Double Marginalization and the Counter-Revolution Against Liberal Airline Competition

Hubert Horan
“DOUBLE MARGINALIZATION” AND THE COUNTER-REVOLUTION AGAINST LIBERAL AIRLINE COMPETITION

Hubert Horan
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Summary: In the last decade, the Department of Transportation has abandoned its previously liberal, market-oriented policies towards international airline competition. While the policies of the 1980s and 90s were designed to maximize industry competitive dynamics so that consumers could benefit from ongoing improvements in price and efficiency levels, recent DOT policies have sought to reduce competition and entrench the position of the largest carriers. These policies have already led to the consolidation of 26 previously independent transatlantic airlines into three collusive alliances that would be virtually immune from future competitive challenges, and in 2009 the DOT has initiated a process that could see 23 previously independent transpacific airlines consolidated into those three same collusive alliances. While the DOT proactively used “Open Skies” treaty negotiations in the 1990s to undermine the ability of governments to reduce consumer welfare through artificial competitive barriers, recent “Open Skies” negotiations with the EU and Japan reestablished that private, bilateral discussions between large legacy airlines and government officials could dramatically restructure international airline competition in favor of those established legacy carriers. While the DOT used antitrust immunity in the 90s as a tool that allowed small competitors such as KLM and Northwest to offer consumers improved schedules and lower prices in previously underserved niche markets, since 2003 the DOT has used antitrust immunity to enhance the market power of the largest incumbents, leading to pricing shifts that appear to have created multi-billion dollar annual consumer welfare losses.

The abandonment of consumer welfare-based airline antitrust policies and the sudden shift to unprecedented levels of international airline concentration was made possible by the DOT’s evisceration of traditional antitrust immunity evidentiary standards. The DOT’s recent immunity grants to members of the Star, Skyteam and Oneworld alliances were based on willful non-enforcement of the Clayton Act market power test and the Horizontal Merger Guidelines’ requirement that applicants present verifiable, case-specific evidence of public

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1 The author is a 30 year industry veteran, currently working as an independent consultant based in Phoenix, with substantial experience in all of the network, alliance, merger and competitive issues raised by these cases. A full list of publications and detailed biographical information is available at horanaviation.com. He has worked in the management of Northwest, America West, Swissair and Sabena, and has consulted for over 30 other carriers, but has no current economic or business interests in or with any of the parties to the cases discussed here.
benefits in order to meet the section 41308 test that immunity is required by the public interest. The DOT has supplanted the need for verifiable, case-specific evidence with a series of arbitrary “rules” that ensure that almost any antitrust immunity proposal will be found to automatically produce public benefits without any risks of creating market power. The most important of these is “double marginalization”, a rule which asserts that every time an immunity grant reduces international competition, consumer prices in certain connecting markets automatically fall 15-25%, regardless of actual market or competitive conditions.

This paper describes the process by which the DOT has used rules such as “double marginalization” to eviscerate traditional antitrust evidentiary standards, and argues that none of the post-2003 consolidation of international aviation would have been possible if the traditional public benefits or market power tests and the traditional evidentiary standards had been enforced. The dispute over evidentiary standards surfaced in late 2009 when the Department of Justice’s Antitrust Division objected when the DOT rubber-stamped the Star/Continental applicants’ unsubstantiated benefit claims. The DOT emphatically rejected the DOJ’s objections as an inappropriate interference with the DOT’s aviation policy and bilateral negotiation prerogatives, a position that was more fully articulated in a recent Dean and Shane Air and Space Lawyer commentary, which claimed that all recent DOT decisions were fully consistent with longstanding pro-consumer, pro-competitive policies, and attacked the DOJ and Congressional critics of the DOT’s antitrust approach as hostile to the interests of the US airline industry. This paper argues that the policies favoring extreme concentration and the effort to render the public benefits and Clayton Act tests meaningless reflect a major policy shift towards more active governmental management of airline industry structure, and represent a counter-revolution against the liberal airline competition policies of the 90s.

1. Evidence justifying ATI grants: “Copy/paste” as antitrust jurisprudence

Airlines applying to the Department of Transportation for antitrust immunity (ATI) must meet the strict section 41308 “required by the public interest” standard and prove that immunity “is necessary...to achieve important public benefits” that “cannot be achieved by reasonably available alternatives that are materially less anticompetitive.” The burden of proof for public benefits rests with the applicants, and the Horizontal Merger

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2 49 U.S.C. §§ 41308(b), 41309
Guidelines defines the evidentiary standards that efficiency claims used to meet the public benefits test must meet: “[the applicants] must substantiate efficiency claims so that the Agency can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so) how each would enhance the merged firm’s ability and incentive to compete, and why each would be merger-specific. Efficiency claims will not be considered if they are vague or speculative or otherwise cannot be verified by reasonable means”\(^4\)

Since ATI eliminates competition in the same manner that a full merger would, immunity cannot be granted unless DOT conducts a Clayton Act test of whether ATI would create or increase market power. The Joint Venture Guidelines and the Horizontal Merger Guidelines define these standards, including the need for evidence demonstrating the absence of risk that it could harm competition by increasing the ability or incentive to raise price or reduce output in any relevant market\(^5\) and evidence that markets are fully contestable, so that “entry would be timely, likely, and sufficient in its magnitude and scope to deter and counteract the competitive effects of concern.”\(^6\)

ATI evidentiary standards became a public controversy in mid-2009 when the DOJ identified numerous cases where the DOT’s Show Cause Order in the Star/Continental case failed to support its findings with the “detailed and fact-intensive analysis” demanded by these evidentiary standards, including:

- “the Applicants made no showing that such entry (that could curb any anti-competitive abuse) would be timely, likely, or sufficient”
- “The (DOT) Order contains no analysis of the competitive effects of immunizing the non-transatlantic international operations of Continental and United”
- “The Applicants have failed to show that nonstop entry would prevent fare increases by Continental and its antitrust immunity partners in overlap markets”
- “DOT cites the Applicant’s assertion that the ATI integrated venture will enable its participants to “pool resources to achieve substantial efficiencies and cost savings”. In DOJ’s view, it is not sufficient, however, merely to point towards claimed benefits; rather the Applicants need to demonstrate that immunity is necessary to achieve them. In this regard, the Applicants fall short.”
- “The Applicants present no evidence however, that customers will receive quantitatively or qualitatively different service if Continental receives antitrust immunity, compared to what would be provided if Continental merely interacted with the level of cooperation expected of any member of the broader, non-immunized Star Alliance”

\(^4\) Federal Trade Commission, Department of Justice, Horizontal Merger Guidelines (1997) p.31
\(^6\) Horizontal Merger Guidelines, p.25-6.
“The Applicants also suggest, without evidentiary support, that consumers benefit from competition between alliances, particularly immunized alliances”

“The Applicants overemphasize the likelihood that immunity for the proposed alliance will substantially reduce double marginalization (extra markups imposed on joint fares)... In fact using 2005-2008 data, DOJ has found that connecting fares offered by non-immunized alliance carriers for transatlantic routes are no more expensive than fares offered by immunized alliances”

“The analysis underlying DOT’s conclusions on carve-outs is unclear. The order declines to carve-out the overlap transborder routes in which Continental and the Star ATI members currently compete on an nonstop basis without citing evidence from the record describing the public benefits likely to result from coordination on these routes... The Order cites no evidence to support revoking the (Frankfurt-Chicago/Washington) carve-outs beyond the Applicants own self serving statements. The Applicants do not provide specific evidence or quantification of diminished efficiencies or consumer value even though Star members have long operated carve-outs imposed in prior cases”

“DOT dismisses concerns about the scope of the immunity on the grounds that the other Star partners have had global immunity with each other for many years. Therefore DOT concludes that it “has enough information to analyze alliance plans” and that restricting the scope here would unfairly disadvantage Continental. DOT does not cite the other information it relies upon to analyze the alliance plans, nor does it explain how Continental, or more significantly consumers, would be harmed by the lack of global immunity”

In Star/Continental, DOT had not required the applicants to present verifiable, case-specific evidence, and did not undertake an independent, objective evaluation of the applicant’s claims. In fact the DOT Show Cause “finding” that immunity would create public benefits consisted of nothing more than a verbatim repetition of the claims in the application. The DOT’s public benefits methodology was literally nothing more than “copy/paste”. The DOT’s approach had been no more rigorous on the other major ATI cases of the past decade but until Star/Continental and OneWorld cases in 2009, no outside parties had ever commented as to whether these approaches were consistent with the law or established review standards.

DOT attacked the DOJ evidentiary concerns in its Final Order as an inappropriate attempt to undermine its international aviation policies: “Were we to suddenly change our antitrust immunity and public interest approach, as DOJ suggests, the credibility of the U.S. government with its international aviation partners would be significantly compromised and our ability not only to reach new Open-Skies agreements but also to maintain those agreements that we have already achieved would be undermined.” DOT made no attempt to justify or explain the evidentiary approaches that DOJ had criticized, and only made minor concessions to the separate

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9 oneworld, supra

Horan, “Double Marginalization and the Counter-Revolution Against Liberal Airline Competition” Draft 31 March 2010, page 4
DOJ argument that overlapping nonstop routes that would lose competition should be carved out of the final immunity grant. Press reports suggested a heated dispute between the two departments that echoed these competing “antitrust evidentiary standards” versus “international aviation competition policy” positions, a debate that required mediation from President Obama’s chief economic adviser, Lawrence H. Summers. Filings in the Oneworld case use more measured language but the gap between the underlying antitrust approaches has not diminished.

