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Hijacking Open Skies: The Line Between Tough Competition and Unfair Advantage in the International Aviation Market

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HIJACKING OPEN SKIES: THE LINE BETWEEN TOUGH COMPETITION AND UNFAIR ADVANTAGE IN THE INTERNATIONAL AVIATION MARKET

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TABLE OF CONTENTS

I. INTRODUCTION

THE PROCESS OF INDUSTRY GLOBALIZATION is quickly changing the way nations all over the world do business with each other. Advancements in technology offer increasing ease

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of communication and greater access to world travel.[1] Within the aviation sector, globalization has produced a trend toward the deregulation of international commercial air travel, resulting in the proliferation of bilateral and multilateral aviation treaties between countries.[2] The Open Skies program is the United States' brand of these agreements.[3]

While the results of the Open Skies policy have been overwhelmingly positive for consumers,[4] three of the largest U.S.-based airlines, American Airlines (American), United Airlines (United), and Delta Air Lines (Delta) (collectively, The Big 3) have been feeling the strain of increased competition from three fast-growing airlines owned by Qatar and the United Arab Emirates (U.A.E.) (collectively, the Gulf Nations).[5] As a reaction to the Gulf Nations' carriers' remarkable success, the Big 3 and various other interested organizations within the commercial air travel industry have joined together to form the Partnership for Open and Fair Skies (the Partnership).[6] In concert with a massive advertising campaign,[7] the Partnership is fiercely lobbying the Obama Administration to reopen the U.S. Open Skies agreements with the Gulf Nations and to either restrict their access to U.S. global routes or terminate the agreements altogether.[8]

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[1] *See* James C. Moore, *Economic Globalization and Its Impact Upon the Legal Profession*, 79 N.Y. ST. B.J. 35, 36 (2007).

[2] *See The Economic Impact of Air Service Liberalization – Final Report*, INTER*VISTAS* ES-2–3 (May 15, 2006), http://www.intervistas.com/downloads/Economic_Impact_of_Air_Service_Liberalization_Final_Report.pdf [https://perma.cc/952K-NDGG] [hereinafter *InterVISTAS 2006 Study*]; *Open Skies Agreements*, U.S. DEP'T OF STATE, http://www.state.gov/e/eb/tra/ata/ [https://perma.cc/TSZ8-CBKE].

[3] *Open Skies Agreements*, *supra* note 2.

[4] *See infra* notes 156–66 and accompanying text.

[5] Susan Carey, *U.S. Airlines Clash Over Rivals from Persian Gulf*, WALL ST. J. (Feb. 23, 2015, 7:24 PM), http://www.wsj.com/articles/u-s-airlines-clash-over-rivals-from-persian-gulf-1424737494.

[6] *Who We Are*, PARTNERSHIP FOR OPEN & FAIR SKIES, http://www.openandfairskies.com/about-us/ [https://perma.cc/2EYR-ZDY4]. In addition to Delta, United, and American, other members of the Partnership include the Air Line Pilots Association, International; the Allied Pilots Association; the Airline Division of the International Brotherhood of Teamsters; the Association of Flight Attendants-CWA; the Association of Professional Flight Attendants; the Communications Workers of America; and the Southwest Airlines Pilots' Association.

[7] *See Partnership Launches New Advertising Campaign*, PARTNERSHIP FOR OPEN & FAIR SKIES (Nov. 17, 2015), http://www.openandfairskies.com/press-releases/new-advertising-campaign/ [https://perma.cc/GM7C-Q46P].

[8] *Restoring Open Skies: The Need to Address Subsidized Competition from State-Owned Airlines in Qatar and the UAE*, PARTNERSHIP FOR OPEN & FAIR SKIES 1, 54 (Jan. 28, 2015), http://www.openandfairskies.com/wp-content/themes/custom/media/

This article will argue that these measures are unnecessary because they are based on unfounded assertions of unfair subsidies and injuries to the American public and economy and instead reflect the narrow financial interests of the Big 3. In addition, the Partnership's arguments are based on equality of outcome, which reflects the old restrictive model of international air travel, rather than on equality of opportunity, which forms the basis of the U.S. Open Skies policy. Finally, attempting to renegotiate the U.S.-Gulf Nations covenants would undermine the entire Open Skies regime and compromise every one of the relationships between the United States and its Open Skies partners. Accordingly, the Obama Administration, and all subsequent presidential administrations, should reject the Big 3's demands and uphold the Open Skies agreements between the United States and the Gulf Nations.

II. HISTORY AND BACKGROUND

In 1944, fifty-two countries came together in Chicago and signed the Convention on International Civil Aviation, commonly known as the Chicago Convention.[9] The Chicago Convention set out regulations governing airspace, air safety, and aircraft registration.[10] It also established the International Civil Aviation Organization (ICAO), a specialized agency of the United Nations with a purpose to oversee the governance and administration of the Chicago Convention.[11] ICAO developed "freedoms of the air," the framework for the exchange of rights upon which today's air transport negotiations are based.[12] Freedoms of the air govern the right of one country's airlines to fly and land in the airspace of another country.[13]

White.Paper.pdf [https://perma.cc/ERF6-ZLQT] [hereinafter *White Paper*]; *see* Carey, *supra* note 5.

9 Gerald Baker, *Aviation Law: The Montreal Convention Regulates Damages for the Death and Injury of Passengers in International Travel*, 289 N.J. LAW. 59, 60 (2015).

10 *Id.*

11 *About ICAO*, INT'L CIVIL AVIATION ORG., http://www.icao.int/about-icao/Pages/default.aspx [https://perma.cc/7U7Q-3JDQ].

12 *History of the Bilateral System*, AUSTL. GOV'T DEP'T OF INFRASTRUCTURE AND REGIONAL DEV., https://infrastructure.gov.au/aviation/international/bilateral_system.aspx [https://perma.cc/8NM5-MUWL].

13 Arpad Szakal, *Freedoms of the Air Explained*, AVIATION L. BLOG (Sept. 27, 2013), http://www.aviationlaw.eu/wp/wp-content/uploads/2013/09/Freedoms-of-the-Air-Explained.pdf [https://perma.cc/TJP2-6KQP]. The nine Freedoms of the Air describe the various rights and privileges relating to international air travel that one State may grant to another State or States. Because only the first five have been officially recognized as "freedoms" by international treaties, they

A core objective set out in the Chicago Convention is to guarantee that "international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically."[14] Since its creation, the Chicago Convention has greatly benefited the international aviation community—offering protection from flags of convenience[15] and free riders[16] and effecting a remarkable degree of safety and security in the industry.[17] However, notwithstanding the "equality of opportunity" language in its preamble, the Chicago Convention contained a number of restrictive and defensively-drafted provisions that reflected the economic and political uncertainty surrounding its post-World War II inception.[18] Representing the principle that each nation has sole and absolute sovereignty over its own airspace,[19] the Chicago Convention prohibited the operation of any international flight over or into a contracting state's territory without that state's express permission.[20]

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are generally considered to be more important than the other four. The First Freedom is the right to fly across the territory of another State or States without landing; the Second Freedom is the right to land in another State's territory for non-traffic purposes; the Third Freedom allows a carrier to put down traffic originating from its home State in the territory of another State; the Fourth Freedom allows a carrier to take on traffic bound for its home state in the territory of the another State; and the Fifth Freedom is the right to put down and take on traffic in the first State's territory that is coming from or bound for a third State. *About ICAO*, *supra* note 11.

14 Convention on International Civil Aviation pmbl., Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295; *see also* Mike Tretheway & Robert Andriulaitis, *What Do We Mean by a Level Playing Field in International Aviation*, INT'L TRANSP. FORUM 1, 5 (June 2015), http://www.itf-oecd.org/sites/default/files/docs/dp201506.pdf [https://perma.cc/E7B8-RSMD].

15 "Flag of convenience" is a term referring to the censured practice by an airline that is owned in one country of "flagging out," or registering its aircraft in another country to capitalize on that nation's lower taxes, cheaper labor, or laxer safety regulations. Allan Mendelsohn, *Flags of Convenience: Maritime and Aviation*, 79 J. AIR L. & COM. 151, 152 (2014).

16 In the international aviation context, the "free rider" problem arises where the global deregulation of air travel allows some countries to take advantage of the most liberal concessions of other nations without opening their own markets to international competition. Antigoni Lykotrafiti, *Liberalisation of International Civil Aviation: Charting the Legal Flightpath*, 43 TRANSPORT POL'Y 85, 88 (2015).

17 *Id.* at 85.

18 *History of the Bilateral System*, *supra* note 12; Tretheway & Andriulaitis, *supra* note 14, at 5.

19 Lykotrafiti, *supra* note 16, at 86.

20 *History of the Bilateral System*, *supra* note 12.

