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Eli A. Friedman

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AIRLINE ANTITRUST: GETTING PAST THE OLIGOPOLY PROBLEM

ELI A. FRIEDMAN*

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I. INTRODUCTION

Since Congress began deregulation of the domestic airline industry in 1978,¹ airlines have transformed and consolidated, resulting in large increases in efficiency and profitability for a small number of remaining "competitors."² United, American, and Delta – the "Big Three" airlines – account for approximately 55% of all U.S. air traffic,³ and the five largest airlines control more than 70% of the U.S. domestic market.⁴ Since there are few other competitors, many less popular routes have monopoly status, and

* B.A. 1998, Florida State University; J.D. candidate May 2001, University of Miami School of Law. The author wishes to thank Professor Gary Minda of the Brooklyn Law School and Professor Alan Swan of the University of Miami School of Law for their insight and guidance in the preparation of this comment.

¹ See Airline Deregulation Act of 1978, Pub. L. No. 96-192, 94 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.).

² See Scott Thurston, *Delta Again Posts Billion-Dollar Profit*, ATLANTA CONST., July 20, 1999, at 1E (reporting that Delta Airlines earned \$1.1 billion in its fiscal year ending June 30, 1999, and \$1 billion for the fiscal year ending June 30, 1998).

³ See Jack Nease, *Airline Deals Would have High Price – For Travelers*, SUN-SENTINAL (Fort Lauderdale, Florida), Dec. 17, 1996, at 3D.

⁴ See Richard Whitaker, *And Then There Were Four . . .*, AIRLINE BUS., Mar. 1998, at 7.

the collective airline industry, with the exception of certain large markets, has the characteristics and pricing power of an oligopoly.⁵ Due to the oligopolistic pricing structure, many routes have disproportionately high airfares.

This comment will examine the high barriers to entry in the airline industry, created primarily by government and the airline industry itself, which largely renders the existence or threat of start-up competition unable to serve as a deterrent to oligopolistic pricing. The primary government created barriers are the prohibition of cabotage⁶ within the United States, foreign ownership restrictions upon airlines, and the anti-competitive management of local airports. The primary industry created barriers to entry are anti-competitive behavior and large economies of scale. The role and effectiveness of competition laws, as applied to mitigate the effects of these barriers, are examined as well.

After establishing that barriers to entry are needlessly contributing to the oligopolistic status of the U.S. domestic airline industry, this comment will then explore how the Department of Transportation's (DOT) practice of granting antitrust immunity to alliances of foreign and domestic airlines is in conflict with the pro-competition goals of the DOT itself and the Department of Justice (DOJ). Lastly, this comment looks at solutions to enhance competition, and new problems that will arise as a result.

II. AIRLINE REGULATION HISTORY

A. Domestic

The United States initiated airline regulation with the passing of the Air Commerce Act of 1926,⁷ which was expanded by the Civil Aeronautics Act of 1938.⁸ The Civil Aeronautics Act created the Civil Aeronautics Authority, which was turned into the Civil Aeronautics Board (CAB) in 1939.⁹ The purpose of the CAB was to regulate: (1) market entry and exit, including the power to grant operating permits and to approve, allocate, and assign routes

⁵ See Katherine Van Wezel Stone, *Labor Relations on the Airlines: The Railway Labor Act in the Era of Deregulation*, 42 STAN. L. REV. 1485, 1541 (1990).

⁶ "Cabotage," is the privilege to transport passengers from one destination to another within a country other than that of the carrier at issue. See *infra* Part III.D.

⁷ Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568 (1926); see also Seth Warner, *Liberalize Open Skies: Foreign Investment and Cabotage Restrictions Keep Noncitizens in Second Class*, 43 AM. U. L. REV. 277, 287 (1993).

⁸ Civil Aeronautics Act of 1938, 49 U.S.C. § 401, *et seq.* (current version at 49 U.S.C. § 1301, *et seq.* (1996)); see also Warner, *supra* note 7, at 288.

⁹ See Warner, *supra* note 7, at 288.

and service to certain communities;¹⁰ (2) rates and air fares;¹¹ and (3) anti-competitive practices.¹² The CAB regulated the airline industry from 1938-1984, presiding over all civil interstate air travel and civil foreign air travel regarding the United States. In the wake of high prices and unprofitable airlines, the Airline Deregulation Act of 1978 provided for the CAB to be dissolved in 1984.¹³

B. *International*

At the Paris Convention of 1919, a treaty was created providing for each nation to have complete and exclusive sovereignty over the airspace above their territory. Eventually ratified by thirty-two nations,¹⁴ this treaty was the primary document governing international civil aviation until the Chicago Convention of 1944, when comprehensive rules were established to govern nearly every aspect of international civil air transportation.¹⁵ The Chicago Convention rules, which were eventually adopted by 180 nations, maintained the position that nations have complete and exclusive sovereignty over the airspace above their territory.¹⁶ Subsequently, in accordance with the Chicago Convention, nations have signed bilateral agreements that expand the rights that they confer upon each other.¹⁷

The United States has signed bilateral "Open Skies"¹⁸ agreements with forty-three other nations, many of them European.¹⁹ "Open Skies" agreements generally incorporate rules allowing the airlines of the two nations to the agreement to provide as much passenger and cargo capacity between the two nations as the airlines desire. This has caused controversy in the European Community (EC), mainly because the EC has created a

¹⁰ See Civil Aeronautics Act of 1938, 49 U.S.C. § 401 (repealed 52 Stat. 987).

¹¹ See *id.* at §1002(d), (repealed 52 Stat. 1018-19).

¹² See *id.* at § 408(a) (current version at 49 U.S.C. § 40101 (1996)).

¹³ See generally Airline Deregulation Act, 49 U.S.C. §§1301-1542 (1988 & Supp. III 1991).

¹⁴ See I.H.P.H. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 4 (6th rev. ed., 1997).

¹⁵ See *id.* at 5.

¹⁶ See *id.* at 12.

¹⁷ See *id.*

¹⁸ The U.S. defined "Open Skies" according to the following criteria: 1) open entry on all routes; 2) unrestricted route and traffic rights; 3) liberalized price setting; 4) liberal charter arrangements; 5) liberal cargo regime; 6) prompt conversion of earnings to hard currency and prompt remission to homeland; 7) open code sharing; 8) rights to control airport functions; 9) pro-competitive provisions on commercial opportunities; and 10) non-discriminatory operation and access for computer reservation systems. See Mead Jennings, *Defining an Open Skies Concept*, AIRLINE BUS., Sept. 1992, at 129.