2. “Antitrust evidentiary standards” versus “the future of global aviation”

In a recent commentary in the American Bar Association’s Air and Space Lawyer, Warren Dean and Jeff Shane’s presented a fuller articulation of the “aviation policy” side of this dispute, arguing that DOT’s ATI decisions are an integral part of its overall approach to international aviation, and cannot be isolated from “Open Skies” and other bilateral negotiating policies. Dean and Shane directly echoes the DOT’s response to the DOJ’s Star/Continental criticism in that it sees an unbreakable link between DOT’s role in negotiating aviation treaties with foreign countries and its role in enforcing US antitrust laws. They portray the dispute as a rearguard action led by DOJ and certain Members of Congress against the liberal regime initiated by the original 1990s “Open Skies” treaties. In Dean and Shane’s view DOJ and others critical of recent ATI decisions were undermining what has been “a major aviation policy success story” because of their “outright hostility” to the interests of the US airline industry which had blinded them to the many “unique benefits” created by immunized alliances

Dean and Shane reframe the discussion away from the “lax versus rigorous evidentiary standards” question posed by DOJ by claiming that the DOT’s pro-alliance agenda is critical to the future of aviation. They describe the 1992 US-Netherlands “Open Skies” Agreement and the resulting Northwest/KLM alliance as “the template

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10 Star/Continental, Final Order supra
12 oneworld, DOJ Comments and Show Cause Order, supra
14 id p 18; Although no submission in any recent ATI cases questions the current jurisdictional arrangements, they aggressively defend the 1984 decision to keep both functions within DOT, even though it had been stripped of antitrust oversight over domestic airlines, and point out that this linkage facilitated the negotiations of the 1990s treaties “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.” The question is whether DOT is still using its international ATI authority to create a “more market-based and pro-competitive regime” as it did in the 90s
15 id p1,17,21

for a major transformation of international aviation” and claim that the resulting “confluence of Open Skies agreements, alliances and ATI has spawned a fundamental reinvention of the global air transport industry”, and even assert that “the emergence of alliances—and particularly immunized alliances—arguably has represented the most important development in the industry since the introduction of jet aircraft.” Even though DOJ’s comments were strictly limited to evidentiary standards and said absolutely nothing about any of the DOT policies and Dean and Shane favor, they feel that the DOJ’s comments threaten this “more efficient and competitive global aviation system” and the outcome of the DOT-DOJ dispute “will have profound implications for the future of commercial aviation.”  

Dean and Shane do not directly acknowledge any of the DOJ’s specific Star/Continental evidentiary concerns, but they assert that whatever objections DOJ might have had are wrong because the DOT findings fully satisfied both the public benefits and the Clayton Act tests. Thus the two parties have used the same legal requirements and the same case evidence to reach exactly opposite conclusions—DOJ said that the DOT’s findings were hopelessly deficient while Dean and Shane say that DOT’s findings in Star/Continental were completely consistent with the law, and ATI could not have been granted in these cases unless these tests had been properly administered. In order to make sense of the competing views about industry consolidation and the future of global aviation, it is necessary to explain these opposite and incompatible views about the case evidence required to show significant public benefits and the market power needed to sustain anti-competitive pricing.

3. “Aviation policy driven bilaterals” versus “Bilateral driven aviation policy”

Dean and Shane’s paper does not define the DOT’s specific international aviation policy objectives that are being threatened by DOJ and others, aside from these general references to the promotion of immunized alliances. There are no references to post-1999 DOT policy analysis of the virtues of increasing the size and market share of immunized alliances beyond their 1999 levels as these do not exist. They argue that DOT’s policies and its ATI decisions “have been a major public policy success story for consumers, global airline

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16 *id* p 17,18
17 “…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 ATL.”, *id* p 17

Horan, “Double Marginalization and the Counter-Revolution Against Liberal Airline Competition”

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competition and the airline industry itself” although the article does not cite any post-1999 evidence of consumer/competitive benefits, or any significant industry service or productivity gains\(^\text{18}\).

The DOT policy objective at stake is the use of ATI to consolidate previously independent international airlines into three collusive alliances, a policy radically different from what DOT was pursuing when it approved Northwest/KLM in the mid 90s. Dean and Shane cite “DOT’s savvy administration of its power to confer ATI”\(^\text{19}\) as a major policy accomplishment, but are unwilling to openly admit that current ATI policy objective is designed to reduce competition, or to openly defend the new policy on the basis of evidence that the risks of reduced competition are fully offset by tangible consumer benefits. In fact, Dean and Shane are unwilling to admit that there has been any change in DOT’s international aviation competition policy despite the obvious contradiction between DOT’s current policy of active government intervention (via ATI) to massively reduce the number of international competitors, and the 1990s “market-based and pro-competitive regime” that they used as justification for an “aviation policy” driven approach to antitrust enforcement.

Dean and Shane’s defense of the linkage between DOT’s antitrust and bilateral negotiation authorities attempts to reverse the horse and the cart. In the 1990s, DOT’s bilateral negotiations were a means of implementing its “market-based” competition policies, policies that were grounded in traditional antitrust logic based on consumer welfare and industry efficiency, and closely aligned with the domestic competition policies enshrined in the Airline Deregulation Act. Today, DOT is conducting bilateral negotiations about the future structure of the international airline industry with other governments and the large incumbent carriers, and then tailoring antitrust findings to support those agreements. Dean and Shane are arguing that competition (antitrust) decisions should be totally deferential to industry structure decisions reached during those private negotiations, even when those “policies” are not market-based, and are not aligned with the consumer welfare/industry efficiency logic that is the basis of the Airline Deregulation Act, and cannot be justified on the basis of the objectives and benefits of 1990s aviation competition policies. Dean and Shane are advocating a fundamental shift from “aviation competition policy driven bilaterals” to “bilateral driven aviation competition policies.” The large intercontinental alliance carriers such as United or Air France would naturally favor “bilateral driven competition policies” since

\(^\text{18}\) The only objective (but pre-1999) evidence cited by Dean and Shane are DOT reviews of the mid 90s impacts of the original ATI grants, US Department of Transportation, Office of the Secretary (1999) “International Aviation Developments: Global Deregulation Takes Off” and (2000) “Transatlantic Deregulation: The Alliance Network Effect”
\(^\text{19}\) id p.21

they are ideally positioned to influence the officials responsible for these bilaterals and often participate directly in the bilateral negotiation process. The “aviation competition policy driven bilaterals” approach of the 1990s made the interests of the large intercontinental carriers subsidiary to broader issues of consumer welfare and overall industry efficiency.

4. “Bilateral driven antitrust enforcement” versus “Evidence driven antitrust enforcement”

The “antitrust evidentiary standards” counter argument is that DOT has radically redefined the traditional evidentiary standards, hollowing them out to the extent that almost any ATI/consolidation proposal being discussed by the industry will automatically be found to produce significant public benefits, and will automatically be found to pose no risk of anti-competitive pricing. Just as Dean and Shane have no post-1999 evidence supporting their policy preferences, none of the recent ATI applicants have presented any post-1999 evidence of actual public benefits, or the actual absence of market power.

The traditional need for verifiable, case-specific evidence of public benefits has been replaced by DOT rulings that ATI applications that meet certain criteria automatically create 15-25% price reductions in connecting markets, in each and every case irrespective of market or competitive conditions. This rule is based on a theory of structural barriers to efficient pricing known as “double marginalization”, a theory supported by a single study prepared by a paid advocate for one of the ATI applicants, and based solely on pre-1999 data. The DOT has based all public benefits findings on this rule, and has simply ignored evidence that the logic and evidence underlying the rule is deeply flawed, and has ignored all recent evidence contradicting the rule. The DOT has abandoned the traditional need for pricing, entry barrier and market contestability evidence showing that ATI grants meet the Clayton Act market power test, because of an arbitrary rule that market power cannot exist in any broadly defined market that has three competitors and an “Open Skies” treaty. The DOT also based its public benefit findings on a rule establishing that unquantified claims of private airline gains can be accepted as proof of significant “public” benefits, even where there is no evidence that overall consumer welfare or industry efficiency actually improved.

By gutting, but not formally eliminating the section 41308 public benefit and Clayton Act market power test, DOT maintains the superficial appearance of following the law, while establishing a process whereby ATI and

*Horan, “Double Marginalization and the Counter-Revolution Against Liberal Airline Competition”*

*Draft 31 March 2010, page 8*
consolidation proposals can be approved much more rapidly, since applicants no longer need to present verifiable, case/market-specific evidence, almost any plausible ATI proposal would automatically meet the redefined standards, and opponents cannot challenge applications based on case/market-specific evidence. As a result, both DOJ and Dean and Shane can cite the same public benefits and market power requirements and reach completely opposite conclusions about the legitimacy of the DOT’s recent ATI findings. Dean and Shane favor the DOT rules gutting these evidentiary standards because they favor much greater consolidation among international airlines, and recognize that the “aviation policy” objective of vastly increased consolidation could not be implemented under traditional standards. However, Dean and Shane are unwilling to openly acknowledge that the DOT’s pro-consolidation decisions depend on these new rules, or that the DOJ and the other parties they attack in their article might have reasonable legal objections to the DOT’s rules independent of any opinions about aviation policies or specific consolidation proposals.