Thus, while traditional bilateral agreements under the Chicago Convention purported to facilitate fair and equal competition, in practice the government parties tended to seek the opposite result, that of ensuring the economic success of their own flag carriers while restricting threatening competition as much as possible.[21] In reality, bilateral air service agreements seemed to favor an "equitable" division of revenues from highly regulated fares that far exceeded marginal costs, with routes and capacity distributed to the end of securing stable and profitable operations rather than facilitating open competition.[22] As one commentator noted, "[w]herever the [international aviation] industry remains regulated, each airline seeks to use the levers of regulation to secure advantage for itself and to hobble its opponents."[23]

In the United States, domestic air travel was similarly restricted.[24] The airline industry was governed by the Civil Aeronautics Board (CAB), a federal agency that strictly regulated the market by limiting competition.[25] The CAB restricted routes and set prices at a level that ensured a twelve percent profit for flights at fifty-five percent of their capacity.[26] As a result, the cost of air travel was prohibitive for the majority of Americans.[27] With domestic commercial aviation under tight federal control, "there was a reason why flying was absurdly expensive. That was the law."[28]

In the 1970s, the United States as well as many other countries began to shift away from conventional protectionist ideals.[29] In

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[21] Tretheway & Andriulaitis, *supra* note 14, at 5.

[22] *Id.*

[23] *InterVISTAS 2006 Study*, *supra* note 2, at 22 (quoting ROBERTS, ROACH & ASSOCIATES, ECONOMIC BENEFITS OF US-UK OPEN SKIES vii (1996)).

[24] *See* David Morris, *Airline Deregulation: A Triumph of Ideology Over Evidence*, HUFFINGTON POST (Dec. 13, 2013), http://www.huffingtonpost.com/david-morris/airline-deregulation-ideology-over-evidence_b_4399150.html [https://perma.cc/V3XY-Z8DJ].

[25] *Id.*

[26] *Id.*

[27] *Id.*; *see also* Derek Thompson, *How Airline Ticket Prices Fell 50% in 30 Years (And Why Nobody Noticed)*, THE ATLANTIC (Feb. 28, 2013), http://www.theatlantic.com/business/archive/2013/02/how-airline-ticket-prices-fell-50-in-30-years-and-why-nobody-noticed/273506/ [https://perma.cc/2H5H-37S5].

[28] Thompson, *supra* note 27.

[29] *The Economic Impacts of Air Service Liberalization 2015*, INTER*VISTAS* 3 (June 12, 2015), http://www.intervistas.com/wp-content/uploads/2015/07/The_Economic_Impacts_of_Air_Liberalization_2015.pdf [https://perma.cc/4BVX-DU3L] [hereinafter *InterVISTAS 2015 Study*].

1978, the United States passed the Airline Deregulation Act (ADA),[30] which was designed to promote competition within the airline industry by relaxing restrictions on pricing, routes, and market entry.[31] The ADA prohibited the regulation of fares by the CAB[32] and prevented unlawful airline mergers.[33] One of the key purposes of the ADA was to provide the American public with greater access to airline services at reasonable prices.[34] The ADA emphasized "placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and to attract capital."[35] The results of domestic deregulation were dramatic; within about thirty years after the passage of the ADA, airfares fell by fifty percent and commercial air traffic tripled.[36] In the mid-1960s, fewer than eighty percent of Americans had ever been on an airplane; by 2000, half the population booked at least one round-trip ticket per year.[37]

The ADA prompted liberalization in the international market as well. In the same year, President Carter signed the International Air Negotiations Statement of U.S. Policy for the Conduct of Negotiations, stating that "[t]he guiding principle of U.S. aviation negotiation policy will be to trade competitive opportunities, rather than restrictions, with our negotiating partners," and promising that the United States would "aggressively pursue [its] interests in expanded air transportation and reduced prices rather than accept the self-defeating accommodation of protectionism."[38]

In 1992, the U.S. Department of Transportation (DOT) announced the "open skies regime," an initiative created to liber-

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30 Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified as amended at 49 U.S.C. §§ 1301–1542 (2015)).

31 Seth M. Warner, *Liberalize Open Skies: Foreign Investment and Cabotage Restrictions Keep Noncitizens in Second Class*, 43 AM. U. L. REV. 277, 289–90 (1993).

32 *See* Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 (codified in scattered sections of Titles 5, 15, 16, 26, 29, and 49 U.S.C.); Warner, *supra* note 31, at 323 n.85.

33 Airline Deregulation Act § 408 (codified as amended at 49 U.S.C. § 1378 (1988)); Warner, *supra* note 31, at 323 n.85.

34 Warner, *supra* note 31, at 289–90.

35 Airline Deregulation Act § 3(a)(4); Daniel C. Hedlund, *Toward Open Skies: Liberalizing Trade in International Airline Services*, 3 MINN. J. GLOBAL TRADE 259, 281–82 (1994).

36 Thompson, *supra* note 27.

37 *Id.*

38 Tretheway & Andriulaitis, *supra* note 14, at 8.

alize the aviation markets between the United States and other nations.[39] The DOT then set out eleven key elements of an Open Skies agreement, which included: open entry and unrestricted capacity and frequency on all routes between partner nations; unlimited route and traffic rights;[40] open code-sharing arrangements;[41] and expressly "procompetitive" provisions for business opportunities, user charges, equitable competition, and agreed rights between parties.[42]

The purpose of Open Skies agreements is to "promote an international aviation system based on competition among airlines in the marketplace with minimum government interference," to create a variety of travel and shipping service options to the public, to incentivize competitive pricing among individual airlines, to expand the number of opportunities for international air travel, and to "ensure the highest degree of safety and security in international air transport."[43] Some of the key provisions of the U.S. Model Open Skies Agreement included the right to fair and equal competition,[44] the right to initiate and compel consultations with the other party at any time,[45] and the right to terminate the agreement with one year's notice.[46]

The United States and the Netherlands commenced the first ever Open Skies agreement in 1992.[47] Today, the United States has Open Skies treaties with more than 100 countries from every part of the world and ranging across a wide spectrum of economic development.[48] While many of the agreements are bilateral, the United States has entered into a number of multilateral

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39 *See* "Open Skies," Order No. 92-8-13, 1992 WL 204010, at *1 (U.S. Dep't of Transp. Aug. 5, 1992).

40 Removing route and traffic restrictions means Open Skies parties are free to operate flights between any point in the United States and any point within a partnering nation. *Id.* at *5.

41 Code-sharing agreements are joint marketing relationships between airlines in which one airline advertises and sells tickets for a route that is actually operated by a different airline. *InterVISTAS 2006 Study*, *supra* note 2, at B-1.

42 "Open Skies," 1992 WL 204010, at *5–6.

43 *Current Model Open Skies Agreement Text*, U.S. DEP'T OF STATE (Jan. 12, 2012), http://www.state.gov/e/eb/rls/othr/ata/114866.htm [https://perma.cc/M2EZ-3947].

44 *Id.* art. 11.

45 *Id.* art. 13.

46 *Id.* art. 15.

47 *Open Skies Partnerships: Expanding the Benefits of Freer Commercial Aviation*, U.S. DEP'T OF STATE (Mar. 29, 2011), http://www.state.gov/r/pa/pl/159347.htm [https://perma.cc/VHJ2-2CFY]; *see also* Tretheway & Andriulaitis, *supra* note 14.

48 *Open Skies Agreements*, U.S. DEP'T OF STATE, http://www.state.gov/e/eb/tra/ata/ [https://perma.cc/U7VT-NQH8].

treaties as well, including the 2001 Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT) with New Zealand, Singapore, Brunei Darussalam, Chile, Samoa, Tonga, and Mongolia,[49] and the 2007 Air Transport Agreement with the European Union (E.U.) and all its member states.[50] As a result of these agreements, over seventy percent of international flights departing from the United States are destined for Open Skies partner countries.[51]

In addition to the Open Skies agreements between the United States and other nations, another significant outworking of America's liberalization policy has been the influence of U.S. antitrust law (or the absence thereof) on the evolution of today's domestic aviation sector.[52] Since the Chicago Convention, international air travel agreements have been subject to an amalgam of international and domestic rules that require an airline to be "substantially owned and effectively controlled"[53] by a citizen of its home state.[54] The effect of these "nationality clauses" is to prohibit airlines from forming independent global route entities.[55] To side-step the ownership requirements, airlines create international route networks by forming alliances with foreign carriers.[56] Predictably, these alliances tend to implicate the antitrust laws of their respective states.[57] In service of the Open Skies liberalization policy, the United States has conferred antitrust immunity on the air service industry with a generous hand.[58]

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49 *Id.*; *Multilateral Agreement on the Liberalization of International Air Transportation*, U.S. DEP'T OF STATE (May 1, 2001), http://www.state.gov/documents/organization/114408.pdf [https://perma.cc/U6Y3-JBM6].

50 *Multilateral Agreement on the Liberalization of International Air Transportation*, *supra* note 49; *U.S.-EU Air Transport Agreement of April 30, 2007*, U.S. DEP'T OF STATE (Apr. 30, 2007), http://www.state.gov/e/eb/rls/othr/ata/e/eu/114768.htm [https://perma.cc/Q5AQ-U2ST].

51 *Open Skies Partnerships*, *supra* note 47.

52 *See* Gabriel S. Sanchez, *An Institutional Defense of Antitrust Immunity for International Airline Alliances*, 62 CATH. U. L. REV. 139, 150–52 (2012).