¹⁹ See *Before the Aviation Subcomm. of the House Transportation and Infrastructure Comm.*, 105th Cong. (2000) (statement of Rodney Slater, Secretary of Transportation) available at <http://199.79.179.73/tabula/teat/Slater2.htm> (on file with author).

Single European Market. As a result, the transport commissioner of the EC has brought suit against EC member states that have negotiated bilateral "Open Skies" agreements with the United States.²⁰

The "Open Skies" agreements foster competition in international aviation. DOT Assistant Secretary Patrick Murphy has released findings that the average fares in US-Europe "Open Skies" markets dropped by more than 5% in 1996-1997, while at the same time fares between the non- "Open Skies" United States-United Kingdom routes rose by 6%.²¹

Separate from "Open Skies" arrangements, the current regulatory scheme that is used to define the rights of an aircraft in a foreign nation is the eight "freedoms" regime.²² The first five "freedoms" were recognized at the Chicago Convention of 1944, and the last three, including cabotage, are not as widely recognized. They are:

1. the right to fly across the territory of a foreign country without landing;
2. the right to land in a foreign country for non-commercial purposes such as refueling;
3. the right of a carrier licensed in one state to put down, in the territory of another state, passengers, freight, and mail taken up in the state in which it is licensed;
4. the right of an air carrier licensed in one state to take on, in the territory of another state, passengers, freight and mail for off-loading in the state in which it is licensed;
5. the right of an air carrier to transport passengers, freight, and mail between two states other than the one in which it is licensed;
6. the right to take on passengers, mail, and cargo in one state and to put them down in a third state after a stopover in the state of registration of the aircraft;
7. the right to take on and put down passengers, mail, and cargo between two states without stopping over in the aircraft's state of registration;

²⁰ 20 See Tom Gill, *Brussels Gears Up to Tackle Aviation*, AIRLINE BUS., Apr. 1999, at 20.

²¹ 21 See Tom Gill, *Little Hope of Early US- UK Open Skies*, AIRLINE BUS., Feb. 1999, at 11.

²² 22 See G. Porter Elliott, *Antitrust at 35,000 Feet: The Extraterritorial Application of United States and European Community Competition Law in the Air Transport Sector*, 31 GEO. WASH. J. INT'L L. & ECON. 185, 212 n.197 (1997/1998).

8. the right to take up and put down passengers, mail, and cargo solely within the territory of a state other than the aircraft's state of registration (also known as cabotage).²³

Within the United States cabotage is strictly prohibited, preventing any non-U.S. flagged carrier from competing on domestic routes. This single barrier to entry, discussed further below, completely eliminates foreign competition.

III. BARRIERS TO ENTRY

The airline industry retains oligopolistic status due primarily to the enormous barriers to entry for new competition, which were created by governments²⁴ and major airlines.²⁵ Without the widespread existence or threat of start-up competition, there is no deterrent to oligopolistic pricing in most markets. According to economist Joe Bain:

Even in automistically organized industries, barriers to entry may, under certain conditions, result in a long-term elevation of prices and profits and a restriction of output Each of the few established sellers - whether they act collectively or singly - will appraise the condition of entry and, anticipating that entry may occur if price exceeds a given level, will regulate his price policies accordingly. There will thus be a sort of "recognized interdependence" of actions not only among established sellers but between established sellers and potential entrants. In this event, variations in the condition of entry may be expected to have substantial effects on the behavior of established sellers, even though over long intervals actual entry seldom or never takes place.²⁶

While the largest airlines are restricted in number, they do not necessarily have diseconomies of scale. The "hub and spoke" system is extremely

²³ See *id.*

²⁴ See FAA/OST, AIRPORT BUSINESS PRACTICES AND THEIR IMPACT ON AIRLINE COMPETITION 33 (Oct. 1999).

²⁵ See *United States v. AMR Corp.*, No. 99-1180-JTM (D. Kan. filed May 13, 1999), available at <http://www.usdoj.gov/atr/cases/f2400/2438.htm> (an ongoing case alleging predatory pricing by AMR Corp., parent of American Airlines); see generally Kevin O'Toole, *American Justice?*, AIRLINE BUS., July 1999, at 66.

²⁶ JOE BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES 3-4 (1956).

efficient, and it serves as a barrier to entry that can only be matched by other airlines with a similar level of efficiency. Any new entrant in the industry must either have a "hub and spoke" system or another type of efficiency in order to be competitive.

A. Government Created Barriers to Entry

The government has created barriers to entry by misallocating airport and gate usage. U.S. Senator John McCain of Arizona, feels that cases of predatory behavior in recent years have been "numerous and compelling."²⁷ According to Senator McCain, "[t]he major airlines have been a great impediment in that they have, to some effect, choked off new competition. I am glad the DOT is investigating those practices, but at the same time we also have to remove the anti-competition restrictions such as slot control at airports."²⁸ The lack of available gates and take-off slots within individual airports has long been exacerbated by exclusive-use lease arrangements and majority-in-interest clauses that permit a *de facto* management of airports by the major airlines who sign long-term leases for gates.²⁹ This *de facto* management is possible because some airlines have clauses in their leases that permit them to veto airport improvements intended to create more capacity.³⁰ The DOT and the Federal Aviation Administration (FAA) are currently investigating these business practices.³¹ Through the Aviation Competition Enhancement Act,³² Senator McCain proposes a mandated slot allocation to new entrants and to a limited number of incumbent carriers where the capacity exists. Where capacity does not exist, Senator McCain proposes a gradual withdrawal of the slots that were grandfathered to the major airlines when deregulation ended in 1985.³³

Of course, the major airlines are opposed to this type of slot allocation, and they claim that the Aviation Competition Enhancement Act is a form of reregulation.³⁴ McCain counters by saying "[t]he barriers of slot control

²⁷ See Karen Walker, *Champion of the Cause*, AIRLINE BUS., Mar. 1998, at 38.

²⁸ See *id.*

²⁹ See *id.*

³⁰ See FAA/OST, *supra* note 24, at 42.