While “double marginalization” may seem like an arcane rule, it has driven has already had a bigger impact on airline competition than anything that has occurred since the 1944 Chicago Convention established today’s legal framework for international aviation. A brief review the historical development of collusive (immunized) alliances and their impact on North Atlantic competition will provide some useful context for the subsequent discussion of how the DOT’s recent ATI evidentiary rules were critical to the recent increases in industry concentration.

5. The economics of intercontinental alliances

The economics and competitive dynamics of intercontinental airline markets are markedly different from shorter-haul domestic and regional markets. All of the “aviation competition policy” and antitrust issues in these cases strictly apply to the intercontinental sector, which accounts for over half of the entire global aviation business. Any discussion of those issues must recognize that because of both natural and artificial barriers, it is much more difficult for “market forces” to discipline competitors and spur productivity in intercontinental markets. Domestic/regional (narrowbody) carriers focus on much smaller market segments, and the “low cost” (LCC) models that dominate those markets are highly flexible, require relatively little startup capital, and can operate small networks efficiently. Intercontinental carriers have huge initial startup costs and require very large scale

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20 Intercontinental markets are defined as citypairs more than 3000 miles apart. In almost all cases, Intercontinental service involves the use of longhaul, widebody aircraft although passengers often connect to these aircraft from shorthaul, narrowbody aircraft that also carry domestic/regional passengers. Domestic/regional markets include “international” (cross-border) service operated on the same basis as domestic services (for example intra-EU, USA to Canada/Caribbean) Horan, “Double Marginalization and the Counter-Revolution Against Liberal Airline Competition” Draft 31 March 2010, page 9
operations, including large fleets of widebodies, global marketing capabilities, and a very large hub-based route network in order to feed passengers onto and between those widebody aircraft. Since those hubs must be in very large cities with a strong local demand for intercontinental travel, new entry into this sector has been entirely limited in recent decades to airlines based in newly developing economies in East Asia and the Persian Gulf. Those natural barriers are augmented by other totally artificial entry barriers established by governments in order to protect incumbent intercontinental airlines. Most governments around the world have established highly liberal entry and pricing rules for domestic and regional markets, but actively intervene to rig market rules to protect the airline(s) serving as their “national champion” in intercontinental markets.

<table>
<thead>
<tr>
<th>Aviation Sector</th>
<th>% of RPMs/revenue</th>
<th>% of emissions</th>
<th>business models</th>
<th>entry barriers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intercontinental (longhaul/ widebody)</td>
<td>55%</td>
<td>30%</td>
<td>strictly via megahubs (JFK, ORD, FRA, CDG, HKG, SIN, etc)</td>
<td>huge-need large fleet of widebodies plus hubs with shorthaul feed, plus many government restrictions</td>
</tr>
<tr>
<td>Domestic/Regional (shorthaul/ narrowbody)</td>
<td>45%</td>
<td>70%</td>
<td>various models possible, mostly “low cost” and point-to-point</td>
<td>generally very low, vast majority of markets have open entry/pricing</td>
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</table>

Because of these natural and artificial barriers, intercontinental markets are not contestable. There has been no growth in the number of intercontinental competitors in 30 years, even though this is the most profitable and fastest growing part of global aviation. All of the dynamic industry growth and increased competition observed in recent decades has been strictly limited to domestic and regional (narrowbody) markets. All of the recent merger and immunity cases since 2003 are designed to increase consolidation within these already non-contestable intercontinental markets, and would have no impact on the over 700 airlines serving the 45% of global demand in shorthaul markets. “Industry consolidation” advocates argue that competition between the 100 airlines serving the 55% of global demand in intercontinental markets should be rationalized to competition between three global alliance groups.

**Figure 1**

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21 See “If Consolidation occurs, it would reverse decades of airline history”, Airlines International, January 2009. Data in the graph is from a proprietary database of all historical passenger airlines operating under unique aircraft operator certificates. Data includes all airlines operating aircraft with at least 50 seats and all airlines operating at least 15 smaller aircraft. The data does not reflect any reduced competition due to ATI; for example United and Lufthansa are counted as fully independent airlines.

All growth in airline competition since 1980 due to Domestic/Regional Carriers

Intercontinental entry/exit has been totally stagnant for three decades

The two types of alliances between intercontinental airlines have totally different economic and competitive characteristics, although Dean and Shane and most other observers discuss the benefits of “alliances” as if these distinctions did not exist. Non-immunized “Branded Alliances” operate globally and emphasize products such as frequent flyer reciprocity, codesharing, common terminal and lounge facilities, and other forms of mutually beneficial interline cooperation that existed long before the current alliance structures were developed. “Collusive Alliances” were first introduced in 1992, and are currently only found on the North Atlantic. Since their members have antitrust immunity to collude on pricing and capacity, the Collusive Alliances require careful antitrust scrutiny while the Branded Alliances do not.

<table>
<thead>
<tr>
<th>Branded Alliances --global scope</th>
<th>start date</th>
<th>Collusive Alliances --limited to North Atlantic</th>
<th>start date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Global Excellence (Delta)</td>
<td>1990 (x)</td>
<td>KL-led alliance (Northwest)</td>
<td>1992 (x)</td>
</tr>
<tr>
<td>Star (United, USAirways, Continental)</td>
<td>1997</td>
<td>SR-led alliance (Delta, later American)</td>
<td>1995 (x)</td>
</tr>
<tr>
<td>One World (American)</td>
<td>1998</td>
<td>LH-led alliance (United, USAirways, Continental)</td>
<td>1997</td>
</tr>
<tr>
<td>Skyteam (Delta, Northwest)</td>
<td>2000</td>
<td>AF-led alliance (Delta, Northwest)</td>
<td>2000</td>
</tr>
<tr>
<td>(x) defunct</td>
<td></td>
<td>BA-led alliance (American)</td>
<td>2010</td>
</tr>
</tbody>
</table>

United States members listed in parentheses.
The original Collusive Alliances developed in response to unique North Atlantic market conditions that are not found in any other intercontinental market. In the early 90s, 70% of the traffic on the North Atlantic were in citypairs that had good single-carrier schedules and a full range of discount fares. This included not only the nonstop service operated in large “gateway” markets, but one-stop online service via large hubs on both sides of the Atlantic.

The original three mid-90s Collusive Alliances (Northwest/KLM, Delta/Swissair/Sabena and United/Lufthansa) succeeded by providing a high-quality online-equivalent service to the other 30% of the market had poor service and much higher fares—hundreds of citypairs linking USA Interior Cities to European Interior Cities such as St. Louis-Brussels or Milwaukee-Munich. The initial growth and profitability of the original three Collusive Alliances was based on a clear competitive advantage over traditional interline services in this important “double connect” market segment, just as other airlines had clear competitive advantage in other nonstop and “single connect” market segments. The benefits derived from these competitive advantages had been fully exhausted by the end of the 90s as they had fully captured the traffic previously served by interline connections. The volume of passengers using alliance “double connect” services also began to shrink because of the dramatic growth of superior nonstop and single connect services that resulted from normal industry capacity growth.

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22 The comments in this section are based on my experience developing the original Northwest/KLM alliance network that has served as the template for all subsequent North Atlantic alliances. This includes various internal market studies conducted that were used to better understand the competitive impacts of the initial alliance schedules and to justify further expansion of alliance operations. I also worked on the Swissair-Sabena-Delta alliance from the European side, and helped shut down several unsuccessful airline alliances (Continental-America West, Qualify). For a more detailed discussion of the competitive economics and public benefits of the original 1990s North Atlantic alliances, see Oneworld, supra, Comments of Hubert Horan, 31 January 2010, DOT Docket OST-2008-0252-3389, pp.7-9. Horan, “Double Marginalization and the Counter-Revolution Against Liberal Airline Competition” Draft 31 March 2010, page 12
Despite the clear success of the original mid-90s Collusive Alliances, in the following 15 years airlines made no attempt to introduce them to transpacific markets or elsewhere, because the underlying “double connect” competitive advantage versus interline service in San Diego-Stuttgart type markets did not exist elsewhere. North American and European traffic is highly dispersed among dozens of large secondary cities, but Asian, South Pacific and South American traffic is not, so “double connect” alliance services are of little value to consumers. Transpacific airlines cannot justify alliance development and management expenses on the basis of increased revenues from Cleveland-Chiang Mai or Baltimore-Busan type markets.