53 *Id.* at 150 (quoting Brian F. Havel & Gabriel S. Sanchez, *The Emerging Lex Aviatica*, 42 GEO. J. INT'L L. 639, 648 (2011)); *see also Current Model Open Skies Agreement Text*, *supra* note 43, art. 3(a).

54 Sanchez, *supra* note 52, at 150. An airline's home state is the state of its incorporation and principal place of business. *Id.*

55 *Id.*

56 *Id.* at 151.

57 *Id.* at 152.

58 James Reitzes & Diana Moss, *Airline Alliances & Systems Competition*, 45 HOUS. L. REV. 293, 303–04 (2008). While antitrust immunity for airlines has been roundly criticized, it is inarguably a helpful tool for circumventing cumbersome

Within this nurturing atmosphere, American, United, and Delta have formed a domestic oligopoly.[59] The Big 3 in combination with Southwest Airlines[60] (Southwest) control ninety percent of the domestic air travel market.[61] On the global stage, the Big 3 each belong to one of the three major alliances that dominate the international air travel industry today[62]: Star Alliance, anchored by United and Lufthansa;[63] SkyTeam, headed by Delta and Air France;[64] and OneWorld Alliance (OneWorld), anchored by American and British Airways.[65] The U.S. government has granted antitrust immunity to both Star Alliance and SkyTeam, enabling them to set prices and apportion capacity for international flights.[66] Thus, while it is an important feature of Open Skies policy, antitrust immunity also has the potential to

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foreign ownership restrictions and bilateral treaty restraints, and for coaxing foreign governments into Open Skies agreements. *Id.*; *see* Sanchez, *supra* note 52, at 141–42.

59 *See* Letter from Diana Moss, President, Am. Antitrust Inst., to Anthony Foxx, Sec'y of Transp., Dep't of Transp., John Kerry, Sec'y of State, Dep't of State, & Penny Priztker, Sec'y of Commerce, Dep't of Transp. 4 (Nov. 9, 2015), http://www.regulations.gov/#!documentDetail;D=DOT-OST-2015-0082-2430 [https://perma.cc/A69K-JKHA].

60 In contrast to the Big 3, Southwest Airlines predominantly serves the U.S. domestic market. The Dallas-based airline offered international service for the first time in 2014 with routes to Mexico and the Caribbean. *See* Charisse Jones, *Southwest Announces First International Flights*, USA TODAY (Jan. 27, 2014, 6:25 PM), http://www.usatoday.com/story/travel/flights/2014/01/27/southwest-launches-international-services/4938011/ [https://perma.cc/72AT-VUSE].

61 Richard Finger, *Airlines Squabble Over "Open Skies" Treaties*, HUFFINGTON POST (June 3, 2015), http://www.huffingtonpost.com/richard-finger/airlines-squabble-over-op_b_6955060.html [https://perma.cc/BE66-DMXX]. With the exception of Southwest Airlines, the domestic market share percentages of the Big 3 (Delta: 16.9%; American: 14.9%; and United: 14.7%) are markedly higher than any other U.S.-based carrier (the next highest market share percentage after United drops to 5.3%). *Bureau of Transportation Statistics*, U.S. DEP'T OF TRANSP., http://www.transtats.bts.gov/ [https://perma.cc/FFT5-XWWF].

62 Reitzes & Moss, *supra* note 58, at 304.

63 Sanchez, *supra* note 52, at 152; *see Star Alliance Member Airlines*, STAR ALLIANCE, http://www.staralliance.com/member-airlines [https://perma.cc/5WD5-C7H8] (28 member airlines).

64 Sanchez, *supra* note 52, at 159; *see SkyTeam Member Airlines*, SKYTEAM, http://www.skyteam.com/en/About-us/Our-members/ [https://perma.cc/LAN2-S6YX] (20 member airlines).

65 Reitzes & Moss, *supra* note 58, at 304; *see Member Airlines*, ONEWORLD, https://www.oneworld.com/member-airlines/overview [https://perma.cc/J226-W6LY] (15 member airlines).

66 Reitzes & Moss, *supra* note 58, at 304.

drive up airfares as carriers that would otherwise compete for the same routes join forces.[67]

Notwithstanding the potential implications of antitrust immunity, the numerous and substantial benefits of air travel liberalization are clear. In the United States, Open Skies agreements stimulate trade and travel, promote economic growth, and create quality employment opportunities.[68] They provide more choices for passengers, improved product and service quality, a more comfortable and convenient travel experience, and substantially lower fares.[69] In fact, Open Skies agreements produce an estimated $4 billion in savings for airline passengers each year.[70]

Similar liberalization policies are now in place all over the world.[71] A 2006 economic study of the impact of international air service deregulation demonstrated how these policies lead to better service and pricing, more options, and global economic growth.[72] When an international or domestic market deregulates its air travel industry, the increase in competition results in new and improved air services.[73] New and better services lead to an increase in traffic as travelers respond to more options and lower fares.[74]

Generally, liberalization between two countries has been shown to increase air traffic between eighteen and seventy-eight percent while airfares typically fall ten to forty percent.[75] For example, in less than two decades following a partial deregulation between the United States and the United Kingdom (U.K.) in 1995, traffic between Chicago and London more than doubled.[76] The Single European Aviation Market, created by the 1992 deregulation of European countries, boosted the annual passenger growth rate from between four and six percent before deregulation to thirty-three percent after deregulation—an incremental increase of 44 million passengers.[77] The implementa-

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67 *Id.* at 305–06.

68 *Open Skies Agreements*, *supra* note 48.

69 *Id.*; Letter from Diana Moss to Anthony Foxx, John Kerry, & Penny Priztker, *supra* note 59, at 1, 2.

70 *InterVISTAS 2015 Study*, *supra* note 29, at 6.

71 *Id.* at iii–iv.

72 *InterVISTAS 2006 Study*, *supra* note 2, at 1–13.

73 *See id.* at ES-6 fig.ES-1.

74 *See id.*

75 *InterVISTAS 2015 Study*, *supra* note 29, at 3.

76 *InterVISTAS 2006 Study*, *supra* note 2, at ES-14.

77 *Id.* at ES-16, 37.

tion of a liberalized air travel policy by Thailand and Malaysia contributed to more than 370,000 additional travelers in 2005.[78]

One of the fastest traffic-growth areas in the world today is the Asia-Pacific Region.[79] The Association of Southeast Asian Nations (ASEAN)[80] functions as a regional bloc much like the E.U. and works to facilitate collaboration on tourism, trade, and economic growth.[81] The ASEAN Single Aviation Market (ASEAN-SAM) is a comprehensive policy adopted by the region with the goal of developing a single, integrated aviation market with fully liberalized air travel among its member nations.[82] In pursuit of this policy, ASEAN members signed the Multilateral Agreement on Air Services (MAAS) in 2009 and the Multilateral Agreement on Full Liberalization of Passenger Air Services (MAFLPAS) in 2010.[83] Although traffic growth in the Asia-Pacific region had already been significant for a number of years, the adoption of the MAAS and MAFLPAS precipitated a large increase in market share for low cost carriers,[84] and both international and domestic travel in the ASEAN market have more than doubled between 2005 and 2012.[85]

The traffic growth experienced by liberalized markets produces economic growth and generates jobs.[86] For example, the 1995 United States and U.K. liberalization resulted in 9,197 additional full-time jobs in the United States and 16,700 in the U.K.[87] Gross Domestic Product (GDP) grew by $747 million in the United States and $970 million in the U.K.[88] The Single European Aviation Market generated a remarkable 1.4 million new full-time positions, and the European GDP increased by $85 billion (62 billion Euro).[89] Liberalization in Southeast Asia produced similar results in Thailand and Malaysia, where each

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[78] *Id.* at 58.

[79] *InterVISTAS 2015 Study, supra* note 29, at 20.

[80] *Id.* at 19. The ASEAN member nations are Thailand, Indonesia, Malaysia, Singapore, the Philippines, Brunei, Vietnam, Laos, Myanmar, and Cambodia. *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* at 20.

[85] *Id.* at 27 fig.4-7.

[86] *See InterVISTAS 2006 Study, supra* note 2, at ES-6 fig.ES-1.

[87] *Id.* at 14.

[88] *Id.*

[89] *Id.* at ES-17.

country gained over 4,300 full time jobs and saw more than $114 million growth in GDP.[90]

The benefits of air travel liberalization are further illustrated by the substantial and undeniably positive impact of deregulation in other industries.[91] Across a variety of sectors, liberalization benefits consumers by lowering prices, providing a wider array of options, and improving quality of service.[92] For example, liberalization of energy markets in the E.U. resulted in a thirty-five percent reduction in gas prices and a ten to twenty percent reduction in electricity prices compared to the same services in the absence of deregulation.[93] Similarly, after opening their telecommunications industries to market forces, Japan and Korea saw a fifty percent drop in the cost of long-distance calls.[94] The deregulation of European television and radio markets created a larger and more diverse range of options, including Indian television channels and New Zealand radio stations.[95] Finally, liberalization of ownership restrictions in the U.S. banking sector has led to improved access to banking centers and an increase in customer service satisfaction.[96] In addition to reduced prices, diversity of options, and better service, liberalization can improve market capacity utilization by (1) creating more efficient consolidation following the increase in competition; (2) increasing productivity and innovation; (3) facilitating the transfer of industry knowledge and best practices; (4) increasing investment as entry costs go down and businesses gain better access to financing sources; (5) improving industry profitability as businesses acquire economies of scale and greater efficiency; and (6) increasing the market value of businesses within the sector by creating more takeover opportunities and thus higher share values for stockholders.[97]

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90 *Id.* at ES-18.

