *supra* note 27, at 1–2.

29. *Id.* at 5. DOT also found in its 2000 report that "[t]raffic on both alliance and non-alliance carriers have [*sic*] increased dramatically, demonstrating that deregulation and airline alliances have not simply re-allocated traffic among carriers but have stimulated additional demand. Increased supply (capacity) is a critically important component of consumer benefits in deregulated markets." *Id.* at 10. Moreover,

"[i]nternational airline alliances have improved service in historically underserved regions of the world and, as a result, have stimulated additional demand for air transportation in those markets." *Id.*

30. 15 U.S.C. §§ 12 *et seq.*

31. Moreover, the ATI enjoyed by many airline alliances is not a license to pillage. Airlines cannot obtain the global, comprehensive ATI enjoyed by labor unions, ocean common carriers, agriculture, professional sports leagues, newspapers, insurance providers, and others. Under current law, the only way airlines can obtain ATI is to apply to DOT for an exemption for specific activities pursuant to a specific agreement. All antitrust exemptions granted by DOT are conditional, and failure to comply with DOT's conditions can result in the loss of immunity. Finally, any agreement or activity that is exempted from the operation of the antitrust laws remains subject to DOT's authority to prosecute unfair or deceptive practices and unfair methods of competition (49 U.S.C. § 41712), which mirrors the authority of the Federal Trade Commission under § 5 of the FTC Act (15 U.S.C. § 45).

32. Star II, *supra* note 11, Order to Show Cause, DOT Order 2009-4-5, at 18–19.

33. SkyTeam I, *supra* note 26, Order to Show Cause, DOT Order 2005-12-12, at 34 (in proposing to deny the SkyTeam I ATI application, DOT stated: "we are reluctant to immunize the alliance agreements when the Joint Applicants have given us so little information about their plans for implementing a grant of antitrust immunity under section 41308").

34. Star II, *supra* note 11.

35. *Id.* The contrast between DOT's response to two separate efforts by the leading SkyTeam carriers to secure ATI for a major expansion of their immunized alliance, including the combination of the separately immunized Delta/Air France and Northwest/KLM alliances, highlights DOT's approach. In the first application in 2005, the details of the SkyTeam carriers' proposed expanded joint venture had not yet been developed in great detail. DOT found that the expanded alliance could be approved as not adverse to the public interest, but it was unable to find, on the basis of the material submitted by the applicants, that a grant of ATI was "required by the public interest." SkyTeam I, *supra* note 26, Order to Show Cause, DOT Order 2005-12-12, at 34. By contrast, SkyTeam's second attempt to expand its alliance, addressed in a 2007 joint application, was successful because, as DOT wrote, "the Joint Applicants now supply a detailed joint venture agreement that integrates international operations to such an extent as to suggest metal neutrality [indifference among participating carriers regarding which carrier's capacity they are selling in any given transaction] and seamless travel across one joint network." DOT found that the alliance would generate substantial public benefits, including "the introduction of new capacity and greater availability of discount fares across the entire joint network[,]" and that ATI was necessary to enable the carriers to achieve these "mergerlike efficiencies and . . . benefits." Joint Application of Alitalia-Linee Aeree Italiane S.p.A., Czech Airlines, Delta Air Lines, Inc., KLM Royal Dutch Airlines, Northwest Airlines, Inc., and Société Air France for Approval of and Antitrust Immunity for Alliance Agreements under 49 U.S.C. §§ 41308 and 41309, DOT Docket OST-2007-28644 ("SkyTeam II"), Show Cause Order, DOT Order 2008-4-17, at 15.

36. The guidelines were published in April 2000 by the Department of Justice and the Federal Trade Commission and are available at http://www.ftc.gov/os2000/04/ftcdojguidelines.pdf.

37. Another Department of Justice/FTC publication, Antitrust Enforcement for International Operations (Apr. 1995), *available at* http://www.justice.gov/atr/public/guidelines/internat.htm/, is not likely to be helpful either.

38. The Supreme Court has granted certiorari in a case that may provide guidance on whether and to what extent the marketing activities of an authorized joint venture are entitled to single-entity treatment under the antitrust laws. *See* Am. Needle, Inc. v. Nat'l Football League, 129 S. Ct. 2859 (2009).

39. *See* R. Shyam Khemani & Leonard Waverman, *Strategic Alliances: A Threat to Competition?* in Competition Policy in the Global Economy: Modalities for Cooperation (Leonard Waverman, William S. Comanor & Akira Goto eds., 1997).

40. The National Cooperative Research and Production Act, as amended, 15 U.S.C. §§ 4301–4306, was enacted to promote innovation, facilitate trade, and strengthen the competitiveness of the United States in world markets by (1) clarifying the applicability of the rule of reason standard to the antitrust analysis of joint ventures and standards development organizations, (2) providing for the possible recovery of attorney fees by joint ventures and standards development organizations that are prevailing parties in damage actions brought against them under the antitrust laws, and (3) establishing a procedure under which joint ventures and standards development organizations are liable for actual, rather than treble, antitrust damages.

41. 49 U.S.C. § 41308(b).

42. *See* Joint Application of Northwest Airlines and KLM Royal Dutch Airlines, DOT Order 93-1-11 (Docket 48342), at 12 (Jan. 11, 1993).