It should be emphasized that the central antitrust and industry structure question here is consolidation, not alliances. The original growth of immunized alliances occurred in the 1990s under highly competitive market conditions. The original Northwest/KLM alliance combined two carriers with 4% shares of the transatlantic market into a single competitor with an 8% share. In 2001, after the alliance networks were fully mature, the largest collusive alliance had only 18% of the market, and the three collusive alliances combined had only a 42% market share. Upon approval of the Oneworld ATI application the market share of the three collusive alliances will have risen from 42 to 92%, and can be expected to increase further since it is unlikely that carriers with market shares of 5% or less could survive independently.\textsuperscript{23}

\textit{figure 3}

<table>
<thead>
<tr>
<th>1993</th>
<th>1995</th>
<th>1997</th>
<th>1999</th>
<th>2001</th>
<th>2003</th>
<th>2005</th>
<th>2007</th>
<th>2009</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Top 3 Concentration of US-Continental Europe market (40 million annual pax)</td>
<td>41%</td>
<td>47%</td>
<td>55%</td>
<td>56%</td>
<td>61%</td>
<td>67%</td>
<td>85%</td>
<td>88%</td>
<td>98%</td>
</tr>
<tr>
<td>Top 3 Concentration of total North Atlantic market (55 million annual pax)</td>
<td>42%</td>
<td>42%</td>
<td>45%</td>
<td>47%</td>
<td>47%</td>
<td>54%</td>
<td>68%</td>
<td>66%</td>
<td>92%</td>
</tr>
<tr>
<td>number of total North Atlantic competitors with minimum departure share of 2%</td>
<td>15</td>
<td>13</td>
<td>13</td>
<td>11</td>
<td>11</td>
<td>9</td>
<td>7</td>
<td>6</td>
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</table>

Thus alliance development and industry consolidation on the North Atlantic must be broken into distinct pre-and post 2003 phases. The high levels of concentration that could potentially help sustain anti-competitive behavior have only arisen in the last couple years, although the movement towards radical consolidation began in 2003, when Air France bid to acquire KLM. This eliminated the major source of price competition between European

\textsuperscript{23} Seat share using DOT Form 41 Schedule T100 data; 2009 shares assumes approval of oneworld application; 2011 shares assumes other small network airlines cannot survive independently and are absorbed into the three large collusive groups. USAirways became a full member of the Star Alliance in 2004, and codeshares actively with other Star members. Although it has not applied for antitrust immunity, USAirways is not considered independent of the other immunized Star members as they have strong incentives not to undercut prices on overlapping routes, and DOT would readily grant full immunity if they applied for it. Similarly, the Northwest/KLM alliance is not considered independent of the Delta/Air France alliance in the four years between the Air France/KLM merger and the DOT’s formal approval of combined Skyteam immunity. Horan, “Double Marginalization and the Counter-Revolution Against Liberal Airline Competition” Draft 31 March 2010, page 13
intercontinental hubs, eliminated the possibility that Northwest Airlines could survive independently, and reduced the number of meaningful competitors serving the 40 million annual passengers in the US-Continental Europe market from 3 to 2. The formal DOT ATI applications that formalized the increase to 92% concentration were filed between 2004 and 2008. This shift from moderate to extreme levels of concentration since the 1990s has been totally artificial, resulting entirely from large carriers petitioning governments for mergers and immunity grants that would eliminate competition. Those same airlines have already begun petitioning governments to permit the consolidation of 23 previously independent transpacific competitors into those same three collusive alliance groups.

6. Gutting the Public Benefits test (I): establish a rule that prices fall whenever competition is reduced

The biggest and most important claim in the recent Oneworld case was that immediately following a grant of immunity, prices would immediately fall $257 per ticket in all connecting markets currently served on an interline basis by the applicants, creating an annual $92 million consumer benefit. This is from the “elimination of double markups on codeshare segments” that Dean and Shane cite, or “double marginalization” as it is called in the ATI cases. This is the biggest single factor behind the DOT’s antitrust jurisprudence, and the biggest

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24 The contract governing Northwest’s alliance with KLM would not have been renewed past its 2012 expiration, as Delta had exclusive rights to be Air France’s US alliance partner. The separate Northwest/KLM and Delta/Air France alliances continued to operate until 2009 but were not independent price competitors. Delta was able to acquire Northwest without any cash payments to Northwest’s shareholders; the stock swap implicitly valued Northwest at roughly the value of its cash and liquid assets on hand at the time of the merger agreement.

25 Recent ATI applications prior to the Oneworld and Star/Continental cases cited earlier include the application to grant ATI to the merged Delta/Air France and Northwest/KLM alliances, (originally submitted as the Joint Application of Alitalia-Linee Aeree Italiane-Spa. Delta Air Lines, Inc., Czech Airlines, KLM Royal Dutch Airlines, Northwest Air Lines, Inc., and Societe Air France under 49 U.S.C. §§ 41308 and 41309 for alliance agreements and for approval of and antitrust immunity, (the “Skyteam I” case), DOT Docket OST-2004-19214, which was subsequently resubmitted as Joint Application of Alitalia-Linee Aeree Italiane S.p.A., et.al. for approval of antitrust immunity (“SkyTeam II”), DOT Docket OST-2007-28644); and the expansion of the United/Lufthansa/SAS/Austrian collusive alliance to include Air Canada, BMI, Swiss, LOT and Turkish (the Joint Application of The Austrian Group, British Midland Airways Limited, Deutsche Lufthansa Ag, Polskie Linie Lotnicze Lot S.A., Scandinavian Airlines System, Swiss International Air Lines Ltd., Tap Air Portugal, And United Air Lines, Inc. under 49 U.S.C. §§ 41308 and 41309 for approval of and antitrust immunity for Alliance Expansion Agreements and an Amended Coordination Agreement, and Joint Application of United Air Lines, Inc. And Air Canada under 49 U.S.C. §§ 41308 and 41309 for approval of and antitrust immunity for commercial alliance, consolidated into a single case known as “Star I”, DOT Docket OST-2005-22922)

26 Since the 1993 demise of Pan Am, all 20 carriers with a transatlantic market share of at least 1% that exited the market did so via ATI or merger. Two of these exits (TW into AA and LX into LH) were precipitated by corporate financial difficulties, but in both cases the North Atlantic routes relevant to this competitive analysis (TWA’s Heathrow franchise, and the Zurich longhaul operation) were viable and sustainable. Other very small carriers exited the North Atlantic, (4 artificially, 14 due to market forces, including for example Citybird, ATA, Tarom, Eos); unlike the consolidation of the larger carriers, this could be said to be a “natural” shakeout of weak airlines, but it had little bearing on the overall level of North Atlantic competition.


28 Dean and Shane supra p.19

single economic justification for intercontinental airline consolidation. If the DOT could not accept “oneworld’s” claim that ATI would eliminate $92 million in “double marginalization” burdens on consumers, the applicants would not have been able to demonstrate the significant public benefits needed to meet the section 41308 “required by the public interest” standard. The entire question of whether recent ATI grants have actually generated significant public benefits, hinges on whether you believe, as Dean and Shane and the DOT do, that “double marginalization” automatically drives $200-$300 fare reductions for connecting traffic, regardless of market conditions. The alleged efficiency gain from eliminating the “double marginalization” on connecting tickets is comparable to eliminating all of the airline wage and salary costs associated with those tickets.29

The entire “double marginalization” claim is based on a single 1990 journal article by Brueckner and Whalen; Brueckner (the principal author) was at the time (and remains) a paid advocate for United Airlines.30 ATI applicants and consolidation advocates claim that “double marginalization” has been documented in the “economic literature” but this “literature” is nothing more than follow-up pieces by Brueckner and Whalen making the exact same points as the original article,31 no other published original research has ever documented the existence of “double marginalization”. The original 2000 paper described a cross-section regression of 1997 transatlantic fares in alliance and non-alliance markets. Brueckner (2003) repeated the

29 Wages, salaries and benefits accounted for 26% of American Airlines’ total 2008 10-K operating expenses
31 “double marginalization has been well documented in the economic literature” Oneworld, Joint Application exhibit JA-19, supra p.1. Another piece written by paid advocates for American Airlines claimed: “virtually every peer-reviewed academic study of immunized international alliances has concluded that, as a result of eliminating carriers’ incentives to impose successive markups on fares for connecting tickets (the so called “double marginalization” problem), alliances have led to lower fares and expanded output”, although no peer reviewed articles written by anyone but Brueckner and Whalen presented any original research on this question. Kasper, D. and Lee, D., “Why Antitrust Immunity Benefits Consumers”, GCP Antitrust Journal, Sep. 2009

original regression using 1999 data, which better identified the actual operator of codeshared flights; Whalen (2007) estimated slightly smaller impacts using a regression of 11 year (1990-2000) panel data instead of cross-section data from a single point in time. These three regressions found 15-25% lower fares in markets served by immunized alliances compared to markets served by traditional interline service or non-immunized codesharing.

It is not surprising that a statistical analysis of the 1990’s transatlantic market identified consumer benefits; fares fell 8% in the 1990s while capacity grew 54%. But Brueckner and Whalen made no attempt to isolate the impacts ATI might have on fares from the impacts of favorable supply/demand conditions or other important competitive and productivity factors, and improperly attributed all of the observed variation to “cooperative alliance pricing”. Brueckner and Whalen’s papers do not mention any other factors that might have influenced pricing, and fail to demonstrate that their statistical analysis had isolated alliance impacts from other possible causes.

The consumer benefits directly attributable to the original 1990s alliances were only found in the 30% of the market previously limited to traditional interline service, and had been fully exhausted by the end of the decade. This was the “double connect” market impact described earlier, which was called the “Alliance Network Effect” in the 1999/2000 DOT studies that Dean and Shane quote, but this was not huge compared to the overall benefits transatlantic consumers realized in the 1990s. When DOT and ATI applicants use the Brueckner and Whalen regression coefficients to calculate alliance public benefits, they are assuming that none of the observed mid-90s consumer benefits were due to market liberalization, supply/demand conditions or carrier productivity, and they are assuming that 2010 market conditions are identical in every respect to 1995 market conditions.

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33 The results of the three statistical analysis are summarized at Oneworld, Horan Comments, supra p.6. Smaller (~15%) price reductions are alleged to occur when airlines that codeshare with immunity are granted ATI; larger (~25%) when non-codeshared interline itineraries were converted to immunized codeshares. The Oneworld applicants could not identify codeshare versus non-codeshare distinctions among its actual 2008 interline passengers, and thus its $92 million annual public benefit claim assumed the smaller (~15%) codeshare to ATI price reduction.