91 *See* Mark Smyth & Brian Pearce, *Airline Liberalisation: IATA Economics Briefing No. 7*, INT'L AIR TRANSPORT ASSOC. 1, 8 (April 2007), https://www.iata.org/whatwedo/Documents/economics/IATA_AirlineLiberalisation.pdf [https://perma.cc/RBU3-JFD2].

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.* at 9.

III. CURRENT STATE OF THE LAW

As a result of the numerous advantages afforded by liberalization, the global aviation industry is increasingly focused on further deregulation between other nations and at home.[98] However, a recent controversy has arisen regarding the Open Skies relationships between the United States and the Gulf Nations. In the past decade, three of the fastest growing players in the international aviation market—Emirates Airlines (Emirates), Qatar Airways, and Etihad Airways (Etihad)—have emerged from the Gulf Nations.[99] In pursuit of aggressive growth strategies, the three Gulf Nations' carriers are expanding their fleets with hundreds of new widebody aircraft, including 160 or more double-decker Airbus A380s,[100] and competing to offer the most exclusive, high-end flying accommodations to first-class passengers.[101] Already the largest international carrier in the world, Emirates plans to more than double the size of its

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[98] *See, e.g.*, *Open Skies Agreements*, *supra* note 48 ("Open Skies agreements have vastly expanded international passenger and cargo flights to and from the United States, promoting increased travel and trade, enhancing productivity, and spurring high-quality job opportunities and economic growth."); *Liberalization*, INT'L AIR TRANSPORT ASSOC. (2013), http://www.iata.org/policy/Documents/liberalization.pdf [https://perma.cc/UE74-GQG4]. The International Air Transport Association (IATA) is a global trade association that represents more than 260 airlines (including major carriers from the United States, the U.K., the E.U., Southeast Asia, and the Gulf Nations) and plays an active role the creation of industry policy. *About Us*, INT'L AIR TRANSPORT ASSOC., http://www.iata.org/about/Pages/index.aspx [https://perma.cc/RH88-YGHS]; *IATA and the 39th ICAO Assembly*, INT'L AIR TRANSPORT ASSOC., http://www.iata.org/policy/promoting-aviation/icao-assembly/pages/index.aspx [https://perma.cc/4HN7-WMVJ]; *InterVISTAS 2015 Study*, *supra* note 29, at v (confirming the benefits of air travel liberalization). The study was commissioned by Boeing, Airports Council International-North America, Air Transport Action Group, European-American Business Council, General Electric, IATA, the Pacific Asia Travel Association, Pratt & Whitney, US-ASEAN Business Council, the U.S. Chamber of Commerce, and the World Travel & Tourism Council. *InterVISTAS 2015 Study*, *supra* note 29, at 1 n.6.

[99] *White Paper*, *supra* note 8, at 1; Doug Parker & Keith Wilson, *Rigging the Game on Open Skies*, WALL ST. J. (Nov. 10, 2015, 6:51 PM), http://www.wsj.com/articles/rigging-the-game-on-open-skies-1447199510 [https://perma.cc/XBV9-ERGK].

[100] *White Paper*, *supra* note 8, at 2; The Airbus A380 is the largest passenger aircraft in the world, featuring two passenger levels and a capacity of 544 passengers in a four-class configuration. *Airbus A380 Family*, AIRBUS, http://www.airbus.com/aircraftfamilies/passengeraircraft/a380family/ [https://perma.cc/96F6-7V3X].

[101] Michael Sasso, *Etihad Says $32,000 Three-Room Flying Suite is a Hit with Travelers*, BLOOMBERG PURSUITS (July 27, 2015, 7:00 PM), http://www.bloomberg.com/news/articles/2015-07-27/flying-butler-with-32-000-ticket-piques-nyc-travelers-interest [https://perma.cc/VPN8-QTWG].

fleet in the coming years.[102] In 2015, Etihad added six new international destinations and increased the number of passengers by seventeen percent from the previous year.[103] Etihad also added fifteen new aircraft in 2015 and plans to receive ten more in 2016.[104] Similarly, in less than two decades, Qatar Airways has grown from a small carrier with only four planes into a major international competitor.[105] Qatar Airways now operates more than 170 aircraft on routes to more than 150 destinations, and the airline is still growing.[106] Qatar Airways has invested more than $70 billion in more than 330 new aircraft to be delivered in the next few years.[107]

In response to the Gulf Nations' carriers' remarkable growth, the Partnership released a fifty-five page report (The White Paper) in January 2015,[108] which claimed that the Gulf Nations' carriers had violated their Open Skies agreements with the United States by receiving more than $40 billion in improper government subsidies "and other unfair government-conferred advantages" over the past decade. The report also claimed that U.S. carriers increasingly struggle to compete as the Gulf Nations' airlines expand their international flight services into the United States.[109] But not every U.S. airline and related organization agrees with the proposed restrictions on agreements with

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[102] Mary Schlangenstein & Kari Lundgren, *Emirates Riding Growth Surge Sees Airline Able to Double in Size*, BLOOMBERG (June 9, 2015, 12:54 PM), http://www.bloomberg.com/news/articles/2015-06-09/emirates-riding-growth-surge-sees-airline-able-to-double-in-size [https://perma.cc/W6BR-CJAV]. Emirates' continued growth will be supported on the ground by the completion of the new Al Maktoum International Airport at Dubai World Central. *Id.*

[103] *Etihad Airways Delivers Another Year of Strong Growth in 2015*, ETIHAD AIRWAYS (Jan. 12, 2016, 12:00 PM), https://www.etihad.com/en-us/about-us/etihad-news/archive/2016/etihad-airways-delivers-another-year-of-strong-growth-in-2015/ [https://perma.cc/9JAV-MANQ].

[104] *Id.*

[105] Media Release, Qatar Airways, The Qatar Airways Story: Charting the Rise of One of the Fastest Growing Airlines in the World (July 2016), http://www.qatarairways.com/iwov-resources/temp-docs/press-kit/The%20Story%20of%20Qatar%20Airways%20-%20English.pdf [https://perma.cc/87NF-SCE3].

[106] *Id.*

[107] *Id.*

[108] *See White Paper*, *supra* note 8, at 1. The White Paper is a report commissioned by United, Delta, and American and submitted to the U.S. government. It details the results of a two-year investigation into the funding and business strategies of Etihad, Emirates, and Qatar Airways. Partnership for Open & Fair Skies, *Restoring Open Skies*, SKIFT, http://skift.com/wp-content/uploads/2015/03/Executive-Summary.pdf [https://perma.cc/8YES-RLCX].

[109] *White Paper*, *supra* note 8, at 1.

the Gulf Nations' carriers. Despite the Partnership's frequent references to "U.S. carriers" as a whole,[110] several smaller U.S.–based carriers actively oppose the Partnership's initiatives.[111] For example, FedEx, JetBlue, Atlas Air, and Hawaiian Airlines have formed U.S. Airlines for Open Skies (USAOS) to encourage the Obama Administration to reject the proposals urged by the Big 3.[112]

The Partnership also faces opposition from European nations. While acknowledging the substantial challenges posed to European airports and airlines by the Gulf Nations' hubs' expansion, Airports Council International (ACI) and the European Transport Council oppose Big 3 initiatives, arguing that more restrictive policies are not the answer.[113] Instead, they urge the pursuit of "a strategy to increase the competitiveness of [E.U.] aviation, which would include relations with key partners, including the Gulf [Nations]."[114] This strategy would focus on creating a healthy European air travel market that attracts the thriving Gulf Nations' carriers to European hubs.[115]

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110 *See, e.g., id.* at 46–52.

111 *See* Benjamin Zhang, *A Group of US Airlines is Teaming Up Against American, Delta, and United*, BUS. INSIDER (Aug. 3, 2015, 5:41 PM), http://www.businessinsider.com/a-group-of-us-airlines-are-teaming-up-against-american-delta-and-united-2015-8 [https://perma.cc/7VFR-JAC6]; Terry Maxon, *Four U.S. Airlines Side with Gulf Carriers Against American Airlines, Delta Air Lines and United Airlines in Open Skies Battle*, DALL. NEWS (Aug. 3, 2015), http://www.dallasnews.com/business/airlines/2015/08/03/four-u-s-airlines-side-with-gulf-carriers-against-american-airlines-delta-air-lines-and-united-airlines-in-open-skies-battle [https://perma.cc/VLL7-95XL].

112 Zhang, *supra* note 111; David Bronczek, *Bowing to Big 3 Demands Would Hurt the Economy*, WALL ST. J. (Nov. 26, 2015, 4:24 PM), http://www.wsj.com/articles/bowing-to-big-3-demands-would-hurt-the-economy-1448573041 [https://perma.cc/54MY-3FV8].