³¹ See *Before the Subcomm. on Aviation, Comm. on Transportation and Infrastructure*, 106th Cong. (1999) (Statement of John Coleman, Director of Aviation Analysis, Department of Transportation concerning air transport in Bangor Maine) available at <http://tabula.ost.dot.gov/test/Coleman2.htm> (on file with author). The Federal Aviation Administration is organized under the United States Department of Transportation.

³² Aviation Competition Enhancement Act of 1997, S. 1331, 105th Cong. (1997).

³³ See Walker, *supra* note 27.

³⁴ See *id.*

were a regulatory act to start with. That's like saying you shouldn't give the Department of Justice the power to go after people who engage in anti-competitive behavior. That's reregulation?"³⁵

B. *Airline Created Barriers to Entry*

The "hub" and "spoke" system arose after deregulation as the airlines struggled to increase efficiencies and profitability. Today, leading domestic airlines are brand name carriers that dominate hub airports in large cities and feed out into large and small city based spokes.³⁶ The basic premise of this system is that each spoke feeds all of the other spokes, or a passenger travels on only one spoke. Spoke destinations are cities of all sizes, but the largest cities are consistently served by several major carriers, and can be both a hub and a spoke to different airlines. Since the hub and spoke economies of scale cannot be matched by a new competitor airline, a large airline has a greater profit margin and more price flexibility, creating a formidable barrier to the maintenance of a new entry when airfare competition heats up. With economic power tilted toward the larger airlines, the low cost airlines have alleged predatory pricing in violation of the U.S. antitrust laws.³⁷

When a low cost carrier (LCC) establishes service on a route, it is often between a hub and a spoke where there is a perceived opportunity to gain market share by charging lower fares, while still making a profit. In response to the new competition, large carriers temporarily lower their prices and expand service to become competitive with the LCC. Due to hub and spoke efficiencies, large carriers may not need to lower their prices below marginal cost in order to be competitive, but they often have anyway.³⁸ Eventually, the LCC can no longer bear the losses of servicing a particular city. The major airline then returns to reduced capacity and raises fares on the particular route, reaping monopoly or oligopoly level profits.³⁹

³⁵ *Id.*

³⁶ See Michael E. Levine, *Antitrust Lessons from the Airline Industry: Airline Deregulation: A Perspective*, 60 ANTITRUST L.J. 687, 691 (1991).

³⁷ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209, 219 (1993) (holding that for predatory pricing recovery under either §2 of the Sherman act or for primary-line price discrimination under the Robinson-Patman Act, the plaintiff must show (1) complained of prices are below an appropriate measure of its rival's costs, and (2) the competitor must have a reasonable prospect of recouping its investment).

³⁸ See Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry, 63 Fed. Reg. 17,919, 17,920 (Proposed Apr. 10, 1998).

³⁹ See *id.*

In short distance markets, without low-fare competition, inflation adjusted fares are substantially higher, not lower, than pre-deregulation fares.⁴⁰ When deregulation occurred,⁴¹ it was widely thought that the contestability of markets would provide ample competition, but as applied to airlines, the barriers to entry are often too high to discipline markets.⁴² Therefore, young, low-cost airlines are not thriving in this environment.

C. Antitrust Enforcement

The rigorous enforcement of antitrust law can curb predatory behavior by major airlines if it can be proven that the major airline is irrationally pricing below marginal cost in the desire to force the competitor out of the market. As described by Kenneth Quinn, a Washington, D.C. attorney and former chair of the American Bar Association's Air and Space Law Forum, proving predatory behavior can be difficult. According to Quinn, "[d]rawing the line between tough competition that is beneficial to consumers, and predatory tactics that are harmful to competition, often is difficult."⁴³ There is no bright line test to delineate between tough competition and predatory pricing, and it must be evaluated on a case-by-case basis by the DOJ.

The U.S. Department of Justice Antitrust Division, through Roger Fones, the chief of the transportation section, claims "our antitrust division has a strong interest in assuring that a new entry is not thwarted by anti-competitive behavior by incumbent airlines."⁴⁴ The DOT and the DOJ share the responsibility for the enforcement of the antitrust laws against airlines.⁴⁵ While the DOJ is the primary antitrust authority in the review of domestic

⁴⁰ See DOT, COMPETITION IN THE US DOMESTIC AIRLINE INDUSTRY: THE NEED FOR A POLICY TO PREVENT UNFAIR PRACTICES (Rev. ed., May 1999) available at <http://www.dot.gov/affairs/dkt3713.htm>. (last visited Sept. 15, 2000) (on file with author).

⁴¹ Prior to deregulation, the CAB subsidized airfares on less popular routes with higher airfares on more popular routes.

⁴² See Levine, *supra* note 36, at 688.

⁴³ Dave Knibb, *Fair or Foul*, AIRLINE BUS., Oct. 1997, at 40.

⁴⁴ *Id.*

⁴⁵ The Department of Justice and the Federal Trade Commission share jurisdiction over federal government enforcement of the federal antitrust laws, with certain industries assigned to one agency or the other by statute. For example, airlines are assigned to the DOJ by 15 U.S.C. § 45 (2001). In certain instances, enforcement jurisdiction is also shared between a primary enforcement agency and a department of the executive branch. In airline antitrust enforcement, the DOJ and the DOT share jurisdiction pursuant to 49 U.S.C. § 41712 (2001). Criminal enforcement and other punitive proceedings are enforced exclusively by the DOJ, the arm of the executive branch empowered to use punitive enforcement measures.

acquisitions and alliances,⁴⁶ the DOT has the ability to grant antitrust immunity to airline alliances when it is in the public interest.⁴⁷

Explaining the Antitrust Division's opinion on different incumbent airline reactions to a LCC, Fones says that fare discounting in response to a LCC is not a concern, and neither is the addition of capacity when the lower pricing stimulates the extra demand.⁴⁸ An airline gets closer to a violation when the incumbent adds flights in order to fly at similar times, or when capacity is added beyond reasonable projections.⁴⁹ The incumbent firmly commits a violation when it decides to bring new service to routes that the LCC serves.⁵⁰

According to Fones, the DOJ goes with the presumption that "the incumbents pre-entry schedules are efficiently operating its network."⁵¹ Therefore, when changes in capacity, schedules, or routing are made upon entry by a LCC, the DOJ demands an explanation.⁵² A classic example of a predatory antitrust violation occurred in 1993 when Northwest Airlines decided to revive its formerly abandoned Minneapolis-Reno route and create a mini-hub in Reno. Since Reno Air had also begun providing Reno-Minneapolis service in 1993, Northwest overlapped much of Reno Air's network.⁵³ While no action was ever filed against Northwest Airlines, the DOT's threat of a cease and desist order forced Northwest Airlines to discontinue its predatory behavior.⁵⁴