34 Average annual capacity growth was 4.4%. Data covers the same time period covered by the regression results used by the oneworld applicants. DOT Form 41 Schedule P12 fare data includes all US carrier Atlantic Entity revenue; DOT Form 41 Schedule T100 capacity includes all transatlantic carriers.

35 Including market liberalization in Europe, increased transatlantic competition following the original “Open Skies” treaties, and major carrier productivity gains from a variety of sources including the privatization of British Airways, the recently integrated Air France-UTA-Air Inter hub in Paris, and the widespread introduction of 767 and A330 aircraft.

36 Dean and Shane supra p. 19

Horan, “Double Marginalization and the Counter-Revolution Against Liberal Airline Competition”
Draft 31 March 2010, page 16
As problematic as the regressions may be, the central antitrust problem is the “double marginalization” theory that Brueckner and Whalen put forward to explain these 1990s pricing/alliance correlations. Under this “double marginalization” theory, none of the benefits created by alliances have anything to do with the superior service Northwest/KLM offered in double connect markets or their competitive advantage versus poorly coordinated interline connections. They attribute all consumer benefits to a “structural negative externality” that forces carriers to set interline prices that are suboptimal from the standpoint of both joint efficiency and market competitiveness. “Double marginalization” theory claims that if American and Iberia currently offer a joint fare from Madrid to Seattle, they will do so by separately “marking up” the separate Madrid-Chicago and Chicago-Seattle segment prorates without ever consulting one another as to what the resulting fare will be, or considering whether that fare would be competitive against the Madrid-Seattle fares charged by others. “Double marginalization” is defined as a market failure, an insurmountable physical barrier to efficiency found in every airline’s interline pricing function; interline fares are 15-25% higher than ATI (or single carrier) fares in each and every case, regardless of market or competitive conditions or carrier productivity. Under this theory, the only ways to reduce the structurally higher costs of interline pricing are merger or full immunity to collude on prices. Thus granting ATI automatically and immediately reduces these fares 15-25% every time competition is reduced. Not under certain market conditions, or if specific productivity gains were achieved, but huge consumer benefits follow automatically from each and very ATI grant organized along Northwest/KLM lines, just as night automatically follows day.

This theory is completely indefensible. “Double marginalization” does not exist, never existed, and has absolutely nothing to do with the actual legitimate benefits of immunized alliances. The “double marginalization” theory was created out of whole cloth—nothing in Brueckner and Whalen’s statistical analysis supports this theory of interline pricing behavior, nor had they conducted any research on how airline interline pricing actually functions. The theory not only ignores the possibility that favorable supply/demand and efficiency conditions influenced 1990s transatlantic prices, but denies the existence of competitive network advantages and disadvantages, and explicitly assumes interline prices cannot be set at rational, revenue-maximizing levels.

38 The regression results showing smaller impacts in codeshare markets contradicts the theory; if carriers actually set interline fares in this manner the “double markups” should be identical in codeshare and non-codeshare cases.
There are no insurmountable structural barrier to rational, efficient interline pricing; carriers can readily optimize interline pricing and traffic using “fare buckets” within revenue management system. All of the observed limitations to interline pricing that Brueckner and Whalen improperly attribute to structural pricing barriers can be readily explained by rational, profit-maximizing behavior. Even though interline fares are used by hundreds of airlines widely across the globe, none of these airlines has ever made any effort to correct the irrational pricing behavior that allegedly increases all interline prices 15-25% above efficiency-maximizing levels. No one independent of the DOT or the ATI applicants has ever claimed that “double marginalization” exists and no other research ever produced findings supporting the Brueckner and Whalen theories. A number of researchers have found that ATI is no longer generating any consumer price benefits (much less the 15-25% benefits claimed here), there is no evidence that any of the recent Star and Skyteam ATI grants generated any “double marginalization” consumer benefits in any connecting markets, and several studies have found evidence that consumers now pay higher fares in ATI markets than non-ATI markets.

DOT has converted “double marginalization” from a theory in one isolated paper, to an established antitrust rule that cannot be challenged on the basis of facts or logic. In the Oneworld case, DOT explicitly rejected a detailed challenge to “double marginalization”, even though it acknowledged DOJ comments that the link between “double marginalization” benefits and ATI had never been proven, did not dispute any of the observed flaws in the theory, and was unwilling to openly defend any of the logic or analysis that the theory is based on. It nonetheless accepted the Oneworld applicants’ $92 million annual consumer benefit claim solely on the basis of the Brueckner and Whalen theory. Unquestioning acceptance of “double marginalization” is critical to Dean and Shane and other industry consolidation advocates because it establishes the automatic rule that each and every ATI application between network airlines will generate large public benefits, and thus eliminates the Horizontal Merger Guidelines requirement for verifiable, case-specific evidence. If ATI automatically generates 15-25% price reductions in any alliance structured along Northwest/KLM lines, regardless of market/competitive

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39 oneworld, Horan Comments, supra p.12-15
40 oneworld, Horan Comments, supra p.15-16
42 oneworld, Show Cause Order, supra p. 30
43 id, p.9, 32

conditions or carrier productivity, then there is no need to produce case-specific evidence regarding the current
marketplace or the actual pricing behavior or efficiency of the applicants. DOT even rejected the claim that the
Oneworld applicants had failed to demonstrate that the traffic base that they claimed would benefit from the $92
million savings were actually paying, as they claimed, fares $257 higher than comparable alliance or online
traffic, or that these markets had any of the characteristics of the ones where Brueckner and Whalen allegedly
found the original 1990s “double marginalization” impacts. By establishing “double marginalization” as a settled
antitrust rule, DOT creates the superficial appearance that it is conducting a public benefits evaluation, when
they have actually rendered the public benefits standard completely meaningless. “Double marginalization”--a
rule that says “consumers benefit whenever competition is eliminated regardless of marketplace conditions”--is
totally inconsistent with any marketplace/economics-focused antitrust approach. But this approach is fully
compatible with the “bilateral driven aviation policy” approach that Dean and Shane favor, where the antitrust
regulator has extremely broad discretion over rules and evidentiary requirements.

7. Gutting the Public Benefits test (II)—eliminate the “public” part of public benefits

Dean and Shane’s central claim is that ATI has only been awarded once it has been objectively demonstrated
that the public benefits will be of significant magnitude. But they fail to provide any evidence that DOT benefit
findings have been objectively demonstrated, and further undermine their credibility by citing the exact list of
public benefits that DOT “copy/pasted” from the Star/Continental application. The listed claims are more
reflective of a marketing press release than a serious analysis of competitive economics but can nonetheless
help illustrate other steps DOT has taken to render the public benefits test meaningless.

- 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

Dean and Shane acknowledge that public benefits must be demonstrably “significant” but without quantitative
data there is no way to demonstrate “significance”. “Significant” public benefits in an airline ATI case, would
naturally occur in the form of observable price or capacity benefits. Northwest/KLM and the other original 1990s

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44 Dean and Shane supra p. 20 quoting Star/Continental Show Cause Order supra, at 18–19.

Horan, “Double Marginalization and the Counter-Revolution Against Liberal Airline Competition”
Draft 31 March 2010, page 19
alliances clearly led to lower prices in certain markets, and some increased transatlantic capacity. If “improved schedule timings” or “increased efficiency” are actually significant, they would translate into price and capacity benefits. “Increased efficiency” is not a legitimate public benefit unless the gains allow the carrier to profitably expand or reduce prices, or to sustain capacity that would have been liquidated absent the efficiency gains.

Despite abundant sources of industry data, none of the Star and Skyteam cases quantify any of the alleged benefits, and Oneworld only quantified two benefits, and only did so because of the DOJ’s evidentiary criticisms in the Continental/Star Alliance case. Those two clams were the $92 million pricing benefit discussed above, based on the Brueckner and Whalen theory, and a $45 million benefit claim from increased nonstop service.

In accepting the Oneworld $45 million nonstop benefit claim, and the “network expansion” claims in prior cases, DOT willfully violated the Horizontal Merger Guidelines requirement that it must have evidence that the public benefits are highly likely to be realized, and that it cannot accept claims that are “vague or speculative or otherwise cannot be verified by reasonable means” or are not clearly based on the grant of immunity”. The Oneworld applicants did not agree to actually operate increased service—they merely suggested the possibility that they might add flights. Since approval of ATI does not obligate them to actually do so, these claims (or certainly some large portion of them) are purely speculative. The claim included new service on the Dallas-Ft.Worth-Madrid route, which has been operated in the past without immunity, and was withdrawn when the recent economic recession began. The DOT rejected Virgin Atlantic and DOJ arguments that this public benefit claim was illegitimate because restoration of this flight would have likely occurred without ATI.45 There is no evidence on the record that any of the prior Star and Skyteam ATI approvals were directly responsible for net increases in transatlantic service that actually created material benefits for consumers. Continental Airlines has recently introduced new service into Lufthansa’s hubs, but this merely replaced service previously operated into Skyteam hubs, and no net benefits were created. “Network expansion” is one of the easiest benefit claims to document and quantify, and the ongoing lack of evidence that meets Horizontal Merger Guidelines standards suggests that the claims are fundamentally deficient.