113 Marisa Garcia, *European Airports and Tourism Boards Side with Gulf Carriers in Open Skies Spat*, SKIFT (June 25, 2015, 5:30 AM), http://skift.com/2015/06/25/european-airports-and-tourism-boards-side-with-gulf-carriers-in-open-skies-spat/ [https://perma.cc/NY8G-BYBC]; *European Airports and Tourism Organisations: Together on Open Skies*, EUR. TRAVEL COMMISSION 7 (June 24, 2015), http://etc-corporate.org/uploads/pdf/ACI%20E%20%20ETC%20Joint%20Paper%20on%20Open%20Skies_June%202015.pdf [https://perma.cc/4CCY-3VQQ].

114 *European Airports and Tourism Organisations: Together on Open Skies*, *supra* note 113; Press Release, Council of the Eur. Union, Outcome of the Council Meeting (June 6–7, 2016), http://www.consilium.europa.eu/en/meetings/tte/2016/06/06-07/ [https://perma.cc/EEG8-B25Q]; *see infra* discussion at Part IV.B (the proper response to increased pressures from Gulf Nations' competitors is not to restrict competition but to increase it).

115 *European Airports and Tourism Organisations: Together on Open Skies*, *supra* note 113; Garcia, *supra* note 113.

IV. ANALYSIS

A. Analysis of the White Paper Claims

1. The Definition of "Subsidy"

The White Paper begins by stating that the Gulf Nations are pursuing economic development plans that are heavily dependent upon a flood of new international commercial air traffic through their major airport hubs.[116] To that end, the Partnership claims that the Gulf Nations have built "vertically-integrated, wholly state-owned aviation sectors that include monopoly service providers and complex interrelationships between their government institutions, airlines, ground handlers, airports, and state-owned banks."[117]

In its classification of "subsidies," the Partnership includes interest-free government loans, cash injections at a time when the recipient airline was not "equityworthy," economic grants,[118] exemptions from airport fees, shareholder advances, government loan guarantees, government assumption of financially burdensome fuel hedging contracts, and land grants.[119] Finally, the Partnership adds to the list "additional and unquantified subsidies," which it claims cannot be calculated because of the opacity of the Gulf Nations' airlines' financial statements.[120]

To bolster its claims, the Partnership points to the fact that the aviation sectors (including airlines) of Dubai, Abu Dhabi, and Qatar are entirely state-owned.[121] For example, the White Paper emphasizes the "strong relationships" between Emirates and the rest of Dubai's aviation sector.[122] Members of the Al Maktoum family rule the Emirate of Dubai.[123] Sheikh Ahmed Bin Saeed Al Maktoum, the chairman of Emirates, also serves as the chairman of every other enterprise in Dubai's aviation industry.[124] Sheikh Ahmed has mentioned Emirates as a key component of Dubai's economic growth initiative, "Strategic Plan

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116 *White Paper*, *supra* note 8, at 1.

117 *Id.*

118 *See, e.g.*, *id.* at 17 ("[A]s Figure 7 shows, a leaked internal study . . . prepared for Etihad in 2010 indicates that the Executive Council of Abu Dhabi 'covers' the cost of Etihad's sponsorship of the Manchester City Football Club.").

119 *Id.* at 12–34.

120 *Id.* at 18.

121 *Id.* at 6.

122 *Id.* at 7.

123 *Id.* at 6.

124 *Id.* at 7.

2020."[125] Given the combined interest that Dubai's government and ruling family[126] have in the success of the Dubai aviation sector, Emirates, and the national economy as a whole, the Partnership concludes that Dubai must be utilizing its government-owned aviation sector to "intervene in the market" and give Emirates an "artificial competitive advantage over foreign carriers."[127]

According to the White Paper, one of the most egregious state "subsidies" Emirates received involves Dubai's two state-owned airports.[128] Because the airline's future potential for growth depends on adequate airport capacity, the government of Dubai has invested nearly $40 billion in airport expansion and improvement.[129] The Partnership claims that while North American and European airports rely completely on the collection of airport user fees for their growth capital, Dubai's government-funded airport improvements allow Emirates to pursue vast expansion projects that far exceed Dubai's current capacity needs.[130] Because funding for these projects does not depend solely on airport user fees, the Partnership concludes that Emirates enjoys a significant advantage over U.S. airlines and other countries' carriers.[131]

The Partnership's allegations of unfair subsidies rest on shaky ground because they fail to (1) establish that any action taken by the Gulf Nations' governments constitutes a subsidy; or (2) show that any such action actually distorts the air travel market.[132] In the context of Open Skies agreements, the word "subsidy" is not easily defined.[133] The White Paper points to the World Trade Organization (WTO) Agreement on Subsidies and Counter-

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125 *Id.* at 10.

126 It is important to note that Emirates is entirely owned by the government of Dubai through its holding company, Investment Corporation of Dubai, and not by Sheikh Ahmed or any member of the Al Maktoum family. *Id.* at 6.

127 *Id.* The Governments of Qatar and Abu Dhabi are allegedly employing similar practices to those of Dubai. *Id.* at 10.

128 *Id.* at 8–9.

129 *Id.* at 9. The government of Dubai invested $7.8 billion in Dubai International Airport with the goal of expanding its capacity to 90 million passengers by 2018, and $32 billion for Al Maktoum International Airport, planning to increase its capacity to 240 million passengers per year (roughly five times the size of Chicago O'Hare International Airport). *Id.*

130 *Id.* at 8–9.

131 *Id.*

132 Tretheway & Andriulaitis, *supra* note 14, at 12.

133 Dennis Schaal, *Future of Open Skies Hinges on the Definition of One Word: Subsidy*, SKIFT (Apr. 28, 2015, 5:00 PM), http://skift.com/2015/04/28/future-of-

vailing Measures (SCM Agreement), which defines a subsidy as a benefit conferred on a recipient by a "financial contribution" from the government.[134] But even the White Paper concedes that the SCM Agreement does not apply in any way to U.S. Open Skies agreements.[135] In fact, international air travel is not subject to the SCM Agreement because it is instead addressed under the WTO General Agreement on Trade Services (GATS), which *expressly excludes* air transport.[136]

A major weakness of the Partnership's definition of a subsidy lies with the numerous forms of financial support that the U.S. government confers on the Big 3. The Partnership vigorously contends that financial benefits such as bankruptcy restructuring, antitrust immunity, and post-disaster relief are somehow different from those received by the Gulf Nations' carriers.[137] Emirates called that distinction a "legal fiction."[138] Indeed, by the standards it uses to measure the Gulf Nations' carriers' government funding, the Big 3 have received more than $100 billion in subsidies of their own since 2002.[139] And by urging the Obama Administration to breach the U.S.–Gulf Nations Open Skies agreements, the Big 3 are now asking for the "Mother of all Subsidies."[140]

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open-skies-hinges-on-the-definition-of-one-word-subsidy/ [https://perma.cc/T3E2-R6BJ].

134 *White Paper*, *supra* note 8, at 12; Agreement on Subsidies and Countervailing Measures art. 1.1(a)(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 401 [hereinafter SCM Agreement].

135 *White Paper*, *supra* note 8, at 12 n.44.

136 Emirates Airlines Response at vi, Information on Claims Raised About State-Owned Airlines in Qatar and the United Arab Emirates, 80 Fed. Reg. 25,671 (Int'l Trade Admin., Dep't of State & Dep't of Transp. May 5, 2015), http://content.emirates.com/downloads/ek/pdfs/openskies_rebuttal/EK_Response_Main.pdf [https://perma.cc/2RT4-B648]; *see also* Rudolph Adlung, *Export Policies and the General Agreement on Trade in Services* annex (World Trade Org., Working Paper No. ERSD-2014-09, 2014), https://www.wto.org/english/res_e/reser_e/ersd201409_e.pdf [https://perma.cc/ST7B-F5HL].

137 *Frequently Asked Questions*, PARTNERSHIP FOR OPEN & FAIR SKIES, http://www.openandfairskies.com/frequently-asked-questions [https://perma.cc/DK86-57SQ].

138 *Emirates' Response to Claims Raised About State-Owned Airlines*, *supra* note 136, at 143.

139 *Id.* at 143, 144 fig.IV-1.

140 *Those Living in Glass Houses Should Not Throw Stones*, BUS. TRAVEL COALITION (May 15, 2015), http://www.businesstravelcoalition.com/press-room/2015/may-15—-those-living-in.html [https://perma.cc/5YTM-WENJ] (internal quotation marks omitted).

A recent financial study by the Risk Advisory Group highlights the immense amount of government funding and support received by the Big 3.[141] The report reveals that the Big 3 have received more than $70 billion in government subsidies over the past fifteen years.[142] Specifically, the Big 3 received a benefit of $30.96 billion from bankruptcy debt relief, which continues to furnish an *additional* annual costs savings of $4.5 billion.[143] Following the termination of the airlines' pension plans, a federal agency shouldered $23.08 billion in liability for the value of the pensions as well as the $6.35 billion cost to the plan participants.[144] The airlines received an estimated $5.6 billion in fuel subsidies[145] and nearly $1 billion in additional miscellaneous subsidies.[146]

Furthermore, even if the Big 3 could successfully distinguish the Gulf Nations' carriers' government "subsidies" from their own subsidies, they are still unable to link those subsidies to actual market damage.[147] The Partnership asserts that U.S. airlines have suffered "widespread harm . . . *as a result* of the Gulf [Nations'] carriers' subsidized expansion [in]to the United States."[148] But the assumption of a causal link between the Gulf Nations' airlines' growth and purported harm to U.S. carriers is entirely unsupported by evidence.[149] Establishing causality is

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141 Risk Advisory Grp., *Financial & Other Governmental Benefits Provided to American Airlines, Delta Air Lines & United Airlines*, BUS. TRAVEL COALITION (May 14, 2015), http://www.businesstravelcoalition.com/documents/financial—other-government.pdf [https://perma.cc/HVT4-DQQ2].