When price cuts are made, the basic test is whether an incumbent's pricing strategy makes sense only if it is designed to drive the new entrant away.⁵⁵ If the strategy is rational on other grounds, the pricing is legal.⁵⁶ According to Fones, "[i]f there exists no prospect for recoupment, then we can be confident that the incumbent's pricing strategy benefits consumers. If the incumbent charges "irrationally" low prices in the short run, but can

⁴⁶ See *Before the Senate Comm. on Commerce, Science, and Transportation*, 106th Cong. (1999) (statement of Mortimer L. Downey, Deputy Secretary of the US Department of Transportation, concerning air transportation in Charleston, South Carolina) available at <http://152.119.36.5/test/Downey1.htm> (on file with author).

⁴⁷ See Federal Aviation Act, 49 U.S.C. §§ 41308-41309 (1996).

⁴⁸ See Knibb, *supra* note 43, at 40.

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See *id.*

more than make up for them with higher prices in the long run, illegal predation may be occurring."⁵⁷

The DOJ will also examine whether losses can be recouped by an LCC discontinuing service in other competing markets. For example, if an incumbent's discounted fares on its Seattle-Reno route were likely to force a LCC to abandon Seattle-Denver as well, the DOJ would consider whether the airline anticipated recouping its losses by charging higher fares on both routes. Fones says that the antitrust division looks "at the recoupment issue first, and then proceed(s) to a cost analysis only if the conduct in question satisfies the recoupment requirement."⁵⁸

With concurrent jurisdiction over the enforcement of federal antitrust laws under the Federal Aviation Act,⁵⁹ the DOT is also authorized to issue a cease and desist order to an airline, through an administrative hearing, if the DOT concludes that an airline is engaging in "unfair competition."⁶⁰ If the airline ignores the cease and desist order, fines can then be assessed.⁶¹ The law does not define "unfair competition" for the DOT.⁶²

The DOT is also authorized to prohibit unfair methods of competition by stopping air carriers from engaging in conduct that can be characterized as anti-competitive under antitrust principles, even if it does not amount to a violation under the antitrust laws.⁶³ The DOT has used its enforcement powers to investigate several antitrust complaints, and has formulated a set of guidelines known as the Enforcement Policy Regarding Unfair Exclusionary Conduct (Enforcement Policy).⁶⁴ The Enforcement Policy was designed to provide guidelines for the DOT to use while assessing exclusionary conduct, but it has not been published as originally proposed. Instead, the DOT has adopted the belief that "publishing . . . analyses and developing standards through a case-by-case approach will be a more effective way of proceeding. A 'one size fits all' approach won't work."⁶⁵

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See 49 U.S.C. § 41309(c) (1996).

⁶⁰ See Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry, 63 Fed. Reg. 17,919, 17,921 (Proposed Apr. 10, 1998).

⁶¹ See *id.*

⁶² See generally Federal Aviation Act, 49 U.S.C. § 1301, *et seq.* (1996).

⁶³ See 49 U.S.C. § 41712; Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry, 63 Fed. Reg. at 17,921.

⁶⁴ See *Before the Subcomm. on Aviation, Comm. on Transportation and Infrastructure*, 106th Cong. (1999) (statement of John Coleman, Director of Aviation Analysis, Department of Transportation, concerning air transportation in Bangor, Maine), available at <http://tabula.ost.dot.gov/test/Coleman2.htm> (on file with author); see generally Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry, 63 Fed. Reg. at 17,921.

⁶⁵ Rodney E. Slater, U.S. Transportation Secretary Slater, In Address to Wings Club, Recommends Continued DOT Focus on Airline Competition (Jan. 16, 2001).

While a case-by-case approach may be a more effective way to proceed, it will require airlines to operate in a less certain environment.

D. *The Resulting Oligopoly*

While antitrust law that prevents collusion regulates the domestic airline industry, it does not prevent an oligopolistic pricing model that invites competitors to price their services in accordance with the prices of others in the industry, also known as "conscious parallelism" pricing.⁶⁶ "Conscious parallelism" pricing is done absent a "contract, combination, or conspiracy" between the competing firms, which is a prerequisite to invoking § 1 of the Sherman Act.⁶⁷ Without some evidence of an agreement, oligopolistic pricing cannot be eliminated.⁶⁸ Since it is an oligopolistic industry, airlines do not price their services based upon their marginal cost. Instead, the pricing structure is based upon their competition, so long as they are profitable. While meeting or beating the competition is traditionally welcomed, competition can easily be observed and followed. Since airfare prices are quickly matched, there is no incentive to price as low as possible.

The elevated prices that result from an oligopolistic market will lower if the oligopoly is weakened by an increase in the number of competitors. A study of 850 non-stop routes by a group of DOJ Antitrust Division economists found that when airline competition in a market moves from three to two equally sized market participants, prices rose by an average of 10%. A further decrease from two to one market participants raised prices another 20% on average.⁶⁹ The market concentration problem was largely irrelevant before deregulation, because the Civil Aviation Board regulated airfares to the level of being "just and reasonable," making monopoly profits or predatory pricing impossible.⁷⁰

⁶⁶ See, e.g., *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 41 (7th Cir. 1992) (parallel behavior in oligopoly fails to establish an agreement).

⁶⁷ See *id.*

⁶⁸ See HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 167 (2d ed., 1994). Hovenkamp writes:

Courts often say that parallel behavior alone does not establish an agreement unless the plaintiff can also show the presence of certain "plus factors" making the inference of agreement stronger. Relevant plus factors include such things as an oligopolistic market structure, advance posting of parallel prices, a history of price fixing or exchange of price information.

⁶⁹ See Gloria Hurdle et al., *Concentration, Potential Entry, and Performance in the Airline Industry*, 38 J. INDUS. ECON. 119, 120 (1989) noted in Robert D. Willig, *Antitrust Lessons from the Airline Industry: The DOJ Experience*, 60 ANTITRUST L.J. 695 (1991).