As with “double marginalization”, the list of alleged Continental/Star benefits that Dean and Shane quote reflect DOT’s desire to render the section 41308 public benefit standard completely meaningless by establishing a

45 Oneworld, Show Cause Order, supra p.31
standard that each any and every ATI application would meet. The DOT has done this by defining private benefits achieved by the applicants as “public benefits” meeting the section 41308 standard, without requiring any evidence that consumers in general did not suffer because of offsetting detriments in other markets. The fact that platinum status members of United’s frequent flyer program can now occasionally get first class upgrades on Continental flights does not mean that ATI created a benefit for the overall public in the form of more generous frequent flyer awards. When Continental joined Star Alliance it created an expanded (Star) network with increased (Star) gateways, increased online (Star) service, expanded (Star) routing options, expanded (Star) corporate and frequent flyer programs, created some (intra-Star) cost efficiencies, and strengthened (Star) financial performance, even though all of these “benefits” were merely shifts to Star markets from other markets. Every ATI application between network airlines with some degree of network overlap could claim the exact same “public benefits” (even the implausible merger of the Star, Skyteam and Oneworld alliances into a monopoly transatlantic collusive group) and is contrary to the notion that antitrust decisions should maximize consumer or overall economic welfare. As with “double marginalization” this automatically met rule eliminates the need for applicants to present any verifiable evidence about actual market, competitive or productivity impacts specific to their case, and thus eliminates the possibility that consolidation applications can be challenged on the basis of case/market specific evidence.

8. Gutting the Clayton Act Market Power Test—evaluate anti-competitive pricing risks without any evidence about pricing or entry barriers or market contestability

Dean and Shane correctly note that ATI cannot be granted unless they meet the Clayton Act test showing that the application would not increase market power. As DOT explained in the original Northwest/KLM case:

“The Clayton Act test requires the Department to consider whether the alliance agreements are likely to substantively reduce competition so that any of the applicants would be able to charge supra-competitive prices or reduce service below competitive levels. To determine whether an alliance or comparable transaction is likely to violate the Clayton Act standard the department considers whether the transaction is likely to create or enhance “market power”, defined as the ability to profitably maintain prices above competitive levels for a significant period of time or to reduce output and service quality below competitive levels. To determine whether a proposed alliance is likely to create or enhance market power, we primarily consider whether the alliance would significantly increase concentration in relevant markets, whether the alliance raises concern about

potential anticompetitive effects in light of other factors, and whether entry into the market would be timely, likely, and sufficient either to deter or to counteract a proposed alliance’s potential for harm.\footnote{Joint Application of Northwest Airlines and KLM Royal Dutch Airlines, 11 Jan 1993, DOT Docket 48342.}

Dean and Shane defend recent ATI grants on the basis that DOT found no threat of market power but ignore the fact that none of DOT’s ATI decisions in the past decade included a Clayton Act test that actually presented or analyzed any pricing data or any evidence of the future market contestability needed to eliminate the risk of supra-competitive prices\footnote{DOT did not analyze evidence of entry barriers in any ATI case except for a brief consideration of airport slot barriers on a handful of large nonstop routes at London Heathrow in the Oneworld case.}. A complete Clayton Act test cannot be laid out here, but several simple data points can illustrate the serious possibility that anti-competitive “market power” has already emerged on the North Atlantic, and that the DOT’s failure to conduct legitimate Clayton Act tests is a serious abdication of its legal responsibility.

**Figure 4**

Increased North Atlantic concentration has already increased prices towards supra-competitive levels. From deregulation until 2003, North Atlantic price trends closely tracked domestic price trend. From 2003 onward, a totally new pattern emerged, with North Atlantic fares rising three times faster than domestic fares\footnote{Data in the graph is total Domestic and Atlantic entity totals for all US carriers from DOT Form 41; passenger revenue data is from schedule P12, segment passengers from schedule T100. Transatlantic revenue on non-US carriers is not. Horan, “Double Marginalization and the Counter-Revolution Against Liberal Airline Competition” Draft 31 March 2010, page 22}. This
fundamental shift in pricing behavior exactly tracks the move towards extreme North Atlantic concentration, which started when Air France bought KLM, previously the largest single driver of price competition in European longhaul network markets. The market power already created by consolidation is much worse than the simple Atlantic/Domestic fare comparison suggests. Under normal, healthy competitive conditions, airline fares are highly responsive to changes in capacity. Domestic fares increased 15% since 2003 because the industry did not add capacity. When Atlantic capacity spiked in the late 90s, average fares fell, even though this was the peak of the dot-com era. But the market power created on the Atlantic in recent years meant normal supply/demand relationships would not work. Atlantic fares increased 46% since 2003, even through capacity also increased 45%

If 2008 capacity levels were operated under pre-2003 competition levels, 2008 Atlantic unit revenues might well been 30-40% lower than observed, suggesting an annual consumer welfare loss due to increased market power of $9-12 billion. Counterfactual historical analyses such as this are a bit complicated; but even if one arbitrarily assumes that only half or less of the observed pricing shift is due to market power, consumer welfare losses have already been staggeringly large:

<table>
<thead>
<tr>
<th>2008 Consumer Welfare Loss if increased</th>
<th>North Atlantic Market Power increased fares by:</th>
</tr>
</thead>
<tbody>
<tr>
<td>5%</td>
<td>$1.5 billion</td>
</tr>
<tr>
<td>10%</td>
<td>$3.0 billion</td>
</tr>
<tr>
<td>15%</td>
<td>$4.5 billion</td>
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<tr>
<td>20%</td>
<td>$6.0 billion</td>
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<tr>
<td>25%</td>
<td>$7.5 billion</td>
</tr>
</tbody>
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A legitimate Clayton Act “market power/market contestability” analysis would also note that

publicly available, but since US flag carriers serve the identical markets with comparable schedules and capacity, the aggregate US carrier Atlantic unit revenue data shown in the graph should very closely track aggregate market levels. An earlier version of this slide was presented in Congressional hearings on the Delta-Northwest merger. Statement of Hubert Horan, “The Anti-Competitive Risks of a Delta-Northwest Merger and the Extreme Consolidation of Intercontinental Airlines”, House Committee on Transportation and Infrastructure, Aviation Subcommittee Hearings, 14 May 2008; capacity comparison is total Domestic and Atlantic entity seat capacity for all (US and non-US) carriers from DOT Form 41 schedule T100. The total 2008 North Atlantic revenue base is conservatively assumed to be $30 billion, based on DOT Form 41, US carrier Atlantic passenger revenue of $15,058 million and a 46% US carrier share of combined total available seat miles. This estimate does not include non-passenger revenue or the portion of transatlantic ticket revenue flown on domestic US or intra-EU connecting flights that would not be categorized as Atlantic revenue in Form 41. A more detailed analysis would likely show relatively large consumer welfare losses in the connecting US-Continental Europe markets where the duopoly of the Lufthansa and Air France-led collusive alliances have had an 85% share for over five year, and smaller welfare losses in other market categories. Some marginal, higher-cost capacity would have been withdrawn in a more competitive environment, although the increased competition may have driven industry productivity improvements, and share shifts favoring more efficient carriers. Lower fares would have also stimulated demand growth. Horan, “Double Marginalization and the Counter-Revolution Against Liberal Airline Competition” Draft 31 March 2010, page 23
There are serious risks that the observed anti-competitive pricing trend will worsen after independent competition from Continental, Iberia, Finnair and American is eliminated and concentration increases from 65-80% to 90-95%. Price competition in isolated large nonstop O&Ds must be evaluated separately, but the table on page 13 reasonably reflects the concentration in Continental Europe connecting markets, which account for the vast majority of North Atlantic traffic.

None of the increased concentration since 2003 is due to efficient airlines displacing inefficient ones or other “market forces”; it is strictly due to the artificial process of large airlines petitioning governments for reduced competition.

North Atlantic markets are not contestable. There is no possibility that future entry would be “timely, likely and sufficient either to deter or to counteract” anti-competitive behavior by the three dominant Collusive Alliances. A new entrant would require a major hub, tens of billions of dollars in new fleet investment and expensive access to highly constrained airports. The last successful entry on the North Atlantic was 23 years ago.\(^{52}\)

Basic network airline economics create serious risks of cartel conditions in these markets--- the three dominant Collusive Alliances would rationally match oligopoly capacity cuts and price increases because more aggressive competition could never displace existing hubs or capture significant market share.

Instead of Clayton Act tests based on case specific evidence of pricing behavior and market contestability, the DOT’s findings are based on an arbitrary rule that assumes that consumer welfare in international airline markets is not threatened as long as at least three competitors operate under an “Open Skies” treaty. Even though the EU-US Open Skies has facilitated increased concentration in a market that has not seen successful new entry in 23 years, the DOT simply asserts that the treaty “enhances competition and promotes new entry” and there is “no basis upon which the Joint Applicants could, as a result of this transaction, impose and sustain supra-competitive prices or reduce service levels below competitive levels.\(^{53}\) Since collusive alliances automatically create consumer benefits, the DOT claims reducing competition via ATI actually benefits consumers by enhancing “inter-alliance competition.”\(^{54}\) Since the protection of airline consumer welfare only require three serious competitors, the DOT’s competitive “analysis” has been wholly limited to simple market share snapshots showing that no highly aggregated market groups (i.e. US-Germany, the overall North Atlantic) are currently dominated by any one of these three competitors.\(^{55}\)

As with the rules establishing public benefits on the basis of “double marginalization” and undocumented private carrier benefits, these rules render the Clayton Act test completely meaningless, since no ATI application (other than a merger between the three collusive alliances) would ever be found to create risks of supra-competitive pricing or otherwise threaten consumer welfare. Under these rules, ATI applicants would have no need to

\(^{52}\) The last new entrant on the North Atlantic to successfully sustain a market position with at least 1% market share was Piedmont Airlines (now USAirways) which began Charlotte-London Gatwick service in 1987

\(^{53}\) Star/Continental Show Cause Order, pp.17

\(^{54}\) Oneworld Show Cause Order, pp.2,13,28,32. As noted earlier, the DOJ observed that the claimed benefits from “inter-alliance competition” were wholly unsubstantiated.