142 *Id.* at 5.

143 *Id.*

144 *Id.* at 7. The government agency, the Pension Benefit Guaranty Corporation (PBGC), was created by the Employee Retirement Income Security Act of 1974. The PBGC is funded by Congress through private equity, insurance premiums, and assets associated with the plans it manages. *Id.*

145 *Id.* at 8.

146 *Id.* at 10–15 (including various state-funded incentive programs, issuance of government bonds, domestic market protections, benefits derived from the Fly America Act, and membership in state-owned alliances).

147 *See also infra* discussion Part. IV.A.2 (discussing the lack of evidence that the Gulf Nations' "subsidies" have harmed the international aviation market).

148 *Comments of the Partnership for Open & Fair Skies on the Responses of Qatar Airways, Etihad Airways, and Emirates Airline*, PARTNERSHIP FOR OPEN & FAIR SKIES 1, 101 (Aug. 24, 2015), http://www.openandfairskies.com/wp-content/uploads/2015/08/Partnership-Rebuttal-Filing-DOT-Aug-24.pdf [https://perma.cc/V4Q8-JQWE].

149 *Edgeworth Economics' Empirical Investigation and Analysis of Economic Issues Raised in "Restoring Open Skies: The Need to Address Subsidized Competition from State-Owned Airlines in Qatar and the U.A.E.*, ETIHAD AIRWAYS 31–33 (May 21, 2015),

crucial to the evaluation of antitrust competition claims and to economic analysis.[150] Without this essential element, the Partnership's assertions amount to nothing more than speculation.[151]

2. *The Threat to U.S. Airlines, Passengers, and Jobs*

The White Paper goes on to discuss the perceived domestic threats posed by the Gulf Nations' carriers' activities. As the study points out, the aggregate widebody capacity of Emirates, Etihad, and Qatar Airways will soon exceed the entire commercial widebody fleet of all U.S.-based airlines combined.[152] The Partnership claims that because the Gulf Nations' carriers are expanding their capacity at a faster rate than the global GDP—which drives air transport demand—they will have to take passengers from United States' and other countries' airlines.[153] The Partnership further complains that the Gulf Nations' carriers are taking market share without significantly stimulating demand, which it insists will force U.S. carriers to reduce or eliminate service to international routes, resulting in the loss of U.S. jobs.[154]

Despite the looming "parade of horribles" the White Paper promises, the Big 3 have failed to prove that the activities of the Gulf Nations' airlines will result in job loss, higher fares, or any damage whatsoever to the U.S. economy.[155] On the contrary, the Gulf Nations' airlines carried 1.1 million international travelers into the United States in 2014, supporting almost 50,000 U.S. jobs and generating more than $4.1 billion in GDP.[156] And the

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http://www.etihad.com/Documents/keep-the-air-fair/pdf/2015-05-21-Edgeworth-Economics-Report.pdf [https://perma.cc/CAS3-6Z9S].

150 *Id.* at 32.

151 *Id.* at 32–33.

152 *White Paper*, *supra* note 8, at 2.

153 *Id.*

154 *Id.* at 2, 48–49, 51. For example, the Partnership claims that, "each daily widebody frequency lost or forgone due to subsidized Gulf [Nations] competition results in a net loss (on average) of over 800 U.S. jobs." *Id.* at 51.

155 Etihad Airways Response at 5–6, Information on Claims Raised About State-Owned Airlines in Qatar and the United Arab Emirates, 80 Fed. Reg. 25,671 (Int'l Trade Admin., Dep't of State & Dep't of Transp. May 5, 2015), http://skift.com/wp-content/uploads/2015/06/Etihad-Response-to-US-Carrier-Allegations-31-May-2015.pdf [https://perma.cc/5JAD-FEYM].

156 *Preserving Open Skies*, U.S. TRAVEL ASSOC., https://www.ustravel.org/system/files/2.%20Fact_Sheet_OpenSkies%20(2).pdf [https://perma.cc/6QS9-ZB3X] (Each international traveler visiting the United States spends an average of $4,300 per trip).

orders for Boeing aircraft by just one of the Gulf Nations' carriers has sustained more than 200,000 U.S. jobs over the past decade.[157]

The economic effects of air liberalization between the U.A.E. and other nations have been markedly positive for those countries as well.[158] For example, the air service liberalization between the U.A.E. and Germany in 1986 expanded the market by nearly 167,000 passengers and generated 19.7% more traffic than would have existed without liberalization, resulting in $152 million growth in Germany's GDP and 2,600 new full-time jobs for Germans.[159] Similarly, in concert with rising oil prices, the 1998 liberalization between the U.A.E. and the U.K. produced a fifty-nine percent boost in traffic and an increase of more than one million passengers and created more than 18,700 jobs and more than $1 billion increased GDP for the U.K.[160] These positive outcomes further undermine the Partnership's claims of impending harm from the Gulf Nations' carriers' expansion.

Moreover, contrary to the Partnership's prediction of a dramatic rise in unemployment, increased competition promotes innovation and productivity and actually tends to improve employment rates in the long run.[161] The effects of air travel liberalization are likely to boost widespread market growth.[162] The subsequent expansion of airlines, airports, and other secondary aviation industries creates "a bigger cake [that] can be shared between employees and shareholders."[163] The Organization for Economic Cooperation and Development (OCED) found "an empirical connection between strong competition in markets for goods and services and better productivity and employment outcomes."[164] This conclusion is strongly supported by evidence

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157 Letter from Roger J. Dow, President & CEO, U.S. Travel Assoc., et al., to Anthony Foxx, Sec'y of Transp., Dep't of Transp., John Kerry, Sec'y of State, Dep't of State, & Penny Priztker, Sec'y of Commerce (June 11, 2015), http://www.regulations.gov/#!documentDetail;D=DOT-OST-2015-0082-0615 [https://perma.cc/72LT-MAZQ].

158 *InterVISTAS 2015 Study*, *supra* note 29, at 8–9.

159 *InterVISTAS 2006 Study*, *supra* note 2, at 42–43.

160 *Id.* at ES-17–18.

161 *See Product Market Competition and Economic Performance*, *in* 72 OECD ECONOMIC OUTLOOK ch. 6, at 1, 7 (2003), http://www.oecd.org/competition/reform/2487682.pdf [https://perma.cc/ZFG3-49V7].

162 Econ. Regulation Grp., *CAP 749: The Effect of Liberalisation on Aviation Employment*, U.K. CIVIL AVIATION AUTHORITY i, v (Mar. 16, 2004), http://publicapps.caa.co.uk/docs/33/CAP749.pdf [https://perma.cc/56GV-GX7F].

163 *Id.* at 7 (internal quotation marks omitted).

164 *Product Market Competition and Economic Performance*, *supra* note 161, at 1.

from the U.K.[165] For example, in response to European liberalization, the demand for air travel in the U.K. rose dramatically, prompting a corresponding forty percent increase in the number of aviation sector jobs between 1991 and 2001.[166]

Air travel deregulation can result in adjustment difficulties initially as the market reacts to new competitive pressures on wages and productivity levels.[167] The prospect of a labor shakeout often creates a political obstacle to product market deregulation.[168] However, it is important to recognize that these effects, if any, are temporary.[169] Ultimately, air travel liberalization stimulates market growth and creates more jobs.[170]

3. *The Disproportionate Benefits of the U.S.–Gulf Nations Agreements*

The Partnership also complains that the Gulf Nations agreements confer immense benefits on the Gulf Nations' carriers by providing access to a highly lucrative market, while offering few advantages to U.S. carriers given what it claims is "a low level of demand for travel originating or terminating in the . . . Gulf [Nations]."[171] But the Partnership misunderstands the analysis of airline industry competition.[172] The proper inquiry does not focus on the number of competitive air travel options between a destination and a *particular airline's hub*, but rather on the combination of options between a particular destination and a *city or state of origin*.[173] For example, a passenger seeking to travel from New York to Mumbai has several options.[174] She may book a flight on Air India with a connection in Delhi, on American or British Airways with a connection in London, on Emirates with a

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[165] Econ. Regulation Grp., *CAP 749*, *supra* note 162, at v.

[166] *Id.* at 5–6. The substantial boost in employment occurred despite the relatively higher labor costs in the U.K. as compared to other European nations. *Id.*

[167] *Product Market Competition and Economic Performance*, *supra* note 161, at 6.

[168] *Id.*

[169] *Id.* Initial adjustment issues can be corrected more quickly by the implementation of training and job search programs. *Id.* at 7 n.13.