⁷⁰ See Andrew Goetz & Paul Dempsey, *Airline Deregulation Ten Years After: Something Foul in the Air*, 54 J. AIR L. & COM. 927, 934 (1989).

In Europe, as of April 1, 1997, European Community member based airlines have been granted cabotage rights within the European Community.⁷¹ This, in combination with the privatization of state owned airlines, has resulted in a considerable decrease in airfares, as well as an increase in the availability and quality of service. If the United States were to grant cabotage rights on a reciprocal basis with the airlines of other nations or groups of nations (such as the EC), whose airlines provide international service to United States' airports, the increased competition would result in a decrease in domestic airfares, as well as new markets for all of the airlines involved.

For example, under cabotage with the EC, a U.S. airline could open up an entire market to itself by providing service between a city-pair such as Paris, France and Rome, Italy. Likewise, a European airline could fly passengers to New York, and then continue on to Atlanta. Currently, however, without a cabotage agreement, only an airline of the EC may fly passengers from Paris to Rome. A U.S. airline cannot access routes between two foreign destinations, and no foreign airline may fly between two destinations within the U.S.

E. Foreign Ownership Restrictions

When the Civil Aviation Board (CAB)⁷² was dismantled in 1984 to promote free market pricing, foreign control and ownership restrictions in airlines were never changed. This barrier prevents foreign companies or citizens from merging or acquiring more than 25% voting equity, or more than 49% non-voting equity in a U.S. airline. Additionally, no more than one third of an airline's board of directors may be foreigners.⁷³ Unfortunately, these restrictions also prevent foreign capital from supporting LCC's to any great extent.⁷⁴

⁷¹ See Elliott, *supra* note 22, at 188.

⁷² The responsibilities of the CAB that were retained after deregulation are now the responsibilities of the DOT. These responsibilities include safety, ownership restrictions, licensing, etc.

⁷³ See Civil Aeronautics Act of 1938, 49 U.S.C. §§ 1301-1557 (1983 & Supp. 1988) (limiting non-U.S. citizens to 25% of an airline's voting stock). The foreign investment limits were originally passed as the Air Commerce Act of 1926, Pub. L. No. 69-254, §§ 1-14, 44 Stat. 568 (1926) (previously 49 U.S.C.A. §§ 171-84 (West, 1951) (repealed 1958)), for national security purposes. The Congress and military reasoned that the citizenship requirement and government intervention helped to assure aircraft availability as well as facilitate an auxiliary air force for United States military service. See *Inquiry into Operations of the United States Air Services: Hearing Before the House Select Committee of Inquiry into Operations of the United States Air Services*, 68th Cong. 527 (1925) (statement of Major General M. Patrick, Chief of the Army Air Service).

⁷⁴ See Constantine G. Alexandrakis, *Foreign Investment in U.S. Airlines: Restrictive Law is Ripe for Change*, 4 U. MIAMI BUS. L.J. 71, 79 (1994).

There exists an inextricable relationship between foreign investment limitations and cabotage, because implementation would yield similar rights at a certain level. If a foreign airline flies between two U.S. destinations, cabotage rights are necessary. If cabotage rights are not available, a foreigner owning a controlling stake in a U.S. airline could achieve the same results, which under the current rules could not be a U.S. aircraft. Therefore, a foreign national could provide U.S. domestic air service only if Congress modified either the cabotage or the foreign ownership rule. The major practical difference would be that in international air travel, a U.S. carrier would fall under different treaties than a foreign carrier. Presumably, foreign carriers could integrate their international service with domestic service under either regime.

One of the biggest supporters of the United States adopting rules permitting cabotage is Virgin Airways (Great Britain) chairman Richard Branson, a British citizen limited by U.S. foreign ownership requirements. Branson once stated:

It is really a ludicrous situation. When I open a Virgin Megastore in New York, I am welcomed with open arms, just as Tower Records is in London. But try to operate an air service between New York and Boston, using U.S. aircraft and U.S. crew, and governments scream that I am mad!⁷⁵

Branson aspires to begin service with a carrier he would name Virgin America, which he claims "will give the big six some real competition."⁷⁶ While Branson clamors for the opportunity to compete with the big five airlines, in reality the DOT may not think that he is truly mad. DOT Assistant Secretary for Aviation and International Affairs, Charles Hunnicut, has asserted that the issue needs to be examined. Hunnicut, while attending the 1998 Washington Deregulation 20 Summit, stated:

We have worked together to dismantle many of the restrictions that some other countries have placed on international services. I think the time has come for all of us to question restrictions that many countries, including the USA, continue to impose on them. Do those restrictions continue to make sense in light of the globalization of markets for goods and services?⁷⁷

⁷⁵ Richard Branson, *Open Skies for Everyone*, FIN. TIMES, Dec. 4, 1996, at 26.

⁷⁶ See Jackie Gallacher, *Virgin Stirs US Cabotage Debate*, AIRLINE BUS., Nov. 1998, at 1.

⁷⁷ *Id.*

Others at the DOT have voiced a different opinion, including Deputy Secretary Mortimer Downey. At the "Aviation in the 21st Century – Beyond Open Skies" conference held in Chicago, Illinois in December 1999, Deputy Secretary Downey stated:

Virtually all countries prohibit carriage of cabotage traffic by foreign airlines, and we have reason to believe that this will be hard for many countries to change anytime soon. In the U.S., the prohibition can only be removed by Congress, and the issue incites strong reaction within the aviation community. Given the obstacles to establishing a viable operation in a foreign country, and particularly in the dynamic competitive situation of the US, we question the extent to which foreign carriers really want or really use cabotage rights.⁷⁸

As for foreign investment, Deputy Secretary Downey remarked, "[s]ome liberalizing of foreign investment – especially among truly privatized carriers – might be of value in promoting a more open international aviation regime."⁷⁹

While some U.S. carriers, including Federal Express, support the lifting of cabotage restrictions with reciprocal rights,⁸⁰ the largest hurdle may be labor organizations. The U.S. Airline Pilots Association has spoken out against cabotage. Their national president, Randolph Babbitt, fearing the loss of jobs to foreign pilots, stated that he "cannot fathom" a reason to support U.S. cabotage.⁸¹ Branson attempts to diffuse the labor issue by establishing that Virgin America would employ 100% U.S. personnel in the cockpit and on the ground, but that promise is not likely to comfort the fears of labor associations.⁸²

Herb Kelleher, the chairman and chief executive of Southwest Airlines also sees the likelihood of cabotage rules coming to the United States as unlikely. When Kelleher was asked about his opinion of cabotage in the United States, he replied:

⁷⁸ Mortimer Downey, Remarks prepared for Delivery During the Conference Aviation in the 21st Century – Beyond Open Skies, Panel F: *The Future of International Airlines in an Open International Aviation Market Environment*, Dec. 7, 1999.