\(^{55}\) Star/Continental Show Cause Order, pp.7-13, Oneworld Show Cause Order, pp.13-17.

present verifiable, case-specific evidence that immunity would not create market power, and other interested parties would be unable to challenge applications on the basis of case/market-specific evidence of entry barriers, non-contestable markets or the supra-competitive prices.

9. Breaking the link between “Open Skies” and liberal market competition.

As Dean and Shane note, the 1990s “Open Skies” treaties were designed to supplant mercantilist bilateral treaties such as the US-UK “Bermuda II” treaty, whereby international airline markets were manipulated through backroom negotiations between the large incumbent carriers and government bureaucrats, with results heavily biased in favor of the short-term interests of those incumbent airlines. By eliminating many of the entry and pricing barriers that the bilateral negotiators had previously used to distort or rig market outcomes, the US Government’s 1990’s “Open Skies” policy and the European Union’s 1990s market liberalization policies established maximization of aggregate consumer welfare and industry efficiency as the central objectives of international aviation policy. They sought to establish the policy that airline winners and losers should be determined by consumers and investors, and the role of government should be limited to ensuring a level and fully competitive playing field. While one can criticize the shortcomings of specific regulatory and policy decisions, the overall benefits of these liberal policies can be measured using objective evidence of increased service, lower prices, carrier productivity and the like.

The reversal of this liberal “hands-off” approach began when the EU shifted to a more interventionist, pro-consolidation policy a decade ago, favoring the interests of the large EU “national champions”, Lufthansa, Air France and British Airways, the leaders of the three Collusive Alliances that the EU expected to dominate a consolidated industry. The EU proactively supported the Air France/KLM merger that reduced the number of intercontinental network competitors in Continental Europe from three to two, but blocked a Ryanair-Aer Lingus merger that would have exposed the transatlantic routes of three “national champions” to aggressive price competition from Europe’s lowest-cost operator. The EU openly advocated “industry consolidation” and proactively supported combinations such as Air France-Alitalia, Lufthansa-Austrian and British Airways-Iberia. The EU delayed a US “Open Skies” treaty for five years with demands that the US change its national

ownership laws so that the three EU carriers could fully control their US alliance partners, and this was a major EU demand during the recent Phase II treaty negotiations\textsuperscript{57}.

While the DOT never became an open, public advocate of intercontinental consolidation, by 2003 DOT had clearly abandoned the 90s “hands-off” policies and shifted to an internal view that international airline industry structure should be proactively managed through bilateral discussions between government officials and the large Legacy airlines. As noted earlier, the DOT has not produced any policy statements or analysis supporting either the general merits of vastly increased market concentration, or the specific merits of supporting claims such as “double marginalization” or “inter-alliance competition.” However this anti-liberal shift can be reasonably inferred from the ATI findings discussed above, and from recent bilateral treaty results. While the State Department achieved several pro-consumer gains in the final treaty, EU-US “Open Skies” is a major departure from the 1990s treaties as it is designed to facilitate increased consolidation, not increased competition, and it is designed to increase governmental influence over industry structure, not to increase the influence of consumers and investors. Carriers have publicly claimed that DOT informally promised approval of the current ATI applications during the treaty negotiations as a quid pro quo for EU approval of open entry in the UK and Spanish markets without the ownership and control provisions the EU had demanded.\textsuperscript{58} In the treaty the DOT agreed to align its airline antitrust rules and processes with EU rules and procedures, a requirement fully consistent with the “bilateral driven antitrust enforcement” approach advocated by Dean and Shane, and

\textsuperscript{57} “The EU-US Open Access Area: how to realize the radical vision” A detailed assessment of the prospects for major international airpolitical liberalization, (Aviation Strategy 70, July 2003); “Airline Consolidation: Myth and Reality” An evaluation of airline mergers in the US, Europe and China, and the general trend towards consolidation (Aviation Strategy 109, November 2006); “An Update on Industry Consolidation and EU-US Treaty Negotiations” (Aviation Strategy No.113, March 2007). While the US and EU shared similar views about the use of ATI in industry consolidation, the EU took a more aggressive position on allowing direct foreign ownership and control. In the phase I negotiations, the EU argued that allowing full financial and management mergers between EU and US carriers would generate €15bn in incremental revenue (more than the combined revenue of Northwest and Southwest) and 80,000 new jobs (more than the combined employment of Delta and Continental). The current 25% limit on foreign ownership of US airlines cannot be amended by treaty, only by an Act of Congress. The failure of the Phase II negotiations to produce major concessions on foreign ownership of US airlines was seen as a diplomatic defeat for the EU. See Pitita Clark, “Washington Wins Battle of Open Skies”, Financial Times, 26 March 2010.

\textsuperscript{58} “Our nation's trading partners, both present and future, have relied on, and will rely on, the continued availability of ATI as the cornerstone of U.S. aviation policy. For example, the U.S.-EU Agreement negotiations included a Memorandum of Consultations that specifically promised prompt action on applications for expanded immunity such as that sought by the Joint Applicants here[. . . .] Thus the Memorandum of Consultations is an acknowledgement of the aeropolitical reality that open skies and ATI are integrally linked and essentially refutes the DOJ's position that the Joint Application is not linked to open skies benefits. DOJ would have the Department renege on that promise” Star/Continental, supra, Response of the Joint Applicants to the Department of Justice, 6 July 2009, pp. 7-9.

completely inconsistent with the view that DOT is a neutral antitrust regulator obligated to follow the *Horizontal Merger Guidelines* and other traditional evidentiary requirements in deciding ATI cases.

10. The new US-Japan bilateral— further corrupting “Open Skies” and further entrenching “bilateral driven antitrust enforcement”

The new US-Japan treaty completes the breakdown of the historical link between “Open Skies” and liberal market competition. While all past “Open Skies” treaties required fully open and equal market access for all carriers, the new treaty maintains strict Japanese government control over slots at Tokyo’s airports, including a provision that US carrier access to the new runway capacity at Haneda Airport should be strictly limited to four flights that must depart between midnight and 6:45 am. Instead of reducing governmental ability to distort airline competition or dictate industry structure, the new treaty was specifically designed to facilitate massive taxpayer subsidies to Japan Air Lines, and the consolidation of the four transpacific carriers with large Tokyo operations into two larger collusive groups that would threaten the survival of smaller competitors. The 1990s treaties clearly weakened the ability of European governments to distort and rig aviation markets, but the new Japan treaty does absolutely nothing to weaken the Japanese government’s control over aviation competition—control far greater than any European government ever had. The large carriers and the DOT clearly intend to pursue the same consolidation of transpacific aviation into the same three Collusive Alliances that now control the North Atlantic. While the early “Open Skies” treaties with the Netherlands and Switzerland were designed to pressure countries like Germany and France to liberalize aviation markets, the Japan “Open Skies” treaty is designed to pressure other Asian countries to eliminate competition from their hubs and carriers, and consolidate into groups led by the collusive alliance networks based at Tokyo.

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59 at the time the US-Japan treaty was signed, multiple press reports in Japan and the US indicated that JAL management and the Japanese Ministry of Transport strongly favored combining (via ATI) the large JAL and Delta/Northwest Tokyo hub operations, a move that (along with ATI for United, Continental and ANA) would have established a top 2 concentration level of 90% in the US-Japan market and made it extraordinarily difficult for American Airlines to remain a viable competitor. Shane served as a paid advocate on behalf of Delta’s efforts to achieve immunity with JAL. Although this plan was not implemented after subsequent management changes at JAL, DOT would have been fully aware when they signed the treaty that it could directly lead to a massive increase in market concentration. Earlier in my career, I was responsible for Northwest’s international network, including its large hub at Tokyo Narita, and am highly familiar with the economics of transpacific operations, and competition in the US-Japan market.

Horan, *Double Marginalization and the Counter-Revolution Against Liberal Airline Competition*
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Just as the words “double marginalization” automatically establish the “fact” of significant public benefits, The Japan treaty demonstrates the DOT rule that a treaty including the words “Open Skies” automatically establishes the “fact” of market contestability, which eliminates the need to examine any verifiable, case-specific evidence about market power. This rule will speed the process of industry consolidation on the Pacific since ATI applicants will not need to produce evidence, and applications cannot be challenged on the basis of evidence that huge artificial barriers to competition actually exist in the Japanese market.