[170] Econ. Regulation Grp., *CAP 749*, *supra* note 162, at v.

[171] *White Paper*, *supra* note 8, at 3.

[172] Edgeworth Econ., *Empirical Investigation and Analysis of Economic Measures Raised in "Restoring Open Skies: The Need to Address Subsidized Competition from State-Owned Airlines in Qatar and the U.A.E."*, ETIHAD AIRWAYS ¶ 10 (May 21, 2015), http://www.etihad.com/Documents/keep-the-air-fair/pdf/2015-05-21-Edgeworth-Economics-Report.pdf [https://perma.cc/4YPH-49R4].

[173] *Id.*

[174] *Id.* ¶ 11.

connection in Dubai, or a number of other options.[175] Although each available route connects through a different hub, they are nonetheless competing for the same passenger.[176] Where the connection takes place is irrelevant.[177] Thus, there is no merit to the Partnership's argument that the Gulf Nations disproportionately benefit from their Open Skies agreements with the United States.[178]

Moreover, even if the Partnership's analysis of the comparative benefits of the Gulf Nations agreements were correct, the argument that each party must benefit equally from an Open Skies covenant is equally invalid. In the process of shaping the parameters of the U.S. Open Skies regime, the DOT carefully considered whether each international agreement "[would] necessarily produce benefits for U.S. interests of economic value equal to those accruing to our bilateral partners."[179] The DOT determined that comparative inequality of benefits should not prevent the United States from entering into any Open Skies agreement so long as its provisions were "consistent with [the United States'] overall international aviation strategy and in the public interest."[180] Thus, even if the Gulf Nations did reap a greater economic benefit from the agreement than did the United States, neither agreement would be considered less valid as a result.

B. The Partnership Conflates U.S. Interests with Those of the Big 3

As a major basis for its arguments, the White Paper cites a fundamental concept of Open Skies policy of "ensuring that in each individual case, the bilateral agreements negotiated under the policy were consistent with U.S. interests."[181] The Partnership claims that the Gulf Nations' carriers' activities are inconsistent with the provisions of their Open Skies agreements because they are harmful to U.S. interests. Specifically, the Partnership asserts that the "subsidies" the Gulf Nations' carriers receive create an artificial cost advantage over U.S. airlines, which will drive

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175 *Id.*
176 *Id.*
177 *Id.*
178 *See id.*
179 "Open Skies," Order No. 92-8-13, 1992 WL 204010, at *1 (U.S. Dep't of Transp. Aug. 5, 1992).
180 *Id.*
181 *White Paper*, *supra* note 8, at 1.

down prices as the Gulf Nations' carriers continue to expand their routes to the United States and will ultimately force U.S. airlines to reduce or completely eliminate services to those routes.[182] This would in turn damage the U.S. domestic market because of the mutually dependent nature of international and domestic networks.[183] The Big 3 and other parties to the Partnership also claim that Etihad, Emirates, and Qatar Airways are displacing U.S. carriers on other international routes beyond the Gulf Nations, including India, Asia, and Europe.[184] In support of this point, the Partnership states that United, American, and Delta each lost market share on their daily routes between New York and Milan when Emirates launched a daily nonstop flight on the same route.[185] The Partnership warns that Emirates' entry has produced an excess capacity on the route that has driven profit margins down to a level that cannot be sustained long-term and will ultimately force at least one U.S. carrier out of the route entirely and that many similar stories are sure to follow.[186]

Notably absent from this list of impending disasters is any meaningful connection to the U.S. economy and the individual consumer. Even if its predictions are accurate, the Partnership is primarily focused on the implications to U.S. carriers, particularly United, American, and Delta.[187] Although the Big 3 frame their agenda as concern for the protection of U.S. interests, in reality "the Big 3 Carriers seek to put their own narrow interests before public benefit, consumer welfare, and competitive markets."[188]

But Open Skies agreements "exist to benefit the entire travel industry and the broader U.S. economy, not just three airlines."[189] As noted by the president of the American Antitrust Institute, the entry of foreign carriers into U.S. air travel markets as a result of Open Skies agreements, "is decidedly in the interest of competition and the U.S. consumer, *even if it may threaten*

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182 *Id.* at 46.

183 *Id.*

184 *Id.* at 46–49.

185 *Id.* at 49.

186 *Id.* at 50.

187 *See, e.g.*, *id.*

188 Etihad Airways Response, *supra* note 155, at 1, 3.

189 Roger Dow, *Clearing the Air on Open Skies*, HUFFINGTON POST BUS. (July 10, 2015, 5:51 PM), http://www.huffingtonpost.com/roger-dow/clearing-the-air-on-open-_b_7771460.html [https://perma.cc/GN4G-SWGD].

the Big 3's private interest[s]."[190] By opening hundreds of new destinations for Americans and improving access into the United States for millions of foreign travelers, Open Skies agreements have unquestionably produced immense benefits for both U.S. consumers and visiting international travelers.[191] The preservation of Open Skies is "critical to thousands of businesses all across America and millions of U.S. jobs that depend on international travel."[192] Accordingly, in light of sound evidence that Open Skies agreements ultimately benefit consumers and facilitate competition without depriving domestic carriers of the ability to compete,[193] there is no reason to conclude that the numerous dire outcomes projected by the Big 3 actually pose any threat to the public interest that Open Skies agreements are intended to protect.[194]

C. Equality of Outcome vs. Equality of Opportunity

The Partnership's arguments are invalid because they seek equality of outcome rather than equality of opportunity. Equality of opportunity is one of the key tenets of Open Skies agreements.[195] Liberalization of international air travel is meant to create a "level playing field" by allowing competition to regulate the market.[196] A level playing field means each nation has the opportunity to utilize its own particular assets as effectively as possible in a fair and open competitive environment.[197] It does not mean handicapping all the players so as to neutralize every potential advantage.[198]

The concept of a level playing field is particularly significant in the aviation sector.[199] General trade theory suggests that a nation's comparative advantages in some markets may help to balance its disadvantages in others.[200] Since the economic contribution made by the stronger industries helps to compen-

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190 Letter from Diana Moss, *supra* note 59, at 6 (emphasis added).

191 Etihad Airways Response, *supra* note 155, at 3.

192 Dow, *supra* note 189.

193 Letter from Diana Moss, *supra* note 59, at 2.

194 *See* "Open Skies," Order No. 92-8-13, 1992 WL 204010, at *1 (U.S. Dep't of Transp. Aug. 5, 1992).

195 Convention on International Civil Aviation, *supra* note 14, pmbl.; Tretheway & Andriulaitis, *supra* note 14, at 6.

196 Tretheway & Andriulaitis, *supra* note 14, at 15.

197 *Id.*

198 *Id.*

199 *Id.* at 5.

200 *Id.*

sate for lower trade in weaker areas, a nation's economic vitality is determined by the aggregate benefit rather than by individual markets.[201] By contrast, air travel is largely isolated from other markets because of the complex structure of international rules and restrictions that continue to govern its operation.[202] Balancing comparative strengths and weaknesses is more difficult.[203] As a result, the issue of a level playing field becomes more pressing and its impact more acutely felt.[204]

These concerns can be alleviated by increased liberalization.[205] In a deregulated air travel market, nations are able to benefit from their comparative advantages and disadvantages within the aviation sector in the same way they would through general trade negotiations.[206] For example, Europe enjoys a comparative advantage over the Gulf Nations in the form of superior manufacturing technology and a more specialized workforce.[207] Conversely, as an international hub connecting Europe with East Africa and South Asia, the Gulf Nations enjoy a geographical advantage which has likely contributed to the their carriers' remarkable growth in recent years.[208] But that growth is largely facilitated by substantial orders for Airbus aircraft, including the luxurious new double-decker A380s.[209] And without the demand from the Gulf Nations' carriers, those A380s probably would never have been built.[210] Thus, by leveraging their relative geographical advantage, the Gulf Nations' airlines have allowed Europe to exercise its own relative advantage in skilled labor and advanced technology.[211]

Moreover, due to the numerous factors influencing the individual competitors within any given industry, the concept of an absolutely level playing field exists only in theory.[212] In the context of international aviation, carriers are blessed or cursed with a number of different variables that are impossible to com-

[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *See id.*
[206] *See id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*; *see also supra* notes 99–107 and accompanying text (discussing the rapid expansion of the Gulf Nations' carriers' fleets).
[210] Tretheway & Andriulaitis, *supra* note 14, at 5.
[211] *Id.*
[212] *Id.* at 7.

pletely equalize. For example, Canada enjoys a geographical advantage because of its location between major air travel markets while New Zealand's airlines must compete from a remote location without access to a stream of international passengers.[213] It would be inappropriate for an air travel treaty to penalize Canada or confer extra benefits upon New Zealand based on factors that are inherent to their geographic locations.[214] In addition, large airlines might benefit from economies of scale that a smaller carrier cannot achieve.[215] But the solution for the smaller airline is not a leg-up conferred by increased regulation, but rather the opportunity to survive and grow, if at all, "by virtue of flexibility and innovation."[216]

Competition between carriers is also influenced by factors of production.[217] For example, the United States competes within the economic reality that Canada has cheaper labor costs and provides more comprehensive social services to its citizens.[218] The cost of fuel varies widely among different countries based upon natural resources or government taxation policies.[219] Some governments levy higher airport charges or impose more burdensome corporate taxes on their carriers than other countries.[220] As one commentator pointed out, "[t]o attempt to level all such comparative advantages to the logical conclusion, the way to achieve a truly 'level' playing field would be by commoditizing international air transport and locking it into the lowest common denominator status quo."[221] Bringing all airlines up to the highest possible level through competition is a much harder task than forcing them all down to lowest common level by excessive regulation.[222] Nonetheless, the established benefits of

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213 *Id.* at 8.