⁷⁹ *Id.*

⁸⁰ See Gallacher, *supra* note 76.

⁸¹ *See id.*

⁸² *See id.*

I don't think that it will ever happen. It does not make any difference to Southwest one way or another, quite frankly. But I do wonder how the foreign carriers could provide lower fares against the more cost-efficient U.S. carriers. I cannot see BA (British Airways) or a Lufthansa, if they were allowed to serve the U.S. more freely, wafting a 747 from Munich to New York, then going on to Richmond. But if they want to do that, it's fine by me.⁸³

While the DOT maintains that it should "[r]educe barriers to the creation of global aviation systems, such as limitations on cross-border investments whenever possible,"⁸⁴ the Department of Defense (DOD) is against the relaxation of rules limiting foreign ownership of U.S. carriers.⁸⁵ During a debate at the Sky Harbor International Aviation Symposium in Phoenix, Arizona in May 1999, DOD Assistant Deputy Undersecretary Mary Lou McHugh stated that changes in U.S. airline ownership rules could have "many ramifications" for the DOD's airlift capabilities during a time of crisis.⁸⁶ Under the DOD's Civil Reserve Air Fleet (CRAF) program, U.S. airlines agree to have their aircraft and crew available for troop and cargo transfer during emergencies.⁸⁷ Airlines volunteer for the program on a year-to-year basis, and are paid when the CRAF system is activated. The DOD believes that foreign-owned airlines would not be as willing or as reliable volunteers as United States owned airlines.⁸⁸ McHugh stated "[w]e feel comfortable with the current situation. During times of crisis we need to know without question that there is support. As we explore airline ownership issues, we must keep U.S. national security foremost in our minds."⁸⁹ The DOD relies on the 725 aircraft signed up for CRAF for approximately 41% of its cargo movements and 93% of its troop movements during a major conflict. CRAF was last activated during the Gulf War.⁹⁰

The feelings on the subject of the relaxation of foreign ownership are not positive with some policymakers in Europe either. Dr. Ralph Fennes, directorate general VII (transport policy) at the European Commission,

⁸³ Kevin O'Toole & Karen Walker, *The King of Low-Cost*, AIRLINE BUS., June 1999, at 38.

⁸⁴ Statement of the United States International Air Transportation Policy, 60 Fed. Reg. 21,841, 21,844 (May 3, 1995).

⁸⁵ See Karen Walker, *U.S. DOD Gives Red Light to Ownership Changes*, AIRLINE BUS., June 1999, at 11.

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ *Id.*

⁹⁰ See *id.*

believes that the next logical step is not the relaxation of foreign ownership limits, but the creation of a "strong multilateral framework across the Atlantic."⁹¹ Tony Baker, the director of International Aviation Negotiations at the United Kingdom Department of Transport, cites the takeover of Air UK by KLM Airlines (Netherlands) as evidence that globalization is already taking place.⁹² Baker asserted the importance of safety issues and the hope that flags of convenience would not occur in the airline industry as they had in the shipping industry, before concluding that "change in ownership rules is maybe an idea whose time has come."⁹³

The current criterion in negotiating international air transport agreements of protecting the citizen airlines of a nation is anachronistic and expensive. The question the United States government should ask is: what is the justification for shielding U.S. airlines from foreign competition? The lower airfares that would result from true deregulation would result in substantial savings on airfares, as well as increased travel, which are efficiencies the entire economy could benefit from.

While the U.S. domestic airline industry enjoys its oligopoly, it has no desire to see the United States pursue cabotage agreements on a widespread level. With the political muscle of the airline industry (and lack of political muscle and education on this complex subject among private citizens), the U.S. Senate would undoubtedly be slow to ratify an agreement providing for reciprocal cabotage with other nations. One way to structure an agreement to be more palatable to the domestic airline industry would be for the United States to deal directly with a group of nations such as the European Union (EU). The Association of European Airlines in its Transatlantic Common Aviation Area (TCAA) statement proposes such an agreement.⁹⁴ The TCAA proposal provides for sweeping changes to the current "Open Skies" framework by liberalizing cabotage and foreign ownership restrictions on a reciprocal basis between the United States and the EU.⁹⁵ If an agreement such as the TCAA is eventually adopted between the United States and the EU, rather than individual European nations, the European market for U.S. carriers will be greatly increased, making a reciprocal cabotage agreement far more equitable to U.S. carriers. The potential for name branded airlines with considerable financial backing to be able to effectively compete with U.S. domestic airlines would lower U.S. domestic airfares significantly. U.S. carriers would also have the opportunity to increase their own profitability

⁹¹ *Id.*

⁹² *See id.*

⁹³ *Id.*

⁹⁴ *See* Graeme Osborn, *Sans Frontiers?*, AIRLINE BUS., Feb. 2000, at 34.

⁹⁵ *See* Chris Thornton, *Freedom's Paths*, AIRLINE BUS., Mar. 2000, at 74.

by providing service within foreign countries. Eventually, other large nations or groups of small nations could enter into agreements with each other, with airlines creating "hub" and "spoke" systems on an international scale.

F. Antitrust Immunity

In 1992, the DOT officially defined "Open Skies" agreements and solicited foreign nations to enter into such agreements with the United States.⁹⁶ When the United States signs an "Open Skies" agreement with a foreign nation, the agreement allows for the airlines of each nation to provide as much air service as desired between the two countries.⁹⁷ If an "Open Skies" agreement is reached with a carrier's home country, the DOT offers antitrust immunity to a foreign carrier who combines service with a U.S. carrier,⁹⁸ in order to permit antitrust immune cooperation in areas such as pricing, revenue sharing, and strategy.⁹⁹ This permits each airline that is a part of the alliance to be a part of a more comprehensive route structure and to offer flights to more destinations.