More importantly for this discussion, the DOT agreed to provisions in the new Japan treaty that were specifically designed to entrench its evisceration of ATI evidentiary standards, and to thwart the ability of the DOJ or other parties to demand reviews of Pacific ATI applications based on market-specific data. Japan Air Lines entered bankruptcy protection on January 19th and filed for ATI with American Airlines on February 12th. Under traditional evidentiary standards, ATI could not be granted without data as to the exact routes and capacity the alliance would operate, since there is no way to evaluate competitive issues or public benefits without knowledge of capacity levels and other specific changes that would occur as a result of ATI. It would also be impossible to evaluate ATI applications without hard data about public subsidies for JAL that could seriously distort competition.60 But none of these things can be known with any certainty until a JAL reorganization plan is financed and approved, a process that could take several years.61 Nonetheless DOT specifically promised that ATI approvals and all other treaty implementation requirements would be in place by October 201062. The Oneworld ATI application will have required 19 months of review, even though the DOT has many years of experience analyzing North Atlantic competitive issues. Even though it has never considered Japan/transpacific industry structure issues before, and the Japanese market includes a range of problematic competitive issues not found in any European markets, the DOT is clearly confident that it can fully review both the JAL/AA and the parallel United/Continental/All Nippon ATI application in six months. This clearly signals that DOT has no intention of conducting an objective antitrust evaluation, and merely intends to rubber-stamp the two applications, a signal reinforced by the fact that neither application includes any substantive evidence regarding

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60 press reports at the time the US-Japan treaty was signed suggested the possibility of taxpayer subsidies to JAL as large as JPY800 billion (USD$8.8 billion). Reuters, “Japan Airlines Turns To Govt. For Huge Bailout”, October 29, 2009
61 United Air Lines’ reorganization required four years under a well established and highly transparent US airline bankruptcy process that creditors were highly familiar with and was free of any direct political interference. No Japanese company the size of JAL has ever undergone this type of bankruptcy restructuring, JAL’s indebtedness is far greater than United’s was, and the JAL bankruptcy is a major political issue in Japan.
public benefits or market power risks. With the artificial six month deadline, if DOJ or other parties demand a more rigorous evaluation, DOT can blame them for creating a major diplomatic row with the Japanese.

11. The counter-revolution against liberal airline competition

Dean and Shane’s article recites the successes of DOT’s highly liberal aviation policies in the 1990s in order to falsely imply that their ATI agenda is driven by the same market-oriented, consumer-welfare maximizing thinking as was behind domestic deregulation and the original “Open Skies” treaties. The extreme consolidation of the North Atlantic, and the impending consolidation of the Pacific are not only totally inconsistent with those past policy, but represents a counter-revolution against the liberal competitive policies of the 80s and 90s, and Dean and Shane are acting as advocates for the counter-revolutionaries. The post-2000 consolidation movement is not trying to update competition policy in light of observable marketplace or economic changes, but they are trying to reestablish the pre-deregulation world of governmentally managed competition, where international aviation was exempt from normal antitrust rules, and where the large incumbent carriers could privately lobby bureaucrats to rig markets so they could exploit market power that reduced both consumer welfare and long-term industry efficiency. If Dean and Shane seriously believed that consolidation around just three global competitors is the “future of aviation” and beneficial to consumers, they should argue their case openly, and they should be arguing for the repeal of the Airline Deregulation Act so that domestic consumers could enjoy the same benefits. If DOT believes that recent ATI applications really created significant public benefits without unduly increasing market power, they should be willing to accept the DOJ’s challenge, and provide evidence that meets Horizontal Merger Guidelines standards.

<table>
<thead>
<tr>
<th>Transatlantic competition: consolidation of 26 independent competitors into 3 collusive alliances almost complete</th>
<th>Transpacific competition: consolidation of 26 independent competitors into 3 collusive alliances began in 2008</th>
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</thead>
<tbody>
<tr>
<td>3 surviving competitors</td>
<td>independent competitors in 2008:</td>
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<tr>
<td>Lufthansa-led collusive alliance</td>
<td>Hainan</td>
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<tr>
<td>TWA (2002)</td>
<td>Cathay Pacific</td>
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<td>Alitalia (2002)</td>
<td>United</td>
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<td>USAirways (2004)</td>
<td>Eva</td>
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<td>KLM (2004)</td>
<td>Continental (a)</td>
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collusive alliance
British Airways-led
collusive alliance

**21 competitors**
eliminated by
governmental approval
of
ATI or merger

Northwest (1993)
Sabena (1995)
Delta (1995)
Austrian (1995)
United (1997)
SAS (1997)
British Midland (2001)

<table>
<thead>
<tr>
<th>Air Canada (2005)</th>
<th>Delta (a)</th>
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<tbody>
<tr>
<td>Swissair/Swiss (2005)</td>
<td>Hawaiian</td>
</tr>
<tr>
<td>LOT Polish (2005)</td>
<td>Japan (b)</td>
</tr>
<tr>
<td>TAP Air Portugal (2005)</td>
<td>All Nippon (b)</td>
</tr>
<tr>
<td>Turkish (2008)</td>
<td>Korean</td>
</tr>
<tr>
<td>Continental (2009)</td>
<td>Asiana</td>
</tr>
<tr>
<td>American (2010)</td>
<td>Air China</td>
</tr>
<tr>
<td>Iberia (2010)</td>
<td>China Eastern</td>
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<tr>
<td>Finnair (2010)</td>
<td>China Southern</td>
</tr>
</tbody>
</table>

**2 others not viable as independent competitors**

Virgin Atlantic
Aer Lingus

Malaysian
Singapore
Thai
Qantas
V Australia (b)
Air New Zealand
Air Pacific
Tahiti Air Nui

(a) competition already eliminated
(b) application pending to eliminate competition

The DOT’s “aviation policy”—the consolidation of all of the major international carriers into three collusive groups—is driving an extraordinary transformation of the industry’s structure, one that will dwarf all of the competitive changes since deregulation. Radical consolidation is a fundamentally anti-market agenda, as the resulting changes are not based on returns to capital from efficiency/productivity gains. The consolidation that began in 1993 and accelerated dramatically after 2003 resulted from large carriers petitioning governments for reduced competition; not from efficient carriers displacing inefficient ones or similar “market forces”. The EU’s “national champion” policy explicitly uses alliances to prop up unprofitable flag carriers such as Alitalia, Austrian, SAS and LOT, and the Japanese government clearly believes that ATI-facilitated reductions in competition would help JAL survive. Despite aggressive pro-consolidation publicity campaigns, private investors have been totally unwilling to risk their capital on any of the major airline combinations of the last five years\(^ {64}\), since the capital markets know that there are no significant economic synergies to be exploited, and that the vast majority of airline mergers have been financial and competitive disasters\(^ {65}\). This type of artificial consolidation entrenches old-line legacy companies, could distort domestic competition\(^ {66}\) and reduces pressures to innovate and improve productivity.

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\(^{64}\) The Delta-Northwest merger was a stock swap with no outside financing. The USAirways-America West combination was a bankruptcy reorganization combining two airlines that would have otherwise liquidated. Widely discussed mergers such as United-Continental and British Airways-Iberia could not find willing investors, even during the greatest financial bubble in world history.

\(^{65}\) The only mergers between large airlines since the 1970s where acquisition and implementation costs were clearly justified by efficiency/productivity gains were ones creating large hubs (TWA-Ozark at St.Louis, Northwest-Republic at Minneapolis, Air France-Air Inter-UTA at Paris) or mergers implemented as part of a major bankruptcy restructuring (USAirways-America West, Lufthansa-Swiss). See Horan Congressional Testimony, supra

\(^{66}\) Carriers such as Delta and Lufthansa are less efficient producers in many domestic (and intra-EU) markets compared to carriers such as Airtran or Easyjet; the risk is that they would use supra-competitive intercontinental profits to distort competition against those lower cost carriers in shorthaul markets.

*Horan, “Double Marginalization and the Counter-Revolution Against Liberal Airline Competition” Draft 31 March 2010, page 30*
This counter-revolution totally depends on “double marginalization” and the other arbitrary rules that DOT has used to render the public benefits and market power test meaningless, and the counter-revolution would collapse if ATI applicants were required to use verifiable, case-specific evidence. As the original 90s alliances demonstrated, traditional evidentiary standards are not an obstacle to consolidation proposals that generate legitimate economic synergies and consumer benefits without creating undo market power. But the post-2003 radical consolidation around three globally collusive alliances rests on a foundation of the willfully false claims embedded in “double marginalization”. All recent consolidation totally depends on the DOT’s insistence that fares automatically fall 15-25% whenever ATI grants reduce competition regardless of market/competitive conditions, that 100% of transatlantic consumer welfare gains in the 90s were due to ATI (and none of the gains were due to carrier productivity or favorable supply/demand conditions), and that a single study of 1990s transatlantic price changes sponsored by ATI applicants can be used to predict price changes 20 years later in any market anywhere on the globe. By ruling that “double marginalization” and the other arbitrary rules are settled, unchallengeable fact, DOT expects to accelerate approval of the Japan and subsequent ATI cases and gives airlines an extremely low cost way to create market power and supra-competitive profits worldwide.

Aside from the impact on airline industry structure and consumer welfare, the counter-revolution replaces the concept of DOT as an impartial enforcer of the antitrust laws with airline antitrust enforcement based on private, negotiations between DOT, the large incumbent airlines, and other governments. Replacing “evidence driven antitrust enforcement” with “bilateral (or policy) driven antitrust enforcement” gives the DOT much more regulatory power and discretion than Congress ever intended, and greatly increases the risk of regulatory capture by the parties DOT is supposed to be regulating. In the 1990s DOT creatively used its combined antitrust and bilateral negotiation roles to significantly liberalize international airline markets. If the DOT is unwilling to abandon “double marginalization” and the counter-revolution against liberal competition, then perhaps Congress should consider shifting international antitrust authority to DOJ, as it did for domestic aviation.