214 *Id.*

215 *Id.*

216 *Id.* at 7.

217 *Id.* at 8.

218 *Id.*

219 *Id.* at 9.

220 *Id.* For example, U.S. airports enjoy substantially more government support than their Canadian counterparts. These benefits include tax-free bond financing, free land, exemption from property taxes, and capital grants to airport infrastructure. *See also supra* notes 137–46 and accompanying text (discussing the extensive government benefits received by Delta, American, and United).

221 *Id.* at 15.

222 *Id.*

open market competition overwhelmingly outweigh the difficulties associated with liberalization.[223]

Instead of working to maintain market dominance by their own merits, the Partnership seeks to redefine a "level playing field" as a tightly controlled arena where no competitor is allowed to simply be better than another.[224] This outcome-based approach is antithetical to Open Skies policy, which is not meant to ensure that every nose crosses the wire at the same time but to promote airline competition for the benefit of the public. Accordingly, the Obama Administration should decline to adopt the Partnership's initiatives because they are inconsistent with the concept of equality of opportunity upon which every Open Skies agreement is based.

D. The Answer is More Competition, Not More Restrictions

Since its inception thirty decades ago, the United States has not once terminated or imposed retroactive limitations on any Open Skies agreement with another country and has fervently encouraged nations all over the world to pursue liberalized international air travel policies.[225] In doing so, the United States has created a strong tradition of upholding its Open Skies covenants and actively promoting the furtherance of international air travel liberalization.[226]

Breaking that tradition could have serious and lasting results.[227] The President and CEO of FedEx Express pointed out that "the Big 3's demands would cause the U.S. to violate its [O]pen [S]kies commitments, triggering possible retaliation and casting doubt on U.S. support for [O]pen [S]kies."[228] The measures advocated in the White Paper would clearly harm the relationships the United States enjoys with the Gulf Nations,[229]

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[223] *See InterVISTAS 2015 Study*, *supra* note 29, at v; Smyth & Pearce, *supra* note 91, at 5.

[224] Tretheway & Andriulaitis, *supra* note 14, at 15.

[225] Etihad Airways Response, *supra* note 155, at 3.

[226] *See Open Skies Agreements*, *supra* note 48.

[227] *See* Bronczek, *supra* note 112.

[228] *Id.*

[229] *See id.* For example, Qatar is home to many U.S. businesses and universities and a significant community of U.S. expatriates. Qatar is also the base for U.S. Central Command and is a valuable defense ally for the United States. Qatar Airways Comment at 58, Information on Claims Raised About State-Owned Airlines in Qatar and the United Arab Emirates, 80 Fed. Reg. 25,671 (Int'l Trade Admin., Dep't of State & Dep't of Transp. May 5, 2015), http://www.qatarairways

compromise every one of the United States' Open Skies relationships, and jeopardize all their attendant benefits to competition and consumers.[230] And for what purpose? On the basis of unsubstantiated injuries and a desire to eliminate their competition, the Big 3 are "seeking to rewrite decades of U.S. Open Skies [p]olicy and potentially over 100 consummated Open Skies agreements."[231] Reopening the U.S.–Gulf Nations Open Skies agreements would send a message to the international aviation community that "the United States wants Open Skies only if its trading partners do not make vigorous use of those rights."[232]

According to Hawaiian Airlines President and CEO Mark Dunkerley, the USAOS "believes that the United States should honor its Open Skies commitments, which opens markets for U.S. carriers, promotes competition on international and domestic routes, and facilitates U.S. exports."[233] Members of the European aviation market agree.[234] Arnaud Feist, the CEO of Brussels Airport and the President of ACI Europe acknowledged the fact that fast-growing Gulf Nations' carriers pose a challenge to the global aviation market but suggested that attacking the competition is the wrong solution.[235] According to European airport and tourism boards, "[f]ocusing [on] quality of outcomes . . . interferes with market forces and hinders innovation."[236] This approach artificially constrains air connectivity, limits consumer choice, and "ultimately reduces wider economic benefits."[237] Instead of reverting back to more restrictive measures, the best way to respond to the challenge is to promote open competition and encourage the Gulf Nations' carriers to choose hubs in the United States.[238]

Without question, continuing to pursue liberalization policies in the face of increasing competition is a complicated and chal-

.com/images/Internet/qr_commercial/ecommerce/relaunch-2011/5-column/promotions/americas/us/QatarAirways-openskies-white-paper.pdf [https://perma.cc/9Z39-M983].

230 Emirates Airlines Response, *supra* note 136, at vii.

231 Etihad Airways Response, *supra* note 155, at 7.

232 Qatar Airways Comment, *supra* note 229, at 58.

233 Zhang, *supra* note 111.

234 Garcia, *supra* note 113.

235 *Id.*

236 *Id.*

237 *Id.*

238 *See id.*

lenging process.[239] Efforts to remove restrictions on operations are often constrained by the persistence of ownership rules.[240] Nations and their airlines pursue deregulation measures on different timelines and at different paces.[241] And as the Big 3 have clearly demonstrated, industry participants whose market dominance is threatened by open competition will "lobby vociferously" to protect their private interests.[242] Despite these difficulties, continued liberalization is not only possible; it is "an essential part of improving the long-term health of the [airline] industry."[243] Because of efforts by large stakeholders to advance restrictive international policies contrary to the public good, industry regulators and national governments must take an active leadership role in working to overcome these challenges.[244] For this reason, it is imperative that the U.S. government refuse the Partnership's demands and act affirmatively to protect U.S. Open Skies agreements, both with the Gulf Nations and the rest of the world.

E. The Lack of Clear Direction for Renegotiating the U.S.-Gulf Nations Agreements

Finally, even if the Obama Administration wished to take up the Partnership's cause, the White Paper is devoid of any clear proposals about how to proceed. Instead, it concludes with a vague admonition that the government should "*take steps* to address [the issue]" and "exercise [its] right to raise its concerns" with the Gulf Nations.[245] And if "taking steps" and "raising concerns" should prove ineffective, the Partnership would have the United States terminate the agreements and "apply the principles of comity and reciprocity" to determine what traffic rights, if any, the United States should grant to the Gulf Nations' carriers on a piecemeal basis.[246]

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239 Smyth & Pearce, *supra* note 91, at 4; Econ. Regulation Grp., *CAP 769: Ownership and Control Liberalisation: A Discussion Paper*, U.K. Civil Aviation Authority ¶ 30 (Oct. 2006), http://publicapps.caa.co.uk/docs/33/CAP769.pdf [https://perma.cc/5DJ7-UCMK].

240 Smyth & Pearce, *supra* note 91, at 5; *see also supra* notes 53–58 and accompanying text (discussing the "nationality clauses" that impose ownership restrictions on international air travel treaties).

241 *Id.*

242 Econ. Regulation Grp., *CAP 769*, *supra* note 239, ¶ 5.73.

243 Smyth & Pearce, *supra* note 91, at 6.

244 Econ. Regulation Grp., *CAP 769*, *supra* note 239, ¶ 3.25–3.27.

245 *White Paper*, *supra* note 8, at 54 (emphasis added).

246 *Id.*

V. CONCLUSION

In conclusion, the Obama Administration should reject the Partnership's demands and continue to honor the U.S. Open Skies agreements with the Gulf Nations. The White Paper published by the Partnership is unpersuasive for several reasons. First, it fails to prove that Emirates, Qatar Airways, and Etihad are unfairly subsidized by their nations' governments. Second, the present and future injuries asserted by the Big 3 are unsupported by evidence and plainly reflect the narrow interests of the Big 3 rather than the public good. Third, its claim that the Gulf Nations' agreements disproportionately benefit the Gulf Nations is based upon a misapplication of the economic analysis of airline industry competition.

Aside from the lack of persuasive evidence or reasoning in the White Paper, there are strong policy considerations against adopting the initiatives urged by the Partnership. Specifically, reopening or terminating the Gulf Nations Open Skies agreements would constitute a violation of those treaties, jeopardizing all of the U.S. Open Skies agreements and its relationships with other member nations. Instead of resorting to the harmful and unproductive restrictions of the past, the U.S. government should continue to actively support open competition by encouraging the Gulf Nations' carriers to increase their activities in the United States for the economic and social benefit of all parties. Finally, the White Paper is ineffective because it fails to set out any clear, actionable steps for the redress of the Gulf Nations' carriers' alleged wrongs. For these reasons, the Obama Administration should refuse to adopt the Big 3 agenda and instead uphold the Open Skies treaties with the Gulf Nations.