The antitrust immunity that the DOT provides to airline alliances ignores an opportunity to have airline competition in the United States in the future.¹⁰⁰ The DOT is eliminating competition between domestic and foreign airlines that may compete with each other in the future or may have done so in the past.¹⁰¹ While the DOT initially approved alliances with antitrust immunity to help smaller airlines compete with the larger international air carriers, the emphasis has now shifted to creating alliances that compete with each other. As a result, the number of international alliances is also raising concerns about the potential effect on the competitive structure of the U.S. domestic airline industry.¹⁰²

The Federal Aviation Act vests the Secretary of Transportation with the power to grant antitrust immunity at his or her discretion, when it is in the public interest.¹⁰³ Additionally, pursuant to the Federal Aviation Act, the

⁹⁶ See Warner, *supra* note 7, at 280.

⁹⁷ See *supra* Part III.B.

⁹⁸ See Warner, *supra* note 7, at 300.

⁹⁹ See *id.* at 301.

¹⁰⁰ Most of the alliances are between United States and European carriers, but they are between United States and Latin American carriers as well. See Kevin O'Toole & David K. Seattle, *Antitrust and Open Skies Head South*, AIRLINE BUS., June 1999, at 18.

¹⁰¹ See Transportation Research Board, National Research Council, *Special Report 255, Entry and Competition in the US Airline Industry: Issues and Opportunities*, July 1999, at 143.

¹⁰² See *id.* at 149.

¹⁰³ See 49 U.S.C. § 41308 (1996).

Secretary of Transportation must approve cooperative agreements and requests. The statute reads, in pertinent part:

The Secretary of Transportation shall approve an agreement, request, modification, or cancellation referred to in subsection (a) [subsection (a) contains the filing procedures] of this section when the Secretary finds it is not adverse to the public interest and is not in violation of this part. However, the secretary shall disapprove-

- (1) or, after periodic review, end approval of, an agreement, request, modification, or cancellation, that substantially reduces or eliminates competition unless the Secretary finds that-
 - (A) the agreement, request, modification, or cancellation is necessary to meet a serious transportation need or to achieve important public benefits (including international comity and foreign policy considerations); and
 - (B) the transportation need cannot be met or those benefits cannot be achieved by reasonably available alternatives that are materially less anti-competitive¹⁰⁴

Of course, as the statute provides, the Secretary of the DOT may rescind the antitrust immunity that was previously granted.¹⁰⁵ While this could create new competition between airlines that would no longer be able to cooperate, the integrity and predictability of the DOT and its rulemaking process would be tarnished, which is essential to the viability and growth of the airline industry. Additionally, if individual airlines were to lose antitrust immunity, they may not be able to adapt quickly enough to maintain viability as a market competitor, resulting in airline failures and even less competition.

IV. THE ANTITRUST IMMUNE PARTNERS

The Netherlands became the first country to reach an "Open Skies" agreement with the United States, and an antitrust immune alliance between Northwest Airlines and KLM airlines immediately followed.¹⁰⁶ Each carrier is now able to access flights within each others network, and they can also offer a transatlantic flight between the United States and the Netherlands when only one of them is actually flying. This essentially reduces the number of flights between the United States and the Netherlands, but the

¹⁰⁴ 49 U.S.C. § 41309(b) (1996).

¹⁰⁵ See *id.*

¹⁰⁶ See Warner, *supra* note 7, at 301.

fact that these nations have "Open Skies" agreements will allow another carrier, from either nation, to absorb any reduction in capacity.

Lufthansa Airlines (Germany) and United Airlines also have antitrust immunity, where revenue is not yet shared, but where each airline keeps the profits from the service it provides.¹⁰⁷ While this alliance prevents Lufthansa from benefiting financially from U.S. domestic air travel (and vice-versa for United Airlines in Germany), it prevents the two airlines from competing on their international routes.¹⁰⁸ The airlines generate traffic for each other, increasing their own profitability and reducing competition.¹⁰⁹ United Airlines and Lufthansa Airlines will soon be creating revenue sharing agreements within their alliance, beginning with their Chicago-Duesseldorf route.¹¹⁰

Through the granting of antitrust immunity, the DOT is eliminating potential competition today, as well as competition that would be gained if a regime of reciprocal cabotage were pursued, instead of the less competitive "Open Skies" agreements that promote alliances. KLM could potentially be offering service in competition with Northwest Airlines, but instead the U.S. government is fostering a cartel between them.

In 1992, British Airways announced plans with US Air (currently US Airways) to create an alliance that involved an integration of operations into a global master brand.¹¹¹ This would have granted US Air access to the plethora of worldwide destinations that British Airways services and it would have brought British Airways access to the many routes that US Air flies within the United States. The greatest problem with the agreement was the lack of reciprocity. Not only was British Airways unwilling to relinquish some of its precious few gates in the United Kingdom to U.S. carriers, but the U.S. carriers were unhappy as well.¹¹² At the prodding of United, Delta, and American Airlines, as well as Federal Express, the DOT refused to approve the proposed investment on citizenship grounds.¹¹³ American Airlines indicated that they felt that even if reciprocal cabotage was agreed to, it was not a fair agreement, as the United States has 40% of the world market, and Britain has only a small fraction of that. American Airlines also claimed that even if the entire EC agreed to reciprocal cabotage, it only amounted to between 10-12% of the market, which was less valuable due to the strong

¹⁰⁷ See Jo Pearce, *Reading the Signs*, AIRLINE BUS., Sept. 1999, at 102.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ See Alexandrakis, *supra* note 74, at 84.

¹¹² See *id.*

¹¹³ See *id.*

ground transportation network in Europe, and a lack of airport facilities that could sustain a high volume of traffic.¹¹⁴ The American Airlines statement makes clear that at least one domestic U.S. airline would rather not compete too hard for additional business. Nonetheless, the statement fails to consider the potential growth areas in Europe and beyond that could be exploited through the experience of U.S. domestic airlines in a relatively deregulated regime.

Since then, American Airlines has itself attempted to form an antitrust immune alliance with British Airways, but the DOT rejected antitrust immunity because the United Kingdom had not agreed to an acceptable "Open Skies" agreement.¹¹⁵ The two airlines will be hindered from coordinating ticket pricing and schedules, but they have stated that they remain committed to linked frequent flier programs and shared terminal facilities through their non-antitrust immune Oneworld airline alliance.¹¹⁶ Cooperative alliances without antitrust immunity, also referred to as codeshares,¹¹⁷ are questionable from a legal standpoint. One unnamed attorney stated, "These codeshare alliances are *de facto* mergers. They can be seen as a way to get around the antitrust laws. That is what the DOT and DOJ will be looking at." Other attorneys have given the opinion that even coordinated frequent flier programs could be regarded as overstepping the boundaries of U.S. antitrust law.¹¹⁸

Without cabotage, foreign airlines have no opportunity to compete with in the U.S. domestic airline industry. The current antitrust immunities that are being granted reduce competition on today's international routes, and if cabotage is ever granted within the United States, airlines will have to transform their entire businesses in order to be competitive.

¹¹⁴ See *id.*

¹¹⁵ See *US Government Rejects Antitrust Immunity for BA/AA (British Airways/American Airlines)*, AIRLINE INDUSTRY INFO., Aug. 3, 1999.

¹¹⁶ See *id.*

¹¹⁷ Code sharing is when a flight reservations code is used jointly by two or more airlines who coordinate to sell tickets on a single flight, sometimes at different prices. While price might not be coordinated by the code sharing airlines, depending upon the capacity of the aircraft, the overall capacity is likely to be reduced from a situation where two separate aircraft were competing on a certain route, effectively raising prices through a decreased supply. The question returns to whether the route could support separate competition profitably. If code-shared flights become the primary flights upon a certain route, it may be more profitable to sustain higher prices with less capacity.

¹¹⁸ See Karen Walker, *United Trusts U.S. Alliances*, AIRLINE BUS., June 1998, at 9.

V. MERGERS AND ACQUISITIONS

Under a regime of reciprocal cabotage or liberalized foreign investment, widespread consolidation may become prevalent. It is difficult, if not impossible, for the DOJ to permit widespread mergers and acquisitions between airlines in a deregulated airline industry and maintain competition. Even if airlines don't compete in a certain market, it is too easy for an airline to completely change the market that it competes in. Often a market can be delineated by only the time of a certain flight, and a new market may require only a change in schedule, let alone service to a third city. Airlines would be able to merge or acquire, and then change their services, reducing competition in the markets served by both airlines in the past.

Mergers and acquisitions can also be healthy for competition. If a failing firm needs to combine in order to survive and continue competing, a merger or acquisition makes sense. One way to decrease the competitive impact of mergers and acquisitions is for the DOJ to issue special guidelines regarding mergers and acquisitions that are particularly tailored to the airline industry. Another alternative is for the DOT to fully enforce 49 U.S.C. § 41712, which allows the DOT to stop airline conduct that violates antitrust principles, without an antitrust law violation.¹¹⁹ One possible method of enforcement is for particular destinations that would experience reduced competition to automatically have their affected routes given or sold to another airline that does not currently provide service upon that particular route, applicable even after a merger or acquisition is completed.

One significant barrier that U.S. airlines have to mergers and acquisitions is their labor unions. The Airline Pilots Association is generally in opposition to mergers and acquisitions because, according to Kit Darby, president of consulting company Air Inc., "[m]ergers and buy-outs leave the seniority issue wide open and a pilot can find himself starting all over again. Consequently, pilots have an almost unnatural fear of mergers. It's the number one issue, whether it's on the domestic level or international."¹²⁰

¹¹⁹ See generally Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry, 63 Fed. Reg. 17,919, 17,921 (Proposed Apr. 10, 1998).

¹²⁰ Karen Walker, *Negotiating Change at ALPA* (Airline Pilots Association), AIRLINE BUS., Sept. 1999, at 36.

VI. RECENT PROGRESS AND PROBLEMS

Recently, some initiatives of the DOT to combat the anti-competitive nature of the domestic airline industry have been rewarded. Early in 2000, JetBlue Airways established limited domestic service across the Eastern seaboard, based at New York City's underutilized John F. Kennedy International Airport. JetBlue is the best financed start-up airline in the United States since deregulation, having ordered twenty-five new Airbus A320's. The aircraft features 162 leather seats, individual television monitors, and one class of service. Even with all of the amenities, JetBlue claims its average fares are 65% lower than those previously existing in the markets served.¹²¹

The continued success of start-up airlines such as JetBlue depends on available airport capacity. Airports are already crowded in the United States, and a potential increase in flights will almost certainly lead to a "crowded skies" problem. While the domestic airlines currently dominate large airports and many gates with their large "hub" and "spoke" systems, many foreign airlines have only a few gates in major airports. In order to be competitive in the U.S., foreign airlines will have to create true "hub" and "spoke" systems, resulting in a shortage of airport capacity. The airport infrastructure will be forced to grow in order to safely accommodate an increase in air travel.

In order to facilitate the required airport growth, airlines must be sensitive to air quality and noise considerations. While the exhaust pollution given off by more flights may be countered by a reduction in long distance automobile trips, the effects on air quality need to be considered, as well as the noise pollution airplanes create. In Europe, the reduction of exhaust and noise pollution is already being addressed with stricter regulations.¹²²

VII. CONCLUSION

A scheme incorporating cabotage and reduced or eliminated foreign investment requirements should be implemented bilaterally on a reciprocal basis. The TCAA proposal by the Association of European Airlines, if implemented, would be an excellent framework for United States and EU cooperation, hopefully providing an example for other regions to follow.

While a start-up LCC airline like JetBlue is encouraging, it will be increasingly difficult for a newcomer to become established and prosper

¹²¹ See Kevin O'Toole & Carol Shifrin, *JetBlue Takes on Big Apple*, AIRLINE BUS., Aug. 1999, at 14.

¹²² See Tom Gill, *Europe Breaks Rank on Noise*, AIRLINE BUS., Apr. 1999, at 32.

among the class of giant sized airlines that the DOT is grooming. The only way that a competitive, growing market can take hold with a considerable, long-term effect on price and service is if domestic and foreign airlines are able to individually establish competing hub and spoke systems on a domestic and international level, while in compliance with the antitrust laws. If the DOT continues to grant antitrust immunity to airlines, sanctioning the equivalent of cartel agreements at the expense of consumers, the barriers to entry in the airline industry will continue to rise.

Cabotage and the elimination of foreign investment requirements alone cannot create a competitive airline industry. Only when combined with the vigorous enforcement of existing antitrust laws and the expansion of airports to meet competitors demands, can the United States foster a competitive and efficient market that will allow the airline industry to continue to grow while protecting air travel consumers.

